

VIRGINIA BEACH BAR ASSOCIATION

TRUST FOR THE GENERAL PRACTITIONER AND THE NEW 3A:11 RULE

April 30, 2020
2:00 p.m. to 5:00 p.m.
Zoom Webinar

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VIRGINIA BEACH BAR ASSOCIATION
TRUST FOR THE GENERAL PRACTITIONER
AND THE NEW 3A:11 RULE
APRIL 30, 2020 2:00 PM TO 5:00 PM
ZOOM WEBINAR

2:00 to 4:00:

Trust for the General Practitioner – Presented by Caryn West, Esq., Allison Zizzo, Esq. and Ashley Brooks, Esq.

4:00 to 5:00:

The New 3A:11 Rule – The Commonwealth and Defense Perspectives – Presented by C. Andrew Rice, Esq. and William H. “Happy” O’Brien, Esq.

Virginia MCLE Board

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Course/Program Title: Virginia Beach Bar Association's Trusts for the General Practitioner and The New 3A:11 Rule

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Trusts for the General Practitioner

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Introduction

I. What is a Trust?

- A. “a fiduciary relationship with respect to property, arising out of a manifestation of an intention to create it, and subjecting the person in whom the property is vested to equitable duties to deal with the property for the benefit of another person.” – Restatement of the Law of Trusts (Am. L. Inst. 1930) Section 2, p. 14, *Definition of Trust*
- B. A legal contract between the Grantor (Settlor, Trustor), the Trustee and the Beneficiary, whereby the Trustee takes legal title to property to hold and manage for the benefit of the Beneficiary (who has equitable title to the property).

II. Types of Trusts

A. Revocable Living (Inter Vivos) Trusts (“RLT”)

1. Pre-Death:

- a. While most Grantors initially serve as Trustee of their own RLTs, the trust agreement also provides for one or more successor Trustees, who step in to manage the trust property when the Grantor becomes incapacitated.
- b. How is incapacity determined? There are multiple methods that can be used as provisions within the RLT. Examples include (i) certification required by the Grantor’s attending physician; (ii) conclusion of a “disability panel” that can include physicians, spiritual advisors, friends and/or family, and (iii) definition that the Grantor is unable to manage his/her financial affairs, as determined by the Trustee.
- c. Utilizing an RLT with a successor Trustee is an alternative to the law of agency, where the principal names an agent/attorney in fact in a Power of Attorney to manage his/her financial affairs in the event of incapacity.

The RLT is superior, as the successor Trustee holds legal title to the trust property.

- d. RLTs are both revocable and amendable by the Grantor. They can also be “restated” in their entirety, while preserving the original trust name and date.
- e. RLTs (as all other trusts) must be “funded” with assets so that the Trustee can manage/distribute them, and in order to avoid probate of the assets. Assets are retitled in the trust name in various ways, for example, deeds for real property, asset transfer forms for investment accounts, and assignments of business interests.

2. Post Death:

- a. **Probate Avoidance:** The most commonly cited purpose for an RLT, which serves as a “will substitute,” distributing the Grantor’s estate without the oversight of the circuit court’s probate process. Probate involves the following basic steps: (i) Recordation of the will (or in the event of intestacy, recording the List of Heirs) and qualification of the Executor (or in the event of intestacy, the Administrator) in the probate clerk’s office; (ii) providing statutory notices to beneficiaries and heirs at law, followed by filing an Affidavit of Notice with the probate clerk affirming that notices were provided; (iii) filing of estate Inventory with the designated Commissioner of Accounts, and (iv) filing estate Accounting with the Commissioner of Accounts for each year the estate is open, detailing all receipts, disbursements and distributions of the estate.
- b. **Tax Planning:** Married couples can utilize A/B Trust Planning to maximize the use of both of their federal estate tax exemptions. Upon the death of the first spouse, the deceased spouse’s trust assets are divided between the “A” trust (often referred to as the “Marital Trust”) and the “B” trust (often referred to as the “Family Trust,” the “Bypass Trust” or the “Credit Shelter Trust”).
 - i. The Marital Trust can be a “General Appointment Trust,” allowing the surviving spouse the power to appoint where any property still held in trust is distributed upon that spouse’s death, or a “QTIP Trust” (Qualified Terminal Interest Property), which restricts the surviving spouse’s ability to choose ultimate beneficiaries of the remaining trust property. QTIP Trusts are often the trusts of choice in blended families, where one planning objective is prohibiting the disinheritance of stepchildren.

- ii. The Family Trust is used to hold trust assets equaling up to the deceased spouse's full federal estate tax exemption amount. It ensures that the deceased spouse's exemption is not lost, and effectively allows a married couple to double the value of assets that are passed to beneficiaries free of estate tax. There are multiple "formulas" for funding the Family Trust, including a fractional formula, pecuniary formula, Clayton Election and disclaimer method.
- c. **Asset Control:** Trusts allow the Grantor to control how the beneficiary uses the trust assets. Upon the death of the Grantor, the RLT becomes irrevocable, and the Trustee must follow the guidelines for distributions set forth by the Grantor in the instrument. Beneficial purposes of asset control include:
 - i. Spendthrift Protection: Trusts that include a "spendthrift provision" protect the trust assets from the beneficiary's creditors (*see Virginia Code Section 64.2-743*), so long as the assets remain in trust.
 - Exceptions are found in *Virginia Code Section 64.2-744(B)* "Even if a trust contains a spendthrift provision, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary."
 - ii. Divorce Protection: Assets held in trust are not subject to equitable distribution in a divorce proceeding.
 - iii. Specific Use of Funds: The Grantor can provide for specific use of trust funds. Common examples include educational expenses, health care needs, assistance with a down payment on a starter home, and assistance with a business startup. Trust funds can be used for the support and maintenance of a beneficiary under appropriate circumstances (e.g., minor children or a surviving spouse). They can also specify that funds be used to maintain real property held in the trust.
 - iv. Incentives: Trusts can be used to shape a beneficiary's behavior and choices. For example, distributions for a beneficiary's education can be contingent upon the beneficiary maintaining a specific GPA or higher. Scholarship matching provisions encourage a beneficiary to strive for scholastic excellence. Income matching provisions challenge a

beneficiary to earn a higher income. Charitable matching provisions encourage a beneficiary's philanthropy. Language can be included in the trust that prohibits distributions if a beneficiary engages in criminal behavior, or has a chemical addiction/substance abuse issue. Trust provisions prohibiting distributions if a beneficiary marries outside of a certain faith have been upheld. However, courts have struck down provisions that violate public policy, such as forbidding a beneficiary from marrying at all, or encouraging divorce.

B. Irrevocable Trusts: Provide limited ability for amendment by the Grantor, and as the name states, cannot be revoked by the Grantor. Generally removes the trust assets from the Grantor's estate and serve a specific purpose. The list of types of irrevocable trusts below is not exhaustive.

1. Irrevocable Life Insurance Trusts (ILITs): A trust that owns, and is the beneficiary of, a life insurance policy. Serves to remove the life insurance proceeds from the Grantor's taxable estate. They are often implemented to provide liquidity to pay a Grantor's estate taxes, so that a "fire sale" of the Grantor's other assets is not required.

2. Special Needs Trusts (SNTs): A trust for a beneficiary who receives public benefits, such as Medicaid or SSI. Preserves the beneficiary's receipt of public benefits, which would otherwise be supplanted by an inheritance causing excess resources. Trust assets augment the beneficiary's quality of life by providing for goods and services not covered by public benefits (e.g., travel, classes, vehicle, vision and dental care).

3. Charitable Remainder Trusts (CRTs): A trust that provides for a specified distribution, at least annually, to at least one non-charitable income recipient for a period specified in the trust instrument (either a lifetime or a term of years), with the remainder interest paid to at least one charitable beneficiary. There are multiple types of CRTs. Benefits include removal of the trust assets from the Grantor's taxable estate, and a charitable deduction (depending on structure, the charitable deduction can apply to the Grantor's income tax return, or estate tax return upon the Grantor's death). CRTs provide maximum value when funded with highly appreciated assets.

4. Asset Protection Trusts/Self-Settled Spendthrift Trusts: A trust that is funded with the Grantor's assets and protected from the Grantor's creditors (*see*

Virginia Code Section 64.2-745.1). Creditor protection is contingent upon the transfer to trust not being made to delay, hinder or defraud a creditor. If a claim exists at the time the Grantor transfers assets to the trust, the creditor has five (5) years from the date of transfer to enforce their claim against the trust assets.

5. Dynasty Trusts: Trusts that allow Grantor's with significant wealth to benefit multiple generations. They are structured to last the maximum term permitted by law (in perpetuity in Virginia), allowing trust assets to be un-depleted by transfer taxes for the term of the trust. They can include spendthrift provisions, protecting trust assets from spendthrift beneficiaries, ex-spouses, and creditors and lawsuits. Ideally they are funded with amounts that take full advantage of the Grantor's transfer tax (estate and generation-skipping tax exemptions).

6. Intentionally Defective Grantor Trusts (IDGTs): A trust that is "defective" for income tax purposes, but effective for estate tax purposes. They are used to remove assets from the Grantor's estate for estate tax purposes, but retain certain powers of the Grantor that allow him/her to continue to be considered the owner of trust assets for income tax purposes.

7. Income Only Irrevocable Trusts (IOITs): Trusts that remove assets from a Grantor's estate, allowing them to ultimately qualify for Medicaid payment of long-term/custodial care. The trust must be drafted to preclude the Grantor from demanding principal from the trust. The trust principal may be invaded only by the Trustee; the Grantor is prohibited from serving as Trustee. Transfers to these trusts are subject to a five (5) year "look-back" period.

8. Pet Trust: A trust that provides for the care of a Grantor's pet, so long as the pet was living during the life of the Grantor (*see Virginia Code Section 64.2-726*).

III. When Not to Use a Trust

- A. When the cost of establishing and maintaining a trust outweigh the benefits.
- B. When the trust beneficiaries are competent and responsible.
- C. When other probate avoidance methods are available, such as beneficiary designations (payable on death, transfer on death), and transfer on death deeds (*for the latter, see Virginia Code Section 64.2-645*).

