EVIDENCE RULES COMMONLY USED IN OR SPECIFICALLY FOR FAMILY LAW CASES

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I. INTRODUCTION

Family law practitioners must be familiar with the basic rules of evidence such as hearsay, authentication, and so forth. A full discussion of those rules is beyond the scope of this presentation. However, there are a number of evidentiary rules that are specific to family law cases, and others that are applied in almost every litigated family law case.

II. RULES SPECIFIC TO FAMILY LAW CASES

Parenting classes
Material: Statements made in court-ordered educational seminars
Statute: Va. Code § 16.1-278.15, 20-103
Proceedings: Cases involving custody, visitation or support of a child pursuant to subdivision A 3 of § 16.1-241 in Juvenile and Domestic Relations District Courts or *pendente lite* matters in Circuit Court.
Rule: Statements made at a court-ordered educational seminar are inadmissible unless the statement admits criminal activity or child abuse or neglect.

Medical evidence in family abuse or neglect cases
Material: A report from treating or examining health care provider or medical records relating to the extent, nature, and treatment of any physical condition or injury suffered by a person and the examination of the person or the result of the laboratory analysis.
Statute: Va. Code § 16.1-245.1
Proceedings: Any civil case heard in a juvenile and domestic relations district court involving allegations of child abuse or neglect or family abuse.
Rule:

- The report or medical records are admissible if the party intending to present the evidence gives the opposing party or parties a copy of the evidence and written notice of intention to present it at least ten days prior to the trial or hearing.
- Reports must have attached to them a sworn statement of the treating or examining health care provider or laboratory analyst who made the report that (i) the information contained therein is true, accurate, and fully describes the nature and extent of the physical condition or injury and (ii) the patient named therein was the person treated or examined by such health care provider; or, in the case of a laboratory analysis, that the information contained therein is true and accurate.

- Medical records must have attached to them a sworn statement of the custodian that the same is a true and accurate copy of the record of such hospital or other medical facility.

Guardians *ad litem*
Material: Child's wishes, written summary of findings, facts, hearsay
Statute: Va. Code §16.1-266.1, Guidelines for the Performance of Guardian *Ad Litem*
Rules:

- "The GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify.[1] The GAL should rely primarily on opening statements, presentation of evidence and closing arguments to present the salient information the GAL feels the court needs to make its decisions."
- "If the child expresses wishes that are contrary to the GAL's assessment of the child's interests and welfare, the GAL is obligated to inform the court of these wishes."
- If a GAL submits a written summary of findings, "copies of the summary should be provided to the other parties and their counsel at least five days prior to the hearing unless otherwise directed by the court."

Genetic tests
Material: Genetic tests and blood tests
Statute: Va. Code § 20-49.3
Proceedings: Any matter in any court in which the question of parentage arises
Rules:

- Genetic test, including a blood test, may be admitted in evidence if contained in a written report prepared and sworn to by a duly qualified expert.
- The written results must be filed with the clerk of the court at least fifteen days prior to the hearing or trial.
- Verified documentary evidence of the chain of custody of the blood specimens is competent evidence to establish the chain of custody.

Testimony by child using two-way closed-circuit television
Material: Testimony of a child
Statute: Va. Code § 63.2-1521
Proceedings: A proceeding involving alleged abuse or neglect of a child under Va. Code § 16.1-241 (custody and visitation in juvenile and domestic relation district court) or Va. Code § 16.1-253 (preliminary protective order) or Va. Code § 20-107.2 (custody and visitation in circuit court).
Rule: The child's attorney or guardian *ad litem* may apply for an order from the court that the testimony of the alleged victim or of a child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for the order at least seven days before the trial date. The Court may order testimony to be taken by closed-circuit television if:

- The child is 14 years of age or younger on the date of the trial; and

[1] In practice, however, GALs often report to the court statements made by the children, healthcare professionals, and other hearsay. At the same time, the guidelines and many courts prohibit cross examination of the GAL.

- The court finds that the child is unavailable to testify in open court for any of the following reasons:
  - The child's persistent refusal to testify despite judicial requests to do so;
  - The child's substantial inability to communicate about the offense; or
  - The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

The attorney for the child, the defendant's attorney, and the guardian *ad litem* shall be present in the room with the child and the child shall be subject to direct and cross examination.

Out-of-state witnesses
Material: Testimony by out-of-state witnesses
Statute: Va. Code § 20-146.10
Proceedings: Child custody proceedings
Rules: An individual in another state can testify by telephone, audiovisual means, or other electronic means.

