NOTICE TO THE BAR AND THE BENCH OF VIRGINIA

Draft Rules Provisions Published for Comment

December 2, 2020

On this date the Supreme Court of Virginia has directed the Rules amendments proposals below, previously reviewed by the Advisory Committee on Rules and the Judicial Council of Virginia, be published for comment by the Bench, Bar and Public.

A. Pretrial-Conferences in Cases Expected to Run Five Days or more

Proposed Revision of Existing Rule of Court:

Rule 1:19. Pretrial Conferences

In addition to the pretrial scheduling conferences provided for by Rule 4:13, each trial court may, upon request of counsel of record, or in its own discretion, schedule a final pretrial conference within an appropriate time before the commencement of trial. In cases set for trial for five days or more, upon request of any counsel of record, made at least 45 days before trial, the court must schedule a final pretrial conference within an appropriate time before commencement of trial. At the final pretrial conference, which the trial court in its discretion may conduct in person or by telephone or by videoconference, the court and counsel of record may consider any of the following:

(a) settlement;

(b) a determination of the issues remaining for trial and whether any amendments to the pleadings are necessary;

(c) the possibility of obtaining stipulations of fact, including, but not limited to, the admissibility of documents;

(d) a limitation of the number of expert and/or lay witnesses;

(e) any pending motions including motions in limine;

(f) issues relating to proposed jury instructions; and

(g) such other matters as may aid in the disposition of the action.

Background Note: A Boyd-Graves study committee addressed the issue whether Rule 1:19 should require a final pretrial conference prior to commencement of trial, and concluded that pretrial conferences are readily available across the Commonwealth where needed, and hence a uniform requirement to hold such a conference would be a waste of time and expense. It concluded, however, that – where a case is scheduled for a trial of three days or more – amending the Rule to require a pretrial conference would be

beneficial and, further, that use of telephone or video-linked conferencing should be encouraged.

To avoid a large number of perhaps unnecessary pretrial conferences, the Advisory Committee recommended that the triggering length of trial for this mandatory provision be set at seven days rather than three days, recognizing that many circuits would routinely grant a final pretrial conference in shorter cases as well, as a matter of discretion. This issue was discussed by the Judicial Council of Virginia on October 22, some members of Council doubted the need for this Rule change, but – *after discussion revealed that some lawyers are reporting that in some circuits a pretrial conference will not be scheduled even in a relatively lengthy case where requested by the parties* – a majority of the Council voted recommend this amendment to Rule 1:19, creating a right to request such a conference if the trial is scheduled to last seven days or more. The Supreme Court solicits comments on whether the proposed amendment would be beneficial generally and -- if any such change should be made -- whether a five-day trial or a different threshold would be appropriate.

B. Rule 4:5(b)(6) – Entity Depositions

Proposed Revision of Existing Rule of Court:

Rule 4:5(b)(6):

* * * *

(b) Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.

* * * *

(6) A party may in the ~~his~~ notice name as the deponent a public or private corporation, or a partnership, an ~~or~~ association, a ~~or~~ governmental agency, or other entity, and must describe and designate with reasonable particularity the matters on which examination is requested. The organization so named must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf;~~,~~ and it may set out~~forth~~ the matters on which each person designated ~~he~~ will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons so designated must testify as to matters known or reasonably available to the organization on the topics specified in the notice of deposition. Except as provided in Virginia Code § 8.01-420.4:1, this subdivision

(b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules and Virginia law.

Background Note: In 2019 the Advisory Committee on Rules of Court arranged for publication of draft revisions to Rule 4:5(b)(6), the entity-deposition Rule. Comment was solicited on provisions being considered at that time by the federal rules drafting bodies for the comparable Federal Civil Rule 30(b)(6), which required extensive "conferral duties" by the parties, requiring continuing negotiations over (1) who will be produced by the entity in response to the deposition notice, and over (2) the number and description of the subjects for examination. Those who commented on the Virginia draft, uniformly opposed those provisions. Similarly, those extra "conferral duties" were opposed by almost all of 1,800 written comments received by the federal rules drafters. Federal Rules drafters removed these onerous proposals, and adopted only minor clean-up of Rule 30(b)(6), and the Virginia Advisory Committee likewise revised the update efforts on Rule 4:5(b)(6) to avoid the objections of the practicing bar to extended "negotiation" requirements in using the entity-deposition procedure.

