

# Venue in Virginia: Putting the ‘Where’ in Wherefore

by David N. Anthony and R. Johan Conrod Jr.

The choice of venue is one of the most significant issues affecting a lawsuit. Differences in likely jury pools, jury awards, judges and court management systems dramatically affect litigation strategy and potential outcomes for the case. For instance, a case filed in a particularly plaintiff-friendly jurisdiction may force a defendant to settle a case to avoid the risk of a large jury award. Similarly, a pro-defendant venue provides a defendant with significant advantages such as an increased probability of a judge granting a demurrer or motion for summary judgment or a jury returning a defense or modest verdict, which may not justify the time and expense of trial. This article discusses the basics of venue and an overview on how to determine the proper venue for lawsuits.

## THE BASICS

### Venue Versus Jurisdiction

Jurisdiction and venue are distinct concepts.<sup>1</sup> “Jurisdiction” concerns the court’s power to hear and determine a specific cause or controversy.<sup>2</sup> A court without jurisdiction has no inherent power to decide the case, and court action under such circumstances is a nullity.<sup>3</sup> In contrast, “venue” is a matter of choosing a convenient forum for a case where the court has jurisdiction.<sup>4</sup> Virginia Code Ann. § 8.01-258 states that “[t]he provisions of this chapter relate to venue – the place of trial – and are not jurisdictional.” In other words, “jurisdictional rules tell us where a party may be sued, while venue rules tell us where such suit ought to be conducted.”<sup>5</sup>

### Venue is Governed by Statute

Common law determined venue based upon where the “principal fact [of the case] occurred.”<sup>6</sup> The rationale for this approach was that juries were comprised normally of people most knowledgeable with the facts of the case.<sup>7</sup> Today, venue is prescribed by statute for all categories of lawsuits in Virginia.<sup>8</sup> In general, venue is controlled by Virginia Code Ann. §§ 8.01-257 to -267 with a few exceptions.<sup>9</sup>

### Improper Venue Typically Does Not Result in Dismissal

Virginia Code Ann. § 8.01-264 states that “no action shall be dismissed solely on the basis of venue if there be a forum in the Commonwealth where venue is proper.” Thus, improperly laid venue will not result in the dismissal of a lawsuit unless no proper forum exists within Virginia. As the Virginia Code states:

[T]he court wherein an action is commenced may . . . dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all of the parties is available . . .<sup>10</sup>

Such conditions include the defendant’s agreement to waive any statute of limitation defense if the action is brought in a more convenient forum.<sup>11</sup>

### Curing Venue Defects

Venue may be cured in three ways:<sup>12</sup>

(1) the court may transfer the case to the proper or a more convenient forum within Virginia on a defendant’s motion under the factors justifying transfer discussed below;<sup>13</sup> (2) the court may retain the case because the proper forum is inconvenient;<sup>14</sup> or (3) a party may waive improper venue. As the Supreme Court has noted, venue “is a privilege which may be waived, and which, if about to be denied must, in Virginia, be claimed . . . otherwise it will be lost . . .”<sup>15</sup> In General District Courts, a venue objection must be raised before the trial date.<sup>16</sup> In Circuit Courts, a defendant must file its objection within 21 days after service of process commencing the action or within such other time as is fixed for filing responsive pleadings.<sup>17</sup>

### Consequences for Improperly Brought or Objected to Venue

The Virginia Code specifically provides consequences for plaintiffs who attempt to improperly lay venue and for defendants who attempt to improperly transfer venue.<sup>18</sup> The court may award costs and attorney’s fees against a plaintiff who files in an improper venue or a defendant who files a frivolous motion to transfer.<sup>19</sup> Virginia courts retain the power to award sanctions for motions or pleadings filed for an improper purpose, including to cause harassment, unnecessary delay or needless increase in litigation costs.<sup>20</sup>

### Norfolk & Western Railway Co. v. Williams

Any Virginia lawyer dealing with venue issues needs to be familiar with the decision of *Norfolk & W. Ry. v. Williams*.<sup>21</sup> In *Norfolk & W. Ry.*, the plaintiff sustained injuries when he fell backwards in a chair in the defendant’s Roanoke office. The plaintiff filed a suit under the Federal Employer’s Liability Act in Portsmouth, which was a permissible venue under Virginia Code Ann. § 8.01-262. The defendant moved to transfer the case to Roanoke – the site of the accident and the location of a majority of the witnesses. The trial court refused to transfer the case, and a jury returned a substantial verdict in plaintiff’s favor.

