Boyd-Graves Conference
October 23, 2009
Main Conference Meeting

The meeting was called to order by Chairman Diane Strickland at 2:06 p.m.

The Chairman thanked the members for coming to the 31st Conference Meeting. She asked all to listen attentively and seriously consider the issues. She read the last paragraph of the Missions Statement. She also reminded people to sign in both days and contribute any topics that they thought the Conference should consider for future study. The Chairman profusely thanked the Virginia Bar Association and their staff for their tremendous help, especially Guy Tower, Brenda Dillard, Jeremy Dillon and Ken Kovac.

Following the welcoming everyone introduced himself by name and area of the Commonwealth. It was announced that the reception will be in the Franklin Marshall Harrison room, and dinner will be in the Bistro Restaurant. The reception is at 6 p.m., the dinner at 7 p.m.

Next year the Conference will meet at the Williamsburg Lodge on October 22, 23 of 2010.

Tab 2 – The minutes of the previous meeting were reviewed. It was noted that at one point on the second page the year 2010 was mistakenly written as 2008. With this correction, after motion duly made and seconded, the minutes were approved unanimously.

The Chairman then thanked the people who helped tremendously with the legislative effort including Guy Tower, Tony Troy, Anne Leigh Kerr, David Cotter from Legislative Services, Mark Obenshain, John Edwards and Manoli Loupassi, the last three being very helpful members of the legislature.

Tab 3 – Professor Hamilton Bryson gave the legislative report. He noted that the Attorney Fees Statute and the Uniform Deposition Act passed while the study of sovereign immunity was defeated. He noted that many of the rules changes were moving forward through the appropriate committees. Several had been approved by the Advisory Committee and were in the Judicial Council. He did note that the recommendation for depositions in some circumstances in Juvenile Court was not approved. The Advisory Committee felt that this would be an expensive and time consuming process at the Juvenile Court level. He also noted that the changes to the priest/penitent privilege were not made but that a bill had been successfully introduced that
changed the doctor/patient privilege. The lawyer/client privilege also was not changed. The Chair thanked Professor Bryson for his hard work on behalf of the Conference.

Tab 4 – Report of the Committee on Evidence. Joe Kearfott gave the report of the Committee. He especially thanked Kent Sinclair for all of his work and then introduced Professor Sinclair who gave the rest of the report. He reviewed in detail the new rules and provisions.

Tab 5 – Proposed Statute to Award Attorney’s Fees Where a Verdict is Less Than $15,000. Charles Hilton gave the report of the Committee. The basic idea behind the proposed statute was to, with the Judge’s discretion, award attorney’s fees in cases where the basic award is less than $15,000. This would give a plaintiff the ability to hire a lawyer in small cases. This statute tracks a similar statute in North Carolina. It was noted that this would include counterclaims and third party claims. A discussion was had as to whether if the total amount awarded exceeded the $15,000 that this would deprive the Court of jurisdiction. After some discussion there was a vote by show of hands and the Chair ruled that there was not a consensus.

Tab 6 – Change to Virginia Supreme Court Rule 1:8 Regarding Amendment of Pleadings. Lee Livingston gave the report of the Committee. There was considerable discussion. Steve Emmert suggested an amendment “If the motion for leave to amend is made orally in open court and is granted, the order shall specify the date by which the amended complaint shall be filed and served.” After some considerable discussion it was decided by voice vote by consensus that this should apply only to written motions. The rule changes were to be redrafted and brought back to the Conference in the morning.

Tab 7 – Report of the Committee Studying the Need for Changes in Virginia’s Arbitration Laws. Wiley Mitchell gave the report for the Committee. The Committee recommended the following;

1. Reconstitute the Arbitration Committee to review whether arbitration clauses in consumer contracts should be unconscionable.
2. No change was recommended in the section allowing one to recover attorney fees in a frivolous appeal of an arbitration award.
3. Now one cannot appeal an award directing arbitration. The Committee recommends a change to this. It is recommended by the committee that the section which forbids the appeal should be struck.
4. Is summary judgment allowed in arbitration? Now no, but no change is recommended by the Committee.
5. Does an arbitrator have the right to change a ruling? Now yes before a final award is entered. No recommended change here either.

The recommendation of the Committee was contained at the bottom of page 6 in the booklet.

*Upon Application of a party, the court shall vacate an award where:*
(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 8.01-581.02 and the party did not participate in the arbitration hearing without raising the objection.

The underlined part of the statute was to be deleted. This was approved by the Conference by consensus by voice vote.

