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The Virginia Magistrate System

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The Virginia Magistrate System

In Colonial Virginia the Justice of the Peace was in many respects the local governing authority. His powers ranged from the trial of criminal cases to the supervision of the building of warehouses and courthouses; the licensing of ferries; and the regulation of the legal and medical professions.

The powers of the Justice of the Peace gradually dwindled in favor of the courts and other local officials, until the Justice of the Peace system was finally abolished in 1974, and replaced with the Magistrate system.

The present day magistrate performs many purely clerical functions, but he also retains important judicial power. This article will examine the powers of the magistrate and the present role of the magistrate in the Virginia system of justice.

Powers Of The Magistrate

Today's magistrate is primarily a committing and issuing official, with limited civil and criminal jurisdiction. By statute the magistrate has the following powers: 1

1. He may admit to bail or commit to jail all persons charged with offenses;
2. He may issue search warrants;
3. He may issue arrest warrants;
4. He has the same power to issue warrants and subpoenas within the city or county as is conferred upon district courts, and the warrants and subpoenas shall be returnable before a district court. (This means that with the exception of unlawful detainer and distress warrants, the claim must be less than $5,000 and the warrant must expressly indicate that it is returnable to the district court.);
5. He may administer oaths and take acknowledgments;
6. He may act as a conservator of the peace. (The title conservator of the peace has a historical definition, but today it should be read as authorizing the magistrate to perform other duties prescribed by the district court judge.)

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The magistrate has limited territorial jurisdiction and as a general rule may not act beyond the borders of his judicial district. Therefore, he may not issue civil process unless the defendant resides within his judicial district, and he may not issue criminal process unless the offense was committed within his judicial district. He may, however, issue an arrest warrant for an offense committed in another judicial district, if the accused physically appears before him. He may also admit a person to bail though the crime was committed in another judicial district, if the accused is brought before him.

**Bail**

A magistrate probably performs no more important tasks than that of setting bail. Because the considerations which influence the bail decision differ considerably depending upon whether the offense charged is a traffic violation or a more serious crime, each is discussed separately.

Most traffic offenses do not directly involve the magistrate. Usually the arresting officer issues a summons or citation, directing the offender to appear in court on a certain date. Often the offender may prefer to post a cash deposit as surety with a court clerk or a magistrate and thus relieve himself of the necessity of appearing in court. In effect, the offender is paying his fine through the magistrate without having to appear in court. In such routine situations the magistrate is not exercising any judicial discretion, but merely performing a clerical function for the court.

In setting the amount of the cash deposit, the magistrate will operate under certain specific guidelines set by the judge. These include the following:

1. The cash deposit required must be sufficient to cover the expected fine and costs, else it will result in a loss of money by the state and an unwarranted savings to the offender. While a capias could be issued to recover the rest of the fine from the absent offender, the amount will normally be so small the expense will not be justified.

2. In some instances, e.g. those involving a youthful offender, the judge may wish to see the offender in court. Thus the magistrate is instructed that he should refuse a cash deposit and inform such an offender that he must appear before the judge. The offender is not prejudiced, since the posting of a cash deposit when the offender is not in custody is deemed a privilege, not a right.

3. Before accepting a cash deposit from a person charged with either reckless driving or speeding, the magistrate is instructed to inform the offender that the failure to appear in court, and the forfeiture of the cash surety, amount to a conviction under Section 46.1-419 of the Motor Vehicle Code and will result in the loss of driving privileges if the offender has two such convictions within a twelve-month period.

While most traffic offenses are handled by summons rather than arrest, an arrest can be made when the police officer reasonably believes that the violator is likely to cause harm to himself or to any other person (e.g. an intoxicated driver), or the arresting officer reasonably believes that the violator is likely to disregard a summons. This latter situation will probably account for the majority of persons brought before the magistrate for traffic violations.

Typically the person arrested is a non-resident motorist and therefore is likely to disregard the summons after leaving the state. The offense may be minor, but unless the driver is from Maryland or the District of Columbia, a magistrate has no choice but to require from the offender the standard cash deposit or a guaranteed arrest bond.

To avoid the impression that the community is operating a "speed trap" for out-of-state motorists, the magistrate must be as courteous as possible and explain fully the procedures being followed. Many persons in this predicament understandably, if unjustifiably, become abusive and profane. A magistrate does not have the judicial power to find the person in contempt, but he may issue a separate warrant for disorderly conduct. However, patience and a judicial demeanor on the part of the magistrate can do much to avoid this type of problem.

