

To: The Bench and Bar of Virginia

From: Advisory Committee on Rules of Court of  
The Judicial Council of Virginia

Date: September 26, 2008

### **Report on Draft Rule 3:25 re Attorney's Fee Application Procedure**

The Supreme Court of Virginia has directed that proposed Supreme Court Rule 3:25 be published for comment. The proposed Rule, which is under consideration but has not been adopted by the Supreme Court, will detail how claims for attorney's fees should be considered in civil litigation. Comments on the proposed Rule may be directed to Steven Dalle Mura, Office of the Executive Secretary, Supreme Court of Virginia, 100 North Ninth Street, Richmond, Virginia 23219 by November 10, 2008.

Over the past three years, the Boyd-Graves Conference and other Bar leadership organizations have recommended the adoption of a Supreme Court Rule detailing how claims for attorney's fees should be considered in civil litigation.

The Advisory Committee on Rules of Court at its April 2008 meeting agreed with these expressions of concern from the Bar 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 Advisory Committee concluded 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, the common law, or a 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 extensive discussion at two separate meetings, the Advisory Committee on Rules of Court agreed to recommend to the Judicial Council the Rule proposed below, which would be added to Part Three of the Rules of the Supreme Court. In turn, the Judicial Council has recommended that the Supreme Court of Virginia adopt this proposal as Rule 3:25. Since the entire proposed Rule is new, it is not shown as underscored or in italics.

### **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 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.

Subsection 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. Nor would it apply to attorney's fees in domestic relations cases, a matter subject to well-established practice.

Subsection B is intended to require that the issue of the availability of attorney's fees 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 Advisory Committee on Rules of Court considered whether this disclosure requirement should take place later in the litigation than at the initial pleading stage. The Advisory Committee 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.

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.

Subsection 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.

Subsection D signals to the parties and the court to address, prior to trial, the procedure for litigating the attorney's fee claim.

## CONCLUSION

The Advisory Committee shares the belief of the bar groups who have asked for the adoption of this rule that it 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.

This 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.