TRIAL TACTICS FOR THE LITIGATION NOVICE

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I. THE COURTROOM IS NOT A SCARY PLACE

- This is something I tell every associate I work with – the courtroom is not a scary place. It is a place where "magic" happens. You can transform yourself from "Jane Doe" on the street into "Wonder Woman". You become bigger than life. You get to advocate and see justice happen.
- So many people look at the courtroom with a lot of anxiety. The courtroom is not your source of anxiety – it is your fear of the unknown. Let's try to calm your mind with some useful tips.

A. LEARN THE RULES OF EVIDENCE

- The Rules of Evidence are among the most important tools in your quiver. Read them. Commit to them. Understand them.

1. Hearsay – He Said/She Said/It Said

- You've got to understand hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing," which is being offered for the truth of the matter asserted. Rule 2:801.
- Essentially, every time someone starts a sentence with "He/She/It said . . ." - that is hearsay.
- Every document is hearsay.

- There is a caveat – there are certain statements and certain documents which fall into one of 24 exceptions (regardless of the availability of the declarant) or within the parameters of the "Dead Man's" statute, Va. Code Ann. § 8.01-397. *See* Va. Sup. Ct. R. 2:803 & 2:804.
- Before you walk into any contested hearing, have a plan about which exception your document or witness statement falls into.
- There are some documents that are considered to be "hearsay within hearsay". For example, a medical record contains statements that the decedent allegedly said. The statements by decedent are hearsay, contained within another document recording those statements. That is hearsay within hearsay. In order to counter a "hearsay within hearsay" argument, you must show that each statement is either "non hearsay" or conforms to the requirements of a particular exception. See, e.g., Eckhart v. Commonwealth, 222 Va. 213 (1981).
- Remember that not all hearsay is "hearsay". For example, if you're offering a statement to show why your client did what he did, you're not offering the statement for the "truth" – i.e., you're not offering it for the substance of the statement. Rather, you are offering it for the purpose of showing your client's reaction. Thus, it is not hearsay. For example, your witness testifies:
    - Q: What happened next?
    - A: The Defendant put a jacket on.
    - Q: Why did he do that?

- A: Because I said, "Defendant, it is cold outside!"
- Opposing Counsel: Objection – hearsay.
- You: Your Honor, I am not offering the statement to prove that it was cold outside. I am offering the statement to show why the Defendant put on a jacket.
- Judge: Overruled.

- Understanding hearsay means you need to understand the purpose of the testimony and the documents you are offering.

2. <u>Relevancy – What Matters & Doesn't Matter</u>

- So many people want to try their cases based upon what the other side will say and do. That's not a good thing. First, remember the roles – Plaintiff (Petitioner) bears the burden of proof and Defendant (Respondent) just needs to poke holes in Plaintiff's case. Defendants need not prove anything to win.
- You should put on "relevant" evidence. What is "relevant" evidence? It is "evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. Sup. Ct. R. 2:401.
- What does that mean? If the document or the witness adds little or nothing to the facts that support the claim – don't call that person or seek admission of the document.
- Trial is not the time to rehash old arguments between family members. Trial is not therapy.

- Trial is a legal proceeding, designed to accomplish the relief sought.

3. **Use the Rules to your advantage**

4. **Prepare your case, outlining the hearsay and evidence rules you plan to use to get your evidence in.**

    - Outline the hearsay and evidence rules in advance for your objections to your opponent's evidence.

B. TECHNICAL ORGANIZATION OF A TRIAL

1. Opening Statement

- Your opening needs to capture your audience.
- You are technically prohibited from "arguing" your case in opening. However, you should use this time to frame the evidence and let the Court know why your client is there, the causes of action, the evidence supporting the action, and what your client is asking for.
- Sounds easy, right? Well, here are some tips:
    - Don't read your opening. Engage your audience.
    - Get to the point. Don't pull out every single detail – flesh out the important facts and nuances
    - Use negative facts in your favor. Every case has warts. If you try to hide them, you lose credibility. Use your opening and your case as a time to get ahead of them.
    - Make sure you keep advising that you will prove X or Y. It doesn't need to be in every sentence.

- If you're counsel for defendant, you don't need to make your opening right at the outset. You can wait until your case begins. But, you should advise the court you'd like to defer your opening until your case begins.

2. <u>Case in Chief</u>

- This is where you start your case. It is important to consider how you approach the evidentiary portion of your case. Some pointers:
  - Witness order matters. Lead with one of your strongest witnesses, and end with your strongest. Weaker witnesses should be somewhere in the middle.
  - Exhibit order matters
  - You are telling a story through your witnesses and your exhibits.
  - You are on direct examination. You are not allowed to "lead" your witnesses. *See* Va. Sup. Ct. R. 2:611(c). A leading question is one in which you as the examiner suggests the answer to the witness responding.
  - Your questions should be organized in a manner that a judge (or jury) can understand what you're asking and why. The story should make sense.
  - Always know what your witnesses are going to say when you put them on the stand. This is key.

- Witnesses can sometimes vary in their statements of fact, and you can request that the jury accept facts most favorable to your client. That approach, however, does not apply to your client:

As a general rule when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has the right to ask the court or jury to accept as true the statements most favorable to him. In such a situation he would be entitled to have the jury instructed upon his contention, or if there were a demurrer to the evidence, the facts would have to be regarded as established in accordance with the testimony most favorable to him. This is not true, however, as to the testimony which he gives himself. No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends upon facts within his own knowledge and as to which he has testified.

Massie v. Firmstone, 134 Va. 450, 462, 114 S.E. 652, 656 (1922).

- While your witness is being cross-examined, remember some rules of thumb:
    - The scope of the cross is limited to what was discussed on direct and to matters involving the witness's credibility. *See* Va. Sup. Ct. R. 2:611(b)(i).
    - You should know if your witness has a felony record or convictions of crimes of moral turpitude, since that definitely impacts credibility.
    - You should have a sense of what the opposing party's cross examination subjects might be. Parties are limited to the subject matter for which they impeach a

witness. Please review Va. Sup. Ct. R. 2:607, 2:608 and 2:609.

- PRACTICE POINTER → If you are cross-examining a witness you interviewed, DO NOT cross examine him/her in a manner that sounds like you're testifying.

