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## Annual Survey of Virginia Law: Civil Procedure and Practice

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# CIVIL PROCEDURE AND PRACTICE

*W. Hamilton Bryson\**

This article considers recent statutes and case law in the field of Virginia civil procedure and practice. Since it has been several years since the last similar effort was published, this essay will take notice of the developments which have taken place from 1983 to May 1985. Much of the case law to be mentioned is pre-1983 trial court material, but since it was only recently published, it will be useful to have it included here. This is especially so since most points of civil procedure and practice, being harmless error, are not often considered by the Virginia Supreme Court on review.

The only major innovation in the area of Virginia civil practice since 1983 has been the creation of the intermediate court of appeals. The other matters relevant to this article are refinements to and explanations of existing procedures and practices.

## I. THE COURT OF APPEALS

### A. *Jurisdiction*

On January 1, 1985, the Virginia Court of Appeals came into existence as an intermediate appellate court between the circuit courts and the Supreme Court of Virginia.<sup>1</sup> It is composed of ten judges and is headquartered in the same building as the supreme court at Ninth and Franklin Streets in Richmond. The clerk of the supreme court also serves as clerk of the court of appeals.

The original jurisdiction of the court of appeals is limited to the issuance of writs of mandamus, prohibition, and habeas corpus, and to the punishment of contempts. In addition, a single judge may exercise "appropriate" action in respect to circuit court injunctions in matters within the appellate jurisdiction of the court

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1. See generally VA. CODE ANN. §§ 17-116.01 to .014 (Cum. Supp. 1985); VA. SUP. CT. R. 5A, reprinted in 11 VA. CODE ANN. 182 (Repl. Vol. 1985); Rasnic, *The New Virginia Court of Appeals: Creation, Jurisdiction and Questions*, 33 VA. B. NEWS, Apr. 1985, at 35, 36.

of appeals, if a petition and the original papers are presented within fifteen days after the entry of the injunctive order.<sup>2</sup> The court has appellate jurisdiction over:

- a) circuit court decisions that determine appeals from administrative agencies;
- b) decisions of the Industrial Commission ruling on worker's compensation claims;
- c) divorce decrees;
- d) the affirmance or annulment of marriages;
- e) child custody resolutions in circuit courts;
- f) spousal and child support decrees of circuit courts;
- g) the disposition of juvenile and domestic relations problems under Title 16.1 and Title 20 in circuit courts;
- h) adoption orders;
- i) interlocutory orders of circuit courts granting, dissolving, or denying injunctions;
- j) convictions in circuit courts for traffic offenses and crimes, unless the death penalty has been imposed.<sup>3</sup>

Except for traffic offenses and crimes, the losing party in the circuit court may appeal to the court of appeals as a matter of right. It was originally proposed to have appeals as of right in all cases, civil and criminal, but the General Assembly set up the court of appeals with only limited civil jurisdiction and with appellate criminal jurisdiction restricted to petitions for appeals.<sup>4</sup> It is anticipated that the decisions of the court of appeals in both civil and criminal matters will be the final appeal and that the course of justice will be satisfied by this single appeal.

Points of legal novelty and matters of unusual precedential value may be taken directly to the Supreme Court of Virginia by a petition procedure bypassing the court of appeals. Although the rules of court do not specify the procedure, it appears that the appellant must first perfect his appeal in the court of appeals and then petition the supreme court to issue a writ of certiorari or a notice in the nature of a writ of certiorari to have the case certified or trans-

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2. VA. CODE ANN. § 17-116.04 (Cum. Supp. 1985).

3. *Id.* §§ 17-116.05 to .05:1(A).

4. *Id.* § 17-116.05:2(B).

ferred to it. Although the statute allows the supreme court to act on its own motion, the court will not always be aware of the existence of the case without a petition from an interested party. Alternatively, the statute allows the court of appeals to move the supreme court for such a writ of certiorari.<sup>5</sup>

## B. Procedure

The procedure for appeals to the court of appeals is prescribed in detail by the statutes and the rules of court,<sup>6</sup> and these must be carefully studied. Highlights of the procedure for civil appeals<sup>7</sup> are as follows. The first step is to file a notice of appeal with the clerk of the trial court or the clerk of the Industrial Commission within thirty days after the entry of the final order to be appealed. Copies of this notice must be sent to all other parties or their counsel of record and to the clerk of the court of appeals. It is to be particularly noted that this copy of the notice of appeal is to be sent to the clerk of the court of appeals within thirty days, accompanied by a twenty-five dollar filing fee.<sup>8</sup> (Since a petition for an appeal to the supreme court need not be filed until three months after the final decree, it is feared that this mandatory deadline in the court of appeals may catch the bar off guard.)

