Fairfax County Circuit Court
Preferred Criminal Law Practices

I. Objectives

1. To expedite the efficient resolution of criminal cases.

2. To reduce the number of unnecessary continuances while providing both the Commonwealth Attorney's office and the defense bar with appropriate guidelines as to when continuances generally will and will not be granted.

3. To establish effective procedures for the resolution of sentencing, revocation and motions hearings on Friday Motions Days.

4. To reduce unnecessary expenditures in criminal cases.

5. To establish an appropriate dialogue between the Bench, the Commonwealth and the defense bar, to consider future changes to Circuit Court criminal procedures that will aid in the prompt but just resolution of criminal cases.

II. Preferred Practices

1. Expedited Discovery.

In order to further the goals of the implementation of these Preferred Criminal Law Practices, the Office of the Commonwealth Attorney of Fairfax County has agreed to provide discovery in most cases before such discovery could potentially be ordered by the Circuit Court. Form discovery orders will be brought to each preliminary hearing by the Commonwealth Attorney prosecuting the case. If the case is bound over for action by the grand jury or if the defendant intends to waive grand jury and plead guilty in Circuit Court, a proposed discovery order will be presented to defense counsel. If defense counsel endorses the order, counsel will arrange a mutually convenient date and time for a discovery conference where discovery will take place. Whenever practicable, the conference will be held in advance of the meeting of the grand jury. The Commonwealth Attorney's office has agreed to hereinafter request that detectives in charge of criminal investigations bring to the preliminary hearing copies of any of the following that are within the custody of the police: 1) any written statement or confession made by the defendant; 2) a list of any tangible objects that the detective believes is relevant to the Commonwealth's case so that the prosecutor can determine as early as reasonably possible what tangible evidence the Commonwealth will seek to introduce in its case in chief at trial; 3) any analyses discoverable under Rule 3A:11(b)(1)(ii); and 4) the defendant's criminal

record. In those cases in which the defendant will be waiving grand jury and pleading guilty within the ensuing two weeks, the Commonwealth will attempt to have these documents turned over to defense counsel the day of the preliminary hearing, if practicable, but no later than the day before the defendant is scheduled to enter a plea of guilty in Circuit Court. In all other cases, counsel will discuss whether this information should be turned over to defense counsel at or before the discovery conference.

In those cases in which defense counsel declines to sign a discovery order obligating the defense to provide reciprocal discovery, the Commonwealth will not be expected to voluntarily provide discovery. In the event that defense counsel contends that the defendant is entitled to broader discovery than the discovery set out in the form discovery order, counsel may file a motion seeking such additional discovery in Circuit Court. Endorsement of the form order by defense counsel will not bar a request for further discovery by duly noticed motion in Circuit Court.

The form discovery orders will be transmitted by the Office of the Commonwealth Attorney to the Chief Judge of the Circuit Court. Upon the return of an indictment, the Chief Judge or his designee will enter the form discovery order in that case.

In those cases where discovery can be effected pre-indictment and the defendant is going to plead guilty, defendants are encouraged to either waive indictment and plead guilty, or plead guilty in the week following term day. The prosecutors and defense attorneys can then concentrate their efforts for the remainder of the term on those cases which are more likely to proceed to trial. If discovery has been completed, motions can also be noticed for hearing earlier in the term because the discovery of statements or tangible items will have been effected at an earlier time. As a result, the parties will be in a much better position to determine at an earlier time whether a case will be tried or will be the subject of a plea of guilty.

2. Plea Agreements

At present, plea agreements are often made before the preliminary hearing in cases which are disposed of in the Circuit Court. Notwithstanding these plea agreements, detectives must appear for the Grand Jury, defendants and their counsel must often appear for term day, cases are often scheduled for trial instead of pleas of guilty, motions are sometimes filed and victims, police officers and jurors must often appear on the trial date at great expense to the criminal justice system. If in fact a plea agreement has been reached at the preliminary hearing, these cases should proceed through the Circuit Court on an expedited basis and needless time and expense should be avoided. It is unfortunately not uncommon for defense attorneys to set guideline probation cases for a trial date one to two months after the preliminary hearing even when their clients are incarcerated. It is further not uncommon for a defendant to renege on a plea agreement in the Circuit Court after charges were *nolle prosed* in the General District Court as a result of the plea agreement. In order to expedite the resolution of these plea agreement cases in

the Circuit Court, whenever possible, counsel and the defendant should consider waiving grand jury and setting the case for a guilty plea in the two weeks after the preliminary hearing. The case can be so docketed by choosing any date Monday-Wednesday that is at least two business days from the preliminary hearing. After the preliminary hearing, defense counsel should proceed to the Office of the Commonwealth Attorney to set a date for a waiver of grand jury and guilty plea in Circuit Court. A list of bad dates (if any) for waivers of grand jury and guilty pleas in Circuit Court will be available. The Office Manager or designee in the Commonwealth Attorney's Office will contact the Criminal Docket Clerk in Circuit Court to assure that the case is docketed on the agreed date. If a problem exists defense counsel will be promptly notified.

