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MEMORANDUM

TO: Circuit and District Court Judges
Commonwealth's Attorneys
Circuit and District Court Clerks

FROM: Robert N. Baldwin *RNB*
Executive Secretary of the Supreme Court of Virginia

DATE: January 14, 1999

RE: Guidelines and Model Form Contract for the Collection of Unpaid Fines, Costs,
Forfeitures, and penalties by Private Contractors

As directed by the 1998 Appropriations Act, a workgroup composed of representatives of the Department of Accounts, the Commonwealth Competition Council, the Commonwealth Attorney Services Council, the Auditor of Public Accounts, the State Compensation Board, the Department of Taxation, the Office of the Attorney General, the Supreme Court of Virginia, a private collection attorney, and court personnel, was established to develop procedures and guidelines and a model contract for the collection of delinquent court ordered fines, costs, forfeitures, and penalties by private collection attorneys or the Department of Taxation.

The enclosed GUIDELINES PROMULGATED PURSUANT TO VIRGINIA CODE §19.2-349 and the FORM FOR CONTRACTS CREATED PURSUANT TO VIRGINIA CODE §19.2-349 have been approved by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board.

The new language in the guidelines and form for contracts were developed to allow debtors to have the option of paying their debt at either the appropriate court or to the private collection contractor. If the debtor makes payments directly to the court, the compensation due to a private contractor for the collection of that account will be calculated at a rate three percentage points less than the amount agreed to in the contract by the Commonwealth's Attorney and the private contractor. It is the responsibility of the private contractor to notify the Director of Management Information Systems for the Office of the Executive Secretary of the Supreme Court of Virginia in writing of the percentage rate agreed to by the Commonwealth Attorney and the contractor within five business days of the effective date of the contract.

Pursuant to subsection E of item 22 of Chapter 1 of the 1998 Special Session of the General Assembly, the Office of the Executive Secretary of the Supreme Court (OES) has enhanced the automated financial management system (FMS) to accept payments made directly to the court by debtors. Additionally, procedures have been established for the clerks of all district and circuit courts to accept the remittance of unpaid delinquent court-ordered fines, costs, forfeitures, and penalties. Court clerks shall transmit to the private collection contractor on a weekly basis a record of all payments received during that period by the court directly from the debtor. The clerk will also include a check drawn on the court's account made payable to the private contractor which reflects all commissions due the contractor for payments received by the court during that period on accounts of the contractor and any necessary adjustments for items such as dishonored checks and disputed credit card payments. The commission check will be transmitted with the court's weekly report of payments received.

Once a contract has been executed by a Commonwealth Attorney and a private collection contractor or the Department of Taxation, the Commonwealth Attorney should promptly notify the Clerk of the appropriate court as to the effective date of the contract.

Should you have any questions regarding the guidelines or model form contract please contact the Department of Technical Assistance for the Office of the Executive Secretary of the Supreme Court of Virginia at (804) 786-6455.

Attachments

GUIDELINES PROMULGATED PURSUANT TO
VIRGINIA CODE § 19.2-349
October 1, 1998

PURPOSE OF GUIDELINES

The primary purposes of these guidelines are to provide the framework for Commonwealth's Attorneys to contract with a private contractor (a private attorney or a private collection agency) or the Department of Taxation for collecting unpaid fines, costs, forfeitures and penalties and, thereby to assist the Commonwealth's Attorneys in meeting their statutory duties under Virginia Code § 19.2-349 to make inquiry as to why such amounts are unpaid and, if they can be satisfied, to institute collection procedures. The guidelines are also designed to provide for an effective coordination of efforts among the courts, Commonwealth's Attorneys, and the contractors. This coordination includes fiscal accountability and proper reporting to ensure proper and timely crediting of payments.

These guidelines are authorized by Virginia Code § 19.2-349, which requires that all contracts must comply with guidelines promulgated by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board.

