THE HONEST GUIDE TO NAVIGATING A VIRGINIA FELONY CHARGE

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Important Note

Being charged with a felony is a big deal. This is a beginner's guide that attempts to provide you with information about the basic process in front of you. DO NOT read this guide and think you can handle representing yourself on a felony. Don't be a putz; You need a lawyer.

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What's The Difference Between A Felony And A Misdemeanor?

You probably already know that being charged with a felony is more serious than being charged with a misdemeanor. The most obvious reason is that felonies carry significantly harsher potential jail or prison sentences. But felony convictions have numerous other consequences that often receive less consideration. A felony conviction is a permanent mark on a person's record that labels them as dangerous and untrustworthy. Some of the most obvious and immediate consequences of a felony conviction in Virginia are: 1.) losing your right to vote, 2.) losing your right to possess a firearm, and 3.) facing deportation if you're not an American citizen. Even if you don't care about any of the above, there are other sweeping consequences. It's much harder to get a good job, loans, access to education, and housing. A great resource that explores negative collateral consequences of felony convictions in each state can be found at https://nicccc.csgjusticecenter.org. The truth is that in many ways, convicted felons are treated as second class citizens. If you or a loved one is charged with a felony, there is no question that it's a high stakes situation that can permanently affect your life.

Felony Punishments

Virginia breaks felony punishments into different categories or "classes."

Class 6 Felonies (Mandatory Minimums)

Class 6 felonies are the lowest class of felonies. The wording in the law is confusing because it initially says that Class 6 felonies are punishable by 1 to 5 years imprisonment. That leaves some people with the mistaken idea that the minimum punishment is 1 year in prison. However, that's not the case. The law goes on to say that "Alternatively, a judge or jury may decide to punish a Class 6 felony with confinement in jail for up to 12 months and a fine of not more than $2,500, either or both." In other words, Class 6 felonies carry between 0 and 5 years and a fine of up to $2,500. An extremely important note is that several Class 6 felonies (such as DUI 3rd or Subsequent Offense, Assault and Battery on a Law Enforcement Officer, and Possession of Firearm by a Felony carry mandatory minimum sentences. We'll get into that later.

Some common Class 6 felonies without mandatory minimums are:

- **Petit Larceny 3rd or Subsequent Offense**

- **Domestic Assault and Battery 3rd or Subsequent Offense**
- **Strangulation**
- **Unlawful Wounding**
- **Felony Destruction of Property**

Class 5 Felonies

Class 5 felonies are the next rung up the punishment ladder. Class 5 convictions carry between 0 to 10 years and a fine of up to $2,500.

Some of the most common Class 5 felonies are:

- **Possession of a Schedule I or II Controlled Substance –** Drugs like cocaine, heroin, meth, and molly.
- **Possession of Marijuana With Intent to Distribute More Than ½ Ounce Less Than 5 Pounds**
- **Making a False Statement On a Gun Purchase Form**

- **Felony Hit and Run –** Hit and Run can also be punished as a misdemeanor, but the felony version requires proof of either injury or property damage exceeding $1000.
- **Voluntary and Involuntary Manslaughter –** Believe it or not, recklessly killing someone falls under the same punishment category as possessing a small quantity of cocaine.

Class 4 Felonies

Unlike the first two classes, Class 4 felonies require a prison sentence. The court can punish a Class 4 felony with a sentence of anywhere between 2 to 10 years in prison. Additionally, the court may impose a fine of up to $100,000. However, it is extremely important to note that although a court is required to impose at least two years, the court can suspend that sentence unless the specific crime requires a mandatory minimum. We'll get into what a suspended sentence means a little bit later.

There aren't nearly as many Class 4 felonies compared to Class 5 and Class 6 felonies. Some examples are:

- **Arson of an Unoccupied Building**

- **Forging a Public Record**
- **Maliciously Shooting At Or Throwing Missile At Occupied Dwelling**

Class 3 Felonies

Anyone found guilty of a Class 3 felony must be sentenced to 5 to 20 years of imprisonment and is subject to up to a $100,000 fine. Again, it's important to note that although the sentence must be 5 years, some or all of that sentence can be suspended unless the law specifically says otherwise.

The most common Class 3 felony is:

- **Malicious Wounding**

Class 2 Felonies

Class 2 felonies are extremely serious and carry a punishment of 20 years to life in prison as well as a fine of up to $100,000. All Class 2 felonies are violent in nature.

A few examples of Class 2 felonies include:

- **1st Degree Murder –** The premeditated and malicious killing of another.
- **Aggravated Malicious Wounding –** Any malicious assault that results in a serious or permanent bodily impairment.
- **Bank Robbery With a Deadly Weapon –** Entering a bank, while armed, with the intent to commit larceny.
- **Armed Burglary –** Entering another person's home with a deadly weapon with the intent to commit a felony or larceny.

Class 1 Felonies

Class 1 felonies are the worst of the worst and are punished by life in prison or death. Capital murder is a Class 1 felony. Some examples of capital murder include murdering more than one person in the same transaction, murdering a pregnant woman, and murdering a police officer.

Unclassified Felonies

A common source of confusion is that Virginia has a number of unclassified felonies. Typically this will appear on a warrant as a

"Class U" felony. The punishment for unclassified felonies varies considerably.

