

# 11th Judicial Circuit

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May 8, 2008

The Hon. Diane M. Strickland, Chair  
Boyd-Graves Conference  
809 Oakwood Drive, S. W.  
Roanoke, VA 24015

Re: Boyd-Graves Study of the obligation to respond to discovery and the right to conduct discovery when demurrers and other issues raised by responsive pleadings are pending decision

Dear Diane:

Our committee met by telephone conference on several occasions to discuss the issue for study set forth above. Although no member of the committee had personally experienced a problem in this area of inquiry, we were made aware of difficulties encountered by others, including one conference member who described that a "demurrer regarding one count can hold the entire case hostage and ultimately result in an untenable and compressed discovery schedule to get the case ready for trial after months of doing nothing."

In many jurisdictions, this is particularly true when an attorney takes the position that discovery cannot go forward until there has been resolution of all demurrers, and the docket of the court does not permit a prompt hearing on the outstanding demurrer or other plea. Under existing rules, the court, in its discretion, can fashion a solution when the issue arises. Our proposed changes to the Rules of the Supreme Court of Virginia 1:18B, 3:8, and 4:1 will address the issue more specifically through provisions regarding the sequence and timing of discovery and the impact on discovery as follows

## **Proposed Amendment to Virginia Supreme Court Rule 3:8**

(Bolded text reflects the proposed additional language)

(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, such defendant shall, 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.

(c) *Discovery in the Absence of Timely Order on Demurrer, Plea or Motion.* If motions, demurrers and other pleas filed by a defendant are not brought on for hearing or otherwise resolved within sixty (60) days of filing, discovery may proceed as to those counts subject to said motions, demurrers, or other pleas absent a stay of

discovery ordered by the court for good cause shown. Per Section 4:1(d) of these rules, discovery on those counts not subject to said motions, demurrers, or other pleas shall not be delayed during this sixty-day period based on the fact that motions, demurrers, or other pleas are pending on other counts.

**Proposed Amendment to Virginia Supreme Court Rule 4:1**

(Bolded text reflects the proposed additional language; strikethrough reflects language to be deleted)

(d) *Sequence and timing of discovery:* Unless the court upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence. ~~and~~ The fact that a party is conducting discovery, whether by deposition or otherwise, **or the fact that a demurrer or motion to one or more counts is pending decision**, shall not operate to delay any other party's discovery **or any discovery as to counts not subject to such demurrer or motion.**

**Proposed Amendment to Uniform Pretrial Scheduling Order (Rule 1:18B), Appendix of Forms, #3**

(Bolded text reflects the proposed additional language)

IV. All dispositive motions shall be presented to the court for hearing as far in advance of the trial date as practical. All counsel of record are encouraged to bring on for hearing all demurrers, special pleas, motions for summary judgment or other dispositive motions not more than 60 days after being filed. **Discovery on counts not subject to such motions should not be delayed during this period based on the fact that other counts are subject to such motions. If said motions are not brought on for hearing or otherwise resolved within this time frame, discovery may proceed as to those counts subject to said motions absent a stay of discovery ordered by the court for good cause shown.**

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We recommend the adoption by the conference of these proposed changes to the Rules of the Supreme Court of Virginia

Yours truly,



Pamela S. Baskerville

cc by email only:

Professor Benjamin Spencer  
James E. Brydges, Jr., Esquire  
David E. Constine, III, Esquire  
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Editor's Note: Following discussion by the Conference, the Committee withdrew its recommendation that Rules 3:8, 4:1 a