SUPREME COURT OF VIRGINIA

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Supreme Court of Virginia Press Release

Media Contact: Patricia L. Harrington, Clerk
Release Date: March 3, 2015

COMMENTS OF CHIEF JUSTICE DONALD W. LEMONS UPON RELEASE OF THE REPORT OF SPECIAL COMMITTEE ON CRIMINAL DISCOVERY RULES

At the direction of the Justices of the Supreme Court of Virginia, a special committee on criminal discovery rules was appointed. The committee was chaired by The Honorable Thomas D. Horne, retired judge of the 20th Judicial Circuit. The committee was representative of diverse interests including prosecutors, criminal defense lawyers, law enforcement officials, academics, clerks, victims' advocates, judges and members of both the House of Delegates and the Senate of Virginia. Over an 11-month period in 2014, the committee considered proposed changes to the Rules of the Supreme Court of Virginia, as well as recommended amendments to the Code of Virginia concerning discovery procedures for criminal cases in the courts of the Commonwealth. The committee delivered its report to the Supreme Court of Virginia on December 2, 2014.

The Court appreciates the leadership of Judge Horne and the thorough consideration of many complex issues by the committee. Today the report is released to the public for commentary. The Supreme Court of Virginia neither endorses nor rejects any of the recommendations of the committee at this time.

Comments on the proposed rules must be received by June 30, 2015, and must be forwarded to:

Patricia L. Harrington, Clerk
Supreme Court of Virginia
100 North Ninth Street, 5th Floor
Richmond, VA 23219

OR via email with the subject line, "Comment on Criminal Discovery Rules" to:

scvclerk@courts.state.va.us

Supreme Court of Virginia

Report of the Special Committee on Criminal Discovery Rules to the Chief Justice and Justices of the Supreme Court of Virginia

December 2, 2014

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Chairman's Introduction

To the Honorable Cynthia Kinser, Chief Justice of the Supreme Court of Virginia and Justices of the Supreme Court

On behalf of the members of the Special Committee on Criminal Discovery Rules, the Final Report of the Committee is submitted for your consideration. The Committee members wish to thank you for the opportunity to explore changes to the criminal discovery rules in the Commonwealth. The proposals contained in this report reflect the collective judgment of experienced professionals representing various disciplines within the criminal justice system of Virginia.

Central themes of these proposed changes are noted in the executive summary. These rule changes point out the importance of the discovery process in the handling of criminal cases. Discovery provides a means to ensure that all parties are given the tools necessary to ensure the administration of justice is fair, open, and efficient.

These rule changes will assist in providing information to the prosecution and the defense that is vital to ensuring pleas are providently entered, preparation for trial is not a matter of guesswork, and judicial resources properly allocated. At the same time, the public safety and private need are carefully balanced through the use of judicial oversight to the process.

While there were sincere concerns expressed as to the discovery of police reports, the committee gave great consideration to the comments made and provided for such disclosure with judicial oversight based upon a finding of "good cause" for redaction and withholding of such information. Both the majority and minority views on the issue are eloquently stated and included for your consideration.

Having now read these rules a number of times over the past year and lived with the evolutionary process giving rise to the recommendations of the Committee, I consider the final product to be a unique contribution to the criminal law of the Commonwealth. Where there was confusion there is now clarity; where there were concerns for public safety there is now judicial oversight; where access to information has been absent, a pathway to knowledge has been provided; and where trial by ambush has been the norm there is now clarity and transparency.

I want to give special thanks to John Koehler,Esq. for his dedication to this effort as and the wise counsel he has afforded the members of the committee. His has been a truly extraordinary gift to the process of making the work of the Committee such valuable experience. All of the members of the Committee would echo my sentiments in this regard.

Lastly, I wish to commend Ms. Sharon F. Board for here enthusiasm and efforts as secretary to the Committee. She has been a real asset to the Committee.

Again, on behalf of the Committee, I commend these Rule Changes to your thoughtful reflection and consideration.

Thomas D. Horne
Leesburg, Virginia

Executive Summary

The Special Committee on Criminal Discovery Rules conducted six plenary meetings from January 2014 to November 2014. At the conclusion of the final plenary meeting, the Committee adopted proposed amendments and additions to the Rules of the Virginia Supreme Court and recommended statutory amendments to the Code of Virginia addressing the procedure for discovery in criminal cases in Virginia's Courts.

Among the Committee's recommendations, the seven most significant changes are as follows:

- The Committee proposes that routine discovery shall be triggered by the filing of written notice by the accused rather than requiring the accused to file a motion seeking discovery.

- The Committee proposes that police reports, including witness interviews, be subject to discovery, with broad provision for withholding, redacting or restricting disclosure of police reports for good cause.

- The Committee proposes that witness statements be subject to discovery on a reciprocal basis, with broad provision for withholding, redacting or restricting disclosure of witness statements for good cause.

- The Committee proposes that witness lists be provided by each party shortly before trial, subject to modification by the court for good cause shown.

- The Committee proposes that a prosecutor's duty to disclose exculpatory information be set forth explicitly by rule.

- The Committee proposes that the Rule governing subpoena duces tecums be modified: (1) to set out in detail the trial court's authority to quash, prohibit or limit disclosure; (2) to define who is -- and who is not -- a "party" for purposes of a subpoena duces tecum; (3) to incorporate statutory privacy provisions involving health records and certain other confidential information; and (4) to provide for ex parte proceedings in certain narrow circumstances.

- The Committee proposes that the parties in a criminal case be required to provide on a reciprocal basis expert witness disclosures similar to that provided in civil cases.

As presented below in detail, the Committee determined that the principal goals of any revision to the criminal discovery process should be to provide reciprocal discovery that would avoid "trial by ambush" by providing both sides with more complete information than the current Rules require; to reduce the costs, burdens and delays associated with the need to comply with both the revised rules and the concomitant duty to protect information as required by statute or the circumstances of the case; to provide for fairness and clarity in the rule governing the use of subpoenas in criminal cases while limiting inconvenience to third parties subject to subpoena; to

provide both sides with advance notice of witnesses (including experts), expected to testify at trial and provide for discovery of witness statements, while providing appropriate protection for victims and witnesses and attorney-client confidentiality; and, to insure that the Commonwealth discloses exculpatory information to the accused as required by due process and under the rules governing the professional conduct of the representatives of the Commonwealth.

The Committee sought to obtain the first of these goals in a manner that balanced the competing interests of the Commonwealth and the accused. The main challenge to achieving this balance was to address concerns that victim and witness safety would be jeopardized if accused individuals were provided access to police reports. This would prove to be the most contentious issue and resulted in the only minority comments in the final report. The Committee addressed these concerns by providing a party broad authority to withhold, redact, or place restrictions on the release of discoverable information upon an assertion of good cause subject to review by the trial court.

With regard to the issue of reducing costs, burdens, and delays, the Committee strongly urges the Court to work with the executive and legislative branches to promote a statewide standard for electronic filing and storage of case information by the courts, law enforcement agencies, and Commonwealth's Attorneys. Recognizing that many localities and agencies have already undertaken to convert their document management systems to electronic formats, the Committee notes that any effort to standardize the process should take into account the existing systems and, where possible, make accommodation to allow for existing investments in technology. It is emphasized that use of electronic document management is a key to avoiding unnecessary costs, burdens, and delays, as well as to avoid misuse or abuse resulting from providing the accused or the public inadvertent access to sensitive information.

The Committee undertook to revise Rule 3A:12 in order to streamline the process for obtaining subpoenas in criminal cases. Additionally, the revision of this rule provides greater clarity and simplicity to the process with respect to obtaining and challenging subpoenas issued to third parties. The rule further provides for ex parte proceedings when necessary to protect the interest of justice.

Upon consideration of the need to provide greater transparency with respect to expert testimony expected to be presented in criminal cases, the Committee drafted a new rule, designated as Rule 3A:12.1, providing for both the Commonwealth and the accused to provide written notice of expert testimony. The notice shall include a summary of the expected testimony. The rule further provides that delivery of a certificate of analysis prepared by the Virginia Department of Forensic Science satisfies the requirement for written notice. Discovery of expected non-expert witnesses and of statements made by such witnesses are addressed in the proposed revision of Rule 3A:11.

With regard to the legal and ethical duty of the Commonwealth to disclose exculpatory information, the Committee initially considered the creation of a new rule expressly addressing this issue. However, because the disclosure of such information is an integral part of the discovery process, the Committee ultimately determined to add an express reference to the prosecutor's duty to disclose exculpatory information to the revised version of Rule 3A:11. The Court may wish to consider further study of the question whether a separate rule addressing a

specific requiremnents and processes for comply with the duty to disclose exculpatory evidence is needed. The Committee also opined that the Court should lend support where possible to efforts to provide training on this issue to law enforcement agencies and prosecutors.

Finally, while the Committee was cognizant that the proposed revisions in the criminal discovery process could place additional burdens on the already limited fiscal and human resources of all parties involved in the administration of criminal justice, the Committee also concluded that the recommendations contained in this report, if adopted, will significantly advance the ultimate goal of maintaining a fair and just system of criminal justice.

Special Committee on Criminal Discovery Rules

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* Prof. Bruck resigned from the Committee upon his appointment to serve as counsel to Dzhokhar Tsarnaev, one of the alleged perpetrators of the 2013 terrorist bombing of the Boston Marathon.

Study Groups

Administration

1. Hon. Randal J. Duncan, Judge
2. Chief Timothy J. Longo, Sr., President of Virginia Association of Chiefs of Police
3. Hon. George E. Schaefer, Clerk
4. Ms. Vicki Tate, Clerk

Bills of Particular/Related Discovery

1. Hon. Marjorie T. Arrington, Judge
2. Thomas J. Bondurant, Jr., Esq.
3. Hon. Stephanie Murray Shortt, Esq., Commonwealth's Attorney
4. Alex N. Levay, Esq.

Brady Material

1. Hon. Rossie D. Alston, Jr., Judge
2. Hon. Michael N. Herring, Esq., Commonwealth's Attorney
3. Bonnie Hoffman, Esq., Deputy Public Defender
4. Sara N. Poole, Esq., Office of Legal Affairs, Department of State Police
5. James McCauley, Esq., Ethics Counsel, Virginia State Bar

Experts

1. Hon. A. Donald McEachin, Senator
2. Hon. Michael Lee Moore, Judge
3. Stephanie Merritt, Esq., Department Counsel at Department of Forensic Science
4. Douglas Ramseur, Esq., Virginia Association of Criminal Defense Lawyers

Overall Discovery Process (Rules/Statutes)

1. Hon. Robert B. Bell III, Virginia House of Delegates
2. Hon. Robert S. Brewbaker, Jr., Judge
3. Hon. Michael R. Doucette, Esq., Commonwealth's Attorney
4. Virginia B. Theisen, Esq., Senior Asst. Attorney General
5. Professor John G. Douglass, University of Richmond School of Law
6. John S. Koehler, Esq., Law Clerk at Supreme Court of Virginia
7. Douglas Ramseur, Esq., Virginia Association of Criminal Defense Lawyers

Subpoenas to Third Parties

1. Hon. Richard H. Stuart, Senator
2. Hon. Randy I. Bellows, Judge
3. Ms. Virginia Coscia, Director at the Fredericksburg Victim-Witness Assistance Program
4. Major Jack Davidson, Virginia Sheriff's Association

Timeline

February 23, 2013	The Indigent Defense Task Force of the Virginia State Bar submits proposed changes to Part 3A of the Rules of the Virginia Supreme Court, which govern practice and procedure for criminal trials in the circuit courts. The principal changes urged by the Task Force would require prosecutors to turn over police reports and "recordings" to criminal defendants; disclosure of the substance of expert testimony 21 days before trial; earlier disclosure of evidence favorable to the accused; and encourage the use of "open file" policies by prosecutors. The Task Force had studied the issue for over nine years; however, in 2011, representatives of the Commonwealth's Attorneys had withdrawn from the Task Force in protest over the proposed changes.
March to August 2013	Public comments on the proposed changes are received by the Supreme Court. Comments both strongly favor and oppose the proposed changes, with an obvious divide between representatives of the defense bar in support of the changes and law enforcement and prosecutors in opposition.
October 2013	The Supreme Court decides to form an independent committee to advise the court on the need for reform of the criminal discovery process. In addition to representatives of the defense bar and Commonwealth's Attorneys, the committee will include members of the bench, legislators, the Office of the Attorney General, court administrators, and representatives of the law enforcement community, victim-witness advocates, and the forensic science services of the Commonwealth. Retired Circuit Court Judge Thomas D. Horne agrees to serve as chair of the Special Committee on Criminal Discovery Rules.
December 16, 2013	Judge Horne conducts a preliminary meeting to plan the work of the committee meeting with the Executive Secretary, the Clerk of the Supreme Court, and the Chief Staff Attorney of the Supreme Court and members of their respective staffs at the Supreme Court in Richmond.
January 13, 2014	The initial plenary meeting of the Committee is held at the Courts' Conference Center in the Supreme Court Building in Richmond. The Committee is divided into six study groups. The study groups meet over the next two months.

