

Minutes of the full conference meeting

October 22, 2010

Williamsburg, Virginia

The Chairman called the meeting to order at 2:00. The chair gave thanks to the VBA including Guy Tower, Brenda Dillard, Jeremy Dillon, Kim Kovac, and Anne Leigh Kerr. There was a significant round of applause for their efforts on behalf of the Conference.

The arrangements for cocktails and dinner was discussed.

The Chairman thanked the sponsors of the cocktail party.

The Conference attendees introduced themselves going around the room.

The Chairman noted that the Conference arrangements for next year were not finalized but it will be in northern Virginia.

Tab 3. General Assembly Action on 2009 Conference Recommendations. Professor Hamilton Bryson gave the legislative report. He thanked Senator Obenshain, Delegate Loupassi and Senator Edwards who assisted. He also thanked David Cotter, Anne Leigh Kerr and Guy Tower from the Virginia Bar Association for their efforts. He noted that Boyd-Graves had a good year. See his report at Tab 3. Four of the Boyd-Graves measures were approved. However several were not successful in getting passed. He reviewed those that were not successful. He also noted that a couple of rule changes were in the process of going through the approval process and were successful to this point. One is pending before the Virginia Supreme Court.

Robin Wood and Liz Whiting gave a report on the attempts to modify Sovereign Immunity at the General Assembly. The statute that the Conference recommended failed in the General Assembly. Neither did the recommended legislative study go forward. This will be reviewed by the Steering Committee in January.

The Chairman reiterated the principle that any individual may oppose any action taken by the Conference in the General Assembly. The Conference only asks that any such action be done with respect and be done accurately.

Tom Williamson gave the report on the failed bill concerning Alhborn. Mark Obenshain, normally a terrific friend of this Conference, opposed the bill. He was a strong advocate for his position. The proposal died in Committee.

The family law proposal concerning the Fifth Amendment passed the House Committee, passed the full House narrowly, but died in the Senate Committee.

The minutes of the previous year's Conference were approved by motion made and seconded unanimously.

Tab 4. Evidence Issues. Joseph Kearfoot gave the report of the Committee on Evidence. See the committee report at tab 4. No action was requested by the Committee.

Tab 5. Sandy Tucker gave the report of the Committee on Spoliation of Evidence. There was no recommendation for any changes. There was also no recommendation for further study.

Tab 6. Punitive Damage issues. John Oakey gave the report of the committee. The issue was whether some part of the money should be given to the State treasury. If anyone feels that something should be done please e-mail Coleman Allen or John so the Steering Committee can decide whether to bring this up as a full topic next year.

Tab 7. The Spear decision. Peter DePaolis spoke for the Committee. He reported on the Spear decision which was studied by the Committee. He noted that other courts have not tended to follow Spear. The committee decided to postpone any consideration because the issue is scheduled for the Virginia Supreme Court for January argument. It was suggested that we will wait for the Supreme Court's ruling before making a decision on whether to recommend anything further.

Tab 8. Voir Dire. Chuck Zauzig gave the report of the committee. His committee proposed a change to rule 3A:14 which is based on the criminal statute to cover civil cases.

Tab 9. Recommended Change to Rule 4:7(d) Regarding Objections to Form during a Deposition. Lee Livingston gave the report of the committee. The issue was when and how objections to form need to be made during the course of a deposition. The Committee suggested a rule change. The first suggestion was contained in the Committee Report as Exhibit A. There was a significant amount of discussion on this issue. Roger Creager suggested that the Federal Rule was better and more concise. "Should" was replaced by "shall" in the fifth line of the proposed change, Rule 4:7(d)(3)(C) upon suggestion from the floor. A number of other changes were proposed including changing opposing to objecting in line 4 of that subsection. There were additional changes made allowing the questioner to require the objector to state the basis of the objection. A vote taken by hand and the Chair ruled that there was not a consensus. Note – this was brought back the next day for further discussion – see that portion of the minutes.