  That is the wrong way to cross examine:

  [6] Plaintiff contends that the trial court erred in refusing to permit her counsel to follow a particular form of questioning of the witness Stout, and thus she was denied her basic right of cross-examination. The record shows that the questions counsel proposed to ask the witness were discussed in chambers. The questions were to begin as follows:

  "Do you recall telling the * * *?

  "Didn't you also tell me * * *?

  "Didn't you tell me * * *?

  "Why did you tell me * * *?"

  In Virginia, "One of the most zealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses." Moore v. Commonwealth, 202 Va. 667, 669, 119 S.E.2d 324, 327 (1961). However this right, when it becomes a subject of abuse, shall be restricted. Norfolk & Western Ry. Co. v. Eley, 152 Va. 773, 778, 148 S.E. 678, 679 (1929).

  To have permitted the questions in the proposed form, the court would have in effect been permitting counsel to testify against Stout without becoming a witness, and this could have resulted in giving the jury the impression that the facts assumed by the questions actually existed. Such a procedure would have amounted to an unwarranted and improper attempt to discredit the witness. Wade v. Peebles, 162 Va. 479, 498, 174 S.E. 769, 776 (1934). Thus we hold that the

trial court did not abuse its discretion in holding that the proposed cross-examination was improper.

Rakes v. Fulcher, 210 Va. 542, 548-49, 172 S.E.2d 751, 756-57 (1970)

- Before you rest your case, make sure you've moved in all of the exhibits you have identified while you were examining your witnesses. A good rule of thumb is to move for the admission of exhibits at the time the witness is talking about the particular exhibit.

3. <u>Rebuttal</u>

- Rebuttal is reserved for plaintiffs. You are entitled to put on additional evidence after the close of the defense's case, provided that the scope of your rebuttal is in response to something brought out in the defense case. It is not a repeat of your case-in-chief.

4. <u>Closing Argument</u>

- This is where you get to argue your case – finally. Take out your case law and your statutes and frame them into an argument that also incorporates the evidence that has been admitted. That is key. Without tying your argument to actual evidence, it becomes difficult for the fact-finder, particularly when you have been in trial for more than an hour or two.

II. BE YOURSELF – PERSUASION IS BELIEVABILITY

- This may seem like common sense, but you're not mimicking others. It comes across disingenuous when you try to be like another lawyer or you're putting on a show for your client.
- Your anxiety will be reduced by not worrying about your delivery. Deliver the message as you would in your "natural habitat".
- Remember that judges and juries are people. They don't want to be shouted at.
- A show of emotion is good, but too much makes you look silly.
- Judges and juries want you to tell them the "truth". They want to see you as a "truth teller"
- Don't oversell your case
- Don't gloss over bad points. Embrace them and turn them into positives

III. CHOOSE YOUR THEME AND BUILD YOUR CASE AROUND IT

- This is the hardest concept to grasp for lawyers grappling with the anxiety of a hearing
- Think about your case. You should be able to describe it in one sentence.
- For instance, in a breach of fiduciary case, I have used the following: "Just because you can, doesn't mean you should."
- Look up famous quotes. Utilize popular culture. I've quoted Yogi Berra when describing a case about res judicata
- Each witness should help with your theme. Each document should be another piece of the puzzle

- Do not duplicate with your witnesses. Having 5 people tell the same story is overkill AND will draw objection. Be lean, mean fighting machines. Some overlap is good. Too much just wastes time.
- Do not get bogged down in the weeds with details that don't matter. Always think, big picture, and use the little nuances to help.
- Judge Stanley P. Klein of the Fairfax County Circuit Court has said, "Be complete without being boring."
- Organize by topics. Chronology does not help your factfinder.

IV. CHOOSE YOUR WITNESSES CAREFULLY

- Here are some tips with clients
    - You don't need to call your client as a witness
    - Witnesses have a specific role. If there are multiple witnesses to the same event, pick your strongest and go with that person. If there is a dispute over relevant facts concerning the same event, take 2 disinterested witnesses
    - If your client can't answer questions directly, if they have bad or slow recall, if they seem weasely – don't call them
    - Does your client get confused while under cross examination?
    - Is your client really nervous about testifying? If nerves are an issue, work with them. You need to practice cross with them. You need to get them to focus on speaking to the judge when answering. Teach them how to block out the rest of the courtroom.

    - Make your client concentrate on answering the question asked, and only the question asked

- Other witnesses
    - Do not talk strategy with people who are not your client!
    - Do not give them their questions in advance of a hearing.
    - Do not tell them how they should answer your questions
    - You can advise them of topics, and you can go over their testimony, but don't coach or try to change anything. Natural is best, and there are ethical issues when you try to shape their testimony too much

V. TRAPS TO AVOID

- If you are a plaintiff, do not try your case in defense of the Defendant's case.
- Don't run from problems. The big issues – the elephants in the room – be proactive and address them during your case. Remember that you are the person selling the truth. Don't gloss over something that harms your client, because it will come up. You need to be the one to bring it up.
- If you know a witness is going to be problematic, don't use him/her
- REMEMBER – preparation beats experience any day. Always PREPARE. Know your argument and your opponent's argument. Focusing on just your side is a bad idea.
- Turn the chessboard around and look at your case from your opponent's perspective. Try to anticipate what your opponent can capitalize on, and shore up that weakness.

- Choose experts wisely. Don't choose an expert who will opine on the law. You won't be able to use him/her. Experts are supposed to assist the trier of fact. Choose experts that are both knowledgeable and can testify well – both on direct and on cross examination.
- In settlement negotiations, do NOT make statements of fact in written settlement communications. They can be used later. See Richmond v. A. H. Ewing's Sons, Inc., 201 Va. 862 (1960).
- Expect the unexpected. Do not make a script of your case. Be ready to change things.
- If an objection is sustained, figure out how to get your evidence in. Don't back off the question. Listen to the judge's ruling and adjust accordingly.
- Keep your ears open. You can capitalize on someone else's statements and arguments. I've used my opponent's arguments as to hearsay in my own case.
- Watch the judge's reactions to things. Listen to your opponent. Adjust your case based upon how things are going in the moment.

