Virginia Law & Procedure

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(Virginia Civil Procedure Outline)

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Virginia Civil Procedure Outline

Index

I. COURTS

A. Judicial Department (Constitution art. VI)

1. Judicial power (Const. art. VI § 1) vested in:

   a. Supreme Court (S. Ct.)

   b. Subordinate courts established by the General Assembly (G.A.). Jurisdiction is therefore entirely statutory.

      (1) Courts "of record" are (see infra):

         (a) Trial Courts of general jurisdiction (i.e. Circuit Courts; not General District Courts)

         (b) Appellate Courts

2. Administration of Judicial System (Const. art. VI § 4)

   a. Chief Justice is administrative head of the judicial system.

   b. G.A. may provide in addition for improvement of administration of justice by the courts and expedition of judicial business.

3. Practice and Procedure

   a. S. Ct. is authorized to make rules governing appeals, and practice and procedure. (Const. art. VI § 5; Code § 8.01-3. See Code of Virginia, Vol. 11 (Lexis, 2002)).

      (1) Rules do not cover all proceedings. Code provisions take precedence over rules, so G.A. can pre-empt S. Ct.

      (2) Input from practitioners

         (a) Boyd-Graves Conference

         (b) Judicial Council and its Advisory Comm. (Code § 17.1-700).

      (3) May prepare rules of evidence to be used in all courts, but S. Ct. has not chosen to do so.

   b. Circuit and G.D.C.'s may also promulgate rules pertaining to the efficient use of courthouses and clerk's offices. There is now a uniform scheduling order. See Rules of Supreme Court, Part One, Appendix.

4. Justices and Judges of courts of record.

a. Qualifications. (Const. art. VI § 7).

(1) Residents of the Commonwealth.

(2) Admitted to the Bar of the Commonwealth at least 5 years prior to appointment or election.

b. Election; terms. (Const. art. VI § 7).

(1) Elected by vote of majority of each house of the G.A.

(2) Term: 12 years for S. Ct. justices, 8 years for judges of other courts of record (6 years for judges of courts not of record, Code § 16.1-69.9).

(3) Governor may make temp. appointments when G.A. not in session.

c. Salaries and allowances. (Const. art. VI § 9).

(1) Fixed by G.A. (See §§ 14.1-33 and 14.1-35).

(2) No salary shall be diminished during judge's term.

d. Restrictions on justices and judges of courts of record. May not (Const. art. IV § 4 and art. VI § 11; Code § 17.1-102):

(1) Practice law anywhere

(2) Seek/accept non-judicial public office

(3) Hold any office of public trust

(4) Engage in any other "incompatible activity"

(5) Be a member of G.A.

e. Retirement. (Const. art. VI § 9).

(1) Determined by G.A.

(a) For judges elected after July 1, 1997, mandatory at age 70.

(b) See generally Code § 51.1-300 et seq.

(2) Chief judge of Ct. of Appeals may appoint retired justices and judges temporarily to substitute for absentees or help with reviewing petitions. (§ 17.1-400).

f. Removal:

(1) Impeachment. (Const. art. IV § 17).

(2) Disabled and Unfit Judges (Const. art. VI, § 10). See also Code § 17.1-900 through 17.1-919.

B. **Supreme Court** (Const. art. VI §§ 1 through 3)

1. Number and quorum. (Code § 17.1-300).

a. At present 7. G.A. may increase or decrease number to not less than 7 or more than 11

b. Any 4 of 7 constitutes a quorum

2. Chief Justice (C.J.).

a. Selected from the justices in a manner prescribed by law.

b. See Code § 17.1-300: Chief Justice is elected by a majority vote of Justice of S.C.

3. May sit en banc or in divisions as may be prescribed by Rules. (Code § 17.1-308).

a. All decisions must be by at least 3 justices.

(1) If any one member of the division differs or (whether he sat on case or not) certifies decision conflicts with S. Ct. decision, case is reheard and decided by S. Ct. en banc. (Rule 5:3(c)).

b. At least a majority of all justices must assent to a decision declaring a law repugnant to either Va. or U.S. constitution.

4. Terms and Sessions (Code §§ 17.1-304, -305, -306).

a. Terms

(1) One term per year, fixed by S. Ct.

b. Sessions

(1) Held in Richmond

(2) Fixed by S. Ct.; special may be ordered by C.J.

5. Original jurisdiction (Const. art. VI, § 1)

   a. Habeas corpus. (§ 8.01-654 et seq.). See, e.g. Burgess v. Cunningham, 205 Va. 623, 139 S.E.2d 110 (1964).

   b. Mandamus. (§ 8.01-644 et seq.). See, e.g. Richlands Medical Association v. Commonwealth, 230 Va. 384, 337 S.E.2d 737 (1985).

   c. Prohibition. (§ 8.01-644 et seq.). See, e.g. Charlottesville Newspaper, Inc. v. Berry, 215 Va. 116, 206 S.E.2d 267 (1974).

   d. Matters of judicial censure, retirement, and removal (exclusive jurisdiction).

   e. Certification of questions from foreign courts, See Rule 5:42. The S.Ct. has discretion whether to accept any request for certification.

6. Appellate jurisdiction (Const. art. VI § 1)

   a. Constitutional appellate jurisdiction:

      (1) Constitutionality of law under Virginia or United States Constitutions.

      (2) Cases involving life or liberty of a person.

   b. Other appellate jurisdiction is statutory. See §§ 8.01-670, -670.1. Subject to minimum value of $500. (§ 8.01-672).

   c. Certification of question of law (Rule 5:42)

      (1) When requested by fed. cts. or highest state court of other state.

      (2) No controlling precedent on point in Va.

      (3) School Bd., City of Norfolk v. U.S. Gypsum Co., 234 Va. 32, 360 S.E.2d 325 (1987); Aetna Cas. & Sur. Co. v. Dodson, 235 Va. 346, 367 S.E.2d 505 (1988); Beach Robo, Inc. v. Crown Cent. Petro. Corp., 236 Va. 131, 372 S.E.2d 144 (1988); Commonwealth v. American Booksellers Ass'n, 236 Va. 168, 372 S.E.2d 618 (1988); Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 374 S.E. 2d 55 (1988); Beach Robo, Inc. v. Crown Cent. Petro., Inc., 860 F.2d 606 (4th Cir. 1988); Bulala v. Boyd, 239 Va. 218, 389 S.E.2d 670 (1990); Lee-Warren v. School Bd., 241 Va. 442, 403 S.E.2d 691 (1991); National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 404 S.E.2d 216 (1991); Osborne v. National Union Fire Ins. Co., 251 Va. 53, 465 S.E.2d 835 (1996).

   d. Section 8.01-670.1 allows appeal of interlocutory orders and decrees, not otherwise applicable. Any party may file petition in Cir. Ct. and certify:

(1) there is substantial grounds for difference of opinion;

(2) no clear controlling precedent;

(3) determination of issue will be dispositive of material aspects of case;

(4) court and parties agree it is in best interest to seek interlocutory appeal.

7. Disposal of case. (Const. art. VI § 6).

a. May remand for new trial.

b. In civil case may enter final judgment but may not increase or decrease unliquidated damages.

(1) But cf. United Constr. Workers v. Laburnum Constr. Corp., 194 Va. 872, 75 S.E.2d 694 (1953), aff'd 347 U.S. 656 (1954). (S. Ct. "modified" downward lower ct. award of unliquidated damages without remanding for new trial).

c. Reasons in writing.

C. **Court of Appeals** (Code § 17.1-400ff.)

1. Number and quorum (§§ 17.1-400 and -402)

a. Number at present 11.

b. Sit in panels of at least 3 judges each at such locations as chief judge shall designate - a quorum.

c. En banc when a dissent in the panel and aggrieved party requests it and at least three other judges of court vote in favor or when any judge of any panel certifies in his opinion the decision was in conflict with prior decisions of court or any panel thereof, and three other judges of court concur; or on its own motion when majority of the court determines it is appropriate, must have no fewer than eight judges.

d. Chief Judge elected by majority vote of the judges of the Court of Appeals to serve a term of four years.

2. Original jurisdiction (Code § 17.1-404)

a. Contempt.

b. Injunctions under § 8.01-626 in any case over which it would have appellate jurisdiction under §§ 17.1-405, 406. Single judge may exercise.

c. Issue writs of mandamus, prohibition, and habeas corpus in any case in which it would have appellate jurisdiction. See, e.g., In re Johnston, 3 Va. App. 492, 350 S.E.2d 681 (1986) (writ of prohibition to prevent lower court's jurisdiction lies only in cases of extreme necessity).

3. Appellate jurisdiction (Code §§ 8.01-672, 17.1-405, 406)

a. By petition:

(1) Conviction of a traffic infraction or a crime except where sentence of death was imposed.

(2) Decision of a circuit court on an application for a concealed weapons permit.

(3) Any final order involving involuntary treatment of prisoner pursuant to § 53.1-40.1

(4) Commonwealth or any county, city, town in which such party could have petitioned Supreme Court for a writ of error under § 19.2-317 and Commonwealth in a criminal case pursuant to § 19.2-398.

b. Of right:

(1) Final decision of a Circuit Court on appeal from an administrative agency (excl. School Boards--see Schwartz v. Highland County School Bd., 2 Va. App. 554, 346 S.E.2d 544 (1986); Commonwealth Department of Highways and Transportation v. E. W. Yeatts, Inc., 233 Va. 17, 353 S.E.2d 717 (1987)) or a grievance hearing decision issued pursuant to § 2.2-3005.

(2) Appeals from the Virginia Workers' Compensation Commission (workmen's comp.).

(3) Dom. Rel.

(4) Any interlocutory decree entered in any case in this section granting, denying an injunction, or adjudicating the principles of the cause.

c. Finality of Court of Appeal decision. (§§ 17.1-410, -411)

(1) Parties have no right to further appeal to S. Ct. in civil cases (and minor criminal).

(2) Party may nonetheless petition for S. Ct. review on constitutional or precedential grounds. See also § 8.01-670.

(3) Under § 17.1-409, Supreme Court on motion of the Court of Appeals or its own motion may take any case from the Court of Appeals, before decision, if:

(a) The case is one of imperative public importance, or

(b) The Court of Appeals docket is crowded.

d. Appeal filed in inappropriate court may be transferred, §8.01-677.1.

e. The Supreme Court thus retains appellate jurisdiction over:

(1) Crimes where sentence of death is imposed

(2) Decisions of the State Corporation Commission

(3) Judicial inquiry and review proceedings

(4) Proceedings under § 54-1-3935, et seq. (suspension of lawyer's license)

(5) Decisions of the Board of Zoning Appeals (Va. Beach Beautification Comm'n v. B.Z.A. of City of Va. Beach, 231 Va. 415, 344 S.E.2d 899 (1986). (CB 1)

(6) Presumably all other appeals from Circuit Courts except those listed above.

(7) See Allstar Towing, Inc. v. City of Alex., 231 Va. 421, 344 S.E.2d 903 (1986)—§ 2.2-4365 (administrative appeal procedure.)

D. **Circuit Courts**

1. 31 circuits (See Code § 17.1-506; Rule 1:15).

2. Original Jurisdiction

a. Nisi prius courts of general jurisdiction (§ 17.1-513; see e.g., County School Board of Spotsylvania v. McConnell, 215 Va. 603, 212 S.E.2d 264 (1975)). Beginning on January 1, 2006, Virginia discarded a civil justice system that had two sides of the court: the law side where the only relief was damages, and an equitable side for equitable relief such as an injunction, specific performance, or rescission. See e.g., Wright v. Castles, 232 Va. 218, 349 S.E.2d 125 (1986). A new Rule 3 adopted by the Supreme Court, effective January 1, 2006, provides for a single form of action where a litigant can obtain both legal and equitable relief in the same action.

b. Exceptions and Limitations

(1) Cases at law to recover personal property or money of value of $4,500 or less (§ 16.1-77, cf. § 17.1-513) exclusive of interest or attorney’s fees.

(2) Cases assigned to another tribunal, e.g.,

(a) Courts not of record (GDC and J & DRC, see infra)

(b) Industrial Commission - workmen's compensation. See Lucas v. Biller, 204 Va. 309, 130 S.E.2d 582 (1963) or

(c) P is not a stranger to the work place or statutory employee of the D. See Dean v. Whalen, 229 Va. 164, 327 S.E. 102 (1985); Compare Stone v. Door-Man Mfg., 260 Va. 406 (2000) with Fowler v. International Cleaning Service, 260 Va. 421 (2000); Bosley v. Shepherd, 262 Va. 641, 554 S.E.2d 77 (2001).

(d) U.S. Courts - pre-empted field e.g., NLRB cases

(e) Federal Maritime Commission - tariff schedules. See Sea- train Lines v. Gloria Manuf. Corp., 222 Va. 279, 279 S.E.2d 166 (1981)

(f) SCC - rate cases

c. Extraordinary Writs (§ 17.1-513)

(1) Quo Warranto (§ 8.01-635 et seq.)

(2) Mandamus, prohibition, and certiorari to inferior tribunals. See, e.g., Early Used Cars v. Province, 218 Va. 605, 239 S.E.2d 98 (1977) (use of mandamus to compel commissioner in chancery to use statutory procedure requiring debtor to appear in action to ascertain his assets)

(3) Mandamus to governing bodies (of each court's jurisdiction) and in other cases to prevent failure of justice (common law)

3. Appellate jurisdiction (§ 17.1-513)

a. From courts not of record (GDC and J&DRC). In effect, trial de novo, as no record to review on appeal

b. From other inferior tribunals e.g. administrative agencies (§ 2.2-4025, et seq. and Rules Part Two A).

4. Administration (§§ 17.1-501 and -502)

a. Judges of each circuit elect Chief judge of the circuit for two years who sees that system of justice operates "smoothly and efficiently" in his circuit

b. Powers of appointment (e.g., of magistrates within the circuit) are exercised by majority of judges

c. Executive Secretary to S. Ct. is "the administrator of the circuit court system" and assists circuit Chief judges

5. A Circuit Court can grant:

a. Money damages.

b. Equitable remedies

(1) injunction
(2) specific performance
(3) rescission/cancellation
(4) restitution/unjust enrichment
(5) constructive/resulting trust
(6) divorce

c. Prior to the adoption of new Rule 3, equity could give complete relief and the chancellor could hear legal claims and enforce legal rights by applying legal remedies only available at law. Advance Marine Enterprises v. PRC, Inc., 256 Va. 1061. 501 S.E.2d 148 (1998).

d. Either party is entitled to a jury trial on any issue rising from the claim at law for damages.

E. **Clerk of Circuit Courts (Code §§ 31-4 and 64.1-75 through -77)**

1. Quasi-judicial functions

a. Probates wills

(1) but does not construe wills or determine validity of particular provisions. See Smith v. Mustian, 217 Va. 980, 234 S.E.2d 292 (1977)

b. Appoints

(1) Guardians
(2) Executors, administrators and curators of decedents
(3) Appraisers of estates of decedents
(4) Certain committees

2. Appeal to court whose clerk made order (§ 64.1-78)

F. **Courts not of Record: In General**

1. State divided into 31 districts (§§ 16.1-69.6 and -69.6:1)

a. Districts are same as the 31 Circuits except Dist. 2 is Va. Beach and Dist. 2A is counties of Accomack and Northampton

b. "District Courts" comprise General District Court (GDC) and Juvenile and Domestic Relations District Court (J&DRC). (§ 16.1-69.5).

2. Jurisdiction (§16.1-77(3))

a. "Small" civil claims, attachments, unlawful entry or detainer, and partition of personal property in GDC subject to $15,000 limit (§§ 16.1-77 through -77.2), but this $15,000 limit shall not apply with respect to (i) distress warrants under the provisions of § 55-230, and liquidated damages for violations of vehicle weight limits under § 46.2-1135, and (ii) unlawful entry and detainer as provided in § 8.01-124 et seq. where damages sustained or rent proved to be owing where premises were used by the occupant primarily for business, commercial or agricultural purposes. §16.1-77(3)

b. Cases dealing with juveniles and certain domestic relations matters (except divorce) in J&DRC (§ 16.1-241)

c. Criminal jurisdiction is outside the scope of this course

d. All district court (GDC and J&DRC) judges have power to adjudicate and commit legally incompetent, drug addicts, and inebriated persons (§ 16.1-69.28)

3. Judges

a. Judges in office January 1, 1973, continue as such until term expires, vacancy occurs, or successor appointed or elected

b. From July 1, 1980, all judges are full time and no judge serves as both GDC and J&DRC judge (§ 16.1-69.10(d))

4. Administration

a. With unified court system, under administrative supervision of Chief Justice (§ 16.1-69.30)

b. Committee on District Cts. (§ 16.1-69.33)

c. Rules of Procedure

(1) S. Ct. is authorized to formulate rules of practice and procedure for GDC and J&DRC (§ 16.1-69.32)

(2) For GDC, see Rules Parts Seven A, Seven B and Seven C.

G. **Courts Not of Record: General District Courts (GDC)**

1. Procedure

a. Governed by Rules of GDC: Rule 7A:1-15, 7B:1-11 and 7C:1-6. Tried according to law and equity (§ 16.1-93). Intended to be fast and simple. No jury. No record (but you can bring in a court reporter to preserve testimony taken under oath).

b. Special statutes

(1) § 16.1-88 (and § 8.01-28): Sworn claims where action for payment of money on contract

(2) § 8.01-416: affidavit re damages to motor vehicles (relieves you of having to pay expert to come to court to testify). 7 days notice or consent of D is required when damage exceeds $1,000

(3) § 16.1-88.01: D may counterclaim in writing for any cause of action - tort or contract - law (or equity, if asking money damages) even if in excess of P's claim at any time before trial (but within GDC's jurisdiction)

(4) § 16.1-88.02: cross-claims between Ds.

(5) § 16.1-88.2: Medical reports may be introduced as evidence in personal injury suits provided party introducing the report gives opposing party ten-day written notice and a copy of the report. This procedure applies to cases removed to the Circuit Court where claim does not exceed the jurisdictional amount of GDC.

(6) § 16.1-88.03: allows corporation, limited liability company, business trust to file a claim in GDC by corporate officer or manager, but with certain limitations set out in subsection b.

(7) § 16.1-89: subpoena duces tecum (discovery procedure for production of documents and things may be directed against parties as well as persons not parties). Request must be filed within 15 days of trial (Rule 7A:12).

(8) § 16.1-95: Abstract of Judgment - must ask for it. (See also § 16.1-116).

(9) § 16.1-98: writ of fieri facias (fi fa) - must ask for it.

(10) § 16.1-103 (§ 8.01-506 et seq.): summons for interrogatories (after fi fa*).

(11) § 16.1-77(5): interpleader - either stakeholder or claimant can bring, but no injunctions ordered.

c. Proceedings begun by

(1) Warrant (§ 16.1-79)

(a) Simpler form than motion for judgment

(b) Action deemed brought when memo filed, if warrant served and returned (§ 16.1-86)

(2) Motion for judgment (§ 16.1-81) (now a complaint)

(a) Action pending when motion for judgment is filed (§ 16.1-86)

(b) Further procedure: Rules of Court for Courts of Record apply as practicable (§ 16.1-82)

d. Service (§§ 16.1-79 and -80; Rule 7B:4)

(1) Directed to sheriff or other officer authorized to serve process

(2) Summons D to appear before court not later than exceeding 60 days from date of service, but no sooner than 5 days. § 16.1-79.

e. Third-party practice (Rule 7B:10)

(1) Party may file third-party warrant or third party complaint on a person not a party who is or may be liable for all or part of the claim asserted.

(2) May file within 10 days after service or up to trial date, whichever is sooner, or with leave of court.

f. Simple form of pleading. Bills of particulars and grounds of defense only if ordered. (Rule 7B:2). After service of process, next step will usually be physical appearance in GDC on "return date."

g. Appearance by P, P's attorney or employee is mandatory for judgment to be granted. (Rule 7B:7).

h. If D does not appear, court may grant judgment for P. (Rule 7B:9, but still entitled to 10 days' notice by mail if service was by posting under § 8.01-296(2)(b)).

i. If P does not appear, court shall dismiss the case with prejudice if D appears and denies under oath that he owes P anything, or dismiss the case without prejudice if D admits owing any amount to P. (Rule 7B:8).

j. If neither P nor D appear, court shall dismiss case without prejudice (Rule 7B:8).

2. Venue (§ 16.1-76, § 8.01-257 et seq.: same as for Circuit Courts, see infra).

3. Jurisdiction (§§ 16.1-77 through 77.2)

a. Courts of limited jurisdiction, confined to that expressly conferred. If ct. had no jurisdiction, any judgment made is void. See, e.g., Lucas v. Biller, 204 Va. 309, 130 S.E.2d 582 (1963). If general district court has jurisdiction it is error for superior court to grant writ of prohibition against judge's action in adjudication of case. See Elliott v. Great Atlantic Management Co., 236 Va. 334, 374 S.E.2d 27 (1988).

b. Amount (§ 16.1-77)

(1) Exclusive

(a) $1.00 to (and including) $4,500.00

(i) Exclusive of interest and attorney's fees contracted for in the instrument (§ 16.1-77(1)).

(ii) Cf. § 17.1-513 (supra), saying courts of record start at $100 and except as to matters not assigned to another tribunal

(2) Concurrent (with Courts of Record)

(a) $4,500.01 to and including $15,000.00, distress warrants under § 55-230 and § 46.2-1175 (violation of motor vehicle weight limits); and to cases involving forfeiture of a bond pursuant to § 19.2-183.

(b) Attachment cases where the P's claim does not exceed $15,000.00

(3) $ amount not applicable to unlawful entry or detainer where claim for damages or rent where premises used for business, commercial, or agricultural purposes.

c. Types of cases (and these are all)

(1) Claims (including exclusive original jurisdiction, supra)

(a) To recover specific personal property (detinue)

(b) To any debt, fine or other money, i.e. to collect a judgment

(c) To damages for breach of contract

(d) To damages for injury to property, real or personal

(e) To damages for injury to the "person." Includes:

(i) defamation. Fuller v. Edwards, 180 Va. 191, 23 S.E.2d 26 (1942)

(ii) Violation of free speech. Howard v. Alum. Workers, 418 F. Supp. 1058 (E.D. Va. 1976), aff'd 589 F.2d 771 (4th Cir. 1978)

(f) GDC may give judgment on a forthcoming bond (with ten days notice) taken by sheriff under a fieri facias issued by the court. D may remove to circuit court if amount exceeds $1,000 and files an affidavit of substantial defense (§ 16.1-77.1)

(2) Partition of personal property (§ 16.1-77.2)

(a) If value $20.00 up to $15,000

(b) May be useful in acrimonious divorce proceedings

(3) Attachments (§ 16.1-105; § 8.01-533ff).

(a) Concurrent with courts of record from $4,500.01 to $15,000

(b) If attachment is levied on real estate, then the case must be removed to proper court of record (§ 16.1-105)

(4) Unlawful entry a (no right in first place to occupy real property (§§ 8.01-124 through -130; § 16.1-92 right to remove; notice § 55-225). Concurrent with Circuit Courts up to $15,000 damages, (if any).

(5) Unlawful detainer (tenant holding over after expiring of lease)

(6) Power to adjudicate and commit legally incompetent, drug-addicted, and inebriated persons, supra (§ 16.1-69.28)

(7) Except where otherwise specifically provided, all jurisdiction, power, and authority over civil action or proceeding conferred upon any GDC judge or magistrate under or by virtue of provisions of the Code of Virginia (§ 16.1-77(4)).

(8) Try and decide any case pursuant to § 2.2-3713 of the Virginia Freedom of Information Act for writs of mandamus or for injunctions.

(9) Interpleader involving personal property but value must be within usual jurisdictional limits (§ 16.1-77(5). See §8.01-364), but GDC does not have any power to issue injunction.

(10) Resident tenant complaining of breach of lease by landlord (§ 55-248.27)

(11) Civil violation of informed written consent law (§ 18.2-76).

(12) GDC has no jurisdiction over cases involving title to real property. (Addison v. Salyer, 185 Va. 644, 40 S.E.2d 260 (1946)). Cf. unlawful entry or detainer -- possession -- statute expressly provides jurisdiction.

(13) Concurrent jurisdiction with Circuit Courts to adjudicate habitual offenders pursuant to § 46.2-355.1.

(14) GDC does not have jurisdiction to issue injunction.

d. Effective 10/1/88, Va. Code §§ 16.1-122.1 - 16.1-122.7 added to create a small claims division in each General District Court of any judicial district encompassing a county with a population in excess of 300,000; jurisdiction over civil claims of $2,000 or less; no party may be represented by counsel.

4. Removal to Circuit Court (§ 16.1-92). After July 1, 2007, there is no right to remove a case filed in the General District Court to the Circuit Court.

5. Appeal (§ 16.1-106 et seq.)

a. If amount exceeds $50.00 or

Irrespective of amount, if the case involves the constitutionality of a statute or ordinance

b. Appeal is to Circuit Court

c. Procedure

(1) Note appeal and file bond with GDC (§ 16.107)

(a) All appeals must be noted in writing by the party, his attorney, his employee or a person entitled to ask for judgment under any statute. (Rule 7A:13).

(b) Within 10 days of the judgment, but bond may be filed within 30 days of judgment (Godlewski v. Gray, 221 Va. 1092, 277 S.E.2d 213 (1981): bond posted within 17 days was permissible except in unlawful entry and detainer cases, where bond within 10 days. (§ 8.01-129). GDC's denial of a motion to set aside a default judgment is not a final appealable order under Va. Code §16.1-106, and Circuit Court has no jurisdiction to hear an appeal of a motion to set aside a default judgment. Architectual Stone, LLC v. Wolcott Center, LLC, 274 Va. 519, 649 S.E.2d 670 (2007).

(c) Bond may be given by one other than the appellant. (Combined Insur. Companies of Amer. v. Mundy, 210 Va. 3, 168 S.E.2d 127 (1969); See § 8.01-4.2).

(d) Indigent not required to give bond except in cases of trespass, ejectment, and rent.

(e) Bond not necessary when appeal by P and D is to protect an estate, infant, convict, insane, county, city, town, or Commonwealth

(f) Incorrect bond (e.g., $70 instead of $100) may be corrected by Circuit Ct. (Burks v. Three Hills Corp., 214 Va. 322, 200 S.E.2d 521 (1973)).

(2) Deposit costs and writ tax in GDC within 30 days of the judgment (Hurst v. Ballard, 230 Va. 365, 337 S.E.2d 284 (1985); timely payment of writ tax jurisdictional. See § 16.1-107.

(3) If counterclaim filed, there must be a specific appeal of counterclaim from GDC; appeal of claim by P does not, ipso facto, move counterclaim to Circuit Court. (See K-B Corp. v. Gallagher, 218 Va. 381, 237 S.E.2d 183 (1977) - even though no decision on counterclaim was made by GDC within 30 days of the judgment)

(4) Papers transmitted by clerk (§ 16.1-112)

d. Procedure in Circuit Court as appellate court (§§ 16.1-112 through -114.1)

(1) Trial de novo, because no record

(2) Clerk of Circuit Ct. notifies Appellee (Aplee) that appeal has been docketed (§ 16.1-112)

(a) Unlike a new complaint, this does not require response by Aplee in 21 days; Tr. Ct. can permit Aplee to file an answer though 21 days have expired. Overnite Transportation Co. v. Barnett's Inc., 217 Va. 222, 227 S.E.2d 695 (1976).

(3) Jury if amount exceeds $50.00 and either party demands (but generally no jury in equity matters)

(4) Tried summarily according to law and equity; when conflict - equity prevails

(5) Note "jeofails" provisions in § 16.1-114.1 (omission or mistake; cure or ignore insubstantial mistakes) (1986 enacted)

e. On appeal by the D to the Circuit Court, P may amend the amount in excess of the jurisdictional amount of GDC. § 16.1-114.1, if P appeals, neither may amend above jurisdictional amount.

f. When the case has been appealed by D, D may file a counterclaim for the first time, if it is within the jurisdictional amount of the GDC. (Copperthite Pie Corp. v. Whitehurst, 157 Va. 480, 162 S.E. 189 (1932)).

g. Thus where there is an appeal, generally, the upper court's jurisdiction is derivative unless changed by statute such as § 16.1-114.1. Exception: unlawful entry or detainer actions, if accrued rent exceeds the jurisdiction of GDC, Circuit Court should still retain jurisdiction. § 8.01-129.

6. Finality of GDC judgment

a. (1) New trial may be granted in GDC within 30 days after judgment. (§ 16.1-97.1(A); cf. rule 1:1-21 days for Cir. Courts). So should wait 30 days to collect judgment instead of 10 days which statute allows for appeal. (See supra, 5.c.(1)(a)).

(2) Motion to rehear no bar to appeal. (§ 16.1-97.1(B))

b. Relief after the 30 days:

(1) Bill of Review in Equity - for after-discovered evidence with leave of court.

(2) Motion: default judgment may be set aside for fraud on court (2 year limit) or clerical mistakes. (§ 8.01-428, see National Airlines v. Shea, 223 Va. 578, 292 S.E.2d 308 (1982): fraud on court for lawyer to remain silent and not make full disclosure as to a continuance in the case).

(3) Independent action for relief for fraud or no process. (§§ 8.01-428(C), see Powell v. Beneficial Finance Co. of Lynchburg, Inc., 213 Va. 647, 194 S.E.2d 742 (1973): judgment set aside as ineffective service of process).

(4) When appeals from GDC, the judgment of the GDC is annulled, and is no longer res adjudicata even if a non-suit is taken by P in the Circuit Court. (See Thomas Gemmell, Inc. v. Svea Fire & Life Insurance Co., 166 Va. 95, 184 S.E. 457 (1936)).

II. PARTIES

A. **Plaintiff**

1. No class actions (Ortiz v. Barrett, 222 Va. 118, 278 S.E.2d 833; see Misjoinder, infra D.3.f). But see Multiple Tort Claim Act. §8.01-267.1-267.9.

2. Ex contractu

a. Third party beneficiaries

May sue directly. (§ 55-22; see, e.g., Richmond Shop Ct. Inc. v. Wiley Jackson Co., 220 Va. 135, 255 S.E.2d 518 (1979), Buchanan v. Buchanan, 174 Va. 255, 6 S.E.2d 612 (1940): it appears that oral contracts are within the scope of § 55-22. Copenhaven v. Rogers, 238 Va. 361, 367, 384 S.E.2d 593, 596 (1989).

b. Assignees

(1) Cause of action ex contractu is generally assignable. (§§ 8.01-13 and -26; see, e.g. Tignor v. Parkinson, 729 F.2d 977 (4th Cir. 1984); Keepe v. Shell Oil, 220 Va. 587, 260 S.E.2d 722 (1979)).

(2) But personal injury not assignable. However, can be assigned as soon as claim reduced to judgment.

(3) No partial assignment to split the action and harass the D (see, e.g. Phillips v. City of Portsmouth, 112 Va. 164, 70 S.E. 502 (1911)). But partial assignment without such harassment is enforceable. (Reich v. Kimnach, 216 Va. 109, 216 S.E.2d 58 (1975)) See splitting cause of action, infra.

(4) K can be assigned after breach (Norfolk & W. R. Co. v. Read, 87 Va. 185, 12 S.E. 395 (1890)).

(5) Where assignment of bond, note, etc., D debtor may assert all discounts against original obligee or intermediate assignee prior to receiving notice of the assignment. (§ 8.01-13).

But D debtor may agree not to assert v. BFP-assignee offsets other than "real defenses" that he may have against obligee-assignor. See § 8.9A-403.

(6) A corporation that receives assets of partnership may be liable on debts arising out of these assets. See Grossman v. Saunders, 237 Va. 113, 376 S.E.2d 66 (1989).

c. Bankruptcy: see Special Rules, infra E. 13.

d. No standing.

One not a party. (See, e.g. Cemetery Cons. Inc. v. Tidewater Funeral Director's Assoc., 219 Va. 1001, 254 S.E.2d 61 (1979); funeral directors not party to K between cemetery and lot owners; see also misjoinder, infra). P who lacks standing cannot substitute new party P who would have standing to maintain an action. See Wells v. Lorcom House Condominiums' Council of Co-Owners, 237 Va. 247, 377 S.E.2d 381 (1989).

e. Subcontractors.

One subc. can sue another, even where principal contract not completed. ("Automatic" Sprinkler Corp. of America v. Petersen, 219 Va. 781, 250 S.E.2d 765 (1979)).

f. Survival of c/a.

All c's/a survive death/dissolution of P. (§ 8.01-25). Successor P must move for substitution of parties after "suggestion," or action discontinued. (§ 8.01-18; Rule 3:17).

g. Proceedings before S.C.C. (Code Title 12.1)

(1) Complainant is Commonwealth; Division of Consumer Counsel in the Attorney General's Office represents interests of consumers. (§§ 2.2-517, 12.1-27; see Blue Cross of Virginia v. Com. ex. rel. State Corp. Commission, 218 Va. 589, 239 S.E.2d 94 (1977)).

(2) S.C.C. has authority to appoint all necessary special and regular counsel. (Blue Cross/Blue Shield, supra).

3. Ex delicto

a. Assignees

(1) Conceptual difference between assignment (by contract) and subrogation (by law). (See Reynolds Metal v. Smith, 218 Va. 881, 241 S.E.2d 794 (1978)); Collins v. Blue Cross of Virginia, 213 Va. 540, 193 S.E.2d 782 (1973).

(2) Cause of action for damage to property is assignable. (§ 8.01-26).

(3) Purely personal actions are not assignable e.g. assault and battery, false imprisonment, malicious prosecution, defamation and personal injuries. (§ 8.01-26).

(4) But rights to damages for purely personal torts can be assigned (i.e., judgments and rights to contribution).

(5) Subrogation of insurance company: see Special Rules, infra E.12.

b. Wrongful Death. (§§ 8.01-50 thru -56)

(1) Statutory creation, as no survival of c/a at common law. England 1844, Va. 1871.

(2) Pers. rep. (P/R) is P. (§ 8.01-50(B)).

(a) This is the regular P/R; not specially appointed. (Hoffman v. Stuart, 188 Va. 785, 51 S.E.2d 239 (1949)).

(b) Personal non-resident P/R may serve subject to provisions of §§ 64.1-116, 26-59). Appointment of Va. P/R to serve with non resident P/R does not oust federal court of diversity jurisdiction where there is diversity between beneficiary and D. (Miller v. Perry, 456 F.2d 63 (4th Cir. 1972)); Johnson v. Worley, 353 F. Supp. 1381 (W.D. Va. 1972)).

(c) D who settles with putative P/R should obtain court approval, or at least that he's settled with correct P/R. (§ 8.01-55; see Caputo v. Holt. 217 Va. 302, 228 S.E.2d 134 (1976): wrong person qualified as P/R, and D settled with him for $20,000. Later, right P/R recovered $25,000, and court allowed no offset!)

(d) To sue a defendant who is dead and no personal representative has been appointed, see § 64.1-75.1 which provides that a personal representative may be appointed only for the purpose of being the named defendant for a suit.

(3) Distribution of damages is to beneficiaries surviving at time of verdict or judgment according to class. (§§ 8.01-53(A) and -54(c)). But remember this does not entitle the beneficiaries themselves to pursue the action instead of the P/R.

(a) Surviving spouse, children of decedent, and children of any deceased child.

(b) If none of (a), parents, brothers, and sisters, and to any other relative who is primarily dependent on decedent for support and a member of same household.

(c) Provided, however, if no child or grandchild, but a surviving spouse and parents, then parents move up to join spouse in the first class.

(d) Provided, if there are no survivors under (a) and (c) above, the award shall be distributed to those beneficiaries and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent; a relative is any person related to the decedent by blood, marriage or adoption and also includes a step-child of the decedent.

(d) If none of preceding classes, to P/R as part of estate. (§ 8.01-54(C)). [So-called "fourth class"].

(e) Distributions to first three classes are free of debts and liabilities of decedent. (§ 8.01.54(C)).

(f) Beneficiaries of first three classes are determined as of verdict/judgment. (§ 8.01-53(B)).

(g) If no statutory beneficiaries, award distributed in accordance with statute of descents § 64.0-1.

(4) Damages and costs recoverable in WD action.

(a) No limit to amount of damages subject to "fair and just." (§ 8.01-52)

(b) Elements:

(i) Punitive damages for willful or wanton conduct or such recklessness as evidences a conscious disregard of safety of others. (§ 8.01-52(5); see Peacock v. J.C. Penney, 764 F.2d 1012 (4th Cir. 1985): negligence less than conscious disregard precluded).

(ii) Heart balm. (§ 8.01-52(1)).

(iii) Pecuniary losses. (§ 8.01-52(2)).

(iv) Care, treatment and hospitalization. (§ 8.01-52(3)).

(v) Reasonable funeral expenses: (§ 8.01-52(4)).

(c) Damages are apportioned (among beneficiaries, and also among those entitled for treatment expense, funeral and punitives) by jury; or court, if case tried without jury or tried by jury which does not apportion. (§ 8.01-54(A) and (B)).

(d) Damage or loss must be sustained by statutory beneficiary. No intent in statute to accumulate an estate for decedent. (Cassady v. Martin, 220 Va. 1093; 266 S.E.2d 104 (1980)).

(e) Expert may testify as to pecuniary loss. (§ 8.01-52; but see Cassady, supra: too speculative); see Howell v. Cahoon, 236 Va. 3, 372 S.E.2d 363 (1988).)

(f) Reimbursement of loss of income from any source, may not be shown in mitigation of damages. (General rule in Va.: § 8.01-35).

(g) Damages are not subject to Federal Estate tax. (Connecticut Bank & Trust Co. v. U.S., 465 F.2d 760 (2d Cir. 1972)).

(h) Costs: Apportioned by Ct. (§ 8.01-52).

(i) Reasonableness of attorneys' fees is an issue in settlement of WD case. Lovelace v. Lovelace, 237 Va. 174, 375 S.E.2d 750 (1989).

