VIRGIN ISLANDS RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose

These rules govern the practice and procedure in all civil actions and proceedings in the Superior Court of the Virgin Islands (the "Superior Court" or the "court"), except as otherwise stated in these rules, or other rules promulgated by the Supreme Court, and except as otherwise provided by law. These rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

REPORTER'S NOTE

The Advisory Committee contemplates that additional groups of rules of court will be adopted by the Supreme Court dealing with particular categories of proceedings, such as small claims cases, landlord-tenant proceedings, and family cases. The language of Rule 1 is intended to provide a general statement that the present Rules apply to Superior Court proceedings and to indicate that more specialized rules may apply in the future to certain categories of actions.

Rule 1-1. Title and Application

(a) Title and Citation. These rules shall be known as the Virgin Islands Rules of Civil Procedure and may be cited in short-form as V.I. R. CIV. P.

(b) Effective Date. These rules shall take effect as provided in a promulgation order by the Supreme Court of the Virgin Islands.

(c) Application to Pending Proceedings. These rules, and subsequent amendments, govern:

(1) proceedings in any action commenced after their effective date; and

(2) proceedings in any action pending on the effective date of the rules or amendments, unless:

(A) the Supreme Court of the Virgin Islands specifies otherwise by order; or

(B) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.

REPORTER'S NOTE

Under this Rule the V.I. R. Civ. P. will take effect as provided in a Promulgation Order by the Supreme Court, and will apply to all actions commenced after their effective date. Importantly, under subpart (c) of this Rule they will apply to all actions that are pending on the date the Rules become effective unless a Superior Court judge makes a specific finding that applying them in a particular previously-pending litigation would be "infeasible" or would "work an injustice." It is anticipated that having an express ruling that prior rules or practices will be applicable will provide clear guidance to counsel and parties in such previously pending cases. If no ruling is made, under this Rule 1-1 the Rules of Civil Procedure will apply to actions filed before adoption of the Rules.

Rule 1-2. Definitions; References to Judges and Magistrate Judges

(a) Definitions. In these Rules of Civil Procedure,

● "*Party*" or "*Plaintiff*" or "*Defendant*" refers to a represented party acting by counsel, and to any self-represented party, as the context requires.

● "*Judge*" refers to a sitting judicial officer appointed by the Governor with the advice and consent of the Legislature in accordance with 4 V.I.C. § 72(a) or appointed or designated pursuant to other statutory authority.

● "*Magistrate Judge*" refers to a sitting judicial officer appointed by the Presiding Judge in accordance with 4 V.I.C. § 122(a) or other statutory authority.

● "*Presiding judicial officer*" refers to a judge or magistrate judge.

● "*Virgin Islands*" refers to the United States Virgin Islands.

(b) Magistrate Judge Authority. Wherever the word "judge" appears in these Civil Rules, the authority and functions specified may be exercised by a magistrate judge to the extent not otherwise inconsistent with these rules, case law precedent, or any applicable statute.

REPORTER'S NOTE

Subpart (a) of this Rule is intended to provide that the definition of "Judge" in the V.I. R.Civ.P. will include senior or retired judges to the extent they are appointed or designated to sit under any provision of Virgin Islands law.

Subpart (b) of the Rule takes cognizance of the fact that Act No. 7888 changed the designation of "magistrate" to "magistrate judge."

Rule 1-3. Procedure in the Absence of Controlling Rule or Virgin Islands Law

(a) Generally. When procedure is not prescribed by these Virgin Islands Rules of Civil Procedure, precedent from the Supreme Court of the Virgin Islands, or the Virgin Islands Code, a judge may regulate practice in any manner consistent with law of the Virgin Islands.

(b) Violation of Requirements Not Specified in these Rules or Applicable Law. No sanction, penalty or other disadvantage may be imposed for noncompliance with any requirement that is not specified in these Civil Rules, the Virgin Islands Code, or in the law of the Virgin Islands, unless the Superior Court has issued an order providing the parties in the action with actual notice of the requirement.

REPORTER'S NOTE

Subpart (a): This Rule recognizes that — where specific guidance or requirements are not provided in the Rules of Civil Procedure, precedent from the Supreme Court of the Virgin Islands will be applicable, along with any provisions of the Virgin Islands Code. Absent such controlling law on procedures to be followed, this Rule confirms that a judge may regulate practice in any manner consistent with law of the Virgin Islands.

Subpart (b): This portion of Rule 1-3 is intended to address those situations where—due to the absence of controlling statutes, Rules, or Supreme Court precedent — there is no prescribed mode of proceeding, and a judge of the Superior Court simply makes an order imposing requirements, that ruling will not be a basis for sanctions or other penalties unless the parties were given notice of the requirements by the issuance of an order providing actual notice of the requirement.

Rule 2. One Form of Action

There is one form of action—the civil action.

Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the clerk of court.

REPORTER'S NOTE

Rules 2 and 3 make it clear that all civil actions may be commenced by a "complaint" whether legal, equitable or declaratory relief is sought. Rule 3 confirms that the complaint is filed in the office of the clerk of the Superior Court. The Advisory Committee considered 4 V.I.C. § 511 and § 512, which require payment of the prescribed fees "in advance," essentially requiring that the proper fees be tendered when the complaint is presented to the clerk for filing, with certain statutory exceptions. The fee payment process — a matter of practice in the clerk's office, regulated by statute — is not separately addressed in the V.I. R.Civ.P. Similarly, the process for seeking in forma pauperis status is governed by statute. 4 V.I.C. § 513 rather than the V.I. Rules of Civil Procedure.

Rule 3-1. Contact Information to Be Provided

(a) Contact Information Requirement. In any case pending in the court, all attorneys representing a party, and all self-represented parties, must provide a current telephone number, mailing address, and e-mail address, if any, for use in serving orders upon any party, or making contact with them, in connection with pending litigation. This information shall appear under the signature line for all motions, pleadings, notices, or other documents filed with the court by any attorney or self-represented party.

(b) Change of Contact Information. Any attorney or self-represented party whose telephone number, mailing address, or e-mail address on file with the court changes shall immediately file a notice containing the updated information with the clerk of the court, and serve copies of said notice on all attorneys and self-represented parties who have appeared in the pertinent case.

(c) Case Information and Litigant Data Form. In addition to complying with the contact information obligations of subparts (a) and (b) of this rule:

(1) The plaintiff, or the plaintiff's attorney, shall file a completed Case Information and Litigant Data Form with the clerk of the court at the time of filing a complaint to commence the action.

(2) A defendant, intervenor, or other party, or the attorney therefor, shall file a completed Case Information and Litigant Data Form with the clerk of the court at the time of first filing of a notice of appearance, answer, or other initial pleading or motion.

(3) If the contact information contained on the Case Information and Litigant Data Form changes for any party or attorney, that party or attorney shall comply with the change of address procedures set forth in subparts (a) and (b) of this rule.

(4) A self-represented party is personally responsible for complying with the change of address procedures set forth in subparts (a) and (b) of this rule.

(5) Represented parties are responsible for advising their attorneys of any change of contact information, and their counsel are responsible for complying with the change of

address procedures set forth in subparts (a) and (b) of this rule.

REPORTER'S NOTE:

This Rule is intended to make a clear statement of the obligation for each attorney representing a party — and each self-represented party — to provide accurate contact information, and to keep that information current and updates with any changes that occur during the pendency of the action. The Advisory Committee considered whether a generalized cross-reference to various annual required filings for attorneys could substitute for case-specific data form information, and concluded that judges and litigants benefit from having a current data form in each pending case, readily available during the proceedings in that matter when the need arises.

Subpart (b) of this Rule states the general obligation promptly to update the contact data when the information changes.

Subpart (c) is broken into separate paragraphs to emphasize that each party brought into the case must provide the contact information, and then must update it as changes occur. It also stresses that a self-represented party has the same obligations to provide and update contact information as the case progresses.

Rule 4. Summons and Service of Process

(a) Contents. A summons shall be in the name of the Superior Court of the Virgin Islands, and it must:

(1) name the court and the parties;

(2) be directed to the defendant;

(3) state the name and address of the plaintiff's attorney or—if self-represented—of the plaintiff;

(4) state the time within which the defendant must appear and defend;

(5) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(6) be signed by the clerk; and

(7) bear the court's seal.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service upon the defendant. A separate summons must be issued for each defendant to be served.

(c) Service.

(1) ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a Virgin Islands Marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under Title 4, Section 513 of the Virgin Islands Code.

(d) [Reserved.]

(e) Serving an Individual Within the Virgin Islands. Unless law of the Virgin Islands provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in the Virgin Islands by doing any of the following:

(1) delivering a copy of the summons and the complaint to the individual personally;

(2) leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(3) delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process; or

(4) completing service in another manner approved by order of the court in the pending case upon a showing:

(A) that plaintiff has exercised due diligence in attempts to complete service using the methods provided in subparts (d)(1) to (d)(3) of this Rule but specific circumstances have made these efforts ineffectual in completing service upon one or more defendants; and

(B) that alternative methods to be specified by order of the court will provide protections calculated to afford proper notice to the defendant(s) involved, and will comport with the requirements of Due Process.

(f) Serving an Individual Located Outside the Virgin Islands. Where 5 V.I.C. § 4903 or other applicable law provides for the assertion of personal jurisdiction over a person located outside the Virgin Islands, the provisions and procedures of Title 5 V.I.C. Chapter 503 shall be followed including, but not limited to, the procedures for service and the filing of proof of service set forth in 5 V.I.C. §4911.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person may be served in accord with the requirements of Title 5, Section 111 of the Virgin Islands Code.

(h) Serving a Corporation, Partnership, or Association. Unless law of the Virgin Islands provides otherwise or the defendant waives service,

(1) a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, may be served:

(A) in the Virgin Islands:

(i) in the manner prescribed by Rule 4(e) for serving an individual; or

(ii) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent; or

(iii) by delivering a copy of the summons and of the complaint to any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of the summons and complaint to the defendant; or

(B) at a place not within the Virgin Islands, in any manner prescribed by Rule 4(f) for serving an individual.

(2) a domestic or foreign limited liability company, may be served:

(A) in the Virgin Islands:

(i) in the manner prescribed by Rule 4(e) for serving an individual; or

(ii) by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing

a copy of the summons and complaint to the defendant; or

(iii) by delivering a copy of the summons and of the complaint to any member of the limited liability company; or

(iv) in any other manner authorized by Chapter 15 of Title 13 of the Virgin Islands Code; or

(B) at a place not within the Virgin Islands, in any manner prescribed by Rule 4(f) for serving an individual.

(3) If legal process against a corporation, limited liability company, partnership, or other association cannot by due diligence be served upon any person authorized to receive it, such process, including the complaint, may be served in duplicate upon the Lieutenant Governor pursuant to Title 13 of the Virgin Islands Code, which service shall be effective for all purposes of law.

(i) Serving the Government of the United States Virgin Islands and Its Agencies, Public Corporations, Officers, or Employees.

(1) ***Government of the Virgin Islands.*** In all cases in which the Government of the Virgin Islands is a named defendant, service shall be made by serving a summons and a copy of the complaint on the Governor and upon the Attorney General of the Virgin Islands.

(2) ***Public Corporations; Autonomous or Semi-Autonomous Government Agencies or Boards; Officers or Employees Sued in an Official Capacity.***

(A) To serve a public corporation, autonomous or semi-autonomous government agency or board, or an governmental officer or employee sued only in an official capacity, a party must

(i) serve the Government of the Virgin Islands as provided in Rule 4(i)(1), and

(ii) also serve a copy of the summons and complaint on the chief executive officer of the entity, and

(iii) also serve a copy of the summons and complaint on any officer or employee named in the action;

(B) To serve a public corporation that can be sued pursuant to 5 V.I.C. § 1142(b), a party must serve the designated registered agent, the chief executive officer, or any other person authorized by law to accept service of process, unless otherwise provided by law;

(C) To serve an autonomous or semi-autonomous governmental agency or board that can be sued in its own name, a party must serve the chief executive officer, or any other person authorized by law to accept service of process, unless otherwise provided by law; and

(D) To serve an officer or employee of a public corporation — or of an autonomous or semi-autonomous agency or board — in an action relating to that employment or position, a party must

(i) serve a copy of the summons and complaint on the chief executive officer of the public corporation, agency or board, and

(ii) also serve a copy of the summons and complaint on the officer or employee named in the action;

(3) ***Governmental Officers or Employees Sued Individually.*** To serve an officer or employee of the Virgin Islands, or of a public corporation, autonomous or semi-autonomous government agency or board, sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the Virgin Islands (whether or not the officer

or employee is also sued in an official capacity), a party must

(A) serve the Government of the Virgin Islands as provided in Rule 4(i)(1), and

(B) also serve the officer or employee as provided in Rule 4(e), (f), or (g).

(4) Suits Based on Legislative or Judicial Branch Actions. In any lawsuit based upon any action, conduct or activity of the Legislative or Judicial Branches of the Government, the Executive Director of the Legislature or the Administrator of Courts shall be personally served with a summons and a copy of the complaint.

(5) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has completed service upon the Attorney General of the United States Virgin Islands; or

(B) serve the Government of the Virgin Islands under Rule 4(i)(3), if the party has completed service upon the officer or employee of the Virgin Islands.

(j) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) *United States*. To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) *Agency; Corporation; Officer or Employee Sued in an Official Capacity*. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) *Officer or Employee Sued Individually*. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) *Extending Time*. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(j)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(j)(3), if the party has served the United States officer or employee.

(k) Serving a Foreign State, a State of the United States, or its Local Government.

(1) ***Foreign State Entities.*** A foreign state or its political subpart, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of the summons and complaint in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(l) Territorial Limits of Effective Service.

Serving a summons and complaint — or filing a waiver of service — satisfies the obligation of service of process sufficient to establish personal jurisdiction over a defendant:

(1) who is subject to personal jurisdiction in the Superior Court in the Virgin Islands; or

(2) when authorized by statute.

(m) Proving Service.

(1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by the Virgin Islands Marshal or deputy marshal, proof must be by the server's affidavit in accordance with 5 V.I.C. § 114.

(2) ***Service Outside the United States.*** Service not within any State or Territory of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(n) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subpart (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

(o) Process Timely Received Good Though Neither Served Nor Accepted. Except for process commencing actions for divorce or annulment of marriage or other actions wherein service of process is specifically prescribed by statute, a proper summons and complaint which have reached the person to whom they are directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this Rule. In any motion challenging service where this subpart (n) is relied upon, the burden of proving timely receipt of the required process by a preponderance of the evidence shall be borne by the plaintiff.

(p) Asserting Jurisdiction over Property or Assets.

(1) ***Statutory Basis.*** The court may assert jurisdiction over property if authorized by a statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) *Defendant's Assets.* On a showing that personal jurisdiction over a defendant cannot be obtained in the Virgin Islands by reasonable efforts to serve a summons and complaint under this rule, the court may assert jurisdiction over the defendant's assets found in the Virgin Islands. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by law of the Virgin Islands.

REPORTER'S NOTE:

Rule 4 covers a wide variety of issues relating to service of process (the summons and the complaint).

Subpart (a) prescribes the components of a valid summons, including the name and address of the plaintiff's attorney or — if self-represented — of the plaintiff, an express statement on the document of the time within which the defendant must appear in response to the process, and a notification to the defendant that a failure to appear and defend will result in a default judgment for the relief demanded in the complaint. Signature and seal requirements are also clearly stated.

Subpart (b) notes the process by which the plaintiff may present a summons to the clerk for signature and seal, and it specifically states: " A separate summons must be issued for each defendant to be served."

Subpart (c) is the detailed provision for service of process on different categories of defendants. It continues the authorization for service of the summons and complaint by any person who is at least 18 years old and not a party, and includes service by the Virgin Islands Marshal, a deputy, or another person specially appointed by the court.

Subpart (e) provides the standard means of serving an individual within the Virgin Islands. In addition to the three traditional means (delivery, leaving a copy at the abode with a person of suitable age and discretion, and delivering to an authorized agent) the Rule now specifically recognizes that the court may — where the facts of a case demonstrate that these three methods are not workable — order another method of completing service so long as the ordered procedure will afford proper notice to the defendant(s) involved, and will comport with the requirements of Due Process.

Subpart (f) implements the statutes that govern service upon an individual located outside the Virgin Islands, key provisions of which are cited in this subpart.

Subpart (g) addresses the means for serving a minor or an incompetent person, and invokes the requirements and procedures of 5 V.I.C. § 111.

Subpart (h) authorizes service of process on a corporation, partnership, or association, using the traditional means for serving an individual, or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to a registered agent. Because of the different structure of limited liability companies under Virgin Islands law, a separate subpart of (h) lists the options for serving one of these entities, which includes service upon a "member" of the LLC.

Subpart (i) prescribes the methods for serving the Government of the Virgin Islands and its agencies, public corporations, as well as public officers and employees. For each category of prospective defendant it is made clear whether the Governor or the Attorney General, and/or the chief executive officer of the entity involved, needs to be served with a copy of the summons and complaint. The slightly different requirements for service upon an autonomous or semi-autonomous public agency or board are also stated. The rule differentiates suits against individual officers or employees of governmental bodies based on whether the individual is sued in an "official capacity" or in an individual capacity.

Subsection (k) deals with serving a foreign nation, a state of the United States, or a local

government elsewhere, and for serving foreign "state entities" cross-references the federal statute which requires suits in any court to achieve service in a particular fashion, as provided in 28 U.S.C. § 1608.

Subsection (l) notes that proper service of the summons and complaint (or the filing of any appropriate documentation of a waiver of service by a particular defendant) will satisfy the needs for service, and will establish personal jurisdiction if the constitutional and statutory requirements for personal jurisdiction are met (minimum contacts, general presence, or other grounds for personal jurisdiction).

Subpart (m) indicates that — except where service of process is completed by the Virgin Islands Marshal or deputy marshal, proof of the completion of service must be made by fling an affidavit by the server as provided in 5 V.I.C. § 114.

Subpart (n) is the provision setting the time period — after filing of a complaint — in which each defendant must be served. While the federal courts have reduced this period to 90 days, the provisions of Virgin Islands Rule of Civil Procedure 4(n) have kept this time period at 120 days, in keeping with traditional practice and in recognition of the burdens entailed in completion of service in the Islands.

Subpart (o) is a safety-valve provision for those cases where the plaintiff can demonstrate that the process — the summons and the complaint — were actually received by a defendant, even in instances where the specifics of Rule 4 may not have been followed. This provision (not applicable for process commencing actions for divorce or annulment of marriage or other actions for which a statute precludes this procedure) indicates that if service of process is challenged by a defendant, the plaintiff must satisfy the burden of proof to show by a preponderance of the evidence that the summons and complaint were — in fact — actually received by this defendant within the 120 days prescribed by Rule 4(n) or other time limits prescribed by law.

Rule 4-1. Service by Publication

(a) Availability. When service of the summons and complaint cannot be made as prescribed in Rule 4, and the requirements set forth in 5 V.I.C. § 112(a) for obtaining substituted service by publication are established by affidavit, and the prerequisites stated in that statute are satisfied, the court may grant an order that service be made by publication in accord with the provisions of that statute.

(b) Contents of Publication. The contents of the summons published shall include the information specified in 5 V.I.C. § 112(b), and any additional information ordered by the court.

(c) Publication. The order of publication shall control the newspaper(s) to be used in publishing the summons, in accord with the requirements and procedures of 5 V.I.C. § 112(c).

REPORTER'S NOTE

This Rule is spelled out here with cross-reference to the statute so that practitioners are alerted that there are prerequisites controlling the availability of publication service, that the content of the published notice must provide certain minimum information and is subject to the court order, and that the specifications in the order will control which newspapers, etc., will be used in the approved publication to accomplish service.

Rule 4.1. Serving Other Process

(a) In General. Process — other than a summons under Rule 4 or a subpoena under Rule 45

— must be served by a Virgin Islands Marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the Virgin Islands. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce law of the Virgin Islands may be served and enforced in any division.

