

VIRGINIA COURT CLERKS ASSOCIATION

LIABILITY PROTECTION

AND

FAITHFUL PERFORMANCE OF DUTY BOND

Presented by

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Division of Risk Management

LIABILITY PROTECTION FOR CONSTITUTIONAL OFFICERS

§ 2.2-1839. Risk management plans administered by the Department of Treasury's Risk Management Division for political subdivisions, constitutional officers, etc.

. . . The Division shall establish one or more risk management plans specifying the terms and conditions for coverage, subject to the approval of the Governor . . . to provide protection against liability imposed by law for damages . . . resulting from any claim made against any . . . constitutional officer . . . or the officers, agents or employees of . . . the foregoing for act or omissions of any nature while in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.

VIRGINIA CONSTITUTIONAL OFFICER AND REGIONAL JAIL RISK MANAGEMENT PLAN

VaRISK

Established pursuant to § 2.2-1839 of the Code of Virginia, to pay all sums which a Constitutional Officer, or any deputy, employee or agent of the Constitutional Officer, is legally obligated to pay on all claims first made or arising from any act occurring during any term of coverage on causes of action established by law by reason of liability arising out of acts or omissions while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.

The Plan will pay \$1,000,000 per claim. There is no aggregate or deductible. In addition to compensation for liability, the Plan provides:

- All expenses, including defense costs.
- Interest on judgment as stipulated.
- Reasonable expenses incurred, except salaries.
- Court costs applicable to the defense.
- Plaintiff's attorney's fees awarded pursuant to 42 USC Section 1988.

Exclusions include:

- Motor vehicle liability
- Property damage liability in excess of \$100,000 per event.
- Pollutants, toxic chemical, etc.
- Off-duty employment except in law enforcement context.
- Illegal profit or advantage, fraudulent or dishonest acts, criminal acts, or willful and wanton acts. Note: defense to civil claims and suits will be provided until a trier of fact determines such acts occurred.
- Contractual liability except mutual aid agreements between entities.
- Many administrative matters (exceptions: matters submitted to the Equal Employment Opportunity Commission; matters submitted to the Virginia State Bar)

FIDELITY BOND AND FAITHFUL PERFORMANCE OF DUTY BOND

Bonding is not insurance, although crime coverage is now found in an insurance format. A bonding company (the SURETY) says that the person bonded (the OBLIGOR, or PRINCIPAL) will do what he or she promises to do for the entity taking out the bond (the OBLIGEE). If the promise is not kept the Surety will be responsible.

- A. A **FIDELITY BOND** guarantees that if the Obligor steals, the Surety will make good the loss.
- B. A **FAITHFUL PERFORMANCE OF DUTY BOND** guarantees that if an Obligor does not adequately perform the duties of the position, the Surety will compensate the Obligee for the loss.

The Surety will make good, but only up to the bond amount. However---and this is where the bond differs most from insurance and where it can cause difficulties in the public sector---the Surety has recourse, which can not be waived, against the Obligor.

Bonding is thus a three-party contract between (1) a surety, (2) an obligor, being the person bonded, and (3) an obligee, the entity being protected. Insurance is a two-party contract where the insurer may or may not have recourse against another. The names are commonly interchanged in conversation; fidelity bond, surety bond, faithful performance of duty bond, public official bond...although there is a difference.

Fidelity

The **fidelity bond** covers loss of money or other property resulting from employee dishonesty. Employee dishonesty means an act committed with "manifest intent" (a) to cause the employer or its insurer to sustain loss, and (b) to obtain financial benefits for the employee or something the employee seeks to benefit.

These are important conditions. An act that does not intend loss to the employer or insurer or benefit for the employee (or designee) is not covered. And the benefit to the employee must be other than salary or other employee benefits.

Faithful Performance

The **Faithful Performance of Duty Bond** protects both the entity and those officials who are required by law to provide a bond against loss due to the dishonest acts of employees serving under them.

Coverage is on an occurrence basis, with a series of acts as well as the involvement of any number of employees colluding in a particular crime constituting one occurrence.

The term “faithful performance of duty” goes further than “honesty”, implying that persons may be responsible for loss of property or money entrusted to them even though they were entirely honest.

