BYRNE CANAAN LAW

APPEALS OF RIGHT IN VIRGINIA: PREPARING FOR THE NEW APPELLATE LANDSCAPE

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For over a decade, the Commonwealth stood alone as the only American state that did not provide an appeal of right in every case. That pariah status will soon end thanks to legislation passed this year expanding the Court of Appeals of Virginia's jurisdiction. Under the new regime, every civil and criminal litigant will have an appeal of right to the Court of Appeals. In anticipation of this generational shift in Virginia litigation practice, these materials review the history of the Court of Appeals leading up to jurisdiction expansion before examining the changes ahead and how litigators can best prepare for them.

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I. The Journey to Appeal of Right[2]

Established in 1779—ten years before the Supreme Court of the United States—Virginia's original Court of Appeals was the forerunner of the modern Supreme Court of Virginia.[3] This Court in all its appellations remained Virginia's sole appellate court for over 200 years.[4] As the Commonwealth grew from a colony to a modern economic powerhouse, it became apparent that a single appellate court could not handle the swelling caseload.

Calls for establishment of an intermediate appellate court came from all over. In the early 1970s, a study commissioned by the General Assembly determined that the Supreme Court was "overburdened" and recommended creation of an intermediate appellate court.[5] Then-UVA law professor Antonin Scalia reached the same conclusion.[6] A 1979 study by the National Center for State Courts likewise recommended an intermediate appellate court.[7]

While this idea percolated in Virginia, thinkers on the national level began emphasizing the role of initial appeals of right in an ideal appellate system. They concluded that the most beneficial appellate structure comprised an appeal of right to an intermediate appellate court followed by an optional appeal by petition to the court of last resort.[8] Some Virginia commentators began endorsing the idea of by-right appeal. For instance, the NCSC study recommended Virginia adopt appeals of right to the intermediate appellate court.[9] But the Judicial Council of Virginia in another intermediate appellate court proposal called for a more limited court with discretionary review.[10]

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[2] For a seminal essay reviewing the history of the Court of Appeals of Virginia, see Stephen R. McCullough & Marla Graff Decker, *The Court of Appeals of Virginia Celebrates Thirty Years of Service to the Commonwealth*, 50 U. RICH. L. REV. 217 (2015).

[3] *Virginia Appellate Court History: August 30, 1779 – New Supreme Court Convenes*, JUDICIAL LEARNING CTR., https://scvahistory.org/virginia-judicial-history/.

[4] W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705, 707 n.9 (2004) (noting the Court went by the "Court of Appeals" and "Supreme Court of Appeals" before Virginia's 1971 Constitution renamed it the "Supreme Court").

[5] VA. COURT SYS. STUDY COMM'N, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA 1, 12–13 (1971).

[6] Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 15, 45–46 (1971).

[7] NAT'L CTR. FOR STATE COURTS, FINAL REPORT: VIRGINIA COURT ORGANIZATION STUDY, 4–5, 39–40, 85 (1979) [hereinafter NCSC FINAL REPORT].

[8] *See* INTERMEDIATE APPELLATE COURTS, AM. JUDICATURE SOC'Y 36 (1976) (describing the "Model Two-Tiered Appellate System" as the most effective appellate court structure).

[9] NCSC FINAL REPORT, *supra*, at 271.

[10] *Judicial Council of Virginia Adopts Proposal for Intermediate Appellate Court*, 29 VA. B. NEWS 4 (1981).

A. A Sharply Limited Court

The narrow view espoused by the Judicial Council ultimately prevailed. After nearly two decades of debate and study, the General Assembly in 1983 passed legislation creating the Court of Appeals of Virginia effective January 1, 1985.[11] Although the General Assembly would refine the Court's technical aspects in subsequent years—such as adding an eleventh judge in 2000[12]—the politics and concerns surrounding its creation defined the Court's narrow scope.

Today's Court of Appeals remains a court of sharply limited jurisdiction, hearing cases in only four areas: (1) criminal, (2) domestic relations, (3) workers' compensation, and (4) state administrative agencies.[13] Although the latter three categories are appeals of right, they comprise less than a fifth of the Court's overall caseload and represent only a fraction of Virginia's civil case volume. Criminal appeals make up over 80 percent of the Court of Appeals' cases, but these are discretionary appeals with only a fraction being heard on the merits.

Perhaps unsurprisingly given this narrow jurisdiction, lobbying for expanded jurisdiction began almost before the paint had dried at Eighth and Franklin. The national consensus favoring initial appeals of right fueled this push. In 1990, the American Bar Association reiterated the two-tiered appellate system with initial appeal of right as the gold standard because it best advanced the twin appellate purposes of error correction and law development.[14] Three years later, the ABA's Judicial Administration Division, including Virginia Chief Justice Harry L. Carrico, concluded that "[a] party to a proceeding heard on the record should be entitled to one appeal of right from a final judgment."[15] Back in the Commonwealth, the Virginia Bar Association produced a 260-page study of the Court of Appeals' jurisdiction in 1994 recommending expansion to provide appeals of right in all civil and criminal cases.[16]

Despite repeated calls for expanded access to appeals, the Court of Appeals' narrow jurisdiction persisted. By 2000, Virginia, West Virginia, and New Hampshire were the only three states that did not offer an appeal of right from all final judgments. The other two states adopted appeals of right from all civil and criminal cases in the ensuing decade, leaving Virginia alone in the nation.

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[11] Ch. 413, 1983 Va. Acts 520.
[12] Ch. 8, 2000 Va. Acts 8, 9.
[13] Code § 17.1-405.
[14] STANDARDS RELATING TO COURT ORGANIZATION, ABA 10 (1990).
[15] DISCUSSION: STANDARDS RELATING TO APPELLATE COURTS, ABA JUDICIAL ADMINISTRATION DIVISION 10–11 (1993).
[16] APPELLATE REVIEW IN VIRGINIA, VBA (1994).

