



★ VIRGINIA ★  
DEPARTMENT *of* ELECTIONS

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the Handbook

# **Chapter 15**

## **Recounts and Contests**

August 2025

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## 15. RECOUNTS AND CONTESTS

<b>REQUIRED FORMS</b> <a href="#">Certification of Recount 802-CC</a> <a href="#">Hand-Counted Ballots Tally Sheet</a> <a href="#">Recount Certification County or City Results by Precinct (SBE-802-LS)</a> <a href="#">Recount Precinct Results</a> <a href="#">Statement of Recount Official, Challenged Ballot (SBE-802-CB)</a> <a href="#">Recount Reimbursement, Recount Officials and Alternates (SBE-802-F)</a>	<b>ADDITIONAL RESOURCES</b> <a href="#">RECOUNTS 101 PowerPoint</a>
<b>REFERENCE</b> <a href="#">Recount Step by Step Instructions (SBE)</a> <a href="#">Virginia's Guide to Hand-Counting Ballots (ELECT)</a> <a href="#">Simultaneous Recount Instructions</a> (ELECT)	<b>REGULATIONS</b> <a href="#">1 VAC 20-80-20 Recounts and Contested Elections</a>

### 15.1 CHAPTER ORGANIZATION

Recounts do not occur often enough to be considered a routine part of an election year. Please take the opportunity, however, to refresh your knowledge of the laws and regulations that govern the circumstances and ways a recount can occur.

§15.2 outlines that a candidate cannot petition the court for a recount unless the election resulted in a margin of victory not more than 1 percent. If either the winner or the apparently unsuccessful candidate ran as a write-in candidate, a recount can be requested as long as the difference is not more than 5 percent.

§15.2.3 discusses the timeline for filing a recount petition, where to file the recount petition, and what components a petition for a recount must contain. §15.2.5 summarizes rules and procedures for conducting the actual recount when authorized.

§15.2.6 applies only to recounts of elections for presidential elections, and §15.2.7 applies only to recounts of referendums. §15.2.8 adds that if the apparent winner subsequently loses because of the recount, that apparent winner may contest the election. §15.2.10 provides essential reminders regarding the proper, secure handling of the election records used to conduct the recount.



## 15.2 RECOUNTS

### 15.2.1 Recount Laws

The recount laws found in the Code of Virginia<sup>1</sup> apply to “all elections held in the Commonwealth,” which includes primaries, general or special elections for offices, multi-winner races, ranked choice voting races, and referenda or questions before the electorate.<sup>2</sup>

Virginia election law does not allow a losing candidate in a party-conducted nomination process (non-primary) to request a recount of non-primary results. The rules or bylaws of the political party, or the “Call” and rules for the non-primary nominating event may permit such a process.

### 15.2.2 Recount Determined by Margin of Victory

#### 15.2.2.1 Recount Only if Difference is No More than 1 Percent (1%)

A petition for a recount may be filed only if there is a difference of not more than one percent (1%) of the total vote cast for the apparent winner and any apparently defeated candidate, as certified by the State Board of Elections or the electoral board.<sup>3</sup>

For multi-winner races, the “apparent winner” for purposes of naming the parties to the recount in a petition is the winning candidate with the lowest vote total.<sup>4</sup>

In a ranked choice voting (“RCV”) election, a losing candidate must be within the required threshold of a winning candidate in the round of tabulation in which the winning candidate first reaches the required threshold to be elected.<sup>5</sup>

#### 15.2.2.2 Recount for Write-In Candidate Only if Difference Not More Than 5 Percent (5%)

A petition for a recount may be filed when there is a difference of not more than five percent (5%) of the total votes cast for the apparent winner and any apparently defeated candidate, if either such candidate was a write-in candidate.<sup>6</sup>

### 15.2.3 Petition for a Recount

A recount cannot be requested until the election is certified. As per §24.2-801, a “petition for a recount of an election, other than an election for presidential electors, shall be filed within 10 days from the day the State Board or the electoral board certifies the result of the election.”



Certified by the <b>local electoral board</b>	Deadline is 10 days from the day the results are certified
Certified by the <b>State Board of Elections (SBE)</b>	Deadline is 10 days from the day the SBE certifies the results

<sup>1</sup> See §§24.2-800 – 802.3 (prescribes procedures for recounts).