For example, public officials are responsible for performing their duty and may be responsible for loss of money due to burglary or hold-up. Assuming the official is blameless, the usual fidelity bond (crime bond) would not protect, but a faithful performance of duty bond would. Other exposures under the faithful performance of duty bond include an employee’s malfeasance, willful neglect of duty, bad faith or negligence. The bond pays the entity if the entity is not able to recover from the guilty employee.

Despite the confusion over names—Fidelity, Faithful Performance of Duty, Public Official, Surety—and understanding over which Bond does what, they are all trying to accomplish the same thing—protecting assets from the wrong doing of employees.

FORGERY OR ALTERATION

Forgery is one of the most profitable crimes. Losses sustain through alteration of money instruments in the U.S. are estimated to be 20 times more than from bank robberies.

Banks are normally responsible for honoring forged documents but several conditions may cause you to pay.

1. Banks may not be liable if negligence on the part of the depositor can be shown.
2. The burden of loss may some times be divided between the bank and the depositor.

3. The bank may not have adequate insurance.
4. There may be a need or desire to avoid controversy.

The bond covers alteration on outgoing or stolen instruments, such as checks, drafts, promissory notes, drawn (or supposed to have been drawn) against the insured's account, either by the insured or the insured's agent. These losses are not covered by property insurance.

Certain legal costs are covered, such as could be incurred if the insured refuses to pay a covered instrument under the reasonable belief it was forged, and is then insured. The insured must first defend the action with the written consent of the insurer, and pay before being reimbursed by the insurer.

Facsimile or mechanically reproduced signatures are treated as hand written signatures.

THEFT, DISAPPEARANCE AND DESTRUCTION

This refers to the loss of money and securities owned or held by the insured or for which the insured is legally liable, inside the insured's premises and outside while in the care of a messenger. Theft is defined as any act of stealing, such as burglary or robbery, but not voluntary parting of property as in extortion.

"Inside" protection is defined as the insured's inside premises and inside a safe or bank. "Outside" coverage is generally restricted to loss while in the care and custody of a messenger. This messenger can be the named insured or an employee while having custody of money or securities outside the insured's premises.

COMPUTER FRAUD

Computer Fraud covers theft of money and securities that by "use of any computer" has been fraudulently transferred.

BONDS OF CONSTITUTIONAL OFFICERS

§15.2-1527. Bonds of Officers. --- Every treasurer or director of finance, sheriff, clerk of a circuit court, commissioner of revenue, and other persons in the offices of constitutional officers required to give bond shall, at the time he qualifies, give such bond as is required by [§49-12](#). Bonds for a treasurer or a director of finance, sheriff, clerk of the circuit court and commissioner of the revenue shall be provided through the state . . . Division of Risk Management pursuant to subsection B of [§2.2-1840](#). The penalty of the bond of each officer shall be determined by the court or clerk before whom he qualifies, within the limits prescribed in §§ [15.2-1528](#), [15.2-1529](#) and [15.2-1530](#)

§15.2-1528. Penalties of bonds of sheriffs, clerks of the circuit court and commissioners of the revenue. --- The penalty of the bond of a sheriff shall be \$30,000. The bond of the clerk of a circuit court shall not be less than \$3,000 and the bond of such clerk shall bind him and his sureties, not only for the faithful discharge of his duties as clerk of the court, but also for the faithful discharge of such other duties as may be imposed upon him by law in like manner or by order of the court and with the same effect as if it were so expressed in the conditions of his bond. The bond of the commissioner of the revenue shall not be less than \$1,000 nor more than \$3,000.

§ 2.2-1840. Blanket surety bond plan for state and local employees. --

A. Subject to the approval of the Governor . . . the Division of Risk Management shall establish a program of blanket surety bonding to provide surety for the faithful performance of duty

B. Local employees, including . . . local constitutional officers . . . shall be required to participate in the blanket surety bond program adopted by the Division through the Comptroller and the Compensation Board. The Division shall exclude clerks of the circuit court with respect to the moneys they hold pursuant to [§ 8.01-582](#) insofar as coverage is provided under [§ 2.2-1841](#) for their faithful performance concerning those moneys.

§ 2.2-1841. Blanket surety bond plan for moneys under control of court.