If this procedure is implemented, needless time and expense for unnecessary grand jury proceedings will be obviated; victims and other witnesses will not have to continue to appear in Circuit Court based upon the uncertainty of whether a case will in fact be a plea of guilty rather than a trial; sentencing of defendants can be expedited so as to release defendants who are granted probation and relocate those defendants to the penitentiary system who will be sentenced to the penitentiary; and the Court, Commonwealth Attorney's office and the defense bar will be able to devote more of their resources to those cases that are actually going to trial.

All defense attorneys should discuss the ramifications of pleas of guilty with defendants and should review the Plea of Guilty form with the defendant <u>in advance of the hearing date</u>. Blank Plea of Guilty forms can be obtained from the Clerk of Court or the Office of the Commonwealth Attorney. When the Judge calls the case on the hearing date, defense counsel should be prepared to tender the fully executed form to the Judge.

3. Continuance Policy

The judges of the Court have already determined that we may have been too liberal in granting continuances in criminal cases. In order to assure fairness, we are establishing guidelines to allow both the Commonwealth and the defense to have a basis for determining whether a case generally will or will not be continued, so that neither side will be unprepared to promptly resolve the case because of an unrealistic expectation that the Court will grant a continuance. The following are examples of cases where a continuance will <u>generally</u> be granted: 1) the unavoidable unavailability of counsel; 2) the unavailability of a material witness <u>who has been subpoenaed</u> to testify at trial; 3) the existence of a plea agreement which calls for the defendant to testify against a co-defendant at the co-defendant's trial.

The following are examples of reasons which <u>generally</u> will not support a continuance: 1) that counsel is unprepared to proceed to trial for reasons including but not limited to the defendant's failure to maintain necessary contact with counsel; or the failure to timely subpoena witnesses for trial; 2) the failure to schedule suppression motions on a timely basis; 3) that a police officer or other witness is either in training or is scheduled to

be on vacation unless the Court is advised of the conflict soon after the case has been scheduled and well in advance of the trial date; 4) the defendant's failure to provide the name and address of a witness whom the defendant determines is a material witness until after defense counsel has lost the opportunity to subpoena the witness; 5) that on the morning of the date set for the entry of a guilty plea, the defendant decides to try the case, unless the Commonwealth is not prepared to proceed to trial that day; 6) that the case is a misdemeanor appeal that has never been continued. All misdemeanor appeals which are continued will be continued to a trial date within three weeks, absent extraordinary circumstances.

All requests for continuances should be made at the earliest possible time. If a trial date is set at the preliminary hearing which conflicts with counsel's schedule, the continuance request should be made within one week of the preliminary hearing so that the trial can be scheduled in that term of court.

Each judge will retain his/her discretion to deviate from these general guidelines in an appropriate case.

4. Realistic Scheduling of the Docket

Each day Monday through Wednesday, the judges who are scheduled to hear criminal cases are generally given two to three jury trials. On a typical day, one or two of the judges winds up with no jury trials while the other(s) winds up with one jury trial. In November 2009, we reviewed the docket for the preceding two weeks to determine the number of jury trials that had been scheduled and the number of trials that in fact had been heard by a jury. Although these two weeks may not be entirely consistent with what takes place in other weeks, they are not very far from the average.

	Jury Trials Scheduled	**Actual Jury Trials**	**Scheduled Jury Trials Which Became Guilty Pleas**	**Jury Trials Continued**
November 2	1	1		0
November 9	4	3	0	1
November 16	1	0		1
November 23	4	2	2	0
November 30	2	1	1	1
December 7	7	2	4	1