<sup>2</sup> See §24.2-800(A).

<sup>3</sup> See §24.2-800(B).

<sup>4</sup> See *Recounts Step-by-Step Guide*, p. 4, “**Third**”, second paragraph.

<sup>5</sup> See *Recounts Step-by-Step Guide*, p. 4, “**Second**”, third paragraph.

<sup>6</sup> See §24.2-800(B).



*15.2.3.1 Where and How to File*

For non-statewide offices, the petition must be filed in the circuit court of the county or city in which the candidate being challenged resides. Here, the losing candidate has 10 calendar days from the day the results were certified to file a petition with the appropriate court.<sup>7</sup>

For statewide offices, the petition must be filed in the Circuit Court of the City of Richmond. Here, the losing candidate has 10 days from the day the results were certified to file a petition with the appropriate court.<sup>8</sup>

*15.2.3.2 What to File*

The petition to the appropriate court must contain:

1. The certified results of the election,
2. A request to the appropriate court to have the ballots in the election recounted<sup>9</sup>; and, when applicable,
3. For multi-winner races, a listing of all winning candidates not named as party to the recount in the petition.<sup>10</sup>

In a referendum, a copy of the petition shall be served on the governing body or chief executive officer of the jurisdiction in which the election was held.<sup>11</sup>

In a multi-winner race, a copy of the petition shall be served on all winning candidates not named as party to the recount in the petition.<sup>12</sup> This gives a winning candidate not named as a party in the petition the opportunity to request to be added as a party to the proceedings. The Court may also act on its own initiative to add parties if “full justice cannot be done.”<sup>13</sup>

*15.2.4 A Recount Court**15.2.4.1 Selecting the Recount Court*

A recount court (hereafter the “Court”) will be established (*see* Va. Code §§ 24.2-801 and 801.1) once the petition is appropriately filed. The Court will consist of three judges: the Chief Judge of the Circuit Court of where the recount petition was filed, and two (2) judges appointed by the Chief Justice of the Supreme Court of Virginia. The Court will preside over the entirety of the recount process.

<sup>7</sup> See [§24.2-801](#).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *Recount Step-by-Step Instructions*, p. 4, “**Third**”, second paragraph.

<sup>11</sup> See [§24.2-801](#).

<sup>12</sup> See *Recount Step-by-Step Instructions*, p. 4 and 5, “**Third**”, second paragraph.

<sup>13</sup> See [§8.01-7](#).



### 15.2.4.2 Standards

As required by the Code, the State Board of Elections adopted standards for the conduct of recounts (Recounts Step-by-Step Instructions).<sup>14</sup> The Chief Judge of the circuit court or the full recount court may, consistent with State Board of Elections standards, resolve disputes over the application of the standards and direct all other appropriate measures to ensure the proper conduct of the recount.<sup>15</sup> These standards include the Recounts Step-by-Step Instructions and Virginia's Guide to Hand-Counting Ballots. For uniformity, the Department of Elections has directed that the Guide to Hand-Counting Ballots is to be used whenever ballots must be hand counted.<sup>16</sup>



#### Regulation Note

##### 1VAC 20-80-20: Recounts and Contested Elections

The standards for recounts and contests are governed by Chapter 8 of Title 24.2.

- The procedures issued by the State Board of Elections are to be implemented as uniformly as possible throughout the entire recount zone.
- The State Board of Elections' guidelines for hand-counting ballots shall be used when manually counting ballots.
- When a recount request is filed, ELECT must send copies of instructions corresponding to the types of ballots and equipment used in each county or city involved to the appropriate clerk of court and local electoral board.
- To prepare for the recount, circuit court clerks are required to:
  1. Secure all printed ballots and other election materials in sealed boxes
  2. Store these boxes in a vault or room not open to the public or to anyone other than the clerk and his or her staff
  3. Keep the room or vault locked at all times except when necessary for the clerk to access the room, and
  4. Certify that these security measures have been taken.

After a recount has been requested, the local electoral board must recommend to the court a location and estimated personnel for completing the recount, a complete list of all officers of election who served in the election to be recounted, with the political party they represented at that election, the precinct they served at, their address and phone number, and an indication of which officers served as chief or assistant chief officers, and a list of the members of the electoral board and the political parties they represent. The Commissioner of ELECT may provide recommendations and information prior to the preliminary hearing and can request information from the electoral board of the county or city involved, which that board must provide. The State Board of Elections and the Department of Elections are to provide any other assistance requested by the court [20-80-20(H)].

