

The Committee proposes the following substitute based on the guidance of the Conference:

Rule 3:25. Claims For Attorney's Fees

(a) *Scope of Rule.* -- This rule applies to claims for attorney's fees, excluding (i) attorney's fees under § 8.01-271.1 of the Code of Virginia, and (ii) attorney's fees in domestic relations cases.

(b) *Demand.* -- A party seeking to recover attorney's fees shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, or in a responsive pleading filed pursuant to Rule 3:8. The demand must ~~include~~ identify the legal basis upon which the party relies in requesting attorney's fees.

(c) *Waiver.* -- The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, ~~absent good cause shown~~ unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8.

(d) *Procedure.* -- Upon the motion of any party, or upon its own motion, the court shall, in advance of trial, establish a procedure to adjudicate any claim for attorney's fees.

2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Attorneys Fees Proof Considerations in Litigation

Ann K. Sullivan, Chair
Stuart A. Raphael
Professor W. Hamilton Bryson
The Honorable Stanley P. Klein

LAW OFFICES
CRENSHAW, WARE & MARTIN, P.L.C.
1200 BANK OF AMERICA CENTER
ONE COMMERCIAL PLACE
NORFOLK, VIRGINIA 23510

TELEPHONE (757) 623-3000
FACSIMILE (757) 623-5735

August 30, 2007

ANN K. SULLIVAN
EMAIL: asullivan@cwm-law.com

VIA E-MAIL: THOMAS.APPLER@WILSONELSER.COM

Thomas L. Appler, Esquire
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, VA 22102-5138

RE: Boyd-Graves Study of Attorneys Fees Proof Considerations in Litigation

Dear Tom:

Our committee composed of Judge Stanley Klein, Stuart A. Raphael, Professor W. Hamilton Bryson and me, unanimously agree to the enclosed study proposing a change to *Rule 3:25 Claims for Attorney's Fees*.

Thank you for the opportunity to be of service.

Very truly yours,



Ann K. Sullivan

AKS/djm
Enclosure

cc: The Honorable Stanley P. Klein
Stuart A. Raphael, Esquire
Professor W. Hamilton Bryson



2007 Boyd-Graves Study of Attorney's Fee Claims in Civil Litigation

In 2005, the Boyd-Graves Conference recommended the adoption of a Supreme Court Rule detailing how claims for attorney's fees should be considered in civil litigation. (A copy is attached as Appendix I.) Although the Conference supported the proposal with near unanimity, the recommendation was not endorsed by the Rules Advisory Committee on the Rules of Court. Anecdotal reports suggested that some members of the Rules Advisory Committee may have believed that the Rule should not list examples of the factors a court might take into consideration when determining further procedures for the adjudication of a fee claim.

The Steering Committee of the Boyd-Graves Conference asked our committee to revisit the matter and to consider whether a different proposal would be both advisable and more likely to receive the support of the Rules Advisory Committee. Our committee was chaired by Ann K. Sullivan, and included the Honorable Stanley P. Klein, Professor W. Hamilton Bryson, and Stuart A. Raphael. The Committee met twice by telephone to discuss the issue and exchanged various correspondence.

The Committee agreed that the current practice of litigating attorney's fee claims creates a trap for unwary practitioners. Some Virginia lawyers are under the impression that claims for attorney's fees should be handled by way of post-trial motion, a practice more common in federal court. A number of cases have involved the resolution of fee claims through post-trial motion, at least where the parties and the trial court agreed to the procedure. *E.g., Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 175, 623 S.E.2d 889, 892 (2006); *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 559, 587 S.E. 2d 581, 582 (2003); *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 500, 362 S.E. 2d 723, 728 (1987). In *Lee v. Mulford*, however, the Supreme Court ruled that "[a]bsent agreement of the parties with the concurrence of the court, or pursuant to contract or statute with specific provisions, a litigant is not entitled to bifurcate the issues and have the matter of attorney's fees decided by the trial court in post-verdict proceedings." 269 Va. 562, 567-68, 611 S.E.2d 349, 352 (2005). The lawyer in *Lee* who thought "it is customary to argue the issue of fees post-trial," *id.* at 565, 611 S.E.2d at 350, thus waived his claim by failing to offer evidence at trial concerning the amount and reasonableness of the fees asserted.