Drafting Tips

I. Directed v. Delegated Trusts

- A. Delegated Trust: A trustee is generally allowed by state statute to delegate certain responsibilities, such as investment management, to other professionals and/or co-trustees. Can include exoneration language, but requires due diligence on part of the Trustee to choose appropriate delegates.
- B. Directed Trust: Separates the responsibilities of Trustee into three (3) roles/entities:
 - 1. Investment Committee, Advisor or Trustee
 - 2. Distribution Committee, Advisor or Trustee
 - 3. Administrative Trustee

II. Tenancy by the Entireties: Property held in trusts for married couples (whether separate trusts or a joint trust) can maintain tenancy by the entireties property, pursuant to *Virginia Code Section 55-20.2 (C)*:

“Notwithstanding any contrary provision of § 64.2-747, any property of a husband and wife that is held by them as tenants by the entireties and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, and any proceeds of the sale or disposition of such property, shall have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety, so long as (i) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their property, including where both spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts. The immunity from the claims of separate creditors under this subsection may be waived as to any specific creditor, including any separate creditor of either spouse, or any specifically described property, including any former tenancy by the entireties property conveyed into trust, by the trustee acting under the express provision of a trust instrument or with the written consent of both the husband and the wife.”

- III. Trust Protectors: Many long-term trusts are now drafted to include a “Trust Protector” or “Trust Advisor,” who is appointed to ensure that the trust is not adversely affected by changes in the law or circumstances. Generally, Trust Protectors are professionals. The following are powers that can be given to a Trust Protector in the trust document:
- A. Remove and replace a trustee
 - B. Veto investment decisions
 - C. Allow the trust to be amended due to changes in the law
 - D. Resolve disputes between multiple trustees or between beneficiaries and the trustee(s)
 - E. Alter distributions from the trust based on changes in the beneficiary’s life
- IV. Investment Authority: A Trustee has a duty to follow the Prudent Investor Rule, which requires a trustee to manage a trust portfolio with “an overall investment strategy having risk and return objectives reasonably suited to the trust” and to “diversify the investments of the trust.” *Restatement (Third) of Trusts (1992)*. However, *Virginia Code Section 64.2-781(B)* provides:
- “The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A general authorization in a controlling document authorizing a trustee to invest in such assets as the trustee, in his sole discretion, may deem best, or other language purporting to expand the trustee's investment powers, shall not be construed to waive the rule of subsection A unless the controlling document expressly manifests an intention that it be waived (i) by reference to the "prudent man" or "prudent investor" rule, (ii) by reference to power of the trustee to make "speculative" investments, (iii) by an express authorization to acquire or retain a specific asset or type of asset such as a closely held business, or (iv) by other language synonymous with clause (i), (ii) or (iii). A trustee shall not be liable to a beneficiary for the trustee's good faith reliance on a waiver of the rule of subsection A.”
- V. Trustee Discretion: Trusts should be drafted to specify the level of Trustee discretion, in accordance with the Grantor’s goals.

- A. “Sole and absolute discretion”: Trustee has complete authority over all distribution decisions. (Certain trusts, such as Special Needs Trusts, require the Trustee to have such discretion.)
 - B. “Ascertainable standards”: Distributions are made for the beneficiary’s “health, education, maintenance and support.”
 - C. Consideration of other resources: Trustee is required to examine other resources available to a beneficiary before making a distribution. For example, prior to paying college tuition, a Trustee may be required to inquire into whether there is a 529 Plan in place for the beneficiary.
 - D. “Accustomed Manner of Living”: The trust may require that the Trustee make distributions that maintain the lifestyle to which the beneficiary has become accustomed.
- VI. Governing Law/Situs: The laws of a particular jurisdiction should be considered when drafting a trust, as certain jurisdictions may be more favorable toward the goal of a Grantor (e.g., spendthrift protection).
- VII. Choosing a Fiduciary: The choice of Trustee is a paramount decision in establishing a trust, as the Trustee will carry out the objectives of the Grantor.
- A. Multiple Trustees. A Grantor may choose to appoint multiple Trustees to serve concurrently.
 - 1. Advantages:
 - a. Division of labor (a benefit in some family dynamics).
 - b. Trustees may have different skill sets to apply.
 - 2. Disadvantage: Disputes between the Trustees can be costly and time consuming. Trust language must be carefully drafted to determine how disputes are resolved (for example, decisions may require a majority vote of Trustees or unanimous consent of Trustees). The trust should also state whether all Trustee signatures are needed to transact business on behalf of the Trust.
 - B. Professionals v. Family Members as Trustees.
 - 1. Advantages of a family member Trustee:

- a. Family members often understand the dynamics surrounding a beneficiary's needs and the Grantor's intent.
- b. In the case of a small trust, family members may be less inclined to take compensation.

2. Disadvantages of a family member Trustee:

- a. Trustees must sometimes be the "bad guy," refusing a requested distribution that does not fall within trust guidelines. This can cause unnecessary tension between family members.
- b. A family member Trustee may not have the requisite objectivity to serve in the role.
- c. If a layperson, serving as Trustee can put a family member at risk of breaching a fiduciary duty.

Trust Administration in Virginia under the Uniform Trust Code

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Governing Law – The Uniform Trust Code

Pursuant to Virginia Code § 64.2-703, the trust document governs most aspects of trust administration. However, the Uniform Trust Code (UTC) governs the requirements for creating a trust. In addition, a trust document cannot abrogate the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. A trust must be for the benefit of the beneficiaries and not be contrary to law or for an illegal purpose. In addition, Virginia Code § 64.2-703 preserves the power of the court to modify or terminate a trust, to require, dispense with, or modify or terminate a bond, to adjust trustee compensation and to “take such action and exercise such jurisdiction as may be necessary in the interests of justice”. Va. Code § 64.2-703. The UTC also protects the rights of creditors and assignees, and the rights of others dealing with the trustee, and also limited the trustee’s ability to limit its liability for breach of trust. Va. Code §§ 64.2-703, 64.2-799.

Who are the Beneficiaries?

Ascertaining the beneficiaries of a trust is sometimes very simple, but not always. The UTC defines a "Qualified Beneficiary" as a “beneficiary who, on the date the beneficiary's qualification is determined, (i) is a distributee or permissible distributee of trust income or principal; (ii) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in clause (i) terminated on that date without causing the trust to terminate; or (iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.” The “Current Beneficiary” means a beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. "Current beneficiary" includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment. Va. Code §64.2-701. A current beneficiary is sometimes known as an “income beneficiary” although they may receive principal distributions as well.

People who may benefit from the corpus of the trust in the future are “remainder beneficiaries”. When there are both current beneficiaries and remainder beneficiaries, the settlor has created a split-interest trust. Once the trustee determines who the beneficiaries are, the Trustee must act in the best interests of all of the beneficiaries, in accordance with the provisions of the trust. Va. Code § 64.2-765. For example, if the settlor left his assets in trust for his wife for her lifetime with the remainder to his children, the trustee should look to the document to determine

the settlor's wishes. If the settlor specifies that he desires his wife to be favored and for her to be provided for in the manner of living that she enjoys at his death, then the trustee must make investment and distribution decisions that favor the wife. However, if the settlor specifies that his wife shall receive the income of the trust for her lifetime, with principal invasion only for her reasonable support after determining what other resources are available to her, then the Trustee must balance the interests of the current beneficiary (his wife) and the remainder beneficiaries (his children) when making investment and distribution decisions. In this manner, it is up to the Trustee to determine the intent of the settlor in providing for the beneficiaries, then make administration decisions in accordance with the settlor's wishes.

Virginia Code §64.2-708 also establishes that the following persons are potentially qualified beneficiaries of certain trusts:

- charitable organizations expressly designated to receive distributions under the terms of a charitable trust if it is a distributee or permissible distributee of trust income or principal, would be a distributee or permissible distributee of trust income of principal upon the termination of interests of others then receiving or eligible to receive distributions, or would be if the trust terminated on that date;
- a person appointed to enforce a trust for the benefit of an animal or other noncharitable purpose;
- the Attorney General in the case of a charitable trust having its principal place of administration in the Commonwealth of Virginia.

Appointment of the Trustee

A named trustee in a document may reject the appointment at any time prior to accepting the trusteeship. A trustee accepts the trusteeship either by the method provided in the document, or, if no method specified, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship. Va. Code § 64.2-754. Importantly, even if the trustee wishes to reject the trusteeship, the trustee may inspect and investigate trust property, and may act to preserve the trust property (as long as a notice of rejection is timely sent to the settlor or qualified beneficiaries). *Id.*

A vacancy in the trusteeship occurs if a designated trustee rejects the trusteeship, cannot be identified or does not exist, or if an existing trustee resigns, is disqualified or removed, dies or adjudicated an incapacitated person. Va. Code § 64.2-757. If there are one or more trustees still in office, the vacancy does not need to be filled. *Id.* If the vacancy is required to be filled for a noncharitable trust, then it shall be filled (1) by a person designated in the trust document, or if none (2) by a person appointed by unanimous agreement of the qualified beneficiaries, or if they cannot or will not, (3) by a person appointed by the court having jurisdiction. *Id.* For a charitable trust, the successor trustee shall be the successor designated in the document, or, if none, one selected by the charity with the concurrence of the Attorney General, if he has requested that his concurrence be obtained. *Id.*

In some cases, a trustee may be required to give bond, with surety or other security.

Cotrustees – Unless the document provides otherwise, Virginia Code § 64.2-756 governs actions by cotrustees:

- Cotrustees may act by majority decision if they cannot reach a unanimous decision.
- In the case of a vacancy, the other trustees act for the trust.
- Generally, a cotrustee must participate unless absent, ill, disqualified or temporarily incapacitated, or in the case of proper delegation. In those circumstances, the other cotrustee(s) may take prompt action as necessary.
- Delegation is permitted unless the trustee that is delegated to cannot hold that power or is not permitted by the document (for example, if the Trustees are required to act jointly).
- A cotrustee is not liable for an action if he or she does not join in the action; but each trustee must exercise reasonable care to prevent a cotrustee from committing a serious breach of trust; and compel a cotrustee to redress a serious breach of trust. A dissenting cotrustee that has notified the other trustee(s) of his dissent is not liable for breach of trust if he joins at the direction of the other cotrustees unless it is a serious breach of trust.