The Supreme Court found that the trial court abused its discretion in refusing to transfer the case to

Roanoke.<sup>22</sup> The Court ruled that “[t]he trial court was presented with sufficient information to show good cause to transfer, including substantial inconvenience to the parties and witnesses, as well as indications of a forum originally selected for ‘not simply justice, but perhaps justice blended with some harassment.’”<sup>23</sup> Thus, the Court set aside the jury verdict and ordered a new trial in Roanoke.<sup>24</sup>

### **WHERE VENUE MAY BE PROPERLY LAID**

Properly laid venue depends upon whether the forum is preferred, permissible, convenient or dictated by contract.

#### **Preferred Versus Permissible Venue**

The Virginia Code specifies two broad categories of venue – preferred and permissible, referred to as Category A and Category B venue.<sup>25</sup>

#### **Category A: Preferred Venue**

Generally, if preferred venue applies, the case must be filed in the forum specified by Virginia Code Ann. § 8.01-261. Section 8.01-261 identifies 20 categories of Category A or preferred venue.<sup>26</sup>

Some examples include the following:

- Actions involving a state regulatory agency action for private plaintiffs prefer venue where the aggrieved party or plaintiff resides, regularly or systematically conducts affairs or business, or has property affected by the action.<sup>27</sup>
- When the Commonwealth is the plaintiff, the preferred venue is where the defendant resides, conducts affairs or business, or has property affected by the agency’s action.<sup>28</sup>
- Cases involving land, such as ejectment actions and actions for unlawful detainer, should be brought in the city or the county where the land is situated.<sup>29</sup>
- Actions to impeach or establish a will should be brought in the county or city where the will was probated, or if not yet probated, where the will may be properly offered for probate.<sup>30</sup>
- Claims brought under the Virginia Tort Claims Act should be filed where the claimant resides, where the act or omission at issue occurred, or if the claimant resides outside Virginia and

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the act occurred outside Virginia, then in the City of Richmond.<sup>31</sup>

#### **Category B: Permissible Venue**

All other cases provide for Category B or permissible venue.<sup>32</sup> Plaintiffs should recognize that the rules regarding permissible venue generally relate to the defendant’s location and activities with two limited exceptions.

The first exception appears in actions to recover or partition personal property.<sup>33</sup> In such cases, if the property is not physically located in Virginia or the evidence of such property is not located in Virginia, the case may be brought where the plaintiff resides.<sup>34</sup> The second exception is where the plaintiff resides if all of the defendants are either unknown, not residents of Virginia, or if no other venue provision applies.<sup>35</sup>

With these exceptions in mind, the application of the permissible venue provisions is fairly straightforward. Venue is permissible anywhere the defendant resides (for corporations this is where the mayor, rector, president or other chief officer resides),<sup>36</sup> has his principal place of employment,<sup>37</sup> has a registered office or agent,<sup>38</sup> or regularly conducts affairs or business activity.<sup>39</sup> Venue also is permissible where the cause of action, or any part thereof, arose.<sup>40</sup>

In actions for breach of contract, venue is permissible either where the contract was formed or breached.<sup>41</sup> In actions based on the delivery of goods, venue is permissible where the goods were received.<sup>42</sup> For actions relating to construction contracts, the proper venue is either where the construction project is located or any other proper venue designation in Chapter 5 with the

