BOYD-GRAVES CONFERENCE

Boar's Head Inn

Charlottesville, Virginia

October 24-25, 2003

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SCHEDULE

SESSIONS:	**Friday, October 24**	**2:00 p.m. - 5:00 p.m.**
	Saturday, October 25	**9:00 a.m. - 12:00 noon**
COCKTAIL PARTY:	**Friday, October 24**	**6:30 p.m.**

Sponsored by:

Breit, Drescher & Imprevento, P.C.
Edmunds & Williams
Furniss, Davis, Rashkind and Saunders
Hunton & Williams
Tremblay & Smith
Troutman Sanders LLP
Wilcox & Savage P.C.
Williamson & Lavecchia, L.C.

DINNER:	**Friday, October 25 (Business Attire)**	**7:30 p.m.**

The Conference appreciates the considerable logistical and other support provided to it by the Virginia Bar Association

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and

AGENDA

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Issue:

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Marilyn C. Goss, Esq.

Deadman's Statute.	3:20-3:50	7

Issue:

Whether the corroboration requirement for admitting testimony of a surviving party be abrogated.

Glenn Pulley, Esq.

Recovery of Attorney's Fees Incurred on Appeal.	3:50-4:00	8

Issue:

Whether the circuit court should retain jurisdiction to assess attorney's fees incurred on appeal to obviate need to file a new action.

Gray Lawrence, Esq.

Pre-suit Disclosure of Insurance Coverage.	4:00-4:20	9

Issue:

Whether insurance carriers should be required to disclosure coverage prior to filing of an action.

Beth Allen, Esq.

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Issue: Whether sanctions should be imposed on a party removing a case from general district court when no substantial defense exists. Michael J. Blachman, Esq.		
Evidence of Insurance Coverage in Punitive Damages	10:30-10:45	16
Issue: Should evidence of insurance coverage or lack thereof be admissible in punitive damage actions. Alan Rashkind, Esq.		
Future of Boyd Graves Conference	10:45-11:30	17
A report on a study of the Conference and its mission. John R. Walk, Esq.		

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An Introduction to the Boyd-Graves Conference

The Boyd-Graves Conference began in 1978. Thomas V. Monahan, a past president of both the Virginia Bar and Virginia Trial Lawyers Associations, started the Conference by arranging annual meetings of experienced civil trial lawyers at the Tides Inn in Irvington. He issued invitations to lawyers from throughout Virginia who represented personal injury plaintiffs, as well as those representing insurers and defendants, and those who practiced in small firms, by themselves, and in large firms. At annual meetings, attendees would discuss potential additions or revisions to the Rules of Court or Code of Virginia, ultimately recommending those modifications which had the consensus support of the Conference's attendees. The Conference worked closely with T. Munford Boyd, Edwards S. Graves and Leigh B. Middleditch, Jr., who had served as advisors to the Virginia Code Commission, which was responsible for the change from Title 8 to Title 8.01 in 1977. In its early years, the Conference was known as the Tides Inn Conference.

Through the years, the Conference outgrew Irvington. The annual meeting came to be held at various locations throughout Virginia. The Conference was renamed the Boyd-Graves Conference, in honor of the contributions of Munny Boyd and Ed Graves to the advancement of Virginia's civil procedure. The group meetings that began as informal face-to-face gatherings on sofas in a small lounge at the Tides Inn are now carefully planned events attended by 100 lawyers, judges, professors and legislators. A steering committee of about 25 lawyers, professors and judges meets during the year to help plan and prepare for the annual meeting. Typically, items are discussed at the annual meeting only after study by committees of Conference members. The written materials contained in this booklet are the work of those committees.

Membership in the Conference continues to be by invitation only. There are no term limits, but neither are there permanent memberships. Even the most active members are rotated off the Conference rolls regularly to make way for new blood. Aside from knowledge, experience and legal ability, the membership committee prizes the capacity to see legal issues not merely from the viewpoint of one's own practice or clients. The Conference seeks members who are willing to consider all arguments and to decide matters based on what is right for Virginia's overall civil jurisprudence.

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BOYD-GRAVES CONFERENCE

Main Conference Meeting

October 25, 2002, 2:00 p.m.
Norfolk Marriott Hotel
Norfolk, Virginia

The meeting was called to order by Tom Williamson, Chairman at approximately 2:00 p.m. He welcomed everyone to the 24th Boyd-Graves Conference. He thanked the Virginia Bar Association for their assistance, especially Sandy Thompson who will be retiring next spring. Consequently, this is her last Conference and she is training her replacement.

1. The Boyd-Graves Conference was summarized by Tom Williamson with special thanks to the late Professors Boyd and Graves, and also Tom Monahan. He also reviewed the rules of the Conference. Votes must be by a consensus and a consensus was in the sole discretion of the Chair but was more than a mere majority.

Everyone was introduced individually by name and geographical location.

2. A motion was made to approve the minutes of the previous meeting which was seconded and approve unanimously.

The Honorable Lydia Taylor reviewed the future Boyd-Graves Conference dates. She reminded the Conference that the 2003 meeting was set at The Boars Head and, assuming the arrangements could be made appropriately, the 2004 meeting will be held at The Omni Hotel in Richmond on October 22-23, 2004. Thanks were given to all of the firms which supported the evening cocktail party.

3. Professor Hamilton Bryson reported on the legislative results. He noted that the attorney issued subpoena provision successfully passed. The proposal for parties to be allowed to proceed in court anonymously was carried over to the next session as the Senate had some concerns. The comparative negligence panel study recommended by the Conference was not approved. The Judicial Council rejected the proposal for jury questionnaires. Professor Bryson did suggest a change in the anonymous party statute and a handout was given out which is attached as Exhibit 1. A recommendation was made by Professor Bryson, and adopted, to review the change noted in Exhibit 1 and vote on it tomorrow.

4. Professor Kent Sinclair reported on the Guide to Evidence. His Committee reviews all statutory changes and case law changes and then meets to discuss the changes in the Guide to Evidence. There were no significant changes by either the Courts or the legislature in the past year. However, many annotations were added. The notes were also revised and expanded. The Committee will continue to review several

topics to expand the Guides. They will also review some of the lengthier annotations to see if they can be made more concise. It was noted by the Chairman that an enormous amount of work on this is being done by Professor Sinclair and his students and as Chair of the Conference he thanked him profusely.

5. Ben Glass reported on the service of discovery by E-mail. He noted that by 2005 every Federal District Court in the country will have ECF. He and his Committee recommended a change to the rules which would permit, when consented to in writing by the person to be served, service of documents by electronic mail after the initial process. Ben Glass moved the Conference to adopt the rule changes that were contained in the report, this was seconded. There was considerable discussion on changing both Rule 1:12 and Rule 1:7. On Rule 1:12, the final line, as adopted by the Conference was changed to "when service is made by electronic mail, a certificate of counsel that the document was served by electronic mail shall be served on all counsel of record by sending a copy by mail or facsimile on or before the day of service." After discussion this was adopted with one negative vote. This was ruled as a consensus by the Chairman. Further discussion was contained as to Rule 1:7. In particular, the computation of time segment whether three days should be added or one day should be added. A phrase was added to Rule 1:7 to make the middle of the sentence read: "three (3) days shall be added to the prescribed time when the papers served by mail, or one (1) day shall, unless otherwise agreed to by the parties in their stipulation agreeing to e-mail, be added to the prescribed time when the papers served by facsimile, electronic mail or commercial delivery service." This change was adopted by 69 favorable votes with a small handful being in opposition which the Chair ruled was a consensus. The Chair ruled that all other recommended changes to the rules were also adopted at that time.

Tom Albro then reported on the problem of judicial review. The legislature is seriously considering this but postponed this until 2003, there being no funding by the legislature for a study. The Committee will continue to review and report on this. However, with the obvious budget crisis, when funding will be available to make a study is anybody's guess.

6. Chuck Zauzig reported on behalf of the Committee on Instructing Juries on Inadmissible Evidence. Judge Klein was very helpful in reporting on his experience in instructing juries on evidence which is inadmissible. He has done it in several cases and has felt that it has been extremely successful. The two proposed Code Sections (Attachment #4 and #5 under Tab 6) were the subject of a motion made and seconded. Pierce Rucker recommended a change to attachment 4 including the language after insurance coverage "or employment benefits of any nature for any party." The adoption of these two was voted on, but the Chair ruled that there was not a consensus. Wiley Mitchell suggested that these be modified to limit them to personal injury, and others suggested that the instructions be sent to the Model Jury and Bench Book people as having been approved by the Conference. The Chair limited the vote to sending Attachment #2 and #3 to the Model Jury Instruction Committee for their review. This motion was adopted by a substantial consensus as ruled by the Chair.

7. Report of Committee Studying Appeals from Rulings on the Validity of Bond Issues. A discussion was led by Frank Friedman who described the problem and noted at Tab 7 the Committee's recommendations for change. After brief discussion, it was on motion made, seconded, and unanimously approved by the Conference.

Later, the Conference was directed to the fact that by adopting the changes as proposed in 2651 *et. seq.*, the Conference omitted changing 2650. By unanimous consent it was made clear that the "of any locality" language was, as proposed by the Committee, to be added to 2650 to clarify this matter.

8. Special Verdicts and Jury Interrogatories. John Walk, Chairman led the discussion. He reviewed last year's report and what happened last year to the Conference's proposals. He also reviewed two Virginia Supreme Court cases from the previous year. He stated that his Committee was unanimous that some form of rule should be recommended by the Conference. However, some of his Committee members want wrongful death and personal injury cases removed from the statute granting the Court the right to use special verdicts and jury interrogatories whereas a minority disagreed. After motion duly made and seconded, a vote was taken to adopt Exhibit A with two words, "of fact," removed in the fourth line of text. This received a vote of 49 in favor and 29 against which the Chair ruled was not a substantial consensus. A vote was then taken on Exhibit B with the words "of fact" removed. The vote, again, was not a substantial consensus according to the Chair. A motion was then made to return to Exhibit A placing the words "at law" behind the words "civil actions." This also failed as the vote was deemed not to be a substantial consensus.

9. Report of the Committee on Adoption of Rules or Legislation Addressing Discovery of Financial Information from Experts. Ann Sullivan, Chairman gave the report of the Committee. An extensive debate on this issue followed but it was clear that there was no consensus on any remedy. The Chairman believed that no consensus was possible this year but recommended that the Committee be continued for another year with the general direction to the Committee to model its proposed rule on the federal court rule. A vote was taken, there were 3 negative votes with it being otherwise unanimous.

10. Report of the Committee Studying Taxable Costs Awarded to Prevailing Parties. Elaine Bredehoft gave the report and suggested the adoption of a rule modeled on the Federal Rules of Civil Procedure. Her proposed draft statute is contained in the report of the committee at tab 10 as well as a form to be completed by the prevailing party for their costs. There were two changes proposed to the proposed draft statute of 17.1-676 which were to remove the word "witness" in the second line of the italicized statute, and also to change the word "subpoenas" to "subpoenaed" in the fifth line of italicized language. The proposed draft statute was adopted by a substantial consensus. The form attached entitled "Bill of Costs" was also adopted by a substantial consensus with the change "and subpoenas" added after "Fees for service of process" in the second item on the form. Therefore, it would read: "Fees for service of process and subpoenas." This was adopted by a substantial consensus.

The Conference was then adjourned by Chairman Tom Williamson at the conclusion of the afternoon meeting.

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BOYD-GRAVES CONFERENCE

Main Conference Meeting

October 26, 2002, 9:00 a.m.
Norfolk Marriott Hotel
Norfolk, Virginia

The meeting was called to order by Chairman Tom Williamson shortly after 9:00 a.m. Chairman Williamson thanked Wiley Mitchell for obtaining the speaker who was excellent, Admiral Natter, Commander of the Atlantic Fleet. He also asked for new topics and circulated a list upon which one could recommend new topics for the coming year.

11. Susan Hicks gave the report of the Boyd-Graves Committee on the establishment of Uniform Criteria for the Use of Commissioners in Chancery. She basically gave a general report discussing a survey which had been sent to the chief judges in each circuit, 50% of whom had responded. The consensus was that uniform standards were not necessary. Therefore, there was no recommendation from the Committee for action.

12. Wiley Mitchell reported on the Subcommittee to Consider Limits on the Right to Request Public Agencies to Produce Records Under the Virginia Freedom of Information Act. There was considerable discussion, in particular that in some instances the Freedom of Information Act was being abused in the discovery process. The Committee suggested a paragraph change to § 2.2-3705 of the Code of Virginia which is contained in its report. After some discussion the paragraph was amended to read: "Records which may be subject to discovery in pending litigation pursuant to the Rules of the Supreme Court of Virginia when requested from a party to that litigation, by a party to that litigation, or by a person acting on behalf of a party." This was discussed at some length and a motion to adopt the proposal as amended was made and seconded. However, upon vote it was not adopted by a substantial consensus as ruled by the Chair.

13. John Oakey reported on the Committee on Comparative Fault. He recommended no action because there was not a consensus on any issue in the Committee and he felt that none could be obtained in the Conference.

15. Robin Wood presented the report of the Committee on the Merger of Law and Equity. The Committee recommended that they merge and there be one type of action in Virginia. He noted that this concept has previously been endorsed by the Boyd-Graves Conference going back at least to the 1980's. Kent Sinclair had drafted a proposal to merge the two which was well received at that time and endorsed by the Conference but failed to receive the approval of the Virginia Supreme Court. The Committee felt that it was time to try again and consequently asked the Conference to reaffirm its position supporting the merger of law and equity. Kent Sinclair stated that he

would again draft a rule merging the two which would, of course, have to be adopted by the Virginia Supreme Court. A handout questionnaire on the merger of law and equity was put on the table outside and peopled were asked to pick it up and respond. He noted that this does not change the substance of the law of equity but only the procedures. A motion to adopt one form of action, that is combine Rules 2 and 3 of the Virginia Supreme Court, was made, seconded, and adopted by a consensus.

At this point, the Committee on the bill allowing parties to sue anonymously brought its bill before the Conference. As noted previously, a handout was given to all members of the Conference the previous day. The recommendation of the committee as written in the handout, attached, was to add one sentence to section B of 8.01-15.1 allowing all parties to know the true identity of all other parties under such provisions of confidentiality as the Court might deem appropriate. The second line stating that at the conclusion of the entire litigation the true identities of all parties should be made public on the record was stricken before submitting the proposal to the Conference for a vote. The additional sentence added to paragraph B of 8.01-15.1(B) was unanimously adopted by the Conference.

16. Jeff Breit presented the report of the Committee on the problem of a non-M.D. testifying such as a Ph.D. psychologist. After much discussion including whether a broad or a narrow approach to this should be considered, it was noted that the Virginia Supreme Court is considering this issue and will probably decide it in January. Therefore, it was thought that it was best to continue this over to next year after the Supreme Court has ruled. Therefore, it was unanimously decided to continue this over to next year.

17. The report of the Committee on Appellate Practice was given by John Keith. His Committee recommended that the section of Rule 1:7 concerning the computation of time which reads "with respect to Part Five and Five A of the rules, this applies only to the time for filing a brief in opposition" should be eliminated and the rules harmonized in the use of the words "filed" and "served" as contained in the report at tab 17. These changes were unanimously adopted. He also discussed the finality of orders and made no recommendation. He pointed out that recent cases have laid out the law very well and there was a Virginia Bar Association article on the subject as well so that practitioners should be appropriately informed on this issue.

18. Report of the Committee on Uninsured and Underinsured Motorist Coverage. This was reported on by Chris Meyer and three issues were discussed. The first was the question of judgment against a so-called immune defendant and a statutory change was suggested to Va. Code Section 38.2-2206 making reference to an "immune defendant." After discussion, this was unanimously adopted.

The second proposal concerned a change to 38.2-2206(k), adopting a paragraph as contained in the report making it possible under some circumstances for a tortfeasor and a plaintiff to agree to accept the coverage without impairing possible underinsured motorists' rights. After considerable discussion, it was decided to carry this over to next

year for further study and in particular to consult with North Carolina lawyers on how it was working in their state.

The third proposal was to adopt a cost shifting change to 38.2-2206(k). The change is noted in the Committee's report and was adopted, after motion duly made and seconded, by consensus, unchanged.

19. Andrew Sacks reported on Confidential Settlements by Political Subdivisions and stated that his Committee needed one more year to review this area. There were certain national trends involved and a final report will be produced next year.

Following this, Chairman Tom Williamson adjourned the meeting by unanimous consent.

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MEMORANDUM

RICHMOND

UNIVERSITY OF RICHMOND
FOUNDED 1830

TO: Boyd-Graves Conference

FROM: W. H. Bryson

DATE: September 24, 2003

RE: 2003 Legislative Report

Faculty
The T. C. Williams
School of Law

The 2003 legislative report must begin with an acknowledgment of two faithful members of the Conference who accomplished the results to be listed. They are Senator Mims, who introduced and supported our proposals in the General Assembly, and David Shuford, the lobbyist of the Virginia Bar Association. Their legal and legislative skills are indeed superlative.

I. New Statutes:

A. § 8.01-15.1. This new statute allows the court to permit a party to sue or be sued anonymously. (It does not provide for fictitious parties.) (SB 985)

B. §§ 15.2-2650, 15.2-2651, 15.2-2656. The provisions for public bond validation proceedings were amended. (SB 981, SB 982)

C. § 38.2-2206. In situations of uninsured motorist liability, an immune defendant can remain as a party in an anonymous fashion. (SB 993)

II. Proposals Not Enacted:

A. The proposal to increase the items required to be taxed as court costs to include court reporter fees, copying expenses, etc., was not enacted. (These items can be taxed as court costs in the discretion of the court.) (SB 983)

B. The proposal to shift the costs of the defense from the liability insurance carrier to the underinsurance carrier where the former was willing to pay its full coverage was rejected and defeated. (SB 994)

III. New Rules:

Rules 1:7, 1:12, 1:13, 4:7, and 4:9 have been amended to accommodate electronic mail.

IV. Rules Proposal Carried Over:

The proposed amendments to Rule 1:7, Part Five, and Part Five A of the Virginia Rules of Court as to the computation of time for filing appellate briefs was opposed at the Advisory Committee on Rules of Court by the Clerk of the Supreme Court. The clerk's office would have to calculate the deadlines from the service but would not always be able to know how the briefs had been served; however, the current Rule 1:7 is clear in its scope. The Advisory Committee on Rules of Court carried this proposal over to its April meeting so that the Boyd-Graves Conference can give further reasons and argument in favor of it.

SB 985 Anonymous plaintiff.

Another bill?

Patron - William C. Mims (all patrons) ..... notes

Summary as passed: (all summaries)

Anonymous plaintiff. Provides that any party can move for an order concerning the propriety of anonymous participation in a proceeding and lists the factors that the court is to consider in determining whether anonymity can be maintained. The issue may be raised at any stage of the litigation when circumstances warrant a reconsideration of the issue. If the court orders identification, the pleadings and dockets will be amended to reflect the true name back to date of filing. Where a party is proceeding anonymously, the court shall ensure that the parties are afforded all the rights, procedures, and discovery to which they are otherwise entitled. This bill is a recommendation of the Boyd-Graves Conference.