Some common examples of unclassified felonies include:

- **Distribution or Manufacture of a Schedule I or II Controlled Substance –** This charge usually involves dealing drugs such as cocaine, heroin, meth, and molly. A conviction for a first offense requires 5 to 40 years in prison and up to a $500,000 fine.
- **Robbery –** A conviction carries 5 years to life in prison.
- **Rape –** A conviction carries 5 years to life in prison.
- **Burglary –** A conviction carries no time all the way up to 20 years.
- **Grand Larceny –** A conviction carries no time all the way up to 20 years.

Bond Hearings

Magistrate Bond Hearings:

Once you're arrested, you're going to be taken before the magistrate who will make an initial bond determination. What happens then hinges on a number of factors.

- **What Is Your Prior Record:** If you don't have much of a prior record and you're charged with a non-violent crime, you're going to be in a much stronger position to get a bond from the magistrate. For example, if you were caught shoplifting $550 worth of clothes from Macy's and it's your first offense, you're probably going to get a bond.
- **The Severity Of The Current Charge:** Certain charges carry a presumption against bond so that the magistrate will automatically deny bond. For example, if you're charged with Robbery, Rape, or Murder, you're not getting a bond from the magistrate under any circumstances. All of the charges carrying a presumption against bond are found in Virginia Code 19.2-120.
- **History Of Failure To Appear**: If you're been convicted of not showing up for court in the past, it can be a major obstacle to getting a bond from the magistrate.

- **Ties To The Area**: If you don't live in the area or have any meaningful ties to the area, it can be a major impediment to getting a bond because you may be considered a flight risk.

General District Court Bond Hearings

If you're denied bond by the magistrate, the next step is a bond hearing scheduled in front of a judge. Most felony charges are initiated by warrant which means that the General District Court (the lower court) will have jurisdiction over the first bond hearing. If the charge is brought by what is called "direct indictment," the charge goes straight to Circuit Court (the higher court) so your bond hearing will happen there. A major downside to being charged by direct indictment is that you will only get one chance in front of a judge to get a bond vs. two chances if the charge is brought by warrant.

A judge at a bond hearing is going to be looking at the same sort of evidence mentioned above: your prior record, the nature of the current offense, the strength of the evidence, your history of appearing in court, and your ties to the area. The bottom-line is that a judge is looking at two major factors: 1.) Whether there is probable cause to believe that you're a danger to the community if

released and 2.) Whether there is probable cause to believe that you present a flight risk.

Bond Hearings Are Extremely Important/Don't Waive An Attorney!

Bond hearings are often the single most important aspect of a criminal case. That statement would likely make even an experienced criminal attorney raise an eyebrow, but we've learned it's true. Can you imagine if you were thrown in jail today? What would happen to your kids? Who would pay the rent? How long is your employer going to keep your job? It's not an exaggeration to say that holding someone on no bond can do serious and irreparable harm to their life. The stakes at bond hearings are incredibly high.

That stands in sharp contrast to how the system and the players in the system often treat bond hearings. In many jurisdictions, there is no public defender present at arraignments. Many defendants waive having an attorney and go forward with a bond hearing alone. Don't be one of those people! You need a lawyer involved in your case as early as possible. A competent lawyer will know how to present a plan of action to give you the best chance of getting out on bond. Depending on the circumstances of your case, that plan might include pre-trial supervision, drug/alcohol treatment, and GPS monitoring.

Appeal Bond Hearings

If you're denied bond in the General District Court, you are entitled to appeal to the Circuit Court where another bond hearing will take place in front of a different judge. The Circuit Court bond hearing is the last bond hearing that your are entitled to by law. If you're denied bond in Circuit Court, there are ways to request a reconsideration of your bond status, but it's going to require a "material change in circumstances." That means things like new favorable evidence, the prosecution continuing the case over your objection, or witnesses changing their stories. The Circuit Court bond hearing should be regarded as your last realistic shot to be released while the case is pending.

The First Step: Preliminary Hearing

The first step in a felony prosecution is usually a preliminary hearing. Preliminary hearings are extremely important to criminal defendants. Despite an oft repeated quote by some GDC judges that preliminary hearings are "not a discovery hearing," that's exactly what they are in reality. In fact, it's often the defense's only opportunity to hear testimony from the key witnesses prior to trial.

Prior to the preliminary hearing, your attorney will file a motion for discovery. The prosecution will then be required to provide information about the evidence against you.

In a felony case, the quality of the discovery response is highly variable.

The only things that the prosecution is required to give you are:

- Statements you made to the police;
- Your criminal history;
- Any exculpatory evidence (favorable evidence tending to show that you didn't do it)

Different cities have different discovery policies. Some jurisdictions give defense attorneys the bare minimum required by law. Others will let you have access to their whole file. Even within the same city, different prosecutors often treat discovery in different ways. Be prepared that the court system moves at a snail's pace. It's not uncommon for it to take months to get the discovery response. It's also not unusual for the court date to be pushed back multiple times.

Once you've received the discovery and gone over it with your attorney, the first actual court date will be the preliminary hearing. So what's a prelim? The short version is it means you were

charged with a felony and the General District Court (lower court) needs to decide whether there's enough evidence to justify sending the case to Circuit Court (higher court) for final resolution. It boils down to whether the prosecutor has evidence against you that rises to the level of probable cause. The probable cause standard might as well be: "Is there any actual evidence that you did it?" Almost all cases end up being certified to Circuit. Even if your lawyer has an amazing argument at prelim about how weak the evidence is, the standard reply from GDC judges is usually, "That sounds like a great argument for Circuit Court." And then they send it to Circuit Court. You should never dump your attorney solely because the case moved forward after a preliminary hearing. Almost every case moves forward, and felony cases are not typically "won" at this stage. The preliminary hearing is really about getting a sneak preview of the prosecution's case and gaining as much information as possible about the evidence against you.

