

# **RULES OF EVIDENCE FOR VIRGINIA**

## Introduction

For over twenty years the Boyd Graves Conference has supported the establishment of Rules of Evidence for Virginia. In March 2008 the Chairman and several past Chairmen of the Conference met with the Chief Justice of Virginia to discuss whether he was aware of any issues which should be considered by the Conference. At that meeting the Chief Justice indicated that he was interested in moving forward with a Code of Evidence. This was the first time that any of the participants were aware that the Supreme Court might approve a Code of Evidence.

## History

In 1983 William Poff, then President of the VSB, appointed a committee to investigate the possibility of developing Rules of Evidence for Virginia. At that time the federal rules of evidence were a few years old and as a result several other states were developing Codes of Evidence of their own. No previous attempt had been made in Virginia.

The Committee recommended that Virginia establish a Code of Evidence. In either 1983 or 1984 the Boyd Graves Conference considered this matter and also recommended the establishment of a Code of Evidence for Virginia. At that time there was still some opposition, primarily from the older lawyers who did not feel that rules were necessary. Subsequent to this recommendation the original Committee, with the backing of the VSB, proceeded to determine the best procedure for enacting a Code of Evidence. Lawyers familiar with the legislative process recommended to the Committee that the Rules should be approved by the Supreme Court but that they should go through the Code Commission so that the legislation would go to the General Assembly as one indivisible Code. It was also necessary that it contain provisions for repealing the existing statutes on evidence. There was concern at that time that if it were done

any other way, the legislature might desire to make changes to individual sections which would be detrimental to the passing of the entire Code. Neither the Committee, the Boyd Graves Conference or any other group recommended that these rules merely restate the Virginia evidentiary law then in existence.

The legislature then passed several sections amending the Code of Virginia to allow the Evidentiary Code to be established. They were:

§ 8.01-3 A. This section allows the Supreme Court to prescribe rules and the following words were added “and may prepare Rules of Evidence to be used in all such courts.”

§ 8.01-3 E. The legislation added “The rules of evidence prepared by the Supreme Court shall be submitted to the Virginia Code Commission for approval as provided in § 30-153 and shall be codified upon enactment by the General Assembly.”

§ 30-153 was also added to the sections pertaining to the Code Commission: “The Commission shall have the responsibility for drafting rules of evidence for introduction in to the General Assembly in accordance with the recommendations of the Supreme Court as provided in subsection E of § 8.01-3. All other sections of the Code of Virginia relating to evidentiary matters shall be revised to the extent necessary.”

Once these sections became law, the Supreme Court accepted this as a directive from the legislature to proceed with the developing Rules of Evidence. They appointed a committee chaired by Stephen Saltzburg and John M. Oakey, Jr. to draft rules to be submitted to the Court. This committee consisted of representatives from virtually every area of the trial bar, including both plaintiffs and defendants civil attorneys, the Attorney General, the Commonwealth Attorneys, criminal defense lawyers, Judges of the Circuit and General District Courts and four law professors. This committee deliberated over a period of one year, and in late 1985 submitted a recommended draft of Rules of Evidence to the Supreme Court.

The Court then submitted the draft for public comment and deliberation. After full consideration of the draft and the public policy considerations involved, the Supreme Court decided not to proceed with the Code of Evidence and did not submit the draft to the Code Commission. Although no official document stated their reasoning, comments included that a Code of Evidence was not needed for Virginia at that time, evidentiary questions were so important they should be decided by a full argument on both sides before the entire Court, the recommended Rules changed Virginia law and were too close to the newly established Federal Rules of Evidence, and that the draft presented filled in gaps in Virginia law and would amount to legislation.

#### Boyd Graves Conference Involvement

In the 1980s when the first two original committees were in existence, the Boyd Graves Conference considered the question of whether Virginia should have Rules of Evidence at least four times. Each time the Conference recommended enacting a Code of Evidence.