Full text:

01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 034854500
02/26/03 Senate: Bill text as passed Senate and House (SB985ER)
03/26/03 Governor: Acts of Assembly Chapter text (CHAP0572)

Amendments:

House amendments
House amendments engrossed

Status:

01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 034854500
01/08/03 Senate: Referred to Committee for Courts of Justice
01/30/03 Senate: Reported from Courts of Justice (13-Y 0-N)
02/03/03 Senate: Constitutional reading dispensed (37-Y 0-N)
02/03/03 Senate: VOTE: CONST. RDG. DISPENSED R (37-Y 0-N)
02/04/03 Senate: Read second time and engrossed
02/04/03 Senate: Constitutional reading dispensed (39-Y 0-N)
02/04/03 Senate: VOTE: (39-Y 0-N)
02/04/03 Senate: Passed Senate (40-Y 0-N)
02/04/03 Senate: VOTE: (40-Y 0-N)
02/05/03 Senate: Communicated to House
02/05/03 House: Placed on Calendar
02/05/03 House: Read first time
02/05/03 House: Referred to Committee for Courts of Justice
02/06/03 House: Assigned to C. J. sub-committee: 2
02/17/03 House: Reported from C. J. with amendment (21-Y 0-N)
02/18/03 House: Read second time
02/19/03 House: Read third time
02/19/03 House: Committee amendment agreed to
02/19/03 House: Engrossed by House as amended
02/19/03 House: Passed House with amendment BLOCK VOTE (99-Y 0-N)
02/19/03 House: VOTE: BLOCK VOTE PASSAGE (99-Y 0-N)
02/20/03 Senate: House amendment agreed to by Senate (38-Y 0-N)
02/20/03 Senate: VOTE: CONCUR HOUSE AMENDMENT (38-Y 0-N)
02/26/03 Senate: Bill text as passed Senate and House (SB985ER)
03/05/03 Senate: Enrolled
03/05/03 House: Signed by Speaker
03/06/03 Senate: Signed by President
03/24/03 Governor: Approved by Governor-Chapter 572 (effective 7/1/03)

summary | pdf

CHAPTER 572

An Act to amend the Code of Virginia by adding in Article 2 of Chapter 2 of Title 8.01 a section numbered 8.01-15.1, relating to anonymous plaintiff.

[S 985]

Approved March 18, 2003

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 2 of Chapter 2 of Title 8.01 a section numbered 8.01-15.1 as follows:

§ 8.01-15.1. Anonymous plaintiff; motion for identification; factors to be considered by court.

A. In any legal proceeding commenced anonymously, any party may move for an order concerning the propriety of anonymous participation in the proceeding. The trial court may allow maintenance of the proceeding under a pseudonym if the anonymous litigant discharges the burden of showing special circumstances such that the need for anonymity outweighs the public's interest in knowing the party's identity and outweighs any prejudice to any other party. The court may consider whether the requested anonymity is intended merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a sensitive and highly personal matter; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent nonparties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and the risk of unfairness to other parties if anonymity is maintained.

B. If the court initially permits a party to proceed anonymously, the issue of the propriety of continued anonymous participation in the proceedings may be raised at any stage of the litigation when circumstances warrant a reconsideration of the issue. In all cases, all parties have the right to know the true identities of all other parties under such provisions of confidentiality as the court may deem appropriate.

C. If the court orders that the anonymous litigant be identified, the pleadings and any relevant dockets shall be reformed to reflect the party's true name, and the identification shall be deemed to relate back to the date of filing of the proceeding by the anonymous party.

D. In any legal proceeding in which a party is proceeding anonymously, the court shall enter appropriate orders to afford all parties the rights, procedures and discovery to which they are otherwise entitled.

Legislative Information System

SB 981 Public Finance Act; appeals from bond validation proceedings.

Another bill?

Patron - William C. Mims (all patrons) ..... notes

Summary as passed: (all summaries)

Public Finance Act; appeals from bond validation proceedings. Allows appeals from circuit court bond validation proceedings if a notice of appeal is filed with the circuit court within 15 days of the final judgment and if a petition if filed with the Supreme Court of Virginia within 30 days of the final judgment. Currently, a petition must be filed with the Court within 15 days of the final judgment. The bill shifts the burden from appellant to the clerk of the circuit court for transmitting a certified copy of the circuit court record to the Supreme Court of Virginia within 30 days of the final judgment when a notice of appeal is properly filed. The bill clarifies that failure of the clerk to do so will not affect the jurisdiction of the Supreme Court to hear the appeal.

Full text:

01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 034850500
02/25/03 Senate: Bill text as passed Senate and House (SB981ER)
03/27/03 Governor: Acts of Assembly Chapter text (CHAP0679)

Status:

01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 034850500
01/08/03 Senate: Referred to Committee on Local Government
01/21/03 Senate: Reported from Local Government (15-Y 0-N)
01/23/03 Senate: Constitutional reading dispensed (39-Y 0-N)
01/23/03 Senate: VOTE: CONST. RDG. DISPENSED R (39-Y 0-N)
01/24/03 Senate: Read second time and engrossed
01/27/03 Senate: Read third time and passed Senate (39-Y 0-N)
01/27/03 Senate: VOTE: PASSAGE R (39-Y 0-N)
01/27/03 Senate: Communicated to House
01/29/03 House: Placed on Calendar
01/29/03 House: Read first time
01/29/03 House: Referred to Committee on Counties, Cities and Towns
02/14/03 House: Reported from Counties, Cities and Towns (21-Y 0-N)
02/17/03 House: Read second time
02/18/03 House: Read third time
02/18/03 House: Passed House BLOCK VOTE (100-Y 0-N)
02/18/03 House: VOTE: BLOCK VOTE PASSAGE (100-Y 0-N)
02/25/03 Senate: Bill text as passed Senate and House (SB981ER)
03/05/03 Senate: Enrolled
03/05/03 House: Signed by Speaker
03/06/03 Senate: Signed by President
03/19/03 Governor: Approved by Governor-Chapter 679 (effective 7/1/03)
03/27/03 Governor: Acts of Assembly Chapter text (CHAP0679)

Legislative Information System | Bills and Resolutions

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CHAPTER 679

An Act to amend and reenact § 15.2-2656 of the Code of Virginia, relating to the Public Finance Act; bond validity.

[S 981]
Approved March 19, 2003

Be it enacted by the General Assembly of Virginia:

1. That § 15.2-2656 of the Code of Virginia is amended and reenacted as follows:

§ 15.2-2656. Appeals.

An appeal ~~shall lie~~ *from the final judgment of the circuit court in a bond validation proceeding may be taken* to the Supreme Court of Virginia ~~from the final judgment of the court~~. No appeal shall be allowed unless ~~the petition for it~~ *a notice of appeal* is filed *in the circuit court* within ~~fifteen~~ *15* days after the date on which the *final* judgment of the court is entered and ~~only if the party taking~~ *unless* the *appealing party's petition for* appeal ~~has the record certified to~~ *is filed with* the Supreme Court of Virginia ~~and the appealing party's brief is filed~~ within ~~thirty~~ *30* days after the date on which the *final* judgment of the court is entered. *When a notice of appeal is timely and properly filed with the clerk of the circuit court, the clerk shall certify and transmit the record to the Clerk of the Supreme Court of Virginia within 30 days after the date on which the final judgment of the circuit court is entered. Failure of the clerk to comply with this requirement shall not affect the jurisdiction of the Supreme Court of Virginia to consider the appeal.* If the ~~appeal is timely and otherwise in conformity with this article and if the~~ Supreme Court of Virginia ~~allows~~ *grants* the *petition for* appeal, it shall be placed on the privileged docket.

Legislative Information System

SB 982 Public Finance Act; applicability.

Another bill?

Patron - William C. Mims (all patrons) ..... notes

Summary as passed: (all summaries)

Public Finance Act; applicability. Provides that the provisions of the Public Finance Act apply to all suits, actions and proceedings involving the validity of bonds of any "instrumentality" of localities. The Act currently applies to any agency or instrumentality of the Commonwealth, but not of localities.

Full text:

01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 033381500
02/25/03 Senate: Bill text as passed Senate and House (SB982ER)
03/26/03 Governor: Acts of Assembly Chapter text (CHAP0570)

Status:

01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 033381500
01/08/03 Senate: Referred to Committee on Local Government
01/21/03 Senate: Reported from Local Government (14-Y 0-N 1-A)
01/23/03 Senate: Constitutional reading dispensed (39-Y 0-N)
01/23/03 Senate: VOTE: CONST. RDG. DISPENSED R (39-Y 0-N)
01/24/03 Senate: Read second time and engrossed
01/27/03 Senate: Read third time and passed Senate (38-Y 0-N)
01/27/03 Senate: VOTE: PASSAGE (38-Y 0-N)
01/27/03 Senate: Communicated to House
01/29/03 House: Placed on Calendar
01/29/03 House: Read first time
01/29/03 House: Referred to Committee on Counties, Cities and Towns
02/14/03 House: Reported from Counties, Cities and Towns (21-Y 0-N)
02/17/03 House: Read second time
02/18/03 House: Read third time
02/18/03 House: Passed House BLOCK VOTE (100-Y 0-N)
02/18/03 House: VOTE: BLOCK VOTE PASSAGE (100-Y 0-N)
02/25/03 Senate: Bill text as passed Senate and House (SB982ER)
03/05/03 Senate: Enrolled
03/05/03 House: Signed by Speaker
03/06/03 Senate: Signed by President
03/24/03 Governor: Approved by Governor-Chapter 570 (effective 7/1/03)
03/26/03 Governor: Acts of Assembly Chapter text (CHAP0570)

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CHAPTER 570

An Act to amend and reenact §§ 15.2-2650 and 15.2-2651 of the Code of Virginia, relating to the Public Finance Act; bond validity proceedings.

[S 982]
Approved March 18, 2003

Be it enacted by the General Assembly of Virginia:

1. That §§ 15.2-2650 and 15.2-2651 of the Code of Virginia are amended and reenacted as follows:

§ 15.2-2650. Article controlling as to proceedings involving validity.

The provisions of this article apply to all suits, actions and proceedings of whatever nature involving the validity of bonds of any locality or other political subdivision, agency or instrumentality of the Commonwealth *or of any locality*, whether the bonds are to be issued following an election on the question of their issuance or without necessity of an election. These provisions supersede all other acts and statutes on the subject and are controlling in all cases, notwithstanding the provisions of any other law or charter to the contrary.

§ 15.2-2651. Proceeding by political subdivision to establish validity; procedure; parties defendant.

The governing body of any locality or other political subdivision, agency or instrumentality of the Commonwealth *or of any locality* proposing to issue bonds may bring at any time a proceeding in any court of the county or city having general jurisdiction and in which the issuer is located to establish the validity of the bonds, the legality of all proceedings taken in connection with the authorization or issuance of the bonds, the validity of the tax or other means provided for the payment of the bonds, and the validity of all pledges of revenues and of all covenants and provisions which constitute a part of the contract between the issuer and the owners of the bonds. The proceeding shall be brought by filing a motion for judgment describing the bonds and the proceedings taken in connection with their issuance and alleging that the bonds when issued shall be valid and legal obligations of the issuer. In the motion for judgment the taxpayers, property owners and citizens of the jurisdiction where the issuer is located, including nonresidents owning property in or subject to taxation by it, and all other persons interested in or affected in any way by the issuance of the bonds shall be made parties defendant.

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SB 993 Motor vehicle insurance; uninsured motorist coverage. Another bill?
Patron - William C. Mims (all patrons) ..... notes

Summary as passed: (all summaries)
Motor vehicle insurance; uninsured motorist coverage. Authorizes an immune defendant to remain as a party to litigation as an anonymous party if the court refuses to dismiss such defendant. A judgment against the immune defendant in such event is enforceable against the insurer to the same extent as though the judgment was entered in the actual name of the immune defendant.

Full text:
01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 034852500
02/21/03 Senate: Bill text as passed Senate and House (SB993ER)
03/24/03 Governor: Acts of Assembly Chapter text (CHAP0283)

Status:
01/08/03 Senate: Presented & ordered printed, prefiled 01/07/03 034852500
01/08/03 Senate: Referred to Committee on Commerce and Labor
01/20/03 Senate: Reported from Commerce and Labor (14-Y 0-N)
01/22/03 Senate: Constitutional reading dispensed (38-Y 0-N)
01/22/03 Senate: VOTE: CONST. RDG. DISPENSED R (38-Y 0-N)
01/23/03 Senate: Read second time and engrossed
01/24/03 Senate: Read third time and passed Senate (38-Y 0-N)
01/24/03 Senate: VOTE: PASSAGE R (38-Y 0-N)
01/24/03 Senate: Communicated to House
01/29/03 House: Placed on Calendar
01/29/03 House: Read first time
01/29/03 House: Referred to Committee on Commerce and Labor
02/11/03 House: Reported from Commerce and Labor (21-Y 0-N)
02/13/03 House: Read second time
02/14/03 House: Passed by for the day
02/17/03 House: Read third time
02/17/03 House: Passed House BLOCK VOTE (91-Y 0-N)
02/17/03 House: VOTE: BLOCK VOTE PASSAGE (91-Y 0-N)
02/21/03 Senate: Bill text as passed Senate and House (SB993ER)
02/22/03 House: Enrolled
02/22/03 House: Signed by Speaker
02/23/03 Senate: Signed by President
03/16/03 Governor: Approved by Governor-Chapter 283 (effective 7/1/03)
03/24/03 Governor: Acts of Assembly Chapter text (CHAP0283)

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CHAPTER 283

An Act to amend and reenact § 38.2-2206 of the Code of Virginia, relating to uninsured motorist coverage; immune defendants.

[S 993]
Approved March 16, 2003

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-2206 of the Code of Virginia is amended and reenacted as follows:

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first $200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer. A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take

other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense available to the insurer to the action brought by the insured, which shall proceed against the named defendant although any judgment obtained ~~would~~ *against an immune defendant shall be entered in the name of "Immune Defendant" and shall* be enforceable against the insurer and any other nonimmune defendant *as though it were entered in the actual name of the named immune defendant.* Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. The bringing of an action against an unknown owner or operator as John Doe shall toll the statute of limitations for purposes of bringing an action against the owner or operator who caused the injury or damages until his identity becomes known. In no event shall an action be brought against an owner or operator who caused the injury or damages, previously filed against as John Doe, more than three years from the commencement of the action against the unknown owner or operator as John Doe in a court of competent jurisdiction. Any recovery against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized. No action, verdict or release arising out of a suit brought under this subsection shall give rise to any defenses in any other action brought in the subrogated party's name, including res judicata and collateral estoppel.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall

limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in subsection A of this section. Insurers issuing or providing liability policies that are of an excess or umbrella type or which provide liability coverage incidental to a policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to those policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.

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Report of the Boyd Graves Evidence Committee

Fall 2003

The Evidence Committee this year was composed of the following members:

Joseph C. Kearfott, Chair
Hon. Rudolph Bumgardner, III
Richard A. Conway, Esq.
Hon. Walter S. Felton, Jr.
Frank B. Miller, Esq.
Colin S. J. Thomas, Jr., Esq.
Stephen R. McCollough, Esq.
Marvin D. Miller, Esq.
John M. Oakey, Jr., Esq.
Ann Adams Webster, Esq.
William O. P. Snead, III
Kenneth Montero, Esq.
Prof. Kent Sinclair, Project Reporter

Preparation. Evidence decisions issued since last year's update of the Guide to Evidence by the Supreme Court and the Court of Appeals were collected and distributed to each member of the Committee during June, 2003. Brief commentary on the existing Guide provisions and proposed citations and parenthetical descriptions were also circulated for several weeks and reviewed by the Committee.

In early September the Court of Appeals' decisions during the summer period were reviewed, and several decisions were identified that needed consideration by the Committee. These were distributed to Committee members in advance of a plenary meeting held at the offices of Hunton & Williams in Richmond on Saturday, September 20, 2003. Despite the Hurricane, almost every member of the Committee was present.

At this work session some 100 pages of materials were discussed, and those cases that merit inclusion in the Guide were identified. Language to be added to notes was drafted and edited. Older citations were updated. Separately, the enactments of the General Assembly were reviewed for inclusion in particular sections of the Guide.

As in prior years, the Committee (composed mainly of civil practitioners and judges) benefited from the active participation by expert criminal defense counsel, and a leading prosecutor who took a day away from preparation for the D.C. Sniper trials. A representative from the Attorney General's office also actively participated. The principles of Virginia evidence law apply in both criminal and civil cases, sometimes in slightly different ways, and the participation of these practitioners (along with two sitting judges) helps assure that the criminal application of the principles is accurately handled in the Guide.

I. SUMMARY OF CASE LAW DEVELOPMENTS

There continue to be several cases decided each year dealing with character proof topic area, especially those involving the use of "prior bad acts" proof. In addition, a number of opinions addressing the requirements for expert proof were handed down in the past year.

However, the Committee did not identify any new decision that changed the basic principles of Evidence set forth in the Guide as a distillation of existing case law and the common law tradition for the various doctrines addressed in the book. Rather, the changes affected a large number of the advisory notes that accompany the summaries. Nor did the General Assembly pass any new statutes creating new codifications of evidence principles.

The provisions for which new case citations or updated notes were prepared – ranging from a parenthetical summary to a short paragraph here and there -- were as follows, with an indication of the topic on which new case law has emerged:

§ 402	Polygraph results; flight by criminal defendants
§ 404(b)	Other bad acts to show intent
§ 405	Character witnesses
§ 411	Disclosure that insurer would pay judgment barred
§ 412	Impeachment use of victim's diary/journal of conduct
§ 501	Spousal privilege
§ 606	Impeaching a verdict by juror affidavits
§ 607	Impeachment by contradiction
§ 609	Impeachment by prior conviction
§ 613	Prior consistent statements and bolstering
§ 615	Exclusion of witnesses
§ 702	Expert testimony in medical cases; blood spatter evidence; biomechanical causation
§ 703	Foundation for scientific testimony
§ 707	Treatises identified before trial
§ 804	Spousal privilege as "unavailability" for hearsay purposes
§ 804(b)(3)	Statements against interest
§ 804(b)(6)	Deadman's act "corroboration" requirement
§ 902	Statutory updates on authentication of exhibits

II. UPDATED "STRING CITES"

Evidence law grows each year. In general, the Committee adds citations each year to the Guide as new case law is handed down by the Commonwealth's appellate courts. One result is that for several of the topics in the Guide, string citations have grown for some basic propositions over the last several years.

In the summer of 2003 the Committee divided up the sections of the Guide and re-read the cases appearing as string citations without descriptive parentheticals that show special application from a particular case.

The result is the trimming out of a number of citations that are no longer the best, most recent or most thorough authority for various propositions addressed in the Guide. Efforts were made to be sure that the cases cited are sufficient to lead a researcher to all of the pertinent decisions construing a particular evidence doctrine.

The advisory notes accompanying the sections of the Guide are trimmer and more readable as a result.

III. *GUIDE* FORMAT: CHANGE FROM "RULES" TO "SECTIONS"

The Committee voted unanimously in favor of a change in the labeling of the principles distilled in the Guide to Evidence.

The prior editions have used the nomenclature "Rule 101," "Rule 102" and so on. Each "Rule" in the Guide is the distillation of a particular evidence doctrine. In 42 states and the federal system these principles are set forth in "Rules of Evidence". Perhaps some day there will be such rules in Virginia as well.

At the present time, however, the Committee has heard reports from several quarters that the use and citation of the Guide is inhibited because of the labeling of each summary as a "Rule" -- the problem being that it is obvious that the Guide is a restatement of existing principles and does not purport to prescribe "rules" that must be followed because of any codification.

As a result, the Committee has concluded that the courts (trial and appellate) are more likely to cite and recognize the Guide as the authoritative summary of prevailing Virginia law if we re-designate the individual summaries as "Sections" instead of "Rules."

We will retain the same numbers for each Section of the Guide. By way of background, the Boyd-Graves Conference may be interested to know that the organization of the Guide into the eleven "articles" follows an organization structure first worked out in the late 1940's by the drafters of the proposed Uniform Rules of Evidence, which several states adopted. This structure makes it possible for a person who knows something about evidence law in one state to focus on specific principles in any other state's body of evidence principles quickly and accurately.

IV. PROPOSAL FOR COMMITTEE STUDY: JUDICIAL ADMISSIONS

Two Shelved Proposals: The Committee considered and rejected, at least for the time being, proposals to create new sections of the Guide to summarize the case law on impeachment by contradiction in Virginia, and to integrate the myriad decisions on when an expert witness is needed to prove a prima facie case. In the former situation, there is to little case law to draw a clear summary, and there does not appear to be a problem in practice that cries out for a creative attempt to synthesize existing practices. In the expert situation, the opposite problem exists: there are numerous, fact-specific decisions requiring or excusing the party with the burden of proof from offering an expert to complete a case on liability. Ultimately, the Committee concluded that this issue is more a matter of substantive law (e.g., medical malpractice liability) than evidence, and that no summary that tried to span several subject matters would be helpful to the users of the book.