You have 2 options at preliminary hearing stage:

1. You can do the prelim and make the prosecutor put on enough evidence against you to establish probable cause; or
2. You can "waive" your right to a prelim (meaning you agree not to have a hearing and the case goes to Circuit Court).

The most common reason someone would waive preliminary hearing is that they have a plea agreement worked out with the

prosecutor and waiving is part of the agreement (saves them from dragging witnesses into court, doing a hearing, etc.).

The major benefits of doing the preliminary hearing are:

- Your defense gets a golden opportunity to see and hear the key witnesses in person
- Your attorney gets to cross-examine the Commonwealth's witnesses
- The Commonwealth will often be forced into revealing its theory of the case; and
- Your attorney might find a glaring weakness in the state's evidence that leads to a better offer or a dismissal.

Having a knowledgeable and tactical attorney can make all the difference at prelim. A solid attorney will use rigorous cross-examination to get as much information as possible and to "lock in" the opposing witnesses' testimony. They'd also take note of the demeanor and believability of the opposing witnesses in order to better assess the strength of your case.

Doing a prelim is a lot like playing a poker game. Except in this version, you get to peek at your opponent's cards without having to show yours in return. In 99.9% of prelims, a solid defense attorney won't be calling any witnesses in your defense. With rare

exception, there's simply no benefit to revealing your strategy or theory of the case when you aren't required to do so. For the most part, your role as the defendant at preliminary hearing is simply to shut up and let your attorney do the talking.

There are attorneys out there who will promise you that they'll "win" your case at prelim. This is typically a bait-and-switch (not to mention unethical since attorneys can't promise results). Considering most cases get certified to Circuit, it is extremely easy for an attorney to stand in at a preliminary hearing, ask a few questions, collect their fee, and then quote you a ridiculous amount to handle the actual "meat" of the case (i.e., the impending trial in Circuit Court). If an attorney is telling you that the case is going to be dismissed for sure at the preliminary hearing, they're not shooting you straight.

Even worse, some attorneys take your money, tell you to waive your prelim (with nothing in return from the prosecutor), and never touch the case again. This results in 1.) The lawyer getting paid without doing any work; and 2.) You losing out on an excellent opportunity for a competent lawyer to cross-examine witnesses.

We're not saying that you should never waive your preliminary hearing. There are some scenarios where it's the best way of getting the most favorable plea agreement terms. What we are saying is that there is almost no scenario where it makes sense to waive a preliminary hearing if you're not getting anything in return. Before you waive prelim, your attorney should be able to give you a detailed and logical explanation of what you're getting in exchange.

Direct Indictments

While most felony cases start with a preliminary hearing, some cases go directly to circuit court through a process called "direct indictment." The right to a preliminary hearing only applies to charges brought by warrant and not to charges brought by indictment. In other words, the prosecution has a way to get around your "right" to a preliminary hearing.

Does this make any sense? Of course not. Your "right" to a preliminary hearing isn't worth much when it's nothing more than a gift bestowed by the prosecution subject to revocation at their whim. That being said, any competent criminal defense attorney needs to be aware of the possibility of a direct indictment and how to best navigate around it.

Once The Case Reaches Circuit Court

Motions To Suppress Evidence

The most common motions involve arguments that the police violated your rights, and therefore, certain evidence should be held inadmissible at trial. Most of the time, defense attorneys will wait to file motions to suppress until the case is in circuit court. We could devote multiple volumes of books to possible motions, so we'll only cover the very basics here.

Relevant motions can include:

- Arguing that evidence was seized in violation of the 4th Amendment i.e. the police stopped you without reasonable suspicion and/or searched you or your property without probable cause;
- Arguing that statements you made to the police are inadmissible because you were not properly advised of your rights before questioning;
- Arguing that certain evidence is not relevant;
- Arguing for confidential informants to be revealed;
- Arguing for evidence not in the discovery response to be revealed;

- Arguing that the Court provide financial assistance for expert witnesses

The only limit to motions practice is imagination. We've filed hundreds of different motions in circuit court. Motions aren't relevant in every case, but they can be an invaluable tool. Even if you don't "win" motions, it can provide an opportunity to hear witnesses' testimony before trial and to make prosecutor's tip their trial strategy.

Pleading Guilty Vs. Going To Trial

There comes a time in every criminal case where a defendant must choose whether to plead guilty or gamble by going to trial. As it turns out, the overwhelming number of criminal defendants decide to fold 'em rather than face the government in court. According to the Virginia State Sentencing Commission, 91% of felony cases in circuit court ended in a guilty plea in 2018. And that's not even including felonies that are reduced to misdemeanors by plea agreement. Why are criminal trials so rare?

The simple explanation is that most folks get a better result by pleading guilty and cutting a deal with the government. The basic idea is that in exchange for giving up all their pesky constitutional rights, defendants get a more lenient result. The prosecution saves

time and resources, judges don't have to spend days on a single case, and the defendant spends less time in jail/prison. Everyone wins. Right?

Not necessarily. The problem is that trials are so rare that many criminal defense attorneys have very little experience actually fighting felony cases. The result is that many attorneys push their clients to plead guilty even when their clients have strong defenses and/or are facing weak cases.