exception of any location outside of Virginia.<sup>43</sup>

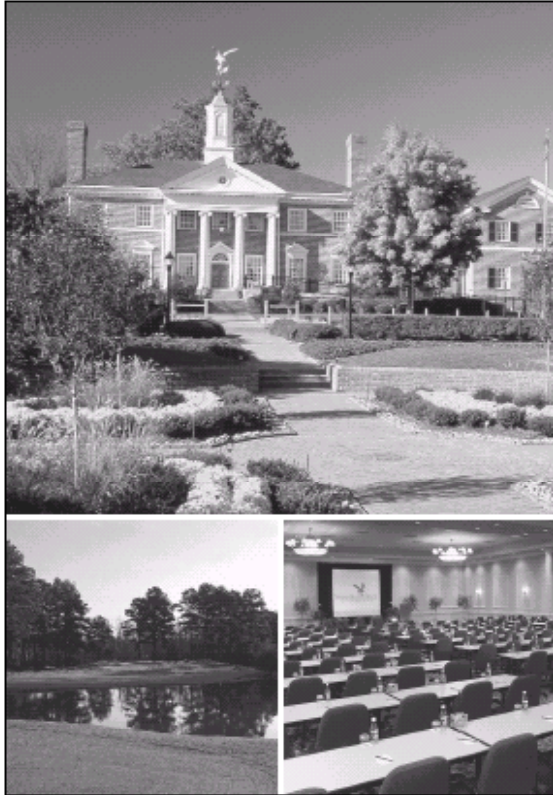
#### **Meyer v. Brown**

A hotly disputed issue involving permissible venue has been the interpretation of “regularly conducts affairs or business activity” under Virginia Code Ann. § 8.01-262(3). In *Meyer v. Brown*, the Supreme Court addressed this issue in ruling that visiting a forum seven times per year on business-related trips was not sufficiently regular to confer venue under this section.<sup>44</sup> In *Meyer*, the defendant insurance manager visited Richmond approximately seven times per year to meet with insurance brokers regarding his business. The defendant also attended business seminars in Richmond approximately three times per year.<sup>45</sup>

The Court ruled that these visits were not sufficiently “regular” to make venue proper in Richmond.<sup>46</sup> The Court held that “[t]he evidence shows that defendant’s activity within the City of Richmond . . . was merely casual or occasional, and not conducted in an orderly, methodical way.”<sup>47</sup> In addition, the Court found that visits of a personal or recreational nature were not relevant for purposes of Virginia Code Ann. § 8.01-262(3).<sup>48</sup>

#### **The Doctrine of Forum Non Conveniens**

Despite a plaintiff’s choice of venue, a defendant still may move to transfer a case to a different forum under the doctrine of forum *non conveniens*. The doctrine of forum *non conveniens* originated as a creation of common law,<sup>49</sup> but since has been codified in Virginia.<sup>50</sup> Section 8.01-265 states that



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a motion to transfer should be granted upon a showing of “good cause.”

### What is ‘Good Cause?’

“[T]here is no clear formula which can be mechanically applied” to determine if there is “good cause” to transfer a case for forum *non conveniens* grounds.<sup>51</sup> However, Virginia venue statutes provide some guidance as to the factors considered when analyzing whether a transfer is appropriate. Virginia Code Ann. § 8.01-257 indicates that the convenience of the parties and witnesses and the administration of justice without prejudice or delay are factors to be considered by the court. Section 8.01-265 also states that “the avoidance of substantial inconvenience to the parties or the witnesses” is a factor which should be considered by courts dealing with forum *non conveniens* motions. Moreover, a plaintiff’s choice of forum should be considered as it has historically been entitled to “great deference;”<sup>52</sup> however, this presumption is not absolute.<sup>53</sup> When “considerations are equal or even close, the plaintiff’s choice of forum must prevail.”<sup>54</sup>

Virginia courts also have relied on the factors established by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert* to evaluate forum *non conveniens* motions.<sup>55</sup> These factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of the unwilling; (3) the cost of obtaining attendance of willing witnesses; (4) the possibility to view the premises, if applicable; and (5) “all other practical problems that make trial of a case easy, expeditious and inexpensive.”<sup>56</sup>

### Virginia Electric & Power Co. v. Dungee

The Supreme Court’s most recent discussion of forum *non conveniens* is *Virginia Elec. & Power Co. v. Dungee*.<sup>57</sup> In *Dungee*, the plaintiff, a minor, sustained severe burns when he came in contact with 13,000 volts of electricity while playing in an electric company’s substation. The plaintiff claimed that the electric company was negligent in maintaining the fence surrounding the substation. A jury awarded the plaintiff \$20 million. The defendant appealed several of the trial court’s rulings, including its refusal to

transfer venue.