One Proposal for Possible Committee Study: The Committee considered whether it was in a position to draft a proposed summary on "judicial admissions" and decided that – if the Conference thinks it is worthwhile to pursue this topic – perhaps a separate sub-committee should study the matter and report next year on any proposal.

The background for the "judicial admissions" is that the Committee was aware from recent case law on "stipulations" as well as basic principles governing admissions in the Grounds of Defense/Answer and in response to Requests for Admissions, that a "judicial admission" is more than an admissible party statement, and amounts to a complete resolution of the subjects it addresses.

If it were determined that it is possible to craft a provision identifying when a judicial admission has been made, and what effect it has, such a provision could be lodged in Article IV, because the effect of a valid judicial admission is to affect the admissibility of contrary proof by rendering it irrelevant and inadmissible. Such a section could also be placed at the end of Article I, but the recent decision in *Jones v. Ford Motor Co.* refers to this doctrine a species of relevance.

The Court of Appeals recently explained in Rose v. Commonwealth, 37 Va. App. 728 n. 2, 561 S.E.2d 46 n. 3 (2002):

> Evidential admissions "are statements made outside of the scope of the court proceedings. These are admissible in evidence but are not binding or conclusive. They may be denied, rebutted, or explained away, and the weight to be given to them is a matter for the trier of fact." Charles E. Friend, The Law of Evidence in Virginia § 18-37 (5th ed. 1999). By contrast, judicial admissions "are concessions made by a party during the course of litigation which bind the party and prevent contrary evidence from being introduced." Id. "It should be noted that both guilty pleas and testimony at a former trial are evidential, not judicial, admissions. " Id. § 18-52.

See 4 John H. Wigmore, Wigmore on Evidence § 1058, at 27 (Chadbourn rev. ed. 1972). (Judicial admissions are "formal act[s], done in the course of judicial proceedings, which waive[] or dispense[] with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opposition is true.").

The Fourth Circuit held 40 years ago that judicial admissions dispense with the need for proof, but may be "relieved" upon a proper showing of mistake:

> [a] judicial admission is usually treated as absolutely binding, but such admissions go to matters of fact which, otherwise, would require evidentiary proof. They serve a highly useful purpose in dispensing with proof of formal matters and of facts about which there is no real dispute. Once made, the subject matter ought not to be reopened in the absence of a showing of exceptional circumstances, but a court, unquestionably, has the right to relieve a party of his judicial admission if it appears that the admitted fact is clearly untrue and that the party was laboring under a mistake when he made the admission.

New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963).

One concern in Virginia is that under *TransiLift* (citation in Note below) requests for admissions responses are not self-executing. Hence the proponent of at least certain forms of admissions must draw them to the trial court's attention and insist (by objection) that the adverse not offer proof that conflicts with the admitted proposition.

The Committee reviewed the following first effort to draft a possible section on this topic:

FIRST DRAFT

§ 416. JUDICIAL ADMISSIONS (*new*)

A. **Finding.** After according any interested party the opportunity to be heard, the trial court may find that a party's binding concession in a responsive pleading, response to Requests for Admissions, a proffered stipulation, or similar formal concession in the legal proceeding, conclusively establishes a fact in issue as a judicial admission.

B. **Effect.** Unless withdrawn or restated with the permission of the trial court, such a judicial admission may not thereafter be qualified, explained, or rebutted by other evidence.

C. **Scope.** The preclusive effect of a judicial admission is limited to the precise fact or facts conceded, and proof on other issues is not thereby precluded.

NOTE

A binding concession by a party or counsel is a judicial admission which has the effect of withdrawing an issue from controversy. Judicial admissions are formal concessions which wholly dispense with the need for proof of the stipulated fact because they have the effect of settling an issue of fact for the purposes of the current litigation. The effect of a judicial admission is to establish the fact for the purposes of the pending case and to eliminate it entirely from the issues to be tried. A judicial admission is, in effect, a waiver by the conceding party.

Judicial admissions may be made in a party's pleadings, in responses to requests for admissions, State Farm Mut. Auto. Ins. Co. v. Haines, 250 Va. 71, 458 S.E.2d 285 (1995), and by specific proffer in writing, Hedrick v. Warden of the Sussex I State Prison, 264 Va. 486, 570 S.E.2d 840 (2002), or orally at trial. See Jones v. Ford Motor Co., 263 Va. 237, 559 S.E.2d 592 (2002). See also Occoquan Land Dev. Corp. v. Cooper, 239 Va. 363, 389 S.E.2d 464 (1990).

See TransiLift Equipment, Ltd. v. Cunningham, 234 Va. 84, 90, 360 S.E.2d 183, 186-87 (1987), discussing the effect of various forms of "admissions" on trial proof, and the effect of the doctrine of Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922) (binding statements or testimony by a party). Numerous modern cases interpret (and limit) the Massie doctrine.

A stipulation of liability has been treated as a judicial admission. See, e.g., Ambiance Associates, Inc. v. Kilby, 230 Va. 60, 334 S.E.2d 556 (1985).

Offers to stipulate to one version, or portion, of an issue, do not operate to preclude proof on other aspects of the issue. See generally Jones v. Ford Motor, supra. Proffered stipulations that are not accepted do not have the effect of a judicial admission. General Motors Co. v. Lupica, 237 Va. 516, 379 S.E.2d 311 (1989).

The United States Supreme Court has suggested that ambiguous or unclear concessions should normally be explored by the court to avoid imposing the preclusive effect of a judicial admission where no such binding concession was intended. See Oscanyan v. Winchester Repeating Arms Company, 103 U.S. 261 (1880) (admission as to causation in counsel's opening statement).

Virginia law allows withdrawal of responses to requests for admissions in appropriate circumstances, see Haines, supra, and amendment of a party's responsive pleading (Rule 1:8), but general case law on relief from judicial admissions offered at trial has not been located. See United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975) (trial judge retains discretion to relieve a party from the effect of a judicial admission in appropriate cases).

Members of the Evidence Committee will be happy to help any Committee appointed to consider the utility of an attempt to create a section of the Guide on this topic. We felt that there may be many ramifications of such a proposed section in the Guide, and that broader input as to the triggering circumstances, limits, and effect of judicial admissions should be explored before a summary was finalized for inclusion in the Guide.

Suggestions Welcome. Topics – either in the existing Guide or matters that you think should be considered for inclusion – are always welcome. The Committee generally starts its work after the June decision day of the Supreme Court, and holds its final meeting in mid-September, so there is a good window for passing along ideas. Send comments or suggestions to the Committee's Chair, Joe Kearfott, or the project's Reporter, Professor Kent Sinclair at UVA School of Law, 580 Massie Road, Charlottesville, VA 22903-1789, or email him at ks3r@virginia.edu.

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September 26, 2003

Thomas W. Williamson, Jr.
WILLIAMSON & LAVECCHIA, L.C.
6800 Paragon Place
Suite 233
Richmond, Virginia 23230

Re: **Boyd Graves Committee to Study Whether to Implement Uniform Criteria for the Appointment of Commissioners in Chancery**

Dear Tom:

Attached please find the final version of our Committee's recommended changes to Va. Code § 8.01-607. As you recall, our Committee polled the Chief Judges of all the Circuit Courts to get their input regarding this issue. Additionally, our Committee members discussed this issue within their local bar organizations. As chair of the Virginia State Bar's Family Law Board of Governors, I solicited their input on this issue.

After serious discussion and much reflection, our Committee came to the conclusion that the use of Commissioners in Chancery in divorce cases produced an "access to justice issue" for divorce litigants in the Commonwealth of Virginia. This is true because virtually all fault divorce cases are routinely referred to Commissioners in Chancery for adjudication of the fault issue. In many jurisdictions, the entire divorce case, including Equitable Distribution, is routinely referred to Commissioners in Chancery. This results in divorce litigants having to pay the Commissioner an hourly fee to hear their case and also having to pay a court reporter to transcribe the hearing.

As you will recall from my interim report last year, a number of the Circuit Court judges responding to our survey indicated that they were not in favor of routinely referring divorce cases to Commissioners in Chancery. They felt that there was frequently a duplication of effort because most divorce cases heard by Commissioners in Chancery have a subsequent hearing by the Circuit Court judge on Exceptions to the Commissioner's Ruling. This means the Circuit Court judge would have to read the transcript and rehear all issues to which exceptions had been filed. The process of ruling on Exceptions to the Commissioner's Report requires Circuit Court judges to spend almost as much time on the case as if they had originally presided over the trial.

The statute drafted by our Committee provides for a phase out of the use of Commissioners in Chancery in divorce cases over the next five (5) years. We felt that divorce litigants could still avail themselves of the use of a judge *pro temp* should they elect to have the case heard by a non Circuit Court judge. The usual reason for requesting the appointment of a judge *pro temp* is to expedite the hearing. However, both parties must request the appointment of the judge *pro temp*.

Very truly yours,

SUSAN HICKS & ASSOCIATES, P.C.

Susan Massie Hicks

SMH/jc
Attachment
cc: Honorable Joanne F. Alper
Honorable Rosemarie Annunziata
Honorable Alan E. Rosenblatt
Lawrence. D. Diehl, Esquire
Reeves W. Mahoney, Esquire
Kenneth B.E. Montero, Esquire

BOYD GRAVES CONFERENCE

PROPOSED LEGISLATIVE AMENDMENTS TO VA. CODE RELATING TO COMMISSIONERS IN CHANCERY

8.01-607. Appointment and removal – (A) Each circuit court shall, from time to time, appoint such commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of such court. Such commissioners shall be removable at pleasure.

(B) For all actions for divorce, affirmation or annulment filed pursuant to Title 20 beginning July 1, 2004 and ending June 30, 2005 and in which there are no issues contested between the parties, the use and appointment of commissioners in chancery shall not be permitted unless by the mutual agreement of both parties.

(C) For all actions for divorce, affirmation or annulment filed pursuant to Title 20 beginning July 1, 2005 and in which there are no issues contested between the parties, the use and appointment of commissioners in chancery shall not be permitted.

(D) For all actions for divorce, affirmation or annulment filed pursuant to Title 20 beginning July 1, 2005 and in which there are issues contested between the parties, the use and appointment of commissioners in chancery shall not be permitted unless by the mutual agreement of the parties.

(E) For all actions for divorce, affirmation or annulment filed pursuant to Title 20 beginning July 1, 2008 and in which there are issues contested between the parties, the use and appointment of commissioners in chancery shall not be permitted.

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BOYD-GRAVES CONFERENCE
October 24-25, 2003

REPORT OF COMMITTEE STUDYING THE RIGHT TO APPEAL FROM A JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT ARREARS OF SUPPORT ORDER WITHOUT POSTING A BOND

This committee, consisting of the Honorable Joanne F. Alper, James R. Cottrell, Morris H. Fine, Marilynn C. Goss, and Carol D. Woodward, was asked to study and recommend revisions to Section 16.1-296 (H) of the Code of Virginia which prescribes the process to appeal a support of the juvenile and domestic relations district court.

The committee communicated by telephone conferences and email in which various members participated.

In its current form the statute reads in relevant part, as follows:

No appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court ***except for that portion of any order or judgment establishing a support arrearage*** *or suspending payment of support during pendency of an appeal. In cases* ***involving support, no appeal shall be allowed*** *until the party applying for the same or someone for him* ***gives bond, in an amount and with sufficient surety,*** *approved by the judge or by his clerk if there is one,* ***to abide by such judgment as may be rendered on appeal if the appeal is perfected or, if not perfected, then to satisfy the judgment of the court in which it was rendered*** *Upon appeal from a conviction for failure to support or from a finding of civil or criminal contempt involving a failure to support, the juvenile and domestic relations district court may require the party applying for the appeal or someone for him to give bond, with or without surety, to insure his appearance and may also require bond in an amount and with sufficient surety to secure the payment of prospective support accruing during the pendency of the appeal.* ***An appeal will not be perfected unless such appeal bond as may required is filed within thirty days from the entry of the final judgment or order.*** *However, no appeal bond shall be required of the Commonwealth or when an appeal is proper to protect the estate of a decedent, an infant, a convict or an insane person, or the interest of a county, city or town.*

The Problem:

- The Juvenile and Domestic Relations District Court is intended as an entry level court with a de novo right of appeal to the Circuit Court. The statute requires that the appeal bond in an arrearage case be set at the "amount owed" and in many instances this results in a de facto denial of the defendant's right of appeal.

Our committee discussed the following issues:

- Denial of right of appeal
- Lack of conformity in the appeal procedure from the Juvenile and Domestic Relations District Court to the Circuit Court and the appeal procedure from the Circuit Court to the Court of Appeals (there being no bond requirement in the latter)
- De novo appeals from the Juvenile and Domestic Relations District Court (resulting in the judgment being vacated) vs. appeals from the Circuit Court to the Court of Appeals (resulting in a stay only)
- Right of removal from the Juvenile and Domestic Relations District Court to the Circuit Court (no consensus within the committee)
- Power of the Circuit Court to review the amount of the bond set by the Juvenile and Domestic Relations District Court

While we came up with the following proposed revisions to the statute, we are not sure that it resolves all of the problems and thus, this is not a final proposal:

No appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal. In cases involving support, no appeal shall be allowed until the party applying for the same or someone for him gives bond, in an amount and with sufficient surety, approved by the judge or by his clerk if there is one, to abide by such judgment as may be rendered on appeal if the appeal is perfected or, if not perfected, then to satisfy the judgment of the court in which it was rendered. ***Provided, however, that the circuit court to which the appeal is taken may increase or decrease any such bond and set conditions for payment and security as it deems adequate in its sound discretion on motion properly made and filed n the juvenile and domestic relations district court within the time prescribed for filing a notice of appeal. The party appealing may defer payment of the bond until a hearing has been held in the circuit court on such party's motion for review and redetermination of the bond*** *Upon appeal from a conviction for failure to support or from a finding of civil or criminal contempt involving a failure to support, the juvenile and domestic relations district court may require the party applying for the appeal or someone for him to give bond, with or without surety, to insure his appearance and may also require bond in an amount and with sufficient surety to secure the payment of prospective support accruing during the pendency of the appeal. An appeal will not be perfected unless such appeal bond as may require,* ***or in lieu thereof a motion for review and redetermination of bond,*** *is filed within thirty days from the entry of the final judgment or order.* ***A failure to comply by the appealing party with the determination of the circuit court with respect to any motion for review and redetermination of the bond shall cause the appeal to be dismissed.*** *However, no appeal bond shall be required of the Commonwealth or when an appeal is proper to protect the estate of a decedent, an infant, a convict or an insane person, or the interest of a county, city or town.*

The proposed language would allow the defendant to note the appeal; seek a review and redetermination of the bond before the Circuit Court; and preserve his/her right of appeal.

Since our committee has not been able to reach a consensus to support the preceding language, we are requesting that we be allowed to study this matter another year and report back at the next Conference and that a currently sitting juvenile and domestic relations district court judge be appointed to our committee.

Respectfully submitted,

Honorable Joanne F. Alper
James R. Cottrell
Morris H. Fine
Carol D. Woodward
Marilynn C. Goss, Chair

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August, 2003

Report to the Boyd-Graves Conference

FROM: Committee to Study the "Deadman's" Statute

The Conference chair appointed a committee composed of Glenn Pulley (chair), Elaine Bredehoft, Robert Calhoun, Frank Hilton, Charles Sickels, and Kent Sinclair. The Committee was asked to review the current version of the Virginia "deadman's" statute, which is codified as Code § 8.01-397. That statute CURRENTLY reads:

> **§ 8.01-397. Corroboration required and evidence receivable when one party incapable of testifying**
>
> In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

The Committee considered numerous recent decisions construing the statute, as well as voluminous background materials, including legislative history materials going back to the late 1800's and other records provided by the Division of Legislative Services. It conducted independent legal research into the law of Virginia, statutory and in case decisions, and the law of a number of other states. National and Virginia law review and treatise discussions were reviewed. The Committee met several times in conference telephone sessions. It had the benefit of prior research by Conference member Bob Calhoun, and work performed on this project by Professor Sinclair and by a law student, Laura A. Williams, under his direction.

Preview. The following report is unanimous in proposing revisions of Code § 8.01-397 to: (1) spell out the fact that the statute does not apply if an interested witness testifies on behalf of the decedent/disabled person; (2) replace the present corroboration requirement with a required assessment of the credibility of all evidence presented (live and hearsay), and (3) clarify that the blanket hearsay exception now in the statute will apply only when the survivor offers testimony about the transactions.

Medieval times – up to the mid-1800's.

As trial by combat gave way to court-based decisions about parties' rights in the late Middle Ages, evidence in the form of sworn testimony by interested parties was forbidden out of fear that an interested witness would necessarily commit perjury. This was true from the 1600's to the early 1800's in Great Britain.

American law prior to 1850 was the same: interested parties were not allowed to testify in their own cases for fear of perjury. In cases involving one deceased or incapacitated party, this meant that the "interested" survivor could not testify at all.

In the mid-1800's reforms in England abolished (by statute) the common law disqualification of interested witnesses.

American jurisdictions started almost immediately to abolish the disqualification of interested witnesses. Virginia first did so in a statute passed in 1866. By an act approved March 2, 1866 (Acts 1865-6, ch. 21, sec. 1, pp. 87-88), the common law disqualification of witnesses for "interest" was abolished.

In the Supreme Court of Virginia's scholarly review of the grand sweep of this history in *Epes' Administrator v. Hardaway*, 135 Va. 80, 115 S.E. 712 (1923) , Judge Burks noted that the overall drift has been consistently over time to allow more and more testimony to be heard by the trier of the facts, and to eliminate disqualifications in whatever format they are found.

> It will be observed that the act, while radically changing the common law rule, contained many qualifications and exceptions. It was far from perfect, and had to be changed or amended from time to time to meet the hardships of different cases as developed by the decisions of this court. It would be impracticable within reasonable limits to discuss all the cases construing the statute and the consequent legislative changes. . . . All of them, however, will be found to be in the extension of the competency of witnesses to testify.

Id. at 85, 115 S.E. at 714 (emphasis added). The goal of the plenary revisions of the Code with respect to deadman's issues in 1919 was to remove "practically all disqualifications," and permit the courts to hear "all evidence bearing on the question at issue" just as is usual "in the business affairs of life." *Id.* at 88, 115 S.E. at 715.

In a prophetic summary of the long flow of case law developments, the Supreme Court of Virginia commented in 1923 that "[n]early all of the difficulties that have arisen in practice have grown out of the exceptions to the rule that interest should not disqualify a witness." *Id.* at 90, 115 S.E. at 715 (emphasis added). In other words, administering the barriers to testimony had already proven to be problematic in Virginia as early as 1923.

First Key Factor in Allowing Testimony: Cross-Examination

All American jurisdictions concluded in the late 1800's and the early 1900's that the availability of cross-examination by trained attorneys was an important factor in reducing the risks of perjury by the survivor in litigations involving dead or incapacitated persons. Judge Burks referred to the key role of cross-examination in *Epes*, writing of "the great safeguard of cross-examination."

In the late 1800's and early 1900's most states considered cross-examination a satisfactory safeguard: they simply passed statutes declaring all witnesses with knowledge to be qualified to testify. Some states made exceptions for cases involving decedents or incapacitated persons, which became known as "deadman's" statutes. These statutes were created in about half of the States during the early years of the 20th Century, but they have proven unnecessary and problematic, and most states that created such laws have abolished them decades ago. By the 1950's deadman's statutes were declared "archaic relic[s] of the past."[1] Today "deadman's acts" are found in only a handful of jurisdictions.[2]

Cross-Examination "Plus." In Virginia, the General Assembly evidently concluded in the late 1800's that cross-examination plus the presence of a live witness who can testify about the events on behalf of the dead or incapacitated party was an adequate balance to safeguard against perjurious claims by the survivor. Thus, in the Virginia Codes of 1887 and 1893 provisions were included that confirmed and continued the 1866 abolition of the former incapacity for interested witnesses. However, the abolition of incapacity was accompanied by a sister section dealing with deadman situations. Under the 1887 and 1893 versions, where one party to a transaction was dead or incapacitated, the interested survivor witness could only testifying if: (1) called by the decedent/incapacitated party's side, (2) some interested witness had testified on behalf of the decedent/incapacitated party, or (3) an agent of the dead or incapacitated person was available to testify.