Compensation. Generally, compensation is as stated in the document. If the document is silent, then compensation shall be reasonable under the circumstances. Va. Code § 64.2-761. If the document specifies compensation, a court may allow more or less compensation if either the duties of the trustee are substantially different from those contemplated when the trust was created, or if the compensation specified in the trust would be unreasonably high or low. *Id.*

A trustee is also entitled to be reimbursed out of the trust property, with interest as appropriate, for expenses properly incurred in the administration of the trust and, in some cases, not properly incurred in the administration of the trust if the failure to reimburse would unjustly enrich the trust. Va. Code § 64.2-762. Any advance to the trust for the protection of the trust gives rise to a lien against the trust property, with interest. *Id.*

Resignation. A trustee may resign in accordance with the provisions of the trust instrument. If the trust is silent, under the UTC, a trustee may resign upon 30 days notice to the settlor (if living), cotrustees and the qualified beneficiaries (unless it's a trust revocable by the settlor), or with approval of the court. The court may impose conditions necessary for protection of the property. Va. Code § 64.2-758.

Duties of the Trustee

A trustee has a duty of loyalty to the beneficiaries and a duty of impartiality among the beneficiaries. Va. Code §§ 64.2-764 – 64.2-765, 64.2-785. The trustee also has a duty to administer the trust as a prudent person would. Va. Code § 64.2-766.

Any trust transaction that involves a conflict of interest between the trust and the trustee's personal interest is voidable unless the transaction was authorized by the terms of the trust, approved by the court, consented to, ratified or released by the beneficiary, or is set out in a contract that predates the trustee's involvement. The beneficiary must, however, bring court action to void

the transaction within the statute of limitations (one year after the trustee sent the beneficiary a report). Va. Code §§ 64.2-764, 64.2-796, 64.2-800.

A conflict of interest exists if the trustee enters into a transaction with himself or herself, his or her spouse, descendants, siblings, parents (or any of their spouses), and agent or attorney of the trustee, or a business or other organization over which the trustee has control. Va. Code § 64.2-764. A conflict also exists in the event of a transaction between the trustee and the beneficiary even if trust property is not involved and is voidable by the beneficiary if the trustee obtained more than normal commercial advantage. *Id.* A conflict would also arise if the trustee entered into a personal transaction which was properly an opportunity of the trust. *Id.*

Trustee Responsibilities and Powers

Trust Property. A trustee is required to take reasonable steps to take control and protect the property of the trust. Va. Code § 64.2-771. A trustee shall keep adequate records of trust administration and shall keep trust property separate from the trustee's own property. A trustee may combine the property of one or more trusts for investment purposes as long as the trustee keeps adequate records of the separate interests of the trusts. *Id.* A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee. Va. Code § 64.2-774. Within a reasonable time, the trustee "shall review the trust's assets and make and implement decisions concerning the make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of [the Uniform Prudent Investor Act]". Va. Code § 64.2-784.

Court Accountings – A testamentary trust is generally subject to supervision by the Commissioner of Accounts. The trustee will then need to file annual accounting with the Commissioner of Accounts. A settlor may exempt the trust from these requirement by creating a Revocable Living Trust during his or her lifetime and providing that the trustee shall not be required to file accountings with the court. The settlor may still require that the trustee provide the beneficiaries with periodic accountings. See Virginia Code § 64.2-775 (trustee's duty to inform and report).

Delegation. A trustee is generally permitted to delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances, unless the document provides otherwise. Va. Code §§ 64.2-769, 64.2-788. The trustee should exercise reasonable care, skill and caution in selecting an agent, establishing the scope and terms of the delegation, and periodically review the agent's actions and monitor the agent's performance. *Id.* The agent owes a duty to the trust to exercise reasonable care. *Id.* A trustee that acts with reasonable care is not liable to the beneficiaries for the actions of the agent. *Id.*

Powers to Direct. In the case of a revocable trust, the trustee may follow the direction of a settlor that is contrary to the terms of the trust. Va. Code § 64.2-770. The terms of a trust may confer on a person other than the settlor of a revocable trust power to direct certain actions of the trustee. The Trustee then shall follow that person's directions unless the action is manifestly

contrary to the terms of the trust or the trustees knows that the proposed action would be a serious breach of fiduciary duty. *Id.* A person other than a beneficiary holding the power to direct is a fiduciary.

Trust Claims. A trustee must also take reasonable terms to enforce and defend claims on behalf of the trust or against the trust. Va. Code § 64.2-773. A trustee shall take reasonable steps to redress a breach of trust or duty known to the trustee to have been committed by a former trustee or other fiduciary. Va. Code § 64.2-774.

Information to Beneficiaries. There is a duty to keep the beneficiaries reasonably informed and provide them with information requested. Va. Code § 64.2-775. Specifically, a trustee shall provide the following:

- Upon request, a copy of the trust instrument;
- Within 60 days after accepting trusteeship, notice to qualified beneficiaries of the acceptance and the trustee's name, address and telephone number;
- Within 60 days of creation of an irrevocable trust or the date a revocable trust becomes irrevocable, notice to qualified beneficiaries of the trust's existence, the identity of the settlors, of the right to request a copy of the trust instrument, and the right to a trustee's report;
- Notice in advance of any change in the trustee's compensation.
- At least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust's assets and, if feasible, market values.
- Upon a vacancy, the former trustee shall send the above report (if deceased or incapacitated, shall be done by personal representative or conservator or guardian).

A beneficiary may waive his or her right to any or all of the above information and reports.

Ascertainable Standard – Making Trust Distributions

The trustee shall make trust distributions to beneficiaries for the purposes expressed in the document. "Ascertainable Standard means a standard relating to an individual's health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986 and any applicable regulations." Va. Code § 64.2-701. A trust may be established generally for the health, education, maintenance and support of a beneficiary or beneficiaries (the "HEMS" standard) or for more general or more particular purposes. Examples of more particular trusts are charitable trusts, educational trusts, qualified S corporation trusts, pet trusts, special needs trusts (also known as supplemental needs trusts).

A beneficiary that is also a trustee may only make discretionary distributions in accordance with an ascertainable standard. Further, a trustee may not make discretionary distributions that satisfy the trustee's legal obligation of support that the trustee personally owes another person. Va. Code § 64.2-776. This does not apply to a spouse who is the trustee of a marital trust that has received a marital deduction.

Depending on the instructions in the document, a trustee may consider making distributions for major life events such as a wedding, purchase of a home, or starting a business. The trustee may also consider making loans to the beneficiaries to assist them in some major life events.

Other Trustee Powers

Virginia Code § 64.2-777 grants broad authority to a trustee to exercise all of the powers conferred by the terms of the document, and, except as restricted by the terms of the trust, “all powers over the trust property that an unmarried competent owner has over individually owned property”, any powers necessary to properly manage and invest the trust property, and all other powers conferred by the Uniform Trust Code.

Virginia Code § 64.2-778 enumerates specific power of a trustee. Some notable powers are the power to borrow money, take actions as shareholders, partners, etc., abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration, pledge trust property to guarantee loans made by others to the beneficiary, appoint a trustee to act in another jurisdiction with respect to trust property in that jurisdiction.

Virginia has adopted the Uniform Decanting Act, Virginia Code §§ 64.2-779.1 *et seq.* which grants to trustees the very important power of decanting a trust. The Act itself extends beyond the scope of this outline, but a trustee should be aware of important times in a trust’s administration when decanting the existing trust might be beneficial. One of the most common situations in which decanting is desired is where one of the beneficiaries might qualify for government benefits either now or in the future, so the trustee is permitted to decant that beneficiary’s interest in the trust into a special needs trust. However, a trust may be decanted for many reasons if the trustee discovers that there is something about the trust that does not (or no longer does) fit the grantor’s intentions or purpose of the trust. A failed (or no longer needed) life insurance trust may be another situation in which decanting is beneficial. A trustee may only exercise its decanting power in accordance with its fiduciary duties.

Spendthrift Trusts

Many trusts contain spendthrift provisions in order to protect the beneficiary’s interest in the trust from a beneficiary’s creditors. If a trust is not a spendthrift trust, then the court may authorize a beneficiary’s creditors to attach the beneficiary’s interest in current and future distributions from the trust. Regardless of whether or not a trust is a spendthrift trust, once funds reach the beneficiary, the creditors may attach the funds in the hands of the beneficiary. Therefore, a trustee should always attempt to determine whether a beneficiary is in danger of creditor actions against them. Va. Code §§ 64.2-742 and 64.2-743. Spendthrift provisions do not protect the beneficiary’s interest in a trust from a court order for support in favor of a beneficiary’s child, or from the interest of any federal, state or local government. Va. Code §§ 64.2-744 and 64.2-745.

In the event that a beneficiary has creditors attempting to collect from his or her assets/bank accounts, it may be appropriate (or even necessary) for the trust to make distributions on the beneficiary’s behalf and not distribute funds directly to the beneficiary.

Uniform Prudent Investor Act

Virginia has also adopted the Prudent Investor Act. Va. Code § 64.2-782 lays out the standard of care under the prudent investor rule:

§ 64.2-782. Standard of care; portfolio strategy; risk and return objectives.

A. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

B. A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

C. Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

1. General economic conditions;
2. The possible effect of inflation or deflation;
3. The expected tax consequences of investment decisions or strategies;
4. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
5. The expected total return from income and the appreciation of capital;
6. Other resources of the beneficiaries;
7. Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
8. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

D. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

E. A trustee may invest in any kind of property or type of investment consistent with the standards of this article.

F. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

G. A trustee may hold any policies of life insurance acquired by gift or pursuant to an express permission or direction in the governing instrument including an authority granted by subdivision B 19 of § 64.2-105 with no duty or need to (i) determine whether any such policy is or remains a proper investment, (ii) dispose of such policy in order to diversify the investments of the trust, or (iii) exercise policy options under any such contract not essential to the continuation of the life insurance provided by such contract. However, apart from these specific authorities, this subsection is not intended and shall not be construed to affect the application of the standard of judgment and care as set forth in this section. This subsection shall apply to all trusts, regardless of when established.

Generally, diversification is mandated unless there in the special circumstances of the trust, there is a reason not to diversify. Va. Code § 64.2-783. Diversification also may not be necessary if the trust is for a particular purpose that does not require or allow for diversification (i.e. the settlor creates a trust for the role purpose of holding one or more closely held business interests). An S Corporation Trust created as a separate trust solely for meeting the requirements of a Qualified Subchapter S Trust would hold only the S Corporation stock and would not be diversified.