(j) Jury verdict for exact amount of funeral expenses is inadequate as a matter of law where there is a statute. E.g., Rice v. Charles, 260 Va. 157 (2000).

(5) Statute of Limitations Applicable to WD.

(a) No action instituted by decedent prior to death --S/L period is two years from death (§ 8.01-244) (See Horn v. Abernathy, 231 Va. 228, 343 S.E.2d 318 (1986)).

(b) PROVIDED 2 year S/L on original c/a for pers. inj. has not already expired. So if original c/a accrued more than 2 years before death, WD action is barred, as WD statute does not create a new c/a, but continues the original one. (See, e.g. Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946): lung disease caused in 1936, discovered in 1940, death in 1942, WD action 1944 barred).

(c) D must plead S/L affirmatively (not by demurrer).

(d) (As to S/L generally, see infra).

c. Survival of Causes of Action (§ 8.01-25)

(1) Hypo. Sam Dead was crossing Main St., and he was struck by a passing car driven by B.M.W. Fastrack and hospitalized. Sam engaged counsel who initiated an action for personal injuries against Fastrack, alleging negligence. Seven months later, Sam, now much recovered, again set out

across Main, was struck by another car driven by Datsun Cogs and died instantly. Sam's family wants to know whether they can (i) pursue the action against Fastrack (ii) recover for their grief from Cogs. The answer is yes. There are two causes of action.

(2) As in contract, all c/a survive death of P (or dissolution if not a person), and P/R or other substitute P must amend or action will be discontinued. (§ 8.01-18; cf. Rule 2:16 & 3:15).

(3) Damage to property of decedent. (See § 64.1-145 and McDaniel v. North Carolina Pulp Corp., 198 Va. 612, 95 S.E.2d 201 (1956)).

(4) For pers. inj. to decedent

(a) action "revived" in name of P/R.

(b) Wrongful Death: if death resulted from the injury, and action for pers. inj. instituted, pleadings amended to conform with Wrongful Death Act. (§§ 8.01-56 and -50). Punitives recoverable. (§ 8.01-52). Bifurcated trial -- first causation, then damages.

(c) But if decedent had already settled for pers. inj. claim at time of death, no WD c/a. (§ 8.01-51; see Brammer v. Norfolk & W. Ry., 107 Va. 206, 57 S.E. 593 (1907)).

(d) Contrast revival where death coincidental (no WD c/a) with case where injury already sued for is also cause of death. (See Edwards v. Jackson, 210 Va. 450, 171 S.E. 2d 854 (1970)).

(5) The wrongful death provision and others providing for survival of causes of action of personal injury do not affect the assignability of actions for personal injuries, even though the normal rule was that if a cause of action survives, it was assignable, and vice versa.

B. **Defendant**

1. Joint obligors ex contractu

a. May sue any one or more. Not necessary to join all. (§ 8.01-30; see also § 8.01-5; Reed & Rice Co. v. Wood, 138 Va. 187, 120 S.E. 874 (1924))

(1) But see Rule 3:10 (cf. FRCP 14) -- 3d party practice; cf. Rule 3:9A

b. Release of one co-obligor is not release of all (§ 11-10).

c. If the claim is barred as to one or more, P may proceed against the unbarred (§ 8.01-442). But P's claim v. D-2 may be barred by estoppel by judgment if D-1

proves that P's claim is unfounded. (See Steptoe v. Reed, 60 Va. (19 Gratt.) 1 (1868)).

d. P may proceed to judgment or dismiss as the Ds are served. He may discontinue as to those not served and sue them later (§ 8.01-30). But see statute re non-suit and tolling of Statute of Limitations. (§§ 8.01-380, 8.01-229(E)(3).

2. Ex Delicto: Joint and several tortfeasors (JTFs)

a. May sue one or more

May sue any one or more (§ 8.01-443; see Hogan v. Miller, 156 Va. 166, 157 S.E. 540 (1931)).

(1) As in ex contractu cases, it is not necessary to join others (§ 8.01-5, but see Rule 3:14)

b. Successive Judgments

May get successive judgments before enforcing a judgment by execution.

(1) Obtaining a judgment v. one JTF does not release all JTFs (§ 8.01-443 changed Common Law rule)

(2) Cf. enforcing judgment or receiving payment

(3) But P is not barred v. other JTFs by sheriff's collecting for P, without his knowledge or direction, a judgment v. one. (Fitzgerald v. Campbell, 131 Va. 486, 109 S.E. 308 (1921)).

c. Who are JTFs

(1) No concert of action is required.

(2) No comparative negligence theory in Va.

(3) Negligence of the JTFs must concur in proximately causing indivisible injuries. (See, e.g. Strickland v. Dunn, 219 Va. 76, 204 S.E.2d 764 (1978); Dickerson v. Tabb, 208 Va. 184, 156 S.E.2d 795 (1967)).

(a) Master & Servant may be sued as JTFs by law of respondeat superior. (Thurston Metals & Supply Co. v. Taylor, 230 Va. 475, 339 S.E. 2d 538 (1986)).

(b) Release of servant does not release master. (Thurston, supra).

(4) Successive tortfeasors are not JTF's

(a) E.g. if doctor (TF-2) treating P who was injured by TF-1, is independently negligent, he is not a JTF, and recovery from TF-1 does not bar action against TF-2. (Washington v. Williams, 215 Va. 353, 210 S.E.2d 154 (1974)).

(b) But if doctor's (TF-2) negligence aggravates original injury, recovery by P v. TF-1 may bar action v. TF-2. (Powell v. Troland, 212 Va. 205, 183 S.E.2d 184 (1971)). But see Powers v. Chernin, 249 Va. 33, 452 S.E.2d 666 (1988) (Joinder not permitted where P. seeks recovery for separate and divisible injuries).

(5) As between JTF's the judgment is indivisible, and one JTF can be required to pay whole amount. (§ 8.01-443). See Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 789 F.2d 272 (4th Cir. 1986).

(6) § 8.01-443 was intended to operate as a pro tanto satisfaction if P so accepted it.

d. Release

Effect of release or covenant not to sue. (§ 8.01-35.1; see Hayman v. Patio Products, 226 Va. 482, 311 S.E.2d 752 (1984); see Green v. Warwick Plumbing Co., 5 Va. App. 409, 364 S.E.2d 4 (1988) (Where P's worker's compensation benefits denied when P settled a subsequent P.I. claim against a third party without consent of employer).

(1) Does not discharge other TFs unless it so provides. (Harris v. City of Roanoke, 179 Va. 1, 18 S.E.2d 303 (1942)).

(a) But see Jones v. General Motors Corp., 856 F.2d 22 (4th Cir. 1988): releases which do not satisfy the requirements of the statute have the effect, according to common law, of releasing all JTFs.

(2) But reduces P's claim v. the other Ds by greater of amount stipulated in the covenant or consideration paid.

(3) Discharges paying TF from liability to other JTFs for contribution. (As to contribution, see infra).

(4) TF settling with P may not get contribution from another TF

(a) If other could not have been held liable by P in original action (See Pierce v. Martin for Benefit of Commercial Union Ins. Co., 230 Va. 94, 334 S.E.2d 576 (1985)) or

(b) If other's liability is not extinguished by the settlement or

(c) (where other TF's liability is extinguished) in respect to an amount in excess of what was reasonable.

(5) So settling TF can recover from others who are discharged a proportionate part of a reasonable amount paid. Sullivan v. Robertson Drug Co., Inc., 273 Va. 84, 639 S.E.2d 250 (2007). In such a case, the D in the contribution case brought by settling tort feasor bears burden to prove settlement was unreasonable. Id.

(6) No contribution where plaintiff suffers separate injuries: D has burden to prove separate injuries. Id.

(7) Release or covenant not to sue not admitted into evidence but will be considered by the court in determining amount for which judgment may be entered.

(8) In determining amount of consideration of covenant or release for a settlement which consists in whole or in part of future payments, the court shall consider expert or other evidence as to the present value of the settlement.

(9) In other jurisdictions, part payment of a judgment is not a release of the joint debtor or of other JTFs but is a pro tanto satisfaction. See Annot., 27 ALR 805, s; 65 ALR 1087, s; 166 ALR 1099 at p. 1108.

e. Standing

One charged with being a JTF has standing to question the action of the court or jury in striking the evidence against another D or finding verdict for him. (State Farm Mut. Auto Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968)).

3. Ins. Co. as D.

a. General Rule: D's insurer cannot be named (as would influence jury adversely).

b. But uninsured motorist (UM) carrier can be named, rather than the uninsured TF. (Willard v. Aetna Cas. & Sur. Co., 213 Va. 481, 193 S.E.2d 776 (1973)).

c. See Virginia Farm Bureau Mutual Ins. Co. v. Gibson, 236 Va. 433, 374 S.E.2d 58 (1988), which held that the P who sues both insured and uninsured D's voids the application of the UM coverage if he enters into a settlement with the insured D without the consent of the uninsured motorist coverage carrier.

4. John Doe as D.

a. Fictitious party D for UM purposes where owner /operator of vehicle unknown.

b. Section 38.2-2206(g) provides outside limit of three years from filing of the action against John Doe for commencement of action against an identified owner or operator who caused injury.

5. John Doe as P.

a. P may proceed under John Doe or a pseudonym only if P shows special circumstance where the party's need for anonymity outweighs public interest in knowing the party's identity and outweighs the prejudices to opposing party. American On Line v. Anonymous Publicity Trade Co., 260 Va. 350 (2001).

b. There is now a statute on P proceeding anonymously. § 8.01-15.1.

6. Contribution and Indemnity

a. Rights of D who has had to pay more than his share to original P, against other obligors under contract or against JTFs.

b. Distinguish.

(1) contribution -- Arises generally by operation of law. D recovers part of what he has paid to P from co-obligor/JTF.

(2) indemnity -- D recovers all that he has paid to D, usually under K.

c. No impact whatsoever on rights of P. So D who has contractual arrangement with 3d party that the latter will hold D harmless against claims (e.g., where sale of business and possibility of outstanding claims) is still liable to P.

d. Contractual claims

There may be contribution required between co-makers of a note or between co-obligors

(1) Watch your procedure – before adoption of new Rule 3:

(a) At law, equal from all, even though some are insolvent or non-residents.

(b) In equity, equal from all who are solvent and residents. (See Cooper v. Greenberg 191 Va. 495, 61 S.E.2d 875 (1950)).

(c) So if you represent contribution P, sue in equity unless all potential contributors are solvent and available.

(d) After January 1, 2006, pray for equitable relief if there is an insolvent Ds.

(2) Cause of action for contribution and indemnity (K/tort) arises on payment. (§ 8.01-249(5)).

(3) Statute of limitations: 5 years for written contracts, 3 years for oral contracts. (§ 8.01.-246). As to neg. instruments, suit is on note itself. (See Payne v. Payne, 219 Va. 12, 245 S.E.2d 133 (1978)). See § 8.3A-118.

e. Tort

(1) General rule: there may be contribution among TF. (§ 8.01-34). Dickenson v. Tabb, 208 Va. 184, 156 S.E.2d 795 (1967).

(2) Exceptions:

(a) No contribution from a TF whom P in the original action could not have held liable. (See, e.g. Pierce v. Martin for Benefit of Commercial Union Ins. Co., 230 Va. 94, 334 S.E.2d 576 (1985). P in original action precluded from recovering from contribution D by own testimony, so contribution P could not recover either; VEPCO v. K. F. Wilson, 221 Va. 979, 277 S.E.2d 149 (1981): original P, employee, could not recover from employer as compensated by Worker's Comp.; so employer could not be liable to contribute either).

(b) No contribution where "moral turpitude." Seems to mean intentional tort as distinguished from negl. (See Hudgins v. Jones, 205 Va. 495, 51, 138 S.E.2d 16 (1964), dictum: history of Va. treatment of contribution).

(c) No indemnification of one D by another, where both D's negligent. Philip Morris, Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268 (1988).

(d) So, defenses of one sued for contribution are:

-- No liability to P in original action (no negligence or no prox. cause or other bar.)

-- Moral turpitude.

-- Settlement (if there was one) was not reasonable. (See Nationwide Mut. Ins. Co. v. Jewel Tea Co., 202 Va. 527, 51, 118 S.E.2d 646 (1961) see CB 27).

(e) No contribution where P suffers separate injuries, D has burden to prove separate injuries. Sullivan v. Robertson, supra.

(3) Amount recoverable in contribution.

Hypo: Suppose P in original action recovers $10,000 from JTF-1, $20,000 from JTF-2, and $12,000 from JTF-3. What can JTF-2 get from the others, assuming all are liable in Va.?

(a) I don't know -- probably $6,666.67 each. (But see 18 Am. Jur. 2d, Contribution, Sec. 55 says No: While P. can pursue the largest, contribution will be apportioned as to amount recovered from each D).

(b) Probably not punitive damages (theory: punitives are punishment).

(4) Equity, as well as law, may also enforce contribution among tortfeasors, but may not do so when the remedy at law is more appropriate and there is no multiplicity of suits to be avoided. (Hudgins v. Jones, supra).

f. Statute of Limitations (S/L)

(1) Implied promise to pay -- 3 years. (See McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950). But see (3)(g) infra).

(2) Runs from date of payment to the P in the original action, by the contribution P. (§ 8.01-249(5)).

(3) Case study of tensions between State law and Federal courts, and development of law by cases and statutes.

(a) Essential question for S/L is when cause of action accrues i.e when the clock starts ticking.

(b) Va. Sup. Ct. establishes that c/a accrues upon payment. (McKay , supra; Nationwide Mutual Insurance Co. v. Jewel Tea Co., 202 Va. 527, 118 S.E.2d 646 (1961) See CB27).

(c) Federal Judge Michael held that c/a for contribution in relation to underlying personal injuries action accrued at time of injury. (Rambone v. Critzer, 548 F. Supp. 660 (1982) See CB 31).

(d) Va. General Assembly in 1983 reacts to Rambone (and in so doing approves it?) by providing for 60 day extension to S/L period. (§ 8.01-229(I)).

(e) Federal Judge Warriner, on the basis of Rambone and § 8.01-229(I), holds that indemnity action barred by S/L, as claim by original P against indemnity D would be so barred. (Smith-Moore Body Co. v. The Heil Co., 603 F. Supp. 354 (E.D. Va. 1985)).

(f) Va. G.A. again reacts in 1986 to reinstate McKay and Jewel Tea. (§ 8.01-249(5)).

(g) Master/Servant

A blameless master may compel indemnification from the negligent servant. (See Maryland Casualty v. Aetna Casualty & Surety Co., 191 Va. 225, 60 S.E.2d 876 (1950); see also Sperry Rand v. ATO, 459 F.2d 19 (4th Cir. 1972)).

7. Parties Immune from Suit

a. Charities

Charitable Immunity: exemption applies to tort liability to beneficiaries of the charity only. (See 9B M.J., Hospitals, Section 7). A volunteer of a charity is immune from liability to the charity's beneficiaries for negligence while the volunteer was engaged in charity work. Moore v. Warren, 250 Va. 421 (1995). Bhatia v. Mehak, 262 Va. 544, 551 S.E.2d 358 (2001). (Volunteer must be acting directly for benefit of charity).

b. Hospitals (§ 8.01-38)

(1) Benefit from charitable tort immunity only if:

(a) renders exclusively charitable services (no bill or charge to patient), or

(b) party alleging tort was accepted as patient under written agreement that medical services supplied on a charitable basis without financial liability to the patient.

(c) Quaere: immunity if no charge to patient as Medicaid pays the bill?

(d) University of Virginia Health Services is not a charity and is not entitled to the defense of charitable immunity. University of Virginia Health Care Services Foundation v. Morris, 275 Va. 319, 657 S.E.2d 512 (2008).

(2) Restrictive approach to determining immunity for charitable purposes. (See Radosevic v. Virginia Intermont College, 633 F. Supp. 1084 (W.D. Va. 1986).

(3) Cf. Cap on liability if exempt from federal taxation under U.S.C. § 501(c)(3) and insured for at least $500,000 each occurrence:

(a) damages limited to insurance limits for non-med. mal.

(b) in action for med. mal. for damages in excess of the amounts set forth in § 8.01-581.15).

(c) Cap is constitutional. Etheridge v. Medical Center Hospital, 237 VA 87 (1988).

(d) Eff. July 1, 1988 cap on punitives: $350,000.

(4) Research Boards: Immunity for every member of any committee, board, etc. established pursuant to federal or state law which functions to authorize, review, or make recommendations on matters, conduct, etc. involved in programs or research protocols conducted under the supervision of faculty or staff of any hospital or college, unless acts are done in bad faith or unless the members know or reasonably should know such acts are in violation of § 32.1-162.16, but immunity does not apply to those persons engaged in the actual conduct of the programs or research protocols. (§ 8.01-44.1)

c. In Title 8.01 there are specific statutes by which immunity is granted to a wide number of persons that can be generally categorized as doing "charitable work." See § 8.01-225 (generally known as the good Samaritan statute); § 8.01-225.1 (team physician); § 8.01-225.2 (emergency care to animals); § 8.01-226.1 (Lawyers helping lawyers with substance abuse problem); § 8.01-226.2 (engineer and architect participation in rescue work); § 8.01-226.3 (crime information – gathering organization); § 8.01-226.4 (hospice volunteer); § 8.01-226.5 (installer of child restraint device); § 8.01-226.5 (teacher, supervisor, self-administration of asthma medication); § 8.01-226.6 (governmental employees for year 2000); § 8.01-220.1:1 (officer, director, trustee of tax exempt organization); § 8.01-220.1:2 (school teacher discipline); § 8.01-220.1:3 (members of church of synagogue).

d. Sovereign Immunity of State

[See generally: 7 Geo. Mason L. Rev. 291 (1984).]

(1) For acts of negligence of state and its employees. Va. Tort Claims Act § 8.01-195.1, et. seq.

(2) Applies to the Commonwealth only, and it does not apply to any county, city, or town, or to an agency of the Commonwealth, such as the University of Virginia. Rector and Visitors of University of Virginia v. Carter, 267 Va. 242, 591 S.E.2d 76 (2004).

(3) Under Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984), an employee of a government entity enjoys sovereign immunity if (a) he is working for a government entity that enjoys immunity, (b) the government entity has an interest and is involved in the job function, (c) a degree of control and discretion is exercised by the government entity, and (d) the employee exercises judgment and discretion in the job function.

(4) Limitations (§ 8.01-195.3)

- (a) No liability for interest prior to judgment; (cf. § 8.01-383 gen. discretion of ct./jury when interest commences);
- (b) No punitive damages;
- (c) Max. award is the greater of $75,000, or $100,000 for cause of action accruing after July 1, 1993, or the maximum limits of any liability policy.

(5) Exclusions (so preserve immunity).
(§ 8.01-195.3):

- (a) Judges, attorney general, Commonwealth's attorney, and other public officers (cf. employees), their agents and employees from tort claims for damages, but only to the extent and degree that the above persons "presently are immunized." (What does this mean?) - See Messina, supra quote from Prosser, p. 309.
- (b) Legislature and staff acting in official capacity,
- (c) Court of the C/W or any member thereof acting in official capacity, or others acting in a judicial capacity (widely construed in Harlow v. Clatterbuck, 230 Va. 490, 339 S.E. 2d 181 (1986): officials of Dept. of Corrections),
- (d) Any officer, agent, or employee of any agency of government in execution of a lawful order of any court,
- (e) Assessment or collection of taxes,
- (f) Institution or prosecution of any judicial or administrative proceeding even if without probable cause.

(g) An inmate of a state correctional facility, unless claimant verifies he has adjusted his remedies under procedures promulgated by the Department of Corrections.

(h) Member of gov. body of county and members of boards, agencies and authorities exercising govt. authority. § 15.1-7.01.

(6) Statute of limitations: notice must be given within one year to the Va. Attorney General. § 8.01-195.7, subject to the tolling provisions of § 8.01-229.

(7) Claims for medical malpractice: subject to provisions of § 8.01-581.1 et seq. (Chapter 21.1). See Edwards v. City of Portsmouth, 237 Va. 167, S.E.2d 747 (1989).

e. Good Samaritans (§ 8.01-225). (See Section 6).

(1) Immunity for person who, e.g.:

(a) in good faith renders emergency care or assistance without compensation to any injured person at the scene of an accident, or en route to hospital (if certified, can be by telephone),

(b) provides assistance upon the request of governmental agency in the event of accident or emergency involving liquified petroleum gas, liquified natural gas, hazardous material or hazardous waste,

(c) has completed a course in cardiopulmonary resuscitation, and who in good faith and without compensation administers emergency cardiopulmonary resuscitation treatment,

(d) in abscence of gross negligence renders emergency obstetrical care or assistance to female in active labor if that person (or associate) has not previously cared for her and her medical records not reasonably available,

(2) Exception: immunity does not extend to liability arising out of the operation of a motor vehicle. (See Penn v. Munns, 221 Va. 88, 267 S.E.2d 126 (1980)).

f. Municipalities

(1) Dual capacity -- "governmental" and "proprietary."

(2) Immune from liability for negligence in performing or failing to perform governmental functions.

(3) No immunity for proprietary functions. (Taylor v. City of Newport News, 214 Va. 9, 197 S.E.2d 209 (1981). (But see § 15.1-701: members immune when exercising govt. authority or discretion.)

(4) E.g., garbage collection is a governmental function, but maintenance of public streets and sidewalks is a proprietary function. When two collide, governmental function overrides.

(5) Notice to municipality must be filed within six months after cause of action accrued. § 15.2-209.

g. Counties enjoy immunity for negligence of employee.

h. Employers

Where employee has been compensated under Workmen's Comp. Act. (Title 65.1, esp. § 65.1-40; see Conlin v. Turner's Express, 229 Va. 557, 331 S.E.2d 453 (1985); (Recovery against employer limited to W.C.A. rights and remedies; provided that if injuries caused by negl. 3P, employee may sue him).

i. Attorneys involved in substance abuse counseling

Licensed lawyer immune if in good faith and w/o malicious intent engaged in effort to assist others lawyers in connection with substance abuse counseling under VSB and VBA guidelines. (§ 8.01-226.1).

j. Officers and directors of tax exempt organizations

Dir./officer who serves w/o compensation immune unless willful misconduct or knowing crim. violation. (§ 8.01-220.1:1)

k. Workers Compensation. If P is statutory employee of D, D is not liable to P in civil action. See Whalen v. Dean Steel, 229 Va. 169, 327 S.E.2d 102 (1985). P may recover only if P is stranger to the work place of D. See Stone v. Door-Man, 260 Va. 406, 537 S.E.2d 305 (2000) and Fowler v. International Cleaning, 2650 Va. 421, 537 S.E.2d 312 (2000).

C. **Parties in Equitable Claims** (Equitable claims may be joined with legal claims under Rule 3:1.

1. On equitable claims not usually the P v. D relationship of legal claim.

a. An action at law is bilateral, all parties on each side being jointly interested in precisely the same way; the purpose of the action at law is to fix the same legal liability on every D in favor of every P

b. Equitable action is for relief other than money damages.

c. In an equitable claim, a merely bilateral controversy may almost said to be exceptional:

(1) Divorce

(2) Specific performance

(3) Injunction

d. In an equitable claim, the main contest may be not between the P and the Ds, but between one or more Ds:

(1) Partition

(2) Suit to sell incompetent's lands

(3) Will contest

(4) Trustee's proceeding

2. The policy of equity is to make a complete disposition of the entire controversy in all of its ramifications, and to award the subject matter of the litigation to the claimants as in equity and in good conscience it should be awarded.

3. Parties in an equitable claim

a. All who are in any way interested should be made parties. (See §§ 8.01-5 and -7).

b. But inability to do so may not block the proceeding: as where all joint contractors cannot be reached, since one or more may be non-residents. (See Cooper v. Greenberg, 191 Va. 495, 71 S.E.2d 875 (1950)).

c. Parties are classified as "necessary" or "proper." (See Rule 3:9A and Butler v. Butler, 219 Va. 164, 247 S.E.2d 353 (1978) (garnishment case - appeal dismissed where garnishee which was dismissed in trial ct. was not named in appeal to Va. Sup. Ct. - ct. held garnishee is indispensable (i.e. necessary) party.

(1) Necessary parties are those whose presence is essential to a complete determination of the controversy and disposition of the subject matter; if cannot be added, suit is dismissed. See, e.g., Walt Robbins, Inc. v. Damon Corp. 232 Va. 43, 348 S.E.2d 223 (1986). (Trustees and benef. of antecedent D/T are nec. parties to mechanic's lien suit.) See Mendenhall v. Cooper, 239 Va. 71, 74, 387 S.E.2d 468, 470 (1990). (M.L. suit dismissed because necessary parties were added after the S.L. had run against them).

(2) Proper parties are those without whose presence in a suit a substantial decree may be made, but not one which completely settles all questions.

So suit can still proceed, even without them. [cf FRCP 20 Permissive Joinder].

(3) As to how parties come to be regarded as subject to the court's jurisdiction, see Chapter IV, Process, infra.

4. Doctrine of Parties by Representation in Equity, e.g., Shareholder's Derivative Suit (P); unknown parties (D) - in rem. (§ 8.01-316: service by order of publication).

D. **Change of Parties/Names of Parties/Amendment/Relation Back**

1. Misnomer (right person under wrong name) (§ 8.01-6)

a. Amendment allowed to correct name. Even if not misnomer, may relate back if (1) claim in amendment arises out of same transaction alleged in original complaint, and (2) if party brought in knew about action within limitation period and not prejudical. § 8.01-6.1.

b. Classic case of misnomer. Jacobson v. Southern Biscuit Co., 198 Va. 813, 97 S.E.2d 1 (1957).

c. No amendment after judgment. (See Leckie v. Seal, 161 Va. 215, 170 S.E. 844 (1933)).

d. Naming as D an Admr. who had been erroneously appointed prior to a proper appointment of another fiduciary is not a misnomer, and could not be corrected under predecessor statute. (Rockwell v. Allman, 211 Va. 560, 179 S.E.2d 471 (1979): distinguishes Jacobson on ground that there P had the right person but the wrong name).

e. Often arises in context of suit v. corporations, as to which, see infra, E.3.

f. See Annot. 85 ALR.3d 130.

g. See Douglas v. San Francisco Hairport, 5 Va. Cir. 318 (1986) (indiv. sued in trade name-verdict valid because true name identical in interest to indiv. name; and indiv. served and made gen. appearance).

2. Right person sued under right name

a. Change of position or status of a party:

(1) Permitted by motion under Rule 3:17.

(2) If successor does not consent to his substitution, movant files motion and amended pleading effecting the substitution and serve on party to be substituted who must file a response within 21 days.

b. Married person or other change of name: no abatement of action. Name may be changed but it makes no difference if it is not. (§ 8.01-19).

c. If change of name, death, or any other cause for abatement occurs after verdict or judgment, Court of Appeals or Sup. Ct. may nonetheless take appeal, in its discretion. (§ 8.01-20).

d. Legal and equitable claim.

3. Misjoinder (§ 8.01-5) [cf. FRCP 21]

a. Definition: too many parties.

b. Does not defeat pending action. So no demurrer.

c. Court may order parties misjoined be dropped, on motion.

d. At law or equity.

e. Plaintiffs: no class actions. Each person injured in an accident has his own c/a v. the D. All Ps cannot join in same action. (cf. Ortiz v. Barrett, 222 Va. 118, 278 S.E.2d 833 (1981)). Exception – Multiple Claimant Litigation Act § 8.01-267.1, et. seq.

f. Ds: joinder of Ds in the alternative permitted where only one is liable, but court may order separate trial of issue or claim. (§ 8.01-281).

g. In action for P.I. or P.D., P has absolute right to have a separate trial if D files a T.P.C. against another tort feasor; P must make motion 5 days before trial.

h. Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987). P may join claims arising in contract and tort against different Ds so long as claim arises out of same transaction or occurrence. § 8.01-272 and § 8.01-281.

4. Nonjoinder (§ 8.01-5 and -7) [cf. FRCP 21; FRCP 19]

a. Definition: too few parties.

b. As with misjoinder, solution is not dismissal, but amendment, unless necessary parties cannot be joined. (See Board of Supervisors of Henrico County v. Heatwole, 214 Va. 210, 198 S.E.2d 613 (1973); Walt Robbins, Inc. v. Damon Corp., 232 Va. 43, 348 S.E.2d 223 (1986)). Fox v. Deese, supra. But see Chesapeake House on the Bay, Inc. v. Va. Nat. Bank, 231 Va. 440, 344 S.E.2d 913 (1986). Marshall v. Cooper, 239 Va. 71, 387 S.E.2d 468 (1990).

c. Court may add new parties on motion, or sua sponte in the interests of justice.

5. Third party practice. (See Rule 3:13 [cf. FRCP 14].

6. Amendment changing or adding a claim of defense relates back for purposes of SL if court finds (a) claim arose out of same transaction, (b) amending party reasonably diligent in amending claim, and (c) D not so prejudiced. § 8.01-6.1.

   a. No amendment shall be made without leave of court. Rule 1:8.

   b. The operative date for an amended pleading is the day the trial court enters the order granting leave to amend. Ahari v. Morrison, 275 Va. 92, 654 S.E.2d 891 (2008).

   c. An amended pleading has no operative efficacy until the court grants leave to amend. Id.

   d. If leave to amend is not granted to plaintiff until after the statute of limitations has run against a new defendant, the complaint is barred by the statute of limitations. Id.

E. **Special Rules for Certain Persons and Entities**

1. Partnerships (Code Title 50)

   a. Common law rule: partnership is not a separate entity, so partners as a whole must sue/be sued. (Strother v. Strother, 106 Va. 420, 56 S.E. 170 (1907)). Caption need not contain partnership name. (McCormick v. Romans and Gunn, 214 Va. 144, 198 S.E.2d 651 (1973): note, however p/ship was alleged in pleadings).

   b. 1985 statutory change: p/ship (Va. or foreign) can now sue/be sued in own name, without joinder of ptnrs. Resultant judgment v. p/ship is effective v. p/ship property, and v. all ptnrs. (§ 50-73.97). Oral partnership to share profits and losses in purchase of real estate is not within statute of frauds. Wingate v. Coombs, 237 Va. 501, 379 S.E.2d 304 (1989).

   c. Ptnrs. jointly & severally liable

      (1) For loss or injury due to the wrongful act or omission of any partner acting in the ordinary course of the partnership business. (§50-73-95(A)).

      (2) For misapplication by ptnr. of money of a third person. (§50-73-95(B); see McCormick v. Romans & Gunn, supra).

   d. Ptnr. liable as indiv.:

(1) Ptnr. undertakes as an individual the performance of a partnership obligation, e.g. as guarantor. Can be sued along with or independently of the partnership. (§ 50-15(b)).

(2) When the partnership assets have been exhausted without satisfying the obligation, P can then go after the ptnrs. as individuals. (§ 8.01-30: co-obligors statute; see B.1 supra).

e. Actions between partners and the partnership

(1) At law: remember, supra, common law does not recognize p/ship as sep. entity. So no action at law by one partner against the partnership because one cannot sue oneself. (See Strother v. Strother, supra).

(2) Under Uniform Partnership Act (§50-73.79 et seq.), a partnership may maintain an action against a partner for breach of agreement and/or breach of duty; and a partner may maintain an action against a partnership or partner for legal or equitable relief. See § 50-73-103 B (1)-(3).

(3) Partner's remedies against the partnership are in equity:

(a) Right to account. (§§ 50-73.101, -103).

(b) Right to cause dissolution of the partnership, and "pay out" of assets. (§ 50-73.117).

f. Limited partnerships (§ 50-73.1 et. seq.)

(1) Limited partner (LP) not liable for obligations of p/ship unless LP also a gen. ptnr. or LP participates in control of business. (§ 50-73.24). When LP permits name to be used in p/ship name, LP liable to creditors w/o actual knowledge.

(2) LP liable for promise to contribute cash or property to p/ship (§ 50-73.33).

2. Unincorporated associations (§ 8.01-15)

a. Sue/be sued as entity in own name. Statute cf. common law.

b. Judgment binds real and personal property, as if Ass'n is incorporated.

c. Service is on any officer, trustee, director, staff member or agent. (§ 8.01-305).

d. Be sure it is unincorporated ass'n and not a trust. (See Yonce v. Miners Mem. Hosp. Ass'n, 161 F. Supp. 178 (W.D. Va. 1958) - UMW Welfare & Retirement Fund is a trust.)

(1) As to treatment of trust, see infra, 5.

(2) Real Estate Investment Trust, constituted under §§ 6.1-343 et seq., is unincorporated ass'n and not a trust. (Grenco REIT v. Brooker, 215 Va. 413, 211 S.E.2d 33 (1975)).

3. Corporations (Stock: Title 13.1 Chapter 9; Nonstock: Title 13.1 Chapter 10).

a. Separate legal entity, so sue/be sued in corporate name.

b. Must be corporate name, not trade name; but an amendment may be allowed to cure the defect in some circumstances. (Jacobson v. Southern Biscuit Co., supra; Baldwin v. Norton Hotel, Inc., 163 Va. 76, 175 S.E. 751 (1934). See Annot., 8 ALR.3d 130).

(1) But may not be allowed, if S/L has run. (See Leckie v. Seal, supra: held that where there was no amendment and judgment went by default, the judgment was a nullity and there could be no amendment; see also 19 C.J.S., Corporations, 1289 and 1328(c)(2)).

(2) How does P discover corporate name?

(a) State Corporation Commission

(b) Clerk's office where registered office is

(3) Same for fictitious name (d/b/a). (§ 59.1-69).

c. Foreign Corporation

(1) If transacting business in Va., cannot sue unless qualified. (§ 13.1-758).

(2) But may qualify pendente lite. (Video Engineering Co. v. Foto-Video Elec., Inc., 207 Va. 1027, 154 S.E.2d 7 (1967)).

(3) If not transacting business, can maintain proceeding without qualifying, because merely maintaining proceeding is not transacting business. (§ 13.1-757).

(4) See § 13.1-757 for list of activities which do not constitute "doing business in Va."

(5) May defend suits even though not qualified.

d. Stockholders must sue in a derivative action, and may not sue in an individual capacity for claims against directors and officers for breach of fiduciary duty and/or engaging in a conflict of interest transaction. See Willard v. Moneta Building

Supply Co., 258 Va. 140, 515 S.E.2d 277 (1999); Simmons v. Miller, 261 Va. 561, 544 S.E.2d 666 (2001). Officers and directors owe duty of loyalty to corporation. See Willard.

e. Employees are free to compete after termination of employment if no contract with covenant not to compete. Peace v. Conway, 246 Va. 278, 435 S.E.2d 133 (1993).

f. Corporation may be liable for acts of employee arising out of the scope of work for duties of the employee even though acts may be detrimental to the company. Gina Chin v. First Union Bank, 260 Va. 533, 537 S.E.2d 573.

4. Executors and administrators (§§ 64.1-144 & 64.1-145)

a. Sue and are sued in representative capacity on decedent's pre-death Ks and damage to estate.

(1) On Ks, all must be joined.

(2) On post-death Ks, executor can sue as P in rep. or individual capacity; as D often sued in indiv. capacity.

b. As to actions arising from pers. inj. to decedents, see supra, A.3.b and c.

c. D in actions based on decedents' tort liability. (See Rockwell v. Allman, 211 Va. 560, 179 S.E.2d 471 (1971)).

d. Foreign pers. rep. may not sue outside the jurisdiction in which appointed; often must act along with Va. rep. (§ 26-59; see McDaniel v. North Carolina Pulp Co., 198 Va. 612, 95 S.E.2d 201 (1956))

(1) Local personal representative does not destroy federal diversity jurisdiction if D is a Virginia resident. (Miller v. Perry, 456 F.2d 63 (4th Cir. 1972); see also 30 Wash and Lee L. Rev. 282 (1973))

e. Example of change of capacity of party not changing cause of action. (Grinels v. Legg, 208 Va. 63, 155 S.E.2d 56 (1967): widow may amend to sue individually rather than as Executrix when Adm'n concludes pendente lite).

5. Trustees

a. Apparently all Trustees must be made parties. (See 90 C.J.S., Trusts and Trustees, Sec. 457, p. 894).

b. May also be necessary to make beneficiaries party. (See Providence Properties, Inc. v. UVB/Seaboard National Trustee, 219 Va. 735, 251 S.E.2d 474 (1979): beneficiary under deed of trust not necessary party to ejectment suit; but see Walt

Robbins, Inc. v. Damon Corp., 232 Va. 43, 348 S.E.2d 223 (1986): (trustees and beneficiary of Deed of Trust necessary parties in enf. of mech. lien.)

6. Persons Under a Disability (PUD): Infants (§ 8.01-2(6)(b))

a. Infant is person under 18, unless context requires otherwise, e.g. ABC law is 21. (§ 1.13.42.)

b. As P, sue by next friend (§ 8.01-8).

(1) In name of infant, not in name of next friend. (Kirby v. Gilliam, 182 Va. 111, 28 S.E.2d 40 (1943)).

(2) So caption reads: "(Infant's name) by next friend's name), his/her next friend."

(3) No formal appointment is necessary in order to act as next friend.

(4) No consent by the infant is required. (Kirby v. Gilliam, supra). But if question is raised as to propriety of proceeding or of next friend, question may be referred to Master.

(5) Infant suing by next friend to set aside will may be hit by in terrorem clause. (Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956)).

(6) But guardian, if appointed, may sue in own name, without infant/next friend, to get payments due on obligations payable to him as guardian. (§ 31-13; Garland v. Norfolk Nat'l Bk, 156 Va. 653, 158 S.E. 888 (1931)).

c. Peculiar features of personal injury actions

(1) The infant cannot recover for "necessary" expenses as these are incurred by parents (Moses v. Akers, 203 Va. 130, 122 S.E.2d 864 (1961)) unless:

(a) The infant has paid or agreed to pay the expenses; or

(b) The infant is alone responsible because of emancipation or the death or incompetence of his parents; or

(c) The parent has waived the right of recovery in favor of the infant, or

(d) Recovery is permitted by statute. (See e.g. § 8.01-66.2: doctors' and hospital's lien for medical expenses on infant P's claim v. persons who caused injury).

