

CIRCUIT COURT OF NORFOLK
Criminal Case Procedures
(Revised effective August 22, 2013)

I. APPOINTMENT OF COUNSEL AND REPRESENTATION

- A. Early Appointment and Court Notification.** The intent of the following procedures is to provide early retention or appointment of qualified counsel to facilitate early communication in each case, and to ensure the timely scheduling of trial dates. The Court will encourage and facilitate the retention of private counsel, but not in a way which will foster unreasonable delay or interfere with the time limits prescribed herein.

Individuals appearing in Circuit Court have the opportunity to retain their own counsel, to have the Court appoint an attorney to represent them if they are indigent, or, with the Court's permission, to waive counsel and represent themselves *pro se*. The Circuit Court and Criminal Docket Clerk should be made aware of an individual's method of representation as early as possible.

- B. Privately-Retained Counsel.** The Court will require that privately retained attorneys notify the Criminal Docket Clerk, in writing, of their appearance in the case at least three working days before Grand Jury Day. Defendants for whom a notice of representation has not been filed will be required to appear in person at the Criminal Docket Call on Grand Jury Day.

In addition, where private counsel is not yet formally retained, but has a reasonable expectation that he/she will be retained for Circuit Court representation, attorneys are requested to so notify the Criminal Docket Clerk, in writing, at least three working days before Grand Jury Day. The Court understands that such a written statement does not constitute a commitment or a formal notice of representation, but merely a good faith effort to assist the Court by providing advance notice of intentions for representation.

Defendants who are granted additional time to retain counsel will be required to appear before a judge the next Grand Jury Day at 9:30 a.m. to inform the Court if counsel has been retained, unless a signed notice of representation has been filed before then. If counsel has not then been retained the Court will appoint counsel, as long as the defendant qualifies for same.

- C. Court-Appointed Counsel.** An indigent person indicted for a felony or appealing a Class 1 or 2 misdemeanor conviction from a District Court, who did not have appointed counsel in the District Court, and who is requesting a court-appointed attorney for Circuit Court representation, will be required to appear at Criminal Docket Call for qualification and attorney appointment. An attorney's appointment in General District Court will carry over to the Circuit Court. An attorney's appointment in the Juvenile and Domestic Relations District Court will carry over to the Circuit Court if the attorney is on the Circuit Court's list

of appointed attorneys. These attorneys are required to appear at Criminal Docket Call only if a trial date has not been selected and scheduling order submitted. If a scheduling order has not been submitted and the defense attorney does not appear at Criminal Docket Call, the case will be set on the next Grand Jury date as "to be set".

- D. **Other Counsel Appointed in Juvenile and Domestic Relations District Court.** If counsel appointed in that Court is not on the Circuit Court's list of appointed attorneys, the appointment will not carry over to the trial in Circuit Court unless three working days before Grand Jury Day the attorney requests and receives the approval of the Circuit Court judge supervising the court-appointed list and notifies the Criminal Docket Clerk by mail or telephone.
- E. **Withdrawal of Counsel.** Any attorney moving to withdraw from a case should notify the Court, in writing, as expeditiously as possible, with a clear statement of the reason, to ensure that new counsel is quickly appointed or retained. Counsel of record shall not withdraw from a case except by leave of the Court, pursuant to Rule 1:5 of the Rules of the Supreme Court of Virginia, and withdrawal will only be permitted for good cause. Failure of a defendant to fully pay a retained attorney, who has filed a notice of representation, is not considered good cause.
- F. **Substitution of Counsel.** Except by leave of court any attorney who wishes to be substituted as counsel in a pending case with a scheduled trial date must be available to represent the defendant on the scheduled trial date or on a date acceptable to the Court.

II. SETTING OF TRIAL DATE

- A. **Purpose.** If at the time of the preliminary hearing the Commonwealth's Attorney has agreed to reduce a felony to a misdemeanor, a plea of guilty should be entered in the District Court. If felony charges are certified to the Circuit Court, a scheduling order complying with paragraph C will be prepared.