B. A New Push for Jurisdiction Expansion

The most recent effort to expand the Court of Appeals' jurisdiction has its origins, as so many significant legislative changes do, with the Boyd-Graves Conference. A 2016 Boyd-Graves study committee charged with considering whether all civil cases should have a right of appeal to the Court of Appeals identified strong factors on both sides of the issue. It carried the matter over to 2017 for further study.[17] The committee's final report was sharply split, recommending expanding jurisdiction by a 4–3 margin.[18] Proponents of expansion emphasized that fundamental fairness required an automatic appeal of right, noting that the Supreme Court's one-line orders refusing civil cases without any reasoning may undermine public confidence in the judiciary.[19] Detractors argued that the significant increase in litigation costs accompanying by-right appeals could not be justified when the existing system issued prompt decisions without a backlog.[20]

The full Boyd-Graves Conference ultimately favored a court-sanctioned study of the issue. Apparently spurred by this recommendation, Chief Justice Donald W. Lemons in 2018 convened a blue-ribbon working group to study the Court of Appeals' jurisdiction. Chaired by Professor Kent Sinclair—University of Virginia professor emeritus, decades-long chair of the Supreme Court's rules advisory committee, and the Court's current Reporter of Decisions—the group devoted particular attention to whether the Court should hear appeals of right in all civil and criminal cases.[21] After months of study, the working group endorsed the "long-term goal of an appeal of right in essentially all civil and criminal cases," noting that by-right review is "simpler, improves access to justice, [and] better reflects the rights of criminal defendants."[22] The group stopped short, however, of recommending particular structural changes to enable its recommendation.

The jurisdiction-expansion movement temporarily subsided in 2019 only to roar back to life when the 2020 General Assembly passed legislation asking the Judicial Council to study the Court of Appeals' jurisdiction and structure with an eye toward providing appeals of right in all cases.[23] It specifically asked the Judicial Council to make recommendations on adding additional judges and dividing the Court into four geographic circuits as well as to propose a budget and other

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[17] BOYD-GRAVES CONFERENCE, COMMITTEE REPORT ON APPEALS OF RIGHT IN CIVIL CASES IN THE COURT OF APPEALS OF VIRGINIA 2–3 (Aug. 25, 2016).
[18] BOYD-GRAVES CONFERENCE, COMMITTEE REPORT ON APPEALS OF RIGHT IN THE COURT OF APPEALS OF VIRGINIA 5–6. (Sept. 6, 2017).
[19] *Id.* at 5.
[20] *Id.* at 5–6.
[21] REPORT OF WORKING GROUP TO STUDY JURISDICTION OF THE COURT OF APPEALS OF VIRGINIA 1 (2018) [hereinafter "2018 WORKING GROUP REPORT"].
[22] *Id.* at 10.
[23] S. J. Res. 47, Va. Gen. Assem. (Reg. Sess. 2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+SJ47ER+pdf.

necessary statutory changes. In response, the Chief Justice reconstituted the working group in 2020 to face the complex structural questions now squarely presented.

Building on its earlier progress, the working group labored through the pandemic summer of 2020, poring over statistics, scholarship, and extensive public comment to produce a landmark report.[24] Remarkably, every bar and business group to offer comments supported an appeal of right in all cases. Although opposition from the plaintiffs' bar was widely expected—so much so that the 2018 working group report expressly anticipated that possibility[25]—the Virginia Trial Lawyers Association endorsed jurisdiction expansion on the condition that it was accompanied by cost-saving measures and that interlocutory appeals remained limited.[26]

The working group made four distinct recommendations:

1. Adopting appeal of right in criminal cases with further appeal by petition to the Supreme Court, with the Attorney General's office representing the Commonwealth from the outset rather than only in granted cases;
2. Adopting appeal of right in all general civil cases with further appeal by petition to the Supreme Court;
3. Rejecting fixed geographic circuits in favor of retaining randomized judicial panels across the Commonwealth; and
4. Adopting a single standard for petitions to the Supreme Court in all cases by repealing Code § 17.1-410, which imposes a heightened threshold for granting appeals in certain subject areas.[27]

It additionally recommended reforming certain aspects of appellate procedure to reduce expense. Specifically emphasized were eliminating the appendix requirement in cases with digital records and revisiting bonding and postjudgment interest requirements to disincentivize frivolous appeals.[28]

The Judicial Council took up the working group's September 24, 2020 report in its October 22, 2020 meeting, voting unanimously to send the recommendations to the General Assembly for consideration in the 2021 session.[29] Although major

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[24] WORKING GROUP TO STUDY JURISDICTION OF THE COURT OF APPEALS OF VIRGINIA, REPORT TO THE JUDICIAL COUNCIL OF VIRGINIA: COURT OF APPEALS JURISDICTION STUDY – SJ 47 1 (Sept. 24, 2020), http://www.vacourts.gov/news/items/covid/jc/2020_1022_materials.pdf [hereinafter 2020 WORKING GROUP REPORT].
[25] 2018 WORKING GROUP REPORT at 9–10.
[26] 2020 WORKING GROUP REPORT at 76–80.
[27] *Id.* at 2–7.
[28] *Id.* at 7.
[29] Peter Vieth, *Appeal-of-Right Plan is Backed by Judicial Council*, VA. LAW. WEEKLY (Nov. 2, 2020), https://valawyersweekly.com/2020/11/02/appeal-of-right-plan-is-backed-by-judicial-council/.

questions lingered—How many more judges would be needed? What additional staff would be required? How much would it all cost? Who gets oral argument?—legislation to implement the proposal was being drafted in the waning weeks of 2020.[30]

C. General Assembly Passes Appeal-of-Right Legislation

The short 2021 Regular Session dawned with parallel bills pending in the House and Senate.[31] Both bills would have implemented the Judicial Council's proposal, but they differed in certain crucial details. For instance, the House bill called for four additional judges while the Senate bill contemplated six judges.

The Senate bill appeared to have more momentum from the start.[32] In the weeks before session began, Senator John Edwards, Chairman of the Senate Judiciary Committee, asked bar groups to begin evaluating candidates for the anticipated judgeships. A Senate committee working group polished the bill's details, and a revised version emerged from committee in early February by an 8 to 6 vote. The full Senate passed the bill by a 21 to 18 party-line vote on February 5. Meanwhile, the House version languished in committee and expired when legislative crossover deadline passed without action.

Now before the same House committee that allowed its sister bill to expire, the Senate bill sat without action for much of February other than a clerical continuance to 2021 Special Session I. Fortunately, a burst of activity from February 20 to 25 allayed any fears that jurisdiction expansion would fail with the finish line in sight. The Senate Bill passed the House committee 13 to 9, albeit with amendments reducing the number of additional judges to four and inserting a kill clause that would defeat the proposal unless the 2022 General Assembly reenacted the bill. The House passed the bill 54 to 45 on February 25, sending the amended legislation back to the Senate—which immediately rejected the House amendments.

With hours remaining before the special session ended—which would kill any outstanding legislation—the House and Senate formed a conference committee to hammer out their differences. The conferees worked into the last weekend of session, but they eventually reached a compromise: they rejected the House amendments reducing the number of judges and imposing a kill clause; delayed the bill's effective date to January 1, 2022; and required a report on the Court of Appeals' expanded workload each January for three years beginning in 2023. The

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[30] *Id.*

[31] H.B. 2112, Va. Gen. Assem. (Reg. Sess. 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?211+ful+HB2112+pdf; S.B. 1261, Va. Gen. Assem. (Reg. Sess. 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+SB1261+pdf.