As approved by the U.S. Supreme Court and effective as of December 1, 2020, Federal Rule 30(b)(6) has been be changed only to provide that, "*Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination*," and to state that a (b)(6) subpoena to a nonparty organization must advise it of its duty to make this designation and to confer with the serving party.

The Virginia Advisory Committee concluded that several minor amendments to the Virginia version of this Rule, 4:5(b)(6), are needed to remove sexist language, clarify the range of entities subject to the Rule, and to implement the provisions of the Virginia 2019 statute that – in effect – requires the use of this 4:5(b)(6) process rather than allowing an adversary to directly notice the deposition of a top officer of certain large corporations, Code § 8.01-420.4:1.

C. Defining "Responsive Pleadings" and Listing Motions Craving Oyer

Proposed Revision of Existing Rule of Court:

Rule 3:8. Answers, Pleas, Demurrers and Motions

(a) Response Requirement. -- A defendant must file pleadings in response within 21 days after service of the summons and complaint upon that defendant, or if service of the summons has been timely waived on request under Code § 8.01-286.1, within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the

Commonwealth. ~~A~~ Pleadings in response under this Rule – other than an answer – are limited to the following, and are deemed responsive only to the specific count or counts addressed therein: a demurrer, plea, motion to dismiss, ~~and~~ motion for a bill of particulars, motion craving oyer, and a written motion asserting any preliminary defense permitted under Code § 8.01-276. ~~shall each be deemed a pleading in response for the count or counts addressed therein~~. If a defendant files no other pleading in response than the answer, it must be filed within the applicable 21-day, 60-day, or 90-day period specified in this Rule. An answer must respond to the paragraphs of the complaint. A general denial of the entire complaint or plea of the general issue is not permitted.

(b) Response After Demurrer, Plea or Motion. --When the court has entered its order overruling all motions, demurrers and other pleas filed by a defendant as a responsive pleading, such defendant must, unless the defendant has already done so, file an answer within 21 days after the entry of such order, or within such shorter or longer time as the court may prescribe. If the court grants a motion craving oyer, unless the defendant has already filed an answer or another responsive pleading, the defendant must file an answer or another responsive pleading within 21 days after plaintiff files the document(s) for which oyer was granted, or within such shorter or longer time as the court may prescribe.

Background Note: A lengthy report at the 2019 Boyd Graves Conference provided a history of the treatment of motions craving oyer and the issue of whether a specification of what serves as a responsive pleading is needed in the Virginia Rules of Court. These considerations were discussed at the September 3, 2020 meeting of the Advisory Committee, which agreed that Rule 3:8 should be expanded to advert expressly to the statutorily preserved category of motions under Code § 8.01-276 as being included with the motions and pleas considered a responsive pleading, and that motions craving oyer should also be included.

The rationale for including motions craving oyer as responsive pleadings in Rule 3:8 is that an oyer application is often a necessary prerequisite to proper filing of a demurrer or the answer itself, both of which are archetypal responsive pleadings. The continued vitality and role of motions craving oyer is discussed in some detail by the Supreme Court of Virginia in *Byrne v. City of Alexandria*, 842 S.E.2d 409 (May 28, 2020). The Advisory Committee added to the Boyd Graves proposal by crafting language for subpart (b) of Rule 3:8 to assure that a granted motion for oyer does not leave the case in limbo, by creating a preset date for the defendant to file an answer or another responsive pleading – triggered by the plaintiff's filing the document(s) for which the court orders oyer. The Judicial Council in October, 2020, recommended these revisions to the Supreme Court, which on December 2, 2020 directed publication of these prospective revisions for public comment.

Email Comments: Send any comments on the planned amendments to portions of the Virginia Rules as published herewith on or before February 12, 2021 to:

Steven Dalle Mura
Director of Research, Office of the Executive Secretary
Supreme Court of Virginia
100 North Ninth Street, Richmond, VA 23219

EMAIL: proposedrules@vacourts.gov