Admission of evidence of sexual acts with children
Material: Out-of-court statement by child aged twelve or younger describing any act of a sexual nature performed with or on the child
Statute: Va. Code § 63.2-1522
Proceedings: Any civil proceeding under Va. Code § 16.1-241 (custody and visitation in juvenile and domestic relations district court), Va. Code § 16.1-253 (preliminary protective order) or Va. Code § 20-107.2 (custody and visitation in circuit court).
Rules:

- The out-of-court statement may be admissible if:
  - The child testifies at the proceeding or by means of a videotaped deposition or close-circuit television and is subject to cross examination concerning the out-of-court statement.
  - The child is found by the Court to be unavailable to testify on the basis that.
    - The child has died
    - The child is absent from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify
    - The child's total failure of memory
    - The child's physical or mental disability
    - The existence of a privilege involving the child
    - The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
    - The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.
  - The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability.
- The proponent must notify the adverse party of his/her intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide

the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

Minor's School Records
Material: A minor's school records relating to attendance, transcripts or grades
Statute: Va. Code § 8.01-390.1
Proceedings: Any matter involving the custody of a minor
Rules:

- Admissible if properly authenticated.
- The copies must be authenticated to be true copies by the custodian.
- An affidavit signed by the custodian of such records, stating that such records are true and accurate copies of such records is valid authentication for the purposes of this section.

Interstate Support Cases
Material: Affidavits, records of child support payments, deposition or testimony by telephone and other means, taking the 5th
Statute: Va. Code § 20-88.59
Rules:

- Affidavits are admissible in evidence if given under penalty of perjury by a party or witness residing in another state.
- A copy of the record of child support payments certified as a true copy of the original by the custodian of the record are admissible to show whether payments were made.
- A party or witness residing in another state may be deposed or testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state.
- If a party refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

Media coverage of family law proceedings
Material: Certain family law proceedings
Statute: Va. Code § 19.2-266
Rule: Electronic media and still photography coverage of adoption proceedings, juvenile proceedings, child custody proceedings, divorce proceedings, and temporary and permanent spousal support proceedings.

III. RULES ROUTINELY USED IN FAMILY LAW CASES

Fifth Amendment: adultery or crimes against nature

Material: Testimony or other evidence that could be used in a criminal prosecution

Statutes:

- The Fifth Amendment to the United States Constitution, and Article 1, section 8 of the Virginia Constitution[2]
- Va. Code §18.2-365: "Any person, ***being married***, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor."
- Va. Code § 18.2-361: Any person who "carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony."

Rules:

- No one can be compelled to give evidence against him or herself that could be used in a criminal prosecution.
- An attorney may make the assertion on behalf of his or her client.
- One may not make a blanket assertion of the Fifth Amendment privilege. It must be made question by question. *Domestici v. Domestici*, 62 Va. Cir. 13 (2003).
- The privilege "applies not only to evidence which may directly support a criminal conviction, but to 'information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution'." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). *Edgar v. Edgar*, 44 Va. Cir. 191 (1997) (holding that adulterous activity that occurred more than one year earlier may be used as evidence of adultery occurring within the one-year limitations period, therefore Fifth Amendment extended to acts taking place over a year earlier); *cf.* Pierce v. Pierce, 25 Va. Cir. 348 (Fairfax County, Annunziatta, J., 1991); *Messiah v. Messiah*, 17 Va. Cir. 365 (Fairfax County, McWeeney, J., 1989).
- An attorney's actions do not waive a client's Fifth Amendment rights. *Travis v. Finley*, 36 Va. App. 189 (2001).
- Courts are to "indulge every reasonable presumption against a waiver of fundamental constitutional rights." *Church v. Commonwealth*, 230 Va. 208 (1985).
- Adultery has a one year statute of limitations.
- Adultery can only be committed by a married person.[3]
- There is no statute of limitations for crimes against nature.

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[2] Both the Federal and Virginia privilege are construed identically. *Taylor v. Commonwealth*, 26 Va. App. 485 (1998).

[3] Sexual intercourse between unmarried persons is no longer illegal after Virginia's fornication statute was struck down by *Martin v. Ziherl*, 269 Va. 35 (2005).

Nude photos or videos
Material: Photograph or video of nude or partially undressed person
Statute: Va. Code § 18.2-386.1
Rule: It is a Class 6 felony to video or photograph a nonconsenting person if that person is nude, in undergarments, or in a state of undress so as to expose the genitals, pubic area, buttocks or female breast if the circumstances are such that the person would have a reasonable expectation of privacy.

Information obtained by key logging program
Material: Information stored on a computer
Statutes: Va. Code § 18.2-152.4
Rule: It is unlawful to, with malicious intent, install or cause to be installed, or collect information through, computer software that records all or a majority of the keystrokes on the computer of another without the owner's authorization.