March 10, 2014	Second plenary meeting of the Committee held at the Courts' Conference Center in the Supreme Court Building in Richmond. Reports received from the study groups.
June 10, 2014	Third plenary meeting of the Committee held at the Courts' Conference Center in the Supreme Court Building in Richmond. Study groups submit proposed amendments and additions to the Rules and recommended statutory amendments.
August 11, 2014	Fourth plenary meeting of the Committee held at the Courts' Conference Center in the Supreme Court Building in Richmond. Proposed amendments and additions to the Rules and recommended statutory amendments considered by the Committee as a whole.
September 3, 2014	Initial draft of the proposed amendments and additions to the Rules and recommended statutory amendments circulated to the Committee for comments.
October 6, 2014	Fifth plenary meeting of the Committee held at the 1st floor conference center in the Office of the Attorney General in Richmond. The Committee adopts the final draft of the proposed amendments and additions to the Rules and recommended statutory amendments for inclusion in the Report of the Committee to the Supreme Court. The Committee receives objections to certain of the proposed changes based upon concerns of the law enforcement community that access to certain materials by criminal defendants will pose a serious threat to victims and witnesses and/or result in widespread distribution of discovery material through social media and by other means.
October 20, 2014	Initial draft of the Report of the Committee to the Supreme Court distributed to the Committee for review and comment.
November 12, 2014	Sixth plenary meeting of the Committee held at the 1st floor conference center in the Office of the Attorney General in Richmond. The Committee adopts final changes to the proposed amendments and additions to the Rules and recommended statutory amendments, adopts the Report of the Committee to the Supreme Court and adjourns *sine die*.
December 2, 2014	Presentation of the Report of the Special Committee on Criminal Discovery Rules to the Chief Justice and Justices of the Supreme Court of Virginia.

1 Introduction

1.1 Background and Formation of the Committee

The Special Committee on Criminal Discovery Rules was formed at the direction of the Chief Justice and Justices of the Supreme Court of Virginia to study whether a reform of the criminal discovery procedures as governed by Part 3A of the Rules of the Virginia Supreme Court was necessary. The decision to form the Committee arose from a prior effort at reforming Part 3A undertaken by the Indigent Defense Task Force of the Virginia State Bar. The proposal received from the Task Force met with strong public criticism, especially from members of the Commonwealth's Attorneys Association and the law enforcement community, over a perceived imbalance in the proposed reforms favoring the accused. Public comment favoring the proposed reforms generally viewed them as a necessary step to redress a perceived advantage of the prosecution in resources and access to information.

Judge Thomas D. Horne, recently retired from the 20th Judicial Circuit, was selected to chair the Committee. The membership of the Committee was deliberately made broader than that of the Task Force so that all interested stakeholders, including the legislature, the trial and appellate benches, the law enforcement community, court administrators, and forensic services, would have a voice along with the prosecutorial and criminal defense bars. The final committee consisted of 28 members in addition to the chair; administrative support was provided by Ms. Sharon Board, administrative assistant to Senior Justice Lawrence L. Koontz, Jr. and Kyle Winey, Esq., Judge Horne's law clerk.

In preparation for the work of the Committee, Judge Horne met with members of the Office of the Executive Secretary, the Clerk of the Supreme Court, and the Office of the Chief

Staff Attorney of the Supreme Court on December 16, 2013. In addition to discussing the logistics for the administration of the Committee, Judge Horne reviewed a report prepared by the Office of the Chief Staff Attorney on criminal discovery practices in other jurisdictions with the two staff attorneys principally responsible for the report's preparation.

1.2 Initial Plenary Meeting

The first meeting of the Committee took place on January 13, 2014, at the Courts' Conference Center in the Supreme Court Building in Richmond with twenty-six members in attendance. Chief Justice Kinser welcomed the Committee and gave a brief summary of their expected role as internal advisors to the Court. This role was subsequently emphasized by Judge Horne, noting that the work product of the Committee was to remain confidential and not subject to release except by direction of the Court.

Judge Horne advised that the Committee would be divided into six study groups to consider various aspects of the issue of criminal discovery reform. The study groups were asked to consider and report back on the topics of administration, bills of particular and related forms of discovery, *Brady* material, experts, the overall discovery process under the current Rules, and subpoenas to third parties.

John S. Koehler, Esq., law clerk to Sr. Justice Koontz, gave a presentation to the committee which reviewed the current Rules applicable to criminal discovery and compared the Virginia Rules to the Federal Rules of Criminal Procedure. Additionally, the presentation addressed the need to review statutes, especially those governing privacy and security concerns of victims and witnesses, which might impact changes made to the criminal discovery process. The presentation concluded with a brief discussion of the application of *Brady v. Maryland*, 373

US 83 (1963), as most recently interpreted by the appellate courts of Virginia. During the remainder of the meeting, the Committee separated into the assigned study groups.

1.3 Additional Plenary Meetings

The Committee met again on March 10, 2014 and again on June 6, 2014 with twenty-one members present at each meeting. During these meetings, the study groups submitted reports of the efforts taken during the intervening periods. A summary of the work of each committee is presented in the next section of the report. On August 11, 2014, the Committee again met in plenary session with twenty members present to review the proposed amendments to the Rules drafted by the study groups. Members who were unable to attend these meetings were provided with audio recordings of the proceedings.

On October 6, 2014, the Committee met in plenary session at the 1st floor conference center in the Office of the Attorney General in Richmond. At this meeting the Committee reviewed the preliminary version of the final draft of the proposed amendments to the Rules. As will be discussed in greater detail below, the two most significant actions of the Committee at this meeting were to adopt a notice-based system for initiating discovery to replace the current order-based system, and the decision to not recommend the adoption of a separate rule governing the duty of a prosecutor to disclose favorable information to the accused, but to instead add language to the proposed amendment of Rule 3A:11 to accomplish this purpose.

On November 12, 2014, the Committee met in its final plenary session at the 1st floor conference center in the Office of the Attorney General in Richmond. At this meeting the Committee adopted several technical changes to the proposed amendments and additions to the Rules and recommended statutory amendments adopted at the prior meeting. The focus of this

meeting was to discuss the minority position that opposed proposed changes to the rules that would require release of police reports to the accused. As outlined in the minority comments, the objection, principally from law enforcement and prosecutors, was that despite provisions in the proposed rule permitting withholding, redacting, or limiting disclosure of sensitive information, there remained a possibility that such information would be intentionally disseminated or used by the accused to harass, intimidate, or cause harm to a victim or witness. Additionally, there was concern that material inappropriate for the accused to have in his possession, such as child pornography, would be made available through the mandatory release of police reports and other evidence in the possession of the Commonwealth.

The debate on this issue revolved around whether there should be per se categories of material that would be withheld, redacted, or made subject to limited disclosure for "good cause," or alternately whether the Committee should provide examples in the rule or in commentary to the rule. There was limited support for imposing per se categories, and likewise some opposition to providing examples, which might be viewed as per se. A majority of the committee ultimately adopted language providing for a non-exclusive list of examples of discovery material that might be withheld, redacted, or made subject to limited disclosure for "good cause." Under the proposed rule, the decision to withhold, redact or limit disclosure of discovery material would be memorialized in writing and would be subject to review by the trial court.

1.4 Media and Public Inquiries

At the outset, it was determined that the Committee's work would be provided to the Court as advisory only and, thus, would be work product not subject to release under the

Freedom of Information Act. Thus, during the course of the Committee's work, inquiries from the media were referred to the Director of Legislative and Public Relations, Office of the Executive Secretary. Inquiries were received from Peter Vieth, a reporter for *Virginia Lawyers' Weekly* and from Lori Simmons, a reporter for News Channel 3 in Hampton Roads. In both instances, the inquiries were responded to with the following statement:

> The Special Committee on Criminal Discovery Rules of the Supreme Court of Virginia held its <date of most recent plenary session>. The Committee is continuing to review the need for reform to the criminal discovery process. The full Committee is next scheduled to meet <date of next plenary session>. It is anticipated that the Committee will conclude its work by the end of the year and present its findings and recommendations to the Supreme Court at that time.

Inquiries from the public included one from a staff member of the American Bar Association who was conducting a review of the criminal procedures of the 50 state jurisdictions. The inquiry was principally to learn whether and when revisions of the Virginia Rules of the Supreme Court would be amended in that regard. As with the media inquiries, the response indicated that the Committee would present its findings and recommendations to the Supreme Court at the conclusion of its work, probably by the end of the year.

The Committee also received two unsolicited substantive communications, one from a private attorney who contacted the Office of the Clerk of the Supreme Court and whose comments were forwarded to the Committee, and the other from the Virginia branch of the American Civil Liberties Union, which contacted the Chief Justice by letter that was distributed to the Committee at the Chief Justice's direction.

2 Work of the Study Groups

2.1 Overall Discovery Process

The Overall Discovery Process Study Group members are the Hon. Robert B. Bell III, Virginia House of Delegates, the Hon. Robert S. Brewbaker, Jr., Judge, Fifth Judicial District, the Hon. Michael R. Doucette, Esq., Lynchburg Commonwealth's Attorney, Virginia B. Theisen, Esq., Senior Asst. Attorney General, Professor John G. Douglass, University of Richmond School of Law, Douglas Ramseur, Esq., Virginia Association of Criminal Defense Lawyers, and John S. Koehler, Esq., Law Clerk to Sr. Justice Lawrence L. Koontz, Jr. The Study Group was tasked with reviewing Rule 3A:11, governing criminal case discovery in the Circuit Court, as well as Rules 7C:5 and 8:15, governing criminal case discovery in the General District and Juvenile & Domestic Relations District Courts.

In its initial meeting, the Study Group proposed seven principles that would guide the process of reviewing and recommending revisions to the discovery process in criminal cases:

1. Rule amendments should aim to avoid "trial by ambush" by providing both sides with more complete information than the current Rules require.