<sup>14</sup> See [§24.2-802\(A\)](#) (requiring creation of standards), [§24.2-802\(B\)](#) (requiring additional standards for simultaneous recounts, and [§24.2-802\(C\)](#) (requiring standards for multi-winner races).

<sup>15</sup> See [§24.2-802\(D\)](#).

<sup>16</sup> See Virginia Admin. Code [1VAC20-80-20\(G\)](#).



#### 15.2.4.3 *Uniform Procedures Required*

The recount procedures to be followed throughout the election district shall be as uniform as practicable, taking into account the types of ballots and voting devices in use in the election district.<sup>17</sup>

#### 15.2.4.4 *Preliminary Hearing*

Within five days (for elections for presidential electors) or seven days (for all other elections) after the petition for a recount is filed, there shall be a preliminary hearing held by the Chief Judge to hear motions and set the recount procedures, subject to review by the full court.<sup>18</sup> At this preliminary hearing, the Chief Judge will also “review all security measures taken for all ballots and voting and counting machines and direct, as s\he deems necessary, all appropriate measures to ensure proper security to conduct the recount,” as per §24.2-802.1(A).<sup>19</sup>

The Chief Judge may set the place for the recount and delivery\transportation of election material and voting systems to that place under appropriate safeguards. In a multi-jurisdictional office\issue recount, the Chief Judge may set the recount places, delivery of election materials, and transportation of voting systems to those locations. The Judge’s appropriate safeguards are delineated in § 24.2-802.1(A). All of the Chief Judge’s preliminary rulings are subject to review, alteration, and finalization by the full court.

Additionally, for multi-winner races, the Chief Judge should rule on motions regarding the addition of other winning candidates as parties to the recount.<sup>20</sup> It is highly suggested that the general registrar and/or electoral board attend this hearing to provide guidance to the court as necessary.

#### 15.2.4.5 *Court Hearing*

After the full court is appointed, a hearing will be held to dispose of all motions and make a final determination of the rules of the recount procedures.<sup>21</sup> ELECT recommends that the general registrar and/or electoral board attend this hearing to provide guidance to the court as necessary.

### 15.2.5 *Rules and Procedures for Conducting the Recount*

The following rules and procedures are presented in summary form and also apply to a recount pertaining to a referendum or question before the electorate as discussed below.

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<sup>17</sup> See §24.2-802.1(B).

<sup>18</sup> See §24.2-802.1(A).

<sup>19</sup> See §24.2-802.1(A).

<sup>20</sup> See *Recounts Step-by-Step Instructions*, p. 21.

<sup>21</sup> See §24.2-802.1(B).



**Best Practice**

Please also note that you can go online to the Forms Warehouse, in the Recount folder, under the Miscellaneous tab, to access a PowerPoint presentation, “Recounts 101”, which have proven very helpful for learning and training purposes. For a more detailed accounting, please review §24.2-802.2 in its entirety.

#### *15.2.5.1 Programming Voting Machines and Performing Logic and Accuracy Testing Prior to the Recount*

The procedures addressed in this Section are from § 24.2-802.1 and §24.2-802.2.<sup>22</sup> The general registrar in concert with the electoral board and the designated voting equipment custodian should work with the locality’s voting equipment vendor to ensure the following programming requirements are established in the recount equipment. The voting machines must be programmed to only count votes for the recount candidates\issue responses and to set aside ballots containing write-in votes, overvotes, and undervotes.<sup>23</sup> Any ballot that cannot be read by the programmed voting machine for these settings must also be put aside and hand counted using the standards promulgated by the State Board pursuant to § 24.2-802.2.<sup>24</sup>

For ranked choice voting (RCV) election recounts, ensure the necessary voting machines, computers, software, data storage devices, and other necessary items are prepared for RCV tabulation in accordance with guidance from the Department of Elections.<sup>25</sup>

After the voting machines are programmed, delivered to the recount site and in accordance with the Recount Court’s directives, the recount officials will run a pre-designated test check of voted ballots through each scanner to ensure logic and accuracy is successfully achieved prior to use.<sup>26</sup> The logic and accuracy testing, location, and those participants and witnesses are designated by the Recount court. Always follow the Court’s directions in these preliminary programming and testing procedures. As stated earlier, being aware of these timing events is why ELECT recommends attending the full court’s hearing.