The availability of an interested witness to testify on behalf of the side of the decedent or incapacitated person remains – in case law – an important exception to the deadman's principles even under the current statute. If such a witness testifies, the ban of the statute is totally inapplicable. *Johnson v. Raviotta*, 264 Va. 27, 563 S.E.2d 727 (2002), approving the holding of the federal district court in *Paul v. Gomez*, 118 F. Supp. 2d 694, 696 (W.D. Va. 2000). See generally *Merchants Supply Co., Inc. v. Ex'rs of the Estate of John Hughes*, 139 Va. 212, 216, 123 S. E. 355, 356 (1924); *Wrenn v. Daniels*, 200 Va. 419 (1958) (contract dispute).

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[1] Mason Ladd, "Witnesses," 10 RUTGERS L. REV. 523, 526 (1956).

[2] Some states still maintain a form of deadman statute (without a corroboration requirement), but the raw numbers and the proportion of states adhering to this form of disqualification of live witnesses declined dramatically during the 20th century, approximately as follows:
1850 – All states and territories (the English model)
1919 – one-half of the states
1953 – one-third of the states
1980 – one-quarter of the states
2003 – fewer than a dozen states

In the 1919 Virginia Code the Legislature again continued and confirmed the abolition of general disqualification for interested party witnesses, stating again that all witnesses are competent. But an adjacent Code section (the "deadman's" section) contained two provisions: (1) that, in cases involving a survivor and a decedent/incapacitated person, *corroboration* is required for a judgment based on the survivor's testimony, and (2) *if the survivor testifies*, out-of-court statements of the decedent/incapacitated person could be received in response. Thus by 1919 the disqualification of the survivor was replaced by a requirement of corroboration coupled with permission for the decedent/disabled person to offer out-of-court statements of the decedent/disabled person to oppose the live testimony of the survivor. *Epes*, 135 Va. at 90, 115 S.E. 715.

Then, about 35 years ago, the deadman's section of the Code was amended to provide that regardless of whether the survivor testifies, in any case by or against a decedent/incapacitated person, the hearsay out-of-court statements of the decedent/incapacitated person are generally admissible. That provision remains in Code § 8.01-397 today. Thus the right to offer out-of-court statements of the decedent/incapacitated person exists under the present version of the statute from the outset of such a case, and is not dependent upon the survivor testifying. No reason for the creation of this sweeping abolition of hearsay principles is apparent in the Revisors' Notes to the Code, and no Supreme Court case has ever commented on any justification for it.

Lopsided and Problematic Provisions

The present "double whammy." Present Virginia law is lopsided: it imposes upon living party witnesses a stringent (and ill-defined) requirement that testimony be "corroborated" and, on the other side, it gives an open-ended permission for the decedent/disabled person's side to offer out-of-court statements by the decedent/disabled person that do not meet any exception to the hearsay rule. The hearsay can be offered – under the current version of the law – whether or not the survivor offers live testimony about the disputed events. So far as the Committee's review of the law of other jurisdictions reveals, this tilting of the tables is more extreme than any other American jurisdiction ever had, and is worse than an anachronism today. No other jurisdiction has such a rule today, and no other jurisdiction ever had a combination of provisions that is as slanted against live testimony as the present Virginia statute.

The "corroboration problem." The 1919 version of the Virginia Code placed lawyers and judges of the Commonwealth in the position of having to assess corroboration for the survivor's testimony, since the incremental relaxation of the medieval limits on the admissibility of party testimony had – as of 1919 – reached the point that the General Assembly thought, in essence:

Cross-Examination + some corroboration = it is safe to allow survivor's testimony[3]

[3] This was the understanding of the General Assembly's calculus given by Judge Burks in *Epes*, 135 Va. at 90, 115 S.E. at 715.

Corroboration for purposes of the dead man's statute requires testimony or other evidence that tends to support some issue or allegation advanced by the party able to testify which is essential to sustain a judgment in such party's favor. Rice v. Charles, 260 Va. 157, 166, 532 S.E.2d 318, 323 (2000). Corroboration can come from any source, need not be presented by the plaintiff, and may be by documentary or physical evidence. See Hereford v. Paytes, 226 Va. 604, 608, 311 S.E.2d 790, 792 (1984). Unfortunately, neither the statute – nor case law – has been able to define the requisite corroboration, other than on a case-by-case basis. The requirement to search the record for corroboration is continued in the present version of Code § 8.01-397. The Supreme Court has often sought to provide generic guidance about the role that corroboration plays,[4] while continuing to recognize that in any individual case the facts will lead to an ad hoc determination whether the requirement is met.

What has happened as a result is an inordinate amount of appellate resources being expended reviewing ad hoc corroboration issues, without any dependable guidance to lawyers, parties and the lower courts because the nature of corroboration inevitably is seen as being different from case to case. Examples of the inconsistent and expressly "ad hoc" or "case-by-case" rulings that have been made are set forth in the Appendix to this report to illustrate the amount of appellate court energies the problem of corroboration has consumed, and the necessarily variable outcomes a case-by-case doctrine produces. See Hereford v. Paytes, 226 Va. at 608, 311 S.E.2d at 792 ("*it is impossible to formulate a fixed rule as to the corroboration necessary in every situation because each case must be decided on its particular facts*").

The expenditure of judicial resources has been enormous. Since the 1920's alone, there have been over 80 (eighty !!) decisions by the Supreme Court construing aspects of the corroboration requirement. The annexed Appendix to this Report is an attempted typology of some of the more prominent of these cases. Suffice it to say that in some two-car traffic accident cases the survivor can testify, and in others he/she cannot; in some doctor-patient circumstances the doctor can testify to what transpired, and in others he/she cannot; in some contract or services claims against an estate the survivor can testify, in others he/she cannot.

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[4] See, e.g., Rice v. Charles, 260 Va. 157, 532 S.E.2d 318 (2000) where the Court said:

[T]he critical inquiry is whether his testimony presented an essential issue that, if not corroborated, would defeat his contributory negligence defense. See Hereford v. Paytes, 226 Va. 604, 608, 311 S.E.2d 790, 792 (1984). . . . [W]e have stated some general principles that are pertinent here. "It is not necessary that the corroborative evidence should of itself be sufficient to support a verdict, for then there would be no need for the adverse or interested party's testimony to be corroborated." Brooks, Adm'r v. Worthington, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965) (citing Burton's Ex'r v. Manson, 142 Va. 500, 509, 129 S.E. 356, 359 (1925); Davies v. Silvey, Adm'x, 148 Va. 132, 137, 138 S.E. 513, 514 (1927); Clay v. Clay, 196 Va. 997, 1002, 86 S.E.2d 812, 815 (1955)). "Corroborating evidence tends to confirm and strengthen the testimony of the witness[,]" and it may come from other witnesses as well as from circumstantial evidence. Hereford, 226 Va. at 608, 311 S.E.2d at 792. It is not essential that a survivor's testimony be corroborated on all material points. Id.; Brooks, 206 Va. at 357, 143 S.E.2d at 845.

The corroboration, to be sufficient under the statute, however, must at least tend, "in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings [and] testified to by the [surviving] witness . . . which allegation or issue, if unsupported, would be fatal to the case." Hereford, 226 Va. at 608, 311 S.E.2d at 792 (quoting Burton's Ex'r, 142 Va. at 508, 129 S.E. at 359). Accord Diehl v. Butts, 255 Va. 482, 489, 499 S.E.2d 833, 838 (1998).

Recent decisions have allowed some testimony by the survivor and found other testimony impermissible, and a 2003 decision suggests that testimony by an adverse party about her version of the events may be "corroboration" in some contexts. Compare *Johnson v. Raviotta*, 264 Va. 27, 34-35, 563 S.E.2d 727, 732-33 (2002), with *Williams v. Condit*, 265 Va. 49, 574 S.E.2d 241 (2003) (four-to-three decision).

Heightened corroboration and heightened uncertainty. In addition to the case-by-case feature of current law, requiring parties to guess and requiring the Supreme Court frequently to determine the merits of a deadman's issue on specific or unique facts, there is the problem of "heightened corroboration." The Court has held that owing to the confidential or fiduciary relationship between some professionals and the decedent/ incapacitated person, allowing testimony by the survivor requires especially powerful corroboration. This standard is not explainable other than by stating that it must be "*more*" than is normally required to corroborate the living witness' testimony. See, e.g., *Diehl v. Butts*, 255 Va. 482, 499 S.E.2d 833 (1998). It applies to some client-professional relationships and some family situations as well, but not parent-child relationships, unless one family member provides financial advice or handles the affairs of another, in which case the higher standard does apply.[5] Some "principal-agent" relationships trigger the application of the heightened requirement.[6] Confusingly, some reported cases say only that a higher standard "***may***" be applied, without specifying whether and when application of the higher burden would be appropriate or necessary.[7]

This "higher" standard is not "clear and convincing proof" but it is more than "ordinary" corroboration. Since the circumstances that would amount to "ordinary" corroboration are uncertain and vary from case to case, the standards and outcomes in cases involving doctors, lawyers, and other professionals, fiduciaries and family members to whom the "extra" or "higher degree" corroboration requirement applies are even less objectively defined or predictable. Many reported decisions appear to simply announce that the required "higher degree" of corroboration is absent without providing guidance on the forms of proof required or the measures for satisfying the standard.[8]

Overall workability of the corroboration requirement. Evidence experts and commentators for many decades have argued that a corroboration requirement "has serious defects" in making an utterly unwarranted "assumption that uncorroborated claims are of such doubtful validity that all must be rejected."[9] Moreover, no court in the Nation has succeeded in defining the application of a corroboration requirement in a fashion that helps lower courts and the practicing bar.

As a major Law Review study of deadman's statutes concluded a number of years ago, one principal "objection to the corroboration requirement is the difficulty in

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[5] Compare Nuckols v. Nuckols, 228 Va. 25, 36-37, 320 S.E.2d 734, 740 (1984); Carter v. Carter, 223 Va. 505, 509, 291 S.E.2d 218, 221 (1982) with Jackson v. Seymour, 193 Va. 735, 740-41, 71 S.E.2d 181, 184-85 (1952).

[6] Creasy v. Henderson, 210 Va. 744, 749-50, 173 S.E.2d 823, 828 (1970).

[7] "In a case involving parties between whom a confidential relationship existed at the time of the transaction relied on, a higher degree of corroboration may be required than in other transactions. Everton v. Askew, 199 Va. 778, 782, 102 S.E.2d 156, 158 (1958) (emphasis added).

[8] See, e.g., Everton v. Askew, 199 Va. 778, 782, 102 S.E.2d 156, 158 (1958); Seaboard Citizens Nat'l Bank of Norfolk v. Revere, 209 Va. 684, 690, 166 S.E.2d 258, 263 (1969).

[9] Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 111 (1963).

administering such a rule. How can corroboration be defined in a way so that the test can be applied in individual cases without resulting in substantial litigation? [T]he requirement is unsound, [and] the courts should not be burdened with its administration."[10] Wigmore declared statutes with this requirement "misguided."[11]

In 1953 a Virginia Law Review article proposed that the corroboration aspect of the statute be abolished in order to "insure to the survivor of a transactions, or any other interested or adverse witness, an equal status with that of the decedent or any other person incapable of testifying." I.e., the proposal was to abolish the corroboration requirement while retaining the hearsay exception in favor of the decedent/incapacitated party's side. Note, *Corroboration in Virginia under Section 8-286*, 39 VA. L. REV. 395, 404 (1953).

As of 1953, only two other states had the corroboration requirement. While several states maintained special disqualifications for certain cases involving decedents, all states but Virginia and two others had abolished the interested-party disqualification of the 1800's without imposing the special corroboration burden on survivors in those states. As of 1953, Virginia was in a minority of 3 states.

Since 1953 both of the other "corroboration-requiring" states – New Mexico and Oregon – have ABOLISHED the corroboration requirement. From about 1980 onward, both of these states have had "Rule 601-style" competency rules, which are provisions stating generally that *any witness with knowledge is competent*. Thus for over 20 years Virginia appears to have been alone in continuing to require corroboration from a live person about a transaction with a decedent.

Academic[12] and judicial criticism of restrictions on the survivor's testimony are long-standing,[13] and Professor McCormick, author of the leading one-volume treatise on

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[10] Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 112 (1963).

[11] 7 Wigmore on Evidence § 2065. Dean Wigmore, perhaps the most famous evidence scholar in American history, denounced statutes that preclude use of a survivor's testimony: "As a matter of policy, this survival of the now discarded interest disqualification is deplorable in every respect; for it is based upon a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words."

[12] Professor Morgan, one of the great evidence scholars of the 20th Century and Reporter for the Model Code of Evidence, spoke of the shortcomings of the statutes in these terms:

> All are based upon the delusion that perjury can be prevented by making interested persons incompetent or by excluding certain classes of testimony. They persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence; if the dishonest party is prevented from committing perjury, he is not prevented from suborning it. If the statutes protect the estates of the dead from false claims, they damage the estates of the living to a much greater extent. And frequently their application prevents proof of a valid claim by the representative of decedent's estate.

Edmund Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, 187 (1956).

[13] See, e.g., St. John v. Lofland, 64 N.W. 930 (N.D. 1895), in which a justice of the North Dakota Supreme Court concluded:

> Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claims than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is

Evidence, reports that "commentators agree that . . . the expedient of refusing altogether to listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of injustice to the other."[14] One nationwide academic study found over six fundamental flaws in statutes excluding testimony from the surviving witness,[15] concluding that "the vagaries and inconsistencies pointed out are sufficient to demonstrate that the thousands and thousands of decided cases have built here one of the most complex and hazardous fields of the law of evidence."[16]

Waste of Appellate Resources. Other jurisdictions have also experienced the phenomenon that the deadman's statute generates an ocean of litigation which provides very little guidance to the bar or the trial courts.[17] An experienced trial lawyer in another state indicted the statute in his jurisdiction barring testimony from the survivor in certain

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remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods - the sword of cross-examinations;

[14] McCormick EVIDENCE § 65.

[15] Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 108 (1963):

(1) The statutes are based upon the fallacy that the number of dishonest persons is greater than the number of honest ones; and that self-interest makes it probable that people will commit perjury.

(2) The statutes themselves cause injustice by preventing proof of honest claims and defenses. In seeking to avoid the possibility of injustice to one side, they work a certain injustice to the other. "It is difficult to understand why all the concern is for the possibility of unfounded claims against the estate. Why is there no concern for loss by the survivor who finds himself unable to prove his valid claim against decedent's estate? Surely a litigant should not be deprived of his claim merely because his adversary dies. It cannot be more important to save dead men's estates from false claims than it is to save living men's estates from loss by lack of proof."

(3) The statutes fail to accomplish their purported purpose since they suppress only a small part of the opportunities for perjured testimony. They block the testimony of the witness only as to certain subjects, leaving him free to testify falsely as to other matters if he sees fit to do so. Furthermore, a witness who will not stick at perjury will not hesitate to suborn perjury by getting a third person to testify as to those matters as to which his own testimony is barred.

(4) The statutes impede the search for truth. The real hazard in shaping any exclusionary rule is that the jury cannot be expected to make sensible findings when it is deprived of substantial parts of available evidence bearing on the issue in dispute. The great danger thus lies in the suppression of truth.

(5) The statutes underestimate the efficacy of cross-examination in exposing falsehood, and the abilities of the judge and jury to separate the false from the true. These safeguards have proved adequate in other situations involving the testimony of parties and interested persons. Why not here?

(6) The statutes burden the parties with uncertainties and appeals. For a hundred years or more, our courts have been struggling with the interpretation of these statutes. The result is a labyrinth of decisions which have often brought confusion rather than clarity. The statutes continue to mystify able judges and lawyers in endless complexities of interpretation and application.

[16] Id.

[17] At a time when the Texas statute was similar to the Virginia Code provision, a prominent trial judge in that state said: "A legal beginner, as well as a veteran, knows well that, at its best, the Dead Man's Statute is full of snares, traps, and pitfalls, and that we have a rule by a wilderness of cases as well as a rule by an uncertain statute. Stout, "Should the Dead Man's Statute Apply to Automobile Collisions?," 38 TEXAS L. REV. 14, 23 (1959).

circumstances on grounds of unfairness *and* on the ground that continued efforts to construe the exceptions lead to a tangled mass of appellate decisions:

> The time consumed in applying and interpreting the statute is out of all proportion to the doubtful good it does. A statute so difficult of definite limitation should be one of undoubted desirability before it is justified. The statute cannot meet this test. It has so befogged our decisions that the Courts and the bar do not yet know the limitations of the rule.[18]

The Blunderbuss Hearsay Exception. The Committee has not located a single other state that maintains the additional feature of the present Virginia statute, a blunderbuss exception for all manner of written and oral hearsay from the decedent/disabled person's side of the case. Under the present Code provision, ANY hearsay statement of the decedent will be received in evidence, whether it is reliable or not, and whether the decedent had any personal knowledge of the subject or not.

McCormick's treatise reports that a very small number of jurisdictions adopted a "balancing" or "rebuttal" hearsay provision by the late 1940s, based on an ABA report in 1938 that suggested it.[19] The idea was that IF the survivor gave live oral testimony, the opportunity for the decedent/disabled person's side to offer prior out-of-court statements provided some opportunity to respond to the live witness. The proposal endorsed by the ABA report, however, suggested that only the decedent's statements "*made in good faith and upon personal knowledge*" be received where the live witness has testified and the decedent/incapacitated person cannot otherwise respond. Virginia law is much less balanced than the ABA proposal of 1938: it allows use of any and all hearsay, regardless of circumstances or whether the declarant had personal knowledge of the topics opined upon, and it applies whether or not the survivor offers live testimony about the disputed events or transactions. It appears, therefore, that about 50 years ago the General Assembly enacted the hearsay portions of the 1938 ABA report, but omitted the protections that the authors of that very proposal recommended!

Worse, in connection with the recodification of the procedure code in 1977, portions of the language were dropped, such that the hearsay exemption is available to the decedent/disabled person's side, whether or not the surviving witness testifies.

The Committee's review of other jurisdictions disclosed no other state with the unrestricted freedom to offer hearsay currently found in the Virginia deadman's statute.[20]

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[18] Cheek, "Testimony as to Transactions with Decedents," 5 TEXAS L. REV. 149, 172 (1927).

[19] See 63 A.B.A.R. 597 (1938).

[20] A law review article in 1963 reported that only two states had such an unrestricted charter for offering statements of a decedent, Massachusetts and Rhode Island. Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 112-13 (1963). Neither of those two states still has the cited provisions.

Proper Balance of Protections: the Advent of Discovery

Most jurisdictions abandoned concerns over live witness testimony by parties 100 years ago, relying on cross-examination as the protection against perjurious testimony by a party.

In the last 50 years, however, there has been one other major development in the litigation of cases that affects the balance of concerns when an interested witness gives live testimony in our courts: the availability of pretrial discovery.

Discovery had not been invented in 1919 when the Virginia statute was cast in essentially its current form, and thus could not have been considered in assessing the protections needed in the courts of the Commonwealth to deal with the risk of perjury by a party.

Today, however, Virginia provides the right to conduct depositions, propound interrogatories, engage in the discovery and inspection of property and documents, utilize requests for admissions and arrange for the physical examinations of parties by independent examiners. The creation and implementation of these tools are among the most important developments in civil litigation in the last 200 years.[21] They are surely among the most important features of modern litigation, and they were totally absent when the Virginia deadman statute was created in essentially its present form in 1919.