So how do you know if you should go to trial? You need an attorney who is experienced taking felony cases to trial who can talk you through all of the potential advantages and disadvantages. Whether you should go to trial is highly dependent on the specific facts and circumstances of each case, but you need an attorney willing and able to fight if the situation calls for it. We have an entire separate guide devoted to helping you find the right defense attorney for your case. But here are some things to look for when hiring a felony criminal defense attorney:

1. What percentage of the attorney's practice is criminal defense? Unless the answer is close to 100%, I would look elsewhere. The guys in the courthouse who are experienced taking criminal cases to trial are the ones who live and breath nothing but criminal work. You can't afford to be represented by someone whose side-gig is criminal defense.

2. Does the attorney have felony trial experience? Even within the field of criminal defense, there are different areas of expertise. Some attorneys are primarily DUI attorneys. Some attorneys handle mostly traffic cases. Some attorneys handle mostly misdemeanors and certain low level felonies.

If you're charged with a felony, you need an attorney with significant serious felony trial experience. If an attorney lacks felony trial experience, they are operating at a tremendous disadvantage. The obvious problem is that the attorney can't competently represent you if the case goes to trial. But the problem is just as large when the case isn't heading toward a trial. What motivation does the prosecution have to give one inch in plea negotiations when faced with an opponent who never takes cases to trial? None. If the evidence against you is overwhelming, your only leverage is often a defense attorney who is willing and competent to take the case to trial.

3. Does the attorney have jury trial experience? Not all trial experience is created equal. An attorney might make bold claims that they've tried hundreds of cases. That sounds impressive but can be highly deceptive. District court misdemeanor trials are on a different planet than serious felony jury trials. You need an attorney with the right skill set for your situation. Ask your

prospective attorney how many felony cases they've taken to trial? How many of those were jury trials? Do they have transcripts demonstrating their work? You would be shocked how many "high profile" attorneys have minimal actual felony trials under their belt.

4. **Does the attorney have motions experience? Does the attorney see any possible relevant motions in my case?** Many cases are determined at the "motions" phase of a case. For instance, a successful motion to suppress evidence can sabotage a prosecution's entire case. Even "losing" motions can be highly effective. A motions hearing can provide the opportunity to hear the testimony of witnesses prior to trial. A motion can make the prosecutor more likely to make a favorable offer. If an attorney ever tells you something like "motions always get denied" or "motions never work," you should run not walk out of his or her office. I would also recommend asking prospective attorneys for samples of their written motions and legal memorandums.

5. Is the attorney knowledgeable about state sentencing guidelines? State sentencing guidelines are often the single most important factor in what the punishment will be in a felony case. We'll explain more about that in a bit. It is absolutely essential that an attorney handling a felony case have a detailed knowledge of how they work. If an attorney cannot have a highly educated

conversation with you about state sentencing guidelines, they should not be handling your felony case.

6. **Does the attorney have experience using expert witnesses?** A credible defense expert can be extremely effective in certain cases. We've worked with computer forensics experts, SANE nurse experts, firearms experts, DNA experts, fingerprint experts, forensic pathology experts, alcohol blackout experts, eyewitness identification experts, and marijuana cultivation experts among others. While certainly not relevant to every case, a good expert witness can be the difference between guilt and innocence. Has your prospective attorney ever worked with expert witnesses? Is an expert witness possibly relevant in your case?

Bench Trial Vs. Jury Trial

If you've made the decision to fight the charges against you, the case will be set for a trial. One of the big decisions that needs to be made is whether to set the case for a bench trial or a jury trial. In a bench trial, a single judge listens to all of the evidence and makes the final decision on whether the prosecution has proven their case. In a felony jury trial, 12 jurors listen to all of the evidence and make the final decision on guilt vs. innocence. In order to reach a verdict, the decision of all 12 jurors must be unanimous. If they can't reach a unanimous agreement, it is a hung jury and a mistrial

is declared. The prosecution then chooses whether to try the case again.

The advantages of a jury trial

If the only question was picking the option that gives you the best chance of being found "not guilty," we would pick a jury trial in most cases. Our experience is that jurors are far likelier to be skeptical of criminal investigations and police officers than judges. If your case involves challenging the credibility of a police officer or arguing that their investigation was shoddy or biased, a jury is likely to be more receptive to your argument. The other major advantage is that you only need one juror on your side to prevent a conviction. Even if a jury is 11-1 in favor of a guilty finding, it's not enough to convict.

If juries are less likely to convict, then why are there so few jury trials in Virginia?

In fiscal year 2018, only about 1% of felony convictions were the result of jury trials. So why are jury trials so rare? The reason that jury trials have nearly gone extinct is simple. Jury sentencing. Virginia is one of the only states in the country with a jury sentencing system. Only 5 other states - Arkansas, Kentucky, Missouri, Oklahoma, and Texas - currently use jury sentencing in

any form for noncapital felonies. Only Virginia and Kentucky employ a mandatory jury sentencing scheme.

So what's the big deal with jury sentencing? Jury sentences are far more unpredictable than judge sentences. To the extent that there is any predictability, they are predictably harsh. In 2016, 48% of jury sentences were above the high end of state sentencing guidelines compared to only 9.1% of judge sentences. In 2017, 46% of jury sentences were above the state sentencing guidelines (we'll explain more about sentencing guidelines later) compared to only 8.6% of judge sentences. In other words, defendants who had a jury trial and lost were about 5 times more likely to be sentenced above their state sentencing guidelines compared to defendants who had bench trials.