Once the machines are programmed and tested, if the total number of machine-readable ballots reported as counted by the scanner plus the total number of ballots set aside by the scanner, then all ballots cast on ballot scanner machines for that precinct shall be set aside to be counted by hand using the standards promulgated by the State Board pursuant to § 24.2-802.2(D)(2).<sup>27</sup>

<sup>22</sup> See [§24.2-802.1](#) and [§24.2-802.2](#).

<sup>23</sup> See [§24.2-802.2\(D\)\(2\)](#).

<sup>24</sup> *Id.*

<sup>25</sup> See *Recounts Step-by-Step Instructions*, p. 9.

<sup>26</sup> See [§24.2-802.2\(D\)\(2\)](#).

<sup>27</sup> *Id.*



*15.2.5.2 How are Ballots Counted?*

**First**, ballots will be scanned by recount officials. For RCV races, a cast vote record will be produced to be used later in the RCV tabulation rounds.<sup>28</sup>

**Second**, the set aside ballots will be hand counted. The recount team will also hand count any ballot that was hand counted on election day. For RCV races, hand-counted ballots will be tallied on a spreadsheet (in accordance with guidance from ELECT) that will be used later in the RCV tabulation rounds.<sup>29</sup>

**Third**, if the recount team cannot agree, the ballot will be challenged and handed to the Court for adjudication. When a ballot is challenged by the recount officials, the Court will adjudicate the validity of the ballot and the voter's intent. Additionally, the Court will certify the results of the recount to the State Board and electoral board.<sup>30</sup>

*15.2.5.3 Party Representatives*

Each party to the recount proceeding can choose an equal number of officers of election who served during the election to serve as recount officials and alternate recount officials.<sup>31</sup> As per §24.2-802.1(C), this number "is to be fixed by the court and be sufficient to conduct the recount within a reasonable period."<sup>32</sup> On the request of any party to the recount, the court shall allow that party to appoint one representative observer for each team of recount officials. The representative observers must have an unobstructed view of the work of the recount officials. The expenses of its representative observers shall be borne by each party.<sup>33</sup>

*15.2.5.4 Other Officials*

Teams of recount officials, substitutes, and observers are designated to undertake the count and determine the vote according to the provisions set forth in the code and the SBE standards.<sup>34</sup> The Court is responsible for supervising the recount. It may do so by requiring delivery of "any or all pollbooks used and any or all ballots cast at the election" or it may indirectly "assume supervision...through the recount coordinators and officials."<sup>35</sup> The Court may select pairs of recount coordinators to serve for each county or city in the election district that shall be members of the county or city electoral board and represent different political parties.<sup>36</sup>

<sup>28</sup> See *Recounts Step-by-Step Instructions*, p. 18.

<sup>29</sup> See *Recounts Step-by-Step Instructions*, p. 19.

<sup>30</sup> See [§24.2-802.2](#).

<sup>31</sup> See [§24.2-802.1\(C\)](#).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See [§24.2-802.1\(D\)](#).

<sup>36</sup> See [§24.2-802.1\(C\)](#).



#### 15.2.5.5 Procedures for Different Ballot Types

For **paper ballots**, hand count the ballots using the Virginia's Guide to Hand-Counting Ballots.<sup>37</sup> The classification of "paper ballots" categorizes machine unreadable ballots such as Enhanced Ballots or any ballot sent via email to UOCAVA or print disabled voters, absentee ballots that are returned by mail that are damaged when opened, e.g., cut by a mechanical opener, Federal Write in Absentee Ballots, and, if applicable, provisional ballots hand counted by the electoral board rather than having been run through a voting machine.