VI. HOW TO DEAL WITH AN INCAPACITATED ADULT AS A PARTY/WITNESS

A common issue that rears its ugly head in these types of proceedings, particularly in the highly contested cases, is whether and to what extent discovery served on a respondent can be limited. If the respondent is not capable of testifying or of answering questions or of competently providing you with information, then you as counsel need to move to protect your client's interests. The first place for you to begin your argument is with Rule 4:1(c) of the Rules of the Supreme Court of Virginia, which provides:

(c) Protective Orders. --Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or city where the deposition is to be taken, **may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense**, including one or more of the following: **(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;** (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.
Va. Sup. Ct. R. 4:1(c) (emphasis added).

Any one of the first three provisions of Rule 4:1(c) can and should apply to those incapable of testifying, since Interrogatories cannot be used in a case with a person clearly incompetent to answer. First, Rule 4:8 requires that Answers be made under oath:

(d) Answers. --Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them.

Va. Sup. Ct. R. 4:8 (emphasis added).

It is a problem to require an incapacitated person to answer interrogatories, since those answers are under oath. Why? If a party is incompetent to testify, then how can that same party be required to give written answers under oath? Of course, not all incapacitated persons may be incompetent to testify, so we will need to consult the Rules of Evidence for additional guidance as to what constitutes "incompetent to testify".

Rule 2:601(b) of the Rules of Evidence states that "A court may declare a person incompetent to testify if the court finds that the person does not have sufficient physical or mental capacity to testify truthfully, accurately, or understandably." Competence requires the capacity to observe events, to recollect and communicate them, the ability to understand the questions, and to frame and make intelligent answers with a consciousness of the duty to speak the truth. *See, e.g., Cross v. Commonwealth,* 195 Va. 62 (1953) (ruling on the test as it applies to a child witness). Expert testimony can be used to prove that a witness is incompetent to testify. A case that actually applied to an adult has very good language about the situation and held that the deposition that had been taken should not be admitted to evidence:

> There can be no doubt, that the rule laid down by Peake in his work on Evidence, and approved by the Court of Errors of New York in the case of Hartford v. Palmer, 16 John. R. 143, is sound and reasonable, and is one, as said by the court in that case, 'which cannot fail to command the respect of all mankind'; to wit, 'that all persons who are examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, whilst under the influence of their malady, not possessing their share of understanding, are excluded.'
> ". . . If at the time of his examination he has this share of understanding, he is competent. That is the test of competency, and of such competency the court is the judge; whilst the weight of testimony -- the credit to be attached to it -- is left to the jury."
> Regarding the competency of a witness and the capacity of communication 2 Wigmore, Evidence (3rd ed. 1940) reads in part:
> "(1) First, it involves as capacity mentally to understand the nature of questions put and to form and communicate intelligent answers.
> "(2) Secondly, does it involve a sense of moral responsibility, of the duty to make the narration correspond to the recollection and knowledge, i.e. to speak the truth as he sees it? It would seem that the clear absence of such a sense would disqualify the witness." § 495 at 587.
> "If it is asked further what shall be the standard by which this capacity to observe, recollect, and communicate is to be judged, the law is found very properly declining to lay down any more detailed rules. The trial Court must determine this capacity. Any more restricted rule, however ingenious, would fail of its purpose, and would hamper rather than assist the process of procuring trustworthy testimony." § 496 at 588.

See also District of Columbia v. Armes, 107 U.S. 519, 2 S. Ct. 840, 27 L. Ed. 618 (1882); Lewis v. Commonwealth, 193 Va. 612, 70 S.E.2d 293 (1952); Annot., 11 A.L.R.3d 1360 (1967); 97 C.J.S. Witnesses § 119 at 529 (1957); 20 Am. Jur. Evidence § 348 at 323 (1939).

In the instant case Dr. Furr was examined for the purpose of determining the competency of Mrs. Estes. It was stipulated that he practiced psychiatric medicine and was "eminently qualified to testify". Further, Mrs. Estes was his patient. Dr. Furr wrote the letter that said she would be unable to appear at the August 12, 1969 trial and she had been under his care for "a severe psychiatric illness" since June 20, 1969. In the letter he expressed the opinion that her testimony would be subject "to the confusion associated with her illness", and her appearance would be expected to have an adverse effect on her illness.

Dr. Furr first saw Mrs. Estes on June 16, 1967, when she was admitted to the emergency room of the Norfolk General Hospital "because of bizarre behavior and irrational thinking". On June 20, 1967 he saw her in his office. Her history revealed emotional instability from childhood. She had been "behaving irrationally", was "mentally upset" and had been "unmanageable" for approximately two weeks. His diagnosis was "schizophrenic reaction, chronic undifferentiated [489] type". He testified that she was "psychotic", explaining the psychosis as "characterized by a disorder of thinking whereby a patient is incapable of realistic and logical reasoning". The treatment he prescribed consisted of tranquilizing medication and psychotherapy.

Mrs. Estes consulted Dr. Furr again on June 21, 1969 at which time he found her condition the same as it was when he first saw her. Her diagnosis continued, "schizophrenic reaction, chronic undifferentiated type". She was hospitalized on the psychiatric floor of the Norfolk General Hospital from June 21, 1969 to July 11, 1969.

Between the interval of Mrs. Estes' visits to Dr. Furr he testified that she was attended by two other psychiatrists, Dr. William Gibbs, who saw her over a relatively long period of time, and Dr. Fathy A. Abdou.

Dr. Furr was permitted to read the discovery deposition given by Mrs. Estes on December 23, 1968. He was specifically questioned as to her competency to testify and to give this deposition. He said that with "reasonable medical certainty" his opinion was that she would not be competent; that he would question the accuracy of her recollection of the events of the accident; that it would be untrustworthy; and that Mrs. Estes was incompetent to testify "[because] she is in poor contact with reality. This is characteristic of her illness". It appears that shortly after the accident involved here Mrs. Estes gave statements that were at variance with the testimony she gave in her discovery deposition. In commenting on this Dr. Furr expressed the belief that "the same fear", which caused her to give conflicting versions of the accident, "presumably is still operating". He commented on the fact that she had "changed her testimony", and noted her statement that for about two weeks before she gave the deposition she had "more or less talked to God about it".

> After hearing Dr. Furr's testimony the trial court ruled that Mrs. Estes was incompetent when she gave the discovery deposition and that it should not be admitted.
> *Helge v. Carr*, 212 Va. 485, 487-489 (1971).