Tab 8 – The Assertion of the 5th Amendment Privilege in Divorce Proceedings. Larry Diehl gave the report for the Committee. He noted that adultery is a crime in Virginia and therefore people take the 5th Amendment in divorce and similar actions. The Committee suggested that the trier of fact in spousal support and maintenance actions be permitted to draw an adverse inference from this taking of the privilege. The suggested change is contained in the Committee’s proposed statutory change at page 1 of the Committee Report which was further modified by adding the word civil in two places. As modified the statute was adopted by consensus by voice vote.

Tab 9 – Timing of Filing of Bills of Costs in State Court. David Anthony gave the report for the Committee. The Committee proposed a statutory change as contained in the book. However, David Cotter of Legislative Services proposed a simpler version which would accomplish the same purpose. After some discussion the recommendations were not adopted by a consensus by voice vote.

Tab 10 – Committee on Comparative Negligence. Judge Klein gave the report in the absence of both co-chairs and stated that the Committee had no formal recommendation.

Tab 11 – Study of the Dollar-Based Provisions in the Virginia Code. David Spencer gave the report for the Committee and especially thanked David Cotter for his excellent work. The idea was to study the dollar amounts in statutes in civil litigation in Virginia to see whether inflation would suggest changes. There were pages of recommendations.

By voice vote all the recommendations on page 2 of the Committee Report were adopted.

By voice vote all the Committee recommendations on page 3 were adopted except for the changes to 8.01-676.1 and 17.1-605. A separate vote was taken on 17.1-605 and this passed by consensus by voice vote. A separate vote was taken on 8.01-676.1 and by show of hands there was not deemed to be a consensus.

By voice vote by consensus all the changes listed on page 4 were approved.

On page 5 the top three items were approved by consensus by voice vote.

With respect to 17.1-624 the Committee recommendation was to abolish this entirely. It was suggested from the floor that the first sentence be retained and this friendly amendment was accepted by the Committee. A motion was made to keep the first sentence and kill the rest and
by voice vote by consensus this was adopted. In addition the title was changed, eliminating the phrase “what included for attorney’s fee” to reflect the changed statute.

The other recommendations on page 5 and following will be taken up by the new Chair and the Steering Committee.

Tab 12 - Sovereign Immunity. Tom Albro gave the report of the Committee. He called on Wiley Mitchell, a member of the Committee representing five members of the Committee and he suggested extending the Virginia Tort Claims Acts to cities and counties. Tim Oksman gave the report for five other members of the Committee in opposition. Mary Lynn Tate moved the adoption of the report favoring the expansion of the Tort Claims Act, Wiley Mitchell seconded it. There was a very spirited debate on the issue. After some time the question was called for and by a show of hands the vote was 71-20 which the Chair ruled was a consensus.

The meeting was adjourned.

Boyd-Graves Conference

October 24, 2009

Full Conference Meeting

The meeting was called to order by Chairman Diane Strickland at 9:03 a.m. She reminded everyone to sign in and also passed out the new topic sheet again.

Tab 13 - Supersedeas Bonds. Roger Creager gave the report of the Committee. The Committee put forth changes to 8.01-676.1 which are contained in its report as Exhibit A. Several changes were suggested from the floor and adopted by the Committee before the final vote. The first change to the proposed statute was the deletion of the last sentence of Section C of the proposed statute beginning “in the case of a judgment…” The second change was that the new phrase at the end of Section E the last sentence beginning “In the case of an appeal bond…” was in its entirely not only retained but repeated at the 12th line of that Section after the words “the appeal shall be dismissed.” The third change to the Committee statue was at the end of the 7th line of Section F where the words “or cash in lieu thereof “where added after the (ii). The fourth change was that the word “shall” was deleted and the word “may” inserted in the second line of Section J2. Finally at the end of the heading Section Q the phrase “of the Supreme Court” is to be replaced by the phrase “or the Supreme Court.” With these changes, all accepted by the Committee through it chairman, the proposed statute was adopted by consensus by a voice vote.
Stuart Raphael gave the report of the Committee. This is the so called clawback or quick peek rule. It was noted that the rule does not change the attorney-client privilege or work product privilege as currently understood in Virginia. Tom Spann had reviewed the proposed changes and his suggestions were incorporate into the Committee’s proposals and he agreed with the proposed rule. A suggestion was made that this might be better done by Rule of Court rather than, as the Committee suggested, by statute, and the Committee through its Chairman preferred the statutory change. A discussion was also had on whether the change as drafted was prospective or retrospective and it was decided not the change the proposed rule to address this issue. The recommended rule was approved by a consensus by voice vote.

Tab 15. Evidentiary Foundation for Electronic or Computer Generated Evidence. Judge Michael Gamble gave the report for the Committee. He reported that the Committee felt that it was important to let the issues develop on a case by case basis and therefore recommended no changes in current law.