In reviewing compliance with the prudent investor rule, the trustee's decisions are examined in light of the facts and circumstances in existence at the time of the decisions. Va. Code § 64.2-787.

Uniform Principal and Income Act

Proper accounting of principal and income within a trust is essential. "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4 (§ 64.2-1009 et seq.). Va. Code § 64.2-1000. "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates. *Id.*

Many trusts are designed to pay income to the current beneficiary and principal to the remainder beneficiaries. A settlor may provide in the trust instrument how he or she would like income and principal to be allocated. In the event the trust instrument does not provide rules regarding income and principal, the Uniform Principal and Income Act applies to determine how receipts and expenses are to be treated. Va. Code §§ 64.2-1000 *et seq.*

Virginia Code § 64.2-1002 grants to a fiduciary the power to adjust between principal and income to the extent he or she feels necessary under certain circumstances. First, the trustee must invest the property as a prudent investor. Second, the trust must describe the amount distributed to a beneficiary by referring to income. Third, the fiduciary determines that complying with the general rules of the UPIA would not be fair to all beneficiaries. Va. Code §§ 64.2-1001 – 64.2-1002. In deciding whether to make an adjustment, the trustee should consider the nature, purpose and expected duration of the trust, the intent of the settlor, the identity and circumstances of the beneficiaries, the need for liquidity, regularity of income and preservation and appreciation of capital, the assets in the trust (including is an asset used by a beneficiary), the net amount allocated

to income, the extent to which the trust instrument allows the trustee to invade principal or accumulate income, the actual and anticipated effect of economic conditions on principal and income, the effects of inflation and deflation, and the anticipated tax consequences. Va. Code § 64.2-1002.

The power to adjust is restricted if the adjustment would adversely affect tax exclusions or deductions, if it would change an annuity amount, or affect the amount set aside for charitable purposes. A trustee is not permitted to make an adjustment if he would be treated as owner of the income, or if it would cause the assets to be included for estate tax purposes in the estate of an individual that has the power to remove the trustee, if the trustee is also a beneficiary, or if the adjustment would benefit the trustee in some other way. In those events, a co-trustee may be permitted to make the adjustment. Va. Code § 64.2-1002.

A trustee may in some circumstances convert an income trust to a total return unitrust. This would mean that the trustee would distribute a defined percentage of the trust. The main reason for converting a trust in this manner is so that the trustee can invest the assets for the best return without prejudicing the income beneficiary or the principal beneficiary. Va. Code § 64.2-1003 (see code section for more on conversion to a unitrust).

Absent the above circumstances, receipts shall be characterized as follows:

- Income
 - Receipts from an entity. Va. Code § 64.2-1012
 - Income receipts from a trust or estate. Va. Code § 64.2-1010.
 - Rents for use of real property, except the security deposit shall be held as principal in accordance with the lease provisions. Va. Code § 64.2-1013.
 - Interest on a note. Va. Code § 64.2-1014.
 - From deferred compensation, any payment characterized as interest, dividend or equivalent. Va. Code § 64.2-1017.
 - 10% of deferred compensation not characterized as interest or a dividend, that is required to be paid during that accounting period. Va. Code § 64.2-1017.
 - If deferred compensation is held by the trust, the trustee shall attempt to determine the internal income of each fund. If he cannot determine the internal income, at least 4% is considered to be internal income. Va. Code § 64.2-1017.
 - 10% of receipts from a liquidating asset (i.e. leasehold, patent, copyright, royalty rights). Va. Code § 64.2-1018.
 - Rents from minerals, water and other natural resources, interest on a production payment, 10% of a royalty, 10% of a working interest. Va. Code § 64.2-1019.
 - 100% of renewable water payment, 10% if water is not renewable. Va. Code § 64.2-1019.
 - 100% timber receipts to the extent that the harvesting does not exceed the rate of regrowth. Va. Code § 64.2-1020.
- Principal
 - Property other than money. Va. Code § 64.2-1009.

- Money or other property received in one distribution or multiple distributions in exchange for an interest in an entity, or from sale, exchange, liquidation or change in form of a principal asset, including realized profit. Va. Code § 64.2-1009.
- Money received in total or partial liquidation of an entity. Va. Code § 64.2-1009.
- Capital gain dividends for federal income tax purposes. Va. Code § 64.2-1009.
- Principal Receipts from a trust or estate. Va. Code § 64.2-1010.
- Assets received from a transferor during the transferor's lifetime. Va. Code § 64.2-1012.
- Money received back from a third party relating to environmental remediation. Va. Code § 64.2-1012.
- Proceeds from eminent domain except for any separate award for loss of income. Va. Code § 64.2-1012.
- Net income received during any accounting period in which there is no beneficiary to whom the trustee may distribute income. Va. Code § 64.2-1012.
- Principal from a note. Va. Code § 64.2-1014.
- Proceeds from a life insurance policy Va. Code § 64.2-1015
- All of a receipt if the allocation to income would be insubstantial Va. Code § 64.2-1016
- 90% of deferred compensation. Va. Code § 64.2-1017.
- 100% of deferred compensation not required to be paid (trustee exercised right of withdrawal. Va. Code § 64.2-1017.
- 90% of receipts from a liquidating asset (i.e. leasehold, patent, copyright, royalty rights). Va. Code § 64.2-1018
- 90% of minerals, water and other natural resource payments not allocated entirely to income. Va. Code § 64.2-1019.
- timber receipts to the extent that the harvesting exceeds the rate of regrowth, and for advance payments, bonuses and other payments not allocated to income. Va. Code § 64.2-1020.
- Derivatives (other than those allocated as part of separate business activities) Va. Code § 64.2--1022
- Options Va. Code § 64.2--1022
- Business Activities
 - A trustee may maintain separate records for business activities and may determine how much of the income should be retained as working capital. Va. Code § 64.2-1011
 - If the trustee sells a business's assets and determine those funds no longer necessary as capital for the business, the trustee shall treat the funds as principal receipts. Va. Code § 64.2-1011

Disbursements shall be allocated to principal and income as follows:

- Income – Va. Code § 64.2-1024

- ½ of trustee compensation and compensation of any person providing investment advisory or custodial services to the trustee
- ½ of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests.
- All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest
- Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset
- Principal – Va. Code § 64.2-1025
 - The remaining ½ of trustee compensation and compensation of any person providing investment advisory or custodial services to the trustee, and of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests
 - All trustee compensation calculated on principal for preparation for sale of property
 - Payments on the principal of a trust debt
 - Expenses of any proceeding regarding principal assets, including a proceeding to construe the trust
 - Any premiums for insurance other than recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset
 - Estate, inheritance, and other transfer taxes
 - Disbursement relating to environmental certain environmental matters
- Income taxes are generally to be paid from income to the extent they arise from income and principal to the extent they arise from principal, even if the taxing authority calls a tax an income tax. Va. Code § 64.2-1028. In addition, a trustee is permitted to make adjustments between principal and income to offset the shifting of economic interests or tax benefits as the fiduciary deems in the best interests of all of the beneficiaries. Va. Code § 64.2-1029

Trust Termination

Upon complete or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The trustee may further specify in that notice that the beneficiary must object within 30 days, after which time the beneficiary will lose his or her right to object. Va. Code § 64.2-779.

Otherwise, upon termination of a trust, the trustee shall distribute the assets to the persons entitled to the property, subject to a trustee's right to retain a reasonable reserve. The trustee may also require a refunding bond. *Id.*

Under Virginia Code § 64.2-732, a trustee may terminate a trust as an uneconomic trust after notice to the qualified beneficiaries if the trust has assets valued at less than \$100,000.

Trust Litigation

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I. BREACHES OF FIDUCIARY DUTY BY THE TRUSTEE

- “A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.”
Va. Code 64.2-792
- **The Trustee’s Duties**
 - **Duty to Administer the Trust and Invest (Va. Code 64.2-763)**
 - A trustee “shall administer the trust and invest trust assets in good faith, in accordance with the terms of the purposes and the interests of the beneficiaries” and must comply with the provisions of the Uniform Prudent Investor Act and the Uniform Principal and Income Act.
 - *Higgerson v. Farthing*, 2017 Va. Cir. LEXIS 118 (Chesapeake, 2017): Attorney/Trustee engaged in high risk investing on behalf of the Trust and incurred over \$1 million in debt for the estate over a three month period in 2011, at one point putting up 100% of the Trust assets as collateral to engage in margin trading. Trustee testified that the only training he had in investing in the stock market came from publications. The Court speculated that Trustee engaged in such high risk trading to cover the excessive fees he paid to himself from the Trust which were in excess of \$1 million dollars. The Court found the Trustee liable for breach of the prudent investor rule in the amount of \$1,382,653, and excessive fees in the amount of \$770,471.33.
 - **Duty of Loyalty (Va. Code 64.2-764)**
 - “A trustee shall administer the trust solely in the interests of the beneficiaries.”
 - **Duty of Impartiality (Va. Code 64.2-765)**

- “If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests”
- Trimmer v. Savage, 89 Va. Cir. 135 (Henrico County, 2014): Trust document provided that upon the Grantor’s death, the remainder of the trust assets will be distributed to Grantor’s three adult children- a son and two daughters. Daughters were Trustees of the Trust. At one point, son sued the Trustee/daughters for defamation, and the Trustee/daughters used Trust property to pay legal fees. The Circuit Court held that the Trustees had a duty to preserve the trust assets for their brother, and to serve impartially. As such, Trustees were required to reimburse the trust.
- However, a Trustee is generally entitled to use trust assets to defend himself against suits for breach of fiduciary duties absent a finding of bad faith.
- **Duty of Prudent Administration (Va. Code 64.2-766)**
 - “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”
- **Costs of Administration (Va. Code 64.2-767)**
 - A Trustee may only incur costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.
- **Trustee’s (special) skills (Va. Code 64.2-768)**
 - “A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.”
- **Control and Protect Trust Property (Va. Code 64.2-771)**
 - “A trustee shall take reasonable steps to take control of and protect the trust property.”

