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March 31, 2022

Members of the General Assembly of Virginia
Pocahontas Building
900 East Main Street
Richmond, VA 23219

Justices of the Supreme Court of Virginia
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219-1315

Re: 2021 Report of the Judicial Council of Virginia

Dear Members of the General Assembly and Justices of the Supreme Court of Virginia:

As Secretary of the Judicial Council of Virginia, I am pleased to submit the 2021 Report of the Judicial Council, as required by Code § 17.1-705.

If you have any questions, please do not hesitate to contact me.

With best wishes, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "KRH".

Karl R. Hade

KRH:jrs


cc: Division of Legislative Automated System

2021

Judicial Council of Virginia



Report to the General Assembly and Supreme Court of Virginia



The Judicial Council of Virginia
2021 Report to the General Assembly and Supreme Court of Virginia
Supreme Court of Virginia, Office of the Executive Secretary
Richmond, Virginia
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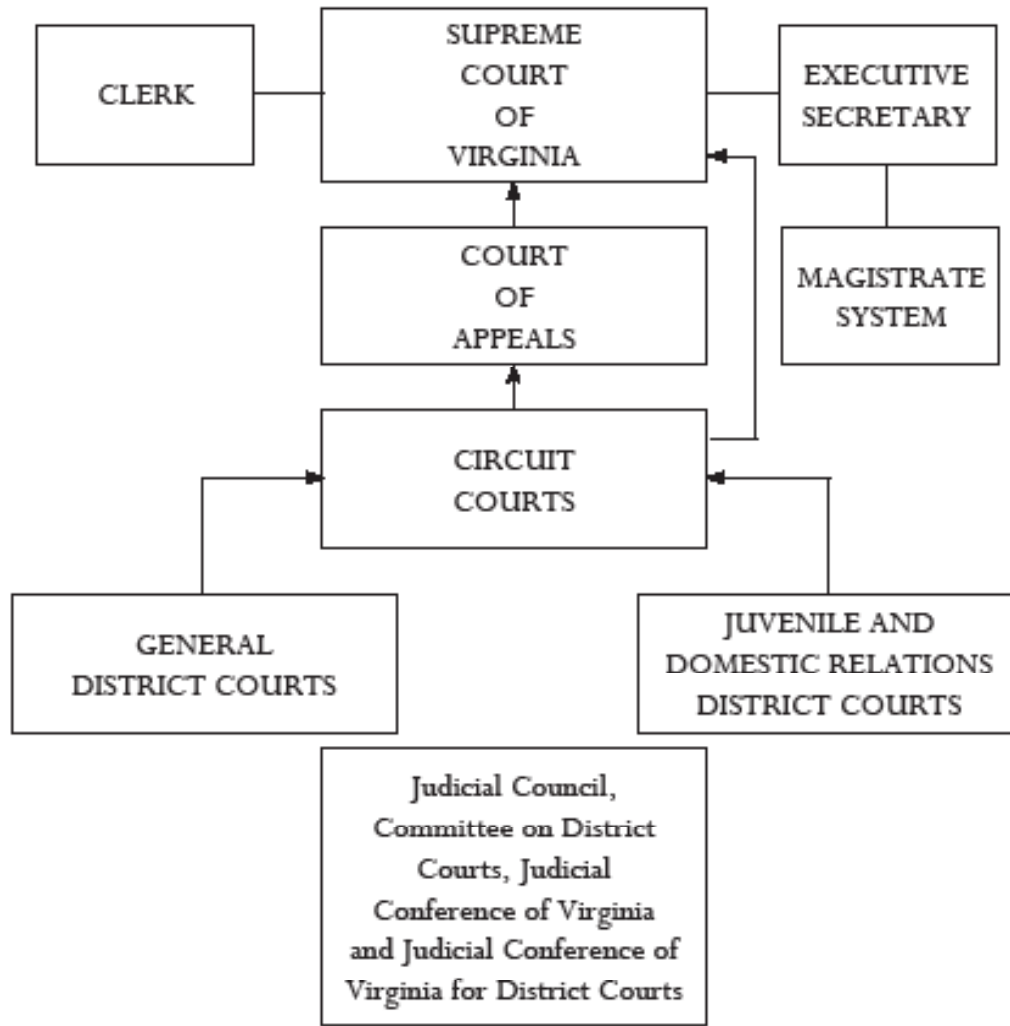
THE JUDICIAL COUNCIL OF VIRGINIA