Tab 16. Medical Liens. Tom Williamson gave the report for the Committee. Basically the Committee studied primarily Medicaid liens and in particular the Ahlborn decision. A majority of the Committee felt that the Commonwealth was violating federal law in its requirements that the whole amount in settlement be subject to the lien not just that part representing medical bills. In the Committee’s proposed statute there is an equitable provision thus giving the courts clearly the right to evaluate the case and give Medicaid its fair share. A change was made in the proposed statutory changes. In 8.01-66.10 the third line of the proposed statute the words “the lien” was added after “with the exception of”. With this change the proposed statute was adopted by unanimous vote by voice vote.

Tab 17. Vocational Experts and Rule 4:10. Larry Diehl gave the report for the Committee. He reported that the Committee could reach no agreement on the general issue in civil cases. However in support cases this is a serious and growing issue. There are inconsistent results from judges in the family law area. The Committee handed out an Exhibit marked G which contained its recommendations. Suggestions were made that the statute be vetted with the VBA Family Law Section and it was noted that there had been some discussions. The Committee recommendation would be to statutorily change the law in the family law area only. After a motion was made there was such a close vote by show of hands that the Chair ruled that there was not a consensus. It was then suggested that the proposals be shared with other Family Law Bar groups and the Committee re reconstituted next year. The incoming Chairman stated that he felt that this was appropriate and no further motion needed to be made.

Tab 18. Medicare Set-Asides. Lisa Bertini gave the report of the Committee and made no specific recommendation. However it was noted that the Medicare set-aside program may result in significant delays in settling personal injury cases in the future.
Tab 19. Jury Venire. Wallace Watson gave the report for the Committee. He noted that in addition to the Boyd-Graves representatives of the clerks were added to the Committee for their insight. He reported that the Clerks objected to the occupation of the spouse being given and as the result of their objections this was withdrawn. The Committee did recommended changing 48 hours to two business days. There was also a recommendation that local bar groups meet with the clerks and Judges and let them know in what respects they were breaking the law in not providing jury lists in a timely manner. A suggestion was made to change the two days to three days but it was reported that this would not be politically viable. However the word “full” was added before the words two business days in order to make the point. The Committee accepted this amendment and the proposal was then voted on and was passed by a consensus by voice vote.

20. Jurisdiction of the Court of Appeals. Steve Emmert gave the report of the Committee. He reported that this was a highly divisive issue and that there was no formal recommendation. He suggested that the Committee be reconstituted in two years or so.

21. Uniform Pre-Trial Scheduling Order. Chuck Sickels gave the report of the Committee. The Committee assignment was to review a ruling of a Circuit Court on the pretrial order relating to expert designations. A suggested change allowed counsel to change the designation of experts schedule by agreement. After some discussion there was a vote by show of hands that the Chair ruled was not a consensus.

22. Claims Against Counties. John Keith gave the report for the Committee. The Committee recommended amending 15.2-1246 to make specific a bond amount. The Committee recommended $500. Judge Taylor suggested $25 and after some discussion this change was approved by consensus by voice vote. The Committee also recommended that there be a specific time period for a county to act which the Committee recommended be 6 months. After discussion the Conference by consensus by voice vote replaced this with 90 days. The proposals were then approved by consensus by voice vote.

23. Nonsuits of Counterclaims. John Walk gave the report of the Committee. His Committee does believe that current law supports the nonsuit of a counterclaim and that a plaintiff cannot nonsuit a claim where there is a counterclaim. Therefore no action was recommended.

Tab 24. Liens for Advanced Attorney’s Fees. Tom Appler gave the report for the Committee. For reasons stated in the report there is no recommended action.

Tab 6. This was a holdover from the previous day. Lee Livingston came back with an amended proposal which was adopted by consensus by voice vote.

Tab – Admission of Demonstrative Evidence. Mary Lynn Tate gave the report of the Committee which was handed out. There was no recommendation for the Conference to act.
Tab – Spoliation of Evidence. There was a written report to be handed out but there was no oral report and no recommendation. The Committee will stay in being for the next Conference meeting.

Tab 12. Sovereign Immunity. Tom Albro suggested a resolution on this subject for the Conference as follows;

_The Boyd-Graves Conference supports amendments to the Virginia Tort Claims Act to extend its provisions to cities, counties and towns. The Conference understands there are public policy considerations associated with this proposal, and supports the creation of a legislative study of the potential financial impact of this proposed amendment._

Mr. Albro moved the adoption of the resolution. The motion was seconded and adopted unanimously by voice vote.

The Chairman thanked the Conference for its work and introduced Roger Mullins as the next Chairman.

The Conference expressed its appreciation for the work of Diane Strickland with a standing ovation.