Tab 11. Court filings of Social Security Numbers. Charles Hilton gave the report of the committee. His proposal is on the first page of his report and is a rule change. It was explained that only matters that get filed shall be covered by this rule. There was a motion to approve which was seconded. On a vote the Chair determined that there was a consensus to approve the rule change.

Tab 10. Liability of Attorney to Client. Tom Appler gave the report for the Committee. The current statute, 54.1-3906, is contained on page 2 of his report. He reported that what the Committee believed the original intent of the statute was is in the Appendix at Proposal 1. However the Committee also suggested Proposal 2 as an alternative. The Conference, after discussion, considered Proposal 2 in the Appendix. That proposal was adopted by voice vote by consensus.

Tab 12. Arbitration. The Hon. Donald Haddock gave the report. He noted that in general the Virginia law was fine, no change was recommended. However there is some concern about arbitration in consumer cases. He reported that a federal law on this subject is pending. There is

also a US Supreme Court case pending. That case was to be argued November 9, 2010. The consumer arbitration problem does need to be fixed but the proposed change in Federal Law may very well preempt anything we can do in Virginia. He asked for the study committee to stay together and to report back again next year.

Tab 13. Expansion of the Jurisdiction of the General District Court. Steve Garver gave the report of the Committee. The proposal was to expand the jurisdiction to \$25,000. It was also suggested that some discovery be allowed. A handout was given out when Conference Members signed in. See attached. There was considerable discussion about the desirability of introducing discovery into GDC cases.

Proposal one. This was simply to raise the jurisdictional limit to \$25,000. This was passed by consensus to by hand count.

Next there was a vote on 2a as amended by two changes. There was no consensus by voice vote.

2b – deposition provisions. Not a consensus by voice vote.

2c – withdrawn.

A new supplemental report was handed out recommending General District Court jurisdiction for Injunctive and Equitable relief for common interest community associations. A vote was taken and by a show of hands there was not a consensus.

Tab 14. Designation of Authoritative Literature. Lisa O'Donnell gave the report of the committee. This is a recommended alteration to 8.01-401.1. There was considerable discussion. Both of the phrases “and/or sections” were removed from the suggested changes after discussion on the floor. After these changes were made the alterations passed by consensus.

Full Conference Meeting

October 23, 2011

Williamsburg, Virginia

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

The first order of business was to deal with new proposals by the Committee on Specifying Objections to Form. See handout which was passed out at the meeting, attached.

After discussion a vote was taken on Proposal 1. This carried by consensus by voice vote.

The second vote taken was whether should or shall be the appropriate word used in Proposal 2. Again, see the attached handout. After considerable discussion the word "shall" was adopted. Following this there was discussion as to whether the underlined sentence in the Proposal should be in the Proposal at all. Roger Creager spoke against the lined sentence being added. The word specific was added per Coleman Allen and accepted by the committee. A vote on whether the sentence should be added at all was held and ruled not a consensus by show of hands by the Chair.

Tab 16. Lee Osborne gave the report of the Committee on Uniform Adult Guardianship. The Committee wanted Boyd-Graves to support a bill currently pending before the General Assembly. The bill has been introduced and carried over. This is a version of the Uniform Act. The VBA Committee, the Trusts and Estate Section of the VBA, has approved the bill. It was moved that The Conference support the bill, Senate Bill 80, with any amendments that the VBA sponsor makes. This was adopted by voice vote by consensus.

Tab 15 Liz Whiting gave the report of the Committee on the Timely Termination of Residual Parental Rights. Two bills were introduced in the General Assembly and were carried over. She gave a report on the current status of the legislation. The Committee did not support either bill and so did not ask for a vote to support either piece of legislation.

Tab 17. Larry Diehl gave the report of the Committee on the Filing of Counterclaims in Family Law Matters. There is a problem stemming from the merger of law and equity in that counterclaims are fee based filings where there weren't any such fees before in equity. See the change at the last page of the report to return to the pre merger status quo. This was adopted by voice vote by consensus.

