

2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Relief from Early Trial Date when Service Delayed

C. Franklin Hilton, Chair
John D. McGavin
Charles W. Sickels
John C. Shea
Honorable Donald M. Haddock

Donald E. Showalter
Glenn M. Hodge
Gregory T. St. Ours
Charles F. Hilton
Daniel L. Fitch
Thomas E. Ullrich
Marshall H. Ross
Stephan W. Milo
George H. Roberts, Jr.
Humes J. Franklin, III

WHARTON ALDHIZER & WEAVER^{PLC}
ATTORNEYS AT LAW

100 SOUTH MASON STREET
P.O. BOX 20028
HARRISONBURG, VIRGINIA 22801-7528
WWW.WAWLAW.COM

TELEPHONE
HARRISONBURG (540) 434-0316
STAUNTON (540) 885-0199
LEXINGTON (540) 463-3691

FAX (540) 434-5502

WRITER'S DIRECT DIAL (540) 438-5301
WRITER'S E-MAIL: FHILTON@WAWLAW.COM

Matthew W. Light
Trisha A. Culp
Michelle K. Bishop
Kristin A. Zech
Jill M. Lowell
P. Marshall Yoder
Whitney J. Levin
Lauren R. Darden
Tracy J. Evans, II

George R. Aldhizer, Jr. (Retired)

August 14, 2007

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

Re: Boyd-Graves Study of Relief from Early Trial Date when Service Delayed

Dear Tom:

As you know, in 2004 I chaired the Boyd-Graves committee appointed to study whether the time within which process must be served should be reduced from one year, as is currently the case. There was no consensus on reducing the one-year period within which service of process must be made under the present law and the 2004 Boyd-Graves Conference voted to carry over for further consideration at the 2005 conference the issue described in the caption of this letter.¹ The objective of carrying the issue over for an additional year was to determine whether the committee could develop a recommendation for a procedure for the scheduling of trials in situations of delayed service on some or all defendants.

The 2004 committee consisted of the Honorable Donald Haddock, Judge of the 18th Circuit in Alexandria, Sandra Havrilak of Fairfax, Coleman Allen, Jr., of Richmond and myself. The official membership of the 2005 committee was unchanged except that we sua sponte enlisted Professor Kent Sinclair and thank him for his gracious assistance and thoughtful recommendations. This is a summary of our study.

The reason this topic was suggested in 2003 for review by the Boyd-Graves Conference is because some trial lawyers have observed that courts in some areas of the state require a civil case to be tried within one year of filing. If service of process is delayed for a substantial period of time after filing the Motion for Judgment, defendants have been presented with inflexible scheduling problems relative to having the case tried within one year of filing and placed in situations where they were extremely pressed to prepare for trial. Any goal of bringing cases to

¹ For those interested, the history behind the 2004 discussion of the background of Rule 3:3 and Code section 8.01-275 are included at Addendum A to this report.

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trial within one year of filing seems to have emanated in 1991 from a "Statement of the Judicial Council of Virginia on the Adoption and Implementation of Case Processing Time Guidelines." See, Addendum B.

There was unanimity in the 2004 committee that, in situations of significantly delayed service of process, there should be flexibility regarding the trial of cases from one year of the date of filing. There was substantial discussion about whether a solution to this problem should take the form of a statute or rule, and Professor Sinclair, who chaired the Advisory Committee on Rules of Practice for the Judicial Council of Virginia, suggested proposing this as a rule change before making any recommendation from the Boyd-Graves Conference concerning new legislation. Therefore, the 2004 committee asked the Conference to approve and recommend to the Advisory Committee to the Judicial Council of Virginia a proposed change to Rule 1:20, "Scheduling Civil Cases for Trial." That proposed rule change did not receive the approval of the Advisory Committee and this matter was not considered at the 2006 Boyd-Graves Conference. At my request, you reappointed and reconstituted the committee to review this matter and the 2007 committee consists of the Honorable Donald Haddock, Judge of the 18th Circuit in Alexandria, John McGavin (Fairfax), John Shea (Richmond), Chuck Sickels (Fairfax), and myself.


The committee learned in its study of this matter that during the 2007 session of the General Assembly a bill similar to the 2004 committee's proposed rule was submitted in the form of a statute by Senator Richard L. Saslaw (Springfield). This proposed statute, Senate Bill 1009, is attached as addendum C. It was unanimously voted out of the Senate and referred to the House Committee for Courts of Justice. It was carried over to the 2008 session.

The 2007 Committee convened on July 9, 2007, and after thorough discussion of the previous proposals and the current bill, Senate Bill 1009, unanimously recommends that the Boyd Graves Conference support Senate Bill 1009. It is believed that Senate Bill 1009 will accomplish the essence of what was proposed in 2005 and, hopefully, the support of the Virginia Bar Association will result in passage of this salutary proposal.