Today, therefore, the equation is:

Discovery + *cross-examination by skilled counsel* = *safeguards against perjury*

In 1919, "trial by surprise" was the norm: litigants did not pre-disclose their expected testimony, and even a good lawyer would need to scramble during cross-examination of a witness who might make up dramatic proof at the last moment. Today discovery and pretrial practice in Virginia ward off these risks to a great extent, and both common law and statutory provisions for impeachment, including use of prior inconsistent statements, bolster the ability of counsel to rein in a witness who attempts to prevaricate.

Thus the present Boyd-Graves Conference Committee came to the view that the need to restrict the availability of live testimony is far less today than it might have been in 1866, or even 1919. The loss of live testimony by an interested witness, and the enforcement of artificial and ill-defined "corroboration" requirements (regular, and "heightened") is no longer necessary. Nor does a blanket hearsay exception making admissible anything and everything the decedent may have uttered, regardless of the circumstances, seem fair or appropriate.

Today the trier of fact can – and should – assess the credibility of the survivor's self-serving live testimony as an interested party in the litigation. The precipitous remedy

[21] See Nathan Glazer, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1963).

of completely foreclosing a claim by a survivor is no longer necessary to assure careful and fair assessment of claims in cases involving decedents or incapacitated person.

Most members of the Committee felt that total abolition of the deadman's statute would not be a dangerous or unwarranted step. However, the Committee considered at some length whether there could conceivably be a "pro-plaintiff" or "pro-defendant" aspect of changing or eliminating the deadman's statute for any possible subject area of the Virginia litigation landscape. We did not think there was a serious risk in any subject matter. Nonetheless, it was recognized that allowing more live-witness testimony under a revamped statute could slightly increase the number of oral contract/services claims that would be viable against an estate, and may allow some doctors to testify as to events during treatment that would not be permitted presently absent "high level" corroboration.

Proposal. To make sure that both sides have fair protections, the Committee resolved to recommend to the Conference that the statute be retained insofar as it allows the decedent/incapacitated party's side to offer proof that would otherwise be excludable as hearsay in those cases where the deadman's act applies (basically: where no interested witness has testified for the decedent or incapacitated person's side) in those instances where the living witness has been allowed to testify about the disputed events or transactions. In that core situation, the mouth of the decedent/incapacitated person has been silenced and the survivor has been able to give his/her version of the events.

The Committee proposal adds one further provision as protection for the parties: an express provision requiring that the trier of fact consider the interests and motives of the parties in weighing the evidence received. This will protect the decedent/incapacitated party's side by encouraging the judge or jury to consider the motivation of the live witness in testifying to what happened. It will also protect the surviving party by encouraging the jury to consider the motives and circumstances of the hearsay statements from the decedent/incapacitated person in those cases where the provision allowing out-of-court statements is triggered.

The changes the Committee proposes would therefore accomplish three important improvements:

❶ **Interested Witness Rule to be Codified (Again).** The Committee's proposed revisions would codify the law of the last 100 years in Virginia that the deadman's statute does not apply where an interested witness testifies <u>for</u> the decedent/incapacitated party. A clear statement of this provision was in the Virginia Code as early as 1887 and, while it is not expressly stated in the current version of the statute, this black-letter rule has been embodied in numerous decisions from the Supreme Court of Virginia over several decades and repeatedly emphasized in the last 18 months. <u>Having this provision back in the statute</u> will assist both lawyers and judges in knowing when provisions of the revised statute are applicable.

❷ **Corroboration Requirement Replaced by Credibility Assessment.** The proposed revision would eliminate the requirement of corroboration in all cases, and replace it with a requirement that the trier of fact be directed to assess the

motivation and interest of witnesses and hearsay declarants whose evidence is received in cases where one participant is incapable of live testimony.

❸ **Hearsay Exception to Apply Only After Live Testimony by the Adversary.** Finally, the proposed revision restates the hearsay exception portion of the statute so that it will provide (as was the case in the 1919 version of the Code) that it is the testimony of a survivor about the disputed events or transactions that triggers the option of the decedent/disabled person's side to offer hearsay in response. This is coupled with the requirement that in a jury case the judge instruct the jury to consider the interests and motivations of the persons whose evidence has been received. Under this proposed revision, if no survivor testifies, the special hearsay provision of the deadman's statute is not applicable (and thus the decedent/disabled person's statements can be offered if they meet one of the 25 recognized hearsay exceptions, but the blanket permission to use hearsay under the deadman's statute would not apply).

All of these changes will improve the quality of fact-finding in Virginia courts by increasing the amount of testimony from living witnesses with knowledge that may be used by judges and juries in deciding cases, while balancing the credibility concerns that arise when competing live testimony and hearsay declarations are received.

These changes also reflect the wisdom of Judge Burks' observation in the 1927 *Epes* decision that, as other protections for the integrity of the trial process are evolved, restrictions on the use of testimony from live witnesses with knowledge should be eliminated. 135 Va. at 84, 115 S.E. at 714.

TEXT OF THE STATUTE SHOWING PROPOSED REVISIONS,
WITH FOOTNOTES EXPLAINING VARIOUS PROVISIONS[22]

8.01-397. ~~Corroboration required and~~ Credibility assessment and evidence receivable when one party is incapable of testifying.

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying ~~, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.~~ :

A. If an interested witness[23] has testified on behalf of the person incapable of testifying about disputed events or transactions between the person incapable of testifying and another party to the litigation, or an agent of the person incapable of testifying has given evidence about such disputed events or transactions[24], (i) no witness with knowledge shall be disqualified from testifying about the disputed events or transactions solely because one participant therein is incapable of testifying[25], and (ii) the credibility of all witnesses in the case, including their interests and motivations in testifying, shall be considered by the trier of fact[26], and (iii) subdivision B of this section shall be inapplicable.[27]

B. If no interested witness or agent has testified on behalf of the person incapable of testifying about disputed events or transactions between the person incapable of testifying and another party to the litigation, and if a party adverse to the person incapable of testifying has given testimony, not elicited by the representative of the party incapable of testifying,[28]

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[22] Stricken material is shown lined-through, and new material is underscored.

[23] The Code does not – at present – define "interested witness" and this proposed revision does not attempt to do so. The intention of the present revision is clarify that the statute is not applicable if an interested witness testifies for the decedent/disabled person, and to make no change in the existing body of law defining the forms of pecuniary interest that render a witness an "interested witness" for purposes of the deadman's section.

[24] The fact that an agent of the decedent/incapacitated party can be the provider of interested testimony was first recognized by the General Assembly in the deadman's act provisions over 100 years ago.

[25] This provision implement's long-standing Virginia law that testimony for the decedent/disabled person by an interested witness ends the applicability of the deadman's act. See Johnson v. Raviotta, 264 Va. 27, 563 S.E.2d 727 (2002). See generally Merchants Supply Co., Inc. v. Ex'rs of the Estate of John Hughes, 139 Va. 212, 216, 123 S. E. 355, 356 (1924); Wrenn v. Daniels, 200 Va. 419 (1958) (contract dispute).

[26] The Committee felt that directing the attention of the trial judge to the credibility issue in cases where conflicting testimony of party and interested witnesses was presented was natural and helpful.

[27] Clause (iii) is included to make it clear that the blanket hearsay exception does not apply to support admission of the decedent/disabled person's statements unless there has been oral testimony by the opposing survivor. Other hearsay exceptions, recognized in the Virginia law of evidence, could be used to offer the decedent/disabled person's prior statements, and if the normal hearsay exception requirements are met the statements could be received on that basis.

[28] This phrase implements a well-documented exception to the application of the statute that applies where an adverse party is called by the representative of the incapacitated party and testifies regarding the facts in

about disputed events or transactions between such adverse party and the person incapable of testifying, (i) all entries, memoranda, and declarations by the party so incapable of testifying made while he or she was capable, relevant to the matter in issue, may be received as evidence,[29] ~~in all proceedings including without limitation those to which a person under a disability is a party.~~ and (ii) the credibility of all witnesses and the weight to be given to all evidence heard in the case shall be considered by the trier of fact in light of the interests and motivations of the persons whose evidence is received.

C. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has been rendered ~~himself~~ unable to testify by an intentional self-inflicted injury.[30]

D. In all cases to which subdivision B of this section applies that are tried to a jury, the court shall expressly instruct the jury that in deciding the case and assessing the weight of the proof, it shall consider the interests and motivations of the persons whose evidence has been received in the case.

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dispute and that testimony is uncontradicted and not inherently improbable. Brown v. Metz, 240 Va. 127, 131-32, 393 S.E.2d 402, 404 (1990); Balderson v. Robertson, 203 Va. 484, 488, 125 S.E.2d 180, 184 (1962).

[29] This provision makes the blanket hearsay exception for statements of a decedent/disabled person applicable only where there has been oral testimony by the adverse survivor.

[30] This provision has been in the deadman section since 1988, and its basic effect is to make the statute inapplicable to cases of suicide. The effect of this provision is that the representatives of decedents who died by suicide do not have the right to demand special corroboration from the survivor, and do not have the right to offer hearsay without meeting one of the recognized hearsay exceptions. The Committee discussed this provision, and decided that the moral judgment of the General Assembly, along with concerns about the unfairness to the survivor of being placed at an evidentiary disadvantage due to another person's suicide, was not obviously wrong. Moreover, this provision has not presented the management problems that the general corroboration and hearsay provisions of the present statute cause. Nor is there any ambiguity about the applicable rule in suicide cases under this provision. The general section, Code § 8.01-396, makes all witnesses competent, and under this suicide provision the deadman section does not apply, so the party opposing the decedent would be competent to testify. In suicide cases, the representative of the decedent does not have any special hearsay exceptions (as provided when -397 applies) either. However, that situation is not inherently unfair to the decedent's side. There are about 25 Evidence law exceptions to the hearsay rule that could be used by the decedent's side to offer prior statements. Thus if the prior statements of the decedent are reliable enough to fit one of the regular hearsay exceptions, they will be admissible. In the absence of problems in Virginia practice in applying the suicide provision, the Committee resolved unanimously to refrain from proposing that this provision be substantively changed. Only a gender-neutralizing word change is proposed.

APPENDIX

NOTES ON THE DIVERSITY OF
CASE-BY-CASE CORROBORATION DECISIONS
under the Virginia Deadman's Statute

Example cases prior to 1950 decided under Code §6209 (originally written in 1919), from 1950-1976 under Code § 8-286, and from 1977 to present under Code § 8.01-397.

Traffic Accident Cases

- Collisions between two parties after which one party is deceased or incompetent, and for which there exist no other living witnesses. Survivor has been precluded from testifying in the following cases due to LACK OF CORROBORATION:
    - *Kimberlin v. PM Transport*, 254 Va. 261 (2002) (evidence of habit must be sufficiently numerous and regular in order to qualify as corroboration; testimony alone as to habit is not sufficient).
    - *Rice v. Charles*, 260 Va. 157 (2000) (recorded blood alcohol level and testimony of other witnesses that decedent saw survivor drinking beer was not sufficient to corroborate survivor's testimony that decedent appeared drunk and thus was contributorily negligent in her own death).
    - *Hereford v. Paytes*, 226 Va. 604 (1984) (credibility of surviving witness alone was not sufficient to corroborate the testimony).
- Survivor has been allowed to testify in the following cases due to CORROBORATION:
    - *Williams v. Condit*, 265 Va. 49 (2003) (defendant's interested spouse's testimony, which was offered *after* plaintiff's evidence).
    - *Penn v. Manns*, 221 Va. 88 (1980) (medical evidence and attendant circumstances show that complications from gun shot wound were likely both cause of car accident and cause of death of wounded passenger).
    - *Whitmer v. Marcum*, 214 Va. 64 (1973) (skid marks observed by state trooper corroborate survivor's testimony as to circumstances of accident).
- CORROBORATION NOT NECESSARY in these car accident cases:
    - Statute deemed inapplicable. *Sturman v. Johnson*, 209 Va. 227 (1968) (defendant's amnesia did not render him incompetent), *John Doe v. Faulkner*, 293 Va. 522 (1962) (hit and run driver is *unavailable*, not *incapable*).
    - *Gray v. Graham*, 231 Va. 1 (1986) (statements of decedent may be received as evidence in any action by or against the estate, even if not *offered* by the estate).
    - *Carter v. Nelms*, 204 Va. 338 (1963) (plaintiff's testimony was later stricken, so it did not require corroboration).
    - *Hoge v. Anderson*, 200 Va. 364 (1958) (when corroborated testimony offered by surviving party, decedent's statements regarding those issues made while capable may be received as evidence).

Medical Malpractice Cases

- Doctor's statements as a matter of law have been ruled NOT CORROBORATED in the following cases:
  - *Johnson v. Raviotta*, 264 Va. 27 (2002) (nurse's notes indicating "units of care," but not recording vital signs, not sufficient to corroborate either doctor's testimony that he instructed nurse to perform checks of vital signs every half hour or hour, or nurse's testimony that she did check decedent's vital signs; doctor's statement as to usual habits during physical examinations not sufficient to corroborate his testimony that he checked decedent's blood pressure twice at the examination prior to her hospitalization, that her blood pressure had dropped, and that this drop meant that he could not have diagnosed at that time the condition which eventually killed the patient).
  - *Diehl v. Butts*, 255 Va. 482 (1998) (testimony of neighbor and brother that decedent or his wife related to them that doctor had told decedent not to work was not sufficient to corroborate doctor's testimony as to the same given higher degree of corroboration required in confidential relationships).
  - *Taylor v. Mobil Corp.*, 248 Va. 101 (1994) (nurse's statement that decedent did not complain of chest pain during stress test does not corroborate as a matter of law doctor's statement that decedent did not complain to him of chest pain either, given her possible bias and conflicting evidence from the stress test).

Gift Cases

- CORROBORATION NOT ESTABLISHED for oral promise to make a gift when testimony of others was not sufficiently detailed. *Vaughn v. Shank*, 248 Va. 224 (1994), *Grace v. Virginia Trust Co.*, 150 Va. 56 (1928) (possession of key to lock box in addition to vague testimony also insufficient to corroborate gift of bond in box), *Nicholson v. Shockey*, 192 Va. 270 (1951) (signature of alleged donor on form account agreement did not corroborate gift of joint accounts to son).
- Corroboration was ESTABLISHED as to gift of bond by both grantees' possession of bond and testimony of others as to close relationship between grantor and grantees and to grantees' long service to grantor. *Shenandoah Valley Nat'l Bank v. Lineburg*, 179 Va. 734 (1942).

Deed Cases

- Corroboration determined NOT SUFFICIENT:
  - Recitals in written deed determine type of interest granted; oral testimony alone cannot alter these when grantor or grantee deceased. *Muth v. Gamble*, 216 Va. 436 (1975), *Roane v. Roane*, 193 Va. 18 (1951), *Crump v. Gilliam*, 190 Va. 935 (1950).
- Corroboration SUFFICIENT:
  - Deed including acknowledgement of conditions or intended possessor. *Hackett v. Emmett*, 215 Va. 726 (1975) (despite the fact that deed was not recorded, decedent's signature on copy of deed granting remainder interest to recipient and delivery to recipient of original through the mail sufficient), *Grimes v. People's Nat'l Bank of Pulaski*, 191 Va. 505 (1950) (text of deed and surrounding circumstances corroborate survivor's

testimony that he believed that incompetent seller had title to the property), *Harper v. Harper*, 159 Va. 210 (1932) (deed including acknowledgement of debt and lien corroborate testimony that survivors are due proceeds from land sale), *Battle and Wife v. Rock*, 144 Va. 1 (1926) (recital in deed releasing property from husband to wife corroborate testimony of others that farm was wife's property).

Will Cases

- Testimony was NOT CORROBORATED as to changes in a will when corresponding circumstantial evidence was ambiguous or nonexistent. *Clay v. Clay*, 196 Va. 997 (1955), *Truslow v. Ball*, 166 Va. 608 (1936).
- Testimony of non-interested parties was SUFFICIENT TO CORROBORATE changes to a will, or existence of extra-testatory parol contracts. *Everton v. Askew*, 199 Va. 778 (1958), *Clark v. Atkins*, 188 Va. 668 (1949), *Simpson v. Scott*, 189 Va. 392 (1949), *McNelis v. Colonial-American Nat'l Bank*, 163 Va. 284 (1934) (testimony of others plus possession of property).

Contract Disputes

- NO CORROBORATION was established in the following circumstances:
  - Written evidence supporting general concepts at issue did not corroborate specific terms of contract in dispute. *Wiltshire v. Pollard*, 220 Va. 678 (1980) (memoranda), *Seaboard Citizens Nat'l Bank v. Revere*, 209 Va. 684 (1969) (account books), *Trevillian v. Bullock*, 185 Va. 958 (1947) (evidence of other debts not at issue), *Noland Co., Inc. v. Wagner*, 153 Va. 254 (1929) (receipts including information about other projects as well), *Ratliff v. Jewell*, 153 Va. 315 (1929) (account book).
  - When testimony offered as corroboration was too vague to establish specifics, it was not sufficient. *Taylor v. Hopkins,* 196 Va. 571 (1954), *Kurtz v. Dickson,* 194 Va. 957 (1953), *Ingles v. Greear*, 181 Va. 838 (1943), *White v. Pacific Mutual Life Ins., Co.*, 150 Va. 849 (1928).
  - Testimony of other witnesses was not sufficiently corroborative when named party's testimony itself is uneven and contradictory. *Burton's Ex'er v. Manson*, 142 Va. 500 (1925).
- CORROBORATION was established in the following cases:
  - Testimony of other, non-interested parties. *Brooks v. Worthington*, 206 Va. 352 (1965), *Rorer v. Taylor*, 182 Va. 49 (1943), *Cannon v. Cannon*, 158 Va. 12 (1932) (contract for care also corroborated by plaintiffs' taking defendant's decedent into home), *Timberlake's Administrator v. Pugh*, 158 Va. 397 (1932) (circumstances and payment of property taxes also corroborated contract for property in return for care).
  - Written documentation or instruments. *Morris v. United Virginia Bank*, 237 Va. 331 (1989) (document signed by decedent in presence of non-interested witnesses), *Batleman v. Rubin*, 199 Va. 156 (1957) (small consideration paid by wife in return for antenuptial agreement), *Bickers v. Pinnell*, 199 Va. 444 (1957) (letter, notations on cancelled checks, and testimony to others), *Leckie v. Lynchburg Trust and Savings Bank*, 191 Va. 360 (1950) (account statement and testimony from uninterested parties), *Southern Materials Co. v. Marks*, 196 Va. 295 (1954) (invoice which laid out standard terms for contracts), *Purcell v. Purcell*, 188 Va. 91

(1948) (letter and statements to others), *Kirkorian v. Dailey*, 171 Va. 16 (1938) (record of sales and rent charges, contract for lease), *Southwest Motor Co. v. Kendrick*, 157 Va. 251 (1931) (reduction of rent and supplemental lease corroborate testimony of tenant as to promise of landlord to remedy poor condition of leased property), *Epes' Administrator v. Hardaway*, 135 Va. 80 (1923) (written instrument and status of son as mother's official agent).

- INTERESTED PARTIES may not provide corroboration in contract disputes.
  - Third party is still deemed interested if his sale of stock or other assets in a company which is a named party in the case at issue was for the sole reason of enabling that third party to introduce testimony without corroboration as an uninterested individual. *Atlantic Coast Realty Co. v. Robertson's Ex'er*, 135 Va. 247 (1923).
  - Individual with similar claims who has not joined as a party in present action is not "interested" and may corroborate party's testimony. *Arwood v. Hill's Administrator*, 135 Va. 235 (1923).
- EXPERT WITNESS CAN CORROBORATE statement of a party who hired him, if an adverse party testifies first. *Haynes v. Glenn*, 197 Va. 746 (1956) (expert testimony to value of items stolen which party had contracted with other party to keep safe).

Loans

- Corroboration was ESTABLISHED in:
  - *Morrison v. Morrison*, 174 Va. 58 (1939) (cancelled checks corroborated existence of a loan, testimony established existence of will directing debts to be paid).
  - *Davies v. Lucy*, 148 Va. 132 (1927) (evidence of cancelled checks for repayment of another obligation corroborated non-payment of the contested loan).

