

Report to the Judicial Council of Virginia: Court of Appeals Jurisdiction Study – SJ 47

September 24, 2020

Working Group to Study Jurisdiction of the Court of Appeals of Virginia

CONTENTS OF THIS REPORT

CONCLUSIONS & RECOMMENDATIONS	p. 2
Part One – Systemic Considerations	p. 8
Part Two – Statistical Overview of All Virginia Appeals	p. 17
Part Three – CAV Operating Models & Caseload Breakdown	p. 21
Part Four – Projecting <u>Criminal</u> Appeal Volume in a By-Right System	p. 30
Part Five – Projecting <u>Civil</u> Appeal Volume in a By-Right System	p. 34
Part Six – Assessing the Regional Operations of the CAV	p. 40
Part Seven – Setting a Reasonable Maximum Caseload Per Judge to Avoid Delay and Backlogs in a By-Right Appeal System	p. 53
Part Eight – Summary of Comments Received from the Public and the Bar.	p. 61
Part Nine – Importance of Adopting Appeal of Right for All Cases	p. 63
Appendix A – All Comments re SJ 47 from Legal and Business Groups	p. 72
Appendix B – All Comments re SJ 47 from Individuals in Virginia.	p. 99
Appendix C – Statutes Relevant to CAV Jurisdictional Change	p. 130
Appendix D – White Paper on the Role of Intermediate Appellate Courts	p. 140
Appendix E – Excerpt: Nat’l Center for State Courts 1979 Virginia Report	p. 171

The Chief Justice first constituted this Working Group in 2018 to study the appellate jurisdiction of the Court of Appeals of Virginia (“CAV”) and to make recommendations on whether it should have jurisdiction over appeals as a matter of right in all civil and criminal cases. Reconstituted in 2020 to study these issues as framed by SJ 47, its members are:

<i>Alice Armstrong</i>	<i>Doris Causey</i>	<i>Bernard DiMuro</i>
<i>Hon. S. Bernard Goodwyn</i>	<i>Stephanie Grana</i>	<i>Leonard Heath</i>
<i>Hon. Glen A. Huff</i>	<i>Donald Jeffrey (2020)</i>	<i>Michael Judge (2018)</i>
<i>Joby Knuth (2020)</i>	<i>Hon. D. Arthur Kelsey</i>	<i>K. Lorraine Lord</i>
<i>G. Manoli Loupassi</i>	<i>Hon. Mary B. Malveaux</i>	<i>Hon. Robert Ferrell Newman</i>
<i>Eric Page</i>	<i>Dennis Quinn</i>	<i>Mike Riggs (2020)</i>
<i>Hon. Wesley G. Russell, Jr.</i>	<i>Prof. Kent Sinclair</i>	<i>Shannon Taylor</i>
<i>C.J. Stuart Thomas, III</i>	<i>Lawrence Vance</i>	<i>Kristy Wharton (2020)</i>

Our recommendations and conclusions regarding adoption of appeal-of-right in Virginia for all criminal and civil cases are concisely set forth at pages 2 to 8 of the present report. Thereafter, extensive background information is provided for the Judicial Council.

CONCLUSIONS & RECOMMENDATIONS

The Working Group reviewed all of the material outlined in the **Table of Contents** of this Report, set forth above, and in the Appendices. The information studied has included:

- judicial administration scholarship and reports on the importance and effectiveness of an appeal of right as all American states – other than Virginia – have implemented this protection for their citizens over the past several decades (recounted at pages 8 - 16);
- a broad range of statistical and descriptive material about current operation of the Virginia appellate system overall, and the Court of Appeals docket in particular, including the extent to which its operations are “regionalized” and the timeliness of its dispatch of the present caseload (pages 17 - 20, 25 - 29 and 44 - 51); and
- the full text of all of the comments on the appeal-by-right concepts set forth in SJ 47 received from both organizations and individuals. All bar and business groups, and almost all of the individuals who responded to a state-wide solicitation for comments, support implementation of an appeal of right for all civil and criminal cases. The comments are summarized at pages 61 - 62 and all are reprinted in full as Appendices A and B to this Report, commencing at pages 72 and 99.

After considering these materials in the summer of 2020, the Working Group met electronically to discuss the issues on September 9, 2020. At that meeting, the Office of the Attorney General joined with the other organizations responding to our inquiry regarding SJ 47 in full support of appeals of right. The Working Group was unanimous in its conclusions.

OVERALL: The Working Group respectfully recommends that in response to SJ 47 the Judicial Council recommend to the Legislature that the Court of Appeals be given appeal-of-right jurisdiction in all criminal and civil cases.

Specifically: we report four distinct recommendations.



1. Criminal Appeals. We recommend that the Judicial Council recommend to the General Assembly that appeal of right be adopted immediately for criminal cases, with further appeal available on a petition for certiorari basis to the Supreme Court of Virginia. Statutory amendments should preserve the option for panels of the Court of Appeals to dispense with oral argument in any case where it is determined that there would be no material benefit from that process. All criminal appeals would be reviewed by a panel of three judges. The legislation should allow for summary disposition in appropriate cases but continue the requirement that the Court of Appeals state reasons for its orders and decisions in all cases (whether oral argument is held or not). Appeal of right for general criminal cases would not alter the provisions governing appeal of death penalty cases directly to the Supreme

Court, or procedures for the Commonwealth's petitions for appeal from pretrial rulings in certain criminal contexts under §§ 19.2-398 and 19.2-401.

CAVEATS and PREMISES:

1-A. This unanimous recommendation supports the jurisdictional change to appeal of right on the express assumption that the General Assembly will be asked to assure that the workload of the CAV will be monitored and supported with appropriate numbers of judicial and support personnel. In particular, the Working Group reports that implementation plans must recognize the possibility of increase in criminal appeal numbers upon a change to by-right criminal appeals:

- **Filing numbers.** The Working Group reports that while pre-COVID-19 felony dispositions in the Commonwealth have been stable at around 25,000 per year in the past decade, and anecdotal opinions from both indigent defense counsel and fee-paid defense attorneys suggest that the number of criminal appeals will not significantly increase in an appeal-of-right system, there are several reasons for caution:

- Different metrics suggested at pages 30 - 33 of this report, comparing the criminal appeal frequencies of other states, could be used to project anywhere from 775 criminal appeals per year in a by-right system in Virginia to upwards of 3,000. As recounted in that portion of the present report, the "middle range" of national experience with the frequency of criminal appeals of right would equate to 1,460 criminal appeals in Virginia. Hence the current actual level of 1,500 to 1,550 petitions per year may prove to be close to the experience in a by-right system, but other "middle range" estimates could suggest as many as 2,200 criminal appeals, and caution is needed to be certain that – if the volume of appeals increases from that currently experienced – judicial caseload and support staffing in the Clerk of Court's office and Staff Attorney's office must be kept adjusted accordingly.
- The assurance that each appeal will be considered by a full three-judge panel may increase somewhat the number of criminal appeals each year in Virginia over the experience of recent years with the petition system.
- Legislative proposals involving jury sentencing, expected to be on the table for the 2021 General Assembly session, also could generate additional criminal appeals.

The CAV's own estimated support staffing needs for the Clerk of Court's office and the Staff Attorney's office are being submitted to the Judicial Council separately, based on varying assumptions as to the actual volume of criminal appeals that may be encountered. Although we cannot say with certainty the extent to which this change might result in a need for additional Court of Appeals judicial and supporting personnel, it is an express premise of the Working Group's recommendation that the Legislature will fund any such needed personnel to permit effective operation of the court.

1-B. Role of the Attorney General. The Working Group unanimously recommends that in by-right appeals of criminal cases the Office of the Attorney General (OAG) should represent the Commonwealth from the outset. The Attorney General agrees with this assessment. Unlike the present petition system, in which local Commonwealth's Attorneys file any oppositions to appeal petitions, and the Attorney General only becomes involved after an appeal is granted, in a by-right appeal system the Attorney General would represent the Commonwealth from the outset of each noticed appeal. This procedure assures consistency of arguments and the highest quality appellate representation for the Commonwealth. Implementing these responsibilities for the preparation of all opposition briefing in criminal appeals will require such additional staffing as the OAG requests and the General Assembly finds appropriate to fund for those additional duties. It is an express premise of the Working Group's recommendations that the Legislature be asked to provide the necessary level of staffing and support for the Criminal Appeals Section of the Attorney General's office to make this system work properly.

2. Civil Appeals. The Working Group unanimously recommends that the Judicial Council recommend to the Legislature that all general civil cases be made appealable as a matter of right to the Court of Appeals, with further appeal available on a writ of certiorari basis by petition to the Supreme Court of Virginia. The Working Group reviewed a wide range of information about the civil dockets in Virginia Circuit Court cases (see pages 63 - 69) and unanimously concluded that piecemeal carving out of partial additional categories (to add to domestic relations and workers' compensation cases already heard in the CAV) would be quite ill-advised. The goal of providing one appeal of right in all civil cases is extremely important, and an increasingly bifurcated system with some fraction of civil litigation appeals going by right to the Court of Appeals and some fraction being subject to a petition for review in the Supreme Court is illogical and ineffective. Bar leaders (and business groups) are unified in the conclusion that having all civil cases reviewable as of right in the CAV, with a possible review on petition for a writ of

certiorari in the Supreme Court thereafter, would be a landmark improvement in the Virginia legal system.

JUDICIAL STAFFING IMPLICATIONS. The Working Group believes that adding jurisdiction over all civil appeals as a matter of right could produce more civil appeals per year than the present level of 400 petitions per year to the Supreme Court. Comparisons of civil appeal “rates” in other jurisdictions are set forth at pages 37 - 38 of this report, although it is not possible to discern from comparable states any truly predictive information about the level of civil appeals that will be experienced in Virginia under a by-right system. The Legislative judgment as to the number of judgeships required for the CAV to hear and decide civil cases promptly at the highest level of quality will depend on its assessment of expected civil case filings. If the total civil appeals in a by-right system increases by 25% over the number of petitions in the current civil system, the total CAV civil filings would be 500 per year. If the number of civil appeals in a by-right system increases by 50% over the present petition volume, the number of added CAV civil filings could reach 600 per year. If the number of appeals in a by-right system was double the present petition volume, the number of added CAV civil appeals could reach 800 per year. If Virginia civil appeals resembles those of other states in our region of the United States (0.4% of civil filings result in appeals), one could expect 650 civil appeals. If the appeal rate we have experienced in Virginia domestic relations cases were predictive of the number of civil appeals in other subject matters of civil litigation (0.7% of all filings result in appeals), the number of civil appeals could reach 1,140. Other commonly used comparisons are set forth at pages 37 - 38, and some would “predict” higher numbers of civil appeals. The number of judgeships needed to safely assign jurisdiction to the CAV over civil appeals should be established by the Legislature in service of the over-arching goal of assuring judicial staffing sufficient to assure prompt and highest-quality disposition of cases appealed in the Commonwealth, having in mind the per-judge caseload considerations discussed at pages 53 - 57 of this report, and the timeliness considerations described at pages 58 - 60. The current CAV staffing is one judge for every 190 filings, which is at the higher end of judicial caseloads across the country, and the National Center for State Courts has recommended that 170 filings per judgeship is a preferable target in structuring a state intermediate court of appeals.

SUPPORT STAFFING IMPLICATIONS. At the request of the Working Group and the Office of the Executive Secretary, the Court of Appeals has prepared an assessment of staffing needs in the Clerk of Court’s office and the Staff Attorney’s office of that court, based on a range of different possible levels of civil appeal filings in a by-right system for civil appeals. It is an express

premise of the Working Group’s recommendation that the Legislature will fund these needed personnel to permit effective operation of the court.

3. Regional Operations of the CAV. The Working Group has reviewed very detailed information about the extent to which existing CAV practices serve the various regions of the Commonwealth, demonstrating impressive organizational expertise and providing excellent convenience to the bar and public by hearing cases in all geographic areas, minimizing travel and expense burdens for the parties. See pages 43 - 51. With respect to the regional spread of CAV judgeships, the Working Group’s strong recommendation is that the Judicial Council recommend to the Legislature that regional operations for the Court of Appeals should not necessitate “stagnant” regional judicial staffing or “non-rotating” assignment of judges and that the present system in which all judges on the CAV rotate assignments and each year sit on panels in all regions of the Commonwealth should be continued. If the General Assembly identifies a goal of assuring more rigorous geographic spread of representation among judges selected to serve on the Court of Appeals, or other measures of diversification, such goals should be achieved on the traditional ad hoc basis in the context of all other factors, and not by linking any particular seat on the CAV to any particular region. 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 procedures regarding disparate panel decisions would be unaffected by the appeal-of-right initiative.

4. Standard for Supreme Court Accepting Review of CAV Dispositions. Currently, under § 17.1-410, decisions of the CAV are declared to be “final” in (i) traffic and misdemeanor cases, (ii) appeals from administrative agencies or the Workers’ Compensation Comm’n, (iii) domestic relations cases, (iv) pretrial appeals in criminal cases pursuant to §§ 19.2-398 and 19.2-401, and (v) appeals involving involuntary treatment of prisoners pursuant to § 53.1-40.1. Subsection B of the statute then allows the Supreme Court to determine on a petition for review that the CAV decision in one of those five categories involves a substantial constitutional question or matters of significant precedential value, and to review them [except pretrial appeals in criminal cases]. As a result, no constitutional question/precedential inquiry is needed for the Supreme Court to accept criminal petitions for appeal in felony cases, but the higher standard is required for the above-listed categories of civil and criminal proceedings. The Working Group recommends that § 17.1-410 be eliminated or streamlined such that all dispositions of the CAV would be subject to a petition for certiorari review to the Supreme Court on the same basis, without specifying different standards or thresholds for granting an appeal depending on predetermined subject matters. This will allow the Supreme Court to use the traditional criteria in reviewing all applications for discretionary appeal, considering

such factors as the precedential value of the case, the presence or absence of an issue of first impression, the possible existence of inconsistent interpretations by the trial courts of particular statutes or prior case law, any evident errors of law in the decisions below, and whether the issue decided by the CAV implicates any constitutional questions.

Other important suggestions.

Support for appeal of right has included identification of some important reforms that should be placed prominently on the agenda for further consideration by the Judicial Council and/or the Legislature, to assure that the appeal system functions properly, and to minimize any unnecessary expense. Key items that surfaced in the comments received and the discussion of the Working Group included:

- The goal of making appeals less costly by eliminating the need for an appendix in all cases where digital records are available, and (accordingly) encouraging the Legislature to take what steps it can to bring about the updating of the procedures and equipment of those 20 to 25 circuits that do not presently digitize their case records.
- The need to deter dilatory appeals by making certain that bonding and post-judgment interest requirements accord with modern American norms – protecting the party that has won below and reducing any incentive to pursue frivolous appeals. The Working Group supported these concerns, tempered by a recognition that waiver or exemption provisions would be needed for protection of indigent parties.

Part One – SYSTEMIC CONSIDERATIONS

Overview. Virginia moved cautiously in 1985 when the Court of Appeals began to hear cases, with its blend of limited-topic civil appeal of right jurisdictional categories, along with the bulk of all criminal appeals on a petition system. The 1985 compromise has worked remarkably well, and the Working Group noted that – on the civil side – the initial structure for CAV jurisdiction right-of-appeal path has significantly reduced the range and volume of appellate litigation by clarifying ambiguities in the law, particularly in domestic relations and workers compensation cases. We think the time has come to take the CAV’s success to the next level, by allocating to this Court jurisdiction over appeals in all criminal and civil cases.

In preparation for its discussions, all members of the Working Group have had the opportunity to study the detailed history of the Court of Appeals in the article by Justice McCullough and Chief Judge Decker published in 16 UNIV OF RICHMOND L. REV. 209, a 2012 White Paper on the Modern Role of Appellate Courts, the conclusions of the VBA’s 260 page study of appellate jurisdiction in Virginia completed in 1994, and the recommendations of the National Center for State Courts’ 400+ page study of Virginia Court structure from decades ago, as well as a statistical overview of the present flow of ordinary criminal and civil appeals. Examples from those materials are annexed to this report as Appendices. We also reviewed the 2017 report of the Boyd-Graves Conference committee that studied these issues for two years and catalogued cogent considerations on all sides of the question of expanded CAV jurisdiction. A brief overview of the uniform approach in other American jurisdictions gave an important vantage point on the issues.

COMPARATIVE PERSPECTIVE

The recommendations in the present report have been developed based on the considerations unique to the landscape of litigation in Virginia, as discussed by the Working Group and suggested in SJ 47.

We note at the outset, however, that the model of an appeal of right for the bulk of all civil and criminal cases is universally recognized in the American legal system. By the 1970s and 1980s, the ABA had joined Aristotle, the American Judicature Society, Roscoe Pound, and others in supporting a Standard of Judicial Administration calling for at least one appeal as a matter of right in all civil and criminal cases. Organized bar and judicial study groups have uniformly concluded that the most beneficial appellate structure for a state’s system is one providing a first-level of appellate review as a matter of right, to an intermediate court of appeals, followed by the option to petition for leave to appeal to the court of last resort. This

is described as the “Model Two-Tiered Appellate System” in the seminal report of the American Judicature Society, in 1976.¹

In June of 1979, the National Center for State Courts completed a three-year study and submitted to the Judicial Council of Virginia a 400+ page report on the operation of the Virginia court system, studying all levels, and concentrating on recommendations regarding the appellate structure. A multi-page excerpt is attached to this report. The conclusion of this massive, multi-year study was: *“In general, appeals from the circuit court should be appeals of right to the intermediate court, and the Supreme Court should have discretionary jurisdiction over all intermediate court decisions.”*

In 1990, the American Bar Association revised and re-issued its “Standards Relating to Court Organization.” Standard 1.13(b) provides that the Supreme Court of a jurisdiction should have review on a petition for certiorari procedure only (with the exception of capital murder cases and resulting death sentences), and that the Court of Appeals in any jurisdiction with such a court should be available to provide “appeal as of right” in all cases. These conclusions proceed from recognition that the two principal functions of appellate review are importantly different. First, there is the goal of providing review in every case for errors in the procedure of a case or in the application of substantive law. This function requires an assured route for review. The second function, however, is lawmaking or policy application in the interpretation of legislation and common law doctrines, which of course is an authority best vested in the Supreme Court of a state. That function, however, does not require that every case be heard; it can be performed on a sampling basis, with the Supreme Court granting review as a matter of discretion based on insightful judgment about the needs of the law in the jurisdiction. In July of 1993, the American Bar Association Judicial Administration Division promulgated a Discussion of Revised Standards Relating to Appellate Courts, drafted by a distinguished panel of 15 judges and justices, including Virginia’s Chief Justice Harry L. Carrico. It concluded flatly: “A party to a proceeding heard on the record should be entitled to one appeal of right from a final judgment.”² The commentary to these national standards states:

The appellate courts have two functions: to review individual cases to assure that substantial justice has been rendered, and to formulate and develop the law for general application in the legal system. In a court system having no intermediate appellate level, both functions are performed by the supreme court. In systems having an intermediate appellate court, these functions are differentiated to an important degree. The intermediate appellate court has primary responsibility for review of individual cases and a responsibility, subordinate to that of the highest court, for extending the application of developing law within the doctrinal

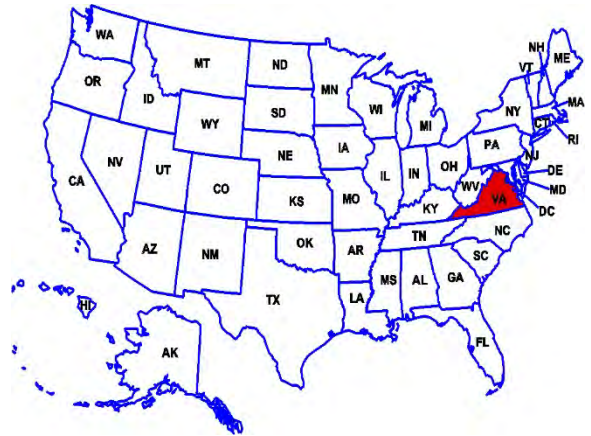
¹ INTERMEDIATE APPELLATE COURTS, (American Judicature Society, 1976) p. 36.

² Standard 3.10, *id.* at 10. *See also id.* at 3.10(b)(“Where there is an intermediate appellate court . . . appeals should be taken there initially, and not directly to the court of last resort, except in capital cases and a limited number of other matters.”), *id.* at 11.

framework fashioned by the highest court; the supreme court exercises a function of selective review to maintain uniformity of decision among subordinate courts and to reformulate decisional law in response to changing conditions and social imperatives.³

In 1994, after two years of study, the Virginia Bar Association published a 260-page study of appellate jurisdiction in the Court of Appeals of Virginia, recommending that it be altered to provide appeal of right jurisdiction for both civil and criminal cases.

By the end of the Twentieth Century, only three states did not afford a routinely available appeal of right for essentially all civil and criminal cases: New Hampshire, West Virginia, and Virginia. Since the year 2000, however, the other two states have adopted appeal of right systems for civil and criminal final judgments.⁴ **That leaves Virginia alone among the American states in not providing one level of appellate review as a matter of right in both civil and criminal cases.**



Generally, as verified by the Working Group after its initial appointment in April of 2018, the structural breakdown of appellate systems across the United States today is:

- **35 States** have Intermediate Courts of Appeal with mandatory jurisdiction in substantially all civil and criminal cases, followed by discretionary further review available from the State Supreme Court. The federal court system follows this model as well.
- **10 States & D.C. have no Intermediate Court of Appeals.** These state Supreme Courts exercise *mandatory jurisdiction* to hear all civil and criminal appeals. Delaware, Maine, Montana, New Hampshire, North Dakota, Rhode

³ *Id.* at 3-4.

⁴ In 2003, the New Hampshire Supreme Court began providing appeal of right for essentially all civil and criminal final judgments. N.H. Sup. Ct. R. 3 and N.H. Rule of Appellate Procedure 7 now deem all such final judgments – in civil and criminal cases – to provide the basis for “mandatory” appeals, and there is no petition process required. Effective December 2, 2010, a new regime became operative in West Virginia, under W. Va. Code 58-5-1, which provides that an appeal will lie from any civil or criminal final judgment, implemented in W. Va. Appellate Rule 5 – which replaces former petition mechanisms by requiring a notice of appeal within 30 days followed by “perfection” of the appeal by filing the record and briefing on a schedule set forth in that Rule. See also W. Va. R. App. P. 21 (clerk’s cmt.). There are no petition procedures. Both of these states, like almost every other state in the Nation, have specific exceptions, or unique categories of orders that require a petition procedure, such habeas petitions, contempt, sexual predator matters, and many others. But final judgments in run-of-the-mill civil and criminal cases in New Hampshire and West Virginia generally are not subject to petition procedure any longer. Cassandra B. Robinson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1222 n.8 (2013) (“New Hampshire and West Virginia have, within the last decade, adopted a court rule providing review of all appeals in the state supreme court.”).

Island, South Dakota, Vermont, West Virginia and Wyoming use this system. The District of Columbia is similar.

- **4 States** vest their Supreme Court with mandatory jurisdiction to hear all civil and criminal appeals, but by statute the top court may reassign specific cases (called “deflecting” those appeals) to an Intermediate Court of Appeals: Idaho, Iowa, Mississippi, and Nevada currently use this structure.
- **1 State** has an intermediate Court of Appeals, but neither the Court of Appeals nor the Supreme Court has mandatory appellate jurisdiction for the bulk of all civil and criminal cases: **Virginia**.

KEY CONCEPTS OF APPELLATE ARCHITECTURE

A well-respected study by the National Center for State Courts, headquartered in Williamsburg, Virginia, concerning the need for appellate review in state court systems concluded that failure to provide “a right of review for all felony and civil cases” deprives citizens of “a substantial legal right.”⁵

[E]rrors occur in trial courts. Even if they concern only the litigants involved in the case and have no broader public impact, the prevailing perception in this country is that there should be an avenue available to the aggrieved party to seek correction of alleged errors. When there is no intermediate appellate court [review] and the volume of appellate work leads a supreme court to exercise its discretion not to review every case, some errors inevitably will go uncorrected. It is not even clear that in these circumstances a supreme court would be able to reach all cases in which matters of public interest (beyond the concerns of the immediate litigants) are involved.⁶

Around the time the Virginia Court of Appeals was created, the National Center for State Courts completed a massive study of the best operations for an intermediate court of appeals focusing on the State of Connecticut (“NCSC 1982 Court of Appeals Study”).⁷ It approached the estimation problems for judicial caseload (at, e.g., page 80) by focusing on judicial productivity levels in other courts, scholarly literature on intermediate appellate court caseload levels, and comparisons with other states’ experience. The NCSC 1982 Court of Appeals Study made the following observations with general continuing applicability for analysis of the operation of the Virginia Court of Appeals:

“An important consideration” in the operation of an intermediate appellate court “is the relationship” of the court to the State’s Supreme Court. In order to organize “appellate courts to make efficient use of judicial resources and avoid confusion,

⁵ The Nebraska Appellate System, A Review, National Center for State Courts, December 28, 1989.

⁶ *Id.* at nn. 25-26. See also the June 11, 2018 prior report of this Working Group, providing further background.

⁷ Jurisdiction, Organization and Size of Connecticut’s New Intermediate Appellate Court, December 23, 1982.

congestion or delay in the final determination of cases, a sound allocation of jurisdiction and authority between the Supreme Court and the intermediate appellate court must be made.”⁸

“In [operating] an appellate court, one of the most basic decisions to be made is the nature and scope of its jurisdiction. A state’s decision in this area reflects its judgment about the nature and volume of case on appeal that should be before the state court of last resort.”⁹

“Among the . . . states currently having intermediate courts, grants of jurisdiction range from having the intermediate court hear only matters assigned by the high court, to having jurisdiction allocated according to subject matter, to having the intermediate court be the appellate court of first instance in all or almost all cases.”¹⁰

“For each of a number of states, the intermediate court has initial appellate jurisdiction of many categories of cases, although there are also a fair number of cases appealed directly to the high court.”¹¹

“A majority of states with intermediate appellate courts give their high courts discretionary review of all intermediate court final decisions.”¹²

“[T]here are three basic procedures for dividing jurisdiction between intermediate courts and supreme courts: 1) routing all, or almost all, appeals initially to the intermediate court, with review thereafter by the supreme court; 2) routing some appeals to the supreme court and some to the intermediate court according to the subject matter of the cases; and 3) giving the supreme court authority to screen appeals and assign them on a case-by-case basis between itself and the intermediate court. There are, in addition, several variations within each of these categories, and a few states have adopted hybrid systems combining features of two or more. Each jurisdictional system has substantial benefits and substantial drawbacks. Selecting the best system requires a difficult balancing of policy concerns in the context of the particular needs of the state.”¹³

“Before analyzing the benefits and drawbacks of the appellate jurisdictional systems, it is necessary to specify the policy concerns that will be used to evaluate the systems. Five such concerns have been identified: 1) division of workload, 2) the precedent-setting function, 3) double appeals, 4) attractiveness of intermediate court judgeships, and 5) expense.”¹⁴

⁸ NCSC 1982 Court of Appeals Study, p. 11.

⁹ *Id.* at 12.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 15.

¹² *Id.* at 18.

¹³ *Id.* at 27.

¹⁴ *Id.* at 27-28.

“The uncertainty of appellate caseload trends greatly complicates the maintenance of firm appellate jurisdictional lines. States quite often set jurisdictional lines according to the caseload size and composition existing at the time, but the size and composition often change drastically. . . . The lesson, therefore, is that the jurisdictional lines and transfer procedures must be sufficiently flexible to permit adjustment of caseloads by surfacing cases appropriate for Supreme Court consideration.”¹⁵

“Precedential concerns. A very important feature of appellate court decision making is the distinction between the precedential and dispute-deciding (or decisional) function. The purpose of the first is to maintain consistency of law, to develop the law in areas not covered by existing law, and at times to change court-made law. The dispute-deciding function involves the application of present law to the facts of a particular case to determine whether the trial court or administrative agency committed reversible error. There is no clear line between these two functions. Nevertheless, it is generally accepted that these are the two major functions of appellate courts – decision- and precedent-making – and that the precedential function arises in only a small minority of appeals. The important point with respect to jurisdictional alignment is that the supreme court is primarily responsible for establishing precedents; the court of last resort alone can insure that the body of precedential law is consistent. . . . The bulk of the work of the intermediate court is to decide cases within the doctrinal framework established by the high court.”¹⁶

“Reduction of double appeals. On the one hand, creation of an intermediate court generally reduces delay on appeal because supreme court backlog is diminished and access to review is facilitated. On the other hand, a two-tiered system presents the possibility of double appeals, to the intermediate court and then to the supreme court. Double appeals obviously increase the time required for final decision; they delay resolution of the litigants’ dispute and may delay resolution of important legal questions. They also increase litigant expense, and they drain judicial resources through some duplication of effort by the two appellate courts. Hence, the jurisdictional system should be designed to reduce double appeals. Double appeals cannot and ought not be eliminated however; review by the intermediate appellate court can serve to winnow issues for more incisive consideration by the supreme court.”¹⁷

“In most states with intermediate courts review is sought from less than half of the intermediate court decisions, and most supreme courts grant less than 15 percent of

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 30. See also Thomas B. Marvell, *The Problem of Double Appeals*, Appellate Court Administration Review (1979).

petitions for review. In all, depending on the state, only some 3 to 10 percent of the intermediate court decisions are reviewed by the supreme court.”¹⁸

“Attractiveness of intermediate court judgeships. The fourth general principle is that intermediate court judgeships should be as attractive as possible so that the court will attract and retain competent judges. . . . Jurisdictional alignment, along with other factors such as salary level, plays an important role in determining the attractiveness of intermediate court judgeships. Division of the caseload . . . is a key factor here.”¹⁹

“Expense. The final principle concerning the division of jurisdiction between appellate courts is that the expense of the appellate system should be minimized to the extent possible without threatening the quality of appellate review. The cost of an appellate system depends substantially on whether initial appeals are properly allocated to the intermediate or supreme court. First, by reducing the number of double appeals, one reduces duplication of effort by appellate judges. Second, by apportioning caseloads efficiently between the two courts, one reduces waste by ensuring that neither court has unused capacity. Both affect the number of judges needed for the intermediate appellate court, which in turn is the prime determinant of the cost of that court.”²⁰

“All or almost all initial appeals to the intermediate court. Under this system, a party losing at the trial court can appeal only to the intermediate court, except in death penalty cases or other very narrow categories of appeals. [The] ABA Appellate Standards favor this system over [those] permitting appellants in many cases to file directly in the supreme court. The reason given is that, ‘provisions conferring a right of direct review before a supreme court . . . have invariably resulted in inappropriate allocations of the supreme court’s resources and sometimes in distortion of procedural rules in an attempt to extend or contract the scope of such provisions.’²¹ The inappropriate allocation results when the high court must decide many cases without substantial legal issues. The Standards emphasize that the supreme court should concentrate on the precedential function, and the intermediate courts [on] the dispute-deciding function. That goal is best reached if the supreme court can select, through the exercise of discretionary jurisdiction over intermediate appellate court cases before or after decision, the cases it will decide.”²²

¹⁸ NCSC 1982 Court of Appeals Study, p. 30.

¹⁹ *Id.* at 31.

²⁰ *Id.* at 32.

²¹ Citing ABA Standards Relating to Appellate Courts 16 (1977).

²² *Id.* at 32-33.

“There are no objective criteria to determine just how many appeals contain substantial precedential issues, but the general consensus is that they comprise only a small portion of the total number of appeals.”²³

2,000 or More Appeals. The model of appeal of right to the intermediate appellate court has generally been adopted in “states with appellate caseloads of over two thousand cases per year.”²⁴

A “common system for dividing jurisdiction between supreme courts and intermediate courts is to specify that certain types of appeal go directly to the supreme court and that other types go to the intermediate court, with provision for review hereafter by the supreme court. . . . Under this arrangement, the supreme court’s workload consists largely of direct appeals, but a substantial number of cases are reviews of intermediate appellate court decisions. [The] types of cases taken directly to the supreme court vary greatly from state to state.”²⁵

Subject Matter Allocations. “The drawbacks of dividing jurisdiction along subject matter lines generally outweigh the benefits. It is argued that an important benefit of such a division is that it apportions the workload between the supreme court and the intermediate appellate court more equitably than the ABA model, and hence permits a smaller and less expensive intermediate court. On the other hand, the division of jurisdiction over initial appeals based on the state’s appellate caseload at one period typically leads to an overburdened supreme court several years later.”²⁶

“Jurisdictional alignments are typically based on judgments that specific types of appeals are important enough to merit immediate consideration by the Supreme Court, without initial review by the intermediate appellate court. As a result, some important cases are routed to the supreme court, and there are fewer double appeals than under the ABA model. But the jurisdictional alignment based on subject matter is an uncertain predictor of the importance of an appeal, as is indicated by the wide variety of criteria used in the states. Thus some appeals with important issues are initially filed in the intermediate appellate court, requiring double appeals, while the Supreme Court may be overburdened with routine appeals.”²⁷

Avoiding Separate Criminal and Civil Courts. Regarding specialized courts of appeal for criminal cases “[s]tudies of the Alabama and Tennessee appellate systems have strongly recommended merger of the states’ separate intermediate courts. Exhaustive studies of the appellate systems in several other states have looked into the possibility

²³ *Id.* at 33.

²⁴ *Id.* at 34. As noted in the statistical data, pages 17 – 20, Virginia currently has approximately 2,500 appeals, and would likely have more if conversion of civil appeals to by-right instead of petition is undertaken.

²⁵ *Id.*

²⁶ *Id.* at 35.

²⁷ *Id.* at 36.

of criminal appellate courts, and all recommend against them. . . . First, the division of the appellate system hinders efficient caseload apportionment among appellate courts when the volume of civil or criminal appeals increase at disproportionate rates. . . . Second, specialized courts of appeals have lower prestige than courts with wider jurisdiction. . . . Third, the judges' interest may become too narrow; they may lose touch with overall trends in legal thought and develop arcane language and overly technical rules. Fourth, specialized judges may believe that their knowledge of the area entitles them to establish policy without due regard to present legislative and decisional law. Finally, the appointment of judges to specialized courts may be dominated by special interested groups, particularly prosecutors or the defense bar.”²⁸

“Review of Appellate Court Decisions. The final issue is the Supreme Court’s jurisdiction over decisions of the Court of Appeals. It is strongly recommended that it be complete discretionary jurisdiction. . . . ABA Appellate Standard 3.10 recommends against appeal of right from the intermediate court. The commentary to this standard states:

Limiting successive appeals gives recognition to the authority and responsibility of intermediate courts of appeal, to the difference in function between such courts and the supreme court, and to the principle that litigation must be brought to conclusion without undue protraction. The purpose of successive review by a higher appellate court is primarily that of resolving questions of law of general significance. Affording the parties a further opportunity for correction of error is at most a secondary objective.

The great majority of states follow this policy.”²⁹

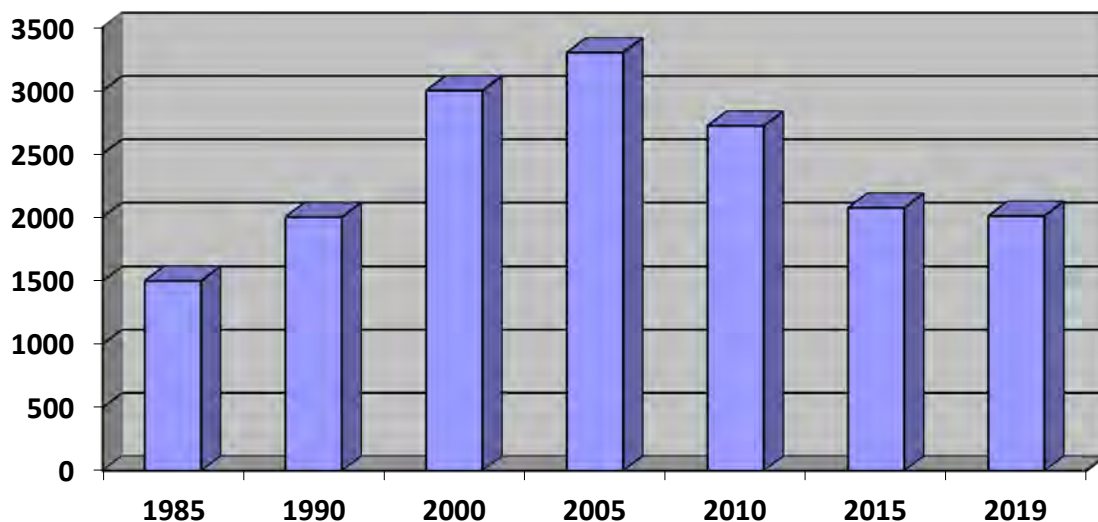
²⁸ *Id.* at 43.

²⁹ *Id.* at 49.

Part Two – STATISTICAL OVERVIEW OF ALL VIRGINIA APPEALS

The Court of Appeals has four principal areas of appellate jurisdiction: criminal cases (by petition); state administrative agency cases (but no jurisdiction over local administrative agency decisions); workers compensation; and domestic relations cases. The Court also has jurisdiction over non-biologically-based writs of actual innocence.³⁰ By statute the Court has jurisdiction over certain habeas corpus cases but under prevailing case law the volume of such petitions is limited. The declining docket numbers and prompt disposition times considered by the Working Group in 2018 have been continued and somewhat clarified by information updated through 2019.

Total Filings in the Court of Appeals



³⁰ Observers will note that – in the 2020 session of the Legislature – two expansions of this procedure were approved that may affect the volume of filings in the Court of Appeals. First, Code § 19.2-327.10 was amended so that it is no longer limited to cases where the defendant pled “not guilty” to the charges. Thus, petitioners who later assert that their confessions were false will not be barred from filing petitions for actual innocence. Second, a sentence formerly contained in this statute stating that “[o]nly one petition” based on non-biological evidence arguments may be filed by any petitioner, was eliminated – opening the door to repeat filings by any individual convicted of a felony. Sentencing statistics in the Commonwealth show that some 25,000 persons are sentenced each year on felony charges. In each of the last two statistical years (*i.e.*, before the 2020 amendments easing restrictions) the Court of Appeals has seen 17 petitions for actual innocence on the basis of non-biological evidence.

The number of petitions for appeal in criminal cases has now remained “flat” for some five years at approximately 1,500 to 1,550 per year:

THE COURT OF APPEALS OF VIRGINIA

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
All Cases Filed	3108	2854	2721	2615	2356	2471	2350	2073	2124	2104	2020	2090
<u>By-right Appeals</u>												
Domestic Relations	256	253	229	279	268	251	242	236	250	235	221	253
Workers Comp.	183	155	172	176	122	196	145	101	90	92	109	95
Admin. Agency	32	39	33	31	33	33	23	17	19	21	20	20
Total by Right	471	447	434	486	423	489	410	356	359	348	350	368
<u>Criminal Petitions</u>	2441	2198	2071	1936	1753	1806	1747	1512	1555	1517	1510	1548
# Granted Appeal	303	269	214	177	210	180	157	189	192	193	150	187
% Granted Appeal	13%	12%	10%	9%	12%	10%	9%	13%	12%	13%	10%	12%
JUDICIAL DECISIONS												
Published Opinions	118	122	96	88	121	78	76	88	66	64	61	78
Unpublished Ops.	442	443	405	327	284	300	327	295	288	273	290	223
Written Orders Stating Reasons	386	346	338	391	369	374	382	316	369	339	348	335
Active Judge Average total Written Dispositions <i>(approximate)</i>	78	76	70	67	65	63	65	58	60	56	64	64

Further Background Notes. It has been reported that the Workers’ Compensation Commission’s mediation program explains, in large measure, the decline in Workers’ Comp appeals. The efforts at ADR by the domestic relations bar have been mentioned as a possible explanation for the trajectory of those filing numbers. Other factors may include the increasing use of plea deals in criminal cases, and a rise in pro se representation at the lower court levels.

Ignoring Many Details. There are many less-numerous categories of cases and duties also facing the Court of Appeals every year, which are not broken out above (but which are included in the total-filings-per-year figures). The point – for purposes of the Working Group – would be to gain a reliable general idea about the orders of magnitude for the bulk of the work and output of the Court, so that the big picture is not obscured by a gazillion other details. Nor is any effort made here to tabulate year-to-year changes, since the goal is not to identify (for example) a 0.7% change from the prior year, but to allow the Working Group to form an assessment of the approximate overall workloads, case groupings, and outputs here, and to see the direction in which the numbers have been moving.

Disposition Time Snapshots. With the help of Chief Judge Decker and CAV Clerk of Court Cindi McCoy, the disposition time displays have been prepared based on the most-recent years for which statistics are available. These are presented in Part Seven of the present report. The disposition times are quite prompt. One possible inference from comparison of the 2005 disposition times (when the total filings of the CAV “maxed out” at some 3,500 annually) and the most recent figures, might be that if a jurisdictional change might increase the total number of filings that does not necessarily suggest that disposition times would be materially slowed. See pages 54 – 55, and 58 – 60 below.

THE SUPREME COURT OF VIRGINIA

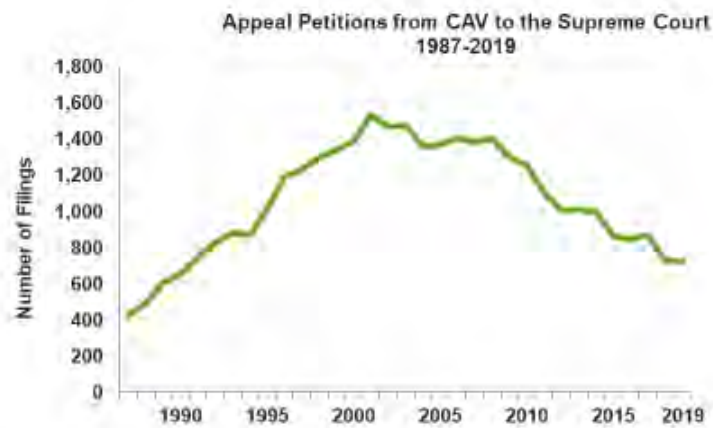
The Supreme Court of Virginia receives some 1,800 combined civil, criminal, and other filings per year, and it has responsibility for *myriad* forms of proceedings. It is not the mission of the Working Group to attempt any assessment of the Supreme Court’s caseload overall, or its procedures and practices. Relevant to the Working Group’s duties in assessing what roles the Court of Appeals should play, it can be reported that, in round numbers, about 4% of petitions for appeal from the CAV to the Supreme Court in criminal cases are granted review annually, and approximately one in four civil litigants who petition for appeal is granted an appeal on any of the assignments of error. These and other important elements of the caseload are reflected in the following history:

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
Total Cases Filed	2615	2639	2485	2333	2216	2050	1918	1996	1852	1782	1704	1760
Appeals of Right	8	14	14	11	10	3	11	5	10	4	6	5

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
<u>Criminal Petitions for Appeal (from CAV)</u>	1199	1263	1298	1151	1016	866	714	652	776	731	823	720
# of Criminal Pet. for Appeal Granted	49	56	49	31	17	25	23	22	30	23	28	27
% of Criminal Appeal Petitions Granted	4%	4%	4%	3%	2%	3%	3%	3%	4%	3%	3%	4%

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
<u>Civil Petitions for Appeal</u>	408	412	453	439	577	451	430	421	413	463	422	397
# of Civil Petitions Granted on at Least One Assignment of Error	100	108	142	98	89	79	89	79	95	80	90	62
% of Civil Petitions Granted on at Least One Assignment of Error	25%	26%	31%	22%	15%	18%	21%	19%	23%	17%	21%	16%

Petitions for Appeal from the Court of Appeals to the Supreme Court Began Declining in 2001 with the Overall Reduction in CAV Criminal Case Filings



Part Three – CAV OPERATING MODELS & CASELOAD BREAKDOWN

A. Criminal Petitions for Appeal – A Brief Sketch of the Current Process

Over the past five years, on average roughly 1,500 to 1,550 petitions for appeal in criminal cases have been filed each year with the Court of Appeals. (See table, page 18). In most of these cases the local Commonwealth's Attorneys file an opposition to the petition for appeal, but the Working Group has been informed that in some of the cases the Commonwealth's Attorneys do not file any response.

One-judge Petition Review. Whether or not the Commonwealth's Attorney has filed any opposition, all petitions are reviewed by a single CAV judge, who makes a judgment on whether an appeal should be granted.

-- if one-judge review determines to **grant** an appeal, the case is scheduled for a merits panel of three judges, full briefing and oral argument. This happens in approximately 1 out of 10 petitions for appeal in criminal cases in recent years.

-- if one-judge review denies the appeal, which happens in approximately 9 out of 10 petitions, the would-be appellant may request a three-judge review of that denial, which is automatically provided upon request.

- in large fraction of the cases where appeal is denied by the one-judge review, the appellant takes no further action (i.e., does not request three-judge review of that denial).

Three-judge Petition Review: Where three-judge review of a one-judge refusal of appeal is sought,

- the appellant is allowed to supplement the previously filed petition for appeal with only a 350-word statement of why the one-judge denial of appeal is wrong.
- where the appellant has requested (and not later waived) oral argument, oral argument will be heard by the three-judge panel considering whether full appeal should be granted.
- if no oral argument is requested, the review is conducted on the petition, any opposition that has previously been filed by the Commonwealth's Attorney, and

the 350-word statement by the appellant on why the one-judge denial of an appeal is wrong.

- in a large majority of cases, three-judge reviews confirm the one-judge denial of an appeal.
- in a small fraction of the cases, three-judge reviews determine to grant an appeal, after which the case is scheduled for briefing and oral argument before a different panel of three judges to decide the merits.

Full Merits Panel Hearings. In total, full merits hearings are held as a result of appeals granted by one-judge or three-judge review of the petitions in around 12% of the petitions for criminal appeal. (See table, page 18).

B. Appeals of Right in Domestic Relations and Workers Compensation

All appeals of right in these categories are assigned to a three-judge merits panel by the Clerk of the CAV at the outset, briefing schedules apply immediately, and oral argument is commonly held in these appeals.

C. A Model of What “Appeal of Right” Would Look Like for Criminal Cases:

[Note, the present system for limited appeals by the Commonwealth under Chapter 25 of Title 19.2 of the Code, §§ 19.2-398 through 19.2-409, would remain unchanged under any logical implementation of SJ 47; appeal of right refers, instead, to appeal by convicted defendants.]

Immediate Involvement of the Attorney General. The Office of the Attorney General would represent the government from the outset in an appeal of right system, once a notice of appeal has been filed.

- After the filing of the appellant’s Opening Brief, the government’s Brief of Appellee in opposition to the appeal would be filed by the Attorney General, and any reply brief by the appellant. Three-judge initial review would then take place based on this briefing, which could be based upon citations to the full appellate record, as governed by Rules 5A:10 and 5A:10A, without the preparation of an appendix (currently required absent court order under Rule 5A:25).

- Cases decided without oral argument could be affirmed or reversed (under a revised Rule 5A:27, which today only speaks of summary affirmance in appeal-of-right cases) and dispositions would in every instance be accompanied by an order or short-form memorandum opinion giving reasons for the disposition.
- Oral argument would be scheduled in those cases where the CAV panel of judges determines that it could be helpful. Statutes and/or rules could provide options for supplemental briefing by both sides, and the Court could enter any necessary orders regarding preparation of an appendix (or designating specific aspects of the broader record to be submitted, as currently contemplated in Rule 5A:25).
- Cases decided after oral argument would be accompanied by a full opinion.

[NOTE: This system has significant workload consequences for the Office of the Attorney General. It has the landmark advantage, however, of having the Commonwealth's arguments preserved and articulated consistently from the outset of every criminal appeal.]

[FURTHER NOTE: No observer has suggested that anything resembling the current one-judge review system would be appropriate in implementing appeal of right in criminal cases.]

D. Topics Addressed Today in Certain Rules of Court

Under current Part Five-A Rules, the following provisions apply, many of which will need to be restructured if a change to by-right jurisdiction for the Court of Appeals is implemented.

Rule 5A:6 states that a notice of appeal must be filed within 30 days of the entry of the appealable judgment.

Rule 5A:7 defines the contents of the record on appeal.

Rule 5A:8 requires the transcript to be filed with the clerk of the trial court in 60 days after final judgment (extendable to 90 days in some instances), and appellant must give notice to other parties of such filing. That same rule contains the provisions for written statements in lieu of transcripts.

Rule 5A:10 requires the circuit court clerk to prepare the record "as soon as possible after notice of appeal is filed," makes provision for awaiting filing of the transcript, and transmitting the record to the Clerk of the CAV.

Rule 5A:10A contemplates use of a “digital appellate record” which “may” be created by the clerk of the trial court.

Rule 5A:12 says a petition for appeal must be filed within 40 days after the record is lodged with the CAV (extendable by another 30 days for cause). The current petition length maximum is 12,300 words.

Rule 5A:13 makes a Brief in Opposition due 21 days after the petition for appeal is served on counsel for the government.

Rule 5A:14 allows the appellant to file a Reply Brief within 14 days after the government’s opposition has been filed, limited to 5,300 words – filing of which waives oral argument.

Rules 5A:15 and **5A:15A** deal with requests for three-judge review after a one-judge denial of a petition for review (on paper and electronically).

Rule 5A:19 says

- the appellant in appeals of right has 40 days from the date the record is filed with the CAV to file an Opening Brief (limited to 12,300 words), with detailed requirements spelled out in Rule 5A:20.
- the Brief of the Appellee (limited to 12,300 words), and any guardian’s brief, are due 25 days after the filing of the opening brief, with detailed requirements found in Rule 5A:21.
- the appellant may file a Reply Brief (maximum 3,500 words) within 14 days of the filing of the Brief of Appellee, with further requirements found in Rule 5A:22.

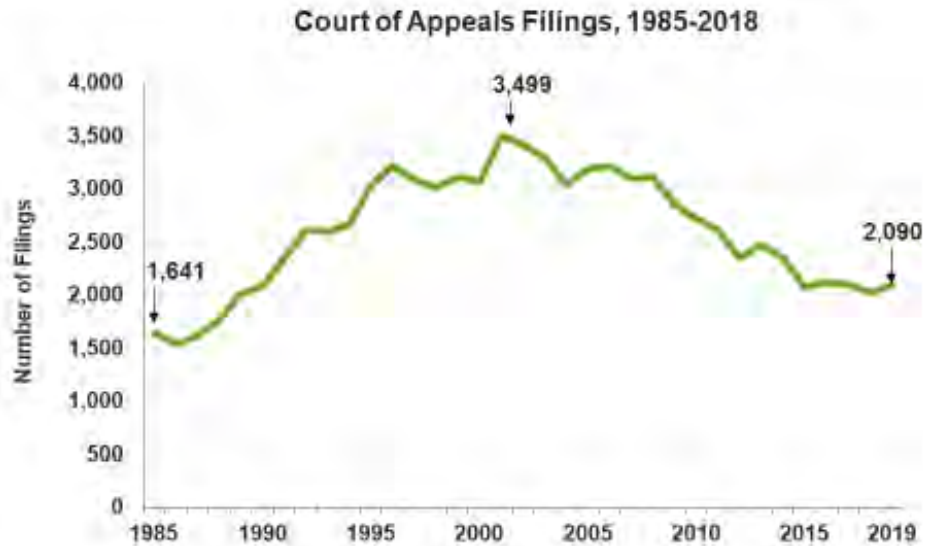
Rule 5A:25 requires appellant to file an appendix no later than the date for the Opening Brief, but under paragraph (b) the CAV may order dispensing with an appendix, so that the appeal proceeds on the original record or any part thereof that the court orders the parties to file.