The contents and regulations for notices of appeals, records on appeal, briefs, appendices, and appeal bonds are dealt with in detail by Virginia Supreme Court Rules 5A:4 through 5A:26 (hereinafter referred to as "Rules"). It is to be particularly noted that notices of appeal from the Industrial Commission must state whether the appellant "challenges the sufficiency of the evidence to support the findings of the Commission."<sup>9</sup> A party that fails to file a brief in a timely manner will not be allowed to argue orally before this court.<sup>10</sup>

The hearings of appeals are had before three-judge panels of the court of appeals. These panels sit in various locations throughout

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5. *Id.* § 17-116.06; VA. SUP. CT. R. 5:14.

6. VA. CODE ANN. §§ 17-116.02, .05:2 to .05:4, .07, .09 (Cum. Supp. 1985); VA. SUP. CT. R. 5A:6-:28, 5A:33-:35.

7. Criminal appeals will not be dealt with in this article.

8. VA. CODE ANN. § 8.01-675.3 (Repl. Vol. 1984); *id.* §§ 17-116.05:2(A), .05:3 (Cum. Supp. 1985); VA. SUP. CT. R. 5A:6, 5A:11(b). This thirty day time limit is mandatory according to Rule 5A:3(a).

9. VA. SUP. CT. R. 5A:11(b).

10. *Id.* R. 5A:26.

the commonwealth, and the composition of the panels is rotated. All three of the judges designated to form a panel must sit together to decide the appeal.<sup>11</sup> If, however, all three conclude on the basis of the record and briefs that the appeal is "without merit," the judgment of the trial court will be affirmed without hearing any oral argument.<sup>12</sup>

There are provisions for rehearings before a panel, which will be the same panel where practicable, and there may be a rehearing before the court of appeals sitting en banc.<sup>13</sup>

### C. *Reviewability*

Following a final determination of the court of appeals, a party may petition for review by the Supreme Court of Virginia.<sup>14</sup> The procedure to be followed begins with a notice of appeal which must be filed with the clerk of the court of appeals "within 30 days after entry of final judgment or order denying a rehearing."<sup>15</sup> The appellant then follows the usual procedures for petitioning for an appeal and perfecting an appeal in the supreme court. Note particularly that the petition for appeal must be filed with the clerk of the supreme court within thirty days (not three months as in direct appeals from trial courts) after the judgment of the court of appeals.<sup>16</sup>

## II. MISCELLANEOUS POINTS

### A. *Settlements Out of Court*

Following a release or a covenant not to sue, joint tort-feasors can be sued under section 8.01-35.1, but their liability may be reduced by the amount of the consideration paid for the release or the covenant.

In determining the amount of consideration given for a covenant not to sue or release for a settlement which consists in whole or in part of future payment or payments, the court shall consider expert or

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11. VA. CODE ANN. § 17-116.02 (Cum. Supp. 1985).

12. VA. SUP. CT. R. 5A:27 to :28(a).

13. *Id.* R. 5A:32 to :35.

14. VA. CODE ANN. § 17-116.07(B) to .09 (Cum. Supp. 1985).

15. VA. SUP. CT. R. 5:14(a).

16. VA. CODE ANN. § 8.01-671(c) (Repl. Vol. 1984); VA. SUP. CT. R. 5:17(a)(2).

other evidence as to the present value of the settlement consisting in whole or in part of future payment or payments.<sup>17</sup>

This change was desirable to clarify the method of placing a value upon structured settlements, which may consist of annuities, for example, instead of lump sum payments.

A release may be set aside on the grounds of a mutual mistake of fact when subsequent unknown injuries are discovered.<sup>18</sup> However, there must be some evidence of a causal connection between the accident and the newly discovered injury in order to avoid a plea of release by showing that it was made under a mistake of fact.<sup>19</sup>

Where a third-party defendant is in default, the defendant (the third-party plaintiff) may recover against him for the amount of the settlement paid to the plaintiff.<sup>20</sup>

### B. *Arbitration*

If a contract provides for arbitration, submission to arbitration is a condition precedent to litigation unless it is specifically agreed otherwise.<sup>21</sup> This provision changes the common law rule.

An arbitrator must be completely impartial and disinterested.<sup>22</sup>

The arbitration provisions of the Code of Virginia, section 8.01-577 to -581, do not apply to bind the commonwealth.<sup>23</sup>

### C. *Service of Process and Notices of Claims*

A foreign corporation that maintains in Virginia a "manufacturer's agent" who takes and forwards orders out of state is subject to service of process under section 8.01-301.<sup>24</sup> When a nonresident corporation exercises control over business within the state, it is "doing business" within the state and is subject to "long arm" service of process.<sup>25</sup>

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17. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1985).

18. *Halstead v. Virginia Farm Bureau Mut. Ins. Co.*, 1 Va. Cir. 22 (Richmond 1962).

19. *Williams v. Johnson*, 2 Va. Cir. 313 (Richmond 1967).