Other Cases

- Corroboration was NOT established in:
  - *Gillespie v Somers*, 177 Va. 231 (1941) (letters contradicted the survivor's testimony).
  - *Heath v. Valentine*, 177 Va. 731 (1941) (notes directly contradicted testimony).
  - *Wills v. Chesapeake Western Rwy, Co.*, 178 Va. 314 (1941) (testimony of bond holder that he did not order trustee to sell property held by trustee to secure bond payments, and that he was not aware that property had been sold, was not corroborated by the fact that the trustee paid bond holder interest due on the bond).

Corroboration not necessary when:

- *Officer* of corporate party who engaged in transaction was the deceased. *Union Trust Corp. v. Fugate*, 172 Va. 82 (1939)
- Testimony was offered by opposing party, if not inherently improbable. *Balderson v. Robertson*, 203 Va. 484 (1962) (car accident), *Brown v. Metz*, 240 Va. 127 (1990) (promise to make gift), *Enright v. Bannister*, 195 Va. 76 (1953) (delivery of deed), *Economopoulos v. Kolaitis*, 259 Va. 806 (2000) (testimony by survivor regarding validity of new will elicited by adverse parties during their portion of the case; despite fact that survivor was beneficiary to will and had previously had a business relationship with decedent, which, had it continued, would have given rise to a presumption of fraud, his testimony does not need to be corroborated).
- An interested party testifies on behalf of decedent. *Paul v. Gomez*, 118 F. Supp. 2d 604 (2000) (car accident), *Wrenn v. Daniels*, 200 Va. 419 (1958) (contract dispute).
- Living parties are disputing validity of a will. *Croft v. Snidow*, 183 Va. 649 (1945).
- Witnesses are not interested parties (contract disputes). *Scholz v. Standard Accident Ins. Co.*, 145 Va. 694 (1926) (witness was merely agent of an interested party). Nor is it necessary if general corroboration as to item at issue is established. *Downing v. Huston, Darbee, Co.*, 149 Va. 1 (1927) (only have to corroborate payment of debt at issue), *Doughty v. Thornton*, 151 Va. 785 (1928) (do not have to corroborate specific amount of payment, if can corroborate general contract for care).

Other Corroboration issues:

- *Adams v. Adams*, 233 Va. 422 (1987) (decedent's statements made while alive were admissible under the statute).
- *Ricks v. Sumler*, 179 Va. 571 (1942) (case remanded for proof of corroboration which was not at issue in prior trial).
- *Mapp v. Byrd*, 169 Va. 519 (1938) (court may decide case on other evidence if it is sufficient after eliminating all contradictory and non-corroborated testimony).

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FAGGERT & FRIEDEN, P.C.

Attorneys and Counselors at Law

September 9, 2003

VIA FEDERAL EXPRESS

Thomas W. Williamson, Jr., Esquire
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Richmond, Virginia 23230

Re: Report of Committee on Recovery of Attorneys' Fees on Appeal

Dear Tom:

The Committee was formed to explore an issue which arose in the following way. Plaintiff and defendant entered into a real estate sales contract which provided, as many contracts do, that the prevailing party shall recover attorneys' fees incurred in the enforcement of the contract. The defendant defaulted and suit was instituted in the Circuit Court of the City of Virginia Beach. The case went to trial. The plaintiff prevailed, recovering not only compensatory damages but attorneys' fees and costs incurred up to the time of trial. The defendant appealed to the Supreme Court of Virginia which refused the petition for appeal. Plaintiff filed a motion in the Circuit Court to recover the additional fees and costs it had incurred on appeal. The Circuit Court had already concluded that plaintiff was entitled to attorneys' fees and costs up to the time of trial; attorneys' fees and costs for appeal were not sought at the time of trial because no one knew at the time whether defendant would appeal, what the outcome of any appeal would be, or the amount of attorneys' fees and costs that might be incurred on appeal. The defendant objected to plaintiff's motion, arguing that the Circuit Court was without jurisdiction. The Circuit Court agreed, leaving plaintiff to file a separate action to recover his fees and costs. A copy of the Circuit Court's order is attached to this Report.

The issue studied by the Committee was a narrow one, directed solely to the power and ability of a circuit court to award attorneys' fees and costs incurred on appeal to an appellee who had already been awarded attorneys' fees and costs by the circuit court when a petition for appeal was refused by the Supreme Court (and, if a petition for rehearing had been filed, the petition had been denied). The Committee's charge was not to consider whether attorneys' fees could be recovered where the right to recover did not exist under present law; hence, its study was restricted to those situations where a litigant had already been awarded attorneys' fees and costs

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in the circuit court pursuant to a contract, statute or other applicable law (applicable law, for instance, including the right to recover attorneys' fees in cases of fraud, Prospect Development Co. v. Bershader, 258 Va. 75, 515 S.E.2d 291 [1999]). Nor did the Committee intend to tread on the power of an appellate court to deal with attorneys' fees in cases in which there is an appeal of right or an appeal has been granted. (Civil cases do not go to the Court of Appeals by petition. Those that get there generally go as a matter of right, *e.g.*, civil contempts. Similarly, if an appeal is granted by the Supreme Court of Virginia, that Court can determine the issue of attorneys' fees incurred on appeal, and can either decide the issue itself or remand to the circuit court, *see* Shepherd v. Davis, 265 Va. 108, 126, 574 S.E.2d 514 [2003][Supreme Court remanded case for determination of attorneys' fees incurred on appeal]). The issue studied by the Committee arises only when a petition for appeal is refused by the Supreme Court and there is no action by the Court, by remand or otherwise, on the fees and costs incurred on appeal.

The Committee agreed that a mechanism should be devised to allow the circuit courts to consider and determine post-appeal applications for attorneys' fees in these limited instances without requiring the successful party to file a new and separate action for fees. It initially considered a change to Va. Code §8.01-682 ("What damages awarded appellee"). However, it was wary of a statutory change going to the jurisdiction of the circuit courts and concluded that a statutory change might result in unintended, and indeed, unforeseen consequences. With considerable help from Kent Sinclair, the Committee agreed to recommend to the conference that a change be made in the existing Rules of the Supreme Court. If the consensus of the Conference agrees, the proposed Rule changes would be submitted to the Judicial Council, which meets in April.

The Committee recommends the addition of Rule 1:1A which would read as follows:

> (a) Notwithstanding any provision of Rule 1:1, in any civil action at law or suit in equity in which a petition for appeal is denied by the Supreme Court (and, if a petition for rehearing has been filed pursuant to Rule 5:20, such petition has been denied), an appellee who has recovered attorneys fees and/or costs in the circuit court pursuant to a contract, statute or other applicable law may make application for additional attorneys' fees and costs incurred on appeal in the circuit court in which judgment was entered within thirty (30) days after denial of the petition for appeal or, if a petition for rehearing has been filed pursuant to Rule 5:20, after denial of such petition. The application may be made in the same case from which appeal was taken. The appellee shall not be required to file a separate suit or action to recover the fees and costs incurred on appeal, and the circuit court shall have continuing jurisdiction of the case for the purpose of adjudicating the application. The circuit court's order granting or refusing the application, in whole or in part, shall be a final order for purposes of Rule 1:1.

> (b) Nothing in this Rule shall restrict or prohibit the exercise of any other right or remedy for the recovery of attorneys fees or costs, by separate suit or action, or otherwise.

Subsection (b) was added to make clear that a successful party could proceed in accordance with subsection (a) but was not required to do so. All other rights and remedies for recovering appellate fees and costs remain intact, including the right to pursue a separate action.

The Committee also recommends adding language to Rule 5:20 to alert practitioners to the existence of Rule 1:1A. The recommended change to 5:20 is as follows:

> Upon denial of a petition for appeal and any petition for rehearing, any appellee who has recovered attorneys fees' and costs in the circuit court may make application for additional fees and costs incurred on appeal pursuant to Rule 1:1A.

J. Gray Lawrence, Jr., Chairman
Douglas P. Rucker, Jr., Esquire
Susan R. Blackman, Esquire
The Honorable Rudolph Bumgardner, III
Frank K. Friedman, Esquire

c: Douglas P. Rucker, Jr., Esquire
Susan R. Blackman, Esquire
The Honorable Rudolph Bumgardner, III
Frank K. Friedman, Esquire

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CHRISTAKIS J. PAPHITES &
DEBORAH C. PAPHITES,

Plaintiffs,

AT LAW NO.: **CL01-2509**

v.

ATLANTIC COAST BUILDERS, INC.

Defendant.

ORDER

ON February 28, 2003 this action came before this Court for hearing upon plaintiffs' Motion for additional attorney's fees. and was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that more than 21 days have passed since the entry of the final order in this matter and therefore this Court has no jurisdiction, pursuant to Rule 1:1 of the Supreme Court of Virginia, to hear plaintiffs' motion, it is hereby

ADJUDGED, ORDERED and DECREED that plaintiffs' Motion for additional attorney's fees be, and hereby is DENIED.

ENTER: 3/12/03

Judge

I ASK FOR THIS:

p.d.
Kellam T. Parks, Esquire

SEEN: AND OBJECTED TO.

p.q.
Wm. Lane Nuckols

PREPARED BY
STALLINGS
AND
RICHARDSON
VIRGINIA BEACH,
VIRGINIA

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BOYD- GRAVES CONFERENCE
October 24 – 25, 2003

REPORT OF COMMITTEE ON PRE-SUIT DISCLOSURE OF INSURANCE COVERAGE

Issue:

Whether Virginia Code § 8.01-417 should be amended to add a provision which would require a motor vehicle liability insurance company to disclose the liability limits of its insurance agreement upon written request of an attorney representing a plaintiff and prior to the filing of a civil action?

Chair: Elizabeth M. Allen, Esq.

Members: James W. Walker, Esq.
Mark E. Rubin, Esq.
Philip C. Coulter, Esq.
John M. Claytor, Esq.

REPORT OF COMMITTEE ON PRE-SUIT DISCLOSURE OF INSURANCE COVERAGE

The Committee on Pre-Suit Disclosure of Insurance Coverage, composed of James W. Walker, Mark E. Rubin, Philip C. Coulter, John M. Claytor and Elizabeth M. Allen, considered whether Virginia should amend Virginia Code § 8.01-417 to require a motor vehicle liability insurance company to disclose the liability limits of its insurance agreement upon the written request of an attorney representing a plaintiff and prior to the filing of a civil action.

During the 2003 Session of the General Assembly, Delegate Terry Kilgore sponsored, H.R. 2178, a bill which provided as follows:

> 1. That § 8.01-417 of the Code of Virginia is amended and reenacted as follows:
>
> § 8.01-417. Copies of written statements or transcriptions of verbal statements by injured person to be delivered to him; declarations pages; insurance agreements.
>
> A. Any person who takes from a person who has sustained a personal injury an signed written statement or voice recording of any statement relative to such injury shall deliver to such injured person a copy of such written statement forthwith or a verified typed transcription of such recording within ~~thirty~~ 30 days from the date such statement was given or recording made, when and if the statement or recording is transcribed or in all cases when requested by the injured party or his attorney.
>
> *B. [~~Upon the written request~~ After written notice of representation] of an injured person [~~or~~,] his attorney [~~made~~ may,] prior to the filing of a civil action for personal injuries [~~,~~ sustained as a result of a motor vehicle accident, request from] any person who has issued an insurance agreement as described in Rule 4:1(b)(2) of the Rules of the Supreme Court of Virginia [, and that person] shall disclose the limits of liability of such insurance agreement in writing within 30 days of the receipt of such request. The disclosure shall be made by sending a copy of the declarations page of such agreement or its equivalent setting forth the limits of liability. The disclosure shall be provided whether or not the person who issued the insurance agreement contests the applicability of the agreement to the*

injured person's claim. Information concerning the insurance agreement is not by reason of disclosure pursuant to this subsection admissible as evidence in trial. Nothing in this subsection shall be deemed to abrogate the provisions of Rule 4:1(b)(2) of the Rules of the Supreme Court of Virginia.

House Bill 2178 passed the House and was reported out of the Senate Courts of Justice Committee. The bill failed on the Senate floor after it was opposed by Senator John H. Chichester. It lost by only a few votes. Delegate Kilgore has indicated he will sponsor the bill again in the next General Assembly.

The Committee convened in a telephone conference on May 30, 2003 and discussed H.B. 2178, its language and contents. At the conclusion of the discussion, it was the consensus of the Committee that the issue be brought before the Boyd-Graves Conference in October. All Committee members favored enactment of the amended statute, although one or two members reiterated this was their personal position and did not necessarily reflect the views of their insurance company clients.

The reasons given by Committee members for favoring the statute's adoption were many. It would promote judicial economy. Enactment of the statute would likely aid in case resolution through settlement. Settlements generally benefit the individual insured. It seems silly to require a $150 filing fee just to allow an attorney to obtain insurance information. Lawyers would be reassured knowing they no longer have to rely on a claims representative's oral representation as to the dollar amount of insurance limits.

Committee members observed that the statute, as drawn, is narrow. It is limited to claims involving motor vehicle accidents only and requires a written request made by an attorney. The provision cannot be used to secure insurance information in product liability cases or in general commercial litigation.

Committee members themselves had no serious reservations about the merits of the legislation. Mark Rubin explained the arguments heard against the proposed amendment on the Senate floor. They reflected the concern that "if you tell plaintiffs' lawyers what the insurance coverage is, they'll only ask for more money". Insurance companies suggested they would prefer to maintain the option of keeping coverage information private until they absolutely have to divulge it.

The Committee discussed several related issues. One Committee member, noting the absence of any remedy in the proposed legislation for an insurer's

refusal to disclose or for inaccurate or incomplete disclosure, thought the provision was better placed within Title 38.2—perhaps as a prohibited unfair claims practice—where a remedy directly against the insurer could be provided. Most Committee members preferred that the legislation be placed in Title 8.01 for practical reasons and because it fits well within the current provisions of § 8.01-417. The Committee concluded that insurers would very likely comply with the statute despite the absence of a remedy, noting that insurers have routinely done so with respect to statements taken from injured persons as required by the current version of § 8.01-417, which also lacks a remedy for noncompliance.

One member queried how the proposed legislation would affect large self-insurance plans and cases in which there are various layers of coverage. The Committee agreed the statute would probably not resolve all questions of this kind in substantial cases, but would provide adequate information in the large majority of motor vehicle cases. Finally, the Committee concurred it would not be placing too onerous an obligation on the insurance companies to ask them to produce a simple declaration sheet (as opposed to the whole policy). Requests would come from attorneys only, which would be another limiting factor.

With respect to the language of H.B. 2178, the Committee suggested only one change. The phrase "such insurance agreement" should be changed to "all such insurance agreements". This recommendation is embodied in the attached proposed amendment to Virginia Code § 8.01-417.

Elizabeth M. Allen, Allen
Chair

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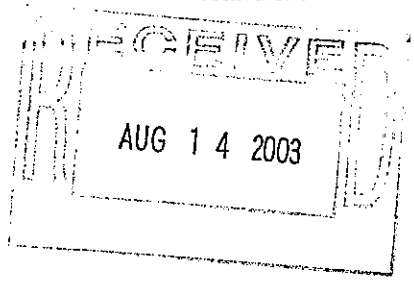

Mr. Thomas Williamson, Esquire
Williams & Lavecchia
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REPORT

Re: Boyd Graves Committee on the Study of Attorney Issued Subpoenas and Whether to Permit Attorneys to Serve Within 10 days of Trial.

Charge: This committee was charged with determining whether or not attorney's should be able to issue subpoenas within 10 days of trial.

Background: The original statutory proposals contained restrictions against subpoenas being issued by an attorney directly within 10 days of trial (or the date of return) while subpoenas issued by the clerk or others (notaries, police officers, prosecutors, or others) could be issued at any time. The original provision was amended and as adopted by the legislature now provides that attorneys may not issue subpoenas within 5 days of trial or when the return is to be made. The committee addressed the issue of whether there is good cause to preclude attorneys from issuing subpoenas within 5 days of the return date.

The committee does not believe there is good cause for the distinction between attorney-issued subpoenas and subpoenas issued by the clerk or others. In fact, in many of the busier jurisdictions it is extremely difficult to get a subpoena issued close to a trial date by the clerk because those jurisdictions are backed up and typically use a computer system which issues subpoenas overnight. Because of cutbacks in clerks offices and delays in entering the data it is almost impossible to get subpoenas issued within 5 days of a court date in some jurisdictions, and if it can be done, it often requires requesting a special favor of the clerk. Code section § 8.01-407, which provides that attorney- issued subpoenas cannot be issued within 5 days, also provides in subsection A that any other subpoena that is issued within 5 days of its return may or may not be enforced; that is a judge may choose not to enforce a subpoena that is issued within 5 days. The committee is of the opinion that provision is sufficient protection of any potential abuse with

attorney issued subpoenas along with the caveat that attorney issued subpoenas are subject to sanctions under § 8.01-271.1 of the code.

2. Further, with the current trend in requiring reporting the names of witnesses, opposing counsel usually know who the witnesses are who will be subpoenaed. If that is a concern, the code could be amended to include language which indicates that an attorney issued subpoena would require that the issuing attorney cause a copy be received by opposing counsel within one business day of the date issued, by telephone facsimile, e-mail, federal express, or any other means.

In conclusion, your committee finds no good cause to support a distinction between the handling of attorney- issued subpoenas and other subpoenas, and recommends that the Boyd-Graves Conference support elimination of the prohibition prohibiting attorney-issued subpoenas being issued within five days.

Yours,

Steven M. Garver,
Committee Chair

CC: Thomas Appler
Leonard Brown
John Cook
Barbara Williams

SMG/ro

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REPORT OF 2003-04 BOYD-GRAVES CONFERENCE COMMITTEE ON INTERLOCUTORY APPEALS

A. Amendment of *Virginia Code* Section 8.01-670.1 To Allow For An Interlocutory Appeal Even Though One Party Opposes It

The Virginia statute providing for interlocutory appeals by permission currently reads as follows:

> § 8.01-670.1. Appeal of interlocutory orders and decrees by permission -- When, prior to the commencement of trial, the circuit court has entered in any pending civil action, except any matters appealable to the Court of Appeals pursuant to § 17.1-405, an order or decree that is not otherwise appealable, any party may file in the circuit court a statement of the reasons why an immediate interlocutory appeal should be permitted. The statement shall include a concise analysis of the statutes, rules or cases believed to be determinative of the issues and request that the court certify in writing that the order or decree involves a question of law as to which (i) there is substantial ground for difference of opinion, (ii) there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) the court and the parties agree it is in the parties' best interest to seek an interlocutory appeal. Within ten days of such certification by the circuit court, a petition for appeal may be filed with the appellate court that would have jurisdiction in an appeal from a final judgment in the proceeding. If the appellate court determines that the certification by the circuit court has sufficient merit, it may, in its discretion, permit an appeal to be taken from the interlocutory order or decree and shall notify the certifying circuit court and counsel for the parties of its decision. No petitions or appeals under this section shall stay proceedings in the circuit court unless the circuit court or appellate court so orders. The consideration of any petition and appeal by the appellate court shall be in accordance with the applicable provisions of the Rules of the Supreme Court and shall not take precedence on the docket unless the court so orders.

The Committee considered a proposal to broaden the provision for interlocutory appeals by amending the language in subsection (iv) in the second full paragraph to read as follows:

> (iv) that the court and at least one of the parties agree that the interests of justice will best be served if an interlocutory appeal is sought

The Committee considered arguments for and against this change. Some Virginia lawyers believe that the present statute is not workable. An informal survey of judges and lawyers revealed only one instance of the use of this statute. The requirement that all parties must agree in order for an interlocutory appeal to be taken means that one party can always block an interlocutory appeal, even if there might be good reasons to allow such an appeal. There may well be cases where an early appeal to the appellate courts to resolve a key issue would result in significant judicial economy but this statutory procedure cannot be used because of the ability of any one party to frustrate its use. Some Committee members felt that sound arguments can be made in favor of amending the statute as set forth above, since even with this amendment the danger of substantially increased use of interlocutory appeals would be protected against not only by the strict requirements of the statute as to the types of issues that may be raised, but also by the requirement that the trial judge agree with the moving party and even then the appellate court still has the discretion, clearly given in the statute, to refuse to hear an appeal under this statute for any reason.