REPORTER'S NOTE

This Rule generally applies to contempt-type applications, and certain in rem proceedings. Service of process in regular civil actions is governed by Rule 4, which precedes this Rule. Service of papers subsequent to the initial service of process is governed by Rule 5, below.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) ***In General.*** Unless these rules provide otherwise, all papers after the complaint that are filed with the court must be served on every party as provided in this rule, including:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear, except:

(A) a pleading that asserts a new claim for relief; and

(B) notice of seeking a default judgment when mandated by Rule 55(b)(2).

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address — in which event service is complete upon mailing;

(D) leaving it with the Virgin Islands Marshal for service, if possible, if the person has no known address;

(E) sending it by electronic means if the person has consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person has consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(c) Serving Numerous Defendants.

(1) ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) ***Required Filings; Certificate of Service.*** Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) ***How Filing Is Made — In General.*** A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Original Signatures Required.*** All papers filed with the court, including complaints, answers, motions, responses in opposition thereto, stipulations, and notices, shall bear the original signature or signatures of the party or parties filing the document, or counsel of record.

(4) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or local practice.

REPORTER'S NOTE

Rule 5 continues the traditional requirement that — except where a particular Rule creates other requirements or procedures — everything that is filed with the court must be served on every party. Standard items are listed in Subpart (a).

Subpart (b) spells out the standard means of post-service-of-process service of papers, including delivery, leaving it at the appropriate office or location, mailing, leaving with the Virgin Islands Marshal, or by electronic delivery — limited to those cases where the party to be served has consented in writing to such means of delivery.

Subpart (c) includes provisions allowing the court to order special service provisions or requirements where an action involves an unusually large number of defendants.

Subpart (d) codifies the requirement that each paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. Exceptions are listed for certain disclosures under Rule 26(a)(1) or (2) and other discovery requests and responses. Filing with the office of the clerk is the normal, and preferred, procedure, although subpart (d) authorizes a judge to accept a paper for filing if the judge expressly agrees to that procedure.

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a statute of the Virgin Islands must promptly:

(1) file a notice of constitutional question stating the question and identifying the pleading, motion or other paper that raises the issue, if a statute of the Virgin Islands is questioned and the parties do not include the Government of the Virgin Islands, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the Virgin Islands — either by certified or registered mail or by sending it to any electronic address that has been expressly designated by the Attorney General for this purpose.

(b) Certification by the Court. The court must certify to the Attorney General that a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the Government of the Virgin Islands may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

REPORTER'S NOTE

Subparts (a) and (b). Because of the public importance of legal actions that call into question the constitutionality of statutes, subparts (a) and (b) of this Rule require both a party and the court itself to give notice of that issue to the Attorney General of the Virgin Islands. The obligation is mandatory, although subpart (d) indicates that a party will not "forfeit" a claim or defense for any failure to provide the required notice.

Subpart (c). Under the Rule the Government of the Virgin Islands is given a period of 60 days following notice that a pending lawsuit involves a challenge to the validity of a statute in which the Government may intervene.

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social security number, taxpayer identification number, or birth date, the name of an individual known to be a minor, or a financial account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social security number and taxpayer identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2 (d); and

(6) a pro se filing in an action brought under Title 5, Chapter 91 of the Virgin Islands Code.

(c) [Reserved.]

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

REPORTER'S NOTE

This provision is similar to those in other jurisdictions, and is compatible with V.I. Supreme Court rules on the same topic.

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) when the period is 15 days or more, count every day, including intermediate Saturdays, Sundays, and legal holidays; when the period is 14 days or less, do not count intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office*.** Unless otherwise provided in a governing court order, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the office of the clerk of the Superior Court is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing January 1 (New Year's Day) January 6 (Three King's Day); Third Monday in January (Martin Luther King, Jr.'s Birthday); Third Monday in February (Presidents Day); March 31 (Transfer Day); Holy Thursday; Good Friday; Easter Monday; Last Monday in May (Memorial Day); July 3 (V.I. Emancipation Day) – Danish West Indies Emancipation Day; July 4 (Independence Day); First Monday in September (Labor Day); Second Monday in October (Columbus Day and Puerto Rico Friendship Day); November 1 (D. Hamilton Jackson Day); Election Day as provided in 18 V.I.C. § 3; November 11 (Veterans Day); Fourth Thursday in November (Thanksgiving Day); December 25 (Christmas Day); December 26 (Christmas Second Day); and

(B) any day declared a holiday by the President or Congress, or by the Governor;

and

(C) any day specified in 1 V.I.C. § 171, or otherwise officially designated as a holiday in the U.S. Virgin Islands.

(b) Extending Time.

(1) ***In General.*** When an act is required or allowed to be done by or within a specified period, the court may upon a showing of good cause or excusable neglect, extend the date for doing that act. The court may consider whether the request to extend time is made before or after the required date; the reason for the movant's delay; whether the reason for delay was within the reasonable control of the movant; the danger of prejudice to the parties; the length of the delay; the potential impact of the delay on judicial proceedings; whether the party seeking the extension has acted in good faith, and all other relevant circumstances surrounding the party's failure to meet the originally prescribed deadline.

(2) ***Exceptions.*** A court may not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).The court may not enlarge the period within which a motion may be made for a new trial, or for correcting an illegal sentence.

(c) [Reserved.]

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the Virgin Islands Marshal), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

REPORTER'S NOTE

Subpart (a): the Rule requires a different method of accounting depending on whether the deadline for a particular filing or action is 15 days or more. If the deadline is at least 15 days, all calendar days are counted (including Saturdays, Sundays and legal Holidays). However, if the deadline prescribes 14 days or less to accomplish a filing or other litigation step, Saturdays, Sundays and Legal Holidays are not counted in determining the last day to act.

As in prior Virgin Islands practice, if the "last day" would fall on a Saturday, Sunday or legal Holiday, the time for completion is automatically extended to the next business day.

Subpart (b): This subpart follows existing case law. Fuller v. Browne, 59 V.I. 948 (2013) states: " 'Excusable neglect' and 'good cause' are essentially synonyms, see Beachside Assocs. v. Fishman, 53 V.I. 700, 713 (V.I. 2010), and the determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances surrounding [the] omission … includ[ing] … the danger of prejudice [to the opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Brown v. People, 49 V.I. 378, 383 (V.I. 2008)" (quoting Pioneer v. Brunswick Assoc., 507 U.S. 380,395(1993)). Beachside said: "In reviewing the trial court's good cause determination, we are mindful that courts have equated 'good cause' with the concept of 'excusable neglect,' which requires 'a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules."

Extension of deadlines for a new trial or under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b) are not permitted.

Subpart (d): The Rule continues the practice of allowing 3 extra days in computing the response period where the triggering motion or other paper is served by mail or by leaving with the Virgin Islands Marshal. No extended period is provided if papers are served electronically.

Rule 6-1. Motion Requirements; Form; Support; Timing

(a) Requirements. All motions must:

(1) be in writing, signed by the attorney of record or the self-represented litigant — unless made during a hearing or trial;

(2) state with particularity the grounds for seeking the order, including a concise statement of reasons and citation of authorities;

(3) state the relief sought; and

(4) if the motion requests affirmative relief, the motion must be accompanied by a proposed order granting the relief sought.

(b) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(c) Permitted Filing of Motion, Response, and Reply. Only a motion, a response in opposition, and a reply may be served on other parties and filed with the court; further response or reply may be made only by leave of court obtained before filing. Parties may be sanctioned for violation of this limitation.

(d) Supporting Affidavits or Documents. When allegations of fact not appearing of record are relied upon in support of a party's motion, response, or reply, unless the court grants permission for a different schedule for the filing of supporting materials:

(1) all then-available affidavits and other documents supporting the party's position shall be filed simultaneously with the motion, response or reply;

(2) any supplemental affidavits or other documents in support of the party's position on the motion must be filed at least 10 days prior to hearing of the motion; and

(3) if supplemental affidavits or other documents are filed by any party under subpart (d)(2), any other party may submit additional affidavits or documents at least 5 days prior to hearing of the motion.

(e) Font Size Requirement and Page or Word Limitation.

(1) All motions, responses and replies shall be prepared using a character font of at least 12 points in height.

(2) Unless otherwise ordered by the court, all motions, responses and replies filed with the court shall not exceed the greater of 20 pages or 6,000 words in length unless leave of court has been obtained in advance for a longer submission. This page or word limit does not include any cover page, caption, table of contents, table of authorities, appendices or exhibits, the statements of undisputed or disputed facts as provided in Rule 56(c), and certificates of service.

(3) Every motion, response and reply shall contain — as part of the certificate of service — a statement that: "*This document complies with the page or word limitation set forth in Rule 6-1(e).*"

(f) Time Periods for Response; Reply.

(1) ***Motions Generally.*** Unless otherwise ordered by the court, a party shall file a response within 14 days after service upon the party of any motion — except a motion filed pursuant to Rule 12 or Rule 56.

(2) ***Rule 12 Motions.*** A party shall file a response within 20 days after service of a motion

under Rule 12 upon the party.

(3) ***Rule 56 Motions.*** Time periods and other requirements for opposition and reply papers in motions for summary judgment shall be as provided in Rule 56.

(4) ***Court Directions.*** For good cause shown, parties may be required to file a response and supporting documents within such shorter period of time as the court may specify, or may be given additional time upon request made to the court.

(5) ***Replies.*** A party may file a reply within 14 days after service of the response, unless otherwise ordered by the court.

(6) ***Disposition of Motion.*** Nothing herein shall prohibit the court from ruling without a response or reply when deemed appropriate.

(g) Consideration of Motions. A request for oral argument shall be separately stated by the movant or respondent. The court may set the motion for hearing or decide it based upon the submission(s).

REPORTER'S NOTE

Under modern Virgin Islands practice each motion, response and reply document includes the argument and authorities in support of the party's position — no separate "brief" document is required.

A minimum font size of 12 points is specified to assure readability. The alternative word or page limits follow modern developments, and are intended to promote uniformity in the length of papers submitted.

Rule 6-2. Motions for Extension of Time

All motions seeking an extension of time under Rule 6(b) shall include the following:

(a) A statement that the moving party has conferred with opposing parties and there is agreement or objection to the motion or that despite diligent effort, the moving party cannot ascertain opposing counsel's position; and

(b) A representation reporting the number of motions for extension of time that have been filed in the pending action by the movant with respect to the same prescribed time period.

NOTE

This rule requires that a party "confer" with opposing counsel. This term is intended to embrace personal meeting, or a telephone conversation, or an email exchange, so that some form of direct communication has taken place in the effort to reach a solution, or at least determine the respective positions of the parties.

Rule 6-3. Continuances

(a) Generally. Continuances of trials, conferences, other scheduled hearings, whether by motion of one party or by stipulation of all parties, will not be routinely granted, but will be granted only upon a demonstration of good cause. Such motions or stipulations must be in writing and served and filed at the earliest practical date prior to the affected trial, conference, or hearing but, in any event, not later than the deadline set forth in subpart (d) of this Rule.

(b) Absence of Witness. When the basis of the request for continuance the absence of a witness, the movant must: (1) demonstrate that the witness is material to the movant's case; (2) demonstrate

that the movant has unsuccessfully exhausted reasonable efforts to secure the attendance of the witness for the trial, conference, or hearing, and; (3) provide a date by which the attendance of the witness can be secured for the trial, conference, or hearing.

(c) Conflict of Counsel. When the request for continuance is based on a scheduling conflict of counsel, the moving attorney must: (1) detail the nature of counsel's scheduling conflict; (2) state when the scheduling conflict arose; (3) state whether opposing counsel agrees to the request for continuance, and; (4) provide dates on which all parties will be available for the trial, conference or hearing.

(d) Time. All motions for continuance must be filed and served not less than 7 days prior to the scheduled trial, conference, or hearing. A motion filed less than 7 days prior to the scheduled trial, conference, or hearing will only be considered upon a showing of exceptional circumstances

REPORTER'S NOTE

Subpart (a) continues previous doctrine that good cause should be shown for a continuance to be granted.

Subparts (b) and (c) specifically address problems concerning the availability of needed witnesses, and conflicting obligations of counsel. Subpart (c) requires that the availability of all parties be determined and then reported to the court as part of the application for an adjourned date for a proceeding.

Rule 6-4 Motions for Reconsideration.

(a) Timing. Except as provided in Rules 59 and 60 relating to final orders or judgments, a party may file a motion asking the court to reconsider its order or decision within 14 days after the entry of the ruling, unless the time is extended by the court. Extensions will only be granted for good cause shown.

(b) Grounds. A motion to reconsider must be based on:

(1) intervening change in controlling law;

(2) availability of new evidence;

(3) the need to correct clear error of law; or

(4) failure of the court to address an issue specifically raised prior to the court's ruling.

Where ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court.

REPORTER'S NOTE

Subpart (a): This Rule sets a 14 day period after the entry of a ruling as the outside date for filing a motion for reconsideration of a ruling. The cross-reference at the outset makes it clear that — for final judgment rulings — the provisions of Rules 59 and 60 will be applicable. Those provisions have separate timing elements, and standards.

Subpart (b): In Martin v. Martin, 58 V.I. 620, 629 (V.I. 2013), and Beachside Assocs. v. Fishman, 53 V.I. 700, 71 (V.I. 2010), the Supreme Court said that a party moving for reconsideration must: "demonstrate that there was (1) an intervening change in controlling law; (2) newly available evidence; or (3) a need to correct clear error of law or prevent manifest injustice." As an example of the third factor, this Rule specifically lists failure of the court to address an issue specifically raised by a party prior to the court's ruling on pending matters.

Rule 6-5. Motions by Counsel for Leave to Withdraw.

No attorney may withdraw an appearance except with leave of court after notice to the attorney's client. All motions for withdrawal as counsel shall include a verified statement as to contact with or attempts to contact the client concerning such withdrawal, an indication of service upon or efforts to serve the client with the moving papers, and updated civil litigant data forms for each client, which forms shall include the client's last known address and telephone number.

REPORTER'S NOTE

All filed papers must be served on other parties. This Rule makes it clear at the outset that the client of an attorney who is seeking leave to withdraw from participation in the case must also be given notice of the application.

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) a counterclaim or crossclaim;

(4) an answer to a counterclaim designated as a counterclaim;

(5) an answer to a crossclaim;

(6) a third-party complaint;

(7) an answer to a third-party complaint;

(8) if the court orders one, a reply to an answer;

(9) a complaint in intervention; and

(10) an answer to a complaint in intervention.

(b) Motions to Request Court Orders.

A request for a court order must be made by motion complying with Rule 6-1 and, where applicable, Rules 6-2 through 6-5 and other Rules of Civil Procedure.

REPORTER'S NOTE

Rule 7 simply provides a roster of the permissible pleadings and assists in using the correct designation for various pleadings and response documents.

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file two copies of a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(b) Time to File; Supplemental Filing. A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

REPORTER'S NOTE

This Rule is designed to avoid conflicts of interest and to make ownership of parties or affiliates clear.

Rule 8. General Rules of Pleading

(a) Claim for Relief. Except as otherwise provided in these Rules, a pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief — because this is a notice pleading jurisdiction — and the pleading shall be set forth in separate numbered paragraphs as provided in Rule 10(b), with separate designation of counts and defenses for each claim identified in the pleading; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief. In accord with 5 V.I.C. § 5, the prayer for relief shall state that the damages are within the jurisdictional limit of the court, but shall not include a specific dollar amount sought for claims pled.

(b) Defenses; Admissions and Denials.

(1) ***In General.*** In responding to a complaint, counterclaim, cross-claim or third-party complaint a party's answer must respond separately to the corresponding paragraphs of the pleading being answered.

(2) ***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the allegation.

(3) [Reserved.]

(4) ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) ***Effect of Failing to Deny.*** An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- comparative negligence;
- duress;
- estoppel;
- failure of consideration;

- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations;
- waiver; and
- workers' compensation bar.

(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) ***In General*****.** Each allegation must be simple, concise, and direct. No technical form is required.

(2) ***Alternative Statements of a Claim or Defense.*** A party may set out two or more statements of a claim or defense alternatively or hypothetically, in separate counts or defenses. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

REPORTER'S NOTE

Language has been included in Rule 8(a) to note that practice in the Virgin Islands continues to adhere to the traditional "notice" pleading ethos as many states and territories have chosen to do, applying an approach that declines to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.

While the provisions of Rule 8 comply with the statutory ban on pleading a specific dollar amount sought in the ad damnum clause of a pleading, it is expected that filing procedures and forms implemented by the clerks of court will facilitate the identification of claims where the damages will not exceed $75,000, making trial before a Magistrate Judge a possibility.

Rule 8-1. Actions Instituted Using Fictitious Name of Defendant

If a defendant's true name is unknown to the plaintiff, process may issue against the defendant, designating that party by a fictitious name and giving an appropriate description sufficient to identify the defendant. Thereafter, and prior to entry of judgment, on motion and notice to the defendant the proceedings shall be amended to set forth the true name of the defendant. No such amendment shall be ordered unless an affidavit shall be filed showing how the true name of the defendant was obtained, and no final judgment shall be entered until such order has been made.

The proceedings may be amended without the filing of an affidavit in those cases in which the defendant has acknowledged his true name in a written appearance or an answer or orally in open court.

Actions may be instituted, and judgments may be entered against defendants designated by the first initial letter or letters, or by a contraction of a given or first name or names.

REPORTER'S NOTE

This Rule continues pre-existing practice allowing "John Doe" designations where a defendant's true name is not known by the plaintiff. It further specifies the mechanics of the procedure later in the proceeding for obtaining amendment to substitute the correct name.

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) ***In General.*** Except when required to show that the court has jurisdiction, or as otherwise required by law, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) ***Raising Those Issues.*** To raise any of those issues, a party must do so by a specific denial or defense, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place should be pled where such facts are material to a claim.

(g) Special Damages. If an item of special damage is claimed, it must be expressly stated, but in accord with 5 V.I.C. § 5 the specific amount of such damages shall not be included in the pleading.

REPORTER'S NOTE

Since the Virgin Islands is a notice pleading jurisdiction, Rule 9 represents a narrow category of special situations where the common law requires heightened or "special" pleading of some issues "with particularity."

Subpart (a) states the negative proposition that — except if required to show that the court has

jurisdiction, or as otherwise required by law — it is not necessary in a pleading to make allegations relating to a party's capacity to sue or be sued, the authority to sue or be sued in a representative capacity, or about the legal existence of an organized association of persons that is made a party. Instead, an opposing party may raise any actual issues about these matters in a denial or defense.

Subpart (b) continues the time-honored requirement that if a party alleges fraud or mistake, a party must "state with particularity" the circumstances constituting fraud or the mistake. On the other hand, the Rule also continues the doctrine that issues of malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Similarly in contract-type cases where there is a "condition precedent" to the obligation, a party may allege "generally' that all conditions precedent have been satisfied. On the other hand, if a party denies that a necessary condition precedent has been satisfied, that party must do so with particularity

Subparts (d) and (e) provide a low threshold for pleading an official document or official act, or a judgment or decision.

Subpart (f) is worded to clearly indicate that — if it is material to a particular lawsuit — the time and place of occurrences should be pled.

Subpart (g), relating to "special damages," requires the existence of a category or item of damage needs to be identified in the pleading, but the specific amount of such damages sought in the case need not be included in the pleading.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

(d) Notation of "Jury Demand" in the Pleading. If a party demands a jury trial by endorsing it on a pleading, a notation shall be placed on the front page of the pleading immediately following the title, stating “Demand For Jury Trial” or an equivalent statement. This notation will serve as a sufficient demand under Rule 38(b). Failure to use this manner of noting the demand will not result in a waiver under Rule 38(d).

REPORTER’S NOTE

Subpart (a) restates the simple requirements for the "caption" of the case, including the court's name, a case title, a file number, and a Rule 7(a) designation. The caption of the complaint must name all the parties. As in the past, after the complaint, the caption of subsequent pleadings, after naming the first party on each side, may refer generally to other parties, such as by using "et al." references.