2. Rule amendments should promote consistent discovery practice across the Commonwealth.

3. Rule amendments should not add to burdens, costs or delays.

4. Rule amendments should result in a streamlined process which can reduce costs, delays and inconvenience to witnesses.

5. With appropriate protections for victims and witnesses, the process should result in both sides knowing in advance of trial what witnesses are expected to testify at trial and should have access to prior statements by those witnesses.

6. Both parties should have access to reports of police investigation.

7. Discovery rights and obligations should be reciprocal.

Consistent with these principles, the Study Group recommended that Rule 3A:11 be amended to include the following requirements: 1) Disclosure of the names of witnesses each party intends to call at trial, 2) disclosure of prior statements of these witnesses, and 3) disclosure of police reports to defense counsel.* During plenary sessions, the Committee expressed a number of concerns with these proposals. Specifically, there was concern regarding the potential for information concerning victims and witnesses being made public and disseminated on social media, the need for a clear definition of what constituted a witness statement and what was meant by a police report.

Over the course of the several sessions, the Study Group presented revised drafts of Rule 3A:11, with a final draft being adopted by the full Committee at the October 6, 2014 plenary session. Additionally, the Study Group recommended, and the Committee adopted, recommended revisions of the Rules applicable in the District Courts to make these Rules consistent with Rule 3A:11.

2.2 Subpoenas to Third Parties

The Subpoenas Study Group members are the Hon. Richard H. Stuart, Senate of Virginia, the Hon. Randy I. Bellows, Judge, Nineteenth Judicial Circuit, Ms. Virginia Coscia, Director at the Fredericksburg Victim-Witness Assistance Program, and Major Jack Davidson of the Washington County Sheriff's Office and the Virginia Sheriff's Association. The Study Group was tasked with review of Rule 3A:12, governing the issuance of subpoenas to third parties in criminal cases.

* A further recommendation of the Study Group relating to limiting the application of the Rules of Evidence in preliminary hearings was not adopted by the Committee.

The Study Group noted that the current Rule, although generally assumed to be applicable to both the Commonwealth and the defense, did not expressly state that the defendant was permitted to seek subpoenas pursuant to the Rule. Additionally, the Study Group noted that the usual point of contention when the Rule was invoked was whether the party to whom the subpoena was directed was a "party" to the action where the entity was a state agency. Finally, the Study Group noted that the Rule could be improved by providing greater guidance on how and when a third party subpoena may be challenged. Following presentation of its first report at the second plenary session of the Committee, based on an expression of support by a majority, the Study Group also examined the need for an ex parte procedure for obtaining a third-party subpoena.

The recommended revisions to Rule 3A:12 drafted by the Study Group addressing these issues were adopted by the full Commission at the October 6, 2014 Plenary Session. As adopted, the revisions also address issues of confidentiality under Code §§ 19.2-11.2 and 32.1-127.1:03.

2.3 Brady Material

The Brady Material Study Group members are the Hon. Rossie D. Alston, Jr., Judge, Court of Appeals of Virginia, the Hon. Michael N. Herring, Esq., Richmond City Commonwealth's Attorney, Bonnie Hoffman, Esq., Loudoun County Deputy Public Defender, Sara N. Poole, Esq., Office of Legal Affairs, Department of State Police, and James McCauley, Esq., Ethics Counsel, Virginia State Bar. The Study Group was tasked with examining the relationship between the required disclosure of materials under *Brady v. Maryland*, 373 US 83

(1963), and the criminal discovery process, as well as the prosecutor's ethical duty with regard to turning over exculpatory evidence. See *Virginia Legal Ethics Opinions*, No. 1862 and 1864.

In its initial meeting, the Study Group concluded that although law enforcement and prosecutor obligations under *Brady* required clarification, it was beyond the authority of the Supreme Court, and, thus beyond the scope of the Committee's directive, to regulate law enforcement officers in their conduct of criminal investigations. Accordingly, the Study Group limited its inquiry to the duty of prosecutors to disclose exculpatory information. Nonetheless, as in the Administration Study Group, concern was expressed that changes in the criminal discovery process could lead to the failure of law enforcement personnel to provide *Brady* material to the prosecutor, perhaps in the belief that broader and more liberal discovery afforded to the accused would suffice to comply with *Brady* obligations. Thus, the Study Group was of opinion that law enforcement and public victim/witness advocates could benefit from training on what information constitutes *Brady* material.

The initial proposal of the Study Group was to draft a new Rule to address both the Constitutional due process obligation of the prosecution to disclose *Brady* material and the broader ethical duty to turn over exculpatory and favorable evidence to the accused.* The draft Rule was reviewed by the Committee during the third and fourth plenary sessions. There was considerable support for the notion that a formal, rule-based policy regarding a prosecutor's duty to disclose exculpatory information would be beneficial, a matter which the Court may wish to inquire into at a later date.

Following the fifth plenary session, it was determined that the Committee would not vote on recommending adoption of a separate rule to provide guidance concerning *Brady* material and

* Virginia is among only a handful of jurisdictions that do not provide written guidelines, either by rule or by statute, with regard to these duties. The electronic appendix to this report includes a chart prepared by the Study Group giving a comprehensive comparison of the different approaches adopted in other jurisdictions with respect to *Brady* disclosure and exculpatory evidence.

ethical duty of the prosecutor to disclose exculpatory material. Instead, a general statement regarding these duties was adopted during the sixth plenary session for inclusion in to the proposed amendments of Rule 3A:11.

The Study Group also discussed the need for redaction of personal identifying information from discovery material with the right of defense counsel to challenge the redaction, if need be, on the grounds that the redacted information is necessary and material to the defense's case. As had been discussed in the Administration Study Group, there was a consensus that there was a need to balance victim and witness security and protection against the accused's right to access to relevant information.

In discussions whether and to what extent to put the Brady obligation in a discovery rule, the study group saw these potential benefits: accountability, consequences for non-compliance, and tightening up some common law doctrine that may be misapplied or misinterpreted.

2.4 Experts

The Experts Study Group members are the Hon. A. Donald McEachin, Senate of Virginia, the Hon. Michael Lee Moore, Judge, Twenty-ninth Judicial Circuit, Stephanie Merritt, Esq., Department Counsel at Department of Forensic Science, and Douglas Ramseur, Esq., Virginia Association of Criminal Defense Lawyers. The Experts Study Group was tasked with studying the current practices regarding the discovery of expert witness testimony, including forensic and scientific analysis evidence.

The Study Group initially concluded that the current provisions of the Rules and the Code which provide for reciprocal discovery of scientific analysis and reports are appropriate and should continue. The Study Group further determined that it would be appropriate and in the

best interests of justice to provide for notice of expert testimony in all cases, not just capital cases, as is currently required by Code § 19.2-264.3:4. After reviewing the procedures for expert testimony discovery in other jurisdictions, the Study Group was of opinion that the Court could adopt a rule-based requirement for notice and disclosure of expert witness reports and testimony.

Following the second plenary meeting of the Committee, the Study Group responded to concerns raised during the meeting that requiring disclosure of expected expert witness testimony might become burdensome and the subject of post-conviction litigation and that in certain cases, the required disclosure of expert witness reports received by the defense that might prove unfavorable to the accused would chill efforts by defense counsel to seek expert opinions. With respect to the first issue, the Study Group determined that the need for disclosure of the grounds of expected expert witness testimony in criminal cases did not need to be as extensive as in civil case, so long as the substance of the expected testimony was revealed through reports and/or a summary. As to the latter issue, the Study Group recommended that disclosure of expert witness reports and testimony should be required only were the party anticipated that the witness would testify at trial.

In the third and subsequent plenary meetings of the Committee, the Study Group presented a draft rule, designated as Rule 3A:12.1, addressing the procedure for giving notice of expected expert witness testimony and reports to be received at trial of a criminal case. The final version of this Rule, as approved by the full Committee, is set out below.

2.5 Administration

The Administration Study Group members are the Hon. Randal J. Duncan, Judge, Twenty-seventh Judicial District, Chief Timothy J. Longo, Sr., of the Charlottesville Police

Department and President of Virginia Association of Chiefs of Police , the Hon. George E. Schaefer, Clerk of the Norfolk Circuit Court, and Ms. Vicki Tate, Clerk of the Wythe County General District Court. The Study Group was charged with reviewing the impact of the proposed revisions to the criminal discovery process on law enforcement and court administration. Three principal issues of concern were identified: 1) with respect to law enforcement, the need for additional training on compliance with criminal discovery and *Brady* compliance; 2)with respect to court administration, the need for additional resources to manage records in criminal cases; and, 3) the need to address issues of privacy of crime victims and witnesses.

The principal concern expressed with respect to law enforcement personnel was that proposals to allow defense counsel to have greater access to original law enforcement documents such as police reports and witness interviews could have two negative consequences. First, there is the possibility that law enforcement personnel would be reticent to include certain information in their formal reports, relying instead on informal communication with the prosecution to convey information that formerly would have been included in written reports. Second, that law enforcement personnel would be less vigilant with respect to *Brady* disclosure under the presumption that the increased access to original documentation would satisfy the obligation to disclose exculpatory evidence. It was agreed by the Committee that the need for more and better training of law enforcement personnel with respect to criminal discovery matters and *Brady* disclosure was a matter to be addressed within the executive branch.

With respect to court administration, it was noted that broader discovery by both the defense and the Commonwealth would inevitably result in increased record volume, requiring additional human and physical resources. This would be especially true if it were necessary for

the clerk to maintain both redacted and unredacted versions of the record where, because of privacy and security concerns, discovery documents in a record that would be accessible to the public would be subject to redaction by statute even if not redacted, or not fully redacted, during the discovery process. The first issue is partially addressed by the recommendation that criminal discovery change from a motion and order process to a notice-based, self-actuating process.

Protecting witness and victim privacy remains a point of great concern for the whole Committee. There is clearly a potential for tension between the rights of the accused to a fair and balanced discovery process and the rights of victims and witnesses to be secure from harassment and unwanted public attention. While it was agreed that to the extent Constitutional due process required the former, the latter would have to yield, it was also recognized that protecting witness and victim safety, and preserving privacy interests to the extent possible, is essential to the administration of justice. Although not a panacea for all privacy and security concerns, the Committee strongly favors support for a transition to electronic document management and filing in all jurisdictions.