The Court sees no reason for a charge to be submitted to the Grand Jury when a guilty plea has been negotiated well before Grand Jury Day. In such cases the Court urges counsel to consider waiving indictment by the Grand Jury. A guilty plea on a waiver of indictment may be set as early as the sixth day after the preliminary hearing.

- B. **Grand Jury Cut-off Date.** The cut-off date for cases to be bound over to the next Grand Jury is the Wednesday in the week preceding Grand Jury Day.
- C. **Scheduling Order.** The scheduling order will be prepared and signed by the defendant's attorney, the Commonwealth's Attorney, and, if practical, the defendant, indicating the agreed upon trial, discovery, and motion dates. The trial date will be within 7 days of the next Grand Jury Day if a plea agreement is reached in District Court and within 60 days of the preliminary hearing, if possible, if no such agreement is reached; provided, that the trial date shall not be more than 120 days after the date of the defendant's arrest, if

possible.

Attorneys are required to submit scheduling and continuance orders to the Criminal Docket Clerk by 2:00 p.m. the day before the scheduled Criminal Docket Call. Orders submitted after the deadline will not be accepted and the attorneys of record will be required to personally appear before the duty judge at 2:30 p.m. on the day of Criminal Docket Call to present an order and explain their failure to adhere to the Criminal Case Procedures.

The order will also indicate the defendant's current intention to plead guilty or not guilty and to request a jury/bench trial. Hearings on unresolved motions will be held not later than three working days before the trial date. Upon Grand Jury indictment and signature by a Circuit Court judge, this document will become an order of the Norfolk Circuit Court.

If trial by jury is demanded in the scheduling order, counsel will set an arraignment for the defendant within seven days of the Grand Jury Day at which the indictment was returned. It is expected that **counsel will have discussed all relevant aspects of the arraignment with their clients, prior to the hearing. Further, between 9:30 and 11:30 a.m. the day before the jury trial, lead counsel must appear for a pre-trial conference and apprise the Court of the case status. If the trial is on a Monday, or a Tuesday after a Monday holiday, the pre-trial conference will be on the preceding Friday. If counsel fail to designate a time for the conference in the scheduling or continuance order, the Clerk will set the matter for 9:30 a.m.**

III. CRIMINAL DOCKET CALL

- A. **Purpose.** Criminal Docket Call will be conducted at 9:30 a.m. on Grand Jury Day, the first and third Wednesday of each month (or if any such Wednesday is a holiday, the following Thursday). Based on the procedures described in the previous sections, cases arising from the General District Court already will have assigned counsel of record and trial dates documented by entered scheduling orders.
- B. **Procedure.** All defendants who are not represented by counsel, must appear at the Criminal Docket Call, which shall proceed as follows:
- The Clerk calls those who are without counsel and qualifies indigent persons.
 - Court-appointed attorneys are assigned. The Clerk will notify such counsel of the appointment by email. Appointed counsel and the assigned prosecutor are to submit a scheduling order by 2:00 p.m. the day before the next Docket Call. Failure to do so will require counsel to appear as described in paragraph II. C. above.
 - Defendants wishing to retain private counsel present their circumstances to the presiding judge who determines whether to grant extension; if an extension is granted, the defendant is told to return to Court on the next Grand Jury Day at 9:30 a.m. to report on counsel status.

- The Court enters orders confirming trial dates, bench/jury trial request, anticipated trial lengths, and scheduling of motions.

If the defendant is not indicted by the Grand Jury, the trial date would be removed from the docket as there would not be a charge before the Circuit Court.

IV. DOCKET PROCEDURES

- A. **General Scheduling.** Trials by jury and by the Court without a jury, pleas of guilty, and motions will be heard Monday through Thursday only; provided, that a plea of guilty may be heard on a Friday if the defendant has a probation violation or sentencing on another charge set on that Friday. Sentencings, Detention and Diversion Center reviews, and returns on findings under advisement will be heard mostly on Friday; provided, that if Court is not in session on a Friday because of a legal holiday or regional Judges' Conference such matters will be heard on the preceding Thursday; provided, further, that in such circumstances the judge presiding over Drug Court will not have a 2:00 p.m. docket. Bond motions may be heard on Monday through Thursday. Drug Court will be held on Thursday at 2:00 p.m. Mental Health Court will be held on Tuesday at 2:00 p.m. No juries shall be commenced on the first Grand Jury Day of each month, and no more than **three** criminal juries will be set on any given day except with the consent of the Chief Judge.