Subpart (b), further implementing the simplicity and clarity required under Rule 8, states that a party must state its claims or defenses in numbered paragraphs, each limited "as far as practicable" to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. This Rule also states the preference for achieving clarity in multi-count or multi-defense cases by having each claim founded on a separate transaction or occurrence — and each defense other than a denial — stated in a separate count or defense.

Subpart (c) continues the practice of authorizing "incorporation by reference" so that a pleading may be structured to "repeat and reallege" averments from one segment in another count. In addition, the Rule requires that if an exhibit is annexed to a pleading it becomes part thereof for all purposes in the proceeding.

Subpart (d) states that a jury demand is made by "endorsing it on a pleading." In general the demand should be placed on the front page of the pleading immediately following the caption, using words such as "Demand For Jury Trial." By cross-reference to Rule 38, subpart (d) states that affixing this demand notice will be sufficient to preserve a party's jury-trial right and, conversely, that failure to precisely comply with this rule will not, by itself, result in a waiver under Rule 38(d).

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is self-represented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(5) that the applicable Virgin Islands law has been cited, including authority for and against the positions being advocated by the party.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

REPORTER'S NOTE

Rule 11 is the basic sanction provision in modern practice nationwide. It is adopted in these Rules with only one minor modification, noted below.

Subpart (a) states the basic requirement that every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is self-represented. Address and contact information are also required.

Subpart (b) — stated in terms of representations — embodies the basic requirement that each paper will not be served or filed for any improper purpose, that the claims or contentions are warranted under existing law (or a good faith argument for modification or extension of existing law) and that all of the factual contentions embodied in the paper have evidentiary support. A similar requirement is applicable to denials. Subpart (b)(5) has been added to stress the importance of presenting Virgin Islands law as the primary resource in every filing.

Subpart (c) sets out the basic sanction mechanisms, which are intended to avoid court rulings if possible. To that end, sanction motions must be made separately from any other motion and must be served under Rule 5, but must not be filed or be presented to the court — because the adversary is permitted 21 days to withdraw or correct the paper against which the motion is directed. The court may, on its own initiative, enter a show-cause order bringing on consideration of possible sanctions. The Rule has a graduated approach to sanctions and requires that the

minimum possible penalty that will address and deter the sanctionable conduct be imposed. There are particular limitations on the imposition of monetary sanctions set forth in subpart (c)(5). As in other jurisdictions, Rule 11 applies to all pleadings and papers other than discovery requests and responses, which our subject to specific sanction provisions in Rules 26 and 37.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a statute of the Virgin Islands, the time for serving a responsive pleading is as follows:

(A) A defendant served with the summons and complaint within the Virgin Islands must serve a responsive pleading within 21 days after being served.

(B) A defendant personally served with the summons and complaint outside of the Virgin Islands pursuant to 5 V.I.C. § 4911 or other applicable law, must serve a responsive pleading within 30 days from the date of service, as required in 5 V.I.C. § 112.

(C) A defendant served by order of publication or by mailing as provided in 5 V.I.C. § 112(c) must serve a responsive pleading within 30 days after completion of the period of publication specified in such order, or — in the case of service of the summons and complaint by mail requiring a return receipt — within 30 days from the date the defendant received the process.

(D) A party must serve a responsive pleading to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(E) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***Government of the Virgin Islands, Public Corporations, Autonomous or Semi-Autonomous Governmental Agencies or Boards: Officers, or Employees Sued in an Official Capacity.*** The Government of the Virgin Islands, public corporations, autonomous or semi-autonomous governmental agencies or boards, or an officer or employee of the Virgin Islands sued only in an official capacity, must serve an answer to a complaint, counterclaim, or crossclaim within 30 days after service thereof upon the Governor and the Attorney General of the Virgin Islands.

(3) ***Governmental Officers or Employees Sued in an Individual Capacity.*** A officer or employee of the Virgin Islands — or of a public corporation, autonomous or semi-autonomous governmental agency or board — sued in an individual capacity for an act or omission occurring in connection with that employment must serve an answer to a complaint, counterclaim, or crossclaim within 45 days after service thereof upon the officer or employee, or service on the Attorney General of the Virgin Islands, whichever is later.

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses

by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses — except lack of subject matter jurisdiction and as provided in subparts (g) and (h) of this rule — must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

REPORTER'S NOTE

Rule 12 controls several important aspects of procedure in civil actions.

Subpart (a) prescribes the time to answer after service of the complaint, counterclaim or cross-claim. The basic period is 21 days after ordinary service of a civil action within the Virgin Islands. A defendant served outside the Virgin Islands is afforded 30 days in which to file the responsive pleading (answer or motion). Separate provisions establish a 30 day period for responding after service by publication or mail service. Governmental bodies of several types are addressed in the Rule, and a 30 day period for responsive pleading is allowed. Where an officer or employee of a governmental body is sued, 45 days after service is permitted for the response. Subpart (b)(4) provides that the filing of a motion under this Rule puts off the time to answer until 14 days after a decision on the motion,

Subpart (b) identifies the categories of motions recognized under this Rule, and Subpart (c) adds the availability of a motion for judgment on the pleadings.

Subpart (d) is a summary judgment-related provision which specifies that reliance upon factual materials outside of the complaint will cause a conversion of a Rule 12(b)(6) or 12(c) motion into a summary judgment application that will be controlled by Rule 56.

Subpart (e) allows a motion for "more definite statement" where the responding party contends that the complaint is so vague or ambiguous that it cannot reasonably be required to prepare a response without further clarification of the complaint.

Subpart (g) addresses the pleading of cross-claims between parties. Subpart (h) deals with the joining of additional parties, and Subpart (i) makes reference to the separate trial provisions of Rule 42.

Rule 13. Counterclaim and Crossclaim

(a) Compulsory Counterclaim.

(1) ***In General.*** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) ***Exceptions.*** The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the Government of the Virgin Islands. These rules do not expand the right to assert a counterclaim — or to claim a credit — against the Government of the Virgin Islands or any of its officers, employees or agencies.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Reserved.]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

REPORTER'S NOTE

Rule 13 concerns counterclaims and cross-claims. It distinguishes between claims that arise out of the same conduct, transaction, or occurrence as the plaintiff's complaint, which are deemed "compulsory counterclaims" and must be pled in response to the pending case to avoid being lost, and on the other hand "permissive counterclaims" which relate to other transactions and may — at the option of the responding pleader — either be pled as counterclaims in the pending action or made the subject of a separate lawsuit. Subparts (a) and (b) separately address these considerations. Subpart (c) makes it clear that a counterclaim can seek different relief, which may exceed that sought in the complaint itself.

Subpart (g) of this Rule deals with cross-claims against a coparty. While a defendant's counterclaims may be unrelated to the transaction set forth in the complaint, this Subpart requires that any cross-claim must arise from the same subject matter set forth in the complaint. Unrelated

claims would require a separate lawsuit.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

REPORTER'S NOTE

Rule 14 restates the third-party practice standards applicable in every American jurisdiction. Subpart (a) of this Rule allows a defendant — acting without leave of court — to serve a third-party complaint on a party that may be liable to the defendant/third-party plaintiff for some or all of the claims brought in the original action. The third-party summons and complaint may be undertaken without leave of court until 14 days after the defendant has filed its answer; thereafter, leave of court would be required to commence the third-party proceeding.

Under Rule 14 each of the parties in the expanded action may assert its claims against any other party; the options are set forth in Subparts (a)(2) and (3) of this Rule. Any party added under the procedures of this rule may, itself, choose to add additional parties defendant (such as fourth- or fifth-party) using the procedures of this Rule.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless a statute of the Virgin Islands or a court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpled issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the Government of the Virgin Islands. When the Government of the Virgin Islands — or a governmental corporation, autonomous or semi-autonomous agency, board, officer or employee — is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process

was delivered or mailed to the Attorney General of the Virgin Islands, and to the officer or employee or governmental body.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

REPORTER'S NOTE

Amendment of pleadings is governed by Rule 15. Subpart (a) allows a 21 day period after service of a pleading in which it may be amended as a matter of course. Subpart (a)(1) also allows amendment after the service of a responsive pleading, or a motion. Amendments that are sought after the early days of the pending case require leave of court — but the rule specifies that leave shall be freely given.

Subpart (b) makes a separate provision for amendment of the pleadings during and after the trial of the action to conform to the pleadings or to address issues tried by consent.

Subpart (c) lays out important "relation back" provisions regarding amended allegations. In general, revised averments that arise from the same conduct, transaction or occurrence originally pled will relate back to the date on which the pleading was originally filed. Special provisions are included for amendments that change the naming of the parties sued, and a notice timetable tied to the 120-day period of Rule 4(m) is required.

Subpart (d) deals with the rare circumstance in which "supplemental pleadings" may be required.

Rule 15-1. Form, Filing and Effect of Amendments

(a) Attaching Complete Copy to Motion. A party moving to amend a pleading shall attach a complete — and properly signed — copy of the proposed amended pleading to the motion papers. Except as otherwise ordered by the court, any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must reproduce the entire pleading as amended specifically delineating the changes or additions and may not incorporate any prior pleading by reference.

(b) Labeling of Amended Pleading. A proffered amended pleading must note prominently on the first page the numbered amendment it represents; e.g., FIRST AMENDED COMPLAINT, SECOND AMENDED COMPLAINT, FIRST AMENDED ANSWER, etc.

(c) Filing and Effectiveness.

(1) Amended pleadings permitted as a matter of course without court permission under Rule 15(a)(1) may be filed with the clerk of court in the usual manner and are effectively filed upon that date. A copy must be served on all parties as provided in Rule 5.

(2) Except as provided in Rule 15, a proposed amended pleading requiring approval of the court under Rule 15(a)(2) or Rule 15(b) which was attached to a motion for leave to file such pleading shall — if leave is granted by the court — be deemed filed on the date the motion attaching a complete and executed copy of the pleading was initially filed. If the court grants leave to file the amended pleading, copies thereof must thereafter be served on all parties as provided in Rule 5, and a copy must be filed with the clerk of court.

REPORTER'S NOTE

Rule 15-1 addresses the mechanics of amendment applications. It specifically requires, in Subpart (a) that a motion for leave to amend a pleading attach a complete and properly-executed copy of the pleading that the party seeks permission to serve and file. Subpart (b) of this Rule provides examples of appropriate naming conventions for amended pleadings. Subpart (c) specifically provides that — in those instances where the court grants leave for the filing of the amended pleading — that pleading will be deemed to have been filed on the date that the motion for leave was filed. If leave to file the amended pleading is denied, the fact that the motion was previously filed will not give any relation-back effect to the proposed paper.

Rule 15-2. Amendment Initiated by the Court

The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If a party is surprised as a result of such amendment, the court may adjourn the hearing for an appropriate period if justice so requires.

REPORTER'S NOTE

Rule 15-2 recognizes the court's discretion to amend any process as necessary, and to protect other parties in the event that such action is required.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any self-represented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) *Scheduling Order.* In all civil cases filed in Tracks 1, 2, and 3 of the Superior Court differentiated case management program the judge must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any self-represented parties at a scheduling conference.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) *Contents of the Order.*

(A) *Required Contents*. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents*. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Virgin Islands Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial;

(vii) include provisions relating to service of papers by e-mail;

(viii) include provisions relating to participation in court conferences or other proceedings by telephone or other electronic means; and

(ix) include other appropriate matters.

(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Virgin Islands Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or other authority;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any self-represented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate — or does not participate in good faith — in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

REPORTER'S NOTE

Rule 16 — the basic pretrial order provision in the Virgin Islands Rules of Civil Procedure — contains multiple provisions intended to make litigation efficient, inexpensive and prompt.

Subpart (b), which deals with scheduling, recognizes the modern Superior Court programs for differentiated case management, and ties the issuance of orders to the receipt of the parties' report under Rule 26(f). The order is to follow a "consultation" with the parties. The judge must issue the scheduling order "as soon as practicable," and absent good cause the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

Subpart (b) also specifies both "required" and "permitted" items for inclusion in a pretrial order. A long list of suggested contents is included.

Subpart (c) deals with pretrial conferences and the required attendance of a party or counsel. It also alerts the parties to a tremendous range of issues which are appropriate for consideration at such conferences.

Subpart (d) provides that after any conference the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

Subpart (e) relates to "final pretrial conferences" and "final pretrial orders" suggesting that a final conference be held as close to the start of trial as is reasonable. It also specifies that such a conference must be attended by at least one attorney who will conduct the trial for each party and by any self-represented party.

Subpart (f) authorizes the court to impose sanctions on any party, or its attorney, who fails to appear for a required pretrial conference or is unprepared to participate meaningfully, or does not participate in the process in good faith. Separate provisions authorize sanctions if a party fails to obey a scheduling or other pretrial order.

Rule 16-1 Joint Final Pretrial Order

A proposed Joint Final Pretrial Order shall be prepared through cooperation of the parties within the deadlines and in accordance with instructions given by the court. After each party has submitted the respective portions of the proposed pretrial order to other parties, plaintiff shall convene a conference, in person or by telephone, to attempt to reconcile any matters on which there is a disagreement. After diligent efforts to resolve such disagreements, all areas of agreement or disagreement shall be noted in the proposed Joint Final Pretrial Order. The proposed order shall be a single document reflecting efforts of all parties, signed by all counsel of record and any self-represented parties, and then filed by plaintiff for review and entry by the court. The court may enforce the provisions and requirements of the Joint Final Pretrial Order by sanctions against counsel or the parties.

Form 16-A — Sample Joint Discovery and Scheduling Planning Order

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF [*Insert Division***]**

	)	
	)	CASE NO. [*Insert No.*]
	)	
Plaintiff,	)	
v.	)	
	)	
*Defendant*s.	)	**JURY TRIAL DEMAND**
	)	[*If Applicable*]

JOINT DISCOVERY AND SCHEDULING PLAN

THE PARTIES to the above-captioned civil action, in accordance with Virgin Islands Rules of Civil Procedure 16 and 26, agree and stipulate to the following discovery and scheduling plan for incorporation into the Case Management Order, dated: _____.

1. All initial disclosures pursuant to V.I. R.Civ.P. 26(a) shall be served on all parties not later than _____.

2. All written interrogatories, requests for production of documents, and requests for admissions

shall be propounded not later than _____, and all responses thereto, including objections, shall be served not later than _____.

3. No party shall propound more than 25 interrogatories, 25 requests for production of documents, and 25 requests for admissions, including all discrete subparts thereof, unless otherwise stipulated by the parties or ordered by the court.

4. All motions to amend the pleadings to add claims, defenses, and/or parties shall be filed and served not later than _____. All fact witness depositions, including depositions of non-parties, taken for purposes of discovery and/or to preserve testimony for trial, shall be completed by _____.

5. No party shall take more ten (10) fact and expert witness depositions, no single deposition shall exceed more than seven (7) hours in durations, and any single deposition shall be completed on the same day on which it is commenced, unless otherwise stipulated by the parties or ordered by the court.

6. All motions to compel, for discovery, sanctions, or for protective orders with respect to all initial disclosures and fact discovery, shall be filed and served not later than _____.

7. The parties' first mediation session shall be commenced and completed not later than _____. Rule 90 of the Virgin Islands Rules of Civil Procedure shall govern all mediation sessions conducted in this civil action.

8. All Plaintiffs shall serve notices identifying all of their expert witnesses, and said expert witnesses' curriculum vitae and written reports, not later than _____.

9. All Defendants, Third Party Plaintiffs, and Intervenors shall serve notices identifying all of their expert witnesses, and said expert witnesses' curriculum vitae and written reports, not later than _____.

10. All Third Party Defendants shall serve notices identifying all of their expert witnesses, and said expert witnesses' curriculum vitae, not later than _____.

11. All expert witness depositions, for purposes of discovery and to preserve testimony for trial, shall be completed not later than _____.

12. All motions to compel, for sanctions, or for protective orders with respect to expert discovery, shall be filed and served not later than _____.

13. All dispositive motions, except for motions challenging subject matter jurisdiction which may be filled at any filed at any time, and *Daubert/Kuhmo* motions shall be filed and served not later than _____.

14. All motions in limine and V.I. Rule of Evidence 104 motions shall be filed and served not later than _____.

15. This Joint Discovery and Scheduling Plan may not be amended, except as ordered by the court for good cause shown.

Respectfully submitted,

DATED: _____, 20__

_____
[Attorney Name]
[Office & Firm Address]
[Telephone No.]
[E-mail address]
[V.I. Bar No.]
[Designation as *Attorney for the (Party)*]

_____
[Attorney Name]
[Office & Firm Address]
[Telephone No.]
[E-mail address]
[V.I. Bar No.]
[Designation as *Attorney for the (Party)*]

The foregoing Joint Discovery and Scheduling Plan is **APPROVED**, and made a part of the Case Management Order dated _____.

Dated:_____, 20__

_____
Hon.
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella George
Acting Clerk of the Court
By: _____
Court Clerk Supervisor ___/___/___

Form 16-B — Sample Joint Final Pretrial Order

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF [*Insert Division***]**

_____

	)	
	)	CASE NO. [*Insert No.*]
	)	
Plaintiff,	)	
v.	)	
	)	

	)	
*Defendant*s.	)	**JURY TRIAL DEMAND**
_____	)	[*If Applicable*]

JOINT FINAL PRETRIAL ORDER

The following shall constitute the Joint Final Pretrial Order pursuant to Rule 16 of the Virgin Islands Rules of Civil Procedure, and this Joint Final Pretrial Order shall govern the conduct of the trial of this case. Amendments to this order will be allowed only in exceptional circumstances to prevent manifest injustice.

APPEARANCES:

[Attorney Name]	[Attorney Name]
[Office & Firm Address]	[Office & Firm Address]
[Telephone No.]	[Telephone No.]
[E-mail address]	[E-mail address]
[V.I. Bar No.]	[V.I. Bar No.]
[Designation as *Attorney for the* (*Party)*]	[Designation as *Attorney for the (Party)*]

1. Nature of Action and Jurisdiction of the court:

2. Factual Contentions of Plaintiff: (Insert Names; This section shall not exceed two pages without leave of the court)

3. Factual Contentions of Defendants: (Insert Names; This section shall not exceed two pages without leave of the court)

4. Factual Contentions of Defendant/Third Party Plaintiff: (Insert Names; This section shall not exceed two pages without leave of the court)

5. Factual Contentions of Third Party Defendants: (Insert Names; This section shall not exceed two pages without leave of the court)

6. Factual Contentions of Intervenors: (Insert Names; This section shall not exceed two pages without leave of the court)

7. Stipulated Facts:

8. Statement of Damages Claimed: (In every case, the statement of damage must be specific. In Personal Injury actions the medical special damages and any wages or other monetary losses should be itemized along with the nature, extent and duration of any alleged injuries. If monetary damages are not sought, the type of relief should be described. This section is limited to one page except by leave of the court.)

9. Statement of Legal Issues Presented: (Each party shall list the contested legal issues to be presented at trial, e.g., negligence, breach of contract, wrongful death, wrongful discharge, etc.)

10. Legal Issues, Defenses or Claims to be Abandoned:

11. Bifurcation: (Each party shall indicate whether the issues of liability and damages should or should not be tried separately.)

12. Additional Discovery: (Unless leave of the court has been obtained to extend pretrial discovery, and it is so noted in the Final Pretrial Order, this order shall contain the statement, "All discovery is complete.")

13. Exhibit Lists: (Each party shall list separately and describe with particularity each exhibit which it intends to use at the trial of this case. Any exhibit not listed may not be used during the parties' case-in-chief, unless the existence of the exhibit, despite due diligence, was unknown to the party and its counsel at the time of submission of this order. This list shall be seasonally supplemented upon the discovery of a new exhibit. If a party intends to use no exhibits at trial for any purpose, the party shall so state. Exhibits should be pre-marked prior to trial.)

14. Fact Witness Lists: (The name of each witness whom the party intends to call at trial shall be listed with a short identifying statement. A detailed summary of the anticipated testimony of each witness must be provided. Except for rebuttal witnesses, no party shall call a witness at trial whose name does not appear on the party's witness list, unless the existence of the potential witness was unknown to the party, despite due diligence, at the time of submission of this order. Upon the discovery of a new witness, the name of such witness, and a summary of the testimony shall be seasonably supplied to all parties and the pretrial order amended.)

