

# OUTLINE of REVISED RULE 3A:11

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**VIRGINIA:** *In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 5<sup>th</sup> day of September, 2018. 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, 2019, subject to any further orders of this Court.*

## **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.

(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.

(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.

(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.

**(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.

(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;

(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;

(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

(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.

(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.

(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.

(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).

(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.

(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.

**(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.

(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.

(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.

(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.

(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.

**(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.

**(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.

**(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)(1) 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.

**(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.