Each judge will have a full Friday criminal docket every other Friday. Thus, generally, four judges will hear criminal matters one Friday and three will do so the next Friday. A judge hearing civil motions on a Friday may also schedule criminal matters at 2:00 p.m.

The criminal docket will begin at 9:30 a.m. Monday through Thursday for guilty pleas, motions, probation violations, and bench and jury trials.

There will be three times available on a Friday criminal docket: 9:00 a.m., 11:00 a.m., and 2:00 p.m. There shall be set five (5) sentencings and five (5) probation violations on each sentencing judge's 9:00 a.m. and 11:00 a.m. dockets. Sentencings and probation violations may be set on a judge's 2:00 p.m. docket with the consent of the judge.

Commonwealth misdemeanor appeals may only be set on Tuesdays. City misdemeanor appeals may only be set on Mondays.

- B. **Setting the Docket.** When a day's docket is set the preceding afternoon, the criminal deputy clerk will inform the docket judge of the number of jury trials, non-jury trials, guilty pleas, lengthy motions, such as motions to suppress, and whether misdemeanor appeals are to be heard the next day. With respect to pleas of not guilty, the Commonwealth's Attorney's Office will tell the criminal deputy clerk which ones are likely to go to trial and the estimated length of each trial. A case will be set on the docket as a plea of not guilty unless, before the docket is set, all material terms of a plea agreement have been agreed to and the defendant has assented to the proposed plea agreement orally or in writing. The

docket judge shall determine the number of judges necessary for the efficient hearing of the next day's criminal matters, and he shall select which judges will hear them. The criminal deputy clerk will seek to balance the non-jury felony cases among the judges assigned to hear them taking into consideration, among other things, the estimated length of time of the cases. In assigning civil or criminal jury trials the docket judge shall not assign such a case to a judge with a Friday criminal docket unless the case can be concluded by Thursday.

- C. **Transfer of Cases.** It is the policy of the Court that at the conclusion of a civil or a criminal docket, all judges shall assist one another in hearing cases not yet adjudicated. The in-court criminal deputy clerk, or the judge, when a civil docket is concluded, shall check all courtrooms and determine the status of the remaining criminal cases. Upon determining that an in-court criminal clerk and court reporter, if necessary, are available, the judge shall effect, through the clerks, the transfer of such cases as are yet to be heard.
- D. **Sentencings after a Request for a Pre-Sentence Report.** If a pre-sentence report is requested, the judge presiding over the trial or accepting the plea of guilty shall ordinarily impose sentence. Another judge may impose sentence unless the defendant or the Commonwealth's Attorney objects.
- E. **Probation Violations.** Probation violations will be set for hearing before any judge on the earliest Friday available to counsel and the Court. The probation violation hearings will be assigned to specific judges no later than the preceding Wednesday, and the clerk's office will put the violation summaries in the judges' mailboxes. The Clerk's office may set no more than five (5) probation violations on the open docket on Monday through Thursday and reports for the violations shall be distributed to the appropriate judge with the criminal docket.
- F. **Capital Murder and other assigned cases.** The clerk's office will continue to assign capital murder cases to judges on a rotating basis. Other cases may be assigned by order of any judge. Cases in which the Court has heard motions to suppress, to continue, or to withdraw as counsel will no longer be assigned, but, rulings on motions and findings of fact made by any judge will be binding at trial.