(2) Above factor(s) not required to be alleged in complaint, but infant P must prove the right to recover at trial. (Chappell v. Smith, 208 Va. 272, 156 S.E.2d 572 (1967)).

(3) The infant can recover damages for:

(a) Pain and suffering;

(b) Permanent injury; and

(c) Impairment of earning capacity after attaining majority. (See § 8.01-37; Akers, supra; Annot., 32 ALR.2d 1060).

(4) The parent has a separate action for

(a) "Necessary" expenses. (See §§ 8.01-36 and -243(B)); and

(b) The loss of services of the infant during minority. (Moses, supra).

(c) No collateral estoppel where judgment against parent: does not prevent child from suing wrongdoer. (See Annot., 41 ALR.3d 536, but note incorrectly called res judicata).

(d) But parent's action is said to be derivative and child must get verdict before parent can. (Norfolk So. Ry. v. Fincham, 213 Va. 122, 189 S.E.2d 380 (1972); cf. § 8.01-36 may alter this).

(e) Where infant is emancipated, the cause of action for lost wages belongs to him; if infant wins, he recovers; if he loses, res judicata and CE as to his parent's claim for such wages. (§ 8.01-37).

(f) Settlement of infant's claim is not settlement of parent's claim unless there is a waiver. See Baumann v. Capozio, 269 Va. 356, 626 S.E.2d 597 (2005).

(5) The two separate causes of action, supra, of the infant and the parent may be joined but the verdict and judgment must be kept distinct. (§ 8.01-36; See Sturman v. Johnson, 209 Va. 227, 228, 163 S.E.2d 170 (1968)).

(a) If either involves the jurisdictional amount for appeal to the Supreme Court ($500), S. Ct. has jurisdiction and if error is granted, cases go up together, but S. Ct. gives separate judgments. (§ 8.01-36).

d. As Defendant

(1) Infant defends by guardian ad litem. (§ 8.01-9; Moses, supra).

(2) If infant sues by next friend, and D counterclaims, guardian ad litem would have to be appointed, unless att'y of record represents infant P. (§ 8.01-9).

(3) Judgment v. infant where no G ad L said to be void. (Moses, supra; Broyhill v. Dawson, 168 Va. 321, 191 S.E. 779 (1937): court held that an infant could have an execution issued on a judgment against him quashed where no guardian ad litem was appointed, even though it did not appear from the record that he was an infant).

(a) But "void" too strong: if Va. att'y represents infant D, G ad L generally not necessary.

(b) Even if att'y acting, court may appoint G ad L. E.g., ins. lawyer might not be adequate.

e. Suing members of the family

(1) General: old policy fears of collusion and strain on family unit in intrafamily actions are giving way to realities of insurance against liability. (Cf. abolition of interspousal immunity in 1981 - § 8.01-220.1).

(2) Child v. Parent/Parent v. Child

(a) Torts for personal injuries: cannot maintain an action. (See Smith v Kaufman, 212 Va. 181, 183 S.E.2d 190 (1971); Wright v. Wright, 213 Va. 177, 191 S.E.2d 223 (1972)), unless:

(i) child is emancipated, or

(ii) parent is sued in vocational capacity and there is insurance (presumed). (Worrell v Worrell, 174 Va. 11, 4 S.E.2d 343 (1939)), or

(iii) automobile cases. (Smith v. Kaufman, supra).

(iv) child's death results from intentional act of parent. Pavlick v. Pavlick, Rec. No. 962474 S.C. 9/12/97. 254 Va. 176 (1997).

(b) Contracts and Torts to property: can maintain action. (Smith v. Kaufman, supra).

(3) Siblings may sue each other even though unemancipated. (Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960): no strain on family relationship).

(4) Persons in loco parentis: same policy as with siblings would apply. (See Smith v. Kaufman, supra; Lyles v. Jackson, 216 Va. 797, 223 S.E.2d 873 (1976)).

f. Guardian

(1) When guardian of property appointed (see Title 31), guardian has enumerated statutory power. § 31-14.1.

(2) Where guardian is appointed, ward may not bring action for personal injury in own name; guardian must bring suit on behalf of ward. Cook v. Radford Comm. Hosp., 260 Va. 443, 530 S.E.2d 906 (2000).

g. Suits to lease or sell infants' lands

(1) Renewal of lease: summary procedure where bound or entitled to renew lease. (§ 8.01-74(A)).

(2) New lease: also summary procedure. (§ 8.01-74(B)).

(3) Sale of and other dispositions of land (§§ 8.01-67 et seq):

(a) Equity proceeding.

(b) G ad L must be appointed and answer even though infant has an attorney. (§ 8.01-73).

(c) Summary proceeding by ref. to commissioner is discretionary. (§§ 8.01-79, -80).

(d) See Lamb, A Virginia Cause: partition suit preferred.

7. PUD: Insane Persons (§ 8.01-2(6)(b))

a. If a court adjudicates a person "incapacitated," the court shall appoint a guardian or conservator for him. (§ 37.2-1007).

b. If a guardian or conservator is appointed, the court shall state the incapacity and define power and length of time (§ 37.2-1000).

c. As Plaintiff

(1) If appointment, sues by guardian; if none, or guardian has adverse interest, sues by next friend. (§ 37.1-139; Bird's Comm. v. Bird, 62 Va. (21 Gratt.) 712 (1872)).

(2) Defects in appointment of guardian: Court will treat guardian as acting as next friend and proceed

d. As Defendant

(1) If there is no guardian, a G ad L is appointed, unless D is represented by duly licensed atty. (Similar to procedure for infants; see §§ 8.01-9 & -297, and dicta in Dunn v. Terry, 216 Va. 234, 217 S.E.2d 849 (1975).

(2) If there is a guardian, the proceeding is brought against the guardian. (§37.2-1026).

(3) If guardian has an adverse interest, a G ad L is still appointed

e. Suits to lease or sell land: as for infants, supra.

f. If possible, get power of attorney before senility or in lucid moment.

g. Guardian may incur debt for necessities, care and support without prior approval of court. (§ 37.2-1023) (Carter v. Cavalier Central Bk., 223 Va. 571, 292 S.E.2d 305 (1982)).

8. PUD: Convicts (§ 8.01-2(6)(a)

a. Committee appointed for felon if incarcerated; committee sues and is sued in matters affecting the estate and/or person of the convict. (§§ 53.1-221 and 222).

b. Failure to appoint a committee does not oust court of jurisdiction. (Cross v. Sundin, 222 Va. 37, 278 S.E.2d 805 (1981)).

c. But action should not be brought against a convict while incarcerated except through committee. (§ 53.1-223); cf. Dunn v. Terry, 216 Va. 234, 217 S.E.2d 849 (1975): proceeding was instituted against the D and he was later convicted and incarcerated). Arguably convict may waive appointment of committee. (See 1982-3 Rep. Att'y Gen. 175).

d. If convict is represented by attorney, no G ad L need be appointed. (§ 8.01-9).

e. Service (§ 8.01-297)

(1) Service is by delivery to officer in charge of jail.

(2) Presumably if he has a committee, the committee is still sued.

f. Convict's right of access to courts as a P: "Precious right" which cannot be denied. (See Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Burgess v. Cunningham, 205 Va. 623, 139 S.E.2d 110

(1964): prisoner sued in own name, original jurisdiction in S. Ct. (habeas corpus); nobody said anything re having to sue by committee).

g. Prisoner on parole may sue and be sued directly.

9. Other PUDs. (See § 8.01-2(6))

10. Married women/spouses

a. Married woman may sue and be sued as if femme sole. (§ 55-36).

b. Interspousal immunity in tort: abolished 7/1/81. (§ 8.01-220.1).

c. Consortium

(1) Under § 55-36, wife may "recover the entire damage" in respect of her own personal injuries, v. 3d party.

(2) So apparently each spouse recovers all damages for his/her own injuries v. 3d party TF.

d. If husband or other person is actually out of pocket, wife's recovery repays, and wife holds as trustee for husband or other person. (§ 55-36).

11. Aliens

a. Lawfully admitted aliens have standing to sue in Virginia courts and in federal courts. (See Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848 (1971)).

b. Unlawfully admitted aliens have standing to sue in Virginia. Peterson v. Neme, 222 Va. 477, 281 S.E.2d 869 (1981).

c. Alien can recover for loss of wages even though employment contract may be unenforceable. (Peterson v. Neme, 222 Va. at 481).

12. Insurance Company

a. The D cannot force the subrogated insurance carrier of the P to be added as a party P. (§ 8.01-5(B); see Miller v. Tomlinson, 194 Va. 367, 73 S.E.2d 378 (1952); cf. Hudgins v. Jones, 205 Va. 495, 138 S.E.2d 16 (1964)).

b. But subrogated ins. co. may nonetheless sue. (See Collins v. Blue Cross of Va., 213 Va. 540, 193 S.E.2d 782 (1973)).

13. Bankruptcy

The trustee in bankruptcy gets causes of action for injuries to property or taking or detention thereof or actions arising under contract; and also gets judgments for personal injuries but not verdicts. (See Ruebush v. Funk, 63 F.2d 170 (4th Cir. 1933)).

14. Commonwealth

Comptroller is a necessary party in contract actions against the Commonwealth.

15. Suretyship

a. To recover against surety on bond, P must prove: execution of bond, default, notice of default, and cost. Bd. of Supervisor v. Safeco, 226 Va. 329, 310 S.E.2d 448.

b. Failure of purpose of project is not defense by surety since obligor could not assert defense. Safeco.

16. Limited Liability Company (Title 13.1, Chapter 12) (L.L.C.)

a. L.L.C. has the same power as an individual to do all things necessary to carry out business.

b. L.L.C. may sue and be sued.

c. L.L.C. has members and/or managers, no stockholders, and unless otherwise provided by Va. Code or in articles of organization, no member, manager, or agent has personal obligations for debts of L.L.C.

d. Good idea to have L.L.C. a party to the operating agreement in addition to member of L.L.C. Mission Residential L.L.C. v. Triple Net Properties, 275 Va. 157, 654 S.E.2d 888 (2008).

e. A member may bring a derivative action in the right of the L.L.C. to the same extent that a stockholder may bring an action under Stock Corporation Act, but it must appear the plaintiff member fairly and adequately represents the interest of the members and L.L.C. in enforcing the rights of the L.L.C. Va. Code § 13.1-1042. Jennings v. Kay Jennings Ltd. Partnership, 275 Va. 594, 659 s.E.2d 283 (2008).

17. Pursuant to § 16.1-106.1, the party who has appealed a final judgment may withdraw the appeal and the judgment of the GDC shall have the same effect as if no appeal had been noted.

III. **VENUE**

A. **General**

1. Applicable to all proceedings in all GDC's and Cir. Cts. (§ 8.01-257), except those excluded in 3, infra.

2. Distinguish from jurisdiction.

   a. For jurisdiction, consider:

      (1) Subject matter. Remember $ limits and limited jurisdiction of General District Courts.

      (2) In personam: see next chapter.

      (3) In rem: physical location of matter which is subject of controversy.

   b. If one Va. court has jurisdiction, any Va. Court at the same level (e.g. Cir. Ct.) has jurisdiction, regardless of geographical location within Virginia.

   c. If court lacks jurisdiction, it cannot entertain the case, and if it does, ultimate disposition is void.

   d. Cf. If court is improper venue, ultimate disposition of case is valid. (§ 8.01.-258).

   e. Result of successful challenge of improper venue is simply transfer of pending proceedings to proper venue (perhaps with costs).

   f. The foregoing analysis does not apply to the exceptions listed in 3.a., infra; for these, venue is an additional element of subject matter jurisdiction.

3. Excluded proceedings. (§ 8.01-259).

   a. Habeas corpus.

   b. Tax proceedings, other than those in Title 58.1.

   c. J&DRC proceedings concerning children.

   d. Adoption.

B. **Preferred (Pfd.) and Permissible (Pmbl.) Venue**.
(§§ 8.01-260 thru 262).

1. Both are proper (§ 8.01-260), but Pfd. is more proper than Pmbl. (§ 8.01-265)

2. Pfd. Venue (§ 8.01-261).

   a. Also called "Category A" venue.

   b. If more than one Pfd., transfer only for good cause and only to another Pfd. venue unless parties agree otherwise. (§ 8.01-265).

   c. Relationships which create Pfd. venue. (§ 8.01-261). These are alternatives. Note particularly:

      (1) Administrative

         (a) Where admin. regs. or decisions are at issue and adversaries are citizens and Commonwealth, generally venue is determined by the citizen's location, whether he is P or D. (§ 8.01-261(1). So A.G., on behalf of the Commonwealth, has to go on the road.

         (b) But when citizen (P) v. Commonwealth officer (D), other than a situation covered by (a), venue is where officer has official office - generally Richmond. (§ 8.01-262(2).

      (2) Land: where it is. (§ 8.01-261(3). Apparently includes disputes involving accounting by trustees of deed of trust. (See Bradley v. Canter, 201 Va. 747, 113 S.E.2d 878 (1960)).

      (3) Attachments: treated as if principal D were the sole D, even though those liable to the principal D may also be Ds. (§ 8.01-261(11).

      (4) Divorce - where parties last cohabited or where D resides.

3. Pmbl. Venue. (§ 8.01-262).

   a. Also called "Category B" venue.

   b. Relationships which create Pmbl. venue. (§ 8.01-262). Again, these are alternatives. Note particularly:

      (1) Where D "is" i.e. place of residence, employment or business. (§ 8.01-262).

      (2) But, if D is sued in fiduciary capacity, where qualified. (§ 8.01-262.6).

      (3) Judges: where the court was held when the action complained of was taken. (Hogge v. Ellenson, 212 Va. 403, 184 S.E.2d 810 (1971): suit to enjoin judge from holding attorney in contempt; venue lay where hearing was held.)

(4) Corporations: registered office or appointed agent to receive process. (§ 8.01-262.2).

(a) Where D "regularly conducts bus." or bus. activity. § 8.01-262(3).

(5) Where c/a arose. (§ 8.01-262.4)

(a) Tort: where any part of injury occurred. (See C&O v. American Exch. Bank, 92 Va. 495, 23 S.E. 935 (1896)).

(b) Contract: place of contracting or breach. (See Big Seam Coal Corp. v. Atlantic Coast Line R. Co., 196 Va. 590, 85 S.E.2d 239 (1955)).

(6) P's residence: if Ds unknown (John Doe action) or all Ds nonresident. (§ 8.01-262.10; see long-arm statute, Chapter IV, infra).

C. **Multiple parties**. (§ 8.01-263).

1. Venue not subject to objection:

a. If suit brought in location that is pfd. venue for at least one party.

(1) But if there are one or more residents and one or more non-residents or unknown parties, venue has to be proper (pfd. or pmbl.) as to at least one resident D.

(2) Otherwise if proper as to any party.

D. **Parties not expressly covered**.

1. Unincorporated Assn.

a. Foreign: Probably caught by § 8.01-262.2 (see §§ 38.1-64 and -70.2 requiring appointment of registered agent for certain businesses - e.g. sale of ins.) or § 8.01-262.4.

b. Domestic:

(1) Some caught by § 8.01-262.1 and 2. E.g., labor union, which will doubtless have an office.

(2) For others with no office, venue may be residence etc., of a co-D officer (see 48 Va. L. Rev. 1523), or where regular business activity. (§ 8.01-262.3).

2. Partnership.

   a. Can get venue with ref. to any one partner.

   b. Or use similar analysis to 1 above.

   c. If ltd. p/ship, watch which partner.

E. **Objections to Venue** (§ 8.01-264).

1. Sole ground: venue not "proper" (cf. meaning in § 8.01-260) i.e.

   a. neither Pfd. nor Pmbl. or

   b. although Pmbl., a Pfd. exists.

2. An objection results in transfer, not dismissal of case.

3. "Simple" motion i.e. show why improper

   a. Not by Ct. sua sponte: Exception: § 8.01-264(D).

   b. If not properly and timely made, deemed waived. Faison v. Hudson, 243 Va. 413, 417 S.E.2d 302 (1992)

   c. In Cir. Ct. must be filed within

      (1) 21 days or

      (2) Time allowed by Court for filing responsive pleadings (see Rule 1:9) or

      (3) If a party D whose presence created venue is dismissed after the parties are at issue, then the remaining party Ds may object to venue within ten days after such dismissal, if they can show that the dismissed party was not properly joined or was added as a D for the purpose of creating venue. (8.01-264(B)).

      (4) May be filed whether pleadings have already been filed or not, provided within 21 days.

      (5) If a divorce suit is filed in an improper venue, a court on its own motion can transfer to the proper preferred venue. (§ 8.01-264(D)).

   d. In GDC (§ 16.1-92)

      (1) must be filed on or before the day of trial, e.g. by motion, ltr., etc.

(2) in order to be considered by Cir. Ct. upon removal, must be raised in affidavit of substantial defense.

(3) warrant/motion for judgment must inform D of his rt. to object.

e. Motion must deny all grounds which could make the present venue proper. (§ 8.01-264 says "**Other than those designated by this chapter**." See also § 8.01-276).

f. Motion must set forth where venue is proper.

4. Motion is "promptly" heard, on the basis of the original Ds and not those subsequently joined, to block a clever maneuver of joining parties to get venue.

5. In addition to the sanction of transfer, costs shall be charged against the P who brought the action in an improper venue, or, if motion to transfer refused and found to be frivolous, against the D who made the motion. (§ 8.01-266).

a. These are not just "court costs" of Ch. 3 of title 14.1, but in addition are compensation for inconvenience, expense and delay.

b. In addition, court has discretion to award attorney's fees.

F. **Change of Venue by Court**. (§ 8.01-265)

1. Not strictly "objection," as that term only applies to a § 8.01-264 motion.

2. Grounds

a. The court may upon a motion of the D dismiss an action brought by a non-resident without prejudice if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction is available in a jurisdiction other than the Commonwealth; the court may condition dismissal upon requirement that the D agrees not to assert the statute of limitations as a defense if the action is brought in a more convenient forum within the time specified by the court or transfer of the action to any other fair and convenient forum having jurisdiction within the Commonwealth, or the court on motion of the P for good cause shown may retain the action for trial.

b. Except by agreement of all parties, no action enumerated in Category A (preferred venue) shall be transferred to or retained by a forum not enumerated in such category

c. Good cause shall be deemed to include, but not be limited to, the agreement of the parties or the avoidage of substantial inconvenience to the parties or witnesses.

d. However, the provisions of this section shall not apply to causes of action which accrue § 8.01-249(4) (action for injury to persons resulting from exposure to asbestos). See Booth v. Broudy, 235 Va. 457 (1988) (Inconvenience to doctors & his patients is not good cause for trial court retaining case where venue was improper).

e. Quaere: does the time limit for objection to venue under § 8.01-264 apply to "good cause" motions to transfer under § 8.01-265? Probably not. If not, § 8.01-265 might be used in some circumstances as a safety net where -264 time limit has expired.

3. Denial of transfer may be abuse of discretion where forum has no nexus with the cause of action. N&W Ry. v. Williams, 239 Va. 390, 389 S.E.2d 714 (1990). But see, VEPCO v. Dungee, 258 Va. 235, 524 S.E.2d 164 (1999

G. **Review**.

If trial court has made an error as to venue or as to award of costs, its action may be reviewed.

H. **Ethical Considerations** (DR 7-102, CB 64).

1. Deliberate misfiling in wrong venue.

I. **Sanctions**.

1. Under fed. law for deliberate filing in wrong venue in debt collection cases. See 15 U.S.C. 1692 et seq. (Fair Debt Collection Practices Act); 15 U.S.C. 45(a)(1) (F.T.C. Act). Cf. Va. Code §§ 59.1-196 thru -207.

2. § 8.01-271.1.

J. **Forum Selection Agreements**.

Court will enforce forum selection clause if fair and reasonable. Paul Business Systems v. Canon U.S.A., Inc., 240 Va. 337, 397 S.E.2d 804 (1990).

IV. PROCESS

A. Introduction

Court's authority to adjudicate over D is limited by:

1. Form of notice given to D, i.e. service of process.
    a. Purpose:
        (1) Officially informs D of action brought against him.
        (2) Formally subjects D to adjudicatory authority of ct.
2. Territory wherein ct. can exercise its power, i.e. jurisdiction over person or thing. (See O. infra).

B. Service of Process generally (§ 8.01-285 through § 8.01-327.2)

1. Definition
    a. Summons (Order) to officer to notify D to answer P's complaint at a time and place specified in the summons.
2. Commencement of Action
    a. Date is important for S/L purposes.
    b. Relates to filing in court, not service of process on D.
3. Circuit Court
    a. Actions commenced by filing a complaint in the Clerk's office on which Clerk issues process: a summons. (Rules 3:2 and 3:5).
    b. Last known address of D must be given. (§ 8.01-290).
        (1) May be given by a separate document.
        (2) But failure to give the necessary addresses does not affect the validity of a judgment. (§ 8.01-290).
4. GDC (§ 16-1-86)
    a. If by warrant, action commences:

(1) When memorandum filed with the Clerk, or other officer authorized to issue warrants,

(2) and filing fee paid.

b. If by complaint, action commences:

(1) When complaint filed with the Clerk

(2) and filing fee paid.

c. Remember that when complaint used, same Rules apply. See § 16.1-82.

5. Computation of Time

a. Don't count both ends, but either, as specified (§ 1-13.3).

b. Saturdays, Sundays, legal holidays, and all days on which Clerk's office is closed as authorized by statute do not count if they are the last day, but the period is extended to the next day which is not a Saturday, Sunday, legal holiday or closed office day. (§ 1-13.3:1; formerly Rule 1:7(a). The Rule is now narrower and ripe for repeal. As to holidays, see § 2-1-21).

c. Civil Process may not be served on Sunday (§ 8.01-289) except in cases of persons escaping out of custody, or otherwise expressly provided (see e.g., § 8.01-542: attachment may be issued or executed on Sunday or holiday).

d. Three additional days are given for mail. (Rule 1:7). Caveat re appeal times.

C. **Classification of process** (by phases of a case)

1. Original (commence action)

2. Mesne (pendente lite) (§ 8.01-314)

a. Service on counsel, authorized to practice in Va. who has entered a gen. appearance for a party or

b. As provided by order of court after 5 day notice of objection by such attorney. E.g. a divorce case continued on docket. (See also Rule 1:12).

3. Final

a. E.g. execution on a judgment: order to sheriff (fi. fa.) to serve judgment debtor.

4. Note also requirements of service in discovery, although not really process (in sense that process emanates from the Ct. through Clerk's office). (Rules 4:1(f)).

5. Where service on counsel is required, service on local associate is sufficient in cases where foreign attorney has been permitted to appear. (Rule 1A:2). Although not required, copy is usually sent to foreign attorney also.

D. **Classification of Service**

1. Actual (e.g., on D personally)

2. Substituted (e.g., on agent of D)

3. Constructive (fictional) (e.g., by order of publication)

E. **Persons who may serve process**

1. Sheriff of county or city. (§ 8.01-293; § 15.1-796)

   a. Must make return. (§ 8.01-325; "Proof of Service" Rule 2:5 and 3:4)

   b. Can serve in own bailiwick and in contiguous cities and counties. (§ 8.01-295). (As a practical matter, sheriffs reluctant to serve outside bailiwick.)

   c. Can be served by one officer even though directed to another. (§ 8.01-295; Federal Land Bank of Baltimore v. Birchfield, 173 Va. 200, 3 S.E.2d 405 (1939).

   d. Sheriff has to get papers from Clerk's office each working day. (§ 8.01-294).

2. Person 18 or older (§ 8.01-293)

   a. Not a party and not interested.

   b. Must make affidavit. (§ 8.01-325).

3. Out of State D (§ 8.01-320).

   a. Served by person authorized to serve process in the jurisdiction in which D is located, or by person over 18 not a party and not interested.

   b. Where there is in personam jurisdiction under long arm statute, same effect as personal service.

4. Divorce or annulment (§§ 8.01-293; 20-99)

   a. Special rules requiring service by sheriff only (i.e. not persons over 18) now abolished.

5. There are penalties for failure of the officer to make proper service.

a. Fine. (§§ 15.1-80, -81.)

b. Civil (e.g., on bond). (See Narrows Grocery Co. v. Baily, 161 Va. 278, 170 S.E. 730 (1933).

F. **Persons exempt from service of process**.

1. Nonresidents if:

a. Brought into state by fraud or trickery. (See Wheeler v. Flintoff, 156 Va. 923, 159 S.E. 112 (1931); Burks, sec. 39).

b. Witness, summoned in Va. or en route through Va.

(1) Criminal: See Davis v. Hackney, 196 Va. 651, 85 S.E.2d 245 (1955); § 19.2-280: Uniform Act to secure attendance of witnesses.

(2) Civil: See Wheeler, supra (Dictum).

c. Party, P or D: probably. (See Wheeler, supra; but see Lester v. Bennett, 1 Va. App. 47, 333 S.E.2d 366 (1985), CB 65).

2. Procedure to object

a. Make special appearance or just file a motion to quash.

b. Quaere: Should not this demonstrate that process has reached its destination and trigger § 8.01-288?

(1) Probably No -- these things are matter of policy (not fact)

3. Judge: Old Va. case. Dictum applies to judges, attorneys, witnesses, and parties. (See Commonwealth v. Ronald, 4 Call. (8 Va.) 97 (1786), cited in Wheeler & Lester, supra).

4. If person is exempt, so is his property, if reasonably necessary for his appearance, e.g. auto. (See Davis, supra.)

G. **Persons privileged from "arrest under civil process."** (§§ 8.01-327.1 and 327.2)

1. Exempt Persons

a. E.g., U.S. Pres., Va. Gov., Lt. Gov. (voters going to an election, minister performing a service before a congregation) who are

2. Exempt from Arrest:

a. Designed to achieve the arrestee's full and proper answer or response to interrogatories under §§ 8.01-506 capias ad respondendum. (See Early Used Cars, Inc. v. Province, 218 Va. 605, 239 S.E.2d 98 (1977), CB 72) or

b. to make him obey court orders, judgments, and decrees (civil contempt).

c. Exemptions just for time specified in Code section. (§ 8.01-327.2).

H. **Service of process on natural persons**.

1. Necessary for Valid Judgment

a. Unless record shows that a notice in writing ("process") reached its destination within the time prescribed by law. (§ 8.01-288; see Davis v. American Inter-insurance Exch., 228 Va. 1, 319 S.E.2d 723 (1984): testimony of P's counsel as to time of receipt of process not sufficient to prove receipt).

(1) § 8.01-288 arguably does not apply except to create in rem juris. where the process reaches the person outside Va. (Cf. § 8.01-320). But see dictum in Davis, supra (no restrictions as to type of juris.)

Cf. Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933).

2. Mode of service on natural persons. (§ 8.01-296)

a. The statute specifies methods which must be attempted in order. (See Washburn v. Angle Hardware, 144 Va. 508, 132 S.E. 310 (1916)).

b. First serve on party in person, if found.

c. If not found, use substituted service. Two possible methods, in order:

(1) Leave at usual place of abode with person over 16 yr. found there who is family member (not temporary sojourner or guest). (§ 8.01-296(2)(a); Washburn, supra).

(a) Last "home" is not usual place of abode. (Washburn, supra).

(b) See Annot., 32 A.L.R.3d 112, "usual place of abode."

(2) If appropriate person not found, post copy at front door or at such other door as appears to be the main entrance of the usual place of abode.

(a) Temporary absence from usual abode does not preclude effective service by posting. (See Spiegelman v. Birch, 204 Va. 96, 129 S.E.2d 119 (1963)).

(b) If service is by posting, P must also give 10 days prior notice by mail before default judgment may be entered. (§ 8.01-296(2)(b)). (See Washington v. Anderson, 236 Va. 316, 373 S.E.2d 712 (1988)).

(3) Statutes authorizing substituted ("constructive") service must be strictly followed. (See National Trust for Historic Preservation in U.S. v. 1750 K Inv. Partnership, 100 F.R.D. 483 (E.D. Va. 1984), aff'd 755 F.2d 929 (4th Cir. 1985): Default judgment void where no notice mailed subsequent to § 8.01-296(2)(b) posting). § 8.01-286.1.

(4) P may ask D after commencement of action to waive service of process and on return D has 60 days to answer after date of request for waiver of service. § 8.01-286.1.

3. Infants and insane

a. Service on them to commence action is not necessary unless in personam judgment is sought; or divorce or annulment of marriage. (Rule 2:4; § 8.01-9; Burks, sec. 42.)

(1) Exception not stated in Rule 3:3, because at law P always seeks a judgment in personam.

b. Be sure a guardian ad litem (G ad L) is appointed for an infant, and for an insane person if he has no committee or if there is a conflict of interest between the committee and the insane person. (See Chapter II, Parties, supra).

4. Nonresidents (N/R)

a. If service while N/R happens to be in Va., generally valid. But see supra E.1; N/R may be exempt from service because of the reason he is in Va. (Cf. Shaffer v. Heitner, infra--minimum contacts requirement for any exercise of S.Ct. jurisdiction.)

b. N/R in motor vehicle or aircraft accident in or over Va.

(1) Serve on Comm'r of DMV (motor vehicle acc.) or Sec'y of C/W (aircraft acc.) (§§ 8.01-307 et seq.) See Dennis v. Jones, 240 Va. 12, 393 S.E.2d 390 (1990).

c. N/R real estate agent.

(1) Serve on Sec'y of Real Estate Comm. (§§ 54-773 and -774)

d. N/R building contractor

(1) Serve Sec'y of C/W. (§ 54-160).

e. N/R "d/b/a"

(1) In certain circuits., can serve local clerk of ct. (§ 59.1-72).

f. Remember service on the N/R in his own jurisdiction. [(See supra D.3: generally does not give Va. court in personam jurisdiction) but see long-arm (p infra).]

5. If fail with substituted service, fall-back is service by publication, but in rem jurisdiction only. (See K. infra).

a. Must still be "minimum contact" with Va. if Va. Ct. is to have jurisdiction. (Shaffer v. Heitner, 433 U.S. 186 (1977)).

I. **Time of serving process**

1. Non-statutory proceeding: within one year of the date the complaint is filed

a. unless Ct. finds as a fact that due diligence was used by P. (Rule 3:5) See also § 8.01-275.1.

b. Diligence only on last day of one-year period is not due diligence under Rule 3:5. (Stark v. Johnstone, 2 Va. Cir. 476 (1979), Judge Walker) See Dennis v. Jones, supra at p. 67.

c. What if action filed (e.g. to halt the running of S/L) but P directs Clerk not to serve?

d. Clark v. Butler Aviation, 238 Va. 506 (right to nonsuit takes precedence over Rule 3:5; but see Gilbreath v. Brewster, 250 Va. 436, 463 S.E.2d 836 (dismissal under Rule 3:5 is not "merits").

2. Statutory proceeding: see if stat. provides a time (e.g., § 8.01-541-Attachment).

J. **Return of process** (§ 8.01-325.)

1. Definition: Notation on the process by officer, or Proof of Service pursuant to Rule 3:6.

2. Must be complete in itself, and cannot be added to by parol evidence.

a. But may be amended to correct even years after judgment, although the officer making the return is dead.

(1) Amendment only made after notice and hearing, and Court must be satisfied that amendment sets out the true facts. (See, e.g., Buttery v. Robbins, 177 Va. 368, 14 S.E.2d 544 (1941)).

b. Must show that all statutory requirements have been complied with, e.g. that personal service was attempted before substituted service used. (Washburn, supra).

(1) Must be signed by officer or deputy.

(2) If statutory requirement is lacking, then a motion to quash is in order.

3. For form in equity, see Rule 2:5, and at law, Rule 3:4.

4. Verity Rule

a. The sheriff's return is prima facie evidence of what it says, but may be disproved. (§ 8.01-326).

b. Effective from 10/1/77.

K. **Service by order of publication** (OOP) (§ 8.01-316 et seq.)

1. Procedure

a. Affidavit that circumstances exist in which OOP may be entered. Affidavit must also state last known post-office address of party or, if it is unknown, state accordingly.

b. If there are or may be unknown interested parties, pleading must so state. Must be reasonably probable that D or someone for him would receive notice of the proceeding in order to take precautions to protect interest. (Forrer v. Brown, 221 Va. 1098, 227 S.E.2d 483 (1981)).

(1) The interest of the unknown person must be described.

(2) The unknown persons must be made parties.

(3) Identifying data must be included, e.g., class to which unknown party belong or source/origin of claim he might have.

(4) Failure to reasonably notify D that his rights might be affected renders judgment void. (Forrer v. Brown, supra.)

c. May also be used in any proceeding where more than ten Ds served and it appears that they represent like interests with the parties unserved.

(1) This is constitutionally suspect. (See Mullane, 339 U.S. 306, 70 S.Ct 652, 94 L.Ed. 865 (1950); Boddie, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) (dictum))

(2) OOP may be entered only by Court.

d. Order itself (§ 8.01-316 and -317)

(1) Entered by Court or clerk (except in situation at c. supra).

(2) Contents (see § 8.01-317).

e. Publication

(1) Published once a week for 4 successive weeks in newspaper prescribed by Court

(2) Clerk must mail copy to each D whose address is given in the affidavit and post at Courthouse door.

f. When does case mature for hearing. (§ 8.01-318)

(1) The date specified in the order

(a) Date not sooner than 50 days after entry of OOP. (§ 8.01-317).

(b) But where service is on N/R in person, treated as service "by publication" under § 8.01-320; thus matures 21 days after service.

g. No further notice is required as to Ds or unknown parties (§ 8.01-318) except:

(1) To counsel of those who appear by counsel

(2) To each D pro se at the address he gives clerk (§ 8.01-319(A))

(3) As especially ordered by the Court

(4) Interim notices e.g. of deposition may be published as provided in § 8.01-319

(a) But in divorce cases, if after D has been legally served with or has accepted service to commence divorce/annulment, D cannot be found and is not rep. by atty., publication is waived. (§ 8.01-319(B))

h. If after publication parties do not appear, evidence in equity must be reduced to writing and preserved. (Rule 2:17). In other cases, judge in his discretion may order evidence to be preserved.

i. OOP requirements are strictly construed and enforced

(1) Names must be substantially correct (see, e.g., Robertson v. Stone, 199 Va. 41, 97 S.E.2d 739 (1957): "Robinson" held sufficient, but there was evidence that D nevertheless received actual notice; Steinman v. Jessee, 108 Va. 567, 62 S.E. 275 (1908): "Steinman" & "Stinman" held defective).

2. Even if requirements are met, a party served by publication generally may within two years appear and have any injustice corrected. (§ 8.01-322; see Robertson, supra).

   a. But one year from date he is served with a copy of the judgment. (See Thomas v. Best, 209 Va. 103, 161 S.E.2d 803 (1968): applies to suit devisavit vel non).

   b. "Injustice" includes settlement conferring benefits on parties appearing but not those who did not appear. (Robertson v. Stone, supra).

   c. § 8.01-322 is intended to protect a party who has no knowledge of litigation affecting him. (Stephens v. Stephens, 229 Va. 610; 331 S.E.2d 484 (1985)). D who received personal or substituted service or who had actual knowledge of the suit at the commencement of the litigation and fails to protect his interest accepts the risk of an unfavorable result. (See Mitchell v. Mitchell, 227 Va. 31, 314 S.E.2d 45 (1984)).

   d. Cf. § 8.01-428 re setting aside Default Judgment on certain grounds; inherent equity power preserved.

3. Remember relief under OOP is only in rem or quasi in rem, unless there are special statutes applicable.

   a. Be sure suit for spec. perf. of K to convey realty keeps nature of in rem and does not ask for in personam relief. (See Cranford v. Hubbard, 208 Va. 689, 160 S.E.2d 760 (1968); Tr. Ct. ordered N/R D to convey land rather than Commissioner; special appearance by D--motion to dismiss overruled and D filed answer.--S. Ct. says Tr. Ct. cannot make such an order--should have appointed Commissioner as in rem relief).

   b. But if D makes general appearance, then in personam juris. is created.

L. **Service on Particular Types of D.**

1. Unincorporated associations (§§ 8.01-305 and -306)

   a. Process may be served on any officer or trustee, director, staff member, or agent where he may be found (NB: different from corporation: only on officer, director, or registered agent).

   b. If principal office is outside Virginia, but the association does business here, service may be made as above and also on the Clerk of the State Corporation Commission

2. Partnership (§ 8.01-304)

   a. Service may be made on any general partner.

   b. Service upon a ltd. partner

(1) Not effective upon the partnership, but upon the ltd. partner in any proceeding to enforce his liability to partnership.

3. Domestic corporations (§ 8.01-299, 13.1-634 and -637 (stock) and 13.1-833 and 836 (nonstock))

a. The above sections apply to non-govt. corporations

(1) For municipal and county governments and quasi-governmental bodies or agencies, see § 8.01-300.

b. Methods of Service

(1) These are alternatives, i.e. need not attempt in order, except (4).

(2) Personal service on any officer, director, or registered agent of such corporation wherever he may be found or

(3) "Substituted service" on registered agent.

(a) Only function of reg'd agent is to receive process and forward it.

(b) Req'd agent may, by notarized instrument in writing, designate person in his office upon whom process may be served (§§ 13.1-637; -836).

(4) If registered agent has not been appointed or cannot reasonably be found at the registered office, then service may be upon the Clerk of the SCC for all process except that issued by the Commission

(a) This is successive, i.e., if not (2) or (3), then (4).

(b) Notice has to be sent by registered or certified mail to the corporation at its principal office.

(5) For service upon corporation as garnishee in garnishment proceedings, see § 8.01-513, and for service in attachment or garnishment proceedings, see § 8.01-302: any agent found in Commonwealth.

c. Corporation operated by trustee or receiver (§ 8.01-303)

(1) This would be, e.g., a corporation in process of dissolution.