Notwithstanding protestations to the contrary from some attorneys, it remains clear that decisions whether a case will or will not actually be tried are often being made the day or night before trial, when they could and should have been made days in advance. Needless work is done by attorneys preparing for the cases. Witnesses and jurors are unnecessarily brought to the courthouse at tremendous expense. The Court's docket cannot be realistically arranged. The judges are aware that sometimes things occur at the last moment which causes cases to become pleas that otherwise would have been trials. However, absent unexpected circumstances arising the day before or the morning of trial, the Court and counsel should know at least two days in advance of trial, which cases will be pleas and which cases will in fact be trials. As a result, in each felony case scheduled for trial, no earlier than four business days and no later than 1:00 p.m. two business days before the morning when the trial is scheduled, defense counsel must execute and file in the office of the Clerk of Court, the Fairfax Circuit Court Criminal Case status Form stating that defense counsel in good faith believes that the case will be (a) a guilty plea, (b) a trial without a jury with the concurrence of the commonwealth, (c) a trial by jury or (d) cannot be determined because the defendant has (1) not maintained contact with counsel so that counsel can file the form in good faith, or (2) the defendant has not authorized counsel to file the form designating the status of the case as (a) a guilty plea, or (b) a bench trial or (c) a jury trial. Each defendant who has been released on bond will have as a special condition of the bond, that the defendant maintain contact with defense counsel and authorize defense counsel to timely file the Criminal Case Status Form in good faith. If the Commonwealth intends to move to *nolle prose* or otherwise dismiss the charge, defense counsel should be so advised at the earliest possible date. If any plea offer will be extended in Circuit Court, the assistant prosecuting the case should in good faith advise defense counsel at the earliest possible time.

If the prosecutor and defense counsel proceed in good faith, the Court should be able to set up its docket each day much more realistically. Unnecessary trial preparation can be avoided by the attorneys, and the victims, citizen witnesses and police officers, whose appearances would have been required, can be excused from appearing, if the case in fact will be a guilty plea. This procedure is not intended to preclude defense counsel from making strategic decisions with his or her client, such as, when there is a real question as to whether the Commonwealth's material witnesses will in fact appear for trial (the judges of the Court will generally grant a continuance upon the non-appearance of a material witness who has been <u>timely</u> subpoenaed).

The judges of the Court strongly encourage all defendants who will be pleading guilty, to advise the Court at the earliest possible opportunity of his or her intention to do so. As the victim can be advised at an earlier time that the additional potential trauma of a trial will not take place and the cost of bringing police officers and jurors to court can be obviated, the judges will favorably consider at sentencing those defendants who, without plea agreements, advise the Court and the Commonwealth at least two days before trial, that they will be pleading guilty.

Not infrequently, defendants fail to appear for trial. Many times these cases are scheduled for jury trials and the witnesses and jurors have been brought to court. Often, after listening to counsel it becomes clear that the defendant has not been in touch with counsel for an extended period of time and counsel has been put in the dilemma of either preparing for a trial that almost definitely will not take place, or running the risk that the defendant will appear on the trial date and counsel will be unprepared for trial. As set out in the Continuance Policy section of this memorandum, if the Commonwealth's witnesses are present, the judges generally will not grant a continuance.

To avoid this situation from occurring, any attorney who has not had contact with the defendant, notwithstanding counsel's efforts to make contact, may contact the Criminal Docket Clerk (246-4946) and request that the case be docketed for a date in advance of the trial date to determine its status. Counsel should then write to and call the defendant to advise of this court date as the defendant's appearance at all court hearings is a condition of the defendant's bond. If the defendant appears, the case will be removed from the docket; counsel can discuss the status of the case with the defendant and can then advise the court at the appropriate time whether the case will be a trial or guilty plea. If the defendant does not appear, the case may be removed from the docket for the trial date, and a bench warrant may be issued. As a result, witnesses and jurors will not unnecessarily be brought to court, both the prosecutor and defense counsel will not have to prepare unnecessarily for trial and the defendant will not run the potential risk of going to trial without defense counsel being adequately prepared.

5. Motions Procedures

A. All criminal motions will be filed in the Criminal Division of the Office of the Clerk of Court. It will not be necessary to file any motions with the Criminal Docket Clerk or in judges' chambers.

B. Bond reduction motions in felony cases can be noticed for hearing Monday-Friday by filing a notice and the motion in the Criminal Division of the Clerk's Office by noon the day before the hearing and serving copies of such pleadings on the Office of the Commonwealth Attorney by the same time. Courtesy copies should also be delivered to Pre-trial Services to assure delivery of the defendant's Demographic Information and Virginia Pre-Trial Risk Assessment Sheet (background information obtained after defendant's arrest a/k/a the blue sheet). Bond reduction motions in misdemeanor cases can be noticed for any day by utilizing the same procedure. All such motions must state the Circuit Court Criminal case number or have a copy of the petition or warrant attached. The motion should state the present bond for each of the charge(s).