With respect to costs associated with the recommendations of the Committee, the Study Group found that comparisons with other jurisdictions that had adopted mandatory "open file" discovery were not available since these costs are local in nature and vary greatly from jurisdiction to jurisdiction. However, concerning a statewide implementation of an electronic document management and filing system, the Administrative Office of the Courts for the State of North Carolina, which adopted an open file policy in 2004 and implemented a Discovery Automation System (DAS) between 2006 and 2011, was able to supply budgetary information for the costs incurred by that office in completing the implementation of that system state-wide:

DAS Budget Summary

	Actual Cost						Total Actual Cost
	FY 06-07	**FY 07-08**	**FY 08-09**	**FY 09-10**	**FY 10-11**	**FY 11-12 (Jul - Sept)**	**2006 - to Sept 2011**
Personnel	155,550.39	212,856.54	219,204.43	395,808.07	351,686.16	68,061.37	1,403,166.96
Equipment	0.00	0.00	4,248.00	318,466.00	30,612.00	559,830.00	913,156.00
Software	0.00	1,164,424.00	610,923.42	0.00	4,375.76	0.00	1,779,723.18
Travel	0.00	12,932.10	0.00	0.00	0.00	0.00	12,932.10
Training	0.00	64,000.00	0.00	0.00	0.00	0.00	64,000.00
Services/Non-recurring (Scanner Consultant)	0.00	0.00	8,875.00	0.00	0.00	0.00	8,875.00
							Total Actual Cost
							2006 - to Sept 2011
Total	**155,550.39**	**1,454,212.64**	**843,250.85**	**714,274.07**	**386,673.92**	**627,891.37**	**4,181,853.24**

2.6 Bills of Particular and Related Forms of Discovery

The Bill of Particulars Study Group members are the Hon. Marjorie T. Arrington, Judge, First Judicial Circuit, Thomas J. Bondurant, Jr., Esq., Hon. Stephanie Murray Shortt, Esq., Floyd County Commonwealth's Attorney, and Mr. Alex N. Levay, Esq. The Study Group was tasked with reviewing the statutes governing discovery process that are governed by statute including indictments and bills of particular. The consensus of the Study group was that Code § 19.2-230 provided insufficient guidance as to when and under what circumstances granting a motion for a bill of particulars would be appropriate. In this respect, the study group recommended and the Committee adopted proposed amendments to Code §§ 19.2-220 and 19.2-230 to be recommended to the General Assembly. Additional discussion on this topic raised the possibility that enhanced discovery would potentially reduce the perceived need for bills of particular in many cases, but that bills of particular would still be necessary in cases where specificity as to

dates of occurrences of repeated criminal offenses, such as sexual abuse of a minor or possession of child pornography.

The Study Group also considered other aspects of the Code that relate to or impact upon criminal discovery, but ultimately did not recommend any amendments to these statutes. Nonetheless, the Court may wish to take note of the potential impact of statutory requirements on discovery in §§ 19.2-10.1 (Subpoena Duces Tecum (SDT) for Banking Records and Credit Cards), 19.2-187.2 (SDT of Analysis Evidence), 19.2-216 (Definition of Indictment/Information), 19.2-223 (Charging Several Acts of Embezzlement), 19.2-231 (Amendment of Indictment), 19.2-265.4 (Failure To Provide Discovery), 19.2-266.2 (Defense Objections Before Trial/Bills of Particular), and 19.2-270.1: 1 (Computer and Electronic Data in Obscenity Cases).

In addition to statutory issues, the Study Group also considered whether certain discovery processes should be subject to review and reform. In this regard, it was recommended that consideration be given to adopting and incorporating the American Bar Association's (ABA) Statement of Best Practices for Promoting the Accuracy of Eyewitnesses Identification Procedures, the ABA's recommendation regarding custodial interrogations, and the ABA's stated principles regarding our criminal justice system. Although the Committee determined that such a recommendation went beyond the scope of the Committee's directive from the Court, these documents are included in the electronic appendix should the Court wish to review them.

3 Proposed Amendments of Rules and Statutes

The recommendations of the Committee for amending the Rules of the Virginia Supreme Court, and also for amendments to the Code of Virginia to be proposed by the Court to the General Assembly for consideration are presented in this section. The proposed final version of the Committee's recommendations is presented first and is followed by a chart giving a comparison of the current version of the rule or statute with the proposed amendment.

3.1 Rule 3A:11. Discovery and Inspection.

(a) Application of Rule.

This Rule applies to any prosecution for a felony in a Circuit Court, and to any misdemeanor brought on direct indictment and as provided in Rule 8:15.

(b) Discovery by the Accused.

(1) Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, that are known by the attorney for the Commonwealth to be within the possession, custody or control of the Commonwealth.

(2) Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, provided that the Commonwealth may object as to the reasonableness of the request.

(3) Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph all relevant police reports, subject to exemptions as provided below or otherwise required by statute. The term "police reports" means any formal, written report of investigation by any law enforcement officer (as defined by Code § 9.1-101) including reports of interviews of witnesses (whether verbatim or non-verbatim); it does not include notes and drafts.

(4) Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph all relevant statements of any non-expert witness whom the Commonwealth is required to designate under subsection (i) of this rule. The Commonwealth shall disclose any statements of rebuttal witnesses, not previously disclosed, prior to the beginning of its rebuttal case.

The term "statements" means a statement written or signed by the witness, a verbatim transcript, or an audio and/or video recording. This paragraph shall not limit the disclosure of police reports under paragraph 3, whether or not such reports contain accounts of statements made by prospective witnesses.

(c) Discovery by the Commonwealth.

If the accused provides written notice for discovery under this Rule and the Commonwealth provides such discovery

(1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and which the defense intends to proffer or introduce into evidence at trial or sentencing.

(2) The accused shall disclose within a reasonable time but not less than ten (10) days before trial whether he intends to introduce evidence to establish an alibi and, if so, that the accused disclose the place at which he claims to have been at the time of the commission of the alleged offense.

(3) If the accused intends to rely upon a defense as provided in Code § 19.2-168, the accused shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.

(4) The accused shall disclose all relevant statements of any non-expert witness, other than the defendant, whom the defense is required to designate under subsection (i) of this Rule. The accused shall disclose any statements of surrebuttal witnesses, not previously disclosed, prior to the beginning of its surrebuttal case.

The term "statements" means a statement written or signed by the witness, a verbatim transcript or an audio and/or video recording.

(d) Time of Notice.

A notice by the accused under this Rule must be made at least ten (10) days before the day fixed for trial. The notice shall include all relief sought under this Rule

(e) Attorney Work Product.

Neither the Commonwealth nor the accused shall be required to disclose mental impressions, opinions, theories or conclusions of attorneys or their agents.

(f) Time, Place and Manner of Discovery and Inspection.

The Commonwealth and the accused shall agree as to the time, place and manner of making the discovery and inspection permitted under this Rule. If the parties are unable to agree, upon motion of either party the court shall enter an order as to the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just, including imposition of an award of attorney's fees or other appropriate sanction if the failure of a party to agree as to the time, place and manner of making the discovery and inspection is deemed unreasonable.

(g) Withholding, Redacting or Restricting Information for Good Cause.

For good cause a party may withhold or redact such information, or condition its disclosure on restrictions limiting copying or dissemination including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. Examples of "good cause" may include, but are not limited to, personally identifying information to protect a victim's or witness's personal or financial security, graphic images, child pornography, and medical or mental health records.

The opposing party may file a motion to compel disclosure or to remove any restriction. The court may order the withholding party to submit the information for review in camera. The court may approve, reject or modify the restriction and may order other relief.

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, including an order restricting the copying or dissemination of the material and the disposition of the material at the conclusion of the case. Upon motion by either party the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a showing in camera, the entire text of the written 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.

(h) Continuing Duty to Disclose; Failure to Comply.

If, after disposition of a notice filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested by notice or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, the party shall promptly notify the other party or his counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.

(i) Witness Lists.

Each party shall provide to the opposing party a written list of names of all witnesses expected to testify at trial. Disclosure of rebuttal and surrebuttal witnesses is not required under this subsection. The Commonwealth shall provide a list no later than seven (7) days before trial; the defendant shall provide a list no later than three (3) days before trial. Upon motion of either party, the court may modify the requirements of this subsection for good cause shown.

At the commencement of trial the parties shall provide their witness lists to the court. Where a party seeks to call a witness not disclosed on the list, the court may fashion such relief as it deems appropriate, including granting a continuance or recess, granting further discovery, instructing the jury regarding nondisclosure, and prohibiting or limiting testimony of the witness. At the request of either party, the court may place the lists or portions of the lists under seal where appropriate for the protection of witnesses.

(j) Prosecutor's Duty to Disclose Exculpatory Information

Upon indictment, waiver of indictment, or return of information, or prior to entry of a guilty plea or plea of no contest, whichever first occurs, the attorney for the Commonwealth shall disclose to the defendant all information in his possession, custody or control that tends to negate the guilt of the accused, mitigate the offense charged, or reduce punishment, subject to modification or limitation by the court. Information that tends to impeach the Commonwealth's witnesses shall be produced no later than seven (7) days prior to the date scheduled for trial.

3.2 Rule 3A:12. Subpoena.

(a) For Attendance of Witnesses.

A subpoena for the attendance of a witness to testify before a court not of record shall be issued by the judge, clerk, magistrate, attorney for the Commonwealth or by the attorney for the defendant. A subpoena for the attendance of a witness to testify before a Circuit Court or a grand jury shall be issued by the clerk or attorney for the Commonwealth and, for the attendance of a witness to testify before a Circuit Court, by the attorney for the defendant as well. The subpoena shall (i) be directed to an appropriate officer or officers, (ii) name the witness to be summoned, (iii) state the name of the court and the title, if any, of the proceeding, (iv) command the officer to summon the witness to appear at the time and place specified in the subpoena for the purpose of giving testimony, and (v) state on whose application the subpoena was issued.

No subpoena or subpoena duces tecum shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which subpoena or subpoena duces tecum is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the Circuit Court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. The proceedings for approval may be conducted in camera, in the judge's discretion, and the judge may seal such proceedings. Such subpoena request shall be made by the attorney for the Commonwealth for the jurisdiction involved, either on motion of the attorney for the Commonwealth or upon request to the attorney for the Commonwealth by the foreman of any grand jury. A defendant may also initiate such a subpoena request.

(b) For Production of Documentary Evidence and of Objects Before a Circuit Court.

Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena. Such subpoena shall command either (1) that the person to whom it is addressed shall appear with the items described either before the court or the clerk or (2) that such person shall deliver the items described to the clerk. The subpoena may direct that the writing or object be produced at a time before the trial or before the time when it is to be offered in evidence. The term "material" as used in this section does not require that the subpoenaed material be admissible at trial or that it be exculpatory.

Any subpoenaed writings and objects, regardless by whom requested, shall be available for examination and review by all parties and counsel. Subpoenaed writings or objects shall be received by the clerk and shall be placed under seal and shall not be open for examination and review except by the parties and counsel unless otherwise directed by the court. The clerk shall adopt procedures to ensure compliance with this paragraph. Until such time as the subpoenaed materials are admitted into evidence, the materials shall remain under seal, except as the court may otherwise deem appropriate.

Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including:

(i) Quashing the subpoena in whole or in part;

(ii) prohibiting or limiting disclosure, removal and copying;

(iii) redacting confidential or immaterial information;

(iv) prohibiting or restricting further disclosure by parties to the litigation; and

(v) ordering return of all copies of the subpoenaed material upon completion of the litigation.

Such motions may be brought by a party to the litigation, by the entity or individual subpoenaed, or by the entity or individual who is the subject of the subpoenaed material.

If a subpoena requires the production of information that is stored in an electronic format, the person to whom it is addressed shall produce a tangible copy of the information. If a tangible copy cannot be reasonably produced, the subpoenaed person shall permit the parties to review the information on a computer or by electronic means during normal business hours, provided that the information can be accessed and isolated. If a tangible copy cannot reasonably be produced and the information is commingled with information other than that requested in the subpoena and cannot reasonably be isolated, the person to whom the subpoena is addressed may file a motion to quash or a motion for limitations on disclosure or other appropriate relief.

(c) Service and Return.

A subpoena may be executed anywhere in the State by an officer authorized by law to execute the subpoena in the place where it is executed. The officer executing a subpoena shall make return thereof to the court named in the subpoena.

(d) Contempt.

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court to which the subpoena is returnable.

(e) Recognizance of a Witness.

If it appears that the testimony of a person is material in any criminal proceeding, a judicial officer may require him to give a recognizance for his appearance

(f) Photocopying of Subpoenaed Documents.