Membership as of December 31, 2021

The Honorable Donald W. Lemons	Chief Justice, Supreme Court of Virginia
The Honorable Marla Decker	Chief Judge, Court of Appeals of Virginia
The Honorable Jerrauld C. Jones	Judge, Fourth Judicial Circuit
The Honorable Thomas J. Wilson, IV	Judge, Twenty-Sixth Judicial Circuit
The Honorable Douglas L. Fleming, Jr.	Judge, Twentieth Judicial Circuit
The Honorable Cheryl V. Higgins	Judge, Sixteenth Judicial Circuit
The Honorable Stacey Moreau	Judge, Twenty-Second Judicial Circuit
The Honorable Deanis Simmons	Chief Judge, Twenty-Eighth Judicial Circuit
The Honorable Jay E. Dugger	Chief Judge, Eighth Judicial District
The Honorable George Barton Chucker	Judge, Fourteenth Judicial District
John S. Edwards	Chair, Senate Courts of Justice, Senate of Virginia
Charniele L. Herring	Chair, House Courts of Justice, Virginia House of Delegates
Monica Taylor Monday, Esquire	Attorney-at-Law, Member of the Bar of the City of Roanoke
Michael N. Herring, Esquire	Attorney-at-Law, Member of the Bar of the City of Richmond
Karl R. Hade*	Executive Secretary

*Ex-officio

VIRGINIA'S JUDICIAL SYSTEM



Route of Appeal →

I. PROCEEDINGS OF THE JUDICIAL COUNCIL OF VIRGINIA

INTRODUCTION

The Judicial Council of Virginia was established by statute in 1930. Council is charged with making a continuous study of the organization and the rules and methods of procedure and practice of the judicial system of the Commonwealth of Virginia, including examining the work accomplished and results produced by the judicial system. See Va. Code § 17.1-703.

PROCEEDINGS OF THE JUDICIAL COUNCIL

Revisions to Appellate Rules to Implement the Jurisdictional Expansion of the Court of Appeals

On October 22, 2020, the Judicial Council discussed and unanimously approved the report of a Working Group that had been constituted to study the jurisdiction and organization of the Court of Appeals of Virginia, including the Working Group’s recommendations regarding the provision of an appeal of right from the circuit courts to the Court of Appeals, the possible organization of the Court of Appeals into geographic circuits, any necessary additional statutory changes, and development of a proposed budget and implementation plan. Largely following the recommendations of this report, the 2021 General Assembly passed SB 1261 to expand the jurisdiction of the Court of Appeals of Virginia.

On March 11, 2021, the Chief Justice appointed a Court of Appeals Expanded Jurisdiction Rules Committee to draft changes to the Rules that would facilitate the jurisdictional expansion in accordance with SB 1261. On October 19, 2021, the Judicial Council considered and unanimously approved revisions to Parts One, Five, and Five A that were drafted by the Committee. Additional details are provided in Part II of this report, “Recommended Changes to Rules of Court.”

Appellate Mediation

In 2017, at the request of Chief Justice Donald W. Lemons, the Joint Alternative Dispute Resolution Committee of the Virginia State Bar and the Virginia Bar Association established a Special Committee to Study Appellate Mediation in Virginia. In 2018, the Special Committee recommended the establishment of mediation pilot projects in the Commonwealth’s appellate courts. The Supreme Court approved the recommendation. The appellate mediation pilot projects began January 1, 2019, and were scheduled to end December 31, 2020. Upon the recommendation of the Special Committee, the Supreme Court approved extending the pilot projects for two years, to expire December 31, 2022.