- **Recordkeeping and Identification of Trust Property**
 - A trustee must keep trust property separate from personal property, and must keep adequate records of the administration of the trust.
- **Reasonable Compensation**
 - “If the terms of a trust do not specify the trustee’s compensation, a trustee is entitled to compensation that is reasonable under the circumstances.” Va. Code 64.2-761.
- **Remedies for Breach**
 - If a Court finds that the Trustee has breached his duties, it may remedy a breach by:
 - Compelling the trustee to perform his duties
 - Enjoining the trustee from committing a breach
 - Compelling the trustee to pay money or restore property to redress a breach
 - Order a trustee to account
 - Appoint a special fiduciary to take and administer trust
 - Suspend the trustee
 - Remove the trustee (see below)
 - Reduce or deny compensation
 - Void an act of the trustee or impose a lien or constructive trust. Va. Code 64.2-792.
- **Damages for Breach of Trust (Va. Code 64.2-793)**
 - A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:
 - The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or
 - The profit the trustee made by reason of the breach

II. RIGHTS OF BENEFICIARIES

- **Rights to Information**
 - Beneficiaries have the right to be reasonably informed by the Trustee of the circumstances of administration and are entitled to information if reasonable.
 - “A beneficiary is entitled to review the trust documents in their entirety in order to assure the trustees are discharging their duty to deal impartially with all the

beneficiaries within.” *Fletcher v. Fletcher*, 253 Va. 30 (1997).

- Within 60 days after accepting a trusteeship, a trustee must notify qualified beneficiaries of the acceptance of the trusteeship and provide trustee contact information. Va. Code 64.2-775
- A Beneficiary is also entitled to information regarding the Trustee’s fees and rate of pay.

- **Rights with Regard to Modification or Termination of Trusts**

- **Revocable Trusts**

- A revocable trust can be revoked by the Grantor at any time and a trust is revocable unless it states otherwise. At the death of the Grantor, the revocable trust becomes irrevocable.
 - “While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.” Va. Code 64.2-752

- **Irrevocable Trusts**

- Modification and/or termination of a noncharitable irrevocable trust requires beneficiary consent. Va. Code 64.2-729

III. REMOVAL AND RESIGNATION OF TRUSTEE

- **Removal of Trustee**

- A beneficiary of a trust may petition the court to remove a trustee if, among other things, “[t]he trustee has committed a serious breach of trust” Va. Code 64.2-759; 64.2-792.
 - A trustee can be removed if:
 - Trustee has committed a serious breach of trust
 - There is lack of cooperation among co-trustees which substantially impairs the administration of the trust
 - Removal serves the best interests of the beneficiaries where there is unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively

- Substantial change in circumstances or removal is requested by all of the qualified beneficiaries
- **Resignation of Trustee**
 - A trustee may resign:
 - Upon at least 30 days notice to the settlor, if living, to all co-trustees, and to the qualified beneficiaries except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke, or
 - With the approval of the Court (Va. Code 64.2-758)
 - When approving trustee resignation, the Court may impose conditions reasonably necessary for the protection of the trust property.

IV. Petitions for Aid and Direction

No Section of the Virginia Code provides for this, but the jurisdiction of courts to consider such suits established in common law. “When genuine doubt and difficulty confront the administrator . . . he is entitled to the aid and protection of a court of equity in a plenary suit.” 2-28 Harrison on Wills and Administration for Virginia and West Virginia.

- Purpose is to protect the personal representative from liability *to the beneficiaries or heirs* for improper distribution of assets due to a misinterpretation of an unclear provision in the will or a question about the identity of the beneficiaries.
 - May be filed at the direction of the Commissioner of Accounts, but doesn’t have to be.
 - Not to be filed if the issue is payment of the decedent’s debts and potential liability of the fiduciary to *creditors* – instead request a debts & demands hearing with the Commissioner of Accounts and/or file for rule to show cause against distribution.
- Suits for Aid & Direction are non-adversarial proceedings. The only remedy sought is guidance, not damages.
 - But it appears that a demurrers and counterclaims against the fiduciary may be filed by the beneficiary/heir defendants, and discovery is permitted. See Rule 3:9 of the Rules of the Supreme Court of Virginia.
 - Established practice is that the suit is styled as a “petition” with all beneficiaries/heirs named as “respondents,” but it can also be filed as a “complaint,” with beneficiaries/heirs named as “defendants.” See Rule 3:2 of the

Rules of the Supreme Court of Virginia. In any case, all beneficiaries must be made parties to the suit.

- Only the fiduciary can bring a suit for aid and direction. Beneficiaries lack standing to do so. *Burns v. Equitable Associates*, 220 Va. 1020, 1028 (1980).
- Petition must be neutral as to the beneficiaries. The fiduciary does not bring it on behalf of any one beneficiary, and cannot advocate the position of one beneficiary over another. See *Shocket v. Silberman*, 209 Va. 490, 492 (1969). This can present problems when the fiduciary is also a beneficiary. See *Jones v. Brandt*, 274 Va. 131 (2007) (aid and direction brought by beneficiary/executor to address the issue of a non-testamentary, POD transfer of account to the executor/beneficiary impacted distribution under the will to that beneficiary).
- Fiduciary cannot appeal the Court's ruling, but the beneficiary defendants can. See *Shocket v. Silberman*, 209 Va. 490, 493 (1969).
- Cost of such a petition is payable out of the Estate. See *Gaymon v. Gaymon*, 258 Va. 225 (1999).
- When to file a suit for Aid and Direction
 - Ambiguous or conflicting provisions in a will and/or a codicil to a will
 - Uncertainty as to whether one or more assets are part of the decedent's estate
 - Determination of the proper distributees
- Examples:
 - *Gorczynski v. Poston*, 248 Va. 271 (1994) (seeking aid and direction to ascertain proper distributees due to ambiguous handwritten changes to will admitted to probate)
 - *Caine v. Freier*, 264 Va. 251 (2002) (seeking aid and direction regarding whether a marital agreement executed by the non-decedent spouse should be given effect in the distribution of the estate, given ambiguous provisions of the will)
 - *Kummer v. Donak*, 282 Va. 301 (2011) (seeking aid and direction regarding whether the term "children" used in the will applied to a beneficiary who was adopted as an adult)

V. Modification of Irrevocable Trusts

Irrevocable Trusts offer the dual benefit of reducing estate taxes and transferring wealth, but in exchange, the Grantor relinquishes the ability to amend or revoke the trust. However, there are a number of exceptions to this general rule.

- Beneficiary-Related Reasons to Modify an Irrevocable Trust
 - Correct a mistake/scrivener's error
 - Change trust situs or governing law
 - Divide or merge trusts
 - Reduce administrative costs
 - Address a change in circumstances (creditor, marital, health – e.g. substance abuse or disability)
- Tax Reasons to Modify an Irrevocable Trust
 - Change from a grantor trust to a non-grantor trust or vice versa
 - Division of trusts for marital deduction or GST planning
 - Focus on income tax planning rather than unnecessary estate tax planning due to increase in the applicable exclusion amount
 - Use the grantor's or beneficiary's GST exemption
- Ways to Modify an Irrevocable Trust
 1. Exercise of General Trust Powers
 - a. The trust instrument may give the trustee the power to revoke or terminate the trust under certain circumstances, to appoint successor trustees, to delay distribution in certain circumstances (e.g. substance abuse or incapacity), to change the trust situs, to disclaim, to confer powers of appointment, the merge with a similar trust
 - b. Some of these powers may be exercised in accordance with certain provisions of the Virginia Code, even if the trust does not specifically grant the to the trustee:
 - Disclaimer - § 64.2-2606
 - Termination of uneconomic trust - § 64.2-732
 - Combination and division of trusts - § 64.2-735
 2. Judicial Modification under § 64.2-729
 - Trustee or beneficiary brings an action to modify the trust (settlor can only initiate a proceeding to modify a charitable trust under § 64.2-731).

- Useful when the grantor cannot or will not consent to an action proposed by the beneficiaries.
- If the settlor and all beneficiaries consent, the Court shall modify the trust, even if the modification is inconsistent with a material purpose of the trust.
- If all beneficiaries consent, the Court may modify the trust if the Court finds the modification is not inconsistent with a material purpose of the trust.
- If not all beneficiaries consent, the Court may approve the modification if the Court finds (a) the modification is not inconsistent with a material purpose of the trust and (b) the non-consenting beneficiary's interests will be adequately protected.

3. Trust Decanting

- In 2012 Virginia's "Decanting" statute became law; in July of 2017 it was repealed in favor of the Uniform Trust Decanting Act," § 64.2-779.1 through § 64.2-779.25. There are currently 24 states that allow for trust decanting.
- Allows a trustee to appoint the income and principal of a trust to a second trust that may have different terms.
 - Only permitted for trusts governed by Virginia law and administered in Virginia – but the second trust may be governed under and/or administered under the law of a different state
 - Unless first trust specifically prohibits decanting, it is permitted
- Very specific beneficiary notice and waiver provisions outlined in § 64.2-779.5, but there is a savings provision in subsection (H) of that section – decanting is not ineffective due to failure to give notice if the trustee "acted with reasonable care" to comply with the notice provisions.
- The nature of the distributive powers in the first trust (whether the trustee has absolute discretion or can only distribute in accordance with ascertainable standards - HEMS), determine the extent to which the trustee can change how distributions are to be made to beneficiaries in the second trust (See § 64.2-779.8 and 64.2-779.9) – In either case, Trustee cannot add or remove beneficiaries
- Specifically allows that the second trust may be a Supplemental Needs Trust for a disabled beneficiary. See § 64.2-779.10

- f. Trustee may not decant to increase his compensation unless all beneficiaries specifically consent to the increase (not just to decanting in general)
- g. IRS's Position on Decanting: In Rev. Proc. 2011-3 the IRS placed decanting on its "no-ruling" list. IRS has specifically said it will not rule on decanting's impact on (i) deduction or inclusion in gross income, (ii) decanting resulting in a taxable gift, or (iii) decanting causing the loss of GST exempt status
 - So, depending on the purpose of the decanting and the changes made from the first trust to the second trust, practitioners should consider possible income, estate, gift and GST tax consequences of decanting
 - No clear consensus on whether second trust must obtain a new tax ID number.