Rule 5A:27, labelled Summary Disposition, states that in by-right appeals if the CAV panel unanimously agrees that the appeal is without merit, it may “forthwith affirm the judgment of the trial court or commission.”

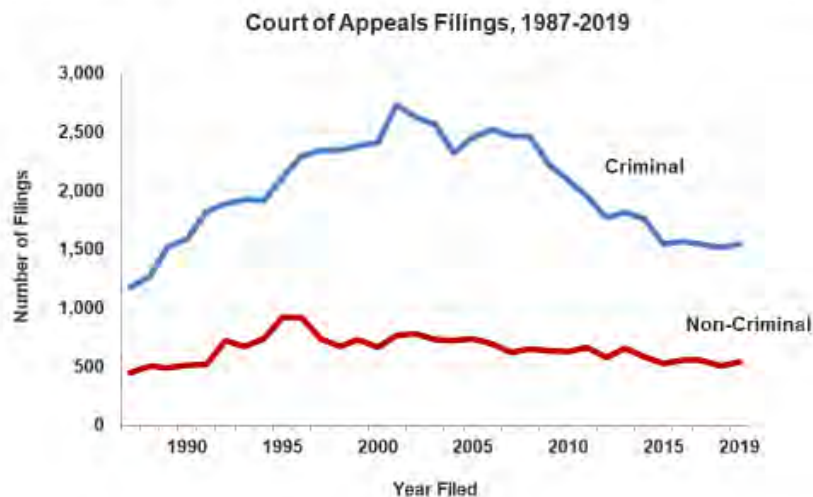
Rule 5A:28 states that in appeals of right (or granted petitions) “oral argument shall be permitted except in those cases disposed of pursuant to Rule 5A:27.”

E. Graphic Breakdown of the CAV Caseload

The number of filings in the Court of Appeals peaked in 2001. Filings have declined by 42% since that year.



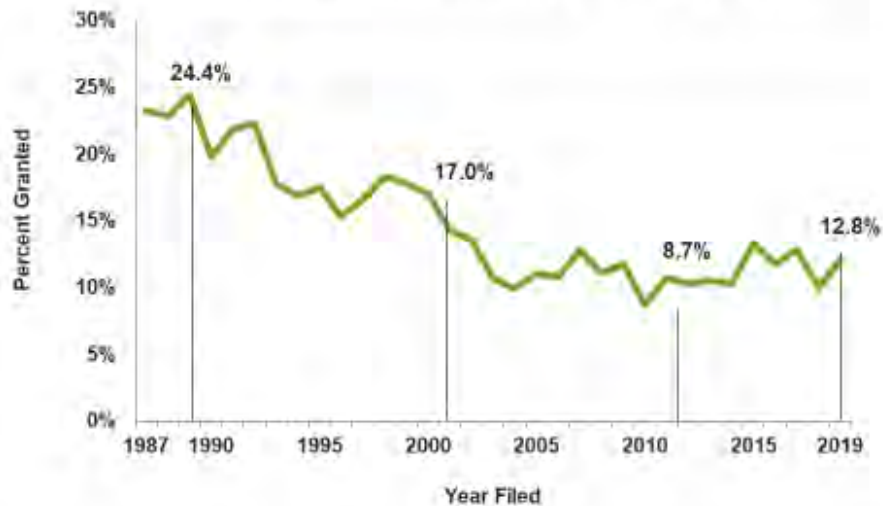
Since 1987, Criminal Cases have Comprised Between 70% and 80% of filings in the Court of Appeals (today 75%)



Note: Pretrial criminal appeals classified in STARS as civil cases were reclassified as criminal cases.

Of criminal petitions filed in 1989, 24% were granted; in 2000 17% were granted; in 2019 about 13% of petitions were granted.

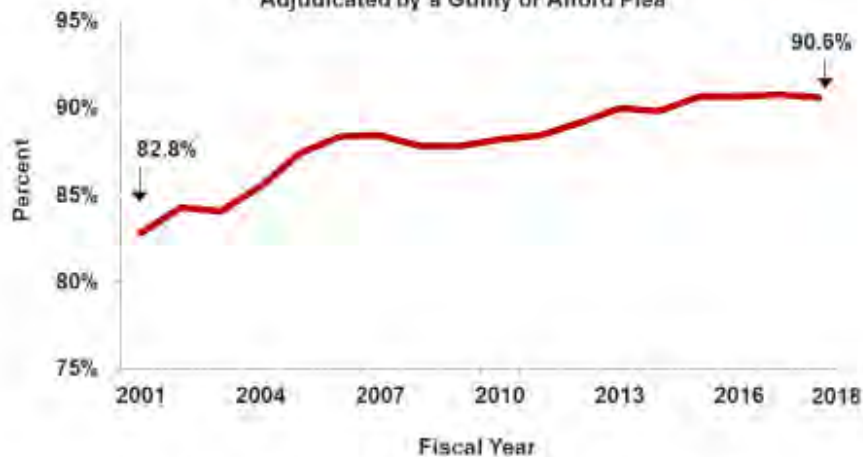
Percent of Criminal Petitions Granted, 1987-2017



Note: Pretrial criminal appeals classified in STARS as civil cases were reclassified as criminal cases.

The proportion of felony conviction cases adjudicated by guilty or Alford pleas has increased steadily since 2001.

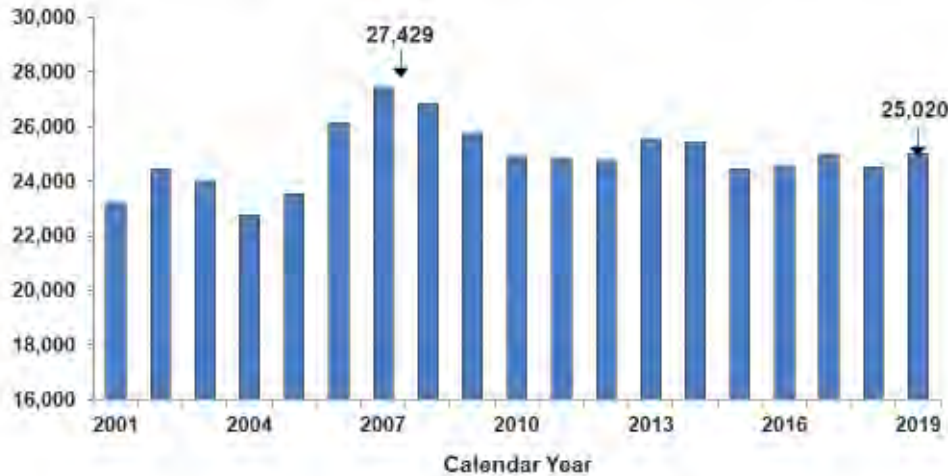
Percent of Felony Sentencing Events Adjudicated by a Guilty or Alford Plea



Note: Due to a small amount of missing information, percent of convictions adjudicated by a guilty plea were estimated for 2002.

Source: Virginia Criminal Sentencing Commission's Sentencing Guidelines Database

Felony sentencing events in Virginia's Circuit Courts peaked in 2007 and decreased to 24,537 in 2018.

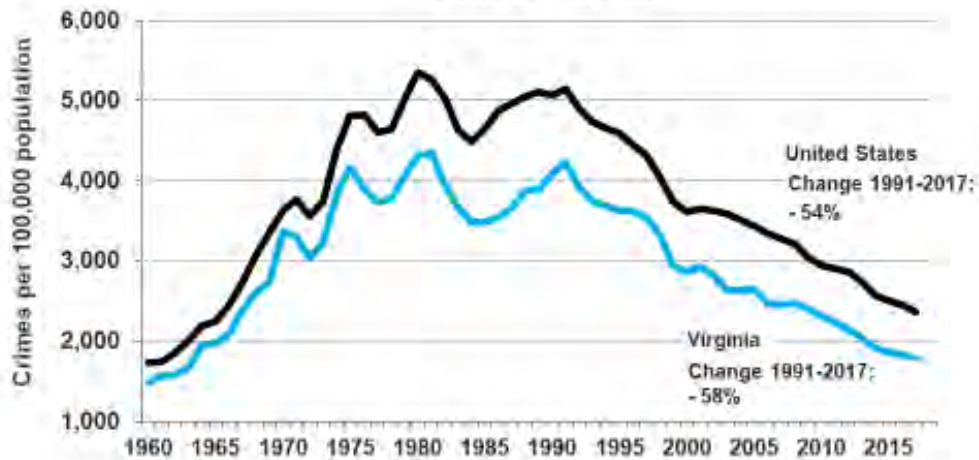


Source: Virginia Criminal Sentencing Commission – Sentencing Guidelines Database FY17-FY19 (July 7, 2020)

Virginia's property crime rate has fallen since the early 1990s, reaching levels not seen since the late 1960s.

Property Index Crime Rate in Virginia and the US

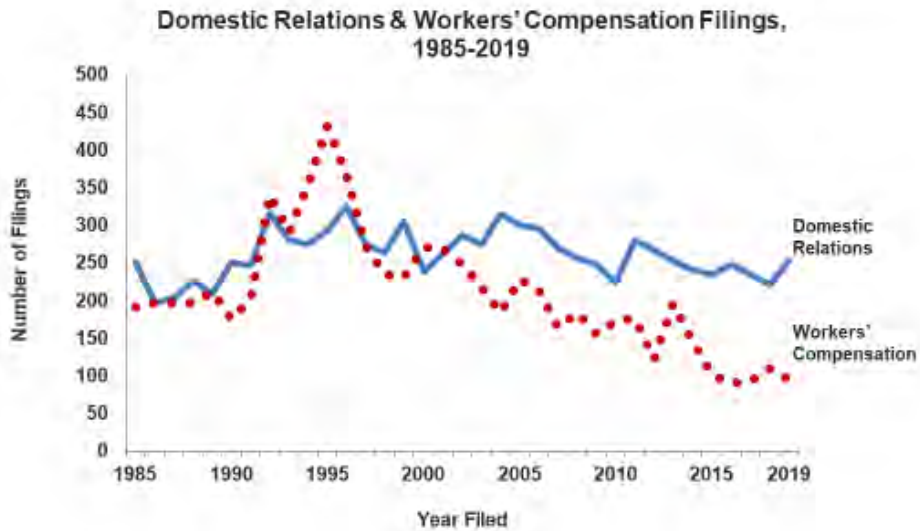
Property index crimes are burglary, larceny and motor vehicle theft



Sources: FBI – 2017 Crime in the United States, Virginia Dept. of Criminal Justice Services - Virginia Crime and Arrest Trends 2008 - 2017

DOMESTIC RELATIONS AND WORKERS' COMPENSATION BACKGROUND

Domestic Relations and Workers' Compensation Case Patterns Flat Domestic Relations, Declining Workers' Compensation



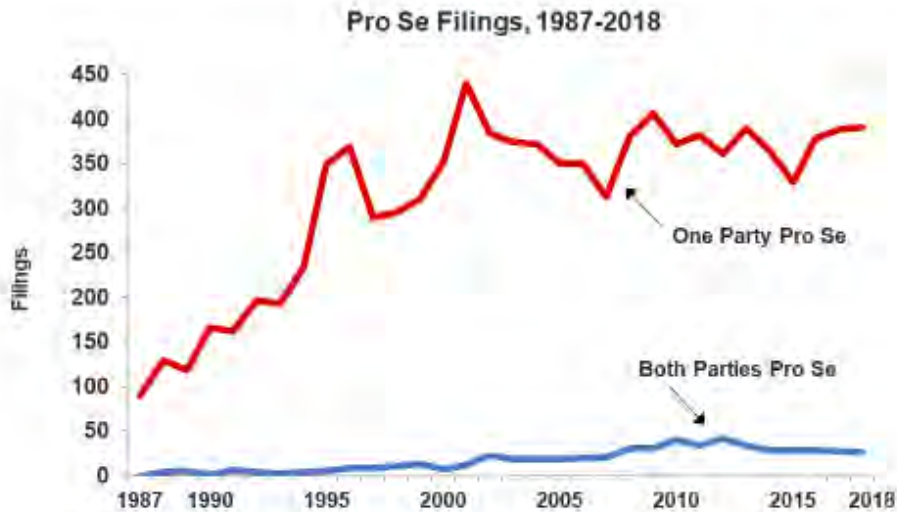
The number of claims filed with the Workers' Compensation Commission declined by 20% between 2011 and 2013.



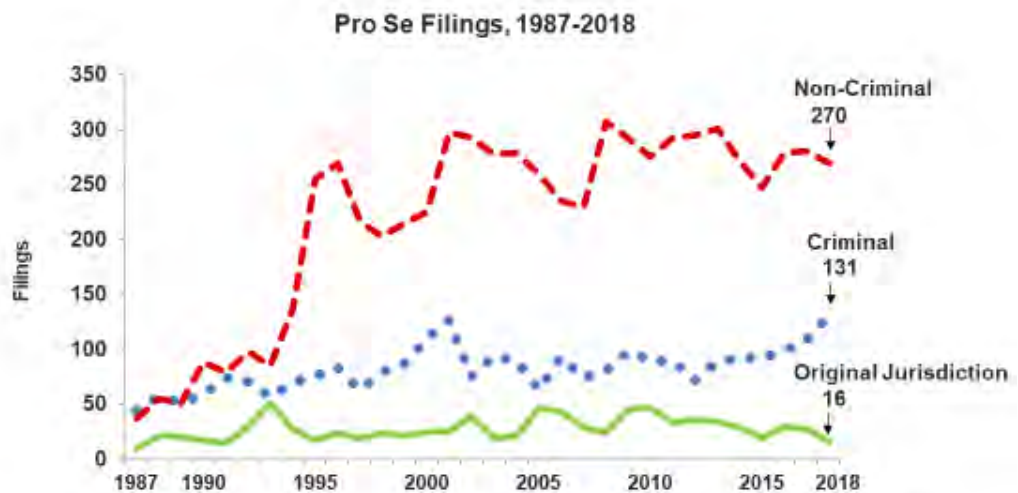
Source: Virginia Workers' Compensation Commission Annual Reports

PRO SE LITIGATION IN THE COURT OF APPEALS

Overall, pro se filings have increased 150% at the CAV since 1990.



Non-criminal cases have comprised the majority of pro se filings since 1994.



Note: Pretrial criminal appeals classified in STARS as civil cases were reclassified as criminal cases.

Part Four – PROJECTING CRIMINAL APPEAL VOLUME IN A BY-RIGHT SYSTEM OF APPEALS

BOTTOM LINE. The Working Group believes that the volume of criminal appeals would not be likely to increase substantially if the present petition-for-appeal system were replaced with an appeal-of-right system. Defense counsel contacted by the Working Group indicated that given ethical and legal duties, and the dynamics of the criminal client/attorney relationship, the number of instances where clients are counselled to appeal, and the number of so-called Anders appeals, would not increase. However, the automatic availability of review by a three-judge panel in an appeal-of-right system, and the possibility of new legislation in 2021 regarding jury sentencing reforms, could result in an increase from the 1,500 to 1,550 petitions for appeal filed in recent years. The following pages reflect a range of potential filing volume for criminal cases, using commonly employed metrics.

BACKGROUND and COMPARISONS. Rather than simply assuming that criminal appeal volume would remain approximately the same under an appeal of right system, the Working Group has reviewed the “standard predictors” of such volume traditionally used by architects of appellate systems in the United States, looking at the relationship between total criminal prosecution proceedings commenced in the circuit courts and the level of appeals, and such measures as the relationship between State population and the number of criminal appeals filed annually in any jurisdiction.

Set forth in the next several pages are a range of statistical considerations reviewed in solidifying the Working Group’s judgment that the volume of criminal appeals would likely continue in the same range as has been witnessed in the last five years.

Criminal Petitions for Appeal (to CAV), circa: 1,500 per year

	2016	2017	2018	2019
<u>Circuit Court</u> Total Criminal Filings	179,116	182,356	192,893	193,658
<u>CAV Petitions</u> for Criminal Appeals	1,555	1,517	1,510	1,548
CAV Petitions for Appeal as % of total Criminal Filings in the Circuit court	0.1 %	0.1 %	0.1 %	0.1 %
<u>Circuit Court Sentencing</u> Events	24,568	24,987	24,537	25,020
CAV Petitions for Appeal as % of all Sentencing Events in Circuit Court	9 %	8 %	8 %	8 %

The following table presents key national averages for the volume of appellate filings:³¹

CRIMINAL CASES: Rates of Appeal from Full Jurisdiction Trial Courts to Intermediate Appellate Courts with By-Right Jurisdiction. Data: NAT'L CENTER FOR STATE COURTS, COURT STATISTICS PROJECT, RETRIEVED 6/30/2020

	2018 Population	Trial Level Criminal Filings	Criminal Appeals of Right to the Ct. of Appeals	Criminal Appeals as % of Annual Criminal Cases Filed	Annual Criminal Appeals per 1 Million Population
Alabama	4,887,871	92,251	509	0.6%	104
Alaska	737,438	7,433	196	2.6%	266
Arizona	7,171,646	49,909	744	1.5%	104
Arkansas	3,013,825	39,457	199	0.5%	66
Connecticut	3,572,665	105,690	138	0.1%	39
Florida	21,299,325	179,743	8,635	4.8%	405
Hawai'i	1,420,491	7,582	233	3.1%	164
Idaho	1,754,208	75,843	442	0.6%	252
Illinois	12,741,080	263,118	2,589	1.0%	203
Indiana	6,691,878	287,204	1,339	0.5%	200
Iowa	3,156,145	126,716	456	0.4%	144
Kansas	2,911,505	38,787	1,064	2.7%	365
Louisiana	4,659,978	145,931	479	0.3%	103
Maryland	6,042,718	33,481	869	2.6%	144
Michigan	9,995,915	50,785	787	1.5%	79
Minnesota*	5,611,179	162,486	886	0.5%	158
Missouri	6,126,452	161,225	906	0.6%	148
Nebraska	1,929,268	14,791	361	2.4%	187
Nevada	3,034,392	12,543	302	2.4%	100
New Jersey	8,908,520	47,718	2,552	5.3%	286
New Mexico	2,095,428	26,648	349	1.3%	167
North Carolina	10,383,620	132,167	574	0.4%	55
Ohio*	11,689,442	73,884	4,053	5.5%	347
Oregon*	4,190,713	80,724	1,481	1.8%	353
Tennessee*	6,770,010	53,273	617	1.2%	91
Texas	28,701,845	222,615	4,696	2.1%	164
Utah	3,161,105	41,032	273	0.7%	86
Washington	7,535,591	46,624	2,336	5.0%	310
Wisconsin	5,813,568	110,352	1,063	1.0%	183
Average				1.8%	182
Median				1.3%	164
NEARBY STATES INCLUDED IN THE ABOVE					
Maryland	6,042,718	33,481	869	2.6%	144
North Carolina	10,383,620	132,167	574	0.4%	55
Tennessee*	6,770,010	53,273	617	1.2%	91
Average				1.4%	97
Median				1.2%	91

³¹ The Working Group expresses its sincere appreciation to the staff and leadership of the Court Statistics Project at the National Center for State Courts, including its director Nicole Waters, Ph.D., Senior Researcher Kathryn Genthon, M.S., and Court Research Analyst Sarah Gibson, M.A., for their prompt and helpful assistance in retrieving relevant data relating to

Criminal Appeals – The Range of National and Regional Experience Summarized

National average (of states reporting data to the National Center for State Courts as shown on the table set forth on the immediately preceding page)

Criminal Appeals as % of total criminal cases commenced in full-jurisdiction trial courts each year, in states with by-right appeal to an intermediate court of appeals:

Percent Appealed

Average: 1.8%
 Median: 1.3%
 Lowest ¼: 0.4%

Lowest quartile of appeal rates for all reporting states:

Middle range (omitting bottom quarter and top quarter):

Middle range: 1.4%

Criminal appeals per million of population in states with by-right appeal of criminal cases to an intermediate court of appeals:

Number Appealed/yr/million

Average: 182 per million
 Median: 164 per million
 Lowest ¼: 74 per million

Lowest quartile of appeal rates for all reporting states:

Middle range (omitting bottom quarter and top quarter):

Middle range: 172 per million

Nearby states’ experience (of those states reporting such data)

Criminal appeals as % of total criminal cases commenced in the trial courts each year, in states with by-right appeal available to an intermediate court of appeals:

Percent Appealed

Average: 1.4%
 Median: 1.2%

Criminal appeals per million of population in states with by-right appeal of criminal cases to an intermediate court of appeals:

Number Appealed/yr/million

Average: 97 per million
 Median: 91 per million

the appeal of civil and criminal cases in the state courts of this Nation, to help the Working Group prepare the present analyses.

PROJECTIONS FOR VIRGINIA CRIMINAL APPEALS OF RIGHT

Based on Virginia’s population of approximately 8.5 million and the number of criminal cases commenced in Circuit Court annually (193,659 in 2019):

Virginia criminal appeal volume projections vary widely depending on the benchmarks considered

Varying Volume Projections for Criminal Appeals

Based on the <u>national average of the % of all criminal cases commenced</u> that are appealed to the court of appeals in appeal-of-right jurisdictions:	2,500 – 3,500
Based on the <u>national average</u> number of criminal appeals to the court of appeals in appeal-of-right jurisdictions taken per million in population :	1,400 – 1,550
Based on <u>regional states’ experience</u> of appeals as a % of total criminal cases commenced annually in the full jurisdiction trial court :	2,300 – 2,700
Based on <u>regional states’ average</u> for criminal appeals taken in a by-right system, per million of population :	775 – 825
Based on the <u>middle range</u> of American states with appeals by right (omitting lowest quarter and highest quarter), appeals to the court of appeals as a percentage of all criminal filings in the full-jurisdiction trial courts average 1.1%, which in VA would be approximately:	2,220
The <u>middle range</u> of American states (omitting lowest quarter and highest quarter) for criminal appeals of right per million in population averages 172, which in Virginia would yield approximately:	1,460

RECONCILIATION. It was noted at the outset of this Part Four of the present report that many experienced observers of the Virginia experience have expressed belief to the Study Committee that the number of appeals that would be taken by right in criminal cases would not be meaningfully greater than the number of petitions for appeal taken now, given the ethical and constitutional duties of counsel, and the existence of some compensation for appellate work, all of which undergird the present frequency of petitions for appeal, and which would apply in similar fashion for an appeal of right process.

The Working Group is aware, however, of the possibility that the automatic availability of three-judge review of criminal appeals under a by-right system could increase, somewhat, the number of appeals that will be filed. In addition, the Group has been advised that reforms in jury sentencing, expected to be considered by the Legislature at its 2021 session, could also increase the number of criminal appeals to a level above the 1,500 to 1,550 level seen in recent years. A key premise of our recommendations is that – whatever the level of criminal appeals actually seen, the judicial and support staffing needs of the CAV need to be assured by the General Assembly in order to permit proper operation of the system.

Part Five – PROJECTING CIVIL APPEAL VOLUME IN A BY-RIGHT SYSTEM

By any assessment, predicting the volume of civil appeals that would be experienced in the Court of Appeals in a by-right system is more difficult than gauging expected criminal appellate volume.

The Working Group believes that the common judgment of those fully familiar with the civil litigation landscape is that the volume of appeals seen through petitions to appeal to the Supreme Court of Virginia in recent decades is not a good predictor of the volume of appeals to be expected in a by-right appeal system for civil cases. In general, the prevalent belief is that the volume of potential civil appeals has been suppressed by the requirement of filing a petition for civil appeal, in a regime where 4/5ths of such petitions are not successful. Making that investment in a potential appeal, with little assurance that the appeal will be granted (and on which assignments of error) deters some segment of the litigants who have lost in the circuit courts from attempting to launch the appeal process.

However, it is also the sense of the Working Group that facing two levels of potential appeal (by-right to the CAV and then an optional petition for appeal on a writ of certiorari basis to the Supreme Court of Virginia thereafter) will dampen some of the expected enthusiasm for launching appeals that might have been contemplated in the earlier system.

WHAT STUDIES SHOW ABOUT CIVIL APPEAL ISSUES

Settled or withdrawn cases are not appealed. No studies (anywhere in the United States) tabulate the frequency of appeals after the granting of demurrers or motions to dismiss, granting of dispositive special pleas, or entry of pretrial summary judgments.

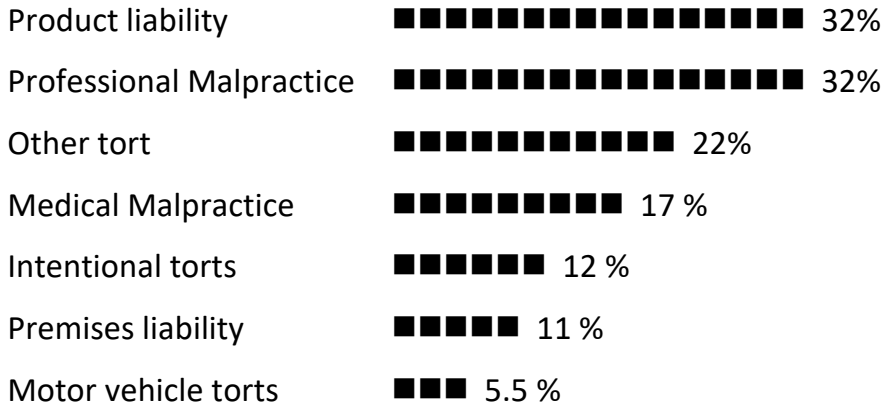
Published studies deal only with the frequency of appeals after a trial is held. Since the number of trials is so small today – in Virginia and elsewhere in America – this information may have limited predictive value for present purposes. We asked the OES Staff to separately break out the cases resolved in numerous case-type filing categories that were tried, and those that were settled and withdrawn, thereby deriving a number that were dismissed by judicial action other than trial. **One presumption** might be that the percentage of pretrial-dismissal-type rulings being appealed is at least as high as the percentage of appeals by losing parties after trial.

National Center for State Courts, Caseload Highlights, Vol. 14 No. 1, March 2007.

Figure 2: RATE OF APPEAL BY CASE TYPE

For Cases Tried the Frequency of Appeals in State Courts Around the Nation is:

TORTS



CONTRACT BASED



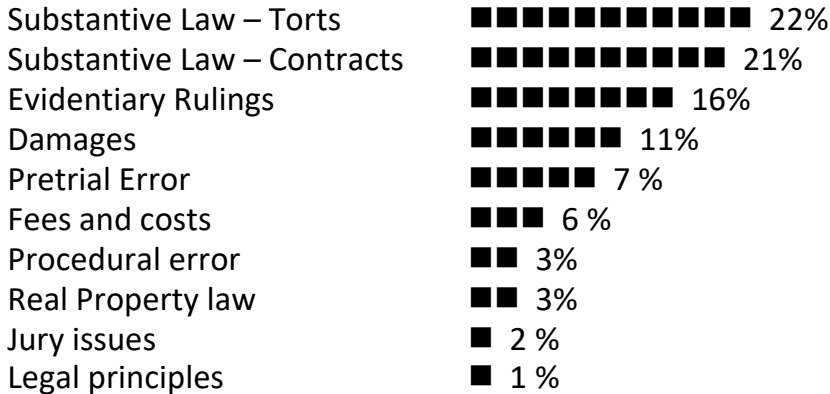
REAL PROPERTY 24 %

In total, 14% to 15% of all civil cases that are tried are appealed. As noted above, presumably a similar proportion of cases decided as a matter of law by the trial courts, on demurrers, motions to dismiss, special pleas, or summary judgment, are also appealed.

Caseload Highlights, Vol. 14 No. 2, July 2007, Figure 1.

Study of Legal Issues raised in Intermediate Court of Appeals cases AFTER TRIAL from 46 urban trial courts around the country:

For Cases Tried in State Courts the Frequency of Issues Raised in Intermediate Court of Appeals Cases Around the Nation is:



ACTUAL VIRGINIA EXPERIENCE: CIVIL CASES IN RECENT YEARS

Civil Petitions for Appeal (to SCV), circa: 400 – 500 per year

	2016	2017	2018	2019
Circuit Court Total Civil Filings (net of domestic relations)	183,000	166,000	164,000	165,000
SCV Total Civil Petitions for Appeal	413	463	422	397
SCV Civil Petitions for Appeal as % of Total Circuit Court Civil Filings	0.2 %	0.3 %	0.25 %	0.25 %

As we did in contemplating the issue of appeal volume in criminal cases, for potential civil caseloads the Working Group began by assessing data retrieved from the National Center for State Courts in June of 2020 on the experience – both nationally and regionally – regarding the volume of civil appeals as a fraction of total annual civil case filings in the plenary jurisdiction trial courts of any state, and as a number of “civil appeals per million of population,” another commonly recognized predictor of appellate volume.

We begin with a key table of civil appeal experience in other states that have by-right appeal available in civil cases to an intermediate court of appeals.

CIVIL CASES: Rates of Appeal from Full Jurisdiction Trial Courts to Intermediate Appellate Courts with By-Right Jurisdiction, **NATIONAL CENTER FOR STATE COURTS DATA FROM THE COURT STATISTICS PROJECT, RETRIEVED 6/30/2020**

	2018 Population	Civil Trial Level Cases Filed	Civil Appeals of Right to the Ct. of Appeals	Civil Appeals as % of Annual Civil Cases Filed	Civil Appeals per 1 Million Population
Arizona	7,171,646	155,084	1,822	1.2%	254
Arkansas	3,013,825	111,724	722	0.6%	240
Connecticut	3,572,665	162,979	912	0.6%	255
Florida	21,299,325	612,630	7,604	1.2%	357
Hawai'i	1,420,491	37,635	369	1.0%	260
Indiana	6,691,878	494,154	910	0.2%	136
Kansas	2,911,505	197,621	455	0.2%	156
Louisiana	4,659,978	195,180	1,348	0.7%	289
Maryland	6,042,718	108,710	1,368	1.3%	226
Massachusetts	6,902,149	112,806	903	0.8%	131
Minnesota*	5,611,179	245,183	1,131	0.5%	202
Missouri	6,126,452	407,990	1,406	0.3%	229
Nebraska	1,929,268	33,818	544	1.6%	282
Nevada	3,034,392	98,201	251	0.3%	83
New Jersey	8,908,520	889,066	3,451	0.4%	387
New Mexico	2,095,428	67,119	432	0.6%	206
North Carolina	10,383,620	155,683	775	0.5%	75
Ohio*	11,689,442	444,943	3,910	0.9%	334
Oregon*	4,190,713	197,862	1,377	0.7%	329
South Carolina	5,084,127	177,557	692	0.4%	136
Utah	3,161,105	125,060	385	0.3%	122
Washington	7,535,591	220,256	1,263	0.6%	168
Wisconsin	5,813,568	310,513	787	0.3%	135
			Average	0.7%	217
			Median	0.6%	226
Mid-Atlantic States Included in the Above					
Maryland	6,042,718	108,710	1,368	1.3%	226
New Jersey	8,908,520	889,066	3,451	0.4%	387
North Carolina	10,383,620	155,683	775	0.5%	75
South Carolina	5,084,127	177,557	692	0.4%	136
			Average	0.6%	206
			Median	0.4%	181

Civil Appeals – Summarizing the Range of National and Regional Experience

National average (of states reporting data to the National Center for State Courts, shown in the table on the immediately preceding page):

Civil Appeals as % of total civil cases commenced in full-jurisdiction trial courts each year, in states with by-right appeal to an intermediate court of appeals:

Lowest quartile of appeal rates for all reporting states:
Middle range (omitting bottom quarter and top quarter):

Percent Appealed

Average: 0.7%
Median: 0.6%
Lowest ¼: 0.3%
Middle range: 0.6%

Civil appeals per million of population in states with by-right appeal of criminal cases to an intermediate court of appeals:

Lowest quartile of appeal rates for all reporting states
Middle range (omitting bottom quarter and top quarter):

Number Appealed/yr/million

Average: 217 per million
Median: 226 per million
Lowest ¼: 114 per million
Middle range: 212 per million

Nearby states’ experience (of those who report such data)

Civil appeals as % of total civil cases commenced in the trial courts each year, in states with by-right appeal available to an intermediate court of appeals:

Civil appeals per million of population in nearby states with by-right appeal of civil cases to an intermediate court of appeals:

Percent Appealed

Average: 0.6%
Median: 0.4%

Number Appealed/yr/million

Average: 206 per million
Median: 181 per million

The Domestic Relations Experience in Virginia

At the Working Group’s request, the Office of the Executive Secretary calculated the number of domestic relations cases filed in the circuit courts in the most recent statistical year. The total was **approximately 37,000/year**.

As noted in the statistical update table above (page 18) the number of domestic appeals under the existing appeal-by-right system for such cases is running **around 250 per year**.

No doubt there are several distinguishing features about domestic relations cases that affect their “predictive value” when thinking about the proportion of other civil filings that may be appealed in any given year, but for present purposes the Working Group notes that this appeal rate is:

0.7 % percent of domestic relations cases filed in circuit court.

PROJECTIONS FOR VIRGINIA CIVIL APPEALS OF RIGHT

Based on Virginia’s population of 8.5 million and the number of non-domestic-relations civil cases commenced in Circuit Court annually (163,000):

Virginia civil appeal volume projections

Varying Volume Projections for Civil Appeals

Based on the <u>national average</u> of the % of all civil cases filed that are appealed to the court of appeals in by-right appeal jurisdictions:	975 – 1,150
Based on the <u>national average</u> of civil appeals to the court of appeals per million of population in appeal-of-right jurisdictions:	1,850 – 1,900
Based on <u>regional states’ experience</u> of civil appeals as % of total civil cases filed:	650 – 975
Based on <u>regional states’ average</u> for civil appeals per million of population:	1,540 – 1,750
Based on the <u>middle range</u> of American states (omitting lowest quarter and highest quarter), appeals of right to the court of appeals as a percentage of all civil filings in the full-jurisdiction trial courts average 0.6%, which in VA would be:	975
Based on the <u>middle range</u> of American states (omitting lowest quarter and highest quarter) civil appeals of right in an appeal-of-right system average 172 per million in population, which in VA would be approximately:	1,450
Based on the Virginia “domestic relations example” discussed on the preceding page, the “percent of filings” appeal frequency experienced in Virginia domestic relations matters (0.7% of total Domestic Relations filings) – if applied to civil non-domestic relations civil cases (approximately 163,000/yr) – would produce approximately this number of civil appeals:	1,140

NOTE: As suggested above, most experienced observers of the Virginia litigation landscape have expressed belief to the Working Group that the number of appeals that would be taken by right in civil cases has been depressed by the vicissitudes of having to file a petition and incur that portion of appellate expenses prior to learning whether the party’s desired appeal will be among the 20% to 25% allowed a hearing at the Supreme Court. Hence the various estimates above are consistent with the observation that the number of petitions for civil appeal today (approximately 400 per year) will be exceeded by the number of appeals taken annually under an appeal of right system.

Based on the experience of other states, even the relatively “low” appellate volumes experienced by other states in our region, the Working Group believes that the volume of civil appeals filed annually in Virginia could reach twice the present civil petition for appeal level (2 x 400/year = 800), to three times that level, perhaps 1,200 per year.

Part Six – ASSESSING THE REGIONAL OPERATIONS OF THE CAV

To date, the CAV has organized its operation in four regions:

REGION 1 – Eastern: Accomack, Chesapeake, Gloucester, Hampton, Isle of Wight, Mathews, Newport News, Norfolk, Northampton, Portsmouth, Southampton, Suffolk, Virginia Beach, Williamsburg/James City, York/Poquoson

REGION 2 – Central: Albemarle, Amelia, Appomattox, Brunswick, Buckingham, Caroline, Charles City, Charlotte, Charlottesville, Chesterfield, Colonial Heights, Cumberland, Dinwiddie, Essex, Fluvanna, Fredericksburg, Goochland, Greene, Greensville, Halifax, Hanover, Henrico, Hopewell, King and Queen, King George, King William, Lancaster, Louisa, Lunenburg, Madison, Mecklenburg, Middlesex, New Kent, Northumberland, Nottoway, Orange, Petersburg, Powhatan, Prince Edward, Prince George, Richmond (City), Richmond (County), Spotsylvania, Surry, Sussex, Westmoreland

REGION 3 – Western: Alleghany, Amherst, Augusta, Bath, Bedford, Bland, Botetourt, Bristol, Buchanan, Buena Vista, Campbell, Carroll, Craig, Danville, Dickenson, Floyd, Franklin, Giles, Grayson, Henry, Highland, Lee, Lynchburg, Martinsville, Montgomery, Nelson, Patrick, Pittsylvania, Pulaski, Radford, Roanoke (City), Roanoke (County), Rockbridge, Rockingham, Russell, Salem, Scott, Smyth, Staunton, Tazewell, Washington, Waynesboro, Wise, Wythe

REGION 4 – Northern: Alexandria, Arlington, Clarke, Culpeper, Fairfax, Fauquier, Frederick, Loudoun, Page, Prince William, Rappahannock, Shenandoah, Stafford, Warren, Winchester

The SJ Resolution also contemplates regional operation of the Court of Appeals. As noted below, the Working Group believes that an excellent implementation of that goal has already been made by the Court of Appeals, and we report our concern that providing convenience to the bar and public (which the current system achieves) should not be compromised in a future system that might “lock” specific judges into particular regions of the Commonwealth.

Using data from those states that responded, the National Center for State Courts reported in *State Appellate Court Divisions*, as of 2019, that the following states had the listed number of “divisions” for operation of their intermediate courts of appeal:

	Number of Divisions of State Courts of Appeal (of the states reporting to NCSC)
Alaska Court of Appeals	0
Arizona Court of Appeal	2
Arkansas Court of Appeals	4
California Courts of Appeal,	6
Colorado Court of Appeals	7
Connecticut Appellate Court	0
District of Columbia Ct of Appeals	5
Florida District Courts of Appeal	5
Georgia Court of Appeals	5
Hawai'i Court of Appeals	0
Illinois District Court of Appeals	5
Indiana Court of Appeals	0
Iowa Court of Appeals	0
Kansas Court of Appeals	0
Kentucky Court of Appeals	3
Louisiana Court of Appeal	5
Maryland Ct of Special Appeals	0
Massachusetts Appeals Court	0
Michigan Court of Appeals	4
Minnesota Court of Appeals	0
Mississippi Court of Appeals	1
Missouri Court of Appeals	3
Nevada Court of Appeals	0
New Jersey Appellate Division	8
New Mexico Court of Appeals	0
New York Appellate Division	4
North Carolina Court of Appeals	1
North Dakota Temporary Ct of Appeals	1
Ohio Court of Appeals	12
Oregon Court of Appeals	0
Pennsylvania Commonwealth Court	0
South Carolina Court of Appeals	0
Tennessee Court of Appeals	3
Tennessee Court of Criminal Appeals	3
Texas Court of Appeals (civil),	14
Texas Court of Criminal Appeals	0

Based on the extensive record-keeping of the CAV already in place (graphic illustrations from which are shown below), the Court keeps careful track of its operations on a regional basis. On the issue whether regional divisions are advisable, reports from consideration of intermediate appellate court operations in other states have sounded a note of caution.

In its massive study of courts of appeals, the National Center for State Courts (“NCSC 1982 Court of Appeals Study”) reported the following consensus among those who have worked for decades on intermediate appellate court structure and operations:

“Permanent Divisions or Rotating Panels. A very important issue concerning intermediate court structure is whether judges should sit in rotating panels or in separate divisions that, because the judicial assignments do not change, operate largely as separate courts. . . . Territorial divisions exist in 14 states [and this system] clearly saves travel time and costs for both the judges and lawyer[s]. Also, it is often said, the judges are more knowledgeable about the particular problems of the local litigants than when the court is centralized.”³²

“Another argument for permanent divisions is that judges often desire to work with only a limited number of colleagues because, it is claimed, small numbers facilitate working arrangements. [However,] permanent divisions or sections are not recommended. Territorial divisions are appropriate only for large states, where travel by lawyers and judges to the capitol is . . . burdensome.”³³

“There are two major problems with intermediate court divisions. First, the separateness of the divisions can foster divergent lines of authority, until resolved by the Supreme Court. Secondly, and probably more important, the caseloads of the divisions tend to become very uneven [resulting in] variations in filings, decisions and backlog [and] the productivity of the divisions, in terms of cases decided per judge, varies almost as much. [Thus,] the divisional system typically leads to uneven distribution of workload and misallocation of the court’s resources.”³⁴

“System for Rotating Judges in Panels. The next issue concerning the panel system is the mechanism for rotating judges between panels. . . . [Most states] rotate the panels quite often [and] Rules in several

³² NCSC 1982 Court of Appeals Study, p. 60.

³³ *Id.*

³⁴ *Id.* at 62.

states specify that each judge on the court should sit with each other judge about equally frequently [and] Many courts change panel assignments for each sitting.”³⁵

The Study Committee would like to report three observations. First, having all of the judges of the Court of Appeals rotate assignments in the various regions of the Commonwealth would be greatly preferable to having 3, 4 or even 5 judges permanently assigned to any particular region, to avoid the “divisional splits” and forum shopping that permanent, “stagnant” or non-rotating judge assignments could engender.

Second, if the Legislature views it as a key goal to assure maximum geographic diversity in the corps of judges sitting on the Court of Appeals, it is our recommendation that this be achieved in the statutes that specify the number of judges, not in the rotational assignment system for hearing cases.

Third, the detailed focus and record-keeping of the Court of Appeals to date shows outstanding care for the regional handling of its caseload:

CAV Regional Operations Report

The Court of Appeals has provided extensive background information for consideration by the Working Group regarding the regional operation concept in SJ 47. Three observations should be made at the outset.

- The CAV operates – today – on a regional basis: it manages all aspects of the appellate process on a regional basis, which appears to address the focus of SJ 47 in both form and substance.
- The convenience entailed in scheduling and holding oral argument in courthouses located in the four regions provides the public and the practicing bar with significant convenience, minimizing travel time and expense for the parties.
- The system, as it has been operated by the Court of Appeals for many years, calls upon all members of that Court to “rotate” in regional assignments, such that each member of the Court, over time, will sit in each of the regional benches. The Working Group may wish to make a recommendation on issues such as:
 - if the CAV were maintained at approximately the present size, or expanded perhaps no more than 16 total judgeships, aren’t there significant problems that could be entailed if the judges were permanently assigned to a particular region? With “static” assignments, division splits in jurisprudential approach could be

³⁵ *Id.* at 66.

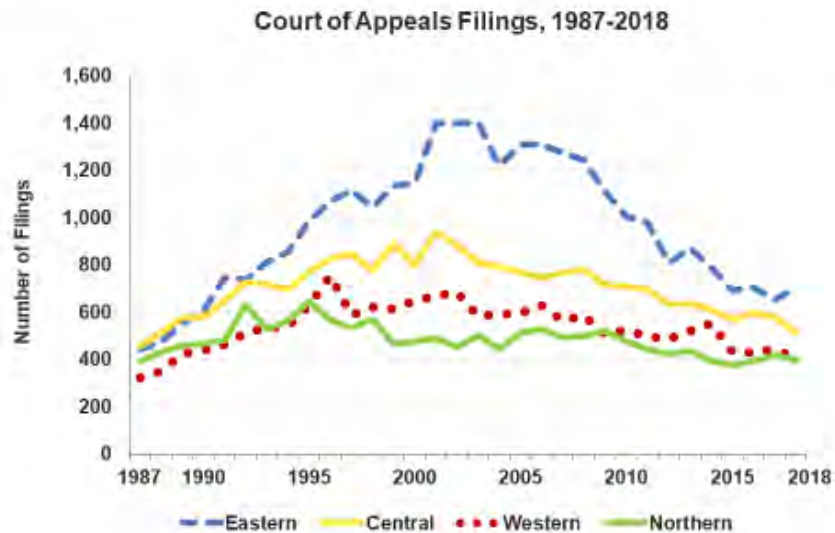
problematic. Would judge-shopping be encouraged if a particular region were perceived to be more plaintiff or defense favorable in any particular domain of law?

-- if the CAV were expanded to 24 judges, averaging 6 per region, would that increased expense be sufficient to mitigate the effects of stagnant or non-rotating judge assignments in the regions?

-- if the concern for regional focus in the SJ Resolution is to provide better assurance that each of the regions of the Commonwealth is fairly represented in election of judges to the CAV, would there be alternative mechanisms that could be adapted from non-court-system legislation to prescribe geographic selection criteria that would nonetheless leave the Court free to rotate assignments around the Commonwealth for each judge selected?

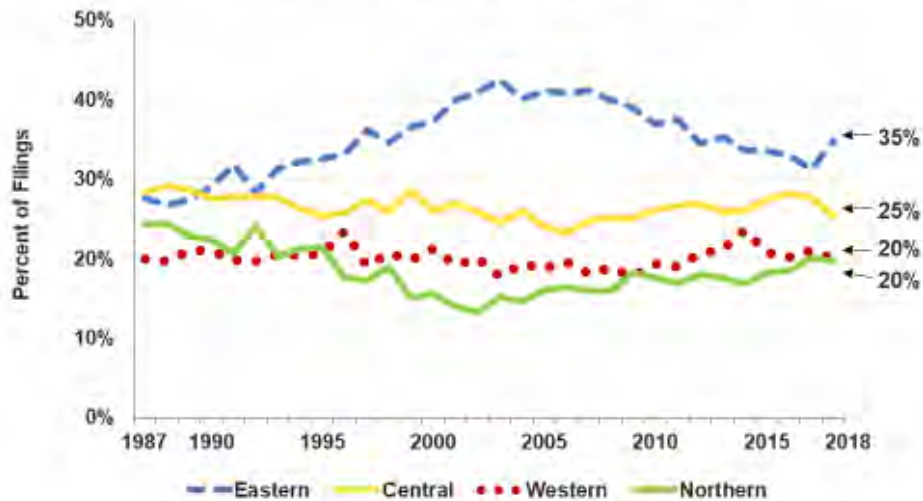
The extent of current regionalization in the operations of the Court of Appeals is illustrated in the following graphic displays:

Since 1990, the Eastern Region has led the other regions in the number of appeals filed with the Court of Appeals.



Since 1993, the Eastern Region has contributed at least 30% of the filings, reaching more than 40% in the mid-2000s.

Court of Appeals Filings, 1987-2018



Since 1990, the Eastern Region has contributed the largest share of criminal cases.

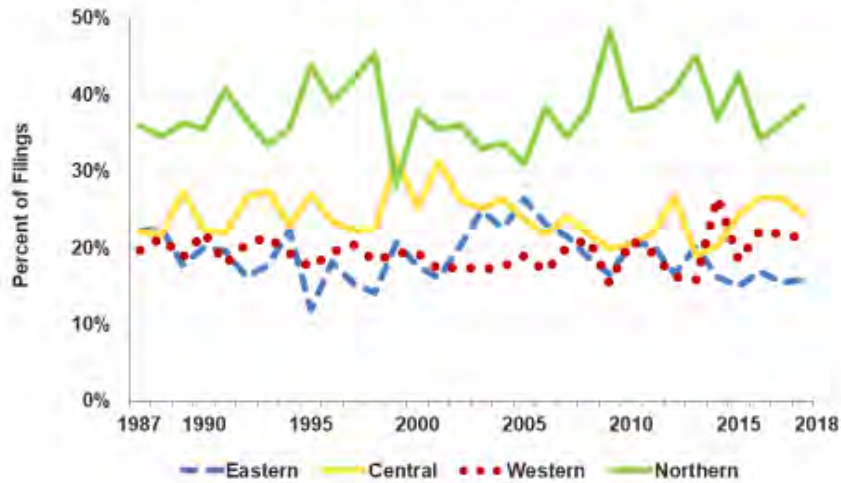
Criminal Filings in the Court of Appeals, 1987-2018

Years	Eastern Region	Central Region	Western Region	Northern Region
1987 – 1989	30.5%	30.5%	19.3%	19.8%
1990 – 1994	34.5%	29.1%	19.4%	17.1%
1995 – 1999	39.9%	27.1%	19.6%	13.3%
2000 – 2004	45.4%	25.5%	18.7%	10.3%
2005 – 2009	45.3%	24.0%	18.3%	12.4%
2010 – 2014	39.9%	26.7%	21.0%	12.4%
2015 – 2018	37.8%	27.3%	20.9%	14.0%

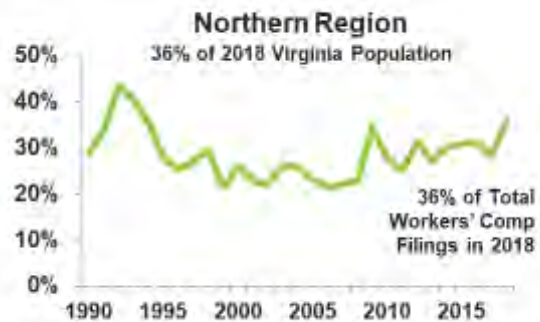
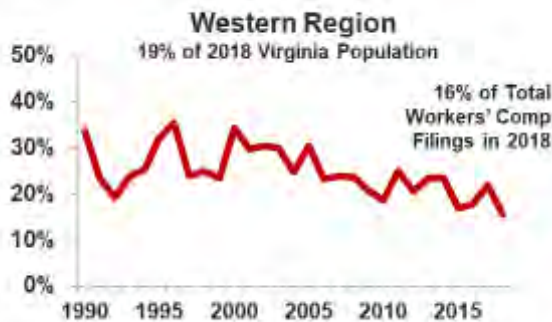
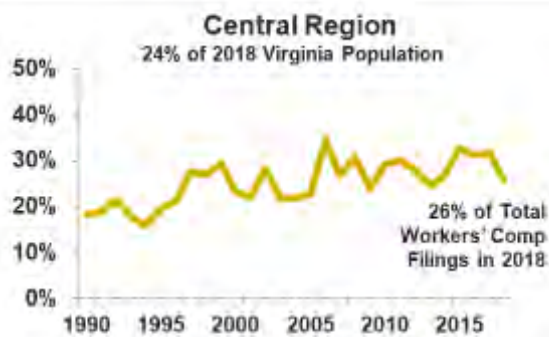
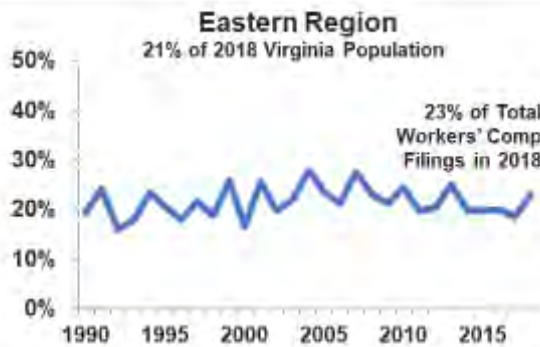
Note: Pretrial criminal appeals classified in STARS as civil cases were reclassified as criminal cases.