In 2021, the Judicial Council considered a request from the Special Committee based on the expanded jurisdiction of the Court of Appeals effective January 1, 2022. The Judicial Council approved minor amendments to the mediator governing documents to support a concurrent expansion of case types eligible for the Court of Appeals mediation pilot project.

Study of the Security of Judicial Officers

The Judicial Council supported a proposal to study issues relating to the security of judicial officers. The Executive Committee of the Judicial Conference of Virginia recommended the study for consideration by the Judicial Council. The recommendation originated from a solicitation seeking legislative proposals to improve the administration of justice. The solicitation went to the members of the Judicial Conference of Virginia and members of the Judicial Conference of Virginia for District Courts, as well as to district clerks and staff in the Office of the Executive Secretary. The Judicial Administration Committee of the Conference first reviewed the submissions and then recommended the ones it favored to the Executive Committee for its review.

The Judicial Administration Committee reviewed three legislative proposals that related to the security of judicial officers (justices, judges, and magistrates), including online security and protection of personally identifiable information. Although each proposal appeared to be meritorious, the Committee believed that recommending legislative action would be premature and that additional study and information would be required to formulate a comprehensive and unified approach to the issue.

The Judicial Council supported the recommendation to study issues relating to the security of judicial officers over the course of 2022. Any legislative proposals that result from the study may then be considered for the 2023 General Assembly Session.

The Honorable Harry L. Carrico Outstanding Career Service Award

In 2004, the Judicial Council of Virginia created an Outstanding Career Service Award in honor of the Honorable Harry L. Carrico, Chief Justice of Virginia from 1981 to 2003. This award is presented annually to one who, over an extended career, demonstrates exceptional leadership in the administration of the courts while exhibiting the traits of integrity, courtesy, impartiality, wisdom, and humility.

The latest recipient of this award, selected in 2020 for presentation in 2021, was the Honorable Everett A. Martin, Jr., judge of the Fourth Judicial Circuit (Norfolk). Judge Martin became a judge of the Norfolk Juvenile and Domestic Relations District Court in 1990 and was elected as a judge in Norfolk Circuit Court in 1995. Earlier, he was in private practice and served as an assistant commonwealth's attorney in Norfolk.

As a judge, he has presided over more than 450 jury trials, contributed to legal scholarship in Virginia law journals, served for nearly 30 years as a bar examiner for the Virginia Board of Bar Examiners, and participated in numerous conferences and educational programs, including at events of the Virginia Bar Association (VBA). He formerly served on the VBA Board of Governors as a judicial representative and has also served on its Civil Litigation Section Council and as vice chair of its Judicial Section.

In addition, Judge Martin has served on the Supreme Court's Ad Hoc Committee on Local Rules, which produced the uniform scheduling order and Rule 4:15; the Circuit Court Forms Committee; and the Law Council of his undergraduate and law school alma mater, Washington and Lee University. He also serves on the invitation-only Boyd-Graves Conference.

II. RECOMMENDED CHANGES TO RULES OF COURT

Background

Article VI, Section 5 of the Constitution of Virginia authorizes the Supreme Court of Virginia to promulgate rules governing the practice and procedures in the courts of the Commonwealth.

In 1974, the Judicial Council of Virginia established the Advisory Committee on Rules of Practice and Procedure in Virginia Courts to provide members of the Virginia State Bar and other interested participants a means of more easily proposing Rule changes to the Council for recommendation to the Supreme Court. The duties of this committee include: (a) evaluating suggestions for modification of the Rules made by the Bench, Bar, and public, and recommending proposed changes to the Judicial Council for its consideration; (b) keeping the Rules up-to-date in light of procedural and legislative changes; and (c) suggesting desirable changes to clarify ambiguities and eliminate inconsistencies in the Rules.

Rules recommended by the Council and subsequently adopted by the Supreme Court are published in Volume 11 of the Code of Virginia. All orders of the Supreme Court amending the Rules, along with an updated version of the Rules that incorporates the amendments as they become effective, are posted on Virginia's Judicial System website at <http://www.vacourts.gov/courts/scv/rules.html>.