Information stored on computer
Material: Information stored on a computer
Statutes: Va. Code § 18.2-152.5, § 18.2-152.4
Rules:

- It is unlawful to examine employment, salary, credit or other financial or identifying information on a computer with knowledge that he or she does not have authority to do so.
- It is unlawful, with malicious intent, to alter or erase any computer data.
- It is unlawful, with malicious intent, to use a computer to make an unauthorized copy of computer data.

Notes:
The judge in *Albertson v. Albertson*, 73 Va. Cir. 94, 96 (Fairfax County, MacKay, J., 2007), explained in dicta that a person would be guilty under Va. Code § 18.2-152.5 if he or she viewed password protected files without authority. There are, however, no reported cases of a person in a family law case being charged criminally for a violation of Va. Code § 18.2-152.5 or 18.2-152.4.

Physician/Patient
Material: Diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment
Statute: Va. Code § 8.01-399, Rule 2:505
Proceedings: Civil proceedings
Rules:

- Material admissible when the physical or mental condition of the patient is at issue in a civil action. Only permissible to obtain information through discovery or through testimony at trial.
- Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of

any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of the Supreme Court.

Counselors/Patient
Material: Testimony by counselors and certain mental health professionals
Statute: Va. Code § 8.01-400.2, Rule 2:506
Proceedings: Actions where the physical or mental condition of the client is at issue or where the court determines the disclosure is necessary.
Rule: Where the physical or mental condition of the client is at issue or if the court finds that disclosure is necessary to the proper administration of justice, "no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice shall be privileged, and disclosure may be required."

Motor Vehicle Value
Material: NADA yellow or black books
Statute: Va. Code § 8.01-419.1
Rule: NADA "yellow" or "black" books, in effect on the relevant date, are admissible as evidence of fair market value on the relevant date.

Tape Recording of a Telephone Conversation
Material: Tape recording of telephone conversation
Statute: Va. Code § 8.01-420.2
Rule: Tape recordings of telephone conversations are not directly admissible unless:

- all parties to the conversation were aware the conversation was being recorded and such knowledge is demonstrated by a declaration at the beginning of the recorded portion that the conversation is being recorded; or
- the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action and one of the parties was aware of the recording and the proceeding is ***not one for divorce***, separate maintenance or annulment of a marriage.

Mediation
Material:

- Memoranda, work product and other materials contained in the case files of a neutral or dispute resolution program
- Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy.

Statute: Va. Code § 8.01-576.10
Rules:

- The material listed above is confidential and is generally not subject to disclosure in discovery or in court.
- Memoranda and other items which were not prepared specifically for use in the dispute resolution proceeding are not confidential.

Exceptions:

- Written settlement agreements are not confidential, unless the parties agree otherwise in writing.

- Materials not specifically produced and used in the mediation.
- If all parties agree in writing.
- Subsequent actions between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding.
- Where a threat to inflict bodily injury is made.
- Where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime.
- Where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint.
- Where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation.
- Where communications are sought or offered in a proceeding to vacate a mediated agreement.
- In a child support case, financial information and written reasons for any deviation shall be disclosed to each party and the court.
- As provided by law or rule.

EXHIBITS

Back

§ 16.1-278.15. Custody or visitation, child or spousal support generally.

A. In cases involving the custody, visitation or support of a child pursuant to subdivision A 3 of § 16.1-241, the court may make any order of disposition to protect the welfare of the child and family as may be made by the circuit court. The parties to any petition where a child whose custody, visitation, or support is contested shall show proof that they have attended within the 12 months prior to their court appearance or that they shall attend within 45 days thereafter an educational seminar or other like program conducted by a qualified person or organization approved by the court. The court may require the parties to attend such seminar or program in uncontested cases only if the court finds good cause. The seminar or other program shall be a minimum of four hours in length and shall address the effects of separation or divorce on children, parenting responsibilities, options for conflict resolution and financial responsibilities. Once a party has completed one educational seminar or other like program, the required completion of additional programs shall be at the court's discretion. Parties under this section shall include natural or adoptive parents of the child, or any person with a legitimate interest as defined in § 20-124.1. The fee charged a party for participation in such program shall be based on the party's ability to pay; however, no fee in excess of $50 may be charged. Whenever possible, before participating in mediation or alternative dispute resolution to address custody, visitation or support, each party shall have attended the educational seminar or other like program. The court may grant an exemption from attendance of such program for good cause shown or if there is no program reasonably available. Other than statements or admissions by a party admitting criminal activity or child abuse or neglect, no statement or admission by a party in such seminar or program shall be admissible into evidence in any subsequent proceeding. If support is ordered for a child, the order shall also provide that support will continue to be paid for a child over the age of 18 who is (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the parent seeking or receiving child support, until the child reaches the age of 19 or graduates from high school, whichever occurs first. The court may also order the continuation of support for any child over the age of 18 who is (a) severely and permanently mentally or physically disabled, (b) unable to live independently and support himself, and (c) resides in the home of the parent seeking or receiving child support.