(2) May be served on any one of its trustees or receivers

(a) If no such service may be had upon any of them, then process may be served by any other mode provided for service on corporation.

(b) Note: this is successive.

4. Foreign corporations (§ 8.01-301)

a. Service may be had in one of the following manners (not successive):

(1) By personal service on

(a) any officer or director in Va. or

(b) the Va. registered agent of a foreign corporation authorized to do business in Va. or

(c) any agent in Va. of a foreign corporation transacting business in Va. without such authorization or

(2) Substituted service (§ 13.1-766, for stock and -928 for non-stock)

(a) On Va. registered agent's designee or S.C.C. if such corporation is authorized to transact business in Virginia or

(b) On Sec'y of C/W if under the long-arm statute (see N. infra)

(c) Note: this is not successive, as is domestic corp., supra.

(3) By order of publication (§§ 8.01-316 and -317)

(a) As for indivs., only gives court jurisdiction in rem or quasi in rem, (whether or not the corporation is authorized to transact business within Virginia)

b. Service in attachment and garnishment proceedings. (See § 8.01-302).

c. Remember even if foreign corp. is validly (i.e., appropriately) served, Va. court may not have juris. if lack of minimum contacts. (Shaffer, supra).

M. **Void and defective service of process**

1. Procedure (§ 8.01-277)

a. Attacked by a motion to quash.

b. Ct. either quashes the process, or permits amendment. D can also object simultaneously with pleading to merits; if fail to object at that time, deemed waived.

2. Distinguish:

a. Void process

(1) defect in issuance of notice/subpoena, e.g. clerk did not sign it

(2) incurable; judgment void

(3) solution: start again, e.g. get clerk to sign.

b. Void service

(1) defect in manner of serving valid notice/subpoena

(2) e.g. left with person younger than 16 yr. at D's abode, or posted at individual's abode when he is there.

(3) incurable; judgment void. (Unless P can show D actually received notice (8.01-288) or D enters general appearance)

c. Defective service

(1) e.g. proof of service incomplete.

(2) Curable by amendment of proof of service (see J.2.a., supra)

3. Classify cases when question of void judgment is in issue:

a. Direct attack. (See e.g Davis v. Hackney, 196 Va. 651, 85 S.E.2d 245 (1955).)

b. Collateral attack; Judgment "void" (see, e.g. Powell v. Beneficial Finance Co., 213 Va. 647, 194 S.E.2d 742 (1973): separate suit in equity). § 8.01-428(D).

c. It has been said that a motion to quash must negative all grounds of jurisdiction. (Eure v. Morgan Jones & Co., 195 Va. 678, 79 S.E.2d 862 (1954): withdrawal of a corporation from the State does not abate an action against it for any cause of action growing out of business done in Virginia).

d. If any process (original, mesne, or final) is made returnable beyond lawful time limit--it is VOID. (Lowenback v. Kelley, 111 Va. 439, 69 S.E. 352 (1910): execution quashed since a scire facias to revive judgment was made returnable more than 90 days from date).

N. **Acceptance and waiver of process**

1. Waiver constituted by:

a. Pleading to the merits.

b. Appearance other than to object.

(1) E.g., motion for continuance.

(2) See Burks, p. 100, sec. 47.

2. Acceptance of service (§ 8.01-327) (and service upon counsel of Mesne & Final Process)

a. So-called friendly suits

b. Possible even in divorce suits

c. Instruments in writing providing for acceptance of service upon D by X (other person on behalf of D) are subject to § 8.01-315 (not confession of judgment--see § 8.01-432 et seq.)

(1) X must file affidavit that he mailed to D notice 10 days in advance of date of judgment

d. Accept by signing proof of service and indicating juris. in which accepted. Va. Code § 8.01-327.

e. Notice and service provisions in discovery. (See Chapter IX, infra).

O. **Jurisdiction**

I. Traditional bases

1. Over persons (in personam)

a. Physical presence of D within jurisdiction.

b. D's domicile within jurisdiction.

c. Consent of D to jurisdiction.

d. General presence. See Witt v. Reynolds, 240 Va. 452, 397 S.E.2d 823 (1990).

2. Over things (in rem) or quasi in rem)

a. Physical presence of subject property within jurisdiction. But must meet minimum contacts test. See Shaffer v. Heitner, 433 U.S. 186 (1977).

3. In personam reaches D and any of his assets; In rem and quasi in rem reach only property that is basis of jurisdiction.

P. Long Arm Statute (§§ 8.01-328 through -330)

1. General

a. See 51 Va. L. Rev. 719 (1965); 69 Va. L. Rev. 85 (1983); 24 Wm. & Mary L. Rev. 229 (1983); 28 Wm. & Mary L. Rev. 89 (1986).

b. What does it do?

(1) Enables Va. cts. to assert in personam jurisdiction over D on the basis of (gen'ly N/R) D's "contacts" with Va.

(2) Even if no personal service in Va. Applies to:

(a) Residents? (See Rep. of the A.G. 1981-1982 p. 55, CB 77)

(b) Any person or other legal or commercial entity, not just foreign corpn's. (§ 8.01-328).

c. Constitutionality

(1) See Int'l Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct. 154 (1945) (contacts sufficient/doing bus.); minimum contacts test.

(2) International Shoe tests have also been applied to in rem jurisdiction (Shaffer v. Heitner, 433 U.S. 186 (1977)).

(3) See also World Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 62 L.Ed.2d 490, 100 S. Ct. 580 (1980): in personam N/A under A.4; Rush v. Savchuk, 444 U.S. 320, 62 L.Ed.2d 516, 100 S. Ct. 571 (1980): Q-in-Rem N/A under A.1; Burger King v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed. 2d 528 (1985).

(4) Voluntary contacts of D with state control, not acts of P within state. (Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)).

(5) The Va. statute § 8.01-328.1 extends personal juris. to outmost perimeters of D.P. (Peanut Corp. of Am. v. Hollywood Brands, Inc., 696 F.2d 311 (4th Cir. 1982): 2 step analysis (i) does statute encompass; (ii) does statute comport with D.P.)

d. Pers. Juris. Where c/a Arises out of (§ 8.01-328.1)

(1) Transacting any business in Va. (A.1)

(a) Va. is a single act jurisdiction, but what is a single act sufficient not to offend D.P.?

(i) In patent infringement suits: sending technicians to Virginia to supervise the installation and modification of machinery bought from D in England by D's New York subsidiary and sold to a Virginia resident; sending its chief officer from time to time to Virginia to confer with officials of its New York subsidiary is sufficient. (See Olin Mathieson Chem. Corp. v. Molins Org'ns, Ltd., 261 F. Supp. 436 (E.D. Va. 1966) (Butzner, J.).

(ii) "Doing business" for certificate of auth. from SCC (and for state tax purposes) different from "doing business" for minimum contacts of long arm (Peanut Corp, supra: telephonic and written communiques sufficient)

(iii) Cf. K-ing in Pa. with a Va. res. to mfr. in Va. and sell a machine to D in Pa. is not sufficient in breach of K suit. (V & V Mining Supply v. Matway, 295 F. Supp. 643 (W.D. Va. 1969); see also Danville Plywood Corp. v. Plain & Fancy Kitchens, Inc., 218 Va. 533, 238 S.E.2d 800 (1977)).

(iv) P, Va. dealer (for D Calif. mfr. which had sold its products to dealers in Va. totaling $3500 over 6-mo. period), which had placed an order with D for its products shipped direct to a customer in N.C., could get in personam jurisdiction under A.1. where the product was rejected by the N.C. customer and sent to P's warehouse in Va. (Kolbe, Inc. v. Chromodern Chair Co., Inc., 211 Va. 736, 180 S.E.2d 664 (1971)).

(v) P, Va. dealer for W. Va. D. Dispute over K made in W. Va., product never entered Va., but P obtained orders in Va. and was paid with checks drawn on Va. banks. A.1 met. (United Coal v. Land Use, 575 F. Supp. 1148 (W.D. Va. 1983); See also Rock-Ola Manufacturing v. Wertz, 249 F.2d 813 (4th Cir. 1957)).

(vi) Ajax Realty Corp. v. Zook, 493 F.2d 818 (4th Cir. 1972): A shipment FOB from D mfr. in Washington State to Colorado distributor who sold to a Va. res. is not sufficient, but see (5) infra (causing injury). 4th Cir. in Ajax (see n.4) has seized upon a dictum in Chromodern to put Va. in the single act school under A.1. overruling former 4th Cir. decision (and D. Ct. decisions) to contrary. Actual grnd. of Ajax is, however, under product liab. (A. 5): K-ed with Colo. distributor but at its request shipped one order of $37,000 to Va. (See 60 Va. L. Rev. 1572 (1974)).

(vii) Acting as att'y in a single suit in Virginia is sufficient. (Willis v. Semmes, 441 F. Supp. 1235 (1977)).

(viii) Mere K nego. in Va. insufficient, Viers v. Mounts, 466 F. Supp. 187 (1979); Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 391 (1984): telephone & telex negotiations. But see Nan Ya Plastics Corp. v. DeSantis, 237 Va. 255, 377 S.E.2d 388 (1989).

(ix) simple connection between K and state insufficient; corp. must "purposely avail itself" of privilege of conducting business. In re Herman Cantor Corp., 22 Bankr. 604 (Bankr. E.D. Va. 1982).

(x) Internet: active website v. passive website. See e.g., Bochan v. LaFontaine, 68 F.Supp.2d 692 (1999).

(2) Contracting to supply services or things in Va. (A.2).

(a) Elefteriou v. Tanker Archontissa, 443 F.2d 185 (4th Cir. 1971) see also I. T. Sales, Inc. v. Dry, 222 Va. 6, 278 S.E.2d 789 (1981) (Virginia court has jurisdiction over Californian who entered into employment agreement in Virginia when a Va. resident even though performance in California).

(3) Causing tortious injury anywhere by an act or omission in this state (A.3).

(a) Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 363, 71 L.Ed. 1091 (1927); see also Marston v. Grant, 351 F. Supp. 1122 (E.D. Va. 1972): no act in Va. in tort action for patent infringement; St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966): writing libel outside and publishing in Va. is sufficient for in personam jurisdiction. Accord, Margoles v. Johns, 483 F.2d 1212 (D.C. Cir. 1973), holding no "act" in D.C., where D in Wisconsin phoned an alleged slanderous remark to X in D.C. Ct. said A.1. and A.6. interpret "act" more broadly than A.3. and A.4. so you need less "act" in K than in tort.

(b) Cf. Early v. Travel Leisure Concepts, Inc., 674 F. Supp. 1199 (E.D. Va. 1987): "omission" was merely failure to warn Va. res. he might be assaulted in D's Jamaica hotel; no other contacts. Ct. finds such "omission" too tenuous--no juris. See also Lomah Electronic Targetry, Inc. v. ATA Trg. Aids, 828 F.2d 1021 (4th Cir. 1987).

(c) Krantz v. Air Line Pilots Association, 245 Va. 202, 427 S.E.2d 326 (1993); non-resident D use computer bulletin board in

Virginia to post message about Va. resident satisfies § 8.01-328 1(A)(3); accord Bochan v. LaFontaine, 68 F.Supp.2d 692 (E.D. Va. 1999) exercise of jurisdiction over non-resident who uses VA based internet provider does not violate due process.

(4) Causing tortious injury in Va. by act or omission outside (A.4) if:

(a) D regularly does or solicits business in Va.

or (b) D engages in other persistent course of conduct in Va. (Willis v. Semmes), supra)

or (c) D derives "substantial revenue" from goods used or services rendered in Va. (Marston v. Grant, 351 F. Supp. 1122 (E.D. Va. 1972).

(d) Quaere: given this condition, what does A.4 add?

(5) Product Liability (A.5).

(a) Injury in Va.

(b) Sale outside Va.

(c) D might reasonably have expected P to use in Va. (Cf. Worldwide Volkswagen, supra).

(d) Provided

(i) D regularly does or solicits business in Va. (Jackson v. Nat'l Linen Service, 248 F. Supp. 962 (W.D. Va. 1965); see also Gordonsville Indus., Inc. v. Amer. Artos Corp., 549 F. Supp. 200 (W.D. Va. 1982): (foreseeability for D.P. is that D's conduct and connection with forum are such that he should reasonably anticipate being hauled into Ct. there, not the likelihood the product will find its way there)

or (ii) D engages in other persistent course of conduct in Va.

or (iii) D derives "substantial revenue" from goods used or services rendered in Va. (See Gordonsville Indus., supra: % of total sales a factor; Jackson v. Nat'l Linen Serv. Corp., supra: Ill. corp'n did mail order business in Va. of $25,000 a year, $4.5 million sales annually; Etzler v. Dille, etc., Co., 249 F. Supp. 1 (W.D. Va. 1965): D foreign corp'n handled its sales of lawn mowers in Va. through independent mfr.'s agents in Va. who forwarded

orders to mfr. Mfr. shipped direct to customer who paid mfr. directly. Volume of business was not given; but Ct. said D derived substantial revenue from business in Va. and engaged in a persistent course of conduct here; Ajax Realty Corp. v. Zook, supra: Long arm jurisdiction (A.5) from a single order of $37,000.00).

(6) Real property in Va.: (A.6)

(a) Remember, under long-arm, this produces in personam juris., not just juris. over the real property.

(b) Sufficient if D contracts in Va. with P to buy real estate, defaults, moves out of Va., the P sells the real estate and sues D for the deficiency. Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968). CB: enforcement of N.C. judgment in Va. against D's realty--min. contacts but no juris.; test is 2-step: 1) Does statute permit service of process on N/R? 2) Does statute meet D.P. stds?

(7) Contracting to insure Va. persons, things, or risks; (A.7)

(a) McGee, supra; cf. Eure v. Morgan Jones, 195 Va. 678, 79 S.E.2d 862 (1954); August v. HBA Life Ins. Co., 17 Bankr 628 (Bankr. E.D. Va. 1982), rev'd 734 F.2d 168 (4th Cir. 1984): pymt. of health ins. premiums to Ariz. ins. co. from new res. in Va. insufficient; Rossman v. Consol. Ins. Co., 595 F. Supp. 505 (1984): Auto inj. P in Va.; Insured and carrier N/R and carrier no bus. in Va.; A.7 appropriate.

(8) Having been ordered in a case, by court with in personam jurisdiction, to pay support of spouse or child. (A.8)

(9) Having maintained in Va. matrimonial domicile (A.9)

(a) at time of separation

or (b) at time c/a arose for divorce/sep. maint.

or (c) at time of commencement of suit

and (d) other party is resident.

(10) Paternity (A.8[iii])

(11) Using a computer or computer network in Virginia.

e. Long arm statute does not limit service of foreign corps under other stats (§ 8.01-328.1.B.; but § 8.01-328.1A extends only to c/a's encompassed within -328.1.A)

f. Methods of Service (§ 8.01-329)

(1) Under any other applicable statute giving personal jurisdiction over non-res.

(a) Foreign corp'ns. (See §§ 8.01-307 through -313; § 8.01-301).

(2) On D's agent in Va. at agent's residence.

(3) On Sec'y of the C/W as stat. agent.

(a) So can always get service if D is in a long-arm category.

(b) Sec'y mails notice by certified, return receipt requested, to last known post-office address of D. Service of process on Sec'y deemed effective on date Sec'y files certificate of compliance w/ Ct. (See § 8.9-329(B)).

(c) Note use Sec'y of C/W for long-arm cf SCC otherwise for corp'ns.

(d) Affidavit by P or P's agent or atty. stating that D is non-res. (but see Rep. of the A.G. supra) or cannot be located after due diligence. Last known address of D must be included in affidavit.

(e) When D is res. (unable to be located), signature of P, P's agent or atty. on affidavit certifies (1) process properly delivered to D under § 8.01-293 and, if unable to execute, (2) bona fide attempt made to determine D's actual place of abode or location.

(f) In ADC, Sec'y will return process if received w/in 10 days of return.

(g) Terms of statute authorizing long-arm jurisdiction must be strictly followed or service will be invalid and any default judgment based on it will be void. Khatchi v. Landmark Restaurant Ass. Inc., 237 Va. 139, 375 S.E.2d 743 (1989); or

(4) Service may be made by (a) any person authorized to serve process in jurisdiction where the D is located or (b) any person 18 years of age or older who is not a party or interested in suit under § 8.01-320.

(5) § 8.01-330 expressly provides that a court of this State may exercise juris. on any other basis authorized by law.

(a) There may be substitute service in other instances than enumerated in the statute; the statute is not in this sense restrictive.

(i) See e.g., St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966), J. Dalton: Writing outside of Va. a defamatory letter which was sent to Va. is sufficient to give Fed. D. Ct. in Va. jurisdiction though not expressly covered by statute. (The publication is the last step in the tort; so though there was no act in Va., there was a tort there).

(ii) But St. Clair was expressly disapproved by 4th Cir. in Beaty v. M. S. Steel Co., 401 F.2d 157 (4th Cir. 1968); but § 8.01-330 was not noted. Ajax, infra, later 4th Cir. case, talks contra Beaty as to Va. law. See also Navis v. Henry, 456 F. Supp. 99 (E.D. Va. 1978) (expressly approving J. Dalton's language); Darden v. Heck's, 459 F. Supp. 727 (W.D. Va. 1978).

(b) Service of process in Fed. Courts incorporate the Va. long-arm statute under Fed. Rule 4(e). Jackson; Etzler, supra.

g. Limitation (§ 8.01-328.1(B)). Where juris. based solely on long-arm statute, only c/a arising from acts enumerated in long-arm statute may be asserted. (See Semmes, 441 F. Supp. 1235 (1977)).

h. Recognition of Foreign Jurisdiction. Any action taken by a litigant which recognizes foreign jurisdiction over the Virginia D will amount to a general appearance in foreign court and its decree is entitled to full faith and credit. (Ceyte v. Ceyte, 222 Va. 11, 278 S.E.2d 791 (1981): Wife moved to amend Ill. decree after service on her in Va.--deemed gen. appearance).

i. Venue for Long-Arm D

(1) No pfd., so look for pmbl. (§ 8.01-262).

(2) If no minimum contacts, no venue. (In re Herman Cantor Corp., 22 Bankr. 604 (Bankr. E.D. Va. 1982). But see Ryan v. Hicks, Harris & Sterrett, (W.D. Va. 1982); CB 87.

Q. **Remember** if process actually reached "person" to whom directed in time, it is sufficient (§ 8.01-288). Quare: whether § 8.01-288 also applies to receipt outside of Va.

R. **Summary of Methods of Service on Out of State Ds.**

ENTITY	METHOD	COMMENT	AUTHORITY
Indiv.	Pers. serv. in Va.	OK, provided not exempt class (e.g. witness)	8.01-296
	Pers. serv. o/s Va.	In rem only unless pers. juris. under 8.01-328.1	8.01-320
	Publication	In rem only	8.01-316
Corp. Auth'd to do business	Pers. or	On: . any officer . any director . reg'd agent	8.01-301
	Subst.	On: . reg'd agent . if none, SCC	
Corp. Not Auth'd	Pers.	On any agent found in Va.	"
	Subst. on Sec'y of C/W or personal service by any person authorized to serve where D is located or person who is not interested in case.	Must be L/A situation Cannot serve on SCC here	"
Any	Serve any of the above or Sec'y of C/W	Long arm jurisdiction* . only if enumerated sit'n and . only as to c/a arising from enumerated situation.	8.01-328.1 and - 329
	General Appearance Publication	By D creates personal juris. In rem only	8.01-301 and -316 et seq.

Caveat: Probably must also be some minimum contract with Va. Shaffer v. Heitner, 433 U.S. 186.

*Remember it can be "short-arm" too: can be used to get juris. over resident if meet requirements of statutes: see e.g. § 8.01-316(A)(1)(b); § 8.01-329(B).

V. PLEADING A CAUSE OF ACTION

A. Introductory Note on Rules of Court.

1. The Rules are divided into Parts, which follow approximately the chronological progress which a case would normally follow, i.e.

   a. Pleadings (and service).

      (1) Divided into two parts – before January 1, 2006:

         (a) Part Two: Equity.

         (b) Part Three: Law.

      (2) After December 31, 2005, part 2 abolished; new Rule 3, one form of action.

   b. Pretrial procedures (mainly discovery). Part Four.

   c. Appeal.

      (1) Divided into two parts:

         (a) Part Five: Supreme Court.

         (b) Part Five A: The Court of Appeals.

2. Part One contains provisions of general application.

3. Part One Provisions Relating to Pleadings.

   a. Signature by counsel: gives assurance of good faith. (R 1:4(a), CB 82; R 1:5).

      (1) Ethical considerations.

      (2) Statutory equivalent to FRCP Rule 11: signature of bad faith pleading may result in sanctions against the attorney. (§ 8.01-271.1). Note: Va. Statute broader than FRCP 11--also includes oral motions. Quare if (oral) objections included. See Ford Motor Co. v. Benitz, 273 Va. 242, ____ S.E.2d ____ (2007).

      (3) Counsel can also now sign affidavit for corporate client (§ 49-7; see, e.g., §§ 8.01-313: service on statutory agent; § 8.01-316: service by publication).

   b. Notice pleading requirement: must inform opposite party of what claim or defense is made, but detail/evidence not necessary. (R 1:4(d); see also R 3:18).

(1) No recovery unless theory plead. Ted Lansing Supply v. Royal Aluminum, 221 Va 1139, 277 S.E.2d 228 (1981); Hensley v. Dreyer, 247 Va. 25, 439 S.E.2d 72 (1994).

c. Allegation of fact in a pleading that is not denied by the adverse pleading is deemed admitted. (R 1:4(e)).

(1) Can answer that do not know/have no knowledge.

(2) Caveat: adverse pleading not always required (e.g., in GDC).

d. Incorporation of Exhibits by reference. (R 1:4(i)).

e. Pleading alternative facts and theories against alternative parties is permitted. (R 1:4(k); see also §§ 8.01-272 and -281 and infra).

f. Joinder of matters arising out of same transaction or occurrence. (R 1:4(k)). §8.01-272.

g. Objections to failure to swear to pleading/produce affidavit (e.g. § 8.01-28 & -279) must be made within 7 days. (R 1:10). See Sheets v. Ragsdale 220 Va. 322, 257 S.E.2d 858 (1979).

h. Amendments require leave of court. (R 1:8). See e.g. Griffin v. Rainer 212 Va. 627, 186 S.E.2d 10 (1972) (trial court's refusal was proper where amendment was offered at conclusion of evidence to alter theory of recovery); Neff v. Garrard, 216 Va. 496, 219 S.E.2d 878 (1975) (amendment setting up new c/a does not relate back to original filing, therefore S/L not tolled), but see § 8.01-6.1 providing claims or defense relates back to date filing if arise out of some transaction or occurrence and party diligent and opposing party not prejudiced.

4. Part One Provisions Relating to Timing.

a. Service by mail: add 3 days to time prescribed in Rules (R 1:7).

(1) But one day when service by facsimile, electronically, or commercial delivery.

(2) No days added when hand delivered.

b. Extension of time fixed in Rules for holidays etc. (§ 1-13.3:1).

c. Court has discretion to extend time for filing all pleadings. (R 1:9).

(1) But extension of 21-day period for objection to venue only if time for filing responsive pleadings is extended. (§ 8.01-264(A)).

B. **Classification of actions**.

1. Real/Personal.

Distinction no longer has practical significance in Va.

2. Subject Matter.

a. Ex contractu.

(1) Founded on contract.

(a) Examples: account, assumpsit, covenant, debt.

b. Ex delicto.

(1) All others.

(a) Examples: detinue, ejectment, forcible or unlawful entry or detainer; replevin (now abolished, § 8.01-218), trespass, case, trover, anti-trust violation, negligence, infringement of patent.

c. Significance.

Different S/L, damages. See Sensenbrenner v. Rust, Orling & Neale, 236 Va. 419, 374 S.E.2d 55 (1988) where privity of contract required where there is no property damage, but only economic loss.

C. Beginning January 1, 2006 – One Form of Action.

1. Law/equity separation is now history.

2. Pleadings.

a. Complaint under Rule 3:1 et seq.

b. All terms "motion for judgment" and "bill in equity" eliminated.

3. P may seek both legal and equitable relief in one action.

4. Writ of mandamus. (§ 8.01-644 et seq.)

a. Extraordinary remedial process; procedure largely statutory.

b. Requirements:

(1) P must have clear right to relief sought.

(2) D must have legal duty to perform act which P seeks.

(3) No adequate remedy at law available to D.

c. Act must be ministerial not discretionary. See Richlands Medical Association v. Commonwealth of Virginia, 230 Va. 384, 337 S.E.2d 737 (1985).

5. Old Technical Actions.

Knowledge can be helpful. See, e.g., E.I. DuPont DeNemours & Co. v. Universal Moulded Prod. Corp., 191 Va. 525, 62 S.E.2d 233 (1950).

D. Splitting the cause of action.

1. Res Judicata and Collateral Estoppel by Judgment.

a. Distinction.

(1) Res Judicata (RJ) Rule 1:6.

(a) bars all subsequent proceedings arising from identified conduct, transactions, or occurrence

(b) upon the same c/a, whether or not the legal theory or rights asserted in second action were raised in the prior action or evidence upon which any claim in the prior suit depended.

(c) between the same parties (or those in privity with parties)

(d) whether or not all potential issues were actually litigated in 1st case.

(2) Collateral Estoppel (CE) or "Issue Preclusion."

(a) bars relitigation of issue in 2d case

(b) even though 2d case is based on different c/a from the 1st

(c) where issue litigated, or there was full and fair opportunity to litigate it in the 1st case.

(d) and same party (or in privity).

(3) See Cromwell v. Sac County, 94 U.S. 351 (1876); Ward v. Charlton 177 Va. 101, 12 S.E.2d 791 (1941).

(4) So initial question in practice is to identify all causes of action that arose from identified conduct, transaction or occurrence.

(a) All such causes of action must be joined, or thereafter be forever barred. Rule 1:6 overrules Davies v. Marshall Home, Inc., 265 Va. 159, 576 S.E.2d 504 See also, Jones v. Morris Plan Bank of Portsmouth, 168 Va. 284, 191 S.E. 608 (1937); Shepherd v. Richmond Engineering Co., 184 Va. 802, 36 S.E.2d 531 (1946).

(i) Purpose: to protect D from repetitious litigation. So if no timely objection by D, waived. Cf. Deal v. C.E. Nix, 206 Va. 57, 141 S.E.2d 683 (1965) (request for multiple trials and later assertion of unsplittable c/a).

(ii) Also, to avoid P creating false jurisdiction, e.g. by getting under GDC value jurisdiction limits, and depriving D of jury. See Adams v. Jennings, 103 Va. 579, 49 S.E. 982 (1905) (but strange case: questionable authority).

(b) if more than one c/a, then consider whether issue preclusion by CE. (The phrase "issue preclusion" was coined in Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., 575 F.2d 530 (5th Cir. 1978), and adopted by the Va. Sup. Ct. in Bates v. Devers, 214 Va. 667 at 672.) See e.g., Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 135 (1949).

2. More Than One C/A.

a. When single tort injures person and property.

(1) In Virginia there is a c/a for personal injuries and a separate c/a for property damage. Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 135 (1949).

b. When P mistakes his remedy as being at law rather than in equity and never reaches (or never could) the merits at law. Weinstein v. Glens Falls Ins. Co., 202 Va. 722, 199 S.E.2d 497 (1961). This case is now suspect after merger of law and equity procedure.

c. When there are several different accounts between P and D although for the same product, where D has requested that the accounts be separated. Deal, supra. But now see Rule 1:6.

d. Bill in equity for injunction followed by action at law for damages. Wright v. Castles, 232 Va. 218, 349 S.E.2d 125 (1986). This case is now suspect after merger of law and equity procedure.

3. One Unsplittable C/a.

a. Installment note providing for automatic acceleration on default. Jones v. Morris Plan Bank of Portsmouth, 168 Va. 284, 191 S.E. 608 (1937).

b. Single contract of employment although basing compensation on various activities of the employee. Shepherd v. Richmond Engineering Co., 184 Va. 802, 36 S.E.2d 531 (1946).

c. Single contract, not divisible. Suffolk v. Conrad Brothers, 255 Va. 171, 495 S.E.2d 470 (1998).

4. Who has C/a.

a. Relevant to question in RJ of who was party in 1st case.

b. Each injured P has own c/a, even if one is secondarily liable to the other. Gary Steel Prod. Corp. v. Kitchin, 197 Va. 471, 90 S.E.2d 120 (1955).

c. If different parties, Due Process prevents operation of either RJ or CE. Blonder-Tongue Labs v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 18 L.Ed. 2d 788 (1971).

5. Requirements for Application of CE.

a. Issue actually adjudicated or full and fair opportunity to litigate it.

(1) e.g. Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965) (2 cases; issues of negligence, contributory negligence and proximate cause. Judgment in 1st case, truck driver v. auto driver, estopped 2d case, in which auto driver sought to relitigate issues against truck owner). But in this case Fed. Ct. predicated Va. S. Ct. would abandon requirement of mutuality. However, Va. S. Ct. still adheres to doctrine of mutuality.

(2) Courts do not have to be in same jurisdiction or of equal dignity. Graves, supra (1st case was in Va. court, 2d in Fed.); Petrus v. Robbins, 195 Va. 861, 80 S.E.2d 543 (1954), revised, 196 Va. 322, 83 S.E.2d 408 (1954).

(3) But administrative proceedings not considered in relation to courts. Appalachian Power Co. v. John Stewart Walker, Inc., 214 Va. 524, 534, 201 S.E.2d 758 (1974).

(4) However, prior administrative proceedings might be considered in relation to further administrative proceedings. Cf. Richmond Cold Storage v. Burton, 1 Va. App. 106, 335 S.E.2d 847 (1985).

b. Mutuality.

(1) Distinguish use of CE by P who won 1st case as determinative of issues in case v. D ("sword") and use by D to prevent a P who lost in 1st case relitigating issue against new D ("shield").

(2) CE may not be asserted against party who litigated in 1st case and lost (loser), unless loser, had he won the 1st case, could have asserted against the asserter. N&W Rlwy. v. Bailey Lumber Co., 221 Va. 638, 272 S.E.2d 217 (1980); Selected Risk Ins. Co. v. Dean, 233 Va. 260, 355 S.E.2d 579 (1987).

(3) Until Bailey, supra, view was that defensive use of CE (as a "shield") did not require mutuality in Va.

(a) E.g. in Graves, the truck owner was not a party in the 1st case: auto driver could not have asserted CE against truck owner, so no mutuality, but truck owner was nonetheless able to assert CE as defense.

(b) Mutuality is not universally required in "shield" cases in other jurisdictions, see, eg, Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942); Annot. 31 ALR 3d 1044 or in federal courts. See, e.g. Parklane Hosiery Co. v. Shore, 565 F.2d 815, aff'd, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

(c) But in Va., dicta in Bailey, supra (which concerned mutuality in context of CE as a sword) implied Graves was erroneous i.e. mutuality required even where CE used as a shield.

(d) Even if mutuality is stated to be a requirement in shield cases, not to be applied "mechanistically." Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974); see also Nero v. Ferris, 222 Va. 807, 284 S.E.2d 828 (1981) (court ducked the mutuality issue).

(4) However, if party in second suit is in privity with party in first suit, then party in second suit is bound by determination in first suit. See Nero v. Farris, 222 Va. 807 (1981).

c. Issue to be precluded was essential to the prior judgment.

(1) Clearly related to (a.) above.

(2) Burden of persuasion must be same in both cases. Newport News Shipbuilding & Dry Dock Co. v. Dir., Office of Workers' Compens. Programs, 583 F.2d 1273 (4th Cir. 1978).

(3) E.g. 1st case involved question of validity of lease as incidental to suit for sale of land; did not preclude subsequent litigation of validity of lease in action for sole purpose of declaring lease void. Doummar v. Doummar, 210 Va. 189, 169 S.E.2d 454 (1969). (Also contains good discussion of distinction between RJ & CE, 210 Va. 191).

d. Consent Judgments.

(1) Clearly apply for RJ purposes, but open question whether could apply for CE. (But see Kasper Wire Works, Inc., supra.)

e. Judgments in Criminal Proceedings.

(1) Issue decided in criminal action can not be used as shield in civil action. (What about mutuality?)

(2) See Smith v. New Dixie Lines, 201 Va. 466; 111 S.E.2d 434 (1959); Prosise v. Haring 667 F.2d 1133 (4th Cir. 1981); Loudon Baptist Temple v. Leesburg, 223 Va. 592, 292 S.E.2d 315 (1982); Selected Risk Ins. Co. v. Dean, 233 Va. 260, 355 S.E.2d 579 (1987); Friend, C.: Law of Evidence in Virginia, § 161.

6. Requirements and Application of RJ.

a. Must prove: file record. Bernau v. Nealon, 219 Va. 1039; 254 S.E.2d 82 (1979).

b. Prior failure to assert compulsory counterclaim in federal court is res judicata bar to assertion of same as cross-claim in subsequent state court action. Nottingham v. Weld, 237 Va. 416, 377 S.E.2d 621 (1989).

E. **Joinder of Claims – Whether Praying for Legal and/or Equitable Relief Under Rule 3**.

1. Proper to join related claims. Felvey v. Shaffer, 186 Va. 419, 42 S.E.2d 860 (1947) (ct. held one could combine in a single action a case for insulting words and slander, and assault and battery, all arising out of a single incident).

2. Proper thing to do is to have separate counts, but failure to do does not seem to be fatal.

3. Lower court also has wide discretion to allow consolidation of cs/a for trial. See, e.g., Gemmell v. Powers, 170 Va. 43, 195 S.E. 501 (1938); Clark v. Kimnach, 198 Va. 737, 96 S.E.2d 780 (1957).

4. Joinder of tort and contract claims. See § 8.01-272 and § 8.01-281.

(a) Old law: forbidden. But see E.I. DuPont De Nemours & Co. v. Universal Moulded Prod. Corp., 191 Va. 525, 62 S.E.2d 233 (1950) (permitted P to join counts of warranty and tort stating demands were of same nature and closely related, each arising out of same gen. c/a; misjoinder of form, not of substance. Ct. said warranty was originally a tort action).

(i) This may be part of the genesis of the warranty (product liability) cases in which tort damages are given in contract actions.

(ii) See also General Bronze Corp. v. Kostopulos, 203 Va. 66, 122 S.E.2d 548 (1961) (permitting two theories to be joined in products liability case) (one c/a -- two theories).

(b) New law: see Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987). (Where court permitted joinder of contract and tort claim against various Ds.), but all claims arose out of the same transaction or occurrence.

5. New Law (§ 8.01-272).

(a) A party may now join a claim in tort with one in contract provided that all claims arise out of the same transaction or occurrence. But Court, in its discretion, may order separate trial for any claim.

(b) As to counterclaims either in tort or contract, see R 3:9. In Va, there are no compulsory counterclaims, but under Federal Rules there are compulsory counterclaims. See Nottingham v. Weld, 237 Va. 416, 377 S.E.2d 621 (1989).

6. Amalgamation of tort and contract.

(a) Products liability cases may be based on:

(1) Negligence (contrib. neg. would bar).

(2) Strict liability in tort where article sufficiently dangerous. Not recognized yet as such in Va. But see Featherall v. Firestone, 219 Va. 949, 252 S.E.2d 358 (1979); Logan v. Montgomery Ward 216 Va. 425, 219 S.E.2d 685 (1975); Laurens v. Int'l Playtex [Civ. Act. #83-0630-R (E.D. Va. 2.1.84).

(b) For arguments on both negligence and contract/warranty theories, see General Bronze Corp. v. Kostopulos, 203 Va. 66, 122 S.E.2d 548 (1961).

(c) Actions seen as "hybrid." See Elkins v. United States, 307 F. Supp. 700, (W.D. Va., 1969) aff'd 429 F.2d 297 (4th Cir. 1970).

(d) Privity substantially abolished by statute for damages to property or personal injury, but not for recovery for economic loss. See, Sensenbrenner v. Rust, Orling & Neal, 236 Va. 419, 374 S.E.2d 55 (1988).

(1) Action v. manufacturer or seller of goods, based on breach of warranty or negligence. (§ 8.2-318).

(2) Damages for personal injury and/or property damage based on negligence. (§ 8.01-223).

(3) But not for economic loss. Sensenbrenner, supra.

(e) For S/L and when it starts to run, see infra, Chapter VIII.

(f) See Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987) for good discussion of joinder of claims against several Ds where a cause of action arises out of same circumstances.

7. P may join an action for fraud with an action under Va. Consumer Protection Act and recover separate amount of damages under each claim. P does not have to elect remedies, and court can supervise verdict to avoid double recovery. Wilkins v. Peninsula Motor Car, Inc., 266 Va. 558, 587 S.E.2d 581 (2003).

8. Joinder of two independent and unrelated claims are subject to a demurrer. See Powers v. Chernin, supra.

9. Demurrer.

(a) Proper means by which to raise objection to misjoinder of claims.

(b) But not proper means for nonjoinder or misjoinder of parties.

F. **Sufficiency and particularity**.

1. Complaint is sufficient if it states briefly the essential facts -- and the true nature of case. (R 1:4(d) and (j)).

2. Elements of particular cs/a to be pled

a. Assault without contact. See Moore v. Jefferson Hospital 208 Va. 438, 158 S.E.2d 124 (1967); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974).

b. Parents have c/a for wrongful birth and can recover costs of care and treatment of child and for emotional distress. Nacash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986).

c. Fraud and conspiracy must be pled with particularity. Tuscarora v. B.V.A. Credit Corp., 218 Va. 849, 241 S.E.2d 778 (1978); Koch v. Realty Corp., 205 Va. 65, 135 S.E.2d 131 (1964); Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928).

d. Judgment improper if entered on theory not pleaded. City of Norfolk v. Vaden, 237 Va. 40, 375 S.E.2d 730 (1989). See also, Ted Lansing Supply Co. v. Royal Aluminum, 221 Va. 1139, 277 S.E.2d 228 (1981) and Hensley v. Dreyer, 247 Va. 25, 439 S.E.2d 372 (1994).