CHANGES TO RULES OF COURT RECOMMENDED BY THE JUDICIAL COUNCIL IN 2020 THAT BECAME EFFECTIVE IN 2021

At the October 22, 2020, meeting, Judicial Council considered a number of changes to conform existing Rules to legislation passed during the 2020 regular session of the General Assembly. Changes to the following Rules were recommended by Council and effected by Order dated January 12, 2021, effective immediately.

- Rule 1:24. Requirements for Court Payment Agreements for the Collection of Fines and Costs.
- Rule 1:25. Specialty Dockets.
- Rule 2:504. Spousal Testimony and Marital Communications Privileges.
- Promulgation of new Rule 2:508. Protected Information; Newspersons Engaged in Journalism.
- Rule 3A:14. Trial Jurors (concerning voir dire)
- Repeal and replacement of Rule 7B:12 governing appeal of civil cases from general district court to circuit court.

Judicial Council also recommended amending the Eminent Domain Pretrial Order Form (Form 3A) to conform its provisions to revisions earlier made to the standard Pretrial Order Form. This change was also effected by the Order dated January 12, 2021, effective immediately.

Additionally, Judicial Council considered and recommended proposals to amend the following Rules which the Court amended by Order dated May 5, 2021, effective July 5, 2021.

- Rule 1:19. Pretrial-Conferences in Cases to Run Seven Days or more.
- Rule 4:5(b)(6). Entity Depositions Rule Revision.
- Defining Responsive Pleadings in Rule 3:8.

RULE CHANGES RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2021

At the April 28, 2021, meeting, Judicial Council considered and recommended to the Supreme Court draft technical amendments to conform Rule 1:24 governing Court Payment Agreements for the Collection of Fines and Costs to minor statutory amendments, and to implement the “shall” revision style previously approved by the Court for Rule 1:25, Specialty Dockets, and the sentencing form. These changes were effected by Order dated August 11, 2021, effective October 11, 2021.

At the October 19, 2021, meeting, the Judicial Council considered adoption of new Rule of Evidence 2:107, addressing the use of ultrahazardous items as exhibits; miscellaneous clean-up revisions following the abolition of the death penalty; and revisions to Rule 3A:17.1 (judge/jury sentencing) in light of SB 5007, 2020 Va. Acts ch. 43, Spec. Sess. I. All of these proposals were approved.

New Rule of Evidence 2:107, Ultrahazardous Items as Exhibits, represents the work product of the Courtroom Narcotics Exposure Workgroup, created at the direction of the Chief Justice to study the issue of exposure to toxic substances in the courtroom. On July 23, 2021, the working group submitted a report that recommended creating Rule 2:107, requiring the use of photographs or a facsimile exhibit in lieu of “highly potent controlled substances” such as fentanyl or carfentanil. Judicial Council’s Advisory Committee on Rules of Court concluded that the rule should be expanded to cover other highly dangerous exhibits, such as explosives, explosive devices, and chemical and biological toxins. The rule proposed by the Advisory Committee was considered and recommended by Judicial Council at the October 19th meeting and promulgated by Order dated November 9, 2021, effective July 1, 2022, unless modified by the General Assembly. *See Va. Code § 8.01-3(E).*

At the October meeting, the Council also recommended technical amendments to the following Rules to conform them to legislation abolishing the death penalty, *see* 2021 Va. Acts chs. 344, 345, Spec. Sess. I, and changing the procedure governing criminal sentencing, *see* 2020 Va. Acts c. 43, Spec. Sess. I. These Rules were amended by Order dated November 9, 2021, effective immediately.

- Rule 2:1101. Applicability of Evidentiary Rules.
- Rule 3A:17.1. Proceedings in Bifurcated Jury Trials of Felonies and Class 1 Misdemeanors.
- Rule 3A:18. Death Penalty. (Stricken and reserved.)
- Rule 5:7B. Petition for a Writ of Actual Innocence.