CONTRACT GUIDELINES

1. The contract made pursuant to Virginia Code § 19.2-349 is made between a contractor, either an attorney in private practice who is a member in good standing with the Virginia State Bar, a private collection agency or the Department of Taxation, and the Commonwealth's Attorney for the local jurisdiction. The contractor is an independent contractor and not an agent of the Commonwealth's Attorney. The contract contemplates that the contractor shall make reasonable and diligent efforts by lawful means to collect unpaid fines, costs, forfeitures or penalties in cases referred to a contractor by the Commonwealth's Attorney. Court-ordered restitution in a criminal case is not a debt contemplated under the contract. [See Form Contract Paragraphs 1, 2].

2. The contracting attorney may not subcontract to any other individual or agency unless co-counsel is required in those instances when the debtor is located in another state. Any such subcontract must be approved in writing by the Commonwealth's Attorney. This provision does not prohibit the use of other lawyers in the same firm or professional corporation. A contracting collection agency may not refer the account to another collection agency or to an attorney. [See Form Contract Paragraph 3].

3. The period of the contract will be twelve months. It may be renewed for no more than four additional twelve-month periods, provided such renewals are pursuant to prevailing terms and conditions as promulgated and amended by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation and the Compensation Board. The contractor will be compensated in an amount negotiated between the Commonwealth's Attorney and the contractor. Typically, this amount will not exceed 30 percent of all monies actually collected through the contractor's efforts. It is the responsibility of the contractor to notify the Office of the Executive Secretary of the Supreme Court of the compensation percentage rate agreed to by the Commonwealth's Attorney and the contractor. Such notification shall occur within five business days of the effective date of the commencement, renewal, or amendment of this contract. If the debtor makes payments directly to the court, the compensation due to a private contractor for the collection of that account shall be calculated at a rate which is three percentage points less than the amount agreed to by the Commonwealth's Attorney and the private contractor. [See Form Contract Paragraphs 4, 8].

4. Each account shall be transferred to the contractor at the time the contract is effective until the account is collected in full or until termination, whichever occurs first, subject to the provisions of Virginia Code § 19.2-341. The compensation due the contractor shall be calculated by the terms of the contract in effect at the time the payment is collected, even if the contractor had undertaken collection efforts on the account under a predecessor contract prior to the effective date of the current contract. [See Form Contract Paragraphs 8, 9].

5. Should the contract terminate for any reason whatsoever, the contractor shall return all accounts to the Commonwealth's Attorney together with a report containing the account status, address and employment information concerning the debtor, to the extent permitted by law. In addition, the contractor shall provide a schedule of all accounts which have been docketed in any circuit court. A copy of this report shall also be sent to the appropriate court. The contractor shall also file a final report in compliance with paragraphs 9 and 10 of the guidelines. After the contract has terminated, the contractor may not accept direct payments from the debtor and the contractor will not be compensated for any payments made to the court. The contractor may not begin collection efforts on any new accounts after the contract period has terminated. [See Form Contract Paragraphs 4, 7].

6. The contract is subject to amendment at any time by the provisions approved by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board. However, should any such required amendment be unacceptable to any party, that party may terminate the contract. The parties are bound to adhere to current guidelines as they are promulgated and/or amended by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board. Amendments to the guidelines will be sent to the contractor within five business days after receipt by the Commonwealth's Attorney. In general, either party may terminate the contract for any reason upon ninety days notice. If the contract is terminated, the contractor must return all unused forms which have been provided by the court for his use in his duties pursuant to the contract. [See Form Contract Paragraphs 5, 6, 7].

7. The clerk of the appropriate court will provide to the Commonwealth's Attorney a list of cases having unpaid fines, costs, forfeitures and penalties, hereafter called "accounts," which will be in the form of a list of judgments resulting from such cases. This list will be provided to the contractor by the Commonwealth's Attorney. The contractor will not be provided the file or copies of the files on a routine basis. However, the clerk will provide reasonable access to such files on a mutually convenient schedule with the contractor. [See Form Contract Paragraph 9].

8. The contractor has no authority whatsoever to compromise or settle a claim for less than the amount due, including interest. The contractor shall be responsible for calculating and collecting ongoing interest using interest tables provided by the appropriate court. [See Form Contract Paragraph 10].