If the case is not then pending in the Circuit Court, the motion must state: (1) the case number(s) from the General District Court or Juvenile Court; (2) the next court date and hearing time; and (3) the date of the alleged offense(s).

C. Each Friday, the Chief Judge will designate one or more judges to hear criminal motions. All criminal motions, (other than suppression motions or other motions where counsel for the moving party needs more than ten minutes to argue), should be noticed for 9:00 a.m. The Court will attempt to hear those [shorter] motions before 10:00 a.m. so that the designated criminal motions judge(s) can begin hearing suppression motions or other [longer] motions promptly at 10:00 a.m.

D. In order to avoid scheduling problems, criminal motions can be noticed for a hearing before a grand jury returns an indictment as long as the hearing date is after the grand jury returns an indictment.

E. Counsel is strongly encouraged to utilize the Court's form discovery order, whenever possible to establish the discovery obligations of the parties. If the defendant contends that additional discovery is warranted in a case, counsel may file a Motion for Discovery, even if counsel has previously endorsed a form discovery order which has been entered. Any such Motion for Discovery should then set out the additional discovery sought and the basis therefore. The motion and notice should be filed in the Office of the Clerk of Court and delivered to the Office of the Commonwealth Attorney so that actual receipt by 4:00 p.m. on the Friday preceding the noticed hearing date is assured.

F. In light of the expediting of discovery, all suppression motions will require two weeks notice, absent leave of the calendar control judge. Attorneys are strongly discouraged from noticing suppression motions for the Friday before trial because it makes it much more difficult for the defendant to advise the Court and the Commonwealth in advance whether the case will be a trial or guilty plea. According to Rule 3A:9(b)(3) of the Rules of the Supreme Court of Virginia, all motions must state with particularity the ground or grounds on which it is based. Therefore, we will require that all motions to suppress set out 1) the statement(s) or tangible object(s) for which suppression is sought; and 2) at least the basis for the suppression (e.g. for statements - Miranda violation or coercion; for objects-lack of reasonable suspicion for the stop, lack of probable cause for the search or arrest, or invalidity of the search warrant, etc.). Absent leave of court, such motions in all felony cases and misdemeanors cases which are set to be tried with or without a jury, must be filed with the criminal clerk's office and served on the Office of the Commonwealth Attorney in a manner sufficient to assure actual notice by 4:00 p.m. on the Friday two weeks preceding the Friday for which the motion is noticed. All attorneys are strongly encouraged to file memoranda in support of motions to suppress setting forth at least the citations of all authorities that defense counsel intends to cite to the Court in support of the defendant's position.

By 4:00 p.m. on the Friday preceding the hearing, the Commonwealth shall file with the Clerk of the Court and serve counsel for defendant with a memorandum in opposition to each suppression motion in which a memorandum was filed by defense counsel, containing, at least, the citations of all authorities which the Commonwealth intends to argue in opposition to the motion.

The judges of the Court are aware that sometimes issues arise at suppression hearings that the attorneys could not anticipate, and therefore counsel who file such memoranda will not be limited to the cited authorities at the hearing. The judges will, however, expect all counsel to exercise good faith in setting out their authorities.

If either attorney believes that the presentation of a suppression motion or motions in a case will take longer than two hours, the attorneys should contact the calendar control judge to potentially set the hearing on a day other than a Friday.

Motions to suppress in misdemeanor cases which are to be tried without a jury must be filed and served on the Commonwealth Attorney in a manner to assure actual notice at least three business days before trial, and should be noticed for the trial date, absent leave of court.

G. As of 4:00 p.m. on the Friday preceding any duly noticed motion to suppress, the motion will not be continued or removed from the docket without leave of court. If a defendant wishes to withdraw the motion, the withdrawal shall take place in open court with counsel for the defendant and the defendant stating that the motion will not be refiled at any subsequent time. In order to determine whether one or more judges should be added to the criminal docket on a given Friday, the Chief Judge must know by Monday morning of that week, how many motions will actually be heard that Friday, so that he can weigh the need for judges for the criminal docket against the need for judges for the civil motions docket. In addition, it is the intent of the Court to take all reasonable steps to prevent judge shopping in criminal motions.

H. Too often at the beginning of jury trials, when the Court is attempting to impanel a jury, both prosecutors and defense attorneys are either exchanging written motions *in limine* for the first time or making oral motions *in limine*. Absent leave of court, for good cause shown, all motions *in limine* should be in writing and should be delivered to opposing counsel and to chambers no later than 4:00 p.m. on the day preceding trial. Motions *in limine* which will take more than thirty minutes to argue (both sides) should be presented on a Friday motion's day.