The Committee believed that instances of inadvertent waiver could be reduced and that justice would be better served if the parties address the issues surrounding the litigation of an attorney's fee claim earlier in the litigation. Those issues include: (1) whether a contract, common law, or statute authorizes the recovery of attorney's fees, notwithstanding the "American Rule" that fees are generally not recoverable in civil litigation; (2) whether the right to a jury trial applies to the claim, an issue affected by the source of the right to recover attorney's fees; and (3) the procedure for litigating a claim for attorney's fees, whether as part of the underlying trial on the merits or through post-trial motion.

After considering several approaches, the Committee developed the Rule proposed below, which would be added to Part III of the Rules of the Supreme Court:

Rule 3:25. Claims For Attorney's Fees

(a) Scope of Rule. -- This rule applies to claims for attorney's fees, excluding (i) attorney's fees under § 8.01-271.1 of the Code of Virginia, and (ii) attorney's fees in domestic relations cases.

(b) Demand. -- A party seeking to recover attorney's fees shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, or in a responsive pleading filed pursuant to Rule 3:8. The demand must include the legal basis upon which the party relies in requesting attorney's fees.

(c) Waiver. -- The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, absent good cause shown.

(d) Procedure. -- Upon the motion of any party, the court shall, or, upon its own motion the court may, in advance of trial, establish a procedure to adjudicate any claim for attorney's fees.

Part (a) describes the scope of the Rule, which would apply to claims for attorney's fees authorized by statute, contract, or common law. The Rule would not apply to claims for attorney's fees as part of a sanction that might be ordered by a court under Va. Code Ann. 8.01-271.1. Neither would it apply to attorney's fees in domestic relations cases, an exception that the Boyd-Graves Conference included in its 2005 proposal.

Part (b) is intended to require the issue of the availability of attorney's fees to be addressed early in the litigation. The party asserting a claim for the recovery of attorney's fees must plead the claim and identify the legal basis for it. The opposing party is thereby placed on notice of the claim. If the opposing party believes the legal basis is inadequate, this procedure facilitates prompt resolution, such as by demurring to, or moving to strike, the claim for attorney's fees. A claim for attorney's fees must be included in the party's pleading asserting a claim on the merits (complaint, counterclaim, cross-claim). If a defendant intends to seek attorney's fees but without filing a counterclaim (such as where a statute or contract upon which the plaintiff has sued provides for the recovery of attorney's fees by the "prevailing party"), the defendant must identify the claim in the responsive pleading filed under Rule 3:8.

The Committee considered whether this disclosure requirement should take place later in the litigation than at the initial pleading stage. We concluded that the pleading stage was appropriate. The parties and the court most typically look to the pleadings to determine whether a claim for attorney's fees has been made in the case. This procedure also dovetails with Rule 3:21, governing the demand for a jury trial. Under Rule 3:21(d), a right to jury trial is waived if neither party requests one within 10 days of the last pleading directed to the issue. This means

that the parties, early in the litigation, will know whether the case will be tried to a jury, and they can take that factor into account in determining how to litigate the claim for attorney's fees.

Part (c) provides that, if a claim for attorney's fees is not made in a timely fashion at the pleading stage, it is waived. However, a court, in its discretion, may provide relief from the waiver for good cause shown.

Finally, part (d) signals to the parties and the court to address, prior to trial, the procedure for litigating the attorney's fee claim.

The Committee believes that the proposed Rule lays out a clear road map for litigating attorney's fee claims. The pleading requirement will be a familiar one to practitioners, and determining in advance of trial the procedure for litigating such claims will help eliminate the traps for the unwary discussed above.

The Committee also believes that, because the proposed Rule is more simple than the 2005 proposal, it is more likely to be endorsed by the Rules Advisory Committee. There are two significant differences between the proposals. First, this proposal does not create a new pleading to be filed by the party seeking attorney's fees. Instead, the demand must be included in the same pleading addressing the underlying merits. Second, the Rule does not specify the factors that the trial court may consider in determining the procedure to adjudicate the fee claim. Trial courts will retain the same discretion they exercise now.

The Committee unanimously agreed that the Boyd-Graves Conference should recommend the adoption of this proposed Rule.