B. In any case involving the custody or visitation of a child, the court may award custody upon petition to any party with a legitimate interest therein, including, but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members. The term "legitimate interest" shall be broadly construed to accommodate the best interest of the child. The authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the custody of the child has previously been awarded to a local board of social services.

C. In any determination of support obligation under this section, the support obligation as it becomes due and unpaid creates a judgment by operation of law. Such judgment becomes a lien against real estate only when docketed in the county or city where such real estate is located. Nothing herein shall be construed to alter or amend the process of attachment of any lien on personal property.

D. Orders entered prior to July 1, 2008, shall not be deemed void or voidable solely because the petition or motion that resulted in the order was completed, signed and filed by a nonattorney employee of the Department of Social Services.

E. In cases involving charges for desertion, abandonment or failure to provide support by any person in violation of law, disposition shall be made in accordance with Chapter 5 (§ 20-61 et seq.) of Title 20.

F. In cases involving a spouse who seeks spousal support after having separated from his spouse, the court may enter any appropriate order to protect the welfare of the spouse seeking support.

G. In any case or proceeding involving the custody or visitation of a child, the court shall consider the best interest of the child, including the considerations for determining custody and visitation set forth in Chapter 6.1 (§ 20-124.1 et seq.) of Title 20.

H. In any proceeding before the court for custody or visitation of a child, the court may order a custody or a psychological evaluation of any parent, guardian, legal custodian or person standing in loco parentis to the child, if the court finds such evaluation would assist it in its determination. The court may enter such orders as it deems appropriate for the payment of the costs of the evaluation by the parties.

I. When deemed appropriate by the court in any custody or visitation matter, the court may order drug testing of any parent, guardian, legal custodian or person standing in loco parentis to the child. The court may enter such orders as it deems appropriate for the payment of the costs of the testing by the parties.

(1991, c. 534; 1992, cc. 585, 716, 742; 1994, c. 769; 1996, cc. 767, 879, 884; 2000, c. 586; 2002, c. 300; 2003, cc. 31, 45; 2004, c. 732; 2008, cc. 136, 845.)

Back

§ 16.1-245.1. Medical evidence admissible in juvenile and domestic relations district court.

In any civil case heard in a juvenile and domestic relations district court involving allegations of child abuse or neglect or family abuse, any party may present evidence, by a report from the treating or examining health care provider as defined in § 8.01-581.1 or the records of a hospital, medical facility or laboratory at which the treatment, examination or laboratory analysis was performed, or both, as to the extent, nature, and treatment of any physical condition or injury suffered by a person and the examination of the person or the result of the laboratory analysis.

A medical report shall be admitted if the party intending to present such evidence at trial or hearing gives the opposing party or parties a copy of the evidence and written notice of intention to present it at least ten days, or in the case of a preliminary removal hearing under § 16.1-252 or § 16.1-253.1 at least twenty-four hours, prior to the trial or hearing and if attached to such evidence is a sworn statement of the treating or examining health care provider or laboratory analyst who made the report that (i) the information contained therein is true, accurate, and fully describes the nature and extent of the physical condition or injury and (ii) the patient named therein was the person treated or examined by such health care provider; or, in the case of a laboratory analysis, that the information contained therein is true and accurate.

A hospital or other medical facility record shall be admitted if attached to it is a sworn statement of the custodian thereof that the same is a true and accurate copy of the record of such hospital or other medical facility. If thereafter a party summons the health care provider or custodian making such statement to testify in proper person or by deposition taken de bene esse, the court shall determine which party shall pay the fees and costs for such appearance or depositions, or may apportion the same among the parties in such proportion as the ends of justice may require. If such health care provider or custodian is not subject to subpoena for cross-examination in court or by a deposition de bene esse, then the court shall allow a reasonable opportunity for the party seeking the subpoena for such health care provider or custodian to obtain his testimony as the ends of justice may require.

(1990, c. 560; 1996, c. 866; 2000, c. 163.)

§ 16.1-245.1. Medical evidence admissible in juvenile and domestic relations district court.

In any civil case heard in a juvenile and domestic relations district court involving allegations of child abuse or neglect or family abuse, any party may present evidence, by a report from the treating or examining health care provider as defined in § 8.01-581.1 or the records of a hospital, medical facility or laboratory at which the treatment, examination or laboratory analysis was performed, or both, as to the extent, nature, and treatment of any physical condition or injury suffered by a person and the examination of the person or the result of the laboratory analysis.