Why are jury sentences so arbitrary and harsh? Because jurors have zero experience with sentencing and they receive zero guidance. By law, juries don't get sentencing guidelines. That's right. The same sentencing guidelines that are required in all felony cases in Virginia and that are routinely relied on by judges don't go to juries. Our sentencing system is to send 12 amateurs into a room, let them flail around blindly, and have them pick a number. It's a recipe for insane results and that's what we often get.

While jury sentencing makes a jury trial extremely risky in certain cases, the risk is smaller in other situations. For example, class 5 and 6 felonies don't require that a jury impose jail time. If you have a client with a sympathetic story, you might not be as concerned about a renegade jury dropping the hammer at sentencing. In other cases such as murder, the risk can be lowered because you're going to get a massive sentence regardless if you're found guilty. A competent felony defense attorney can talk you through the risk to reward ratio for your particular circumstances so that you can make an educated decision. If an attorney tells you that jury trials never make sense, they're either not telling you the truth or don't know what they're talking about.

The Wildcard Of The Prosecution's Right to a Jury Trial

Another strange quirk of Virginia's system is that it gives prosecutors the right to ask for a jury trial. Confused? You should be because the U.S. Constitution only provides the right to a jury trial to criminal defendants. However, the Virginia Constitution has been interpreted as giving the same right to prosecutors. The twisted result is that jury trials are often used as a threat by prosecutors who know full well that defense attorneys are often scared to death of jury sentencing.

Here's an example known all too well to defense attorneys who practice in Virginia Beach. The prosecutors by policy request jury trials on all possession with intent to distribute a schedule I or II substance cases (things like coke, molly, meth, and heroin). If the defendant has no record and pleads guilty, he'll likely be sentenced near the low end of his guidelines (something like 1 year if he doesn't have a terrible record). If the defendant takes the risk of going to jury trial and loses, the minimum jury recommendation is 5 years. Needless to say, there aren't many distribution trials in Virginia Beach.

How Plea Agreements Work

As mentioned above, the vast majority of felony cases end with a guilty plea. Most guilty pleas involve a plea agreement. Plea agreements are written contracts between the defense and the prosecution that say how the case is resolved. These are some examples of how a plea agreement might work:

- An agreement for a felony charge to be reduced to a misdemeanor;
- An agreement for a felony charge to be reduced to a lesser felony charge;
- An agreement for a certain number of charges to be dropped;

- An agreement that a defendant will receive a specific punishment;
- An agreement that the punishment will be capped at a certain number, i.e. the punishment cannot be higher than 6 months but the defense can argue for less;
- An agreement that the defendant will have to complete a certain program successfully in lieu of going to jail;
- Some combination of the items above.

The above are only examples of terms that are found in plea agreements. There are many, many different possible ways to structure a plea agreement. For some of our clients, the top priority is avoiding jail time. For others, it's avoiding a felony conviction. For others, it's avoiding a sentence that will result in losing employment. For others, it's about avoiding probation. Every client and every situation are different. It's important to have an attorney who will discuss your priorities and negotiate accordingly.

1st Offender Plea Agreements

One of the most common plea agreements is for a defendant to be placed on "first offender." First offender is found in Virginia Code 18.2-251. It allows for defendants charged with first offense drug

possession charges (even felonies like possession of cocaine, heroin, meth, molly) to avoid felony convictions. Defendants can only do first offender one time, and are only eligible if they have no prior drug convictions. Even a prior misdemeanor drug conviction such as possession of marijuana disqualifies you from first offender.

In a first offender agreement, the case is continued for one year. The defendant has to remain of good behavior for that year (meaning no new convictions), complete 100 hours of community service, complete treatment if required by a probation officer, have clean urine screenings, have a suspended driver's license for 6 months, and pay court costs. If all of the conditions are fulfilled, the charge is dismissed at the end of the year.

There are a lot of misconceptions about first offender. We are frequently asked by clients if they can get first offender for non-drug related charges. Unfortunately, the answer is no. First offender is only permitted for drug possession charges. That also means that first offender is also not available for defendants who are convicted of distributing drugs.

Deferred Findings

The idea behind deferred findings is to allow certain people to walk away with no conviction even when they're guilty (just like with the first offender). Unfortunately, deferred findings have become extremely controversial. While the state of the law is confusing, the most recent appellate cases in Virginia have suggested that deferred findings for guilty adult defendants are not permitted unless the General Assembly passes a law specifically allowing it. The only deferred finding law in Virginia for adults charged with felonies is the "first offender" law for drug possession discussed above.

This is a situation where it's important for an attorney to know the customs in the local court. While it is extremely, extremely rare, I have had isolated instances of judges agreeing to deferred findings for certain clients in non-violent felony cases. However, the majority of judges that I encounter will not even consider it for adult clients.

Juvenile Felony Deferred Findings

The juvenile system on the other hand is a completely different animal. Virginia law allows deferred findings for any juvenile charge. Even felonies. Even violent felonies. That means that there is much more flexibility in working out agreements where juvenile clients who are charged with serious felonies can still walk away with no record. If you're looking for an attorney for a juvenile

felony, it's important to find someone extremely familiar with the juvenile process.