15. Expert Witness Lists: (The names of expert witnesses should be listed and a reference should be made to any prior order controlling the terms and conditions of experts' reports and testimony. Copies of expert reports and resumes of experts are not to be attached to the Final Pretrial Order, but shall be separately submitted to the court on the day of the Pretrial Conference.)

> **As to Medical Malpractice Actions only: Each party shall cite the volume, chapter and line of any learned treatises it plans to utilize at trial during direct or cross examination.**

16. Deposition testimony to be read into the record at trial: (Each party using such evidence shall identity the deposition to be used by name, date, time, and location, and list the pages and lines to be used at trial.)

17. Estimated Length of Trial: (Each Party shall provide an estimated length of trial and set forth the trial date which has been assigned.)

18. (TO BE COMPLETED BY THE COURT) In a jury case, the parties shall file and serve their witness lists, exhibit lists, proposed special jury instruction and jury charges, proposed voir dire, and proposed verdict forms not later than _____.

19. (TO BE COMPLETED BY THE COURT) In a non-jury, the parties shall file and serve their witness lists, exhibit lists, proposed findings of fact and conclusions of law, and pretrial bench briefs not later than _____.

CONCLUDING VERIFICATION

(The following statement is to be included the conclusion of every Joint Final Pretrial Order, immediately above counsel's signatures as illustrated below.)

We hereby certify by the affixing of our signatures to this short form Joint Final Pretrial Order that it reflects the efforts of all counsel and that we have carefully and completely reviewed all parts of this order prior to its submission to the court.

Respectfully submitted,

DATED: _____, 20__

_____
[Attorney Name]
[Office & Firm Address]
[Telephone No.]
[E-mail address]
[V.I. Bar No.]
[Designation as *Attorney for the (Party)*]

_____
[Attorney Name]
[Office & Firm Address]
[Telephone No.]
[E-mail address]
[V.I. Bar No.]
[Designation as *Attorney for the (Party)*]

The foregoing Joint Final Pretrial Order is hereby **APPROVED**.

Dated:_____, 20__ _____
Hon.
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella George
Acting Clerk of the Court
By: _____
Court Clerk Supervisor ___/___/___

Form 16-C Sample Business Records Certification
[Authorized under V.I. Rules of Evidence 803(6)-(7) and 902(11).]

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF [*Insert Division***]**

Plaintiff,	)	CASE NO. [*Insert No.*]
v.	)	
*Defendant*s.	)	**DECLARATION**

BUSINESS RECORDS CERTIFICATION

I, _____ [*print name*] in my capacity as _____[*a custodian of the records*; *or other stated position making the signer a qualified witness on behalf the business/office*] of _____ [*name of business/office*] do hereby make this Declaration under penalties of perjury, and state:

1. I am over the age of 18 years, of sound mind, and competent to make this Declaration.

2. I have personal knowledge of the facts herein stated because of my employment position and experience.

3. Attached to this Declaration are _____ pages of records from our business/office, which are exact duplicates of the records in our files.

4. The records annexed to this Declaration:
(a) were made at or near in time to the events and information recorded;
(b) were created by (or from information transmitted directly from) persons who had knowledge of the events/information recorded;
(c) were made in the course of our regularly conducted business activity; and
(d) were made and kept as a necessary part and regular practice of our business.

[*Include* ¶¶ 5, 6 *and/or* 7 *for medical records and medical billing records only.*]

5. The attached records relate to medical treatment and medical billing for the identified patient, and:
(a) These records are exact duplicates of the records in our files.
(b) The total amount of charges incurred for the services provided was $_____.
(c) The total amount paid by the patient (or the patient's insurer) was $_____.
(d) The amount of charges that remain outstanding is $_____.

6. Services were provided as reflected in the attached records, and were reasonably necessary.

7. The amounts charged for the services reflected in the attached records were reasonable for services rendered, at the time and place specified.

I declare (or *certify, verify, or state*) under penalty of perjury under the laws of the United States of America (and/or U.S. Virgin Islands) that the foregoing is true and correct pursuant to 28 U.S.C. §1746(2) and V.I. R.Civ.P. 84, which both authorize the making of these statements without the signature of a notary.

Executed/Signed on this ____ day of _____, 201___.

_____ _____

(Signature) (Print Name)

_____

(*Position/Title as Record Custodian or other Qualified Declarant*)

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a personal representative;

(D) a guardian;

(E) a bailee;

(F) a trustee of an express trust;

(G) a party with whom or in whose name a contract has been made for another's benefit; and

(H) a party authorized by statute.

(2) ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued shall be determined by the law of the Virgin Islands.

(c) Minors, Disabled or Incapacitated Persons, and Others.

(1) ***Appointed Representative.*** A person appointed by statute or court order to serve as the representative of a minor, disabled or incapacitated person, or any other individual or entity, may sue or defend on that person or entity's behalf.

(2) ***Without a Representative.*** A minor, disabled or incapacitated person who does not

have a duly appointed representative may sue by a next friend.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

(e) Actions for Wrongful Death and Survival. In wrongful death suits filed under 5 V.I.C. §76 and in survival actions filed under 5 V.I.C. § 77, the action may be prosecuted in the name of a plaintiff identified in the complaint as acting as a personal representative. The named plaintiff shall serve as personal representative throughout the proceeding unless replaced by order of the court.

REPORTER'S NOTE

Rule 17 addresses issues of capacity, recognizing that a variety of appointed representatives may bring action on behalf of the real party in interest, without joining that person.

Under Subpart (b) the capacity of a person or entity to sue or be sued will be determined by the law of the Virgin Islands.

Subpart (c) addresses actions involving minors, disabled or incapacitated persons, and others requiring a representative. It specifies that any properly-appointed representative may bring action, or defend, on behalf of such persons. Further, in Subpart (c)(2) the rule provides that — where no appointed representative exists — a minor or a disabled or incapacitated person may sue by a "next friend," typically a family member. No court appointment is required for the commencement of an action in a next friend capacity.

Subpart (d) indicates that a public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

Subpart (e) it is a provision dealing specifically with wrongful death and survival actions under 5 V.I.C. §76 and § 77. To avoid any unnecessary requirement to open an estate, and to permit swift commencement of proceedings where required for statute of limitations or other purposes, this subpart of the rule provides that an action may be prosecuted in the name of a plaintiff who is identified in the complaint as acting as a personal representative, although court appointment to that position has not at that time been made. The named plaintiff will serve as personal representative throughout the proceeding unless replaced by order of the court.

Rule 18. Joinder of Claims

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

REPORTER'S NOTE

Rule 18 states the general policy allowing a party to combine other, alternative or independent, claims with any properly-pled claim otherwise pending against the same party. As is common in modern American practice, pleading of alternative or "contingent" claims it is also permitted.

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

REPORTER'S NOTE

Rule 19 is the modern embodiment of the "necessary parties" doctrine. Under Subpart (a) if the absence of a person who is subject to service of process would mean that the court cannot accord complete relief among other parties — or if the absent person has an interest relating to the subject and completing the litigation in the person's absence may impair or impede the ability to protect the interest, or if it would leave any existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest — this Rule requires that

the person be joined.

Under Subpart (b) of Rule 19 if a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider are set forth in this Subpart of the Rule.

Subpart (c) indicates that — when asserting a claim for relief — a party must identify any known person who would qualify as necessary under the standards of this Rule. Subpart (d) makes these joinder principles subject to Rule 23 when a class action is involved.

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) ***Defendants.*** Persons — as well as a vessel, cargo, or other property subject to process in rem — may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

REPORTER'S NOTE

Rule 20 is the "permissive joinder" provision. Under Subpart (a) multiple plaintiff's may join in one action if they assert any right to relief jointly, severally, or in the alternative arising out of the same transaction, occurrence, or series of transactions or occurrences, so long as there is at least one question of law or fact common to all plaintiffs. Similarly, multiple defendants may be joined if any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction and at least one question of law or fact common to all defendants will arise in the action.

Subpart (b) specifies that the court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

REPORTER'S NOTE

Rule 21 makes it clear that "misjoinder" and "nonjoinder" of parties is not jurisdictional: such a defect will not cause the action to be dismissed. The Rule confirms the discretion of the court to rule, at any time, adding or dropping a party on such terms as are just in the circumstances. Severance of claims involving one or more parties is also authorized.

Rule 22. Interpleader

(a) Grounds.

(1) ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. This procedure is subject to 5 V.I.C. § 1391.

REPORTER'S NOTE

Rule 22, the "interpleader" rule, provides an option for any party who may be exposed to double or multiple liability who require other potential claimants to an asset to respond by asserting any rights they may have been the "res." In accord with the modern Virgin Islands interpleader statute, a party asserting a claim in interpleader (whether as a plaintiff or a defendant claiming such rights) may also pursue a claim for entitlement to some or all of the property that is the subject of the action.

Subpart (b) of this Rule makes it clear that it provides an alternative, but does not limit, the rights of joinder of parties allowed by Rule 20.

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subpart (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. [Reserved.]

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d), subject to the provisions of this subpart (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(B).

REPORTER'S NOTE

Rule 23 follows — in all its detail — the modern approach to class actions followed in almost

every American jurisdiction, including the federal courts. The rule specifies "prerequisites" in the established categories of numerosity, common questions of law or fact, and the "typicality" of the claims or defenses of the representative parties such that they will fairly and adequately protect the interests of the proposed "class."

Subpart (b) identifies several "types" of circumstances that will warrant the establishment of a class action including concerns over potentially inconsistent adjudications without a proceeding in this form, and the most basic circumstance: where questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The Rule specifies various factors for consideration in making these determinations, as part of Subpart (b).

Subpart (c) calls for early consideration of a "class certification order" determining whether the case will be permitted to proceed in a class-plaintiff format. If approved, the class will be defined and counsel designated as representative of that class. There are detailed provisions for directing "the best notice that is practicable under the circumstances" of the pendency of the action and their options under applicable procedures.

Open-ended guidelines are provided in Subpart (d) for conducting further proceedings in an action under this rule.

Subpart (e) addresses the required procedures by which class actions may be settled, voluntarily dismissed, or compromised: court approval is required for each of these steps. In addition, further notice requirements are imposed by this part of the rule.

Subpart (f) is marked [Reserved] to hold a place for any future development in governing Virgin Islands law dealing with appealability of class certification or other rulings relating to the maintenance of class actions. In the absence of statutes or Rules of Court on the appeal issues, general law of the Virgin Islands concerning appealable orders until guidance is received from the Supreme Court of the Virgin Islands in any appeal from a Virgin Islands proceeding, or upon a certified question accepted by the Supreme Court from a federal or state court.

Subpart (g) deals with the procedures and requirements for appointing class counsel, and identifies factors to be considered by the court, such as the attorneys experience and resources to facilitate performing the role of class counsel.

Subpart (h) authorizes the court in an action that has been certified to proceed in class form to award reasonable attorney's fees and nontaxable costs. Procedures of Rule 54(d)(2) are invoked by cross reference, and — as with other parts of the class action rule — proper notice of the application for fees and its consideration by the court must be provided.

Rule 23.1. Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

REPORTER'S NOTE

Rule 23.1 authorizes "derivative actions" on behalf of a corporate entity. Subpart (a) makes this procedure applicable where a corporation or an unincorporated association could enforce a right but has failed to enforce it. A shareholder or "member" may pursue the action on the corporation's behalf unless it appears to the court that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

Subpart (b) makes it a requirement that the complaint be verified, and usually that it allege shareholder or member status at the time of the transaction complained of. The complaint must "state with particularity" the efforts by the plaintiff to obtain the desired action from the directors or comparable authority of the entity involved, or its shareholders or members, along with any the reasons for not obtaining the action or not making the effort.

Subpart (c) provides that a derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval, on proper notice.

Rule 23.2. Actions Relating to Unincorporated Associations

Subject to the provisions of Title 28, Chapter 33 of the Virgin Islands Code, this rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

REPORTER'S NOTE

Like the derivative lawsuit provisions in Rule 23.1, this Rule requires that any party purporting to act in a representative capacity as a member of an unincorporated association must be a person who will fairly and adequately protect the interests of the Association and its members. By cross reference two Rule 23 other case-management orders by the court are authorized.

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal or Virgin Islands statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that

interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal or Virgin Islands statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By Governmental Bodies, Officers or Employees.*** On timely motion, the court may permit the Government of the Virgin Islands, an autonomous or semi-autonomous governmental agency or board, a public corporation, or a governmental officer or employee to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer, employee or governmental body, agency or board; or

(B) any regulation, order, requirement, or agreement issued or made under a statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

REPORTER'S NOTE

Rule 24 broadly authorizes intervention and pending actions. Intervention "of right" is available if a statute so provides, for any action where the intervenor can assert an interest relating to the property or transaction that will be impaired or impeded absent participation. Such intervention may be denied if the existing parties adequately represent that interest. In addition, intervention is allowed to anyone who has a claim or defense in common with the pending action and which involves a common question of law or fact. Special provision is made for intervention by the Government of the Virgin Islands, governmental corporations, agencies, and boards as well as officers and employees of a governmental body. The rule requires that the court consider, in exercising its discretion on whether to allow intervention, whether it would unduly delay or prejudice the adjudication of the original parties' rights.

Subpart (c) requires that a motion to intervene be served on the existing parties as provided in Rule 5, and must state the grounds for intervention. In addition the intervention application must attach a copy of the pleading which the proposed intervening party would present.

Rule 25. Substitution of Parties

(a) Death.

(1) ***Substitution if the Claim Is Not Extinguished.*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. The motion may be granted at any time within two years after the death.

(2) ***Continuation Among the Remaining Parties.*** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate,

but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) ***Service.*** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

REPORTER'S NOTE

Rule 25, which deals with the substitution of parties, is operable when a party dies, is replaced in office, and other situations. When a party dies — if the claim is not extinguished — a two-year period from the date of death is allowed for the court to grant a substitution motion.

In the case of incompetency Subpart (b) provides that the court may, on motion, permit the action to be continued by or against the party's representative.

Subpart (c) indicates that if an interest in the underlying property is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action.

Under subpart (d) an action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office. The successor is automatically substituted as a party.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment, unless it would be unduly burdensome to produce a copy of an item, in which case each item must be clearly identified, along with a statement

as to why each cannot readily be copied, and including a description of the location where each can be reviewed;

(iii) a computation of each category of damages claimed by the disclosing party — with all supporting documents in the party's control produced as received — unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) a copy of any insurance agreement — primary or otherwise — under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment, and any documents received from insurers that relate to any reservation of rights or denial of coverage.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iii) an action to enforce or quash an administrative summons or subpoena;

(iv) a proceeding ancillary to a proceeding in another court; and

(v) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures — In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures — For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses*. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Virgin Islands Rule of Evidence 702, 703, 704 or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Virgin Islands Rules of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Virgin Islands Rules of Evidence 402 or 403 — is waived unless excused by the

court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is not relevant to any party's claim or defense.

(D) *Duplicative discovery*. Duplicative disclosure is not required, and if all information and materials responsive to a request for disclosure has already been made available to the discovery party, the responding party may, for its response, state specifically how and in what form such prior disclosure has been made. Where only part of the information has previously been provided to the discovering party, the response may so state and must then further make available the remaining discoverable information or materials.

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. The motion must include 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. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses in motions relating to protective orders.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have

conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(4) *Effect on the Discovery Process of Motions Filed.* The filing of any motion — including potentially dispositive motions such as a motion to dismiss or a motion for summary judgment — shall not stay discovery in the action unless the judge so orders.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all self-represented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Virgin Islands Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if self-represented — and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without

substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

REPORTER'S NOTE

Rule 26 is the foundational provision regarding mandatory early disclosures and the scope of discoverable information throughout the action.

Subpart (a) sets forth the nature and prescribed timing for "required disclosures" that must be made in the initial stages of the lawsuit. In addition to information identifying the parties, this Subpart requires that each party produce a copy of all documents, electronically stored information, and tangible things the party possesses or controls unless it would be unduly burdensome to produce a copy of an item, in which case each item must be clearly identified, along with a statement as to why each cannot readily be copied, and including a description of the location where each can be reviewed. In addition Subpart (a)(iii) requires production of a computation of each category of damages claimed by the disclosing party — with all supporting documents in the party's control produced as received — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure. A separate provision of Subpart (a) calls for production for inspection and copying of any insurance agreement — primary or otherwise — which may be available to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. It is further provided that the proceedings "exempt" from required initial disclosures include actions for review of an administrative record, habeas corpus and other post-conviction relief in criminal cases, and actions to enforce arbitral awards.

Initial disclosures must include the identification of any expert witness each party "may use at trial." As in federal practice unless otherwise stipulated or ordered by the court, the disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The Rule specifies in detail multiple categories of information which are required to be included in the report. An abbreviated form of report is required from other witnesses who may qualify as experts — but were not specially retained for that purpose.

***Committee Discussion Point:** The provision in Rule 26(a)(2)(C) applies to treating physicians and the Committee considered whether to adopt a specific Rule 26 subpart for treating physician witnesses, or whether to add words to Rule 26(a)(2)(C) to state expressly that this subpart applies to treating physicians. After full discussion the Committee concluded that this provision is sufficient at the present time in dealing with problems in the discovery about and testimony from, treating physicians.*

Numerous other pretrial disclosure obligations are stated in Rule 26, along with associated time deadlines.

Subpart (b) is the general "scope" provision governing discovery in the Virgin Islands. It defines discoverable materials as "any nonprivileged matter that is relevant to any party's claim or defense." A separate provision on electronically stored information — comparable to language in the federal system — allows a responding party to identify requested information as being "not reasonably accessible," after which further pursuit of the responsive information is permitted under standards specified in the rule. This Subpart of the Rule states that duplicative disclosure is not required where all information and materials responsive to a request for disclosure has

already been made available to the discovery party

Under Rule 26(b)(3) long-standing doctrines of trial preparation material protection, "work product," are continued, subject to the traditional doctrine that a showing of special need and an inability to obtain equivalent materials may overcome the protections of this doctrine. However, "opinion work product" displaying counsel's mental processes, conclusions, strategies and the like, cannot be obtained.

Rule 26 (b)(4) makes the taking of a deposition of any person who has been identified as an expert a matter of right. The modern version of this rule applicable in the Virgin Islands includes an express provision dealing with discoverability of communications between counsel and the expert witness — with particular attention to identifying facts, data, or assumptions on which the expert has been directed to rely. Long-standing cost-transfer provisions to place the expense of expert depositions upon the party seeking that testimony are continued in the Virgin Islands rule.

One member of the Advisory Committee is of the view that Rule 26(b)(4) on the cost of depositions of experts is inconsistent with 5 V.I.C. § 660 (providing a $4 daily witness fee). The Committee concluded that the daily fee statute sets a floor, and is not intended to address expert witness depositions covered by Rule 26(b)(4).

Under rule 26(b)(5) any time a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must expressly state that it is withholding responsive information on that basis. Further, the rule requires the creation of a "privilege log" that describes nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. On the other hand the rule also includes a "claw-back" provision for the retrieval of erroneously produced documents or files.

Subpart (c) authorizes regular protective order practice. Any such motion must include 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. The full range of dispositions will be open to the court, from barring production to enforcing it, and including a variety of protective provisions in the order.

Under Subpart (d) a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. There is a provision in this rule for so-called "early Rule 34 requests" to be made more than 21 days after the summons and complaint are served on a party, which will be deemed to have been served at the first Rule 26(f) conference.

A separate "sequencing" provision expressly addresses the effect of motions interposed by a defendant. Subpart (d)(4) expressly states that discovery is not stayed or deferred by the filing of a motion, including so-called dispositive motions such as applications under Rule 12 or Rule 56.