A medical report shall be admitted if the party intending to present such evidence at trial or hearing gives the opposing party or parties a copy of the evidence and written notice of intention to present it at least ten days, or in the case of a preliminary removal hearing under § 16.1-252 or § 16.1-253.1 at least twenty-four hours, prior to the trial or hearing and if attached to such evidence is a sworn statement of the treating or examining health care provider or laboratory analyst who made the report that (i) the information contained therein is true, accurate, and fully describes the nature and extent of the physical condition or injury and (ii) the patient named therein was the person treated or examined by such health care provider; or, in the case of a laboratory analysis, that the information contained therein is true and accurate.

A hospital or other medical facility record shall be admitted if attached to it is a sworn statement of the custodian thereof that the same is a true and accurate copy of the record of such hospital or other medical facility. If thereafter a party summons the health care provider or custodian making such statement to testify in proper person or by deposition taken de bene esse, the court shall determine which party shall pay the fees and costs for such appearance or depositions, or may apportion the same among the parties in such proportion as the ends of justice may require. If such health care provider or custodian is not subject to subpoena for cross-examination in court or by a deposition de bene esse, then the court shall allow a reasonable opportunity for the party seeking the subpoena for such health care provider or custodian to obtain his testimony as the ends of justice may require.

(1990, c. 560; 1996, c. 866; 2000, c. 163.)

Back

§ 63.2-1522. Admission of evidence of sexual acts with children.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283 or § 20-107.2, an out-of-court statement made by a child the age of twelve or under at the time the statement is offered into evidence, describing any act of a sexual nature performed with or on the child by another, not otherwise admissible by statute or rule, may be admissible in evidence if the requirements of subsection B are met.

B. An out-of-court statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:

a. The child's death;

b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;

c. The child's total failure of memory;

d. The child's physical or mental disability;

e. The existence of a privilege involving the child;

f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; and

g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.

2. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

1. The child's personal knowledge of the event;

2. The age and maturity of the child;

3. Certainty that the statement was made, including the credibility of the person testifying about the statement and any apparent motive such person may have to falsify or distort the event including bias, corruption or coercion;

4. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

5. The timing of the child's statement;

6. Whether more than one person heard the statement;

7. Whether the child was suffering pain or distress when making the statement;

8. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

9. Whether the statement has internal consistency or coherence, and uses terminology appropriate to the child's age;

10. Whether the statement is spontaneous or directly responsive to questions;

11. Whether the statement is responsive to suggestive or leading questions; and

12. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the out-of-court statement.

(1988, c. 892, § 63.1-248.13:2; 2002, c. 747.)

Back

§ 63.2-1521. Testimony by child using two-way closed-circuit television.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283 or § 20-107.2, the child's attorney or guardian ad litem or, if the child has been committed to the custody of a local department, the attorney for the local department may apply for an order from the court that the testimony of the alleged victim or of a child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for the order at least seven days before the trial date.

B. The provisions of this section shall apply to the following:

1. An alleged victim who was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the trial; and

2. Any child witness who is fourteen years of age or under at the time of the trial.

C. The court may order that the testimony of the child be taken by closed-circuit television as provided in subsections A and B if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

1. The child's persistent refusal to testify despite judicial requests to do so;

2. The child's substantial inability to communicate about the offense; or

3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

Any ruling on the child's unavailability under this subsection shall be supported by the court with findings on the record or with written findings in a court not of record.

D. In any proceeding in which closed-circuit television is used to receive testimony, the attorney for the child and the defendant's attorney and, if the child has been committed to the custody of a local board, the attorney for the local board shall be present in the room with the child, and the child shall be subject to direct and cross examination. The only other persons allowed to be present in the room with the child during his testimony shall be the guardian ad litem, those persons necessary to operate the closed-circuit equipment, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

E. The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony.

Back

§ 8.01-399. Communications between physicians and patients.

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of Supreme Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

(Code 1950, § 8-289.1; 1956, c. 446; 1966, c. 673; 1977, c. 617; 1993, c. 556; 1996, cc. 937, 980; 1998, c. 314; 2002, cc. 308, 723; 2005, cc. 649, 692; 2009, c. 714.)

Back

§ 8.01-400.2. Communications between certain mental health professionals and clients.

Except at the request of or with the consent of the client, no licensed professional counselor, as defined in § 54.1-3500; licensed clinical social worker, as defined in § 54.1-3700; licensed psychologist, as defined in § 54.1-3600; or licensed marriage and family therapist, as defined in § 54.1-3500, shall be required in giving testimony as a witness in any civil action to disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge his professional or occupational services according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking professional counseling or treatment and advice relative to and growing out of the information so imparted; provided, however, that when the physical or mental condition of the client is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice shall be privileged, and disclosure may be required. The privileges conferred by this section shall not extend to testimony in matters relating to child abuse and neglect nor serve to relieve any person from the reporting requirements set forth in § 63.2-1509.