In order to limit the scope of the discovery or mode of discovery, you should file a Motion for Protective Order (after making a good faith effort to resolve the matter with the counsel who issued the discovery), arguing that Interrogatories necessarily require a person to be competent to testify, which your client is not. Other discovery methods can be used to obtain documentary information, but if the respondent is not competent to testify, then neither depositions nor interrogatories can or should be used. Request for Production of Documents, subpoenas, etc. are all viable alternatives. If there is a question as to evidence that the respondent, through you, would like to put on at trial – specifically as to witnesses or disclosure of persons with knowledge – the court can simply require disclosure of persons with knowledge under the terms of the Protective Order. The court can craft something similar to Fed. R. Civ. Pro. 26 disclosures that the Federal Courts mandate. While these disclosures are not provided for in the Rules of the Supreme Court of Virginia and are somewhat unusual in the context of state court proceedings, it is certainly reasonable for the Court to permit discovery in a manner that does not foreclose a litigant's ability to pursue a case, while still protecting the rights of the respondent, which is in line with the provisions of Rule 4:1(c).

VII. WRITTEN ADVOCACY IS JUST AS IMPORTANT AS COURTROOM TACTICS

A. <u>PLEADINGS & REQUIREMENTS</u>:

- **Complaint/Petition:** Initial pleading stating the cause of action and grounds for relief. It needs to recite a plain statement of what damages or relief is being sought. The names of the parties, along with addresses, must be

somewhere in the Complaint. *See* Va. Sup. Ct. R. 3:2; *see also* VA. CODE ANN. § 8.01-290 (Michie 2016).

→ **PRACTICE POINTER:** Remember that all complaints are pleadings, subject to the provisions of VA. CODE ANN. § 8.01-271.1 (Michie 2011). It is always best to review the possible evidence and supporting law in order to meet the good faith basis requirement found in VA. CODE ANN. § 8.01-271.1 (Michie 2011). Virginia Code Ann. § 8.01-271.1 (Michie 2011) states in pertinent part:

> Except as otherwise provided in §§ 16.1-260 and 63.2-1901, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action . . . .
>
> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.
>
> . . . .
>
> If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

VA. CODE ANN. § 8.01-271.1 (Michie 2011).

→ **<u>Be careful</u>** – make sure your pleading is signed by an attorney, licensed in Virginia. Having a partner sign the Complaint who is not licensed in Virginia will result in nullifying or voiding the filing. *See Shipe v. Hunter*, 280 Va. 480 (2010).

- **Summons:** In order for service of process to be complete, a civil summons must be issued by the Court. "Process" means the "civil summons". *See* Va. Sup. Ct. R. 3:5; *see also* VA. CODE ANN. § 8.01-285 (Michie 2011).

- **Acceptance/Waiver of Service:** A party may agree to accept or waive service of process. *See* VA. CODE ANN. § 8.01-286.1 (Michie 2011).

1. <u>In what venue is the suit brought?</u>
   - If the lawsuit is one to establish or impeach a will, it is filed in the venue in which the will was probated, or if not probated at the time of the action, where the will may be properly offered for probate (i.e., the testator's last place of residence). *See* Va. Code Ann. § 8.01-261(7) (Michie 2011).

   - All other types of actions must be brought in accordance with Va. Code Ann. §§ 8.01-261 and 8.01-262 (Michie 2011).

2. <u>Joining Parties: What parties are necessary to name in a lawsuit?</u>
   - You should name all persons who have an interest in the outcome of the lawsuit. "[A] court lacks power to proceed with a suit unless all necessary parties are properly before the court." *Asch v. Friends of the Cmty of Mount Vernon Yacht Club,* 251 Va. 89, 91 (1996).
   - Virginia Supreme Court Rule 3:12(a) states the following:

     > A person who is subject to service of process may be joined as a party in the action if (1) in the person's absence complete relief

cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest of the person to be joined. If such a person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Va. Sup. Ct. R. 3:12(a).

- The Supreme Court of Virginia has adopted and recognized that the term "necessary parties" includes:

> "All persons, natural [A]ll persons, natural or artificial, however numerous, ***materially interested*** either legally or ***beneficially*** in the subject matter or event of the suit and who must be made parties to it, and ***without whose presence in court no proper decree can be rendered in the cause***… [based] upon the broad and liberal doctrine that courts of equity delight to do complete justice by determining the rights of all persons interested in the subject matter of litigation, so that the performance of the decree rendered in the cause may be perfectly safe to all who are required to obey it, and ***that further litigation touching the matter in dispute may be prevented***.
>
> *The Buchanan Co. v. Heirs of Smith & Banks & Others*, 115 Va. 704, 707-708 (1914) (quoting 1 Barton's Chy. Pr. 141) (emphasis added.)

- This basically means all persons potentially affected by the outcome of the lawsuit being filed. It can include legatees, next-of-kin, etc.

B. IS AN ANSWER REQUIRED?

1. Was there service of process?

a. Generally

- Service of process is governed by statute.
- If Waiver/Acceptance of Service is signed by a defendant, then no service is required.
- Otherwise, service should be accomplished pursuant to statute.

b. There must be personal jurisdiction over the party.

i. Jurisdiction with an out-of-state defendant can be challenging.

Virginia's Long Arm Statute provides the following:

> A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
>
> 1. Transacting any business in this Commonwealth;
>
> 2. Contracting to supply services or things in this Commonwealth;
>
> 3. Causing tortious injury by an act or omission in this Commonwealth;
>
> 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth;
>
> 5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when he might reasonably have expected such person to use, consume, or be affected by the goods in this Commonwealth, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;
>
> 6. Having an interest in, using, or possessing real property in this Commonwealth;
>
> 7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting;
>
> 8. Having (i) executed an agreement in this Commonwealth which obligates the person to pay spousal support or child support to a domiciliary of this Commonwealth, or to a person who has satisfied the residency requirements in suits for annulments or divorce

for members of the armed forces or foreign service officers of the United States pursuant to § 20-97 provided proof of service of process on a nonresident party is made by a law-enforcement officer or other person authorized to serve process in the jurisdiction where the nonresident party is located, (ii) been ordered to pay spousal support or child support pursuant to an order entered by any court of competent jurisdiction in this Commonwealth having in personam jurisdiction over such person, or (iii) shown by personal conduct in this Commonwealth, as alleged by affidavit, that the person conceived or fathered a child in this Commonwealth;

9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is based, or at the time a cause of action arose for divorce or separate maintenance or at the time of commencement of such suit, if the other party to the matrimonial relationship resides herein; or

10. Having incurred a liability for taxes, fines, penalties, interest, or other charges to any political subdivision of the Commonwealth.

