

**VSb Indigent Defense Task Force requests comments for proposed amendments to
Virginia Supreme Court Rule 3A:11**

The following proposal is published for public comment, which should be submitted in writing to Karen A. Gould, Executive Director, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, VA 23219 or gould@vsb.org, no later than the end of business January 15, 2013.

RULES OF SUPREME COURT OF VIRGINIA
PART THREE A
CRIMINAL PRACTICE AND PROCEDURE

Rule 3A:11. Discovery and Inspection.

(a) *Application of Rule.* This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment. Notwithstanding the provisions of this Rule, the parties to any prosecution are encouraged to agree in writing to a disclosure of more information than is provided by this Rule. The terms of any form of open file discovery shall be defined by the understanding between the parties but shall require the accused to provide notice of alibi and expert witness designation as otherwise provided in this Rule. Open file discovery shall be continuing in nature.

(b) *Discovery by the Accused.*

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

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, police reports, papers, recordings, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his or her defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of ~~statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in~~

clause (ii) of subparagraph (b)(1) of this Rule. The term police reports in this paragraph refers to narrative reports and supplemental reports prepared by law enforcement in their investigation of a case.

(3) Upon indictment, the Commonwealth shall further provide relevant information favorable to the accused as to guilt, punishment, or a preliminary matter, including any material facts that tend to impeach or negatively affect the credibility of the Commonwealth's witnesses.

(4) Nothing in subparagraph (b)(1), (2) or (3) shall preclude the Commonwealth from redacting the identity and address or other similar identifying information of a witness when necessary to protect the safety of that witness or his or her family, unless court ordered to produce said information upon motion of the accused.

(c) *Discovery by the Commonwealth.* If the court grants relief sought by the accused under clause (ii) of subparagraph (b) (1) or under subparagraph (b) (2) of this Rule, it shall, upon motion of the Commonwealth, condition its order by requiring that:

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

(2) The accused disclose whether he or she intends to introduce evidence to establish an alibi and, if so, that the accused disclose the place at which he or she claims to have been at the time of the commission of the alleged offense, a general description of his or her activities at that time and the names and addresses of any witness who will corroborate said alibi. The accused shall provide notice of alibi to the Commonwealth at least fourteen (14) days before trial.

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

(d) *Notice and Designation of Expert Testimony.* Whenever the accused, the accused's attorney, or the attorney for the Commonwealth intends to introduce expert opinion testimony at trial, the accused, the accused's attorney, or the attorney for the Commonwealth shall notify the opposing party in writing of such party's intention to present such testimony at least twenty-one (21) days before the trial to include copies of any written reports of the witness, a summary of the proposed expert testimony that describes the witness's opinions and the basis and reasons for those opinions as well as the witness's

qualifications and contact information. Either party may supplement his or her designation and notice if the other party's notice requires additional expert witness assistance. Said supplemental designation and notice shall be filed within fourteen (14) days of the original expert witness designation.

(~~d~~e) *Time of Motion.* A motion by the accused under this Rule must be made at least ~~10~~-forty-five (45) days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(~~e~~f) *Time, Place and Manner of Discovery and Inspection.* An order granting relief under this Rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(~~f~~g) *Protective Order.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Commonwealth or the accused, the court may permit the ~~Commonwealth~~ moving party to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a showing in camera, the entire text of the ~~Commonwealth's written~~ statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

(~~g~~h) *Continuing Duty to Disclose; Failure to Comply.* If, after disposition of a motion filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, he or she shall promptly notify the other party or his or her counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.