Subject to the provisions of subsection (b), removal and photocopying of subpoenaed documents by any party or counsel shall be permitted. The court shall direct a procedure for removal, photocopying and return of such documents.

(g) Undue Burden.

Where subpoenaed material is so voluminous that its production would place an undue burden on the subpoenaed entity, the court may order that the subpoena duces tecum be satisfied by making the writings and documents reasonably available for inspection by the requesting party, subject to review by the court.

(h) Freedom of Information Act

In accordance with Virginia Code Section 2.2-3703.1, the provisions of the Freedom of Information Act ("FOIA") shall not govern a court's determinations with regard to the applicability of this Rule.

(i) Subpoena Issued to a Party

In a criminal proceeding, a subpoena duces tecum may not be used to obtain material from a party. Nor may a subpoena duces tecum be used to obtain material from an agency or entity participating in, or charged with responsibility for, the investigation or prosecution of a criminal case such that the agency and its employees are deemed agents of the Commonwealth. A subpoenaed agency or entity claiming party status may seek to quash a subpoena on that basis and, if sustained, discovery shall be produced pursuant to Rule 3A:11. For purposes of this rule, the Department of Forensic Science and the Division of Laboratory Consolidated Services are not parties.

(j) In Camera Review

In determining whether a protective order should issue, or other relief be granted, a court may in its discretion review subpoenaed material in camera.

(k) Ex parte proceedings

(i) A court may not issue a witness subpoena on an ex parte basis.

(ii) A court may not issue a subpoena duces tecum on an ex parte basis, except as follows: Where either the Commonwealth or the defendant seeks to have a subpoena duces tecum issued on an ex parte basis, the party seeking issuance of the ex parte subpoena must file an ex parte affidavit with the court which explains the basis for the request to have the subpoena issued ex parte. The affidavit shall be placed under seal. Should the court require additional information not contained within the affidavit, the court may conduct an ex parte hearing with the party requesting the subpoena duces tecum. Any such hearing shall be on the record and sealed until further order of the court.

(iii) A court may only issue a subpoena duces tecum on an ex parte basis if it concludes that it is necessary to do so in the interest of justice.

(iv) A court's decision with regard to the ex parte request for a subpoena duces tecum is not subject to appeal.

(v) If a request for the issuance of a subpoena duces tecum is granted, the subpoena shall issue and the records returned under seal to be made available for examination and copying by the requesting party only.

(vi) If a request for the issuance of a subpoena duces tecum is denied, the request shall remain under seal, and the requesting party may resubmit the subpoena duces tecum on a non-ex parte basis.

(vii) Any motion to quash a subpoena duces tecum issued on an ex parte basis shall be made on the public record and shall not be treated as an ex parte matter.

(viii) In the event that the requesting party determines that records obtained pursuant to an ex parte subpoena duces tecum may be used at trial, the requesting party shall move no later than fourteen (14) days before trial to make available to the opposing party the entirety of the records produced pursuant to the ex parte subpoena duces tecum. If the requesting party fails to do this, the records may not be used by the requesting party at trial for any purpose.

(l) Confidentiality Provisions of 19.2-11.2

Where the confidentiality provisions of Virginia Code Section 19.2-11.2 apply, any material produced pursuant to a subpoena duces tecum shall be treated in accordance with the provisions of the statute.

(m) Health Record Privacy.

Any subpoena duces tecum seeking health records, or records concerning the provision of health services, as those terms are defined by Virginia Code Section 32.1-127.1:03, are subject to the procedures and requirements of Virginia Code Section 32.1-127.1:03(H), including the provisions for objecting to disclosure by a motion to quash.

(n) Decision of the Court

A court must state on the record, or in writing, its reasons for making a decision pursuant to this Rule.

3.3 Rule 3A:12.1. Expert Notice Prior to Trial.

(a) Notice by the Commonwealth.

Whenever the Commonwealth intends to introduce expert opinion testimony at trial in Circuit Court, the attorney for the Commonwealth shall notify in writing the accused of the Commonwealth's intent to present such testimony no later than fourteen (14) days before trial, or as otherwise ordered by the court. The written notice shall include the witness's name and contact information, a summary of the witness's qualifications, a summary of the anticipated expert opinion testimony and copies of written reports, if any, prepared by the witness.

(b) Notice by the Accused.

Whenever the accused intends to introduce expert testimony at trial in Circuit Court, the accused shall notify the attorney for the Commonwealth in writing of the accused's intent to present such testimony no later than seven (7) days before trial or as otherwise ordered by the court. The written notice shall include the witness's name and contact information, a summary of the witness's qualifications, a summary of the anticipated expert opinion testimony and copies of written reports, if any, prepared by the witness.

(c) Failure to Provide Notice; Remedy.

If the court finds that a party has failed to provide this notice in a timely manner, the court may grant such relief as it deems appropriate, including but not limited to the granting of a continuance or the exclusion of the expert testimony.

(d) Supplemental Notice; Notice of Rebuttal Experts.

With leave of the court for good cause shown, the parties may supplement this written notice of expert witness testimony and the Commonwealth may offer written notice of rebuttal expert witness testimony.

(e) Certificates of Analysis.

For the purposes of this Rule, unless otherwise ordered by the court, providing the other party with a copy of a Virginia Department of Forensic Science Certificate of Analysis signed either by hand or by electronic means by the person performing the analysis or examination shall satisfy the written notice requirement of this Rule.

3.4 Rule 7C:5. Discovery.

(a) Application of Rule.

This Rule applies only to the prosecution for a misdemeanor which may be punished by confinement in jail and to a preliminary hearing for a felony.

(b) Definitions.

For purposes of discovery under this Rule 1) the prosecuting attorney is the attorney for the Commonwealth or the city attorney, county attorney, or town attorney, who is responsible for prosecuting the case; 2) if no prosecuting attorney prosecutes the case, the representative of the Commonwealth shall be the law enforcement officer, or, if none, such person who appears on behalf of the Commonwealth, county, city or town in the case.

(c) Discovery by the Accused.

Upon written notice by an accused to the court and the Commonwealth, the prosecuting attorney or representative of the Commonwealth shall 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:

(1) 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

(2) any criminal record of the accused.

(d) Time of Notice.

A notice by the accused under this Rule shall be filed with the court and a copy thereof mailed, faxed, or otherwise delivered to the prosecuting attorney or, if applicable, to the representative of the Commonwealth at least ten (10) days before the day fixed for trial or preliminary hearing. The notice shall include the specific information or material sought under this Rule

(e) Time, Place and Manner of Discovery and Inspection.

In the absence of an agreement by the parties, either party may move the court for an order specifying the time, place and manner of making the discovery and inspection permitted and the court may prescribe such terms and conditions as are just.

(f) Duty to Disclose Exculpatory Information.

Nothing in this Rule shall obviate or supplant the obligations of the representative of the Commonwealth to disclose exculpatory information in a misdemeanor case.

(g) Failure to Comply.

If at any time during the course of the proceedings, it is brought to the attention of the court that the prosecuting attorney or representative of 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.

3.5 Rule 8:15. Discovery

(a) Adult Criminal Cases.

Upon written notice timely made by the accused, Rule 7C:5 shall apply in all cases involving adults charged with a felony and/or a misdemeanor which may be punished by incarceration.

(b) Juvenile Delinquency Cases.

Upon written notice timely made by the juvenile, (1) Rule 3A:11 shall apply in all cases in which a juvenile is charged with an act that would be a felony if committed by an adult, and (2) Rule 7C:5 shall apply in all cases in which a juvenile is charged with an act that would be a misdemeanor punishable by incarceration if committed by an adult.

(c) Other Cases.

In all other proceedings, the court may, upon motion timely made and for good cause, enter such orders in aid of discovery and inspection of evidence as permitted under Part Four of the Rules, except that no depositions may be taken.

(d) Proceedings Concerning Civil Support.

In proceedings concerning civil support, the judge may require parties to file a statement of gross income together with documentation in support of the statement.

3.6 Code § 19.2-11.2. Crime victim's right to nondisclosure of certain information; exceptions; testimonial privilege.

Upon request of any witness in a criminal prosecution under § 18.2-46.2, 18.2-46.3, or 18.2-248 or of any violent felony as defined by subsection C of § 17.1-805, or any crime victim, neither a law-enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, telephone number, social security number, date of birth, operator's license number, or place of employment of the witness or victim or a member of the witness's or victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause.

Except with the written consent of the victim, a law-enforcement agency may not disclose to the public information which directly or indirectly identifies the victim of a crime involving any sexual assault, sexual abuse or family abuse, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause. In addition, at the request of the victim to the Court of Appeals of Virginia or the Supreme Court of Virginia hearing, on or after July 1, 2007, the case of a crime involving any sexual assault or sexual abuse, no appellate decision shall contain the first or last name of the victim.

Nothing herein shall limit the right to examine witnesses in a court of law or otherwise affect the conduct of any criminal proceeding.

3.7 Code § 19.2-220. Contents of Indictment in General

The indictment or information shall be a plain, concise and definite written statement, (1) naming the accused, (2) describing the offense charged, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date. In describing the offense, the indictment or information may use the name given to the offense by the common law, or the indictment or information may state so much of the common law or statutory definition of the offense as is sufficient to advise what offense is charged. The legal sufficiency of a particular indictment shall not restrain or preclude the trial court from ordering a bill of particulars pursuant to Virginia Code Section 19.2-230.

3.8 Code § 19.2-230. Bill of Particulars

A court of record may direct the filing of a bill of particulars at any time before trial. A motion for a bill of particulars shall be made before a plea is entered and at least seven (7) days before the day fixed for trial and the bill of particulars shall be filed within such time as is fixed by the court. A bill of particulars may be requested when the indictment or presentment insufficiently informs the accused of the nature of the allegation, to avoid potential cases of double jeopardy and to clarify issues where multiple dates, acts or images are alleged that could be charged individually or collectively.