(1982, c. 537; 2005, c. 110.)

Back

§ 8.01-419.1. Motor vehicle value.

Whenever in any case not otherwise specifically provided for the value of an automobile is in issue, either civilly or criminally, the tabulated retail values set forth in the National Automobile Dealers' Association (NADA) "yellow" or "black" books or any vehicle valuation service regularly used and recognized in the automobile industry that is in effect on the relevant date, shall be admissible as evidence of fair market value on the relevant date.

The determination of value shall be subject to such other creditable evidence as any party may offer to demonstrate that the value as set forth in the NADA publication or any vehicle valuation service utilized by another party fails to reflect the actual condition of the vehicle and that therefore the value may be greater or less than that shown by the NADA publication or any vehicle valuation service.

(1993, c. 759; 2006, c. 402.)

Back

§ 8.01-420.2. Limitation on use of recorded conversations as evidence.

No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section shall not apply to emergency reporting systems operated by police and fire departments and by rescue squads, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62.

Back

§ 20-88.59. Special rules of evidence and procedure.

A. The physical presence of a nonresident party who is an individual in a tribunal of the Commonwealth is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage.

B. An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them that would not be excluded under the hearsay rule if given in person is admissible in evidence if given under penalty of perjury by a party or witness residing in another state.

C. A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it and is admissible to show whether payments were made.

D. Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least 10 days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

E. Documentary evidence transmitted from another state to a tribunal of the Commonwealth by telephone, telecopier, or other means that does not provide an original record may not be excluded from evidence upon an objection based on the means of transmission.

F. In a proceeding under this chapter, a tribunal of the Commonwealth shall permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of the Commonwealth shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.

G. If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

H. A privilege against disclosure of communication between spouses does not apply in a proceeding under this chapter.

I. The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this chapter.

J. A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child.

(1994, c. 673; 2005, c. 754.)

Back

§ 8.01-576.10. Confidentiality of dispute resolution proceeding.

All memoranda, work products and other materials contained in the case files of a neutral or dispute resolution program are confidential. Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy, including screening, intake and scheduling a dispute resolution proceeding, whether made to the neutral or dispute resolution program staff or to a party, or to any other person, is confidential. However, a written settlement agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the dispute resolution proceeding agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the dispute resolution proceeding, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-576.12 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

(1993, c. 905; 1994, c. 687; 2002, c. 718.)

Back

18.2-365. Adultery defined; penalty.

Any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor.

(Code 1950, §§18.1-187, 18.1-190; 1960, c. 358; 1975, cc. 14, 15.)

20-88.59. Special rules of evidence and procedure.

A. The physical presence of a nonresident party who is an individual in a tribunal of the Commonwealth is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage.

B. An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them that would not be excluded under the hearsay rule if given in person is admissible in evidence if given under penalty of perjury by a party or witness residing in another state.

C. A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it and is admissible to show whether payments were made.

D. Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least 10 days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

E. Documentary evidence transmitted from another state to a tribunal of the Commonwealth by telephone, telecopier, or other means that does not provide an original record may not be excluded from evidence upon an objection based on the means of transmission.

F. In a proceeding under this chapter, a tribunal of the Commonwealth shall permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of the Commonwealth shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.

G. If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

H. A privilege against disclosure of communication between spouses does not apply in a proceeding under this chapter.

I. The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this chapter.

J. A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child

Back

§ 20-49.3. Admission of genetic tests.

A. In the trial of any matter in any court in which the question of parentage arises, the court, upon its own motion or upon motion of either party, may and, in cases in which child support is in issue, shall direct and order that the alleged parents and the child submit to scientifically reliable genetic tests including blood tests. The motion of a party shall be accompanied by a sworn statement either (i) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties or (ii) denying paternity.

B. The court shall require the person requesting such genetic test, including a blood test, to pay the cost. However, if such person is indigent, the Commonwealth shall pay for the test. The court may, in its discretion, assess the costs of the test to the party or parties determined to be the parent or parents.

C. The results of a scientifically reliable genetic test, including a blood test, may be admitted in evidence when contained in a written report prepared and sworn to by a duly qualified expert, provided the written results are filed with the clerk of the court hearing the case at least fifteen days prior to the hearing or trial. Verified documentary evidence of the chain of custody of the blood specimens is competent evidence to establish the chain of custody. Any qualified expert performing such test outside the Commonwealth shall consent to service of process through the Secretary of the Commonwealth by filing with the clerk of the court the written results. Upon motion of any party in interest, the court may require the person making the analysis to appear as a witness and be subject to cross-examination, provided that the motion is made at least seven days prior to the hearing or trial. The court may require the person making the motion to pay into court the anticipated costs and fees of the witness or adequate security for such costs and fees.