For **optical scan tabulators**, rerun all machine-readable ballots through an appropriately programmed tabulator.<sup>38</sup> Any ballots set aside as overvotes, undervotes, or containing write-ins; any ballots not accepted by the tabulator; or any ballots for which a tabulator could not be appropriately programmed must be hand counted using the 'Virginia's Guide to Hand-Counting Ballots'.<sup>39</sup>

If the total number of optical scan ballots counted by the ballot reader plus the total number of ballots set aside by the scanner do not equal the total number of ballots rerun through the scanner, the recount officials must count the votes on all of the ballots by hand using the Virginia's Guide to Hand-Counting Ballots.<sup>40</sup>

#### 15.2.5.6 Ranked Choice Voting Tabulation

The recount officials, with guidance from ELECT, will upload the cast vote records produced in the ballot scanning and hand counting stages into the approved RCV tabulation software approved.<sup>41</sup> In general, the RCV process varies depending on the vendor used; this includes the RCV tabulation rounds due to differences in cast vote records produced by various vendors. Since there are multiple vendors used by localities, it is not possible to enumerate all procedural details. Localities will be provided with ELECT guidance for detailed administration of RCV tabulation rounds.<sup>42</sup>

#### 15.2.5.7 Concluding the Recount

The recount officials must write down and submit to the Court the number of valid ballots cast in the precinct for each of the candidates in the recount, or for or against the question. If the number of votes recorded on the voting machines is greater than the number of names on the pollbooks of persons voting, the figures recorded on the machines themselves shall be accepted as correct.<sup>43</sup>

For a local office recount, all precincts involved, i.e., Election Day, Central Absentee Precinct – Early Voting, Mailed Absentee, and Post Election, and Provisional report final recount totals as described above.

<sup>37</sup> See §24.2-802.2(D)(1) (requiring recount officials count paper ballots according to SBE standards). See also Virginia Admin. Code [1VAC20-80-20\(G\)](#).

<sup>38</sup> See §24.2-802.2(D)(2).

<sup>39</sup> See §24.2-802.2(D)(2) (requiring recount officials count such ballots according to SBE standards for hand counting ballots). See also Virginia Admin. Code [1VAC20-80-20\(G\)](#).

<sup>40</sup> See §24.2-802.2(D)(2).

<sup>41</sup> See Virginia Admin. Code [1VAC20-100-50\(E\)](#).

<sup>42</sup> See *Recounts Step-by-Step Instructions*, p. 18.

<sup>43</sup> See §24.2-802.2(E).



For multi-jurisdictional office recount, each locality will report all precincts and forward all results and challenged ballots to the recount court. The recount court will direct the accumulation of all locality results. Following the court's directions will aide greatly in a successful outcome.

#### 15.2.5.8 *Certifying the Recount*

At the conclusion of the recount, after allowing the parties to visually inspect any questioned ballots and after hearing the arguments of the parties, the Court will rule on the validity of all questioned ballots and votes.<sup>44</sup>

By an appropriate order, the Court will certify to the State Board and other appropriate electoral boards the vote for each party to the recount or the vote for and against the question. The Court will declare the winning candidate or question accordingly.<sup>45</sup> The Certification of Recount 802-CC form should be used. Should the recount court's final order determine a new winner, it will direct either the State Board or the electoral board to issue a new certificate of election.

Changes in vote totals identified by the recount must be entered into Enhanced Results under the recount results section for the office. A recount is a court action and, thus, should be kept separate from the original "official results." The recount court's final order will contain the final recount results. The recount results will be posted on the Enhanced Results website.<sup>46</sup> The public will then be able to view both the original "official results" and the recount court's final recount results.

#### 15.2.5.9 *In the Event of a Tie*

If the certified results of the recount determine a tie, in a majority of cases, the Court must issue a writ for a special election.<sup>47</sup>

#### 15.2.5.10 *Appealing the Recount*

The recount proceeding shall be final and not subject to appeal.<sup>48</sup> However, a candidate who was originally declared the winner and loses as a consequence of a recount, may file a written complaint or a notice to contest the result, as applicable, within ten days of the entry of the order of the recount Court.<sup>49</sup> Procedures for contesting the result are set forth under the provisions governing Contested Elections.<sup>50</sup>

#### 15.2.5.11 *Costs*



The costs of the recount are assessed against the counties and cities comprising the election district if one of the following occurs:

- The candidate petitioning for the recount wins;

<sup>44</sup> See §24.2-802.2(F).

<sup>45</sup> *Id.*

<sup>46</sup> See §24.2-802.2(F).

<sup>47</sup> See §24.2-802.2(H).