[32] For the legislative history of the Senate proposal, see *SB 1261*, LEGISLATIVE INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1261.

House (54 to 42) and Senate (20 to 17) adopted the conference report, sending the compromise bill to the Governor's desk on February 27, 2021.[33]

The sole remaining hurdle was appropriations—six new judges and supporting staff, as well as dozens of additional appellate attorneys in the Attorney General's office, required funding. The Governor's budget had allocated approximately $5.1 million for four new Court of Appeals judges in December 2020, and the General Assembly included funding for the two additional judgeships in the Budget Conference Report. By the end of the session, the legislation was largely funded.[34]

Governor Northam signed the legislation into law without amendments on March 31, 2021.[35] Virginia's new appellate regime will therefore begin on January 1, 2022. With the jurisdiction-expansion legislation now part of the Acts of Assembly,[36] Virginia litigators should begin preparing for the changes that appeals of right will bring to their practices.

II. A Transformation in Virginia Appellate Practice

Just a few months from now, litigators will face the most significant change in civil procedure since the 2006 merger of law and equity[37] and the biggest shift in appellate procedure since the Court of Appeals' creation in 1985. Much must happen in the months between now and the January 1, 2022.

A. Judicial Elections and Court Preparations for the New Regime

The portions of the legislation amending Code § 17.1-400—determining the number of judges on the Court—will take effect on July 1, 2021. This earlier date will give the General Assembly time to consider candidates for the seven available

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[33] S.B. 1261 (enrolled), Va. Gen. Assem. (Special Sess. I 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+SB1261ER+pdf.
[34] *See* DEPT. PLANNING & BUDGET, S.B. 1261, FISCAL IMPACT STATEMENT 2 (Special Sess. I 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?212+oth+SB1261FER122+PDF [hereinafter S.B. 1261 FISCAL IMPACT STATEMENT]; S.B. 1100, Items 40, 48, & 57, Va. Gen. Assem. (Reg. Sess. 2021).
[35] *See* Press Release, Office of the Governor, Governor Northam Acts on Budget, Remaining Bills from 2021 Special Session (Mar. 31, 2021) ("Governor Northam signed the following key bills into law: . . . Senate Bill 1261, sponsored by Senator John Edwards, provides for an appeal of right in every civil case and expands the Virginia Court of Appeals from 11 to 17 judges."), https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-894142-en.html.
[36] 2021 Acts ch. 489 (Spec. Sess. I), https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0489+pdf.
[37] *See* W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006).

judgeships (the six newly added slots plus Judge Alston's seat, which remains open since his appointment to the federal judiciary).[38]

In the immediate aftermath of the 2021 session, legislators contemplated an expeditious timeline for judicial selection.[39] Legislative leaders urged bar organizations to consider all judicial applicants in April and May so that the legislature could elect the judges in time for them to begin serving on July 1, 2021.[40] Although Court of Appeals Chief Judge Marla Decker had expressed her desire to have the new judges seated by this date to facilitate court administration, including arranging for chambers and bringing new staff up to speed, this schedule has proven too ambitious.[41] Now General Assembly leaders hope to receive recommendations from the bar organizations by July 30, but no special session has yet been scheduled to consider the at least 50 candidates vying for the seven available seats.[42] A special session is expected to take place later in the summer.

A key consideration in the judicial-selection process will be diversity. Many groups have noted that of the Court's ten current judges, most have a background in prosecution, the Attorney General's Office, or insurance defense; none have chambers west of Lynchburg; only three are women; and only one is a person of color.[43] The amended Code § 17.1-400 expressly requires the General Assembly to "consider regional diversity in making its elections," but legislative leaders have made clear that racial and practice-area diversity will also play a substantial role in the selection process.[44]

In addition to judicial elections, the July 1, 2021 effective date for the legislation changing the Court's composition gives it the time needed "to prepare and approve new rules, establish chambers, and hire clerks and staff in preparation of hearing cases on January 1, 2022."[45] Clearly having anticipated the legislation's success, the Court promulgated substantial revisions to Parts 5 and 5A of the Rules of the Supreme Court of Virginia on April 1, 2021—the day after the Governor

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[38] Peter Veith, *Assembly Leaves Court of Appeals Seat Unfilled*, VA. LAW. WEEKLY (Mar. 12, 2020), https://valawyersweekly.com/2020/03/12/assembly-leaves-court-of-appeals-seat-unfilled/.
[39] *See* Letter from Sen. John S. Edwards, Chair, Senate Judiciary Committee and Del. Charniele L. Herring, Chair, House Courts of Justice Committee, to Virginia Bar Leaders 1 (Mar. 15, 2021), https://valawyersweekly.com/files/2021/03/498889811-2021-Court-of-Appeals-of-Virginia-Vetting-Process-3-15-21.pdf [hereinafter Letter to Bar Leaders].
[40] *Id.*
[41] Peter Vieth, *Interviews Planned for Appeals Court Candidates*, VA. LAW. WEEKLY (May 17, 2021), https://valawyersweekly.com/2021/05/17/interviews-planned-for-appeals-court-candidates/.
[42] Peter Vieth, *50 Respond to New call for Appeals Court Apps*, VA. LAW. WEEKLY (April 26, 2021), https://valawyersweekly.com/2021/04/26/50-respond-to-new-call-for-appeals-court-apps/.
[43] *Id.*; *Groups Push for More Diversity on Virginia Appeals Court*, VA. LAW. WEEKLY (April 21, 2021), https://valawyersweekly.com/2021/04/21/groups-push-for-more-diversity-on-virginia-appeals-court/.
[44] Letter to Bar Leaders, *supra*, at 2.
[45] *Id.* at 1.

signed the legislation.[46] Although additional rule changes will almost certainly follow as the process of implementing the legislation continues, these amendments go a long way toward building on the Court's adaptations during the COVID-19 pandemic to anticipate more efficient and higher volume appeals going forward.

While legislators select judges and the administrative process of expanding the Court of Appeals continues, Virginia litigators should busy themselves preparing for the new appellate landscape. The remainder of these materials addresses how the jurisdiction-expansion legislation will change litigation and what attorneys need to know to be ready.

B. Transitional Phase for Pending Appeals

When the new appellate structure springs to life at midnight on January 1, 2022, pending appeals will largely continue under the former regime—with one significant exception.

Language appearing on the last page of the bill clarifies how each appellate court will handle its pending appeals when the legislation takes effect. Cases in which a notice of appeal to the Supreme Court is filed prior to the effective date will continue in that Court unaffected by the legislation. This language has major strategic implications.