The electric company argued that the test for good cause was not exclusively that of “substantial inconvenience.”<sup>58</sup> In addition, the defendant contended that the *Norfolk & W. Ry.* decision held that a court abuses its discretion when “it declines to transfer venue from a forum with no practical nexus to the cause of action to a more convenient forum with a strong nexus.”<sup>59</sup> The Supreme Court agreed with the defendant that substantial inconvenience was not the only factor to consider when analyzing whether to grant a forum *non conveniens* transfer; however, the Court rejected the electric company’s assertion that “transfer is required based solely on the lack of a practical nexus of the venue with the litigation.”<sup>60</sup> The Court affirmed the trial court’s venue decision.<sup>61</sup>

### Venue by Contractual Agreement

Historically, American courts took a dim view of forum selection clauses, finding they violated public policy because they attempted to “oust the jurisdiction” of the courts.<sup>62</sup> However, following the United States Supreme Court’s decision in *M/S Bremen v.*



*Zapata Off-Shore Co.*,<sup>63</sup> the Supreme Court of Virginia adopted a more “modern view” in ruling in *Paul Business Systems v. Canon U.S.A., Inc.*<sup>64</sup> that forum selection clauses are enforceable “unless the party challenging the enforcement establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power.”<sup>65</sup> The circumstances to ignore a forum selection clause are unusual, and few Virginia courts have invalidated forum selection clauses.<sup>66</sup>

## CONCLUSION

Four general rules provide guidance to litigators regarding the application of venue to civil litigation:<sup>67</sup>

1. If the venue chosen is not proper, the case should be transferred to a proper forum (assuming the defendant does not waive its objection or no proper forum exists within Virginia).

2. If the venue is permissible but a preferred venue applies, the case should be transferred to the preferred venue.

3. If the venue is permissible, the court may order transfer if another forum is more convenient upon a

showing of good cause.

4. If venue is preferred, transfer cannot occur unless the parties consent or another preferred venue is more convenient.<sup>68</sup>

Trial lawyers should consider carefully these general rules to all lawsuits. After all, the issues surrounding venue selection and transfer are numerous, and an understanding of these key concepts is critically important to maximizing litigation success. **VBA**

## NOTES

1. See *United Coal Co. v. Land Use Corp.*, 575 F. Supp. 1148, 1159 (W.D. Virginia 1983).
2. See *County of Bedford v. City of Bedford*, 243 Va. 330, 334, 414 S.E.2d 838, 841 (1992) (citing *Murray v. Roanoke*, 192 Va. 321, 327, 64 S.E.2d 804, 808 (1951)); *Brown v. Commonwealth*, 215 Va. 143, 145, 207 S.E.2d 833, 835 (1974) (stating that “[j]urisdiction may be generally defined as the power to hear and adjudicate a case on its merits”).
3. See *Brown* 215 Va. at 145, 207 S.E.2d at 836 (citing *S. Sand & Gravel Co. v. Massaponax Sand & Gravel Co.*, 145 Va. 317, 323-24, 133 S.E. 812, 813-14 (1926)).
4. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); see also *S. Sand*, 145 Va. at 323-24, 133 S.E. at 813-14 (stating that “venue has to do with geographical or territorial considerations . . . .” (emphasis in original)).
5. *NTN Bearing Corp. of Am. v. Charles E. Scott, Inc.*, 557 F. Supp. 1273, 1277 (N.D. Ill. 1983)

(paraphrasing *Leroy*, 443 U.S. at 180).

6. W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* 145 (3d ed. 1997) (“Bryson”); Martin P. Burks, *Common Law and Statutory Pleadings and Practice* § 37 (4th ed. 1952) (“Burks”).