Jurisdiction in subdivision 9 is valid only upon proof of service of process pursuant to § 8.01-296 on the nonresident party by a person authorized under the provisions of § 8.01-320. Jurisdiction under subdivision 8 (iii) of this subsection is valid only upon proof of personal service on a nonresident pursuant to § 8.01-320.

B. Using a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth. For purposes of this subsection, "use" and "computer network" shall have the same meanings as those contained in § 18.2-152.2.

C. When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him; however, nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this Commonwealth over foreign corporations which are subject to service of process pursuant to the provisions of any other statute.

ii. At least one opinion in Virginia has conferred jurisdiction over Will legatees. *See, e.g., Eldridge v. Sloper*, 75 Va. Cir. 513 (Alexandria Cir. Ct. 2007). However, it remains an issue undecided by the Supreme Court of Virginia. Thus, you will need to review applicable case law in determining whether a court in Virginia can exercise jurisdiction over a non-resident defendant.

c. Service of Process Upon Natural Persons.

- Service upon individuals within the Commonwealth must comply with the following statutory section:

> Subject to the provisions of § 8.01-286.1, in any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:
>
> 1. By delivering a copy thereof in writing to the party in person; or
>
> 2. By substituted service in the following manner:
>
> a. If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older; or
>
> b. If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode, provided that not less than 10 days before judgment by default may be entered, the party causing service or his attorney or agent mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing. In any civil action brought in a general district court, the mailing of the application for a warrant in debt or affidavit for summons in unlawful detainer or

other civil pleading or a copy of such pleading, whether yet issued by the court or not, which contains the date, time and place of the return, prior to or after filing such pleading in the general district court, shall satisfy the mailing requirements of this section. In any civil action brought in a circuit court, the mailing of a copy of the pleadings with a notice that the proceedings are pending in the court indicated and that upon the expiration of 10 days after the giving of the notice and the expiration of the statutory period within which to respond, without further notice, the entry of a judgment by default as prayed for in the pleadings may be requested, shall satisfy the mailing requirements of this section and any notice requirement of the Rules of Court. Any judgment by default entered after July 1, 1989, upon posted service in which proceedings a copy of the pleadings was mailed as provided for in this section prior to July 1, 1989, is validated.

c. The person executing such service shall note the manner and the date of such service on the original and the copy of the process so delivered or posted under this subdivision and shall effect the return of process as provided in §§ 8.01-294 and 8.01-325.

3. If service cannot be effected under subdivisions 1 and 2, then by order of publication in appropriate cases under the provisions of §§ 8.01-316 through 8.01-320.

4. The landlord or his duly authorized agent or representative may serve notices required by the rental agreement or by law upon the tenant or occupant under a rental agreement that is within the purview of Chapter 13 (§ 55-217 et seq.) of Title 55.

VA. CODE ANN. § 8.01-296 (Michie 2016).

d. Service by Publication.

- You can serve by publication under very limited circumstances.
- You need to follow the instructions in the following statute to the letter. Remember – you cannot serve a party by publication UNLESS (1) the court has personal jurisdiction over the party **and** (2) the party fits within

the criteria set forth in the following statute **and** (3) you follow the procedure set forth in the following statute.

> A. Except in condemnation actions, an order of publication may be entered against a defendant in the following manner:
>
> 1. An affidavit by a party seeking service stating one or more of the following grounds:
>
> a. That the party to be served is (i) a foreign corporation, (ii) a foreign unincorporated association, order, or a foreign unincorporated common carrier, or (iii) a nonresident individual, other than a nonresident individual fiduciary who has appointed a statutory agent under § 26-59; or
>
> b. That diligence has been used without effect to ascertain the location of the party to be served; or
>
> c. That the last known residence of the party to be served was in the county or city in which service is sought and that a return has been filed by the sheriff that the process has been in his hands for twenty-one days and that he has been unable to make service; or
>
> 2. In any action, when a pleading (i) states that there are or may be persons, whose names are unknown, interested in the subject to be divided or disposed of; (ii) briefly describes the nature of such interest; and (iii) makes such persons defendants by the general description of "parties unknown"; or
>
> 3. In any action, when (i) the number of defendants upon whom process has been served exceeds ten and (ii) it appears by a pleading, or exhibit filed, that such defendants represent like interests with the parties not served with process.
>
> Under subdivisions 1 and 2 of this subsection, the order of publication may be entered by the clerk of the court. Under this subdivision such order may be entered only by the court. However, any orders not properly entered, but processed by a clerk prior to July 1, 2010, shall be deemed to have been properly entered.
>
> Every affidavit for an order of publication shall state the last known post office address of the party against whom publication is asked, or if such address is unknown, the affidavit shall state that fact.

> B. The cost of such publication shall be paid initially by the party seeking service; however, such costs ultimately may be recoverable pursuant to § 17.1-601.
>
> VA. CODE ANN. § 8.01-316 (Michie 2016).

e. Service Outside the Commonwealth.

- Service of process upon a person can be effected outside the Commonwealth. In cases in which the Court has jurisdiction pursuant to VA. CODE ANN. § 8.01-328.1 (Michie 2011), service upon a person outside the Commonwealth shall have the same effect as service upon a person located in the Commonwealth. *See* VA. CODE ANN. § 8.01-320(A) (Michie 2016).
- However, in situations in which the court does not have personal jurisdiction pursuant to VA. CODE ANN. § 8.01-328.1 (Michie 2016), or if a person is served by "substituted service" (i.e., in the manner described in VA. CODE ANN. § 8.01-296(2)(a)), service shall have the same effect as service by publication.
- The statute provides in pertinent part:

> A. Subject to § 8.01-286.1, service of a process on a nonresident person outside the Commonwealth may be made by: (i) any person authorized to serve process in the jurisdiction where the party to be served is located; or (ii) any person 18 years of age or older who is not a party or otherwise interested in the subject matter of the controversy and notwithstanding any other provision of law to the contrary, such person need not be authorized by the circuit court to serve process which commences divorce or annulment actions. When the court can exercise jurisdiction over the nonresident pursuant to § 8.01-328.1, such service shall have the same effect as personal service on the nonresident within Virginia. Such service when no jurisdiction can be exercised pursuant to § 8.01-328.1, or service in accordance with the provisions of subdivision 2 a of § 8.01-296 shall have the same effect, and no other, as an order of publication duly executed, or the publication of a copy of process under this chapter, as the case may be; however, depositions may be taken at any time after 21 days' notice of the taking of the depositions has been

> personally served. The person so served shall be in default upon his failure to file a pleading in response to original process within 21 days after such service. If no responsive pleading is filed within the time allowed by law, the case may proceed without service of any additional pleadings, including the notice of the taking of depositions. . . .
>
> VA. CODE ANN. § 8.01-320 (Michie 2016).

f. Actual notice "cures" defects

- If a defendant actually receives "process", then even if service is defective, such receipt cures service defects:

> Except for process commencing actions for divorce or annulment of marriage or other actions wherein service of process is specifically prescribed by statute, process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.
>
> VA. CODE ANN. § 8.01-288 (Michie 2011).