(1988, cc. 866, 878; 1989, c. 598; 1992, c. 516; 1997, cc. 792, 896.)

§ 18.2-152.2. Definitions.

For purposes of this article:

"Computer" means a device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions. Such term does not include simple calculators, automated typewriters, facsimile machines, or any other specialized computing devices that are preprogrammed to perform a narrow range of functions with minimal end-user or operator intervention and are dedicated to a specific task.

"Computer data" means any representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared and is intended to be processed, is being processed, or has been processed in a computer or computer network. "Computer data" may be in any form, whether readable only by a computer or only by a human or by either, including, but not limited to, computer printouts, magnetic storage media, punched cards, or stored internally in the memory of the computer.

"Computer network" means two or more computers connected by a network.

"Computer operation" means arithmetic, logical, monitoring, storage or retrieval functions and any combination thereof, and includes, but is not limited to, communication with, storage of data to, or retrieval of data from any device or human hand manipulation of electronic or magnetic impulses. A "computer operation" for a particular computer may also be any function for which that computer was generally designed.

"Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, causes the computer to perform one or more computer operations.

"Computer services" means computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection therewith.

"Computer software" means a set of computer programs, procedures and associated documentation concerned with computer data or with the operation of a computer, computer program, or computer network.

"Electronic mail service provider" (EMSP) means any person who (i) is an intermediary in sending or receiving electronic mail and (ii) provides to end-users of electronic mail services the ability to send or receive electronic mail.

"Financial instrument" includes, but is not limited to, any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction authorization mechanism, marketable security, or any computerized representation thereof.

"Network" means any combination of digital transmission facilities and packet switches, routers, and similar equipment interconnected to enable the exchange of computer data.

"Owner" means an owner or lessee of a computer or a computer network or an owner, lessee, or licensee of computer data, computer programs or computer software.

"Person" shall include any individual, partnership, association, corporation or joint venture.

"Property" shall include:

1. Real property;

2. Computers and computer networks;

3. Financial instruments, computer data, computer programs, computer software and all other personal property regardless of whether they are:

a. Tangible or intangible;

b. In a format readable by humans or by a computer;

c. In transit between computers or within a computer network or between any devices which comprise a computer; or

d. Located on any paper or in any device on which it is stored by a computer or by a human; and

4. Computer services.

A person "uses" a computer or computer network when he attempts to cause or causes a computer or computer network to perform or to stop performing computer operations.

A person is "without authority" when he knows or reasonably should know that he has no right or permission or knowingly acts in a manner exceeding such right or permission.

Back

§ 18.2-152.4. Computer trespass; penalty.

A. It shall be unlawful for any person, with malicious intent, to:

1. Temporarily or permanently remove, halt, or otherwise disable any computer data, computer programs or computer software from a computer or computer network;

2. Cause a computer to malfunction, regardless of how long the malfunction persists;

3. **Alter, disable, or erase any computer data**, computer programs or computer software;

4. Effect the creation or alteration of a financial instrument or of an electronic transfer of funds;

5. Use a computer or computer network to cause physical injury to the property of another;

6. Use a computer or computer network **to make or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data,** computer programs or computer software residing in, communicated by, or produced by a computer or computer network;

7. —Repealed.]

8. **Install or cause to be installed, or collect information through, computer software that records all or a majority of the keystrokes made on the computer of another without the computer owner's authorization**; or

9. Install or cause to be installed on the computer of another, computer software for the purpose of (i) taking control of that computer so that it can cause damage to another computer or (ii) disabling or disrupting the ability of the computer to share or transmit instructions or data to other computers or to any related computer equipment or devices, including but not limited to printers, scanners, or fax machines.

B. Any person who violates this section is guilty of computer trespass, which shall be a Class 1 misdemeanor. If there is damage to the property of another valued at $1,000 or more caused by such person's act in violation of this section, the offense shall be a Class 6 felony. If a person installs or causes to be installed computer software in violation of this section on more than five computers of another, the offense shall be a Class 6 felony. If a person violates subdivision A 8, the offense shall be a Class 6 felony.

C. Nothing in this section shall be construed to interfere with or prohibit terms or conditions in a contract or license related to computers, computer data, computer networks, computer operations, computer programs, computer services, or computer software or to create any liability by reason of terms or conditions adopted by, or technical measures implemented by, a Virginia-based electronic mail service provider to prevent the transmission of unsolicited electronic mail in violation of this article. Nothing in this section shall be construed to prohibit

the monitoring of computer usage of, the otherwise lawful copying of data of, or the denial of computer or Internet access to a minor by a parent or legal guardian of the minor.