The Division shall establish a program of blanket surety bonding to provide surety for the faithful discharge of duty with respect to moneys held pursuant to §§ 8.01-582 and 8.01-600 by all general receivers and clerks. General receivers and clerks shall participate in the program. The Division's cost of obtaining and administering the blanket surety bond shall be paid from those moneys covered by the bond.

§ 8.01-582. Appointment of general receivers; their duties; audit of funds.

Any circuit court may appoint a general receiver of the court, who may be the clerk of the court, and who shall hold his office at its pleasure. The general receiver's duty shall be, unless it is otherwise specially ordered, to receive, take charge of and hold all moneys paid under any judgment, order or decree of the court, and also to pay out or dispose of same as the court orders or decrees. Moneys held pursuant to this section shall be deemed public deposits as set forth in Chapter 44 (§ 2.2-4400 et seq.) of Title 2.2 and shall be invested in certificates of deposit or time deposits, and in accordance with the provisions of Chapter 45 (§ 2.2-4500 et seq.) of Title 2.2, as ordered by the court. All moneys received under this section are subject to audit by the Auditor of Public Accounts. The Auditor of Public Accounts shall prescribe mandatory record keeping and accounting standards for general receivers.

§ 8.01-600. How money under control of court deposited; record kept; liability of clerk.

A. This section pertains only to money held by the clerk of the circuit court, when the court orders moneys to be held by the clerk pursuant to this section. The clerk shall have the duty, unless it is otherwise specially ordered, to receive, take charge of, hold or invest in such manner as the court orders and also to pay out or dispose of these moneys as the court orders or decrees. To this end, the clerk is authorized to verify, receive, and give acquittances for all such moneys as the court may direct.

C. All deposits under this section shall be secured in accordance with the Virginia Security for Public Deposits Act (§ 2.2-4400 et seq.).

F. Except as otherwise ordered by the court, for good cause shown, the clerk shall be liable for any loss of income which results from his (i) failure to invest the money within sixty days of the court order creating the fund or (ii) failure to pay out any money so ordered by the court within sixty days of the court order. He shall be charged with interest from the date of the court order until such investment or payment is made.

G. The clerk shall keep an accurate and particular account of all moneys received, invested, and paid out by him, showing the respective amounts to the credit of each case in the court and designating in the items the judgments, orders or decrees of court under which the respective sums have been received, invested or paid out. At least annually and no later than October 1 of each year, the clerk shall make a report to the court showing the balance to the credit of each case in the court in which money has been received by him, the manner in which money has been received by him, the manner in which it is invested, the amounts received, invested or paid out during the year ending June 30 of the current year, the approximate date on which the moneys held for the beneficiaries will become payable, and the whole amount then invested and subject to the future order of the court. A copy of this report shall be recorded in the trust fund order book. The clerk shall, at any time when required by the court or the Auditor of Public Accounts to do so, furnish a statement of the amount subject to the order of the court in any case pending therein and any other information required by the court or the Auditor of Public Accounts as to any money or other property under his control before the court. When the clerk receives funds under this section, he shall be entitled to receive fees in accordance with § 17.1-287 in the amounts as specified for general receivers in § 8.01-589.

H. All moneys received under this section are subject to audit by the Auditor of Public Accounts.

BOND CLAIMS

Entities covered by the Commonwealth's bond program must report loss immediately to the Division of Risk Management, the Auditor of Public Accounts and the State Police. Most commercial bonds call for immediate notice of loss, with a detailed proof of loss filed within 90 to 120 days of discovery. Records must verify the amount. The bond does not require the guilty employee to be convicted.

If an extension is needed, request it early and get it in writing. Gathering proof may be difficult. You may need help from lawyers and accountants. Your employees and appointees can bring suit for personal injury, such as defamation or libel and slander, if the case is not clear-cut.

Embezzlements may occur over many years. Specialized accountants may be required because the source of information may be the alleged criminal. Financial records of several must be reviewed. Therefore the cost to prepare the bond claim can be substantial. Legal expenses dealing with bond losses are not covered.

Valuation. Most bonds value inventory losses at cost. To obtain the maximum recovery requires documentation to relate the loss to the market value of the merchandise or its replacement cost.

A cause of controversy when an employee steals property, or is suspected of stealing, can be the inventory exclusion. The fidelity bond excludes any part of a loss whose existence or amount depends upon an inventory or profit and loss computation.