Tab 18. Stephen Price gave the report of the Committee. Motions Craving Oyer. Apparently these were abandoned in a rule codification. The committee recommended a rule change to bring back the effect but not the specific motion. Some spoke that the rule change was not the best way to fix the problem. Steve Emmert suggested a change to the bill of particulars. The Committee supported Steve's changes. It was suggested that the Committee make changes and come back with specific language. However others argued that there was no need for a change in current practice. Ham Bryson suggested that the motion does still exist. A vote on whether this is a problem that needs to be fixed. By vote of hands the Conference decided that there was not a problem so no action was taken.

Tab 19. David Anthony gave the report for the Committee in the absence of the chairman who was attending the birth of a child. The issue studied was whether to change discovery deadlines. The committee felt that the flexibility of the pretrial order in non routine cases was sufficient and no formal rule change was needed. Therefore no action was suggested.

Tab 20. Charitable immunity. Derek Walker gave the report of the committee. Note most states have abolished charitable immunity. There was no consensus in the committee so no recommendation for change was made. However he did suggest that this be carried over for next year for additional study. There was a suggestion from the floor to consider expanding the committee to bring charitable groups into the committee or those who represent charitable groups.

Tab 21. Special Appearance Committee. Roger Creager gave the report assisted by Stuart Raphael. Noted that Stuart Raphael had done an excellent report contained in the Committee Report. There was some discussion. The idea was to clarify the law so that persons would know what would and what would not constitute a special appearance. Ham Bryson spoke against the proposal but Stuart Raphael disagreed. Both Proposals A and B were adopted by consensus by voice vote. The next vote was on C. The Chair ruled that there was no consensus on Proposal C. Note that a friendly amendment by Larry Diehl to add a subsection B(7) was not adopted by the chair. "making a special appearance objecting to process or jurisdiction"

Tab 22. Attorneys Fees and Costs. David Carson gave the Report of the Committee. See the amendment to Rule 1:1A contained in the Committee Report. There was some discussion. There was concern that this might transfer the duty of The Court of Appeals to determine whether the party was entitled to fees or not to the trial court. It was decided to carry over the issue until next year.

Tab 23. John McGavin. Attorney-issued subpoenas. The report was no action. However he did give a brief report. The suggestion was that this was best left to the General Assembly. A statute is being considered there.

Adjourned at 11:35 pm.

**PROPOSAL FOR CONSIDERATION BY
BOYD-GRAVES CONFERENCE
2010 Fall Meeting**

***General District Court Jurisdiction Authority to Order
Injunctive Equitable and Declaration Relief in Certain Circumstances***

Background: Common interest community associations (condominium unit owners associations and property associations) administer rules that govern the affairs of the community. Those rules are based on authority in recorded governing documents (condominium instruments for condominiums and a declaration of covenants, conditions and restrictions for property owners associations). The recorded governing documents require an association to initiate legal action to correct conditions. And, the governing boards of directors of these associations are often expected by homeowners to take action to enforce the system of covenants and restrictions by legal action.

Before initiating legal action, most associations make efforts to resolve issues internally through a due process hearing procedure which allows the association to assess a charge against an owner for a violation. Those charges are collectible like any other assessment imposed by an association, and are typically collected through General District Court action. However, even if the charges are paid by the homeowner, the underlying covenant violation may go unaddressed – and that is the real concern for the association, not the collection of charges. The charges are considered an incentive to encourage compliance, but the charges do not always achieve the desired compliance.

Under the current statutory scheme, legal action to require the homeowner to address the violation must be taken in Circuit Court. Legal action to enforce covenants and restrictions in association governing documents can be expensive and protracted. And, at the end of the action, if the association is successful, the association may also be awarded legal fees, a costly proposition for a homeowner.

Recommendation: Amend the jurisdictional authority of the General District Courts to allow the General District Court to order injunctive relief to allow the correction of conditions giving rise to governing document violations in common interest community associations.

Discussion:

Section 16.1-77 of the Virginia Code grants the General District Court authority to hear and decide cases involving claims for injunctive, equitable, or declaratory relief only in specific, limited cases:

- Va. Code § 16.1-77(3) grants jurisdiction in actions of unlawful entry or detainer as specified in Virginia Code Sections “8.01-124 et seq.” and “55-217 et seq.”
- Va. Code § 16.1-77(4) grants jurisdiction to the General District Court over actions where jurisdiction is conferred “under or by virtue of any provisions of the Code of Virginia.”