Back

§ 18.2-152.5. Computer invasion of privacy; penalties.

A. A person is guilty of the crime of computer invasion of privacy when he uses a computer or computer network and i**ntentionally examines without authority any employment, salary, credit or any other financial or identifying information**, as defined in clauses (iii) through (xiii) of subsection C of § 18.2-186.3, relating to any other person. **"Examination" under this section requires the offender to review the information relating to any other person after the time at which the offender knows or should know that he is without authority to view the information displayed.**

B. The crime of computer invasion of privacy shall be punishable as a Class 1 misdemeanor.

C. Any person who violates this section after having been previously convicted of a violation of this section or any substantially similar laws of any other state or of the United States is guilty of a Class 6 felony.

D. Any person who violates this section and sells or distributes such information to another is guilty of a Class 6 felony.

E. Any person who violates this section and uses such information in the commission of another crime is guilty of a Class 6 felony.

F. This section shall not apply to any person collecting information that is reasonably needed to (i) protect the security of a computer, computer service, or computer business, or to facilitate diagnostics or repair in connection with such computer, computer service, or computer business or (ii) determine whether the computer user is licensed or authorized to use specific computer software or a specific computer service.

Back

§ 20-146.10. Taking testimony in another state.

A. In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this Commonwealth for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

B. A court of this Commonwealth may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this Commonwealth shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

C. Documentary evidence transmitted from another state to a court of this Commonwealth by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

(1979, c. 229, § 20-141; 2001, c. 305.)

Back

§ 8.01-390.1. School records as evidence.

In a proceeding where a minor's school records relating to attendance, transcripts or grades are material, copies of such school records solely relating thereto shall be received as evidence in any matter involving the custody of that minor or the termination of parental rights of that minor's parents, provided that such copies are authenticated to be true copies by the custodian thereof, or by the person to whom the custodian reports if they are different. All other school records in any matter involving custody or termination of parental rights may be authenticated to be true and accurate copies by the custodian thereof, or by the person to whom the custodian reports if they are different. An affidavit signed by the custodian of such records, or by the person to whom the custodian reports if they are different, stating that such records are true and accurate copies of such records shall be valid authentication for the purposes of this section. Except for copies of report cards and letters previously sent to parents, subjective information, including observations, comments or opinions shall be redacted, by the court, from any records prior to admittance of the records into evidence pursuant to this section. Any party seeking to introduce records authenticated by affidavit under this section shall deliver notice and a copy of such records to the other parties so that they are received not less than seven days prior to the introduction of such records.

(2000, c. 558; 2009, c. 212.)

Back

§ 18.2-386.1. Unlawful filming, videotaping or photographing of another; penalty.

A. It shall be unlawful for any person to knowingly and intentionally videotape, photograph, or film any nonconsenting person or create any videographic or still image record by any means whatsoever of the nonconsenting person if (i) that person is totally nude, clad in undergarments, or in a state of undress so as to expose the genitals, pubic area, buttocks or female breast in a restroom, dressing room, locker room, hotel room, motel room, tanning bed, tanning booth, bedroom or other location; or (ii) the videotape, photograph, film or videographic or still image record is created by placing the lens or image-gathering component of the recording device in a position directly beneath or between a person's legs for the purpose of capturing an image of the person's intimate parts or undergarments covering those intimate parts when the intimate parts or undergarments would not otherwise be visible to the general public; and when the circumstances set forth in clause (i) or (ii) are otherwise such that the person being videotaped, photographed, filmed or otherwise recorded would have a reasonable expectation of privacy.

B. The provisions of this section shall not apply to filming, videotaping or photographing or other still image or videographic recording by (i) law-enforcement officers pursuant to a criminal investigation which is otherwise lawful or (ii) correctional officials and local or regional jail officials for security purposes or for investigations of alleged misconduct involving a person committed to the Department of Corrections or to a local or regional jail, or to any sound recording of an oral conversation made as a result of any videotaping or filming pursuant to Chapter 6 (§ 19.2-61 et seq.) of Title 19.2.

C. A violation of subsection A shall be punishable as a Class 1 misdemeanor.

D. A violation of subsection A involving a nonconsenting person under the age of 18 shall be punishable as a Class 6 felony.

E. Where it is alleged in the warrant, information, or indictment on which the person is convicted and found by the court or jury trying the case that the person has previously been convicted within the 10-year period immediately preceding the offense charged of two or more of the offenses specified in this section, each such offense occurring on a different date, and when such offenses were not part of a common act, transaction, or scheme, and such person has been at liberty as defined in § 53.1-151 between each conviction, he shall be guilty of a Class 6 felony.

(1994, c. 640; 2004, c. 844; 2005, c. 375; 2008, c. 732.)