

Minutes of the Boyd-Graves Conference

Full Conference

October 28, 2011

The Chair convened the meeting at 2:00 p.m.

The members then introduced themselves briefly by name and city.

The Chair then recognized Pia Trigiani the President of the Virginia Bar Association and suggested that the members seriously consider joining the VBA if they were not already members. He then introduced Yvonne C. McGhee the Executive Director of the VBA and again acknowledged the work of the VBA and its the staff.

A statement of policy was read by Roger Mullins as follows:

Policy Statement – Post Conference Remarks

1. There are no restrictions on members of the Conference who wish to speak in favor of or opposition to the proposals of the Conference to the General Assembly or other policy makers;
2. Members who choose to comment on the Conference proceedings should use care to describe them accurately;
3. In commenting about Conference actions, members who have not been asked to present or support the Conference position are requested to make clear that they are speaking as individuals and not on behalf of the Conference.

The minutes of the prior meeting were reviewed and upon motion duly made and seconded were approved.

It was announced that the next meeting will be at the Homestead. The VBA has succeeded in getting favorable rates for the Conference.

Tab 3. Professor Hamilton Bryson gave the legislative report. He thanked David Cotter and the entire VBA team for their support. He noted that the Conference's proposals received favorable treatment. The General District Court limit was raised to \$25,000. The statute regarding filing fees for counterclaims in divorce actions passed. The bill concerning a general appearance waiving jurisdiction passed. The statute regarding the designation of expert literature did not pass having run into a Virginia Supreme Court decision covering the same area of law and the proposal needs to be reconsidered in light of that decision. Several proposed rules were in making their way through the various committees. These included rules on social security numbers, clarifying objections, and voir dire in civil cases. The rule on filing by people not licensed in Virginia was killed by the Advisory Committee of Rules after the Virginia Supreme Court in two cases indicated that it believed that such a filing was void. Finally, and of great importance, the Virginia Supreme Court approved the Rules of Evidence subject to approval by the General Assembly.

Tab 20. Punitive Damages Study Committee. Steve Busch gave the report for the committee. The committee recommended that there be no split in punitive damages between the injured person and the Commonwealth. He noted that several states had adopted such a split but have recently repealed it and only nine states still retain such a split. He noted that the original statute was passed in 1988 and based on inflation alone the \$300,000 cap should now be \$680,000. However he recommended that more study be done on this issue. The Chair took a vote on the allocation issue and the Conference overwhelmingly voted not to approve allocation. A second vote was taken to authorize the Committee to continue to study the issue and this was approved.

Tab 17. Court Appointed Counsel for Indigent Parent. Steve Emmert gave the report for the Committee. The recommendation was that court appointed counsel be appointed for an indigent non-consenting parent in an adoption proceeding. The Committee recommendation was passed by voice vote by consensus.

Tab 4. State Class Action. Coleman Allen gave the report for the Committee. He noted that Virginia was one of two states which do not have a state class action law. The Committee was concerned that there was not sufficient support within the Conference for a state class action statute and wanted a vote from the Conference before proceeding with the work of actually drafting such a statute. A number of people, including Joe Kearfoot, spoke against class actions. The Conference was asked to vote on whether the Committee should continue to study the issue and draft a statute for the next year. The Conference voted overwhelmingly to continue the study.

Tab 5. Committee to Study injunction Bonds. Tony Troy and Stuart Raphael gave the report. There was an issue of when bonds needed to be issued for permanent or temporary injunctions. The proposed statutory changes tracked the Federal Rule. The changes were described as technical and would bring Virginia into harmony with the Federal Rule and most other states. The proposals contained at Tab 5 were adopted nearly unanimously by a show of hands.

Tab 6. Service in Divorce Actions. Robin Wood presented the report for the Committee. The subject was service of process in divorce actions. Where personal service has been obtained and there is no answer and the defendant is therefore in default does the defendant have to be given notice of depositions? The trial courts are not consistent on this issue. The Committee recommended an amendment to the statute, as contained at tab 6, stating that no such notice was necessary in that situation. The statutory change as recommended by the Committee was adopted by voice vote that was almost unanimous.

Tab 7. Trial preparation. Experts. Frank Hilton gave the report for the Committee. The subject involved expert designations and reports. He read aloud a long paragraph concerning this issue and it was suggested that this be put in wiring and presented to the Conference in that form. It was presented to the Conference in the form attached with the changes in black bold language. There was a discussion as to where the new language would best fit, and after discussion it was decided to defer the proposal until next year when there can be a new draft of the proposal.

Tab 8. Construction Contracts, Virginia Code 11-4.1. Stuart Raphael gave the report. This issue was prompted by the *Uniwest* case. It was recommended by the Committee that no change be made and this report was accepted overwhelmingly by a show of hands.

Tab 13. Evidence Committee. Joe Kearfoot and Kent Sinclair were called up to discuss the status of the Rules of Evidence. They noted that the Virginia Supreme Court has adopted the Rules but that legislative action was also necessary. It was noted that this Conference had been working on this project for many years. It was hoped that the Rules could be adopted without change by the General Assembly. No vote of the Conference was required because the Conference had been on record as favoring this for many years.

Professor Sinclair then reviewed the changes that were made necessary by statutory and judicial changes in the law of evidence.

A substantial round of applause was given to Professor Sinclair for his hard work on this project for many years.