- However, this section is not a substitute for obtaining service of process by lawful means.

g. Certain actions can waive service defects.

- If a party files pleadings in your case (i.e., a demurrer, a plea in bar, discovery, or participation in a hearing on the merits), then he waives defects in personal jurisdiction or service of process. *See* VA. CODE ANN. § 8.01-277.1(A) (Michie 2011).
- If you are representing a defendant for whom you are making an argument regarding either defective service or personal jurisdiction, then you need to be certain you read VA. CODE ANN. § 8.01-277.1(A) carefully AND file your motion contesting service and/or personal jurisdiction by "special appearance". See VA. CODE ANN. § 8.01-277.1(B) (Michie 2011).

2. <u>What is an Answer?</u>

- **Answer & Grounds of Defense:** This is an answer to the allegations set forth in the Complaint. The Answer is in the form of "admit" or "deny". If some allegations are admitted in a paragraph, and others denied, you should state what is admitted and what is denied. This pleading needs to be filed within 21 days of the date of service of the Complaint. *See* Va. Sup. Ct. R. 3:8.

    - If a Demurrer, Plea in Bar or other responsive pleading is filed, then you will have either 21 days from the date the responsive pleadings are ruled upon (or such other time period as determined by the Court). See Va. Sup. Ct. R. 3:8.

    - If you allege additional facts within your answer, you can demand that those facts be replied to pursuant to Va. Sup. Ct. R. 3:11.

      → **PRACTICE POINTER:** If you are retained within a week of the Answer needing to be filed, then it is prudent to request an extension of time to file responsive pleadings. Additional time is liberally granted, and such motions are subject to Rule 1:9.

3. <u>When does an Answer need to be filed under oath?</u>
    - Virginia Code Ann. § 8.01-28 (2016) requires that when a Complaint is required by statute to be filed under oath, either the Answer must be under oath (or it must be accompanied by an affidavit).
    - **<u>HOWEVER</u>**, there is a cure. If a Motion to Strike the Answer is filed, Va. Sup. Ct. R. 1:10 provides a right to cure to Defendant's failure to file a verified answer. Rule 1:10 states in relevant part that:

      > If a statute requires a pleading to be sworn to, and it is not…objection…must be made within seven days after the pleading is filed by a motion to strike. <u>At any time before the court passes on the motion or within such time thereafter as the court may prescribe, the pleading may be sworn to or the affidavit filed</u>.

Va. Sup. Ct. R. 1:10 (emphasis added).

4. What other pleadings can be filed in response to a Complaint?

- **Demurrer:** This is the state-law equivalent of a Federal Rule 12(b)(6) Motion to Dismiss (failure to state a claim upon which relief can be granted). It requests that the Complaint be dismissed for the failure to state a claim upon which relief can be granted. *See* Va. Code. Ann. § 8.01-273(A) (Michie 2011). A demurrer must be filed within 21 days of service of the Complaint. *See* Va. Sup. Ct. R. 3:8.

  - A demurrer tests the legal sufficiency of the facts alleged in a Complaint. *See Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554 (2003); *W.S. Carnes, Inc. v. Bd. of Supervisors*, 252 Va. 377, 384 (1996).

  - All facts alleged in the Complaint are to be taken as true. *See, e.g., Nedrich v. Jones*, 245 Va. 465, 470 (1993).

  - However, "[a] demurrer admits the truth of all facts alleged in a motion for judgment but does not admit the correctness of the pleader's conclusions of law." *Filak v. George*, 267 Va. 612, 617-618 (2004) (citing *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 570-71 (2003); *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102 (2001)).

  - "Nor does a demurrer admit 'inferences or conclusions from facts not stated.'" *Arlington Yellow Cab Co. v. Transportation, Inc.*, 207 Va. 313, 318-19 (1988) (citations omitted).

  - Documents attached to the Complaint can also form the basis of the Demurrer, and such documents can amplify allegations (or supercede

inconsistencies) made in a Complaint. *See Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 383 (1997); *see also CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993); *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 398 (1985).

→ **PRACTICE POINTER:** If a document upon which the cause of action in a Complaint is based has not been attached to the Complaint, you can file a Motion Craving Oyer to have the document incorporated into the Complaint. BEWARE, HOWEVER, that Motions Craving Oyer are for specific categories of documents, although the rules have been relaxed in recent years.[1] Historically, they were only applicable to deeds and probate documents. *Smith v. Wolsiefer*, 119 Va. 247 (1916) (citing *Langhorne v. Richmond R. Co.*, 91 Va. 369 (1895)).

- **Bill of Particulars:** If the Complaint does not set forth specific enough facts for your client to be able to respond, then you may file a Motion for Bill of Particulars, so that Plaintiff will be required to file a more particularlized statement of the claim. *See* Va. Sup. Ct. R. 3:7.

- **Plea in Bar:** A pleading filed that sets forth an affirmative defense to a cause of action (e.g., statute of limitations, standing, estoppel, laches, etc.)

[1] "A motion to crave oyer is a request of the Court to require that a document sued upon, or a collateral document which is necessary to the Plaintiff's claim be treated as though it were part of the Plaintiff's pleadings." *Ragone v. Waldvogel*, 54 Va. Cir. 581, 582 (Roanoke Cir. Ct. 2001) (citing *Burton v. F.A. Seifert & Co.*, 108 Va. 338, 350 (1908)). A defendant may "crave oyer of all documents mentioned in the pleadings, as long as the document forms a basis for any of the plaintiff's claims." *Colinsky Consulting v. Holloway*, 57 Va. Cir. 403, 405 (Norfolk Cir. Ct. 2002) (citing *Sjolinder v. American Enterprise Solutions, Inc.*, 51 Va. Cir. 436, 437 (Charlottesville Cir. Ct. 2000)).