20. *Clark v. Haynes Furniture Co.*, 2 Va. Cir. 158 (Henrico County 1983).

21. VA. CODE ANN. § 8.01-577(B) (Repl. Vol. 1984).

22. *Bradley v. Shute*, 1 Va. Cir. 216 (Richmond 1981); *see also Gammon v. First Dominion Corp.*, 1 Va. Cir. 102 (Richmond 1970) (ruling that a receiver must also be disinterested).

23. *Deal v. Commonwealth*, 224 Va. 618, 299 S.E.2d 346 (1983).

24. *Sawyer v. Hunter Eng'g Co.*, 1 Va. Cir. 14 (Princess Anne County 1960).

25. *Commonwealth Distrib. Co. v. Hans Holterbosch, Inc.*, 1 Va. Cir. 77 (Richmond 1968).

Process may be served on a dissolved corporation under the old section 13.1-11 (now section 13.1-637) by service on the person who was the registered agent at the time of the dissolution.<sup>26</sup>

Section 8.01-300 has been recently amended so that cities, counties, towns, et cetera can no longer be served with process through service upon their councilmen, county treasurers, supervisors, or commissioners of revenue. It appears that the most appropriate officials to be served are city attorneys, county attorneys, and commonwealth's attorneys, all of whom are lawyers; moreover, the city and county attorneys will themselves be directly involved in the defense of the litigation.

Faulty service of process is cured by section 8.01-288, if the defendant actually received the writ of process within the time prescribed by law, but the plaintiff must prove the receipt of the process and that it was timely.<sup>27</sup> There have been several recent amendments to the statutes and rules regulating service, delivery, and notice of process on out-of-state defendants, but problems still remain.<sup>28</sup>

The provisions for suing the commonwealth were changed in 1984 to require the notice of the claim to be filed with the Attorney General; such *notice* must be filed within one year after the accrual of the cause of action. The *action* against the commonwealth must be commenced between six months and eighteen months after the filing of the notice with the Attorney General. The tolling provisions of section 8.01-229 apply to this statute of limitations.<sup>29</sup>

When an action for personal injury is brought against a municipality, the plaintiff must notify in writing the appropriate official of the *precise location* where the injury occurred in order to aid the municipality in promptly correcting any defective condition.<sup>30</sup>

In *Adams v. Wright*, Judge Marvin Cole ruled that the notice of claim for medical malpractice must give a reasonable description of the complained of acts.<sup>31</sup>

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26. *Bass v. Richmond Baseball, Inc.*, 2 Va. Cir. 310 (Richmond 1966).

27. *Davis v. American Interins. Exch.*, 228 Va. 1, 319 S.E.2d 723 (1984).

28. These complex matters will have to be dealt with in another article and at greater length than is possible here.

29. VA. CODE ANN. §§ 8.01-195.6 to -195.7 (Repl. Vol. 1984 & Cum. Supp. 1985).

30. *Town of Crewe v. Marler*, 228 Va. 109, 319 S.E.2d 748 (1984).

31. *Adams v. Wright*, 1 Va. Cir. 433 (Richmond 1984) (construing VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984)).

#### D. Appeals from District Courts

Upon removal from the general district court to the circuit court by the defendant, the plaintiff cannot amend the ad damnum to a sum greater than the jurisdictional limits of the district court.<sup>32</sup>

Upon an appeal, the judgment of the general district court is annulled, and the parties may amend their pleadings.<sup>33</sup> However, upon an appeal from the general district court, the circuit court cannot allow any claim, setoff, or counterclaim that is in excess of the jurisdiction of the district court.<sup>34</sup> This limitation exists because the jurisdiction of the circuit court over the case is derived from the general district court. To allow otherwise would defeat the statutes which create and define the district courts. Although this writer has seen no case authority on the point, it appears that if a plaintiff during a case that was removed from or appealed from the general district court suffers a nonsuit in the circuit court, he cannot recommence the action with a prayer for damages in excess of the jurisdiction of the general district court for the same considerations.

There is no right to appeal a decision not to reopen a case in the general district court.<sup>35</sup>

#### E. Venue

For an action founded on a guarantee, the city where the payee resides is a proper forum under section 8.01-262(4).<sup>36</sup> In an action for rent, the proper venue is where the premises are located.<sup>37</sup>

The word "regular" in the venue statute, section 8.01-262(3), means usual and customary and does not refer to the quantity of business conducted in a city or county.<sup>38</sup> A party who frequently and regularly purchases and receives supplies in and advertises in

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32. *United Leasing v. Powell*, 1 Va. Cir. 335 (Henrico County 1983).

33. *Estes v. Crawley*, 2 Va. Cir. 129 (Henrico County 1983).

34. *Roberts v. Colonial Ford Truck Sales, Inc.*, 2 Va. Cir. 422 (Richmond 1975); *Uzzle v. Garian*, 1 Va. Cir. 47 (Richmond 1965).