Sentencing Guidelines

The sentencing guidelines are in theory a recommendation to the sentencing judge as to what an appropriate sentence would be. The general idea is that the guidelines promote consistency in statewide sentencing so that people charged with similar crimes who have similar records receive similar punishments whether they live in Roanoke, Richmond, Virginia Beach, etc. Almost every felony offense (about 95%) is covered by the sentencing guidelines . The sentencing guidelines are produced by taking a number of factors into consideration. By far the two most important factors are: 1. prior record and 2. the current crime charged. People charged with violent offenses and those with lousy prior records tend to have guidelines that are much higher.

While judges have the authority to ignore the guidelines, they rarely do. Judges are required to give written explanations anytime they depart from the guidelines. The result is that state sentencing guidelines very well could be the most important aspect of how much time someone convicted of a felony ends up serving. In 2016, 90.2% of felony sentences statewide in Virginia were within or above the guidelines recommendation. In Virginia Beach,

93.2% of felony sentences were within or above the guidelines recommendation. In other words, if you're convicted of a felony, your chances of being sentenced below the sentencing guidelines recommendation is slim.

That's why it's extremely important to have an attorney experienced with the nuances of guidelines. For example, let's say you're charged with robbery for which the guidelines are terrible. A reduction in charges from robbery to grand larceny can mean the difference between years in prison and months or less in prison. To give another example, let's say you're charged with Possession with Intent to Distribute a Schedule I or II Substance. Even with no prior record, the guidelines will start at a minimum of 7 months. Getting the charged reduced to simple possession can reduce to the guidelines to a recommendation of no jail time with probation. Those are only two very obvious examples. There are literally thousands of examples where having an attorney experienced with "massaging" the guidelines can be the only thing preventing you from serving months if not years in prison that you didn't have to serve.

Yet another reason you need an attorney who knows the guidelines backwards and forwards is that they're frequently calculated incorrectly. In Virginia, probation officers who prepare presentence reports also prepare sentencing guidelines. I've had too many cases to count where the guidelines contained errors that

hurt my client. If you're charged with a felony, you should absolutely talk to any prospective attorney about sentencing guidelines. If that attorney cannot have a highly educated conversation about state sentencing guidelines, you should run out of the office.

Mandatory Minimums

A number of felony charges carry mandatory minimum sentences. That means that a judge is required by law to put you in jail or prison for a certain minimum period of time. Mandatory minimums cannot be suspended. Some examples of felony charges carrying mandatory minimums include:

- **DUI 3rd or 4th Offense:** A third offense DUI within 10 years carries a mandatory jail sentence of three months. A third offense within 5 years carries a mandatory jail sentence of six months. It's important to note that these are *minimums*. A court can impose even more time. Any DUI conviction after a DUI 3rd felony is a 4th offense that carries a mandatory minimum of 1 year in prison.
- **Possession of Firearm by a Convicted Felon:** Possession of a firearm by a non-violent felon where the prior felony is within the last 10 years carries a mandatory minimum of 2

years in prison. A prior violent felony conviction triggers a mandatory minimum 5 years in prison.

- **Assault and Battery of a Law Enforcement Officer:** This carries a mandatory 6 months in jail.
- **Distribution of Schedule I or II Drug 2nd or 3rd Offense:** A second offense distribution charge carries 3 years mandatory minimum. A third offense carries 10 years mandatory minimum.

What Are Suspended Sentences

A suspended sentence means jail or prison time placed over your head for a certain period of time. For example, let's say that a defendant was convicted of distributing cocaine and sentenced to 10 years in prison with 9 years suspended conditioned on 5 years good behavior and compliance with supervised probation. That sentence would mean that the defendant would only serve 1 year. After being released he would have 9 years of time hanging over his head. If the defendant messes up within the good behavior period set by the court by committing a new crime or not complying with probation (things like not showing up for appointments, dirty urine screenings, changing addresses without permission), the court can impose some or all of the 9 year sentence.

Suspended sentences are extremely common in felony cases. In fact, almost every felony conviction will include some form of a suspended sentence. It is important to note that mandatory minimum sentences cannot be suspended. For example, if a defendant is convicted of assault and battery on a law enforcement officer, he is serving a minimum of 6 actual months behind bars no matter what.

Felony Appeals

Within 30 days of being convicted of a felony in circuit court, a defendant has the right to appeal to the Court of Appeals of Virginia. Most clients have no idea how vanishingly tiny their chances on appeal really are. Most envision getting a brand new trial. It doesn't work like that. There's no new trial and no new evidence. The truth that most attorneys won't tell you is that appeals almost always lose.

The first step in an appeal is writing the "petition for appeal." This is where the defense attorney writes arguments about how the trial court messed up and why the conviction(s) should be reversed. A single judge at the Court of Appeals reads the petition and either grants or denies it. If it's granted, it doesn't mean you've won. Far

from it. All that means is that a judge has deemed the issue worthy of further consideration. About 90% of criminal appeals are denied and die at this stage. If the petition is granted, you advance to the next step called the merits stage.

At the merits stage, the attorney general's criminal appeals division takes over for the local Commonwealth's Attorney's Office. The AGs have a tremendous home field advantage because they write tons of criminal appeal briefs and appear before the Court of Appeals judges far more frequently than any defense attorney. Both sides write briefs and make oral arguments before a panel of three Court of Appeals judges.