Supplementation of disclosures and discovery responses is required by Subpart (e) of Rule 26, and is applicable two the initial disclosures as well as responses to interrogatories, requests for production or requests for admissions. Where those responses are shown later to be "incomplete or incorrect" supplementation is required if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. This updating requirement is also applicable with respect to expected expert testimony, and applies both to statements in the required "report" of the expert and to testimony given by the expert in any deposition.

Subpart 26 (f) sets out the timing and procedures for the conduct of discovery planning

conferences and other management procedures relating to discovery in the case. The content for such a plan is specified in the rule along with suggestions for other matters to be considered.

Subpart (g) is a discovery-specific sanction provision that incorporates the "representation" approach of Rule 11, stating that a party represents — in every discovery request, response, or objection — that to the best of their knowledge, information, and belief after a reasonable inquiry each disclosure, it is complete and correct, each request, response, or objection is warranted by law and not interposed for any improper purpose, and that it is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Rule 26-1. Discovery and Trial Testimony from Expert Witnesses

(a) Payment for Expert Witness Depositions.

(1) Unless the parties have agreed to other arrangements in writing, responsibility for compensating expert witnesses shall be according to Rule 26(b)(4)(E).

(2) Unless otherwise ordered by the court, a proposed bill for the expert's charges must be provided to the party seeking discovery a reasonable period of time prior to the deposition. If the deposing party objects to the charges, prompt application shall be made to the court to obtain a ruling on their reasonableness before the deposition.

(3) If an expert demands payment in advance of the deposition date, absent an agreement of the parties on other arrangements, the party seeking discovery must advance or otherwise secure such sums.

(b) Testimony and the Expert's Written Report/Deposition. The testimony of an expert witness at trial shall be limited to:

(1) the opinions disclosed in any written report or supplemental report permitted under Rule 26(a)(2); and

(2) any additional opinions elicited from the expert at a deposition.

REPORTER'S NOTE

Rule 26-1 provides that a party is entitled to receive "a reasonable period of time prior to the deposition" a statement of the fees and charges to be levied by the expert in connection with the deposition.

One member of the Advisory Committee is of the view that Rule 26-1 relating to the compensation of experts is inconsistent with 5 V.I.C. § 660 (providing a $4 daily witness fee). The Committee concluded that the daily fee statute sets a floor, and is not intended to address expert witness depositions covered by Rule 26-1.

Subpart (b) states clearly that the testimony of an expert witness at trial will be limited to those opinions disclosed in any written report or supplemental report permitted under Rule 26(a)(2); and any additional opinions elicited from the expert at a deposition.

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) *Petition.* A person who wants to perpetuate testimony about any matter cognizable in a Virgin Islands court may file a verified petition in the court where any expected adverse

party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a court of the United States Virgin Islands but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) ***Notice and Service.*** At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside of the Virgin Islands in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35.

(4) ***Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the jurisdiction where it was taken.

(b) Pending Appeal.

(1) ***In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) ***Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action

to perpetuate testimony.

REPORTER'S NOTE

Rule 27 is a standard provision regarding the taking of testimony to preserve it. Under Subpart (a) it is possible — before a lawsuit is filed — for a person who wants to perpetuate testimony about any matter cognizable in a Virgin Islands court to file and serve a verified petition in the court where any expected adverse party resides, asking for an order authorizing deposition of a named person in order to perpetuate their testimony.

Similarly, under Subpart (b) if an appeal has been taken or may still be taken, the court may — on motion — permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States Virgin Islands.

(1) ***In General.*** Within the United States Virgin Islands, a deposition must be taken before an officer authorized to administer oaths either by law of the Virgin Islands or by the law in the place of examination.

(2) ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) Outside of the United States Virgin Islands. Depositions outside of the United States Virgin Islands shall be taken in compliance with the provisions of 5 V.I.C. § 4921.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

REPORTER'S NOTE

The straightforward provisions of Rule 28 identify persons before whom depositions may be taken. Under Subpart (a) a deposition within the Virgin Islands must be taken before an officer authorized to administer oaths either by law of the Virgin Islands or by the law in the place of examination. As noted in Subpart (b), depositions outside of the United States Virgin Islands must be taken in compliance with 5 V.I.C. § 4921.

Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

REPORTER'S NOTE

Rule 29 states a broad authorization for the parties to stipulate about depositions and other discovery procedures. Only an agreement that would interfere with a court-ordered time schedule would require approval by the court.

Rule 29-1. Stipulations on the Scope of Discovery

The parties may, by stipulation, expand the scope of disclosures under Rule 26(a).

REPORTER'S NOTE

Rule 29-1 authorizes the parties to agree on expansion of the scope of disclosures as required by Rule 26(a).

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request complying with Rule 34 to produce documents and tangible things at the deposition.

(3) ***Method of Recording.***

(A) *Method Stated in the Notice*. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) ***By Remote Means.*** The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) ***Officer's Duties.***

(A) *Before the Deposition*. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion*. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental body, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Virgin Islands Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. No more than one attorney for each party may question the deponent, unless otherwise provided by stipulation of the parties or order of the court.

(2) ***Objections.*** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope directly to the officer, or may serve the party noticing the deposition, who must deliver the sealed envelope to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) ***Sanction.*** The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) ***Motion to Terminate or Limit.***

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition — and any exhibits marked at the deposition — in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) ***Documents and Tangible Things.***

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and

attached to the deposition. Any party may inspect and copy them. If the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals*. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(h) Filing of Depositions Before Trial. If a case is to proceed to trial, the depositions eligible for filing — along with its exhibits — shall be filed three (3) business days before the trial is to begin unless otherwise ordered by the court. In that regard, a party taking the deposition shall be the custodian of the original deposition, and at its own initiative, or upon timely request by another party seeking to use the deposition, shall file a copy of the original.

(i) Depositions and Discovery outside the Virgin Islands. The procedures for use of letters rogatory for discovery outside the Virgin Islands are set forth in 5 V.I.C. § 4921. The Uniform Interstate Depositions and Discovery Act (Chapter 505 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 4922 et seq.) provides for discovery involving jurisdictions recognizing reciprocal discovery obligations, and includes provisions for issuance and service of subpoenas for depositions and production of documents in those jurisdictions.

REPORTER'S NOTE

Rule 30 is the basic provision governing depositions, and it addresses such basic considerations as When a Deposition May Be Taken, whether leave is required, and related consideration.

Subpart (b) deals with the Notice of the Deposition, and includes provisions for both a "bare" notice and one annexing a document production request. The methods for recording the testimony are also addressed in that subpart. Duties of the officer who will "preside" at the deposition are also enumerated.

Subsection (b)(6) is the well-known provision for noticing the deposition of a public or private corporation, a partnership, an association, a governmental body, or other entity. The notice must describe with reasonable particularity the matters for examination and the named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each

person designated will testify.

Subpart (c) deals with the examination and cross-examination of a deponent, basically requiring that these steps proceed as they would at trial under the Virgin Islands Rules of Evidence, except Rules 103 and 615. Special language is included regarding objections — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition. Objections must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. The Virgin Islands Rule states that an objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). A sentence at the end of this subpart states: "No more than one attorney for each party may question the deponent, unless otherwise provided by stipulation of the parties or order of the court."

As in other jurisdictions, subpart (d) of Rule 30 prescribes that — unless otherwise stipulated or ordered by the court — a deposition is limited to 1 day of 7 hours. The Rule further states that a court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. Subpart (d) also alerts parties that the court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

Subpart (e) retains traditional practice for review and correction of the deposition transcript by the witness.

Subpart (f) provides that the officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The Virgin Islands provision provides that — unless the court orders otherwise — the officer must seal the deposition (and any exhibits marked at the deposition) in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording.

Subpart (g) preserves long-applicable language concerning the sanction available if a noticing party failed to attend and proceed with the deposition, to serve a subpoena on a nonparty deponent, who consequently did not attend.

Subpart (i) has been added to the deposition Rule to highlight the availability of two procedural statutory regimes for discovery outside the Virgin Islands: the procedures for use of letters rogatory for discovery set forth in 5 V.I.C. § 4921, and the Uniform Interstate Depositions and Discovery Act — Chapter 505 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 4922 et seq. — which provides for discovery involving jurisdictions recognizing reciprocal discovery obligations.

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under

this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, other entities or governmental bodies may be deposed by written questions in accordance with Rule 30(b)(6).

(5) ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion or Filing.

(1) ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed.

(2) ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

REPORTER'S NOTE

Rule 31 continues the little-used but occasionally convenient procedure of taking a deposition upon written questions, a process available without leave of court. The party who notices the deposition must deliver to the officer a copy of all the questions served and of the notice.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Virgin Islands Rules of

Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Virgin Islands Rules of Evidence.

(3) ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice*. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or Virgin Islands court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Virgin Islands Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript

of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity*. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question*. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

REPORTER'S NOTE

Rule 32, which is the omnibus provision controlling use of deposition transcripts or recordings in court, follows long-used lines, making use of all or part of a deposition available against a party who was present or represented at the taking of the deposition or had reasonable notice of it. Use is permitted to the extent the testimony is admissible under the Virgin Islands Rules of Evidence if the deponent were present and testifying. In addition to impeachment use, the deposition of a party, agent or entity-designee may be used for any purpose.

Unavailable witnesses for purposes of Rule 32 include the familiar categories: witnesses who are dead, more than 100 miles from the place of hearing or trial, too old, ill or frail to attend, not amenable to subpoena power, or there are other "exceptional circumstances" making it appropriate to permit the deposition to be used. Provisions are also included dealing with depositions that were taken on short notice (less than 14 days), involvement of unrepresented parties, and use of part of a deposition.

Subpart (b) continues former practice: an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

Subpart (c) states that a party must provide a transcript of any deposition testimony to be offered, but may provide the court with the testimony in nontranscript form as well.

Subpart (d) contains waiver-of-objection provisions but, as in prior practice an objection to a deponent's competence — or to relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. As before, matters of "form of the question" and similar objections are indeed waived since these are matters that can be corrected at the time if noted by the objector.

Rule 33. Interrogatories to Parties

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

(2) ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(3) ***Form*.** Unless interrogatories are served in electronic form, they shall be prepared so that sufficient space is provided for insertion of answers after each interrogatory or subpart thereof. The answering party shall insert answers following each question and return the properly signed original to counsel or the self-represented party that propounded such interrogatories, and must also serve copies upon all other parties. If the interrogatories are served in paper form and insufficient space exists on the original for insertion of answers, the answering party shall retype the questions and provide answers so as to ensure that each answer follows the question or subpart being responded to.

(b) Answers and Objections.

(1) ***Responding Party.*** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is the Government of the Virgin Islands, a public corporation, an autonomous or semi-autonomous agency or board, a private corporation, a partnership, an association or other entity, by any officer, employee or agent, who must furnish the information available to the party.

(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be agreed by the parties under Rule 29 or be ordered by the court.

(3) ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) ***Signature.*** The person who makes the answers must sign them, and the attorney or self-represented party who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Virgin Islands Rules of Evidence.

(d) Duty of Reasonable Diligence; Option to Produce Business Records. An answer must be given to each interrogatory as provided in subpart (b) of this Rule unless the responding party represents in good faith in its response that it cannot — in the exercise of reasonable efforts — prepare an answer from information in its possession or reasonably available to the party. In that instance, and if the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information) — and if the burden of deriving or ascertaining the answer will be substantially the same for either party — the responding party may answer by:

(1) specifying the records that must be reviewed, providing sufficient detail and explanation to enable the interrogating party to identify and understand the records as readily as the responding party could; and

(2) producing copies of the records, compilations, abstracts, or summaries with the answer to the interrogatory, unless duplicating such materials would be unduly burdensome.

REPORTER'S NOTE

Rule 33, dealing with interrogatories has been updated, though its basic operation is familiar to the Virgin Islands bar. As in prior practice, absent a stipulation or court order a party may serve no more than 25 written interrogatories, "including all discrete subparts." The Rule provides that — unless interrogatories are served in electronic form — they must be prepared so that sufficient space is provided for insertion of answers after each interrogatory or subpart thereof. The answering party will then insert answers following each question

Subpart (b) deals with answers and objections. The standard 30-day time for responding is continued. Each interrogatory must be answered "separately and fully in writing under oath" unless an objection is lodged to all or part of the question.

Subpart (d) has been adapted for Virgin Islands practice in two important ways. It begins with a clear statement that an answer must be given to each interrogatory as provided in subpart (b) ("separately and fully in writing") unless the responding party "represents in good faith in its response that it cannot — in the exercise of reasonable efforts — prepare an answer from information in its possession or reasonably available to the party." If that representation can be made, the party may use the traditional Rule 33(d) option of stating that the answer may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information) — and if the burden of deriving or ascertaining the answer will be substantially the same for either party. Under the Rule as formulated, the responding party may make such an answer by specifying the records that must be reviewed, providing sufficient detail and explanation to enable the interrogating party to identify and understand the records as readily as the responding party could; and — in an important change from prior practice — by producing copies of the records, compilations, abstracts, or summaries with the answer to the interrogatory, "unless duplicating such materials would be unduly burdensome."

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection with sufficient particularity to identify what has been withheld. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored

information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

REPORTER'S NOTE

Rule 34, the provision governing production of documents including electronic records and files, applies — as in prior practice — to materials "in the responding party's possession, custody, or control."

Subpart (b) continues the traditional provision requiring a description "with reasonable particularity" of each item or category of materials desired. The standard 30-day response period continues. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The modern provision states that the party responding to the production request may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. Detailed provisions — which parallel those in federal practice — deal with the "form" in which electronic files may be produced. The response and objection provision now states that any objection must set forth whether any responsive materials are being withheld on the basis of that objection with sufficient particularity to identify what has been withheld.

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) ***In General.*** The court where the action is pending may order a party whose mental or physical condition, including blood group or DNA profile, is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) ***Motion and Notice; Contents of the Order.*** The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination — including any testing or procedure to be permitted — as well as the person or persons who will perform it.

(C) may include provisions as needed to address:

- any persons — other than the examiner and examinee — who will be permitted to be present during the examination. Any such persons shall remain silent during the process.
- any form of recordation of the examination to be permitted; and
- any other matter necessary to assure that the examination will not be impeded, obstructed or disrupted.

(3) Agreement by the Parties. The parties — including any self-represented parties —

may agree upon the conduct of a physical or mental examination without the necessity of obtaining an order of the court.

(b) Examiner's Report.

(1) ***Delivery to the Party or Person Examined.*** The party who requested the examination must deliver a copy of the examiner's report, together with like reports of all earlier examinations of the same condition, to the party against whom the examination order was issued and, if separate, to the person examined.

(2) ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) ***Production of Reports by the Party Examined.*** After delivering the reports, the party who moved for the examination is entitled to receive from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) ***Waiver of Privilege.*** By obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have, in that action or any other action involving the same controversy, concerning testimony about all examinations of the same condition.

(5) ***Failure to Deliver a Report.*** The court on motion may order on just terms that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) ***Scope.*** This subpart (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subpart does not preclude obtaining an examiner's report or deposing an examiner under other rules.

REPORTER'S NOTE

Rule 35, regarding physical and mental examinations continues the traditional requirement of an "order" of the court authorizing the examination unless the parties enter an agreement on the topic.

Under subpart (a) the Rule is modernized to include checking of a person's DNA profile as part of authorized testing, where it is a matter in controversy in an action.

The court order provision in the Rule states that the court must specify "time, place, manner, conditions, and scope of the examination — including any testing or procedure to be permitted — as well as the person or persons who will perform it. As applicable in the Virgin Islands, the Rule goes on to identify topics the order may address, including a specification of any persons — other than the examiner and examinee — who will be permitted to be present during the examination and the forms of recordation, if any, that will be permitted. The Rule states that any persons besides the examiner and examinee "shall remain silent during the process."

Under Subpart (b) the Rule now provides that the party who moved for the examination must deliver a copy of the examiner's report, together with like reports of all earlier examinations of the same condition, to the party against whom the examination order was issued and, if separate, to the person examined. Thereafter, the examining party is entitled to receive from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition.

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) ***Form; Copy of a Document.*** Each request must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

REPORTER'S NOTE

Rule 36, on Requests for Admissions, has been carried forward without material change in the modern Virgin Islands Rules of Civil Procedure. The traditional 30-day period for response is applicable, unless a longer or shorter period is agreed by the parties or ordered by the courts. As in the past if a request is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial "must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest." The

Rule cautions that the responding party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. Objection and motion practice is unchanged.

Subpart (b) makes admitted matter conclusively binding on the responding party "unless the court, on motion, permits the admission to be withdrawn or amended." The standard, which is expressly made subject to the provisions or Rule 16(e), states that the court may permit withdrawal or amendment of an admission if that step "would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subpart (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) ***Sanctions Sought Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced

through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

REPORTER'S NOTE

Rule 37, the central "sanction" provision of the modern American procedural rules is implemented in the Virgin Islands without material alteration. Thus under Rule 37(a) a motion to compel disclosure or discovery is a prelude to other more serious sanctions. All such motions must include a certification that the movant "has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." As under prior practice "an evasive or incomplete" discovery response "must be treated as a failure to disclose, answer, or respond." The prevailing party on discovery motions continues to be entitled to recover the reasonable expenses entailed in the motion practice, including attorney's fees.

Subpart (b) makes available the recognized "case-dispositive" sanctions for disobedience to a discovery order of the court. These sanctions include taking facts as established for purposes of the action, prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence, striking pleadings in whole or in part, staying further proceedings until the order is obeyed, dismissing the action or proceeding in whole or in part, entering a default judgment against the disobedient party, or treating the disobedience as a contempt of court.

Separate subdivisions of subpart (b) deal with failure to produce a person for examination, failure to disclose or to supplement responses, failure to admit under Rule 36, failure to attend a party's own deposition, failure to respond to interrogatories under Rule 33 or a request for inspection under Rule 34. As in prior practice, failures to provide required discovery are "not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)."

Committee Discussion Point: *Subpart (e) adopts the modern national provision regarding failure to preserve "electronically stored information." It follows the carefully tailored rule that — if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery — the court may, if it finds prejudice to another party from loss of the information, order measures "no greater than necessary to cure the prejudice." Only if the court finds that the party that allowed or caused destruction of the information acted "with intent to deprive another party" of that information, does Rule 37(e) authorize an "unfavorable inference" instruction, or a more serious sanction such as dismissal of*

an action or entry of a default judgment. The Committee discussed specifically whether this Subpart should require a showing of "fraud" or "bad faith" as some prior case law has discussed in regard to adverse inference instructions. By a large majority, the Committee concluded that use of the modern concept of "intent to deprive another party" of information as the trigger for availability of an adverse inference was clearer, easier to apply, and most directly tailored to the conduct this Subpart of the Rule is intended to deter, or redress after the fact. This standard is used in federal courts and other jurisdictions and will be subject to considerable interpretive case law in the coming years; it was determined to be the best for use in the courts of the Virgin Islands.

Subpart (f) follows the modern sanction provision applicable if a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f).

Rule 37-1. Pre-Motion Discovery Conferencing Duties of All Counsel.

(a) Good Faith Negotiation Requirement. Prior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for the parties and any self-represented parties shall confer in a good faith effort to eliminate the necessity for the motion — or to eliminate as many of the disputes as possible.

(b) Demanding Party's Specification Letter

The party requesting resolution of a discovery dispute shall serve a letter on other counsel identifying each issue and/or discovery request in dispute, stating briefly the moving party's position with respect to each (and providing any legal authority), and specifying the terms of the discovery order to be sought.

(c) Conference Arrangements and Personal Negotiations Requirement

(1) ***Facilitating a Conference.*** After service of the letter request, it shall be the responsibility of counsel for the requesting party to make any necessary arrangements for a conference.

(2) ***Personal Discussions Requirement.*** To the extent practicable, counsel are encouraged to meet in person at a mutually convenient location. If, in the consideration of time and/or resources, counsel agree that meeting in person is not practicable, the conference may take place telephonically or by video conferencing. Mail or e-mail exchanges are not sufficient.

(3) ***Completion of Negotiations.*** Unless otherwise provided by stipulation of the parties, or by written order of the court, the conference shall be completed within 15 days after the moving party serves a letter requesting such conference.