9. (a) A private contractor shall make reports and disbursements to the clerk of the appropriate court no less frequently than on a monthly basis. A copy of these reports must be provided to the Commonwealth's Attorney for information purposes. The contractor may choose to make reports and disbursements more frequently than on a monthly basis. Each report, however, must be accompanied by a disbursement check to cover the monies collected by the private contractor since the last report filed. [See Form Contract Paragraphs 11, 12].

(b) Pursuant to subsection E of item 22 of Chapter 1 of the 1998 Special Session of the General Assembly, the Office of the Executive Secretary of the Supreme Court (OES) has established the following procedures for the clerks of all district and circuit courts to accept the remittance of unpaid delinquent court-ordered fines, costs, forfeitures and penalties:

On a weekly basis, the clerk of the appropriate court shall transmit to the private contractor a record of all payments received during that period by the court directly from the debtor. On a weekly basis, the clerk will draw a check on the court's account made payable to the private contractor which reflects all commissions due the contractor for payments received by the court during that period on accounts of the contractor and any necessary adjustments for items such as dishonored checks and disputed credit card payments. This check will be transmitted with the court's weekly report of payments received.

10. A private contractor may wait for a period of no longer than one monthly reporting period after receipt of a debtor's check to ensure payment on the debtor's check before report and disbursement of these monies to the clerk. No refunds will be made by the clerk to the contractor

for non-payment on a debtor's check. [See Form Contract Paragraphs 11, 12].

11. A private contractor must use forms which are approved by the OES. The contractor must use any new forms created by the OES, any forms as amended by the OES, and cease using forms withdrawn by the OES as such changes are implemented, without further amendment of the contract. Notification of formal changes shall be sent to the contractor within five business days after receipt by the Commonwealth's Attorney. [See Form Contract Paragraph 13].

12. The contractor shall not engage in any unethical or illegal actions in the collection of these accounts. A private contractor must agree to bear the liability for any errors, damages, or injuries that occur during the course of his contract and as a result of his contract work. The Commonwealth of Virginia and the Commonwealth's Attorney must be held harmless for any such damages. The contractor must also agree to retain all records for a period of at least five years and make the records available for inspection at any time by the Auditor of Public Accounts and/or by the Commonwealth's Attorney. [See Form Contract Paragraphs 14, 15].

13. At no additional cost to the Commonwealth of Virginia (including its courts and its Commonwealth's Attorneys), the contractor will bond or otherwise insure through insurers the faithful performance of all personnel in his office who may collect and disburse funds collected on unpaid fines, costs, forfeitures and penalties for at least \$10,000.00 each, or such higher sum as will provide coverage for collections, and shall provide documentary proof of such coverage to the Commonwealth's Attorney. The bond applicable to the Department of Taxation pursuant to Virginia Code § 58.1-201 shall satisfy this requirement. [See Form Contract Paragraph 16].

GUIDELINES FOR PARTIES TO THE CONTRACT

A. Only one contractor shall be under contract at any time to collect any unpaid fines, costs, forfeitures and penalties imposed by a particular court.

B. In selecting a contractor, the Commonwealth's Attorney should take into account the expertise of each potential contractor together with the fee for which he is willing to perform services. There are a variety of ways in which such services can be obtained on a competitive basis, such as a Request for Proposal or competitive negotiations with several qualified potential contractors at the same time. Selection of a contractor on a competitive basis shall be made in accordance with the applicable provisions of the Virginia Public Procurement Act, Virginia Code §§ 11-35 through 11-80.

C. Commonwealth's Attorneys who serve on a part-time basis may not contract with themselves in their private capacity to make collections for the various courts.

D. Parties to the contract should be aware that it may be a violation of the Virginia Code of Professional Responsibility for a contractor who is an attorney to represent defendants in criminal cases in the same jurisdiction in which the Commonwealth's Attorney prosecutes criminal cases.

E. The Commonwealth's Attorney shall provide to the clerk of the appropriate court a list of all accounts which have been referred to the contractor for collection by use of an appropriately marked copy of the list. A copy of any contract entered into by the Commonwealth's Attorney pursuant to Virginia Code § 19.2-349 shall be promptly filed after execution with the clerk of the court for which money is to be collected.