Counsel considering civil appeals in late 2021 should refrain from noting an appeal until the legislation becomes effective. Although filing well before the deadline is generally wise in appellate practice, noting an appeal to the Supreme Court when the Rule 5:9 30-day deadline would not expire prior to 2022 could constitute appellate malpractice. Counsel should only file a notice of appeal to the Supreme Court in cases where delay would violate Rule 5:9's mandatory deadline and procedurally bar the appeal. Otherwise, they should wait until 2022 to note an appeal of right to the Court of Appeals pursuant to the amended Code § 8.01-675.3.

Nothing changes for civil cases pending before the Court of Appeals when the legislation becomes effective—the civil cases within that Court's current jurisdiction are already of right.

The bill provides a boon for criminal litigants with cases pending before the Court of Appeals. As long as the Court has not yet ruled on a pending petition for appeal, that petition will be deemed granted on January 1, 2022. Once the clerk certifies the grant to the trial court and counsel, the case will be mature for proceedings on the merits. Counsel with criminal cases in late 2021 should wait until just before the Rule 5A:12 40-day deadline expires to file their petitions in

[46] *Order Amending Parts Five and Five A of the Rules of the Supreme Court of Virginia*, SUP. CT. VA. (April 1, 2021), http://www.courts.state.va.us/courts/scv/amendments/parts_5_and_5a.pdf.

order to maximize the chances that the Court will not deny the petition before the legislation takes effect.

An open question is what will happen in criminal appeals when the Court of Appeals denies the petition by one-judge order in late 2021, but the Rule 5A:15A 14-day period to demand review by a three-judge panel has not elapsed. Code § 17.1-407 presently provides for oral argument of right before a three-judge panel after a single judge denies the petition. But the new legislation substantially revises this statute to address only petitions by the Commonwealth in criminal cases. The enactment clauses are also silent about what should happen in this situation. Hopefully, the Court will treat cases in limbo between the one-judge and three-judge stages as those in which "a decision . . . remains pending" and automatically grant them. As written, however, the few cases that fall in this unfortunate category could be deprived of three-judge review, leaving a Supreme Court appeal as the only remaining redress. This possibility raises questions of fundamental fairness with potential habeas implications. Counsel who might find themselves in this situation would be wise to prepare for immediate filing of Rule 5A:15A three-judge demands in late 2021.

C. Shifts in Civil Caseload

Unsurprisingly, the transition to appeal of right in both civil and criminal cases is projected to increase the volume of cases the Court of Appeals considers each year. Exactly how much the caseload will increase, however, is difficult to estimate.

Few civil cases ever see an appeal. Many are settled or otherwise withdrawn, and a settlement cannot be appealed. Some are resolved by pretrial dispositive motions, but no data is available on the frequency of appeals following a granted demurrer, plea in bar, or other like ruling. The information that is out there only addresses appeals after trial. But given the small number of trials in modern civil practice, even that information may have limited value in estimating the future civil appellate caseload.[47]

Over the last few years, civil petitions to the Supreme Court have hovered around 400 annually. During that same period, total circuit court civil filings (not counting domestic relations cases) averaged about 170,000 cases per year.[48] Thus, under the present Virginia appellate structure, approximately 0.25% of all civil cases filed in Virginia are appealed.

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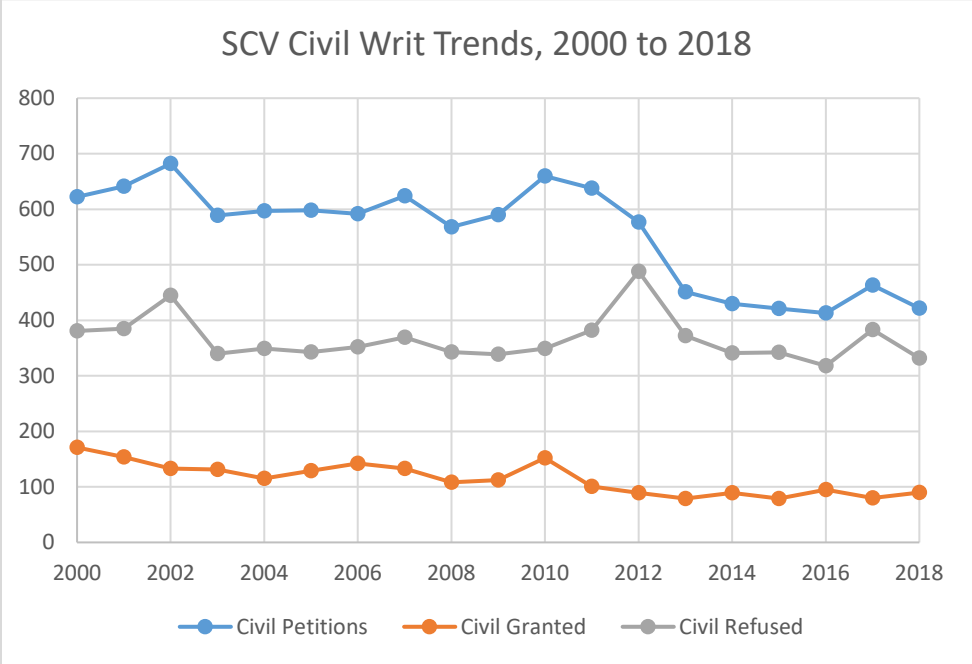
[47] For an overview of the decline in civil trials and its effects on appellate litigation, see Graham K. Bryant & Kristopher McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT U. L. REV. 287 (2018).

[48] S.B. 1261 FISCAL IMPACT STATEMENT 3.

In terms of absolute numbers, civil petitions for appeal have gradually dropped from around 600 per year to the current level of 400 per year in the last few decades. Of those, only around 100 are granted each year. Interestingly, the Supreme Court's civil grant rate has held steady around 100 cases per year regardless of the total number of civil petitions filed. These statistics are illustrated in the following table.



Virginia's current civil appeal rate is well below average. Nationally, an average of 0.7% of all civil cases filed are appealed. The fiscal impact statement accompanying the jurisdiction-expansion legislation applied the national 0.7% rate to Virginia's average filing load to reach a rounded estimate of 1,187 civil appeals of right per year.[49] The filing-load figure used in this calculation, however, may be flawed because it appears to consider concealed handgun permit applications in the total number of civil filings.[50] While civil in nature and technically appealable, concealed handgun permits are rarely appealed, meaning their inclusion may skew the projection calculation.