35. *Henrico County v. Brown*, 2 Va. Cir. 97 (Henrico County 1982); *see also* *Material Handling Indus. v. Mercer Rug & Carpet Sales, Inc.*, 2 Va. Cir. 232 (Richmond 1984).

36. *Noland Co. v. Aden*, 1 Va. Cir. 201 (Roanoke 1980); VA. CODE ANN. § 8.01-262(4) (Cum. Supp. 1985).

37. *United Leasing v. Powell*, 1 Va. Cir. 335 (Henrico County 1983) (construing un-amended portion of VA. CODE ANN. § 8.01-262(4) (Cum. Supp. 1985)).

38. *Evans's Adm'r v. Hadad*, 1 Va. Cir. 507 (Richmond 1984); VA. CODE ANN. § 8.01-262(3) (Cum. Supp. 1985).



a city is conducting business there for the purposes of venue under section 8.01-262(3).<sup>39</sup>

The last two cited cases are typical of many which give a very broad interpretation to the words "regularly or systematically conducts affairs or business activity" in section 8.01-262(3). It was felt that these words created an opportunity for improper forum shopping, and this statute was amended in 1985 to delete the words "or systematically." It does not appear to this writer that either case would have been decided differently under the amended statute; "regularly" and "systematically" are near synonyms in the context of venue.

In a suit for a divorce, venue, being jurisdictional, must be alleged in the body of the bill so that it can be proved.<sup>40</sup> The proper venue in a divorce suit must be proved by specific testimony and not by merely conclusory words.<sup>41</sup>

Venue in suits for injunctions is not mandatory.<sup>42</sup>

The fact that the parties live in a neighboring county is not by itself sufficient good cause for a transfer of venue under the principle of forum non conveniens.<sup>43</sup> However, a change of venue under section 8.01-265 will be allowed so that related actions can be tried together to avoid inconsistent results.<sup>44</sup> When a case is transferred to a more convenient forum pursuant to section 8.01-265, the receiving court cannot reconsider the issue of venue.<sup>45</sup>

A venue statute enacted after a cause of action arose but before the action is begun applies to that action.<sup>46</sup>

Section 8.01-264(B) was added in 1985 to allow objections to venue to be raised after the parties are at issue if a party upon whom venue was based is dismissed from the action. For the purposes of venue, this codifies common law pleas in abatement *puis darrien continuance*.<sup>47</sup> Matters in abatement can be raised by mo-

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39. *Wilson v. Wood*, 2 Va. Cir. 125 (Richmond 1983).

40. *Martin v. Martin*, 1 Va. Cir. 149 (Richmond 1973).

41. *Lipps v. Lipps*, 2 Va. Cir. 4 (Richmond 1979).

42. *Hawthorne v. Hawthorne*, 2 Va. Cir. 483 (Henrico County 1979) (construing unamended portion of VA. CODE ANN. § 8.01-621 (Cum. Supp. 1985)).

43. *Smith v. Williams*, 2 Va. Cir. 479 (Richmond 1979) (construing unamended portion of VA. CODE ANN. § 8.01-265 (Repl. Vol. 1984)).

44. *Grinstead v. Carter*, 1 Va. Cir. 194 (Pulaski County 1979).

45. *United Va. Bank v. First & Merchants Nat'l Bank*, 2 Va. Cir. 438 (Richmond 1975).

46. *Mitchell v. Lee*, 2 Va. Cir. 316 (Richmond 1969).

47. See M. P. BURKS, PLEADING AND PRACTICE 333 (4th ed. 1952).

tion if done after the matter occurred and before any other motion, even though the time for making motions in abatement raising the objection has passed. Except for venue, no other needs for this procedure in modern practice come to mind.

#### F. *Parties*

The failure of an infant to sue by next friend can be cured by amendment which will validate the prior proceedings.<sup>48</sup>

A judgment cannot be entered against a person who is in prison even though the civil action was begun before his conviction unless a committee has been appointed for him.<sup>49</sup> The action will abate upon the party's imprisonment and must be revived against a committee. If the party is represented by counsel and thus does not need to have a committee or guardian ad litem,<sup>50</sup> there should not be any abatement. Where an indigent person confined to prison is sued and defends *in forma pauperis*, he must be represented by a guardian ad litem; if the plaintiff prevails, the *plaintiff* must pay the fees of the guardian ad litem as an item of court costs.<sup>51</sup>

A dead person cannot be a party to a lawsuit, and thus a suit filed against a dead person does not toll the statute of limitations.<sup>52</sup>

A foreign corporation without a certificate of authority under the old section 13.1-119 (now section 13.1-758) cannot maintain a suit, though it may file one and then obtain the required certificate.<sup>53</sup>

As of 1985, a partnership can sue and be sued in its recorded name or in the name under which it does business.<sup>54</sup>

An uninsured motorist carrier is not a stranger to an action brought by its insured even though it is not a party in the strict sense.<sup>55</sup>

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48. *Custalow v. Custalow*, 1 Va. Cir. 49 (Richmond 1966).