F. The contractor should be advised that the Commonwealth's Attorney has access to certain information from the Department of Motor Vehicles and/or the Virginia Employment Commission which could facilitate the collection process. The Commonwealth's Attorney should provide this information to the contractor when requested in a manner acceptable to the Commonwealth's Attorney. The contractor may use this information only in furtherance of collection efforts under the terms of the contract.

G. The contractor must take appropriate steps to ensure that judgments are docketed in each jurisdiction wherein the debtor is known to own an interest in realty. The contractor should notify the clerk in writing when a judgment has been docketed in a jurisdiction other than that in which the fines, costs, forfeitures and penalties were originally imposed. The contractor must release any judgment obtained while under contract upon full payment at any time while the contractor retains the authority to do so under the terms of the contract. [See Form Contract Paragraph 7]

H. In entering into contracts under these Guidelines, Commonwealth's Attorneys should note that, because the Department of Taxation is a state agency, it may not be subject to all the provisions of the Model Contract which has been developed pursuant to the Guidelines. For example, the Department of Taxation is prohibited from disclosing information obtained from the United States Internal Revenue Service.

FORM FOR CONTRACTS CREATED PURSUANT TO
VIRGINIA CODE § 19.2-349
October 1, 1998

The Commonwealth's Attorney for the City/County of _____
(hereinafter referred to as "the Commonwealth's Attorney") and _____
(hereinafter referred to as "the Contractor") hereby agree as follows:

1. PURPOSE: The purpose of this contract is to obtain the services of the contractor to cause, on behalf of the Commonwealth, proper proceedings to be instituted for the collection and satisfaction of such fines, costs, forfeitures, and penalties and interest thereon as may be referred to him for collection and satisfaction by the Commonwealth. The parties expressly agree that the contractor is an independent contractor and not an agent of the Commonwealth's Attorney. Court-ordered payment of restitution to the victims of crimes is excluded from the terms of this contract. [See Contract Guidelines 1,2].

2. EFFORTS: The contractor shall make reasonable and diligent efforts by lawful means to collect all unpaid fines, costs, forfeitures or penalties and interest thereon in cases referred to him by the Commonwealth's Attorney. The contractor's failure to make such reasonable and diligent efforts may result in termination of the contract without prior notice. [See Contract Guideline 1].

3. ASSIGNMENT OF CONTRACT: This contract shall not be assignable by the contractor, in whole or in part. However, legal counsel may be retained, if the contractor is an attorney, for the assistance of collection efforts on individual cases if the debtor is located in a jurisdiction outside the Commonwealth of Virginia. Such a subcontract must be approved writing by the Commonwealth's Attorney. Any legal counsel retained in such a case must be located in the state in which the debtor is found. This provision does not prohibit the use of other

lawyers in the same firm or professional corporation. [See Contract Guideline 2].

4. CONTRACT PERIOD: Subject to the following provisions, this contract is for the twelve-month period beginning _____ and ending _____.

a. The contract is renewable at the end of twelve months upon agreement of the parties and subject to terms and conditions promulgated by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board, as they may exist at the time of renewal. After the initial term of the contract, the contract may not be renewed for more than four additional twelve-month periods.

b. In the event the contract terminates, either due to non-renewal or through the exercise of the right to termination by either or both parties, the contractor must relinquish all accounts to the Commonwealth's Attorney. After the contract has terminated, the contractor may not continue collection efforts on cases begun prior to the termination.

c. After the contract has terminated, a contractor may not accept payment from any debtor and the contractor will not be compensated for any payments made to the court for an account which had been referred to the contractor. [See Contract Guidelines 3, 5].

5. AMENDMENTS: This contract is subject to amendment at any time by provisions approved by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board upon reasonable notice. If any such amendment is unacceptable to either party, that party may terminate the contract as provided in paragraph No.7 of this contract [See Contract Guideline 6].