The Northern Region has contributed the largest percentage of Domestic Relations cases nearly every year since 1987.

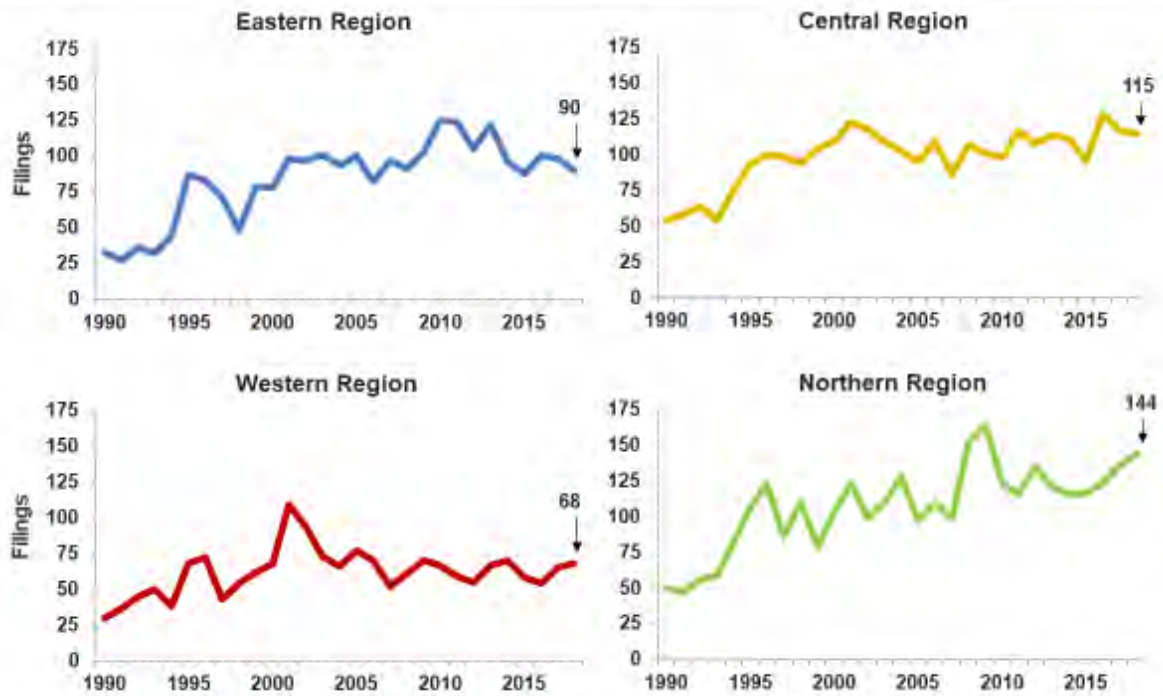
Domestic Relations Filings by Region, 1987-2018



Workers' Compensation Filings by Region, 1990-2018



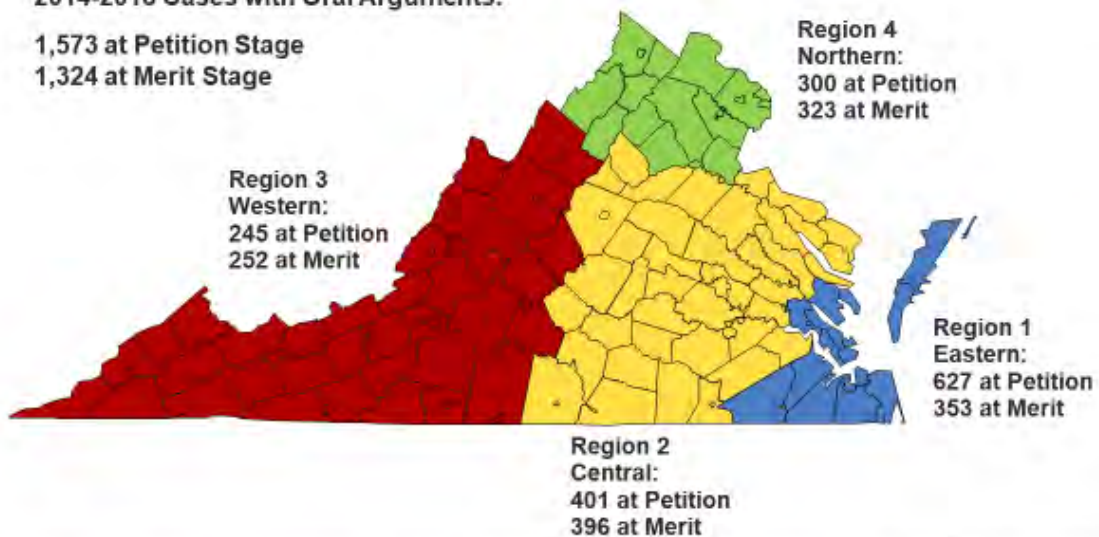
Pro Se Filings by Region, 1990-2018



Court of Appeals Filings, 2014 – 2018 Oral Arguments

2014-2018 Cases with Oral Arguments:

1,573 at Petition Stage
1,324 at Merit Stage



Note: Cases with oral arguments at the petition stage and the merit stage are counted in both categories.

**Court of Appeals Filings, 2014 – 2018
Eastern Region
Oral Arguments at Petition Stage**

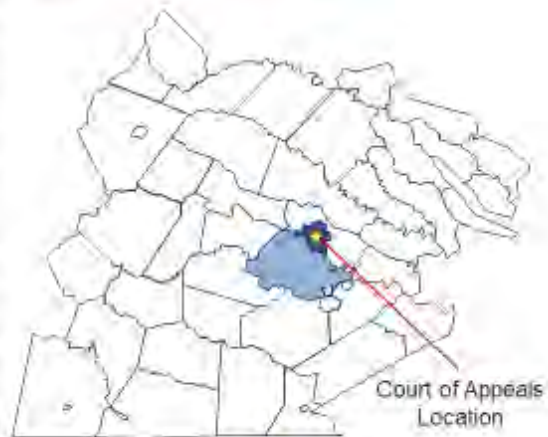
<u>Jurisdiction</u>	<u>Cases</u>
Accomack	1
Chesapeake	83
Gloucester	13
Hampton	117
Isle of Wight	4
Mathews	4
Newport News	97
Norfolk	86
Northampton	3
Portsmouth	31
Southampton	2
Suffolk	7
Virginia Beach	130
Williamsburg	28
York County	21
Total	627



<25 Filings
 25-50 Filings
 51-75 Filings
 >75 Filings

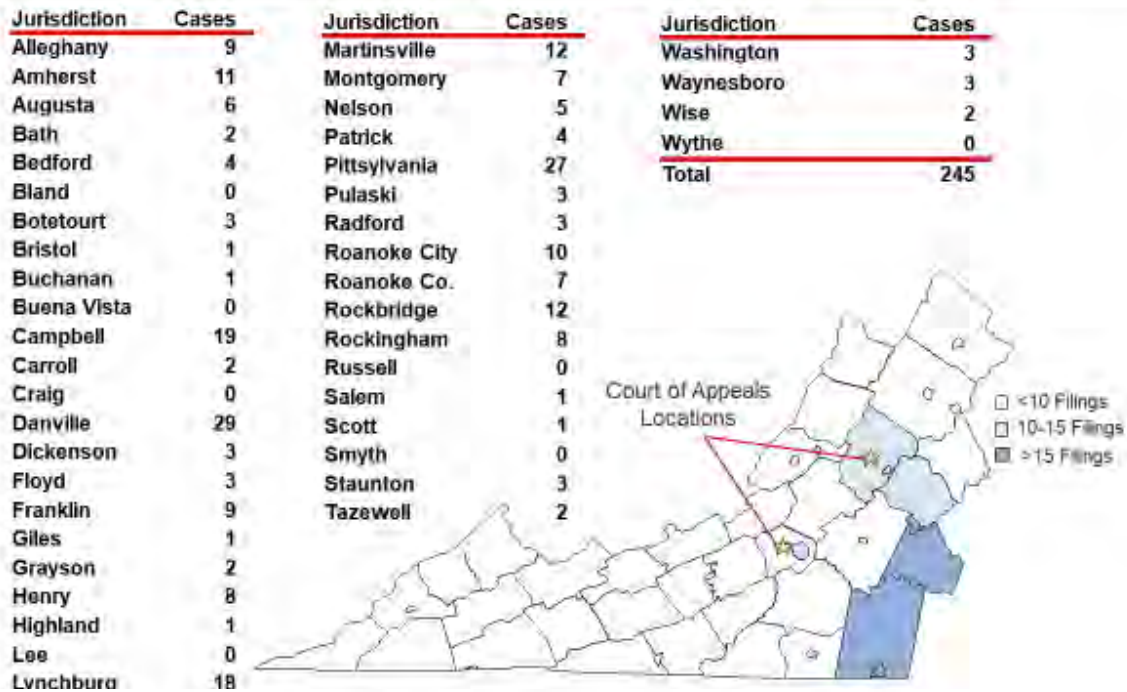
**Court of Appeals Filings, 2014 – 2018
Central Region
Oral Arguments at Petition Stage**

<u>Jurisdiction</u>	<u>Cases</u>	<u>Jurisdiction</u>	<u>Cases</u>	<u>Jurisdiction</u>	<u>Cases</u>
Albemarle	8	Henrico	24	Spotsylvania	11
Amelia	5	Hopewell	4	Surry	0
Appomattox	1	King and Queen	0	Sussex	3
Brunswick	4	King George	1	Westmoreland	3
Buckingham	1	King William	3	Total	401
Caroline	6	Lancaster	3		
Charles City	3	Louisa	6		
Charlotte	4	Lunenburg	0		
Charlottesville	10	Madison	2		
Chesterfield	72	Mecklenburg	7		
Colonial Hghts	16	Middlesex	6		
Cumberland	2	New Kent	4		
Dinwiddie	1	Northumberland	1		
Essex	0	Nottoway	9		
Fluvanna	1	Orange	3		
Fredericksburg	16	Petersburg	22		
Goochland	0	Powhatan	8		
Greene	4	Prince Edward	4		
Greensville	1	Prince George	7		
Halifax	9	Prince William	0		
Hanover	19	Richmond City	87		
		Richmond Co.	0		

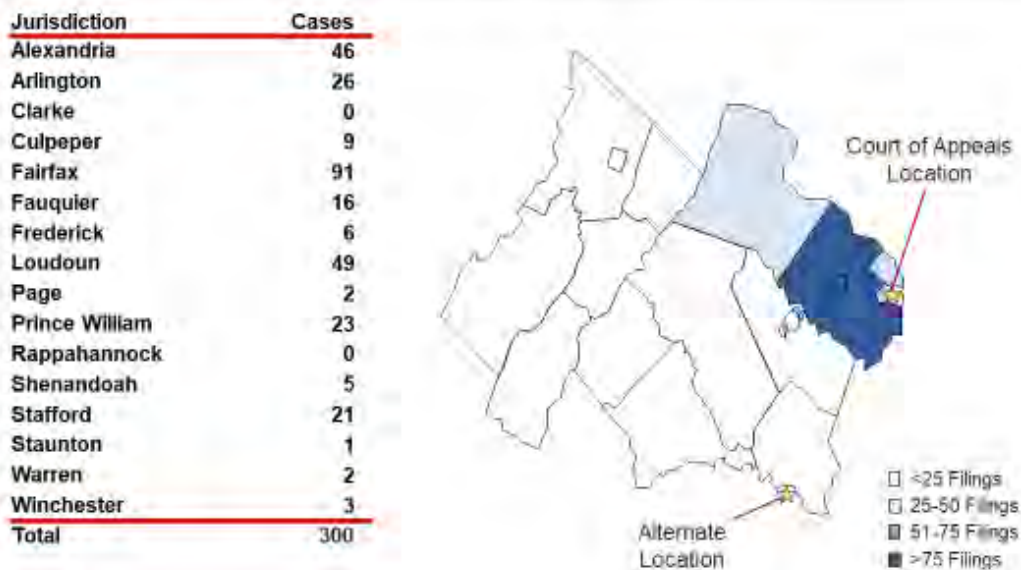


<25 Filings
 25-50 Filings
 51-75 Filings
 >75 Filings

**Court of Appeals Filings, 2014 – 2018
Western Region
Oral Arguments at Petition Stage**



**Court of Appeals Filings, 2014 – 2018
Northern Region
Oral Arguments at Petition Stage**



Court of Appeals Filings, 2014 – 2018 Eastern Region Oral Arguments at Merit Stage

<u>Jurisdiction</u>	<u>Cases</u>
Accomack	3
Chesapeake	44
Gloucester	7
Hampton	45
Isle of Wight	1
Mathews	1
Newport News	42
Norfolk	59
Northampton	1
Portsmouth	28
Southampton	2
Suffolk	16
Virginia Beach	62
Williamsburg	12
York County	5
No Locality Specified*	25
Total	353



* "No locality specified" includes Workers' Compensation Commission and Original Jurisdiction cases.

Court of Appeals Filings, 2014 – 2018 Central Region Oral Arguments at Merit Stage

<u>Jurisdiction</u>	<u>Cases</u>	<u>Jurisdiction</u>	<u>Cases</u>	<u>Jurisdiction</u>	<u>Cases</u>
Albemarle	19	Henrico	30	Spotsylvania	21
Amelia	2	Hopewell	6	Surry	0
Appomattox	4	King and Queen	1	Sussex	4
Brunswick	3	King George	2	Westmoreland	2
Buckingham	1	King William	3	No Locality Specified	40
Caroline	3	Lancaster	1	Total	396
Charles City	1	Louisa	4		
Charlotte	1	Lunenburg	0		
Charlottesville	2	Madison	3		
Chesterfield	46	Mecklenburg	5		
Colonial Hghts	3	Middlesex	2		
Cumberland	2	New Kent	1		
Dinwiddie	9	Northumberland	0		
Essex	0	Nottoway	3		
Fluvanna	0	Orange	5		
Fredericksburg	11	Petersburg	12		
Goochland	3	Powhatan	11		
Greene	0	Prince Edward	2		
Greensville	3	Prince George	7		
Halifax	6	Prince William	0		
Hanover	8	Richmond City	104		
		Richmond Co.	0		



Court of Appeals Filings, 2014 – 2018
Western Region
Oral Arguments at Merit Stage

<u>Jurisdiction</u>	<u>Cases</u>
Alleghany	1
Amherst	14
Augusta	12
Bath	2
Bedford	5
Bland	0
Botetourt	2
Bristol	10
Buchanan	2
Buena Vista	0
Campbell	15
Carroll	3
Craig	1
Danville	15
Dickenson	3
Floyd	3
Franklin	8
Giles	0
Grayson	0
Henry	5
Highland	0
Lee	4
Lynchburg	21

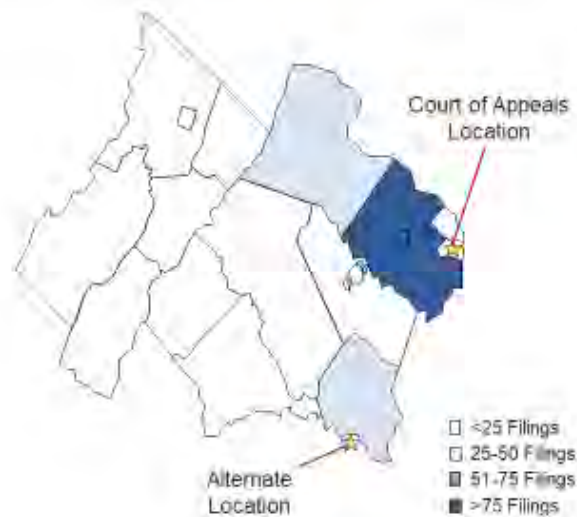
<u>Jurisdiction</u>	<u>Cases</u>
Marlinsville	1
Montgomery	7
Nelson	2
Patrick	4
Pittsylvania	12
Pulaski	2
Radford	1
Roanoke City	9
Roanoke Co.	9
Rockbridge	4
Rockingham	15
Russell	1
Salem	4
Scott	2
Smyth	1
Staunton	3
Tazewell	6

<u>Jurisdiction</u>	<u>Cases</u>
Washington	5
Waynesboro	4
Wise	4
Wythe	1
No Locality Specified	29
Total	252



Court of Appeals Filings, 2014 – 2018
Northern Region
Oral Arguments at Merit Stage

<u>Jurisdiction</u>	<u>Cases</u>
Alexandria	20
Arlington	24
Clarke	3
Culpeper	2
Fairfax	99
Fauquier	13
Frederick	6
Loudoun	42
Page	2
Prince William	15
Rappahannock	1
Shenandoah	3
Stafford	27
Warren	3
Winchester	2
No Locality Specified	61
Total	323



Statutes Relating to Geographical Selection. With the help of Ms. Kristen Walsh of the General Assembly’s Division of Legislative Services, the Working Group has learned of several models in existing Virginia statutes under which the General Assembly has expressed its preference for geographic diversity in selecting a body’s membership. For example:

ASPIRATIONAL EXAMPLES

§ 2.2-2452 (Board of Veterans Services) “In making appointments, the Governor shall endeavor to ensure a balanced geographical representation on the Board”

§ 2.2-2455 (Charitable Gaming Board) “To the extent practicable, the Board shall consist of individuals from different geographic regions of the Commonwealth.”

§ 2.2-2353 (Innovation Partnership Authority) “In making the appointments, the Governor and the Joint Rules Committee shall consider the geographic and demographic diversity of the Board.”

§ 54.1-2313 (Cemetery Board) “Appointments to the Board shall generally represent the geographical areas of the Commonwealth.”

§ 58.1-4004 (Lottery Board) “Prior to the appointment of any Board members, the Governor shall consider the political affiliation and the geographic residence of the Board members.”

Part Seven – SETTING A REASONABLE MAXIMUM CASELOAD PER JUDGE TO AVOID DELAY AND BACKLOGS IN A BY-RIGHT APPEAL SYSTEM

ESTABLISHING A TARGET MAXIMUM CASELOAD PER JUDGE

[SIZE OF THE INTERMEDIATE APPELLATE COURT]

Recommended size of an intermediate court “is based on many factors: the present and projected volume of appeals filed, the size of the present backlog, the numbers of judges on intermediate courts in other states, standards concerning case dispositions in appellate courts, and the particular circumstances” of the state.³⁶

170 Filings Per Judge. With a projected “caseload of 1,200 appeals. . . it is estimated that the [intermediate] court should have seven judges.”³⁷ This rule-of-thumb equates to a maximum target filing level of 170 new cases annually per judgeship on an intermediate court of appeals.

“Standards for judgeship needs. There are no official standards concerning the number of judges needed for a specific caseload level, but two respected scholarly writings have suggested standards, which have received widespread attention.

“First, Professors Carrington, Meador, and Rosenberg suggest a hundred dispositions on the merits per year per judgeship as ‘the most efficient number’ in state intermediate courts.³⁸ This estimate, however, assumes that the court often uses summary procedures – that a third of the cases are decided without oral argument, and that three-quarters of the cases are decided by memorandum opinions (and a quarter by full opinion).

“Second, Professor Leflar states that ‘no appellate judge should be expected to write more than 35, or conceivably 40, full-scale publishable opinions per year.’”³⁹

“To apply these standards . . . one must estimate the number of cases to be decided each year.”⁴⁰

³⁶ NCSC 1982 Court of Appeals Study, p. 74

³⁷ *Id.* at 79.

³⁸ Carrington, Meador, & Rosenberg, *Justice on Appeal* 143-46 (1977).

³⁹ NCSC 1982 Court of Appeals Study, p. 80, quoting Robert Leflar, *Internal Operating Procedures of Appellate Courts*, 8-9 (1976).

⁴⁰ NCSC 1982 Court of Appeals Study, p. 81.

Assuming the availability of “summary procedures” for some segment of the caseload, “a standard of 60 decisions per judge is suggested for the Court of Appeals, which is half again as many opinions per judge as Leflar’s upper limit, but substantially less than the 100 decisions per judge recommended [as a ceiling] by Carrington, Meador, and Rosenberg (who assume frequent use of summary procedures).”⁴¹

“Experience in other courts. [Looking at] caseload statistics for appellate courts in other states with intermediate courts . . . shows a wide variation in caseload. The median number of filings per judge is about 165, and the median number of cases decided per judge is about 95, a figure very similar to the 100 suggested by Carrington, Meador, and Rosenberg.”⁴²

“[C]riminal cases . . . are generally believed to require less judge time on the average than civil cases. . . . Courts with predominantly civil caseloads . . . usually are at or below the 60 decisions-per-judge level.”⁴³

“Although it is difficult to compare situations existing in different states . . . the size of those courts elsewhere is at least illustrative of what might be appropriate.”⁴⁴

CASELOADS PER JUDGE AFFECT COURT DELAY

In general, structuring an intermediate appellate court with excess caseloads for the judges is a recipe for delays in dispositions, and creation of appellate backlogs. In Virginia, it appears from the case processing experience reported in the charts set forth below at pages 59 - 60 of this Report, the case processing times were not materially slower in the year 2000, when total filing numbers reached approximately 3,000, about 1,000 more filings than now annually reach the CAV.

At that 3,000 filings-per-year level, total filings averaged 300 per judge. The table on page 56 below, however, reflects the fact that very few state legislatures have chosen to saddle their intermediate court of appeals judges with more than 200 total filings per year, and of the reporting states, only two very large systems (Pennsylvania and Florida) exceed 300 filings per year per judge.

To assure the continued timeliness and high quality of Court of Appeal dispositions in Virginia, and the Court’s ability to offer explanatory orders in all cases identifying reasons for the dispositions, the General Assembly should be encouraged to avoid significantly exceeding

⁴¹ *Id.*

⁴² *Id.* at 82.

⁴³ *Id.* at 82-83.

⁴⁴ *Id.* at 86.

200 or 250 filings per year in assessing the needed staffing of the CAV to take on additional categories of cases.

- Thus it is probable that any marginal increase in the number of criminal appeals that might result from converting the present petition system to appeals of right would neither overwhelm the present complement of judges of the Court of Appeals nor result in significantly increased case-processing times, assuming that support staff is provided to commensurate with any increase in criminal appeals experienced in the coming years.
- Imagining the impact of allocating some or all civil appeals to the Court of Appeal for review as a matter of right in the first instance requires more assumptions than predicting criminal case volume under an appeal of right system.

-- The Supreme Court has received approximately 400 petitions for civil appeal each year in the modern era, and has found approximately 100 per year to merit full review.

-- If twice as many civil litigants chose to appeal to the Court of Appeals in an appeal-of-right system (800/yr) and the Court of Appeals found most of those appeals susceptible of disposition without oral argument, and granted full review with oral argument to perhaps 200 civil appeals (twice the number heard by the SCV on the merits in recent years), the resulting case load increase (800 civil filings; 600 summary dispositions with orders or opinions giving reasons; 200 full opinions after oral argument consideration) would bring the Court of Appeals to perhaps 2,800 filings per year (2,000 criminal appeals of right; 800 civil appeals of right).

In its Report to the 74th Regular Session of the Nevada State Legislature, the Supreme Court of that state reported in §5 with regard to the “optimum relative workload” for appellate courts that:

The relative workload of a court may be determined by taking the total number of cases decided by the court and dividing that number by the number of justices sitting on the court. The resulting number may be compared with the number of cases that experts consider to be the optimum for an appellate judge to decide in a year. Taking into account the other duties of a judge, experts suggest that an appellate court with the "usual mix" of cases . . . should be required to dispose of no more than 100 cases per judge per year.⁴⁵

In this context, “the optimum relative workload number of 100 is based upon the number of cases in which each [appellate judge] must prepare a written decision. . . .”⁴⁶

⁴⁵ Citing Carrington, Meador, and Rosenberg, *Justice on Appeal* 146 (1976).

⁴⁶ Institute for Court Management, *Jurisdiction of the Proposed Nevada Court of Appeals* 38 (May 2009).

Appellate Courts and Filing Numbers: Per Judge Caseload Examples

A National Center for State Courts comparison of caseloads of intermediate appellate courts tabulated the modern experience of seven states a few years ago.⁴⁷ In 2020, the Working Group has supplemented this information with the most current Court of Appeals statistics for other publicly reporting states, based on official Annual Reports from their court systems:

State	Ct. of Appeal Judgeships	Total Filings	Filings Per Judge
Tennessee Ct of Appeals, ⁴⁸ civil	12	1,029	86
North Carolina Court of Appeals ⁴⁹	15	1,300	87
Massachusetts Appeals Court	28	2,784	99
Tennessee Ct of Appeals, criminal	12	1294	108
Kansas Court of Appeals ⁵⁰	14	1717	123
Arizona Court of Appeal ⁵¹	22	2,954	134
Iowa Court of Appeals ⁵²	9	1227	136
Kentucky Court of Appeals ⁵³	14	1913	137
Illinois Court of Appeals (5 districts)	54	7,730	143
Maryland Court of Special Appeals ⁵⁴	15	2,223	148
Wisconsin Ct of Appeals ⁵⁵ (4 districts)	16	2377	149
Washington State Court of Appeals ⁵⁶	22	3797	173
New Jersey Appellate Division	37	6,606	179
Virginia Court of Appeals⁵⁷	11	2,090	190
Michigan Court of Appeals	28	6,257	223
California Ct of Appeal (4 th district)	25	6,041	242
Indiana Court of Appeals	15	3,988	266
Pennsylvania Superior Court	20	8,000	400
Florida Ct of Appeal (5 districts)	61	25,906	425



⁴⁷ National Ctr. for State Cts., “Michigan Court of Appeals: Assessment of Operations & Technology” Table 2, p. 4.

⁴⁸ Tennessee maintains two Courts of Appeals, one exclusively criminal. The statistics here reflect the judicial capacity and caseloads broken out by the official Annual Report of the Judiciary. From tncourts.gov/courts/court-appeals/about. Annual Report of the Tennessee Judiciary, Fiscal Year 2018-2019, p. 10.

⁴⁹ North Carolina Judicial Branch (website visited July 6, 2020).

⁵⁰ Kansas Appellate Reports, 2019 Appellate Courts, p. 2. (June 30, 2019).

⁵¹ Annual Report of the Arizona Judicial Branch (2018) at azcourts.gov (website visited July 6, 2020).

⁵² Iowa Judicial Branch 2018 Report, iowacourts.gov (website visited July 6, 2020).

⁵³ 2020 Kentucky Court of Appeals Statistics, July 7, 2020 (from Counsel to the Clerk of the Court).

⁵⁴ From mdcourts.gov/cosappeals (website visited July 6, 2020); 2019 Strategic Plan, p. 54.

⁵⁵ From wicourts.gov (Court of Appeals Annual Report 2018, p. 2).

⁵⁶ State of Washington Appellate Courts, Operational and Procedural Review, June 2016, p. 8.

⁵⁷ Based on 2019 filing data. Note that for the past year only 10 seats on the Court of Appeals have been filled.

Comparing Similar-Sized States. A common consideration in assessing the appropriate size for an intermediate court of appeals is the experience of other states with comparable population bases. The table below arrays all of the states with populations ranging from 5 million citizens to 10.5 million, the group above and below Virginia’s population of approximately 8.5 million in the most recent census:

	Population	Size of Intermediate Court of Appeals
<u>Georgia</u>	10,617,423	15
<u>North Carolina</u>	10,488,084	15
<u>Michigan</u>	9,986,857	28
<u>New Jersey</u>	8,882,190	37
<u>Virginia</u>	8,535,519	11
<u>Washington</u>	7,614,893	22
<u>Arizona</u>	7,278,717	22
<u>Massachusetts</u>	6,892,503	28
<u>Tennessee</u>	6,829,174	25
<u>Indiana</u>	6,732,219	15
<u>Missouri</u>	6,137,428	32
<u>Maryland</u>	6,045,680	15
<u>Wisconsin</u>	5,822,434	16
<u>Colorado</u>	5,758,736	22
<u>Minnesota</u>	5,639,632	19

This table illustrates that Virginia has the fewest court of appeals judgeships of any state anywhere in this population range. The state closest in population to Virginia is New Jersey, which has three times as many court of appeals positions. All of the states with smaller population on this list have courts of appeal larger than Virginia. The two states just below Virginia in total population have 22 court of appeals judges each.

FACILITATING CONTINUED TIMELINESS AND QUALITY IN THE DISPOSITIONS OF THE COURT OF APPEALS OF VIRGINIA

Generally the Virginia bench and bar have been fully aware of periods when there was a delay in disposition of caseload volume by the appellate courts, so academic study of this may not be necessary. However, it bears noting that in addition to ABA time standards the National Center for State Courts published in August 2014 the *Model Time Standards for State Appellate Courts*, a joint project with the State Justice Institute, the Conference of Chief Justices, and the Conference of State Court Administrators, in conjunction with participation from the Conference of Chief Judges of the State Courts of Appeal, the National Conference of Appellate Court Clerks and the American Bar Association. In preparation for these standards, 71 intermediate appellate courts around the Nation were surveyed regarding existing time standards and recommended time ranges.

For intermediate appellate courts⁵⁸ the consensus standards summarized in this joint report were as follows for the number of days from filing a petition or filing a notice of appeal, and disposition:

Criminal cases, granting or denying appeal or summary adjudication

75% of the cases decided within 150 days

95% of the cases decided within 180 days

For criminal cases where full review is granted by the Court of Appeals

75% of the cases decided within 300 days

95% of the cases decided within 450 days

For appeal-of-right systems the standards for intermediate appellate courts are

Criminal cases

75% of the cases decided within 450 days of filing the notice of appeal

95% of the cases decided within 600 days of filing the notice of appeal

Civil cases

75% of the cases decided within 390 days of filing the notice of appeal

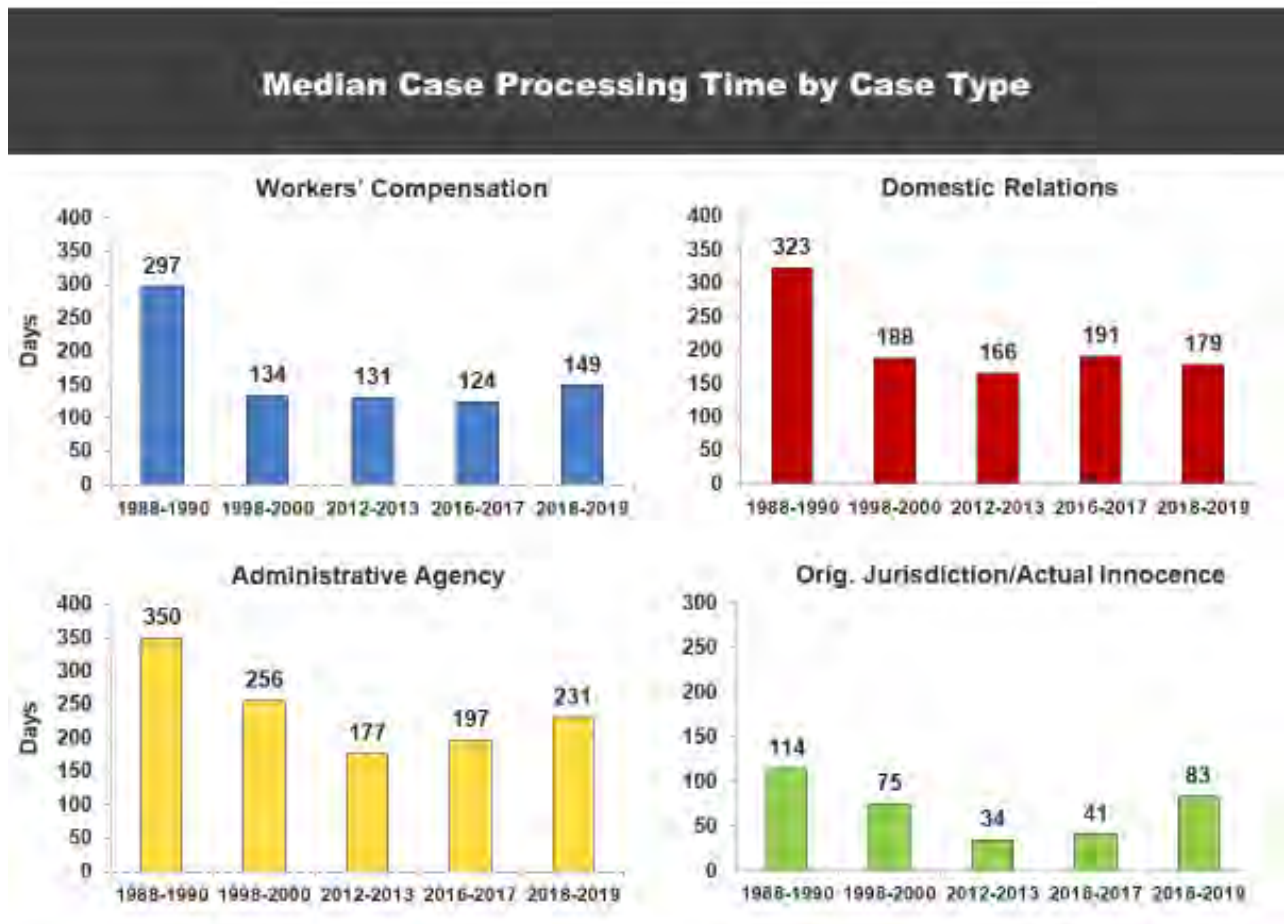
95% of the cases decided within 450 days of filing the notice of appeal

⁵⁸ Tabulated at page v of the NCSC joint Model Time Standards report.

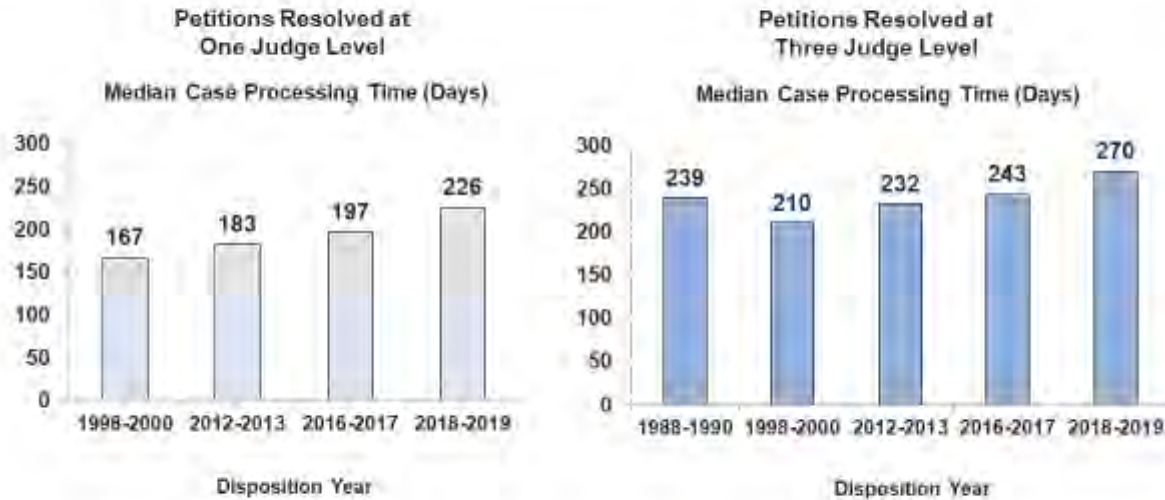
The Court of Appeals' success in timely disposing of the entire range of its existing docket duties is apparent in the graphic displays set forth in the two pages below.

Recommended Priority. The Working Group strongly recommends that a high priority should be given by the Judicial Council and the Legislature to making sure that the manner in which any expanded caseload is placed in the Court of Appeals (whether in terms of timing, sequence, or overall workload) be assessed with a constant focus on not damaging the excellent success the CAV has achieved in the timely disposition of cases on its docket, all the while "giving reasons" for even the most brief of its decisions and orders.

CURRENT CAV PROCESSING TIME SUCCESS



Criminal Petitions – Median Case Processing Times



Note: Appeals still pending in the Court of Appeals were excluded.

3

Criminal Petitions – Median Case Processing Times



Note: Appeals still pending in the Court of Appeals were excluded.

4

Part Eight – SUMMARY OF COMMENTS RECEIVED

Comments Received after Circulation of SJ 47 Throughout the Commonwealth’s Legal and Business Communities

CRIMINAL AND CIVIL APPEAL OF RIGHT

- Every bar and business group that commented favored appeal of right in civil and criminal cases.

Va. Bar Ass’n, pg. 72

Va. Trial Lawyers Ass’n, pg. 75

Va. Ass’n Crim. Defense Lawyers, pg. 80

Va. Chamber of Commerce, pg. 83

Va. Indigent Defense Comm’n, pg. 85

Va. Acad. of Elder Law Atty’s, pg. 92

Old Dominion Bar Ass’n, pg. 95

Va. Manufacturers Ass’n, pg. 96

Several commenting groups laid out the particular premises underlying their support. All who commented indicated that a key premise is adequate staffing of the CAV.

- Of the individual attorneys responding

- nineteen favored creating an appeal of right (Brandenstein, Edmonds, Emmert, Galumbeck, Gear, Glasberg, Gunn, Gwinn, Marr, Marritz, Mullins, Phillips, Plumlee, N. Smith, Tennant, Thomas, Walker, West, Williamson)
- one favored appeal of right in felony conviction cases only (Sanders)
- one favored three-judge review without making it appeal of right (Blanch)
- one thought that this change was not clearly needed (Delaney)
- one thought it could be too expensive (Westreich)
- one opposed the idea due to potential expense and delay (Lawrence)
- one thought it would damage “analogy of judgment” [*not explained*] (Crider)
- one had no opinion (Bryson)

Comments from individual respondents are reprinted alphabetically in Appendix B.

REGIONAL OPERATIONS

On the issue of regional operations, all commenters who addressed the issue were in favor of the Court of Appeals continuing to hear argument in various geographic locations (note, VTLA suggested a five-part geographic spread of operations).

Non-Rotating “Regional” Judges. On the question of having non-rotating judges located in discrete regions, only two comments were received favoring that system. (Blanch and Edmonds, who each estimated it would require 4 to 6 judges per region). Groups and

individuals expressly opposing non-rotating judges located in discrete regions included: VBA, VTLA, Va. Chamber of Commerce, VAIDC.

OTHER ISSUES

Frequent Suggestion: Elimination of the Appendix Process. A number of commenters commented that procedures should be changed so that the vast majority of cases could use digital records thereby eliminating or greatly reducing use and cost of appendix preparation. VBA, VTLA, VACDL, VAIDC.

Other Important Suggestions. Topics that will merit study in the coming years based on comments received:

1. Increases in interlocutory appeals should be avoided, to keep overall appellate costs and delay in check. VTLA
2. Bonding requirements and post-judgment interest reform could help deter unnecessary appeals, including possibly enhanced requirements for appeals that might be sought from the CAV to the SCV. VTLA
3. The inter-panel accord doctrine and use of en banc determinations should continue. VTLA, Va. Chamber of Commerce
4. Significant experiential and demographic diversity should be sought in CAV judgeships.
5. If possible, oral argument should be allowed in any criminal appeal, with the possible exception of cases after guilty pleas, revocation appeals, and Anders appeals (VACDL, VAIDC), and the ability to file a reply brief without waiving oral argument should be implemented.
6. Rules 5A:18 and 5:25 contemporaneous objection requirements and exceptions should be applied to achieve fundamental fairness.
7. Compensation for court-appointed criminal defense counsel should be substantially increased. VACDL, Blanch

Concern re Adult Guardianship and Conservatorship Practice. Based on the comments of the Academy of Elder Law Attorneys, while general estates cases would be benefitted by an appeal of right to the CAV, concerns are expressed that in adult guardianship and conservatorship matters periodic review in the circuit courts has been working well and that funds which should go to care for the incapacitated person could be impacted by the cost of appeals.

Part Nine – THE IMPORTANCE OF ADOPTING APPEAL OF RIGHT FOR ALL CASES

Piecemeal Civil Appeal Expansion – Considered and Rejected. Since the Judicial Council will apparently need to report to the Legislature on behalf of the court system by addressing the estimated number of CAV judge positions that might need to be added, the Working Group *initially considered* five sequencing options that could be recommended. Thus, we considered whether the Legislature should be invited to make the following jurisdictional changes **at the very outset** of restructuring CAV jurisdiction:

1. Criminal cases only in the first stage of jurisdictional expansion for the CAV.
2. Criminal cases plus just a few selective categories of additional civil cases to CAV as of right in the first phase of jurisdictional expansion for the CAV.
3. Criminal cases plus all civil cases pleading for less than \$100,000 (or some other number) in damages to the CAV as of right in the first stage of jurisdictional expansion. Statistics on the dollar filing ranges seen in the Virginia circuit courts in recent years is being obtained.
4. Criminal cases plus almost all civil cases to CAV in the first stage (omitting, probably, personal injury, asbestos, products liability, wrongful death and med mal cases, to deflect opposition from the plaintiff's bar).
5. Criminal cases plus all civil cases (except habeas corpus petitions) from the very outset of the expansion of CAV jurisdiction.

Conclusions. After considering such “phase in” possibilities, the Working Group was unanimous in concluding that piecemeal additions to the civil caseload of the Court of Appeals was **not a desirable plan**. There is an inherently illogical structure if some civil matters are appealable *by right* to one appellate tribunal while others are appealable *by petition* to the other, and increasing the divergence that has existed concerning domestic relations and workers' compensation matters makes little sense.

The “error correction” function of an intermediate court of appeals is a key concept in creating an effective appellate court architecture. Appeal of right provides assurance that there will be one level of appellate review that is available upon timely demand, to correct any legal errors made at the trial court level. Placing that review jurisdiction in the Court of Appeals has the signal advantage that it frees the Supreme Court to develop the law and interpret new statutes, without also serving as the basic error-correction tribunal for some segment of the civil docket.

The Working Group examined in some detail the civil docket load of the circuit courts of Virginia, by subject matter and in terms of the *ad damnum* amount of recovery for which complaints filed each year in the system pray for relief. These statistics have been broken down here into numerous separately tabulated topic areas of litigation, which can be consolidated roughly into six categories but could be differently aggregated to identify a large number of possible candidate topic-groups for piecemeal assignment of civil cases to the CAV in a by-right system:

	2019 Case Closure #s	% of all Civil Cases
● contract actions	3,595	2%
● real property (incl. landlord-tenant & em. domain)	1,667	1%
● wills & trusts	254	0.1%
● local government (incl. zoning, tax disputes, FOIA)	4,484	2%
● administrative agency reviews	2,263	1%
● other general civil matters (non-personal injury or death)	30,376	15%

We have also separately calculated the approximate annual volume of injury and death actions to help gauge what would be entailed in *exempting* these from a general civil appeal to the CAV. These cases are not included in the “other general civil matters.”

Contract Cases

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
CNTR	CONTRACT ACTIONS	3,544	1,710	1,519	315
PERF	SPECIFIC PERFORMANCE	51	44	4	3
		3,595		1,523	318

Real Property, Landlord Tenant & Condemnation

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
COND	CONDEMNATION	267	103	33	131
EJCT	EJECTMENT	13	9	1	3
ESTB	ESTABLISH BOUNDARIES	45	19	12	14
GATA	GAPL-TENANT'S ASSERTION	19	11	5	3
GAUD	GAPL-UNLAWFUL DETAINER	248	119	89	140
LIEN	JUDGMENT LIEN (BILL TO ENFORCE)	49	32	4	13
LT	LANDLORD/TENANT	13	8	2	3
MECH	MECHANIC'S LIEN	126	96	13	17
PART	PARTITION	348	217	38	93
QT	QUIET TITLE	224	83	50	115
RE	ENCUMBER/SELL REAL ESTATE	278	30	29	219
UD	UNLAWFUL DETAINER	37	15	8	14
		1667		284	765

Wills & Trusts Cases

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
AID	AID AND GUIDANCE	109	32	37	40
CNST	CONSTRUE WILL REFORMATION	19	8	6	5
REFT	OF TRUST	38	6	13	19
TRST	TRUST DECLARE /CREATE	45	14	14	17
WILL	WILL CONSTRUCTION	63	34	19	10
		274		89	91

Local Government (Incl. Zoning, Tax Disputes & FOIA)

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
CTAX	CORRECT/ERRON. STATE/LOCAL TAXES	68	42	1	45
DTAX	DELINQUENT TAXES	1,566	861	97	608
FOI	FREEDOM OF INFORMATION	2	2	0	0
GOVT	APPEAL - LOCAL GOVERNMENT	11	5	4	3
JR	JUDICIAL REVIEW	11	6	3	2
REIN	REINSTATEMENT (GENERAL)	2,789	838	462	1,489
WC	WRIT OF CERTIORARI	17	8	3	6
ZONE	APPEAL BD OF ZONING APPS.	20	10	5	5
		4,484		575	2,158

Administrative Agency Review

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
AAPL	ADMINISTRATIVE APPEALS	82	44	12	26
ABC	APPEAL - ABC BOARD	4	3	0	1
ACOM	APPEAL - COMPENSATION BOARD	5	3	2	0
AGRI	APPEAL - AGRICULTURE & CONSUMER SERVICES	1	0	0	1
AVOT	APPEAL - VOTER REGISTRATION	37	21	9	7

DRIV	REINSTATE DRIVING PRIV. APPEAL -	879	397	184	298
EMP	EMPLOYMENT COMMISSION	21	13	1	7
GRV	GRIEVANCE PROCEDURES	8	8	0	0
MAR	APPEAL MARINE RESOURCES	1	1	0	0
REST	RESTORE DRIVING PRIVILEGE	1,225	344	387	494
		2,263		595	834

Other General Civil Cases

CASE CATEGORY		Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
ACCT	ACCOUNTING	28	19	2	7
ATT	ATTACHMENT	11	6	4	1
CC	COUNTER CLAIM	348	238	29	81
CCON	CIVIL CONTEMPT	270	237	15	18
CJ	CONFESS JUDGM'T COMPLAINT -	344	41	40	263
COM	CATCH-ALL	3,339	2,263	442	634
COMP	APPROVE SETTLM'T (INJURY/ DEATH)	3,211	2,504	269	438
CROS	"CR" CROSS CLAIM	92	54	15	23
CSVP	CIVIL COMMITMENT OF SEXUAL PRED	24	4	10	10
CTP	THIRD PARTY DEF'T IMPLEADED	56	50	2	4
DECL	DECLARATORY JUDGMENT	630	375	153	102
GACC	COUNTERCLAIM	35	18	4	13
GAMJ	GAPL-MOTION FOR JUDGMENT	54	39	12	3
GARN*	GARNISHMENT	11,752	9,326	446	1,800
GAWD	WARRANT IN DEBT	804	533	192	79
IC	INVOL. COMM'TM'T	211	152	8	51
INJ	INJUNCTION	263	186	37	40

INTD	INTERDICTION	133	47	19	67
INTP	INTERPLEADER	172	71	33	68
	INTERROGATORY	501	452	1	48
INTR	SUMMONS				
MJ &	MOTION FOR	211	111	0	100
MJAL	JUDGMENT				
PET	PETITION Catch-all	7,660	3,855	448	3,357
REM	REMOVAL	19	8	4	7
	TRANSFER STRUCT.	191	64	45	82
SS	SETTLEMENT				
ST	STATUS PETITIONS	13	10	3	0
	ENFORCE VENDOR'S	4	3	0	1
VEND	LIEN				
		30,376		2,233	7,297

Injury and Death Actions

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
AL	ASBESTOS LITIGATION	19	18	0	1
GTOR	GENERAL TORT LIABILITY	1,110	903	41	166
ITOR	INTENTIONAL TORT	371	304	20	47
MED	MEDICAL MALPRACTICE	512	425	34	53
MV	MOTOR VEHICLE TORTS	5,869	5,086	212	571
PROD	PRODUCT LIABILITY	71	61	2	8
WD	WRONGFUL DEATH	218	143	22	53
		8,170		331	899

ACTUAL EXPERIENCE WITH THE AMOUNT OF DAMAGES SOUGHT IN CIVIL COMPLAINTS

The Office of the Executive Secretary of the Supreme Court also provided the Working Group with the following tabulation of the levels of damages sought in complaints filed annually in the circuit courts.

Civil Filings in Virginia Circuit Courts By Amount of Damages Sought

	2019 # complaints in civil cases	2019 % of all civil cases
Under \$ 50,000	169,564	76%
\$ 50,000 – 74,999	1,742	1%
\$ 75,000 – 99,999	963	0.4%
\$ 100,000 – 149,999	1,744	1%
\$ 150,000 – 199,000	1,048	0.5%
\$ 200,000 or more	7,045	3%
No Dollar Ad Damnum	41,917	19%

Thus, 77.4 % of the cases annually are pled below \$ 100,000.

RECAP OF THE RECOMMENDATION REGARDING APPEALS OF RIGHT

Having looked in detail at the breakdown of civil cases in the circuit courts (as shown above), the Working Group is unanimous in recommending that appeal of right to the Court of Appeals should include all civil cases, not merely some increased “carving out” of topics (or dollar sizes) of the civil cases that would otherwise be heard in the Supreme Court under the present system.

Neither the plaintiff’s bar nor the defense bar supports the allocation of merely “some” of the civil caseload to the Court of Appeals. Rather, a clear system making all cases appealable as of right to the intermediate court makes the most sense, and best serves the interests of the litigants and the public. “Both the criminal defendant who is wrongly convicted and the civil defendant facing a potentially bankrupting judgment hold on dearly to the promise of error correction in a higher court,” and a robust appellate system serves many

functions, “including correcting legal and factual errors; encouraging the development and refinement of legal principles; increasing uniformity and standardization in the application of legal rules; and promoting respect for the rule of law. In criminal cases, appellate rights play an additional role in guarding against wrongful conviction of the innocent.”⁵⁹

Adopting a further piecemeal approach by adding only a fragment of the civil caseload to the jurisdiction of the Court of Appeals would make the current system more confusing and illogical, and would fail to achieve the primary systemic goal of assuring individuals and businesses in the Commonwealth of the right to have a discrete level of three-judge appellate review in all cases (at the CAV) with a potential for a petition for writ of certiorari review in the Supreme Court thereafter on a discretionary basis. A recent survey of national thinking on the right to an appeal in both civil and criminal cases concludes:

Both civil and criminal appeals protect against arbitrary or erroneous application of the law; both promote the development and standardization of legal doctrine; and both assist in standardizing outcomes for similarly situated litigants. The risks of withholding appellate remedies are also more similar than different. On the criminal side, scholars have pointed out that because of the high error rate at trial, appeals are critical to maintaining institutional legitimacy: The degree of error reported, if left uncorrected because of the elimination of a right of appeal that is merely statutory, would be intolerably high and would delegitimize any punishment imposed through such an adjudicatory process. Others have made a similar legitimacy argument in support of civil appeals: As the framers of the Constitution recognized, the absence of a guaranteed appeal in cases involving substantial deprivations of property would undermine confidence in the judicial system; were there no appeal guaranteed for civil judgments, every man would have reason to complain, especially when a final judgment, in an inferior court, should affect property to a large amount.⁶⁰

It is clear that a major aspect of this proposal, particularly the extension of the right of appeal to civil cases, is tied to funding. As some of the comments received from the VTLA and others have suggested, enactment of a recast system of appellate jurisdiction would likely need to be undertaken during a General Assembly long session as part of the overall budget and implemented thereafter. The next budget session is 2022, but that cycle may be unrealistic given current fiscal realities. Thus, at least some of the comments received propose having a Legislative Study finalize the details of the appeal-of-right architecture for Virginia criminal and civil appeals by early 2023, such that it could be submitted for budget purposes prior to the 2024 budget session. The implementation would then become effective in July of 2024.