The working group provided varying estimates for total post-jurisdiction-expansion appeals depending on which assumptions it adopted.[51] It projected ranges from 650 to 975 appeals on the low end, to as many as 1,540 to 1,750 appeals on the high end, leaving the roughly 1,200-appeal estimate based on the national appeal

[49] *Id.*
[50] *See* OFFICE OF THE EXEC.SEC'Y, CASELOAD STATISTICS OF THE CIRCUIT COURTS 119 (2021), http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/circuit/cr01monthly/2020/cr01_2020_dec.pdf.
[51] 2020 WORKING GROUP REPORT at 39.

rate somewhere in the middle.[52] Only time will tell how much Virginia's civil appeal rate actually increases following jurisdiction expansion. But it is possible that the number of civil appeals heard on the merits could increase by 1,200%—or more. That possibility should capture every civil litigator's attention.

D. The New Criminal Appellate Regime

The increase in criminal appeal volume is easier to anticipate. This is because, despite outward appearance, criminal appellants in Virginia already have an appeal of right in all but name. Under the current procedure, every defendant who unsuccessfully petitions the Court of Appeals is entitled to receive a written explanation of the reasons for the refusal as well as to give oral argument before a three-judge panel.[53] These written explanations take the form of one-judge denial orders, which generally comprise multiple pages discussing the case background and applicable law, then applying the law to the facts to reach a decision. They are, in form and effect, the equivalent of a written opinion affirming a merits appeal.

Because implementing by-right appeals for criminal cases will have little practical difference from the current process, predicting the change in case volume is easier. The Court of Appeals has considered an average of 1,500 to 1,550 criminal petitions in recent years with a grant rate of around 12%, yielding an average of about 180 merits criminal appeals per year. Under the appeal-of-right regime, alongside other legislative action in the criminal setting, criminal appeals are expected to increase by about 20%, or 300 additional criminal appeals annually.[54]

The change from the current system of one-judge and three-judge orders to appeals of right, however, will involve major structural changes in how the Commonwealth is represented. Under the current system, the Commonwealth's Attorney's office for the jurisdiction from which an appeal is taken bears responsibility for representing the Commonwealth at the petition stage. Only if the appeal is granted does the Criminal Appeals Section of the Attorney General's office assume representation. Although the present system increases efficiency in refused cases, the bifurcated representation can lead to disjointed arguments and inhibit the Commonwealth's advocacy in granted cases.

Under the new legislation, the Attorney General will represent the Commonwealth in all criminal appeals. The only exception is if the Commonwealth's attorney who prosecuted the case at trial obtains the Attorney General's consent to represent the Commonwealth on appeal *and* files a notice of appearance pursuant to Code § 2.2-511(A). The working group unanimously recommended this procedure because it would ensure consistency of arguments

[52] *Id.*
[53] Code §§ 17.1-413(A); 17.1-407(D).
[54] S.B. 1261 FISCAL IMPACT STATEMENT at 2.

throughout the appellate process, ensuring representation of the highest quality for Commonwealth.[55] It will also free up local Commonwealth's Attorney's offices to focus on trial-level prosecution without the time-consuming task of appellate brief writing.

This change comes with a sizeable cost. The Attorney General anticipates that it will need an additional 54 attorneys—plus 13 administrative staffers—to handle the increased caseload, with each new attorney increasing the section's appellate capacity by approximately two cases per month.[56] At present, funding has been appropriated for 27 new attorney and 7 new administrative staff positions.[57] Hiring for these open positions is currently underway, part of the appellate hiring bonanza resulting from the jurisdiction-expansion legislation.[58]

Despite these substantial investments supporting the Commonwealth's representation, the legislation does not include corresponding provisions to increase the quality of defense appellate representation. It does require all criminal cases in circuit court to be recorded and transcribed for appeal at the Commonwealth's expense, and it eliminates the need for appeal bonds in criminal cases, reducing substantial expenses of appeal. But it does not address the systemic disadvantages that indigent defendants face by, for instance, establishing a statewide defense appellate unit to oppose the Attorney General's Criminal Appeals Section as appellate specialist against appellate specialist.

The legislation also does not address the inadequate compensation paid to court-appointed criminal appellate attorneys. The statute governing compensation for such attorneys provides: "the court to which an appeal is taken shall order the payment of such attorneys' fees in an amount not less than $300, costs or necessary expenses of such attorneys in an amount deemed reasonable by the court."[59] That statute was last amended in 1984.

Many of the public comments considered by the working group emphasized the need for increased resources for indigent defendants. For instance, the Virginia Trial Lawyers Association stressed that any proposal must include "a provision for appropriate funding for indigent defense, including refunding the Office of the Appellate Defender as a part of the Virginia Indigent Defense Commission."[60] Similarly, a criminal defense attorney with experience representing indigent defendants on appeal observed with regard to appellate costs:

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[55] 2020 WORKING GROUP REPORT at 4.
[56] S.B. 1261 FISCAL IMPACT STATEMENT at 4.
[57] S.B. 1100, Item 57 #2c, Va. Gen. Assem. (Reg. Sess. 2021), https://budget.lis.virginia.gov/amendment/2021/2/HB1800/Introduced/CR/57/2c/.
[58] Jason Boleman, *Hire Away: New Laws Create Job Openings Across Virginia* (May 3, 2021), https://valawyersweekly.com/2021/05/03/hire-away-new-laws-create-job-openings-across-virginia/.
[59] Code § 19.2-326.
[60] 2020 WORKING GROUP REPORT at 78.

> While the court reporter and brief-binders get paid full freight and bill many thousands of dollars, the court appointed appellate attorney gets about $500, total. I have in the past received $250 for an appeal that required over 100 hours of work. That's $2.50 per hour. Most attorneys will not do court appointed appeals because they are a genuine danger to the attorney's ability to operate their business.[61]

Although adopting criminal appeals of right is an important step forward, it remains to be seen whether its provisions will be enough to advance access to justice on appeal for criminal defendants, and especially indigent defendants.

E. Reduced Access to Oral Argument?

Virginia's current appellate system can pride itself on having some of the most robust access to oral argument of any appellate system in the country. Although litigants were once entitled to an hour each of oral argument,[62] appellants in every case are still entitled to at least a ten-minute writ argument.[63] This right to oral argument in Virginia strikes a sharp contrast to the federal appellate courts and many sister states, which functionally permit oral argument only when the court desires.[64]

Needless to say, some observers have expressed concern about language in the jurisdiction-expansion legislation that could be interpreted as reducing access to oral argument of right. The wording in question is an amendment to Code § 17.1-403 authorizing

> the Court of Appeals to dispense with oral argument if the panel has examined the briefs and record and unanimously agrees that oral argument is unnecessary

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[61] *Id.* at 99–100.