6. Misdemeanor Appeals

Presently, misdemeanor jury trials are heard Monday - Wednesday. Many *pro se* defendants do not understand the ramifications of requesting a jury trial, including the costs involved. Many of them never intend to go forward with a jury trial. As a result, all defendants or defense attorneys who request jury trials, upon noting an appeal, will be required to appear at Misdemeanor Term day which is held at 9:00 a.m. on the first Monday of the month following the month in which the appeal is noted. At that term day, a judge will explain the need for an understanding of the Court's procedures, the preparation of appropriate jury instructions and the cost involved and will then schedule those cases for trial. Any defendant who does not appear for this term day will have his or

her case set for trial without a jury. Defendant's wishing to appeal but not asking for a jury trial will receive a Circuit Court trial date when they note their appeal in the General District Court.

7. Requests for Transcripts

The Courts expenditures for transcripts have risen dramatically in the past few years. Although transcripts of all relevant proceedings must be prepared for purposes of appeals to the Virginia Court of Appeals and the Virginia Supreme Court, the costs for certain other transcripts can and should be minimized. The Court will no longer entertain *ex parte* motions for transcripts for preliminary hearings, pre-trial motions or trials except when notices of appeal have been timely filed. All requests for transcripts, if an appeal has not been noted, must be made by motion duly filed and served upon opposing counsel of record. Requests for expedited transcripts will be disfavored and will only be authorized when the circumstances of the case necessitate an expedited transcript. Requests for transcripts should be limited to those portions of the hearing or trial that are necessary for the specific matter that will be presented to the court. For example, a preliminary hearing transcript should be limited to the testimony of the relevant witness or witnesses, not the argument of counsel. Trial transcripts for purposes of post-trial motions should be limited to the specific witness(es) or trial ruling(s) which will form the basis for the post trial motion.

8. Fees for Expert Witnesses

The costs for expert witnesses retained by the Commonwealth and court- appointed counsel have also risen dramatically in recent years. Consequently, the Court will no longer authorize counsel to retain experts with an unlimited budget. Absent leave of court, requests for appointment of experts should be made by motion duly filed with notice to opposing counsel of record and should include the name, address and, if possible, curriculum vitae of the proposed expert, the scope of the matter(s) to be assigned to the expert and the expert's estimated fee and cost structure. Although the judges will obviously retain discretion to authorize sums in excess of the estimated fees and costs if the circumstances of the case so warrant, we will generally expect the expert to provide the requested services within the estimated budget. Submission for payment of fees for expert witnesses must be submitted to the Court for payment within thirty (30) days of the completion of all proceedings in the court for which the request is being submitted.

9. Transportation Orders

It is primarily the responsibility of defense counsel to timely advise the Court if the defendant is incarcerated in a jurisdiction other than Fairfax County. If defense counsel knows that the defendant is incarcerated elsewhere, counsel should promptly notify the Clerk's office of (1) the defendant's name; (2) the trial, hearing or sentencing date; and (3) the facility in which the defendant is incarcerated. A similar communication should be

contemporaneously forwarded to the Office of the Commonwealth Attorney. Form orders are also available in the Clerk's office and upon completion and filing at least three days before the hearing or trial date, will be forwarded to a judge for entry.

If counsel learns of the need for a transportation order less than three days before the hearing or trial, counsel should immediately so advise the Criminal Docket Clerk and the Office Manager or designee in the Office of the Commonwealth Attorney.

10. Interpreters

It is the responsibility of an attorney, who becomes aware that his/her client or witness does not speak English, to contact the Criminal Docket Clerk at 246-4946 to request an interpreter. The request should be made at the earliest possible opportunity, but no later than five business days before the trial or hearing and should include the defendant's name, the court date and the language (and dialect, if necessary) of the non-English speaking defendant/witness.

III. Establishment of Mechanism for Future Dialogue

Although this Bench and the Bar continue to collaborate and establish innovative procedures to help the Bench, Bar and litigants in civil matters, no such ongoing dialogue has been established in criminal cases. We hope that a permanent committee will be established consisting of one judge of the Circuit Court, the Public Defender or his designee, the Commonwealth Attorney or his designee and the chair of the Circuit Court committee's criminal subsection. This committee should meet at least twice a year to discuss areas of concern and possible implementation of procedures which could improve the system of criminal justice in the Fairfax County Circuit Court.

IV. Conclusion

We have given serious consideration to the concerns that each of you has expressed and sincerely feel that the above-proposed practices will provide a framework through which we can more efficiently and expeditiously resolve the criminal cases in the Fairfax Circuit Court.