⁵⁹ Cassandra B. Robinson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1221 (2013).

⁶⁰ *Id.* at 1230 (citations, internal quotation marks and brackets omitted).

The Working Group does not purport to specify what steps the Legislature may deem most effective in considering and, we hope, implementing the appeal-of-right system for all cases in the Virginia court system. We do believe firmly, however, that this reform would remedy a fundamental defect in the Virginia appellate system.

The right to appeal at least once without obtaining prior court approval is nearly universal – within the universe bounded by the Atlantic and Pacific Oceans, Mexico and Canada [and] the right has become, in a word, sacrosanct.⁶¹

During the 1970s, when most American states were completing their appeal-of-right systems by creating intermediate courts of appeal, the writings of Professor Robert Leflar were often quoted by state legislatures and court system architects:

It is almost axiomatic that every losing litigant in a one-judge court ought to have a right to appeal to a multi-judge court. Most do not appeal, but the right is a protection against error, prejudice, and human failings in general. . . . Justice and good law are needed for little cases as well as for big ones, and even frivolousness is a matter of opinion. One appeal is enough, but one should be allowed in almost any case.⁶²

As noted at the outset of this Report, a similarly summary is found in the comment of the American Bar Association's Commission on Standards of Judicial Administration in support of a standard mandating appeal of right for all general criminal and civil cases: “The right of appeal . . . is a fundamental element of procedural fairness as generally understood in this country.”⁶³

Four decades after the broad recognition of these principles across the United States – leaving Virginia as the only state in the Nation that denies its individual citizens and businesses an appeal of right in criminal and civil cases – we believe it is time for Virginia to implement this reform.

Respectfully submitted,

Working Group Studying CAV Jurisdiction and SJ 47

⁶¹ Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L. J. 62, 63 (1985).

⁶² Robert Leflar, *Internal Operating Procedures of Appellate Courts* 4, 9-10 (1976).

⁶³ ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary at 12 (1977).

Appendix A
Comments by Legal & Business Groups

Organized 1888
Chartered 1890



The Virginia Bar Association

*The Virginia Bar Association is the independent voice of the Virginia lawyer,
advancing the highest ideals of the profession through advocacy and volunteer service.*

Executive Director
R. Yvonne Cockram
ycockram@vba.org
804-644-0041 Ext. 111

Board of Governors

President

Alison M. McKee
Kaufman & Canoles, P.C.
Virginia Beach

President-elect

Richard H. Ottinger
Vandevanter Black LLP
Norfolk

Immediate Past President

Richard E. Garriott, Jr.
Pender & Coward, P.C.
Virginia Beach

Chair

Board of Governors

Victor O. Cardwell
Woods Rogers PLC
Roanoke

Chair

Law Practice

Management Div.

Cliona Mary Robb
ThompsonMcMullan P.C.
Richmond

Chair

Young Lawyers Division

Madelaine A. Kramer
Sands Anderson PC
McLean

Chair-elect

Young Lawyers Division

Franklin R. Cragle, III
Hirschler
Richmond

Ryan W. Boggs

Dominion Energy
Richmond

Rosalie P. Fessier

TimberlakeSmith
Stauton

David J. Gogal

Blankingship & Keith, PC
Fairfax

Helivi L. Holland

City Attorney
Suffolk

Charles E. James, Jr.

Williams Mullen
Richmond

Hon. Cynthia D. Kinser

Kinser Law PLC
Pennington Gap

Benjamin D. Leigh

Atwill, Troxell & Leigh, P.C.
Leesburg

Eric H. Monday

Asst. City Manager
City Attorney

Martinsville

Rhodes B. Ritenour

Bon Secours Health System
Richmond

Robert E. Scully, Jr.

Blankingship & Keith, PC
Fairfax

W. Ryan Snow

Crenshaw, Ware & Martin, P.L.C.
Norfolk

Judicial Representative

Hon. Daniel E. Ortiz
Fairfax

Law School Representative

Dean Henry N. Butler
Arlington

Legislative Representative

Sen. Mark D. Obenshain
Harrisonburg

Government Attorney Representative

Travis G. Hill
Richmond

General Counsel

Eric J. Sorenson, Jr.
Woods Rogers PLC
Lynchburg

August 17, 2020

BY ELECTRONIC MAIL
SJ47study2020@vacourts.gov

Karl Hade, Secretary of the Judicial Council
Executive Secretary
Supreme Court of Virginia
100 N. 9th Street, Third Floor
Richmond, VA 23219

Re: SJ47 Study
Jurisdiction and Organization of the Court of Appeals of
Virginia

Dear Mr. Hade:

I am writing to provide the Judicial Council with the views of The Virginia Bar Association on SJ47. The VBA is Virginia's oldest and largest voluntary bar association. We trace our roots back to our founding in 1888 and have over 4,000 members across the Commonwealth in a variety of practice areas. While there is some difference of opinion among our members on certain aspects of the proposal, the consensus view of the association supports the expansion of the Court of Appeals' jurisdiction to provide one appeal of right in all cases.

Our members see this as an access-to-justice issue, and one implicating due process of law. Because most civil judgments are reviewable only on petition for appeal to the Supreme Court, and because the Supreme Court chooses to award so few appeals each year, a circuit court's rulings stand very little chance of reversal. That, our members posit, means that many erroneous circuit-court rulings go uncorrected.

1111 East Main Street, Suite 905, Richmond, Virginia 23219
804-644-0041 • Fax: 804-644-0052 • www.vba.org

Additionally, by statute all Court of Appeals opinions must explain the reasons for the decision. In contrast, over 90% Supreme Court appeals end with a two-sentence writ-refusal order that explains nothing about the Supreme Court's legal reasoning. This leaves our members powerless to provide a meaningful answer when an unsuccessful appellant asks, "Why?"

The experience of other states – specifically, of all 49 other states – proves that a one-appeal-of-right system is as workable as it is desirable. Some of our members expressed concern over added delays and costs associated with a two-tiered system. But the majority of our respondents found this concern to be minimal, outweighed by the value of having a reasoned decision in every appeal. On balance, the association sees this proposal as an important improvement in our justice system.

Based on our members' comments, I offer these additional observations:

- An expansion of the Court of Appeals' jurisdiction will be an empty change, and potentially counterproductive, if that court is inadequately staffed. The court will foreseeably require additional judges, and commensurate increases in its staff. For criminal appeals, the framework will require added funding for court-appointed counsel or the resurrection of the Appellate Defender's Office.
- Our members support the concept of regional courts, but oppose purely resident judges within regions. That is, we believe that all judges of the court should continue to sit in panels statewide. We also strongly support the court's retaining the interpanel accord doctrine. Virginia law should not vary from region to region.
- The principle underlying this proposal is that each litigant should have the right to one of-right appeal. While support within the association for this principle is strong as it relates to civil litigation, our members recognize that the need for change is less acute in the realm of criminal appeals. There, the Court of Appeals currently generates a reasoned decision on each petition for appeal, and a dissatisfied appellant may appeal by right to a three-judge panel.

Karl Hade, Secretary of the Judicial Council

August 17, 2020

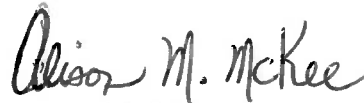
Page 3

- There is substantial support within the association for one means of reducing the cost of appeals: dispensing with the mandatory appendix. Most circuit courts possess the ability to produce searchable digital records. The appellate courts accordingly should be able to dispense with the printed appendix in most if not all appeals, and rely on the digital record. This benefit will be especially significant in criminal litigation and in complex civil appeals.

- Our members strongly perceive that the proposal will benefit the Commonwealth's benches and bar by providing far more procedural and substantive guidance in the form of published, citable opinions. Virginia's experience bears this out, as our body of jurisprudence in criminal law, domestic relations, and Workers' Compensation has greatly expanded since the advent of the Court of Appeals in 1985. We foresee a similar benefit to civil litigation if Virginia adopts this proposal.

The Virginia Bar Association endorses the proposal that Virginia join the rest of the states in providing a right of appeal to all litigants.

Very truly yours,



Alison M. McKee

President, The Virginia Bar Association

VIRGINIA
TRIAL LAWYERS
ASSOCIATION

919 EAST MAIN STREET
SUITE 620
RICHMOND, VIRGINIA 23219
(804) 343-1143 • (800) 267-8852
(804) 343-7124 fax
www.vtla.com

Elliott M. Buckner
President
7130 Glen Forest Drive, Suite 400
Richmond, VA 23226
ebuckner@breitcantor.com

Valerie M. O'Brien
Executive Director
vobrien@vtla.com

August 20, 2020

Karl R. Hade, Secretary of the Judicial Council
Executive Secretary
Supreme Court of Virginia
100 North Ninth Street, Third Floor
Richmond, VA 23219

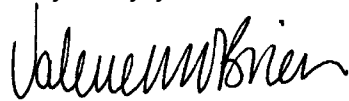
Dear Mr. Hade,

Please see the attached for comments from the Virginia Trial Lawyers Association on the jurisdiction and organization of the Court of Appeals of Virginia as sought in your Call for Comment from June 22, 2020.

Thank you for this opportunity to submit comments and we look forward to working with the Court and the General Assembly, along with the other stakeholders, on this important matter.

Best wishes for the remainder of your summer that all remain safe and healthy.

Very truly yours,



Valerie M. O'Brien

Attachment

The Virginia Trial Lawyers Association (VTLA) comprises nearly 2,000 lawyers and legal professionals – from diverse backgrounds, with diverse practices, and with diverse viewpoints – united by the common goal of promoting professionalism among the trial bar and access to justice throughout Virginia. Its membership is thus not of one mind when it comes to the proposal to provide for an expanded Court of Appeals jurisdiction to allow for an appeal of right in all civil cases. There are legitimate concerns about whether this change in Virginia practice would lead to less efficient administration of justice and would provide a systemic advantage to the well-funded interests that can sustain and often benefit from protracted litigation. Nevertheless, on balance, and conditioned upon addressing the issues raised below, VTLA writes in qualified support of the proposal to modernize appellate practice in Virginia to permit an appeal of right in all civil cases to the Court of Appeals of Virginia.

A. VTLA Cautiously Favors an Appeal of Right in All Civil Cases

1. Concerns About the Proposal

VTLA is primarily concerned about how this proposal would affect the length of time necessary to resolve disputes and about the costs of doing so. On the issue of time, there is a significant risk that an expanded appeal of right system would lead unsuccessful parties to appeal as a matter of course. This would be due both to a perception that there is no real cost to taking the chance on an appeal and to the reality that delay often favors the party who was unsuccessful in the trial court. Unnecessary, unmeritorious appeals would be a bane both to the pursuit of efficient justice and to the court system. And appeals becoming a tool for delay would cut against all of the perceived positives that are animating this proposal to begin with.

The issue of cost is also significant. Litigation already costs a great deal of time and money. Appeals, of course, only add to both. And while some litigants can sustain those increased costs with no real impact, the average citizen—which comprises the overwhelming majority of VTLA’s clients—usually cannot. Increased costs thus create a systemic advantage in favor of a privileged subset of civil litigants. A system that perpetuates, and even exacerbates, this inequity is intolerable.

2. Perceived Benefits of the Proposal

First, an expanded appellate system will promote development of the law. As it stands, there are many important questions that arise in civil practice for which there is no appellate direction that is on point. This causes a significant lack of predictability and consistency in the trial courts across the Commonwealth. A more robust appellate system with a greater number of reasoned decisions will close these large gaps in the Virginia case law.

Second, expanding appeals of right to all civil cases would, if done correctly, increase access to justice and confidence in the judicial system. In the current system there is a perception that, given standards of review and the increasingly small fraction of appeals that see the light of a review on the merits, many errors go uncorrected. At worst, this feeds a perception that only those with means or in the know can open the doors of the appellate courthouse sufficiently wide to obtain actual review on the merits. An appeal of right would give litigants from all walks of life the comfort of knowing that they received meaningful process and review of their causes. Similarly, receiving reasoned decisions and explanations in all cases would promote

confidence in the judicial system in that it would provide both the litigants and the public with a better explanation for why a given case produced a given result.

Third, VTLA anticipates that routing civil appeals to the Court of Appeals would likely decrease the average time for appellate resolution, with the added benefit of a reasoned decision. Currently, it takes 14-15 months (measured from the trial court's final judgment) for the Supreme Court to award an appeal, consider the case on the merits, and issue a written decision. In contrast, the Court of Appeals processes its of-right docket (principally Workers' Compensation and domestic-relations appeals) in about seven months. Under the proposed new system, only in the very few appeals where the Supreme Court awards an appeal for law-development purposes would the appellate process exceed the current 14-15 months.

B. Conditions of Implementation

To balance the very serious concerns about the proposal against the perceived positives, VTLA's support is qualified by the following conditions:

VTLA's support is contingent upon there being no further expansion of the availability of interlocutory appeal. One benefit of being so late to move to an appeal of right in all civil cases is that Virginia has the benefit of seeing what our sister states have done, both correctly and incorrectly. One place where many states have allowed the pendulum to swing too far is in the expansion of the availability of interlocutory appeals. This leads to piecemeal appellate resolution within a given case and gridlock up and down the appellate ladder. The Commonwealth should maintain its current system, where interlocutory appeals are the exceedingly rare exception to the rule.

VTLA further assumes that this proposal is limited to addressing how civil appeals are handled. If the process ends up changing how criminal appeals are handled in the Court of Appeals, there must be a provision for appropriate funding for indigent defense, including re-funding the Office of the Appellate Defender as a part of the Virginia Indigent Defense Commission.

To address the cost and delay concerns highlighted above, VTLA strongly favors the following changes:

- First, the Judicial Council should consider the tools available to dissuade unnecessary appeals, primarily bonding requirements and post-judgment interest. Based on VTLA's examination of other states, Virginia appears to be on the low end of the post-judgment interest scale and of appellate bonding requirements. VTLA thus encourages an increase to these mechanisms to prevent unnecessary appeals or appeals used only as a delay tactic.
- Second, to mitigate against increased litigation costs VTLA proposes doing away with the requirement of an appendix in appeals of right to the Court of Appeals. The appendix is usually a significant cost in an appeal, but given recent developments it is also unnecessary. Most, and perhaps all, circuit courts are now preparing and transmitting the records in PDF format with pagination. The record on appeal is already digitized, paginated, and easily searchable. In the vast majority of cases there is simply no compelling need to create a new document that contains some subset of the

record. This is especially so when most appellate judges in Virginia are now accessing the appendix electronically anyway instead of relying upon a hard copy. Eliminating the requirement of an appendix in every case would significantly decrease the costs of doing appellate business.

- Third, to address both the time and cost concerns, barriers should be put in place to discourage appeals to the Supreme Court in all but the most consequential cases. The mine run of civil appeals should end with a decision from the Court of Appeals. A petition for appeal to the Supreme Court—with its attendant increases in costs and time—should not be the default for the losing party in the Court of Appeals. It should instead be the minority of decisions from the Court of Appeals that prompts a petition for appeal to the Supreme Court. Thus, to discourage further appeals to the Supreme Court as a matter of course, there should be stepped-up bonding requirements and interest that kick in once the Court of Appeals has rendered its decision.

C. Structure and Composition of the Expanded Court

1. Regional organization

VTLA strongly opposes any move toward rigid regionalism within the Court of Appeals or any system that would result in only certain judges hearing cases from certain parts of the state. The benefits of development of the law and increased predictability and consistency would be undone by a system where there is not one coherent body of law for the entire Commonwealth, but rather several regional bodies of law developed by regionally segregated judges.

Relatedly, VTLA's support for this proposal is contingent upon maintaining a strong inter-panel accord doctrine. A precedential ruling of a panel of the Court of Appeals should be binding upon all future panels unless abrogated by the *en banc* Court or the Supreme Court. A panel hearing a case in one part of the state should not be free to rule differently than a prior panel from another part of the state on the same question of law.

Nevertheless, VTLA supports the Court's hearing argument at various locations across the Commonwealth, making the Court more accessible to the public. VTLA would suggest that there should be five court locations: (1) northern Virginia; (2) central Virginia; (3) eastern Virginia; (4) northwest/Valley; and (5) southwest Virginia.

2. Composition of the Court

VTLA's support for this proposal assumes that the expansion in jurisdiction will be accompanied by a commensurate expansion in staffing. There must be enough judges and judicial staff to handle the increase in appeals to the Court of Appeals without causing an increase in the average time for appellate resolution.

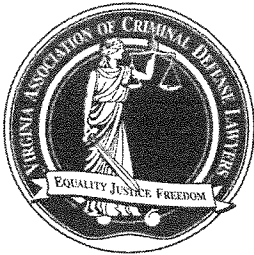
Related to the point made immediately above, VTLA's support for this proposal is contingent upon there being a significant increase in both the experiential and demographic diversity of the makeup of the Court. The makeup of the Court needs to reflect the makeup of the bar and the litigants that appear before it. That means the members of the Court must come from a wide array of personal, professional, and practice area backgrounds.

To determine the number of additional judges necessary, VTLA suggests looking at the percentage of cases filed in the United States District Courts for Eastern and Western Districts of Virginia that result in appeals to the Fourth Circuit. That percentage could then be applied to annual civil circuit court filings in Virginia to predict what the expanded Court of Appeals caseload would be. The number of additional new judges would be however many judges necessary to maintain the current approximate caseload, as it is VTLA's sense that the current makeup of the Court of Appeals is able to handle the current caseload effectively.

D. Implementation Schedule

A major aspect of this proposal is tied to funding. It would thus have to be enacted during a General Assembly long session as part of the overall budget, and implemented thereafter. The next budget session is 2022, but that seems unrealistically soon given current realities. Thus, VTLA proposes having a study group finalize the details by early 2023, such that it could be submitted for budget study prior to the 2024 budget session. The implementation would then become effective in July of 2024.

VTLA looks forward to working with the Court and the General Assembly, along with the other stakeholders, on this important step forward.



Virginia Association of Criminal Defense Lawyers

3126 W. Cary Street, #615, Richmond, Virginia 23221

Tel. (804) 262-8223 Fax (804) 262-8225

Website: www.vacdl.org

Email: vacdlawyers@gmail.com

August 19, 2020

By Email: SJ47study2020@vacourts.gov

Karl Hade, Secretary of the Judicial Council
Executive Secretary
Supreme Court of Virginia
100 N Ninth Street, 3rd Floor
Richmond, VA 23219

To Mr. Hade and the Judicial Council of Virginia:

The Virginia Association of Criminal Defense Lawyers ("VACDL") submits its comments on Senate Joint Resolution 47, which asks the Judicial Council of Virginia to study the jurisdiction and organization of the Court of Appeals of Virginia.

In principal, the VACDL enthusiastically supports the establishment of an "appeal of right" in all criminal matters. However, the VACDL recognizes that the need and desire to create a more equitable system of appellate jurisprudence cannot be achieved without advancing certain rights and providing necessary safeguards. Although well-intended, the implementation of an "appeal of right" in criminal case has the potential of increasing certain financial and logistical barriers, reducing or eliminating certain rights which are protected under the current system, or otherwise falling short of achieving the desired goal of advancing criminal justice reform.

Accordingly, the VACDL not only acknowledges the importance of an "appeal of right" in all criminal cases, but also cautions and advocates that the anticipated improvements in criminal justice, as envisioned, might be thwarted unless certain rights or procedures are improved or recognized, to include – at the very least -- the following:


1. An opportunity to present oral argument in every criminal appeal, whether it be in person or otherwise on the record;
2. A recognition that the contemporaneous objection "exceptions" as set forth in Rules 5A:18 and 5:25 -- "good cause shown" and "ends of justice" -- should apply to achieve fundamental fairness rather than act as an almost-absolute bar to relief on appeal;
3. Achieving equity and leveling the playing field by disallowing the Commonwealth from taking inconsistent positions on appeal (e.g. holding the

Commonwealth to the same burden as the defendant when it comes to the preservation of issues and legal positions in the court below);

4. The elimination of “technical” procedural defaults by establishing a mechanism to “correct” the record when the record is incomplete, (e.g. transcripts filed late, exhibits not included, etc.), as well as a procedure to “correct” the brief before any dismissal if the brief is technically deficient under the Rules of Court for one reason or another;
5. The elimination of an “appendix” as unnecessarily expensive and burdensome, especially when most records are in digital form;
6. An increased and reasonable time frame to identify issues to be raised and the time for filing the brief (i.e., beyond which is currently established for appeals of right). Note that this is especially important regarding either newly appointed or retained counsel;
7. A substantial increase in compensation for court-appointed representation, which is woefully inadequate by any standard;
8. The establishment (or re-establishment) of the Office of the Appellate Defender as part of the IDC to improve the overall quality of appellate advocacy; and,
9. Automatic review by the Virginia Supreme Court if there is error below (i.e., not merely “discretionary” review if there is error below).

As for the establishment of geographic circuits within the Court of Appeals, the VACDL supports this proposal with the understanding and acknowledgement that the number and diversity of judges will increase, including the necessity and justification for judges who have criminal defense experience and especially indigent defense experience.

The anticipated improvement of Virginia’s appellate system is well-intended and can substantially increase criminal justice if its implementation reflects a commitment to increase fairness and equity for all persons regardless of race, sexual orientation, gender identity, status, or financial well-being.

Sincerely,

Elliott B. Bender
VACDL President, 2020



August 20, 2020

By Electronic Mail

Karl Hade, Secretary of the Judicial Council
Executive Secretary
Supreme Court of Virginia
100 N. Ninth Street, Third Floor
Richmond, VA 23219
SJ47study2020@vacourts.gov

Virginia Chamber of Commerce Comments on SJ 47 (Court of Appeals of Virginia)

Dear Executive Secretary Hade:

Thank you for the opportunity to comment on the merits of SJ 47, which asks the Judicial Council to make recommendations on implementing an appeal of right to the Court of Appeals of Virginia in all criminal and civil cases, with appeal by certiorari to the Supreme Court of Virginia.

The Virginia Chamber of Commerce is Virginia's leading non-partisan business-advocacy organization that works in legislative, regulatory, civic, and judicial arenas to further long-term economic growth in our Commonwealth. With over 26,000 members, the Chamber represents virtually every business and industry sector in Virginia.

The Chamber supports creating an appeal of right in all civil and criminal cases

The Chamber wholeheartedly endorses the creation of an appeal of right in civil cases. Several considerations drive our enthusiastic support for this proposal.

First, the absence of an appeal of right in civil cases undermines the quality of justice delivered in Virginia by making the trial court's decision effectively unreviewable in cases important to the business community. As the framers of SJ 47 recognized, Virginia is now the only State in the United States without a guaranteed right of appeal in civil or criminal cases. Multimillion-dollar judgments in property, tort, and breach-of-contract disputes are currently reviewable only by a discretionary petition for appeal to the Supreme Court of Virginia. On average, only 15–20% of petitions for appeal are accepted in civil cases.¹ That means that the outcome in the trial court is very likely going to stand.

¹ COMMITTEE REPORT ON APPEALS OF RIGHT IN THE COURT OF APPEALS OF VIRGINIA at 2 (Boyd-Graves Conference Sept. 6, 2017), <https://tinyurl.com/y5gh77j9>.

Second, current law treats civil appeals in cases of importance to the business community less favorably than a handful of categories where an appeal of right in civil cases is now permitted: juvenile and domestic relations cases, worker’s compensation appeals, and appeals from administrative agencies. *See* Va. Code Ann. § 17.1-405. Whether intended or not, that differential treatment suggests second-class status for business cases compared to family-law matters, workers’ compensation disputes, and administrative procedure cases.

Third, the absence of an appeal of right in cases important to the business community means that only the Supreme Court of Virginia issues precedential authority in business-law matters. As a result, decisional law in Virginia is less-well developed than in jurisdictions like Delaware and New York in areas important to commerce, such as the Uniform Commercial Code, construction litigation, and corporate governance.

Creating an appeal of right in civil cases would address all three of these problems. Virginia would no longer be an outlier jurisdiction when it comes to appeals of right in civil cases. Unjust results in the trial court would have a better chance of being corrected on appeal. The appearance of second-class status for business cases would be eliminated. And the decisional law in business cases would increase, both because the number of business-law cases reaching an appellate court would increase, and because the Court of Appeals and the Supreme Court of Virginia would both issue authoritative opinions in business-law matters.

This structural improvement in the Commonwealth’s civil-justice system will be good for business in Virginia. It will not only improve the justice and fairness of outcomes in matters litigated in Virginia State court; it will improve Virginia’s national image and profile as a hospitable place to do business, thereby attracting more business to the Commonwealth, improving our economy, and providing jobs to Virginia residents.

Faith that an unfair judgment in a civil case can be corrected on appeal has long been a fundamental tenet of American jurisprudence. As Noah Webster wrote in 1787, defending the need for appellate jurisdiction in federal courts created under the United States Constitution:

[A]ppeals are allowed under our present confederation, and no person complains; nay, *were there no appeal, every man would have reason to complain*, especially when a final judgment, in an inferior court, should affect property to a large extent.²

Modern jurists and legal scholars agree. As Judge Coffin has written, “[t]he opportunity to take one’s case to ‘a higher court’ as a matter of right is one of the foundation stones of both our state

² Noah Webster, EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), *reprinted in* PAMPHLETS OF THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 53 (Paul Leicester Ford ed., 1888) (emphasis added), <https://tinyurl.com/yy4udj94>.

and federal court systems.”³ Indeed, the “underlying sentiment that there is (or must be) a higher authority which may be consulted to correct injustice has been ingrained in formal, governmental dispute-resolution systems throughout recorded history.”⁴ The American Bar Association has described the right of appellate review not as an optional feature, but as a “fundamental element of procedural fairness.”⁵

It is therefore especially odd and discomfiting that, in the Twenty First Century, Virginia alone fails to provide an appeal of right in civil cases.

An appeal-of-right system will not lead to excessive appeals. Statistical surveys in our sister jurisdictions indicate that “only approximately fifteen percent of state-court civil cases are appealed.”⁶ Nor has the availability of an appeal of right unduly favored business interests. In sister jurisdictions, for instance, “[p]laintiffs and defendants appealed trial-court judgments at a nearly equal rate.”⁷

Nonetheless, some may oppose appeals of right in civil cases on the ground that it would marginally increase the costs to litigants and prolong the ultimate resolution of litigated cases. But that objection is unpersuasive when one considers that it has been rejected in federal practice and by every one of Virginia’s sister jurisdictions. No one advocates eliminating civil appeals of right in federal court or in other State court systems. To be sure, a case could last longer and cost more with an appeal of right to an intermediate court and potential certiorari review by the highest court. But as in other jurisdictions, that marginal cost and delay are more than offset by the improvement in the justice and fairness of outcomes. We agree with those legal experts who have observed that “when weighed against the risks of erroneous and uncorrectable rulings . . . and diminished faith in the judicial system, the costs of guaranteed review are costs worth shouldering.”⁸

Organizing the Court of Appeals into Four Geographic Circuits

SJ 47 also requests comment “on organizing the Court of Appeals into four geographic circuits, approximately encompassing central Virginia, eastern Virginia, northern Virginia, and western

³ Frank M. Coffin, *THE WAYS OF A JUDGE; REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 16 (1980).

⁴ J. Clark Kelso, *A Report on the California Appellate System*, 45 *HASTINGS L.J.* 433, 433–34 (1994).

⁵ AM. BAR ASS’N, *JUDICIAL ADMIN. DIV., STANDARDS RELATING TO APPELLATE COURTS* § 3.10, at 18 (1994).

⁶ Cassandra Burke Robertson, *The Right to Appeal*, 91 *N.C. L. REV.* 1219, 1226 (2013).

⁷ *Id.*

⁸ *Id.* at 1223.

Karl Hade, Secretary of the Judicial Council

August 20, 2020

Page 4

and southwestern Virginia.” The Chamber does not oppose that idea. Having regional proximity for the hearing of an appeal would reduce the burden of travel for litigants.

But the Chamber recommends two procedural safeguards when implementing this part of the proposal.

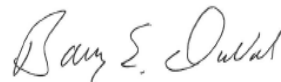
First, the judges of the Court of Appeals should continue to sit on panels throughout the Commonwealth, rather than sitting only in the geographic region in which they reside. The practice of judges rotating in panels throughout the Commonwealth—as they do now—will improve consistency across panels, broaden the judges’ experience, and reduce the potential for reputational valences attaching to regional circuits.

Second, the convenience that geographic circuits will provide litigants should not alter the well-established “interpanel accord doctrine,” under which a published decision of one panel of the Court of Appeals becomes precedential and “cannot be overruled except by the Court of Appeals sitting en banc or by the Virginia Supreme Court.” *Butcher v. Commonwealth*, 838 S.E.2d 538, 541 n.6 (Va. 2020) (quoting *Clinchfield Coal Co. v. Reed*, 40 Va. App. 69, 73 (2003)). Allowing geographic circuits of the Court of Appeals to disagree with one another could generate confusion. It could lead to different legal rules depending on where the litigants reside. And having different legal rules in different geographic regions would then encourage litigants to forum shop in choosing where to bring a case, or in seeking to transfer venue to a geographic circuit with more favorable law. Accordingly, the creation of geographic circuits should not alter the existing rule under which the first panel’s published opinion on a legal question is precedential until overruled by the Supreme Court of Virginia or by the full Court of Appeals sitting en banc.

* * *

In short, the Chamber strongly supports the creation of an appeal of right in civil cases. We believe that it will improve the delivery of justice in Virginia and make the Commonwealth an even more attractive jurisdiction in which to conduct business and expand opportunities and jobs for Virginians.

Best regards,



Barry DuVal
President & CEO



August 17, 2020

Judicial Council of Virginia

SJ47 Study

We write to support implementation of an appeal of right from the circuit court to the Court of Appeals in criminal cases, with further review by the Supreme Court available thereafter on a petition basis. This support is contingent on specific procedural protections, as discussed below. We also write to express concerns about organizing the Court of Appeals into four geographic circuits.

The thoughts expressed are influenced, in part, from a survey of the Indigent Defense Commission's (IDC) twenty-five public defender offices. Specifically, each public defender office's appellate supervisor was invited to share an opinion on these possible appellate changes.

Appeal of Right to the Court of Appeals

Minimum Requirements for an Appeal of Right

It is crucial to define an appeal of right. Too often, the legal community uses the word "appeal of right" but conceptualizes the details differently.

Any appeal of right, specifically in criminal cases, must provide:

- A meaningful, merit-based review by, minimally, three judges as to issues raised by the appellant
- A right to an oral argument before the panel of judges
- An opportunity for the appellant to file a reply brief (without waiving oral argument) following the appellant's opening brief and the appellee's brief
- An order or opinion by the Court explaining its rationale for affirming or reversing the circuit court

To effectuate this appeal of right in criminal cases, briefly, what should be done is elimination of the current writ stage. There would be no need for Rules of the Supreme Court, Parts 5A:12 through 5A:15A. Instead, appellants would generally follow the current merit stage, as outlined in Rules 5A:16, 5A:17 (unless indigent), 5A:19-23, 5A:26, 5A:28, et seq. Rather than filing a petition for appeal, an appellant would file an



opening brief. Thereafter, instead of filing a brief in opposition, the appellee would file its brief on the merits. The appellant would have the opportunity to file a reply brief. Following oral argument by both parties, the Court would issue its judgment with supporting rationale and authority. Rehearing proceedings on the merits could remain unchanged.

Benefits of an Appeal of Right

The above conceptualization of an appeal of right would further the General Assembly's recognition, as articulated in Senate Joint Resolution No. 47, that criminal defendants must have "a bona fide right to appeal" that is "part of fundamental procedural due process that has its ultimate roots in the Virginia Declaration of Rights." As noted, Virginia is an outlier compared to other jurisdictions in not having an appeal of right. Given the liberty interests at stake for criminal defendants, there should be at least one level of review on the merits of the issues.

The appellate system would benefit from the efficiency of all appeals following the same procedure in the Court of Appeals. Implementation of the current merit stage as the new appeal of right would be relatively easy as appellate practitioners are already familiar with the current merit process. Additionally, it would save time for the parties and the Court in about 10% of criminal appeals which now go through two stages, *i.e.* the writ and merit stages.

To further streamline the process and with the additional benefit of cost-savings, the requirement of an appendix, as described in Rule 5A:25, can be removed. Instead, an appeal of right can cover review of the entire record. Given that the majority of records from the circuit courts are now digital, instead of paper, and that the parties cite to the exact pages of the record in their pleadings, an appendix is no longer necessary. In a single criminal appeal this can save thousands of dollars. Currently, printing companies prepare the appendix, and, for indigent appellants, the Supreme Court directly reimburses the printing companies.



Response to the Supreme Court's June 11, 2018 Report Regarding Appeals of Right

The Current Writ Procedure is NOT a De Facto Appeal of Right

The existing writ process is NOT a *de facto* appeal of right, despite that some in the legal community assert that criminal defendants currently have an appeal of right to the Court of Appeals even if we do not refer to it as such. A June 11, 2018 report from a working group put together by Chief Justice Donald Lemons of the Supreme Court to study the jurisdiction of the Court of Appeals stated that it was “unanimous in concluding that the *reality* of an appeal of right is already being provided by the [Court of Appeals]” in criminal cases. This conclusion, and the rationale supporting it, is in error. It is important to note that no public defenders or representatives from the IDC were part of this working group.

The report states that “the operation of the criminal appellate process provides essentially an appeal of right at present, since no appeal is denied without a statement of reasons.” Currently, one judge of the Court of Appeals reviews a petition and issues a per curiam order granting some or all of the assignments of error or explaining the reasons for denying or dismissing any assignments of error. This per curiam order is a final judgment appealable to the Supreme Court.

This process is not the equivalent to an appeal of right. First, only one judge issues the order. The order does not even state which judge from the Court of Appeals made the decision. Second, the reasoning in the per curiam order for denial or dismissal of issues raised by the appellant is inadequate compared to the reasoning stated in opinions following merit review. There is also a noticeable and wide variation of quality in the per curiam orders. There have been instances where the per curiam order was patently wrong, such as erroneously stating that a necessary transcript was not timely filed. Other times, the order’s reasoning is poorly researched and written. Certainly, a relatively anonymous order lacking in detail is not the equivalent to an appeal of right. Third, per curiam orders do not carry the same persuasive or precedential value as merit opinions. There is also a lack of transparency with per curiam orders. While unpublished and published opinions are posted online, per curiam orders are not.

The working group’s report points to the “automatic availability of review by a three judge panel” and states that this “underscores the opportunity for consideration of the merits of the claimed errors in every case.” While there is a three-judge review process, it is not on the merits of the issues. It is a *rehearing* process that considers any error in the per curiam order’s denial of the petition for appeal. The three-judge panel does not



directly review the trial court's judgment on the merits. See Rule 5A:15A (explaining that the request for a review by a three judge panel must, in 350 words or less, include a "statement identifying how the one-judge order is in error").

The report states that "[t]he fact that only half of the one-judge dispositions rendered under the present system lead to a request for three-judge reconsideration demonstrates in part that the petitioning parties recognize that their claims have been substantively reviewed." This reasoning is pure speculation. In its training programs with public defenders and private court-appointed counsel, the IDC strongly encourages attorneys to file three-judge demands frequently. When there are discussions as to why attorneys are not more often filing these pleadings, the common response assumes that the three-judge panel will just defer to and "rubber-stamp" the one-judge order, "wasting time" and leading to the same outcome.

The Availability of Oral Argument Must Not Be Reduced or Eliminated

The working group's report determined "that appeal-of-right review does not necessarily require oral argument in all or even most cases." The conclusion was prompted by the concern "that managing a larger docket would continue to put pressure on the capacity of the Court of Appeals to hear oral argument in some segments of its case load."

The right to oral argument is vital. Currently, appellants have a right to oral argument in both the writ and merit stages of an appeal. It makes no sense that criminal defendants in Virginia would lose rights under an appeal of right system. Jurists have expressed that oral argument makes a difference in their decision in some cases. Oral argument gives the parties an opportunity to directly address jurists' questions that may not have been discussed on the briefs. Oral argument is also important as to public perception of a fair appellate process. Criminal appellants who are out on bond and family members of those incarcerated are often present at oral argument.

Possible Exceptions to Appeals of Right

If data legitimately suggests that appeals of right will strain resources, one possible solution is to carve out a statutory exception for an appeal of right. Specifically, appeals following guilty pleas and revocation of a suspended sentence or probation violations—where there are limited grounds to appeal—can be required to go through a writ process in the Court of Appeals. While the majority of appeals in these types of cases are highly unlikely to prevail, there are some that result in merit opinions and even reversals. For example, the due process right to confrontation during probation violations has been



discussed in merit opinions throughout recent years. Providing for a writ process allows the majority of guilty plea and revocation appeals to be resolved fairly quickly, but provides a safety net for an award of an appeal in those rare cases that deserve consideration on the merits.

Another possible exception to appeals of right are those where counsel finds the client's appeal to be without merit. These types of appeals are commonly referred to as *Anders* petitions. The procedure can remain the same, as expressed in *Anders v. California*, 386 U.S. 738 (1967) and its Virginia progeny as well as Rule 5A:12(h).

Conclusion Regarding Appeal of Right

Any appeal of right must improve the current appellate system. An appeal of right that looks like the current merit stage in the Court of Appeals accomplishes this goal. The General Assembly, in Senate Joint Resolution No. 47, recognizes that "a lack of appellate review increases the likelihood of judicial mistakes, wrongful convictions, and unjust outcomes." Re-defining our current system and calling it an appeal of right, as suggested in the Supreme Court's 2018 report, or eliminating protections, such as oral argument, would be moving away from the General Assembly's stated goals.

Organization of the Court of Appeals into Geographical Circuits

The current structure of the Court of Appeals is already divided into four regions. For example, oral arguments are held regionally from where the appeal originated. Judges of the Court will travel and hear appeals from all over the Commonwealth. A change to a circuit system would have only judges from a particular region hearing all of the appeals originating from that region.

An important question is what would happen to the current interpanel accord doctrine, where a panel decision is binding on other panels in the Court of Appeals. Under the proposed changes, would an appellate circuit court's decision be binding on other circuits? There are concerns whether the answer is yes or no.

If an appellate circuit court's decision is not binding on other circuits, the primary concern of a circuit system is inequitable results depending on where you live in the Commonwealth. There could be similar cases with different outcomes. While the Supreme Court may choose to hear a case and clarify a circuit split, in the meantime, there is inequity and inconsistency in the law. And, there is no guarantee if, or when, the Supreme Court may grant a petition on the divisive issue. There are also questions



whether the Supreme Court's decision would be retroactive, providing any relief to those affected by the now overruled decision. Alternatively, if the answer is yes, the interpanel accord doctrine applies, then one geographical part of the Commonwealth will be interpreting and applying the law for the entire Commonwealth.

A strength of the current system is the rotation of judges. There is a potential for bias, even unintentional, if the same three judges, from a particular region, decide all the appeals in that same region. Minimally, there needs to be a rotation of judges within a circuit. This may not be feasible given resources. Ideally, even on a larger scale of the entire Commonwealth, there should be appellate judges with a diversity of backgrounds.

Overall, public defenders have not expressed complaints about the current organization of the Court of Appeals. It remains unclear how a reorganization into circuits would benefit our clients and public defense as a whole.

Thank you for the opportunity to comment on the jurisdiction and organization of the Court of Appeals.

Sincerely,

David Johnson
Executive Director

Catherine French Zagurskie
Chief Appellate Counsel



VAELA

Virginia Academy of Elder Law Attorneys

Virginia Chapter of the National Academy of Elder Law Attorneys

2020-2021

Board of Directors

August 17, 2020

President

Angela Griffith
Fairfax

Karl Hade, Secretary of the Judicial Council
Executive Secretary Supreme Court of Virginia
100 N. Ninth Street, Third Floor
Richmond, VA 23219

Vice President

Vera Golenzner
Fairfax

Treasurer

Stephen Taylor
Virginia Beach

Dear Secretary Hade:

Secretary

Samantha Fredieu
Fairfax

The Virginia Academy of Elder Law Attorneys (hereinafter “VAELA”) consists of approximately two hundred attorneys specializing in estate practice, elder law, and guardianship/conservatorship proceedings. Therefore, we will primarily limit our comments to these areas of practice, and the effects that expansion of the jurisdiction of the Virginia Court of Appeals could have on our clients.

Past President

Christopher McCarthy
Midlothian

Guardianship and Conservatorship Actions

As an initial matter, Circuit courts can modify guardianship matters at any time after the final order is entered pursuant to Virginia Code Section 64.2-2012. *As practitioners who have been handling cases of this nature for many years, it has been our experience that the current method of review for guardianships, whereby parties can seek modification of orders in circuit court at any time, has been working.*

Costs

With regard to guardianship and conservatorship matters, in particular, we are very concerned that expansion of the Court of Appeals’ jurisdiction could have some unintended and very adverse effects on alleged incapacitated adults, especially concerning fees and costs. The Respondent, an alleged incapacitated person, ends up bearing not only his or her own attorney’s fees and costs, but also those of Petitioner’s counsel, the Guardian *ad litem*, and often, of relatives who dispute the proposed guardianship and file cross-petitions. The Commonwealth will pay for certain fees if Respondent is indigent, but if the Respondent has an estate, this can be a very heavy financial burden. Adding the expenses of an appeal of right to the Court of Appeals could make a guardianship proceeding even more costly should one party choose to appeal. Moreover, these are resources that would be better used to pay for the care of the incapacitated party.

If any party in a guardianship matter can appeal to the Court of Appeals, this means that not only could an estate incur the expenses of the appeal itself, but the trial process would become more expensive. Attorneys would need to have a court reporter present at all proceedings and make sure that a proper record is created for appeal, with proffers made and objections noted and preserved.

It is also worth noting that under the current system where one must petition for appeal at the Supreme Court of Virginia, the costs for appeal can be

Directors

Scott Alperin
Harold Barton
Stephen Burns
Katherine Charapich
Ross Hart
Melanie Lee
Amy McCullough
Gretchyn Meinken
Jesci Norrington
Natalie Page
Hanna Rodriguez
Catherine Schott Murray
Ari Sommer
Matthew Sunderlin
Edward Zetlin

VAELA

**PO Box 178
Pilot, VA 24138**

VAELA.org

(757) 585-3989

somewhat contained. The Court can narrow the scope of the appeal, thereby containing some expenses, by granting only part of a set of assignments of error, or by correcting an error using a *per curiam* order.

Many guardianship cases involve families with limited means, and it is not uncommon for parties to participate *pro se*. Under these circumstances, motions for review and modification in circuit court are more accessible and less expensive than an appeal.

In addition, one should be aware that the vast majority of guardianship cases are uncontested. Of the small subset which are contested, many which involve issues of longstanding family dynamics. Very often, the party appealing would not be the alleged incapacitated person but rather a disgruntled family member. Given that the estate of the incapacitated person bears most of the legal fees, the threat of nuisance appeals draining the estate is very real. Practitioners specializing in this area of law generally try to contain their costs, and appeals of right to the Court of Appeals could make this dramatically more difficult.

Finality of Orders

The finality of orders can be of pressing concern in many guardianship matters. Some cases come before the circuit court on an emergency basis, and concern situations where medical treatment decisions must be made very quickly for a person unable to give consent, or may involve situations where the local Department of Social Services needs to assist a victim of abuse and/or neglect. In these types of cases, the most likely appellants would be alleged abusers or disgruntled family members, and the availability of an automatic appeal of right on these guardianship orders could disrupt treatment and services for a very vulnerable population of the elderly and disabled.

Based upon our experience, we are also concerned that facilities (hospitals, nursing homes, and assisted living) might interpret an appeal to mean that the guardianship is not final, and limit the ability of guardians and other agents to make critical decisions for their wards.

Impact on the Respondent

One cannot ignore that contested guardianship cases involve family conflict that can be very stressful for the Respondent. Allowing the litigation to continue through the appeal of right process will prolong the stress borne by the Respondents, with the adverse health consequences this often brings. Very often, persons who are the subject of a guardianship action are already in fragile health.

For the reasons listed above, we strongly disfavor expanding the jurisdiction of the Court of Appeals of Virginia to include automatic appeals of right in adult guardianship and conservatorship matters.

Estate Litigation

When considering the idea of expanding the jurisdiction of the Court of Appeals of Virginia to cover appeals of right from estate litigation, our recommendations are somewhat different. Anecdotally, it appears that estate litigation has been on the rise in recent years.

We have observed that there are relatively few reported estate cases, though the Supreme Court of Virginia has been taking more and more appeals in this area of law in recent years. Increasing the body of reported law regarding trusts and estates may benefit practitioners as we advise our clients on how to handle difficult estate issues, such as settling debts in an insolvent estate or dealing with disputes among beneficiaries. However, many estate disputes tend to involve very fact specific situations, so a right of appeal in estate cases may

increase burden and expense to the courts but provide only very limited utility to practitioners.

Estate litigation differs from guardianship litigation in two key respects. First, once the circuit court's order becomes final under Rule 1:1 of the Rules of the Supreme Court of Virginia, parties cannot seek review and modification in the circuit court as they can with guardianship orders. If there are issues with the circuit court's ruling that need to be addressed, the matter must be appealed. For this reason, increasing access to appeals could be positive for our clients, and moreover, for the body of law.

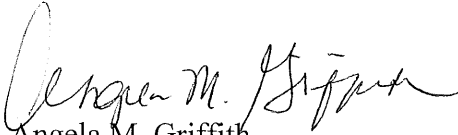
Secondly, while the estate ends up bearing some costs of litigation in an estate dispute, it generally is not taxed with the fees and costs of every party to the dispute. VAELA still has concerns about the increased expense of appeals to an estate, or the possibility of nuisance appeals by a disgruntled beneficiary, but it is not of the same magnitude as our concerns regarding guardianship and conservatorship expenses, outlined above, where the incapacitated Respondent is forced to spend money on legal fees instead of their own care needs.

Division of the Court of Appeals into Four Geographic Circuits

In recent years, the Court of Appeals of Virginia has held court in locations covering different regions of the Commonwealth. It is our understanding that each judge normally sits in each location at least once per year, and that each judge serves on a panel with every other judge at least once during the year. The current system helps ensure at least some uniformity of decisions across the state.

Division of the court into four circuits would undermine this system, and we are concerned that this could increase division within the Commonwealth. The possibility of legal precedent tending one way in northern Virginia, while looking somewhat different in central Virginia, for example, would increase the complexity of legal interpretation for practitioners in any area of law. Estate law and elder law would be no exception to this. Having differing regional bodies of legal precedent would make advising fiduciaries more difficult than it already is. In addition, creating regional courts of appeal also raises the possibility of parties trying to engage in forum shopping. We see no good reason to create four regional circuits when the current system of organization for the Court of Appeals is already working.

Thank you for the opportunity to provide comment on this matter. VAELA would be pleased to provide any additional information or further explanation of the issues outlined above.


Angela M. Griffith
President



“Virginia’s Advocates for Equal Justice”

P.O. Box 12301 | Richmond, Virginia 23241-0301 | www.olddominionbarassociation.com

Karl Hade
Secretary of the Judicial Council
Executive Secretary
Supreme Court of Virginia
100 N. Ninth Street, Third Floor
Richmond, VA 23219

Re: ODBA Comments to Senate Joint Resolution 47

Dear Mr. Hade:

The Old Dominion Bar Association would like to submit the following comments regarding Senate Joint Resolution 47.

We recommend implementing an appeal of right in all cases decided by and appealed from the circuit courts to the Court of Appeals. Virginia is the only state that does not have this right. We recommend further review by the Supreme Court on a certiorari basis.

We highly recommend a three (3) judge panel for initial review. A three judge panel ensures greater impartiality. Additionally, we recommend that the attorney general’s office handle appeals. We recommend that all judges hear all matters whether civil or criminal—no divided divisional court of appeals. We recommend an increase in judges on the Court of Appeals with a minimum of 25 to start. The four geographical circuits is highly recommended.

This process should began immediately. We propose implementation of criminal cases first. Civil cases should follow soon thereafter. Consistent review and monitoring of the implementation of this system should occur during the first three years with periodic system monitoring thereafter.

We recommend an increase in minorities on the Court of Appeals. People of color make up the majority of cases appealed. We highly recommend a diverse court.

ODBA special committee on Senate Joint Resolution 47 respectfully submit our comments.

With best regards,

Bruce C. Sams
ODBA President

From: [Brett Vassey](#)
To: [SJ47 Study 2020](#)
Subject: Virginia Manufacturers Association Comments on SJ 47 (Court of Appeals of Virginia)
Date: Friday, August 21, 2020 4:26:41 PM

EXTERNAL EMAIL

THIS MESSAGE ORIGINATED FROM AN EXTERNAL ADDRESS. USE CAUTION CLICKING ON ANY LINKS OR DOWNLOADING ANY ATTACHMENTS

August 20, 2020

By Electronic Mail

Karl Hade, Secretary of the Judicial Council
Executive Secretary
Supreme Court of Virginia
100 N. Ninth Street, Third Floor
Richmond, VA 23219
SJ47study2020@vacourts.gov

Virginia Manufacturers Association Comments on
SJ 47 (Court of Appeals of Virginia)

Dear Executive Secretary Hade:

Thank you for the opportunity to comment on the merits of SJ 47, which asks the Judicial Council to make recommendations on implementing an appeal of right to the Court of Appeals of Virginia in all criminal and civil cases, with appeal by certiorari to the Supreme Court of Virginia.

The Virginia Manufacturers Association (“VMA”) is the only statewide association exclusively dedicated to manufacturers and their allies. Virginia’s more than 5,000 manufacturers employ over 200,000 individuals, contribute \$42 billion to the gross state product, and account for over 80% of the state’s exports to the global economy.

The VMA strongly endorses the creation of an

appeal of right in all civil cases. The VMA joins in and adopts the comments on SJ 47 submitted by the Virginia Chamber of Commerce (the "Chamber"). For all of the reasons stated by the Chamber, the VMA offers its enthusiastic support for this proposal.

Providing an appeal of right in all civil cases is critical for at least three reasons. First, it will improve the quality of justice delivered in Virginia with respect to business suits, by ensuring that appellate review is available of all trial court decisions. Second, it will provide business cases with the same judicial review as provided in juvenile and domestic relations cases, workers compensation appeals, and appeals from administrative agencies, so that business cases are not perceived as receiving "second-class" treatment. Third, it will lead to more developed decisional law in Virginia in areas important to commerce, because precedential authority will be issued not just in the rare Virginia Supreme Court case, but from the Court of Appeals as well.