6. ADHERENCE: The parties covenant and agree that they will at all times abide by current guidelines then in force and effect as they are promulgated and/or amended by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation, and the Compensation Board. [See Contract Guideline 6].

7. TERMINATION: Either party has the right to terminate this contract upon ninety days notice for any reason whatsoever. Upon termination, whether pursuant to this paragraph or to a failure to renew this contract in accordance with subparagraph 4(a), the contractor must return to the Clerk of the _____ Court of _____ City/County all unused forms provided to him by the said Court for use in the performance of the contractor's duties under this contract. The contractor shall also return all accounts to the Commonwealth's Attorney with a report containing the account status, address and employment information concerning the debtor, to the extent permitted by law. In addition, the contractor shall provide a schedule of all accounts which have been docketed in any circuit court. A copy of this report shall also be sent to the appropriate court. [See Contract Guidelines 5, 6, G].

8. COMPENSATION:

- (a) The contractor shall be compensated in the amount of _____ percent of all monies collected and paid directly to the contractor. It is the responsibility of the contractor to notify the Office of the Executive Secretary of the Supreme Court of the rate of compensation agreed to by the Commonwealth's Attorney and the contractor. Such notification shall occur within five business days of the effective / date of the commencement, renewal or amendment of this contract. The compensation due the contractor shall be calculated by the terms of the contract in effect at the time the payment is collected, even if the contractor had undertaken collection efforts on the account under a predecessor contract prior to the effective date of the current contract.
- (b) For those payments made directly to the court on the contractor's accounts, the contractor shall be compensated at a rate which is three percentage points less than the rate agreed to by the Commonwealth's Attorney and the contractor. (This subparagraph applies only to contracts with private contractors.) [See Contract Guidelines 3, 4].

9. FORM OF REFERRAL: By statute (Va. Code §§ 19.2-340 and 19.2-341), unpaid fines, costs, forfeitures and penalties constitute a judgment in favor of the Commonwealth for which "execution may issue thereupon in the same manner as upon any other monetary judgment." Therefore, the clerk of the appropriate court will provide to the Commonwealth's Attorney a list of unpaid fines, costs, forfeitures and penalties. This list will contain the following:

- (1) the debtor's name;
- (2) the debtor's address according to the court's record;
- (3) if known, the debtor's social security number or driver's license number;
- (4) the principal amount due; and
- (5) the date from which interest is calculated.

This list will be provided to the contractor by the Commonwealth's Attorney. The contractor will not be provided the case files or copies of the files on a routine basis. Subject to the provisions of Virginia Code § 19.2-341, each account shall be transferred to the contractor until the account is collected in full or until termination of the contract, whichever occurs first. [See Contract Guidelines 4, 7].

10. SETTLEMENT OF CLAIMS: The parties to this contract expressly covenant and agree that the contractor has no authority whatsoever to compromise or otherwise settle any case for less than the amount of the judgment plus any accrued interest. [See Contract Guideline 8].

11. REPORTING REQUIREMENTS: The contractor will make a monthly report of collections on approved forms to the clerk of the appropriate court covering each calendar month. The monthly report shall be filed with the clerk on or before the fifteenth calendar day of the next following month. An informational copy of the monthly report also shall be sent to the Commonwealth's Attorney. (This paragraph applies only to contracts with private contractors.) [See Contract Guidelines 9, 10].

12. DISBURSEMENT OF COLLECTIONS: A private contractor shall make monthly disbursements of monies collected for each calendar month. The disbursement must be made by check drawn on an account of the contractor, which is to be made payable to the clerk of the appropriate court. The disbursement check is to be filed simultaneously with the monthly report on or before the fifteenth calendar day of the next following month. (This paragraph applies only to contracts with private contractors.) [See Contract Guidelines 9, 10].

13. MANDATORY USE OF STATE FORMS: Because of the Commonwealth's need for uniform accounting and reporting procedures within its courts, the contractor:

- (1) Will use forms approved by the Office of the Executive Secretary for handling and reporting the collection transactions in accordance with the instructions for using such forms provided through the clerk; and
- (2) Will use all new forms and the latest version of existing forms as they are promulgated in accordance with the instructions for using such forms and cease using any form the use of which has been officially terminated.