4 Comparison of the Current Rules and Statutes and the Proposed Amendment of Rules and Statutes

Red underscored text represents new language; ~~gray strickout~~ shows deletions.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
Rule 3A:11. Discovery and Inspection.	Rule 3A:11. Discovery and Inspection.
(a) Application of Rule. This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.	(a) Application of Rule. This Rule applies to any prosecution for a felony in a eCircuit eCourt, and to any misdemeanor brought on direct indictment and as provided in Rule 8:15.
(b) Discovery by the Accused. (1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.	(b) Discovery by the Accused. (1) Upon written ~~motion of~~notice by an accused ato the court ~~shall order the Commonwealth's attorney and to~~ the attorney for the Commonwealth~~—to~~, the Commonwealth shall permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or ~~copies thereof, or~~ the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, ~~or copies thereof,~~ that are known by ~~the Commonwealth's attorney~~ the attorney for the Commonwealth to be within the possession, custody or control of the Commonwealth.
(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.	(2) Upon written ~~motion of~~notice by an accused ato the court ~~shall order~~and to ~~the Commonwealth's attorney~~ the attorney for the Commonwealth ~~to~~, the Commonwealth's shall permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, ~~upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Ruleprovided that~~ the Commonwealth may object as to the reasonableness of the request.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
<No current Rule>	(3) Upon written notice by an accused to the court and to the, the attorney for the Commonwealth shall permit the accused to inspect and copy or photograph all relevant police reports, subject to exemptions as provided below or otherwise required by statute. The term "police reports" means any formal, written report of investigation by any law enforcement officer (as defined by Code § 9.1-101) including reports of interviews of witnesses (whether verbatim or non-verbatim); it does not include notes and drafts.
<No current Rule>	(4) Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph all relevant statements of any non-expert witness whom the Commonwealth is required to designate under subsection(i) of this rule. The Commonwealth shall disclose any statements of rebuttal witnesses, not previously disclosed, prior to the beginning of its rebuttal case. The term "statements" means a statement written or signed by the witness, a verbatim transcript, or an audio and/or video recording. This paragraph shall not limit the disclosure of police reports under paragraph 3, whether or not such reports contain account s of statements made by prospective witnesses.
(c) Discovery by the Commonwealth. If the court grants relief sought by the accused under clause (ii) of subparagraph (b)(1) or under subparagraph (b)(2) of this Rule, it shall, upon motion of the Commonwealth, condition its order by requiring that:	(c) Discovery by the Commonwealth. If the ~~court grants relief sought by the~~ accused provides written notice for discovery under ~~clause (ii) of subparagraph (b)(1) or under subparagraph (b)(2) of~~ this Rule~~, it shall, upon motion of~~ and the Commonwealth~~, condition its order by requiring that:~~ provides such discovery:
(1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and which the defense intends to proffer or introduce into evidence at trial or sentencing.	(1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and which the defense intends to proffer or introduce into evidence at trial or sentencing.
(2) The accused disclose whether he intends to introduce evidence to establish an alibi and, if so, that the accused disclose the place at which he claims to have been at the time of the commission of the alleged offense.	(2) The accused shall disclose within a reasonable time but not less than ten (10) days before trial whether he intends to introduce evidence to establish an alibi and, if so, that the accused disclose the place at which he claims to have been at the time of the commission of the alleged offense.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
(3) If the accused intends to rely upon the defense of insanity or feeblemindedness, the accused shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.	(3) If the accused intends to rely upon ~~the~~a defense ~~of insanity or feeblemindedness~~as provided in Code § 19.2-168, the accused shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.
<No current Rule>	(4) The accused shall disclose all relevant statements of any non-expert witness, other than the defendant, whom the defense is required to designate under subsection(i) of this Rule. The accused shall disclose any statements of surrebuttal witnesses, not previously disclosed, prior to the beginning of its surrebuttal case. The term "statements" means a statement written or signed by the witness, a verbatim transcript or an audio and/or video recording.
(d) Time of Motion. A motion by the accused under this Rule must be made at least 10 days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.	(d) Time of ~~Motion.~~ Notice. A ~~motion~~notice by the accused under this Rule must be made at least ten (10) days before the day fixed for trial. The ~~motion~~notice shall include all relief sought under this Rule~~. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.~~
<No current Rule>	(e) Attorney Work Product. Neither the Commonwealth nor the accused shall be required to disclose mental impressions, opinions, theories or conclusions of attorneys or their agents.
(e) Time, Place and Manner of Discovery and Inspection. An order granting relief under this Rule 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~~f) Time, Place and Manner of Discovery and Inspection. ~~An order granting relief under this Rule shall specify the~~The Commonwealth and the accused shall agree as to the time, place and manner of making the discovery and inspection permitted under this Rule. If the parties are unable to agree, upon motion of either party the court shall enter an order as to the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just, including imposition of an award of attorney's fees or other appropriate sanction if the failure of a party to agree as to the time, place and manner of making the discovery and inspection is deemed unreasonable.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
(f) Protective Order. 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 be 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) Protective Order.~~ (g) Withholding, Redacting or Restricting Information for Good Cause. For good cause a party may withhold or redact such information, or condition its disclosure on restrictions limiting copying or dissemination including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. Examples of "good cause" may include, but are not limited to, personally identifying information to protect a victim's or witness's personal or financial security, graphic images, child pornography, and medical or mental health records. The opposing party may file a motion to compel disclosure or to remove any restriction. The court may order the withholding party to submit the information for review in camera. The court may approve, reject or modify the restriction and may order other relief. 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., including an order restricting the copying or dissemination of the material and the disposition of the material at the conclusion of the case. Upon motion by the ~~Commonwealth~~either party the court may permit the ~~Commonwealth~~party to make such showing, in whole or in part, in the form of a written statement to be 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~~written 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.
(g) Continuing Duty to Disclose; Failure to Comply. If, after disposition of a motion filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, he shall promptly notify the other party or his counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.	(gh) Continuing Duty to Disclose; Failure to Comply. If, after disposition of a ~~motion~~notice filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested by notice or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, ~~he~~the party shall promptly notify the other party or his counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
<No current Rule>	(i) Witness Lists. Each party shall provide to the opposing party a written list of names of all witnesses expected to testify at trial. Disclosure of rebuttal and surrebuttal witnesses is not required under this subsection. The Commonwealth shall provide a list no later than seven (7) days before trial; the defendant shall provide a list no later than three (3) days before trial. Upon motion of either party, the court may modify the requirements of this subsection for good cause shown. At the commencement of trial the parties shall provide their witness lists to the court. Where a party seeks to call a witness not disclosed on the list, the court may fashion such relief as it deems appropriate, including granting a continuance or recess, granting further discovery, instructing the jury regarding nondisclosure, and prohibiting or limiting testimony of the witness. At the request of either party, the court may place the lists or portions of the lists under seal where appropriate for the protection of witnesses.
<No current Rule>	(j) Prosecutor's Duty to Disclose Exculpatory Information Upon indictment, waiver of indictment, or return of information, or prior to entry of a guilty plea or plea of no contest, whichever first occurs, the attorney for the Commonwealth shall disclose to the defendant all information in his possession, custody or control that tends to negate the guilt of the accused, mitigate the offense charged, or reduce punishment, subject to modification or limitation by the court. Information that tends to impeach the Commonwealth's witnesses shall be produced no later than seven (7) days prior to the date scheduled for trial.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
Rule 3A:12. Subpoena.	Rule 3A:12. Subpoena.
(a) For Attendance of Witnesses. A subpoena for the attendance of a witness to testify before a court not of record shall be issued by the judge, clerk, magistrate, Commonwealth's Attorney or by the attorney for the defendant. A subpoena for the attendance of a witness to testify before a circuit court or a grand jury shall be issued by the clerk or Commonwealth's Attorney and, for the attendance of a witness to testify before a circuit court, by the attorney for the defendant as well. The subpoena shall (i) be directed to an appropriate officer or officers, (ii) name the witness to be summoned, (iii) state the name of the court and the title, if any, of the proceeding, (iv) command the officer to summon the witness to appear at the time and place specified in the subpoena for the purpose of giving testimony, and (v) state on whose application the subpoena was issued. No subpoena or subpoena duces tecum shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which subpoena or subpoena duces tecum is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the circuit court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. The proceedings for approval may be conducted in camera, in the judge's discretion, and the judge may seal such proceedings. Such subpoena request shall be made by the Commonwealth's attorney for the jurisdiction involved, either on motion of the Commonwealth's attorney or upon request to the Commonwealth's attorney by the foreman of any grand jury.	(a) For Attendance of Witnesses. A subpoena for the attendance of a witness to testify before a court not of record shall be issued by the judge, clerk, magistrate, ~~the Commonwealth's attorney~~ the attorney for the Commonwealth or by the attorney for the defendant. A subpoena for the attendance of a witness to testify before a ~~c~~Circuit ~~c~~Court or a grand jury shall be issued by the clerk or ~~the Commonwealth's attorney~~ the attorney for the Commonwealth and, for the attendance of a witness to testify before a ~~c~~Circuit ~~c~~Court, by the attorney for the defendant as well. The subpoena shall (i) be directed to an appropriate officer or officers, (ii) name the witness to be summoned, (iii) state the name of the court and the title, if any, of the proceeding, (iv) command the officer to summon the witness to appear at the time and place specified in the subpoena for the purpose of giving testimony, and (v) state on whose application the subpoena was issued. No subpoena or subpoena duces tecum shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which subpoena or subpoena duces tecum is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the ~~c~~Circuit ~~c~~Court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. The proceedings for approval may be conducted in camera, in the judge's discretion, and the judge may seal such proceedings. Such subpoena request shall be made by the ~~the Commonwealth's attorney~~ the attorney for the Commonwealth for the jurisdiction involved, either on motion of the ~~the Commonwealth's attorney~~ the attorney for the Commonwealth or upon request to the ~~the Commonwealth's attorney~~ the attorney for the Commonwealth by the foreman of any grand jury. A defendant may also initiate such a subpoena request.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
(b) For Production of Documentary Evidence and of Objects Before a Circuit Court. Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena. Such subpoena shall command either (1) that the person to whom it is addressed shall appear with the items described either before the court or the clerk or (2) that such person shall deliver the items described to the clerk. The subpoena may direct that the writing or object be produced at a time before the trial or before the time when it is to be offered in evidence. Any subpoenaed writings and objects, regardless by whom requested, shall be available for examination and review by all parties and counsel. Subpoenaed writings or objects shall be received by the clerk and shall not be open for examination and review except by the parties and counsel unless otherwise directed by the court. The clerk shall adopt procedures to ensure compliance with this paragraph. Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including limiting disclosure, removal and copying. If a subpoena requires the production of information that is stored in an electronic format, the person to whom it is addressed shall produce a tangible copy of the information.	(b) For Production of Documentary Evidence and of Objects Before a Circuit Court. Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena. Such subpoena shall command either (1) that the person to whom it is addressed shall appear with the items described either before the court or the clerk or (2) that such person shall deliver the items described to the clerk. The subpoena may direct that the writing or object be produced at a time before the trial or before the time when it is to be offered in evidence. The term "material" as used in this section does not require that the subpoenaed material be admissible at trial or that it be exculpatory. Any subpoenaed writings and objects, regardless by whom requested, shall be available for examination and review by all parties and counsel. Subpoenaed writings or objects shall be received by the clerk and shall be placed under seal and shall not be open for examination and review except by the parties and counsel unless otherwise directed by the court. The clerk shall adopt procedures to ensure compliance with this paragraph. Until such time as the subpoenaed materials are admitted into evidence, the materials shall remain under seal, except as the court may otherwise deem appropriate. Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including: (i) Quashing the subpoena in whole or in part; (ii) prohibiting or limiting disclosure, removal and copying.~~,~~; (iii) redacting confidential or immaterial information; (iv) prohibiting or restricting further disclosure by parties to the litigation; and (v) ordering return of all copies of the subpoenaed material upon completion of the litigation. Such motions may be brought by a party to the litigation, by the entity or individual subpoenaed, or by the entity or individual who is the subject of the subpoenaed material. .