It is primarily in the area of arrest for offenses other than traffic violations that the magistrate exercises discretion and performs more than a clerical function. An accused held in custody pending trial has a right to be released from custody if the accused can provide adequate assurance that he will appear in court as directed. Initially, the magistrate is the official who determines what conditions, if any, will be imposed on the accused's release. The possible conditions range from a written promise to appear, to execution of a


3 Under reciprocal agreements with Maryland and the District of Columbia, residents of these two areas are, in effect, treated as Virginia motorists. Va. Code Ann. §§ 46.1-179.1 to 46.1-179.3.
bail bond with solvent sureties and a return to custody after specified hours. These possible conditions are so numerous and varied that the magistrate must exercise a great deal of judgment and discretion. As a member of the local community the magistrate is perhaps better suited than any other person to know what action is necessary to secure the appearance of the accused in court. While the magistrate should receive general guidance from the judge of the court he serves, it is improper for the magistrate to blindly follow a rigid schedule of bail bonds based on nothing but the nature of the charged offense. The magistrate must exercise his own discretion and it is wrong for a police officer to ask the magistrate to refuse bail or to set a very high bail. The magistrate must remember that the accused has a right to a reasonable bail, and bail set too high without regard to the accused's financial ability is really a denial of bail.

Search Warrants And Arrest Warrants

The law concerning the issuance of search warrants and arrest warrants is frequently referred to as the "quagmire of the fourth amendment." It is difficult enough for lawyers and judges to thread their way through this legal quagmire, but it is seemingly an impossible task for the average magistrate who has no formal legal education. The magistrate's function is to review the factual situation set out in the affidavit and make a determination whether probable cause exists to issue the appropriate warrant. Short of an extensive and continuous education in fourth amendment law, little can be done to prepare the magistrate for determining whether a particular set of facts constitutes probable cause. While it is obviously desirable for the magistrate to be familiar with factual situations that have been held to constitute probable cause in the past, the factual situations vary so much that probable cause always requires a case by case determination. Ultimately the magistrate must trust his common sense and logic to determine whether probable cause exists.

Although fourth amendment law is complex, many of the problems in the area are created not by a misunderstanding of the law, but rather by a magistrate's failure to follow even the standards that are clear. When a court finds a lack of probable cause, it is frequently not because probable cause did not exist in fact, but because it was not set out in the affidavit. In the past, a common fault of many magistrates was to merely "rubber-stamp" a request for a warrant from the police without requiring the factual situation to be set out in a proper affidavit. This tendency to rubber-stamp police requests was one of the prime faults of the former justice of the peace fee system where the income of a justice of the peace depended to a large extent on retaining good relations with the police. A justice of the peace who denied many police requests for a warrant or who was critical of the need for a warrant in a particular situation, could quickly find that the police henceforth dealt with another more "cooperative" justice of the peace. Also since the elected justice of the peace frequently received little guidance from anyone, it was natural for him to turn to the police, with whom he dealt every day, for advice on how to discharge his office. This blurring of the distinction between the magistrate's duty and the policeman's duty led to an abrogation of the judicial function of the justice of the peace and resulted in this official functioning almost as a member of the police force.

By eliminating the fee system, the new Virginia magistrate system will reduce the magistrate's reliance on the good will of the police. Eliminating the popular election of magistrates and placing them under the control and supervision of the Chief Circuit Judge also encourages the magistrate to look to the judiciary rather than the police for guidance. This does not suggest that good relations between magistrates and police should be terminated; a good working relationship is obviously desirable. But it is important that a line be drawn between police work and the magistrates' function. Under the new system the magistrate is properly regarded as an arm of the judiciary, rather than an arm of law enforcement.

Civil Duties

While the vast majority of magistrates are primarily concerned with criminal matters, magistrates are also authorized to perform certain duties which are civil in nature. The most common is the issuance of process, such as civil warrants. Magistrates are authorized to issue civil warrants returnable to the proper district court. Generally, the plaintiff or his attorney has drafted the warrant and the magistrate's

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job is simply a clerical one of collecting the issuing fee, delivering the warrant to the sheriff or other officer for service, and then transmitting the proper portion of the fee to the district court. Since a warrant is a pleading stating a legal claim in legal terms, the average magistrate will not know enough law to frame the legal issue properly, and will not draft the warrant himself. In fact, it should be noted that the preparation of a pleading (warrant) involves the practice of law and it could be considered the unauthorized practice of law for a layman magistrate to draft a warrant as opposed to merely issuing it.

As an ethical matter, it is improper for a magistrate to issue civil warrants when his employer is the plaintiff and the magistrate is in any way involved in the collection of accounts for his employer. It is also improper for a lawyer who is a magistrate to represent, in either a criminal or civil case, a party who appeared before him in his capacity as a magistrate. Furthermore, by statute no magistrate shall issue any warrant or process on complaint of his spouse, child, grandchild, parent, grandparent, parent-in-law, child-in-law, brother, sister, brother-in-law, sister-in-law, nephew, niece, uncle, aunt, first cousin, guardian, or ward.