[62] THOMAS R. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS 73 (1975) ("When the present Rules of Court became effective, in 1950, each side was permitted one hour. The allotted time was reduced to forty minutes in 1969 and finally to the current thirty minutes in 1971.") (citations omitted).

[63] *See* Robert P. Coleman, III, *The Vanishing Oral Argument: Why It Matters and What to Do About It*, ABA APP. ISSUES (Feb. 18, 2020), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/the-vanishing-oral-argument/ ("For instance, in state court in Virginia, the parties have the right to ten minutes of oral argument in each case. The Fourth Circuit, in contrast, goes through a complex decision-making process to determine whether a case will be argued at all.").

[64] *See* James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. APP. PRAC. & PROCESS 89, 91–92 (2018), https://lawrepository.ualr.edu/appellatepracticeprocess/vol19/iss1/6/.

> because (a) the appeal is wholly without merit or (b) the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed.

In essence, this provision allows the Court to forego any oral argument if it determines that the appeal is meritless or that the key issues are controlled by unchallenged precedent. Read broadly, this language could permit the Court to allow oral argument only in those cases presenting an issue of first impression. It has echoes of Federal Rule of Appellate Procedure 34(b), which the American Academy of Appellate Lawyers has described as creating an "institutionalized rebuttable presumption against argument."[65]

Given Virginia's tradition of wide access to oral argument, however, this broad interpretation is unlikely. Arguably more expansive language was suggested in the working group's report.[66] And there are self-evident problems in a system of by-right appeal in which the Court lacks discretion to dispense with argument in truly frivolous cases. In fact, the Court itself requested that the General Assembly include this language to promote efficiency in handling the nontrivial number of completely meritless appeals filed each year. Counsel who have dealt with handwritten pleadings from certain pro se litigants can sympathize. The intended purpose of this language is not to stifle access to oral argument in counsel-filed appeals.

That said, as time goes on and the Court's workload evolves, it is possible this provision could eventually devolve into the sort of rebuttable presumption against oral argument that plagues the federal courts.

F. Mandatory E-Filing and Changes in Appendix Procedures

Historically, brief printing, paper filing, and appendix preparation have been among the most substantial expenses of appeal. The working group recognized this burdensome aspect of appellate practice and suggested that the jurisdiction-expansion proposal reduce the expense of appeals by eliminating the appendix requirement in all cases where digital records are available. Many who provided public comment, including four statewide legal groups, agreed that eliminating appendices in lieu of digital records would be a key appellate reform.[67] Likely for

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[65] *Id.* at 91.
[66] 2020 WORKING GROUP REPORT at 132–33 (suggesting language stating: "The rules shall prescribe procedures governing the summary disposition of appeals in appropriate circumstances, authorizing the Court of Appeals to prescribe truncated record or appendix preparation, and allowing the Court of Appeals to omit oral argument if the panel determines that it would not be helpful").
[67] *Id.* at 7, 62.

this reason, the amendment to Code § 17.1-403 discussed above also includes language "authorizing the Court of Appeals to prescribe truncated record or appendix preparation."

The change makes sense—after all, the vast majority of circuit courts already prepare records for appeal as digital PDFs, and most appellate judges and their staffs review the briefing and records electronically. The problem is the minority of circuits that still use paper records. The working group encouraged the General Assembly to bring about an update of procedures and equipment in the 20 to 25 circuits that are not digital.[68] Because Virginia circuit court clerks are independently elected constitutional officers, however, the decision to go digital ultimately rests with the clerk—the General Assembly and even the Supreme Court have limited power to force a change.[69]

Another change in appellate practice prompted by COVID-19 was the switch to electronic filing for essentially every document filed with either court.[70] Under the rules applicable when the pandemic began, multiple paper copies of petitions and briefs had to be filed with the Court. Although the pandemic-induced transition to pure e-filing was originally a round-peg-square-hole solution to protect clerk's office staff and attorneys from viral transmission, the Court refined the Virginia Appellate Courts Electronic System (VACES) as the emergency persisted. VACES is now an integrated electronic filing system capable of handling every possible filing in the appellate courts.[71]

On April 1, 2021—the day after Governor Northam signed the legislation—the Court promulgated substantial amendments to the rules of appellate procedure that make the COVID-19 changes to e-filing permanent. These new rules, which became effective on June 1, 2021, require e-filing of all submissions—specifically including appendices—via the robust new VACES. It also provides for service of filings on other parties exclusively by email and use of digital records if available. They specifically prohibit any paper filings unless a litigant is exempt from the e-filing requirements.

In the Supreme Court, new Rule 5:1B sets out these requirements. Amended Rule 5A:1 contains new language with essentially the same effect in the Court of Appeals. Notably, substantial revisions to Rule 5A:25 governing appendices in the

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[68] *Id.* at 7.
[69] Va. Const. art. VII, § 4; Code § 15.2-1634.
[70] *See* Code § 32.1-48.013:1; *In re: Electronic Filing of Pleadings During COVID-19 Emergency*, SUP. CT. VA. (February 11, 2021), http://www.vacourts.gov/news/items/covid/2021_0211_scv_temp_efiling_order.pdf; *In re: Fifth Order Concerning Court Operations under the Public Health Emergency Created by the Outbreak of Coronavirus Disease 2019 (COVID-19),* CT. APP. VA. (Feb. 22, 2021), http://www.vacourts.gov/news/items/covid/2021_0222_cav_operations_order_fifth.pdf.
[71] *See* VACES User Help, https://eapps.courts.state.va.us/help/robo/vaces/index.htm#t=VACES.htm.

Court of Appeals indicate that not only will appendices be entirely electronic—they may not be needed at all in some cases. A completely reworked subsection (b) now provides that although the Court may by order require a paper appendix, it also may "sua sponte or on motion, enter an order dispensing with the appendix and permitting an appeal to proceed on the original record with any copies of the record, or relevant parts, that this Court may order the parties to file." Given that all civil appeals will soon begin in the Court of Appeals, counsel should consider filing a motion to dispense with the appendix and to proceed on the (digital) record early in every appeal as a cost-saving measure.

These new rules should be familiar to counsel who have handled appeals under the COVID-19 procedures. They largely extend the pandemic procedures into the formal filing process going forward, although they add some new options and opportunities for advocacy in the process. Gone are the days of having to file PDFs *and* multiple expensive paper copies of every appellate submission. Although adapting to a primarily digital appellate system will be a new experience, Virginia litigants stand to benefit from the substantially reduced costs of printing and appendix preparation. Appellate printing services that have not already adapted their business models in anticipation of this change, however, will be less fortunate.