REPORTER'S NOTE

Rule 37-1 is a specific requirement — set forth in a rule accompanying the basic sanction provisions — approved by a virtually unanimous Advisory Committee to further state the requirement of good-faith negotiation prior to lodging a discovery motion, and the practice of requiring a letter identifying each issue and/or discovery request in dispute. "To the extent practicable, counsel are encouraged to meet in person at a mutually convenient location."

Rule 38. Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the United States Constitution and the Revised Organic Act — or as provided by a Virgin Islands or

federal statute — is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand — which may be included in a pleading — no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 14 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

REPORTER'S NOTE

Rule 38 on jury trial rights is continued without significant variations. Under subpart (b) a party is to make a written demand for jury trial on any issue triable of right which may be included in a pleading — no later than 14 days after the last pleading directed to the issue is served. Because in modern practice a jury-trial right may apply to one count or claim but not others, a party is invited to make a demand specific to particular issues. Subpart (d) of Rule 38 continues the doctrine that it is a waiver of the right to jury trial if a party fails to make and serve a timely jury demand.

Rule 39. Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States Virgin Islands or a statute of the Virgin Islands provides for a nonjury trial.

REPORTER'S NOTE

Rule 39, the parallel provision on jury trials, calls for designation of the action as a jury case

on the docket when a demand is made. If no demand for a jury trial is made, the court will ordinarily try the issues, but subpart (b) provides that it may, on motion, order a jury trial on any issue for which a jury might have been demanded. Subpart (c) continues the practice of permitting the court to empanel an "advisory jury" and — upon consent of the parties — to accord that verdict the same effect as a verdict by a jury hearing the case as a matter of jury trial rights.

Rule 40. Reserved.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal or Virgin Islands court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subpart (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

REPORTER'S NOTE

Rule 41 deals with voluntary, and other, dismissals of pending actions. As in other

jurisdictions, it allows a plaintiff to voluntarily dismiss an action without court approval before the opposing party serves either an answer or a motion for summary judgment. As elsewhere, unless the notice or stipulation states otherwise, the dismissal is without prejudice. But — as in federal practice — if the plaintiff previously dismissed any federal or Virgin Islands court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits. Once the initial period of the action has passed, under Rule 41(a)(2) an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.

Subpart (b) deals with "involuntary" dismissals, such as where a plaintiff "fails to prosecute or to comply with these rules or a court order." In that instance, unless the court's order states otherwise, a dismissal — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

Subpart (c) makes Rule 41 applicable to dismissal of any counterclaim, crossclaim, or third-party claim.

Subpart (d) makes possible the recovery of costs of a previously dismissed action. Thus if a plaintiff has previously dismissed an action in any court and then files another action based on or including the same claim against the same defendant, the court may order the plaintiff to pay all or part of the costs of the previous action, and may — indeed — stay the proceedings until the plaintiff has complied.

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any right to a jury trial.

REPORTER'S NOTE

Rule 42 addresses consolidation, providing broad discretion for the court to act where multiple actions involve "a common question of law or fact." Conversely, under subpart (b) the court may order separation of trials in an action to avoid prejudice, or to expedite and minimize expense and burdens of the actions. This includes the power to order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken orally in open court unless a statute of the Virgin Islands, the Virgin Islands Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. In all proceedings the admission of evidence and the competency and privileges of witnesses and parties shall be governed by the statutes of Virgin Islands and these Rules of Evidence.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. Unless otherwise agreed by the parties, the court may appoint a certified or otherwise qualified interpreter who is not related to or affiliated with any party in the action and shall, subject to 4 V.I.C. § 323, fix reasonable compensation to be paid from funds provided by law or — unless otherwise provided by governing law — by one or more parties. The parties involved in litigation in which there will be a need for an interpreter are responsible for securing and submitting the name(s) of qualified interpreters for approval by the court at least 6 days before the interpreter's services are required. In the exercise of discretion the judicial officer may require prepayment of the estimated expenses of providing such services. The interpretation provided pursuant to this rule shall be in the simultaneous mode unless otherwise directed by the presiding judicial officer.

REPORTER'S NOTE

Rule 43 states the familiar principle that witness testimony is taken orally in open court unless a statute of the Virgin Islands, the Virgin Islands Rules of Evidence, other rules adopted by the Supreme Court provide otherwise. Subpart (b) authorizes a solemn affirmation instead of an oath where appropriate. Subpart (c) states that — when a motion relies on facts outside the record — the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

Subpart (d), dealing with interpreters has been revised to accord with Virgin Islands law. Under this provision, unless otherwise agreed by the parties, the court may appoint a certified or otherwise qualified interpreter who is not related to or affiliated with any party in the action and shall, subject to 4 V.I.C. § 323, fix reasonable compensation to be paid from funds provided by law or — unless otherwise provided by governing law — by one or more parties. The Rule states that the parties involved in litigation in which there will be a need for an interpreter are responsible for securing and submitting the name(s) of qualified interpreters for approval by the court at least 6 days before the interpreter's services are required. New language states that interpretation provided pursuant to this rule shall be in the simultaneous mode unless otherwise directed by the presiding judicial officer.

Rule 44. Proving an Official Record

Proof of an official record shall be undertaken in compliance with Title 5, Chapter 509 of the Virgin Islands Code, and Articles VIII and IX of the Virgin Islands Rules of Evidence.

REPORTER'S NOTE

Rule 44 provides a cross-reference to governing statutory provisions regarding proof of official records, and to the parallel provisions of Articles VIII and IX of the Virgin Islands Rules of Evidence.

Rule 44.1. Determining Foreign Law

Determining law from jurisdictions beyond the Virgin Islands shall be as provided in Title 5, Chapter 507 of the Virgin Islands Code.

REPORTER'S NOTE

Rule 44.1 provides a reference to the provisions of Title 5, Chapter 507 of the Virgin Islands Code applicable where proof of the law of another jurisdiction is needed.

Rule 45. Subpoena

(a) In General.

(1) *Form and Contents.*

(A) *Requirements — In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to Attend a Deposition — Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* The clerk of court must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the Virgin Islands.

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then — at least 5 days before it is served on the person to whom it is directed — a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) *By Whom and How.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person.

(2) *Service in the Virgin Islands*. A subpoena may be served at any place within the United States Virgin Islands.

(3) *Service in a Foreign Country.* A subpoena may be served at any place outside the

United States Virgin Islands in accordance with the provisions of 5 V.I.C. § 4922 et seq.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the division where the action is pending must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the division where the action is pending for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the division where the action is pending must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court where the action is pending may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the division where the action is pending for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Contempt. The court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

(g) Subpoenas and discovery outside the Virgin Islands. The procedures for use of letters rogatory for discovery outside the Virgin Islands are set forth in 5 V.I.C. § 4921. The Uniform Interstate Depositions and Discovery Act (Chapter 505 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 4922 et seq.) provides for discovery involving jurisdictions recognizing reciprocal discovery obligations, and includes provisions for issuance and service of subpoenas for depositions and production of documents in those jurisdictions.

REPORTER'S NOTE

Subpart (a) states matters governing the form and contents of a subpoena, by whom and where it may be issued. Subpart (b) provides basic guidance on the service of a subpoena in the Virgin Islands, and cross-references the provisions of 5 V.I.C. § 505 for service outside the Virgin Islands.

Subpart (c) deals with the "place of compliance" with a subpoena, and continues the limitation that a subpoena may command a person to attend a trial or other proceeding only within 100 miles of where the person resides, is employed, or regularly transacts business in person. As under prior practice, a subpoena may require production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person, or the inspection of premises.

Subpart (d) sets forth detailed provisions for protection of a person subject to a subpoena, and the mechanisms for its enforcement. In general the party or attorney responsible for issuing and serving a subpoena must take "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Detailed provisions for the lodging of objections to a subpoena are included, as are provisions for quashing or seeking modification of a subpoena's terms.

Subpart (e) makes it clear that the subpoena response procedures apply to producing documents or electronically stored information. As in other document production the records must be produced "as they are kept in the ordinary course of business" or organized and labeled to correspond to the categories demanded in the subpoena. Provisions paralleling Rule 34 are included to allow a party subject to a subpoena to select the "form" in which electronic files are produced. Importantly, the Rule also contains a provision found in other American subpoena rules today allowing the responding party to identify specified records as "not reasonably accessible because of undue burden or cost." In motion practice the objecting party has the burden to show the undue burden or cost. But even if that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations

of Rule 26(b)(2)(C).

Subpart (f) provides that the court may a properly served person who disobeys a subpoena in contempt.

Subpart (g) has been added to signpost the availability of the "letters rogatory" procedure for discovery outside the Virgin Islands as set forth in 5 V.I.C. § 4921, and the provisions of the Uniform Interstate Depositions and Discovery Act — Chapter 505 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 4922 et seq. — which also provide for discovery involving jurisdictions recognizing reciprocal discovery obligations, and include procedures for issuance and service of subpoenas for depositions and production of documents in those jurisdictions.

Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

REPORTER'S NOTE

Rule 46 states the familiar principle that is not necessary to "except" to a ruling of the court, after making an argument or objection.

Rule 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The use of peremptory challenges in civil proceedings is governed by Title 5, Section 323 of the Virgin Islands Code.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

REPORTER'S NOTE

Rule 47 on jury selection states that the court may permit the parties or their attorneys to examine prospective jurors or may itself do so. However, if the court examines the jurors, it must also permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper. Subpart (b) refers by cross-reference to the peremptory challenge provisions governing civil proceedings as set forth in Title 5, Section 323 of the Virgin Islands Code. Finally, subpart (c) states the traditional doctrine that during trial or deliberation, the court may excuse a juror for good cause.

Rule 47-1. Juror Contact

(a) Before or during the trial of a case, no attorney, party, or witness shall, directly or indirectly, communicate with or cause another to communicate with any prospective or current member of the jury.

(b) After the conclusion of a trial, no attorney, party, or witness shall, directly or indirectly, communicate with or cause another to communicate with any member of the jury until the jury is

discharged by the court.

REPORTER'S NOTE

Rule 47-1 spells out specific Virgin Islands doctrines concerning contact with jurors. It bars direct or indirect contact by an attorney, party or witness with any prospective or sitting jurors before or during the trial, and subpart (b) imposes a parallel restriction applicable after the conclusion of a trial, until the jury is discharged by the court.

Rule 48. Number of Jurors; Verdict; Polling

The number of jurors in a civil matter, verdicts, and the polling of jurors are governed by 4 V.I.C. § 80 and by Title 5, Chapters 31 and 33 of the Virgin Islands Code.

REPORTER'S NOTE

Rule 48 cross-references several provisions of the Virgin Islands Code relating to the number of jurors in a civil matter, provisions governing verdicts, and the process of polling of jurors.

Rule 49. Special Verdict; General Verdict and Questions

(a) Special Verdict.

(1) ***In General.*** The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) ***Instructions.*** The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) ***Issues Not Submitted.*** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) ***In General.*** The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) ***Answers Inconsistent with the Verdict.*** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) ***Answers Inconsistent with Each Other and the Verdict.*** When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, where the inconsistency cannot be resolved by the court on a fair reading of the answers in light of the jury instructions given in the trial, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict. If the inconsistency cannot be resolved by the jury, the judge must order a new trial unless the party who is disadvantaged by the inconsistent answers waives objection and accepts the verdict based on the answers least favorable to that party.

(5) Waiver of Objection to Inconsistency in the Verdict. Except as provided in subpart (b)(4) of this Rule, a party waives any objection to inconsistency in the verdict if the party fails to object to the verdict or move for its resubmission to the jury prior to discharge of the jury.

(c) Poll of Jury; Correction of Verdict. As provided in 5 V.I.C. § 360, when a verdict is given and before it is filed, the jury may be polled on the request of either party, for which purpose each shall be asked whether it is his verdict. If more than one-sixth of the jurors answer in the negative, the jury shall be sent out for further deliberation. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may again be sent out.

(d) Filing and Form of Verdict; Discharge of Jury. As provided in 5 V.I.C. § 361, when the verdict is given, and is such as the court may receive, and the jury is not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the minutes as of the day's proceedings on which it was given.

REPORTER'S NOTE

Rule 49 deals with special and general verdicts and the issues of inconsistencies within a verdict or involving "answers" to special interrogatories by juries. Subpart (a) describes the process for submitting requests for special written findings by a jury, including the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

Subpart (b) deals with general verdicts accompanied by written questions on one or more issues of fact that the jury must decide. It provides that when the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers. However, when the answers are consistent with each other but one or more is inconsistent with the general verdict, the court is given options under this rule to enter judgment notwithstanding the general verdict, to direct the jury to further consider its answers and verdict, or to order a new trial. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, the Rule states that — where the inconsistency cannot be resolved by the court on a fair reading of the answers in light of the jury instructions given in the trial — the court must direct the jury to further consider its answers and verdict. If the inconsistency cannot be resolved by the jury, in order to avoid needless retrials the Virgin Islands Rule specifically provides that "the judge must order a new trial unless the party who is disadvantaged by the inconsistent answers waives objection and accepts the verdict based on the answers least favorable to that party." Another provision spells out the doctrine well-established in case law that — except as provided in subpart (b)(4) of this Rule — a party waives any objection to inconsistency in the verdict if the party fails to object to the verdict or move for its resubmission to the jury prior to discharge of the jury.

Subpart (c) states the import of 5 V.I.C. § 360 concerning polling of the jury.

Subpart (d) echoes the provisions in 5 V.I.C. § 361 for the filing of a verdict by the clerk of court, and the discharge of the jury from the case.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the Supreme Court of the Virgin Islands orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the Supreme Court of the Virgin Islands orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the Supreme Court of the Virgin Islands conclude that the

trial court erred in denying the motion. If the Supreme Court of the Virgin Islands reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

REPORTER'S NOTE

Rule 50 embodies the modern "judgment as a matter of law" concept, which has replaced "directed verdicts" and other procedures. Under subpart (a) if a party has been "fully heard" the court may enter judgment when it is clear as a matter of law that the party may not prevail. Motions for judgment as a matter of law are common when a plaintiff rests, but may be made at any time before the case is submitted to the jury.

Subpart (b) deals with the process of "renewing" a motion for judgment as a matter of law as late as 28 days after the entry of judgment or — if the motion addresses a jury issue not decided by a verdict — no later than 28 days after the jury was discharged. Such a motion may be made as an alternative or as part of a request for a new trial under Rule 59.

Subpart (d) provides a time period for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered (28 days after the entry of the judgment).

Subpart (e) addresses the interplay between new trial applications and motions for entry of judgment as a matter of law, and appellate review of such decisions.

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give. All requests for charge must be plainly marked with the name and number of the case; shall contain citations of supporting authorities if any; shall designate the party submitting the same; and in the case of multiple requests by a party, shall be numbered in sequence.

(2) ***After the Close of the Evidence.*** After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before closing arguments to the jury;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) ***How to Make.*** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) ***When to Make.*** An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction

or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) ***Assigning Error.*** A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected.

(2) ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

REPORTER'S NOTE

Rule 51 on requests for instructions to the jury provides for submission of proposed instructions at the close of the evidence "or at any earlier reasonable time that the court orders."

Subpart (b) states that the court must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before closing arguments to the jury; it also states that the parties must be given an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered.

Subpart (c) deals with objections to jury instructions, and requires an objecting party do so on the record, stating distinctly the matter objected to and the grounds for the objection.

Subpart (d) authorizes a party to assign as error defects in the instructions actually given, or the failure to give an instruction, if that party properly requested it. As in traditional Virgin Islands practice, a court "may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights."

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) ***In General.***

(A) In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(B) In a non-jury case, the litigants must file proposed Findings of Fact and Conclusions of Law within 21 days after the conclusion of trial.

(2) ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) ***Effect of Findings by a Master or Magistrate Judge.*** Findings by a master or magistrate judge, to the extent adopted by the court, must be considered the court's findings.

(5) ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

REPORTER'S NOTE

Rule 52 on findings and conclusions in actions tried without a jury requires the court to find the facts specially and state its conclusions of law separately. In a non-jury case, the litigants must file proposed findings of fact and conclusions of law within 21 days after the conclusion of trial.

Subpart (b) states that on motion made with 28 days after the entry of judgment the court may amend its findings — or make additional findings — and may amend the judgment accordingly. Such a motion may accompany a motion for a new trial under Rule 59.

Subpart (c) authorizes judgment on partial findings where a party has been fully heard in the case and the court finds against the party on an issue disposing of a claim or defense. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Rule 53. Masters

(a) Appointment.

(1) ***Scope.*** Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available judge or magistrate judge.

(2) ***Disqualification.*** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 4 V.I.C. § 284, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) ***Possible Expense or Delay.*** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) ***Contents.*** The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) ***Issuing.*** The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 4 V.I.C. § 284; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority.

(1) ***In General.*** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) ***Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) Action on the Master's Order, Report, or Recommendations.

(1) ***Opportunity for a Hearing; Action in General.*** In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than

21 days after a copy is served, unless the court sets a different time.

(3) ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or

(C) will be final.

(4) ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) ***Payment.*** The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

REPORTER'S NOTE

Rule 53 regarding "masters" (formerly, "special masters") authorizes the court to appoint a master if the parties consent, or where some exceptional circumstances or difficulties make appointment necessary, such as pretrial management needs that cannot be "effectively and timely addressed by an available judge or magistrate judge." Subpart (b) requires the court to give notice to the parties and allow them opportunity to be heard regarding the possible appointment. Under subpart (c), unless the appointment order imposes limitations, the master has broad power to regulate the proceedings, including the conduct of evidentiary hearings. Rule 53(c) also authorizes a master to impose sanctions as provided by Rule 37 (discovery between the parties) or 45 (subpoenas to non-parties). Subpart (d) calls for the master to issue orders and for the clerk to docket such orders. As noted in subpart (e) of the Rule, a master is to prepare a report to the court, which will be filed and served on each party. Subpart (f) requires the court, in considering and acting upon a master's order, report, or recommendations, to give the parties notice and an opportunity to be heard. The court itself may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions, though the rule prescribes a limited standard of review for factual findings of the master. Subpart (g) calls upon the court to set the master's compensation on the basis and terms stated in the appointing order, although the court may set a new basis and terms after giving notice and an opportunity to be heard. Approved compensation must be paid either by a party or parties, or from a fund or subject

matter of the action within the court's control. The court must allocate payment among the parties. Finally, subpart (h) of the master rule provides that a magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made as a "master" under this rule.

Rule 54. Judgments; Costs

(a) Definition; Form. "*Judgment*" as used in these rules includes a decree and any order from which an appeal lies. A judgment must not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Relief to Be Granted. A default judgment must not differ in kind from what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs, Including Attorney's Fees.

(1) ***Application.***

(A) Within 30 days after the entry of a final judgment or a judgment allowing costs, the prevailing party shall serve on the adverse party and file with the court a bill of costs, together with a notice of motion when application will be made to the court to tax the same. Chapter 45 of Title 5 of the Virgin Islands Code governs such applications and includes specific provisions dealing with actions involving infant plaintiffs, parties acting in a representative capacity, and public corporations as parties.

(B) As provided in 5 V.I.C. § 521(b) and § 541, costs which may be allowed in a civil action include:

(i) Fees of officers, witnesses, and jurors;

(ii) Necessary expenses of taking depositions which were reasonably necessary in the action;

(iii) Expenses of publication of the summons or notices, and the postage when they are served by mail;

(iv) Compensation of a master as provided in Rule 53;

(v) Necessary expense of copying any public record, book, or document used as evidence on the trial; and

(vi) Attorney's fees as provided in subpart (d)(2) of this Rule.

(C) A bill of costs shall precisely set forth each item thereof, so that the nature of the charge can be readily understood, and — in accord with 5 V.I.C. § 543(b) — the party claiming any item of cost shall attach thereto an affidavit, made personally or by a duly authorized attorney or agent having knowledge of the facts, stating that:

(i) the items are correct;

(ii) the services were actually and necessarily performed; and

(iii) the disbursements were necessarily incurred in the action or proceeding.