This pleading can apply to one count of a complaint, or to the complaint in its entirety.[2]

5. What if you have an additional claim?
    - **Cross-Claim:** A claim based upon the same set of circumstances against a co-defendant. *See* Va. Sup. Ct. R. 3:10.

    - **Counterclaim:** A claim that is either based upon the same set of circumstances or a totally different claim against the same opposing party, and it could possibly name other parties as well. *See* Va. Sup. Ct. R. 3:9.

    - **Third party Complaint:** A claim by a defendant against a party that has not been named. This is a party that the defendant claims is liable for some cause of action stated in the Complaint. See Va. Sup. Ct. R. 3:13.

6. What if an Answer or other responsive pleading is not filed?
    - You should file a motion for entry of a default judgment.
        - Virginia Supreme Court Rule 1:4(e) provides that "an allegation of fact in a pleading that is not denied by the adverse party's pleading, when the adverse party is required by these Rules to file such pleading, is deemed to be admitted."

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[2] "[A] plea in bar is a defensive pleading that reduces the litigation to a single issue." *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 562 (1992) "Its very purpose is to decide factual issues whose determination, when applied to certain legal principles, may end or limit pending litigation." *Painter v. Singh*, 73 Va. Cir. 77, 78 (Fairfax Co. Cir. Ct. 2007) (citing *Nelms v. Nelms*, 236 Va. 281 (1988). A plea in bar, if proven, creates a bar to a plaintiff's recovery. *See Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010) (citing *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008); *Baker v. Poolservice Co*., 272 Va. 677, 688 (2006); *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594 (2000)). The burden of proof lies with the party asserting the plea. *See id*. (citing *Baker v. Poolservice Co*., 272 Va. 677, 688 (2006); *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594 (2000); *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996)).

- According to Va. Sup. Ct. R. 3:19, "a defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default." Va. Sup. Ct. R. 3:19(a).

- If you are asking for purely equitable relief, then a court can enter an order upon default. "Except in suits for divorce or annulling a marriage, the court shall, on motion of the plaintiff, enter judgment for the relief appearing to the court to be due." Va. Sup. Ct. R. 3:19(c)(1).

- Be cautious, however, since courts will permit a defendant in default to file a late responsive pleading. While you may be able to obtain attorney's fees for your client's trouble, the court may still permit the defendant to file pleadings.
  - Va. Sup. Ct Rule 3:19(b) states, "[t]hat prior to entry of judgment, for good cause shown the court may grant leave to a defendant who is in default to file a late responsive pleading. Relief from default may be conditioned by the court upon such defendant reimbursing any extra costs and fees, including attorney's fees, incurred by the plaintiff solely as a result of the delay in filing of a responsive pleading by the defendant."
  - Although "good cause" has not been interpreted in the context of Va. Sup. Ct. R. 3:19(b), the Supreme Court of Virginia in *AME Fina. Corp. v. Kiritsis* states, "that circumstances that support the exercise of discretion to extend the time for filing include lack of prejudice to the opposing party, the good faith of the moving party, the promptness of the moving party in responding to the opposing parties' decision to progress with the cause, the existence of a meritorious claim or substantial defense, the existence of legitimate extenuating circumstances, and justified belief that a suit has been abandoned or will be allowed to remain dormant on the docket." *AME Fin. Corp. v. Kiritsis,* 281 Va. 384, 392 (2011).

- The Supreme Court of Virginia has stated that, "a good cause determination invests a trial court with discretion. Additionally, the use of the word 'may,' as opposed to 'shall,' in Rule 3:19(b) evidences that even after a defendant shows good cause, a trial court has discretion to grant or refuse the defendant's motion for leave to file late responsive pleadings." *Id.* at 392-93.

B. DISCOVERY

1. Before Filing a Lawsuit

a. Depositions

- You can petition the Court for permission to depose a witness prior to initiation of a court case pursuant to Va. Sup. Ct. R. 4:2.
- The rule states in pertinent part:

> (a) Before Action.
>
> (1) Petition. --A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this Commonwealth may file a verified petition in the circuit court in the county or city of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (A) that the petitioner expects to be a party to an action cognizable in a court of this Commonwealth but is presently unable to bring it or cause it to be brought; (B) the subject matter of the expected action and his interest therein; (C) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (D) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (E) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. --The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 21 days before the date of hearing the notice shall be served either within the Commonwealth in the manner provided for service of a complaint or without the Commonwealth in the manner provided by Code § 8.01-320; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not so served, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a person under a disability, a guardian ad litem shall be appointed to attend on his behalf.

(3) Order and Examination. --If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these Rules. The attendance of witnesses may be compelled by subpoena, and the court may make orders of the character provided for by Rules 4:9 and 4:10. For the purpose of applying these Rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Cost. --The cost of such depositions shall be paid by the petitioner, except that the other parties in interest who produce witnesses on their behalf or who make use of witnesses produced by others shall pay their proportionate part of the cost of the transcribed testimony and evidence taken or given

on behalf of each of such parties.

(5) Filing. --The depositions shall be certified as prescribed in Rule 4:5 and then returned to and filed by the clerk of the court which ordered its taking.

(6) Use of Deposition. --If a deposition to perpetuate testimony is taken under these Rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this Commonwealth in accordance with the provisions of Rule 4:1.

Va. Sup. Ct. R. 4:2

→**PRACTICE POINTER:** You should use in the event the potential witness or person is ill and may or may not be alive if/when a case is filed. **BE CAREFUL** however, because the witness might not be competent to testify. The test is reflected below, and it is suggested that a physician will need to testify as to whether the proposed witness can be considered "competent" to testify.

Regarding the competency of a witness and the capacity of communication 2 Wigmore, Evidence (3rd ed. 1940) reads in part:

"(1) First, it involves as capacity mentally to understand the nature of questions put and to form and communicate intelligent answers.

"(2) Secondly, does it involve a sense of moral responsibility, of the duty to make the narration correspond to the recollection and knowledge, i.e. to speak the truth as he sees it? It would seem that the clear absence of such a sense would disqualify the witness." § 495 at 587.

