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23 October 2007

Thomas L Appler, III, Esquire
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, Virginia 22102

Re: Boyd-Graves Study Committee To Study Invalidation of Filing by Counsel Who's
License is Suspended

Dear Mr. Appler:

I here provide a tardy report from our sub-committee which was made up of:

The Honorable Pamela S. Baskervil
Marni E. Byrum, Esquire
David E. Constine, III, Esquire
John P. Ellis, Esquire
J. Scott Sexton, Esquire

and I served as committee chair.

This sub-committee was to consider the issues raised in the ruling in *Neary v. Adu-Gyamfi* 270 Va. 28, 613 S.E. 2d 429 (2005) and *Jones v Jones* 49 Va. App. 31, 635 S.E. 2d 694 (2006). In the first case the Supreme Court dismissed a judgment obtained by Adu-Gyamfi in a suit for injuries sustained in an automobile accident. The plaintiff had previously filed suit and that suit had been non-suited. The non-suit had been entered in a case in which their then attorney had filed the motion for judgment when his license to practice law had been administratively suspended. The Court found the filing a nullity since the attorney was not validly licensed when filing the motion for judgment. Justice Koontz filed a dissent which pointed out that the "nullity rule" was not by statute or Rule of Court and was too harsh in these circumstances. The intent to protect the public from the unauthorized practice of law was a valid purpose, but here the result was to the contrary and would not foster confidence in the legal system or the Bar. In *Jones v. Jones* the Court considered an appeal on behalf of a party who filed a notice of appeal by her attorney who's license was suspended at the time the notice was filed and the Court dismissed the appeal as the notice was a nullity.

At the outset the sub-committee considered many similar cases which include a filing by a pro-se personal representative of a wrongful death case and other similar cases. Other states and the Federal Rules permit a relation back to the original date of filing after the transgression is cured by amendment. The committee however, decided to narrow the focus to when an attorney (or one who purports to be an attorney) files a pleading which is deemed a nullity as a result of the attorney not having a valid active license at the time. The remaining issues may be a subject for further review at another date but are not specifically addressed in the charge to our sub-committee.

In short the sub-committee believed that the results of the foregoing cases was harsh and left innocent members of the public victims unfairly. Further, it appeared from the facts of these cases that no prejudice had occurred to the opposing parties and that the parties were innocent themselves, but faced with the harsh result in any event.

The sub-committee opined that the Court should adopt a Rule or the legislature should adopt a statute which provides that when a pleading is filed by one who purports to be an active licensed member of the Virginia Bar and it turns out that there was no such valid license that the Court may in its sound discretion relate back the pleading to the date the pleading was actually filed when the issue is cured by the entry of appearance of a validly licensed attorney or by the reinstatement of the license of the attorney originally filing the otherwise defective pleading.

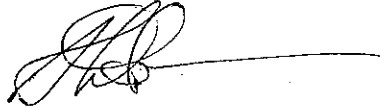
There is no statute which deals with this issue (the nullity rule) and certainly as is evident by *Jones* to apply it only to statute of limitations would not resolve the filing of other pleadings. Therefore, the sub-committee would defer to the Conference as a whole if a new statute is necessary, but short thereof, an amendment to the Rules of Court may suffice. Rule 1:5 deals with Counsel and Rule 1:8 provides for liberal amendments, either of which may be an appropriate place to modify the Rules. If a statute is necessary, it may be in the section regarding attorneys or in the civil procedure section. Essentially the language would provide the following:

Whenever a pleading is required to be signed or filed by an attorney and when it is filed or signed by a person purporting to be an attorney who it turns out is not, or the attorney's license to practice law in Virginia is suspended, revoked or otherwise invalid, the Court may, in its sound discretion, permit the pleading to relate back to the date of the actual filing when a validly licensed attorney makes an appearance and so moves the Court.

The sub-committee is of the opinion that a Courts "sound discretion" is an appropriate standard to protect the public and at the same time to prevent abuses.

Appler Letter
Boyd Graves Report
23 October 2007
page 3 of 3

Yours,

A handwritten signature in black ink, appearing to be 'S. Garver', with a long horizontal line extending to the right.

Steven M. Garver
Sub-Committee Chair

SMG/pf
cc: Sub-Committee Members

Editor's Note:

The Committee recommendation was adopted "in concept" but there were numerous suggested revisions from the floor. The matter was referred back to the Committee for revision of its proposal.