<sup>48</sup> See §24.2-802.2(G).

<sup>49</sup> See §24.2-814.

<sup>50</sup> See §24.2-803 et seq.



- The petitioners for a referendum win; or
- There is a difference of not more than one half of one percent of the total vote, prior to the recount, between the two candidates.<sup>51</sup>

When none of the above circumstances occurs, the costs are assessed against the petitioning candidate.<sup>52</sup> The manner in which costs can be assessed against the petitioner and are calculated is discussed in detail in the code.<sup>53</sup> Any petitioner who may be assessed costs must post a bond with the Court in the amount of ten dollars per precinct in the area subject to the recount.<sup>54</sup>

### 15.2.6 Special Procedures for Presidential Elections

The unique recount petition timing established in § 24.2-802.1(A) ensures that any recount in an election for presidential electors in Virginia would be concluded no later than six days before the date set for the meeting of the presidential electors (so that Virginia's electoral votes could be counted).<sup>55</sup> Detailed procedures for the filing of a petition for such a recount are set forth in §24.2-801.1.<sup>56</sup> Other deadlines (such as the date for the holding of the preliminary hearing)<sup>57</sup> are shortened. Most importantly, any contest of such election would proceed concurrently, and not wait upon the results of the recount. The procedures and deadlines for the contest are in §24.2-805.<sup>58</sup>

### 15.2.7 Referendum recounts

#### 15.2.7.1 Filing the petition

A petition for a recount involving a question or referendum may be filed only in the event that the difference in the vote for and against is not more than fifty votes or one percent of the total vote, whichever is greater, as certified by the State Board of Elections or the electoral board.<sup>59</sup>

<sup>51</sup> See §24.2-802.3(A).

<sup>52</sup> *Id.*

<sup>53</sup> See §§24.2-802.3(A) and (B).

<sup>54</sup> See §24.2-802.3(C).

<sup>55</sup> See §24.2-801.1.

<sup>56</sup> See §24.2-801.1.

<sup>57</sup> See §24.2-802.1(A) (requiring recount preliminary hearing in an election for presidential electors be held within five days of the filing of the petition).

<sup>58</sup> See §24.2-805.

<sup>59</sup> See §24.2-800(C).



Should the vote difference fall within this range, fifty or more voters qualified to vote on the question may appeal from the determination of the State Board of Elections or electoral board by signing and filing a petition for a recount.<sup>60</sup> The petition for a recount must be filed within ten days from the day the appropriate electoral board certified the results of the election.<sup>61</sup> In the case of a statewide referendum, a petition for a recount must be filed in the Circuit Court of the City of Richmond.<sup>62</sup> In the case of any other referendum, a petition for a recount must be filed in the Circuit Court of any county or city comprising a part of the election district.<sup>63</sup>

A petition for a recount must set forth the results as certified by the State Board of Elections or the electoral board and must also request that the Court recount the ballots.<sup>64</sup> A copy of the petition must be served on the governing body or chief executive officer of the jurisdiction in which the election was held within ten days after the State Board of Elections or electoral board has certified the results.<sup>65</sup>

#### 15.2.7.2 *Conducting the Recount*

The procedures for conducting the recount with respect to a question or referendum are the same as those set forth above in summary form with respect to elections for office.<sup>66</sup>

### 15.2.8 Contesting a Recount

Any candidate originally determined the apparent winner in a primary or other election, but who subsequently loses as a consequence of a recount, may contest the election pursuant to the applicable provisions of a contested election discussed below.<sup>67</sup>

### 15.2.9 Disposition of Election Records After a Recount



Official election records conveyed to the Court in a recount proceeding by election or recount officials or by another Clerk of Court, must be secured and retained by the Clerk who received them until the recount is concluded and afterwards until the time for initiating a contest for that same election has expired and no contest is pending.<sup>68</sup>

Afterwards, if the Clerk of the Court where the recount was conducted is in possession of official election records conveyed from another county or city, not normally part of his jurisdiction, the Clerk must return those records to the Clerk of Court for that county or city. The election records should otherwise be handled the same as all other records for that election under appropriate laws or regulations.<sup>69</sup>

<sup>60</sup> *Id.*

<sup>61</sup> See [§24.2-801\(A\)](#).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See [§24.2-801\(B\)](#).