49. *Haboush v. Mulligan*, 2 Va. Cir. 322 (Richmond 1970).

50. W. H. BRYSON, *HANDBOOK ON VIRGINIA CIVIL PROCEDURE* 89 (1983).

51. *Englehart v. Green*, 2 Va. Cir. 5 (Henrico County 1980).

52. *Radford v. Olinger*, 1 Va. Cir. 329 (Montgomery County 1983); *Clark v. Early*, 1 Va. Cir. 268 (Campbell County 1982).

53. *Retail Recruiters v. J. & I. Assocs.*, 1 Va. Cir. 280 (Henrico County 1982).

54. VA. CODE ANN. § 50-8.1 (Cum. Supp. 1985).

55. *Phelps v. Watts*, 2 Va. Cir. 442 (Lynchburg 1975).

## G. *Pleading*

Rule 2:14 was amended in 1984 to permit cross bills in equity to be filed without prior leave of court, as is allowed at common law under Rules 3:9 and 3:10.

Punitive damages are not recoverable in a court of equity.<sup>56</sup>

An amendment to the pleading may allege a new cause of action, but it does not relate back to the time of the original filing.<sup>57</sup> After the period of limitations has expired, parties cannot be added or substituted by amending the pleadings.<sup>58</sup>

Summary judgment is allowed in all suits in equity except suits for divorce or annulment of marriage by a new Rule 2:21 which became effective in 1983.

## H. *Statutes of Limitations*

The statute of limitations governing actions for damage done by defective products is found in section 8.01-243.<sup>59</sup> An action for damages arising from a wrongful diversion of property through an agent's misuse of delegated powers is covered by a five-year statute of limitations.<sup>60</sup> Under section 8.2-725, the period of limitations for consequential damages resulting from the breach of a warranty in the sale of goods is four years.<sup>61</sup>

The statute of limitations period for suing to remove asbestos from buildings belonging to public educational or charitable institutions, cities, counties, towns, or school boards was extended to 1990 by a new section 8.01-250.1.

Where a contract requires a continuation of services, the statute of limitations period begins to run when the services are terminated and not when the specific act complained of occurred.<sup>62</sup>

An action for an asbestos-related injury accrues when a physi-

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56. *Pillis v. Nash*, 2 Va. Cir. 377 (Richmond 1973).

57. *Adams v. Wright*, 1 Va. Cir. 433 (Richmond 1984). *Contra Uzzle v. Garian*, 1 Va. Cir. 47 (Richmond 1965).

58. *Radford v. Olinger*, 1 Va. Cir. 329 (Montgomery County 1983); *Clark v. Early*, 1 Va. Cir. 268 (Campbell County 1982); *Saady v. Thomas*, 1 Va. Cir. 60 (Richmond 1967).

59. *Smith v. Aluma-Coverall Corp.*, 1 Va. Cir. 224 (Henrico County 1981).

60. *Alderman v. Damewood*, 2 Va. Cir. 61 (Roanoke 1981) (construing unamended portion of VA. CODE ANN. § 8.01-243(B) (Repl. Vol. 1984)).

61. *Lewis v. Sears Roebuck & Co.*, 1 Va. Cir. 91 (Richmond 1969).

62. *C. Arthur Weaver Co. v. Boone*, 2 Va. Cir. 242 (Richmond 1984).

cian first communicates a diagnosis of an asbestos-related disease to the party; however, no such action can be brought more than two years after the death of the injured person.<sup>63</sup>

The statute of limitations can be pleaded against the governing body of a sanitary district.<sup>64</sup>

A suit brought in a foreign jurisdiction tolls the statute of limitations.<sup>65</sup> Section 8.01-229(E)(3) was amended in 1983 to toll the statute of limitations in actions that were nonsuited in federal and state courts that were recommenced elsewhere.

The statute of limitations is tolled as to a named uninsured motorist when the action against him is filed against an unknown, uninsured John Doe.<sup>66</sup> If the rule were otherwise, where an insurance carrier knows the identity of an uninsured motorist but the plaintiff, its insured, does not, the insurance company could remain silent until the statute of limitations has run against the uninsured defendant and escape its statutory and contractual liability.

Subsection (I) was added to section 8.01-229 in 1983 to toll the statute of limitations against third party defendants for sixty days where the third party plaintiff was sued within thirty days of the expiration of the limitation period.