In the early 1990s there were a number of members of the Boyd Graves Conference who continued to support a Code of Evidence for Virginia. This matter was again placed on the agenda of the Boyd Graves Conference and a committee chaired by Frank B. Miller, III was appointed to make recommendations as to what could be done to achieve this goal. This group recommended that the Conference publish a guide to evidence in Virginia which would state the existing Virginia law on evidence. This project lasted for several years and culminated in the current "Guide to Evidence in Virginia" which was first published in 1997. Each year since then a group of attorneys representing various areas of trial practice has met and made recommendations to update the publication. The reporter for a number of years has been Professor Kent Sinclair and the current Chairman of the Committee is Joseph C. Kearfott. A

number of years ago the Rules were changed to Sections to make it clear that even though the Committee felt strongly that they followed current Virginia law, they had not been approved by the Supreme Court. This publication is copyrighted by the Virginia Law Foundation and is a Virginia CLE Publication. A new edition has been published each year for at least the last eight years. Many judges have used it as a resource and the Chief Justice recently indicated that he was arranging for copies to be sent to all of the judges in Virginia.

#### Recent Activity

In recent years interest in developing official Rules of Evidence has been revived. A new set of evidentiary rules has been developed by the Advisory Committee on Rules and approved by the Judicial Council of Virginia. This report is dated March 18, 2008. The background and introduction section of that report states as follows:

“After 13 years of study by bar groups and the Advisory Committee on Rules, draft Virginia Rules of Evidence were published for public comment three times by the Judicial Conference of Virginia at this Committee’s behest: first in 2005, again in 2006, and yet again for comment by February 1, 2007. The draft Rules distill and restate existing Virginia evidence principles, and do not change or overturn any existing caselaw precedent or statutory provisions. Now, after 15 years of study, the Advisory Committee on Rules of Court unanimously recommends adoption of the Rules. At the Committee’s meeting, the motion was made by a lawyer who specializes in plaintiff’s work, was seconded by a Commonwealth’s attorney, and voted for unanimously by the defense practitioners (civil and criminal), and all of the judges on the Committee. There was no dissent: it was a unanimous vote.”

The draft rules approved by the Judicial Council evolved over a number of years and it appears that the Guide to Evidence was one of the primary sources used. The Advisory Committee also published an initial set of rules and received detailed suggestions from the Virginia Trial Lawyers Association, the Virginia Association of Defense Attorneys, the Attorney General’s office and a number of other groups and individuals. As the Report states “None of

the comments received during the three-year publication and comment process opposed the plan to adopt a set of rules to distill Virginia law.”

It is also important to note that the Commission on Virginia Courts in the Twenty-first Century (commonly referred to as the Futures Commission) stated in January 2007 that “Virginia should improve the administration of justice at the trial court level by adopting Rules of Evidence for civil and criminal proceedings” Recommendation 4.6.

The current status is that the Judicial Council has submitted proposed draft Rules of Evidence to the Supreme Court and recommended that “the Supreme Court approve the draft Rules as set forth above and that they be promulgated and submitted to the Code Commission for approval in an omnibus bill setting a date for effectiveness upon July 1, 2009 upon approval of the General Assembly, and repealing such statutes as are noted above where the content of certain existing provisions is being moved into the Rules of Evidence.”

#### Recommendation

This matter has been considered many times in the past by the Conference. It now appears that another recommendation by the Conference would be helpful. The below named persons have been active in pursuing the Code of Evidence over the years, and each has worked on the revisions to the Guide to Evidence in Virginia. It appears that it might be helpful to have an approval by the Conference of the Conclusion and Recommendations of the Advisory Committee on Rules and the Judicial Council of Virginia. We urge the Conference to support the Advisory Committee on Rules and the Judicial Council of Virginia and to adopt their recommendation verbatim:

**“IT IS RECOMMENDED that the Supreme Court approve the draft rules as set forth above and that they be promulgated and submitted to the Code Commission for approval in an omnibus bill setting a date for effectiveness upon July 1, 2009 upon approval of the General Assembly, and repealing such statutes as noted above, where the content of certain existing provisions is being moved into the Rules of Evidence.**

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Joseph c. Kearfott  
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Editor's Note: No action was taken on the Committee's report.