G. **Variance between Allegata and Probata.**

1. Minor variation is inconsequential. See § 8.01-377.

Simmers v. DePoy, 212 Va. 447, 184 S.E.2d 776 (1971) -- Allegation stated accident was south of intersection; Probata indicated it was north of intersection.

Chappell v. Smith, 208 Va. 272, 156 S.E.2d 572 (1967) -- infant recovering med. expenses did not allege but proved emancipation.

Caputo v. Holt, 217 Va. 302, 228 S.E.2d 134 (1976)-- allegation of compensatory W.D. damages sufficient to sustain probata of solace.

2. Major variation.

   (a) Cannot recover on quantum meruit when express contract is alleged. Five Lakes, Inc. v. Randall, Inc., 214 Va. 4, 196 S.E.2d 906 (1973); Griffin v. Rainer, 212 Va. 627, 186 S.E.2d 10 (1972). Hensley v. Dreyer, 247 Va. 25, 439 S.E.2d 372 (1994). (Cannot rescind contract on mutual mistake of fact where not pled).

3. A party is bound by his case as alleged.

   a. Travelers Indemnity Co. v. Obenshain, 219 Va. 44, 245 S.E.2d 247 (1978); Goodstein v. Weinberg, 219 Va. 105, 245 S.E. 140 (1978); Berry v. Klinger, 225 Va. 201, 300 S.E.2d 792 (1983). Unless amended, a litigant's pleadings are binding upon him. His opponent is entitled to rely upon the position he takes; and rely that his position will not suddenly be changed without notice during trial. For this reason, a litigant will not be permitted to assume, successively, an inconsistent and mutually contradictory position during trial. See Winslow v. Scaife, 224 Va. 647, 299 S.E.2d 354 (1983). (But see § 8.01-281).

   b. Remember leave of court necessary for amendment. (R 1:8). Ct. will grant amendment if subst. justice promoted and opposite party not prejudiced thereby. (§ 8.01-377).

4. And P is bound by the amount set out in the ad damnum, even if jury returns verdict for more. Powell v. Sears, Roebuck, 231 Va. 464, 344 S.E.2d 916 (1986).

5. Also, P cannot recover punitive damages if he has not expressly claimed them in prayer for relief or ad damnum clause. (Harrell v. Woodson, 233 Va. 117, 353 S.E.2d 770 (1987))

6. Complaint shall contain an ad damnum clause stating amount of damages sought. Rule 3:2(c)(ii).

H. **Commencement of Action**.

1. Law. (R 3:2).

   a. P file complaint in clerk's office.

   b. P pays statutory writ tax and clerk's fees.

c. Clerk then issues summons (see Rule 3:5 for form and content requirements) and attaches to it copy of complaint.

d. Clerk then delivers complaint for service as P directs.

e. For service of process, see Chapter IV, supra.

VI. DEFENSIVE PLEADING

A. Timing

D must make some response within 21 days of service. (R 3:8) [Remember, generally no defensive pleading required in GDC.]

B. Distinguish three types of defensive pleading

1. Remember, the object of the exercise is to get out quickly and cheaply. The "go jump" pleadings: D does not touch the merits of claim made against him, and proposes reasons why he is not required to.

    a. objection to jurisdiction – in personam (can be waived) and subject matter jurisdiction (cannot be waived)

    b. objection to venue

        (1) But remember, result will be transfer, not dismissal, but see § 8.01-265 where non-resident brings action on claim arising outside Virginia.

    c. plea in suspension

    d. demurrer

    e. plea of statute of limitations

        (1) See Chapter VIII, infra.

    f. motion for summary judgment

2. Response to P's claim on the merits

    a. As a matter of tactics (and economics), D will usually prefer to delay this until exhausts possibilities under 1.

3. "Offensive" defensive pleadings and "pass the buck" pleadings.

    a. Against P or other Ds. See Chapter VII, infra.

C. Objections to Venue and Jurisdiction

1. By written motion. Formerly by Plea in Abatement, now abolished. (§ 8.01-276)

    a. Venue. Motion under §§ 8.01-264 or -265. State proper venue. (§ 8.01-276).

    b. Jurisdiction:

(1) Person or subject matter.

(2) Written motion to dismiss for lack of jurisdiction.

(3) Subject matter jurisdiction can be raised at any time, either by direct or collateral attack. (§ 8.01-276) See Goranson v. Capital Airlines, 221 F. Supp. 820 (E.D. Va. 1963)

D. Plea in suspension (rare)

1. Formerly plea in abatement; now abolished. (See § 8.01-276).

2. Grounds:

a. P has become alien enemy.

b. Another suit pending on same c/a.

c. D adjudicated bankrupt but not discharged.

d. Failure to exhaust admin. remedies

3. Result is temporary stay in proceedings.

E. Demurrer (challenge to legal sufficiency)

1. Definition.

a. A pleading by which the demurrant tests the legal sufficiency of every other pleading, admitting as true all material facts well pleaded. Bellamy v. Gates, 214 Va. 314, 200 S.E.2d 533 (1973). (See § 8.01-273).

b. Cf. FRCP 12 (b)(6): failure to state a claim upon which relief may be granted.

c. P can test sufficiency of any defensive pleading by a motion to strike. §8.01-274.

d. The old "special" demurrer is abolished. §8.01-275: "Statute of Jeofails" – no complaint shall abate for want of form where sufficient facts alleged for court to proceed on merits.

2. Based on P's Pleadings

a. Reaches only matters apparent on face of P's pleading

(1) plus matters made a part by Oyer (motion of demurrant) – this is known as "craving oyer." See Wards Equipment v. New Holland N.A., 254 Va. 379, 493 S.E.2d 516 (1997).

(2) Attempt to include more is not appropriate; "speaking demurrer."

b. Demurrant admits all material facts which are properly pleaded in the attacked pleading; but says they are not sufficient in law to justify the relief sought.

(1) Does not admit conclusions of law. See Walker & Laberge Co. v. First Nat'l Bank of Boston, 206 Va. 683, 146 S.E.2d 239 (1966) (lack of consideration and fraud); Caplan v. Stant, 207 Va. 933, 154 S.E.2d 121 (1967) (alleging a person a "surety").

(2) Does not admit inferences stated by the pleader. Walker, supra. But does admit inferences properly drawn, i.e. that may be fairly and justly drawn from the facts alleged; Burns v. Board of Supervisors of Fairfax Co., 218 Va. 625, 238 S.E.2d 823 (1977), CB 84; Duggin, Trustee v. Adams, 234 Va. 221, 360 S.E.2d 832 (1987).

(3) But admission is for purposes of the demurrer only.

3. Contents (§ 8.01-273)

a. Demurrant upon filing must give grounds in writing, and only those stated will be considered. See Klein v. National Toddle House Corporation, 210 Va. 641, 172 S.E.2d 782 (1970); Chippenham Manor, Inc. v. Dervishian, 214 Va. 448, 201 S.E.2d 794 (1974).

b. But grounds may be amended like other pleading.

c. No specific form required.

d. May file demurrer simultaneously with other pleadings. Matthews v. Jenkins, 80 Va. 463 (1885).

4. What may be reached by demurrer

a. Failure of P to state c/a. See, e.g., Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 (1980) (D doctor won 1st case; P brought 2d case v. attorney who had acted for P in 1st case. Attorney successfully demurred.)

b. Misjoinder of cs/a. Powers v. Cherin, 299 Va. 33, 452 S.E.2d 666 (1995).

c. Equitable remedy where adequate remedy exists at law for damages. See Pennsylvania-Little Creek Corp. v. Cobb, 215 Va. 44, 205 S.E.2d 661 (1974).

d. Constitutionality of a statute or municipal ordinance. Adkins v. City of Richmond, 98 Va. 91, 34 S.E. 967 (1910).

e. Laches for equitable relief. Pittman v. Pittman, 208 Va. 476, 158 S.E.2d 746 (1968).

f. Not: expiring of S/L: this must be raised as an affirmative defense set forth in a responsive pleading. (§ 8.01-235). See Chapter VIII, infra.

5. Consequences of a good (i.e. appropriate) demurrer

a. Can result in final judgment which is res judicata.

--Griffin v. Griffin, 183 Va. 443, 32 S.E.2d 700 (1945) (demurrer sustained to divorce complaint, P did not amend, decree issued and no appeal. Later alleged same facts in 2d action; dismissed on basis that 1st decree was RJ).

--Baker v. Butterworth, 119 Va. 402, 89 S.E. 849 (1916) (Complaint showing contributory negligence on face; judgment for D.)

(1) But sustaining demurrer does not result in final judgment starting the 21-day period unless there is other action by the Court. Bibber v. McCreary, 194 Va. 394, 73 S.E.2d 382 (1952). See Norris v. Mitchell, 255 Va. 235, 495 S.E.2d 809 (1998).

b. May result in amendment of pleading by demurree.

(1) Amendments freely allowed. (R 1:8)

(a) The demurrant will have "educated" the demurree.

(2) Correctness of trial court in sustaining demurrer may be argued on appeal if demurree has made timely objection, and even if he has repleaded. (§8.01-273(B)). See Baker v. Butterworth, supra; Burns v. Bd. of Supervisors, supra.

6. Consequences of a bad (inappropriate) demurrer

a. Case goes on. D may be able to make other preliminary motions e.g. motion to strike, see infra.

F. Motion for Bill of Particulars (R 3:7)

1. Can be used by P in relation to D's pleadings, but more likely vice versa.

2. Object: to inform adverse party of the c/a (or defense), to enable preparation to meet the pleading. Cf. FRCP 12(e), Motion for More Definite Statement.

3. Court discretion (R 3:16(b)) but may be error to refuse. City of Portsmouth v. Weiss, 145 Va. 94, 133 S.E. 781 (1926).

4. Sanctions

a. Party has two chances; if 2d B/P fails to inform adverse party of true nature of case, B/P and original pleading may be stricken. (R 3:7(b)). See Marshall v. Dean, 201 Va. 699, 112 S.E.2d 895 (1960).

5. Negligence

a. P need not specify particulars in original pleading (R 3:18(b)). Cf. Ragsdale v. Jones, 202 Va. 278, 117 S.E.2d 114 (1960) (P need not have specified DWI).

b. But D may request in B/P the basis for allegation of negligence (or contributory negligence).

G. Pleadings in Bar or Special Pleas

1. Affirmative Defenses: May be included in Answer (R 3:8), or separately.

2. Usually will be confined to those which, if established, will end the proceeding; e.g.:

a. S/L

b. Res judicata

c. Collateral estoppel by judgment

d. Statute of Frauds

e. Bankruptcy

f. Accord and satisfaction

g. Contributory negligence (Rule 3:18).

h. Usury (§ 6.1-330.56; Roanoke Mtg. Co. v. Henritze, 151 Va. 220, 144 S.E. 430 (1928)).

3. Special Pleas in Equity (Where Only Equitable Relief is Sought). § 8.01-336 D.

a. Special Plea in Equity: Single issue of fact likely to be determinative of the cause.

b. If a "special plea in equity" is filed, and P takes issue, either party may demand a trial by jury. And verdict is binding in same manner as at law; not advisory. See Stanardsville Volunteer Fire Co. v. Berry, 229 Va. 578, 331 S.E.2d 466 (1985).

c. A special plea is not just a denial. See Bolling v. General Motors Acceptance Corporation, 204 Va. 4, 129 S.E.2d 54 (1963).

4. On equitable claim, the court on its own motion, or on motion of party, where a case is doubtful by conflicting evidence, directs an issue to be tried before an advisory jury; but jury verdict not binding on judge. § 8.01-336(E).

H. Pleadings to the Merits

1. "Answer" (R 3:8).

2. Due within 21 days of service or within time set by court after disposition of preliminary pleas (R 3:7).

   a. Failure by D to plead puts him in default (R 3:19). Williams v. Service, Inc., 199 Va. 326, 99 S.E.2d 648 (1957); Federal Realty v. Litterio, 213 Va. 3, 189 S.E.2d 314 (1972).

   b. Consequences of default (R 3:19):

      (1) D waives trial by jury

      (2) D waives objections to admissibility of evidence

      (3) D not entitled to notice of further proceedings (except 10 day notice under § 8.01-296(2)(b)--see infra)

   c. On motion of P, court issues judgment (if liquidated damages) or, if P demands, puts question of damages to jury (if unliquidated damages) (R 3:18). But if service by posting or on agent, no judgment unless copy of pleading mailed to D at least 10 days before judgment. (§§ 8.01-296(2)(b); 8.01-315). See Chappel v. Smith, 208 Va. 272, 156 S.E.2d 572 (1967); Funkhouser v. Million, 209 Va. 89, 161 S.E.2d 725 (1968).

   d. Within 21 days after a default judgment for good cause shown by the Court may release a D from a default judgment. R 3:18(d).

3. Reply required from P only to plea, motion or affirmative defense; otherwise deemed denial (R 3:11).

4. Parties at issue when all pleadings filed, or time for filing expired (R 3:8).

5. Contributory negligence defense available only if pleaded or shown by P's own evidence: so D should plead it. (R 3:16(d)).

6. P must respond to counterclaims and crossclaimsRule 3:9, 3:10. Cf. Rule 3:11.

7. There is no default in a divorce proceeding. R 3:19(c).

8. Inconsistent defenses may be asserted. Wilroy v. Halbleib, 214 Va. 442, 201 S.E.2d 598 (1974) (forgery and signature obtained by undue influence -- will case). (See also § 8.01-281: pleading in the alternative; Rule 1:4(k)).

9. Equitable defenses are available in actions arising under contract (§ 8.01-422: the old recoupment statute, e.g.:

   a. fraud

   b. failure of consideration

   c. mistake

   d. unreasonableness or unconscionability of attorney's fee.

I. Pleadings Which Must be Sworn

1. Verification of pleadings usually not required

2. Exceptions

   a. Designed to eliminate proof or place the burden of proof on the party more able to give authentic evidence.

   b. In § 8.01-279.

      (1) Allegation of signature. (Subject to § 8.3A-308 -- no requirement of affidavit to deny, e.g., genuineness of signature on commercial paper, and burden of proof is on alleged signer or those claiming under him).

      (2) Ownership, operation, or control of property.

      (3) Existence of partnership or corporation.

   c. In § 8.01-28.

      (1) In action on a note or contract, P may file an affidavit with his complaint or warrant stating the amount, that it is justly due, and the time for the running of interest, as well as account (all served).

      (2) These allegations will be admitted unless D denies them under oath.

         (a) Practice in some GDCs is to treat D's sworn testimony as answer under oath.

   d. In § 8.01-416.

(1) Estimate under oath of motor vehicle damage of $1,000 or less, may be admitted into evidence in Cir. Ct. or GDC. If over $1,000, may be admitted if at least 7 days notice before trial.

e. Mandamus. (§ 8.01-644).

3. Safety Nets.

a. Rule 1:10 prevents the above from being a trap in equity or law: objection within 7 days or waived. Cf. Sheets v. Ragsdale, 220 Va. 322, 257 S.E.2d 858 (1979).

b. Sworn stmt. that affiant has no recollection is a denial. Breeding v. Johnson, 208 Va. 652, 159 S.E.2d 836 (1968).

J. Motion for Summary Judgment.

1. Appropriate at any time after parties are at issue (R 3:20)

2. May be used by P too.

3. Court must enter if movant entitled based on

a. pleadings

b. pre-trial orders

c. admissions

d. but may not use depositions in whole or in part (this severely restricts use of S.J § 8.01-420.

e. request for admissions

f. motion to strike evidence sustained (§ 8.01-378)

See e.g., City of Newport News v. Anderson, 216 Va. 791, 223 S.E.2d 869 (1976) (no negligence).

4. Court shall not enter

a. If any material fact is in dispute (R 3:20). See e.g., Richmond, F. & P. R. Co. v. Sutton Co., Inc., 218 Va. 636, 238 S.E.2d 826 (1977), CB 87; Gilmore v. Basic Industries, Inc., 233 Va. 485, 489, 357 S.E.2d 514 (1987).

b. When based in whole or in part on discovery depositions under Rule 4:5, unless all parties agree (§ 8.01-420).

5. Court may enter

a. As to undisputed portion of contested claim (interlocutory).

b. As to liability, though damages still in dispute.

6. Court need not enter if cross-motions for summary judgment filed. Cen. Nat. Ins. v. Va. Farm Bureau Ins., 222 Va. 353, 356, 282 S.E.2d 4, 6 (1981); Town of Ashland v. Ashland Investment Co., 235 Va. 150, 366 S.E.2d 100 (1988).

7. No recording of telephone conversations shall be admitted into evidence unless (1) all parties to the call were aware it being recorded or (ii) admission of crime that is basis for civil action, but does not include divorce action. § 8.01-420.2.

VII. AGGRESSIVE PLEADINGS BY DEFENDANT AND THIRD PARTY PRACTICE

A. Overview: We are dealing with:

1. Claims by D v. P asserted in the context of the action/suit brought by P v. D.
   a. May be defensive: "I don't owe you anything, because . . . ."
   b. or offensive: "Even if I owe you $X, I don't have to pay, because you owe me $Y."
   c. Terminology - Counterclaim Rule 3:9.
   d. There is no compulsory counterclaim, but beware of issue of collateral estoppel.
   e. Set off – See § 8.01-422; see generally, 16 MJ setoff, p. 652, et. seq.
2. Claims by D_1 v. D_2
   a. A "pass the buck" procedure.
   b. May be v. existing D_2
   c. or D_1 may bring in D_2 ("third-party practice") R:3:13.
   d. Terminology – Crossclaim Rule 3:10.
3. 3d Party Intervention – Rule 3:14
   a. Party not already involved in the litigation
   b. voluntarily joins in
4. Note Nonsuits
   a. Usually within sole power of P. But if counterclaim, cross-claim or 3d party claim filed, D's consent is necessary, unless such claims can be tried separately. (§ 8.01-380(C)).

B. D v. P: Counterclaims and Cross-Claims.

1. Counterclaim (R 3:10)
   a. For Cir. Ct., Rules govern. (§ 8.01-272 and 8.01-281).
   b. For GDC, see c.
   c. Need not grow out of the same transaction.

d. Permissive (Optional)

(1) so failure of D to raise does not result in res judicata bar. (Cf FRCP 13(a): counterclaim arising out of same transaction is compulsory)

(2) but collateral estoppel might bar later action by D.

e. Timing

(1) D must file within 21 days of service of complaint.

(2) S/L tolled by P's filing if D's claim arises from same transaction.

(3) D may assert any claim v. P acquired up to time of filing of D's pleading.

f. How to Plead:

(1) Separate paper or

(2) in answer, separately identified.

g. Amount:

(1) May exceed amount sued for by P in complaint (cf. recoupment, infra).

h. Subject Matter

(1) need not be liquidated damages

(2) tort or K.

(a) Quaere: can the counterclaim itself mix tort and K claims? (See §§ 8.01-272 and -281). Answer: yes.

i. Court has discretion to order separate trial. Leech v. Beasley, 203 Va. 955, 128 S.E.2d 293 (1962).

j. Filing counterclaim waives D's right to remove to federal court (as in effect, D becomes a P). Sood v. Advanced Computer Techniques Corp., 308 F. Supp. 239 (E.D. Va. 1969).

k. P's response: same as D's to Complaint (R 3:8)

(1) Don't forget to do so by confusing with replication.

l. Materiality.

(1) Counterclaim must be v. P, in same capacity as P's claim v. D e.g.

(a) Surety.

If P sues principal and surety, surety may set out principal's claims v. P, but not debt owed to surety personally by P. Stimmell v. Benthall, 108 Va. 141, 60 S.E. 765 (1908).

(b) Husband and wife.

D may not set off debts owed by H alone in action by H and W jointly as Ps. Stowers v. Dutton., 161 Va. 658, 171 S.E. 510 (1933).

(c) Assignor and Assignee.

Because of materiality rule, D can counterclaim v. assignee P amount due to D from assignee only (and not also due from assignor). But statute allows D to bring in assignor so excess can be set off against him. (§ 8.01-423).

(2) Common Law

(a) "Set-off" unknown--extrinsic to P's demand.

(b) Common Law "Recoupment" was known and survives Rule 3:9. See, e.g., City of Richmond v. Chesapeake and P. Telephone Co., 205 Va. 919, 140 S.E.2d 683 (1965) (pre-Rules).

(i) Same transaction.

(ii) Break-even at best; no excess can be recovered.

(iii) Not against a sealed instrument.

(iv) S/L: tolled by P's filing since same transaction, D has no S/L problem.

(3) Statutory

(a) Recoupment (§ 8.01-422).

(i) Contract actions only.

(ii) Must arise from K sued on. Dexter-Portland Cement Co. v. Acme Supply Co., 147 Va. 758, 133 S.E. 788 (1926).

(iii) Allows recovery in excess of P's claim. Hamilton v. Goodridge, 164 Va. 123, 178 S.E. 874 (1935).

(iv) Allows assertion of equitable defenses.

C. D_1 v. D_2: Cross-Claims

1. Cross-claim (R 3:10)

a. Subject Matter

(1) Must grow out of matter pleaded in complaint (cf. R 3:9 re counterclaims.)

(2) May be any c/a against any one or more Ds. (cf. R 3:9).

b. Against existing D_2 only (cf. R 3:12 and 3:13). Masters v. Hart, 189 Va. 969; 55 S.E.2d 205 (1949).

c. Timing

(1) 21 days after service of complaint on the cross-claiming D.

(a) subject to court-allowed extension (R 1:9)

(2) D's c/a need not exist at the time of P's filing.

(3) S/L on D's claim arising from same transaction as P's complaint tolled from date of P's filing. (§ 8.01-233(B)).

d. Treated as new complaint.

(1) So service of Notice of cross-claim necessary.

(2) But not for purposes of costs; no writ tax or filing fee due.

(3) D_2 pleads to cross-claim as if complaint. (See R 3:10(c)).

D. Bringing in additional parties at law

1. Rule 3:12 and 3:13.

2. At law, provisions now in Rules:

a. Presence necessary for just adjudication. (R 3:12).

b. 3d Party practice: party liable to existing D. (R 3:13).

c. Additional D on P's motion. (R 3:16).

3. "Presence Necessary" (R 3:12)

a. "may" cf. FRCP 19, vs. "shall." This difference, together with R 3:12, robs the Rule of much of its significance.

b. Additional party (A) brought in by order of court on motion of

(1) P

(2) D

(3) A himself (intervention in Rule 3:14)

c. A can be brought in as D or involuntary P. Rule 3:12(a)

d. Grounds: presence of A necessary to

(1) give existing parties complete relief

or (2) protect A's interest in subject matter

or (3) protect existing parties from multiple liability by reason of A's interest.

(4) Note that if such a party exists and is not joined initially, P must include names and reasons why not joined, in his original pleading. (R 3:12(c)).

e. Motion to join:

(1) Must be filed with the clerk within 21 days after service of complaint on movant. 3:12(b)

(a) Subject to R 1:9 (extension in discretion of ct.)

(b) No provision for when A may move, although Rule contemplates he may come in to protect his interest. (R 3:12(a)). Quaere whether a non-party can make a motion.

(2) Must be served as complaint.

(a) subject to Rules except

(b) no payment of writ tax and clerk's fees.

f. Disposition if A cannot be joined:

(1) Action dismissed if Trial Ct. determines that in equity and good conscience the action should not proceed. Factors to be considered include: (3:12(c))

(a) To what extent judgment without him may be prejudicial to the existing parties

(b) How the prejudice can be lessened by

(i) protective provisions in the judgment

(ii) the shaping of relief

(iii) other measures

(c) Whether judgment without him will be adequate

(d) Whether P will have an adequate remedy if the action is dismissed.

(e) A pleading asserting a claim for relief shall state the name, if known, of any person who are not joined and the reason why not joined. 3:12(d).

4. Third Party Practice (R 3:13)

a. FRCP 14: can get help with construction from authorities discussing it. See Reich v. Kimnach, 216 Va. 109, 216 S.E.2d 58 (1975).

b. Rule applies for Cir. Cts.; for GDC, see § 16.1-93.

c. Purpose:

(1) to dispose of all P's claims among Ds and potential Ds in one setting, i.e., judicial economy, e.g., indemnity and contribution claims.

(2) See Valley Landscaping Co. Inc. v. Rolland, 218 Va. 257, 237 S.E.2d 120 (1977).

d. Procedure by D_1:

(1) D_1 ("third party plaintiff", 3PP) files T.P.C. and requests service on non-party ("third party defendant," 3PD)

(a) Or, if counterclaim against him, P can also bring in 3PD (as in posture of a D).

(2) No leave of court necessary (if timely): just like commencing new action 3PP v 3PD, but it will be dealt with at the same time as P v. D_1/3PP.

(3) Timely if filed up to 21 days after D_1/3PP serves responsive pleadings (not service on D_1)

(a) Thereafter, leave of Court is required on motion after notice to all parties.

(4) D_1/3PP may file against any non-party who is or may be liable for all or part of P's claim against the D_1/3PP.

(a) Does not apply unless P in original action has c/a against putative 3PD. VEPCO v. Wilson, 221 Va. 979, 277 S.E.2d 149 (1981).

(b) But apparently does apply where D_1/3PP has potential claim for contribution or indemnity v. 3PD, although c/a will not accrue until payment of claim by 3PP to original P. (§ 8.01-249(5)).

(i) So 3PD is put to expense of defense, although no c/a against him exists, and if original P loses action v. D_1/3PP, no c/a ever comes into being.

(ii) Quaere: is this constitutional? Probably.

(5) Permissive (optional). So D_1 may instead raise separate action after found liable in P v. D_1.

e. See § 8.01-381(B) for separate trials where D files a TPC by alleging damages to P caused by negligence of TP) in operation of a motor vehicle.

f. Procedure by 3PD:

(1) 3PD makes defenses to 3PP under Rules 3:8 and counter- and cross-claims under 3:9 and 3.10. (i.e. as if a principal D)

(2) 3PD may assert against original P:

(a) Any defense that 3PP has to P's claim;

(b) Any claim arising out of transaction that is subject matter of P's claim against 3PP.

(3) 3PD may himself bring in other 3PDs.

g. Procedure by original P:

(1) P may within 21 days after service of the T.P.C. upon the 3PD assert against 3PD any claim arising out of P's complaint transactions.

(a) And 3PD may respond with defenses, etc., under Rule 3:8.

g. Procedure by any party: may move

(1) to strike 3 T.P.C., or

(2) for severance of 3 T.P.C. or for separate trial.

(a) Quaere: does this refer to before and after pleading stage, or contemplate that seriatim verdict/judgment in one trial?

5. Additional D on P's motion (R 3:16): see 8.01-7

a. With leave of court.

b. At any stage, as justice requires.

c. Motion with amended complaint must be served on counsel of existing parties as required by Rule 1:12.

d. If motion granted, amended complaint filed in clerk's office.

(1) As to new parties, Rule 3:3 –3:5 applies as usual.

(a) But no costs.

(2) All Ds must file pleadings in response.

e. Remember if counterclaim against P, he can also use Rule 3:13, as he is in the posture of a D with respect to the counterclaim.

E. Addition or Dropping of Parties by Court

1. Misjoinder and nonjoinder, supra. § 8.01-5.

2. On affidavit (§ 8.01-5).

or 3. Court sua sponte (§ 8.01-7).

VIII. LIMITATION OF ACTIONS

A. Introduction

1. Policy

   a. To require timely enforcement of rights

      (1) to guard against lost evidence

      (2) to prevent witness from disappearing

      (3) so potential Ds can sleep easy

      (4) to suppress fraudulent and stale claim

      (5) to prevent surprise.

   b. So Statutes of Limitation (S/L)

      (1) Set time limits within which P must go to court.

      (2) If P fails to act within those rights, he loses his remedy (or in some cases his right).

      (3) In any event, S/L effectively deprives P of his right, as it is no longer enforceable.

      (4) But S/L may be tolled either before or after cause of action accrues. See § 8.01-229 and F, infra.

   c. Also Statutes of Repose (S/R)

      (1) Bar action after a certain period.

      (2) Differ from S/L in the point from which they run.

      (3) In Va. at present, apply to construction services and medical malpractice. See § 8.01-250, see also § 8.01-243 C. 1 and 2.

      (4) Policy: to enable potential Ds to have a clean sweep eventually. Otherwise consider

         (a) Retired physician: must maintain "tail-end" insurance.

(b) Manufacturer: potential liability and therefore insurance costs accumulate over the years.

(5) Note "S/R" is sometimes used as a generic term to include S/L and any statutory time limits on enforcement of rights.

(6) See School Board of City of Norfolk v. United States Gypsum Co., 234 Va. 32, 360 S.E.2d 325 (1987) (application of § 8.01-250.1 retroactively is unconstitutional under due process clause of Va. Const. Art. 1, 811).

d. And in equity, doctrine of laches

(1) strictly speaking, S/L applies only at law

(2) but see I, infra.

2. Three kinds of S/L

a. "Pure" S/L (§§ 8.01-228 et seq.)

(1) Bars the remedy.

(2) The right technically still exists, but not worth anything.

(3) New S/L may apply retrospectively, if change gives Ps sufficient notice. Hurdle v. Prinz, 218 Va. 134, 235 S.E.2d 354 (1977).

b. "Special" S/L.

(1) Statute creates a right, but only if timely enforced.

(2) So failure to act in time leads to loss of right, and P traditionally had to include in pleading averment that timely filed.

(3) Examples:

(a) Wrongful Death.

(b) Mechanic's Lien. Neff v. Garrard, 216 Va. 496, 219 S.E.2d 878 (1975).

(c) Tort Claims Act. (§ 8.01-195.7).

(d) § 8.01-40 (unauthorized use of person's name or picture for advertising purposes).

(i) agencies of the C/W incorporated for charitable or educational purposes. (§ 8.01-231)

(ii) Cities and counties, even if acting in governmental capacity. See, Burns v. Bd. of Supervisors, 227 Va. 354, 315 S.E.2d 856 (1984).

c. Statute of Repose - See A.1.c. See §8.01-243(c)(1) and (2): §8.01-249(4)(5).

B. Four Fundamentals in Applying the S/L

1. How many c's/a does the P have?

2. When does the S/L begin to run on each cause of action?

3. How long does it run for - What S/L applies to each c/a?

4. What stops it ticking? "Tolling the S/L." (§ 8.01-229).

C. Determine the Number of C's/A

1. Right of action cannot accrue until there is a c/a.

2. For a c/a there must be

a. Duty at law or legal obligation

b. Breach of duty or obligation

c. Harm

(1) Barnes v. Sears, 406 F.2d 859 (4th Cir. 1969).

(2) Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969).

(3) Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 135 (1949).

(4) But see § 8.01-249(4) for asbestos related injuries and § 8.01-249(2) for breast implantation injuries.

D. Accrual of the Cause of Action (§ 8.01-230)

1. Consider

a. nature of action (K or tort)

(1) object of action, not form

(a) Birmingham v. C&O, 98 Va. 548, 37 S.E. 17 (1900); App. Power Co. v. G.E., 508 F. Supp. 530 (W.D. Va. 1980). Affirmed by 665 F.2d 1038 (4th Cir., 1981).

(b) Oleyar v. Kerr, 217 Va. 88, 225 S.E.2d 398 (1976).

(c) Remember products liability K/tort interface. See e.g., Friedman v. Peoples Drug, 208 Va. 700, 160 S.E.2d 563 (1968).

b. wrong by D

c. injury to P.

2. Contract

a. C/a accrues on breach of K. (§ 8.01-230; for UCC sale of goods Ks, see § 8.2-725)

(1) UCC applies

(a) to parties in privity

(b) in action v. mfr. or seller of product, regardless of privity. (§ 8.2-318)

(c) but not to too remote mfr. - see, Rapp v. Whitlock, 222 Va. 80, 279 S.E.2d 133 (1981); 3 year S/L applies under § 8.01-246(4).

b. Where c/a is for breach of warranty under UCC, breach occurs.

(1) when tender of delivery is made (§ 8.2-725(2)).

(2) regardless of P's lack of knowledge of the breach

(3) unless warranty explicitly extends to future performance of the goods and discovery of breach must await such performance

(a) in which case c/a arises when breach is or should have been discovered. For an unsuccessful attempt to use this provision, see E.T. Gresham Co. v. Koehring Crane & Excavator, 479 F. Supp. 132 (E.D. Va. 1979). (P argued that warranties covered future

performance of crane) and Luddeke v. Amana Ref., 239 Va. 203, 387 S.E.2d 502 (1990) (which P failed to properly plead).

c. for other Ks, breach occurs

(1) On sale of defective goods. Burke-Parsons, infra at p. 129; Richmond Redevelopment and Housing Authority v. Laburnum Construction Corporation, 195 Va. 827, 80 S.E.2d 574 (1954).

(2) On supply of service or completion of service K.

(3) Life insurance: demand required within reasonable time after death. Page v. Shenandoah Life Ins. Co., 185 Va. 919, 40 S.E.2d 922 (1947).

(4) Demand notes: on demand. If no demand, action to enforce demand note. Statute of limitations does not run until ten years after each payment of principal and interest. § 8.3A-118. If demand made, six years from date of demand.

(5) Condition precedent: S/L does not run until condition performed. Whitehurst v. Duffy, 181 Va. 637, 26 S.E.2d 101 (1943) (K of guaranty conditional on foreclosure; Guarantor has reasonable time to demand performance of condition the foreclosure).

(6) Course of dealing may have to be examined to determine when performance was due. Clifton D. Mayhew, Inc. v. Blake Const. Co., 482 F.2d 1260 (4th Cir. 1973).

(7) Partnership accounting: c/a accrues on cessation of dealings of partnership. (§ 8.01-246(3)). (New case of S/L among partners and joint ventures. C/a accrues upon winding up of affairs.

(8) Lease right of action accrues with initial breach--no continuing breach of lease which extends statute of limitation. Westminster Investing v. Lamps Unlimited, 237 Va. 543, 379 S.E.2d 316 (1989).

(9) In action on an open account, from the later of the last payment or last charge for goods or services rendered on account. §8.01-249(8).

d. Note there is no general discovery rule. See e.g., the warranty case, Laburnum, supra, and the life insurance case, Carmichael, supra (in which beneficiaries did not know of the existence of the policy until too late); (but see § 8.01-243 C. 1 and 2 and § 8.01-249(4) for certain tort actions), infra at 132.

3. Damage to Property - Tort/Contract

a. If damage to property itself on K theory, 2. supra applies.

b. On tort theory, under § 8.01-230, when damage occurs.

(1) The case of Harbour Gates Owners' Assoc. v. Berg, supra, has been overruled by amendment to § 8.01-230 in 1996.

(2) But Va. S.Ct. has held that where property causes consequential damage to other property, c/a in respect of the latter arises when the damage occurs (at least under a tort negligence theory), although c/a in respect of the damage to the former arises on the sale (see 127 supra). Stone v. Ethan Allen, Inc., 232 Va. 365, 350 S.E.2d 629 (1986) (defective refrigerator: warranty claim accrued on delivery, negligence claim for fire damage to house caused by refrigerator accrued on date of damage; decided under prior law to October 1, 1977); INA v. GE, 376 F. Supp. 638 (W.D. Va. 1974). But see Smithfield Packing Co., Inc. v. Dunham-Bush, Inc., 416 F. Supp. 1156 (E.D. Va. 1976). McCloskey & Co. v. Wright, 363 F. Supp. 223 (E.D. Va. 1973) (where c/a against architect for faulty construction designed accrued on date of delivery of plans, not after defects discovered).

(3) Some earlier cases suggest the opposite conclusion. See Burke-Parsons-Bowlby Corp. v. E.D. Etnyre & Co., 585 F. Supp. 620 (W.D. Va. 1984) (tank-trailer overturned, spilling cargo; claim for costs of cleaning up spill barred by S/L running from date of sale. N.B. claim was not actually for damage to P's own property); Smithfield Packing Co. v. Dunham-Bush, Inc., supra (boiler purchased in 1963, exploded in 1973; consequential damage to other property regarded as result of original breach of warranty and therefore c/a accrued at time of sale of boiler); Housing Authority v. Laburnum, supra (gas pipe; warranty theory; c/a accrued at time of installation).

c. The damage/breach of duty dichotomy.

(1) For c/a arising after 7/1/96 code specifies that for property damage c/a accrues when damage occurs and also for personal injury, c/a accrues on injury to P. (§ 8.01-230).

(2) It is clear that for c/a arising after 7/1/96, S/L runs from date of damage to property.

(3) See Sensenbrenner v. Rust, 236 Va. 419, 374 S.E.2d 55 (1988) for discussion of breach of contract (economic loss) and damage to property.

d. Damage to Buildings.

(1) Where caused by equipment etc. installed in building, e.g. refrigerator in Stone.

(a) same analysis as in b. and c., supra.

(b) what about materials incorporated in structure, e.g. defective concrete?

(2) Where caused by defective workmanship.

(a) c/a accrues on breach of K or duty (§ 8.01-230) i.e. on "delivery" of finished building or on incorporation of materials. See Sensenbrenner v. Rust, supra at p. 129.

(b) for condominiums, statutory warranty period. (§ 55-79.79(b)).

(c) Statute of repose also operates. (§ 8.01-250).

(i) In respect of tort action only. Fidelity & Deposit Co. v. Bristol Steel, 722 F.2d 1160 (4th Cir. 1983) (i.e. N//A to building K in surety action v. contractor to recover under K of indemnity). But this is questionable. See Cape Henry, supra, where S/R applied in breach of warranty case, but see Eagles Court v. Heatilator, Inc., et al., 239 Va. 325 (1990), where Supreme Court held that if machinery or equipment installed in a structure upon real property constitutes proximate cause of injury to property or person, then cause of action accrues on the date of injury.