V. TRIAL PROCEDURES

- A. **Punctuality.** Counsel appearing in cases listed on the docket as pleas of not guilty are expected to arrive punctually in the appropriate courtroom at the beginning of that docket. Counsel appearing in cases listed on the docket as guilty pleas or for sentencings or probation violations are expected to arrive punctually unless they have notified the judge or the clerk's office and opposing counsel, if possible, of the reason for the delay and the likely time of arrival. **If plea negotiations and the preparation of necessary papers are not completed before the day of trial, counsel are expected to arrive before the beginning of the docket to complete such work.** A pattern of unexcused tardiness or lack of preparation is a basis for removal from the court-appointed list or other sanction.

- B. Continuances.** It is the formal policy of the Court to grant continuances only for good cause. An attorney has established good cause when the underlying eventuality is unforeseen, is not due to the lack of preparation, is relevant, is brought to the Court's attention in a timely manner, and does not prejudice the adversary. A list of reasons for which a continuance will or will not ordinarily be granted is in the Court's Criminal Continuance Policy, which is attached. Continuances of unassigned trials should be requested in writing or by telephone conference with a criminal continuance judge; continuances of probation violations should be so requested with the duty judge; continuances of sentencings shall be granted only by the sentencing judge unless he will be absent until the date of sentencing in which case they may first be granted by the two criminal continuance judges, then the duty judge. Continuances should be requested as soon as the circumstances justifying the continuance become known to counsel. Motions for continuance on the morning of trial are not viewed favorably.
- C. Motions to Suppress.** The trial date set by the scheduling order is not to be used as the date for a motion to suppress. Except for good cause shown and in the interest of justice, a motion to suppress shall be heard at least three working days before the trial date. The Court will strictly enforce the time limits of Code of Virginia § 19.2-266.2. Furthermore, the evidence sought to be suppressed and the grounds for suppression shall be *specifically* stated.
- D. Release of Witnesses under Subpoena.** The Court expects that every case set for trial will be adjudicated on that trial date. Counsel may excuse witnesses and appear on the trial date unprepared to adjudicate the case on a not guilty plea only after the defendant unequivocally indicates an intention to plead guilty. In cases involving a plea agreement; an unequivocal intent to plead guilty means that there is agreement on all terms of the plea agreement.
- E. Setting Cases for Guilty Pleas in Advance of the Trial Date.** In the event the defendant expresses an intent to plead guilty that is not unequivocal, counsel may schedule the matter on the docket in advance of the scheduled trial date for an anticipated guilty plea without bringing witnesses. If the guilty plea is then tendered and accepted by the Court, the Clerk shall cancel the trial date and counsel shall release subpoenaed witnesses.
- F. Plea Agreements.** The propriety and value of properly handled plea agreements are recognized; however, there can be no prior commitment by the Court to approve a plea agreement, and counsel should always be prepared to explain his rationale, especially if the recommended sentence is outside the sentencing guidelines. The written plea agreement, and, if used, the written stipulation of Commonwealth's evidence and the advice of rights form, must be thoroughly reviewed by defense counsel with the defendant and signed before the case is called.

If the Court rejects the plea agreement, the defendant will be allowed to withdraw his plea of guilty. A continuance will be ordered to provide sufficient time for summoning witnesses and assignment of the case to a different judge for trial. The Chief Judge will assign the

case to a judge on a rotating basis. Any plea agreement offered to the Court after the rejection of an earlier plea agreement shall state that a previous plea agreement has been submitted.

- G. Co-Defendant Cases.** By agreement of counsel, co-defendants who plead guilty and are before the Court on charges arising out of the same incident or incidents (no unrelated charges), are to be sentenced by the first judge accepting a guilty plea from any one of the co-defendants.
- H. Post-trial but Pre-Sentencing Matters.** Absent extenuating circumstances, all such matters concerning a particular defendant shall be directed to and heard by the sentencing judge. In the event that the sentencing judge is unavailable and the matter concerns a continuance, it should first be directed to the two criminal continuance judges, then to the duty judge.
- I. Pre-Sentence Reports.** The report shall be made a part of the record as required by statute, but not as evidence in the case, and after the sentencing hearing it shall be sealed and not disclosed except by order of the Court.