7. See *Burks* § 37.

8. See *Dowdy v. Franklin*, 203 Va. 7, 9, 121 S.E.2d 817, 818 (1961); *Burks* § 37.

9. See, e.g., Va. Code Ann. § 8.01-259 (excluding habeas corpus proceedings, tax proceedings other than those listed in Title 58.1, juvenile and domestic relations proceedings concerning children, and adoptions from the provisions of Chapter 5, Venue).

10. See Va. Code Ann. § 8.01-265.

11. See *id.*

12. See *Burks* § 37.

13. See Va. Code Ann. § 8.01-264. Presumably, a court can transfer an action *sua sponte*.

14. See Va. Code Ann. § 8.01-265; see discussion *infra* on *Forum Non Conveniens*.

15. *Texaco, Inc. v. Runyon*, 207 Va. 367, 370, 150 S.E.2d 132, 135 (1966) (quoting *Burks supra*); see also *Decker v. Decker*, 12 Va. App. 536, 539, 405 S.E.2d 12, 13 (1991) (citing Va. Code Ann. § 8.01-264 for the proposition that a “venue irregularity shall be deemed to have been waived unless the defendant objects to venue.”).

16. See Va. Code Ann. § 8.01-264.

17. See *id.*

18. See Va. Code Ann. § 8.01-266.

19. See *id.*

20. See Va. Code Ann. 8.01-271.1; Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 6.8 (3d ed. 1998) (explaining that Va. Code Ann. § 8.01-271.1 mirrors Fed. R. Civ. P. 11) (“Sinclair”).

21. 239 Va. 390, 389 S.E.2d 714 (1990).

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22. *Id.* at 396, 389 S.E.2d at 718.  
 23. *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)).  
 24. The *Williams* decision reiterates that courts will look beyond a plaintiff's choice of forum and consider the convenience to the parties.  
 25. See Va. Code Ann. §§ 8.01-261-262.  
 26. See Va. Code Ann. § 8.01-261.  
 27. See Va. Code Ann. § 8.01-261(1)(a).  
 28. See Va. Code Ann. § 8.01-261(1)(b).  
 29. See Va. Code Ann. § 8.01-261(3).  
 30. See Va. Code Ann. § 8.01-261(7).  
 31. See Va. Code Ann. § 8.01-261(18).  
 32. See Va. Code Ann. § 8.01-262.  
 33. See Va. Code Ann. § 8.01-262(5)(c).  
 34. See *id.*  
 35. See Va. Code Ann. § 8.01-262(10).  
 36. See Va. Code Ann. § 8.01-262(1).  
 37. See Va. Code Ann. § 8.01-262(1); *Smith v. Williams*, 2 Va. Cir. 479, 482 (Richmond 1979) (holding that venue was appropriate in Richmond where the defendant's principal place of employment was located in Richmond even though the accident occurred in Henrico County and all interested parties resided in Henrico County).  
 38. See Va. Code Ann. § 8.01-262(2); *Byrd v. Halpert*, 38 Va. Cir. 234 (Richmond 1995) (holding that Richmond was a permissible venue when the defendant was served through the Secretary of the Commonwealth); *Wray v. Floyd & Beasley Transfer Co.*, 29 Va. Cir. 126 (Richmond 1992) (stating that venue is proper in Richmond pursuant to Va. Code Ann. § 8.01-262(2) because the defendant was served through the Secretary of the Commonwealth).  
 39. See Va. Code Ann. § 8.01-262(3); *Meyer v. Brown*, 256 Va. 53, 500 S.E.2d 807 (1998) (holding that visiting a forum seven times per year on business-related trips was not sufficiently regular to confer venue under this section); *Hooker v. Brown*, 41 Va. Cir. 336, 337 (Richmond 1997) (holding that visiting siblings in Richmond two or three times a month did not constitute regularly conducting affairs); *Morey v. McDonald*, 36 Va. Cir. 511 (Richmond 1995) (holding that venue is improper in

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The nomination process for selecting the 2004 VBA Young Lawyers Division Secretary/Treasurer and new members of the Executive Committee has begun with the appointment of King Tower of Williams Mullen as Chair of the VBA/YLD Nominating Committee.