(ii) Runs from date of performance or furnishing of services and construction.

(iii) 5 year period.

(iv) Constitutional challenge (special legislation) rejected by Judge (now Justice) Compton in Adams v. Carrier Corp., 1 Va. Cir. 150 (1973), writ of error refused, 214 Va. XLIII (1974). [Some states have held similar S/R unconstitutional. Cf. State Farm Fire v. Ace Electric, Inc., 660 P.2d 995 (Nev. 1983); Daugaard v. Baltic, 349 N.W.2d 419 (S.D. 1984)]; Hess v. Snyder Hunt Corp, 240 Va. 49, 392 S.E.2d 817 (1990).

(v) May reduce S/L period in which action may be brought, but does not extend S/L period. VMI v. King, 217 Va. 751, 232 S.E.2d 895 (1977) (under prior law).

(vi) Covers person designing and constructing: see the statute for services included. Also covers parties who furnish construction materials. Cape Henry v. Nat'l Gypsum, 229 Va. 596, 331 S.E.2d 476 (1985). Electrical panel is not "equipment or machinery." See Grice v. Hungerford Mechanical Corp., 236 Va. 305, 374 S.E.2d 17 (1988).

(vii) Does not cover installers of machinery and equipment. Hupman v. Cook, 640 F.2d 497 (4th Cir. 1981); Cape Henry Towers, Inc. v. Nat. Gypsum Co., 229 Va. 596, 331 S.E.2d 476 (1985). See also, Eagles Court Condo v. Heatilator, Inc., 239 Va. 325, 389 S.E.2d 304 (1990). Where injury to person or property is caused by equipment or machinery installed in a structure upon real property, the cause of action for such injury accrues at the time it occurs as provided in §§ 8.01-243 and 8.01-246.

(viii) § 8.01-250.1 revived right of action in asbestos related claims by C/W, counties, cities & school boards.

(a) But declared unconstitutional. See, School Board of City of Norfolk v. United States Gypsum Co., 234 Va. 32, 360 S.E.2d 325 (1987).

4. Personal Injuries.

a. C/A accrues at time of injury to P, not at breach of duty by D. (§ 8.01-230). See Locke v. Johns-Manville, 221 Va. 951, 275 S.E.2d 900 (1981) (referring to "right of action" as accruing on sustaining of injury, i.e. date P was hurt).

(1) P exposed to asbestos dust in employment which ended in 1972 = breach of duty by D.

(2) But action filed in 1978 not necessarily time-barred, as injury to P might not have developed until after 1972.

(3) Remanded to establish when injury occurred.

(4) Va. S. Ct. reiterated that it was not applying a discovery rule. (So if disease began to develop in 1973, P would be barred even though no diagnosis until 1978: exact result changed by statute 1985; see c. infra. But Locke principle may still apply in non-asbestos related injuries occurring a long period after exposure, e.g. owing to water pollution).

(5) Granahan v. Pearson, 782 F.2d 30 (4th Cir. 1985). (c/a accrues when there is injury, no matter how slight and further complications from first injury do not create another c/a and a new two year period.

b. No general discovery rule.

(1) See Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946); Anderson v. Clinchfield Coal Co., 214 Va. 674, 204 S.E. 257 (1974); Irvin v. Burton, 635 F. Supp. 366 (W.D. Va. 1986) (wrongful birth).

(2) But see C. infra, emergence of discovery rule in particular contexts.

c. Discovery Rule for asbestos related diseases.

(1) When diagnosis is first communicated to the injured person by a physician. (§ 8.01-249(4)).

(2) What if injured person never goes to physician and first diagnosis is after his death?

(a) Does "or his agent" in statute cover this situation?

d. Injuries due to medical malpractice (§ 8.01-243(C)). (Overruling Hawks v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966).

(1) Discovery rule applies in limited circumstances:

(a) To foreign object having no therapeutic or diagnostic effect left in body or where initial discovery is prevented by fraud, concealment, or intentional misrepresentation.

and (b) Where D is "health care provider."

(c) Special one year limitation period.

(d) Runs from actual date of discovery, or when it reasonably should have been discovered.

(e) Subject to 10 year statute of repose.

(i) running from date of accrual of c/a (i.e., injury).

(ii) e.g. small instrument left in body; begins to injure, July 1975. No pain until 1986, diagnosis 1987. One year

period runs from 1987, but action barred by statute of repose in 1985.

(iii) but for person under a disability, tolled during disability. (§ 8.01-229(A)(2)).

(f) Note; exception for foreign objects with therapeutic/ diagnostic effect left in body, e.g. IUD or Pacemaker - usual rules for med. mal. apply.

(g) Boyd-Graves Conference, 1987, proposal for general discovery rule with 2 yr. S/L and 10 yr. S/R currently being studied, but still no action.

(2) Continuous Treatment Rule.

(a) Policy: treating physician may reassure patient that nothing is wrong, until it is too late for the patient to bring action.

(b) So c/a accrues when course of treatment ends. Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979); Fenton v. Denaceau, 220 Va. 1, 225 S.E.2d 349 (1979). Grubbs v. Rawls, 235 Va. 607, 369 S.E.2d 683 (1988) - clarifies that S/L does not begin to run until termination of doctor-patient relationship for same or similar illness. Justice v. Natvig, 238 Va. 178, 381 S.E.2d 8 (1989).

(3) Wrongful birth, wrongful life, and wrongful conception: no discovery rule. See Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986). Scarpa v Melzig, 237 Va. 509, 379 S.E.2d 307 (1989) (right of action for negligent sterilization accrues on date of surgery) has been overruled by Nunnaly v. Artis, 254 Va. 247, 492 S.E.2d 126 (1997) (where S.Ct. holds that no injury for wrongful conception until there is a pregnancy). This is not a reject of "discovery" rule, but a recognition that there is no injury until conception.

(4) In product liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, where the fact of the injury and its causal connection to the implantation is first communicated to the person by physician. §8.01-249(7).

e. Injuries due to defective workmanship in buildings

(1) Statute of repose (§ 8.01-250) applies to personal injuries too. See supra, 3.d(2)(c).

f. Products Liability

(1) C/a on negligence theory accrues at injury, not purchase of product.

See Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969); Barnes v. Sears, Roebuck & Co., 406 F.2d 859 (4th Cir. 1969).

5. Developing Rules for Professionals

a. Health Care Providers

(1) See supra 4.d.

b. Attorneys

(1) Title Search: c/a accrues when certificate is rendered by attorney. Clemmer v. Cobbs (Cir. Ct. 1984, unreported)

(2) Continuous treatment rule extended from M.D.s. Keller v. Denny, 232 Va. 512, 352 S.E.2d 327 (1987) ("does not begin to run . . . until termination of undertaking or agency"). Cf. Wood v. Carwile, 231 Va. 320, 343 S.E.2d 346 (1986) (quantum meruit claim; S/L begins to run at termination of undertaking).

c. Architects

(1) Improper design: statute of repose runs from date of approval of plans. VMI v. King, 217 Va. 751, 232 S.E.2d 895 (1977).

(2) But see earlier Federal Court cases, holding that breach of warranty occurs at time architect tenders plans. McCloskey & Co. v. Wright, 363 F. Supp. 223 (E.D. Va. 1973); Federal Reserve Bank v. Wright, 392 F. Supp. 1126 (E.D. Va. 1975). But c/a for negligent supervision runs from date of completion of the work or if divisible contract from the completion of each phase of the work. Id. at 1132.

(3) K c/a, although "sounding in" tort. VMI, supra.

d. Accountants

(1) On termination of services. Boone v. Weaver, 235 Va. 157, 365 S.E.2d 764 (1988).

6. Accrual of Miscellaneous Causes of Action

a. Fraud or mistake (§ 8.01-249(1)).

(1) Discovery rule. See Gilmore v. Basic Industries, 233 Va. 485, 357 S.E.2d 514 (1987); Eshbaugh v. Amoco Oil Co. 234 Va. 74, 360 S.E.2d 350 (1987).

b. For money on deposit with a bank; when request in writing is made therefore, e.g. by check. (§ 8.01-249(2)).

c. For malicious prosecution or abuse of process; when relevant action is terminated. (§ 8.01-249(3)).

d. For contribution or indemnity; when contributee or indemnitee discharges the obligation. (§ 8.01-249(5). Compare Nationwide Mutual v. Jewel Tea Company, 202 Va. 527, 118 S.E.2d 646 (1961) with United Services Automobile Assoc. v. Nationwide Mutual Ins. Co., 218 Va. 861, 241 S.E.2d 784 (1978) (insurance co. subrogee must file a suit against tortfeasor within the same time period as its insured is required to file his c/a.)

(1) But remember, 3d party claim may be asserted before c/a has accrued. See § 8.01-281A.

e. On bonds of fiduciaries. (§ 8.01-245(C)).

(1) Accrues on the first of

(a) return day of execution

or (b) time of right to require payment or delivery upon court order.

f. Relative to account settled by fiduciary. (§ 8.01-245(B)).

(1) Suit to hold fiduciary liable for any balance

or (2) suit to surcharge or falsify such account

(3) accrues when account is confirmed.

g. For libel: on publication - one year limitation § 8.01-247.1.

(1) if republished, new S/L runs from date of republication.

h. For conspiracy to injure business (§ 18.2-500): when injured, i.e. some damages sustained. Eshbaugh v. Amoco Oil Co., 234 Va. 74, 360 S.E.2d 350 (1987).

i. Enforcement of construction payment bond (§ 11-23): last date on which insured principal performed labor or supplied materials. Southwood Builders v. Peerless Ins. Co., 235 Va. 164, 366 S.E.2d 104 (1988).

j. In action for injury resulting from sexual abuse occurring during infancy or incapacity of the person, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. Sexual abuse means sexual abuse as defined in subsection 6 of § 18.2-67.10 and acts constituting rape, sodomy, object sexual penetration, or sexual battery as defined in Article VII (§18.2-61 et seq.) of Chapter IV of Title 18.2.

k. For injury to person resulting from exposure to asbestos, when a diagnosis of asbestosis, etc. is first communicated to the person or his agent by a physician with the proviso that no such action may be brought more than two years after the death of such person.

l. Products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, when the fact of the injury and its causal connection to the implantation is first communicated to a person by a physician.

m. Actions on open account from the latter of the last payment or last charge for goods and services rendered on the account.

E. Limitation Periods - What S/L Applies

1. Quick Look at the major ones.

a. Contracts

(1) oral: 3 years (§ 8.01-246(4)).

(2) UCC sales contracts: 4 years (§§ 8.01-246; 8.2-725). Rapp v. Whitlock, 222 Va. 80, 279 S.E.2d 133 (1981).

(a) May be reduced to not less than 1 year by agreement.

(3) written: 5 years (§ 8.01-246(2)).

(a) Legal malpractice actions are breach of contract actions. Where existence of a written contract is proven, the limitations period is 5 years; without proof of a written contract, the 3 year statute of limitations for oral contracts applies. The statute of limitations begins to run when the particular undertaken or transaction terminated. Machellan v. Throckmorton, 235 Va. 341, 367 S.E.2d 720 (1988).

(4) Notes (§ 8.3A-118)

(a) Six years after due date on a note payable at a definite time.

(b) On a demand note, ten years after last payment of principal and interest if no demand made

(c) Six years after demand on demand note

(d) Three years after notice of dishonor of draft

(e) Three years to enforce obligations of the acceptance of a certified check on the issues of a teller's check, cashier's check, or travelers' check

(f) Six year certificate of deposit.

b. Tort

(1) Personal injuries: 2 years. (§ 8.01-243(A)).

(2) Property damages: 5 years. (§ 8.01-243(B))

(a) includes parents' c/a arising from tortious personal injury to child. Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936)

(b) includes c/a for unauthorized use of name for trade purposes. (§8.01-40). Lavery v. AMCI, supra, at p. 2.

(c) includes S.H. dissenter's rights. Willard v. Moneta Bld. Supply, 258 Va. 140, 515 S.E.2d 277.

(3) Wrongful Death: 2 years from date of death if death occurs within two years from the date the c/a accrues. (§ 8.01-244(B)).

(4) Damages resulting from fraud: 2 years. (§ 8.01-243(A)) for c's/a accruing after July 1, 1987. See Acts of Assembly 1987 C. 679.

c. Adverse possession: 15 years. (§ 8.01-236).

d. Va. Judgments: 20 years but can be renewed for 20 years upon show cause motion. (§ 8.01-251(A)). But GDC judgments only 10 years unless extended or docketed in Cir. Ct. (§ 16.1-94.1).

e. But is it necessary to have different periods? 1987 Boyd Graves Conference proposal for uniform limitation period; 2 years for personal injury; 5 years for all other personal actions.

2. What is Contract and What is Tort?

a. See D.1.a., supra.

b. Products Liability.

(1) Action for damage to defective product itself: contract (warranty) action.

(2) Action for damage to other property and personal injuries: tort.

(3) See Appalachian Power Co. v. G.E., 508 F. Supp. 530 (W.D. Va. 1980), affirmed by 665 F.2d 1038 (4th Cir., 1981) (court looks to origin of relationship to determine applicable S/L).

(4) Different periods apply to different theories of relief (and remember, c/a accrues at different times under different theories). See e.g., Stone, supra (warranty and negligence theories). [But Stone probably is not last word on this issue].

c. Sensenbrenner v. Rust, supra at p. 129 - damages to building resulting from breach of K.

3. Policy for tort/K distinction

a. Contracts came out of friendly relationship: provide longer period to encourage friendly resolution.

(1) And very long (5 yr.) period where major evidence (the K) is preserved in writing.

(2) But what about evidence of the breach?

(3) and would not a shorter period encourage speedier settlement or abandonment of relationship, i.e., bring the matter to a head?

b. No such friendly relationship in tort, so short period to clear the air.

(1) Quaere: would a longer period help injured Ps? Or would it just delay distribution of compensation?

4. Other Periods

a. Fraud: 2 yrs. (§ 8.01-243(A)). Code section adopted in 1987; changed Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986); see Toner & Son v. Staunton Prod. Credit, 237 Va. 155, 375 S.E.2d 530 (1989).

b. Personal actions for which no other period is specified: prior to 7/1/91 - 1 yr. (§ 8.01-248). Does not cover W/D, which has its own provisions. Horn v. Abernathy, 231 Va. 228, 343 S.E.2d 318 (1986). Every personal action accruing on or after July 1, 1995, for which no other limitation is otherwise prescribed, shall be brought within two years after the right to bring the action has accrued. However, every action for injury resulting from libel, slander, insulting words, or defamation shall be brought within one year after the cause of action accrues. §8.01-247.1. False advertising claims are subject to catch-all. Parker Smith v. StoCorp., 262 Va. 432, 551 S.E.2d 615 (2001).

Confusion is caused by varying terms used in Code to refer to personal injuries, e.g. personal injuries (§ 8.01-243(A)); injury to the person (§ 8.01-230); injuries to the person (§ 8.01-246); bodily injury (§ 8.01-250.

(Source: Report of Judge Zepkin and Professor Donaldson to 1986 Boyd-Graves Conference).

c. Civil Rights Cases under 42 U.S.C. 1983: 2 yrs.

(1) Federal Statute does not contain S/L,, so Va. applies. Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978).

d. Recognizances: 10 years (§ 8.01-246).

(1) except recognizance of bail in civil suit: 3 years.

e. Settlement of Partnership Accounts and Joint Ventures: 5 years. (§ 8.01-246(B)) Roark v. Hicks, 234 Va. 470, 362 S.E.2d 711 (1987).

f. Breach of condition subsequent or reversion: 10 years (§ 8.01-255(1)).

g. Fiduciaries and fiduciary bonds: 10 years (§ 8.01-245).

h. Avoidance of voluntary conveyance: 5 years (§ 8.01-253).

(1) from recordation

(2) if not recorded, discovery (actual or should have)

i. Enforcement of legacies and devises as charge on land: 20 years (§8.01-254).

j. Foreign c/a.

(1) General Rule: forum governs limitation period.

(2) Exceptions:

(a) If foreign statute creating c/a also prescribes limitation period, then it (the foreign period) governs. Norman v. Baldwin, 152 Va. 800, 148 S.E. 831 (1929).

(b) Ks governed by law of foreign jurisdiction; apply shorter of foreign or Va. S/L (§ 8.01-247). Hansen v. Stanley Martin Cos, 266 Va. 345, 585 S.E.2d 567 (2003). See, Zukowski v. Dunton, 650 F.2d 30 (4th Cir. 1981).

k. Suits on foreign judgments. (§ 8.01-252).

(1) shorter of

(a) foreign S/L and

(b) 10 years.

See e.g. Carter v. Carter, 232 Va. 166, 349 S.E.2d 95 (1986) (foreign judgment creditor may have up to 30 years to enforce his judgment).

l. And don't forget Federal Law.

(1) May impose its own S/L, e.g. motion to vacate arbitral award under Federal Arbitration Act. 3 months. Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986).

F. Tolling the Running of S/L (§ 8.01-229).

1. When Filing of an Action is Obstructed (§ 8.01-229(D)).

a. filing bankruptcy

b. using any other direct or indirect means to obstruct the filing of the action.

(1) example - Jayne v. Kane, 140 Va. 27, 124 S.E. 247 (1924); Newman v. Walker, 270 Va. 291, 618 S.E.2d 336 (2005).

(2) But does it toll if P has lien on property in Virginia.

(3) Does not toll if long-arm jurisdiction available; D has to obstruct by moving from State.

See Bergman v. Turpin, 206 Va. 539, 145 S.E.2d 135 (1965) (interpreting old § 8.78.1 and -67.2, non-res. motorist).

(4) Fraud by D. preventing suit. See Jayne v. Kane, supra (false representation that D was still living in W.Va.). But quare: is Jayne still good law after passage of long-arm statute. Cf. Bergman, supra. Newman v. Walker, supra, at F.1.b.(1) (giving a false name at scene of accident if misrepresentation intended to obstruct filing of action.

(5) Affirmative misrepresentation of scene of accident. Newman v. Walker, 270 Va. 291, 618 S.E.2d 336 (2005).

c. Does not stop the 10 year period of § 8.01-251(c) (lien of judgment) despite § 8.01-229.

2. Filing of proper court action on the c/a.

a. But it must be the same c/a; a boundary case does not toll S/L on c/a based on trespass. Brunswick Land Corp. v. Perkinson, 153 Va. 603, 151 S.E. 138 (1930).

(1) Court proceeding suspends S/L if merits not determined during pendency of proceeding. (§ 8.01-229(E)(1)). (Does this apply to a c/a dismissed for failure to serve process within a year under Rule 3.5(e)? The answer is yes, but see, Clark v. Butler, 238 Va. 506, 385 S.E.2d 847 (1989) where P may take a nonsuit before entry of order dismissing action and § 8.01-229(E)(3) allows P to refile within six months.

(a) If P takes voluntary nonsuit under § 8.01-380, may recommence within the balance of original S/L or 6 months from nonsuit. (§ 8.01-229(E)(3)). See, Sherman v. Hercules, Inc., 636 F. Supp. 305 (W.D. Va. 1986).

(b) The 6 month period run from date of court order confirming same. See § 8.01-229(E)(3).

(c) If D dies after nonsuit taken, the original action must be "recommenced" within the 6 months nonsuit period (§ 8.01-229(E)(3)) or within one year of appointment of personal representative. (§ 8.01-229(B)(1)) whichever is longer.

(2) If a judgment or decrees is arrested or reversed upon a ground which does not preclude a new action for the same cause, a new action may be brought within one year after such arrest or reversal (§ 8.01-229(E)(2)). See Woodson v. Commonwealth Utilities, Inc., 209 Va. 72, 161 S.E.2d 669 (1968).

(3) In the event of loss or destruction of any of the papers or records in a former action commenced within the prescribed S/L period, a new action may be brought within one year after such loss or destruction but not after. (§ 8.01-229(E)(2))

(4) Counterclaim and cross-claim tolls S/L from commencement of P's action. (§ 8.01-233(B))

(a) only if arise out of same transaction/occurrence.

(5) "John Doe" action. See § 38.2-2206(g) – three years from filing of John Doe suit to bring in party who caused injury.

(6) Creditor's actions suspend S/L for provable debts. (§ 8.01-229(H))

(a) provided they are brought before Commissioner under 1st reference for account of debts;

(b) otherwise runs until later accounting order or independent action.

b. But amendment introducing a new c/a or making a new demand does not relate back to filing of pleading now amended. Neff v. Garrard, 216 Va. 496, 219 S.E.2d 878 (1975), supra.

c. Amendment does relate back to date of filing if court finds (1) claim arose out of conduct, transaction, or occurrence set forth in original pleading; (2) amending party reasonably diligent in asserting claim; and (3) opposing party will not be substantially prejudiced. See § 8.01-6.1

3. Death. (§ 8.01-229(B)).

a. Death of P; personal c/a accrued before death (§ 8.02-229(B)(1)).

(1) Period is longer of

(a) original S/L

(i) provided it didn't expire before death

and (b) One year after qualification of P/R

(i) But if P/R not qualified within 2 years of death, deemed to have qualified within 2 years of death (§ 8.01-229(B)(6)). So maximum period is 3 years from death.

b. Death of P; personal c/a accruing to P's estate (after death) (§ 8.01-229(B)(5)).

(1) Period is longer of

(a) original S/L

(i) provided it didn't expire before death

(b) one year after qualification of P/R

(i) same limitation where delayed qualification

c. Death of P; Wrongful Death Actions (§ 8.01-244)

(1) If no action pending for personal injury

(a) c/a accrues on death

(i) provided S/L has not yet run

(b) S/L: 2 years

(c) but if WD action dismissed within two years w/o determining merits (including non-suit), S/L tolled for period such action was pending

(2) N/A to death of P/R. Horn v. Abernathy, 231 Va. 228, 343 S.E.2d 318 (1986).

(3) If action is already pending, see a., supra

d. Death of D; personal c/a accrues before death (§ 8.01-229(B)(2))

(1) Period is longer of

(a) original S/L

(i) provided it didn't expire before death

(b) One year after qualification of the P/R

(i) same limitation where delayed qualification

e. Death of D; personal c/a accruing against D's estate (after death) (§ 8.01-229(B)(4))

(1) Later of

(a) Original S/L

and (b) Two years after qualification of P/R

(i) same limitation where delayed qualification

4. Disability. (§ 8.01-229(A))

a. What disability – See §8.01-2(6):

(1) Infant - 18 years.

(2) Incapacitated person.

(a) Either having been adjudged mentally incapable of rationally conducting his own affairs, or

(b) Otherwise appearing the Court or jury that he is or was thus incapable of conducting his own affairs within the prescribed limitation period.

(c) For matter of proof, see Fines v. Kendrick, 219 Va. 1084, 254 S.E.2d 108 (1979).

(3) Convict

(a) But only applies if convict institutes suit against his committee.

b. As of when:

(1) The old law required the disability to have existed when the c/a accrued. Whitehurst v. Duffy, 181 Va. 637, 26 S.E.2d 101 (1943).

(2) The new law causes the period of disability (for a convict the period of incarceration) to toll the statute whether it exists at the time when the c/a accrued or later arises.

c. Effect:

(1) Period of disability is not counted.

(a) Except, as to incapacitated, where a guardian or conservator is appointed, he may begin an action before the period of the S/L or within one year after his qualification, whichever occurs later.

(b) As to convict, only vs. his committee.

(2) So, for injury to infant, S/L does not begin to run until he reaches 18, then runs for 2 more years.

(a) 1987 Code amendment limits this for medical malpractice injuries, where c/a accrues on or after 7/1/87. Action must be brought by date of tenth birthday or 2 years from injury. (§ 8.01-243.1).

d. Ultimate period.

(1) Under old law, statute of repose of 20 years from accrual and despite disability.

(2) Under new law, no ultimate period.

e. Do not forget that an infant, incapacitated person, and convict can all sue during disability.

(1) Of course, if the conservator or guardian of any of these does not do so, he could be held to account, and perhaps the infant, incapacitated, or convict is protected.

5. Effect of new promise (§ 8.01-229(G))

a. Start running of a new limitation period from date of new promise. Ingram v. Harris, 174 Va. 1, 5 S.E.2d 624 (1939).

(1) So not strictly speaking a "tolling" of the original S/L. The period is fixed by the instrument or transaction containing the original promise, not by the instrument of the new promise.

b. Applies only to award or K claims.

(1) Excludes judgment or recognizance.

(2) Excludes torts.

c. Requirements:

(1) Must be in writing and signed by debtor.

(a) Need not be gratuitous. Guth v. Hamlet Assocs., Inc., 230 Va. 64, 334 S.E.2d 558 (1985) (status and tax reports made in compliance with the original K).

(2) New promise may be an acknowledgment from which promise may be implied. Nesbit v. Galleher, 174 Va. 143, 5 S.E.2d 501 (1939).

(a) If debt is acknowledged, promise to pay will be implied.

(b) May be very skimpy.

(3) Must be made by debtor or agent.

(4) Must be made to the creditor.

(a) But may be made indirectly. See Bickers v. Pinnell, 199 Va. 444, 100 S.E.2d 20 (1957) (decedent in his lifetime directed his personal representative to pay a bill owing to his daughter).

(5) No new consideration is required.

d. Is effective whether made before or after S/L has expired. Ramey v. Ramey, 181 Va. 377, 25 S.E.2d 264 (1943).

e. Procedure:

(1) If D pleads S/L, P need not give notice before trial of intent to rely on the new promise, unless D expressly calls for a reply.

(a) Rule 3:11, replication, covers this procedural matter also.

f. By P/R. (§ 8.01-232(B)).

(1) Does not revive the c/a or start new S/L running.

(2) P/R must plead S/L, and may not waive.

(3) If P/R pays a barred claim, he is liable to the estate. (§ 26-5).

G. Estoppel to plead the S/L (§ 8.01-232)

1. Promise not to plead S/L, written or oral, is operative only when it would be a fraud on the creditor to permit S/L.

a. And old-timey fraud is meant: misrepresentation of present fact, not future intention. Soble v. Herman, 175 Va. 489, 9 S.E.2d 459 (1940).

b. If no fraud

(1) Unwritten promise is void.

(2) Written promise shall have the effect of a promise to pay.

(3) And the debtor must be the promisor (not, e.g., his personal representative). See Soble v. Herman, supra.

H. Who may plead the S/L

1. Generally the D only.

a. But in creditors' suits and other proceedings to liquidate debtor's assets, all creditors who participate can toll the S/L; and one creditor may plead S/L against another. Callaway's Administrator v. Saunders, 99 Va. 350, 38 S.E. 182 (1901).

I. Limitations and Laches Claims in Equity

1. Four situations

a. Cases where claims are equitable.

(1) Equity will follow the law and apply legal S/L

(2) Examples:

(a) Suit in equity to enforce a lost negotiable note.

(b) Suit in equity to enforce copyright and incidentally have an accounting.

b. Following legal analogy

(1) D procures conveyance of P's land by fraud and holds for statutory period. P sues to rescind. Equity would follow the legal S/L period.

(a) But excludes time the P was reasonably unaware of the fraud. (See d.(2) infra).

c. Claims purely equitable: laches, not S/L

(1) Examples:

(a) Beneficiary under trust.

(b) Compel re-execution of lost instruments.

(2) Here: purely equitable doctrine of laches applies. Rowe v. Big Sandy Coal Corp., 197 Va. 136, 87 S.E.2d 763 (1955).

(a) Each case depends on own peculiar facts.

(b) Factors:

(i) Length of time.

(ii) Unavailability of witnesses.

(iii) Loss of material evidence.

(iv) P's opportunity to bring the proceeding before.

(v) P's negligence.

(c) If long delay, there may be presumption against the laggard, e.g., 20 yrs. for foreclosure of mortgage; 5 yrs. for suit to set aside voluntary conveyance.

d. Equity may nonetheless grant relief, if alternative relief, not time barred by S/L, is available. Johnson v. Buzzard Island Shooting Club, 232 Va. 32, 348 S.E.2d 220 (1986) (statutory action to repeal land grant barred by 10 yr. S/L; but court could still remove cloud on title).

IX. DISCOVERY

A. Overview

1. Rules Part Four (R 4:0)

a. Law and equity claim.

(1) "action" includes claims in law and equity.

(2) in practice, major fact-finding vehicle on any claim is deposition. (See R 4:7(a)(1) and (4)). "Deposition de bene esse."

b. Circuit Courts only

(1) No discovery in GDC, except subpoena duces tecum (SDT: request for production of documents)

(a) in GDC, SDT may be directed to a party as well as a non-party. (§ 16.1-89)

(b) policy: if less than $1,000, expense of discovery not justified; if more than $1,000, P has option of raising action in Cir. Ct. and having discovery there.

(c) in practice, GDC trial may serve purpose of free discovery. Remember right to new trial (de novo) in Cir. Ct.

c. Parties and Non-Parties

(1) Certain methods are available only against parties.

(2) Remember provisions for bringing in additional parties, Chapter VII, supra.

d. Service

(1) generally informally on counsel. (R 4:1(f); 1:12)

(2) except where depos. before action or pending appeal. (R 4:1(f); 4:2(a)(2)).

e. Filing (R 4:1(g))

(1) Request for discovery and responses thereto

(2) with the clerk of the court where the action is pending.

(3) For depos., see also Rules 4:2(a)(5); 4:6(b).

(4) includes documents and tangible things requested under Rule 4:9(c) and documents under Rule 4:9(a)(2).

(a) Result: some clerk's offices overwhelmed.

(b) These go to the requesting attorney unless court orders that they should go to the clerk.

(5) Filing requirement:

(a) Interrogatories (R 4:8(c)) – not in office of clerk

(b) Requests for Admission (R 4:11(c)) – same.

(c) Oral depositions, other than divorce or annulment. (R 4:5(f))

2. Methods (R 4:1(a))

a. Depositions

(1) parties and non-parties
(2) upon oral examination (R 4:5)
(3) upon written questions (R 4:6).

b. Written Interrogatories (R4:8) – limited to 30.

(1) to parties only.

c. Production of Documents and Things (subpoena duces tecum) (R 4:9)

(1) parties (R 4:9(a),(b) and (c-1)).

(2) non-parties (R 4:9(c) and (c-1).

d. Entry on land (R 4:9(a)(3))

(1) parties only

(2) for inspection and other purposes.

e. Physical and mental examinations (R 4:10)

(1) parties or person in legal custody or control of party

(2) when condition is in controversy

(3) requires court order.

f. Requests for admission (R 4:11)

(1) parties only

(2) for purposes of pending action only

(3) relate to statements or opinions of fact or applications of law to fact

or (4) genuineness of document.

B. Scope (R 4:1(b))

1. Any matter

a. not privileged, relevant to the subject matter (rather than issues). See Dunbar v. U.S., 502 F.2d 506 (5th Cir. 1974) (ownership of money not relevant to the subject matter of the case).

b. Even if evidence will not be admissible at the trial, if it may reasonably lead to admissible evidence. See Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 253, 217 S.E.2d 863 (1975) (evidence of post-accident design change admissible).

(1) so insurance coverage is discoverable (R 4:1(b)(2)).

c. But in domestic relations, eminent domain and prisoner remedy cases, discovery only if relevant to issues. (R 4:1(b)(5)).

2. Note "not privileged"

a. Certain classes of information are privileged, and therefore not discoverable. Generally because of confidential relationship existing between issuer and recipient of such information.

b. Attorney/Client

(1) Client to Atty. NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965)

(2) Atty. to Client. Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968)

(3) House Counsel. See Natta, supra; U.S. v. United Shoe Machinery, 89 F. Supp. 357 (D. Mass. 1950)

(4) Client a corporation S.Ct. has rejected control group test. Upjohn v. U.S. 449 U.S. 383 (1981).

(5) Patent lawyer, a lawyer? Yes and No in Natta, supra; Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D.Cal. 1963)

(6) EEOC a lawyer? Yes: EEOC v. Georgia Pacific Corp., 11 Fair Empl. Prac. Cas. (BNA) 722 (D.Ore. 1975)

(7) Confidential data: See United Shoe Machinery, supra

(8) Evidence as "tainted." See Valencia, 541 F.2d 618 (6th Cir. 1976)

(9) It is the client's privilege, not the atty's. So only client can waive. See e.g. CFTC v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986 (1986) (bankruptcy receiver)

(10) An employee's use of his employer's computer to send emails to employee's attorney is not privileged when employee handbook provided there was no expectation of privacy in using employer's computer.

c. Work Product Doctrine (R 4:1(b)(3))

(1) Applies to materials prepared in anticipation of litigation or trial

(a) although not covered by attorney/client privilege, e.g., because prepared entirely within the atty's office.

(b) Applies not just to attorneys; also party's consultant, insurer, agent, etc.

(2) See Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947); FRCP 26(b)(3).

(3) Party seeking must show that he has

(a) substantial need and

(b) cannot obtain otherwise without undue hardship. See Rakes v. Fulcher, 210 Va. 542, 172 S.E.2d 751 (1970) (old version of R 4:9).

(c) Nixon case is precedent that government must disclose in proper circumstances, e.g., antitrust prosecution, United States v. U.S. Gypsum Co., 1974-2 Trade Cases p.75, 406 (W.D.Pa. 1974).

(4) Court shall protect against disclosure of:

(a) Mental impressions

(b) Conclusions

(c) Opinions

(d) Legal theories. Extends to compilation of documents, the very existence of which may reveal theory. Shelton v. A.M.C., 805 F.2d 1323 (8th Cir. 1986).

d. Physician/Patient (§ 8.01-399)

(1) Waived when patient's condition in issue.

(a) Includes waiver of psychiatric data when psychiatric condition is in issue. See Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976).

(b) Patient's privilege, not physician's

(c) but court can order disclosure.

e. Husband and Wife (§ 8.01-398) (but not when suing each other).

f. Minister of religion (§ 8.01-400).

(1) See Annot., 71 ALR 3d 794.

(2) Priest/penitent privilege vests in the priest, and can be waived by him. Seidman v. Fishburne-Hudgins, 724 F.2d 413 (4th Cir. 1984).

g. Fifth amendment: D's asserting self-incrimination does not alone trigger immunity. North Amer. Mortgage v. Pomponio, 219 Va. 914, 252 S.E.2d 345 (1979).

h. Conflict of interest forms by those applying for U.S. Gov't jobs are privileged. Association for Women in Science v. California, 566 F.2d 339 (1977).

3. Experts of other party (R 4:1(b)(4))

a. Facts known and opinions held, acquired for litigation or trial, are discoverable only as follows.

b. Expert expected to be called at trial

(1) One party may require another through interrogatories to state

(a) Identity of each person whom other expects to call as expert at trial

(b) Subject matter on which he is expected to testify

(c) Substance of his facts and opinions

(d) Summary of grounds for each opinion

(e) May depose expert

(2) Court on motion may order further discovery

(3) Failure to disclose experts' opinions in Interrogatories will preclude the expert from testifying at trial. John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007).

c. Expert not expected to be called at trial.
(R 4:1(b)(4)(B))

(1) His facts and opinions are discoverable only

(a) upon a showing of exceptional circumstances making it impractical for discoverer to obtain by other means.

or (b) under Rule 4:10(c), where medical examination

d. Costs. (See R 4:1(b)(4)(C))

(1) also in eminent domain proceedings, (R 4:1(b)(4)(D)) (no FRCP equivalent).

C. Court Supervision

1. General Rule: None.

2. Exceptions: prior ct. approval where:

a. data of another party's expert, not expected to be called at trial other than by Rule 4:10(c) (R 4:1(b)(4)(B); see B.3.c, supra).

b. early depos. on oral examination

(1) before period for filing of responsive pleading has expired unless

(a) counsel certifies that prospective deponent is about to leave. (R 4:5(a)(2) and (b)(2)).

or (b) D has served a notice of taking deposition, i.e. the responsive period provision is for D's benefit: he waives by serving notice. (R 4:5(a)(1)).

c. production of documents and things by certain officials (R 4:9(c-1))

d. physical and mental examination (R 4:10)

e. in prisoner remedy proceedings (R 4:1(b)(5)(b))

g. limits

(1) depositions: none

(2) interrogatories: no more than 30 interrogatories served on each party. (R 4:8(g)).

3. Exceptions: Protective Orders (R 4:1(a))

a. At instance of

(1) a party

or (2) the person subjected to discovery.

b. What Court:

(1) Where the proceeding is pending, or adjacent city or county, or where all agree.

(2) Nonparty – where resides, employed or agree.

c. When:

(1) before discovery (triggered by receipt of notice)

or (2) during deposition (R 4:5(d))

(a) Deposition may be suspended for time necessary to make a motion for an order.

(b) Costs incurred in relation to motion: awarded per Rule 4:12(a)(4).

d. Scope of order:

(1) Such as required to protect party or person from

(a) annoyance

(b) embarrassment

(c) oppression. See, e.g., Celanese Corp. v. Duplan Corp., 502 F.2d 188 (4th Cir. 1974) (proposed non-party deponent in ill health, and no showing that necessary).

(d) undue burden or expense

(e) during deposition: bad faith.

(2) May include in order that

(a) the discovery not be had

(b) the discovery be had only on specified terms including time and place

(c) discovery be by a different method

(d) certain matters not be inquired into or the discovery be limited to certain matters

(e) no persons be present except those designated

(f) a deposition be unsealed only by order of the Court

(g) trade secrets or other confidential material be not disclosed or disclosed only in a designated way

(h) the parties simultaneously file information in sealed envelopes to be opened only as directed by the Court.

(3) See e.g. Harlem River Consumers Co-op. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551 (S.D.N.Y. 1972) (P's counsel may not use photo of 36 defense lawyers at work on P's documents).

e. Costs; ordering discovery:

(1) If motion for protective order denied in whole or in part

(2) Court may provide for payment of costs (including attorneys' fees) per Rule 4:12(a)(4) incurred in connection with the motion.