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
If a tangible copy cannot be reasonably produced, the subpoenaed person shall permit the parties to review the information on a computer or by electronic means during normal business hours, provided that the information can be accessed and isolated. If a tangible copy cannot reasonably be produced and the information is commingled with information other than that requested in the subpoena and cannot reasonably be isolated, the person to whom the subpoena is addressed may file a motion for a protective order or motion to quash.	If a subpoena requires the production of information that is stored in an electronic format, the person to whom it is addressed shall produce a tangible copy of the information. If a tangible copy cannot be reasonably produced, the subpoenaed person shall permit the parties to review the information on a computer or by electronic means during normal business hours, provided that the information can be accessed and isolated. If a tangible copy cannot reasonably be produced and the information is commingled with information other than that requested in the subpoena and cannot reasonably be isolated, the person to whom the subpoena is addressed may file a motion ~~for a protective order~~to quash or a motion ~~to quash~~for limitations on disclosure or other appropriate relief.
(c) Service and Return. A subpoena may be executed anywhere in the State by an officer authorized by law to execute the subpoena in the place where it is executed. The officer executing a subpoena shall make return thereof to the court named in the subpoena.	(c) Service and Return. A subpoena may be executed anywhere in the State by an officer authorized by law to execute the subpoena in the place where it is executed. The officer executing a subpoena shall make return thereof to the court named in the subpoena.
(d) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court to which the subpoena is returnable.	(d) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court to which the subpoena is returnable.
(e) Recognizance of a Witness. If it appears that the testimony of a person is material in any criminal proceeding, a judicial officer may require him to give a recognizance for his appearance.	(e) Recognizance of a Witness. If it appears that the testimony of a person is material in any criminal proceeding, a judicial officer may require him to give a recognizance for his appearance.
(f) Photocopying of Subpoenaed Documents. Subject to the provisions of subsection (b), removal and photocopying of subpoenaed documents by any party or counsel shall be permitted. The court shall direct a procedure for removal, photocopying and return of such documents.	(f) Photocopying of Subpoenaed Documents. Subject to the provisions of subsection (b), removal and photocopying of subpoenaed documents by any party or counsel shall be permitted. The court shall direct a procedure for removal, photocopying and return of such documents.
<No current Rule>	(g) Undue Burden. Where subpoenaed material is so voluminous that its production would place an undue burden on the subpoenaed entity, the court may order that the subpoena duces tecum be satisfied by making the writings and documents reasonably available for inspection by the requesting party, subject to review by the court.
<No current Rule>	(h) Freedom of Information Act In accordance with Virginia Code Section 2.2-3703.1, the provisions of the Freedom of Information Act ("FOIA") shall not govern a court's determinations with regard to the applicability of this Rule.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
<No current Rule>	(i) Subpoena Issued to a Party In a criminal proceeding, a subpoena duces tecum may not be used to obtain material from a party. Nor may a subpoena duces tecum be used to obtain material from an agency or entity participating in, or charged with responsibility for, the investigation or prosecution of a criminal case such that the agency and its employees are deemed agents of the Commonwealth. A subpoenaed agency or entity claiming party status may seek to quash a subpoena on that basis and, if sustained, discovery shall be produced pursuant to Rule 3A:11. For purposes of this rule, the Department of Forensic Science and the Division of Laboratory Consolidated Services are not parties.
<No current Rule>	(j) In Camera Review In determining whether a protective order should issue, or other relief be granted, a court may in its discretion review subpoenaed material in camera.
<No current Rule>	(k) Ex parte proceedings (i) A court may not issue a witness subpoena on an ex parte basis. (ii) A court may not issue a subpoena duces tecum on an ex parte basis, except as follows: Where either the Commonwealth or the defendant seeks to have a subpoena duces tecum issued on an ex parte basis, the party seeking issuance of the ex parte subpoena must file an ex parte affidavit with the court which explains the basis for the request to have the subpoena issued ex parte. The affidavit shall be placed under seal. Should the court require additional information not contained within the affidavit, the court may conduct an ex parte hearing with the party requesting the subpoena duces tecum. Any such hearing shall be on the record and sealed until further order of the court. (iii) A court may only issue a subpoena duces tecum on an ex parte basis if it concludes that it is necessary to do so in the interest of justice. (iv) A court's decision with regard to the ex parte request for a subpoena duces tecum is not subject to appeal. (v) If a request for the issuance of a subpoena duces tecum is granted, the subpoena shall issue and the records returned under seal to be made available for examination and copying by the requesting party only. (vi) If a request for the issuance of a subpoena duces tecum is denied, the request shall remain under seal, and the requesting party may resubmit the subpoena duces tecum on a non-ex parte basis.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
	(vii) Any motion to quash a subpoena duces tecum issued on an ex parte basis shall be made on the public record and shall not be treated as an ex parte matter. (viii) In the event that the requesting party determines that records obtained pursuant to an ex parte subpoena duces tecum may be used at trial, the requesting party shall move no later than fourteen (14) days before trial to make available to the opposing party the entirety of the records produced pursuant to the ex parte subpoena duces tecum. If the requesting party fails to do this, the records may not be used by the requesting party at trial for any purpose.
<No current Rule>	(l) Confidentiality Provisions of 19.2-11.2 Where the confidentiality provisions of Virginia Code Section 19.2-11.2 apply, any material produced pursuant to a subpoena duces tecum shall be treated in accordance with the provisions of the statute.
<No current Rule>	(m) Health Record Privacy. Any subpoena duces tecum seeking health records, or records concerning the provision of health services, as those terms are defined by Virginia Code Section 32.1-127.1:03, are subject to the procedures and requirements of Virginia Code Section 32.1-127.1:03(H), including the provisions for objecting to disclosure by a motion to quash.
<No current Rule>	(n) Decision of the Court A court must state on the record, or in writing, its reasons for making a decision pursuant to this Rule.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
<No current Rule>	Rule 3A:12.1. Expert Notice Prior to Trial. (a) Notice by the Commonwealth. Whenever the Commonwealth intends to introduce expert opinion testimony at trial in Circuit Court, the attorney for the Commonwealth shall notify in writing the accused of the Commonwealth's intent to present such testimony no later than fourteen (14) days before trial, or as otherwise ordered by the court. The written notice shall include the witness's name and contact information, a summary of the witness's qualifications, a summary of the anticipated expert opinion testimony and copies of written reports, if any, prepared by the witness.
<No current Rule>	(b) Notice by the Accused. Whenever the accused intends to introduce expert testimony at trial in Circuit Court, the accused shall notify the attorney for the Commonwealth in writing of the accused's intent to present such testimony no later than seven (7) days before trial or as otherwise ordered by the court. The written notice shall include the witness's name and contact information, a summary of the witness's qualifications, a summary of the anticipated expert opinion testimony and copies of written reports, if any, prepared by the witness.
<No current Rule>	(c) Failure to Provide Notice; Remedy. If the court finds that a party has failed to provide this notice in a timely manner, the court may grant such relief as it deems appropriate, including but not limited to the granting of a continuance or the exclusion of the expert testimony.
<No current Rule>	(d) Supplemental Notice; Notice of Rebuttal Experts. With leave of the court for good cause shown, the parties may supplement this written notice of expert witness testimony and the Commonwealth may offer written notice of rebuttal expert witness testimony.
<No current Rule>	(e) Certificates of Analysis. For the purposes of this Rule, unless otherwise ordered by the court, providing the other party with a copy of a Virginia Department of Forensic Science Certificate of Analysis signed either by hand or by electronic means by the person performing the analysis or examination shall satisfy the written notice requirement of this Rule.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
Rule 7C:5. Discovery. (a) Application of Rule. This Rule applies only to the prosecution for a misdemeanor which may be punished by confinement in jail and to a preliminary hearing for a felony.	Rule 7C:5. Discovery. (a) Application of Rule. This Rule applies only to the prosecution for a misdemeanor which may be punished by confinement in jail and to a preliminary hearing for a felony.
(b) Definitions. For purposes of discovery under this Rule 1) the prosecuting attorney is the attorney for the Commonwealth or the city attorney, county attorney, or town attorney, who is responsible for prosecuting the case; 2) if no prosecuting attorney prosecutes the case, the representative of the Commonwealth shall be the law enforcement officer, or, if none, such person who appears on behalf of the Commonwealth, county, city or town in the case.	(b) Definitions. For purposes of discovery under this Rule 1) the prosecuting attorney is the attorney for the Commonwealth or the city attorney, county attorney, or town attorney, who is responsible for prosecuting the case; 2) if no prosecuting attorney prosecutes the case, the representative of the Commonwealth shall be the law enforcement officer, or, if none, such person who appears on behalf of the Commonwealth, county, city or town in the case.
(c) Discovery by the Accused. Upon motion of an accused, 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: (1) 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 (2) any criminal record of the accused.	(c) Discovery by the Accused. Upon ~~motion of~~written notice by an accused~~,~~ to the court ~~shall order~~and the Commonwealth, the prosecuting attorney or representative of the Commonwealth ~~to~~shall 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: (1) 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 (2) any criminal record of the accused.
(d) Time of Motion. A motion by the accused under this Rule shall be made in writing and filed with the Court and a copy thereof mailed, faxed, or otherwise delivered to the prosecuting attorney and, if applicable, to the representative of the Commonwealth at least 10 days before the day fixed for trial or preliminary hearing. The motion shall include the specific information or material sought under this Rule.	(d) Time of ~~Motion~~Notice. A ~~motion~~notice by the accused under this Rule shall be ~~made in writing and~~ filed with the ~~C~~court and a copy thereof mailed, faxed, or otherwise delivered to the prosecuting attorney ~~and~~or, if applicable, to the representative of the Commonwealth at least 10 days before the day fixed for trial or preliminary hearing. The ~~motion~~notice shall include the specific information or material sought under this Rule.
(e) Time, Place and Manner of Discovery and Inspection. An order granting relief under this Rule 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) Time, Place and Manner of Discovery and Inspection. In the absence of an agreement by the parties, either party may move the court for an order ~~granting relief under this Rule shall specify~~specifying the time, place and manner of making the discovery and inspection permitted and the court may prescribe such terms and conditions as are just.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
<No current Rule>	(f) Duty to Disclose Exculpatory Information. Nothing in this Rule shall obviate or supplant the obligations of the representative of the Commonwealth to disclose exculpatory information in a misdemeanor case.
(f) Failure to Comply. If at any time during the course of the proceedings, it is brought to the attention of the court that the prosecuting attorney or representative of 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.	(g) Failure to Comply. If at any time during the course of the proceedings, it is brought to the attention of the court that the prosecuting attorney or representative of 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.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
Rule 8:15. Discovery. (a) Adult Criminal Case. In any cases involving adults charged with crime, the provisions of Rule 7C:5 shall govern discovery.	Rule 8:15. Discovery. (a) Adult Criminal ~~Case~~Cases. ~~In any~~Upon written notice timely made by the accused, Rule 7C:5 shall apply in all cases involving adults charged with ~~crime, the provisions of Rule 7C:5 shall govern discovery~~a felony and/or a misdemeanor which may be punished by incarceration.
(b) Juvenile Delinquency Cases. In juvenile delinquency cases, when the juvenile is charged with an act that would be a felony if committed by an adult, or in a transfer hearing or a preliminary hearing to certify charges pursuant to § 16.1-269.1, the court shall, upon motion timely made by the juvenile or the Commonwealth's Attorney, and for good cause, enter such orders in aid of discovery and inspection of evidence as provided under Rule 3A:11. In juvenile delinquency cases when the juvenile is charged with an act that would be a misdemeanor if committed by an adult, the court shall, upon motion timely made and for good cause, enter such orders for discovery as provided under Rule 7C:5.	(b) Juvenile Delinquency Cases. ~~In juvenile delinquency cases, when~~ Upon written notice timely made by the juvenile, (1) Rule 3A:11 shall apply in all cases in which a juvenile is charged with an act that would be a felony if committed by an adult, ~~or in a transfer hearing or a preliminary hearing to certify charges pursuant to § 16.1-269.1, the court shall, upon motion timely made by the juvenile or the Commonwealth's Attorney, and for good cause, enter such orders in aid of discovery and inspection of evidence as provided under Rule 3A:11. In juvenile delinquency~~and (2) Rule 7C:5 shall apply in all cases ~~when the~~in which a juvenile is charged with an act that would be a misdemeanor punishable by incarceration if committed by an adult, ~~the court shall, upon motion timely made and for good cause, enter such orders for discovery as provided under Rule 7C:5~~.
(c) Other Cases. In all other proceedings, the court may, upon motion timely made and for good cause, enter such orders in aid of discovery and inspection of evidence as permitted under Part Four of the Rules, except that no depositions may be taken.	(c) Other Cases. In all other proceedings, the court may, upon motion timely made and for good cause, enter such orders in aid of discovery and inspection of evidence as permitted under Part Four of the Rules, except that no depositions may be taken.
(d) In proceedings concerning civil support, the judge may require parties to file a statement of gross income together with documentation in support of the statement.	(d) Proceedings Concerning Civil Support. In proceedings concerning civil support, the judge may require parties to file a statement of gross income together with documentation in support of the statement.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
§ 19.2-11.2. Crime victim's right to nondisclosure of certain information; exceptions; testimonial privilege. Upon request of any witness in a criminal prosecution under § 18.2-46.2, 18.2-46.3, or 18.2-248 or of any violent felony as defined by subsection C of § 17.1-805, or any crime victim, neither a law-enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, telephone number, or place of employment of the witness or victim or a member of the witness' or victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause. Except with the written consent of the victim, a law-enforcement agency may not disclose to the public information which directly or indirectly identifies the victim of a crime involving any sexual assault, sexual abuse or family abuse, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause. In addition, at the request of the victim to the Court of Appeals of Virginia or the Supreme Court of Virginia hearing, on or after July 1, 2007, the case of a crime involving any sexual assault or sexual abuse, no appellate decision shall contain the first or last name of the victim. Nothing herein shall limit the right to examine witnesses in a court of law or otherwise affect the conduct of any criminal proceeding.	§ 19.2-11.2. Crime victim's right to nondisclosure of certain information; exceptions; testimonial privilege. Upon request of any witness in a criminal prosecution under § 18.2-46.2, 18.2-46.3, or 18.2-248 or of any violent felony as defined by subsection C of § 17.1-805, or any crime victim, neither a law-enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, telephone number, social security number, date of birth, operator's license number, or place of employment of the witness or victim or a member of the witness's or victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause. Except with the written consent of the victim, a law-enforcement agency may not disclose to the public information which directly or indirectly identifies the victim of a crime involving any sexual assault, sexual abuse or family abuse, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause. In addition, at the request of the victim to the Court of Appeals of Virginia or the Supreme Court of Virginia hearing, on or after July 1, 2007, the case of a crime involving any sexual assault or sexual abuse, no appellate decision shall contain the first or last name of the victim. Nothing herein shall limit the right to examine witnesses in a court of law or otherwise affect the conduct of any criminal proceeding.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
§ 19.2-220. Contents of indictment in general. The indictment or information shall be a plain, concise and definite written statement, (1) naming the accused, (2) describing the offense charged, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date. In describing the offense, the indictment or information may use the name given to the offense by the common law, or the indictment or information may state so much of the common law or statutory definition of the offense as is sufficient to advise what offense is charged.	§ 19.2-220. Contents of indictment in general. The indictment or information shall be a plain, concise and definite written statement, (1) naming the accused, (2) describing the offense charged, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date. In describing the offense, the indictment or information may use the name given to the offense by the common law, or the indictment or information may state so much of the common law or statutory definition of the offense as is sufficient to advise what offense is charged. The legal sufficiency of a particular indictment shall not restrain or preclude the trial court from ordering a bill of particulars pursuant to Virginia Code Section 19.2-230.