Respectfully submitted,


Charles F. Hilton

CFH/sam
Enclosures

cc:  Honorable Donald M. Haddock (w/ enclosures)
John D. McGavin, Esquire (w/ enclosures)
John C. Shea, Esquire (w/ enclosures)
~~Charles W. Sickels, Esquire (w/ enclosures)~~

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Addendum A

Virginia Rule of Practice and Procedure 3:3(c) & Virginia Code § 8.01-275.1

The general purpose for Rule 3:3(c)² is to promote timely service of process in lawsuits. In determining whether a dismissal for failure to serve process within one year under Rule 3:3(c) is without prejudice, the Virginia Supreme Court stated, "The purpose of Rule 3:3 is to provide for timely prosecution of lawsuits and to avoid abuse of the judicial system." Gilbreath v. Brewster, 463 S.E.2d 836, 838 (Va. 1995). The Court held that the dismissal was with prejudice because, otherwise, a litigant could abuse the system by repeatedly filing an action without attempting to serve the defendant. Id. The United States District Court for the Eastern District of Virginia also interpreted the purpose of Rule 3:3(c). In Saunders v. Wire Rope Corp., 777 F.Supp. 1281 (E.D.Va. 1991), the court said that "the general thrust of Rule 3.3(c) appears to contemplate and encourage prompt, bona fide efforts to secure service on defendants once the action has been filed." Id. at 1283.

Virginia Code section 8.01-275.1 was enacted to codify Rule 3:3(c).³ Waterman v. Halverson, 540 S.E. 867, 868 (Va. 2001) (citing Frey v. Jefferson Homebuilders, Inc., 467 S.E.2d 788, 789 (Va. 1996); Gilbreath v. Brewster, 463 S.E.2d 836, 838 (Va. 1995)). There is some indication that section 8.01-275.1 was enacted at a time when the Supreme Court was

² Rule 3:3(c) states, in pertinent part, "No judgment shall be entered against a defendant who was served with process more than one year after the commencement of the action against him unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on him." Rules of Virginia Supreme Court Rule 3:3(c), Va. Code Ann. (LexisNexis 2003).

³ Section 8.01-275.1 states, in pertinent part, that "Service of process in an action or suit within twelve months of commencement of the action or suit against a defendant shall be timely as to that defendant. Service of process on a defendant more than twelve months after the suit or action was commenced shall be timely upon a finding by the court that the plaintiff exercised due diligence to have timely service made on the defendant." Va. Code § 8.01-275.1.

considering changes to Rule 3:3(c) to shorten the one year rule. There is a suggestion that the Virginia Supreme Court was proposing to amend Rule 3:3(c) from one year to 120 days in conformity with Rule 4(m) of the Federal Rules of Civil Procedure that require service of process within 120 days of filing.

According to the Court in Waterman, there is no variance between Rule 3:3(c) and section 8.01-275.1. Waterman at 868. "Both of these provisions seek to promote a policy of timely prosecution of law suits and to avoid abuse of the judicial system." Id. Since the statute defines timely service as one year and the rule similarly suggests that timely service is one year, there is no reason to conclude that the enactment of the statute nullified or invalidated any portion of the rule. Id. at 869. Both the rule and the statute allow a plaintiff to serve process on a defendant even after one year if he or she qualifies for the due diligence exception. See Rules of Virginia Supreme Court Rule 3:3(c); Va. Code § 8.01-275.1.

Federal Rule of Civil Procedure 4(m)

The Federal Rule for timely service of process, Rule 4(m) provides 120 days after filing for the summons and the complaint to be served on the defendant.⁴ Congress enacted this rule in 1983 to replace the then-existing "due diligence" standard for determining whether service of

⁴ The current Federal Rule of Civil Procedure 4(m) (1993), when enacted in 1983, was actually Federal Rule of Civil Procedure 4(j). It states, in pertinent part, "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1)." F.R.C.P. Rule 4(m) (West 2003).

process was timely. Both Congress and the Supreme Court endorsed the 120-limit on service. 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1137 (2d ed. 1987). The change “reflects the modern trend of encouraging more efficient litigation by reducing the time between the institution of an action and service of process.” Id. Another suggested advantage of the rule is that it allows the court to dismiss the plaintiff’s action when the time requirement is not met and, thus, the rule reduces the accumulation of cases in the federal courts and speeds up their movement. Id. (citing Op. U.S. Department of Justice, Office of Legal Affairs, 96 F.R.D. 81, 119 (1983)).