For these reasons, and as further discussed in the comments submitted by the Chamber, the VMA strongly supports the proposal to provide an appeal of right in all civil cases.

Best Wishes,

Brett

Brett A. Vassey
President & CEO
Virginia Manufacturers Association
www.vamanufacturers.com
804.643.7489, ext. 125

APPENDIX B

COMMENTS FROM INDIVIDUALS (alphabetical by commenter)

From: Patrick Blanch
Subject: Comments on SJ47
Date: Tuesday, June 30, 2020 3:14:36 PM

First, some background about me: I am a practicing criminal defense trial and appellate attorney in Fairfax County. I have been in practice for 14 years and have represented approximately 15-20 clients on appeals in the Virginia appellate courts, and I have lectured at continuing legal education seminars on appellate matters. I have represented clients on appeal in both a retained capacity and in a court-appointed capacity.

1. **Appeal of right**

I do not presently support creating an appeal of right to the Court of Appeals of Virginia. There are at least two significant reasons why an appeal of right is not the best solution to improve appellate review of criminal cases. First, it would drain an enormous amount of funding for very little gain, and there are other places such funding would be more effectively directed. Second, a more limited solution is available to effectively increase the quality of review that the Court of Appeals gives to Petitions.

With respect to funding, it is helpful to consider where the costs lie in an appeal. Most defendants in circuit court are represented by court-appointed attorneys. Therefore, the appeals would also be done by court-appointed attorneys. That means that the government pays the cost of the transcripts, appendix, and briefs.

Drafting and filing a Petition for appeal is far less expensive than fully briefing an appeal. To file a Petition, a transcript usually must be obtained, which is probably \$1500-\$2500 per day of a jury trial. An average jury trial is probably about 2-3 days. That's already a lot of money. However, those costs double, or more, when an appeal is granted and the case must be formally briefed for the Court. The attorney must assemble an appendix, write briefs, and have the briefs properly bound.

The appendix and brief binding are done by private companies who charge by the page for these services. It is not unusual for these fees to be \$5000 or more, just for the assembly and service of documents necessary for the Court to rule on the case at that stage.

Creating an appeal of right in the Court of Appeals would therefore cause a substantial increase in the costs associated with court-appointed representation. The government would either need to increase the budget for the court reporters and appendix/brief service providers, or redirect additional funding from other court-appointed work. Either option is a less than ideal use of such funds, particularly when one considers how much a court-appointed attorney gets paid for an appeal. 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.

The court appointed appellate attorney is often the defendant's trial lawyer. Most of these trial lawyers have no prior appellate experience. These attorneys often do not know the rules for appeals, nor do they know how to properly frame arguments on appeal. As a consequence, a large portion of the criminal case law made in Virginia is the product of an inexperienced and underfunded trial lawyer representing the defendant, while the Commonwealth is represented by career appellate attorneys with endless resources at the Office of the Attorney General. It is no surprise that the Commonwealth wins a disproportionate share of criminal appeals. It is also not surprising that many defendants whose appeals have merit lose in the Court of Appeals anyway¹ because their lawyer does not know the rules.

A better use of the money that would be appropriated to pay for an appeal of right would be to pay court-appointed appellate attorneys a reasonable fee. This would allow experienced appellate attorneys to take court appointed appeals without fear of damaging their business. No one will get rich doing this work, but it would not be cost prohibitive either. Improving the quality of court- appointed criminal appellate lawyers is the first and most necessary step toward creating a truly balanced adversarial appellate forum. It would actually improve the quality of the law being made in Virginia. It is an admirable goal to create an appeal of right in Virginia. That goal should be strongly considered only after other priorities have been met. An appeal of right is not a panacea. In fact, with court-appointed attorney pay for appeals in its present state, creating an appeal of right would likely exacerbate the current imbalance in the quality of adversarial representation in Virginia's appellate courts by overwhelming the few experienced appellate attorneys who still take court- appointed appeals.

There is a more modest way to improve the quality of the Court's review of Petitions. It is important to first consider how appeals are reviewed. Presently, when a petition for appeal is filed at the Court of Appeals, a single judge (or possibly a law clerk) reviews the Petition to determine whether it has merit. Many petitions simply do not have merit. This is a function of the fact that court-appointed attorneys must file an appeal if their client directs them to do so, even if the appeal meritless or frivolous. During this review by a single judge, most of these "bad" cases are sifted and the Petitions are denied. Of course, the Court sometimes denies petitions that have merit. Presently, an appellant can demand a review of the first judge's decision by a panel of three other judges, any of whom can award an appeal, and in this way some mistakes made by the single judge review are caught and corrected.

A better way to improve review of Petitions is to require three-judge review at the first stage, and retain the ability to demand another panel of three judges. It is less

¹ This is an old problem, and our appellate courts have been regularly pointing it out for nearly half a century. See *Towler v. Commonwealth*, 216 Va. 533, 534 (1976) ("...we lament the numerous instances in which we have been forced to dismiss appeals because of failure to observe the rule's requirements."); *Bartley v. Commonwealth*, 67 Va. App. 740, 746 (2017) (same).

likely that a group of three judges reviewing a petition in the first stage would make the same mistakes that a single judge is likely to make without colleagues involved to compare and review work. This would create more work for the Court, but certainly less than would be created by an appeal of right. It would require more judges to be added to the Court, but not as many as would need to be added to accommodate an appeal of right.

2. **Reorganization of the Court of Appeals**

With respect to reorganizing the Court of Appeals into geographic circuits, I don't believe it is strictly necessary, but it would surely have many benefits. Judges and the litigants would have less travel, and the Commonwealth would have less cost associated with travel including the expenses the Commonwealth pays related to travel and lodging for judges, clerks, and court-appointed attorneys. There would be increased familiarity and, presumably, increased respect both for the Court and attorneys. This would require a substantial staffing increase. I expect there would need to be 4-6 judges in each circuit, as opposed to the 11 total that presently exist. I base this number on the present system which requires at least four judges to be available for review of petitions.

These changes should be made as expeditiously as possible.

Patrick M. Blanch

Zinicola, Blanch, Overand & Hart, P.L.L.C. Fairfax, VA 22030

From: **Brandenstein, Henry F.**

Subject: Senate Joint Resolution 47

Date: Tuesday, August 18, 2020 12:35:26 PM

I have been admitted to practice in Virginia since 1981.

I am very much in favor of implementing an appeal of right in all cases from the Virginia circuit courts to the Court of Appeals. The judicial system in Virginia is generally excellent. But as the number and complexity of the matters presented at the circuit court level has continued to grow the timeliness, quality and consistency of the system has been challenged. Having an intermediate court with broad jurisdiction over all matters would help improve and maintain the quality of the system and offer additional guidance to circuit court judges and litigants concerning the proper interpretation and application of Virginia law. It also would reduce the burden upon the Supreme Court if it were permitted to select which petitions are afforded the opportunity to present oral argument and allow the Court to more quickly accept and address cases it deems important.

Establishing four geographic circuits for the Court of Appeals is a good concept

but will require careful planning. Would a decision from one circuit be binding upon a different circuit? Would circuit court judges sometimes be designated to sit on appeals court panels?

Thank you for the opportunity to comment.

Henry F. Brandenstein, Jr., Esq. | Venable LLP
8010 Towers Crescent Drive, Suite 300, Tysons, VA 22182

To: Judicial Council of Virginia
From: **Hamilton Bryson**
Re: Va. 2020 SJ47
Date: 25 June 2020

I was recently sent a request to comment on the Va. 2020 SJ47 by the Richmond Bar Association, of which I am an active member.

As a preliminary disclaimer, I am also a professor of law at the University of Richmond, a member of the Virginia State Bar, the Virginia Bar Association, the Boyd-Graves Conference, and the Advisory Committee on Rules of Court. I do not practice law, and will receive no financial advantage, directly or indirectly, from the proposals of SJ47. My interest in this is as an academic lawyer and a long-time student of Virginia law.

As a general principal of jurisprudence, it has long been believed that the due process of the law is to be served by one fair trial and one fair appeal. Therefore, I very much favor increasing the jurisdiction of the Virginia Court of Appeals, as suggested by SJ47. (To have more is to put in jeopardy, first, the concept of access to the courts because of the increased expense of litigation and, second, the finality of result, without which justice could be indefinitely delayed and thus defeated.)

As a legal academic, this would make it easier to teach Virginia law by having more judicial authority available, upon which to base my lectures. As a matter of general jurisprudence, if the law is better settled by more judicial precedents, it will be better understood. This is a good thing so that people can make decisions as to their private affairs, knowing that the law and the courts of law will enforce their rights. Also, if the law is settled and known, there will be less need to resort to the courts because disputes can be more easily amicably settled outside of the courts.

When the Virginia Court of Appeals was created by 1985, it was discussed as to whether the court should sit in fixed geographic divisions or sit in state-wide random panels. The latter choice was settled upon in order to achieve a state-wide uniformity of

jurisprudence. The argument for the former was the convenience of the judges and the court's personnel and a lower cost of the administration of justice.

I do not have an opinion on this issue one way or the other. However, I would observe that, if the court sits in fixed geographical divisions, it is easier to get from Hampton and Newport News to Richmond than to Norfolk because of the Hampton Roads.

From: Samantha Cohn
Subject: Right of Appeal from Circuit Court
Date: Tuesday, June 23, 2020 3:27:05 PM

To Whom It May Concern,

I am a civil plaintiff's attorney that handles subrogation matters in the Commonwealth. I have been barred since 2015 and actively litigating with my current firm since 2016 in General District Court and Circuit Courts throughout the Commonwealth. Most of our cases are heard in General District Court but occasionally we do have cases that either originate in Circuit Court or that we are substituted into. I believe there should be a right of appeal from Circuit Court to the Court of Appeals in civil matters. I agree that the lack of oversight of Circuit Courts regarding civil matters has led to unpredictability, unjust outcomes, erroneous rulings with no right of redress, and a lack of consistency in the application of law. While I do feel that there should be the availability of appeal from the Circuit Court to the Court of Appeals I also believe that there should be safeguards in place, such as some measures currently exercised during the appeals process from General District to Circuit, to prevent frivolous, erroneous, or inappropriate appeals. I believe that there should be the option of one appeal as a matter of right meaning that if a case has been appealed from the General District to Circuit there is no additional right of appeal to the Court of Appeals. That a case that originates in Circuit Court should have the right to appeal but not a matter that has been appealed to Circuit. Having the appellant post a bond ensures some mechanism of gatekeeping as a demonstration of commitment to the appeals process, the inference of which could be validity of the appeal. Again, there should be a mechanism by which civil Circuit Court cases have the right of appeal to the Court of Appeals with mechanisms in place to ensure that the Court's docket is not clogged with specious appeals.

Samantha B. Cohn
Chaplin & Gonet, 4808 Radford Avenue, Suite 100, Richmond, Virginia 23230

From: Crider Law office
Subject: Comments on the jurisdiction and organization of appeals
Date: Thursday, July 23, 2020 9:19:09 AM

Please don't implement the suggestions noted in the "Call for Comment" correspondence dated 22 June 2020. Having practiced law in Circuit Courts for nearly 40 years, I am of the opinion that analogy of judgment has great value. I fear that value to our citizens would be diminished if these proposals are adopted.

Expansion of the judicial system, with regionalization, makes no sense to me, particularly the taxpayer. Since I oppose both of these changes, I naturally recommend against a proposed implementation schedule.

With kind regards,
Henry G. Crider

From: **Mary L. C. Daniel** <mdaniel@vacourts.gov>
Sent: Monday, August 24, 2020 3:43 PM
SJ47 Study 2020 Comments

I strongly favor the idea of having regional Courts of Appeals that would include appeals of right. However, I think we need more courts, each with 3 Justices. Minimum of 4 more, evenly placed geographically.

Not only will the volume overwhelm the currently-proposed structure, the currently-proposed geography disadvantages everyone west of the Blue Ridge Mountains.

Mary Costello Daniel
26th Circuit General District Court
Presiding Judge for Winchester & Frederick County

From: [Raighne Delaney](#)
Subject: Expansion of Court of Appeals
Date: Wednesday, July 01, 2020 1:55:46 PM

I've gone back and forth in my mind regarding the expansion of the Court of Appeals and allowing an appeal of right in all civil cases.

If I had to pick good idea or bad idea, I'd say that its probably a bad idea.

While I make my living litigating, I think it is a tremendously wasteful way to resolve disputes. The Circuit Court judges practice a rough justice sometimes, but in the end, I think they are right 80% of the time.

As for the 20% of the time that I think they are wrong, most of the time, the bad decision cannot be appealed, or it is not worth pursuing an appeal.

In cases in which appeals are allowed by right in other states, I'm of mixed opinion how helpful it really has been.

So, while I think there are a few cases in which an automatic right of appeal would be beneficial, my guess is that those times are not worth it on a systemic basis either for the courts or the litigants.

And, allowing a right of appeal is also a way to oppress litigants who cannot afford the additional time and cost of an appeal.

Thus, I think it is a bad idea.

Raighne C. Delaney

Bean, Kinney & Korman, Arlington, VA 22201

From: **Thomas Edmonds**
Subject: Comments of Expansion of Court of Appeals of Virginia
Date: Thursday, June 25, 2020 4:48:41 PM

I was teaching in the law school at Florida State University when that state created its intermediate court of appeals. I was serving as dean of the law school at the University of Richmond when our court of appeals was created. Thus, I had a first hand opportunity to observe the first cut at creating increased appellate capacity in those two jurisdictions, and I knew well some of the initial occupants of positions on those two intermediate appellate courts. In Virginia, several of those early judges were circuit court judges prior to their elevation, and two, Ballard Baker from Henrico and Marvin Cole from Richmond City, were active alumni of the law school at U.R. I must say, Florida came much closer to getting this right than did Virginia.

Most importantly, the court in Florida had very broad jurisdiction, with appeals as a matter of right from almost all final decisions by state circuit courts, except in the limited matters where there was an appeal of right directly to the state supreme court, with further review on a discretionary basis by the supreme court following a decision by the court of appeals.

Previously, as in Virginia before creation of our court of appeals, virtually all circuit court decisions were the final word in most types of cases in Florida, with appellate review rarely achieved in light of the limited number of certiorari grants available from the seven member supreme court. Thus, there was scant binding appellate law in many areas, and the state circuits had outsized final authority to declare what the law was in a very high percentage of cases in which there was no appellate authority on point, or where a state statute had not previously been interpreted by the supreme court.

With the limited grant of jurisdiction in Virginia when our court of appeals was created, increased appellate treatment of matters of first impression and interpretations of new state statutes that could not be resolved from the language of the act, was also limited to those areas of the law within the court of appeals' jurisdiction. Thus, in most areas of business and commercial law, our circuit courts remain the final authority in many cases where increased appellate capacity would be very beneficial in my view.

The Florida intermediate appellate court was also created and staffed very differently from the way in which it was done in Virginia. Instead of just one body serving the entire state, district courts of appeal were created to serve several contiguous circuits in each geographical part of the state. I believe there were ten or twelve of these districts, as Florida is a larger and more populous state than is Virginia, and each DCA has about the same number of judges as does our single court of appeals, reflection their court's broader jurisdiction and larger number of appeals as a matter of right, To the extent matters are handled differently by different DCAs, this becomes a basis for review by the supreme court, similar to the federal system.

I think four appellate districts sounds about right for Virginia, and I assume this is driven by the expected increase in cases with an expansion of the court's jurisdiction. I would guess this would take some 30-36 additional appellate judges. In view of the limited amount of general fund money spent on our judicial branch of state government, this should not present any major funding problem if the policy resolve is present to provide for increased appellate capacity. My belief is that this would be very beneficial for the citizens and businesses of the Commonwealth.

Respectfully submitted, Thomas A. Edmonds

From: lsemmert@sykesbourdon.com
Subject: SJ47 study
Date: Tuesday, August 18, 2020 3:34:36 PM

This note is in response to the Judicial Council's invitation for comments on the resolution to study expansion of the jurisdiction of the Court of Appeals of Virginia. I'm writing in support of that expansion.

I'm a member of the Virginia State Bar and am a former chair of its Appellate Practice Committee. I'm also the founder and a past chair of the Virginia Bar Association's Appellate Practice Section. My practice is exclusively appellate; well over 90% of my caseload is in the Supreme Court of Virginia. I follow the appellate courts carefully, and post opinion analysis and commentary on those courts on my website, *Virginia Appellate News and Analysis*, which is now in its 16th year of publication. I solicit and digest appellate statistics from all three appellate courts that meet in Virginia. I'm also a member of the national Executive Board of the ABA's Council of Appellate Lawyers; through that organization, I correspond regularly with appellate colleagues across the nation.

Senate Joint Resolution 47 notes that Virginia is now alone in the nation in not affording civil and criminal litigants an automatic right of appeal. When I discuss our appellate framework with my colleagues from other states, and tell them that a litigant here who suffers a \$25 million judgment or receives a 20-year prison sentence has no right to a merits review and must petition for the right to present his appeal to the appellate court, their reactions are uniform: stunned silence and an agape stare, followed by expressions of disbelief. We are indeed alone, in a place where no other state would venture.

But our existing two-level appellate system can easily be adapted to address this situation. The creation of the Court of Appeals in the 1980s was the result of some bargaining blended with some diplomacy and some compromises. The resulting court of sharply limited appellate jurisdiction has done a fine job of filling in many gaps in our jurisprudence – especially our criminal law – that existed in 1985. But it is now a noticeably underutilized court. Converting it to a court of general appellate jurisdiction, with appeals of right assured to each appellant, would be quite feasible and would do much to improve the public's perception of our system of appellate justice.

It is this perception that is the focus of my comments. Others will point out the various benefits of our guaranteeing an of-right appeal. I've read Prof. Sinclair's excellent and comprehensive June 11, 2018 committee report, and I don't propose to replot that ground, other than to say that I agree with the report. I write instead to explore a topic that others may be hesitant to raise: the Supreme Court's institutional legitimacy.

On the surface, the court's legitimacy is beyond dispute; in Article VI of the Constitution of Virginia, the people have created the Supreme Court and have authorized it to exercise the judicial power of the Commonwealth. No one can plausibly question that.

But beneath that surface, the court relies on something quite different: public confidence. It's not enough that the court possess the judicial power and exercise it dispassionately and impartially. Unless the public *perceives* that the court is a dispassionate and impartial arbiter of our disputes, the court's legitimacy will be impaired. It will still function even without public approval, but a court that cannot command public confidence will foreseeably suffer a crisis in legitimacy.

As you know, the Supreme Court explains a tiny percentage of its rulings. In 2019,

the court handed down 77 published opinions and orders, plus 31 unpublished orders, for a total of 108 reasoned decisions. But 1,081 appeals – almost exactly ten times that 108 figure – died quiet deaths, dispatched by a two-sentence writ-refusal order that says nothing about the legal issues in the case. The same fate awaited 163 original-jurisdiction petitions, for a total of 1,244 no-explanation refusals. Those appellants walk away from the legal system unconvinced that their arguments were heard; they perceive that no one in the Supreme Court even considered their concerns. We in the appellate bar assure our share of those clients that the court did indeed give their appeals serious consideration, but the clients' understandable perception is otherwise. (I can't speak for non-appellate lawyers who handle their own appeals. Presumably some of them give their unsuccessful clients the same assurance, but it's likely that a great many agree with their clients' suspicions.)

The Court of Appeals doesn't share this problem, because of Code §17.1- 413(A). The obligation to "state in writing the reasons" for each decision, even writ refusals, means that even unsuccessful litigants receive proof that jurists heard and considered their arguments, every time. That fosters public confidence in that court. Not so with the Supreme Court.

In theory, the Supreme Court could address this perception problem without of-right appeals, by resolving to issue reasoned writ-refusal orders in each case. I don't believe that that change in procedure will arise in my lifetime unless the General Assembly mandates it, and I regard that possibility as remote. The better solution is the one proposed in SJ47: Give each litigant in Virginia the same right enjoyed by litigants in every other corner of the nation. We shouldn't have allowed ourselves to be left behind.

Finally, it's possible that some readers of these comments make take them as impudent. No one appointed me as a sort of modern Roman censor to make pronouncements about the legitimacy of a body with the dignity of the Supreme Court. That prompts me to add that I set out these comments for the opposite reason, specifically, my profound respect for the Supreme Court as an institution and for the justices as individuals. I recognize their integrity and their commitment to their oaths and their obligations.

That respect makes it more troubling for me to have to assure laymen, time and again, that *yes, the court took your appeal seriously, despite the fact that you don't see any evidence of that*. Even with my assurances, a great many such litigants – and even many trial lawyers who consult me – are convinced that they lost because the fix was in, that they lost because of connections, or that they lost for some other reason that reflects poorly on the court's institutional legitimacy. In this sense, I believe that it's in the Supreme Court's interest that each appellate litigant enjoy the right to one appeal, without having to ask anyone for permission.

Thank you for giving me the opportunity to submit these comments to the Council.

Steve Emmert (VSB #22334)
Sykes, Bourdon, Ahern & Levy
Virginia Beach

From: Robert Galumbeck
To: SJ47 Study 2020
Subject: Court of Appeals
Date: Monday, June 22, 2020 2:25:54 PM

I have been practicing law for 44 years and have practiced regularly in the Court of Appeals since its inception. Most of my appeals have been criminal and domestic relations cases.

An automatic appeal in criminal cases to the Court of Appeals is a great idea, as is being able to appeal of divorces to the Supreme Court, without special circumstances.

I think that regionally dividing the court of appeals is a bad idea. If I have to travel, that is fine. I think dividing up the court will diminish its importance and lead to many more requests for rebearing by the entire court.

Thank you,

Robert M. Galumbeck
Galumbeck and Kegley, Attys. P.O. Box 626 206 Main Street
Tazewell, Virginia 24651 Telephone: (276) 988-6561

From: Kimberly Gear
To: SJ47 Study 2020
Subject: Q of Appeal of Right
Date: Friday, July 03, 2020 5:18:58 PM

Re: the question for an appeal of right

This is a long overdue step for justice in Virginia and I am absolutely behind this step. I also believe that splitting the Intermediate Court regionally would parse out difficulties in complexity and applicability of laws across localities with differing challenges. I'm puzzled as to why this isn't automatic already.

K Gear

From: Victor M. Glasberg
To: SJ47 Study 2020
Subject: Right of appeal
Date: Wednesday, August 05, 2020 12:07:37 PM

I support an absolute right of appeal in all civil cases.

In virtually 100% of cases reaching a verdict for one side or the other, one lawyer ends up having been wrong in his or her assessment of what would likely happen. This is because lawyers are human, and humans don't always get everything right. This includes judges, who for all their awesome power, are simply lawyers in black robes. We all benefit from having our work reviewed, particularly in the face of professional objections to what we have done. Who among us has not reached a better decision -- or changed our minds -- by submitting our original assessment for review by persons qualified to assess it?

Mandatory review should also help obviate the willingness of some judges to rule peremptorily and without explanation -- something that happens rarely, I expect, but happens. I recall a case in which I represented two TV talking heads against a local businessmen who sought manifestly unconstitutional relief against them for having commented, on the air, on how the Alexandria City Council had given expedited treatment to the businessman's land-use proposal. The defense did not even file a brief in opposition to my fully-briefed motion to dismiss setting forth dispositive First Amendment law. Following a hearing, the judge -- long since retired -- denied the motion to dismiss without any explanation. It was a stunning, embarrassing, example of judicial irresponsibility. The case was then non-suited and brought back. Another judge was assigned, I refiled my brief, the other side again filed nothing, and the second judge issued a wonderful opinion explaining elementary principles of First Amendment law from Con Law 101.

My practice being almost entirely federal, I lack information to take a position on the other matters at issue. Thank you for considering these thoughts.

Vic Glasberg
Victor M. Glasberg & Associates
121 S. Columbus Street Alexandria, VA 22314

From: Gunn, Travis C.
Subject: Jurisdiction and Organization of the Court of Appeals of Virginia
Date: Wednesday, July 01, 2020 1:33:02 PM

As a member of the Virginia bar, I support both (1) implementing an appeal of right in all cases decided by and appealed from the circuit courts to the Court of Appeals and (2) organizing the Court of Appeals into four geographic circuits. I have no opinion on a proposed implementation schedule outside of believing that the sooner, the better.

Regarding Proposal (1):

Creating a right of appeal in all circuit court cases to the Court of Appeals would benefit the bench, the bar, and the public by providing appellate finality to many legal issues that remain unresolved or uncertain here in Virginia because of the limited circumstances of appellate review for many types of cases. Simply, the more cases that appellate courts must consider means more opportunities for appellate courts to resolve outstanding issues and to develop Virginia law. That process will guide the bench in how to handle these issues as they arise in future cases, guide the bar in counseling their clients, and guide the public in conducting itself.

Moreover, having an appeal of right in more cases will not necessarily raise the specter of judicial appellate workload about more *unnecessary* cases. Civil litigants must pay for their attorney's time, even on appeal. And Virginia appellate courts already know how to process cases that do not present new or difficult issues, such as through unpublished opinions, such that these matters would not likely add significant additional burden.

Regarding Proposal (2):

Organizing the Court of Appeals into four geographic circuits would benefit the development of Virginia law and the public. First, having different circuits usually entails the circuits not following each other as binding authority, but simply as persuasive authority. This allows for circuits within the Court of Appeals to consider and fully vet issues over time, with different counsel and different arguments being raised. This situation also allows for circuits to disagree with each other—whereas, currently, a Court of Appeals panel is bound by any prior panel opinion, despite disagreement. This type of disagreement will help crystalize legitimate, significant, and likely difficult issues of Virginia law—issues that the Supreme Court should address, but which it might currently be unaware of because there is no opportunity for this type of disagreement at the lower appellate level.

In sum, I believe both proposals benefit Virginia and the practice of law here in the Commonwealth. I hope to see these changes take effect.

Best Regards,

Travis C. Gunn Associate McGuireWoods LLP Gateway Plaza
800 East Canal Street Richmond, VA 23219-3916

From: **Mike Gwinn**
To: SJ47 Study 2020
Subject: Federal Circuit as an Example; Do Not Make Multiple Appeals Circuits
Date: Friday, August 21, 2020 8:56:39 PM

I would like to recommend the panel look at the Federal Circuit as an example when it does its research before it makes its suggestions. Unlike the other federal appellate courts, the Federal Circuit has national jurisdiction over several subject areas (e.g. patents and Government Contracts). Although there are still open questions in those subject areas, it helps limit forum shopping and other “games” you see in the broader federal justice system.

I also strongly recommend that Virginia have one Court of Appeals that receives all trial court appeals instead of several circuits, such as in California or Florida. Having a single, by right appellate court would add significant clarity to Virginia law and decrease the uncertainty and expense of legal advice in the Commonwealth. Instead of having competing appellate circuits, we should have one appellate court that is adequately staffed. A good compromise would be to have the court travel so that litigants don't always have to travel to Richmond to have their appeals heard.

Mike Gwinn
Smith Pachter McWhorter PLC

From: **Nicholas Lawrence**
Subject: Comment regarding jurisdiction of the Court of Appeals
Date: Tuesday, August 18, 2020 12:53:36 PM

I have been in practice in Virginia for ten years. My practice is exclusively civil, and does not include worker's compensation or domestic relations cases. In my view, the joint resolution is mistaken in its belief that "parties in civil cases are often denied appellate review." Every civil litigant has the right to file a petition for appeal with the Supreme Court of Virginia, and that petition, together with the record, is considered by a panel of three justices. Further, the disappointed party has the right to present ten minutes of oral argument to the panel. I have attended a number of writ panels over the years, and the justices are uniformly prepared and respectful.

By contrast, in the federal system, many "by right" appeals are dismissed by way of unsigned per curiam decisions, without the appellant ever having the opportunity to even state their position orally.

The quality of justice cannot be assessed by simply looking at the number of writs that have been granted, or similar statistics. In my own cases the panel has granted writs in all of the cases where I thought the trial court had erred, in all cases where I thought it was a close question as to whether the trial court erred, and have also granted writs in two cases that I thought had little to no merit.

In my opinion, our current appellate process works well for civil cases. The proposed changes are likely to make the process longer and more costly, without any obvious reason to think the overall quality of justice will improve. The trial courts are well aware that a three justice panel can be asked, as a matter of right, to review the record and determine whether the decision ought to be reviewed by the full court.

Nicholas J. Lawrence
Bancroft, McGavin, Horvath & Judkins, P.C.
9990 Fairfax Boulevard | Suite 400 | Fairfax, Virginia 22030

From: **Marr, Michael T.**
Subject: Senate Joint Resolution 47
Date: Thursday, August 20, 2020 3:56:53 PM

I could not agree more with a full, intermediate court of appeals (broken down geographically or otherwise). The absence of one has hampered the development of Virginia law and limited the access of civil litigants to fair results.

First, it is no accident that most treatises and hornbooks when discussing a general proposition of law cite to other states (some more commonly than others) but Virginia is hardly if ever cited.

Virginia opinions are not instructive, at both the trial court level and the supreme court level, such that general propositions can be readily identified and relied upon. The economic loss rule is a great example. Other jurisdictions, whether that be Maryland or North Carolina, benefit greatly from the great work and intermediate court does. The opinions at all three levels in these jurisdiction provide a level of clarity Virginia should aspire to.

Second, without an intermediate court of appeals, without the equivalent of a Rule 12(b)(6) motion, without meaningful summary judgment, and with very little chance of an appeal being granted, and with an even smaller percentage of cases overturned, tremendous power rests in the hands of a judge or a jury. I simply do not believe that the trial courts are simply getting it right. No, the door is closed almost completely on undoing whatever happened at the trial court level.

But we cannot forget, without an intermediate court of appeals (and its appeal as of right), a party's outcome depends too much on the judge that party draws, whether that be on demurrer—I would say on motion for summary judgement, but that is Everest in Virginia—and at trial. Given the spotty record of human nature, granting singular power to any one judge among fifteen in Fairfax for example, with embarrassingly de minimis oversight by an appellate court, is too great a temptation for some, and too great a burden for others. Our present systems asks too much of our judges.

But this overemphasis and reliance on the trial court level increases the risk of litigation and the costs of litigation, unnecessarily. While that increased uncertainty of the outcome of trial, and the low expectation of having an appellate argument, may put pressure on litigants to settle, less work for the courts should not be the goal of a fair and reasonable process.

Rather, potential litigants and their attorneys should have some clarity—which in my experience in other jurisdictions, for whatever that is worth, is more prominently achieved through the body of law that develops at the intermediate level, and then is refined at the highest level in these other jurisdictions. That clarity affords potential litigants the oft-sought after "what the law is" , which Virginia does do poorly, and that clarity allows parties to contract or otherwise engage in commerce with greater certainty in connection with the risks and benefits of their proposed conduct and the

risks and benefits of seeking recourse to the courts.

As it stands now, being a litigant now in Virginia means, he or she is stuck. In other words, he or she must have a jury trial or bench trial if he or she does not want to settle, and he or she will have to live with the bench verdict or jury verdict. It should be noted that this less-than-desirable outcome is not the product of robust jurisprudence. Just the opposite. It is too much the product of chance, not the law.

Thank you for your consideration.

Michael T. Marr
Sands Anderson PC McLean

From: **Nicholas Marritz**
To: SJ47 Study 2020
Subject: Supporting the Creation of an Appeal As of Right
Date: Wednesday, August 05, 2020 1:00:37 PM

I am an attorney with the Legal Aid Justice Center, a statewide nonprofit organization that provides free civil legal services to low-income people across the Commonwealth. I am making these comments solely in my personal capacity and am not purporting to speak for my organization.

I strongly support expanding the jurisdiction of the Virginia Court of Appeals to create an appeal as of right in all cases.

Senate Joint Resolution 47 gives compelling reasons for creating such a right. To me, the most compelling reasons are these: Virginia is the only state in the United States without a guaranteed right to appeal in all cases; and a bona fide right to appeal has been recognized as a part of fundamental procedural due process that has its ultimate roots in the Virginia Declaration of Rights. Furthermore, lower court judges are likely to do a better job if they know that their actions are subject to review by a higher court.

For these reasons, I strongly support expanding the jurisdiction of the Virginia Court of Appeals to create an appeal as of right in all cases. Thank you for considering these comments.

Nicholas Marritz, Attorney (VSB No. 89795)
Legal Aid Justice Center
6066 Leesburg Pike, Suite 520 Falls Church, VA 22041

From: roger@rogermullins.com
Subject: Appeal of Right and Jurisdiction of Court of Appeals
Date: Monday, June 22, 2020 3:29:23 PM

HONORABLE Members of the Judicial Council:

* * * * every convicted person should have an appeal of right.

In civil cases, an appeal of right will serve to alert Judges that correct decision making will be essential to be reasonably assured of full tenure. I personally have found that some Judges decide matters with an expectation that the case is too modest in value to warrant an appeal. I believe the data that indicates the right to an appeal improves justice from the Circuit Court benches. My involvement with the Boyd Graves Conference has been a most satisfying experience in finding ways to improve the administration of justice. We need to continue that effort!

Sincerely,

Roger W. Mullins, 126 Church Street, Tazewell, VA

From: Jonathan Phillips
Subject: Comment on the Jurisdiction and Organization of the Court of Appeals
Date: Tuesday, June 30, 2020 2:55:02 PM

As someone who primarily practices in criminal defense, following a number of years as an Assistant Commonwealth's Attorney, I would be a proponent of appellate circuits for individual regions around the Commonwealth.

Creating an appeal of right in cases decided and then appealed from the circuit courts to the Court of Appeals, especially in criminal matters, would be the best method by which we could assure the court system is regularly monitoring the important rights of individual defendants and the Commonwealth's interests which all too often slip through without thorough consideration.

Many criminal litigants look at the appellate process as a Hail Mary or ethical obligation rather than an appropriate and effective check and balance on the courts. The separate geographic-based jurisdictions would allow for this would-be appellate court to efficiently and conveniently handle a larger number of appeals and allow for a better dialog and increased trust among the bar and citizens that come before the courts from trial to final appeal. I would support the proposal as a result.

Jonathan Phillips, Esq. VSB # 77188
LEFFLERPHILLIPS PLC | Office: [703-293-9300](tel:703-293-9300) |

From: Bryan Plumlee
To: SJ47 Study 2020
Subject: Right of Appeal
Date: Monday, June 29, 2020 10:45:43 AM

The right of appeal must be implemented to bring Virginia into the modern age of jurisprudence.

I write in support of this conclusion and challenge the efficiency of the current system not the fairness of our courts. With the right of appeal will come more binding authority for judges and lawyers to draw from. With the additional rulings by our Court of Appeals, gaps in the law will be filled and lawyers may better predict an outcome for their clients. The cost of litigation shall not increase but will eventually decrease. The right to an appeal will further open the process and allow more individual participation in a system which is too costly at this time. I know this first hand as I am an active member in the bar of another state which provides an automatic right to appeal in all cases.

Thank you

**Comments of Elwood Earl “Sandy” Sanders, Jr., Esq.
On SJ 47 (Appeal of rights in the state courts)**

I am honored but humbled to give these comments to the Judicial Council of Virginia in regard to the law authorizing the study on the appeals of right. I am an attorney with over thirty years practice experience in Virginia; I am licensed in all the Virginia state courts, both Federal District Courts, the Fourth Circuit Court of Appeals and the United States Supreme Court. I have tried cases before juries and judges; written scores if not hundreds of petitions and briefs and conducted many oral arguments. I was Virginia's first Appellate Defender from 1996 to 2000. I now collaborate with lawyers throughout the Commonwealth at Lantagne Legal Printing to get their appeals printed and filed in a timely and proper manner.

I would state at the outset that I am in no way speaking for Lantagne Legal Printing and all these comments are my own. I did discuss briefly this opportunity to give comment with a principal at Lantagne and I do have their permission to give personal comments. Some of my comments will help printers, including Lantagne, and some might not. I would say that some of my observations are based on my over 13 years service at Lantagne; I would also say that legal printing companies, if they are professional and experienced, are an important part of the appellate process that ought to be taken into account in debating major changes in appellate procedure. Wholesale abandonment of appeals of right in some cases ought to be offset by appeals of right in

other cases because of the potential deleterious effect on appellate printing companies. Several areas where printers help counsel are timely filing electronically or by hand on day of filing, more procedural correctness in items filed, and general neatness of appearance. This saves time for court staff in the supervision of pleadings in cases before the court.

Much has been made that Virginia is the only state in the Union without an appeal of right in every civil and criminal case. However, I would suggest that appeals of right, while in theory sounds good, are not a panacea. It can be argued the present petitioning system which in Court of Appeals cases (and subsequent appeal in most of those cases to the Supreme Court) could and do provide more thorough review than an appeal of right. It certainly depends on the judges and support staff of the court. Terminology could be more inclusive and user-friendly: Maybe instead of “grant” or “deny” appeal, it could be: grant further review or deny further review. The term implies strongly there WAS review of the matter before the court.

There is at the present time appeals of right in several kinds of cases. Capital murder where the defendant is sentenced to death is probably constitutionally mandated; few if anyone would suggest that change. The Court of Appeals have appeals of right in several kinds of cases: Domestic relations, worker's compensation, agency appeals and several other areas. (There is an appeal of right at the Supreme Court of Virginia in specialized cases involving bar discipline and the SCC.) But criminal and traffic cases are still by a petitioning process.

Appeals of right can be very costly. The need for an appendix is a huge driver in these cases and that appendix can be thousands of pages; the Court of Appeals decision in *Patterson v. City of Richmond*, 39 Va. App. 706 (2003) where the Court of Appeals held that if a record item was not in the appendix it will not be considered in the decision on a certain assignment of error has to be one aspect considered by counsel in the appendix insertion analysis. These appendices can be thousands of dollars for preparation. Any expansion of the appeal of right jurisdiction has to take that into account.

The costs and increased complexity associated with appeals of right must be taken into account in expansion of the appeal of right. It is good that the new President of the Virginia State Bar, Brian L. Buniva, wants to make access to justice a theme of his term. The appeal of right procedure and costs can hinder *pro se* litigants from access to justice and while most of the *pro se* cases are ultimately not found meritorious (many may be frivolous or maybe many are just not able to afford counsel) there is an access to courts issue.

The appeal of right process can be abused by a deep-pockets litigant who wants to use the appeal process to secure settlement of rights won at the court or commission below. This can arise in worker's compensation cases. It would be very easy and tempting for the losing employer (usually the real party of interest is an liability carrier)

to appeal and seek a give-back of hard won benefits or remedies. Claimants on the other hand might want to appeal the Commission decision but the costs could be a hindrance. Petitioning in these cases could quickly resolve these issues at less cost and if appeal is granted, than the settlement value for the granted appellant is increased.

There is a strong argument that domestic relations cases ought to be by petition as well. Most of these cases are decided by an abuse of discretion standard of review and that is a high standard. All the access to courts and costs issues are just as valid. But there is another countervailing view: The costs of the appeals of right might actually discourage litigation; domestic relations law is an area that could sorely use less litigation. One area of severe concern, however, ought to be the termination of parental rights/abuse and neglect cases. These are appeals of right; thus the appendix issue arises.

Most of these cases are utterly without merit. There are understandably angry and disappointed “parents” and other relatives who want to appeal. *Pro se* parties again might want to be heard but the appeal of right process provide headwinds to access to courts. Petitioning would allow the Court of Appeals to weed out meritorious cases to be more fully reviewed.

There is always an option to dispense with the appendix; some states do that. With our long experience with the appendix in the Commonwealth, that would be a radical step. (The effect on appellate printers in other states and its effect on effective filings of the appeal are relevant.) The apparent ease of just filing a brief is illusory. Not having an appendix would require the entire record to be available to the judges and to litigants. Every city and county would have to be automated. The Federal courts do in fact limit the pages for the appendix in court-appointed cases except by leave of court; this policy can be problematic on Equal Protection grounds as retained criminal cases have no such limitation. So removing the appendix from most appeals of right is not a step to be taken lightly. Might be better to overrule *Patterson* and be more strict on unnecessary designation.

Felony criminal cases, on the other hand, because of the loss of liberty, loss of some civil rights such as voting, and general disgrace, present a different issue: Cost cannot and should not be the driving force. Complete review is critical. The vast majority of criminal appeals seem to be court appointed. Technically the losing defendant pays the costs; the Commonwealth pays the lawyer and the printer, upfront, if you would, and then seek the costs from the defendant. I suspect the majority of the costs end up being assumed by the Commonwealth and are never paid. The vast majority of the cases before the Court of Appeals are criminal petitions.

The grave nature of a felony trial inheres in favor of such criminal cases to be heard on the merits. I think the vast majority of cases are correctly decided: Grant or deny. There are two levels of review to grant or deny. But even one such case denied when it should be granted is one case too many.

For jurisdictional reasons, the demarcation between appeals of right and petitioning must be clear. Also, the responsibility of the attorney to review the record and file a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) is going to come into play. Hence, I would suggest that if a case goes to trial in the Circuit Court, either judge or jury, that if the defendant is convicted of a felony (ancillary misdemeanors in the same trial would be included in the appeal) or if the defendant is convicted of a felony and gets actual time in the penitentiary to serve (again the ancillary misdemeanor rule applies) then the defendant gets an appeal of right to the Court of Appeals with further review by petition to the Supreme Court of Virginia. Guilty pleas and probation violations would still be by petition and maybe have those cases final in the Court of Appeals subject to the limited jurisdiction of the Supreme Court in other similar cases pursuant to Va. Code Ann. Section 17.1-410. (The conditional guilty plea reserving an appellate issue would be an appeal of right.) Most of the *Anders* cases would fall in one of those two categories; counsel deciding to file an *Anders* petition in a trial setting would have to petition the Court of Appeals to do so and ask for an extension of the briefing and designation deadlines. Since present Virginia law forbids proportional sentencing review as long as the sentence is lawful, these sentencing questions would be by petition as well with a procedure similar to *Anders* unless ancillary to other non-sentencing assignments of error.

Granting all civil cases by appeal of right to the Court of Appeals would not only have the same issues of costs and complexity as domestic relations, worker's compensation and other cases, but also have the effect of freezing all the prior precedent of the Supreme Court as the Court of Appeals cannot and should not overrule the Supreme Court. There could be a bypass mechanism but maybe a better procedure for civil cases might be in certain types of judgments (demurrer granted, summary judgment, *bona fide* argument to overrule a case, etc.) a petition for review similar to the Va. Code Ann. Section 8.01-626 that would have power to reverse that judgment, with all other cases by petition directly to the Supreme Court. The effect of this would be an appeal of right in key civil cases.

There is one more consideration in the effect of more appeals of right on the appellate process. Serious consideration must be given to a statewide appellate defender office to take all the indigent criminal appeals of right. This office would be modeled on the successful capital defender offices (the existing capital defender offices could actually be expanded to capital/appellate offices with the addition of a number of attorneys and support staff); the decline of death verdicts is a clear indication, for good or ill others can decide, of the effectiveness of this office. This would probably raise the level of advocacy in the appeals of right and the occasional granted criminal case.

A useful aspect of the judicial process is the existence of the *en banc* Court of Appeals to resolve conflicts among panels and hear important cases. Only the *en banc* Court can overrule a panel decision. However, any *en banc* review at the Court of Appeals of more

than fifteen judges would have great potential for being cumbersome. With hundreds of criminal cases entering the appeals of right stage immediately, fifteen judges are probably not enough. With four sites hearing cases, twenty active judges is probably minimum. Perhaps *en banc* review could be replaced with a procedure to allow one panel of the Court of Appeals to overrule an prior panel with a petition of right by the losing party to the Supreme Court to resolve that or any other conflicts among decisions of the Court of Appeals. (Of course any party not prevailing in an appeal of right could petition to the Supreme Court.) I do not think regional courts as is done in Florida is desirable as there is merit in each of the judges rotating from time to time throughout the Commonwealth.

My summary is that the appeal of right issue is a crucial one to be resolved. Having appeals of right in all cases to the Court of Appeals is an illusory remedy. It will increase costs and not ensure better results. A good number of the present appeals of right at the Court of Appeals ought to be by petition. However, if the appeals of right were to increase to cover all felonies after a trial, that would be the best way to reallocate the resources of the Commonwealth and its litigants. This increase should be accompanied by a statewide appellate unit of the Indigent Defense Commission and an increase in the number of the judges of the Court of Appeals. I can be reached for further comments and questions at eesjresquire@netscape.net or 804 814-2109.

From: Nicholas Smith
To: SJ47 Study 2020
Subject: Support of appeals by right in a single Court of Appeals
Date: Thursday, August 13, 2020 9:18:28 AM

I'm writing to support an appeal as of right from Virginia Circuit Courts to the Virginia Court of Appeal. This will help better protect individual rights and increase consistency among Virginia judicial districts, settling more questions of law and enforcement. However, Virginia should not adopt districts for the Court of Appeals. To ensure uniform application of this right, by-right appeals should be conducted by a single unified body (with panel/en-banc if necessary). As well, this would bring the Commonwealth into line with the vast majority of international consensus on rights to appeal in criminal matters.

Let me give one example. It was longstanding under Virginia law that a person driving a vehicle must yield to a person walking in a crosswalk (§ 46.2-924). However, local police in Richmond argued that the way to determine if someone yielded was if the pedestrian wasn't hit by the driver, which differs from how some other jurisdictions

were interpreting this. Further, due to contributory negligence and the way the law is written, pedestrians are commanded not to "enter or cross an intersection in disregard of approaching traffic" while "[t]he drivers of vehicles entering, crossing, or turning at intersections shall change their course, slow down, or stop if necessary to permit pedestrians to cross such intersections safely and expeditiously."

This confusion and differing treatment made it difficult to understand what the law was, which made it harder to change. When advocating at the General Assembly to clarify the law, some legislators said jurisdictions they represented said the interpretation of the law was clear, so there was no need to change it. And since the interpretations of Richmond police were always dicta, expressed orally, and since police did not charge people for violation of this statute and the Court of Appeals did not take up such a case from another jurisdiction, this was essentially unreviewable.

This also counsels against having multiple districts at the Court of Appeals. The purpose of appeals is to ensure correctness or lack of unreasonableness in judicial administration and uniformity across the Commonwealth. Having multiple districts will stifle that purpose. In my example, had another circuit ruled on yielding to pedestrians, the incorrect application of the law in Richmond would have continued, unreviewable. Virginia already has Circuits for appeal of District judgments, and so for second appeals for cases that originated at the district level and first appeals from cases with higher stakes at the circuit level, Virginia should retain one appeals body. As well, multiple circuits mean the possibility of circuit splits, which could actually lead to more work for the Supreme Court of Virginia. In a single Court of Appeals, en banc review can correct most of the mistaken panel judgments, leaving the Supreme Court the time to look at the more complex and crucial cases that have already had multiple layers of review. While a decentralized system may have been more relevant when travel and communications throughout the Commonwealth were difficult, today that problem is much smaller.

This does not mean that all appeals need oral argument review. Dilatory cases can be dismissed based on written submissions. While allowing de novo review of cases from circuit court just as de novo review of cases in district court at circuit could be an interesting development that should be studied, given the lack of need for testimony in many cases when not conducting a de novo review, having cases decided in Richmond is not burdensome for defendants and witnesses who could file briefs and give depositions in their home locality. As we have learned in the covid-19 pandemic, arguments by lawyers can also be made by video, minimizing the inconvenience of a centrally located Court. En banc review may be a way to reduce the judicial workload, by assigning appeals to panels unless the full court agrees in its discretion to en banc review before or after the appeal is heard, as in the Federal appeals system. If necessary, panels could travel monthly or quarterly as needed to different regions of the Commonwealth to hear appeals, with en banc review heard in Richmond, thereby limiting the need for the entire Court to travel.

Lastly, it should be noted that appeals as of right in criminal cases are a national and international standard. Virginia is the only state not to employ as of right appeals.

The United States Senate ratified the International Covenant on Civil and Political Rights (see Treaty Document 95-20), which requires appeals as of right to criminal convictions (see section 14(5)). The ICCPR has been ratified by 173 countries, leaving the Commonwealth in the same pot as the non-ratifiers: Bhutan, Brunei, China, Comoros, Cuba, Kiribati, Malaysia, Micronesia, Myanmar, Nauru, Oman, Palau, Saint Kitts and Nevis, Saint Lucia, Saudi Arabia, Singapore, Solomon Islands, South Sudan, Tonga, Tuvalu and the United Arab Emirates. The right to an appeal in criminal matters has been enshrined in numerous human rights documents, including the American Convention on Human Rights and the European Convention on Human Rights. (For a thorough history of the right to appeal and its expansion across jurisprudential systems, see "A Comparative Analysis of the Right to Appeal", Peter D. Marshall, Duke Journal of Comparative & International Law, Vol 22:1.)

The judicial system in Virginia is not set in stone. It should adapt to new circumstances, and review best practices elsewhere and assimilate them into our system. It is time to allow appeals as of right to the Virginia Court of Appeals, while ensuring uniformity in its application across the Commonwealth, so that all Virginians can have greater certainty about what the law is. Thank you for your consideration.

From: Christian Tennant
Subject: Comments on SJR 47
Date: Thursday, July 02, 2020 5:22:54 PM

I have over 20 years of experience practicing tax law in the Commonwealth. For tax purposes, I could not be in more favor of having appeals heard by the Court of Appeals as a matter of right. As the tax system is currently set up in the Commonwealth, any taxpayer assessed with a state or local tax may file an administrative appeal to the tax authority that assessed the tax. Certainly, this appeal is not to an unbiased third party. From there, the only option is to appeal to circuit court. The taxing authority (state or local government) typically files many unnecessary motions meant to drive the taxpayer's costs up. As an example, a locality on a recent case filed many motions including a demurrer. The locality did not brief this demurrer. When the hearing came, the locality withdrew the demurrer before the judge. Meanwhile, the taxpayer's counsel had to brief the demurrer and prepare to argue the demurrer charging the client for all of this. Having an appeal of right would hopefully make the taxing authority in this anecdote think twice about pulling stunts like this. It would also be more fair to taxpayers. As an aside comment, the federal government sees it fit to have a separate tax court. While there are many aspects of this tax court that would not be necessary in

the Commonwealth. I would like to see something of this nature in Virginia.

I appreciate the opportunity to comment. Thank you,

J. Christian Tennant

Commonwealth Tax Law, Richmond, Virginia 23242 (804) 360-0033

Norman A. Thomas, PLLC

Re: SJ 47 Study

Pursuant to the June 22, 2020 *Call for Comment*, I here comment on the Senate Joint Resolution 47 study and a potential Court of Appeals' (CAV) jurisdiction expansion. I am a member of the Virginia State Bar since June 1981 and devote the entirety of my law practice to appellate litigation in civil and criminal cases. Although I serve in leadership positions of the Appellate Sections of both the Virginia Trial Lawyers Association and the Virginia Bar Association, this letter contains my professional comments. I here speak for no organization.