4. Nonjudicial Settlement Agreement

Another method for modification of an irrevocable trust without Court involvement is execution of a Nonjudicial Settlement Agreement (NJSA) pursuant to § 64.2-709. Enacted in Virginia in 2005 as part of the Uniform Trust Code.

- a. Simpler than decanting.
- b. Unlike Judicial modification, settlor's consent is not required
- c. § 64.2-709 should be read in conjunction with § 64.2-729 to determine who the "interested persons" are (persons whose consent would be required if seeking a judicial modification).
- d. "Interested persons" who are minors or not yet born can now be represented by a parent or by an adult beneficiary with a substantially identical interest (provided there is no conflict of interest between them) See § 64.2-716 and § 64.2-717. Previously, appointment of a guardian *ad litem* was required
- e. Only valid if it does not violate a material purpose of the trust – practitioners should state in the agreement what the material purposes are and expressly state that the modification does not violate them.
- f. Statute includes a non-exhaustive list of matters that may be resolved by NJSA, but subsection B) says that a NJSA can address "any matter involving a trust."
- g. NJSA can be used to incorporate a reference to § 64.2-770 into a trust (which protects trustees from liability for performing acts pursuant to directions from a trust director).

- h. Even if the NJSA is valid under the § 64.2-709, the IRS may not be bound by it unless the matter has been determined by the highest state court. See *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

THE NEW RULES OF CRIMINAL DISCOVERY IN VIRGINIA

Effective July 1, 2020

Rule 3A:11. Discovery and Inspection.

(a) *General Provisions.* - (1) This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.

Subsection (a)(1) remains the same. However, keep in mind that Rule 8:15 deals with discovery in J&DR court. Therefore any changes in Rule 3A:11 will also apply in J&DR court if the juvenile is charged with a delinquent act if committed by an adult or in any transfer/certification hearing pursuant to VA Code Section 16.1-169.1.

(2) The constitutional and statutory duties of the Commonwealth's attorney to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule.

While this provision is new, it imposes no additional responsibilities on prosecutors than are already imposed by Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); or Rule 3.8 of the Rules of Professional Conduct.

(3) A party may satisfy the requirement to permit the opposing party to inspect and copy or photograph a document, recorded statement or recorded confession by providing an actual duplicate, facsimile or copy of the document, recorded statement or recorded confession to the opposing party in compliance with the applicable time limits and redaction standards set forth in this Rule.

This provision is also new but is intended to codify and encourage what is already the existing practice in many jurisdictions.

(4) Any material or evidence disclosed or discovered pursuant to this Rule and filed with the clerk of court shall be placed under seal until it is either admitted as an exhibit at a trial or hearing or the court enters an order unsealing the specified material or evidence.

This provision is new. It does not require that discovery material be filed with the court; it just requires that if either party does file a copy of discovery material with the court that such copy shall be sealed until an appropriate time. The purpose is to avoid either party to get around the constraints of Rule 3.6 of the Rules of Professional Conduct dealing with pre-trial publicity.

(b) *Discovery by the Accused.* - Upon written motion of an accused a court shall order the Commonwealth's attorney to: (1) Permit the accused to inspect and review any relevant reports

prepared by law enforcement officers and made in connection with the particular case, including any written witness statements or written summaries of oral statements contained within such reports, that are known to the Commonwealth's attorney to be in the possession, custody or control of the Commonwealth. Nothing in this Rule requires that the Commonwealth provide the accused with copies of the relevant law enforcement reports, although it may do so in its discretion. The court's order providing for inspection and review of these reports shall be subject to the provisions of subparts (c)(1) and (c)(2) of this Rule regarding redaction and restrictions on dissemination of designated material.

This provision is new and is one of the crucial changes. Notice that the existing language “inspect and copy or photograph” has been changed to “inspect and review.”

This new subsection will be applicable to reports made in connection to that particular case, but the word “relevant” may require more review by the prosecutor. For the first time, Virginia’s discovery rule will include the right to inspect and review all written witness’s statements, not merely statements by the accused. It is not limited to those statements that the Commonwealth will use at trial.

(2) Permit the accused to inspect, review and copy or photograph any relevant:

(A) written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the accused to any law enforcement officer, that are known to the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth;

Written or recorded statements by the accused to anyone. “It is settled that the language of (former) Rule 3A:11(b)(1)(i) requires the prosecutor to turn over written and recorded statements by the accused whether made to a law enforcement officer or not.” Smoot v. Commonwealth, 37 Va. App. 495, 500 (2002).

The substance of any oral statements made to any law enforcement officer. “The fact that (former) Rule 3A:11(b)(1) provides for disclosure of a defendant’s ‘oral statements or confessions’ he or she makes ‘to a law enforcement officer’ indicates that the rule contemplates disclosure only of those statements made either in response to police questions or at least volunteered to an officer, but not those an officer merely happens to hear.” Brown v. Commonwealth, 68 Va. App. 746, 793 (2018).

(B) written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the accused to any person other than a law enforcement officer, that the Commonwealth intends to introduce into evidence against the accused at trial;

This is new, but is self-explanatory.

(C) written or recorded statements, or the substance of any oral statements, made by a co-defendant or co-conspirator that the Commonwealth intends to introduce into evidence against the accused at trial; and

This is new, but is also self-explanatory.

(D) written reports of autopsy examinations, 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 Commonwealth's attorney to be within the possession, custody, or control of the Commonwealth.

This is existing language.

(3) Permit the accused to inspect, review and copy or photograph designated books, papers, documents, tangible objects, recordings, buildings or places, or copies or portions thereof, that are known by the Commonwealth's attorney to be within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to preparation of the accused's defense and that the request is reasonable.

At first blush this too seems like existing language but it is not. However the Court has included "recordings."

(4)(A) Notify the accused in writing of the Commonwealth's intent to introduce expert opinion testimony at trial or sentencing and to provide the accused with: (i) any written report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and the bases and reasons for those opinions, and (ii) the witness's qualifications and contact information.

(B) Nothing in subparts (b)(4)(A)(i) and (ii) of this Rule shall render inadmissible an expert witness's testimony at the trial or sentencing further explaining the opinions, bases and reasons disclosed pursuant to this Rule, or the expert witness's qualifications, just because the further explanatory language was not included in the notice and disclosure provided under this Rule.

Providing a copy of a certificate of analysis from the Virginia Department of Forensic Science or any other agency listed in Virginia Code § 19.2-187, signed by hand or by electronic

means by the person performing the analysis or examination, shall satisfy the requirements of subparts (b)(4)(A)(i) and (ii) of this Rule.

Clearly this is substantively new.

(5) Provide to the accused a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing. This provision is subject to subpart (c)(1) of this Rule and to any protective orders entered by the court pursuant to subpart (g).

Issues include:

- *The timing of the delivery of a witness list could bar any last minute change in trial strategy;*
- *The timing of the delivery of a witness list could bar any last minute change in witness substitution if a witness was unable to come to court but another witness was available to substitute;*
- *The fact that the language of the proposal was not limited to case-in-chief witnesses. This could prevent a party from presenting rebuttal witnesses;*
- *The fact that there would be inequitable application of the rule to the prosecution and the defense. A defendant's constitutional right to present witnesses in his own defense could trump a rules violation for failing to list all defense witnesses. The prosecution does not have an equivalent constitutional provision; and*
- *Witness protection. Even witness lists limited to names but with no addresses or other contact information would offer insufficient protection to some of our witnesses, in spite of the provisions in subsection c and subsection (g)(1)(iv) dealing with Redaction and Restricted Dissemination Material.*

(6) This Rule does not authorize the discovery or inspection of the work product of the Commonwealth's attorney, including internal reports, witness statements, memoranda, correspondence, legal research or other internal documents prepared by the office of the Commonwealth's attorney or its agents in anticipation of trial.

While new, this subsection codifies existing caselaw.

(7) This Rule does not authorize the discovery of the names and/or personal identifying information of confidential informants whom the Commonwealth does not intend to call at trial and with regard to whose identity the Commonwealth asserts it holds a privilege.

(c) *Redaction and Restricted Dissemination Material.* - (1) With regard to any material or evidence provided pursuant to this Rule,

(A) the Commonwealth may redact the residential address, telephone number, email address and place of employment of any witness or victim, or any member of a witness's or victim's family, who satisfies the conditions outlined in §19.2-11.2 of the Code of Virginia. The Commonwealth may redact the date of birth and Social Security Number of any person whose information is contained in material or evidence provided pursuant to this Rule; and

(B) If the Commonwealth redacts personal identifying information pursuant to this subpart of the Rule, the accused may file a motion seeking disclosure of the redacted information. Should the court find good cause for disclosure, it may order the Commonwealth to provide the redacted information. In its discretion, the court ordering the provision of redacted personal identifying information may order that the information be identified as "Restricted Dissemination Material" pursuant to subpart (c)(2) of this Rule.

(2) The Commonwealth may designate evidence or material disclosed pursuant to this Rule as "Restricted Dissemination Material" by prominently stamping or otherwise marking such items as "Restricted Dissemination Material."

(A) The Commonwealth may designate any evidence or material subject to disclosure pursuant to this Rule as "Restricted Dissemination Material," without supporting certification, if the accused's attorney agrees to the designation.

(B) In the absence of an agreement by the attorney for the accused, the attorney for the Commonwealth may designate any evidence or material as "Restricted Dissemination Material" by stamping or otherwise marking it as such and providing a certification in writing, upon information and belief, that: (i) the designated material relates to the statement of a child victim or witness; or (ii) disclosure of the designated material may result in danger to the safety or security of a witness or victim, danger of a witness being intimidated or tampered with, or a risk of compromising an ongoing criminal investigation or confidential law enforcement technique.

(C) Except as otherwise provided by order of the court or these Rules, "Restricted Dissemination Material" may only be disclosed to the accused's attorney, the agents or employees of the accused's attorney, or to an expert witness. The accused's attorney may orally communicate the content of "Restricted Dissemination Material" to the accused or allow the accused to view the content of such material but shall not provide the accused with copies of material so designated. "Restricted Dissemination Material" may not otherwise be reproduced, copied or disseminated in any way.

(D) If the Commonwealth designates evidence or material as "Restricted Dissemination Material" pursuant to subpart (c)(2)(B) of this Rule, the accused may at any time file a motion seeking to remove that designation from such evidence or material. Should the court find good cause to remove the designation, it may order that the evidence or material no longer be designated as "Restricted Dissemination Material."