We've saved everybody the time and closely examined the success rate of appeals. Well over 95% of criminal appeals to the Court of Appeals result in wins for the prosecution. If a criminal defendant loses in the Court of Appeals, he has the right to appeal further to the Supreme Court of Virginia. If you can believe it, the chances for criminal defendants in the Supreme Court are even slimmer. In 2016, 99.63% of criminal appeals to the Supreme Court of Virginia ended in prosecution victories. Another mind- blowing stat is that almost 8% of criminal appeals to the Supreme Court in 2016 were dismissed for procedural defaults. In other words, the appeal was dismissed for technical reasons because the attorney screwed up by filing late or filing something that didn't follow the Supreme Court rules.

If money is no object to you, there is usually nothing to lose by appealing. That being said, it's important that you go into an appeal with your eyes wide open to the fact that getting a conviction reversed is a major longshot. If you take anything away from this reading this section, it is that appeals are expensive, time consuming, and almost always lose. If an attorney is trying to sell you on the idea that the best angle on your felony case is paying a massive fee for an appeal to the Court of Appeals, you should be skeptical.

Hiring A Private Attorney Vs. Public Defender For My Felony Case

As attorneys in private practice, we've come to fully appreciate the powerful social stigma attached to public defenders. A fairly typical consultation for us goes something like this:

Client: I need to hire you. I can't be represented by a public defender.

Us: Who is representing you?

Client: [fill in the name of public defender]

Us: She/He is a great attorney. I would hire them to represent me if I was in trouble.

Client: Yeah, but I can't be represented by a public defender.

Us: You know that both of us were longtime public defenders right?

Client: But you're not anymore, and I need a private lawyer.

This post probably doesn't help our business as private attorneys, but we want to set the record straight. The simple fact is that there is no better way to learn how to be a successful defense attorney than being a public defender. It's an occupation that throws you straight into the deep end of the courtroom and forces you to learn how to swim. Public defenders get more cases and more trial experience than anyone else. Let us make our point very clear: **Good public defenders are real lawyers. The realest lawyers. There are PDs who are better lawyers than almost any private attorney out there.**

That being said, some of the rumors about PDs are true: they are underpaid, overworked, underappreciated, and under-resourced. They bust their asses day in and day out and get little to no respect.

As a sad consequence, a lot of high quality public defenders don't stick around for the long term. And who can blame them? It takes an almost inhuman level of dedication to make a career out of something that society doesn't value at a fraction of your market value. In our experience, the result is that most public defenders will fall into one of a few different categories:

One category is the true believers who make it their life's work. These are the attorneys who have an undying passion to help the needy. They are highly qualified, believe in indigent defense, work extra hours, and value the impact they have on society. They respect the Constitution and show up to court ready to fight the good fight even if it means walking into a judicial buzzsaw. They believe that everyone deserves the best defense possible and, of course, they are ABSOLUTELY right.

Another category would be the eager to learn PD attorneys. They realize that there is no better way to become a great attorney than by being in court as much as possible and fighting whenever they can. They LOVE the good fight in the PD's office because it teaches them how to throw a nasty right hook (and how to take one too). They are ambitious, well-prepared, and consider themselves students of the game. Some attorneys in this category will fall in love with indigent defense and stick around. However, simple economics dictate that most leave to make more money in the private world once they've honed their skills.

The most unfortunate category is the comfort-zone lifers. This is the group that gives PDs a bad name. This group sticks around for less than ideal reasons like: the job has good health benefits, they know it's damn near impossible to get fired from a state job... and so on and so on. These are the attorneys that you don't want on your case. They've stopped doing the job (if they ever did it) and have become part of the conviction machine. They feel no shame pleading clients on an assembly line and rationalize why they haven't had a trial in 5+ years. The awful truth is that they almost never get fired and bring home the same paycheck as the PDs who actually put in the hard work of actually fighting for their clients.

So where does that leave a criminal defendant? If a family member or friend has the means to pony up for a private attorney, should they ditch the PD? The answer isn't always black and white. Our abbreviated attempt at a pros/cons list of having a private attorney over a public defender would be this:

PROS (of hiring a private attorney over having a PD):

- Good private attorneys will give you more personal attention. When we were PDs, we each typically carried caseloads of between 120-150 felony clients at any given time. A former public defender who we greatly admire compared being a PD to being a triage nurse. You have to

make an assessment of which clients are in direst need of your attention and the rest often get pushed to the back burner. Private attorneys, on the other hand, handle far fewer serious cases and are competing with other attorneys for your money. That means that successful private attorneys don't necessarily adhere to 9 to 5 hours and are more likely to make themselves available to address your concerns -- no matter how critical or trivial (after all, that's what you're paying them for).

- You can choose your attorney. If you're appointed a PD, you might get top-of-the-line representation but you also might get a schmuck. I doubt many in the PD world would dispute this point. Many are rock stars and some are duds. Of course, there are many in between. But the reality is, the court appoints you to the PD's office, the PD's office assigns an attorney, and you're stuck with who you've got. If you come to us or any other private defense attorney, you show up for a consultation, chat with us, and if you don't like us, you just hire someone else (or go with the PD's office if you qualify). Having the option of choosing an attorney you're comfortable with is an amazing luxury to have when your liberty is on the line.

- Public defenders are overworked and overextended. Well at least the good ones are because they're always trying to fight

for their clients -- all 120-150 of them. But no matter how great you are as an attorney, if you have more cases than you can handle, you're bound to slip up from time to time. In the PD world, cases and clients will, by necessity, become prioritized based on the PD's very finite resources of time and attention. The pay provided by the Commonwealth of Virginia (about $51,000 for an assistant PD with minimal opportunity for advancement) is a joke and leads to frequent turnover. Honestly, it's a pathetic shame that Virginia does not better prioritize the rights of indigent defendants.