D. Supplementation of responses (R 4:1(e))

1. Party is required to supplement responses to the following extent:

a. Info re identity and location of additional persons having knowledge of discoverable matter.

b. Identity of each expert expected to be called at trial, and the subject matter and substance of his expected testimony.

c. If a party learns the response made was incorrect when made or is no longer correct and failure to amend would amount to a knowing concealment.

d. If duty to supplement is imposed by

(1) Order of Court

(2) Agreement of parties

(3) New requests for supplementation, made before trial.

2. No such duty on non-party.

E. Failure to make discovery; sanctions (R 4:12 of FRCP 37)

1. What is failure. (See R 4:12(a)(2) and (3)).

2. Motion for order compelling discovery

a. On reasonable notice to

(1) other parties

(2) persons affected.

b. Deposition (4:5 or 4:6):

(1) made to court at locus of deposition

(2) if during deposition, party may adjourn to seek order.

c. Other discovery than depositions:

(1) interrogatories and subpoena duces tecum: to court where action is pending (R 4:8, 4:9)

(2) remember physical or mental examination has to be ordered by court initially (R 4:10)

(3) request for admission: failure to respond admits; so no point in seeking order (R 4:11(a))

d. Court in denying motion in whole or in part may make protective order under Rule 4:1(c).

e. Expenses (R 4:12(a)(4)):

(1) If court grants or refuses motion, it **shall** put expenses on party or deponent at fault

(a) unless opposition to motion was justified, or

(b) other circumstances made this unjust.

(2) If court grants motion in part, **may** apportion expenses.

f. Failure to comply with order (R 4:12(b)):

(1) sanctions by court where deposition being taken:

(a) contempt of that court (R 4:12(b)(1))

(2) sanctions by court where action pending against party:

(a) holding matter as established for purposes of pending action only

(b) disobedient party precluded from

(i) supporting or opposing designated claims or defenses

(ii) introducing designated matters in evidence

(c) striking out pleadings or parts thereof, staying proceedings until the order is obeyed, or giving judgment by default against the disobedient party

See Bova v. Roanoke Oil Co., 180 Va. 332, 23 S.E.2d 347 (1942)

See Dunbar v. United States, 502 F.2d 506 (5th Cir. 1974)

(d) contempt of court

(i) But not for failure to obey order to submit to physical or mental examination.

(ii) E.g., D.C. order fining IBM $150,000 per day upheld and not appealable: IBM v. U.S., 471 F.2d 507 (2d Cir. 1972).

(e) Specifically where party fails to produce non-party for examination under 4:10(a), sanctions may be applied on party

(i) unless the party can show he could not produce the non-party.

(f) Allotment of expenses against party or his attorney.

3. Failure to admit under Rule 4:11.

a. Taken as admitted. (R 4:11(a)).

or b. Expenses: If party requesting proves what was asked, requester may apply to court for expenses incurred in making the proof, including attorneys' fees

(1) Court **shall** so order unless it finds

(a) the request was objectionable under 4:11(a);

or (b) the admission sought was unimportant;

or (c) requestee had reasonable ground for thinking he might prevail;

or (d) other good reason for failure.

4. Other failure of party. (R 4:12(d)).

a. Regardless of prior order compelling discovery, if party fails to

(1) appear before officer for deposition after proper notice;

or (2) serve answers or objections to interrogatories under Rule 4:8;

or (3) serve written responses to request for admissions under Rule 4:9,

(4) even if discovery was objectionable, but no protective order sought

b. Then court where action is pending **may**

(1) take such action as is just, including steps under Rule 4:12(b)(2) paragraph (A), (B), and (C)

c. And court **shall** cause defaulting party to pay reasonable expenses including attorneys' fees unless

(1) default was substantially justified

or (2) other circumstances make the award unjust.

F. A Study Of Federal And Virginia Rules Of Discovery

Significant differences are indicated by underlined comments

		F.R.C.P.	Va. Rule	Comment
INTERROGATORIES TO ADVERSE PARTIES.		Rule 33	Rule 4:8	
1.	Of Right.	33(a)	4:8(a)	Leave of court not required as to service on P or after D served with process.
2.	Service.	5(b)	1:12	Service is made by delivering or mailing a copy to counsel of record or upon the adverse party if he has no counsel of record.
3.	Answer.	33(a)	4:8(d)	The interrogatories shall be answered separately and fully in writing under oath signed by the party served, (or objected to) and served on the party submitting them as indicated above within twenty-one days (30 days under F.R.C.P.) except that a D may serve answers within twenty-eight days (45 days under F.R.C.P.) after service of process.
4.	Form.	*	4:8(b)	Virginia Rule requires that proponent leave spaces for responses.
5.	Scope.	26(b)	4:1(b)	Interrogatories may relate to any matter which can be inquired into under rule defining the general scope of discovery. Remember, under Virginia Rule of Court 4:1(b), scope of discovery is narrow in cases involving divorce, habeas corpus or eminent domain.
6.	Answers Used as Evidence.	33(b)	4:8(e)	Answers to interrogatories may be used to the extent permitted by the rules of evidence and may also be used in connection with motions for summary judgment.
7.	Filing with Clerk.	5(d)	4:8(c)	Filing is no longer required under Virginia rules; under F.R.C.P., required unless Court orders otherwise.

8.	Limitations on Interrogatories.	[some local Rules]	4:8(g)	Under Virginia rules, no party shall without leave of court serve upon another party more than thirty interrogatories. Similar requirements are promulgated by local rule in some federal district courts.
9.	Option to Produce Business Records	33(c)	4:8(f)	Where the answer to Interrogatories may be derived or ascertained from business records of party upon whom served, sufficient to allow party serving access thereto.
REQUESTS FOR ADMISSIONS.		Rule 36	Rule 4:11	Virginia enacts F.R.C.P. 36 almost verbatim; Rule of Court 4:11 only changes the time within which a written answer or objection must be served by the party from whom the admission is requested before the matter is deemed admitted.
1.	Availability.	36(a)	4:11(a)	May be served only by a party upon another party to the action, and only after action is commenced.
2.	Documents admitted as Genuine.	36(a)	4:11(a)	Admission of truth of any matters within the scope of discovery relating to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.
3.	Leave of Court.	36(a)	4:11(a)	Not necessary if served upon the P after commencement of the action and upon any other party with or after service of the bill of complaint or motion for judgment upon that party.
4.	Service	36(a); 5(b)	4:11(c); 4:8; 1:12	Requests and answers or objections thereto are served by mailing or delivering copies to counsel of record, or to the party if he has no counsel of record, and certifying compliance with this requirement.

5.	Admission if no response	36(a), 2d para.	4:11(a), 2d para.	Matter as to which admission is reqested is deemed admitted unless within 21 days (30 days under FRCP) after service of the request or 28 days (45 days under F.R.C.P.) for Ds after being served with process or within such shorter or longer time as the court may allow, there is served an objection with grounds stated or a denial in whole or in part or a qualified answer or a statement of reasons why a matter cannot be admitted or denied. See, e.g., Clifton v. Gregory, 212 Va. 859, 188 S.E.2d 203 (1972) (neither admitted nor denied, alleged totally deaf).
6.	Restriction	36(a), (b)	4:11(a), (b)	Admissions are for the purpose of the pending action only and cannot be used against a party in any other proceeding.
7.	Filing.	5(d)	4:11(c); 4:8	As for interrogatories: not required under Virginia rules; required under FRCP unless court order.
PRODUCTION OF MATERIALS AND DOCUMENTS AND ENTRY FOR INSPECTION				
I	**In Possession of a Party**	Rule 34	Rule 4:9	
1.	Availability.	34(a)	4:9(a)	Available only to a party from another party to the action.
2.	Subject matter	34(a)	4:9(b)	Documents, tangible things or land in control/possession of party to be made available to other party's inspection.
3.	Service.	34(b); 5(b)	4:9(b); 1:12	Notice served on counsel
4.	Filing of Request	5(d)	4:9(e) (4:8(c))	Not required under Virginia Rule
5.	Description of Items.	34(b)	4:9(b)	The request shall set forth the items to be inspected either by individual item or by category, describing each with "reasonable particularity."

6.	Time, Place, Etc. of Inspection.	34(b)	4:9(b)	The request shall specify a reasonable time, place, period and manner of making the inspection and performing the related acts.
7.	Leave of Court.	34(b)	4:9(b), (c-1)	Not necessary if served upon P after commencement of action and upon any other party with or after service of the bill of complaint or motion for judgment upon that party, except with respect to certain officials under Virginia Rule.
8.	Response to Request-Time	34(b)	4:9(b)	Party served with a request must make a written response within 21 days (30 days under F.R.C.P.) except for a D who may serve a response within 28 days (45 days under F.R.C.P.) after service of bill of complaint or motion for judgment upon that D. The court may allow shorter or longer time.
9.	Response to Request--Contents.	34(b)	4:9(b)	Must state that the request is granted or denied with respect to each item. Reasons for any objection must be stated. Party submitting request may move for an order respecting any failure to re-spond.
II	**In Possession of a Non-Party.**	Rule 34(c)	Rule 4:9(c)	Federal Rules do not address this except to state that independent action against a person not a party for production of documents, etc. is not precluded by the rules. In Virginia courts this procedure involves a subpoena duces tecum.
1.	Written Request	*	4:9(c)	The party seeking production must file a written request with the clerk. Notice must be given to adverse parties. The clerk will issue a subpoena duces tecum requiring the person in whose possession the documents etc. are to produce them before the clerk or court, who shall permit inspection.
2.	Leave of Court	*	4:9(c)(2)	May be issued by attorney.
3.	Subject matter	*	4:9(c)	Documents and tangible things.

4.	Motion to Quash.	*	4:9(c)	On motion the court may quash or modify the subpoena.
5.	Filing	*	4:9(c)	Required in court where action pending or through which items subpoenaed, unless counsel agree on alternative.
MENTAL OR PHYSICAL EXAMINATION OF PARTY.		Rule 35	Rule 4:10	
1.	Availability.	35(a)	4:10(a)	Available to a party against a party or a person under the custody or legal control of a party where condition is in controversy. Only on motion for good cause shown after notice to all parties and (if non-party), to the person to be examined. See e.g., Virginia Linen Serv. Inc. v. Allen, 198 Va. 700, 96 S.E.2d 86 (1957).
2.	Specifications	35(a)	4:10(a)	Order must specify the time, place, manner and scope of the examination and the physician or physicians to make the examination.
3.	Effect of Examined Party's Taking Deposition.	35(b), (1), (2)	4:10(c)(2)	If the party examined takes the deposition of any physician conducting an ordered examination, the party examined waives any privilege between himself and his own physician with respect to the condition in controversy. Under F.R.C.P., this also applies where examined party requests copy of examination report.
4.	Report of Examining Physician.	35(b)(1)	4:10(c)(1),(2)	Under Virginia Rule, is filed with clerk and is not evidence unless tendered by the party examined. Under F.R.C.P., report must only be delivered to party against whom the order is made or the person examined.
5.	Examination by Agreement of Parties.	35(b)(3)	4:10(c)(3)	Covered by Rule unless specify otherwise.

6.	Resident of Commonwealth	*	4:10(b)	Under Virginia rules, the physician must be a resident of Virginia unless the court deems that in the interest of justice a non-resident physician should be allowed.

DEPOSITIONS

I	**Depositions before action is commenced.**	Rule 27	Rule 4:2	
1.	By Petition	27(a)(1)	4:2(a)(1)	A person who desires to perpetuate his testimony or that of another person regarding a matter may petition the court in the district or city or county of residence of any expected adverse party.
2.	Notice and Service.	27(a)(2)	4:2(a)(2)	The petitioner thereafter must serve notice upon all expected adverse parties. Service must be made at least twenty-one days (20 days under F.R.C.P.) before the hearing. Service outside Va. § 8.01-320) or by OOP possible.
3.	Covers.	27(a)(3)	4:2(a)(3)	Depos, s.d.t. phy/mental exam.
4.	Use.	27(a)(4)	4:2(a)(6)	If a deposition to perpetuate testimony is allowed, it is usable in any action involving the same subject matter in accordance with other rules regarding uses of depositions.
5.	Perpetuation by Action.	27(c)	*	Under F.R.C.P. testimony may also be perpetuated by action; in Virginia, Rule 4:2 is the exclusive provision.
6.	Filing.	30(f)	4:2(a)(5)	Must be filed with clerk.
7.	Costs	*	4:2(a)(4)	Paid by petitioner, unless others produce own witnesses or make use of those produced by others.
II	**Depositions pending appeal.**	Rule 27(b)	Rule 4:2(b)	Similar to depos. before action is commenced.
III	**Persons before whom depositions may be taken.**	Rule 28	Rule 4:3	

1.	Authorized Person.	28(a)	4:3(a)	Depositions may be taken before any person authorized by law to administer oaths in Va., or otherwise authorized to take depositions in a foreign jurisdiction. Don't need judge.
2.	Uniform Foreign Deposition Act	*	C.§ 8.01-411	Permits parties to litigation in other states to depose witnesses in Virginia. Every state and the District of Columbia has provisions permitting litigants in Virginia to invoke its laws to compel persons to appear and testify at depositions. See Bryson, Handbook on Virginia Civil Procedure, p. 222.
3.	Disqualification for interest	28(c)	*	
IV	**Stipulations regarding depositions (and other discovery procedure).**	Rule 29	Rule 4:4	F.R.C.P. and Va. Rules of Court are essentially identical granting parties broad discretion to modify discovery procedures, including agreement that depos. may be taken before a person other than one specified above. Federal Rules require court approval to extend the time allowed for responses to interrogatories or requests for admission or production.
V	**Oral Depositions.**	Rule 30	Rule 4:5 Rule 4:7 A	Audio visual
1.	Of whom.	30(a)	4:5(a)	Party and non-party.
2.	Leave of Court.	30(a)	4:5(a)	Generally leave of court is not required unless P seeks to depose a witness within twenty- one days (30 days under F.R.C.P.) after service of complaint upon any D.
3.	Notice.	30(b)(1)	4:5(b)(1)	Reasonable notice to all parties is required.
4.	By Telephone.	30(b)(7)	4:5(b)(7)	The parties may stipulate in writing that a deposition be taken by telephone.
5.	Subpoena of Witnesses.	30(g), 45	4:5(g)	If party fails to do so and witness does not show, cost penalty against party.

6.	Corporate deponent.	30(b)(6)	4:5(b)(6)	Organization must designate officer, etc. to appear on its behalf.
7.	Limitation on Number	[some local rules]		None.
8.	Examination.	30(c)	4:5(c)	As at trial. On oath administered by officer taking deposition. Examination and cross-examination.
9.	Objections.	30(c) 2d para.	4:5(c) 2d para.	To manner of taking, form of questions etc. Must be made or waived. Ketchmark v. Lindauer, 198 Va. 42, 92 S.E.2d 286 (1956).
10.	Preservation of testimony.	30(b)(4) and (c)	4:9(c), (d)	Transcript on request of one party. Signed by deponent within 21 days unless waived by deponent and parties, or signed by officer with explanation. Deponent may make changes in form or substance.
11.	Production of Materials.	30(b)(1) and (5)	4:5(b)(1) and (5)	Witness may be required to bring documents and things with him, by subpoena duces tecum.
12.	Preservation of Materials.	30(f) 2d para	4:5(f)(1) 2d para.	On request of party, identified and annexed to deposition.
13.	Written Questions.	30(c) 2d para	4:5(c) 2d para	Instead of participating, party may serve written questions on party taking deposition, who transmits them to officer, who propounds them.
14.	Filing.	30(f)	4:5(f)(1)	Required by F.R.C.P.; in Virginia, required only in divorce or annulment, or by order of court.
VI	**Audio Visual Recording**	*	Rule 4:7A	Effective July 1, 1984 Virginia rules provide for taking audio-visual depositions. Requires use of time clock and limits editing. Rule 4:5 applies, with the exception of Rule 4:5(e).
VII	**Depositions on Written Questions**	Rule 31	Rule 4:6	
1.	Of whom.	3l(a)	4:6(a)	Party and non-party.

2.	Service.	31(a)	4:6(a)	Notice designating officer before whom deposition will be taken and questions upon every other party. Within 21 days (30 days under F.R.C.P.) after such service, a party may serve cross questions upon all parties. Within ten days after such service a party may serve redirect questions on all parties. Within ten days after service of redirect questions, a party may serve recross questions.
3.	Officer.	31(b), 30(c), (e)(f)	4:6(b), 4:5(c), (e),(f)	A copy of the notice and all questions must be delivered by the party taking the deposition to the designated officer who will take the testimony.
4.	Subpoena of witnesses.	31(a); 45	4:6(a)	
5.	Filing.	31(b); 30(f)	4:6(b); 4:5(f)	As for oral depositions.
VIII	**Limit on Depositions**	[Some local Rules]		None.
IX	**Uses of depositions**	Rule 32	Rule 4:7	
1.	Against Whom.	32(a)	4:7(a)	As a general rule, a deposition cannot be used against someone who was not a party at the time it was taken.
2.	Similar Matters in Second Proceeding.	32(a)(4)	4:7(a)(7)	If the issues are substantially the same and if the parties had due notice and if they are the same or in privity to parties from an earlier proceeding, deposition from the earlier proceeding can be used.
3.	By Adverse Parties.	32(a)(2)	4:7(a)(3)	Depositions of any party may be used for any purpose by adverse parties.
4.	De Bene Esse.	32(a)(3)	4:7(a)(4)	The general rule is that a deposition of a witness may only be read if not able to testify in person. The offering party must prove unavailability; see Rule for grounds.
5.	To Impeach.	32(a)(1)	4:7(a)(2)	Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent-witness.

6.	Deponent Under Disability.	*	4:7(a)(6)	Under Virginia rules, no deposition may be read against a person under a disability unless his legal representative is actually present or has previously agreed to the questions.
7.	Summary Judgment.	*	4:7(e)	Under Virginia rules, no motion for summary judgment in any action at law or motion to strike the evidence shall be sustained when based upon any oral depositions under Rule 4:5, unless they were received in evidence under the de bene esse rules or all parties agreed. See §8.01-420.
8.	After interlocutory decree.	*	4:7(a)(7)	Deposition may be offered for the first time if principles of after-discovered evidence would permit, or if relates to matters not ruled upon in interlocutory decree.
9.	Whose Witness	*	4:7(c)	Under Virginia Rule, party does not make deponent his witness by taking deposition, but does by using, unless use is to impeach or deponent is adverse party. But any party may rebut contents of depositions.

X. TRIAL: PRELIMINARIES AND INCIDENTS

A. Preliminaries

1. Pre-Trial Conference (R 4:13); Pre-Trial Scheduling Order Rules 1:18; and 1:18 B.

2. Particular Cases

   a. Medical Malpractice. See Medical Malpractice Rules of Practice, promulgated by Chief Justice pursuant to § 8.01-581.11.

      (1) Reprinted at back of Michie Vol. 11.

      (2) Tort claims encompassed by statutory scheme; contract claims outside scope of statutory scheme. Glisson v. Loxley, 235 Va. 62, 366 S.E.2d 68 (1988).

   b. Arbitration (§ 8.01-577)

      (1) Agreement to arbitrate is binding.

      (2) Necessary preliminary to instituting court proceedings

         (a) and will usually preclude suit.

      (3) Enforcement. (See Uniform Arbitration Act, § 8.01-581.01 et seq.)

3. Setting the case for trial. § 8.01-331 to -335)

   a. Practice differs in several jurisdictions

      (1) Some by praecipe. (Cf. Rule 1:15(b)).

         (a) Counsel request court to set date and indicate time and jury required.

         (b) Mails copy to opposing counsel.

         (c) Appearance at "docket call," usually once a month.

         (d) Set date by agreement.

   b. Local Rules of Ct. determine practice (Rule 1:15)

      (1) Counsel's responsibility to ascertain rules of ct. when he becomes counsel of record before it, and abide thereby

(2) Thus good practice to give clerk of ct. a call before hearing and ask for copy of rules in force.

(3) Local rules of court that abridges the substantive rights of parties is void ab initio. Collins v. Shepherd, 274 Va. 369, 649 S.E.2d 672 (2007).

4. Continuances

a. Definition

(1) Deferring the case to another term

b. Distinguish

(1) Setting case: fixing a date for trial

(2) Postponing: delaying to a later date in the same term

c. Discretion of trial court

(1) Except as to the General Assembly Statute (§ 30-5, infra) the trial court has considerable discretion. Jordan v. Taylor, 209 Va. 43, 161 S.E.2d 790 (1968).

(2) Discretion may not be abused. Bradley v. Poole, 187 Va. 432, 47 S.E.2d 341 (1948) (Court excused a specialist doctor retained by defense and refused a continuance. The doctor's advice was required to assist in the defense of the action. Held: error).

d. Grounds

(1) General Assembly (30-5)

(a) Party or his counsel.

(b) Sacred period from 30 days prior to session of Gen. Ass. to 30 days after adjournment.

See Rice v. Com., 212 Va. 778, 188 S.E.2d 196 (1972);

Howell v. Catterall, 212 Va. 525, 186 S.E.2d 28 (1972) (applies to Lt. Gov.).

(c) Continuance of right in this situation only. Rice, supra.

(2) Absence of witness

(a) Evidence must be material. See Shifflett v. Com., 218 Va. 25, 235 S.E.2d 316 (1977); United States v. Wilson, 721 F.2d 967 (4th Cir. 1983).

(b) Evidence must not be cumulative.

(c) Due diligence (including serving or trying to locate and serve, and tender of due compensation) must have been used. See Shifflett, supra. [Practice pointer: subpoena as soon as trial date set.]

(d) Probable availability at next trial must be shown.

(3) Absence of documents

(a) Same requirements as for absence of witness, (2) supra

(4) Absence or unpreparedness of counsel

(a) Not a cause for continuance if due to laxness of party in procuring. See Miller v. Grier S. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951). See also Shifflet, supra; Autry v. Bryan, 224 Va. 451, 297 S.E.2d 690 (1982).

(b) But usually granted if counsel is unavailable because of illness (unless unduly protracted) or has a conflicting case in another court.

(c) Lawyer "stacking" cases may, however, be fined if he fails to appear.

(d) See, e.g., Mills v. Mills, 232 Va. 94, 348 S.E.2d 250 (1986) (counsel withdrew on the eve of hearing).

(e) Ethical perspective: DR 6-101.

(5) Surprise

(a) Possibly a sufficient reason, but only if reasonable diligence has been used.

(6) Absence of party

(a) if party is an essential witness

or (b) if party reasonably necessary to conduct of case.

(c) But not where party is shamming. Miller v. Johnson, supra.

(7) Amendment of pleadings

(a) Generally good cause if other party needs more time (R 1:8 and 1:9)

(8) Officer's failure to serve process when requested properly to do so.

e. Evidence of Grounds for Continuance

(1) Affidavits are often used.

f. Costs of continuance

(1) Generally awarded against the applicant. (See § 14.1-187).

5. Nonsuit (§ 8.01-380)

a. By P only.

(1) First one is of right: no consent of D or leave of court is necessary (§ 8.01-380(B)) unless counterclaims, etc. (§ 8.01-380(C)). See Iliff v. Richards, 221 Va. 644, 272 S.E.2d 645 (1980).

b. Usually used when P thinks he is going to lose but may win next time.

(1) May be used if fail to get continuance.

c. When taken (§ 8.01-380(A))

(1) Often: morning of trial.

(2) But may be anytime:

(a) before the jury retires

or (b) if no jury, before the proceeding has been submitted to the court for decision. Moore v. Moore, 218 Va. 790, 240 S.E.2d 535 (1978) (filing of report of commissioner in chancery is not submission for decision). Khanna v. Dominion Bank of Northern Va. N.A., 237 Va. 242, 377 S.E.2d 378 (1989); City of Hopewell v. Cogar, 237 Va. 264, 377 S.E.2d 385 (1989).

(3) If a nonsuit is taken within 7 days of trial, the court in its discretion may access a reasonable witness fee, travel costs of expert witnesses.

but always (c) before motion to strike has been sustained

(i) even if Court has indicated it will sustain the motion. Berryman v. Moody, 205 Va. 516, 137 S.E.2d 900 (1964); Newton v. Veney, 220 Va. 947, 265 S.E.2d 707 (1980).

d. Court may allow P to withdraw nonsuit before dismissal of suit. Nash v. Jewell, 227 Va. 230, 315 S.E.2d 825 (1984); but Circuit Court does not have authority to grant a nonsuit in a writ of certiorari relating to a Board of Zoning Appeal decision. Board of Zoning Appeals v. Board of Sup. of Fairfax County, 275 Va. 452, 657 S.E.2d 147 (2008).

e. Next proceeding. (§ 8.01-380(A)).

(1) Must be in the same Court unless

(a) No jurisdiction

(b) Wrong venue

(c) Other good cause shown.

(d) But can be in Federal Court instead of same State Court. Popp v. Archbell, 203 F.2d 287 (4th Cir. 1953); Alderman v. Chrysler, 480 F. Supp. 600 (E.D. Va. 1979).

(2) Section 8.01-380(B) requires the plaintiff to give notice to all counsel and parties not represented by counsel and order must reflect all prior nonsuits.

f. Return of property in detinue actions.

(1) If P voluntarily nonsuits, he must return property seized or value thereof to D. J. I. Case Co. v. UVB, 232 Va. 210, 349 S.E.2d 120 (1986).

6. Bond:

a. Resident D may "suggest" that non-resident P post bond. (§ 14.1-185). See Chagnon v. Hofferman, 230 Va. 176, 335 S.E.2d 268 (1985).

B. Jury (§8.01-336 et seq.)

1. Constitutional Background (U.S. Const., 7th Amend.; Va. Const., Art. I, § 11)

a. U.S. Const. does not require jury of 12. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970) (criminal); Colgrove v. Battin, 413 U.S. 149, 93 S.Ct. 2448 (1973) (civil).

b. A trial by jury is not required by either U.S. or Va. Const. for all civil proceedings. Alexander v. Com., 214 Va. 539, 203 S.E.2d 441 (1974) (proceeding declaring magazines obscene and restraining their sale).

(1) Right to jury does exist under 7th amendment as to those 'suits at common law' requiring jury when 7th amendment was adopted. Thus, not for statutory public rights or others. Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 97 S.Ct. 1261 (1977); Kitchen v. Dept. of Highways & Transport., Fairfax Cir. Ct. Case Nos. 75111, 77246 (9/3/87) (no rt. to jury in suits v. C/W under Va. Tort Claims Act).

2. When Jury Trial May be Had. (§ 8.01-336).

a. At law, when amount in controversy exceeds $100 and

(1) party demands (§ 8.01-336(B))

or (2) court orders it sua sponte (§ 8.01-336(C)).

(3) But remember, no jury in GDC. See Beaudett v. City of Hampton, 775 F.2d 1274 (4th Cir. 1985).

(4) Except in case for negligence resulting in injury to person or property, the court may submit written interrogatories to jury on one or more issues. §8.01-379.3.

b. On equitable claim (§ 8.01-336(D)):

(1) On a "special" plea in equity, the allegations of which are denied

(a) but only if party requests it.

(b) Verdict of jury is binding. (See Chapter VI G.2., supra).

(2) Issue out of chancery. (§ 8.01-336(E)).

(a) On motion and affidavit of party

or (b) by court sua sponte.

(c) Different creature from jury trial on a plea, e.g., advisory only. See Stanardsville Volunteer Fire Co. v. Berry, supra, 229 Va. 578, 331 S.E.2d 466 (1985).

3. Exemption and Disqualification of Persons from Jury Service

a. Jury commissions make up list of qualified persons not exempt or excluded. (§8.01-345).

b. Qualified Persons (§ 8.01-337):

(1) citizens over 18

(2) resident in Commonwealth 1 year; county or city 6 months

(a) military personnel not considered resident.

c. Disqualified persons (§ 8.01-338 et seq):

(1) mentally incompetent

(2) convicted of felony

(3) other persons under disability (see § 8.01-2)

(4) person who requests that he be included (§ 8.01-339)

(5) person who has a matter before court that term (§ 8.01-340).

d. Exempt persons (§§ 8.01-341 & -341.1):

(1) Automatic exemption (§ 8.01-341), e.g. President of U.S., Governor of Commonwealth, licensed practicing attorneys.

(2) Persons claiming exemption (§ 8.01-341.1), e.g. person over 70 or person responsible for person with physical/mental impairment or for child of less than 16 who requires care during court hours.

(3) Exemptions drastically reduced effective July 1, 1987. See 1987 Cum. Supp.

4. Voir Dire and Disqualification of Veniremen from Particular Case.

a. Panel. (§ 8.01-348).

(1) Clerk draws names at random.

(2) Makes up list of more names than necessary for case (§ 8.01-350):

(a) 11 for jury of 5

(b) 13 for jury of 7

(3) Sheriff notifies persons on list. (§ 8.01-350; see also § 8.01-298).

b. Objections. (§ 8.01-352).

(1) Prior to jury being sworn:

(a) Leave of court not required.

(b) Grounds:

(i) irregularity in making up list

(ii) legal disability of proposed juror

(2) After jury is sworn:

(a) Leave of court required.

c. Voir dire. (§ 8.01-358). Rule 1:21.

(1) Potential jurors on list are called until panel free of exceptions is obtained. (§ 8.01-357).

(2) Court and counsel (since 1966; cf FRCP 47(a)) have the right to examine prospective jurors under oath.

(a) Counsel may wish to examine to determine whether to challenge for cause or peremptorily. See Brown v. Commonwealth, 212 Va. 515, 184 S.E.2d 786 (1971), vacated on other grounds, 408 U.S. 940 (1972).

(3) Areas of interrogation: trial court may refuse to allow counsel to question unless relevant to disclosure of one of the following. (See LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983)).

(a) If a juror is related to a party.

(i) Being related to counsel does not disqualify.

Petcosky v. Bowman, 197 Va. 240, 89 S.E.2d 4 (1955).

See Annot., 64 A.L.R.3d 126.

(ii) Consanguinity or affinity.

(iii) At common law, one was related if within the 9th degree, counting one step per generation to a common ancestor and back again.

(b) If a juror has any interest in the matter.

Salina v. Com., 217 Va. 92, 225 S.E.2d 199 (1976) (Juror was stockholder in corporation which D was accused of stealing from).

(c) If a juror is sensible of any bias or prejudice.

(i) A juror's statement that he can try the case without prejudice, despite his knowledge, is not necessarily conclusive.

See Siegfried v. City of Charlottesville, 206 Va. 271, 142 S.E.2d 556 (1965).

Salina v. Com., supra.

(d) If a juror has expressed or formed an opinion.

(4) Areas not permitted:

(a) Insurance.

(i) Hope Windows, Inc. v. Snyder, 208 Va. 489, 158 S.E.2d 722 (1968) held error to ask prospective juror if he works or has worked for an insurance company. Davis v. Maynard, 215 Va. 407, 211 S.E.2d 32 (1975).

(b) May not examine juror's acquaintance with prospective witnesses or membership in social clubs to help decide which peremptory challenges to use.

Davis v. Sykes, 202 Va. 952, 121 S.E.2d 513 (1961)

Jackson v. Prestage, 204 Va. 481, 132 S.E.2d 501 (1963)

(5) Test: If it appears to the Court that the juror does "not stand indifferent in the cause," he is excused.

(a) But merely having some knowledge of the case does not disqualify him. Charlottesville Music Cen., Inc. v. McCray, 215 Va. 31, 205 S.E.2d 674 (1974).

(b) Personal acquaintance with testator and belief that he was insane in case involving question of testator's competency justifies excusing juror. Rust v. Reid, 124 Va. 1, 97 S.E. 324 (1918).

d. Peremptory challenges. (§ 8.01-359).

(1) Panel of 11 for jury of 5 (cases where amount in dispute up to $7,000), 13 for 7 (more than $7,000).

(2) Each side strikes names alternately until panel is reduced to requisite number.

(3) So each side gets 3 strikes, regardless of how many Ps and Ds. See Annot. 32 A.L.R.2d 747.

(4) Exclusion of particular race or class. See Annot. 49 A.L.R.3d 14.

e. Waiver of Objections.

(1) Many defects are waived or put beyond challenge if not made before jurors are sworn. See Burks v. Webb, 199 Va. 296, 99 S.E.2d 629 (1957).

(2) No exception to juror because of age or other legal disability after he is sworn except by leave of court. (§ 8.01-352).

(a) Court will start again only if intentional irregularity and juror's continuing presence will cause injustice.

(3) Jeofails statute: unprejudicial irregularities in drawing, summonsing, empanelling jurors must be objected to before swearing of jury. (§§ 8.01-352 and -353). See King v. Jones, 824 F.2d 324 (4th Cir. 1987) (P failed to object prior to conclusion of voir dire to D. Ct.'s refusal to ask certain questions to jurors. Held: waived; cannot raise on appeal).

5. Tactics: how decide if you want a jury?

a. Nature of case: complicated or simple.

b. Popularity of your client and his witnesses.

c. Appealing nature of case.

d. How having a jury may affect your planning:

(1) More detailed presentation may be required

(a) Court often knowledgeable with matters which one must explain to a jury.

(b) Matters in the area of sympathy or emotion may be brought in.

(2) More preparation on law.

(a) Jury instructions.

(3) More preparation on facts.

(a) Care given to witnesses used.

(b) More witnesses may be used.

(4) Less elimination of factual issues by discovery because you want to parade witnesses before the jury.

6. 3 Person Juries (§ 8.01-359(D)).

a. By agreement of P & D.

b. Each side nominates a juror; the two so selected nominate a third.

c. Consider use in case of particular complexity.

7. Special Juries. (§ 8.01-362).

a. Jurors summoned as the court designates.

b. Thus, jurors elected from specific pool.

8. No Impartial Jury Locally.

a. Court may summon jurors from another locality. (§ 8.01-363).

b. Or transfer venue. (§ 8.01-265).

9. Summary Jury Trial. (§ 8.01-576.1 through .3).

a. 1988 Code Amend.

(1) Purpose is quick dispute resolution.

b. Parties may agree in writing to issues by summary jury trial.

(1) but not allowed if purpose is delay.

c. Held within 21 days after such request by parties to ct.

d. Seven jurors selected but no voir dire or challenges.

e. Procedure:

(1) Verbal summary of issues and evidence presented by each side.

(2) P goes first and each party may rebut upon request.

(3) Testimony and doc. evidence not allowed.

(4) Jury decides as usual.

f. Verdict not binding and inadmissible at subseq. trial of case.

(1) unless otherwise agreed by parties

C. Opening Statement of Counsel

1. There is no statute but a fixed custom in civil cases. (cf. § 19.2-265 for criminal cases).

2. Often a good idea even where there is no jury.

3. Nature:

a. Not an argument.

b. Confined to facts you expect to prove.

(1) And do not include those you do not expect to prove. See Baker Matthews Lumber Co. v. Lincoln Furniture Mfg. Co., 148 Va. 413, 139 S.E. 254 (1927).

(2) Do not state law. Lam v. Lam, 212 Va. 758, 188 S.E.2d 89 (1972).

(3) And do not say P has been in several accidents and D in none. Carter v. Shoemaker, 214 Va. 16, 197 S.E.2d 181 (1973).

4. Who goes first:

a. Usually party having burden of proof

D. The Proof: Manner and Time of Taking; Weight in Equity

1. Manner of taking

a. Law Claim

(1) Ore tenus (orally) before Court (and Jury, where appropriate)

(a) Depositions may be used as authorized by Rule 4:7. See Chapter IX, supra (de bene esse).

(2) Exhibits may be taken to the jury room. (§ 8.01-381).

(a) With leave of court.

(b) Caveat: may put undue emphasis on insignificant part of the evidence.

(3) Reporting and transcript of proceeding. (See Rule 1:3).

b. Equity Claim: three methods

(1) Depositions (divorces) – mainly in uncontested

(2) Ore tenus

(a) Remember, Judge sits without jury, unless plea in equity or "issue out of chancery," supra B.2.b.

(b) Court must order record to be preserved when Ds are proceeded against by publication and have not appeared; otherwise, discretionary.

(3) Commissioner in Chancery (§ 8.01-607 et seq; R 3:23).

(a) Case should not be referred to a commisisoner until the reference is shown to be justified. Evidence may be required to show justification. Binkley v. Parker, 190 Va. 380, 57 S.E.2d 106 (1950).

(b) Weight to be given Commissioner's report

(i) By Judge: does not have the weight of jury verdict. (§ 8.01-610). But should be sustained unless not supported by the evidence. Hill v. Hill, 227 Va. 569, 318 S.E.2d 292 (1984).

(ii) On appeal: when sustained by Judge: appeal court must still set aside if against weight of evidence. See McGrue v. Brownfield, 202 Va. 418, 117 S.E.2d 701 (1961).

(iii) On appeal; when disapproved by Judge: appeal court must decide whether evidence supports the Commissioner or the Judge. Hill, supra.

(c) Procedure:

(i) Commissioner must give notice of filing of report.

(ii) Reasonable notice of hearing is given. (§ 8.01-615).

(iii) Exceptions must be filed by parties within 10 days from filing of report; later for cause shown. (§ 8.01-615).

(iv) Full (ore tenus) hearing may then be demanded.

(v) Orders on the report are entered by the Court not the Commissioner.

2. Time of taking

a. Depositions, see Chapter IX, supra, and see Binkley v. Parker, supra for practice of waiting.

b. Proffer of testimony to preserve objection and make record on appeal. Wyche v. Comm., 218 Va. 839, 241 S.E.2d 772 (1978); Whitaker v. Comm., 217 Va. 966, 234 S.E.2d 79 (1977).

(1) unilateral avowal, unchallenged

(2) stipulation

(3) testimony given in absence of jury

3. Sequestration of witnesses (exclusion of witnesses from hearing). (§ 8.01-375).

a. Ct. may separate sua sponte.

b. Ct. must separate on motion of either party.

c. Does not apply to:

(1) individual party

(2) one officer of corporate party

d. One expert witness for each party may remain, at request of such party.

e. After witness has finished, he may remain. But be sure he has finished (not possibly to be recalled).

f. Purpose to prevent perjury.