(E) Within 21 days of the entry of a final order by the trial court, or upon the termination of the representation of the accused, the accused's attorney shall return to the court all originals and copies of any "Restricted Dissemination Material" disclosed pursuant to this Rule. The court shall maintain such returned "Restricted Dissemination Material" under seal. Any material sealed pursuant to this subpart shall remain available for inspection by counsel of record. For good cause shown, the court may enter an order allowing additional access to the sealed material as the court in its discretion deems appropriate.

(F) In any case in which an accused is not represented by an attorney, the Commonwealth may file a motion seeking to limit the scope of discovery pursuant to this Rule. For good cause shown, the court may order any limitation or restriction on the provision of discovery to an accused who is unrepresented by an attorney as the court in its discretion deems appropriate.

This language is in response to the fact pattern of LEO 1864 and seeks to codify it in some workable fashion. In other words, the defendant will have oral disclosure of the materials but will not have a physical copy with which he can disseminate or post on social media.

This is probably the most complicated addition to the new discovery rules. But the language is fairly specific as to what can and cannot be done. While there will most likely be at first a lot of litigation on what is and isn't "restricted dissemination material," we should soon have some idea on how our local judges are going to rule and govern ourselves accordingly.

Subsection (c)(2)(E) is designed to allow for the making an appellate record, and if necessary, address a writ of habeas corpus.

Do not forget that there is also subsection (g) below dealing with protective orders.

(d) *Discovery by the Commonwealth.* - If the court grants disclosure to the accused under subpart (b) of this Rule, it shall also order the accused to: (1) Permit the Commonwealth to inspect and copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath analyses, and other scientific testing within

the accused's possession, custody or control that the defense intends to proffer or introduce into evidence at trial or sentencing.

This is existing language.

(2) Disclose whether the accused intends to introduce evidence to establish an alibi and, if so, disclose the place at which the accused claims to have been at the time the alleged offense was committed.

This is existing language.

(3) 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 if the accused intends to rely upon the defense of insanity pursuant to Chapter 11 of Title 19.2; provided, however, that no statement made by the accused in the course of such an examination disclosed pursuant to this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination was conducted with or without the consent of the accused.

This is existing language.

(4)(A) Notify the Commonwealth in writing of the accused's intent to introduce expert opinion testimony at trial or sentencing and to provide the Commonwealth with: (i) any written report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and the bases and reasons for those opinions, and (ii) the witness's qualifications and contact information.

(B) Nothing in subparts (d)(4)(A)(i) and (ii) of this Rule shall render inadmissible an expert witness's testimony at the trial or sentencing further explaining the opinions, bases and reasons disclosed pursuant to this Rule, or the expert witness's qualifications, just because the further explanatory language was not included in the notice and disclosure provided under this Rule.

Providing a copy of a certificate of analysis from the Virginia Department of Forensic Science or any other agency listed in Virginia Code§ 19.2-187, signed by hand or by electronic means by the person performing the analysis or examination, shall satisfy the requirements of subparts (d)(4)(A)(i) and (ii) of this Rule.

New language that mirrors the Commonwealth's obligation to disclose expert witness, pursuant to new subsection (b)(4).

(5) Provide to the Commonwealth a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the accused at trial or sentencing. The accused's attorney may redact the personal identifying information of any witness if so authorized by a protective order entered by the court pursuant to subpart (g) of this Rule.

This is new language that mirrors the Commonwealth's obligation to disclose expert witness, pursuant to new subsection (b)(5).

- *The timing of the delivery of a witness list could bar any last minute change in trial strategy;*
- *The timing of the delivery of a witness list could bar any last minute change in witness substitution if a witness was unable to come to court but another witness was available to substitute;*
- *The fact that the language of the proposal was not limited to case-in-chief witnesses. This could prevent a party from presenting rebuttal witnesses;*
- *The fact that there would be inequitable application of the rule to the prosecution and the defense. A defendant's constitutional right to present witnesses in his own defense could trump a rules violation for failing to list all defense witnesses. The prosecution does not have an equivalent constitutional provision; and*
- *Witness protection. Even witness lists limited to names but with no addresses or other contact information would offer insufficient protection to some of our witnesses, in spite of the provisions in subsection c and subsection (g)(1)(iv) dealing with Redaction and Restricted Dissemination Material.*

(e) *Time of Motion.* - A motion by the accused under this Rule must be made at least 10 calendar days before the day fixed for trial. The motion, shall identify all relief sought pursuant to this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

This is existing language.

(f) *Time, Place and Manner of Discovery and Inspection.* - The order granting relief under this Rule shall specify in writing the time, place and manner of making the discovery and inspection ordered. The court in its discretion may prescribe such terms and conditions as are reasonable and just.

With the exception of adding the words "reasonable and," this is existing language.

(g) *Protective Order.* - (1) Upon the motion of either party and for good cause, the court may enter a protective order with regard to the discovery or inspection required by this Rule. The court in its discretion may order any condition that it deems necessary to the orderly adjudication of the case or to the fair administration of justice. These conditions may include, but are not limited to:

- (A) a requirement that the parties not disclose the contents of any material or evidence disclosed or discovered pursuant to this Rule in any public forum, including any website;
 - (B) a requirement that the parties not disclose the contents of any material or evidence disclosed or discovered pursuant to this Rule to any third-party who is not an agent or employee of the parties or an expert witness;
 - (C) authorization to either party to withhold the residential address, telephone number, email address or place of employment of any witness not covered by the terms of subpart (c)(l) of this Rule; or
 - (D) authorization for either party in appropriate circumstances to withhold from disclosure or place additional restrictions on dissemination of information otherwise discoverable but not exculpatory.
- (2) Should either party believe in good faith that the terms of a protective order entered by the court have been violated, such party may move the court to enforce the order and to impose any necessary and appropriate sanction authorized by Virginia law.

This subsection expounds in greater detail the protective order language of the existing Rule.

(h) *Continuing Duty to Disclose; Failure to Comply.* - If, after disposition of a motion under this Rule, counsel or a party discovers before or during trial additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule but has not previously been disclosed, the party shall promptly notify the other party or their counsel or the court of the existence of the additional material. If at any time during the pendency of the case 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 authorized by Virginia law as it may in its discretion deem appropriate;

This is existing language except for the addition of the language in the last sentence “authorized by Virginia law as it may in its discretion” deem appropriate. This seems to be a reference to VA Code § 19.2-265.4 and the caselaw interpreting that statute, which adds the power of punishing through contempt.

The *new* 3A:11

The Times They Are a
changin'

C. ANDREW RICE

ACA VIRGINIA BEACH

W. HAPPY O'BRIEN

DOUMMAR & O'BRIEN

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3A:11

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The Hard Truth on 3A:11

- ▶ This rule has many changes and additional requirements on the Commonwealth as well as Defense Counsel.
- ▶ Understand that this is an overview of substantive changes of the rule, but should not stand in place of your thorough examination of the new rule and how it applies to your practice.
- ▶ Many of the changes may require litigation, of which there are no Legal Ethics Opinions, or case law to guide us in particular instances.

Efforts for change

Several forces have combined to advance change:

- The defense bar
- Legislators
- The ACLU
- Standards in other states
- Commonwealth Attorneys

Efforts for change

- ▶ A number of groups including prosecutors and defense attorneys have convened committees to work out changes to the Rule.
- ▶ Prosecutors withdrew from one of the earliest committees due to an inability to reach any consensus
- ▶ A subsequent committee convened by the Supreme Court requested changes in November 2014. By order dated December 2, 2015, the Supreme Court declined to adopt the changes
- ▶ The Virginia State Bar convened a task force which also produced proposed changes. Those changes are incorporated in the proposed new Rule (see Appendix).
- ▶ While the VSB task force was at work, Senator Stanley proposed legislation on discovery, which he only withdrew when promised that the Task Force was making progress.

The supreme court speaks

- ▶ “It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective July 1, 2020, subject to any further orders of this court.”

The supreme court speaks



And the changes are



New rule: Subsection (a)

General Provisions

- ▶ Subsection **(a)2** adds exculpatory evidence to the discovery Rule: “..[D]uties of the Commonwealth’s attorney to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule.”

Rule 3.8

Professional Conduct

- ▶ The prosecutor in a criminal case shall:
- ▶ (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- ▶ (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- ▶ (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- ▶ (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- ▶ (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - ▶ (1) the information sought is not protected from disclosure by any applicable privilege;
 - ▶ (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - ▶ (3) there is no other feasible alternative to obtain the information;
- ▶ (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- ▶ (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - ▶ (1) promptly disclose that evidence to an appropriate court or authority, and
 - ▶ (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - ▶ (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - ▶ (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- ▶ (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Rule 3.8 Professional Conduct

- ▶ Special Responsibilities of a Prosecutor
 - ▶ Already in the RPC
- ▶ Brady 373 US 83
- ▶ Giglio 405 US 150
 - ▶ This material had to be turned over to begin with.

New rule:
Subsection
(a)
general provisions

- ▶ Subsection (a)4 provides that any discovery material filed with the court will be placed under seal at the time it is filed.

Purpose

- ▶ Subsection (a)4 prevents a party from attempting to get around the constraints of Rule 3.6 of the Rules of Professional Conduct

Rule 3.6

Professional Conduct

- ▶ (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

New rule: Subsection (b)

DISCOVERY BY THE
ACCUSED

- ▶ (b)1
- ▶ This is the first of the key changes to the Rule
- ▶ In this subsection, the defense is entitled to inspect and review (but not copy) “RELEVANT REPORTS PREPARED BY LAW ENFORCEMENT OFFICERS...IN CONNECTION WITH THE PARTICULAR CASE.”

New rule: Subsection (b)

DISCOVERY BY THE
ACCUSED

What are Relevant Reports? (II)

- ▶ (b)6: “The Rule does not authorize discovery or inspection of the Commonwealth’s, “work product...internal reports, witness statements, memoranda, correspondence, legal research or other internal documents prepared by the office of the Commonwealth’s attorney or its agents in anticipation of trial.”