On the other hand, the Committee members were mindful of the concerns voiced during the legislative process last year. The Virginia Bar Association initially proposed an interlocutory appeals statute that would not have required the consent of all parties.

The Virginia Trial Lawyers Association (the "VTLA") vigorously opposed this proposal. The VTLA and many Virginia lawyers expressed concern that the interlocutory appeals procedure could result in cases becoming stalled while an interlocutory appeal was taken, and this could result in a significant change in the usual time to trial and judgment. As a result of these concerns and the VTLA opposition, the statute was changed to require consent of both parties.

Yet, some lawyers continue to feel that in its present form the statute creates a procedure which is very difficult to use, and of very limited usefulness.

The Committee failed to arrive at a clear consensus as to whether the statute should be amended, but voted in favor of submitting the proposed change and this report to the full Conference for its consideration without any recommendation by the Committee. Although both the current and the new version of the statute provide that the trial court proceedings would not be stayed unless the circuit court or the appellate court so orders, the Committee felt that it was likely that a stay would be granted where an interlocutory appeal was allowed, since in many cases the reason for taking and allowing an interlocutory appeal would be to obtain an appellate decision without having to first complete all the proceedings in the trial court.

B. Enactment of a New Statute or Rule To Allow for Entry of Appealable Orders in Certain Cases Involving Multiple Claims or Parties

The Committee also considered the possibility of enactment of a new statute or Virginia Supreme Court Rule which would allow for entry of a "final order" from which an appeal could be taken even though the case involved multiple claims and/or multiple parties, and some claims as to some parties remained pending. The Committee felt there

are probably some cases where this type of procedure would be useful and would remedy the problem that exists, for example, where one party is dismissed out of a case completely, but cannot appeal for months or years because the case remains pending as to other parties. On the other hand, none of the members on the Committee were aware of information indicating that this was a common problem. Thus, the Committee decided to refer possible new language to the Conference for its consideration, but without a recommendation for or against its adoption.

New *Virginia Code* Section 8.01-670.2 [or New Virginia Supreme Court Rule 1:1(b)]

"When more than one claim for relief is presented in an action or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Comparison of new *Virginia Code* Section 8.01-670.2 [or New Rule 1:1(b)] and Fed. R. Civ. P. 54(b)

The bracketed language shown in italics and bold typeface below appears in Fed. R. Civ. P. 54(b), but is not included in the new Virginia statute or rule:

"When more than one claim for relief is presented in an action ***[, whether as a claim, counterclaim, cross-claim, or third-party claim,]*** or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. ***[In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.]"***

Explanation of possible new statute or rule

The new language is based on Fed.R.Civ.P Rule 54(b), which permits a court following the specified process (and using the particular language described in the Rule) to enter a final (and thus appealable) judgment as to one or more claims or parties in a multi-claim or multi-party case.

Fed.R.Civ.P. 54(b) adds certainty to the appeal process by specifying what in essence are "magic words" to indicate that a judgment is final as to certain claims or parties. The new *Virginia Code* §8.01-670.2 under consideration contains a more generic

reference to claims than Fed.R.Civ.P. 54(b) to account for Virginia's "nomenclature," and also deletes Fed.R.Civ.P. 54(b)'s statement as to the meaning of not having the "magic words" in the order (because these consequences are described elsewhere in Virginia statues and rules).

Unlike current *Virginia Code* § 8.01-670.1, the process envisioned in *Virginia Code* § 8.01-670.2 could be sought by one or both parties, or triggered by the Court acting *sua sponte.*

As with Fed.R.Civ.P. 54(b), it would be anticipated that a court relying on this process would explain why there is "no just reason for delay." Any orders meeting this criterion would have all the effects of a final judgment, including the ability for the adverse party to execute upon the judgment (absent a stay), the triggering of the running of interest, and other effects.

Respectfully submitted,

2003-04 Boyd-Graves Conference
Committee on Interlocutory Appeals

The Honorable William H. Ledbetter, Jr.
Thomas E. Spahn, Esquire
John W. Zunka, Esquire
Christopher A. Meyer, Esquire
Roger T. Creager, Esquire

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REPORT OF THE BOYD-GRAVES COMMITTEE ON ESTABLISHMENT OF A BUSINESS COURT WITH JURISDICTION LIMITED TO COMPLEX BUSINESS CASES

BACKGROUND

With the practice of law having become increasingly specialized over the last 20 to 30 years, lawyers are often appointed to the bench with limited exposure to the myriad kinds of cases that they are presented with as judges. Judges whose careers were devoted to criminal defense, domestic relations, or personal injury litigation are often called upon to preside over complex business litigation. While the trial bench in Virginia boasts extremely capable jurists, there are undoubtedly occasions when judges are presented with commercial cases that present issues with which they have little or no familiarity or experience. Moreover, as criminal dockets swell, judges' ability to set aside weeks on their dockets to try the occasional lengthy commercial dispute may be extremely limited.

To address these and other concerns, several states have instituted procedural and other systemic changes in their judicial systems that have been referred to generally as "business courts." As is summarized more fully below, the business court models and experiments range from the long-standing Delaware Chancery Court, which adjudicates most civil matters involving Delaware corporations, to North Carolina's appointment of a single Judge of the Business Court who travels the state to take over cases designated as complex business cases, to pilot projects in several states where commercial disputes are placed on a separate track within the existing court system.

The common goal of the various business court models is to improve the quality of decisions made in business litigation by increasing the consistency, predictability, and accuracy of the application of principles of business law to specific disputes. Many states that have created business courts have designated a limited number of sitting judges (or newly-appointed judges) to decide only commercial matters – in virtually all cases, consisting of judges with significant business backgrounds. In many states, business courts also strive to enhance the efficiency with which business disputes are resolved by focusing on early settlement or ADR and by streamlining the pretrial and trial procedures. In those states with separate business courts, the entire court system can benefit because of the easing of the burdens that can be imposed on judges by large and complex commercial cases, which often involve significant discovery disputes or proceedings, extensive motions practice, and a need for published opinions.

SUMMARY OF BUSINESS COURT MODELS

Some form of business court has already been established in California, Delaware, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, and Wisconsin. Other states reportedly

considering whether to establish a business court include Arizona, Colorado, Georgia, Maine, Michigan, Minnesota, and Ohio.

Set forth below is a representative sample of the various business court models in effect.

Illinois. In the Cook County Circuit Court, the chief judge assigns several judges to handle commercial cases. Cases satisfying the criteria for a business case are automatically assigned to the commercial calendar, although the rules of procedure remain the same as with other non-business cases.

Delaware. Although not technically a separate "business court," Delaware's Chancery Court is generally thought of as the prototype of a separate court that resolves business disputes. The Delaware Chancery Court's jurisdiction extends to civil matters involving Delaware corporations, and the court has years of experience in resolving, and published jurisprudence in the area of, business and commercial disputes. The court employs separate procedural rules, including special summary procedures for business cases. The court's remedial powers are limited, however, to equitable relief.

Maryland. In 2002, Maryland created by statute a Business and Technology Court that focuses on resolving business disputes in general and on issues important to companies in the technology industry. In each circuit, the chief judge assigns one judge to be trained in business issues, and that judge must commit to spend five years in the Business and Technology Court. All decisions must be published, and cases are automatically assigned to the court's docket.

North Carolina. In 1995, the North Carolina Supreme Court created a separate Business Court and assigned a single judge, The Honorable Ben Tennille, to that Court. Judge Tennille boasts a long and distinguished career in litigation at a prominent North Carolina firm and an in house career at one of the state's larger corporations. Upon motion of the parties or on the initiative of the trial judge, the Chief Justice assigns cases to the Business Court (although there is no definition of what is a complex business case meriting such assignment). There are slightly different rules of practice and procedure before the Business Court, including rules promoting the use of technology, procedures for real time transcription, and the posting of transcripts of Business Court proceedings on the Court's website.

New York. Since 1995, the New York Supreme Court has had a division dedicated to commercial litigation operating in five counties, including those encompassing Manhattan and Rochester. The Court designates specific judges in those jurisdictions to hear only commercial litigation. The division in New York County also offers court-annexed ADR, in which parties may obtain the services of a neutral of their choice from a roster of specially trained professionals experienced in commercial matters.

Pennsylvania. In 2000, the Court of Common Pleas established a new track for business litigation within its established structure. Guidelines explaining which

cases would be assigned to the business court program were created and circulated. The court also offers an ADR program to the parties.

PROS AND CONS OF BUSINESS COURTS

Pros. The advantages of a business court are several. One of the most important is the ability to assign complex business disputes to a judge with the experience, training, and interest in presiding over commercial disputes. Reflecting the increasing specialization in the law, not all judges bring to the task a great deal of experience with business issues. Judges with an existing expertise in business matters may be better able to adjudicate the wide variety of issues presented by complex commercial cases without need for substantial research and preparation. Another advantage is the flexibility allowed the judge and parties in scheduling hearings and trials, without having to accommodate a busy criminal docket or domestic relations docket. Judges responsible only for a commercial docket may be better able to take an active role in the management of such cases. Because business litigation often involves significant discovery disputes and a substantial motions practice, with heavy briefing, business courts may also be better able to handle the resolution of such matters, particularly where written opinions are called for. Business courts also offer the possibility of separate rules of procedure, which may entail the use of ADR procedures and other non-traditional means of resolving disputes. In Virginia, commercial litigators are often frustrated with the rules barring the use of depositions to support motions for summary judgment – rules that could be relaxed or eliminated in a separate business court or in a separate track for business disputes. While not a litigation concern, another perceived advantage of a business court is the attraction of businesses to states that provide such a business-friendly innovation.

Cons. There are also potential pitfalls in a state's consideration of instituting a business court. First and foremost is the perception that some may draw that parties to business cases would enjoy a higher quality of justice or a higher level of judicial resources at the expense of other cases. A second potential concern is that of judges themselves, many of whom will not favor a step in the direction of specialization on the bench and currently enjoy the occasional complex business case that arises on their dockets. With dockets filled with often repetitive and routine domestic, criminal, and other matters, many circuit court judges relish the opportunity to adjudicate complex business disputes and would not wish for such cases to be assigned elsewhere. Finally, any business court model that entails significant costs to implement will undoubtedly draw criticism from both the General Assembly and the Supreme Court in this era of budget shortfalls.

THE COMMITTEE'S RECOMMENDATION

The Committee studied materials from the various jurisdictions that have instituted a business court model and discussed at length whether there was a need for a business court in Virginia. The views expressed ranged from "Yes, we need to do this,"

to "If it ain't broke, don't' fix it." After two meetings of debate about whether to press forward with consideration of the various business court models, the Committee concluded that it needed more guidance from the Conference before a determination of which of the various business court models in existence, if any, might be recommended for use in Virginia.

Consequently, the Committee asks that the Conference indicate whether there is enough support for the adoption of *some* business court model to justify the Committee moving forward with a recommendation of one or more models for consideration by the Conference next year. If the Conference does not support even the concept of a business court in Virginia, the Committee will not undertake to weigh the pluses and minuses of the various models and recommend a specific model or models to the Conference.

Thomas L. Appler
John Barry Donohue, Jr.
J. Gray Lawrence, Jr.
Stephen M. Sayers
The Honorable Clifford R. Weckstein
David G. Shuford, Chairman

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Virginia Code § 8.01-399 - Communication With Practitioners of the Healing Arts

A Report to the Boyd-Graves Conference
Fall, 2003

From: Roger W. Mullins, Chair
M. Pierce Rucker
Howard C. McElroy
Charles J. 'Chuck' Zauzig III

This committee was requested to review §8.01-399 to determine whether to recommend an amendment to expressly state that a treating physician can be required to testify about the reasons for a diagnosis, and, secondly, whether the statute should be applicable to associates and partners of a treating physician. Attached is a copy of the entire statute as amended by the General Assembly in 1998, following a previous report to and action by the Boyd Graves Conference in 1997, and as amended in 2002. There has arisen questions as to the interpretation of the statute as amended whereby circuits are divided in applying the statute during discovery and trial. At least one circuit Judge has refused to permit any inquiry of the treating physician as to the reasons for and basis of a diagnosis of the condition and treatment of the patient because such are 'opinions' and prohibited by the terms of the statute. Other circuit Judges have permitted such inquiry because such are 'facts' and disclosure is permitted by the statute.

The second issue, whether the statutory privilege should apply to a colleague who is associated with or a partner of the treating physician, is currently one of several issues in a case in which a writ has been granted and which is pending appeal. A Bill is expected to be introduced in 2004 to amend the statute to state that the privilege does extend to associates and partners.

The committee met initially by telephone conference to discuss the statute and determine the particular concerns. Pierce Rucker became the chief proponent of a change to address the first issue, and Chuck Zauzig became the proponent of the change relating to the second issue. Following a lively discussion, Pierce Rucker was asked to draft his proposed amendment to address issue number one. Sandy Snead volunteered to obtain and disseminate information relating to the medical ethics of disclosure of confidential information. Chuck Zauzig was asked to provide the committee with a draft of the anticipated Bill to amend the statute to address the second issue.

The committee met by telephone conference on July 29, 2003 with a copy of a draft proposal from Pierce to address issue number one, and a copy of the Bill to amend the statute to address number two. Again, a lively debate was had in which Chuck Zauzig was adamant that no amendment of the statute permitting inquiry as to differential diagnoses would be acceptable to the plaintiffs bar. He stated he has been involved annually in the legislative process resulting in the

amendments to the statute and he believed the current language be a compromise reached by the adverse parties after a long and difficult legislative battle. He stated that the proposal by Pierce was an attempt to gain something that was compromised during the battle. We discussed whether to consider a change stating that such inquiry would be permissible only when plaintiff called the treating physician as a witness in support of the claim. That proposal also was not persuasive. Pierce asked for other proposals to amend the statute and there were none. Howard indicated he generally agreed that such inquiry should be permitted when the treating physician is called by the plaintiff to support the claim, but he agreed with Chuck that a consensus would not likely be achieved. Sandy felt the statute could be amended to make it clear that the privilege must be clearly waived by the patient in order for any inquiry about reasons for diagnosis to be permitted. He, however, was unable to articulate a proposal. At the request of Pierce Rucker, a vote was taken on his proposal (Appendix B) resulting in a 3-2 vote against.

Chuck Zauzig then stated that his proposal to amend the statute to apply to associates and partners of the treating physician would likely suffer the same fate as issue number one and, further, that he has an appeal granted in a case in which this issue is a part. He asked to withdraw his proposal since the appeal was granted and let it take its' course. The committee agreed with his assessment and the proposal was not considered.

August 1, 2003

_____

Roger W. Mullins

Appendix A

§ 8.01-399. Communications between physicians and patients. —

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnosis or treatment plan of the practitioner, as documented in the patient's medical record, during the time of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act, (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of the Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of the Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of the practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law. (Code 1950, § 8-289.1; 1956, c. 446; 1966, c. 673; 1977, c. 617; 1993, c. 556; 1996, cc. 937, 980; 1998, c. 314; 2002, cc. 308, 723.)

The 2002 amendments substituted "that" for "which" in subsections A and F and subdivision D 3; inserted "or as provided in this section," after "consent of the patient," in subsection A; moved the "or" from the end of clause (i) to the end of clause (ii) and added clause (iii) in subsection C; deleted the commas preceding and following "nor anyone acting on the lawyer's behalf" and inserted "concerning a patient" following "information" in the first sentence of the first paragraph of subsection D; inserted ", or his agents," following "healing arts" in subsection F; and *added* or ~~deleted~~ language in subsection B as follows:

B. ~~Notwithstanding subsection A, when~~ *If* the physical or mental condition of the patient is at issue in a civil action, *the diagnosis or treatment plan of the practitioner, as documented in the patient's medical record, during the time of the practitioner's treatment, together with the* facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. *However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case.* ~~However,~~ No disclosure of *diagnosis or treatment plan* facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. *Only diagnosis offered to a reasonable degree*

of medical probability shall be admissible at trial.

The 1998 amendments added the last sentence in the first paragraph of subsection D and added subdivisions D 1, D 2 and D 3.

Appendix B

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Re: Boyd Graves Committee on §8.01-399 of the *Code of Virginia*

Gentleman:

I apologize for not corresponding with you earlier regarding my assignment from our June 10, 2003, conference call. However, here I am with my suggestions with regard to an amendment to paragraph B of §8.01-399. My suggested changes are in italics. I propose the following:

If the physical or mental condition of the patient is at issue in a civil action, the diagnosis or treatment plan of the practitioner, as documented in the patient's medical record, during the time of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with the attendance examination or treatment, shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. *Such disclosure may include the reasons for the diagnosis or treatment plan from the practitioner as developed by him during the time of the practitioner's treatment.* In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in this case, *together with the practitioner's reasons for the diagnosis or treatment plan as developed by him during the time of the practitioner's treatment.* No disclosure of the diagnosis or treatment plan, facts communicated to, or otherwise learned by such practitioner, *or the reasons for the diagnosis or treatment plan* shall occur if the court determines, upon the request of the patient, that such facts *or reasons* are not relevant to the subject matter involved in the pending litigation or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis *or the reasons therefore* offered to a reasonable degree of medical probability shall be admissible at trial.

As I discussed in our June 10, 2003, conference, I believe this clarification of paragraph B will serve to harmonize divergent rulings by circuit courts of the Commonwealth of Virginia in past rulings on the extent to which a practitioner may provide reasons for his/her diagnoses or treatment plans as contemplated in this paragraph.

I look forward to our conference call on July 29, 2003, at 10:00 a.m., and remain

Very truly yours,

M. Pierce Rucker

MPR/slg

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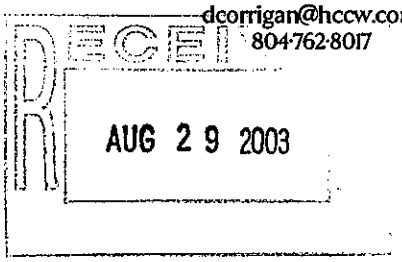
August 28, 2003



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Richmond, Virginia 23230-1652

Re: Boyd Graves Committee – Time Limit on Taking Nonsuit If No Service

Dear Tom:

I am writing on behalf of the Boyd Graves Committee on Time Limit on Taking Nonsuit If No Service. The members of the committee are Tom Blair from Danville, Irv Cantor from Richmond, Brian Dolan from Norfolk, Bob Mitchell from Winchester and myself. We had two conference calls and performed some research into potential solutions of this issue.

After the first conference call, Brian Dolan and Bob Mitchell began drafting potential amendments to §8.01-380 and §8.01-229 which would essentially put a time limit on how long a case could sit before the nonsuit right expired. Several members of the committee favored this approach and at the time of our second conference call, several of us expected that we would make some recommendation along these lines.

In our second conference call on June 26, Irv Cantor, with considerable support from Tom Blair, suggested that this problem needs no solution. Irv's main point was that plaintiff's attorneys frequently file "shadow suits" against non-target defendants, particularly in medical malpractice cases. In almost every instance, these shadow suits are never served and are dismissed without the defendant ever even being aware that he has been sued. The reason for the shadow suits, as I understand it, is that plaintiff's counsel is not completely certain that he has the right defendants in his "main action," and wants to have a separate suit out there in case his main action faces problems. Because medical malpractice cases can take several years to resolve, particularly if the panel proceedings are delayed, the necessity of shadow suits is more important than the small problem with cases that are filed but never served and then nonsuited when the failure to obtain service is raised.

Our group determined that there was an impasse between the members of the plaintiff's bar and members of the defense bar on this issue. Therefore, we are not able to issue a recommendation. In the event that the conference thinks that there is a possibility of a clear

majority among the conferees, we would be happy to reconsider this issue. For now, however, this issue does not appear to be ripe for solution.