I favor expansion of the Court of Appeals' jurisdiction to include appeals of right in civil cases. Based on my experience it appears that a significant number of facially meritorious appeals end with a Petition for Appeal's denial in the Supreme Court. When the Supreme Court denies a Petition for Appeal, it does not explain its analytical reasons for doing so. This absolute finality, combined with the absence of explanation genuinely frustrates civil litigants and counsel alike and engenders an absence of public confidence in the Commonwealth's justice system. Naturally, the fewer appeals heard on the merits, the slower Virginia law develops in relation to societal and economic complexities.

As to appeals of right in criminal cases, I do not view the current system as "broken." As a result, I do not advocate for appeals of right in criminal cases. While it is true that the CAV denies Petitions for Appeal in many criminal cases, based on my experience I do not feel that a significant percentage of meritorious criminal cases fail to attain a hearing on the merits in that court.

The CAV's existing procedural mechanisms appear to work well. If a single judge denies a Petition for Appeal, that judge must explain her or his rationale. The petitioner then may demand a three-judge panel upon stating reasons for the demand. Should a three-judge panel deny the Petition for Appeal, it, too, provides its reasons for doing so. And, of course, the petitioner may further petition for appeal to the Supreme Court. By design, this tiered system of Petition for Appeal consideration operates to screen-out unmeritorious criminal appeals and enable the Court to focus on the merits of facially meritorious ones. Litigants and counsel avoid the frustration attendant to an unexplained Petition for Appeal denial.

Nevertheless, if the Judicial Council or the General Assembly perceives

appeals of right in criminal cases as a social justice requirement, then I do not argue with that perception or implementation of appeals of right. The public should view our criminal justice system as socially, including racially, just and equitable. Our society's recent focus on social justice issues surely will factor into your deliberations and ultimate recommendations. Our criminal justice system should be just and likewise be publicly perceived as just.

Organizationally, to accommodate expanded jurisdiction the CAV necessarily would expand and sit in regions. I believe it important that CAV judges continue to rotate much as they do now, with all judges sitting in all parts of the state on a rotational basis. I also suggest that a published CAV panel decision should continue to bind other panels absent an en banc or Supreme Court decision to the contrary. Our appellate justice system would suffer from regionally "balkanized" jurisprudence.

To save litigant costs, now that we have digital records of trial court and executive agency proceedings, I suggest that no need exists for an appendix in every appeal heard on the merits. Digital records utilize PDF format, are searchable, and their pages sequentially numbered according to a relatively standard system of organization. Appendices should be dispensed with unless the Court directs otherwise in a given appeal. The General Assembly may enact legislation requiring that circuit court clerks and agency secretaries provide digital records in all proceedings. The legislation also may specify a standardized organization of record contents or prescribe that it be specified by Court rule. The legislation or mandated Court rule may provide that in some cases the Court may direct the parties to prepare an appendix. This reform will make an appeal of right more financially accessible to litigants.

One key to any CAV jurisdiction expansion will be the need for supporting budgetary appropriations for facilities and staffing, and in general, all things required for our judicial branch to accommodate the expansion. Also, the budget needs of circuit court clerks' offices, the Indigent Defense Commission and the Attorney General's Office will be affected. If the COVID-19 pandemic has damaged Virginia's tax revenues and projections as significantly as many fear, then it would be better to wait at least until the next biennium to begin implementation of any CAV jurisdiction expansion.

Finally, I strongly believe that the CAV and the Supreme Court should remain as error correction and law development courts. CAV jurisdiction expansion should not leverage our Supreme Court into a "policy court" as some Virginia Bar members advocate. A policy court, whether intentionally or not, typically devolves into a political court. A politicized Supreme Court would defeat both achievement and public perception of equal justice under Virginia law.

Thank you for the opportunity to make these comments.

Norman A. Thomas

From: James Walker
To: SJ47 Study 2020
Date: Tuesday, June 23, 2020 11:50:12 AM

My practice is and has always been in areas outside the jurisdiction of the Court of Appeals. Some comments as a practitioner of 30+ years:

First, this change is long overdue. The lack of an appeal of right in civil cases (outside of the domestic relations arena has) been a featured piece of advice to my clients weighing removal to federal court at the outset, if available, and whether to proceed to trial. In a very real sense, the jury's verdict is likely the final say given the low odds of SCOVA granting a petition in a civil case. Clients unfamiliar with Virginia procedure are stunned to find out that there is no effective right of review.

Second, COAVA is already organized and sits in four distinct "circuits" mainly, it seems, for the convenience of the litigants. The panels in each region will vary session to session. If the proposal is to make permanent judicial assignments by region, that's fine, so long as a right to request en banc review is retained for all cases. Otherwise, there is a better chance of "splits in the circuits" faced by federal courts.

Third, in order to resolve appeals in timely fashion, i.e., within twelve months of the final order in the circuit court, it seems that there would need to be at least an additional six judges so that there are at least four permanently assigned in each "circuit." If I am reading the statistics correctly, SCOVA receives about 450 petitions per year in civil cases. How many of those come from COAVA is not clear, but I assume the vast majority do not. COAVA handles a little over 2000 appeals annually, the vast majority by unpublished order or opinion. However, I would expect more appeals in civil cases if there an appeal of right is available. I know I would recommend that course more frequently over giving up or settling post judgment if I as sure that there would be effective, timely review. (For reference, it looks like the Fourth circuit takes in about 2000 new appeals annually (excluding pro se filings) with a median disposition time of about six months with 18 full time judges.

I don't see an impediment to having COAVA with expanded jurisdiction ready to accept appeals by the fall of 2021 provided the GA can and will fill and fund the new positions in the 2021 session. One thing we've all earned this spring is that we don't need physical offices together to be effective in our jobs. New judges means a few new law clerks (two per circuit, maybe) hired in the summer of 2021. Otherwise the infrastructure is in place or easily expanded, and there do not appear to be any substantive changes that need to be made to the rules.

Get this done, folks.

JAMES W. WALKER
O'Hagan Meyer, Richmond.

From: Winston West
Subject: Comments re SJ47
Date: Thursday, July 02, 2020 8:24:02 AM

Thank you for the opportunity to comment on the future of the Court of Appeals of Virginia (CAV). I am also licensed in NC, and the appellate court structure alleviates substantial work for the NC Supreme Court, much in the same way that SJ47 seeks for the Supreme Court of Virginia.

The Court of Appeals of NC hears almost all appeals, as of right, in three judge panels. The exceptions include capital murder cases when death is the penalty and certain administrative appeals, which are taken straight to the NC Supreme Court. The panels are randomly assigned.

Appeals from the NC Court of Appeals are then taken as a matter of discretion, on a writ of certiorari, to the NC Supreme Court, except when a judge on the NC Court of Appeals panel dissents or there is an "important constitutional question," as designated by the Court of Appeals or Supreme Court. The latter two situations may be appealed as of right to the NC Supreme Court.

A similar scheme would greatly benefit the Supreme Court of Virginia and its workload. In order to accommodate the extra work, the CAV could be expanded to 15 judges (5, 3 judge panels). The CAV should continue to sit in Richmond, rather than be compartmentalized into "districts." For example, the Western Virginia district would have to be geographically large in order for there to be comparable volume to a Northern Virginia district, for example. The CAV could continue to "ride circuit" in its discretion.

Further, for other jurisdictional matters, Workers Compensation Commission and other administrative agency appeals should first be taken in the circuit court where the individual resides, rather than being taken to the CAV. Currently, for example, appeals from the Virginia Employment Commission are taken to circuit court. The circuit court should be permitted to review the agency record *de novo*, rather than providing deference to the agency decision.

Appeals from the State Corporation Commission and Virginia State Bar disciplinary process could continue in the Virginia Supreme Court. A scheme for applying for "important constitutional question" consideration for a direct appeal to the Virginia Supreme Court would be beneficial.

Thank you for your consideration. This email is being sent from my personal email, rather than my official email on file with the Virginia State Bar, as these comments reflect my opinion, rather than that of my employer law firm.

Kindest Regards,
N. Winston West, IV (VSB # 92598)

From: Jonathan Westreich
To: SJ47 Study 2020
Subject: Court of Appeals
Date: Wednesday, July 01, 2020 3:18:51 PM

I do not support expanding the Court of Appeals jurisdiction to include all cases decided by the Circuit Court as this will cause delay and final resolution of disputes

If the Court's jurisdiction is expanded nevertheless, this will require a massive expansion in the Court including both the creation of the geographic circuits and substantial increase in the clerk's office to handle the influx and avoid unnecessary delay

In this current budgetary scenario, I would prefer that funding for the judicial system be directed to already existing courts, including pay to deputy clerk's of courts which is embarrassingly low, rather than creating new court

Jonathan Westreich
604 Cameron Street, Alexandria, Virginia 22314

From: Thomas W. Williamson, Jr.
Re: SJ47 Study

Dear Secretary Hade:

Thank you for the opportunity to participate in the discussion about the Court of Appeals and its future.

My gray hair confirms that I was practicing before the birth of our Court of Appeals. After experiencing an ever growing delay in the processing of Supreme Court appeals, its creation, coupled with Chief Justice Carrico's push to expedite the Supreme Court's work, ameliorated the harms engendered by the backlog.

The unique jurisdictional boundaries of the Court of Appeals, a product of political compromise, was accepted by many as less than ideal but forward progress. Shortly after the creation, I attended a State Bar panel which included a Kentucky Supreme Court justice. According to our Bluegrass state guest, Virginia had added 11 appellate judges but assigned them the work of deciding the easiest cases found on an appellate court docket: criminal, family law and workers compensation. He proceeded to predict that Virginia would ultimately erase this circumscribed jurisdiction.

Almost forty years have passed and we still deny appeals as a matter of right to

most civil litigants. Our persistence as an outlier among states in this regard has continued despite the 2006 Recommendation of the *Commission on Virginia Courts In the 21st Century;: To Benefit All, To Exclude None* to expand the civil jurisdiction of the Court of Appeals.² As a participant in the Commission's work, I felt strongly then that it was the right call.

A critical component of justice is the perception of justice by the parties and the larger society. Two pillars of the perception of justice are that justice be meted out in a timely manner and that decisions be pronounced accompanied by a thoughtful articulation of principled reasons for the decision. Permitting denial of an appeal with a laconic "no reversible error" engenders no perception of justice for the losing party. Delay arising out of petitioning for an appeal before the appeal can be heard and decided frustrates all parties to the appeal.

If Virginia were to grant all parties an appeal of right and expand the Court of Appeals jurisdiction, there is little evidence that the workload or staffing needs of the Court of Appeals would be significantly increased. No longer would the Court handle a file twice as currently transpires when appeals are granted. Most appeals could be concluded with a *per euriam* opinion requiring minimal preparation when all three appellate judges have found no reversible error.

As the population of Virginia has grown and diversified over the last forty years and our economy has become increasingly complex, the demands for the Supreme Court of Virginia to address issues of first impression thoughtfully and promptly have also grown. Freed of the task of meticulous review of trial court records for error, the Court can focus on the application of the ancient common law and the ever increasing body of statutory law to the questions and controversies of the Twenty First Century.

I do not support the creation of judicial circuits for the Court of Appeals. Instead, I favor the Court hearing argument at venues in the various regions of the Commonwealth but doing so with panels drawn from all of the judges. Judicial circuits would tend to create variances in jurisprudence instead of a desirable uniformity. These variances would lead to more *en bane* rehearings with an attendant delay and draining of judicial time. In my view, *en bane* rehearings should be either eliminated or a rare event. Ever changing panels composed of judges from diverse regions and backgrounds is a preferable pathway to achieving uniformity of decision. If discrepancies arise in the Court of Appeals decisions, the Supreme Court can resolve the discrepant outcomes.

I look forward to learning the conclusions of the Judicial Council's study.
Sincerely,

Thomas W. Williamson, Jr.

² Recommendation 4-3.1,4.6. Virginia should expand the civil appellate jurisdiction of the Court of Appeals to include all appeals from circuit courts and administrative agencies with the exception of the State Corporation Commission and appeals involving attorney disciplinary matters with an accompanying allocation of resources to ensure accessible, responsive, effectively administered appellate opportunity for the citizens of the Commonwealth.

Appendix C

Statutes Relevant to CAV Jurisdictional Change

§ 2.2-511. Criminal cases

A. . . . the authority of the Attorney General to appear or participate in the proceedings shall not attach unless and until a petition for appeal has been granted by the Court of Appeals or a writ of error has been granted by the Supreme Court. . . . In all criminal cases before the Court of Appeals or the Supreme Court in which the Commonwealth is a party or is directly interested, the Attorney General shall appear and represent the Commonwealth. In any criminal case in which a petition for appeal has been granted by the Court of Appeals, the Attorney General shall continue to represent the Commonwealth in any further appeal of a case from the Court of Appeals to the Supreme Court.

REVISION NOTES:

❶ If the Legislature determines that the AG should represent the Commonwealth at all stages of a criminal appeal, subsection A would need to read in substance:

A. . . . the authority of the Attorney General to appear or participate in the proceedings shall not attach unless and until a notice of petition for appeal has been filed in granted by the Court of Appeals ~~or a writ of error has been granted by the Supreme Court~~. . . . In all criminal cases before the Court of Appeals or the Supreme Court in which the Commonwealth is a party or is directly interested, the Attorney General shall appear and represent the Commonwealth and. ~~In any criminal case in which a petition for appeal has been granted by the Court of Appeals, the Attorney General shall continue to represent the Commonwealth in any further appeal of a case from the Court of Appeals to the Supreme Court.~~

❷ If the Legislature determines that the Commonwealth's Attorneys will represent the Commonwealth in filing initial opposition briefing, with the Attorney General only becoming involved if the CAV schedules supplemental briefing or oral argument, subsection A of this statute would need to say, in substance:

A. . . . the authority of the Attorney General to appear or participate in the proceedings shall not attach unless and until supplemental briefing or oral argument has been directed ~~a petition for appeal has been granted~~ by the Court of Appeals ~~or a writ of error has been granted by the Supreme Court~~. . . . In all criminal cases before the Court of Appeals in which supplemental briefing or oral argument of the appeal is

directed, and all criminal cases in the Supreme Court in which the Commonwealth is a party or is directly interested, the Attorney General shall appear and represent the Commonwealth. In any criminal case in which the Attorney General appears for the Commonwealth in a petition for appeal has been granted by the Court of Appeals, the Attorney General shall continue to represent the Commonwealth in any further appeal of a case from the Court of Appeals to the Supreme Court.

In this second structure, any statutes governing duties of Commonwealth's Attorneys would need a comparable amendment.

§ 8.01-670. In what cases awarded

A. Except as provided by § 17.1-405, any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved:

1. By any judgment in a controversy
2. By the order of a court refusing a writ of quo warranto or by the final judgment on any such writ; or
3. By a final judgment in any other civil case.

B. Except as provided by § 17.1-405, any party may present a petition for an appeal to the Supreme Court in any case on an equitable claim wherein there is an interlocutory decree or order:

1. Granting, dissolving or denying an injunction; or
2. Requiring money to be paid or the possession or title of property to be changed; or
3. Adjudicating the principles of a cause.

C. Except in cases where appeal from a final judgment lies in the Court of Appeals, as provided in §17.1-405, any party may present a petition pursuant to § 8.01-670.1 for appeal to the Supreme Court.

REVISION NOTES: No change appears to be needed in this section.

§ 8.01-676.1 Security for appeal . . .

B. Security for costs on petition for appeal to Court of Appeals or Supreme Court.-- An appellant whose petition for appeal is granted by the Court of Appeals or the Supreme Court shall (if he has not done so) within 15 days from the date of the Certificate of Appeal file an appeal bond or irrevocable letter of credit . . .

REVISION NOTES: It appears that subsection B would need to state, in substance:

B. Security for costs on ~~petition for~~ appeal to Court of Appeals or Supreme Court.-- An appellant in whose petition for appeal is granted by the Court of Appeals or whose petition for appeal is granted by the Supreme Court shall (if he has not done so) within 15 days from the date of the Certificate of Appeal file an appeal bond or irrevocable letter of credit . . .

§ 17.1-402. Sessions; panels; quorum; presiding judges; hearings en banc

A. The Court of Appeals shall sit at such locations within the Commonwealth as the chief judge, upon consultation with the other judges of the court, shall designate so as to provide, insofar as feasible, convenient access to the various geographic areas of the Commonwealth. The chief judge shall schedule sessions of the court as required to discharge expeditiously the business of the court.

B. The Court of Appeals shall sit in panels of at least three judges each. The presence of all judges in the panel shall be necessary to constitute a quorum. The chief judge shall assign the members to panels and, insofar as practicable, rotate the membership of the panels. The chief judge shall preside over any panel of which he is a member and shall designate the presiding judges of the other panels.

C. Each panel shall hear and determine, independently of the others, the petitions for appeal and appeals granted in criminal cases and the other cases assigned to that panel.

D. The Court of Appeals shall sit en banc (i) when there is a dissent in the panel to which the case was originally assigned and an aggrieved party requests an en banc hearing and at least four judges of the court vote in favor of such a hearing or (ii) when any judge of any panel shall certify that in his opinion a decision of such panel of the court is in conflict with a prior decision of the court or of any panel thereof and three other judges of the court concur in that view. The court may sit en banc upon its own motion at any time, in any case in which a majority of the court determines it is appropriate to do so. The court sitting en banc shall consider and decide the case and may overrule any previous decision by any panel or of the full court.

E. The court may sit en banc with no fewer than eight judges. In all cases decided by the court en banc, the concurrence of at least a majority of the judges sitting shall be required to reverse a judgment, in whole or in part.

REVISION NOTES: No change appears to be needed in this section.

§ 17.1-403. Rules of practice . . . and internal processes . . . summary disposition of appeals without merit

The Supreme Court shall prescribe and publish the initial rules governing practice, procedure, and internal processes for the Court of Appeals designed to achieve the just, speedy, and inexpensive disposition of all litigation in that court consistent with the ends of justice and to maintain uniformity in the law of the Commonwealth. Before amending the rules thereafter, the Supreme Court shall receive and consider recommendations from the Court of Appeals. The rules shall prescribe procedures governing the summary disposition of appeals which are determined to be without merit.

REVISION NOTES: Possible changes would recognize the possibility that summary dispositions could go either way, and adding language regarding the appendix at the

end of this paragraph of the statute, “The rules shall prescribe procedures governing the summary disposition of appeals in appropriate circumstances which are determined to be without merit, 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.”

§ 17.1-404. Original jurisdiction in matters of contempt and injunctions, writs of mandamus, prohibition and habeas corpus

The Court of Appeals shall have authority to punish for contempt. A judge of the Court of Appeals shall exercise initially the authority concerning injunctions vested in a justice of the Supreme Court by § 8.01-626 in any case over which the court would have appellate jurisdiction as provided in §§ 17.1-405 and 17.1-406. In addition, in such cases over which the court would have appellate jurisdiction, the court shall have original jurisdiction to issue writs of mandamus, prohibition and habeas corpus.

REVISION NOTES: No change appears to be needed in this section.

§ 17.1-405. Appellate jurisdiction

Any aggrieved party may appeal to the Court of Appeals from:

1. Any final decision of a circuit court on appeal from (i) a decision of an administrative agency, or (ii) a grievance hearing decision pursuant to § 2.2-3005;
2. Any final decision of the Virginia Workers' Compensation Commission;
3. Any final judgment, order, or decree of a circuit court involving:
 - a. Affirmance or annulment of a marriage;
 - b. Divorce;
 - c. Custody;
 - d. Spousal or child support;
 - e. The control or disposition of a child;
 - f. Any other domestic relations matter;
 - g. Adoption . . . ; or
 - h. A final grievance hearing decision
4. Any interlocutory decree or order entered in any of the cases listed in this section (i) granting, dissolving, or denying an injunction or (ii) adjudicating the principles of a cause.

REVISION NOTES: Any additional categories of civil jurisdiction should be listed in subparagraph 4 et seq., and existing number 4 should be renumbered to follow those added categories.

§ 17.1-406. Petitions for appeal; cases over which Court of Appeals does not have jurisdiction

A. Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to Article 6.1 (§ 18.2-307.1 et seq.) of Chapter 7 of Title 18.2, (iii) any final order of a circuit court involving involuntary treatment of prisoners pursuant to § 53.1-40.1, or (iv) any final order for declaratory or injunctive relief under § 57-2.02. The Commonwealth or any county, city or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398.

B. In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.

REVISION NOTES: Subsection B does not appear to require any amendment. Subsection A may be amended to state, in substance:

A. Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to Article 6.1 (§ 18.2-307.1 et seq.) of Chapter 7 of Title 18.2, (iii) any final order of a circuit court involving involuntary treatment of prisoners pursuant to § 53.1-40.1, or (iv) any final order for declaratory or injunctive relief under § 57-2.02. The Commonwealth or any county, city or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398.

§ 17.1-407. Procedures on appeal

A. The notice of appeal in all cases within the jurisdiction of the court shall be filed with the clerk of the trial court or the clerk of the Virginia Workers' Compensation Commission, as appropriate, and a copy of such notice shall be mailed or delivered to all opposing counsel and parties not represented by counsel, and to the clerk of the Court of Appeals. The clerk shall endorse thereon the day and year he received it.

B. Appeals pursuant to § 17.1-405 are appeals of right. The clerk of the Court of Appeals shall refer each case for which a notice of appeal has been filed, other than appeals in criminal cases, to a panel of the court as the court may direct.

C. Each petition for appeal in a criminal case shall be referred to one or more judges of the Court of Appeals as the court shall direct. A judge to whom the petition is referred may grant the petition on the basis of the record without the necessity of oral argument. The clerk shall refer each appeal for which a petition has been granted to a panel of the court as the court shall direct.

D. If the judge to whom a petition is initially referred does not grant the appeal, [*upon timely request*] counsel for the petitioner shall be entitled to state orally before a panel of the court the reasons why his appeal should be granted. If all of the judges of the panel to whom the petition is referred are of the opinion that the petition ought not be granted, the order denying the appeal shall state the reasons for the denial. Thereafter, no other petition in the matter shall be entertained in the Court of Appeals.

REVISION NOTES: It would appear that subsections C and D would be abrogated in any system of appeal of right in criminal cases. Subsection A does not appear to require any amendment. Subsection B could be amended to state in substance:

B. Appeals pursuant to § 17.1-405 and § 17.1-406 are appeals of right. The clerk of the Court of Appeals shall refer each case for which a notice of appeal has been filed, ~~other than appeals in criminal cases,~~ to a panel of the court as the court may direct.

§ 17.1-408. Time for filing; notice; petition

The notice of appeal to the Court of Appeals shall be filed in every case within the court's appellate jurisdiction as provided in § 8.01-675.3. The petition for appeal in a criminal case shall be filed not more than forty days after the filing of the record with the Court of Appeals. However, a thirty-day extension may be granted in the discretion of the court in order to attain the ends of justice. When an appeal from an interlocutory decree or order is permitted in a criminal case, the petition for appeal shall be presented within the forty-day time limitation provided in this section.

REVISION NOTES: It would appear that this statute can be repealed, or that only the first sentence should be retained. Code § 8.01-675.3 essentially provides that – for

all cases within the jurisdiction of the Court of Appeals, a notice of appeal must be filed within 30 days.

§ 8.01-675.3. Time within which appeal must be taken; notice

Except as provided in § 19.2-400 for pretrial appeals by the Commonwealth in criminal cases and in § 19.2-401 for cross appeals by the defendant in such pretrial appeals a notice of appeal to the Court of Appeals in any case within the jurisdiction of the court shall be filed within 30 days from the date of any final judgment order, decree or conviction. When an appeal from an interlocutory decree or order is permitted, the appeal shall be filed within 30 days from the date of such decree or order, except for pretrial appeals pursuant to § 19.2-398.

For purposes of this section, § 17.1-408, and an appeal pursuant to § 19.2-398, a petition for appeal in a criminal case or a notice of appeal to the Court of Appeals, shall be deemed to be timely filed if (i) it is mailed postage prepaid by registered or certified mail and (ii) the official postal receipt, showing mailing within the prescribed time limits, is exhibited upon demand of the clerk or any party.

REVISION NOTES: The reference to § 17.1-408 would be deleted if that provision is repealed.

§ 17.1-409. Certification to the Supreme Court

A. . . . the Supreme Court . . . may certify [any] case for review by the Supreme Court. . . .

B. Such certification may be made only when, in its discretion, the Supreme Court determines that [the] case is of such imperative public importance as to justify the deviation from normal appellate practice and to require prompt decision in the Supreme Court

REVISION NOTES: No changes appear to be needed in this section

§ 17.1-410. Disposition of appeals; finality of decisions

A. Each appeal of right taken to the Court of Appeals and each appeal for which a petition for appeal has been granted shall be considered by a panel of the court. When the Court of Appeals has (i) rejected a petition for appeal, (ii) dismissed an appeal in any case in accordance with the Rules of Court, or (iii) decided an appeal, its decision shall be final, without appeal to the Supreme Court, in:

1. Traffic infraction and misdemeanor cases where no incarceration is imposed;
2. Cases originating before any administrative agency or the Virginia Workers' Comp. Comm'n;

3. Cases involving the affirmance or annulment of a marriage, divorce, custody, spousal or child support or the control or disposition of a juvenile and other domestic relations cases

4. [Pretrial appeals] in criminal cases pursuant to §§ 19.2-398 and 19.2-401. . . . ; and

5. Appeals involving involuntary treatment of prisoners pursuant to § 53.1-40.1.

B. Notwithstanding the provisions of subsection A, in any case [except pretrial appeals in criminal cases] in which the Supreme Court determines on a petition for review that the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value, review may be had in the Supreme Court in accordance with the provisions of § 17.1-411.

REVISION NOTES: A recommendation has been sought by the author of SJ47 on whether this statute should be amended or repealed. If it is repealed, the Supreme Court would be free to select cases for appeal from all subject matters in its discretion. If it is retained, any other subject matters would need to be added, or made subject of a nonrestricted appeal provision, and subsection A would need to read, in substance;

A. Each appeal of right taken to the Court of Appeals ~~and each appeal for which a petition for appeal has been granted~~ shall be considered by a panel of the court. When the Court of Appeals has (i) ~~rejected a petition for appeal,~~ (ii) dismissed an appeal in any case in accordance with the Rules of Court, or (iii) decided an appeal, its decision shall be final, without appeal to the Supreme Court, in:

§ 17.1-411. Review by the Supreme Court

Except where the decision of the Court of Appeals is made final under § 17.1-410 or § 19.2-408, any party aggrieved by a final decision of the Court of Appeals, including the Commonwealth, may petition the Supreme Court for an appeal. . . .

REVISION NOTES: If § 17.1-410 is repealed, reference to that provision would need to be deleted here: "Except where the decision of the Court of Appeals is made final under ~~§ 17.1-410 or~~ § 19.2-408, any party aggrieved by a final decision of the Court of Appeals, including the Commonwealth, may petition the Supreme Court for an appeal. . . .

§ 17.1-412. Affirmance, reversal, or modification of judgment; petition for appeal to Supreme Court upon award of new trial

A judgment, order, conviction, or decree of a circuit court or award of the Virginia Workers' Compensation Commission may be affirmed, or it may be reversed, modified, or set aside by the Court of Appeals for errors appearing in the record. If the decision of the Court of Appeals is to reverse and remand the case for a new trial, any party aggrieved by the granting of the new trial may accept the remand or proceed to petition for appeal in the Supreme Court pursuant to § 17.1-411.

REVISION NOTES: No changes appear to be needed in this section

§ 17.1-413. Opinions; reporting, printing etc.

A. The Court of Appeals shall state in writing the reasons for its decision (i) rejecting a petition for appeal or (ii) deciding a case after hearing.

REVISION NOTES: The petition reference in this section would be omitted, and the awkward “decision . . . deciding a case” phrasing could be smoothed out:

A. The Court of Appeals shall state in writing the reasons for its rulings decision in ~~(i) rejecting a petition for appeal or (ii) deciding a case after hearing.~~

§ 17.1-414. Facilities and supplies

A. The Court of Appeals shall be housed in the City of Richmond and, if practicable, in the same building occupied by the Supreme Court. When facilities are required for the convening of panels in other areas of the Commonwealth, the chief judge of the Court of Appeals shall provide for such physical facilities as are available for the operation of the Court of Appeals. The Court of Appeals may use any public property of, or any property leased or rented to, the Commonwealth or any of its political subdivisions for the holding of court and for its ancillary functions upon proper agreement with the applicable authorities. The Court of Appeals also may use any federal courtroom, the moot courtroom of any accredited law school located in the Commonwealth, or any other facility deemed adequate for the holding of court and for its ancillary functions upon proper agreement with the applicable authorities. Any expense incurred for use of such facilities may be paid from the funds appropriated by the General Assembly to the Court of Appeals.

REVISION NOTES: No changes appear to be needed in this section unless the decision is made by the Legislature to require permanent brick-and-mortar locations in various regions.

STATUTORY AND CONSTITUTIONAL NOTES ON HABEAS CORPUS AND OTHER MATTERS

Article VI, Section 1, of the Constitution of Virginia provides: “The Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of habeas corpus, mandamus, and prohibition; to consider claims of actual innocence presented by convicted felons in such cases and in such manner as may be provided by the General Assembly; in matters of judicial censure, retirement, and removal under Section 10 of this Article; and to answer questions of state law certified by a court of the United States or the highest appellate court of any other state.

Section 1 ends by stating that, “**subject to**” that “**limitation**[.]” and others, “the General Assembly [has] the power to determine the original and appellate jurisdiction of the courts of the Commonwealth.”

When proposing modifications to the Constitution for its 1971 general revision, the Commission on Constitutional Revision recommended removing habeas from the Supreme Court’s original jurisdiction, and the General Assembly rejected that change. Thus, it appears the General Assembly may not remove the Supreme Court’s original habeas jurisdiction without an amendment to the Constitution.

In addition, to reassign habeas responsibilities the General Assembly would be required to retool Code § 8.01-654 et seq. and Code § 17.1-310, which define the Supreme Court’s current statutory habeas jurisdiction.

The Legislature also might consider amending or abolishing Code § 17.1-404 if it elected to transfer original habeas jurisdiction to the Court of Appeals. That statute provides that “in such cases over which the [Court of Appeals] would have appellate jurisdiction, the court shall have original jurisdiction to issue writs of mandamus, prohibition, and habeas corpus.” The Court of Appeals has construed this section narrowly, however, limiting it to extraordinary matters.

Appendix D

The Role of State Intermediate Appellate Courts

Principles for Adapting to Change



November 2012

A White Paper produced by the Council of Chief Judges of the State Courts of Appeal



This white paper has been prepared under an agreement between the Council of Chief Judges of the State Courts of Appeal and the National Center for State Courts. Financial support was provided by the State Justice Institute. The points of view and opinions offered in this white paper are those of the authors and do not necessarily represent the official policies or position of the Council of Chief Judges of State Courts of Appeal, the National Center for State Courts, or the State Justice Institute.

The Council of Chief Judges of State Courts of Appeal gratefully acknowledges the financial contribution of the State Justice Institute. Without their support this white paper would not have been possible.

CCJSCA Review Committee

Honorable David V. Brewer

Former Chief Judge
Oregon Court of Appeals

Honorable James Z. Davis

Judge
Utah Court of Appeals

Honorable Gary W. Lynch

Judge
Missouri Court of Appeals, Southern District

Honorable William B. Murphy

Chief Judge
Michigan Court of Appeals

Honorable Ann A. Scott Timmer

Judge
Arizona Court of Appeals, Division 1

Honorable James T. Worthen

Chief Justice
Texas Twelfth Court of Appeals

Authors

John P. Doerner

Project Director
National Center for State Court

Christine A. Markman

Staff Attorney
Colorado Supreme Court

I. INTRODUCTION

A. Objectives and Overview

The majority of states have one or more intermediate appellate courts (IACs), with over ninety such courts nation-wide. IAC jurisdiction varies from state to state, as does their role in each state's judicial system. In most states, however, intermediate appellate courts were established to relieve the workload of the state's highest court by serving as the courts where most litigants obtain review of adverse decisions from trial courts and various administrative agencies. IACs primarily provide an appeal of right and most do not have discretion to decline to hear an appeal filed with the court. Because IACs must hear virtually all cases that are properly before them, they typically have extremely heavy workloads and are often referred to as the "workhorses" of the appellate justice system.

The role of IACs has changed over time as a result of steadily rising appellate filings and an expansion of their jurisdiction through statutory enactments and state constitutional amendments. States' highest courts, most of which do have primarily discretionary jurisdiction, do not have the resources to review every decision in which an IAC addresses an issue of first impression or clarifies or develops existing law. Thus, while IACs continue to serve their traditional role as error correction courts, their role has evolved to include significant responsibility for the definition and development of the law, a role that had historically been served only by the states' highest courts.

Although the role of the IACs has changed over time, the fact that they have mandatory jurisdiction and no ability to control the size of their workload has not. In addition, most IACs have experienced significant increases in the number of annual filings since the 1980s. As a result of the increased caseload, many IACs were successful in obtaining legislative approval for additional judges and non-judicial staff members. But courts at all levels have experienced significant budgetary reductions since 2008 due to the widespread fiscal crisis. These budgetary limitations have necessitated reductions in staffing levels for many courts and have placed a significant burden on them as they work to maintain timely and high quality service to the public while managing high volume caseloads with shrinking resources. Courts have responded to these challenges in a variety of ways, including re-evaluating the use of staff, making technological improvements, and adopting organizational and operational changes designed to resolve cases more efficiently. Through these challenges, IACs remain steadfast in their commitment to meet these increased demands without compromising their ability to render quality jurisprudence.

Against this background, the Council of Chief Judges of the State Courts of Appeal (CCJSCA) and the National Center for State Courts (NCSC) jointly undertook this effort to study the evolution of the role played by the intermediate appellate courts and their core functions and principles. The study also examined the effect of the recent fiscal crisis on IACs, and how they have adapted to new budgetary realities. Funding was provided by the State Justice Institute (SJI).

B. Data Collection Process

The NCSC assigned a consultant team who worked closely with a project committee composed of CCJSCA member representatives.¹ Together, they developed an on-line survey designed to collect data regarding the historical and modern roles of respondent courts; changes to their jurisdiction over time; the courts' goals, objectives, and core principles; how courts measure their fulfillment of those goals and objectives; the extent and effects of budgetary reductions; the level of state legislatures' understanding of the work of the courts and the effect of budget cuts on the courts' ability to function effectively; and operational and managerial strategies courts have adopted in response to budget reductions. This survey was administered to the full membership of the CCJSCA. In all, thirty-one intermediate appellate courts responded to the survey.

Following collection of the data, the NCSC compiled and analyzed the survey results which were presented to and discussed with the project committee. The team also conducted additional research regarding the establishment and role of IACs in state judiciaries and compared the values expressed by the IACs with the

¹ CCJSCA member representatives were: Chief Judge David Brewer, Oregon Court of Appeals; Judge Ann Scott Timmer, Arizona Court of Appeals, Division 1; Judge Gary Lynch, Missouri Court of Appeals, Southern District; Chief Judge William Murphy, Michigan Court of Appeals; Chief Justice Jim Worthen, 12th Texas Court of Appeals; and Judge James Davis, Utah Court of Appeals

recently published *Principles for Judicial Administration*.²

II. ROLE OF STATE INTERMEDIATE APPELLATE COURTS

A. History, Purpose, and Jurisdiction

Appellate courts have two primary roles: to review individual decisions of lower tribunals for error and to interpret and develop the law for general application in future cases filed in all levels of the legal system. The legal systems in most states initially contemplated a single appellate court that served both functions. But throughout the twentieth century, appellate courts experienced significant increases in workload as a result of various factors, including population growth, expanded post-conviction and appellate rights in criminal cases, increases in legislation and government regulation, expansion of appellate jurisdiction to include the review of agency decisions, and a societal trend toward resolving social and economic controversies through the legal system. The burgeoning workload resulted in a backlog of appellate cases and a growing lack of confidence in the judicial system.

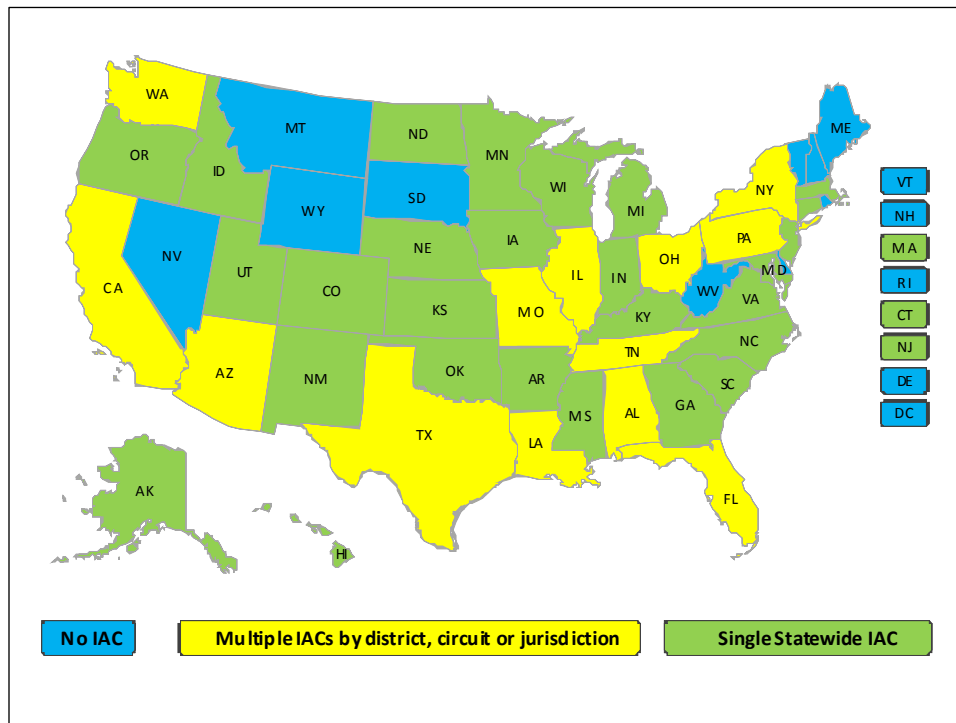
To relieve the pressure of the workload and ensure the timely resolution of appeals, forty states³ and the

² <http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1891>

³ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky,

Commonwealth of Puerto Rico established one or more intermediate appellate courts – typically by constitutional amendment -- with over ninety such courts now existing nation-wide. The District of Columbia and ten states have only a court of last resort.⁴ The intermediate appellate court structure by state is depicted in Illustration 1 below:

Illustration 1 – Intermediate Appellate Courts by State



Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

⁴Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

Of the thirty-one intermediate appellate courts that participated in this study, nine were established between 1875 and 1915, and twenty-two were established between 1963 and 1996.

States that have both a court of last resort and one or more intermediate appellate courts vary considerably in how they structure their appellate court systems and divide jurisdiction among the courts. The scope of intermediate appellate court jurisdiction is defined by each state's substantive law, whether by constitutional provisions or legislative enactments. Several respondent courts indicated that, when first established, their jurisdiction was limited by case type or geographic territory, but that it expanded over time to meet the changing needs and demands of the state's judicial system.

In most states, the majority of appeals of trial court and administrative decisions are reviewed in the first instance by the intermediate appellate courts, whose mandatory jurisdiction requires them to accept such appeals for review.⁵ Appeals in capital cases and a limited number of other case types⁶ are usually

⁵ Some states have procedures that permit courts of last resort to select appeals initially filed in the intermediate appellate court for transfer or that allow intermediate appellate courts to request the court of last resort to accept direct appellate jurisdiction over certain appeals, such as those involving issues of significant public interest or significant issues of first impression.

⁶ In most states, death penalty cases are taken directly from the trial courts to courts of last resort, bypassing the intermediate appellate courts. Alabama, Ohio, and Tennessee are exceptions to this general practice; in those states, death penalty cases

filed directly with the higher courts. The higher courts generally have discretionary jurisdiction to review cases already decided by the intermediate appellate court, selecting the cases they review in order to address novel legal issues, reformulate decisional law, and maintain consistency in lower court decisions. In a few states, all appeals are initially filed in the court of last resort, which retains some cases while transferring others to the intermediate appellate court.⁷ For example, the North Dakota Court of Appeals hears only the cases assigned to it by the Supreme Court, and in some years the Supreme Court assigns no cases to the Court of Appeals. Similarly, the Idaho Court of Appeals hears cases assigned by the Idaho Supreme Court (except capital murder convictions and appeals from the Public Utilities Commission or Industrial Commission, which must be heard by the Supreme Court); appellants may petition the Idaho Supreme Court to rehear a Court of Appeals decision, but the Supreme Court is not required to grant such a petition.

Most state intermediate appellate courts have general jurisdiction, but some states have multiple intermediate courts of appeal with distinct subject-matter jurisdiction. Alabama, New York, and Tennessee, for example, have separate intermediate appellate courts for civil and criminal matters. Indiana has one

are appealed directly to the intermediate appellate courts. Other appeals that are typically filed directly with the court of last resort include election disputes and habeas corpus, mandamus, and quo warranto proceedings.

⁷ Idaho, Iowa, Mississippi, North Dakota, Oklahoma, and South Carolina.

intermediate appellate court for tax matters and another for all other appeals, and Pennsylvania has two intermediate appellate courts, one that hears non-criminal matters brought by and against the government and one that is a general court of appeal.

State intermediate appellate courts also differ with respect to their geographic jurisdiction and degrees of independence from each other. Most have statewide jurisdiction, though some of those courts have multiple sites. Several state intermediate appellate courts, however, have multiple courts with regional jurisdiction and independence or a single court with multiple locations and geographically assigned cases.⁸

B. Evolution and Contemporary Role

Most intermediate appellate courts are cast primarily in the role of error correction, following precedent established by the courts of last resort, and error-correcting opinions typically affect only the parties to the cases in which the opinions are issued. But not all cases involve pure legal questions based on settled law or cases in which the legal issues are settled and resolution of the appeal requires the application of established law to straightforward facts. There is often an absence of binding precedent, and many cases involve either conflicts between statutes or previous court decisions, or the application of existing law to new fact patterns. In those cases, intermediate

⁸Arizona, California, Florida, Illinois, Louisiana, New York, Ohio, Texas, and Washington.

appellate court do not function solely as error-correcting courts, but also have responsibility -- subordinate to that of the higher court -- for announcing new rules of law, expanding or modifying existing legal principles, and resolving conflicts in authority. Opinions in such cases have precedential value and a broader impact on the legal system, affecting not only the litigants in the cases in which the opinions are announced, but also parties in future cases.

Although litigants in most states may petition the court of last resort for further review of adverse decisions of intermediate appellate courts, such review is generally discretionary and is exercised in a small percentage of cases – typically less than ten percent of cases heard by the intermediate appellate courts. Courts of last resort generally do not grant petitions for review in cases that involve only error correction, and most do not have the capacity to grant review in all cases in which intermediate appellate courts have issued opinions formulating and developing the law. Thus, by virtue of sheer volume, intermediate appellate courts are the court of last resort for most litigants, and their role in the appellate system has evolved from the original purpose of relieving the workload of higher courts by absorbing their error-correcting function to also playing a significant role in advancing the law in cases of first impression.

C. Shared Values

Despite significant differences in size, structure, jurisdiction, and internal governance, the survey responses reveal

that intermediate appellate courts share the common goal of rendering quality decisions clearly and efficiently, thereby preserving public confidence in the judiciary. These courts have also identified both explicitly and implied in the comments, shared institutional values and objectives for accomplishing that basic goal, including:

- Adopting effective internal management and operational structures that maximize public resources;
- Implementing case management processes that promote the timely and efficient disposition of cases;
- Promoting public awareness about the judicial system and avenues for access to the courts;
- Maintaining judicial integrity by promoting transparency regarding court processes; and
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court.

Twenty-four of the respondent courts reported that they have adopted performance goals and objectives, including establishing timelines for the case resolution, minimum annual clearance or disposition rates, and individual production expectations for judges.⁹ Half of those courts did so internally, two reported that

⁹ These performance goals and objectives are in addition to timelines established by legislation or court rule requiring the expedited handling of appeals in parental termination and other time-sensitive case types.

their performance goals and objectives were imposed by statute or rule, and six courts indicated that their performance goals and objectives were promulgated in coordination with state court administrators, legislatures, or rule-making bodies, sometimes as part of the budget negotiation process.

Several courts reported that the impetus for adopting performance goals and objectives was the American Bar Association model time standard recommendation that appellate courts resolve ninety-five percent of all cases within one year of the notices of appeal being filed.¹⁰ Three of the respondent courts (the Oregon Court of Appeals and both divisions of the Arizona Court of Appeals) have adopted and implemented modified versions of the Appellate CourtTools performance measurement system developed by the NCSC.

Of the twenty-four courts that have adopted performance goals and objectives, about half indicated that they periodically distribute statistics reflecting their performance results internally, while the other half make that information publicly available, either through state court administrators' offices, state legislatures, or on court websites.

Summaries of three courts' survey responses regarding their performance goals and objectives are featured in the break-out boxes on the following pages.

¹⁰See ABA Judicial Admin. Div., *Standards Relating to Appellate Courts*, 1994 ed., § 3.52, at 101.

Arizona Court of Appeals

Like the other respondent courts, the Arizona Court of Appeals reported that one of its primary goals is continued excellence in processing and deciding appellate matters. In furtherance of that overarching goal, the two divisions of the Court of Appeals, along with the Arizona Supreme Court, adopted many of the formal performance measures known as the Appellate CourTools.

A working committee reviewed performance statistics from a period of years relating to different performance criteria for the various types of appeals the court hears. The committee then developed performance targets for completion of the court's work. For example, Arizona adopted the CourTools measure of the time from notice of appeal to ultimate disposition, and subsets of that time frame, including measuring from the time an appeal is at-issue (the completion of briefing) until disposition, and from the time the appeal is submitted following conference and/or oral argument until disposition. The courts also measure case clearance rates and the age of pending caseloads. CourTools statistics are reviewed quarterly, and the statistics and an explanatory report are published annually. The report is provided to the Arizona Supreme Court and the state court administrator's office, and is posted on the Court of Appeals' website for easy public access.

In addition, the courts conduct surveys every two years of the attorneys who have appeared before the court, and the trial judges whose decisions have been reviewed, regarding case management issues and the quality of judicial review.

Utah Court of Appeals

The Utah Court of Appeals captures detailed data on all of its cases, providing the court with the tools it needs to make sound management decisions. In addition, the court has developed many internal operating procedures concerning time standards once a case has been submitted for decision.

For example, the court adopted internal procedures for the circulation of opinions which require that the first draft of the majority opinion must be circulated to the other judges on the panel within 90 days of the date of the initial case conference. Concurring or dissenting opinions must be circulated within 30 days of circulation of the majority opinion. Judges are encouraged to provide the author judge with "action slips" -- written comments and proposed changes to the draft -- within 7 days, which the author judge may accept or reject. Within 21 days after voting is completed on the majority and any concurring or dissenting opinions, a draft is circulated to all judges, law clerks, and central staff, who must convey any concerns or comments about the draft to the author of the opinion or the presiding judge within 7 days. The author judge then has 14 days to review suggestions and incorporate changes.

Michigan Court of Appeals

The impetus for the Michigan Court of Appeals' adoption of performance goals and objectives was the ABA's 1994 publication of model time standards recommending that appellate courts resolve 95% of all cases within one year of the notices of appeal being filed.

In 1998, a workgroup of judges and staff, along with representatives of the Michigan Supreme Court and state court administrative office, met to address the ABA model as applied to this court. Because Michigan court rules allow a full ten months for transcript preparation, briefing, and record production, they concluded that the ABA model was unrealistic. Instead, they established the goal for the court of deciding 95% of all appeals within 18 months, but little headway was made in meeting this goal in the ensuing years.

At the end of 2001, another committee of Court of Appeals judges and staff met to address the backlog and delay in deciding cases. In 2002, they issued a report that (1) set forth a specific plan to increase the number of dispositions, and (2) established measurement standards and time frames for resolving 95% of all appeals within 18 months. In response, the judges of the court unanimously adopted a delay reduction plan that sought to increase the number of dispositions by assigning additional cases to panels without the benefit of staff reports and proposed opinions, and by producing summary reports or draft opinions only in routine cases.

The plan also sought to decrease the time to disposition by establishing time frames for issuing opinions according to the type of case and/or hearing panel and by proposing several court rule amendments designed to hasten the time in which appeals become ready for decision, especially those involving the termination of parental rights. The Supreme Court adopted many of the proposed rule amendments. Although the court is still a couple percentage points shy of reaching the "95-in18" goal, it has set new goals of eliminating the backlog of appeals and deciding 95% of all cases within 15 months. Increased appropriations and disciplined spending has enabled the court to increase its central research staff in an effort to reach the new goals within a reasonable period of time.

Finally, in 2004, the Michigan Supreme Court authorized the court to conduct a pilot program with an expedited track for appeals from orders granting or denying summary disposition, which account for about half of the court's civil case docket. Implementation of the expedited track, known as the "90/90 Plan," began in 2005. Under the plan, transcript preparation and briefing were to be completed in 90 days. The court would then have 90 days to review the briefs and record, hear oral argument (if any), and issue an opinion. Unfortunately, the expedited track was terminated in 2007 because budget cuts and resulting decrease in staff made it impossible for the court to decide the appeals within the promised timeframe.

The chief clerk prepares weekly reports that measure (1) the average time to disposition by case category, and (2) the percentage of dispositions in increments from 10 to 24 months. The clerk also prepares monthly reports that measure certain caseload factors and track the status of pending cases to ensure timely processing. These weekly and monthly reports are only published internally. From the late 1990s through the mid 2000s, the court prepared annual reports that contained sections on court performance, including the average age of opinion cases at disposition, the number of dispositions by opinion and order, the clearance rate of cases, the percentage of pending cases that were 18 months or younger, and the percentage of cases that were decided within 18 months. The reports had been suspended for the past several years due to budget cuts but one was prepared for 2011 and is available on the court's website.

III. THE NEW BUDGET PARADIGM

Because the intermediate appellate courts provide an appeal of right in most cases and do not have discretion to decline to hear such appeals, they must consider and issue decisions in virtually all cases that are properly before them, absent a transfer of jurisdiction to the state's higher court. Thus, intermediate appellate courts have no control over the size of their workload as measured both by annual case filings and the number of decisions issued each year. Over the past few decades, most appellate courts across the country have experienced a steady increase in the number of annual case filings and a corresponding increase in workload, generating the need for additional judges and support staff.

At the same time, however, courts of all levels have experienced significant budgetary reductions since 2008 due to the widespread fiscal crisis, effects of which are likely to continue for some time. Twenty-two of the respondent states reported reductions in their budgets in recent fiscal years, and six indicated that their budgets have been generally flat, with no appreciable cuts but also no increases to meet inflation and the corresponding increase in the costs of doing business. Courts typically have relatively low actual operating expenses and the vast majority of a court's budget is for personnel expenses. Thus, budgetary limitations have resulted in reductions to staffing levels – both judicial and support staff -- placing a significant burden on courts as they work to maintain timely and high quality service to the public.

