

**2007 BOYD-GRAVES CONFERENCE**

**SUBCOMMITTEE REPORT**

***Rule Amendment to Permit Use at Trial of Deposition Transcripts of Licensed Practical  
Nurses/Potential Rule Regarding De Bene Esse Depositions***

Brian O. Dolan, Chair  
Gary C. Hancock  
L.B. Chandler, Jr.  
M. Pierce Rucker,  
Peter C. DePaolis  
The Honorable Joanne F. Alper

**KAUFMAN & CANOLES**

— | A Professional Corporation | —  
**Attorneys and Counselors at Law**

Brian O. Dolan  
757 / 624-3118  
bodolan@kaufcan.com

757 / 624-3000  
fax: 757 / 624-3169

*Mailing Address:*  
P.O. Box 3037  
Norfolk, VA 23514

150 West Main Street  
Suite 2100  
Norfolk, VA 23510

September 24, 2007

**VIA E-MAIL – thomas.appler@wilsonelser.com**  
**AND U.S. MAIL**

Thomas L. Appler, Esq.  
Wilson, Elser, Moskowitz, Edelman  
& Dicker, LLP  
8444 Westpark Drive  
Suite 510  
McLean, VA 22102

**Re: Committee Report on Rule Amendment to Permit Use at Trial of Deposition  
Transcripts of Licensed Practical Nurses/Potential Rule Regarding *De Bene  
Esse* Depositions**

Dear Tom:

The above Committee, which included the Honorable Joanne Alper, Pierce Rucker, L.B. Chandler, Gary Hancock, Peter DePaolis, and Brian Dolan, convened via teleconference several times and discussed the above two issues. The first issue was a carryover from the 2006 Conference, *i.e.*, whether the Rules of the Supreme Court of Virginia should be expanded to allow the use of deposition transcripts at trial, in lieu of a live appearance, for licensed practical nurses regardless of their availability to testify. Second, we examined whether there is a need for a Rule of Court that would specifically address the use of *de bene esse* depositions.

Regarding the use of deposition transcripts at trial, last year this Committee unanimously recommended expanding Rule 4:7(a)(4)(E) to include licensed practical nurses and physician assistants. The Committee believed that this was a minor change that would benefit both sides at trial. The current version of Rule 4:7(a)(4)(E) and the Committee's proposed change appear below.

**Current Rule 4:7(a)(4)(E)**

The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing *ore tenus* upon an equitable claim if the court finds: . . . (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his

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profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or *sua sponte*, order him to attend and to testify *ore tenus*. . . .

#### Proposed Revision

The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing *ore tenus* upon an equitable claim if the court finds: . . . (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, **[physician assistant]**, surgeon, dentist, chiropractor, **[licensed practical nurse]**, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or *sua sponte*, order him to attend and to testify *ore tenus*. . . .

The Committee also offered a more expansive alternative. The alternative proposal was to include physician assistant as well as most clinical "persons" included in the definition of "health care provider" under Va. Code § 8.01-581.1, but exclude all entities and administrative staff, physical therapy assistants, and dental hygienists.

#### Alternative Proposed Revision

The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing *ore tenus* upon an equitable claim if the court finds: . . . (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, **[pharmacist, optometrist, podiatrist, physical therapist, physician assistant, clinical psychologist, clinical social worker, professional counselor, licensed marriage and family therapist, emergency medical technician, licensed practical nurse]**, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or *sua sponte*, order him to attend and to testify *ore tenus*. . . .

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During the 2006 Conference some members raised concern about any expansion of Rule 4:7(a)(4)(E). Therefore, our Committee accepted the task of re-examining the issue, including whether all or some of the existing exceptions instead should be eliminated.

Having reconsidered this issue, the Committee continues to recommend that Rule 4:7(a)(4)(E) be amended at minimum to include licensed practical nurses and physician assistants. The Conference members also should consider the broader alternative. The Committee recommends against deleting some or all the Rule.

The second Rule change this Committee explored was whether there exists a need for a Rule regarding the use of *de bene esse* depositions at trial. It was the sense of the Committee that existing Rules, the Uniform Scheduling Order, and the ability to resort to the trial court if necessary provide sufficient bases for resolving any issues. Thus, the Committee does not see the need to suggest modifying an existing Rule or recommend creating a new Rule to address *de bene esse* depositions.

Sincerely,

Brian O. Dolan

cc: Gary C. Hancock, Esq. (via e-mail)  
L.B. Chandler, Jr., Esq. (via e-mail)  
M. Pierce Rucker, Esq. (via e-mail)  
Peter C. DePaolis, Esq. (via e-mail)  
The Honorable Joanne F. Alper (via e-mail)

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Editor's Note:

The Committee's recommendation that licensed practical nurses and physician's assistants be added to Rule 4:7(a) failed to achieve a consensus of the Conference. A new Committee will be formed to study the broader issue of whether procedures for introduction of depositions at trial should be revised.