As used in this contract:

--"Accounts" means all individual listings of unpaid fines, costs, penalties, forfeitures and interest provided by the court.

--"Forms" means official forms approved by the Office of the Executive Secretary of the Supreme Court of Virginia.

--"Instructions" means the printed official directions for completing and distributing official forms. These instructions will be printed by the Office of the Executive Secretary of the Supreme Court of Virginia and distributed through the Clerk.

--"Clerk" means the Clerk of the Court whose fines, costs, forfeitures, and penalties are being collected by the contractor.

[See Contract Guideline 11].

14. INSPECTION AND RETENTION OF RECORDS: The contractor expressly agrees to allow inspection and audit at any time by the Auditor of Public Accounts and/or the Commonwealth's Attorney of all records and files pertaining to accounts referred under this

contract. The contractor further expressly agrees to retain the records of transactions under this contract for a period of no less than five years. [See Contract Guideline 12].

15. CIVIL LIABILITY:

- (a) The contractor shall not engage in any unethical or illegal actions in the collection of these accounts.
- (b) The contractor agrees to be responsible for the work, to indemnify, to defend and to hold harmless the Commonwealth's Attorney, the Commonwealth of Virginia, its officers, agents and employees from the payment of all sums of money by reason of any claim against them arising out of any and all occurrences resulting in bodily or mental injury or property or monetary damage that may happen to occur in connection with and during the performance of the contract including but not limited to claims under the Workers' Compensation Act. The contractor agrees that he will, at all times, after completion of the work, be responsible for the work, indemnify, defend and hold blameless the Commonwealth's Attorney, the Commonwealth of Virginia, its officers, agents, and employees from all liabilities resulting from bodily or mental injury or property or monetary damage directly or indirectly arising out of the performance or non-performance of the contract (This subparagraph applies only to contracts with private contractors.) [See Contract Guideline 12].

16. PERFORMANCE BOND: The contractor, at no additional cost to the Commonwealth of Virginia (including its courts and its Commonwealth's Attorneys), will bond or otherwise insure through third party insurers licensed to do business in Virginia the faithful performance of the contractor and each person employed by him who may collect and disburse any unpaid fines, costs and other sums which the contractor was employed to collect. Each such person shall be individually bonded or insured for at least \$10,000.00 or such higher sum as will provide coverage for collections, with the Commonwealth of Virginia listed as an additional insured. The contractor shall provide documentary proof of such coverage to the Commonwealth's Attorney. The bond applicable to the Department of Taxation pursuant to Virginia Code § 58.1-201 shall satisfy this requirement. [See Contract Guideline 13].

17. ETHICS TN PUBLIC CONTRACTING: By entering into this contract, the contractor certifies that the contract is made without collusion or fraud and that he has not offered or received any kickbacks or inducements from any other potential contractor in connection with the award of this contract, and the contractor further certifies that he has not conferred on any public employee having official responsibility for making the award of this contract, any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised unless consideration of substantially equal or greater value was exchanged.

18. APPLICABLE LAW AND COURTS: This contract shall be governed in all respects by the laws of the Commonwealth of Virginia and any litigation with respect thereto shall be brought in the courts of the Commonwealth. The contractor shall comply with applicable federal, state and local laws and regulations.

19. DEBARMENT STATUS: By entering into this contract, the contractor certifies that he is not currently debarred from submitting bids/proposals on contracts by any agency of the Commonwealth of Virginia, nor is he an agent of any person or entity that is currently debarred from submitting bids/proposals on contracts by any agency of the Commonwealth of Virginia.

20. MEMBERSHIP IN VIRGINIA STATE BAR: By entering into this contract, the contractor certifies that he is a member in good standing of the Virginia State Bar. (This provision applies only if the contractor is an attorney.)

IN WITNESS WHEREOF the parties have caused the agreement to be executed by the following duly-authorized officials:

_____ Commonwealth's Attorney

for _____ City/County on

_____ (Date)

_____ Contractor's Name and Title

or Corporate Affiliation on _____ (Date)