

KAUFMAN & CANOLES

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Attorneys and Counselors at Law

Brian O. Dolan
757 / 873-6311
bodolan@kaufcan.com

11817 Canon Boulevard
Suite 408
Newport News, VA 23606

757 / 873-6300
fax: 757 / 873-6359

July 24, 2008

VIA E-MAIL AND U.S. MAIL

The Honorable Diane M. Strickland
Retired Judge
809 Oakwood Drive, SW
Roanoke, VA 24015

Re: Committee Report on Continuing Need for Rule 4:7(a)(4)(E) and Need for Separate Rule for De Bene Esse Depositions

Dear Judge Strickland:

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 issues. The first issue was a carryover from the 2006 and 2007 Conferences, where we reported our recommendation to expand the scope of Rule 4:7(a)(4)(E) to include licensed practical nurses and physician assistants. There was no consensus to follow our recommendation. This year, we were asked to consider whether Rule 4:7(a)(4)(E), which has no direct counterpart in Federal Rule of Civil Procedure 32(a)(4), instead should be deleted. This Committee unanimously agreed that Rule 4:7(a)(4)(E) should remain intact.

The second change this Committee examined, whether there should be separate rules for “*de bene esse*” depositions from those that apply to “discovery” depositions, was a carryover from the 2007 Conference. We solicited input from the members of the Virginia Association of Defense Attorneys and the Virginia Trial Lawyers Association. We received less than two dozen comments. Most of the comments, however, indicated that there was no need for separate rules. Thus, it is doubtful that there is a problem significant enough to warrant a change. Several other comments focused on receiving insufficient pretrial notice of their opponent’s intent to use the deposition transcript at trial. To address the notice concern, we considered making the Uniform

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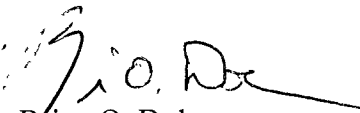
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Pretrial Scheduling Order (the "Uniform Order") mandatory in all cases but concluded that would necessitate changing Rule 1:18, which makes a scheduling order optional, and that in many cases the parties may prefer not having a scheduling order. Another option we weighed was inserting into Rule 4:7, with some slight modification, paragraph XI, "Deposition Transcripts to be Used at Trial," of the Uniform Order. This would result in the Uniform Order being redundant, or in need of modification. Moreover, we believed that the Supreme Court of Virginia intentionally and with good reason chose to put paragraph XI in the Uniform Order rather than insert such language in Rule 4:7. Concerned parties also remain free to raise the issue with the court anytime before trial. Therefore, we do not recommend creating a separate rule for "*de bene esse*" depositions.

Very truly yours,



Brian O. Dolan

BOD/gsh

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

Editor's Note: The Committee recommended that Rule 4:7(a)(4)(E) not be deleted and that there be no s