- Va. Code § 16.1-77(6) grants jurisdiction to the General District Court to “try and decide cases.....for writs of mandamus or for injunctions” under the Virginia Freedom of Information Act as provided in Virginia Code § 2.2-3713 and the Government Data Collection and Dissemination Practices Act as provided in Virginia Code §2.2-3809.
- Va. Code § 16.1-77(7) grants jurisdiction to the General District Court to suspend and restore driving privileges of “habitual offenders” pursuant to the provisions of Virginia Code § 46.2-355.1 et seq.

The jurisdictional statute does not confer a generally-available power to grant equitable or injunctive relief to parties appearing before the general district court.

Virginia Code Section 16.1-77 has been supplemented by other sections of the Virginia Code to confer on the General District Court the authority to grant injunctive and equitable relief:

- Va. Code § 19.2-152.8 - The General District Court has authority to issue emergency protective orders in certain cases.
- Va. Code § 15.2-2209 (as amended by 2008, Ch. 727) - The Virginia General Assembly revised the Virginia Code provisions relating to zoning to confer jurisdiction on the general district courts to “order the violator to abate or remedy the violation in order to comply with the zoning ordinance.”

A similar provision in the Virginia Property Owners’ Association Act and the Virginia Condominium Act would permit the General District Court to order parties in violation of the governing documents of a common interest ownership community association to “abate or remedy” that violation. Otherwise, a separate action in Circuit Court, with the attendant costs to both litigants and the court system, would be required to obtain equitable relief. Separate action in Circuit Court is particularly inefficient where, as would be the case in actions alleging a violation, the General District Court judge has already become familiar with the facts of the case and the governing documents.

The proposal is very much like the recent change to allow localities to take action to obtain compliance with zoning violations in an action brought in the General District Court. The typical violation of association governing documents is much like a zoning violation – for example – the failure to maintain a property in good condition. A locality may cite a homeowner for failing to maintain a property, impose a fine and collect that fine through action in General District Court. Under amendments to Va. Code § 15.2-2209 in 2008, the locality can also ask the court to order the violator to abate or remedy the violation.

The proposal is supported by Community Associations Institute, the national trade association that represents the interests of community association leaders, homeowners and professionals who serve community associations.

Committee on Specifying Objections to Form
Proposed Amendment to Rule 4:7(d)(3) (Tab 9)
October 23, 2010

The Committee met and considered the comments at the Conference.

The Committee proposes the following substitute, to be considered in a series of votes.

Vote No. 1.

Rule 4:7(d)(3) should be amended as follows:

Change existing Rule 4:7(d)(3)(C) to (D), and add as Rule 4:7(d)(3)(C):

A person may object to the form of a question either by stating “objection to the form” or by stating the specific objection to form. A general objection to the form of a question shall be sufficient to preserve the objections unless the basis for the objections is requested, in which case the specific form objection must be stated in order to preserve the objection. The person questioning the deponent may require that objecting parties state the basis for all objections to form. Parties may stipulate to continuing objections to a line of questions, so long as the stipulation is clear, to avoid repetitive interruptions in the questioning.

Vote No. 2.

Add a second sentence to the language adopted above:

A person may object to the form of a question either by stating “objection to the form” or by stating the specific objection to form. Objections [should/shall] be stated concisely, in a non-argumentative and non-suggestive manner. A general objection to the form of a question shall be sufficient to preserve the objections unless the basis for the objections is requested, in which case the specific form objection must be stated in order to preserve the objection. The person questioning the deponent may require that objecting parties state the basis for all objections to form. Parties may stipulate to continuing objections to a line of questions, so long as the stipulation is clear, to avoid repetitive interruptions in the questioning.

Vote 2(a): Determine whether a majority supports using “should” or “shall”

Vote 2(b): Determine if there is a consensus for the underlined language.