4. Expert witnesses: whether permitted to express opinion as expert.

a. Generally a matter of discretion with trial court. Landis v. Common., 218 Va. 797, 241 S.E.2d 749 (1978).

b. Can't use lay witness of opponent to express opinion as an expert. N & W Railway v. Chrisman, 219 Va. 184, 247 S.E.2d 457 (1978).

E. Withdrawing the case from the Jury; Motions to Strike

1. "Demurrer to evidence" (§ 8.01-276).

a. obsolete 10/1/77.

b. use motion to strike in lieu thereof.

2. Motion to strike evidence in actions at law. (R 1:11).

a. Procedure:

(1) Motion may be made orally by either party.

(a) Rarely made by party having burden of proof.

(2) Motion may be made by D at conclusion of P's evidence. See, e.g., DHA, Inc. v. Leydig, 231 Va. 138, 340 S.E.2d 831 (1986).

(a) If then denied, it must be renewed at the conclusion of all the evidence, or it is waived. And apparently must also be renewed at instruction stage. See, e.g., Spitzli v. Minson, 231 Va. 12, 341 S.E.2d 170 (1986) (D moved to strike evidence at conclusion of P's case and at close of all evidence, and moved to set aside verdict. But failed to preserve objections at instruction stage; held: waiver of contention that trial court erred is not rule as a matter of law).

(3) May be renewed after hung jury has been discharged.

(a) See, e.g., Hoffner v. Kreh, 227 Va. 48, 313 S.E.2d 656 (1984) (D's motion sustained; P led no evidence of D's negligence in road accident where decedent was prone in the road at night).

(b) If Jury has been discharged and P's motion is granted, a new trial confined to damages will be required, if damages are unliquidated.

(4) Motion should never be made in the middle of a party's evidence. Durham v. National Pool Equip. Co. of Va., 205 Va. 441, 138 S.E.2d 55 (1964).

(5) Test: Motion not granted unless reasonable men could not differ regarding conclusion that:

(a) P has not proved his case:

Williams v. Vaughan, 214 Va. 307, 199 S.E.2d 515 (1973)

Brown v. Koulizakis, 229 Va. 524, 331 S.E.2d 440 (1985)

Surface v. Johnson, 215 Va. 777, 214 S.E.2d 152 (1975)

(b) or D has not refuted P's case:

Monday v. Oliver, 215 Va. 748, 214 S.E.2d 142 (1975)

Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976)

(c) As Burks points out (Sec. 284, pocket part), it may be difficult to persuade the Court to say that reasonable men could not differ when they have just done so.

(d) Evidence viewed in light most favorable to nonmoving party.

(6) Result of successful motion to strike. (§ 8.01-378; R 3:20).

(a) Summary judgment or partial summary judgment. (R 1:11).

(b) Judge cannot direct verdict w/o sustaining such motion. (§ 8.01-378). See Kesler v. Allen, 233 Va. 130, 353 S.E.2d 777 (1987).

b. Nature:

(1) Different from motion to strike evidence improperly admitted and have jury instructed to disregard it (if they can).

(2) It is a motion testing the sufficiency of the party's evidence to sustain his case.

(a) If made by D at conclusion of P's evidence, the same test is applied as in the case of old "demurrer to evidence."

(i) I.e., for purpose of motion all believable facts and inferences therefrom in the challenged evidence are taken to be true.

Green v. Smith, 153 Va. 675, 151 S.E. 282 (1930)

Dudley v. Guthrie, 192 Va. 1, 63 S.E.2d 737 (1951)

Matney v. Cedar Land Farms, Inc., 216 Va. 932, 224 S.E.2d 162 (1976)

(b) If made by either P or D at conclusion of all the evidence, a "somewhat more liberal rule" is "sometimes" applied. Dudley v. Guthrie, supra.

(i) These words may mean that supplementary rather than contradictory facts have affected the credibility of some of P's evidence; or that Trial Ct. is in a better position to rule when all the evidence is in.

(3) Motion to strike has been held to require action on the party's case as pleaded; not as the evidence developed beyond the allegations (i.e. variance between allegata and probata). See Lee v. Lambert, 200 Va. 799, 108 S.E.2d 356 (1959).

(a) If the result seems harsh, the Court may

(i) treat pleadings as broad enough to fit the evidence (Greenbrier Farms, Inc. v. Clarke, 193 Va. 891, 71 S.E.2d 167 (1952))

or (ii) allow amendment (under Statute of Jeofails, §§ 8.01-377 and R 1:8) to have allegata and probata made consistent.

(4) Motion may lead to additional evidence required to make out the party's case. See e.g., Fink v. Higgins Gas & Oil Co., 203 Va. 86, 122 S.E.2d 539 (1961).

(a) And Trial Court should re-open case where justice requires and this procedure is not too disruptive.

c. Availability:

(1) Actions at law.

(2) Issue of devisavit vel non (issue sent from chancery court to court of law to determine validity of will).

3. Motion to Strike on Equity Claim. (§ 8.01-282).

a. Apparently only by D.

(1) Probate proceeding. See Wilroy v. Halbleib, 214 Va. 442, 201 S.E.2d 598 (1974) (no evidence of undue influence in execution of will; trial court erred in not striking evidence).

(2) Issue out of chancery. See Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 153 S.E.2d 193 (1967) (Bill in chancery for contribution; jury verdict for P set aside since D not liable to those paid by P).

F. Instructions to the Jury – See Model Jury Instruction Prepared by a committee appointed by the Virginia Supreme Court.

1. Different from a charge.

a. In other jurisdictions, the Court makes a charge to the jury:

(1) Comments on evidence

(a) See Spence v. Miller, 197 Va. 477, 90 S.E.2d 131 (1955) (example of Va. rule forbidding comments on the evidence)

(b) See also Oak Knolls Realty Corp. v. Thomas, 212 Va. 396, 184 S.E.2d 809 (1971) (Tr. Ct. may not comment on the evidence)

(2) Sets out law whether or not counsel draft suggestions

(3) Considers suggestions of counsel submitted

(4) May be made before or after arguments

2. Virginia custom and practice.

a. While Court may give instructions on its own, the practice is not to do so, except for some standard instructions. See E. I. DuPont De Nemours & Co. v. Snead, 124 Va. 177, 97 S.E. 812 (1919).

(1) Counsel tender instructions to the court

(2) If instruction is erroneous or equivocal, it is rejected.

(a) But Court may correct and give, and should do so when necessary for jury's understanding of applicable law. Burks, sec. 286, pp. 522-23.

(b) And Court need not give in exact language of counsel but may do so. Does not if substance of instruction duplicates others.

b. Court may not give peremptory instruction directing verdict. (§ 8.01-378).

c. Instructions generally are statements by the trial court of the law applicable to the issues and evidence, calculated to enable the jury to arrive at a proper verdict under applicable law on jury's findings of what the facts are.

(1) Abstract instructions are not given (i.e., those not based on the evidence or unrelated to an issue). See Burks, sec. 288; DuPont, supra; Swersky v. McPeek, 214 Va. 253, 199 S.E.2d 507 (1973) (improper to instruct re damages for humiliation and embarrassment when there was none)

(a) The "scintilla" rule (entitled to instruction if scintilla of evidence) has been rejected. Burks, sec. 289.

(2) But instructions (other than finding instructions) may be given separately on the various principles of law involved.

(3) Instructions may not be multiplied unnecessarily. See Dupont, supra; Burks, sec. 297; Leech v. Beasley, 203 Va. 955, 128 S.E. 293 (1962); Meade v. Belcher, 212 Va. 796, 188 S.E.2d 211 (1972).

(4) Each party entitled to submit instructions on own theory of the case, subject, of course, to evidence and issues requirements. Burks, secs. 288 and 292.

(a) As evidence conflicts, so do instructions.

(b) Finding instructions: of course conflict. See (6) infra.

(5) That trial court may not comment on the evidence does not preclude its reference to the evidence in instructions; e.g., "if you find X facts, Y results will follow."

(6) "Finding" instructions.

(a) For P.

(i) Must contain every element of the case based on the evidence. See Atlantic Co. v. Roberts, 179 Va. 669, 20 S.E.2d 520 (1942); Burks, sec. 298.

(ii) E.g., if contributory negligence is in the case, it must be mentioned in the finding instruction.

(iii) This does not mean that if P has several independent grounds for recovery he must prove them all. See Dunn v. Strong, 216 Va. 205, 217 S.E.2d 831 (1975).

(b) For D.

(i) May be given if any element of P's case is lacking. Burks does not distinguish; see sec. 298, p. 535.

(7) "Monetary figure" doctrine.

(a) Court may not include in instructions, the figure-amount sued for in cases of unliquidated damages, but must say "not to exceed the amount sued for." Simmons v. Adams, 202 Va. 926, 121 S.E.2d 379 (1961).

(b) Cf. argument of counsel, infra (can include amount sued for). See Va. Code § 8.01-379.1, but see § 8.01-38.1 cannot mention cap on punitives.

3. Reversing on instructions

a. Making the instructions a part of the record.

(1) Each instruction is marked "given" or "refused" and initialed by court; becomes part of the record. (R 5:10(a)(2)).

(a) Counsel must object if not satisfied and give grounds of objection. See Spitzli, supra.

(b) Contention may be sufficiently contained in alternate instructions. Pilot Life Insurance Co. v. Karcher, 217 Va. 497, 229 S.E.2d 884 (1976).

b. Even erroneous instructions may not cause a reversal if they are not prejudicial. DuPont, supra.

c. Volenti non fit inuria: inviting error: no reversal. See Burks, sec. 299; Travelers Ins. Co. v. Lobello, 212 Va. 534, 186 S.E.2d 80 (1972).

d. Example of reversing because of erroneous instructions: Bickley v. Farmer, 215 Va. 484, 211 S.E.2d 66 (1975).

4. Procedure in Trial Court

a. Submission of instructions to Court.

(1) Copy of all instructions is given to opposing counsel for objection.

(2) Court considers instructions, with criticisms, and takes action after argument or opportunity for argument.

(a) Gives as offered

or (b) Corrects and gives

or (c) Rejects

(3) Time of submission to court:

(a) Varies with local rules. Rule 1:15(c). Check with clerk.

(b) In advance of trial: allows judge to know theories parties will rely on.

or (c) During trial.

b. Instructions finally approved are the Court's

(1) Are read orally prior to argument by Counsel.

(2) Are usually used by counsel during argument.

(3) Copies are given to the jury when it retires.

(4) Jury may request and be given additional instructions in an appropriate case. See Petcosky v. Bowman, 197 Va. 240, 89 S.E.2d 4 (1955).

5. Tactics

a. P with a strong case.

(1) May offer fewest instructions possible.

(2) May accept all possible amendments to meet D's objections.

b. D defending a weak case.

(1) May multiply

(a) Objections to P's instructions.

(b) Instructions for D.

6. Expert in cases for negligence resulting in injury to person or wrongful death, the court may submit written interrogatories on one or more issues. See § 8.01-379.3.

G. Argument of Counsel (§ 8.01-379)

1. Right to open and close

   a. Is in party having burden of proof.

      (1) But refusal to comply may not be reversible error. See Valley Mutual Life Ass'n, 79 Va. 421 (1884).

      (2) Strategy of cutting off P's closing argument by D's waiving argument. Cf. Jerrell v. Norfolk & P. Belt Line R.R., 166 Va. 70, 184 S.E. 196 (1936) (cutting off time).

2. Number

   a. No restriction (pre-10/1/77, old § 8-219 provided two to a side or more with leave of court).

3. Time

   a. Discretion of Court. See Jordan v. Taylor, 209 Va. 43, 161 S.E.2d 790 (1968).

      (1) But may not be abused.

      (2) And counsel, if discretion abused, may not be required to go through rigmarole of requesting additional time at end of argument, and then objecting to refusal. Jerrell, supra.

4. Improprieties

   a. To read lawbooks to jury. Newport News & Old Pt. Ry. & Elec. Co. v. Bradford, 100 Va. 231, 40 S.E. 900 (1902).

      (1) Judge instructs on law.

      (2) Judge's instructions can be reread by counsel.

   b. To ask jury to apply "Golden Rule" by putting themselves in P's shoes. But cf. State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968) (not reversible error where trial judge admonished jury).

   c. To mention evidence ruled inadmissible. Lugo v. Joy, 215 Va. 39, 205 S.E.2d 658 (1974).

d. To castigate witnesses without support in evidence

(1) E.g., "employees will lie," without evidence to support, held error. Norfolk & W. R. Co. v. Eley, 152 Va. 773, 148 S.E. 678 (1929).

(2) But parties may be castigated if evidence supports. See, e.g., Herman v. United States, 220 F.2d 219 (4th Cir. 1955).

e. To omit a matter from opening argument and then argue it in closing argument if D has not mentioned it. Jordan v. Taylor, supra; Jerrell, supra

f. To express personal opinion: Jones v. Com., 218 Va. 732, 240 S.E.2d 526 (1978).

5. Behavior permitted in Argument.

a. Blackboard may be used during argument of user; must be turned away from jury after that.

(1) E.g., to note figures supported by evidence but not those which are speculative (e.g., pain and suffering, and percentage of disability) and in realm of jury determination. Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959).

b. Counsel may mention amount sued for in opening statement and/or closing argument. § 8.01-379.1. Cf. not proper in Court's instructions to jury, supra). See Phillips v. Fulghum, 203 Va. 543, 125 S.E.2d 835 (1962).

6. Time to object to argument

a. Objection should be made at time offensive words uttered.

(1) Trial court can often halt and correct impropriety. Cape Chas. Flying Serv., Inc. v. Nottingham, 187 Va. 444, 47 S.E.2d 540 (1948).

(a) Even where insurance was clearly sought to be injected. See Burks, sec. 317.

(b) Even v. Due Process argument. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974).

(2) Can use objection to throw arguer off his stride.

(3) If argument is very far-out, even if trial court corrects, adverse party may still want to move for a mistrial. If he does not, probably too late. See Swift v. Com., 199 Va. 420, 100 S.E.2d 9 (1957).

H. Verdict of Jury

1. In general

   a. Two classifications:

      (1) General

         (a) Decides for P or D on the material issues.

      (2) Special verdict.

         (a) A finding of all the facts necessary to enable the Court to determine the issues (or an issue) submitted.

   b. Examples of Special Verdict

      (1) Variance between allegata and probata; court may direct the jury to find the facts. (§ 8.01-377).

      (2) Declaratory judgment; submission of issues to jury for fact findings. (§ 8.01-188).

      (3) Jury's verdict on a special plea in equity. (§ 8.01-336(D)).

      (4) Jury's verdict on an issue out of chancery. (§ 8.01-336(E)).

      (5) Issue of fact in suit to remove cloud on title. (§ 55-153).

   c. Polling jury: judge in open court asks if the verdict is that of each juror.

   d. Verdict must be unanimous (unless counsel agree to accept less). See 28 Wash. & Lee L. Rev. 309 (1971) (suggesting less).

2. Verdicts in actions at law

   a. Quotient verdicts of juries (or awards of commissioners in eminent domain proceeding) are improper. VEPCO v. Pickett, 197 Va. 269, 89 S.E.2d 76 (1955).

      (1) These are verdicts or awards reached pursuant to an agreement, in advance, to add up all figures, divide and be bound by the result.

      (2) Note different uses of term "quotient." Burks says quotient verdict is good (p. 576).

b. Form of verdict is generally immaterial, and court may correct without making an error, having the jury confirm as corrected. See Burks, Sec. 323 at p. 594.

E.g., Northern Va. Power Co. v. Bailey, 194 Va. 464, 73 S.E.2d 425 (1952) ("We the Jury find the D guilty of negligence and award the P, Mrs. Susie V. Bailey, ten thousand dollars." Objection not made at the time. Jury had been properly instructed. Supreme Court says Trial Court could have corrected. Decision affirmed).

Carter v. Butler, 186 Va. 186, 42 S.E.2d 201 (1947) (Trial Court had said it would write out verdict on oral report. A juror reported that the insurance company should give P $3,000. Insurance had not been mentioned in the trial. Held: no error).

Long & Foster Real Estate, Inc. v. Clay, 231 Va. 170, 343 S.E.2d 297 (1986). (General verdict for counterclaimant is finding against both adverse parties (master & servant) even though not specified).

c. But Court cannot supply substance under guise of correcting form.

(1) E.g., punitive damages may not be awarded without an award of actual damages. Zedd v. Jenkins, 194 Va. 704, 74 S.E.2d 791 (1953).

(a) This is not a matter of form. But the D (where $3,000 punitive damages was awarded for alienation of affections and evidence would have justified actual damages) waived all rights unless the appeal court thought him entitled to final judgment on the ground that the jury had impliedly found no actual damages.

(2) Verdict inconsistent in itself cannot stand. Roanoke Hospital Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 214 S.E.2d 155 (1975).

d. Verdict must respond to all the issues. See Burks, sec. 321, at p. 572.

e. If verdict is confused or not certain, it must be set aside. See Burks, sec. 321, at p. 574.

E.g., Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963) (jury split compensation for P among several Ds, and did not make plain against whom punitive damages were awarded. Trial Court tried to get verdict straightened out but did not succeed).

f. Verdict cannot divide compensatory damages among several joint tort-feasors. See Freeman v. Sproles, supra.

g. Verdict may not exceed ad damnum; clause cannot be amended after verdict. See Nassif v. Bd. of Supervisors, Fairfax Cty., 231 Va. 472, 345 S.E.2d 520 (1986).

h. Verdict which is correct stands, although inconsistent with an erroneous instruction. Burks, sec. 321, at p. 577.

i. Interest. (§ 8.01-382).

(1) Jury may allow interest from a date preceding judgment.

(2) If it does not expressly do so, interest runs from the date of judgment at legal rate (presently generally 8% p.a.). (See § 6.1-330.54).

(a) But post-award interest on condemnation awards controlled by § 33.1-128. State Hwy. & Transp. Comm'r v. Cardinal Realty Co., 232 Va. 434, 350 S.E.2d 660 (1986).

(3) Exception in U.C.C. (8.3-122).

(a) Primary obligor from date of demand.

(b) Other obligors: from date of accrual of c/a.

(c) Note that (a) and (b) may be the same.

j. Objections to Verdict.

(1) Must be made at time of verdict, and grounds stated. Burks, sec. 323.

(a) Ask clerk re local practice for recording objections.

3. Verdicts on equitable cases

a. Traditional: issue out of chancery (§ 8.01-336(E)).

(1) Court needs to be informed upon a matter or matters of fact.

(a) Remember verdict is advisory only.

(b) But it is error not to obtain it when reasonably necessary.

(c) Judge may disregard verdict/report.

(i) E.g., DeJarnette v. Thomas M. Brooks Lumber Co., 199 Va. 18, 97 S.E.2d 750 (1957) (P asked reduction of price and recovery of loss of profits from sale of timber, arising because of alleged misrepresentation of D. D denied fraud, and court ordered issue out of chancery. Verdict was for P, but court set it aside and granted judgment for D. Held: Proper. Reliance on misrepresentation not proved).

(ii) E.g., Wiltshire v. Pollard, 220 Va. 678, 261 Va. 542 (1980) (report of commissioner in chancery not accepted by judge where P had burden of proof by clear and convincing evidence to show resulting trust in favor of deceased father in stock owned by employer in another corp.).

b. Special verdict on plea. (§ 8.01-336(D)).

(1) Remember: must be on a plea that presents a single set of facts as a defense to P's suit or that part of bill to which it is presented.

(2) Verdict upon plea, if proper, may end case.

(3) Verdict is as binding as verdicts in law cases (not advisory).

(4) Either party may demand. Trial Court may not refuse.

(5) Examples:

(a) Bolling v. G.M., 204 Va. 4, 129 S.E.2d 54 (1963). Suit on conditional sales contract. Contract was admitted, but D counterclaimed for damages because of misrepresentation of what the truck sold could do. Held: no plea.

(b) Campbell v. Johnson, 203 Va. 43, 122 S.E.2d 907 (1961). Suit to recover stolen goods and declare constructive trusts in property purchased with the stolen property; D denied the theft. D's plea held proper. The jury properly passed only on the defense, not the amount of property stolen.

(c) Towson v. Towson, 126 Va. 640, 102 S.E. 48 (1920). In divorce suit, D's challenge to domicile of P held proper plea. Verdict was in favor of the challenged party.

(d) Eagle Lodge v. Hofmeyer, 193 Va. 864, 71 S.E.2d 195 (1952). Injunction to prevent use of road. Plea of easement by prescription necessitated jury trial. Verdict for D was held unsupported by evidence.

(e) Standardsville Vol. Fire Co. v. Berry, 229 Va. 578, 331 S.E.2d 466 (1985).

I. Motions after verdict

1. Formerly, several motions were in vogue:

   a. Arrest of judgment. See Burks, sec. 327.

   b. Judgment n.o.v. (non obstante veredicto). See Burks, sec. 328.

   c. Repleader. See Burks, sec. 329.

   d. Venire facias de novo. See Burks, sec. 330.

   e. These motions lay for errors apparent on the face of the record, per se.

2. New practice.

   a. Two most commonly employed:

      (1) Motion for new trial

         (a) only used in jury trials.

      (2) Motion to set aside the verdict.

         (a) as contrary to or not supported by the evidence.

3. Timing.

   a. Remember Circuit Court only retains jurisdiction for 21 days after judgment entered. (R 1:1)

   b. So must make these motions before judgment, or within 21 days.

   c. Caveat: Judge's oral announcement of ruling re these motions is not sufficient to vacate judgment order. Written order must be entered within 21 day period.

4. Motion for new trial. (§ 8.01-383).

a. Number of new trials that can be granted when the verdict is set aside as being contrary to the evidence is two.

b. Do not have to move for a new trial to preserve right to present errors on appeal. (§ 8.01-384).

c. Grounds and examples:

(1) Error (or misconduct) of judge. See Annot. 41 A.L.R.3d 845, 1154.

(a) Petcosky v. Bowman, 197 Va. 240, 89 S.E.2d 4 (1955). Judge commented adversely on D's filing a cross-claim. Held: cured by his explanation. Judge also urged jury to reach a verdict. Held: no error.

(b) Spence v. Miller, 197 Va. 477, 90 S.E.2d 131 (1955). Judge commented on credibility of witness and did not sufficiently cure; it is not up to counsel to tell Judge how to cure. Held: error.

(c) Gilliland v. Singleton, 204 Va. 115, 129 S.E.2d 641 (1963). Judge improperly allowed papers to be taken to jury room. Also commented slightingly to counsel. Held: error.

(d) Buffalo Shook Co. v. Barksdale, 206 Va. 45, 141 S.E.2d 738 (1965). Held that it was not error to let jury take the papers. The jury had been properly instructed, and there were no slighting remarks made to counsel. But § 8.01-381 does not provide that jury may take pleadings.

(e) Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1975). Held not error for Judge to refuse to permit witness to be recalled after he had been extensively examined on direct- and cross-examination.

(f) Lee v. Southland, 219 Va. 23, 244 S.E.2d 756 (1978).

(2) Error or misconduct of jury.

(a) Kearns v. Hall, 197 Va. 736, 91 S.E.2d 648 (1956). Jury improperly made tests on its own at a view of the grounds at scene of accident. Held: error.

(b) Hickerson v. Burner, 186 Va. 66, 41 S.E.2d 451 (1947). Juror improperly went to scene of accident and made tests. Information

he gave was already in evidence, and did not influence other jurors. Held: Not reversible error.

(c) McGuire v. Howard, 203 Va. 965, 128 S.E.2d 281 (1962). Held error where a juror did same thing as in (b) and did influence other jurors.

(d) Juror Talking to party: Harris v. Hampton Rds. Tractor & Equip. Co., 202 Va. 958, 121 S.E.2d 471 (1961). Held: no error for juror to chat with officer of party re matters other than is in the case. Accord Futrell, supra; Seaboard Coast Line R.R. v. Ward, 214 Va. 543, 202 S.E.2d 877 (1974).

(e) Procedure (§ 8.01-352)

(i) Court must take sworn evidence in usual way to ascertain error or misconduct of jury. Affirmative duty on court to investigate. Commercial Union v. Moorefield, 231 Va. 260, 343 S.E.2d 329 (1986).

(ii) Hearsay, unsworn statements are insufficient. Kearns v. Hall, supra.

(iii) Juror may testify as to overt act of himself and others as distinguished from his mental processes which he later decided were incorrect. See Annot. 32 A.L.R.3d 1356.

(iv) Remember, at voir dire, juror must disclose in open court any relevant fact he happens to know re the issues in the case. (§ 8.01-358).

(3) Insurance Mentioned.

(a) Phillips v. Campbell, 200 Va. 136, 104 S.E.2d 765 (1958). Jurors discussed insurance and on subsequent examination by Court several said insurance had influenced their verdict. There was no evidence of insurance introduced into the case. Held: no error.

(b) Simmons v. Boyd, 199 Va. 806, 102 S.E.2d 292 (1958). Impropriety by trial court where P's expert witness on cross-examination read a letter which said insurance was involved. Trial court set aside the verdict for P for $20,000 (no permanent injury) and on re-trial there was a smaller verdict (of $6,500). The Supreme Court re-instated the first verdict, with strong dissents.

(c) State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968). Held: no error.

(d) Travelers Ins. Co. v. Lobello, 212 Va. 534, 186 S.E.2d 80 (1972): held error where P (Lobello) sued D-1 uninsured motorist; D-2; and D-3. P served D-1 by serving on Travelers Insurance Company, his carrier. D-1 represented himself at trial. Traveler's counsel told jury that he represented P's uninsured motorist's carrier and was assisting D-1. Held: D-2 was entitled to a reversal of judgment against D-2 but judgment against D-1 affirmed, as otherwise Traveller's would benefit from error it invited.

(4) Misconduct of counsel.

(a) Inadvertently leaving notes in jury room held no error. Futrell, supra.

(b) Improper opening statement. Carter v. Shoemaker, 214 Va. 16, 197 S.E.2d 181 (1973) (P accident prone; held error).

(c) Mentioning insurance. See (3), supra.

(5) Misconduct of parties.

(a) Talking to juror re other matters. Harris, Futrell; supra (both held no error); accord, Murphy v. Virginia Carolina Freight Lines, Inc., 215 Va. 770, 213 S.E.2d 769 (1975).

(6) Misconduct of third persons.

(a) Dozier v. Morrisette, 198 Va. 37, 92 S.E.2d 366 (1956). Jurors were told on court green by insurance company agent about insurance in the case. Verdict for P was set aside, although D thus profited by its own misdeed. There had been a hung jury, and liability was apparently a close question.

(b) See Harris v. Tractor Co., supra.

(7) After discovered evidence.

(a) For new trial, the following requirements must exist with respect to after discovered evidence:

(i) Must have been discovered since the trial but within the 21 days.

(ii) Must be so material as calculated to produce an opposite result. See Whittington v. Commonwealth, 5 Va. App. 212, 361 S.E.2d 449 (1987).

(iii) Must not be merely cumulative.

(iv) Must not have been reasonably discoverable before trial. Fulcher v. Whitlow, 208 Va. 34, 155 S.E.2d 362 (1967).

(b) These requirements may be relaxed in exceptional circumstances, especially where there is fabricated, perjured or mistaken testimony by party.

(c) See Annot., 55 A.L.R.3d 696 (amount of recovery).

(d) See, e.g., Independent Cab Association v. LaTouche, 197 Va. 367, 89 S.E.2d 320 (1955) (new trial granted); Rountree v. Rountree, 200 Va. 57, 104 S.E.2d 42 (1958) (new trial denied); Fulcher, supra.

(8) Accident and surprise.

(9) Damages Excessive/_____. (§ 8.01-383 and 8.01-383.1). See Smithey v. Sinclair Refining Co., 203 Va. 142, 122 S.E.2d 872 (1961).

(a) Court may grant new trial, and if liability is plain, limit the new trial to damages only.

(b) Court may grant new trial on merits and damages. Clatterbuck v. Miller, 215 Va. 359, 209 S.E.2d 904 (1974).

(c) Court may, if damages are reasonably ascertainable, impose a remittitur, i.e., Court sets amount and gives winning party choice to accept it or have new trial. See, e.g., Lynchburg Coca Cola Bottling Co. v. Reynolds, 215 Va. 1, 205 S.E.2d 396 (1974); Bassett Furniture Indus., Inc. v. McReynolds, 216 Va. 897, 224 S.E.2d 323 (1976) ($1,000,000 to $550,000); LaVay Corp. v. Dom. Fed. Savings & Loan Ass'n, 645 F. Supp. 612 (E.D. Va. 1986), rev'd in part, aff'd in part, 830 F.2d 522 (4th Cir. 1987), cert. denied, 108 S.Ct. 1027 (1988) (ct. can then order retrial on damages only); Hogan v. Carter, 226 Va. 361, 310 S.E.2d 666 (1983) (ct. must state reason for remittitur).

(d) If damages in excess of cap on punitives in action vs. hosp. (§ 8.01-38.1), Court may automatically reduce reward and enter j'ment for maximum ($350,000).

(e) Test: must be so great as to shock the conscience and to suggest jury was motivated by passion, prejudice, or corruption, or misunderstanding of law/facts. See Edmiston v. Kupsenel, 205 Va. 198, 135 S.E.2d 777 (1964); Smithey, supra; Transilift Equipment v. Cunningham, 234 Va. 84, 360 S.E.2d 183 (1987).

(10) Damages too small. (§§ 8.01-383, 8.01-383.1). See, e.g., Wright v. Estep, 194 Va. 332, 73 S.E.2d 371 (1952); Bradner v. Mitchell, 234 Va. 483, 362 S.E.2d 718 (1987) (verdict only $42.65 above special damages).

(a) Evidence insufficient to find D liable: verdict not set aside, P not prejudiced, really not entitled to any.

(b) Evidence insufficient to find D not liable: Court will set aside verdict and grant new trial limited to question of damages. See Rawle, supra ($1,500 to $5,000).

(c) Evidence decidedly preponderates against P's right to recover: verdict will not be set aside for inadequacy.

(d) Evidence preponderates in favor of P, though there is sufficient evidence to support a verdict finding D not liable: new trial granted for inadequacy, which may be limited to damages or may be on all issues where damages not distinctly separable from merits.

(e) No clear preponderance of evidence for P or D:

(i) Nominal damages. Usually no new trial, unless bias, etc., are shown, otherwise than by the smallness of the verdict, in which event new trial on damages only.

(ii) Damages substantial though inadequate: new trial usually awarded, limited to damages.

(iii) Evidence on merits not too well developed, or not distinctly separable from damages, new trial probably granted on all issues including damage. Compare Rome v. Kelly Springfield Tire Co., 217 Va. 943, 234 S.E.2d 277 (1977) with May v. Leach, 220 Va. 472, 260 S.E.2d 456 (1979).

d. Verdict of jury, if fair, must stand. Raisovich v. Giddings, 214 Va. 485, 201 S.E.2d 606 (1974); Seaboard Coast Line R.R. v. Ward, 214 Va. 543, 202 S.E.2d 877 (1974).

5. Motion to set aside verdict. (§ 8.01-430).

a. Grounds: verdict not supported by evidence; may involve factors listed at 4, supra.

b. Court shall not grant new trial

(1) where there is sufficient evidence for the court itself to decide the merits

(2) but court may impanel jury to assess damages only. See Hardy v. Greene, 207 Va. 81, 147 S.E.2d 719 (1966).

c. Factors:

(1) Evidence must be quite clear. See Crist v. Washington, Va. & Md. Coach Co., 196 Va. 642, 85 S.E.2d 213 (1955).

(2) Court may, (but rarely does) where there is no conflict in the evidence as to damages, set aside jury verdict and increase damages. See Bass v. Peterson, 168 Va. 273, 191 S.E. 519 (1937) (Sup. Ct. reversed attempt by trial court); Apperson-Lee Motor Co. v. Ring, 150 Va. 283, 143 S.E. 694 (1928) (where damage to auto was said by P to be $350 to $550 and admitted by D to be $250, trial ct. set aside jury verdict of $250 and increased to $350.

(3) Ct. may not set aside award of Com'r in eminent domain proceedings where award in the range of values. State Highway Com'r v. Frazier, 214 Va. 556, 203 S.E.2d 350 (1974).

(4) Case must, of course, be clear and one as to which reasonably fair-minded men may not differ. See Gable v. Bingler, 177 Va. 641, 15 S.E.2d 33 (1941) (trial court entered judgment against master and servant although jury brought in verdict against master only, despite the Court's instructions; Lane v. Scott, 220 Va. 578, 260 S.E.2d 238 (1979); Lee v. Southland, 219 Va. 23, 244 S.E.2d 756 (1978).

(a) Test of incredible evidence. See Burke v. Scott, 192 Va. 16, 63 S.E.2d 740 (1951) ". . . so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ."

d. Effect of properly setting aside verdict: annuls verdict and precludes its later reinstatement. Ambiance Associates v. Kilby, 230 Va. 60, 334 S.E.2d 556 (1985).

6. Review of Trial Court's Decision on Motion. (§ 8.01-680).

a. Trial court's action in granting or refusing a new trial shall not be reversed unless such action seems plainly wrong or without evidence to support it.

b. A verdict not approved by trial ct. is not entitled to as much weight as a verdict approved by it. Cloutier v. Virginia Gas Distribution Corp., 202 Va. 646, 119 S.E.2d 234 (1961).

c. If trial court errs in setting aside the verdict and granting a new trial:

(1) First verdict is re-instated. Helge v. Carr, 212 Va. 485, 184 S.E.2d 794 (1971).

(2) All proceedings after the first verdict are void.

(a) And no evidence in the second trial can be considered on appeal. Judge v. Burton, 198 Va. 664, 96 S.E.2d 120 (1957).

J. The Bill of Review in Equity. (§ 8.01-623).

1. Timing: 6 months after entry of decree.

a. Except PUD: six months after removal of disability.

b. Cf. usual 21 day rule (R 1:1).

2. Leave of Court.

a. Required where ground is after discovered evidence.

b. Not required where ground is error on face of the record.

3. Order to be reviewed may be enjoined.

4. Lies to final order only.

a. Errors in interlocutory decrees are reached by a petition to rehear; must be filed within 21 days of final judgment.

b. Bill to review addressed to errors in an interlocutory decree is demurrable.

5. To what directed:

   a. Not weight of evidence except that in decree itself. Stamps v. Williamson, 190 Va. 145, 56 S.E.2d 71 (1949).

   b. Not errors of judgment in determination of facts. Rice v. Standard Products Co., 199 Va. 380, 99 S.E.2d 529 (1957).

   c. To two things:

      (1) Error of law on face of the record. Stamps v. Williamson, supra.

      (2) After discovered evidence. Lile, sec. 164.

   d. Remedy for other putative errors is appeal.

6. For an example of a good bill of review, see Tackett v. Bolling, 172 Va. 326, 1 S.E.2d 285 (1939).

K. Judgments/Decrees

1. Terminology. (§ 8.01-2(2)).

   Document containing decision of court – order (no more decrees)

2. Correction of Mistakes in Trial Court

   a. Clerical errors (§ 8.01-428(B)).

      (1) In judgments.

         (a) Corrected by trial ct.

         (b) At any time.

         (c) But as soon as appeal docketed, only with leave of appellate court.

      (2) See Cass v. Lassiter, 2 Va. App. 273, 343 S.E.2d 470 (1986) (evid. must clearly support conclusion of error of oversight or inadvertence; drafting error resulted in inconsistencies between divorce agreement and decree; trial court properly corrected error.)

   b. Default judgments/decrees pro confesso. (§ 8.01-428(A)).

(1) Upon motion by judgment debtor.

(2) For void judgment or accord and satisfaction.

(a) Any time after entry of judgment/decree.

(b) But only within very suit in which judgment/decree entered. (Niklason v. Ramsey, 233 Va. 161, 353 S.E.2d 783 (1987).

(c) "Void judgment" means procured by extrinsic or collateral fraud or entered by court without jurisdiction. (Rook v. Rook, 233 Va. 92, 353 S.E.2d 756 (1987)).

(3) For fraud on the court.

(a) Only within 2 years after entry.

(b) E.g. National Airlines v. Shea, 223 Va. 578, 292 S.E.2d 308 (1982) (P's attorney improperly led D to believe continuance granted; D fails to attend; default judgment entered. Held: default judgment set aside).

(4) Procedure:

(a) See McEwen Lumber Co. v. Lipscomb Lumber Co., 234 Va. 243, 360 S.E.2d 845 (1987) (Court lacked jurisdiction to set aside different proceeding. Insufficient proof of fraud, voidness, etc. in case under review).

c. Party not served with process. (§ 8.01-322 Cf. § 8.01-428(C)).

(1) Party served by order of publication. (See Chapter IV, supra) and not appearing.

(2) May have case reheard or injustice corrected.

(3) Time limits:

(a) Within 2 years of decree/judgment/order.

(b) If D served with copy of decree, etc. within 2 year period, then within 1 year of such service.

d. Independent action. (Cf. § 8.01-428(D)).

(1) Relief party from unconscionable judgment/proceeding.

(a) E.g. Powell v. Beneficial Finance Co., 213 Va. 647, 104 S.E.2d 647 (1973) (Minor forged father's signature on promissory note. Stopped paying installments. Minor tore up summons--default judgment granted. Held: default judgment set aside.)

(2) Inherent power of court.

(3) Will be narrowly construed. Basile v. American Filter Service, Inc., 231 Va. 34, 340 S.E.2d 800 (1986).

e. Amendment of record.

(1) Court can correct at any time.

(2) Where truth and justice so require.

(3) See Netzer v. Reynolds, 231 Va. 444, 345 S.E.2d 291 (1986) (erroneous suggestion of lack of jurisdiction in record corrected 15 years later, when both parties had already died!)

3. Verdicts in Action at Law.

a. Verdict for servant also exonerates the master.

(1) See Roughton Pontiac Corp. v. Alston, 236 Va. 152, 372 S.E.2d 147 (1988).