Copies of all invoices in support of the request for each item shall be appended to the verified bill of costs.

(D) As provided in 5 V.I.C. § 543(a) and (c), costs which a party is entitled to recover must be taxed, whether or not they have been paid by such party. Upon allowance the bill of costs shall be included in the judgment or decree.

(E) Upon failure of the prevailing party to comply with this Rule, all costs may be waived.

(2) ***Attorney's Fees.***

(A) *Generally.* As provided in 5 V.I.C. § 541 the measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for attorney's fees incurred in maintaining the action or defenses thereto; provided, however, the award of attorney's fees in personal injury cases is prohibited unless the court finds that the complaint filed or the defense is frivolous as defined in that statute.

(B) *Special Procedures; Reference to a Master or a Magistrate Judge*. The court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a magistrate judge or a special master under Rule 53 without regard to the limitations of Rule 53(a)(1).

(3) ***Collection of costs by execution***. As provided in 5 V.I.C. § 542, the costs which a party is entitled to recover may be collected by execution to enforce the judgment as a part thereof.

REPORTER'S NOTE

Rule 54 (a) defines a "judgment" as any order from which an appeal lies.

Subpart (b) is the well-known "partial final judgment" provision applicable in federal practice and that of most states for many decades. In a multi-claim case, it allows the court to direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. If that recitation is not made, any order or other decision that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Subpart (d) deals with submission of a bill of costs, and includes Virgin Islands-specific provisions and language. It authorizes the prevailing party to submit — within 30 days after the entry of a final judgment — a bill of costs, together with a notice of motion. As stated in subpart (d), Chapter 45 of Title 5 of the Virgin Islands Code governs such applications and includes specific provisions dealing with actions involving infant plaintiffs, parties acting in a representative capacity, and public corporations as parties. The compensable forms of costs authorized by 5 V.I.C. § 521(b) and § 541 are recited in the Rule, and include attorney's fees, subject to provisions of § 541 and § 543.

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the court or the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) ***Claims for a Sum Certain.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the court or the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) ***All Other Claims.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals — preserving any statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) Judgment Against the United States Virgin Islands. A default judgment may be entered against the Government of the Virgin Islands, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

REPORTER'S NOTE

Rule 55, the default judgment rule, reflects prior Virgin Islands practice in providing that a default will be "entered" where a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise. Subpart (a) of the Rule clarifies that the note of default may be made by the clerk or the court.

Subpart (b) on the entry of an actual default judgment recognizes a distinction in permitting — in cases where the amount sought is a "sum certain" — the court or the clerk to act upon the filing of the plaintiff's affidavit showing the amount due by entering judgment for that amount. In non-sum-certain cases, the party must apply to the court for a default judgment. In all cases a default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. Provisions of the Rule require 7 days' notice if the defaulting party has appeared personally or by a representative in the action. The Rule also authorizes the court to conduct hearings or make referrals — preserving any statutory right to a jury trial — for determination of damages, including the conduct of an accounting.

Subsection (c) invokes Rule 60(b) in authorizing the court to set aside an entry of default for good cause, and it to set aside a final default judgment under the provisions of that Rule.

Rule 55-1. Applications for Default Judgment

(a) Additional Notice. The court may order written notice of the application for judgment to be served upon the party against whom judgment by default is sought if it shall seem to the court that justice so requires.

(b) Claims Involving Sale of a Chattel. Whenever application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel, which chattel has been repossessed peaceably or by legal process, the plaintiff shall prove before the court a description of the property, the amount realized at the sale or credited to the defendant and the cost of sale.

REPORTER'S NOTE

Rule 55-1, a Virgin Island-specific default application provision, contains its own notice requirement, and also addresses claims for entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel, which chattel has been repossessed peaceably or by legal process. It requires that the plaintiff prove a description of the property, the amount realized at the sale or credited to the defendant, and the cost of sale.

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by the court, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Support; Statement of Specific Undisputed Facts*****.** Each summary judgment motion shall include a statement of undisputed facts in a separate section within the motion. Each paragraph stating an undisputed fact shall be serially numbered and each shall be supported by affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon regarding such fact. This section shall not count towards the 20 page or 6000 words limitation for such motions.

(2) ***Opposition; Statement of Disputed Facts.***

(A) *Time for Response*. Any party adverse to a motion filed under this Rule may file a brief in opposition, any affidavits desired and/or other documents relied upon in opposition to the motion, within 30 days of the filing of the motion.

(B) *Response to Undisputed Facts.* A party opposing entry of summary judgment must address in a separate section of the opposition memorandum each of the facts upon which the movant has relied pursuant to subpart (c)(1) of this Rule, using the corresponding serial numbering, either

(i) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or

(ii) stating that the fact is disputed and providing affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon as evidence relating to each such material fact, by number.

(C) *Optional Identification of Additional Facts.* In addition, a party opposing summary judgment may, if it elects to do so, state additional facts that the party contends are disputed and material to the motion for summary judgment, presenting one or more genuine issues to be tried. The party shall supply affidavit(s) or citations specifically identifying the location(s) of the material(s) in the record relied upon as evidence relating to each such material disputed fact, by number. This section shall not count towards the 20 page limitation for such opposition memorandum.

(3) *Reply by Party Moving for Summary Judgment.* Any reply by the movant to the opposition by the non-moving party shall be filed within 14 days after the filing of the brief in opposition to summary judgment. If the non-moving party has identified additional facts as being material and disputed, as provided in subpart (c)(2)(C) of this Rule, the moving party shall respond to these additional facts by filing a response using the corresponding serial numbering of each such fact identified by the non-moving party and either

(A) agreeing that the additional fact is disputed for the purpose of ruling on the motion for summary judgment only; or

(B) stating that particular numbered facts are undisputed and providing affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon as evidence relating to each such material fact, by number.

This section shall not count towards the 20 page or 6000 words limitation for such replies.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit, Certification or Declaration Submitted in Bad Faith. If satisfied that an affidavit, certification or declaration under this rule is submitted in bad faith or solely for delay,

the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

REPORTER'S NOTE

Rule 56 is the well-known summary judgment provision applicable in most American jurisdictions, allowing entry of judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Subpart (b) states that — unless the court has set another time period — a summary judgment motion may be filed at any time until 30 days after the close of all discovery.

Subsection (c). *After discussions in 2016 and 2017, the Advisory Committee on Rules of Court has again discussed, at its March 2018 meeting, the failure of present Rule 56 to adequately elicit statements of undisputed and disputed facts that prove very helpful in the fair disposition of summary judgment motions, and help focus the parties and the court on key items which either do or do not present triable issues that would prevent summary adjudication. The proposed revisions set forth in this recommendation to the Supreme Court take several steps to provide improvements that are balanced – not requiring any specific formats, or elaborate tables, or submission of proofs, yet requiring submission of either affidavit support or record citations to document the party's representations that a given fact is undisputed or disputed. In subpart (c)(1) the revised Rule requires a movant to include a discrete section of the moving papers that states undisputed facts individually, and numbers them. Each must be supported by affidavit or by citations "identifying specifically the location(s) of the material(s) in the record relied upon regarding such fact." Similarly subpart (c)(2) will require the opposing party to respond to the movant's stated facts, also in a separate section of the opposition papers, either agreeing that certain of the numbered facts relied upon by the movant are undisputed for the purpose of ruling on the motion for summary judgment only, or stating that such fact or facts are disputed, providing affidavits or citations to materials in the record that relate to such facts, by number.*

Subpart (d) allows the non-moving party to show by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition. The court may then defer or deny the motion, allow more time or make other directions to the parties.

Subparts (e) and (f) warn that if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court make any appropriate order, which may include treating facts as undisputed for purposes of the motion, or granting summary judgment.

Subpart (g) allows the court — if it does not grant all the relief requested by the motion — to nonetheless enter an order stating any material fact, including an item of damages or other relief, that is not genuinely in dispute and treating the fact as established in the case.

Subpart (h) provides for a sanction of recovery of reasonable expenses and counsel fees if a party submits an affidavit, certification or declaration in bad faith or solely for delay. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under Title 5, Chapter 89 of the Virgin Islands Code. Rules 38 and 39 govern a demand for a jury trial. The existence of

another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

REPORTER'S NOTE

Rule 57, the declaratory judgment Rule, simply provides an express cross-reference to statutory provisions in Title 5, Chapter 89 of the Virgin Islands Code.

Rule 58. Entering Judgment

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings of fact under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment. Upon determination of an action by a judge or jury, the judge shall promptly sign the judgment, which shall take effect, for purposes of appeal, upon entry by the clerk of the court, unless otherwise ordered by the court. Unless the court orders otherwise, the clerk of the court must promptly enter the judgment.

REPORTER'S NOTE

Rule 58 is a streamlined provision calling for use of a separate document to embody every judgment and amended judgment, with listed exceptions. Subpart (b) has been edited so that it states that the judge should promptly sign the judgment (which takes effect for appeal purposes when entered by the clerk) and then the Rule states that the clerk of the court must promptly enter the judgment.

Committee Discussion Point: *The Committee discussed whether Subpart (b) should set forth an outside date — after which a judgment embodying the disposition would be "deemed" to have been filed. Two members of the Committee suggested a provision setting a 120 day period. A large majority of the Committee, however, felt that by using the requirement that the judge "promptly sign the judgment" the Rule goes far enough to avoid unnecessary delays in the process of entering judgments.*

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:

(A) after a jury trial, for any one of the following reasons:

(i) newly discovered evidence that is material to a party's claim or defense and that could not have been discovered before trial despite the exercise of due diligence;

(ii) misconduct of a juror or jury tampering;

(iii) accident or surprise that ordinary prudence could not have guarded against;

(iv) excessive or inadequate damages;

(v) an intervening change in controlling law; or

(vi) attorney or party misconduct that undermined the trial.

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in non-jury cases.

(2) ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 20 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

REPORTER'S NOTE

Rule 59 states a variety of grounds traditionally recognized as a basis for new trial applications. While remittitur is not valid in the Virgin Islands, subpart (a)(iv) is retained to allow for other non-remittitur defects to be remedied. Subpart (b) sets a 28 day deadline for filing a motion for a new trial after entry of judgment. Under subpart (c) the opposing party has 20 days after being served to file opposing affidavits. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the Supreme Court of the Virgin Islands and while it is pending, such a mistake may be corrected only with leave from that Court.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that could not, with reasonable diligence, have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether in a form previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) set aside a judgment for fraud on the court.

REPORTER'S NOTE

Rule 60 is the traditional provision for correcting a clerical mistake or a mistake in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the Supreme Court of the Virgin Islands court and while it is pending, such a mistake may be corrected only with leave from that Court. Subpart (b) recounts the recognized grounds for relief with the catch-all in subdivision (6) "any other reason that justifies relief." Pursuant to subpart (c) a motion under Rule 60(b) must be made "within a reasonable time" but three of the grounds are specified which must be brought no more than a year after the entry of the judgment.

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

REPORTER'S NOTE

Rule 61, the "harmless error" rule states the general principle that an error in the admission or exclusion of evidence, as well as other errors, will not be ground for granting a new trial, or setting aside a verdict, if the error or defect does not affect any party's substantial rights.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions and Receiverships. Except as provided in Rule 62(c) and (d), a judgment and proceedings to enforce it are stayed for 30 days after its entry unless the court orders otherwise.

(b) Stay with Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security, and remains in effect for the time specified in the bond or other security.

(c) Stay of an Injunction or Receivership. Unless the court orders otherwise, an interlocutory or final judgment in an action for an injunction or receivership are not stayed after being entered.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

(e) Stay Without Bond on an Appeal by the Government of the United States Virgin Islands, Its Officers, or Its Agencies. The Government of the Virgin Islands is exempt from bonds, undertakings, and security, to the extent provided by 5 V.I.C. § 1141.

(f) [Reserved.]

(g) Supreme Court's Power Not Limited. This rule does not limit the power of the Supreme Court of the Virgin Islands or the Chief Justice, under V.I. R. App. P. 8 and other provisions of Virgin Islands law:

(1) to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

REPORTER'S NOTE

Rule 62 provides that no execution may issue on a judgment, no proceedings to enforce it, until 14 days have passed, except in injunction or receivership cases. Under subpart (b) the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the specified post-trial motions, upon proper security. Subpart (c) provides that in injunction appeals the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. Under subpart (d) the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

Rule 63. Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

REPORTER'S NOTE

In accord with Virgin Islands statutes, Rule 63 states simply that if a judge is unable to go forward with the case, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties.

Rule 64. Seizing a Person or Property

At the commencement of and throughout an action, every remedy is available that, under the law of the Virgin Islands, provides for seizing a person or property to secure satisfaction of the potential judgment.

REPORTER'S NOTE

Rule 64 deals with seizure remedies, and states simply that — if Virgin Islands law recognizes a remedy for seizure to secure satisfaction of a potential judgment — such remedy is available at the beginning and throughout the pendency of the an action

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) ***Notice.*** The court may issue a preliminary injunction only on notice to the adverse party.

(2) ***Consolidating the Hearing with the Trial on the Merits.*** Before or after beginning a hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) ***Issuing Without Notice.*** The court shall consider and rule upon an application for a temporary restraining order as soon as practicable, and may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk of court's office and entered in the record. The order expires at the time after entry — not to exceed 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) ***Expediting the Preliminary-Injunction Hearing.*** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) ***Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The Government of the Virgin Islands, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) ***Contents.*** Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required.

(2) ***Persons Bound.*** The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Application of Statutes Regarding Injunctions. Nothing in this Rule shall supersede the provisions of any statute of the Virgin Islands relating to injunctions.

REPORTER'S NOTE

Rule 65, the injunction rule, states familiar premises for the issuance of a preliminary injunction and consolidation of hearings on injunction applications with consideration of the merits of the action. Under subpart (b) the court is encouraged to promptly consider and rule upon an application for a temporary restraining order, and procedures are described. The prescribed expiration period of 14 days is retained, along with the option of a court, for good cause, to extend the TRO for a like period. The reasons for an extension must be entered in the record. Subpart (c) states that a court may issue a preliminary injunction or a temporary restraining order "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, the Government of the Virgin Islands, its officers, and its agencies are not required to provide such security. Under subpart (d) every injunction and restraining order must explain the reasons for its issuance, and state specifically and "in reasonable detail" the act or acts restrained or required. The orders bind the parties, their agents, and others "who are in active concert or participation" with them. Subdivision (e) was added to make it clear that the Rule does not conflict with any specialized injunction statutes.

Rule 65.1. Proceedings Against a Security Provider

Whenever these rules require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court's jurisdiction and irrevocably appoints the clerk of court as its agent for receiving service of any papers that affect its liability on

security. The security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the clerk of court, who must promptly send a copy of each to every surety whose address is known.

REPORTER'S NOTE

Rule 65.1 provides that a surety's liability may be enforced on motion without an independent action.

Rule 66. Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. An action in which a receiver has been appointed may be dismissed only by court order.

REPORTER'S NOTE

Rule 66 states simply that the Virgin Islands Rules of Civil Procedure govern the proceedings in any action in which the appointment of a receiver is sought or a receiver sues or is sued.

Rule 67. Deposit into Court

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 5 V.I.C. § 1391 and any like statute.

REPORTER'S NOTE

Rule 67 is a simplified provision stating the process of depositing property in court, and the fact that money paid into court under this rule must be deposited and withdrawn in accordance with 5 V.I.C. § 1391 and any similar statute. Note that unclaimed property may be subject to the provisions of 28 V.I.C.§ 653.

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, any party may serve upon an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The court must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, any party may make an offer of judgment. It must be served within a reasonable time — but at least 14 days

— before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. Unless otherwise provided by 5 V.I.C. § 541 or another statute of the Virgin Islands, if the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the offeror's costs incurred after the offer was made.

(e) Costs Defined. For purposes of this Rule, the term "*costs*" is defined under 5 V.I.C. § 541.

REPORTER'S NOTE

Rule 68, the offer of judgment rule, has been worded to allow either side in the case to make such an offer. Subparts (a) and (c) spell out the 14-day before trial limitation, and the option of the opposing party to accept an offer. Under subpart (b), an unaccepted offer is considered withdrawn, and the fact an offer was made is not admissible except in a proceeding to determine costs. Subpart (d) recognizes the limits imposed under 5 V.I.C. § 541 or other statutes of the Virgin Islands regarding recovery of costs, including attorney's fees in certain cases, and limits the cost-transfer provisions of Rule 68 to circumstances permitted under the statutes. Where applicable, the Rule provides that if the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the offeror's costs incurred after the offer was made.

Rule 69. Execution on Judgments

(a) Requests for Writs of Execution. A money judgment is enforced by a writ of execution, unless the court directs otherwise. All requests for issuance of writs of execution and other process for the enforcement of judgments shall be made in writing, by praecipe, to the clerk of the court for the judicial division in which the judgment was entered

(b) Orders for Discovery; Supplementary Proceedings.

In aid of the judgment of execution, as provided in 5 V.I.C. §§ 501 and 502, the judgment creditor or his successor in interest — when that interest appears of record — may examine any person, including the judgment debtor in the following manner:

(1) the creditor or successor shall present to a judge a petition verified by the oath of such person or his agent or attorney, stating the amount due on such judgment and stating that the creditor or successor believes that such judgment debtor has assets not exempted by law.

(2) Upon the filing of such petition, the judge shall promptly consider and rule upon the application, and may make an order requiring the judgment debtor to appear at a specified time and place to provide discovery on oath concerning the debtor's assets. The time and place designated shall not be changed, nor shall more than one hearing be held, without further order of the court.

(3) Certified copies of orders for discovery of assets shall be served upon the judgment debtor personally at least 7 days before the day for appearance provided therein.

REPORTER'S NOTE

Rule 69 deals with execution on judgments by a writ of execution. It also sets forth a procedure in accord with 5 V.I.C. §§ 501 and 502 for the examination of the judgment debtor to be examined concerning available assets.

Rule 70. Enforcing a Judgment for a Specific Act

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the Virgin Islands, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

REPORTER'S NOTE

Rule 70 continues prior provisions where a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified. The court may order the act to be done — at the disobedient party's expense — by another person appointed by the court, and the court may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

Rule 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party

REPORTER'S NOTE

Rule 71 provides that if an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

Rule 71.1. Condemning Real or Personal Property

(a) Applicability of Other Rules. The Virgin Islands Ruels of Civil Procedure govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) Complaint.

(1) ***Caption.*** The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property.

(2) ***Contents.*** The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) ***Parties.*** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) ***Procedure.*** Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) ***Filing; Additional Copies.*** In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) ***Delivering Notice to the Clerk of Court.*** On filing a complaint, the plaintiff must promptly deliver to the clerk of court joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) ***Contents of the Notice.***

(A) *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) *Conclusion.* The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the Virgin Islands where the attorney may be served.

(3) ***Serving the Notice.*** Personal service of the notice shall be made in accordance with Rule 4.

(4) ***Effect of Delivery and Service.*** Delivering the notice to the clerk and serving it have

the same effect as serving a summons under Rule 4.

(5) ***Amending the Notice; Proof of Service and Amending the Proof.*** Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) Appearance or Answer.

(1) ***Notice of Appearance.*** A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) ***Waiver of Other Objections and Defenses; Evidence on Compensation.*** A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial of the Issues.

(1) ***Issues Other Than Compensation; Compensation.*** In an action involving eminent domain under Virgin Islands, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) ***Appointing a Commission; Commission's Powers and Report.***

(A) *Reasons for Appointing*. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) *Alternate Commissioners.* The court may appoint up to two additional persons

to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) *Examining the Prospective Commissioners.* Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) *Commission's Powers and Report*. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action or a Defendant.

(1) *Dismissing the Action.*

(A) *By the Plaintiff.* If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) *By Stipulation.* Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(C) *By Court Order.* At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) *Dismissing a Defendant.* The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) *Effect.* A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) *Deposit.* The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) *Distribution; Adjusting Distribution.* After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) Costs. Costs are not subject to Rule 54(d).