Tab 14. Virginia Arbitration Laws. Wiley Mitchell gave the report of the Committee. In particular the Committee looked at arbitration clauses in consumer contracts. The Committee believes these clauses are unfair and unconscionable. Mr. Mitchell noted that the Conference had never voted on the proposition that such clauses were unconscionable. He noted that there was a bill in Congress to clarify the issues but it was not moving forward for various reasons. The United States Supreme Court has ruled that the Federal Arbitration Act preempts any state action in this area and a recent case out of West Virginia has further limited the rights of the states to act in this area. However he suggested that to the extent possible the Commonwealth of Virginia should consider legislation to make such clauses invalid in Virginia and that Boyd-Graves should contact its representatives in Congress to see if the act clarifying this at the national level can be passed. It was suggested the matter be continued for a year to further define contract of adhesion and review whether there is anything we can do to void such clauses in consumer contracts. This motion passed overwhelmingly by a show of hands.

Tab 9. Report on the Impact of the *Spear* Decision. Peter DePaolis gave the report of the Committee. This was the nonsuit case that was refilled with a higher ad damnum and declared by the trial court as invalid. This case was appealed and settled on appeal and all the other trial court cases have gone the other way. Therefore the Committee believes that no action need be taken by the Conference unless decisions agreeing with *Spear* are decided. Therefore the Committee will disband at this time.

The meeting was adjourned at 4:52 p.m.

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The meeting was called to order by the Chairman at 9:00 a.m.

Larry Diehl and John Walk were thanked for their entertainment the night before.

Tab 12. Recoverable Costs and Attorney's Fees on Appeal. Stephen Price gave the report for the Committee. He asked that the Committee be permitted to continue its study for one more year.

Tab 10. Virginia Code Section 8.01-271.1. Steven Garver gave the report of the Committee. This report concerned sanctions. The Committee suggested that the word "shall" in the statute be changed to "may." The Committee discussed the equivalent of the Federal safe harbor clause and was evenly split on which of the two options in the book should be adopted. After considerable discussion and some disagreement it was decided to vote on whether the "shall" should be retained or be replaced by "may." By hand count it was overwhelmingly decided to leave the statute as is with the word "shall." The Chair then asked for a vote on whether there should be a safe harbor provision and after discussion a vote was taken by hands and the Chair ruled that there was not a consensus.

Tab 11. Common Interest Doctrine. Lee Livingston gave the report for the Committee. He indicated that it was the Committee's recommendation that the development of this doctrine be left to the common law and no statute or rule need be adopted.

Tab 15. The Pretrial Scheduling Order. Judge Gamble gave the report for the Committee. He passed out a new copy of the report which had cosmetic changes only. The Committee recommended changes to Rule 1:18B only and not any of the other parts of the pretrial order. He reviewed the proposed changes with the Conference. The suggestion was that the trial judge could enter the standard pretrial order without a hearing if 30 days had passed since a trial date had been set if no order had been requested by the parties. It was suggested that the sending of the pretrial order should start the 30 days running and this friendly amendment was accepted and ratified by a show of hands with an overwhelming vote. After considerable debate it was decided to send the report back to the Committee for more work on the appropriate time frame.

Pia Trigiani, President of the Virginia Bar Association, was introduced and gave greetings. She introduced the new team of lobbyists and discussed the reasoning and procedures for their hiring. At the conclusion of her talk there was a round of applause.

Tab 16. Charitable Immunity. John McGavin gave the report for the Committee. The Committee recommended no change to current Virginia law.

Tab 18. Designation of Literature. Chuck Sickels gave the report for the Committee. He reviewed the history of the rule in the General Assembly and of the *Bostic* decision which caused some concern. The Committee reached a consensus that the situation needed fixing but the Committee could not reach a decision on how to fix the problems. It was decided that this should be addressed in 2012.

Tab 19. A Discovery Rule. Brian Slaughter gave the report for the Committee. He indicated that the Committee felt that changes should be made but could not reach a decision on what

those changes should be. There was considerable discussion about this and some very strongly voiced arguments both for and against various changes to the statute. It was pointed out by some that the escape valve, filing Virginia cases in other states which had a discovery rule to avoid the Virginia statute of limitations, was being closed as other states were, in part for financial reasons, closing the courthouse doors to those suits. Some of those states were applying the shorter of possible statutes of limitations, that is the shorter of the local statute or the statute that would apply if the statute had been brought in the home state (here Virginia) thus applying the Virginia statute and eliminating Virginia cases.

After considerable debate a vote was taken that a change of some kind needed to be made. This passed unanimously.

After further discussion the Chair ruled that we weren't ready to vote on a particular change and this would be carried over to next year.

Tab 21. Amendment to Rule 4 for Surveillance Material. Derrick Walker gave the report for the Committee. He reported that there was no significant problem identified by the Committee that needed to be fixed and therefore there was no recommendation.

Tab 22. Commonwealth v. Wynn. He reported that the Committee felt that the case was good law and no change need to be made. In particular, the Committee did not recommend the adoption of Federal Rule 703 for Virginia.

State Senator Mark Obenshain and Delegate Manoli Loupassi were thanked for their legislative efforts and the Virginia Bar Association was again thanked for its efforts.

John Walk was introduced as the new Chairman. Roger Mullins was thanked for his hard work.

Roger thanked the Conference for the opportunity to work with them.

John Walk talked briefly about the future of the Conference and read the third paragraph of the Mission Statement.

A motion to adjourn was made, seconded, and carried unanimously about 10:50 a.m.