State governments have paid increased attention in recent years to the details of appropriated budgets and how their various state agencies, departments, and judicial branches operate. Virtually all states now require or encourage higher degrees of organizational accountability, transparency and a performance management mindset. These changes describe a “new budget paradigm” that is increasingly affecting the management and operations of the intermediate appellate courts, separate from the recent recession that continues to affect court budgets.

This new budget paradigm has highlighted the need for intermediate appellate courts to ensure that legislatures understand their core functions and principles, and appreciate the demands placed on them, including the inability to control increasing workload, and the impact on the public of continued budgetary reductions, both in terms of the quality of the services provided and the public's confidence in the judiciary. Four of the respondent courts reported that their state legislatures have a clear understanding of those issues, and twelve indicated that their legislatures have a more limited understanding of those issues. But almost half of the respondent courts reported that their legislatures have little or no understanding of the core functions of intermediate appellate courts, the operational challenges they face, and the effect of budget cuts on the timeliness and quality of services provided.

The new budget paradigm has also highlighted the need to ensure that courts are operating as efficiently as possible. Most respondent courts reported that they continually examine their organizational structures, operational and workflow processes, allocation and utilization of staff, and application of technology, in an effort to adapt to their growing caseloads and improve the efficiency of court operations, without compromising their ability to provide quality jurisprudence for their citizenry.

IV. EFFECTS OF BUDGETARY REALITIES

While a few courts reported that budgetary issues have had little or no effect on court staffing levels and operations, over half of the responding courts indicated that budgetary limitations and the new budget paradigm have impacted employee compensation, and have required some reductions in staffing levels and changes to court operational systems.

A. Staffing Levels and Employee Compensation

With respect to staffing levels and employee compensation, the responding courts consistently reported that the most significant impact has been on non-judicial staff -- clerk's office staff, secretaries, and legal staff (both law clerks and central staff attorneys), but several courts also reported reductions in judicial resources. More specifically, courts reported that that budget limitations have required them to:

- freeze non-judicial salaries by eliminating merit, automatic step, and cost of living increases;
- impose mandatory furlough days on non-judicial staff and/or encourage employees to take voluntary furlough days;
- reduce work hours for some employees;
- lay off non-judicial staff;
- eliminate judicial and non-judicial positions vacated through attrition;
- delay filling judicial and non-judicial positions vacated through attrition;
- eliminate or delay filling judicial positions vacated when judges retire or resign; and
- reduce the number of days for which retired judges may be compensated.

B. Organizational and Operational Changes

Not surprisingly, courts also reported that reductions in personnel have required significant organizational and operational changes, including the redistribution of work and realignment of job duties among remaining staff to accommodate reductions in staffing levels, and more judicial involvement in work previously performed by law clerks and central staff attorneys. One court indicated that it achieved significant savings by

consolidating separate Clerk of Court offices for its supreme and intermediate appellate courts into one combined Appellate Court Clerk's Office.

Because the vast majority of intermediate appellate courts' budgets are for personnel expenses, there are few areas of discretionary spending where courts can achieve savings. Nevertheless, courts reported that they have implemented a variety of cost-saving measures to reduce discretionary spending, such as reducing library resources (particularly print holdings), eliminating in-house settlement programs, reducing the number of hours the court is open to the public, deferring technological improvements and equipment updates, delaying the purchase of office supplies, limiting travel and continuing legal education allowances.

C. Effects on Performance

Courts reported that budgetary limitations and the new budget paradigm have had both positive and negative effects on court performance. As discussed below in Section V, the focus by legislatures, as the primary funding authority for most courts¹¹, and the public's interest in organizational accountability, transparency, and performance has caused many courts to streamline their procedures to become more efficient and maximize the use of public resources. Some courts reported that these measures have not only

¹¹ Some courts receive funding from county funding authorities rather than from state legislatures but because most intermediate appellate courts are funded by state legislatures, this report refers to funding authorities as legislatures.

improved overall court operations, but have also had a positive effect on morale.

But many courts reported that the budgetary challenges, particularly reductions in staffing levels, have had negative effects on morale and the quality of the court's written opinions; decreased productivity, backlogs, and clearance rates; and sharply increased the time required to resolve appeals. Courts also reported that budget reductions in trial courts and government agencies have resulted in delays in filing records and briefs, contributing to delays in the resolution of appeals.

V. STRATEGIES FOR RESPONDING TO THE NEW BUDGET PARADIGM

Intermediate appellate courts have developed a wide range of strategies to deal with modern budget realities and resultant staffing reductions in an effort to maximize efficiency and productivity, ensure the timely resolution of appeals, continue to produce quality written opinions, and maintain public confidence in the judiciary. The strategies reported most frequently focused on the use of legal staff, case screening and differentiation, technological advancements, imposition of internal case processing deadlines, and improved coordination with legislatures and state court administrators

A. Use of Legal Staff

Intermediate appellate courts employ several types of legal staff to help manage their heavy workloads, including law clerks, central staff attorneys, and other

court attorneys, and several respondent courts indicated that they are re-evaluating their attorney support structures and exploring more cost-effective ways to utilize legal staff and increase their productivity.¹² This process has led many courts to turn increasingly to permanent legal staff instead of relying solely on short-term law clerks.

Courts have historically relied primarily on law clerks (often referred to as "elbow clerks"), who work for an individual judge and have no direct responsibilities to the court as a whole, to provide legal research and writing support for the judges to whom they are assigned. Under the traditional hiring model, law clerks work for an individual judge for one or two years to gain additional legal research and analytical skills before practicing law. But many appellate courts reported that because the learning curve for new law school graduates is steep, most law clerks do not produce consistently high quality work until well into their terms. Accordingly, although most courts continue to have some short-term law clerk positions, many have begun to allow judges to employ long-term or permanent law clerks in an effort to maximize the usefulness of law clerks to the judges they serve.

Consistent with the recognition that long-term law clerks produce higher quality

¹² A 2011 white paper commissioned by the CCJSCA summarizes data collected from thirty-four intermediate appellate courts across the country regarding the various ways in which they use legal staff. See *Comparative Attributes of Legal Staff in Intermediate Appellate Courts*, Council of Chief Judges of the State Courts of Appeal, April 2011.

work and are generally more useful to the judges they serve than short-term law clerks, most intermediate appellate courts also employ central staff attorneys who serve indefinite terms and work for the court as a whole rather than for an individual judge. Central staff lawyers serve as research attorneys who may prepare memoranda or draft opinions on cases, sometimes without the initial involvement of judges, and also perform other chambers support, such as opinion editing, and administrative functions, often in conjunction with the Clerk of Court's Office. Central staff attorneys tend to stay employed with the courts for which they work for many years -- often their entire legal careers -- and develop valuable expertise and institutional knowledge. Although central staff attorneys are typically paid more than short-term law clerks, courts have found -- even in tight budgetary circumstances -- that the salary differential is worth the significant productivity, efficiency, and work quality benefits provided by permanent legal staff.

Several courts indicated that they have reduced the number of law clerks assigned to each judge and/or the size of their central staff and that judges have had to assume responsibility for some of the work previously done by legal staff and accept some portion of their caseload without bench memoranda or draft opinions. But courts also reported that they have adapted the way they use legal staff to maximize their effectiveness and productivity and ensure that they provide the legal support services necessary to enable courts to manage their burgeoning caseloads. Specifically, courts reported using central staff attorneys to accomplish

various operational efficiencies, such as streamlining motions, screening cases early in the appeal process for jurisdictional and procedural defects, and assessing case difficulty for purposes of identifying cases appropriate for summary disposition and

equalizing case assignments among judges. A brief description of how the Colorado Court of Appeals uses staff attorneys for these purposes is discussed in more detail below.

Colorado Court of Appeals

The Colorado Court of Appeals rules on over 13,000 motions per year. It combines its motions practice with a screening process designed to identify appeals with jurisdictional defects before briefing begins.

A staff attorney screens every case for jurisdictional defects shortly after the notice of appeal is filed. In cases with a possible jurisdictional defect, the screening attorney issues an order directing the appellant to cure the defect or explain why the appeal should not be dismissed. Screening files and motions are then divided into three general categories.

Certain types of motions, including dispositive motions and most motions for stay, are decided by a three-judge motions panel, which rotates on a monthly basis. Other matters, including uncontested motions involving ministerial or procedural issues, are ruled on under the Chief Judge's signature by a central staff attorney. All other motions are decided by one judge, usually the Chief Judge.

At separate one- and three-judge motions meetings scheduled weekly, a staff attorney orally presents motions to the judges and makes a recommendation regarding the disposition of each motion. The staff attorney then prepares written orders or, in some cases, drafts opinions for publication.

Another method courts reported using to maximize the usefulness of central staff attorneys is encouraging or requiring them to develop one or more areas of specialization, particularly in cases involving administrative law or statute-driven subjects, such as domestic relations, workers compensation, and parental

termination. As a corollary to staff attorney specialization, a significant number of courts indicated that there are subject matter areas for which staff attorneys write all or most of the initial opinions. Courts that reported using one or both of these approaches indicated that doing so is more efficient and results in higher quality

opinions than having short-term law clerks with generally limited experience in those areas getting bogged down in trying to understand complex statutory and administrative law or side-tracked by irrelevant issues that are easily identified by an attorney who specializes in those areas.

B. Screening and Case Differentiation

Most respondent courts indicated that they employ a process of screening cases for jurisdictional and other procedural defects (such as lack of a final order or subject matter jurisdiction, or failure to timely appeal) at some point in the appeal process. The timing of the screening varies among courts, as does the person responsible for conducting the screening, but in most courts the screening is done by a staff attorney or other court attorney (not a law clerk) before briefing begins -- either shortly after the appeal is filed or after the record is filed. In a few courts, the jurisdictional screening is done after briefing is complete, often by a law clerk, as part of the opinion-drafting process, primarily because those courts do not have the staffing resources to screen cases earlier.

Courts that screen cases for jurisdictional and other procedural defects early in the appeal process do so for several reasons. The identification and potential dismissal of cases with incurable jurisdictional defects before briefing helps manage the courts' dockets and saves both time and money for the court and the parties. In addition, identifying and notifying the parties of potential defects

gives them an opportunity to resolve the problem or clarify the record and can sometimes narrow the scope of the issues on appeal.

Courts also use case screening to balance the difficulty of case assignments among judges. For example, a case screening process that assesses overall case complexity and assigns a difficulty rating to each case based on factors such as the size of the record, length of the briefs, number of issues raised, and complexity of the issues presented, can be used to balance not only the difficulty of cases assigned to each panel but also the difficulty of writings assigned to individual judges.

Case screening can also be part of differentiated case management programs and expedited calendars designed to resolve certain classes of cases more expeditiously, reduce or avoid backlogs, and redirect judicial resources to more demanding cases. The key to the success of differentiated case management programs is identifying cases appropriate for placement on an accelerated calendar early in the appellate process. The screening and case differentiation systems adopted by the New Mexico and Michigan courts of appeal are highlighted in the breakout boxes on the following pages.

New Mexico Court of Appeals

The ten-member New Mexico Court of Appeals pioneered an accelerated docket program that, unlike the California and Rhode Island models, emphasizes briefing in the form of “docketing statements” and deemphasizes oral hearings. Established in 1975, New Mexico’s summary calendar is one of the most enduring instances of procedural differentiation in state appellate courts.

The summary calendar was initially aimed at expediting criminal appeals and reducing transcript volume and cost. However, the scope of the calendar has been expanded to include all other case types in the court’s jurisdiction, including workers’ compensation, domestic relations, and routine civil appeals.

Within ten days after a notice of appeal is filed in the New Mexico Court of Appeals, trial counsel is required to file a “docketing statement” that outlines the relevant facts, lists the issues on appeal, indicates how the issues were preserved in the trial court and identifies relevant authorities.

After the trial court or administrative agency record (without transcripts) is filed, a central staff attorney reviews the record, docketing statement, and applicable law, then prepares a memorandum recommending a calendar assignment. A single judge reads the memorandum and either adopts the recommended calendar assignment or makes a different calendar assignment.

Cases placed on the summary calendar include those with issues governed by settled New Mexico law or that otherwise have obvious outcomes. They are decided without transcripts, a 20-day briefing time and no oral argument. Cases that are not assigned to the summary calendar are assigned to either the legal calendar or the general calendar. Legal calendar cases are also decided with no transcripts, but have 30-day full briefing. General calendar cases have transcripts and 45 day full briefing time. Oral argument in non-summary calendar cases is by the granting of an attorney’s request for oral argument.

During the calendaring process, a central staff attorney reviews the file for jurisdictional defects (such as no final judgment or order, or an untimely notice of appeal), and also reviews the docketing statement, record, and applicable law. The staff attorney then prepares, for a single judge’s signature, a calendar notice or notice of proposed disposition briefly setting forth the Court’s understanding of the facts and issues, and the rationale for its proposed decision. The parties may file memoranda in response to the calendar notice within 20 days. The failure to oppose the Court’s proposed disposition constitutes acceptance of the proposed decision. The central staff attorney reviews any memoranda received in response to the calendar notice and recommends to the single calendaring judge a further notice of assignment to a non-summary calendar or to resolve the case by opinion. If an opinion is to be filed, a three-judge panel is assigned and must agree.

The New Mexico Court of Appeals resolves from 55 to 65% of its appeals on the summary calendar.

Michigan Court of Appeals

The Michigan Court of Appeals provided the following description of its use of legal staff both for traditional research and writing functions and for case screening and differentiation.

Before cases are assigned to a panel, central staff attorneys prepare research reports for most cases and draft opinions for those cases expected to be resolved by unpublished opinion. Research reports contain neutral statements of the relevant facts, summaries of the parties' arguments, legal analyses of the issues raised, and recommendations as to dispositions. The draft opinions typically include a short recitation of the relevant facts and a succinct analysis of each issue. The assigned judge will accept, revise or reject the drafts and produce final opinions, with assistance from a law clerk. Judges may request additional staff attorney assistance in limited situations to take advantage of particular areas of expertise. Law clerks draft opinions for cases that are submitted to panels without research reports

The court uses a two-step difficulty assessment process, one for assigning cases to central staff, then for achieving balance in the judges' workload. The first assessment, or day evaluation, is performed by a senior staff attorney after briefing is completed. The attorney estimates in days the amount of time each case will require for preparation of a research report based on factors such as the type of case, the length of the briefs and record, and the number and complexity of issues. Career track attorneys work on those cases expected to take 7 days or more and less experienced limited tenure attorneys work on cases of that are more routine and expected to take 4 to 6 days. Contract attorneys work primarily on termination of parental rights appeals but will also work on other routine appeals on occasion. These assessments are also used to identify appropriate cases to assign to judges on case call without research reports, which is done to advance the court's delay reduction goals.

The second assessment, focusing on difficulty, is made by a supervising staff attorney. Each case with a research report is rated on a 1 to 6-point scale usually assessing factors such as the number of issues presented, whether the issues are routine, whether publication is recommended, the experience of the authoring attorney and the length of the research report. These assessments are distinct from the day evaluation and are used to balance the workload for judges on case call. Judicial caseloads typically consist of from 19 to 23 aggregate difficulty points. Different judges may have varying numbers of cases assigned to them but a similar number of difficulty points.

Most courts that have implemented such systems indicated that they typically use central staff attorneys to screen case filings and identify appropriate cases, and most expedited review programs involve abbreviated briefing. Six examples of procedural and case differentiation programs are described below. Any of these programs can be adjusted to fit the particular needs and circumstances of other

intermediate appellate courts, and can be used for any case type or for particular subjects (civil, criminal, worker's compensation, etc.).

- **Limited Brief, Expanded Oral Argument Calendar.** Under this system, a court attorney identifies routine cases before briefing begins based primarily on the notices of

appeal and underlying trial court order. For courts that have in-house settlement or mediation programs, cases suitable for the limited brief/expanded oral argument calendar can also be selected from among those that remain unsettled after a settlement conference. The parties file briefs with a page limit substantially less than the rules would otherwise allow, and the court holds expanded oral argument (for example, instead of fifteen minutes per side, the court might allow thirty minutes per side). Participation in such programs is generally voluntary, but courts can encourage participation by committing to issue a decision within two weeks after argument.

- **Show Cause Calendar.** The show cause calendar is based on the same principle as the limited briefing, expanded oral argument calendar: full briefing is not necessary in routine appeals, and judicial resources should be allocated among cases in proportion to their complexity. Selection of cases for the show cause calendar is a two-step process. After the lower court record is filed, appellants are required to submit written statements of up to five pages summarizing the issues presented in the appeal; appellees may file similar summary statements. After reviewing the parties' summary statements, a judge holds a conference with the attorneys and parties to evaluate the complexity of the case and its appropriateness for

the show cause calendar. Cases the conference justice concludes do not warrant full briefing are set on the show cause calendar and assigned to a panel for oral argument. The parties are permitted to file supplemental statements of ten pages or less, and the cases are orally argued shortly thereafter. Show cause dispositions, which require unanimity, result in a one-page order and summary affirmance or summary reversal.

- **Summary Calendar.** The summary calendar program adopted by the New Mexico Court of Appeals is described in more detail in the break-out box on page 15, but the gist of the program is that the court identifies cases early in the process that involve straight-forward issues that can be resolved on settled law based not only on limited briefing, but also on a limited record. This program recognizes that the preparation and filing of the trial court record often causes significant delays, and cases identified for participation in the program are those that can be resolved without transcripts. For those cases, the court submits written proposed dispositions to the parties who are given an opportunity to respond. If the panel to which a summary calendar cases assigned disagrees with the response or if the parties agree that the proposed disposition is appropriate, the court issues a memorandum opinion consistent with the proposed disposition without briefing or oral argument.

- **No-Argument Calendar.** The examples of procedural differentiation programs described above rely on systems of tracking cases early in the appellate process. A more common form of procedural differentiation, used to some degree by most state intermediate appellate courts, is to decide a portion of their appeals without oral argument. The intended and observed effect of “no argument calendars” is to reduce the time judges spend on non-argued appeals. A common practice is for central staff attorneys to prepare memoranda or draft opinions in cases that are not orally argued, and for chambers staff to prepare draft opinions in orally argued cases. While directing cases to a non-orals calendar can reduce the time from close of briefing to issuance of an opinion, it does not reduce the time between the date the notice of appeal is filed and the date briefing is completed.
- **Sentencing Calendar.** For many intermediate appellate courts, although criminal cases represent a majority of the court’s filings and can contribute to the accumulation of significant backlogs, the majority of criminal cases are relatively straight-forward and can be resolved on settled law. Accordingly, several of the case differentiation systems respondent courts described involved primarily criminal cases. Among the programs described included one that focuses

on cases in which the only issues raised are challenges to the sentence imposed, because the legal issues are settled, and questions regarding the application of law to case-specific facts can be resolved based on a review of a limited record – typically just the judgment of conviction, pre-sentence investigation report, and sentencing hearing transcript – that can be prepared on an expedited basis.

Under one example of a sentencing calendar program, cases are placed on an orals calendar dedicated solely to sentencing appeals, the court holds abbreviated arguments (for example, instead of fifteen minutes per side, the court might allow only ten minutes per side), and decisions are announced in an order, not an opinion. Like the other expedited calendar programs described above, sentencing calendars enable courts to resolve a portion of their criminal caseloads more expeditiously and allocate judicial resources among cases in proportion to their complexity. Moreover, by concentrating criminal sentencing appeals on a separate calendar, courts can improve the quality of their decision-making in those appeals by achieving greater consistency in the resolution of similar issues.

- **Limited Briefing, No-Argument Criminal Per Curiam Calendar.** This system is designed to identify criminal cases that can be resolved based on the record and the

appellant's opening brief, with no response brief, thereby eliminating or reducing the sometimes significant delay in filing responsive briefs. One court's system is structured as follows. A central staff attorney with experience in criminal law reviews every opening brief and record filed in criminal cases to identify cases that may be appropriate for summary disposition without an answer brief. The types of cases selected for this program are typically sentence appeals and appeals of trial court orders denying post-conviction motions that are governed by settled law or are procedurally barred (time-barred or successive). The staff attorney prepares a summary draft opinion, usually within one or two weeks after the opening brief is filed, and the cases are then assigned to the per curiam division, which meets weekly. Membership on the panel rotates regularly, and the judges who sit on the per curiam division also sit on a "regular" division. If the panel agrees with the proposed disposition, it issues an opinion without holding oral argument, usually within two weeks of the meeting. If the division concludes that an answer brief is necessary or that the case is not appropriate for summary per curiam disposition, the court orders that a response brief be filed and assigns the case a regular division.

By resolving identified cases without answer briefs, courts can reduce backlogs, redirect judicial

resources to more complex cases, and, by reducing the number of briefs states Attorneys General are required to file, allow them to likewise reduce their backlogs and redirect their resources to more complex cases. Courts can also accomplish those dual goals by having a staff attorney review all criminal opening briefs to determine which issues, if any, merit a response brief and which can be resolved based only on the opening brief and record and ordering that the answer brief address only those issues identified by the court as meriting a response.

These are just a few examples of case differentiation systems used in intermediate appellate court which acknowledge that judicial resources should be allocated among cases in proportion to their complexity: the most difficult cases consume a disproportionately large amount of attorney and judicial time, while the least difficult cases consume a disproportionately small percentage.

C. Technological Advancements

Technological advancements have been a significant factor in allowing many courts to maintain high clearance rates, avoid backlogs, and issue opinions on a timely basis in most appeals. Although obtaining the equipment or programs necessary to accomplish technological improvements in court systems always presents a budget challenge, many courts

have found that the short-term investment is cost effective in the long-term because it enables them to streamline operations and save money in other areas, including personnel, copying and mailing expenses.

The technological advancement mentioned most frequently by respondent courts is the adoption of electronic filing systems allowing lower courts to e-file or provide digital versions of the record, and that require parties to e-file briefs, motions, and other case related documents.¹³ Several courts indicated that they are in the planning stage and have not yet actually implemented e-filing systems, but have begun to require parties to file digitized copies (either on disk or through an email delivery system) of their briefs and pleadings along with the paper originals. Requiring digital filings – whether through an e-filing system or by requiring simultaneous filing of paper and digital documents – reduces the number of paper documents that must be handled and docketed by clerk’s office staff, allows legal staff and judges to access records, briefs, and other pleadings remotely, and gives them the option of printing those materials or reviewing them electronically.

Although the implementation of e-filing systems is costly and requires extensive up-front training of court personnel, courts that have made the investment report that the initial expense is well spent in the long-term because of the significant efficiencies and ongoing cost

¹³ Courts with e-filing systems typically allow pro se parties to continue to file their pleadings and briefs on paper. Court personnel then scan the documents and store the electronic version with e-filed materials.

savings achieved through e-filing systems. Moreover, some courts charge a filing fee for each document in addition to the initial case filing fee to offset the cost of the e-filing system.

Courts have adopted other technological advancements, both with respect to interactions with litigants and the public, and with respect to internal operation systems. Examples of technological advancements that respondent courts (or state judicial branches) reported adopting to improve filing systems and other interactions with litigants and the public include:

- Eliminating court reporters statewide and simultaneously implementing an automated transcript management system, which significantly reduces the traditionally significant delay between the filing of the notice of appeal and the filing of the record;
- Linking e-filed or digital versions of documents in the court’s case management system so they are directly accessible by court staff and judges;
- Conducting all written correspondence with litigants, attorneys, and lower court personnel electronically;
- Issuing orders and opinions electronically;
- Posting opinions and dispositive orders online;

- Developing and posting self-help forms that help litigants (particularly pro se parties) prepare pleadings that are clear and comply with applicable rules; and
- Improving and updating court websites to enhance litigants' access to public court records and provide up-to-date information to the public (thus reducing telephone calls requesting information from court staff) about court rules, internal court procedures, and other court operations.

Courts also reported adopting technological advancement designed to streamline internal operations, minimize administrative burdens on judges and staff, maximize the speed and portability of digital text, and reduce the costs associated with document-driven systems (such as copying and mailing expenses) including:

- Storing draft opinions and other court documents in shared databases;
- Circulating draft opinions electronically;
- Commenting on and editing opinions electronically; and
- Conferencing and voting electronically in cases in which in-person or extensive discussions are unnecessary.

D. Imposition of Internal Case Processing Deadlines

For many courts, budget limitations and staffing reductions have caused sometimes significant backlogs and that can prevent courts from achieving the goal of ensuring the timely resolution of all appeals. Some jurisdictions have taken various measures to improve the management of pending cases in their courts by establishing aspirational timelines and benchmarks for the preparation and issuance of opinions, including:

- Requiring judges to circulate draft opinions within a certain number of days (often 90 days) after case assignment and requiring concurring or dissenting opinions to be circulated within a certain number of days (often 30 days) thereafter;
- Preventing judges who still have excessive outstanding writings from sitting on any new cases;
- Internally circulating reports showing the number of cases each judge has outstanding and the number of days each case has been pending since the assignment date;
- Internally circulating the number of decisions issued as well as the average number of days cases were pending between the assignment date and the date the opinion was announced, for each judge;
- Establishing timelines for panel members to comment on draft

opinions or requiring panel members to comment on other judges' draft opinions before circulating draft opinions of their own for comment by the other panel members; and

- Requiring panel members to meet with the Chief Judge to re-conference and discuss the status of cases that have been pending for more than ninety days.

5. Improved Coordination with Legislatures and State Court Administrators

A number of respondent courts expressed concern that their state legislatures view the judicial branch as a department or agency, rather than a separate co-equal branch of government, and as a result, courts have historically not been fully and adequately funded. Others commented that their legislatures continue to pass laws that increase the court's workload without providing funding. These concerns, combined with the ongoing effects of the recession and increasing attention to the details of appropriated budgets and court operations, emphasize the importance of ensuring that legislatures understand the budgetary needs of intermediate appellate courts and the effect on courts and the public of further budget reductions.

To that end, courts reported making increased efforts to be as transparent as possible and educate legislatures about court operations at all levels to ensure that

legislators and their staffs understand the difficult structural and fiscal decisions required to enable courts to enhance the quality of justice while facing increased caseloads with fewer resources. Courts indicated that they often coordinate with their state court administrators' offices during the budget negotiation process with legislatures. The specific measures judicial systems and intermediate appellate courts have taken in this regard include:

- Hiring and working closely with knowledgeable and experienced state court administrators and budget staff;
- Providing legislatures with statistical reports of the court's operations;
- Preparing and distributing annual reports explaining the nature and extent of the work of the court and reiterating the standards against which court performance is measured;
- Providing timely and accurate information regarding court operations throughout the budgetary process;
- Encouraging chief judges and court administrators to engage regularly in straightforward communications with key budget decision makers; and
- Assessing operations to evaluate alternatives and to develop improvements to the court's efficiency. These can be shared with legislators and others responsible for court appropriations.

For courts in states with multiple courts of appeal, the appropriation process used by the fourteen Texas Courts of Appeal might be of particular interest. Specifically, the Texas Courts of Appeal reported that they have developed a unified approach for working with the legislature to secure appropriate funding for the judicial branch as a whole, including the appellate courts. They submit appropriation requests based on the concept of "similar funding for same size courts." This unified approach has fostered solidarity among the courts of appeal, simplified the requests for appropriations, and reduced competition and acrimony between courts during the legislative budget process.

All budget requests should be based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models and application of appropriate performance measures. The requests should focus on obtaining funding sufficient to allow the court to resolve cases in accordance with recognized time standards; have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facilities guidelines; and have access to technologies comparable to those used in other governmental agencies and private businesses.

VI. PRINCIPLES FOR JUDICIAL ADMINISTRATION APPLIED TO THE INTERMEDIATE APPELLATE COURTS

The new budget paradigm and changing socioeconomic factors have created shifting demands on our judicial institutions, requiring courts at all levels to continually find solutions that provide quality judicial services more efficiently. To maintain public confidence in the judiciary, efforts by court leadership to address the long-term budget shortfalls and the inevitable restructuring of court services must be guided by overarching practical operational principles. In response to this need, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) jointly adopted 25 *Principles for Judicial Administration* in July 2012.

The *Principles for Judicial Administration* provide the context in which operational as well as budgetary and funding principles, originating from a variety of organizations such as NCSC, CCJ, and COSCA and the reengineering experiences of the judicial branches in several states, are unified. While the principles are interdependent, they are grouped into four categories:

- Governance;
- Decision-Making and Case Administration;
- Developing and Managing the Judicial Budget; and
- Providing Adequate Funding.

The first two categories are foundational principles that can enable courts to manage their resources efficiently and effectively. They are necessary pre-conditions for the second two categories that address court budgets and funding.

While the principles are focused on state judicial systems generally, they are also applicable to the functional aspects of intermediate appellate courts. They are explicitly intended to help chief judges and court administrators as they seek to address long-term budget shortfalls and the inevitable restructuring of court services. Many of the principles are directly related to the common objectives, strategies and actions taken by intermediate appellate courts to address tightening budgets and the new budget paradigm, and performance management issues previously discussed. A summary of the principles for Judicial Administration is included as an appendix to this white paper.

In Section II (C), we identified 5 shared values among the intermediate appellate courts. These shared values are:

- Adopting effective internal management and operational structures that maximize public resources;
- Implementing case management processes that promote the timely and efficient disposition of cases;
- Promoting public awareness about the judicial system and avenues for access to the courts;

- Maintaining judicial integrity by promoting transparency regarding court processes; and
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court.

Many of the Principles for Judicial Administration directly connect with these shared values. The remainder of this section discusses selected judicial administration and their application to the shared values of intermediate appellate courts.

A. Governance Principles

Principle 1: Effective court governance requires a well-defined governance structure for policy formulation and administration for the entire court system.

Principle 2: Judicial leaders should be selected based on competency.

Principle 3: Judicial leaders should focus attention on policy level issues while clearly delegating administrative duties to court administrators.

Principle 4: Court leadership, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.

Related Shared Value:

- Adopting effective internal management and operational structures that maximize public resources

The shared value of adopting effective internal management and operational structures that maximize public resources speaks directly to the governance of the IAC in concert with Principles 1 through 4. Effective governance of an IAC requires a well-defined structure for formulating policy as well as administering the day-to-day operations of the court. Court leadership should possess a high level of administrative competence and demonstrate a commitment to the mission and values of the judiciary and the court's responsibilities to its justice system partners and the general public.

In an effective governance model, the chief judge provides leadership for the court, directs its administration, and serves as the principal intermediary between the court and the judicial system of which it is a part, the other branches of government, the bar, and the public. Effective leaders in all organizations, whether private or public, should focus their attention on policy level issues concerning the court's internal operations and external matters affecting the court, while clearly delegating the administrative duties to staff.

B. Decision-Making and Case Administration Principles

Principle 9: Court leadership should make available, within the court system or by referral, alternative dispositional approaches, including:

- a. The adversarial process.
- b. A problem-solving, treatment approach.
- c. Mediation, arbitration or similar resolution alternative that allows the

disputants to maintain greater control over the process.

- d. Referral to an appropriate administrative body for determination.

Principle 10: Court leadership should exercise control over the legal process.

Principle 11: Court procedures should be simple, clear, streamlined and uniform to facilitate expeditious processing of cases with the lowest possible cost.

Principle 12: Judicial officers should give individual attention to each case that comes before them.

Principle 13: The attention judicial officers give to each case should be appropriate to the needs of that case.

Principle 14: Decisions of the court should demonstrate procedural fairness.

Principle 15: The court system should be transparent and accountable through the use of performance measures and evaluation at all levels of the organization.

Related Shared Values:

- Implementing case management processes that promote the timely and efficient disposition of cases
- Maintaining judicial integrity by promoting transparency regarding court processes
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court

The primary function of intermediate appellate courts is to review appealed decisions of lower tribunals, but they also have responsibility -- subordinate to the higher court -- for announcing new rules of law, expanding or modifying existing legal principles, and resolving conflicts in authority. All decision-making and case administration procedures should support those functions while also advancing these principles and shared values.

Intermediate appellate courts usually sit in panels of three judges when hearing and deciding cases. In accordance with Principle 14, membership on the panels should change periodically, and panel assignments should be made randomly, such that each judge sits with every other judge as often as practicable. To ensure objectivity and fairness, cases should be assigned to panels in a random process after judges with a disqualifying conflict of interest, as defined by the state's rules of judicial conduct, have been eliminated from the list of potential panel members. The random assignment of cases to panels does not preclude the differentiation of cases according to their urgency, complexity, common subject matter, common parties, and other relevant criteria. Indeed, cases involving the same parties and/or related lower court proceedings should be assigned to the same panel whenever possible. Differentiated case management programs, summary calendars, alternative dispute resolution services such as mediation, and other case administration procedures that allocate judicial resources among cases according to their relative urgency and complexity can be greatly beneficial to their expeditious

resolution. These programs and procedures are addressed and discussed in Principles 9 through 13. However, as stated in Principle 12, the panel assigned to determine the merits of an appeal must ultimately make a collective and deliberative decision in each case, including cases identified as appropriate for summary disposition. This helps to avoid the appearance of cursory consideration, which can undermine public confidence in the integrity of the judiciary.

When reviewing the merits of a lower court decision, IACs determine whether that court correctly applied and interpreted the law, conducted the proceeding fairly and deliberately to avoid substantial prejudice to the parties, and made its decision based on factual findings that are reasonably supported by the evidence. Appellate courts should not consider an issue that was not raised below unless it relates to the court's jurisdiction or must be addressed to prevent manifest injustice.

The parties to an appeal have the opportunity to request oral argument on the merits of the case, and the court usually has the authority to order oral argument when it deems necessary, even if the parties do not request it. Some IACs also have authority to deny a request for oral argument if the panel concludes that it would not assist the court in its deliberation of the case. Rules are usually in place allowing each side a specific length of time for oral argument. The panel can adjust the allotted time commensurate with the relative difficulty of the questions presented for review. Principles 10, 11 and 13 are reflected in these practices.

The judges assigned to decide a case should confer reasonably soon after argument or submission on the briefs. Although opinions may be issued by one designated author judge, all panel members should participate equally in the consideration of the case and the determination of the appropriate outcome. Responsibility for authoring opinions should be assigned among the judges by the presiding judge on the panel pursuant to a rotational system that can be adjusted to balance the difficulty of overall writing assignments and equitable workloads.

IACs should ordinarily provide a reasoned explanation of the court's dispositional decision, though a decision can be issued in a variety of forms and lengths, including orders, memorandum opinions, and published opinions. All parties to an appeal should be provided with a copy of the court's decision. Courts that sit in more than one panel should strive for decisional consistency, though the ultimate responsibility for consistency among panels rests with the state's higher court.

Even when explicit time standards for the resolution of cases do not exist, IACs should adopt aspirational internal time frames for the disposition of cases.¹⁴ To ensure transparency and accountability, these established time frames should be openly available and related statistics

¹⁴ In order to efficiently measure actual court performance relative to such time frames, the court must necessarily utilize a case management system that includes all appropriate data relative to the filing and disposition of cases, as well as the achievement of various milestones, for the various case types.

published on a regular and timely basis. Annual reports should include the extent of compliance with the court's established time frames for case resolution. Principle 15 supports these types of efforts to ensure transparency regarding overall court performance and accountability.

VII. CONCLUSION

Appellate courts serve a dual role in state judicial systems: 1) reviewing individual decisions of lower tribunals for error and, 2) interpreting and developing the law for general application in future cases filed in all levels of the legal system. The former is traditionally the primary role of intermediate appellate courts, while the latter is the primary role of courts of last resort. But due to the rising number of intermediate appellate court decisions without a corresponding increase in the capacity of the courts of last resort to review all cases in which an IAC has announced a new rule or expanded on existing law, IACs have become the court of last resort for the vast majority of litigants. While a large percentage of IAC decisions involve error correction, a large number also address issues of first impression. Although data specifically addressing this evolution in the role of IACs are not currently available, it is generally understood that most IAC decisions – estimated at over 90% in many states – do not undergo further review. As a result, many of those decisions no longer affect only the parties to the case in which the opinion was rendered but instead may establish precedent that develops and

clarifies the law on important issues of broader impact.

IACs serve these dual roles in the context of a societal trend toward relying on the judiciary to resolve social and economic controversies, as reflected by increased legislation and governmental regulations at both the federal and state levels that create and expand upon legal rights. While federal courts also serve an important function, state courts are more frequently the courts in which issues that affect individuals and their local communities are resolved, including criminal, domestic relations, child welfare, education, property rights, ballot initiatives, unemployment, and disability matters. IACs play a vital role in most states' judicial systems. The failure of IACs to remain current in resolving their caseloads and rendering effective, well-reasoned decisions, would likely have a negative effect on the ability of both trial courts and courts of last resort to perform their respective functions adequately. The pressure on IACs to resolve appeals expeditiously despite budgetary limitations and resultant staffing reductions is exacerbated by the growing trend in both state and federal legislation to require expedited handling of certain categories of cases, thus further delaying resolution of non-expedited appeals. Beyond effects on the judiciary, individuals, commercial enterprises and governmental agencies would likely also be negatively impacted. Thus, IACs need to ensure that the public and state legislatures understand the work of the court, efforts of the court to improve its organizational performance, and the effects of adding unfunded mandates and statutorily expedited case types. In

addition, because the vast majority of an IAC's budget is for personnel expenses, opportunities are limited for budget reduction without corresponding impacts to court performance.

But even if legislatures fully understand the effect of budget cuts on courts and the administration of justice, courts will not be immune from the realities of the recent fiscal crisis and the new budget paradigm. They must strive to work more efficiently and effectively with shrinking resources. IACs should be mindful that they are part of a bigger enterprise of state government and of their role within the judicial system. Courts should thus re-examine their organizational structures and operational practices with an eye toward improving efficiencies while continuing to produce justice that resolves individual cases promptly, provides clear guidance to lower court judges, and fosters the public's ongoing confidence in the judiciary as a whole. The *Principles for Judicial Administration* provide a framework for IACs adapting to change.

Public confidence in the judiciary depends not only on the timely resolution of individual cases and the quality of opinions, but also on public perceptions regarding the internal workings of courts, the establishment and fulfillment of performance objectives, their adherence to broadly accepted court principles, and the selection and retention of qualified and capable judges. Transparency and accountability are thus critical to a well respected judiciary and can foster an environment in which the public and other branches of government understand the judiciary's role, are more likely to support

adequate funding, and are less likely to interfere with court governance. Courts should promote a culture of transparency and accountability by making information readily available to the public regarding access to the courts, internal court operations, achievement of performance objectives, and how courts are using public resources.

This white paper is intended to stimulate discussion and the sharing of ideas among intermediate appellate courts regarding the various ways in which they have adapted to budgetary limitations and to encourage discussion among chief judges and court administrators regarding the unique approaches they have adopted to solve common problems. It is presented as one in a series of analytical projects that will examine various aspects of intermediate appellate court operations and management issues. Future studies may include topics such as technological applications and solutions; case differentiation systems; the establishment of performance objectives, including how they are measured and reported; and the impacts of intermediate appellate court performance on other levels of the judicial system, other branches of government, the business community, and the public.

Appendix E

NATIONAL CENTER FOR STATE COURTS

FINAL REPORT:

VIRGINIA COURT ORGANIZATION STUDY

SUBMITTED TO THE
JUDICIAL COUNCIL OF VIRGINIA

JUNE 1979

[Pages 271-277]

Jurisdiction of the Intermediate Court

Decisions about jurisdiction in a two-tiered appellate system are difficult and complex. This report recommends that Virginia adopt the streamlined jurisdictional arrangement proposed by the ABA Appellate Standards. In general, appeals from the circuit court should be appeals of right to the intermediate court, and the Supreme Court should have discretionary jurisdiction over all intermediate court decisions.

Several major topics are encompassed by this general recommendation: whether there should be appeal of right to the intermediate court, whether some cases should be appealed directly from the trial courts to the Supreme Court, and whether the intermediate court should be a court of last resort in some types of appeals. These will be discussed in this section. An additional jurisdictional question, whether the intermediate court should be divided into divisions with separate territorial jurisdictions, will be addressed in the following section, which describes the proposed structure of the intermediate court.

Appeal of Right and Review Procedures. There should be appeal of right to the intermediate court from all final decisions of the circuit court. Under present standards of fairness in this country, "it is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court . . . [as] a protection against error, prejudice, and human failings in general."¹¹ But an appeal of right, as is discussed below, does not require a long, cumbersome appellate process.

The distinction between appeal of right and discretionary review is not always clear. Appeal of right implies that the appellate court makes a single decision in each case. Discretionary review implies that the court makes an initial decision whether to let the lower court result stand or to study the case to make a decision on merits. Appeal of right also implies more thorough consideration of the case than most courts give when exercising discretionary review.

In recent years, however, procedures in appeals of right have approached those used in discretionary review. Traditionally, judges decided an appeal only after reading the briefs and record, hearing lengthy oral argument, and preparing a published opinion. But in the past two decades, the appellate workload explosion has caused many courts, especially intermediate courts, to curtail elements of the traditional procedure. Study of the record, or even the briefs, is left to staff attorneys and law clerks. Oral arguments are shortened and frequently not allowed at all. Decisions are announced in short, unpublished memoranda opinions. In a few courts, many cases are decided without any opinion. That is, the procedures in appeals of right have approached those used in discretionary review, such as in the petition stage at the Virginia Supreme Court.

In recommending an appeal of right, therefore, this report does not suggest that the intermediate court use all elements of the traditional appellate procedure. The court may wish to decide many cases without oral argument or without full-length published opinions.

Decisions could be made with short memorandum opinions, which might refer simply to a prior decision that controls the issues raised. Decisions by simple order, such as those in the petition stage in the Supreme Court, are also possible (though ABA Appellate Standard 3.36 advises against such a procedure). The briefs in the Court of Appeals would be the same short, photocopied briefs now submitted to the Supreme Court with petitions to appeal.

Appeal of right does mean, and this report recommends, that the court not have two separate decision stages (one to decide whether to grant review and a second to decide appeals granted). More important, appeal of right means that the intermediate court should satisfy certain minimum standards for the thoroughness of review. Here we rely upon the ABA Appellate Standards to provide guidelines. These were mentioned in the previous paragraph and earlier in this chapter when discussing procedures in the petition for appeal stage in the Supreme Court. A basic reason for the proposed intermediate court, in fact, is to supply judicial capacity sufficient to meet the ABA Standards.

Division of Jurisdiction. The states have designed a great many ways to divide jurisdiction over initial appeals between supreme courts and intermediate courts. This report recommends that Virginia substantially comply with the ABA Appellate Standards in this regard. Standard 3.10 states that initial review should ordinarily be taken to the intermediate court, and not the supreme court. The rationale given (and the rationale stated earlier by the Court Study Commission for its recommended appellate court jurisdiction) is that the Supreme

Court should concentrate on the law-making function of appellate courts and the intermediate court should concentrate on the error-correcting function. Original jurisdiction writs, because they seldom involve important issues, should also be filed in the intermediate court instead of the Supreme Court.

Standard 3.10 gives two exceptions to the general rule that all initial appeals be filed in the intermediate court: a) states may provide for direct appeal to the supreme courts in death penalty cases, and b) supreme courts should be permitted to bypass the intermediate court in "cases of great and immediate public importance," either at the request of a party or on the court's own motion. The division of jurisdiction between the Virginia Supreme Court and intermediate court should deviate from the ABA model in two respects.

First, the Supreme Court should continue to have mandatory jurisdiction over those cases in which it now has mandatory jurisdiction. Besides death penalty cases, permitted by the ABA Standards, the Court should also have sole, mandatory jurisdiction over appeals from the Corporation Commission, and original jurisdiction in bar discipline cases and Judicial Review and Inquiry Committee matters. It is presently believed that these cases are worthy of full-scale treatment by the Supreme Court; whatever the reasons for this belief, they would not be affected by the creation of an intermediate court. We emphasize, however, that cases in these categories constitute a small portion of the Court's present caseload and would continue to account for a minor part of the Court's workload after an intermediate court is created.

Second, the Supreme Court should have authority to bypass the intermediate court in any appeal, not just cases of great and immediate public importance, as suggested by the ABA Standards. This authority, which is often given to state supreme courts, would allow the Supreme Court to relieve the intermediate court whenever caseloads temporarily rise beyond the new court's capacity to decide cases expeditiously. The bypass authority however, should not be used as a substitute for expansion of the intermediate court necessitated by increased volume.

The division of appellate jurisdiction recommended here, essentially the ABA model, is in accord with the trend among other states. Maryland, for example, recently adopted the ABA model. Nevertheless, it should be recognized that in most states with intermediate courts a large number of initial appeals go to the supreme court. Certain types of cases--for example, appeals from major felony convictions--may go directly to the supreme court; or the supreme court may screen all appeals, apportioning some to itself and some to the intermediate court. These arrangements have the advantage of limiting the number of second appeals. But they have numerous disadvantages. The most important problem when jurisdiction is divided along subject-matter lines is that the supreme court's caseload becomes excessive as the volume of appeals falling within its mandatory jurisdiction increases. The major problem when the supreme court itself divides cases between itself and the intermediate court is that the top court tends to pass on only the dull, routine cases, making intermediate court judgeships unattractive.

Review of Intermediate Court Decisions. The Supreme Court should have discretionary review of intermediate court decisions. That is, there should be no appeal of right from the intermediate court, and the supreme court should have the authority to review any intermediate court decision upon request of a party. Both recommendations are in accord with ABA Appellate Standard 3.10.

Appeal of right from intermediate courts in a few states is available in several circumstances: a) when the case contains certain specified issues, b) when there is a dissent in the intermediate court, or c) when the intermediate court certifies the case to the supreme court. The basic problem with all these arrangements is that they can require second appeals in cases that do not have sufficient law-making importance to justify Supreme Court review. For example, there is little reason for the Supreme Court to review a non-unanimous intermediate court decision concerning sufficiency of evidence. Also, the Supreme Court may disagree with the intermediate court's judgment when the latter certifies that the issues in a case are sufficiently important to merit a ruling by the top court. Dissents below and non-binding certifications, however, would be valuable indications to the Supreme Court that it should grant discretionary review.

It is very important that the Supreme Court not be precluded from reviewing certain types of intermediate court decisions. The Court should have authority to manage and develop the state's jurisprudence in all areas of the law. Only one state, Florida, has attempted to vest a significant amount of final jurisdiction in intermediate courts. The result has been nothing short of chaos; the Florida Supreme Court has strained to expand its control over the Courts of

Appeals, creating a confusing body of law intended to regulate when it will or will not review the lower appellate court.¹²

Organization and Cost of the Intermediate Court

This section will discuss several important details of the workings of the proposed intermediate court. The National Center recommends that the court be centralized: it should be based in Richmond, and to the extent possible it should share Supreme Court facilities, such as the clerk's office. The court should have 12 judges initially, although more judges will be needed later if caseloads continue to expand at their present rate. The new court will cost about \$1,353,500 a year at present prices, and the initial start-up costs will be about \$120,000.

Centralization and Panels. The court should be centralized, and the administrative functions and judges' offices should be located in Richmond. The court, however, would sit in three-judge panels, the procedure used by almost all intermediate courts in the country. Panel assignments would rotate; each judge should sit regularly with each of his colleagues. The court should not hold en banc hearings, since panel conflicts can be resolved by the Supreme Court. The court should be empowered to hold panel hearings outside the capitol.

There are two major reasons for the centralization recommended here--to ensure caseload balance among judges and panels, and to reduce the court's cost.

**ESTIMATED STAFFING NEEDS OF COURT OF APPEALS'
CHIEF STAFF ATTORNEY'S OFFICE AND CLERK'S OFFICE
IF COURT'S JURISDICTION IS EXPANDED**

- **SCENARIO ONE:** Estimate of the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right.

CSA Summary:

20% increase (300 cases):

**2 Staff Attorney I positions
1 Administrative Staff Attorney position**

Clerk Summary:

20% increase (300 cases):

**1 Deputy Clerk position
1 Assistant Clerk position**

- **SCENARIO TWO:** Estimate of the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right and its civil jurisdiction is expanded to include subject matters approximately equivalent to an additional 800-1,200 cases per year.

CSA Summary:

**20% criminal increase (300 cases),
plus 800 civil cases:**

**1 Staff Attorney II position
7 Staff Attorney I positions
1 Administrative Staff Attorney position
1 Paralegal position**

**20% criminal increase (300 cases),
plus 1,200 civil cases:**

**2 Staff Attorney II positions
9 Staff Attorney I positions
1 Administrative Staff Attorney position
2 Paralegal positions**

Clerk Summary:

**20% criminal increase (300 cases),
plus 800 civil cases:**

**3 Deputy Clerk positions
3 Assistant Clerk - Paralegal positions
3 Assistant Clerk positions**

**20% criminal increase (300 cases),
plus 1,200 civil cases:**

**4 Deputy Clerk positions
3 Assistant Clerk – Paralegal positions
5 Assistant Clerk positions**

Court Operations:

**One Full-Time Civil
Reporter of Decisions**

BACKGROUND INFORMATION REGARDING ESTIMATED STAFFING REQUIREMENTS FOR PROPOSED SCENARIOS

We have been asked to address the additional staffing needs for the Office of the Chief Staff Attorney (CSA) and the Clerk's Office under two scenarios involving legislative changes to the Court's jurisdiction:

- **The first scenario** is to estimate the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right.
- **The second scenario** is to estimate the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right **and** its civil jurisdiction is expanded to permit an appeal of right in all civil cases, with an expected additional 800-1,200 cases per year.

I. Scenario One - Criminal Appeal of Right

The change to a criminal appeal of right presents the most difficult scenario for estimating staffing needs. We have no way to know how many additional cases will result from changing to a criminal appeal of right, so staffing calculations must be based on some logical assumptions. Every effort has been made to provide realistic estimates. Based on Sentencing Commission figures that show approximately 23,600 defendants were sentenced for at least one felony offense per calendar year and taking into account the current number of criminal petitions filed annually, we will assume an increase in the number of appeals filed by approximately 20%. Based on the average number of petitions filed from 2014 through 2019 (1,500), we estimate that the jurisdictional change may result in a total of approximately 300 **additional** filings per year. We note this estimate (even at the 20% projection) is extremely conservative considering the data provided in the Supplemental Report of the Court of Appeals of Virginia Jurisdiction Study Group. See Supplemental Report, CAV Jurisdiction Study Group, Draft of August 25, 2020 at 27-30. The Supplemental Report projects total possible criminal filings between 1,460 and 2,220 using calculations “[b]ased on the middle range of American states with appeals by right (omitting the lowest quarter and the highest quarter).” Id. at 30.¹ Consequently, for purposes of the estimated staffing needs, we will assume a 20% annual increase, or **300 additional criminal cases** (making the total criminal filings 1,800).

The Office of the Chief Staff Attorney (CSA) is responsible for preliminary processing of approximately 85% of the total court filings (other cases are addressed by the Clerk's

¹ The Supplemental Report includes projections of criminal filings as high as 3,500 cases based on “the national average of the percentage of all criminal cases commenced that are appealed to the court of appeals in appeal-of-right jurisdictions.” Supplemental Report, CAV Jurisdiction Study Group at 30.

Office). CSA personnel can process an average of 115 criminal cases annually per attorney, in an average time of 21.4 days per case under the current petition system. In addition, one support staff member is necessary per approximately every four to five attorneys.