VBA/YLD members interested in being considered for nomination as an officer or Executive Committee member should contact the Nominating Committee Chair at [ktower@williamsmullen.com](mailto:ktower@williamsmullen.com), (804) 783-6438. All VBA/YLD members are encouraged to seriously consider these positions.

The Nominating Committee plans to complete the nomination process by the September 19-21 VBA/YLD meeting at Wintergreen. Interested nominees should contact the committee chair as soon as possible.

Richmond where the defendant only comes to Richmond once a month to eat).  
 40. See Va. Code Ann. § 8.01-262(4); *Faison v. Hudson*, 243 Va. 413, 417, 417 S.E.2d 302, 303-04 (1992) (quoting Va. Code Ann. § 8.01-262(4) for the proposition that venue is proper where the cause of action arose).  
 41. See *Big Seam Coal Corp. v. Atl. Coast Line R.R. Co.*, 196 Va. 590, 593, 85 S.E.2d 239, 241 (1955); *Rector v. Approved Fin. Corp.*, 48 Va. Cir. 329, 330 (Richmond 1999) (reiterating that a cause of action arises either "where the contract is made or where any breach takes place."); *Dean Steel Erectors v. Virginia Steel Erectors*, 35 Va. Cir. 346 (Rockingham County 1995) (holding that venue was proper in Rockingham County because the "to pay" doctrine dictates that a debtor is obligated to seek out a creditor to make payment and failure to seek out the creditor results in a default where the creditor is located).  
 42. See Va. Code Ann. § 8.01-262(8).  
 43. See Va. Code Ann. § 8.01-262.1(A).  
 44. See *Meyer*, 256 Va. at 57, 500 S.E.2d at 810.

45. *Id.*  
 46. *Id.*  
 47. *Id.*  
 48. *Id.*  
 49. See *Norfolk & W. Ry.*, 239 Va. at 392, 389 S.E.2d at 715.  
 50. See Va. Code Ann. §§ 8.01-257, -265; see also *Dungee*, 258 Va. at 246, 520 S.E.2d at 170 (noting that in *Williams*, the Supreme Court "concluded that the litigation had 'no practical nexus' with Portsmouth but had 'a strong nexus' with Roanoke") (citing *Williams*, 239 Va. at 396, 389 S.E.2d at 717).  
 51. *Norfolk & W. Ry.*, 239 Va. at 393, 389 S.E.2d at 716; *Wray*, 29 Va. Cir. at 130.  
 52. *Norfolk & W. Ry.*, 239 Va. at 394, 389 S.E.2d at 716.  
 53. *Id.* at 394, 389 S.E.2d at 717 (citing *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981)).  
 54. *Grubbs v. S. Ry.*, 19 Va. Cir. 367, 368-69 (Richmond 1990).  
 55. See *Norfolk & W. Ry.*, 239 Va. at 393, 389 S.E.2d at 716 (quoting *Gulf Oil Corp.*, 330 U.S. at 508).  
 56. *Id.*  
 57. 258 Va. 235, 520 S.E.2d 164 (1999).  
 58. *Id.* at 245, 520 S.E.2d at 170.  
 59. *Id.*  
 60. *Id.*  
 61. *Id.*; see also *Champigny v. Bayly*, 55 Va. Cir. 381, 384-85 (Norfolk 2001) (citing *Virginia Elec. & Power* for the proposition that a lack of a practical nexus alone was not sufficient to show good cause for a transfer).  
 62. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).  
 63. See *id.*  
 64. *Paul Bus. Sys. v. Canon U.S.A., Inc.*, 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990).  
 65. *Id.*  
 66. However, in one specific circumstance, forum selection clauses are invalidated by statute. See Va. Code Ann. § 8.01-262.1 (invalidating forum selection clauses in actions under a contract for construction if the clause mandates a venue outside of Virginia and the construction project is physically located in Virginia).  
 67. See generally *Sinclair* §§ 6.1-6.11.  
 68. See Va. Code Ann. §§ 8.01-261, -265; *Virginia Civil Benchbook for Judges and Lawyers* 1-35 (The Bench Book Committee ed. 2002).

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