G. Interpanel Accord and Availability of Rehearing En Banc

Unlike the Supreme Court, which hears merits cases only as a full seven-justice Court, the Court of Appeals hears and decides most cases in three-judge panels.[72] The three-judge panel will continue to be how the Court hears most cases after the jurisdiction-expansion legislation takes effect, meaning that attorneys bringing appeals of right before the Court should be familiar with the interpanel accord doctrine and the principles governing rehearing *en banc*.

When the General Assembly asked the Judicial Council to consider jurisdiction expansion in 2000, it specifically asked for recommendations on dividing the Court of Appeals into four geographic circuits. Court observers noted that fixed geographic divisions would complicate the precedential value of panel decisions, potentially creating circuit splits within Virginia akin to the splits between federal appellate circuits. The working group ultimately declined to recommend geographic circuits, observing:

> It is far better for the integrity and development of a consistent jurisprudence for the Commonwealth and its citizens, that the CAV should remain free to continue its successful randomized rotation of assignments for all of its judges to sit in the various different geographic regions each year. Existing case law doctrines and CAV

[72] Code § 17.1-402.

> procedures regarding disparate panel decisions would be unaffected by the appeal-of-right initiative.[73]

The essential case law doctrine regarding disparate panel decisions is the rule of interpanel accord, under which the published decision of any three-judge Court of Appeals panel, including the rationale for that decision, "'becomes a predicate for application of the doctrine of *stare decisis*' and cannot be overruled except by the Court of Appeals sitting *en banc* or by the Virginia Supreme Court."[74] Because the General Assembly declined to split the Court of Appeals into geographic circuits, the interpanel accord doctrine continues to apply. As a result, every published decision by a panel of the expanded Court of Appeals will become binding appellate precedent, substantially expanding the corpus of Virginia appellate case law over time.

The Supreme Court will likely continue to accept few civil appeals each year, meaning that published opinions of a three-judge Court of Appeals panel will likely become the final word on many aspects of Virginia law. The only alternative to overturn a panel decision is a Court of Appeals rehearing *en banc*. Although *en banc* procedures remain similar, the jurisdiction-expansion legislation makes a few changes litigants should know.

Formerly, the Court of Appeals would hear cases *en banc* in only three situations: (1) there was a dissent in the panel to which the case was originally assigned, the aggrieved party requested rehearing *en banc*, and at least three other judges voted in favor of rehearing; (2) a judge of a panel certified that a decision of that panel conflicts with a prior decision of the Court, including another panel's decision, and three other judges agreed; or (3) the Court, on its own motion, determined by a majority of judges that rehearing *en banc* was appropriate.[75]

The new legislation primarily amends Code § 17.1-402(D) by increasing the number of judges needed to agree to rehearing *en banc* in accordance with the Court's larger size. When it takes effect, six judges will have to vote in favor of rehearing rather than the former four in the first two situations.

The legislation also includes a significant change liberalizing the availability of *en banc* rehearings. Inserted in the statutory language governing the third situation is now the phrase, "or upon the petition of any party." Previously, a party could petition for rehearing *en banc* only if there was a dissent in the panel decision. The other two circumstances required the Court itself to determine that rehearing *en banc* was appropriate. Now, a party can petition for rehearing *en banc* even

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[73] 2020 Working Group Report at 6
[74] *Clinchfield Coal Co. v. Reed*, 40 Va. App. 69, 73 (2003) (quoting *Johnson v. Commonwealth*, 252 Va. 425, 430 (1996)).
[75] Code § 17.1-402(D).

without a dissent, and if nine of the 17 judges agree, the rehearing will be awarded. As a strategic matter, this language creates a new opportunity to bring the case before the other 14 members of the Court. Convincing nine judges to agree that the panel erred is a heavy burden, especially without a dissent, but it is an opportunity for advocacy that did not exist before.

The only remaining question about *en banc* rehearings is a practical one: where, exactly, will all 17 judges sit to rehear the case? Under current practice, the judges sit *en banc* in the Supreme Court of Virginia courtroom with four extra chairs to accommodate the 11-member court. That physical bench was tightly packed with 11 judges—it is difficult to imagine all 17 judges comfortably hearing cases in that space. How to accommodate the *en banc* Court is undoubtedly among the many practical issues Court administrators are considering in these key months prior to the January 1, 2022 effective date.

H. Interlocutory Appeals Remain an Infrequent Option

The jurisdiction-expansion legislation also overhauls the statutory scheme for interlocutory appeals. Other than directing that the Court of Appeals rather than Supreme Court hear interlocutory appeals, however, the procedure remains essentially unchanged from existing practice. An interlocutory appeal must be made by petition—not of right—to the appellate court, and the petition can be filed only after the circuit court certifies the case for appeal. As a result, the volume of interlocutory appeals should not substantially change in the new regime.

Interlocutory appeals have been the subject of substantial legislative attention in recent years. The current statute governing interlocutory appeals, Code § 8.01-670.1, was first enacted in 2002. It provided that a circuit court could certify a case for an interlocutory appeal only if the challenged ruling met four criteria: (1) substantial ground for difference of opinion existed regarding the issue, (2) no Virginia appellate precedent clearly controlled, (3) determination of the question would be dispositive of a material aspect of the case, and (4) the circuit court and parties agreed that it was in the parties' best interest to seek an interlocutory appeal. This last element functioned as a one-party veto, permitting any litigant to unilaterally shut down a potential interlocutory appeal.

The one-party veto provision drew criticism over the years, and in 2019, a Boyd-Graves Conference committee studying the issue "found no good reason to allow it" because the gatekeeping function is better served by the courts than an interested party.[76] Instead, the committee determined that the requirement for circuit court certification of the remaining elements combined with the appellate

[76] COMM. ON INTERLOCUTORY APPEALS, BOYD-GRAVES CONFERENCE, COMM. REPORT 1, 5 (Aug. 30, 2019), https://cdn.ymaws.com/www.vba.org/resource/resmgr/boyd-graves/2019_booklet/2019_B-G_Booklet-2.pdf.

court's discretion to determine whether that certification "has sufficient merit" provided adequate protection against inappropriate interlocutory appeals.

That committee also noted that Virginia had no mechanism for interlocutory review of immunity determination, a significant oversight because "immunity protects the defendant's right not to be subject to litigation" in the first place. As the committee observed, that "right is effectively lost if an order denying immunity cannot be reversed on an interlocutory appeal."[77]

As a result of the Boyd-Graves Conference recommendations, the General Assembly substantially amended Code § 8.01-670.1 in 2020, reframing the process of seeking interlocutory appeal to require a motion for certification. The same elements apply, except for the one-party veto. The statute now permits briefing on the motion if a party opposes certification. The amendments also incorporated the Code § 8.01-626 injunction-review petition process to permit interlocutory review of immunity orders. Finally, the amendments clarify that trial proceedings are not stayed pending an interlocutory appeal's resolution unless the appeal could be dispositive of the entire action or other good cause exists. The failure to seek an interlocutory appeal will not waive the issue on appeal of the final order.