CONS (of hiring a private attorney over a PD):

- There are many great public defenders. If you get one of these studs, your case will likely be handled thoroughly and competently. These attorneys make time to ensure they're prepared when they appear in front of a judge. Doesn't necessarily mean they'll give you peace of mind by returning all of your calls but they WILL be ready to go on your court date.

- Public defenders know their judges. Public defenders usually only practice in one city or county so that means they get to know all the idiosyncrasies and tendencies of the judges better than anyone else. Knowledge of these tendencies can be critical in a case. Some judges will take an argument like,

"Hey judge, it was just some marijuana," with a smile and an approving nod while other judges will BURY YOU AND YOUR SUPPORT OF ILLEGAL ACTIVITIES (along with your reputation) UNDER THE COURTHOUSE. Being "in the know" about the judge can make all the difference. Truth is, we often ask the PDs for intel when we find ourselves in an unfamiliar jurisdiction.

- Public defenders don't cost as much. If you win, you don't pay anything. If you lose, your court costs are still probably way less than what you'd pay a private attorney. There might be some truth to the old saying, "you get what you pay for," but for all the reasons in this post, you might luck out by being able to have your cake and eat it too if you go with the PD's office.

We have the utmost respect for the competent, well-prepared public defender. Anyone who says otherwise either hates poor people or hates the United States Constitution. The posting for the PD's job description is pretty much listed in the Sixth Amendment of the Bill of Rights. With that very full disclosure, we also know from decades of experience in the trenches that not all public defenders are created equal and that some clients are better served by private representation.

Things To Watch Out For When Hiring An Attorney

1. Beware an attorney who promises results.

"What's going to happen in my case?"

That's usually one of the first questions that we're asked by clients. And duh, We get it. Of course, that's why they called us.

However, there is usually no reliable answer in the first client interview. There are many, many variables in every case. The strength of the evidence, your prior record, the particular prosecutor, the particular judge, whether there are suppression issues, etc, etc. etc. If an attorney promises you that they'll get a certain result in the initial consultation, **run away**. Any honest attorney will tell you that all they can promise is to work hard to do everything possible to get you the best result.

We can't count how many cases we've had where a client was duped into hiring someone else based on false promises, only to come back to us later (several thousand dollars lighter) on to clean up the mess.

2. What does the fee include?

A number of attorneys charge "a la carte" fees. You pay one fee for bond hearing, a separate fee for each court appearance, a

separate fee for a preliminary hearing, a separate huge fee for a trial. We've had many clients come to us after they paid another attorney far more money than they bargained for. We're not saying that there is only way to come up with a fee structure, but it should be completely transparent at the beginning. Our belief is that an attorney taking on a felony case should be in it for the entire representation from start to finish no matter if the case ends up being complicated, gets continued four times, takes extra work out of the courtroom, or requires a jury trial.

The bottom-line is that you never want financial pressure to be a consideration in your decision-making process.

Ever.

The fact is, some people may be best served by taking a deal and pleading guilty. However, you should never feel pressured to make that decision because you can't afford a separate fee for a trial.

3. Am I going to be able to contact you directly when I have questions?

Many attorneys delegate most of their client interaction to paralegals or secretaries. After giving them your money, you might never hear from the attorney again, until you show up for court.

You don't want to put your future in the hands of an attorney who doesn't return your calls. We've learned from long experience that the best results come from working as a team with our clients. If

you have a question, or if something important comes up, you want to be able to communicate directly with the person representing you.

Dos and Don'ts When Hiring A Lawyer

When you start calling attorneys, there are some things you'll want to avoid saying.

- Don't start the conversation by saying the police were rude or violated your rights.
- Don't say that it's going to be an easy case.
- Don't tell the attorney that you're broke. This is how we feed our families.
- Don't ask for the attorney's "record" as though they're a boxer.

These are hallmarks of difficult and unrealistic clients that every criminal defense attorney can identify a mile away. Most attorneys won't touch your case with a twenty-foot pole or they will double the fee they quote you, because you come across as "high maintenance."

Instead, this is how you should handle yourself at the consultation:

- Show up to your appointment on time and dress nicely. It immediately sets you apart from 90% of the people

consulting with the attorney and sends a strong positive signal that you are someone worth taking on as a client.

- Talk about the facts of your case. Don't talk about the fee. Defense attorneys like interesting cases. We've ended up quoting low fees just because we're interested in the issues presented by a case.

- Be painfully honest with the attorney about the facts of the case. We've heard it all. Defense attorneys don't make judgments. It's refreshing to hear a client tell us the full story, warts and all. We'll probably give you a better fee quote.

- Let the attorney know that you're realistic about your expectations. Obviously different cases have different achievable outcomes. If you were caught red handed with five kilos of coke and three AK-47s, don't come to the meeting talking about how you won't settle for anything less than a misdemeanor with no jail time. Realistic clients get better fee quotes.

Final Thoughts

We hope that this information was useful to you. We've devoted our entire careers to defending criminal clients in the trenches of the criminal justice system; and we take our deepest pride in providing exceptional defense to clients charged with felonies.

If you're charged in Virginia Beach or anywhere else in the Hampton Roads area, feel free to give us a call. We give free consultations, and we're always 100% honest, even when it means that we end up turning away business.

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