Very truly yours,

David P. Corrigan

DPC/jd
Cc: D. Thomas Blair, Esquire
Irvin V. Cantor, Esquire
Brian O. Dolan, Esquire
Robert T. Mitchell, Jr., Esquire

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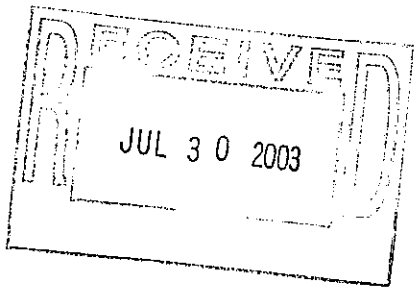
July 29, 2003



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Re: Boyd Graves Committee on Sanctions for
Removal When No Substantial Defense
Virginia Code Section 16.1-92

Dear Tom:

This committee has met by conference call on two separate occasions. Prior to our initial meeting, I forwarded a letter to each member of the committee, setting out what I perceived to be the problems with Section 16.1-92 and a proposed amendment to the statute that was introduced in the 2003 General Assembly, but was killed in committee.

In our initial meeting, several opinions were expressed. One opinion was that the General District Court Judges have the inherent power to award sanctions if an affidavit for removal is filed in a case where there is clear liability. There was also an opinion expressed that causation of injury should be considered a substantial defense. It is my understanding that most General District Court Judges feel that the language of the statute leaves them no discretion and if an affidavit is filed, they have no choice but to allow the case to be removed. At the conclusion of our first meeting, it was agreed that each member of the committee would do some independent research to ascertain whether or not this was a "burning" issue in Virginia, to ascertain the legislative history of our removal statute, and further, to survey other jurisdictions to ascertain if they have similar statutes.

At our second meeting, based on the research by Marni Byrum, we were told that there are currently nine states that have removal statutes similar to Virginia's. In those states, an affidavit is not filed for removal, but rather, it is done on motion and at the court's discretion. We were unable to ascertain any legislative history of our statute.

It was our conclusion that as a committee, we would be willing to further pursue this matter and do further research to investigate the feasibility and desire of amending our statute to perhaps conform to similar statutes in other states. However, prior to undertaking that task, it would be best to have the conference decide whether or not this is an issue they want to further investigate and/or if there is any interest in amending the statute.

I will be happy to discuss this with you once you have had an opportunity to review this letter and the enclosures.

Very truly yours,

Michael J. Blachman

MJB/mcr
Enclosures
CC: Marni E. Byrum, Esquire
James E. Brydges, Jr., Esquire
John P. Ellis, Esquire

§ 16.1-92. Removal of action involving more than $4,500.

When the amount in controversy in any action at law except cases of unlawful entry and detainer in a general district court exceeds the sum of $4,500, exclusive of interest, attorney's fees contracted for in the instrument, and costs, the judge shall, at any time on or before the return day of the process, or within ten days after such return day, if trial of the case has not commenced and if judgment has not been rendered, upon the application of any defendant, the filing by him of an affidavit of himself, his agent or attorney, that he has a substantial defense to the action, exclusive of the sole issue of the amount, ~~or~~ computation or causation of damages, which affidavit shall state the grounds of such defense, and the payment by him of the costs accrued to the time of removal, the writ tax as fixed by law, and the costs in the court to which it is removed as fixed by subdivision 13 of § 17.1-275, remove the action and all the papers thereof to a court having jurisdiction of appeals from the court wherein the action was brought; and the clerk if there be one, or the judge if there be no clerk of the court, shall promptly transmit the papers in the case and the writ tax and costs to the clerk of the court to which the action is removed. If the defendant fails to pay the accrued costs, writ tax, and the costs in the court to which the case is removed at the time the application for removal is filed, the judge shall proceed to try the case.

On the trial of the case in the circuit court the proceedings shall conform as nearly as may be to proceedings prescribed by the Rules of Court for other actions at law, but the court may permit all necessary amendments, including amendments to increase the amount of the claim above the jurisdictional amount set forth in § 16.1-77, enter such orders, and direct such proceedings as may be necessary or proper to correct any defects, irregularities and omissions in the pleadings and bring about a trial of the merits of the controversy.

In no event shall an objection to venue be considered by the circuit court unless raised by a defendant in his affidavit of substantial defense filed in the general district court.

The limits for removal of cases under the Tort Claims Act (§ 8.01-195.1 et seq.) shall be governed by the jurisdictional amounts set forth in that act.

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July 17, 2003

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Re: Boyd Graves Committee on Admissibility of Evidence of Insurance Coverage (or Lack Thereof) in Punitive Damages Cases
Our File No. 8895

Dear Tom:

Please accept this letter as the report of the Committee which I was asked to chair. On July 7, 2003, our Committee had a lunch meeting at which Burke McCormick and Hunton & Williams served as our gracious hosts. Burke and I were joined by all three other members of the Committee (Ted Allen, John Keith and Don Patten).

Before the meeting we had all reviewed the April 17, 2003 decision by the Virginia Supreme Court in the case of *Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180. At the meeting we also circulated, and discussed as well, the April 7, 2003 decision by the Untied States Supreme Court in the case of *State Farm Mut. Auto. Ins. Co. v. Campbell, et al.*, decided on certiorari to the Supreme Court of Utah. As you know, the Virginia Supreme Court ruled in *Allstate v. Wade* that the trial court did not err in refusing to allow plaintiff's uninsured motorist carrier to inform the jury that it, rather than the uninsured motorist, would be paying any damage award, and to argue therefore that a large punitive damage award would not serve the punitive purpose that jurors might otherwise believe would be served. While any opinion is capable of being limited to its specific facts, it is the sense of our Committee that this opinion, in conjunction with previous opinions by the Virginia Supreme Court, stands for the proposition that it is only in the rarest of cases that a jury should be informed of the existence of insurance coverage, for fear that the knowledge of the existence of insurance coverage will prejudice either the insurer or some other party to the litigation. The *State Farm v. Campbell* case is the one which applies the Due Process Clause of the United States Constitution so as to limit the size of an award of punitive damages, and resulted in the Court setting out a presumptive upper limit on the ratio of punitive damages awards to compensatory damages awards, with the further

apparent proviso that, as the compensatory damage award increases in size, the ratio between punitive damages awarded and compensatory damages awarded must be reduced.

After having satisfied ourselves that we viewed the import of *Allstate v. Wade* in the same way, we then asked ourselves if we thought there should be an exception for the apparent rule in *Allstate v. Wade* for cases involving punitive damages. For the same reasons upon which the decision in *Allstate v. Wade* appears to have been based, in part, that is, the likelihood of prejudice from the introduction of evidence of insurance, the consensus of the Committee was that we should make no special provision or offer no exception to what we perceive to be the rule for cases involving punitive damages. There was discussion about difficulties which would ensue if evidence of punitive damages were to be admitted: when would it be appropriate to admit such evidence, given that it would have potentially prejudicial effect on the resolution of other issues in the case? What evidence would be admitted if there was a question as to the existence of coverage or the amount of the limits and especially where there might be coverage for punitive damages under some, but not all circumstances (*see, e.g.*, Va. Code § 38.2-227, which establishes that there is no public policy prohibition in this Commonwealth against providing insurance coverage for punitive damages arising out of the death or injury of any person as a result of negligence, including willful and wanton negligence, but excluding intentional acts). There was also a discussion about the potential for unfairness to a plaintiff, if a defendant was entitled to offer evidence of modest net worth, when in fact the defendant might well have significant insurance coverage. On balance, however, it seemed to be the consensus of the Committee that while there might be potential for unfairness in certain circumstances to some side or the other, ultimately, the decision as to what amount should be awarded so as to punish the defendant and so as to send a message to the community, which is to say serve as a deterrent to others, was a decision best made without consideration by the fact finder of the existence, or of the lack of existence, of insurance.

During the course of the discussions by the Committee, several members expressed frustration over the absence of authority in Virginia as to when and how evidence of the net worth of a defendant is discoverable and admissible in cases where punitive damages are claimed. Some courts apparently require a *prima facia* showing of entitlement to punitive damages before the evidence will be admitted, and some few may even require that such a *prima facia* case be established pretrial before there is discovery of the net worth of a party, while other courts impose no limitation on discovery and many impose no limitation on when evidence of the net worth of a defendant may be introduced in a case where the plaintiff is claiming entitlement to punitive damages. On behalf of the Committee, I was asked to petition you to reassign consideration of that topic to us next year, in the hope that we might be able to come up with a consensus proposal for guidelines to Virginia courts on that subject.

With respect to the subject assigned to us, it is fair to say that the Committee does not wish to make any recommendation, and feels that the current law as recently announced by the Virginia Supreme Court would appear satisfactorily to give sufficient guidance to the bench and bar.

Respectfully submitted,

Alan B. Rashkind

ABR:sld
Enclosures

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REPORT OF COMMITTEE ON FUTURE OF BOYD GRAVES CONFERENCE

This Committee was composed of The Honorable Pamela S. Baskervill, Linda S. Laibstain, Esquire, John M. Oakey, Jr., Esquire, Benjamin W. Glass, III, Esquire, Kenneth B.E. Montero, Esquire, Stephen C. Price, Esquire and John R. Walk, Esquire. Our charge was to examine the future of the Boyd Graves Conference and to make recommendations as to how the conference could better fulfill its mission and/or how the mission of the Conference may be redefined. Set forth below are the results of our discussion over the past year through correspondence, e-mail and teleconferences.

Size of Conference

Although this point is frequently cited as an issue facing the Boyd Graves Conference, the consensus of the group was that at the present level of attendance, which is consistently approximately 100 members, the size of the Conference does not present a problem. Instead, the Committee focused on the composition of the Conference and developed several recommendations in this regard.

Enhancing Participation

The Committee was unanimous that in addition to the expectation of attending the annual meeting of the Conference, there should be an expectation of regular committee work. Many members of the Committee believed this to be presently the case. Among other things, it was thought that participation in

committee work would reinforce to members the "give and take" entailed in developing recommendations to the Conference and assist in developing a consensus around recommendations brought to the Conference by its various committees.

Members of the General Assembly and the judiciary would be excepted. All other members would be expected to volunteer for committee work on a regular basis. For present purposes, "regular" was defined as every two years, consistent with the present policy related to attendance at the annual meeting of the Conference.

Moreover, the Chairs of the various committees would be responsible for reporting to the Membership Committee, on a confidential basis, persons who volunteer for committee work but fail to meet basic participation expectations such as attending meetings, participating in committee discussions and completing delegated work on a timely basis.

The Committee also considered the status of senior members. The Committee was of the view that there should not be any mandatory retirement of senior members. However, they should continue to be invited only for so long as they continue to participate and contribute to the work of the Conference. Senior members would not be exempted from the expectation of regular participation in committee work. Moreover, it was recognized that in order for the Conference to remain vital and relevant, it needs a regular infusion of "new blood". Hopefully, spaces would be available based on the participation criteria discussed above.

Diversity of Practice

The Committee examined diversity of the Conference as to geography, firm size, urban vs. rural, practice area and otherwise. Of necessity, the various opinions expressed were largely anecdotal. Of these, the area in which there was broadly based concern was that of practice area. Due to its origins as somewhat of a "summit conference" between the Virginia Trial Lawyers Association and the Virginia Association of Defense Attorneys, the Boyd Graves Conference has historically been dominated by attorneys who practice exclusively in the area of personal injury law.

This has had a polarizing effect which has become evident in the discussion of many issues and prevented the Conference from developing a consensus on important initiatives such as summary judgment, contributory negligence and so on. As a result, it increasingly appears that the Conference is only able to act on either highly specialized or relatively trivial matters. If the situation is not corrected, the Boyd Graves Conference risks being displaced by the Civil Litigation Committee of the Virginia Bar Association as the primary force in civil litigation reform in Virginia.

The lack of diversity of practice area has also manifested itself in a negative way in the recommendations of the Conference. Not long ago, the Conference recommended to the General Assembly the adoption of a unified statute of limitations of four (4) years. In so doing, the members were obviously mindful of the limitations periods for written contracts and property damage (5 years),

unwritten contracts (3 years), and personal injury and wrongful death (2 years). Moreover, the concept of a unified limitations period has great merit. However, because of the lack of members practicing in commercial litigation, the Conference was apparently not mindful of other limitations periods such as the 20 year statute of limitations on enforcing deeds of trust. It was not until the Conference's recommendation was brought before the General Assembly and faced vehement opposition from bankers' groups that this flaw was discovered. Needless to say, the Conference's recommendation was not adopted.

Because the Committee was acting on anecdotal evidence, however, no specific changes in membership policy are recommended. Instead, the Committee recommends that the membership be surveyed and that an analysis of responses be performed in order to determine the extent to which the Conference lacks diversity of practice area and to identify practice areas which are presently under-represented. Appended to this report is a suggested survey form for use by the Conference. In addition to practice area, information is sought regarding other matters, e.g., geography, size of firm, urban vs. rural, in order to test the Committee's conclusion that the Conference is appropriately diverse with respect to these factors.

The Committee suggests that a copy of the survey be included with the binder sent to each participant in advance of the Conference along with an explanatory letter requesting each participant to complete the survey and return it when registering for the Conference. Extra copies would be made available at the

registration table, with the goal being to collect a completed survey from each participant at this year's Conference. Based upon an analysis of the responses by this Committee or the Membership Committee, a more specific recommendation could be developed for next year's Conference.

Mission of the Boyd Graves Conference

Historically, the Boyd Graves Conference has functioned to develop recommendations to the Virginia Supreme Court and to the General Assembly as to changes in the rules and statutes governing civil litigation. It was agreed that the Conference should continue to regard this as its primary mission and the foregoing recommendations were designed to preserve and enhance the Conference's fulfillment of this mission.

However, there was also belief that with the talent represented by the members of the Boyd Graves Conference, it could be doing more. Each year the Conference develops a large binder of committee reports. Frequently, these reports contain valuable research materials which would be of assistance to members of the Bar. Several Committee members cited instances where they had consulted their binders of past meetings of the Conference in connection with their practice. Perhaps the best example of the Boyd Graves Conference expanding its role beyond being an advocate for law reform has been the development of the Guide to Evidence. The work of this Committee has since been published and disseminated widely among the judiciary and practicing trial attorneys.

The Committee recommends that the Boyd Graves Conference formally embrace a more educational mission. Specifically, the Conference should seek a means to publish its Committee reports on an annual basis. This would likely be done electronically rather than in "hard copy" form due to the cost of publication. Rather than host its own internet site for this purpose, possibilities were discussed of enlisting the aid of the Virginia Supreme Court, Virginia Bar Association or University of Richmond Journal of Law and Technology. The Committee recommends that a separate committee with greater technical expertise be formed to pursue this initiative.

The committee reports are particularly relevant where the recommendations of the Conference are adopted into law by the General Assembly. Access to such material is particularly needed given the frequent lack of published legislative history by the General Assembly. Accordingly, the Committee recommends that the Boyd Graves Conference pursue having its reports incorporated into the official legislative record and, thus, become part of the legislative history of bills adopting its recommendations.

The Committee also concluded that it would be beneficial to solicit input from outside the Conference as to specific topics to be considered for action and as to its mission generally. Consistent with this recommendation, Chief Justice Hassell should be invited to address the Conference or the Steering Committee regarding his ideas as to how the Conference can be of assistance to the judicial system. The Committee recommends that similar invitations be extended in future years to

other Justices of the Supreme Court, members of the House and Senate Courts Committees and the Attorney General or appropriate members of his/her staff. The Steering Committee should also solicit input from such leaders through one-on-one discussions with representatives selected by the Boyd-Graves Chairman.

Continuing Legal Education Credit

Finally, consistent with the foregoing recommendation, the Committee recommends that the Conference apply to the Virginia State Bar for formal recognition as an educational conference. No credit would be sought for committee work, including preparation and presentation of committee reports. This was considered and will remain a bar activity. Approval for CLE credit would be sought only for attendance at the Friday afternoon and Saturday morning formal sessions of the Boyd Graves Conference.

The MCLE Board has promulgated Standards for Approval of Programs which may be found at § 103 of its regulations. The Boyd Graves Conference easily meets or exceeds most of the eleven (11) published criteria, e.g. "significant intellectual or practical content", "recognized legal subject matter", "high quality written materials." However, among the published criteria is subsection (j) which states: "participation in deliberative groups concerned with law reform, judicial administration or regulation of the profession will not be approved for credit".

This standard was likely intended to disqualify the typical bar committee work. As discussed above, however, no CLE approval would be sought for the

committee work of the Boyd Graves Conference -- only attendance at the annual meeting at which the formal Committee presentations are made.

While it is unlikely that this standard was intended to apply to the Boyd Graves Conference, it is difficult to argue that it is not a "deliberative group" concerned with "law reform". Accordingly, it may be necessary to seek amendment of 103(j) in order to permit approval by the MCLE Board. The specific amendment suggested would read as follows:

> Participation in deliberative groups concerned with law reform, judicial administration or regulation of the profession will not ordinarily be approved for credit. However, where such group can clearly demonstrate compliance with each of the above listed criteria, the fact that the group is "deliberative" or "concerned with law reform" shall not preclude approval for CLE credit for all or part of its program.

The Committee requests that the Boyd Graves Conference approve this recommendation for submission to the MCLE Board.

BOYD GRAVES CONFERENCE
MEMBER SURVEY

Name: _____

Firm: _____

Address: _____

I: Area of State:

Eastern District
- Alexandria Division _____
- Newport News Division _____
- Norfolk Division _____
- Richmond Division _____

Western District
- Abingdon Division _____
- Big Stone Gap Division _____
- Charlottesville Division _____
- Danville Division _____
- Harrisonburg Division _____
- Lynchburg Division _____
- Roanoke Division _____

II. Type of Practice:
- Judicial _____
- Private _____
- Governmental _____
- Corporate _____
- Retired _____

III. Size of Firm/ Agency:
- 200+ _____
- 150-199 _____
- 100-149 _____
- 75-99 _____
- 50-74 _____
- 25-49 _____
- 15-24 _____
- 10-14 _____
- 5-9 _____
- 2-4 _____
- Solo _____

Note: On part IV, please indicate your practice area(s) by percentage, making sure your responses add up to 100%. If appropriate, you may check "other", but please specify your area of practice in the blank provided. If you are a judicial member, please indicate the type of cases you hear or areas in which you have particular interest or expertise.

IV. Practice Area:

Administrative Law	_____
Admiralty Law	_____
Antitrust/Trade Regulation	_____
Bankruptcy	_____
Business Transaction/Contract	_____
Civil Rights & Discrimination	_____
Collection/Repossession	_____
Commercial Litigation-Defense	_____
Commercial Litigation-Plaintiff	_____
Construction/Building Contracts	_____
Consumer Claims	_____
Corporate Administrative	_____
Corporate & Business Organization	_____
Corporate & Merger Acquisition	_____
Criminal	_____
Domestic Relations	_____
Environmental Law	_____
Entertainment	_____
Estate, Trust & Probate	_____
Financial Institution/Banking	_____
Government Contracts & Claim	_____
Immigration & Naturalization	_____
Insurance Coverage	_____
Intellectual Property (Patent/Copyright/Trademark)	_____
International Law	_____
Labor-Management	_____
Labor-Union/Employee	_____
Local Government	_____
Mass Torts/Class Action	_____
Natural Resources (Oil & Gas)	_____
Personal Injury-Plaintiff	_____
Personal Injury-Defense	_____
Real Estate-Commercial	_____
Real Estate-Residential	_____
Securities	_____

Tax	_____
Workers' Compensation-Defendant	_____
Workers' Compensation-Plaintiff	_____
Other _____	_____
Total	100%

V. Years you have been a member of the Conference _____

VI. Do you regularly practice on the chancery side of the Court or have particular interest or expertise in chancery practice?

_____
_____
_____

VII. Do you primarily practice in state court or federal court?

State Court _____ Federal Court _____

VIII. Do you primarily practice in urban or rural areas?

Urban _____ Rural _____

IX. Do you have any suggestions as to how we may improve the Boyd Graves Conference or enhance its mission?

_____
_____
_____

X. Do you have any suggestions for topics to be considered by the Boyd Graves Conference?

_____
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