Revisions to Parts One, Five, and Five A to Implement the Jurisdictional Expansion of the Court of Appeals of Virginia

At the October 19, 2021, meeting, Judicial Council also considered and unanimously approved revisions to Parts One, Five, and Five A drafted by the Court of Appeals Expanded Jurisdiction Rules Committee appointed by the Chief Justice on March 11, 2021. These Rule changes were drafted to facilitate the expansion of the jurisdiction of the Court of Appeals of Virginia in accordance with SB 1261. Prior to bringing the proposal to Judicial Council, the draft Rule changes were published for public comment, circulated to appellate stakeholder groups, and finally reviewed by the Advisory Committee on Rules of Court. The proposal presented and approved at the October 19th Council meeting incorporated input from each of these stages of the review process.

Most of the changes are self-explanatory, reflecting the creation of an appeal of right to the Court of Appeals in both civil and criminal cases. Some of the more noteworthy changes are as follows:

- **Criminal Appeals.** By providing an appeal of right to the defendant in criminal cases, SB 1261 eliminates the one-judge-order/three-judge-review procedure in Code § 17.1-407. Because appeals by criminal defendants will be appeals of right, the Office of Attorney General will now represent the Commonwealth from the outset of the appeal unless the Attorney General consents to an appearance by the Commonwealth's Attorney. See Code § 2.2-511(A).

To implement these changes, Rule 5A:6(d)(3) is revised to require appellants in criminal cases to provide notice of the appeal both to opposing counsel in the Commonwealth's Attorney's office as well as to the Office of Attorney General. Where the appellant has email access, the appellant must email the notice of appeal to a dedicated email inbox at the Office of Attorney General. Rule 5A:6(g) is added to require a notice of appearance within 14 days by the Office of Attorney General or by the Commonwealth's Attorney designated to handle the appeal under Code § 2.2-511.

Appeals by the Commonwealth in criminal cases pursuant to Code § 19.2-398 remain discretionary. When seeking review of a pre-trial ruling under § 19.2-398(A) (Fourth, Fifth, and Sixth Amendment rights) or § 19.2-398(E) (unconstitutionality of the statute or ordinance under which the accused is charged), the Commonwealth must file the petition for appeal within 14 days of the notice of filing of transcripts. Code § 19.2-402(B); Rule 5A:12(a)(3). The brief in opposition is due 14 days later. Rule 5A:13(a)(4). A petition for appeal by the Commonwealth in a felony case from an order of release on conditions, Code § 19.2-398(B), or after conviction where the sentence imposed by the circuit court is contrary to mandatory sentencing or restitution terms required by statute, Code § 19.2-398(C), is governed by the standard timelines: the petition for appeal is due not later than 40 days after the filing of the record, Rule 5A:12(a)(4), and the brief in opposition is due 21 days after service of the petition, Rule 5A:13(a)(4).

- **Petitions for Appeal in Civil Cases.** Although the vast majority of appeals in civil cases become appeals of right, SB 1261 preserves discretionary appeals to the Court of Appeals for interlocutory appeals under the Multiple Claimant Litigation Act, Code § 8.01-267.8, and certified question-of-law appeals under Code § 8.01-675.5(A) (formerly Code § 8.01-671.1(A)). The Code specifies the timing to file the petition for appeal in these cases: 10 days from entry of the order appealed from under the Multiple Claimant Litigation Act, Code § 8.01-267.8(C), and 15 days from entry of the order granting certification in appeals under § 8.01-675.5(A). Although the Code does not specify the deadline for the brief in opposition in either type of proceeding, the drafters selected 7 days as the appropriate default,

Rule 5A:13(a)(1)–(2), recognizing that a party could move for an extension of time, in an appropriate case, under Rule 5A:3.