The amended Code § 8.01-670.1 will be short-lived. The jurisdiction-expansion legislation repeals that statute and replaces it with a new statute, Code § 8.01-675.5. That new statute's content, however, is familiar: it contains the same language from the 2020 amendments to Code § 8.01-670.1. The only changes are those necessary to require that all interlocutory appeals will be heard by the Court of Appeals rather than the Supreme Court. Because the new legislation additionally provides that the Court of Appeals will hear all injunction-review petitions filed under Code § 8.01-626, the interlocutory appeal statute continues to incorporate the injunction-review procedures for review of immunity rulings.

The 2020 changes increased the availability of interlocutory review in civil cases that present novel and dispositive issues, thereby promoting efficiency in litigation. The 2021 jurisdiction-expansion legislation does not further expand this availability, but simply changes the Court that hears interlocutory appeals. Even so, review of immunity rulings is a significant new development in Virginia appellate practice. As a practical matter, every case involving an immunity determination will likely have two rounds of appeals—interlocutory and from the final orders. Attorneys should counsel their clients to anticipate this procedural novelty.

[77] *Id.* at 2.

III. Practice Pointers for the New Appellate Landscape

The legislation establishing appeals of right will dramatically expand access to merits appellate review in Virginia. But it does little to address the notorious labyrinth of appellate procedure. Although more people than ever before will have access to appeals, navigating the appellate process will remain as challenging as ever.

A remarkable number of civil cases are procedurally dismissed, meaning the appellate court refuses to hear them because of a technical failure in appellate procedure. Over the last two decades, approximately one-quarter of all civil appeals were dismissed for procedural issues before even reaching a Supreme Court writ panel. Many of these defaulted appeals were likely filed by pro se litigants, but a concerning number of them almost certainly came from counsel.

Among those cases that survive the initial procedural review, it is not unusual for entire assignments of error or arguments to be defaulted for other procedural failings. The Rules of Court describe seemingly straightforward requirements for crafting assignments of error, but a corpus of precedent has developed over the years adding additional—and sometimes seemingly contradictory—requirements that attorneys planning an appeal must consider.

Procedural defaults are often perceived as legal technicalities that exist to stifle access to appellate justice and arbitrarily defeat good faith efforts at trial. But, applied fairly and with the benefit of the doubt in close cases, they advance important first principles of our adversarial system by placing a case's scope in the hands of the litigants rather than a judge.[78] Procedural defaults are unlikely to go away with the transition to appeals of right.

The standard of review is another subtle feature of appellate procedure that catches many trial attorneys unaware. Appellate practitioners widely recognize that "standards of review constitute the most important factor in a preliminary assessment of prospects for a reversal" on appeal.[79] For instance, an appeal based solely on a challenge to sufficiency of the evidence will be reversed only if the trial court's decision was "plainly wrong or without evidence to support it"—a nearly insurmountably high bar to success.[80] In contrast, an appeal based on a challenge to statutory construction presents a question of law reviewed de novo—the appellate court considers the question in the first instance without any deference to the trial

[78] *See* Bryant & McClellan, *supra*, at 337 n.295. For a more thorough explanation of the purposes of appellate procedural default rules, see D. Arthur Kelsey, *Procedural Defaults: Balancing Systemic & Individual Justice*, 1 VTLAPPEAL 1, 1–3 (2012), http://www.vtla.us/2012/Appellate/Issue1/KELSEYProcedural.pdf.

[79] BRENDON ISHIKAWA & DANA CURTIS, APPELLATE MEDIATION: A GUIDEBOOK FOR ATTORNEYS AND MEDIATORS (2016).

[80] Code § 8.01-680.

court. De novo appeals, by sole virtue of this standard of review, are more likely to succeed than sufficiency appeals.[81]

The applicable standard of review should govern essentially every aspect of appellate case preparation, from crafting the assignments of error to framing the arguments on brief. Copying arguments from trial advocacy directly into appellate briefing is a sure recipe to stymie an otherwise meritorious appeal.

Finally, appellate oral argument differs from oral arguments at the trial level in both procedure and substance. Appellate oral argument is a rigidly formal process rich with tradition and ceremony. Attorneys unfamiliar with the appellate setting often betray their inexperience with failures in form, courtesy, and etiquette. The recent rise of videoconference oral argument compounds these difficulties by injecting the complexities of unique software platforms and internet connectivity issues into the oral argument setting.[82] Even after the pandemic abates, the efficiencies created by videoconference arguments mean they are likely to remain part of Virginia's appellate landscape.

Civil litigators who plan to handle their own appeals should act now to become familiar with the nuances of appellate procedure. Begin with studying principles of error preservation at trial—without properly preserved challenges below, there is no basis for an appeal. Review the rules and precedent on crafting effective assignments of error. Consider what adaptations are necessary to account for the standard of review and understand how the purposes of appellate review differ from trial advocacy. Then tailor your arguments accordingly—fact-based, emotional jury arguments are unpersuasive to an appellate court.

Prepare to deliver effective oral argument. One key advantage provided by the rise of videoconference oral argument is that the Court of Appeals now maintains an online archive of *video* oral argument recordings as well as its usual audio recordings.[83] Taking the time to watch arguments can help you develop a feel for appellate argument in a way listening to audio alone cannot.

Finally, consider consulting with attorneys who regularly practice before Virginia's appellate courts. Just as it is prudent to talk with a local attorney when appearing before an unfamiliar circuit court for the first time, having an appellate

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[81] For an excellent starting point to become familiar with Virginia's appellate standards of review, see Robert B. "Chip" Delano, *Overview of Standards of Appellate Review in Virginia*, 30 J. CIV. LITIG. 343 (2019), https://docs.vada.org/library/journals/31-3-Delano-Standards_of_Appellate_Review.pdf.

[82] *See* Graham K. Bryant, *Oral Arguments by Videoconference: Avoiding Common Pitfalls*, VIRGINIA LAWYER, October 2020, at 45–46, https://virginialawyer.vsb.org/publication/?i=676369&article_id=3783791&view=articleBrowser&ver=html5.

[83] *Court of Appeals of Virginia Recordings of Oral Arguments*, VA. JUD. SYS., http://www.courts.state.va.us/courts/cav/oral_arguments/home.html.

specialist provide an orientation to practice and procedure before the Court of Appeals can increase your confidence handling appeals of right in Virginia's new appellate landscape.