New rule: Subsection (b)

DISCOVERY BY THE ACCUSED

- ▶ **(b)2(A)**: standard existing language
- ▶ **(b)2(b)** While the Commonwealth has previously not been required to share written or recorded statements or the substance of any oral statements made by the accused to anyone other than law enforcement officers, **the new rule requires that such statements be provided in discovery.**

Rule 3.4 Professional Conduct

- ▶ (a) Can't obstruct another parties access to evidence
- ▶ (d) in pretrial procedure, make a frivolous discovery request or fail to make a diligent effort to comply.
- ▶ (e) in trial allude to evidence that may not be admissible
- ▶ (h) request a person refrain from voluntarily giving relevant information to another party

Hypothetical

- ▶ Lawyer A receives discovery from the Commonwealth containing statements made by the defendant to his mother, that are now discoverable.
- ▶ Lawyer A calls mother and asks to speak with her before she speaks with the Commonwealth about those statements.
- ▶ Lawyer A tells the mother that she does not have to talk the Commonwealth.

Hypothetical

- ▶ What Rules of Professional Conduct would be at play?
 - ▶ Rule 3.4, and Rule 4.3
- ▶ Did Lawyer A commit a violation of Rule 3.4 with their first question?
 - ▶ No merely asking for preferred treatment violates no part of 3.4
- ▶ Did Lawyer A violate rule 3.4 with the second statement
 - ▶ No merely stating that the mother did not have to speak with the Commonwealth violates no part of 3.4, while that may have been “advice” under Rule 4.3, the Lawyer did not tell the mother to NOT talk to the Commonwealth, merely that she just did not have to.
 - ▶ Rule 4.3 – Giving Legal Advice

Hypothetical

- ▶ 4.3 – Giving Legal Advice to Unrepresented Parties
 - ▶ Three Prong Test, an ethical issue arises if all three are done in the same communication.
- ▶ 1) The communication must be on behalf of a client;
- ▶ 2) The communication must include advice, other than the advice to secure counsel; and
- ▶ 3) The interests of the person must be or have a reasonable possibility of being in conflict with the interest of the client.
 - ▶ Here telling the mother that she did not have to speak with the Commonwealth would satisfy prong 1, and clearly it satisfies prong 2.
 - ▶ This is interesting because we don't have the statement given in discovery in our hypothetical, so Lawyer A may know based on the statement that the mothers interests are aligned with that of his client. Lawyer A must ascertain the interest before making the statement to stay within compliance.

New rule:
Subsection
(b)

DISCOVERY BY THE
ACCUSED

- ▶ (b)2(C):
- ▶ Such statements made to a co-defendant or co-conspirators *that the Commonwealth intends to use at trial* must also be disclosed to the defense in discovery.

New rule: Subsection (b)

DISCOVERY BY THE
ACCUSED

- ▶ **(b)3:**
- ▶ Looks the same but it is not.
- ▶ The court has added the word recordings to be allowed to be copied.

New rule: Subsection (b)

DISCOVERY BY THE
ACCUSED

- ▶ **(b)4(A):**
- ▶ The Commonwealth must provide the report of any expert it intends to use at trial or sentencing, along with the expert's contact information.
- ▶ If there is no written report, then a summary of the expert's conclusions must be provided to the defense

New rule:
Subsection
(b)

DISCOVERY BY THE
ACCUSED

- ▶ **(b)5:**
- ▶ Provide to the accused a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing. This provision is subject to subpart (c)(1) of this Rule and to any protective orders entered by the court pursuant to subpart (g).

*New
rule:*

Subsection (c)
Redaction and Restricted
Dissemination Material

New rule: Subsection (c)

Redaction and
Restricted
Dissemination Material

- ▶ **(c)1(A):** The Commonwealth may redact dates of birth and social security numbers *for any person* whose identity must be revealed to the defense.
- ▶ The address, telephone number, email address and place of employment of any **victim** as defined in §19.2-11 et al

New rule: Subsection (c)

Redaction and
Restricted
Dissemination Material

- ▶ **BUT** the defendant may move the court to compel the Commonwealth to disclose that personal information.
- ▶ The court may order that the information be designated Restricted Dissemination Material (RDM).

New rule: Subsection (c)

Redaction and
Restricted
Dissemination Material

▶ RESTRICTED DISSEMINATION MATERIAL (c)2(B)

- ▶ RDM is that which would result in cognizable danger to the safety or security of a witness or victim; or
- ▶ Would result in cognizable danger of a witness being intimidated or tampered with; or

New rule:
Subsection
(c)

Redaction and
Restricted
Dissemination Material

- ▶ RESTRICTED DISSEMINATION MATERIAL (II)
- ▶ May compromise an ongoing criminal investigation or confidential law enforcement technique; or
- ▶ Relates to the statement of

New rule:
Subsection
(c)

Redaction and
Restricted
Dissemination Material

▶ RESTRICTED DISSEMINATION
MATERIAL (III)

- ▶ The Commonwealth's attorney must execute a document certifying that the material qualifies as RDM unless the attorney for the accused agrees to the designation; see (c)2(a)

New rule: Subsection (c)

Redaction and
Restricted
Dissemination Material

▶ RESTRICTED DISSEMINATION MATERIAL (IV)

- ▶ RDM may only be disclosed to the attorney for the accused
- ▶ Defense attorney cannot reproduce, copy or disseminate RDM in any way. (c)(2)(C)

New rule: Subsection (c)

Redaction and
Restricted
Dissemination Material

- ▶ RESTRICTED DISSEMINATION MATERIAL (V)
- ▶ Where a defendant is not represented by counsel, the Commonwealth must move the court to limit the scope of discovery; see (c)2(F)

Hypothetical

- ▶ Lawyer A is appointed to a case
- ▶ Material which is deemed RDM by the court, or agreement, is disclosed to Lawyer A pursuant to subsection (c).
- ▶ Lawyer A discovers a conflict and must withdraw from the case.
- ▶ What Rule of Professional Responsibility Governs
- ▶ What must the Lawyer do with such the Restricted Dissemination material?

Hypothetical

- ▶ Rule 3.6 Governs :(a)A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- ▶ Subsection (A) 4 of the new discovery rule states that any discoverable material filed with the court shall be placed under seal.
- ▶ Under (c) redaction of Restricted Dissemination Material, (c) (2) (E) within 21 days of being released from the case the lawyer must return the material to the COURT, where it must be sealed.

Hypothetical

- ▶ Why is there an ethical element under Rule 3.6?
 - ▶ Because circuit court files are matters of public record. News, citizens, or others involved in the case could ask to pull the courts file and make copies.
 - ▶ While normally discovery would be exchanged between the Commonwealth and Defense counsel, and only a copy of the Order listing what was disseminated would be filed with the Court, RDM is actual discoverable material, that must be filed with the court.
 - ▶ Therefore to stay in compliance with the new 3A:11, and Rule of Professional Conduct 3.6 Counsel will need to make sure the material is sealed and returned to the court. NOT GIVEN to the Defendant.

New rule: Subsection (d)

Discovery by the
Commonwealth

- ▶ (d)4:
- ▶ Requires defense to notify the Commonwealth in writing of the intent to use expert testimony at trial or sentencing, and provide the same information that the Commonwealth is required to give pursuant to (b)4.

New rule: Subsection (d)

Discovery by the
Commonwealth

- ▶ **(d)5:**
- ▶ Requires defense to provide the Commonwealth a list of witnesses it intends to use at trial or sentencing, and provide the same information that the Commonwealth is required to give pursuant to (b)5.

New rule: Subsection (d)

Discovery by the
Commonwealth

- ▶ **(d)5:**
- ▶ Provide to the Commonwealth a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing. This provision is subject to subpart (c)(l) of this Rule and to any protective orders entered by the court pursuant to subpart (g).

New rule: Subsection (d)

Discovery by the
Commonwealth

- ▶ (d)5:
- ▶ Practically, this means that street names are not acceptable; addresses of witnesses including family members must be provided, and a full witness list must be provided to the Commonwealth or these people will not be allowed at trial.

Hypothetical

- ▶ Lawyer A represents Defendant charged with burglary. The matter will be going to trial. Defendant has several witnesses that he provides street names for. Defendant does not know where these individuals live, but assures Lawyer A that they will meet with them.
- ▶ Lawyer A maintains contact with his client, however never meets with the witnesses.
 - ▶ What Rule of Professional Conduct is implicated?
 - ▶ What relief and course of action must Lawyer A take to comply with the new 3A:11?

Hypothetical

- ▶ Rule 1.1 (5) - Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.
- ▶ Burglary is a Category II offense, Lawyer A should be meeting with witness and/or diligently trying to track them down. This would be considered a major litigation and would require more elaborate treatment than a minor case.

Hypothetical

- ▶ Under the new discovery rule; to call a witness at trial, defense must provide to the Commonwealth a list of witnesses.
- ▶ To stay compliant with the rule, and to maintain the record showing compliance with Rule 1.1, Lawyer A must, pursuant to subsection (e) of 3A:11 file a motion to be heard at least 10 days prior to the trial date.

New rule:

Subsection (g) Protective Orders



New rule:
Subsection
(g)
Protective Orders

- ▶ (g)1:
- ▶ Either party may petition the court to protect materials required for discovery by ordering any, all, or other conditions for disclosure. Examples are:

New rule:
Subsection
(g)
Protective Orders

- ▶ Restrict public disclosure including to any website (e.g., Facebook);
- ▶ Restrict disclosure to any third party except expert witnesses;
- ▶ Authorization to withhold any personal information listed in (c) 1;
- ▶ Place additional restricts on withholding non-exculpatory evidence

Questions

Rules of Professional Conduct in 3A:11 PowerPoint

Rule 1.1

Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

[7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

Rule 3.4

Fairness To Opposing Party And Counsel

A lawyer shall not:

- (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.
- (b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:
 - (1) reasonable expenses incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;
 - (3) a reasonable fee for the professional services of an expert witness.
- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
- (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
- (f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.
- (g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.
- (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the information is relevant in a pending civil matter;
 - (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and
 - (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
- (i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.
- (j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Rule 3.6

Trial Publicity

- (a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.
- (b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

Rule 3.8

Additional Responsibilities Of A Prosecutor

A lawyer engaged in a prosecutorial function shall:

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
- (b) not knowingly take advantage of an unrepresented defendant;
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Rule 4.3

Dealing With Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.