Suppose you have a shrinkage that you suspect, but can't prove, is from employee theft. Eventually you catch the dishonest employees, but you can only prove they took a small amount. You feel certain that the total loss was from their dishonesty, but can't prove it. You're probably out of luck for the whole amount. Your best approach is to arrange audits and inventories so loss causes can be pinpointed.

Another limitation of fidelity bond or crime coverage is the condition that a loss is covered only if the employee had manifest intent to (1) cause you to sustain loss, and (2) obtain financial benefit for the employee or another person.

Fidelity bonds typically cover designated persons. Examples of persons excluded under most commercial bonds include:

1. Those with prison records. You may obtain a federal bond specifically designed to cover such persons at no cost, for up to 12 months, and a \$10,000 limit from state unemployment compensation offices.
2. Persons whose employment has been terminated are usually covered only 30 days beyond termination.

FREQUENTLY ASKED QUESTIONS ABOUT BONDS.

WHAT'S THE DIFFERENCE BETWEEN A FIDELITY BOND AND A FAITHFUL PERFORMANCE OF DUTY BOND?

A fidelity bond, or crime insurance, covers the risk of employee dishonesty—specifically, the risk that an employee will steal money.

A faithful performance of duty bond covers any loss the organization or a member of the public suffers because the employee failed to faithfully perform his or her duty. In other words, the faithful performance of duty bond will protect the organization against losses caused either by dishonesty or by other types of employee malfeasance besides dishonesty. Faithful performance of duty bonds are designed to cover those in positions of trust, frequently designated so in the *Code of Virginia*.

WHAT WOULD A FAITHFUL PERFORMANCE OF DUTY BOND COVER THAT A FIDELITY BOND WOULD NOT?

A faithful performance of duty bond will cover the same dishonesty as a fidelity bond. In addition, it would come into play in additional situations, such as a loss of Commonwealth funds resulting from an employee's malfeasance, willful neglect of duty, bad faith or negligence.

WHY WOULD WE WANT TO PROTECT AN APPOINTEE / EMPLOYEE FROM THE CONSEQUENCES OF HIS OR HER OWN WRONGDOING?

Bonds do not protect the employee. Bonds protect the organization and the public from the loss of Commonwealth funds. Individuals cannot collect under these specific bonds. Should a bond pay as a result of an employee's dishonesty or malfeasance, funds would be paid to the organization.

IS AN APPOINTEE / EMPLOYEE ON HIS OR HER OWN IF HE OR SHE IS ACCUSED OF INTENTIONAL WRONGDOING UNDER THE BOND PROGRAM?

No, not if he or she is only *accused* of intentional wrongdoing. But an employee is on his or her own to pay the damages if a court determines the employee's guilt.

CAN AN OFFICER FILE A CLAIM UNDER A FAITHFUL PERFORMANCE OF DUTY BOND FOR A LOSS OCCASIONED BY THE SIMPLE NEGLIGENCE OF AN APPOINTEE OR EMPLOYEE?

Technically, yes. But there may be little point in doing so. Third-party negligence claims are covered under the Virginia Constitutional Officer and Regional Jail Risk Management Plan ("Va RISK"). Remember also that the bond administrator, whether insured or self-insured, is entitled to recover from the employee anything it pays to the organization on the employee's behalf.

Filing a faithful performance of duty bond claim can have major consequences. It is not something to be taken lightly.

An organization considering filing a claim under a faithful performance of duty bond to recover a loss suffered because of the employee's mistake or carelessness, should take the action very seriously. By making that claim, the organization is saying that the employee failed to faithfully perform his or her duties and the employee should therefore repay the organization for the loss he or she caused. The bond pays only if the employee has a duty to do so, and if the employee has a duty to pay. The surety making the payment is entitled to attempt to recover from the employee anything it pays on the organization's behalf.

WHY DOESN'T THE FIDELITY BOND JUST COVER CERTAIN INDIVIDUALS?

When you structure bond coverage in that way, you are in effect betting you know who is going to steal the money and how much they'll be able to steal. From the standpoint of protecting the Commonwealth's assets, it is better to cover positions to reach more possibilities, however remote. It is best to ensure that if a loss occurs, it is covered.

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