<sup>65</sup> See [§24.2-801\(C\)](#).

<sup>66</sup> See [§24.2-802.2](#).

<sup>67</sup> See [§24.2-814](#).

<sup>68</sup> See *Recounts Step-by-Step Instructions*, pg. 20. See also [§§24.2-668\(A\)](#), [24.2-669](#), and [24.2-802\(A\)](#); and Virginia Admin. Code [1VAC20-80-20\(C\)](#) (detailing procedures for how clerks of circuit courts in possession of official election records and materials should secure them).

<sup>69</sup> See *Recounts Step-by-Step Instructions*, p. 20.



## 15.3 CONTESTS

### 15.3.1 Overview

§15.3 presents the second part of this chapter; §15.3.2 outlines how unsuccessful candidates can contest the results of an election, §15.2.3-5 cover the exceptions applicable to certain elections and §15.2.6 concludes by explaining the bond requirements for candidates contesting elections for statewide office in the Commonwealth.

### 15.3.2 Applicability and Who Can Contest

An unsuccessful candidate in most general elections, special elections, or primaries can initiate a contest. The rules and procedures governing a contested election vary depending upon the office for which the election was held. Within the Code of Virginia, §24.2-803 relates to contests of elections for General Assembly; §24.2-804 to contests of elections for Governor, Lieutenant Governor, and Attorney General; §24.2-805 to contests of elections for presidential and vice presidential electors, as well as primaries for U.S. Senate and for statewide offices; and §24.2-806 to contests of all other primaries and elections.<sup>70</sup>

### 15.3.3 Exceptions

Contests of elections for the U.S. Senate or U.S. House of Representatives are conducted under the procedures of the respective Houses.<sup>71</sup> Virginia law does not cover this subject.

Additionally, Virginia law does not provide procedures to contest the results of a presidential primary.<sup>72</sup> More generally, Virginia election law does not contain any provisions for a losing candidate in a party-conducted nomination process other than a primary to contest the results. The Party Plan, rules or bylaws of that party, or the "Call" and rules for the nominating event may provide for such a party-conducted process.

### 15.3.4 Procedures governing a contested election to the General Assembly

#### 15.3.4.1 How to Initiate Contest

To initiate a contest, the losing candidate (contestant) first must give written notice of his intent to contest the election, both to the party who has been declared the apparent winner (contestee) and the Clerk of the appropriate House. Additionally, the contestant must post a surety bond in the amount of \$100 for each precinct contained in whole or in part of the district contested. If the contestant wins the contest, the bond shall be returned. If the contestant loses the contest, the bond shall be forfeited to the extent of the contestee's actual and documented costs of defending against the contest.<sup>73</sup>

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<sup>70</sup> See §§[24.2-803](#) – [24.2-806](#).

<sup>71</sup> See [U.S. Const. Art. I, §5](#) ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members...").

<sup>72</sup> Presidential primaries are a fairly recent development in Virginia (first held in 1988 as a one-time event, then put into state law in 1999).

<sup>73</sup> See [§24.2-803\(B\)](#).



#### 15.3.4.2 *Contestant must Provide Notice within 30 days of election or 3 days after recount*

Notice must be submitted within thirty days following the date of the election or three days after the conclusion of a recount, whichever is later. The notice must state the grounds upon which the contest will be based. These grounds must include either or both of the following:

- Objections to the contestee's eligibility based on specific allegations
- Objections to the conduct or results of the election, accompanied by specific allegations that, if proven true, would have a probable impact on the outcome of the election<sup>74</sup>

#### 15.3.4.3 *Contestee Must Answer*

Within ten days of service of this notice, the contestee must file a written answer with the Clerk of the appropriate House. The answer must admit or deny the allegations or state that he has no knowledge of the contestant's allegations. Additional defenses may be included. This answer must be signed by the contestee and verified by oath or affirmation.<sup>75</sup>

#### 15.3.4.4 *Depositions*

Either party, following service of the notice, may take depositions. The contestant must complete depositions within twenty days and the contestee within thirty days, following the date of the notice of intent to contest the election. Written affidavits by a witness may be submitted if stipulated to in writing by both parties. Either party may apply to the Clerk of the Circuit Court of the county or city in which the party resides, or the Clerk shall issue subpoenas for witnesses.<sup>76</sup>

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<sup>74</sup> See §24.2-803(B).