In addition to the issuance of process, the magistrate is authorized to issue a summons for unlawful detainer, which allows a landlord to regain possession of his real property and to recover damages from a tenant who is unlawfully retaining possession of the premises. Since there is no limitation on the power of the district court to try this action, except that the lease be for less than two years, a magistrate may, unlike his authority in most civil actions, issue the summons without regard to the amount in controversy.

Although the Virginia Code is somewhat ambiguous in the area of distress warrants and attachments, it appears that a magistrate has authority to issue a distress warrant regardless of the amount in controversy or the fact that it is returnable to a circuit court. As for attachments, the general section of the Code listing the powers of magistrate continues to list the issuance of attachments as one of the magistrate's powers. But this was apparently a legislative oversight, and it is believed that a magistrate no longer has such authority. The specific section of the Code governing petitions for attachment deleted justices of the peace from the list of officers competent to hear petitions and issue attachments. Since the title "magistrate" was not inserted in place of the title "justice of the peace," it apparently was the intent of the General Assembly to deprive magistrates of the power to issue attachments.

The remainder of the magistrate's civil powers consists of certain semi-clerical functions, including the taking of affidavits and acknowledgments, and the administration of oaths.

**Training And Supervision**

Responsibility for educating magistrates in the proper performance of their office is the responsibility of the Chief Circuit Judge and the Executive Secretary of the Supreme Court of Virginia. Since the magistrate is somewhat of a hybrid—at times functioning as a relatively low level clerk and at other times functioning as a member of the judiciary—there is some controversy over the extent of any training program. Those emphasizing the clerical function see little need to train or educate magistrates, or to pay sufficient salaries to attract high caliber personnel. Those emphasizing the judicial function contend that the standards for selection and training of magistrates should be in line with the traditionally high standards required of the judiciary.

The training process in Virginia has begun with the distribution of a Virginia Magistrates' Manual and the staging of regional magistrates' conferences. Day to day supervision is provided Circuit or District Judges, who in some instances have promulgated rules and specific instructions not covered in the statutes or in the Virginia Magistrates' Manual.

At present all training sessions are voluntary and there is no statutory requirement that a magistrate have any formal training or pass any sort of test before being certified as a magistrate. Under the present system the caliber of Virginia's magistrates will be

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7 The Canons of Ethics of the Association of Magistrates of Virginia are set out in the appendix.

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Summer Clerkships

The recent popularity of summer clerkships for law students made possible by a generous bar has also provided what, when all is said and done, is perhaps the most efficient type of clinical program in existence. There is no interference with regular academic work, the time is adequate for exposure to most of the aspects of a legal problem and the return to school is soon enough to permit the student to relate the practical aspects of his summer training to his formal law studies. It is an understatement to say that this is a boon to the law teacher and the law school. What sometimes appears to the student to be too abstract to permit understanding takes on life and meaning that makes the professional instructor's task meaningful.

Prospects For The Future

The advent of third-year practice on the state level will significantly expand opportunities for clinical education of the advocacy kind and will, correspondingly, bring more practicing attorneys into one important aspect of legal education. Meanwhile, non-advocacy aspects of clinical education may be spurred to greater growth. Those law schools with healthy budgets may be able to employ full-time clinical education directors. Those not so fortunate will either utilize part-time directors or depend on the practicing bar for gratuitous assistance. Whatever the direction clinical legal education takes in the Commonwealth, the practicing lawyer will play a significant role. The full-time teaching lawyer stands by, ready to be of assistance.

Selected Bibliography

CLEPR, Clinical Education for the Law Student (1973)
Packer and Ehrlich, New Directions in Legal Education (Abridged ed., 1973)

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determined solely by the Chief Circuit Judge who has "full supervisory authority over the magistrates." Only time will tell if supervision by the judiciary will raise the caliber of the Virginia magistrates to the proper level, or if a legislative scheme of training and certification will be necessary.

Appendix

Canons Of Ethics And Procedure
Association Of Magistrates Of Virginia

1. All Magistrates will conduct themselves with dignity and in keeping with the office they shall occupy. They shall maintain order, and exercise privacy, where required, in police matters.
2. The fees prescribed by law are to be collected from all persons without discrimination.
3. Knowledge coming to a Magistrate in his official capacity or contacts so made shall not be used for ulterior purposes of personal gain or advantage to himself or other persons.
4. The Magistrates shall cooperate with the Judges and the various courts to the end that there may be continuity and uniform procedure in the work of such courts.
5. The Magistrates shall work together to solve local problems and pass on to one another information that may be helpful.
6. Gratuities are not to be accepted by Magistrates for work performed in his official position.
7. No Magistrates shall receive claims or evidences of debt for collection and it shall be unlawful for any Magistrate to receive claims of any kind for collection.
8. A Magistrate should be patient, dignified and courteous to litigants, defendants and others with whom he deals in his official capacity.
9. No gratuity is to be accepted by a Magistrate from any person, firm or corporation who may stand to benefit directly or indirectly from the normal and impartial discharge of duty by said Magistrate.