When a potential plaintiff gives the required notice to a health care provider that he has a malpractice claim against him, the statute of limitations stops running during the pendency of the malpractice review panel proceedings. When such proceedings are finished and the statutory tolling period has ended, the original limitation period recommences to run.<sup>67</sup>

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63. VA. CODE ANN. § 8.01-249(4) (Cum. Supp. 1985).

64. *Burns v. Board of Supervisors*, 227 Va. 354, 315 S.E.2d 856 (1984) (the dissenting opinion in this case is convincing to this writer).

65. *Fischer & Porter Co. v. Glen Falls Ins. Co.*, 1 Va. Cir. 304 (Warren County 1982) (construing VA. CODE ANN. § 8.01-229(E) (Repl. Vol. 1984)).

66. *Truman v. Spivey*, 225 Va. 274, 302 S.E.2d 517 (1983).

67. *Baker v. Zirkle*, 226 Va. 7, 307 S.E.2d 234 (1983); *Dye v. Staley*, 226 Va. 15, 307 S.E.2d 237 (1983). Although the supreme court was interpreting § 8.01-581.9 before it was amended in 1982, it appears that the amendment was only a clarification of the statute and these cases would have been decided in the same way under the amended statute.

## I. *Discovery*

The discovery procedures of Part Four of the Rules of the Supreme Court of Virginia can be used in actions to correct sales tax assessments.<sup>68</sup>

A report made by a party at the request of his attorney is privileged from discovery.<sup>69</sup> An interrogatory calling for the names of persons who will be called as witnesses at trial is improper as it inquires into the attorney's work product.<sup>70</sup> However, if the interrogatory is answered without objection, witnesses not disclosed should be excluded from testifying.<sup>71</sup>

Where good cause is shown, a party may discover the work product of opposing counsel, but not opinion work product.<sup>72</sup> Facts, as opposed to opinions, can be discovered from the expert witnesses hired by opposite parties upon a showing of good cause.<sup>73</sup> Information acquired by a worker's compensation carrier is not a part of the injured plaintiff's work product and thus is not subject to Rule 4:1(b)(3).<sup>74</sup>

Where a defendant refuses to respond to a discovery request on the grounds of self-incrimination, such refusal will be considered to be an answer in the negative.<sup>75</sup> On the other hand, *McIntyre v. McIntyre* held that, while a plaintiff in a civil case could not be compelled to answer any question about his adultery as this might incriminate him, his bill could be dismissed for his failure to respond.<sup>76</sup> In 1985, a new section 8.01-223.1 was added to the Code prohibiting the exercise of any "constitutional protection" from being used against a party in a civil action. This statute appears to overrule *McIntyre*.

The income tax returns of a non-party witness are privileged and

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68. *United Airlines v. Commonwealth*, 2 Va. Cir. 428 (Richmond 1975).

69. *Industrial Chem., Inc. v. Rehrig Int'l*, 2 Va. Cir. 147 (Richmond 1983).

70. *Gray v. White*, 1 Va. Cir. 104 (Richmond 1970). Rules 4:1(b)(1) and 4:1(e)(1) provide only for the discovery of the names of witnesses who may have knowledge of the matters in issue.

71. *Stone v. Bowyer*, 2 Va. Cir. 360 (Campbell County 1973).

72. *Tabb v. Judd*, 2 Va. Cir. 406 (Richmond 1975); *Morris v. American Homeowners Ins. Co.*, 1 Va. Cir. 64 (Richmond 1967).

73. *Rubatex Corp. v. DuPont*, 1 Va. Cir. 69 (Richmond 1968).

74. *Williams v. Smith-Moore Body Co.*, 1 Va. Cir. 356 (Richmond 1983).

75. *Gannt v. Gannt*, 1 Va. Cir. 266 (Richmond 1982).

76. *McIntyre v. McIntyre*, 1 Va. Cir. 175 (Henrico County 1975).

are not discoverable.<sup>77</sup>

Depositions cannot be taken by a notary who is not a member of the bar because such interrogation of a deponent constitutes the unauthorized practice of law.<sup>78</sup>

The Uniform Audio-Visual Deposition Act, section 8.01-412.2 through section 8.01-412.7, was enacted in 1983.<sup>79</sup> This Act permits the taking of depositions by audio-visual equipment. The General Assembly changed the uniform act in only one respect, which was to eliminate the expense of such depositions as an item of court costs. The expenses of written depositions have never been included in court costs in Virginia, and this change was necessary to conform with the established practice. Audio-visual depositions have a distinct advantage over written depositions in that the demeanor of the declarant is preserved for the judge and jury. However, audio-visual depositions can be manipulated wrongfully by varying the background, focus, lighting, et cetera to blur and to diminish the effectiveness of a witness.

A new subsection (b)(7) to Rule 4:5 was added in 1983 to allow the parties to stipulate to taking depositions by telephone.

