1978

Discovery in Virginia

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PREFACE

This book enlarges and supersedes my *Interrogatories and Depositions in Virginia* (1969). A discussion of the production of documents and things for inspection and of physical and mental examinations has been added to the old work. The 1969 volume has been brought up to date to reflect the major changes in Part Four of the Virginia Rules of Court, which were made in 1972 and 1977. These changes were made to conform the Virginia rules to the federal rules of discovery as amended in 1970 and to deal with the deliberate omission of discovery matters from the new Title 8.01 of the Virginia Code. It is to be noted that all discovery provisions in modern Virginia are now to be found in the Rules of Court, Part Four, and in the traditional equity practices.

Part Four of the Rule of Court follows very closely the Federal Rules of Civil Procedure 26 through 37. The purpose of this is to have the federal cases available for the guidance of Virginia practitioners, since the only Virginia cases reported are those at the appellate level and these rarely deal with matters of discovery. Therefore this book deals not with all of the combinations and permutations of discovery but rather only with the Virginia variants. This is a Virginia supplement to the general treatises which deal with the federal law of discovery. Furthermore, this is a book on theory not tactics; it discusses only the law, what can be done, not what should be done.

It appears that too many people today are so enthralled with where we are going that they have lost sight of where
we started. It requires hindsight as well as foresight to understand a trend. Thus the study of the historical background of the modern discovery devices gives a valuable perspective, and this has been included in order to give the fullest and broadest understanding of the subject. The current methods of discovery were not invented in 1938 upon the promulgation of the Federal Rules of Civil Procedure. Rather the well-known and well-established practices of the equity courts were adapted and expanded for use in the federal courts at that time. The federal rules are the basis of the Virginia rules. “Out of the old fields comes the new corn.”

The Virginia rules of discovery are printed in an appendix to this work so that all of the Virginia material on the subject can be found in this handbook.

I would like to thank Professor Ronald J. Bacigal, Mr. Robert N. Baldwin, Mr. Frank J. Ceresi, and Mrs. Edward L. Robinson for their assistance to me in connection with this book.

W.H.B.
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Discovery in Virginia

INTRODUCTION

As of the first of February, 1967, the entire field of discovery in Virginia has been radically changed from what it was before, and this has resulted in a great change in the method of modern litigation. On this date the substance of the federal rules of discovery was incorporated into the Virginia Rules of Court, Part Four.

The general idea of discovery is an integral part of equity pleading and has been since its development in the fifteenth and sixteenth centuries. Interrogatories to parties and orders to produce things have always been available in equity. Depositions, of course, are the normal method of presenting evidence to an equity judge. Over the centuries, in England as well as in Virginia, these procedures have been constantly expanded, as we shall see. One of the more significant expansions was to allow discovery at common law. This was accomplished first by means of pure bills of discovery in equity, then by statute, and then by the rules of court.

However, these traditional discovery procedures were aimed solely at the gathering of admissible evidence and no more. In 1938 in federal practice and in 1967 in Virginia these time-honored devices were greatly enlarged in scope and in use so that they could be used to fish around for information which might be useful in preparing for the litigation or its out-of-court settlement. The scope of discovery was expanded to include anything "relevant to the subject matter involved in the pending action" and which is "reasonably calculated to lead to the discovery of
admissible evidence." Note that the scope is relevance to the subject of the suit, not merely to the pleadings.

Considering that the present rules of discovery are to be interpreted broadly and that amendments to the pleadings are to be allowed liberally, the old method of trying a case by sneaking up on the adverse party in court and taking him by surprise with unexpected issues and evidence is no longer viable. The theory of the modern rules of discovery is to avoid this by making all the issues and all the evidence known to all the parties before trial. It is hoped that the results of the litigation will be more fair and just in that only the true issues will be dealt with and that the judge and jury will be presented with all the relevant evidence and argument but with only that which is relevant. Furthermore, it is expected that out-of-court settlements of disputes will be increased and that the court dockets will no longer be burdened with causes in which there is no genuine legal dispute for the court to determine.

The result of the modern rules of discovery is to add a third stage to the litigation process, which comes in between the pleadings and the trial. The discovery stage greatly supplements the pleading stage by narrowing the issues or by adding new ones and by making known more of the facts of the case. The amendment of the pleadings is a frequent result of discovery. In any case the pleadings are now greatly reduced in importance. Since many points of law and evidence are settled at a pretrial conference, it is vital that the discovery stage be used diligently to collect the facts and the law for use at the later stages of the litigation. In doubtful cases the results of the discovery stage will often determine the outcome.

With the exception of specialized uses, all discovery matters are covered by Part Four of the Rules of Court.
It was felt that these procedural matters are more appropriately regulated by rules of court rather than by statutes. Therefore in 1977, as a part of the general revision of the Virginia civil procedure statutes, the general discovery provisions were deleted from the code.

This book will consider first those discovery devices which are most similar to pleadings and then those which were originally used for the presentation of evidence. Interrogatories were originally part of the pleadings in equity, and requests for admission are merely suggested answers to unasked interrogatories. Both of these devices, which are limited to use against other parties, and production of things by other parties are governed by the same rules and have the same scope. Production of things by non-party witnesses, depositions, and medical examinations were originally means of gathering and presenting evidence.