REPORTER'S NOTE

Rule 71.1 is a provision adapted from procedures applied in the federal courts and other jurisdictions. It is designed to govern proceedings to condemn real and personal property by

eminent domain. It addresses such matters as the content of the complaint in such case (subpart (c)) and how process in such actions is served. Subpart (e) addresses the appearance or answer of defendants in such actions, and the requirement of proper notice. A separate provision is set forth in subpart (f) regarding the amendment of pleadings in condemnation cases, and subpart (g) deals with substituted parties. Trial of the issues is before "commissioners" designated to decide the case governed by subpart (h).

Rules 72 — 76 [Reserved]

Rule 77. Conducting Judicial Business

(a) When Court Is Open. The court shall be deemed always open for the filing of any emergency paper, of issuing and returning any emergency process and of making emergency motions and orders, provided, however, that the court shall be opened for regular business on normal business days and during normal business hours, except Saturdays, Sundays, and holidays.

(b) Sessions of Court

(1) The court shall hold regular sessions in the judicial division of St. Thomas and St. John at Charlotte Amalie and in the judicial division of St. Croix at Kingshill. The court may hold special sessions at such other places within each judicial division as the nature of the business may require and upon such notice as the Presiding Judge orders.

(2) The Presiding Judge shall designate the days upon which sessions of the court will be held at each place of holding court and the hour at which the court will be in session there.

(c) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the Virgin Islands. But no hearing — other than one ex parte — may be conducted outside the Virgin Islands unless all the affected parties consent.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by the Virgin Islands Appellate Rule 5(a).

REPORTER'S NOTE

Rule 77 carries forward former Superior Court provisions regarding the operation of the clerk's office and sessions of court. Under revised subpart (d) after entry of a judgment or order the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b). However, lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by the Virgin Islands Appellate Rule 5(a).

Rule 77-1. Advancement of Case on Calendar

The court, for good cause shown, may advance the trial of any action on the list of contested cases.

REPORTER'S NOTE

Rule 77-1 gives authority for the court, upon a showing of good cause, to "advance" the trial of any particular action on the list of contested cases.

Rule 77-2. Cases not Reached

Contested matters not reached or disposed of on the date set for trial shall be carried over until a new date is fixed.

REPORTER'S NOTE

Rule 77-2, continuing former law, states that contested matters not reached or disposed of on the date set for trial shall be carried over until a new date is fixed.

Rule 78. Hearing Motions

Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

REPORTER'S NOTE

Rule 78 simply states that a court may establish regular times and places for oral hearings on motions.

Rule 79. Records Kept by the Clerk of Court

(a) Calendars. The clerk of the court shall maintain a calendar which shall list the cases to be heard at each session of the court in each division. The clerk of the court shall also maintain a docket for each division of the court, in which he or she shall enter the title of each case, with date of its commencement and a record of all the fees charged.

(b) Civil Docket.

(1) ***In General.*** The clerk of the court must keep a record known as the "civil docket." The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) ***Items to be Entered.*** The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk of the court;

(B) process issued, and proofs of service or other returns showing execution;

(C) appearances, orders, verdicts, and judgments; and

(D) a record of every proceeding with the date thereof

(3) ***Contents of Entries; Jury Trial Demanded.*** Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and

the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk of the court must enter the word "jury" in the docket.

(c) Civil Judgments and Orders. The clerk of the court must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk of the court must keep these in the form and manner prescribed.

(d) Indexes. Under the court's direction, the clerk of the court must keep indexes of the docket and of the judgments and orders described in Rule 79(c).

(e) Other Records. The clerk of the court must keep a record of every proceeding and any other record required by statute, rules of court issued by the Supreme Court of the Virgin Islands, or the Presiding Judge.

REPORTER'S NOTE

Rule 79 addresses the records kept by the clerk, such as the calendar and docket records, jury demands and judgments and order records.

Rule 79-1. Sealing of Records

In any case or proceeding deemed by the court to be sensitive, the record thereof, including all filings pertaining thereto, shall be sealed, secured and controlled by the court's administrator or the clerk of court; provided, however, that a cross-reference of the case by its case number shall be maintained in the office of the clerk of court for public referral.

REPORTER'S NOTE

Rule 79-1 authorizes the sealing of records containing sensitive personal information.

Rule 79-2. Exemplification of Court Records

(a) Any party to a proceeding before the court may request from the office of the clerk of court an official attested copy of the court documents pertaining to the proceeding, together by an exemplification executed by the clerk.

(b) The office of the clerk court may, upon request by a party or an entity, be required to provide an exemplification of court records, where a mere certification of record is deemed insufficient to assure the authentication of a document. Such exemplification consists of a tripartite document that includes: the exemplification of records by the Clerk, the judge's certification and a clerk's certificate. Whenever the clerk of court is required to exemplify any record of the court, there shall be imposed a fee for exemplification of court records in an amount to be set by the court.

REPORTER'S NOTE

Rule 79-2 allows any party to a proceeding before the court to request attested copies of official records.

Rule 79-3. Exhibits

(a) Disposition of exhibits. All exhibits received in evidence or offered and rejected during trial or any evidentiary hearing, shall be delivered to the clerk of court through the courtroom

marshal, who shall keep the same in custody until it is determined whether an appeal has been taken from a final judgment. In the event of an appeal, exhibits shall be retained by the clerk until disposition of the appeal. The clerk of court shall permit court judges, magistrates, official court reporters, and chambers staff to have custody of exhibits when necessary to expedite the business of the court. No other persons shall be permitted to remove exhibits from the custody of the clerk of court, except upon order of the court in extreme circumstances.

(b) Sensitive Exhibits. After submission into evidence, sensitive exhibits, including without limitation narcotics, weapons, currency, and any other evidence designated by the court as sensitive, shall remain in the custody of the proponent or the appropriate agency during the trial of the case and for any appeal period thereafter.

(c) Return of Exhibits. Unless otherwise ordered by the court, all exhibits in the custody of the clerk shall be returned to the offering party upon the later of the following: (A) the expiration of the period within which an appeal must be filed; or (B) the completion of the appellate process. The clerk of court shall notify the offering party in writing of the requirement to present him/herself to the office of the clerk to claim such exhibits within 30 days of receipt of the written request by the clerk of court.

(4) Unclaimed exhibits. Unclaimed exhibits which remain in the custody of the court for a period of 120 days after trial and any final appeal may be destroyed or otherwise disposed of by the court.

REPORTER'S NOTE

Rule 79-3 relates to the disposition of exhibits, including "sensitive exhibits" and deals with disposition of unclaimed exhibits after a trial or hearing and appeal

Rule 80. Stenographic Record of Proceedings

(a) At the request of any party to a proceeding before the court or upon the direction of the judge, the reporter-secretary shall prepare a transcript thereof, attach to the transcript an official certificate, and deliver the same to the party or judge making the request. The reporter-secretary shall also promptly deliver to the court for its record a certified copy of any transcript so made. The reporter may charge and collect fees for transcripts requested by the parties, excluding the court and the Government of the Virgin Islands, at rates prescribed by the court.

(b) At the request of any party to a proceeding before the court, the clerk of court shall provide electronic transcripts of the proceedings, if such proceedings were digitally recorded. The requesting party shall pay a fee for such electronic transcript in an amount set by the court. Upon payment of the designated fee, the clerk of court shall submit copies of the transcript, to be distributed as follows: One electronic transcript copy shall be submitted to the requesting party, one to each opposing party, and one to the case file. An additional fee may be charged if more than five electronic copies are required.

(c) If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who recorded it.

REPORTER'S NOTE

Rule 80 provides basic guidance on the recordation of proceedings, including digital recording.

Rule 81. [Reserved]

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the Superior Court or the venue of actions in those courts.

REPORTER'S NOTE

Rule 82 makes it clear that the Virgin Islands Rules of Civil procedure do not "extend or limit" the jurisdiction of the Superior Court or alter the available venue for hearing actions.

Rule 83. [Reserved.]

Rule 84. Unsworn Declarations Under Penalty of Perjury

Wherever, under these rules or under any rule, regulation, order, or requirement adopted by, made pursuant to, or incorporated within these rules, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(a) If Executed Within the United States Virgin Islands: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

(b) If Executed Outside the United States Virgin Islands: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States Virgin Islands that the foregoing is true and correct. Executed on (date). (Signature)".

REPORTER'S NOTE

Rule 84 is the Virgin Islands implementation of a common American provision allowing the use of declarations under penalty of perjury in circumstances where a rule, regulation, order, or requirement calls for a sworn declaration, verification, certificate, statement, oath, or affidavit. The Rule specifies the language to be used in the signature block of such declarations to comply with the requirements.

Rule 85. Court Orders

All orders, judgments, and determinations of the court shall be in writing and signed by the judge, magistrate judge, or clerk of the court; provided, however, that oral orders shall be enforceable pending their reduction to writing.

REPORTER'S *NOTE*

Rule 85 provides for the enforceability of written orders, and of oral orders (pending reduction

to writing).

Rules 86 — 89 [Reserved.]

Rule 90. Civil Mediation

(a) Definition. "*Mediation*" means a process whereby a neutral third person called a "mediator" acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving and exploring settlement alternatives.

(b) Exclusions from Mediation. The following types of actions shall not be referred to mediation:

(1) Criminal actions;
(2) Appeals from rulings of administrative agencies;
(3) Forfeitures of seized property;
(4) Habeas corpus and extraordinary writs; or
(5) Other matters as may be specified by order of a judge.

(c) Referral for Mediation; Party Agreements. Except as provided in subpart (b) of this Rule, a judge may order any matter to be referred to mediation. The parties to any contested civil matter may file a written stipulation to mediate any issue between them at any time, and may agree upon a mediator to serve in that process. Such stipulation shall be incorporated into the order of referral.

(d) Procedure

(1) ***Conference or Hearing Date.*** Unless otherwise ordered by the court, the first mediation conference shall be held within 60 days of the order of referral.

(2) ***Role of Counsel***. Unless otherwise ordered by the court, counsel to the parties shall attend and participate in the mediation conference.

(3) ***Notice.*** Within 14 days after the order of referral, the parties shall notify the court of the agreed mediator and the date and place of mediation. If the parties cannot agree upon a mediator the plaintiff or petitioner shall so notify the court within such 14 days and the court shall appoint a certified or otherwise qualified mediator, as provided in subpart (i) of this Rule, selected by rotation or by such other procedures as may be adopted by administrative order of the court.

(4) ***Rescheduling.*** A mediator or the parties by agreement are authorized to change the date and time for the mediation conference, provided the conference takes place within the deadline for the mediation. Any continuance of the conference beyond that time must be approved by the judge.

(5) ***Location.*** The mediation conference shall take place at a site designated by the court or any other place stipulated to by the parties.

(6) ***Discovery.*** Discovery may continue throughout mediation. Such discovery may be delayed or deferred upon agreement of the parties or by order of the court.

(7) ***Communication with Parties***. The mediator may meet and consult with the parties and their counsel on any issue pertaining to the subject matter of the mediation. Should the mediator wish to discuss a matter with the parties or their counsel, the mediator must inform all parties to the mediation of the location and subject matter of such meeting. The mediator can consult with any party or their counsel only upon agreement of all parties. The mediator may keep a written record of any and all meetings conducted with the parties or their counsel and such record shall be made available to the parties, it being understood that this record

shall not relate to the ex parte communications with the mediator.

(8) ***Disclosure Privilege***. Each party involved in a court-ordered mediation conference has a privilege not to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceeding.

(9) ***Inadmissibility of Mediation Proceedings***. Any or all communications, written or oral, made in the course of a mediation proceeding, other than an executed settlement agreement, shall be inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

(10) ***Completion Date.*** Mediation shall be completed within 45 days of the first mediation conference unless extended by order of the court or by stipulation of the parties, but in any event the process shall not exceed 90 calendar days.

(e) Duties of Mediator; Disqualification.

(1) ***Oath.*** Before commencing service, each mediator shall take an oath or affirmation similar to that administered to officials of the court.

(2) ***Orientation Session.*** The mediator has a duty to define and describe the process of mediation and its costs during an orientation session with the parties before the mediation conference begins. The orientation should address the following:

(A) Mediation procedures;

(B) The differences between mediation and other forms of conflict resolution, including therapy and counseling;

(C) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(D) The confidentiality provision as provided for by Title 5, Section 854 of the Virgin Islands Code;

(E) The duties and responsibilities of the mediator and the parties;

(F) The fact that any agreement reached must be reached by mutual consent of the parties; and

(G) The information necessary for defining the disputed issues.

(3) ***Impartiality***. The mediator has a duty to be impartial, and to advise all parties of circumstances bearing on his/her possible bias, prejudice or lack of impartiality.

(4) ***Disqualification.***

(A) Mediators have a duty to disclose any fact bearing on their qualifications which would be grounds for disqualification.

(B) Any person selected as a mediator may be disqualified for bias, prejudice or impartiality as provided for by Title 4, Section 284 of the Virgin Islands Code, as may be amended, and shall disqualify himself in any action in which he would be required under 4 V.I.C. § 284 to disqualify himself if he were a judge. Any party may move the court to enter an order disqualifying a mediator for good cause.

(C) If the court rules that a mediator is disqualified from hearing a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment. The time of mediation shall be tolled during any period in which a motion to disqualify is pending.

(f) Sanctions for Failure of Party to Appear; Authority Required. If a party, without good cause, fails to appear at a duly noticed mediation conference or fails to participate in the mediation in good faith, the court shall impose sanctions, including an award of mediator and attorney's fees and other costs against the party failing to appear or found not to have mediated in good faith. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity

and to recommend settlement to the appropriate decision making body of the entity. Otherwise, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) The party or its representative having full authority to settle without further consultation; and

(2) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation.

(g) Compensation of the Mediator. The mediator shall be compensated by the parties. The presiding judge may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator shall be compensated at the hourly rate set by the presiding judge. Each party shall pay one-half or such other proportionate share of the total charges of the mediator, unless the court determines that one party has not mediated in good faith in which event the total fees may be assessed against that party by the court. Mediators are expected to render pro bono service by charging reduced fees or no fees to an indigent party, where such indigency is established by affidavit filed in the court.

(h) Disposition.

(1) ***Absence of Agreement.*** If the parties do not reach any agreement as to any matter as a result of mediation, or if the mediator determines that no settlement is likely to result from the mediation, the mediator shall report the lack of agreement to the court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(2) ***Agreement Reached*.** If an agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. The agreement shall be filed when required by law or by the parties' consent. If the agreement is not filed, a joint stipulation of dismissal or consent judgment shall be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript may be filed with the court.

(3) ***Enforcement of Agreement; Sanctions***. In the event of any breach or failure to perform under the agreement, the court upon motion may impose sanctions, including costs, attorney's fees, or other appropriate remedies including entry of judgment on the agreement.

(i) Certification and Qualification of Mediators.

(1) ***Certified Mediators***. The presiding judge may certify as a mediator any person who:

(A) is at least 21 years of age;

(B) is a citizen of the United States of America or a legal immigrant;

(C) has completed a minimum of 20 hours in a training program approved by the court; or

(D has been a person certified as a mediator by the American Arbitration Association, or any other organization approved by the court, and

(E) is a member in good standing of the Virgin Islands Bar with at least 5 years of V.I. practice, and an active member of the V.I. Bar within 1 year of application for certification; or

(F) is the holder of a Master's degree in Social Work, Psychology or related field of Conflict Resolution and a member in good standing in his or her professional field with at least 5 years of practice in the V.I.

(G) Notwithstanding the foregoing procedures, the presiding judge may certify as a Superior court mediator any former judge of a federal, state or Superior court.

(2) ***Qualified Mediators***. The presiding judge may designate as a qualified mediator any person who:

(A) is at least 21 years of age;

(B) is a graduate of an accredited high school or holder of a high school equivalency diploma;

(C) is a citizen of the United States of America or a legal immigrant;

(D has at least 8 years of specific and active experience in his/her field of endeavor;

(E) is of good moral character as shown by at least 2 character references who are not related by blood or marriage;

(F) is not an abuser of alcoholic stimulants, narcotic drugs, or any controlled substances;

(G) is not suffering from any mental or emotional impairment and does not have a history thereof.

(H) Any person who meets the foregoing requirements may be eligible to serve as a Qualified Mediator of the Superior court. A Qualified Mediator may become a Certified Mediator upon compliance with the requirement for certification.

(3) ***List.*** A list of all persons certified as mediators shall be maintained by the court.

REPORTER'S NOTE

Rule 90 is an mediation provision similar to those used in several other courts. It permits a judge to order any non-exempted matter to be referred to mediation. A timetable for holding an initial mediation session is set at 60 days after the referral. Subpart (b) identifies five types of lawsuits presently deemed inappropriate for mediation referrals. Subpart (c) makes clear the parties' right to agree to mediation and to select a mediator. There are several provisions for the mechanics of the mediation process in subpart (d). Subpart (e) addresses the duties and roles of the mediator, and subpart (d) deals with completion of the mediation process. Sanctions for failure to participate, including failure to bring a client or representative with full authority, are provided in subpart (f). Subpart (h) deals with the results when there either is, or is not, an agreement reached as a result of the mediation process. See also Virgin Islands Rule of Evidence 408 concerning the inadmissibility of settlement discussions. Identification of certified — or otherwise qualified or agreed — mediators is addressed at the end of the Rule in subpart (i).

Rule 91. Writs of Review

(a) A writ of review may be granted by the court upon the petition of any party to any proceeding before, or aggrieved by, the decision or determination of an officer, board, commission, authority or other tribunal established by statute. Such petition shall be filed with the Appellate Division within the time provided by statute, or if none is provided, then no later than 30 days after the date of the decision or determination to be reviewed.

(b) The petition for writ of review shall include all parties before the respondent officer, board, commission, authority, or tribunal from which petitioner seeks a review. The petition shall recite such decision or determination to be reviewed, designate as a respondent the officer, board, commission, authority, or tribunal appealed from, and set forth the errors alleged to have been committed. The petition shall also be signed by the petitioner, or by his attorney, who shall further attach a certificate affirming that he has examined the process or proceeding and the decision or determination sought to be reviewed, that he believes that the same is, in his professional opinion, erroneous, and that he is not filing the petition for delay.

(c) Before granting the petition the court may require the petitioner to post a surety bond in an amount to be fixed by the court in order to ensure that the petitioner will obey the determination or decision sought to be reviewed and perform his obligations thereunder in case it is affirmed by

the court after review.

(d) Summons shall not issue upon the filing of a petition for writ of review. If the court grants the petition, the clerk of court shall issue the writ, along with a copy of the petition, directed to the respondent officer board, commission, authority, or tribunal whose decision or determination is to be reviewed, or to the clerk or other person having custody of his or its records or proceedings. The respondent officer, board, commission, authority, or tribunal shall return the writ to the court within twenty (20) days together with a certified copy of the record of the proceedings to be reviewed by the court. The record of the proceedings shall include the final decision or determination of the respondent officer, board, commission, authority or tribunal, as well as any intermediate orders issued, exhibits or evidence taken, and the transcript of proceedings before the respondent officer, board, commission, authority or tribunal.

(e) The court may, upon application by the petitioner, include in the writ a clause requiring the respondent officer, board, commission, authority or tribunal to desist from further proceedings in the matter under review until the final determination thereof by the court.

(f) Unless otherwise ordered, the petitioner shall serve and file a brief within 20 days after submission of the record of the proceedings, or after a briefing schedule is issued, whichever comes first.

(g) The respondent shall serve and file a responsive brief within 20 days after service of the petitioner's brief. If a respondent fails to file a brief within the time provided by this Rule, or within the time as extended, the respondent will not be heard at oral argument except by permission of the court.

(g) A petitioner may file a reply brief only if ordered by the court.

(h) Unless otherwise provided by statute, factual determinations are to be reviewed for clear error while legal findings, statements of law, and the application thereof shall be afforded plenary review.

REPORTER'S NOTE

Rule 91 addresses special procedural provisions applicable to writs for review of decisions or determinations of administrative officers, boards, commissions, authorities or other tribunals established by statute.