The reciprocity provision of the Uniform Foreign Depositions Act, section 8.01-412, requires substantial reciprocal privileges only, and not an identical statute. This Act applies to the production of documents as well as to the taking of depositions.<sup>80</sup>

The status of a managing agent for the purposes of Rule 4:5(b)(6) does not turn on his knowledge but on the functions he performs.<sup>81</sup>

The deposition of a party may be used by an adverse party on motions relating to venue even though the adverse party is present.<sup>82</sup> A deposition taken for a prior trial may be used in a later trial as long as the issues are the same and the party-opponent in the previous case had the same interest and motive in cross-examination as the present opponent.<sup>83</sup> Rule 4:7 applies to transcriptions of testimony given at trials as well as to depositions, and such

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77. *Green v. Sixty-Seventh Sales Co.*, 1 Va. Cir. 115 (Richmond 1972).

78. *Allen v. Allen*, 1 Va. Cir. 157 (Richmond 1973).

79. *See also* VA. SUP. CT. R. 4:7A.

80. *In re Servo Corp.*, 1 Va. Cir. 54 (Richmond 1967).

81. *Orlich v. Larus*, 1 Va. Cir. 214 (Richmond 1980).

82. *Wilson v. Wood*, 2 Va. Cir. 125 (Richmond 1983) (construing VA. SUP. CT. R. 4:7(a)(3)).

83. *Green v. Doe*, 1 Va. Cir. 118 (Richmond 1972).

transcriptions can be used *de bene esse* at later trials.<sup>84</sup>

In proceedings under section 8.01-506 to discover the assets of a judgment debtor, only current officers of the judgment debtor can be forced to answer interrogatories.<sup>85</sup> Proceedings by interrogatories to discover a judgment debtor's assets can be had in circuit courts upon general district court judgments pursuant to section 16.1-116.

Requests for admission are designed to reduce the issues, but every fact touched on during the depositions should not be made the subject of a request for admission.<sup>86</sup>

Since 1983, a party is limited to deposing only five witnesses in a case, according to Rule 4:6A, and he may serve only thirty interrogatories upon each other party under Rule 4:8(g); the court upon motion may waive these limitations. These limitations are based on local rules of the federal courts for the Eastern District of Virginia which proved to be very effective in limiting the costs and time spent in discovery. Well-crafted and carefully thought out discovery is beneficial and effective; the shot gun approach to discovery, as to law school exams, is wasteful of time and is to be discouraged.

During a deposition, if improper procedures are being followed or harrassment is being practiced, the judge should be contacted by telephone for a ruling where this is possible.<sup>87</sup>

The sanctions of Rule 4:12 for failure to respond to requests for discovery will not be granted against an uninsured motorist carrier who has no control over the uninsured defendant.<sup>88</sup> The insurance carrier cannot deny coverage for noncooperation in such a case because the carrier's liability is to insure the plaintiff.

An order dismissing a case for failure to answer interrogatories is *res judicata*.<sup>89</sup>

In order to reduce the amount of material in the clerk's office, requests for and results of discovery are no longer to be filed with the court. Depositions, answers to interrogatories, et cetera will be

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84. *Smith v. Smith*, 2 Va. Cir. 448 (Richmond 1976).

85. *Laundry & Dry Cleaner Suppliers v. Commercial Wholesale Laundry Co.*, 1 Va. Cir. 86 (Richmond 1969).

86. *Taylor v. Richmond Memorial Hosp.*, 2 Va. Cir. 224 (Richmond 1984).

87. *Layne's Adm'r v. Christie*, 1 Va. Cir. 504 (Richmond 1984).

88. *Egan v. Jones*, 1 Va. Cir. 235 (Richmond 1981).

89. *Nuchols v. Marshall*, 2 Va. Cir. 454 (Richmond 1977).

made a part of the record when introduced into evidence or at the order of the judge.<sup>90</sup> Nevertheless, all requests for discovery and all responses thereto must still be served on all counsel of record in the lawsuit.<sup>91</sup>

### J. *Freedom of Information Act*

Records generated by a fire department to promote compliance with safety standards must be produced under the Freedom of Information Act, section 2.1-342, but records which lead to criminal prosecutions are exempt.<sup>92</sup>

A pre-arranged telephone conference call is not a "meeting" within the scope of the Act, and thus the Roanoke City School Board was held not to have been required to comply with the Act.<sup>93</sup>

The fact that a document was passed through intermediaries does not negate the exception of section 2.1-342(b)(4) to the Freedom of Information Act.<sup>94</sup> Matters protected by the Privacy Act, sections 2.1-377 to -386, may not be disclosed under the Freedom of Information Act.<sup>95</sup>

### K. *Incidents of Trial*

Where a court reporter is sworn under Rule 1:3, any interested person has the right to buy a transcript upon the terms fixed by the judge.<sup>96</sup> Section 8.01-420.3 provides that "the court shall not direct the court reporter to cease recording any portion of the proceeding without the consent of all parties or of their counsel of record."