- **Deadline for the Opening Brief.** SB 1261 provides that the appellant’s opening brief in a criminal appeal is due not more than 40 days after the record is filed in the Court of Appeals. Code § 17.1-408. The legislation is silent about the deadline for the opening brief in a civil case. But proposed Rule 5A:19(b)(1) provides for the same 40-day deadline for the opening brief in all cases unless a “statute or order” of the Court provides for different timing. The trial court record is not typically filed in the Court of Appeals until 80 days or longer after the entry of the order from which the appeal is taken. For lawyers previously accustomed to having 90 days from the final decision in the circuit court to file a petition for appeal in the Supreme Court, the preparation time for appeals of right should be about the same or longer, although the timing will vary in individual cases according to how quickly the circuit court clerk forwards the record.
- **Electronic-Record Cases.** Rule 5A:25 is amended to eliminate the requirement of a joint appendix in cases where the circuit court files an electronic record with the Court of Appeals. The requirement is retained, however, to exchange proposed assignments of error on the same timetable previously required in designating the contents of the appendix. This requirement is particularly important when new counsel represents the appellee (such as in criminal appeals handled by the Office of Attorney General). Without that requirement, appellate counsel would learn the assignments of error only upon reading the appellant’s opening brief. In paper-record cases, a joint appendix is still required. Paper-record cases pose a significant obstacle to the distribution of the record to the parties and the Court, making the joint appendix an indispensable tool. An Advisory Note is added to notify practitioners of the need to check with the clerk’s office of the originating circuit court to determine whether an electronic record will be filed in a particular case.
- **Extension of Petition for Appeal Deadline.** The Code provision governing discretionary appeals to the Supreme Court of Virginia currently allows a one-time “30-day extension” of the deadline to file the petition for appeal “in the discretion of the court, in order to attain the ends of justice.” Code § 8.01-671(A). The new legislation removes that 30-day cap. Rule 5:17(a) is amended to reflect that change. As the only remaining petitions for appeal to the Court of Appeals are appeals by the Commonwealth in criminal cases and because SB 1261 does not provide an ends-of-justice exception to extend the deadline for such petitions, these rule changes do not provide a mechanism for the Commonwealth to obtain an extension.
- **Restrictions on Summary Disposition.** Rule 5A:27 is amended to restrict the instances in which the Court of Appeals may dispense with oral argument, consistent with Code § 17.1-403 as amended by SB 1261.
- **Petitions for Review.** The procedure in Rule 5:17A for petitions for review under Code § 8.01-626 is replicated as new Rule 5A:12A governing such petitions in the Court of Appeals. Note that the petition-for-review procedure in Code § 8.01-626 was expanded by the General Assembly in 2020 to encompass interlocutory appeals of orders granting or denying a plea in bar based on absolute, qualified, or sovereign immunity. 2020 Va. Acts ch. 907 (codified at Va. Code Ann. § 8.01-670.1(B)).

SB 1261 moved that provision from Chapter 26 (Appeals to the Supreme Court) to Chapter 26.1 (Appeals to the Court of Appeals), creating new Code § 8.01-675.5.

The prior page limits for petitions for review—15 pages for the petition and 12 pages for the response—are revised to 20 pages each. The expanded page limit was requested by several commenters who pointed out the difficulty of addressing complex questions in 15 and 12 pages, respectively.

- **Briefing limits.** The briefing limits in Part Five A are amended to state both page and word limits. Currently, Part Five uses both page and word limits while Part Five A uses only word limits. The corresponding page limits in the Part Five A revisions are generally borrowed from Part Five. The page limits are invariably more generous than the word limits (using the Times New Roman font). This change was recommended by the Expanded Jurisdiction Committee and was welcomed by the clerk’s office to better police compliance with the brief-length requirements.
- **Signature Block Clarification.** The rules are revised throughout to clarify that the page and word limits do not include counsel’s “signature block.” This was requested by several commenters and eliminates potential confusion.
- **Bond Forms.** The letter-of-credit forms (Form 10 in Part Five and Form 9 in Part Five A) are updated to reflect the change in appellate practice, reduce legalese, and reference current legal requirements. These were the only bond forms that were not updated when the forms were overhauled and revised in 2017 in response to recommendations from the Boyd-Graves Conference.

Because the jurisdictional changes take effect January 1, 2022, these Rule changes were effected by Order dated November 1, 2021. See Code § 8.01-3(C) (“New rules and amendments to rules shall not become effective until 60 days from adoption by the Supreme Court.”).