<sup>75</sup> *Id.*, at (C).

<sup>76</sup> *Id.*, at (D).



#### 15.3.4.5 *Subsequent Proceedings*

A written petition must be filed with the clerk of the appropriate house within ten days of the filing of the notice of intent to contest the election if contesting a November general election. If the election was held on a different date, the written petition may be filed within ten days of the filing of the notice, or within two days of the commencement of the next General Assembly session, whichever is later.<sup>77</sup> The Clerk shall refer the record<sup>78</sup> to the Committee on Privileges and Elections which, unless another Committee is designated, shall hear the contest, conduct an investigation, and report its findings and recommendations to the house for action.<sup>79</sup> The house may declare either party the winner or declare the election void and order a writ of election.<sup>80</sup> Should it be determined that there is a tie vote, there shall be a determination by lot;<sup>81</sup> however, no recount shall be permitted.<sup>82</sup> Should the house find, by a two-thirds vote, that the contest was brought in bad faith, the contestant shall be ordered to pay the contestee any amount above the posted bond in order to reimburse the contestee for his actual and documented costs in defending against the contest.<sup>83</sup>

### 15.3.5 Exceptions applicable to contests in other elections

#### 15.3.5.1 *Contest of Election of Governor, Lieutenant Governor, or Attorney General*

Notice of intent to contest must be filed with the Clerk of the House of Delegates. The filing of a petition to contest must be within two days of either the commencement of a Special Session of the General Assembly convened expressly to hear the contest, or of the beginning of the next scheduled regular session of the General Assembly, whichever occurs first.<sup>84</sup> At the time of filing the notice, the contestant shall post a surety bond of \$10 per precinct in the state. A final determination will be made by both houses of the General Assembly sitting jointly, presided over by the Speaker.<sup>85</sup>

#### 15.3.5.2 *Contest of Election of Presidential and Vice-Presidential Electors or Primaries for United States Senate or Statewide Office*

The proceedings shall be in the Circuit Court of the City of Richmond before a special court composed as specified in §24.2-805.<sup>86</sup>

<sup>77</sup> *Id.*, at (E).

<sup>78</sup> *Id.*, at (G) (the “record” includes the notice, answer, petition, reply, depositions, and affidavits).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*, at (H).

<sup>81</sup> See §24.2-674.

<sup>82</sup> See §24.2-803(H).

<sup>83</sup> See §24.2-803(H).

<sup>84</sup> See §24.2-804. The Code includes a two-day deadline for these offices because the new terms for these offices begin at noon on the first Saturday after the second Wednesday in January, when the regular session of the General Assembly convenes.

<sup>85</sup> See §24.2-804.

<sup>86</sup> See §24.2-805.



Notice of intent to contest an election for presidential or vice-presidential electors shall be filed no later than 5:00 p.m. on the second day after the day the Department of Elections certifies the results. A copy of the complaint shall be served on each contestee within five days after the Board's certification. The contestee's answer shall be filed within five days after the complaint is served on him.

The contest shall not wait upon the results of any recount. The proceedings shall be completed at least six days before the fixed time for the meeting of electors.<sup>87</sup>

#### *15.3.5.3 Contest of Primary for the U.S. House of Representatives, State Senate, House of Delegates, or any County, City, Town or District Office, or Contest of Election of any County, City, Town, or District Office*

The contest is conducted in the Circuit Court of the county or city in which the challenged candidate resides before a special court composed as specified in §24.2-806.<sup>88</sup> Specific rules governing the procedures for contesting any of these elections are covered in detail under §§24.2-807 - 813.<sup>89</sup>

### 15.3.6 Bond

Only candidates contesting elections for Governor, Lt. Governor, Attorney General, the House of Delegates, or the State Senate are required to post bond in order to contest the election.<sup>90</sup> There is no bond requirement for other candidates filing contests.

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<sup>87</sup> See §24.2-805.

<sup>88</sup> See §24.2-806.

<sup>89</sup> See §24.2-807-813.

<sup>90</sup> See §§24.2-803(B) and 24.2-804 (requiring posting of bonds for contests of elections for General Assembly, Governor, Lieutenant Governor, and Attorney General).