The failure to obtain service of process within a year of commencing the action will result in a dismissal unless good cause for the delay is shown.<sup>97</sup>

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90. VA. SUP. CT. R. 4:5(f)(1), 4:7(f), 4:8(c), 4:11(c).

91. *Id.* R. 1:12, 4:1(f).

92. *Richmond Mercury Corp. v. Williams*, 2 Va. Cir. 432 (Richmond 1975).

93. *Roanoke City School Bd. v. Times-World Corp.*, 226 Va. 185, 307 S.E.2d 256 (1983) (interpreting unamended portion of VA. CODE ANN. § 2.1-341(a) (Cum. Supp. 1985)).

94. *Cataldi v. Madison College*, 2 Va. Cir. 447 (Richmond 1976).

95. *Harlow v. Commonwealth*, 2 Va. Cir. 473 (Richmond 1979).

96. *Rountree v. Johnson*, 1 Va. Cir. 37 (Richmond 1963). This right is now also required by VA. CODE ANN. § 8.01-420.3 (Repl. Vol. 1984).

97. *Stark v. Johnstone*, 2 Va. Cir. 476 (Richmond 1979); *Brown v. Tucker*, 1 Va. Cir. 94



Where a plaintiff who has taken no action in a case for two years later indicates a desire to proceed, the case should not be discontinued under section 8.01-335(A).<sup>98</sup>

The trial court has the discretion to allow a plaintiff to withdraw a nonsuit for good cause shown before the formal order has been entered by the court.<sup>99</sup>

Section 8.01-380(A) was amended in 1983 to allow a nonsuited action to be recommenced in a federal court.

A stay in the proceedings because the defendant is taking bankruptcy will not be granted where any recovery is covered by insurance.<sup>100</sup> The Soldiers' and Sailors' Civil Relief Act, was enacted for the benefit of service personnel only and not for their insurance carriers, and thus where the defendant's liability is fully covered by insurance, a continuance will not be granted to the defendant.<sup>101</sup> When a continuance is granted to a client of a member of the General Assembly pursuant to section 30-5 to accommodate a regular session of the legislature, the calling of a special session following the adjournment of the regular session does not extend the continuance.<sup>102</sup>

Notice of a hearing on a motion for default judgment must be given to defendant's counsel of record pursuant to Rule 1:13.<sup>103</sup>

Section 8.01-322, providing for petitions for rehearing after default judgments, applies where there was notice by publication and the defendant had no actual notice of the suit, but not where process was delivered to the defendant out of state under section 8.01-320.<sup>104</sup>

Mandamus does not lie to compel a clerk of court to act contrary to a judicial order.<sup>105</sup>

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(Richmond 1969); see also *Kirstein v. Kirstein*, 2 Va. Cir. 161 (Henrico County 1983) (absence of the defendant from the state is good cause).

98. *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1984).

99. *Id.* It is the opinion of this writer that this can be done up to 21 days after the entry of judgment pursuant to VA. SUP. CT. R. 1:1.

100. *Upshaw v. W. T. Grant Co.*, 1 Va. Cir. 180 (Henrico County 1976).

101. *Rafferty v. Bruner*, 1 Va. Cir. 43 (Richmond 1965).

102. *Upshur v. Haynes Furniture Co.*, 228 Va. 595, 324 S.E.2d 653 (1985).

103. *Proffitt v. Proffitt*, 1 Va. Cir. 184 (Henrico County 1978).

104. *Mitchell v. Mitchell*, 227 Va. 31, 314 S.E.2d 45 (1984).

105. *Material Handling Indus. v. Mercer Rug & Carpet Sales, Inc.*, 2 Va. Cir. 232 (Richmond 1984).

### L. *Appeals in the Supreme Court*

The Rules of the Supreme Court of Virginia, Part Five, for practice in the supreme court have been completely redrafted and renumbered. There are numerous very small changes, and the new rules themselves must be carefully read. The most important change is in making a transcript a part of the record. Rule 5:11 provides that this is done simply by filing the transcript in the office of the clerk of the circuit court. Filing must occur within sixty days after the entry of the final order; however, the trial court judge has the discretion to extend this time limit. In addition, Rule 5:11(b) requires the clerk of the trial court to notify all counsel of record of the date of the filing. Rule 5:37(c) places an affirmative duty on the prevailing party to seek court costs by filing under oath an itemized bill of costs. Costs are no longer automatically provided for in the court's mandate.

### M. *Court Costs*

In both the supreme court and the court of appeals, if the prevailing party desires to receive court costs, he must now file an itemized and verified bill of costs; this bill must be filed with the clerk of court within ten days after the decision is rendered by the court.<sup>106</sup>

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106. VA. SUP. CT. R. 5:37(c), 5A:30(c).