VI. POST-SENTENCING MATTERS

- A. Judge to Whom Directed.** Any post-sentencing matter, included, but not limited to, an amendment to a sentencing order, a motion to reconsider or to suspend the unserved portion of a sentence, a request for a probation violation capias, a petition for a writ of habeas corpus or other post-conviction relief, a review of a juvenile serious offender commitment or finding of not guilty by reason of insanity, or a pardon request, shall be directed to the sentencing judge. If the sentencing judge is no longer in active service any such post-sentencing matter shall be directed to his successor. The Clerk's Office will maintain a list of the judges' successors. If the original sentencing judge has no successor when the matter is raised it shall go to the duty judge.

CIRCUIT COURT OF NORFOLK - CRIMINAL CONTINUANCE POLICY

A continuance of a criminal case or sentencing will only be for good cause shown and with the approval of the Court. If the matter is assigned the request must be made to the judge to whom the case is assigned. If the case has not been assigned the request must be made to the duty judge. Refer to paragraph 5B above for the continuance policy regarding probation violations.

If a continuance is granted, counsel must submit by the end of the next business day, to the judge who granted the continuance, an order stating the specific reason for the continuance and the new trial date (approved by the Clerk's office) which shall, if possible, be within 120 days of the defendant's arrest.

Good cause for a continuance does not ordinarily include the following:

1. Counsel for both parties agree to the continuance.
2. The case has never been continued before.
3. The case has been continued once, but on the motion of the other party.
4. Financial arrangements have not been satisfied.
5. The defendant has charges pending in another Court and desires to dispose of those charges first, or the defendant has other charges pending in this Court and wishes to consolidate them.
6. Counsel for the defendant and the Commonwealth need additional time to discuss a possible plea agreement.
7. The defendant wants to hire a new attorney after previously declaring indigency and having received court-appointed counsel who is ready and prepared for trial.
8. A witness who was not subpoenaed by movant is not present.
9. Further time is needed for investigation unless, before the scheduled trial date, counsel has established to the Court's satisfaction that due diligence has been exercised and that counsel would otherwise not be prepared and ready for trial.
10. A material witness has been subpoenaed but the subpoena return indicates "not found" and counsel has no new information or leads in locating the witness.
11. The defendant is assisting law enforcement officers in the investigation of routine matters or is a witness for the Commonwealth or the United States in another case that has not yet been tried.

Although a continuance should not be granted if the reason for the request is within the control of counsel or reasonably foreseeable, the defendant's constitutional right to a fair trial will many times require that a continuance be granted to bring a witness material to the defense before the Court. Furthermore, by statute, continuances ought to be granted if necessary. See Virginia Code §19.2-162. Consequently, the failure of counsel to proceed in an orderly and expeditious fashion in preparation for trial is a matter of great concern to the Court. Failure of counsel to proceed as expected will not go unnoticed and may result in sanctions and/or removal (in the case of

court-appointed defense counsel) from the court-appointed attorney list.

The Court is likely to be most unreceptive to a continuance request made on the day of trial as witnesses may be inconvenienced. The unnecessary delay of cases will not be permitted.

Good cause may include the following:

1. The death, serious illness, or personal or family emergency of a party, material witness, or counsel.
2. The unavoidable absence of a material witness.
3. Counsel is not prepared for trial because of the inability of defendant and counsel to meet. However:
 - (A) The defendant's bond status may be affected if the Court determines the defendant has been dilatory.
 - (B) Removal from the list of court-appointed attorneys may be ordered if the Court determines counsel has been dilatory.
 - (C) Other sanctions may be used by the Court in addressing counsel's failure to be prepared.
4. The late submission of discoverable material by the Commonwealth which necessitates further investigation or summoning of additional witnesses by the defense. However, where tardy submission of discoverable material necessitates a continuance, sanctions may be in order, including, but not limited to, charging the continuance to the Commonwealth for purpose of speedy trial calculations.
5. The defendant was not transported to Court from a jail located outside the city's limits.
6. A previously ordered mental evaluation has not been completed.
7. The defendant fails to appear for trial.