Part of the drive behind changing Rule 4(m) from a due-diligence standard to a 120-day period was that the 1980-1983 amendments to Rule 4 no longer required federal marshals to serve summons and complaints. Op. U.S. Supreme Court, 93 F.R.D. 255, 263 (1981). The amendment exchanged the reliability of using federal marshals with the convenience of allowing any competent adult third-party to serve process. Id. In order to ensure that service by that third-party was timely and reliable, Congress imposed the 120-day time limit for service of process. Id.

When it amended Rule 4(j) and renumbered it as 4(m) in 1993, the Advisory Committee on Federal Rules of Civil Procedure received suggestions that it should further shorten the time period from 120 days to 90 days for timely service. FRCP Minutes 10/21/1993 at *7. In rejecting a proposal to shorten the time period, the Committee noted, “A reduction from 120 days to 90 days...seems the sort of adjustment that should be made only if there is a clear problem to be fixed.” Id. Thus, FRCP 4(m) currently uses the 120-day time period for timely service of process.

Addendum B

Circuit Courts of Virginia
Voluntary Case Processing Time Guidelines



*Statement of the Judicial Council of Virginia
on the Adoption and Implementation of Case Processing Time Guidelines*

(Implemented July 1, 1991)

Excellence in the administration of justice is a longstanding commitment made by the judiciary to the people of Virginia. In the eyes of the public, "excellence" increasingly is being measured by the ease and quality of the litigation process as well as the case outcome. Thus, a continuing obligation of the judiciary is to ensure effective access to justice, including the opportunity to resolve disputes without undue hardship, cost, inconvenience, or delay.

During the past decade, leaders within Virginia's judicial branch have sought to address each of these barriers to ready access to the courts. Of growing consternation is court delay, recognized in Virginia and elsewhere as a prime cause of diminished public trust and confidence in the courts. As caseloads at each level of court have increased, judges and clerks have worked diligently, albeit in different ways, to manage the volume of litigation and avoid the scope of delay experienced in other states. In addition, the General Assembly of Virginia consistently has assisted the courts through the provision of additional judicial resources where required.

Determining methods to improve efficiency in case processing as well as increasing the convenience of courts to litigants also has been an important objective set forth by the Judicial Council within its *Comprehensive Judicial Plan*. Pilot projects on delay reduction have been initiated in several courts and training seminars on the topic have been provided. Reports on court delay have been issued both by the Virginia Bar Association and committees of the Virginia State Bar.

Most recently, the 1989 report of the Commission on the Future of Virginia's Judicial System developed an extensive set of proposals aimed at addressing court delay both today and in the coming decades. Notwithstanding these significant efforts, legislators, Bar members, citizens, and, importantly, judges and court officials continue to express open concern about the ability and capacity of the trial and appellate courts to resolve disputes in the expeditious manner all citizens deserve.

In concert with the recommendations of the Futures Commission and its own previously established objectives, the Council believes that in order for the courts to continue to dispense justice in a timely and efficient manner, there is need for a more comprehensive approach to reducing and preventing delay. Thus, the following case processing time guidelines for the trial courts have been adopted by the Council:

- A. General Civil - (Circuit Court) 90% of all civil cases should be settled, tried, or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the Court determines exceptional circumstances exist and for which a continuing review should occur.
- B. Criminal -
 - FELONY - (Circuit Court) 90% of all felony cases should be adjudicated or otherwise concluded within 120 days from the date of arrest; 95% within 180 days; and 100% within one year. Preliminary hearings for felony cases in district courts should be concluded within 45 days from the date of arrest.
 - MISDEMEANOR - (General District Court and adult misdemeanors in the Juvenile and Domestic Relations District Court) 90% of all misdemeanors and infractions should be adjudicated or otherwise concluded within 60 days from the date of arrest or citation and 100% within 90 days.

PERSONS IN PRETRIAL CUSTODY - Persons incarcerated before trial should be afforded priority for trial.

The guideline for criminal cases covers the time from arrest to adjudication not sentencing.

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SENATE BILL NO. 1009
AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee for Courts of Justice
on January 31, 2007)
(Patron Prior to Substitute--Senator Saslaw)

A BILL to amend and reenact § 8.01-332 of the Code of Virginia, relating to docketing civil actions for trial.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-332 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-332. Calling current docket.

The current docket may be called for the purpose of fixing cases for trial, on such days or at such intervals as may be directed by order of court.

Civil actions or proceedings filed in circuit court for monetary damages, excluding requests for default judgments and determination of damages thereunder, actions brought under Chapter 11 (§ 16.1-226 et seq.) of Title 16.1 or under Title 20, shall not be set for trial earlier than six months after service of process has been made on all defendants to the action unless (i) the parties to the action agree otherwise, or (ii) good cause is shown that the trial should proceed at an earlier date.

Legislative Information System

Editor's Note:

The Committee recommended adoption of an amendment to Virginia Code § 8.01-332 regarding setting cases for trial. A vote was taken but there was no consensus in favor of this recommendation.