"If it is asked further what shall be the standard by which this capacity to observe, recollect, and communicate is to be judged, the law is found very properly declining to lay down any more detailed rules. The trial Court must determine this capacity. Any more restricted rule, however ingenious, would fail of its purpose, and would hamper rather than assist the process of procuring trustworthy testimony."

Helge v. Carr, 212 Va. 485, 488 (1971).

2. After Filing a Lawsuit

a. Virginia Supreme Court rule 4 governs discovery in civil cases filed in the Commonwealth.

b. Methods of Discovery at your disposal, all of which are subject to Rule 4:1 (scope and other rules governing all discovery):

- **Interrogatories** – written questions to a party (you cannot issue interrogatories to non-parties). You are limited to 30 (inclusive of sub-parts). Answers are required to be under oath. *See* Va. Sup. Ct. R. 4:8.

- **Request for Production of Documents and Things** – written requests to a party (you cannot issue requests to non-parties). There are no limits in numbers. *See* Va. Sup. Ct. R. 4:9.

- **Request for Entry upon Land for Inspection** – written request to a party to enter upon land for inspection. *See* Va. Sup. Ct. R. 4:9. **PRACTICE POINTER** – This has been used for purposes of appraising property.

- **Request for Admissions** – written statements directed to a party for which you are requesting a response of "admit" or "deny". *See* Va. Sup. Ct. R. 4:11.

- **Depositions** – oral questions to parties and non-parties. *See* Va. Sup. Ct. R. 4:5. They can be for discovery purposes or in lieu of trial testimony. Depositions can also be videoed, but notice must be given in advance of such deposition. *See* Va. Sup. Ct. R. 4:7A.

c. If a party fails to comply with a discovery request, you may file a Motion to Compel pursuant to Va. Sup. Ct. R. 4:12(a). If the party

still does not comply, you may file a Motion for Sanctions pursuant to Va. Sup. Ct. R. 4:12(b).

- You cannot obtain sanctions until an Order compelling a response has been entered. *See* Va. Sup. Ct. R. 4:12; *see also Walsh v. Bennett*, 260 Va. 171 (2000); *Travis v. Finley*, 36 Va. App. 189 (2001).
- One of the sanctions available is dismissal of the lawsuit. *See* Va. Sup. Ct. R. 4:12(b)(2); *see also Brown v. Black*, 260 Va. 305 (2000).

→ **PRACTICE POINTER:** If your client cannot timely respond to discovery, ask for an extension of time and/or file a Motion enlarging the amount of time for your client to respond. Be sure to advise your client the importance of responding to discovery.

- Be sure that the discovery you request falls within the parameters of permissible discovery. The scope of discovery is defined as follows:

> (b) *Scope of Discovery.* --Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:
>
> (1) *In General.* --Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subject to the provisions of Rule 4:8 (g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery

> sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).
>
> Va. Sup. Ct. R. 4:1(b)(1).

- **OBJECTIONS:** While the discovery rules permit the filing of objections, they should only be filed for those requests that go beyond the scope of discovery, or inquire into information protected by a privilege. If you claim privilege, be sure to file a privilege log. See Va. Sup. Ct. R. 4:1(b)(6).
- You can always ask for the issuance of a Protective Order, under certain circumstances.

> (c) Protective Orders. --Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or city where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that

> discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.
>
> Va. Sup. Ct. R. 4:1(c).

C. Dead Man's Statute

1. Generally

- The "dead man's statute" refers to Virginia Code Ann. § 8.01-397. It governs the admissibility of statements by a deceased person. It is an exception to the hearsay rule.
- Virginia Code section 8.01-397 states the following in pertinent part:

> In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party.

- In short, all written statements by the decedent will be admissible (subject to, of course, other objections, such as relevancy).

2. Oral statements offered by an adverse or interested party are inadmissible absent corroborative evidence.

- In some cases, it is clear that the person involved is considered to be an adverse party, since the person is a party to the lawsuit. *See, e.g., Stephens v. Caruthers*, 97 F. Supp. 2d 698, 705 (E.D. Va. 2000). Therefore, corroboration would be required. Otherwise, the statements will be inadmissible.
- Further, the corroboration cannot come from someone who is an "interested party". An "interested party" is not an easy determination. That is an issue that has yet to be decided by the Virginia courts (i.e., the types of relationships swept in by the term "interested party"). However, the U.S. District Court for the Eastern District of Virginia has reasoned:

> No Virginia authority directly addresses this question. Yet, existing authority does make clear that the phrase "adverse or interested party" refers to two, distinct categories of persons, namely "adverse" parties and "interested" parties. And the case law further confirms that an "adverse party" is "one who is a party to the record," while an "interested party" "is one, not a party to the record, who is pecuniarily interested in the result of the suit."
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> *Stephens v. Caruthers*, 97 F. Supp. 2d 698, 705 (E.D. Va. 2000) (citing *Atlantic Coast Realty Co. v. Robertson's Ex'r*, 135 Va. 247, 116 S.E. 476, 480 (1923) and *Merchants Supply Co. v. Executors of Estate of Hughes*, 139 Va. 212, 215, 123 S.E. 355, 356 (1924)).

- This means that neither Executors nor beneficiaries can obtain a judgment based upon oral statements of the deceased without corroboration.
- What is meant by the term "corroboration"? The following standard was recently reiterated by the Supreme Court of Virginia:

> [i]t is not necessary that the corroborative evidence should of itself be sufficient to support a verdict, for then there would be no need for the adverse or interested party's testimony to be corroborated. Corroborating evidence tends to confirm and strengthen the testimony of the witness[,] and it may come from other witnesses as well as from circumstantial evidence. It is not essential that a survivor's testimony be corroborated on all material points.
>
> The corroboration, to be sufficient under the statute, however, must at least tend, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings [and] testified to by the [surviving] witness . . . which allegation or issue, if unsupported, would be fatal to the case.
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> *Estate of Parfitt v. Parfitt*, 277 Va. 333, 343 (2009) (quoting *Rice v. Charles*, 260 Va. 157, 165-66 (2000)).

- If the person wishing to admit the statements of the decedent is/was a fiduciary for the deceased, a higher degree of corroboration will be required than for other transactions. *See Clay v. Clay*, 196 Va. 997, 1002 (1955); *see also Nicholson v. Shockey*, 192 Va. 270, 283 (1951). Without corroboration, the testimony about his/her version of events will be significantly limited.