Current Version of the Rule or Statute	Revised Version of the Rule or Statute
§ 19.2-230. Bill of particulars. A court of record may direct the filing of a bill of particulars at any time before trial. A motion for a bill of particulars shall be made before a plea is entered and at least seven days before the day fixed for trial and the bill of particulars shall be filed within such time as is fixed by the court.	§ 19.2-230. Bill of particulars. A court of record may direct the filing of a bill of particulars at any time before trial. A motion for a bill of particulars shall be made before a plea is entered and at least seven days before the day fixed for trial and the bill of particulars shall be filed within such time as is fixed by the court. A bill of particulars may be requested when the indictment or presentment insufficiently informs the accused of the nature of the allegation, to avoid potential cases of double jeopardy and to clarify issues where multiple dates, acts or images are alleged that could be charged individually or collectively.

5 Minority Comments

The Government's first and foremost duty is to protect the public and "to do no harm." The suggestion to drastically change the Rules to open criminal investigative files, with the burden of filing a Protective Order on the Commonwealth, requires prosecutors & judges to gamble with witness safety by attempting to predict the unpredictable. The suggested changes will be counterproductive and ultimately detrimental to Virginia's judicial system.

Of significant concern is the fact that no studies, surveys or reports have been reviewed to determine the impact where Discovery Rules have been modified to be more open. Since the last meeting, additional Virginia Commonwealth Attorney surveys have come in regarding the release of criminal files (reflected below). The following specific issues also need to be addressed:

(1) Will the release of criminal investigative files cause more damage than good? [One hundred (100%) of LEOs and eighty-eight (88%) of CAs polled believe that the release of criminal investigative files will be detrimental to public safety and if you add in the CA unknowns, it would be ninety-six (96%).

(2) What will the chilling effect be on reporting crime when victims, witnesses and citizens know that their information will not be protected? [For example, US DOJ estimates only 50% of crime is reported and eighty-six (86%) of CAs polled have had witnesses or victims express concerns about their information being released.]

(3) What percentage of arrests will not make it to trial because of tampering and obstruction due to the premature release of information? ["The time between a suspect's arrest and trial is the most dangerous; repeated and lengthy trial delays expand the opportunities

available to a motivated intimidator." "One survey showed 36% of witnesses had been directly threatened; among those who had *not* been threatened directly, 57% feared reprisals." "Anecdotes and surveys of police and prosecutors estimate that witness intimidation plays a role in 75 to 100% of violent crime committed in gang-dominated neighborhoods." US DOJ]

(4) Whether the release of criminal investigative files will be counter-productive as law enforcement will not document crucial evidence and/or will create secondary files? [Ninety-four (94%) of CAs and eighty-six (86%) of LEOs surveyed believe it will be counter-productive and if you added in the unknowns or "it depends" it would be ninety-seven (97%).]

(5) What are the actual percentages and/or recent number of false convictions? Will production of criminal investigative files actually reduce false convictions? [There was no empirical data produced.]

(6) What will be the financial and operational costs to law enforcement officers, Commonwealth's Attorneys, the court systems and ultimately on our taxpayers? [Sixty-nine (69%) of CAs polled said they would not have the funds, or it would be burden, to redact information from criminal investigative files. The vast majority of CAs do not currently have open file policies and would be heavily impacted. Even the CAs, who say they have "open file" usually give only Brady material, or they redact information, or they do not release copies to Defense Counsel; and the CAs that do release to Defense Counsel usually do not agree to Defendant receiving a copy.]

In lieu of releasing criminal investigative files, the suggestions below should provide a fair system for all parties without jeopardizing public safety:

(1) Pass a Brady Rule instead of one suggested;

(2) Mandate better training for law enforcement officers through DCJS;

(3) Mandate better policies for law enforcement agencies through DCJS;

(4) Mandate better training for prosecutors with Brady being required as part of CLE Ethics;

(5) Mandate that officers, who intentionally and maliciously violate Brady be decertified and prosecutors, who intentionally and maliciously violate Brady be disbarred.

Respectfully submitted.

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Office of Legal Affairs
Department of State Police

6 Reports and Exhibits

An electronic appendix of the reports generated by the Study Groups with exhibits and other materials reviewed by the Committee is appended to this report as a DVD-ROM disc. The materials are also available on SharePoint. For ease of access, the materials in the appendix have been grouped according to subject matter.

1. Minutes of the Plenary Meetings of the Committee

    a. Criminal Discovery Rule Committee Meeting - Minutes 1.13.14.pdf
    b. Criminal Discovery Rule Committee Meeting - Minutes 3.10.14.pdf
    c. Criminal Discovery Rule Committee Meeting - Minutes 6.10.14.pdf
    d. Criminal Discovery Rule Committee Meeting - Minutes 8.11.14.pdf
    e. Criminal Discovery Rule Committee Meeting - Minutes 10.6.14.pdf
    f. Criminal Discovery Rule Committee Meeting - Minutes 11.12.14.pdf

2. General Materials

    a. Attorney General Opinions

        i. Opinion of the Attorney General 80-81-141.pdf
        ii. Opinion of the Attorney General 90-143.pdf
        iii. Opinion of the Attorney General 91-80.pdf
        iv. Opinion of the Attorney General 91-81.pdf
        v. Opinion of the Attorney General 93-128.pdf
        vi. Opinion of the Attorney General 97-74.pdf
        vii. Opinion of the Attorney General 98-121.pdf
        viii. Opinion of the Attorney General 13-094.pdf

    b. Case Law

        i. Workman v. Commonwealth (2006).pdf
        ii. Garnett v. Commonwealth (2008).pdf
        iii. Bly v. Commonwealth (2010).pdf
        iv. Commonwealth v. Tuma (2013).pdf

    c. Concerns of Law Enforcement Community With Respect to Proposed Revisions of Rule 3A11 (Fifth Plenary Meeting PowerPoint).pdf
    d. Drafting Guidelines (Third Plenary Meeting PowerPoint).pdf
    e. Federal Rules of Criminal Procedure.pdf
    f. Law Review Articles

g. Overview of Virginia Criminal Discovery (First Plenary Meeting PowerPoint).pdf
h. Proposed Amendments of the Virginia State Bar Indigent Defense Task Force.pdf
i. Public Comments to the Supreme Court of Virginia on Revision of Rule 3A 11.pdf
j. Research Memorandum on Criminal Discovery Practices in Other Jurisdictions.pdf
k. Comparison of Current Rules of the Supreme Court with the Federal Rules of Criminal Procedure
l. Working Drafts of the Committee

3. Rule 3A11 - Overall Discovery Materials

   a. First Report of the Overall Discovery Study Group.pdf
   b. Second Report of the Overall Discovery Study Group.pdf
   c. Third Report of the Overall Discovery Study Group.pdf
   d. Proposed Revisions to 3a11(b)(3) and (e) Considered at Sixth Plenary Meeting.pdf
   e. CC-XXXX Notice Regarding Discovery by the Accused (MASTER) DRAFT Fall CCFC.pdf

4. Rule 3A12 - Subpoenas to 3rd Parties Materials

   a. First Report of the Subpoenas to 3rd Parties Study Group.pdf
   b. Second Report of the Subpoenas to 3rd Parties Study Group.pdf
   c. Third Report of the Subpoenas to 3rd Parties Study Group.pdf
   d. Third Report of the Subpoenas to 3rd Parties Study Group Addendum of Judge Bellows.pdf

5. Bills of Particular

   a. First Report of the Bills of Particular Study Group.pdf
   b. Second Report of the Bills of Particular Study Group.pdf

6. Brady Materials

   a. First Report of the Brady Study Group.pdf
   b. Second Report of the Brady Study Group - Brady 50 State Comparison Spreadsheet.pdf
   c. Second Report of the Brady Study Group - Brady v. Maryland and Prosecutorial Disclosures A Fifty State Survey.pdf
   d. Third Report of the Brady Study Group.pdf
   e. Fourth Report of the Brady Study Group.pdf
   f. Judge Bellows – Alternate Brady Proposal 9-10-14.pdf

7. Experts Materials

   a. First Report of the Experts Study Group.pdf
   b. Second Report of the Experts Study Group.pdf
   c. Third Report of the Experts Study Group.pdf