Committee Report prepared by Stuart A. Raphael

LAW OFFICES
CRENSHAW, WARE & MARTIN, P.L.C.
1200 BANK OF AMERICA CENTER
ONE COMMERCIAL PLACE
NORFOLK, VIRGINIA 23510

TELEPHONE (757) 623-3000
FACSIMILE (757) 623-5735

ANN K. SULLIVAN
EMAIL: asullivan@cwm-law.com

September 14, 2005

Wiley Mitchell, Esq.
Willcox & Savage, P.C.
One Commercial Place
Suite 1800
Norfolk, VA 23510

Re: Boyd Graves – Adjudication of Attorney's Fees Claims

Dear Wiley:

The topic presented to our committee for consideration was whether a procedure should be established for the adjudication of attorney's fees as an element of damages or a recoverable cost. The issue was originally presented in the context of a jury trial and the attendant practical problems presented by simultaneously preparing a case for trial and asserting or defending a claim for ongoing work. For example, should counsel depose opposing counsel following discovery and determine the extent and nature of his preparation for trial? The need for a procedural mechanism for presenting the claim was brought into further focus by the Supreme Court in its holding in *Lee v. Myford*, 611 S.E.2d 349 (April 22, 2005) wherein the court held that absent agreement of the parties approved by the court, or pursuant to a contract or statute with specific provisions, a litigant is not entitled to have the matter of attorney's fees decided by the trial court in post-verdict proceedings. The issue of the timing of the resolution of attorney's fees claims has created a procedural pitfall for practitioners in the absence of specific guidance by the Rules.

Although Virginia courts generally follow the "American Rule" of non recoverability of attorney's fees, exceptions do exist. Statutory provisions, rules of court and common law permit an award of attorney's fees. Examples include actions under, Virginia Conspiracy Act, Consumer Protection Act, antitrust suits, anti monopoly suits, Home Solicitation Sales Act, private actions under criminal statutes prohibiting misrepresentations in sales, a suit to avoid a fraudulent or voluntary conveyance, to sell land for taxes, civil cases under the Administrative Process Act, Freedom of Information Act, to enforce a lien for assessments on a condominium unit, to collect a penalty for failure to release a lien, to enforce land use restrictions by homeowners associations, to recover for a violation of the Virginia Petroleum Products Franchise Act, Motor Vehicle Warranty Enforcement Act, Fair Housing Act, and the Residential

**CW
&M**

Wiley Mitchell, Esq.
September 14, 2005
Page 2

Landlord and Tenant Act. Contracts increasingly provide for payment of attorney's fees by the breaching party.

Our committee unanimously agreed that the addition of a Rule to formulate a procedure for resolution of these claims would minimize the complexities of the presentation of such claims and promote the ends of justice. However, in light of the variety of circumstances in which this issue arises, the committee did not feel that it could recommend a procedure that would work in all cases. Rather, the committee felt that a requirement of notice to the court and counsel and direction to the court as to the issues to be considered is setting a procedure for adjudicating the claim was the best course. We, therefore, propose the Rule addition which is enclosed.

Very truly yours,



Ann K. Sullivan

AKS/ast

Enclosure

cc: Committee Members for Adjudication of Attorneys' Fees Claims

CW

PROPOSED RULE CHANGE

PRETRIAL PROCEDURES
FORMULATING ISSUES 4:13(B)

- except in domestic relations cases*
- B. In the event that a party seeks to recover attorney's fees as an element of damages, or as recoverable costs in a pending action, a pleading entitled or containing a section entitled Notice of Request for Attorney's Fees must be filed and served on all opposing parties or their counsel of record. This Notice shall state the legal basis upon which the party relies to assert the claim and shall be filed no later than thirty (30) days from the establishment of the trial date. In the event that such a Notice is not filed, the claim will be deemed waived, absent good cause shown. Upon motion presented, the court will establish a procedure to adjudicate the claim for attorney's fees. In establishing the procedure for adjudication of attorney's fees, the following factors may be considered:
1. The agreement of the parties;
 2. The right to a jury trial;
 3. Whether the issue may most effectively be adjudicated at trial or post trial;
 4. Judicial economy;
 5. The effect, if any, on any relevant privileges affected by the assertion of the claim; and
 6. Such other factors as may aid in the disposition of the claim.

Editor's Notes:

The Committee revised its proposed Rule 3:25 pursuant to comments from the floor and the revised proposal was approved by a consensus of the Conference. The revised proposal reads as follows:

Rule 3:25. Claims For Attorney's Fees

(a) *Scope of Rule.* -- This rule applies to claims for attorney's fees, excluding (i) attorney's fees under § 8.01-271.1 of the Code of Virginia, and (ii) attorney's fees in domestic relations cases.

(b) *Demand.* -- A party seeking to recover attorney's fees shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, or in a responsive pleading filed pursuant to Rule 3:8. The demand must identify the basis upon which the party relies in requesting attorney's fees.

(c) *Waiver.* -- The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8.

(d) *Procedure.* -- Upon the motion of any party, the court shall, or upon its own motion, the court may, in advance of trial, establish a procedure to adjudicate any claim for attorney's fees.