*** Note that our formula of **115 criminal cases per attorney** can be used to estimate staffing needs if it is determined that more or fewer cases are anticipated.

To maintain the quality, efficiency, and quantity of the work the CSA produces annually, assuming a 20% increase in criminal case filings, **two additional Staff Attorney I positions** would be necessary to accommodate the anticipated increased caseload from the change to an appeal of right. We have also added **one Administrative Staff Attorney position** to track cases, compile data, conduct targeted research, and screen unique legal issues processed through the Chief Judge. This position is important to continued efficiency and is included in all the assumed scenarios to changes in the Court's jurisdiction.

**CSA Summary (20% increase): 2 Staff Attorney I positions
1 Administrative Staff Attorney position**

Further, personnel in the Clerk's Office can process in an accurate and timely manner an average of 125 cases annually per staff member.

*** Note that our formula of **125 cases per staff member** can be used to estimate staffing needs if it is determined that more or fewer cases are anticipated.

To maintain the quality, efficiency, and quantity of the cases the Clerk's office can process in a timely manner, assuming a 20% increase in criminal case filings, **one additional Deputy Clerk position** and **one additional support staff position** would be necessary.

**Clerk Summary (20% increase): 1 Deputy Clerk position
1 Assistant Clerk position**

II. Scenario Two - Criminal Appeal of Right and Civil Appeal of Right

As set forth above, assuming a 20% increase, we estimate that a jurisdictional change to a criminal appeal of right will result in a total of approximately **300 additional** criminal filings per year. Thus, to maintain the quality, efficiency, and quantity of the work the CSA produces, **two additional Staff Attorney I positions and one Administrative Staff Attorney position** would be necessary to accommodate the anticipated increased caseload from the change to an appeal of right. To maintain the quality, efficiency, and quantity of the cases the Clerk's Office can process in a timely manner, **one additional Deputy Clerk position** and **one additional support staff position** would be necessary to accommodate the anticipated increased caseload from the change to an appeal of right.

Given that civil cases frequently have significantly larger records and that due to the diversity of the cases we do not have staff with subject-matter expertise in the assumed expanded jurisdictional areas, we estimate that the CSA staff attorneys would process an average of **95 civil cases annually per attorney**. Therefore, in addition, based on the instruction to assume an expanded jurisdiction that results in **800-1,200 additional** civil filings per year, in order to process this additional civil caseload in approximately the same time as the Court's current caseload and to ensure the same efficiency and quality of the work product that the CSA produces, **one to two additional Staff Attorney II (supervisor) positions and five to seven additional Staff Attorney I positions, as well as one to two additional support staff positions**, would be necessary.

Thus, to adequately provide for the maximum number of total projected cases under Scenario Two (1,500 additional cases), a total of **eleven additional Staff Attorney positions**, including supervisory attorneys, **one Administrative Staff Attorney**, and **two additional support staff positions** would be necessary.

CSA Summary (800 additional civil cases and a 20% increase in criminal cases):

- 1 Staff Attorney II position**
- 7 Staff Attorney I positions**
- 1 Administrative Staff Attorney position**
- 1 Paralegal position**

CSA Summary (1,200 additional civil cases and a 20% increase in criminal cases):

- 2 Staff Attorney II positions**
- 9 Staff Attorney I positions**
- 1 Administrative Staff Attorney position**
- 2 Paralegal positions**

In addition, personnel in the Clerk's Office can process in an accurate and timely manner an average of **125 cases annually per staff member**. Therefore, to process this additional civil caseload and maintain the quality, efficiency, and quantity of the cases the Clerk's office can process in a timely manner, **two to three additional Deputy Clerk positions and five to seven additional support staff positions** would be necessary.

Thus, to adequately provide for the maximum number of total projected cases under Scenario Two (1,500 additional cases), a total of **four additional Deputy Clerk positions, three additional Assistant Clerk – Paralegal positions, and five additional Assistant Clerk positions** would be necessary.

Clerk Summary (800 additional civil cases and a 20% increase in criminal cases):

- 3 Deputy Clerk positions**
- 3 Assistant Clerk - Paralegal positions**
- 3 Assistant Clerk positions**

Clerk Summary (1,200 additional civil cases and a 20% increase in criminal cases):

- 4 Deputy Clerk positions**
- 3 Assistant Clerk – Paralegal positions**
- 5 Assistant Clerk positions**

Finally, under the current structure of the Court, the Civil Reporter of Decisions and the Criminal Reporter of Decisions are each a part-time position. In light of the significant increase in civil caseload it is imperative to have a full-time Civil Reporter of Decisions. It is also likely necessary to have a full-time Criminal Reporter of Decisions but since the increase in criminal cases is more tentative that is not included in the current proposed budget.

One Full-Time Civil Reporter of Decisions

Court of Appeals Expansion - Fiscal Impact

Scenario I: 20% increase, additional 300 criminal cases

Chief Staff Attorney Office	2 Staff Attorney I positions & 1 Administrative Staff Attorney	\$	344,519.54
Clerks Office	1 Deputy Clerk and 1 Assistant Deputy Clerk	\$	161,877.20
		\$	506,396.74

Scenario II: 20% increase, additional 300 criminal cases plus 800 civil cases

Chief Staff Attorney Office	1 Staff Attorney II, 7 Staff Attorney I, 1 Administrative Staff Attorney, 1 Paralegal	\$	1,117,679.58
Clerks Office	3 Deputy Clerks, 3 Assistant Deputy Clerks, 3 Paralegals	\$	126,904.60
Court Reporter	1 full-time court reporter	\$	344,211.60
IT	3 PC/Video support technicians	\$	709,670.40
		\$	2,298,466.18

Scenario III: 20% increase, additional 300 criminal cases plus 1200 civil cases

Chief Staff Attorney Office	2 Staff Attorney II, 9 Staff Attorney I, 1 Administrative Staff Attorney, 2 Paralegals	\$	1,547,260.88
Clerks Office	4 Deputy Clerks, 5 Assistant Deputy Clerks, 3 Paralegals	\$	126,904.60
Court Reporter	1 full-time court reporter	\$	344,211.60
IT	3 PC/Video support technicians	\$	939,968.20
		\$	2,958,345.28

Additional Annual & Setup costs

Cost for Each Additional Court of Appeals Judge

CAV Judge		\$	279,986.18
Law clerks (2)		\$	229,679.70
Admin		\$	93,732.00
	Annual Staffing	\$	603,397.88

Office Lease and IT Network Charges

Annual Office Lease (Current Average)		\$	36,926.00
Annual IT Network & Software Charges		\$	4,116.25
		\$	41,042.25

Annual Costs Staff & Office \$ 644,440.13

Initial Office Setup Costs

Furniture, files, telephones, etc		\$	30,000.00
IT Hardware/Software purchases (Judge plus staff, replace every 4-5 years)		\$	28,854.75
	Initial Office Setup	\$	58,854.75

Court of Appeals Expansion - Fiscal Impact Summary

		Total Annual Costs	Initial Office Setup		Total Year 1 Costs
Scenario I: Staff	\$	506,396.74		\$	506,396.74
1 Additional Judge	\$	644,440.13	\$ 1,150,836.87	\$ 58,854.75	\$ 1,209,691.62
2 Additional Judges	\$	1,288,880.26	\$ 1,795,277.00	\$ 117,709.50	\$ 1,912,986.50
3 Additional Judges	\$	1,933,320.39	\$ 2,439,717.13	\$ 176,564.25	\$ 2,616,281.38
4 Additional Judges	\$	2,577,760.52	\$ 3,084,157.26	\$ 235,419.00	\$ 3,319,576.26
5 Additional Judges	\$	3,222,200.65	\$ 3,728,597.39	\$ 294,273.75	\$ 4,022,871.14
 Scenario II: Staff	\$	 2,298,466.18		\$	 2,298,466.18
1 Additional Judge	\$	644,440.13	\$ 2,942,906.31	\$ 58,854.75	\$ 3,001,761.06
2 Additional Judges	\$	1,288,880.26	\$ 3,587,346.44	\$ 117,709.50	\$ 3,705,055.94
3 Additional Judges	\$	1,933,320.39	\$ 4,231,786.57	\$ 176,564.25	\$ 4,408,350.82
4 Additional Judges	\$	2,577,760.52	\$ 4,876,226.70	\$ 235,419.00	\$ 5,111,645.70
5 Additional Judges	\$	3,222,200.65	\$ 5,520,666.83	\$ 294,273.75	\$ 5,814,940.58
 Scenario III: Staff	\$	 2,958,345.28		\$	 2,958,345.28
1 Additional Judge	\$	644,440.13	\$ 3,602,785.41	\$ 58,854.75	\$ 3,661,640.16
2 Additional Judges	\$	1,288,880.26	\$ 4,247,225.54	\$ 117,709.50	\$ 4,364,935.04
3 Additional Judges	\$	1,933,320.39	\$ 4,891,665.67	\$ 176,564.25	\$ 5,068,229.92
4 Additional Judges	\$	2,577,760.52	\$ 5,536,105.80	\$ 235,419.00	\$ 5,771,524.80
5 Additional Judges	\$	3,222,200.65	\$ 6,180,545.93	\$ 294,273.75	\$ 6,474,819.68

Note: If Scenario II or III adopted, additional space in downtown Richmond area would need to leased for these employees, cost unknown

TO: Judicial Council of Virginia

FROM: Advisory Committee of Rules of Court

September 25, 2020

The Advisory Committee on Rules of Court met September 3, 2020 and reports two categories of recommendations to the Judicial Council.

First, there are several Rules that need to be amended to conform to new or modified legislative language. These are summarized in item 1 below and set forth in full in Appendix A to this report. These changes implement legislative developments that are now in effect, and thus they are susceptible to executive action by the Council without presentation at a meeting, unless a member of the Council requests discussion.

Second, there are three Rules revisions (and one minor form update) proposed by the Advisory Committee that can be presented for discussion at the next meeting of the Council when the Chief Justice determines that the agenda time permits. These proposals are set forth in item 2 below.

1. *Ministerial Changes to Conform to Legislation*

The Advisory Committee recommends that the Council approve several Rules Revisions that are necessary to conform to legislation adopted by the General Assembly. The full text of each item is set forth in Appendix A to this report.

- Rule 1:24 (d) is a lengthy provision tracking almost verbatim Code § 19.2-354.1 governing the payment of fines and costs on an installment basis. That statute was amended in 2020 to delete a particular provision, which had stated: “The court may require the defendant to present a compliance summary prepared by the Department of Motor Vehicles of the other courts in which the defendant also owes fines and costs.” The Rule has echoed this exact language, which should now be deleted from the Rule since it is no longer authorized in the statute.
- Rule 3A:14 currently lists seven mandatory topics for court voir dire questioning in felony cases, and then notes that counsel has the right to ask any questions relevant to the qualifications of an impartial juror. The 2020 enactment of Code § 19.2-262.01 enumerates topics that may be asked in that regard. Thus a cross-reference to that statute should be added to the Rule after the listing of mandatory topics, so that it states: “Thereafter, consistent with the provisions of Code § 19.2-262.01, the court, and counsel as of right, may examine on oath any prospective juror and ask any questions relevant to the qualifications as an impartial juror.”

- Rule 7B:12, addressing the issue of what claims are brought to the circuit court when a party appeals a General District Court ruling, has been abrogated by statutory amendments to Code § 16.1-106, and the Rule must be revised to track the new version of the statute (which provides, in substance, that the filing of a timely notice of appeal by one party from a judgment relating to a claim, counterclaim, cross-claim or third-party claim, or another appealable order of the general district court, is deemed a timely notice of appeal by any other party on a final order or judgment entered in the same or a related action arising from the same conduct, transaction, or occurrence, and that each party must perfect its own appeal rights by payment of any writ tax or costs applicable under § 16.1-107).

- The spousal privilege statutes were amended in 2020 to eliminate “husband and wife” references in favor of “spouse” references. Rule 2:504 must be conformed to that usage.

- A new statute, § 19.2-271.5, creates a limited “newsperson’s privilege” in criminal cases. Since all evidentiary privilege statutes are also reflected in a Part Two rule of evidence, a Rule tracking this statute is needed. In sequence, it will be numbered Rule 2:508.

- Rule 1:25 on “Specialty Dockets” requires minor edits consistent with changes effected by Chapter 1096 of the 2020 statutes, creating the Behavioral Health Docket Act. These Rule amendments simply conform the terminology and add a reference to the Behavioral Health Docket Act itself.

2. *Discussion Items*

- A. Pretrial-Conferences in Cases to Run Seven Days or more.**
- B. Rule 4:5(b)(6) – Entity Depositions Rule Revision.**
- C. Defining Responsive Pleadings in Rule 3:8.**
- D. Updating the Eminent Domain Pretrial Order Form.**

A. Pretrial-Conferences in Cases Expected to Run Seven Days or more.

A Boyd-Graves study committee looked at the issue whether Rule 1:19 should require a pretrial conference within five days of trial, and concluded that pretrial conferences are readily available across the Commonwealth where needed, and hence a uniform requirement to hold such a conference would be a waste of time and expense. It concluded, however, that – where a case is scheduled for a trial of three days or more – amending the Rule to require a pretrial conference would be beneficial and, further, that use of telephone or video-linked conferencing should be encouraged. To avoid a large number of perhaps unnecessary pretrial conferences, the Advisory Committee recommends that the triggering length of trial for this mandatory provision be set at seven days rather than three days, recognizing that many circuits would routinely grant a final pretrial conference in shorter cases as well, as a matter of discretion. The Advisory Committee recommends that the Council adopt this amendment to Rule 1:19 creating a right to request such a conference if the trial is scheduled to last seven days or more:

Rule 1:19. Pretrial Conferences

In addition to the pretrial scheduling conferences provided for by Rule 4:13, each trial court may, upon request of counsel of record, or in its own discretion, schedule a final pretrial conference within an appropriate time before the commencement of trial. In cases set for trial for seven days or more, upon request of any counsel of record, made at least 45 days before trial, the court must schedule a final pretrial conference within an appropriate time before commencement of trial. At the final pretrial conference, which the trial court in its discretion may conduct in person or by telephone or by videoconference, the court and counsel of record may consider any of the following:

- (a) settlement;
- (b) a determination of the issues remaining for trial and whether any amendments to the pleadings are necessary;
- (c) the possibility of obtaining stipulations of fact, including, but not limited to, the admissibility of documents;
- (d) a limitation of the number of expert and/or lay witnesses;
- (e) any pending motions including motions in limine;
- (f) issues relating to proposed jury instructions; and
- (g) such other matters as may aid in the disposition of the action.

B. Rule 4:5(b)(6) – Entity Depositions.

In 2019 the Advisory Committee arranged for publication of draft revisions to Rule 4:5(b)(6), the entity-deposition Rule. Comment was solicited on provisions being considered at that time by the federal rules drafting bodies for the comparable Federal Civil Rule 30(b)(6), which required extensive “conferral duties” by the parties, requiring continuing negotiations over (1) who will be produced by the entity in response to the deposition notice, and over (2) the number and description of the subjects for examination. Those who commented on the Virginia draft, uniformly opposed those provisions. Similarly, those extra “conferral duties” were opposed by almost all of 1,800 written comments received by the federal rules drafters.

As approved by the U.S. Supreme Court for effectiveness December 1, 2020, Federal Rule 30(b)(6) will be changed only to provide that “*Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination,*” and to state that a (b)(6) subpoena to a nonparty organization must advise it of its duty to make this designation and to confer with the serving party.

The Advisory Committee concluded that several minor amendments to the Virginia version of this Rule, 4:5(b)(6), are needed to remove sexist language, clarify the range of entities subject to the Rule, and to implement the provisions of the 2019 statute that – in effect – requires the use of this 4:5(b)(6) process rather than allowing an adversary to directly notice the deposition of a top officer of certain large corporations, Code § 8.01-420.4:1, which now provides with regard to the taking of depositions of certain corporate officers as follows:

A. For the purposes of this section, "officer" means the president, chief executive officer, chief operating officer, or chief financial officer of a publicly traded company or of a subsidiary of such company that employs 250 or more people.

B. In any action in which an officer's publicly traded company is a party, if a party issues a witness subpoena for the deposition of an officer prior to taking the deposition of a corporate representative pursuant to Supreme Court Rule 4:5(b)(6), and the officer, or company on the officer's behalf, files a motion for a protective order asserting that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive, in order to defeat such motion for a protective order, the burden is on the party seeking the deposition to show that (i) the officer's deposition is reasonably calculated to lead to the discovery of admissible evidence, (ii) the officer may have personal knowledge of discoverable information that cannot reasonably be discovered through other means, and (iii) a deposition of a representative other than the officer or other methods of discovery are unsatisfactory, insufficient, or inadequate.

C. A motion for a protective order filed pursuant to subsection B shall include one or more proposed corporate employees available to be deposed instead of the officer, along with a description of the employee's role in the corporation, his knowledge relevant to the subject matter of the litigation, and the source of such knowledge, provided that the party opposing the motion has stated with reasonable particularity the matters on which the officer's examination is requested.

D. If a protective order is issued and the party seeking the deposition subsequently learns that the requirements set forth in subsection B can be met, then the party seeking the deposition may file for modification or lifting of the protective order.

E. The provisions of this section apply to a subpoena issued pursuant to the Uniform Interstate Depositions and Discovery Act (§ 8.01-412.8 et seq.) consistent with the provisions of subsection E of § 8.01-412.10.

At its September 2020 meeting the Advisory Committee resolved unanimously to recommend to the Judicial Council the following proposed limited edits to Virginia Rule 4:5(b)(6) – designed to cure several problems, and also to implement the exact (and quite limited) level of party conferral duties that the new federal rule will entail:

Rule 4:5(b)(6):

* * * *

(b) Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.

* * * *

(6) A party may in the ~~his~~ notice name as the deponent a public or private corporation, or a partnership, an ~~or~~ association, a ~~or~~ governmental agency, or other entity, and must describe and designate with reasonable particularity the matters on which examination is requested. The organization so named must ~~shall~~ designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out ~~forth~~, for each person designated, the matters on which each person designated ~~he~~ will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons so designated must ~~shall~~ testify as to matters known or reasonably available to the organization on the topics specified in the notice of deposition. Except as provided in Virginia Code § 8.01-420.4:1, this subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules and Virginia law.

C. Defining Responsive Pleadings and Listing Motions Craving Oyer

A lengthy report at the 2019 Boyd Graves Conference provided a history of the treatment of motions craving oyer and the issue of whether a specification of what serves as a responsive pleading is needed in the Virginia Rules of Court. These considerations were discussed at the September 3 meeting of the Advisory Committee, which agreed that Rule 3:8 should be expanded to advert expressly to the statutorily preserved category of motions under Code § 8.01-276 as being included with the motions and pleas considered a responsive pleading,¹ and that motions craving oyer should also be included, since an oyer application is often a necessary prerequisite to proper filing of a demurrer or the answer itself. The continued vitality and role of motions craving oyer is discussed in some detail by the Supreme Court of Virginia in *Byrne v. City of Alexandria*, 842 S.E.2d 409 (May 28, 2020). The Advisory Committee added proposed language to subpart (b) of Rule 3:8 to assure that a granted motion for oyer does not leave the case in limbo, by creating a preset date for the defendant to file an answer or another responsive pleading – triggered by the plaintiff’s filing the document(s) for which the court orders oyer.

Rule 3:8. Answers, Pleas, Demurrers and Motions

(a) **Response Requirement.** --A defendant ~~must~~shall file pleadings in response within 21 days after service of the summons and complaint upon that defendant, or if service of the summons has been timely waived on request under Code § 8.01-286.1, within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the Commonwealth. A Pleadings in response under this Rule – other than an answer – are limited to the following, and are deemed responsive only to the specific count or counts addressed therein: a demurrer, plea, motion to dismiss, and motion for a bill of particulars, motion craving oyer, and a written motion asserting any preliminary defense permitted under Code § 8.01-276. ~~shall each be deemed a pleading in response for the count or counts addressed therein.~~ If a defendant files no other pleading in response than the answer, it shall be filed within the applicable 21-day, 60-day, or 90-day period specified in this Rule. An

¹ This Code section, which has almost never been cited – much less applied or explained – reads as follows:

Code § 8.01-276. Demurrer to evidence and plea in abatement abolished; motion to strike evidence and written motion, respectively, to be used in lieu thereof

Demurrers to the evidence and pleas in abatement are hereby abolished.

Any matter that heretofore could be reached by a demurrer to the evidence may hereafter be subject to a motion to strike the evidence.

Any defense heretofore required or permitted to be made by plea in abatement may be made by written motion stating specifically the relief demanded and the grounds therefor. Except when the ground of such motion is the lack of the court's jurisdiction over the person of an indispensable party, or of the subject matter of the litigation, such motion shall be made within the time prescribed by Rules of the Supreme Court.

If the motion challenges the venue of the action, the movant shall state therein why venue is improperly laid and what place or places within the Commonwealth would constitute proper venue for the action.

answer shall respond to the paragraphs of the complaint. A general denial of the entire complaint or plea of the general issue shall not be permitted.

(b) Response After Demurrer, Plea or Motion. --When the court has entered its order overruling all motions, demurrers and other pleas filed by a defendant as a responsive pleading, such defendant ~~must~~shall, unless the defendant has already done so, file an answer within 21 days after the entry of such order, or within such shorter or longer time as the court may prescribe. If the court grants a motion craving oyer, unless the defendant has already filed an answer or another responsive pleading, the defendant must file an answer or another responsive pleading within 21 days after plaintiff files the document(s) for which oyer was granted, or within such shorter or longer time as the court may prescribe.

D. Updating the Eminent Domain Pretrial Order Form.

Effective September 1, 2019 the standard model pretrial order (Form 3) was amended in Paragraph XI, relating to the designation of deposition transcripts for use at trial, substituting "30 days before trial" for "15 days before trial" in the third sentence and rewriting the fourth sentence.

Identical amendments to the Eminent Domain pretrial order form (Form 3A) will have Paragraph XI read as follows:

XI. Deposition Transcripts to be Used at Trial

Counsel of record shall confer and attempt to identify and resolve all issues regarding the use of depositions at trial. It is the obligation of the proponent of any deposition of any non-party witness who will not appear at trial to advise opposing counsel of record of counsel's intent to use all or a portion of the deposition at trial at the earliest reasonable opportunity. Other than trial depositions taken after completion of discovery under Paragraph II, designations of portions of non-party depositions, other than for rebuttal or impeachment, shall be exchanged no later than 30 days before trial, except for good cause shown or by agreement of counsel. It becomes the obligation of the non-designating parties of any such designated deposition to file any objection or counter-designation within seven days after the proponent's designation. Further, it becomes the obligation of the non-designating parties to bring any objections or other unresolved issues to the court for hearing no later than 5 days before the day of trial.

After dissemination of this proposed revision, no comments were received, and thus it is recommended that this revised language be substituted in Form 3A so that the transcript designation provisions in eminent domain cases match those found in general Form 3.

Appendix A

Rules Revisions to Implement Statutory Provisions

1. Voir Dire in Criminal Cases

In the current session, the Legislature has passed a new statute, § 19.2-262.01, titled: **Voir dire examination of persons called as jurors**, approved as Chapter 157 of the 2020 Acts of Assembly. It provides:

In any criminal case, the court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether the juror can sit impartially in either the guilt or sentencing phase of the case. Such questions may include whether the person or juror is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein. The court and counsel for either party may inform any such person or juror as to the potential range of punishment to ascertain if the person or juror can sit impartially in the sentencing phase of the case. The party objecting to any juror may introduce competent evidence in support of the objection, and if it appears to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to the fact in issue, shall disclose the same in open court.

After discussion, the Advisory Committee concluded that the most helpful step for the bench and bar would be to have a brief cross-reference added to Rule 3A:14, which lists seven categories of necessary inquiries in criminal voir dire, to note the permissive impact of this statute, as shown in the underscored insertion below.

Rule 3A:14. Trial Jurors

(a) Examination. – After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:

- (1) Is related by blood, adoption, or marriage to the accused or to a person against whom the alleged offense was committed;
- (2) Is an officer, director, agent or employee of the accused;
- (3) Has any interest in the trial or the outcome of the case;
- (4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect the juror's impartiality in the case;
- (5) Has expressed or formed any opinion as to the guilt or innocence of the accused;

- (6) Has a bias or prejudice against the Commonwealth or the accused; or
- (7) Has any reason to believe the juror might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, consistent with the provisions of Code § 19.2-262.01, the court, and counsel as of right, may examine on oath any prospective juror and ask any questions relevant to the qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

2. Appeal of General District Court Matters

After the *Robinson Family LLC* decision, 295 Va. 130 (2018), the result of that case was distilled in Rule 7B:12:

Rule 7B:12. Appeal by One Party; Separate Notices of Appeal by Other Parties

(a) In civil cases, the filing of a timely notice of appeal by one party from a judgment relating to a claim, counterclaim, cross-claim or third-party claim, or another appealable order of the general district court, does not constitute an appeal by any other party with respect to the matter appealed -- or with respect to any other claim, counterclaim, cross-claim, third-party claim, judgment or other order of the general district court.

(b) A separate and timely notice of appeal must be filed by any party in order to appeal any rulings as to other claims, counterclaims, cross-claims, third-party claims, judgments, or other appealable orders that have not been appealed by the opponent.

However, in the 2020 General Assembly, the Legislature adopted revisions of § 16.1-106 for the express purpose of overturning *Robinson* by providing that one notice of appeal brings the whole case up to the circuit court, subject only to the requirements of § 16.1-107 that each party must satisfy any applicable bonding, writ tax and cost obligations. The changes to § 16.1-106 are shown here:

§ 16.1-106. Appeals from courts not of record in civil cases.

A. From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than \$20, exclusive of interest, any attorney fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or bylaw of a municipal corporation, or of the enforcement of rights and privileges conferred by the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), or of a protective order pursuant to § 19.2-152.10, or of an action filed by a condominium unit owners' association or unit owner pursuant to § 55.1-1959, or of an action

filed by a property owners' association or lot owner pursuant to § 55.1-1819, or from any order entered or judgment rendered in a general district court that alters, amends, overturns, or vacates any prior final order, there shall be an appeal of right, if taken within days after such order or judgment, to a court of record. Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken and shall be heard de novo.

B. If any party timely notices an appeal as provided by subsection A, such notice of appeal shall be deemed a timely notice of appeal by any other party on a final order or judgment entered in the same or a related action arising from the same conduct, transaction, or occurrence as the underlying action; however, all parties will be required to timely perfect their own respective appeals by giving a bond and the writ tax and costs, if any, in accordance with § 16.1-107.

If an appeal is noted and perfected after the sheriff has served the notice of intent to execute a writ of eviction, which is required to be served at least 72 hours before such eviction in accordance with law, the party noting or noting and perfecting such appeal shall notify the sheriff of such appeal.

The Advisory Committee noted that Rule 7B:12 must conform to the new provisions added to subsection B of the statute, and that the text of this Rule should now provide:

Rule 7B:12. Appeal by One Party; Perfection of Appeal by Other Parties

(a) As provided in Code § 16.1-106(B), in civil cases, the filing of a timely notice of appeal by one party from a judgment relating to a claim, counterclaim, cross-claim or third-party claim, or another appealable order of the general district court, shall be deemed a timely notice of appeal by any other party on a final order or judgment entered in the same or a related action arising from the same conduct, transaction, or occurrence.

(b) All parties are required to timely perfect their own respective appeals by giving a bond and paying the writ tax and costs, if any, in accordance with § 16.1-107.

3. Amendment of Rules of Evidence re Privilege based on Legislation

In the 2020 Legislature, two statutes were adopted affecting the law of privilege.

Spousal Privilege. An omnibus redefinition of marriage to avoid husband and wife references amended numerous statutory provisions. The statute governing spousal privilege was one of those affected. The 2020 amendments, House Bill 623,

<https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0900+pdf>, alter many gender specific references in the Code; specifically, the bill amends Code § 19.2-271.2 to change “husband and wife” to “persons married to each other” and “spouse” as appropriate.

Edits of Evidence Rule 2:504, which is derived from this statute, need to be made, as implemented in the following wording changes.

Rule 2:504 SPOUSAL TESTIMONY AND MARITAL COMMUNICATIONS PRIVILEGES (Rule 2:504(a) derived from Code § 8.01-398; and Rule 2:504(b) derived from Code § 19.2-271.2)

(a) *Privileged Marital Communications in Civil Cases.*

1. ~~Husband and wife~~ Persons married to each other shall be competent witnesses to testify for or against each other in all civil actions.
 2. In any civil proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between such person and his or her spouse during their marriage, regardless of whether such person is married to that spouse at the time he or she objects to disclosure. This privilege may not be asserted in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse. For the purposes of this Rule, "confidential communication" means a communication made privately by a person to his or her spouse that is not intended for disclosure to any other person.
- (b) Testimony of Husband and Wife in Criminal Cases.

(b) *Spousal Testimony of ~~Husband and Wife~~ in Criminal Cases.*

1. In criminal cases ~~husband and wife~~ persons married to each other shall be allowed, and, subject to the Rules of Evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled to be called as a witness against the other, except (i) in the case of a prosecution for an offense committed by one against the other, against a minor child of either, or against the property of either; (ii) in any case where either is charged with forgery of the name of the other or uttering or attempting to utter a writing bearing the allegedly forged signature of the other; or (iii) in any proceeding relating to a violation of the laws pertaining to criminal sexual assault (§§ 18.2-61 through 18.2-67.10), crimes against nature (§ 18.2-361) involving a minor as a victim and provided the defendant and the victim are not married to each other, incest (§ 18.2-366), or abuse of children (§§ 18.2-370 through 18.2-371). The

failure of either ~~husband or wife~~ spouse to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by any attorney.

2. Except in the prosecution for a criminal offense as set forth in subsections (b)(1)(i), (ii) and (iii) above, in any criminal proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between such person and his or her spouse during their marriage, regardless of whether the person is married to that spouse at the time the person objects to disclosure. For the purposes of this Rule, "confidential communication" means a communication made privately by a person to his or her spouse that is not intended for disclosure to any other person.

Newsperson's Privilege. A new statute, creating a circumscribed and qualified privilege for newsmen, effective July 1, 2020, is § 19.2-271.5. It provides that no newsmen engaged in journalism shall be compelled by the Commonwealth or a locality to testify in a criminal proceeding about, disclose, or produce protected information, as defined in the statute, except when the court finds that (i) the protected information is necessary to the proof of an issue material to an administrative or criminal proceeding; (ii) the protected information is not obtainable from any alternative source; (iii) the Commonwealth or locality exhausted all reasonable methods for obtaining the protected information from all relevant alternative sources, if applicable; and (iv) there is an overriding public interest in the disclosure of the protected information, including preventing harm to or death of a person. The new statute further provides that any information obtained in violation of the provisions of the bill shall be inadmissible for any purpose in an administrative or criminal proceeding. The new section reads as follows:

§ 19.2-271.5. Protected information; newsmen engaged in journalism.

A. As used in this section, unless the context requires a different meaning:

"Journalism" means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

"News organization" means any (i) newspaper or magazine issued at regular intervals and having a general circulation; (ii) recognized press association or wire service; (iii) licensed radio or television station that engages in journalism; or (iv) business that, by means of photographic or electronic media, engages in journalism and employs an editor overseeing the journalism function that follows commonly accepted journalistic practice as evidenced by (a) membership in a state-based journalism organization, including the Virginia Press Association

and the Virginia Association of Broadcasters; (b) membership in a national journalism organization, including the National Press Club, the Society of Professional Journalists, and the Online News Association; (c) membership in a statewide or national wire news service, including the Capital News Service, The Associated Press, and Reuters; or (d) its continuous operation since 1994 or earlier.

"Newsperson" means any person who, for a substantial portion of his livelihood or for substantial financial gain, engages in journalism for a news organization. "Newsperson" includes any person supervising or assisting another person in engaging in journalism for a news organization.

"Protected information" means information identifying a source who provided information to a newsperson under a promise or agreement of confidentiality made by a news organization or newsperson while such news organization or newsperson was engaging in journalism.

B. Except as provided in subsection C, no newsperson shall be compelled by the Commonwealth or a locality in any criminal proceeding to testify about, disclose, or produce protected information. Any protected information obtained in violation of this subsection is inadmissible for any purpose in an administrative or criminal proceeding.

C. A court may compel a newsperson to testify about, disclose, or produce protected information only if the court finds, after notice and an opportunity to be heard by such newsperson, that:

1. The protected information is necessary to the proof of an issue material to an administrative or criminal proceeding;

2. The protected information is not obtainable from any alternative source;

3. The Commonwealth or locality exhausted all reasonable methods for obtaining the protected information from all relevant alternative sources, if applicable; and

4. There is an overriding public interest in the disclosure of the protected information, including preventing the imminent threat of bodily harm to or death of a person or ending actual bodily harm being inflicted upon a person.

D. The publication by a news organization or the dissemination by a newsperson of protected information obtained while engaging in journalism shall not constitute a waiver of the protection from compelled testimony, disclosure, and production provided by subsection B.

Because every other evidentiary privilege statute is echoed in a comparable Part Two Rule of Evidence, the newsperson's privilege statute would be reflected in the following new Rule of Evidence:

Rule 2:508. Protected information; newspersons engaged in journalism.

[Derived from Code § 19.2-271.5]

A. Implementing Code § 19.2-271.5, as used in this Rule, unless the context requires a different meaning:

"Journalism" means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

"News organization" means any (i) newspaper or magazine issued at regular intervals and having a general circulation; (ii) recognized press association or wire service; (iii) licensed radio or television station that engages in journalism; or (iv) business that, by means of photographic or electronic media, engages in journalism and employs an editor overseeing the journalism function that follows commonly accepted journalistic practice as evidenced by (a) membership in a state-based journalism organization, including the Virginia Press Association and the Virginia Association of Broadcasters; (b) membership in a national journalism organization, including the National Press Club, the Society of Professional Journalists, and the Online News Association; (c) membership in a statewide or national wire news service, including the Capital News Service, The Associated Press, and Reuters; or (d) its continuous operation since 1994 or earlier.

"Newsperson" means any person who, for a substantial portion of his livelihood or for substantial financial gain, engages in journalism for a news organization. "Newsperson" includes any person supervising or assisting another person in engaging in journalism for a news organization.

"Protected information" means information identifying a source who provided information to a newsperson under a promise or agreement of confidentiality made by a news organization or newsperson while such news organization or newsperson was engaging in journalism.

B. Except as provided in subpart C, no newsperson shall be compelled by the Commonwealth or a locality in any criminal proceeding to testify about, disclose, or produce protected information. Any protected information obtained in violation of this subsection is inadmissible for any purpose in an administrative or criminal proceeding.

C. A court may compel a newsperson to testify about, disclose, or produce protected information only if the court finds, after notice and an opportunity to be heard by such newsperson, that:

1. The protected information is necessary to the proof of an issue material to an administrative or criminal proceeding;
2. The protected information is not obtainable from any alternative source;

3. The Commonwealth or locality exhausted all reasonable methods for obtaining the protected information from all relevant alternative sources, if applicable; and

4. There is an overriding public interest in the disclosure of the protected information, including preventing the imminent threat of bodily harm to or death of a person or ending actual bodily harm being inflicted upon a person.

D. The publication by a news organization or the dissemination by a newsperson of protected information obtained while engaging in journalism shall not constitute a waiver of the protection from compelled testimony, disclosure, and production provided by subpart B.

Since, under Code § 8.01-3(E), evidence rules designed solely to embody statutory provisions do not require the months of latency before effectiveness applicable to other evidence Rules, these two provisions can be recommended for effectiveness “at any time,” which usually means 60 days, like other Rules of Court under § 8.01-3(B).

4. Specialty Dockets Rule.

Rule 1:25 requires minor edits consistent with changes effected by SB 818, passed during this past Regular Session of the General Assembly (Chapter 1096), creating the Behavioral Health Docket Act. With this action, the portions of Rule 1:25 relating to such dockets becomes more interstitial. Amendments to Rule 1:25 relate to terminology and add a reference to the Behavioral Health Docket Act itself, as set forth here:

Rule 1:25. Specialty Dockets.

(a) *Definition of and Criteria for Specialty Dockets.* —

(1) When used in this Rule, the term “specialty dockets” refers to specialized court dockets within the existing structure of Virginia's circuit and district court system offering judicial monitoring of intensive treatment, supervision, and remediation integral to case disposition.

(2) Types of court proceedings appropriate for grouping in a “specialty docket” are those which (i) require more than simply the adjudication of discrete legal issues, (ii) present a common dynamic underlying the legally cognizable behavior, (iii) require the coordination of services and treatment to address that underlying dynamic, and (iv) focus primarily on the remediation of the defendant in these dockets. The treatment, the services, and the disposition options are those which are otherwise available under law.

(3) Dockets which group cases together based simply on the area of the law at issue, e.g., a docket of unlawful detainer cases or child support cases, are not considered “specialty dockets.”

(b) *Types of Specialty Dockets.* — The Supreme Court of Virginia currently recognizes only the following three types of specialty dockets: (i) drug treatment court dockets as provided for in the Drug Treatment Court Act, § 18.2-254.1, (ii) veterans dockets, and (iii) behavioral/~~mental~~ health dockets as provided for in the Behavioral Health Docket Act, § 18.2-254.3. Drug treatment court dockets offer judicial monitoring of intensive treatment and strict supervision in drug and drug-related cases. The dispositions in the family drug treatment court dockets established in juvenile and domestic relations district courts may include family and household members as defined in Virginia Code § 16.1-228. Veterans dockets offer eligible defendants who are veterans of the armed services with substance dependency or mental illness a specialized criminal specialty docket that is coordinated with specialized services for veterans. Behavioral/~~mental~~ health dockets offer defendants with diagnosed behavioral or mental health disorders judicially supervised, community-based treatment plans, which a team of court staff and mental health professionals design and implement.

- (c) *Authorization Process.* — A circuit or district court which intends to establish one or more types of these recognized specialty dockets must petition the Supreme Court of Virginia for authorization before beginning operation of a specialty docket or, in the instance of an existing specialty docket, continuing its operation. A petitioning court must demonstrate sufficient local support for the establishment of this specialty docket, as well as adequate planning for its establishment and continuation.
- (d) *Expansion of Types of Specialty Dockets.* — A circuit or district court seeking to establish a type of specialty docket not yet recognized under this rule must first demonstrate to the Supreme Court that a new specialty docket of the proposed type meets the criteria set forth in subsection (a) of this Rule. If this additional type of specialty docket receives recognition from the Supreme Court of Virginia, any local specialty docket of this type must then be authorized as established in subsection (c) of this Rule.
- (e) *Oversight Structure.* — By order, the Chief Justice of the Supreme Court may establish a Specialty Docket Advisory Committee and appoint its members. The Chief Justice may also establish separate committees for each of the approved types of specialty dockets. The members of the Veterans Docket Advisory Committee, the Behavioral/Mental Health Docket Advisory Committee, and the committee for any other type of specialty docket recognized in the future by the Supreme Court shall be chosen by the Chief Justice. The State Drug Treatment Court Advisory Committee established pursuant to Virginia Code § 18.2-254.1 shall constitute the Drug Treatment Court Docket Advisory Committee.
- (f) *Operating Standards.* — The Specialty Docket Advisory Committee, in consultation with the committees created pursuant to subsection (e), shall establish the training and operating standards for local specialty dockets.
- (g) *Financing Specialty Dockets.* — Any funds necessary for the operation of a specialty docket shall be the responsibility of the locality and the local court, but may be provided via state appropriations and federal grants.
- (h) *Evaluation.* — Any local court establishing a specialty docket shall provide to the Specialty Docket Advisory Committee the information necessary for the continuing evaluation of the effectiveness and efficiency of all local specialty dockets.

Supreme Court of Virginia 2020 Court-Initiated Legislation

Subject of Legislation	Bill Number (Patron): Last Action
Clarification of Statutes Related to Postrelease Incarceration of Felons for Violations of Postrelease Supervision	<ul style="list-style-type: none"> • HB 752 (Jones): Acts of Assembly, Chapter 1115 • SB 312 (Stanley): Acts of Assembly, Chapter 1116
Unclaimed Funds Deposited by Bail Bondsman Upon Surrender of Principal	<ul style="list-style-type: none"> • HB 138 (Collins): Incorporated into HB 136 (Collins), Acts of Assembly, Chapter 20 • SB 294 (Marsden): Acts of Assembly Chapter 531
Curing Signature Defects in Pleadings	<ul style="list-style-type: none"> • HB 1378 (Leftwich): Acts of Assembly Chapter 74 • SB 229 (Petersen): Acts of Assembly Chapter 351

EXECUTIVE SECRETARY
KARL R. HADE

**ASSISTANT EXECUTIVE SECRETARY &
LEGAL COUNSEL**
EDWARD M. MACON

COURT IMPROVEMENT PROGRAM
SANDRA L. KARISON, DIRECTOR

EDUCATIONAL SERVICES
CAROLINE E. KIRKPATRICK, DIRECTOR

FISCAL SERVICES
BARRY M. WENZIG, DIRECTOR

HUMAN RESOURCES
RENÉE FLEMING MILLS, DIRECTOR

SUPREME COURT OF VIRGINIA



OFFICE OF THE EXECUTIVE SECRETARY
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219-2334
(804) 786-6455

JUDICIAL INFORMATION TECHNOLOGY
MICHAEL J. RIGGS, SR., DIRECTOR

JUDICIAL PLANNING
CYRIL W. MILLER, JR., DIRECTOR

JUDICIAL SERVICES
PAUL F. DELOSH, DIRECTOR

LEGAL RESEARCH
STEVEN L. DALLE MURA, DIRECTOR

LEGISLATIVE & PUBLIC RELATIONS
KRISTI S. WRIGHT, DIRECTOR

MAGISTRATE SERVICES
JONATHAN E. GREEN, DIRECTOR

September 25, 2020

TO: Judicial Council of Virginia

FROM: Executive Committee,
Judicial Conference of Virginia

Re: Legislative Proposals for 2021 General Assembly Session

The Executive Committee of the Judicial Conference of Virginia recommends the following legislative proposal for consideration by the Judicial Council. This recommendation results from a solicitation seeking legislative proposals to improve the administration of justice in the courts of record from the members of the Judicial Conference of Virginia and members of the Judicial Conference of Virginia for District Courts, as well as district clerks and Office of the Executive Secretary staff. The submissions were first reviewed by the Judicial Administration Committee of the Conference and then by the Executive Committee. New language is shown as underlined.

1. Expansion of use of audio/visual technology beyond pretrial proceedings in limited circumstances.

This proposal would allow, not require, the court to use two-way electronic video and audio communication for (i) entry of a plea of guilty or nolo contendere and the related sentencing of the defendant charged with a misdemeanor or felony, (ii) entry of a nolle prosequi, or (iii) adjudication of an alleged violation of probation. Such an appearance would require the consent of the court and all parties. These provisions would apply generally and are not restricted to periods defined by an order declaring a judicial emergency. If enacted, this proposal would reduce the transport of prisoners to the courthouse and improve the timeliness of getting matters on the docket and before the court.

§ 19.2-3.1. Personal appearance by two-way electronic video and audio communication; standards.

A. Where an appearance is required or permitted before a magistrate, intake officer or, prior to trial, before a judge, the appearance may be by (i) personal appearance before the magistrate, intake officer or judge or (ii) use of two-way electronic video and audio communication. With the consent of the court and all parties, an appearance in a court for the purpose of (i) entry of a plea of guilty or nolo contendere and the related sentencing of the defendant charged with a misdemeanor or felony, (ii) entry of a nolle prosequi, or (iii) adjudication of an alleged violation of probation may be by two-way electronic video and audio communication.

If two-way electronic video and audio communication is used, a magistrate, intake officer or judge may exercise all powers conferred by law and all communications and proceedings shall be conducted in the same manner as if the appearance were in person. If two-way electronic video and audio communication is available for use by a district court for the conduct of a hearing to determine bail or to determine representation by counsel, the court shall use such communication in any such proceeding that would otherwise require the transportation of a person from outside the jurisdiction of the court in order to appear in person before the court. Any documents transmitted between the magistrate, intake officer, or judge and the person appearing before the magistrate, intake officer, or judge may be transmitted by electronically transmitted facsimile process or other electronic method. The facsimile or other electronically generated document may be served or executed by the officer or person to whom sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures thereon shall be treated as original signatures.

.....

SUPREME COURT OF VIRGINIA

EXECUTIVE SECRETARY
KARL R. HADE

**ASSISTANT EXECUTIVE SECRETARY &
LEGAL COUNSEL**
EDWARD M. MACON

COURT IMPROVEMENT PROGRAM
SANDRA L. KARISON, DIRECTOR

EDUCATIONAL SERVICES
CAROLINE E. KIRKPATRICK, DIRECTOR

FISCAL SERVICES
JOHN B. RICKMAN, DIRECTOR

HUMAN RESOURCES
RENÉE FLEMING MILLS, DIRECTOR



OFFICE OF THE EXECUTIVE SECRETARY
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219-2334
(804) 786-6455

JUDICIAL INFORMATION TECHNOLOGY
MICHAEL J. RIGGS, SR., DIRECTOR

JUDICIAL PLANNING
CYRIL W. MILLER, JR., DIRECTOR

JUDICIAL SERVICES
PAUL F. DELOSH, DIRECTOR

LEGAL RESEARCH
STEVEN L. DALLE MURA, DIRECTOR

LEGISLATIVE & PUBLIC RELATIONS
KRISTI S. WRIGHT, DIRECTOR

MAGISTRATE SERVICES
VACANT

MEMORANDUM

TO: The Judicial Council of Virginia

FROM: Steven L. Dalle Mura
Alisa W. Padden
Department of Legal Research
Office of the Executive Secretary

RE: Report of the Circuit Court Forms Advisory Committee

DATE: September 25, 2020

On April 7, 2020, the Circuit Court Forms Advisory Committee met by conference call to consider the revision of existing forms and the creation of new forms in response to new legislation and suggestions received by this office for improving the content or utility of the circuit court forms. The Committee reviewed the various forms and respectfully submits these recommendations to you for approval.

An explanatory paragraph prefaces each revised circuit court form or new circuit court form. If there is a revision to a current form, where feasible, the revision appears with underlining for inserted text and with strikeouts for deleted text.

We shall be glad to answer any questions regarding these proposals. If, upon review of these materials prior to the Judicial Council meeting, you identify specific problems or questions about these proposals, we would be especially glad to speak with you prior to the meeting, in order that we might have the opportunity to explore fully the issue, in the hope we could then have any necessary resolution ready to present at the meeting. Either of us would be happy to hear from any of you. (Steven Dalle Mura, 804-786-6654, sdallemura@vacourts.gov; Alisa Padden, 804-371-0937, apadden@vacourts.gov.)

AGENDA

FORM	PAGES
1. CC-1379, ACKNOWLEDGEMENT OF SUSPENSION OR REVOCATION OF DRIVER'S LICENSE/ORDER AND NOTICE OF DEFERRED PAYMENT OR INSTALLMENT PAYMENTS	3-7
2. CC-1393, SENTENCING ORDER	8-20
3. CC-1393(A) (NEW FORM), ADDENDUM TO SENTENCING ORDER FOR JUVENILE ADJUDICATED DELINQUENT OR FOUND GUILTY OF VIOLENT FELONY	21-25
4. CC-1395 (NEW FORM), PROTECTIVE ORDER – ACT OF VIOLENCE CONVICTION	26-34
5. CC-1395(A) (NEW FORM), PROTECTIVE ORDER-ACT OF VIOLENCE CONVICTION FIREARM CERTIFICATION	
6. CC-1414, PETITION FOR PROCEEDING IN CIVIL CASE WITHOUT PAYMENT OF FEES OR COSTS	35-40
7. CC-1421, PETITION FOR PROCEEDING IN A NO-FAULT DIVORCE WITHOUT PAYMENT OF FEES OR COSTS	
8. CC-1445 (NEW FORM), SUBSTANTIAL RISK ORDER	41-55
9. CC-1451, PETITION FOR CHANGE OF SEX	56-60
10. CC-1452, ORDER FOR CHANGE OF SEX	
11. CC-1465(B), PETITION FOR RESTORATION OF DRIVING PRIVILEGE – HABITUAL OFFENDER	61-98
12. CC-1465(D), ORDER RESTORING DRIVING PRIVILEGE – HABITUAL OFFENDER	
13. CC-1470, PETITION FOR RESTORATION OF DRIVING PRIVILEGE – THIRD OFFENSE	
14. CC-1471, ORDER RESTORING DRIVING PRIVILEGE – THIRD OFFENSE	
15. CC-1508 (NEW FORM), CERTIFICATE OF RELEASE OF PROHIBITED COVENANTS	99-102
16. CC-1643 (NEW FORM), CERTIFICATE OF PROPOSED GUARDIAN	103-105
17. CC-1644, REPORT OF GUARDIAN FOR INCAPACITATED PERSON	106-119
18. CC-1644 (SAMP), SAMPLE REPORT OF GUARDIAN FOR INCAPACITATED PERSON	
19. CC-1682, ACCOUNT FOR INCAPACITATED ADULT	
20. CC-1682 (SAMP), SAMPLE ACCOUNT FOR INCAPACITATED ADULT	
21. CC-1683, ACCOUNT FOR MINOR	
22. CC-1683 (SAMP), SAMPLE ACCOUNT FOR MINOR	

Circuit Court Form CC-1379 ACKNOWLEDGMENT OF SUSPENSION OR
REVOCATION OF DRIVER'S LICENSE

Abstract Senate Bill 513 and House Bill 909 repeal the statutory provision authorizing the DMV to suspend driver's licenses upon convictions for violating drug laws. The corresponding language is removed from Section I of form CC-1379.

Source Senate Bill 513 (Chapter 741, effective July 1, 2020)/House Bill 909 (Chapter 740, effective July 1, 2020)

Revision Legislative

Form Type Printed

COMMONWEALTH OF VIRGINIA

VA. CODE §§ 19.2-354; 19.2-358

Case No(s).

In the Circuit Court for the [] City [] County of
[] COMMONWEALTH OF VIRGINIA

[] CITY [] COUNTY OF V.
DEFENDANT

SSN DRIVER'S LICENSE NUMBER DRIVER'S LICENSE STATE
RESIDENCE ADDRESS
MAILING ADDRESS IF DIFFERENT FROM ABOVE
TELEPHONE NUMBER

I. ACKNOWLEDGMENT OF SUSPENSION OR REVOCATION OF DRIVER'S LICENSE

I acknowledge that I have been notified that my driver's license/driving privilege:
[] is suspended or revoked for a period of effective as a result of
[] my conviction by this Court.
[] action taken by the Virginia Department of Motor Vehicles pursuant to Va. Code § 46.2-390.1 for the Court's conviction or
finding of facts sufficient to convict me of violating the drug laws (Va. Code §§ 18.2-247 through 18.2-264) of this
Commonwealth.
[] Declaration by the Virginia Department of Motor Vehicles [] Adjudication by Court
that I am a habitual offender.

I acknowledge that I owe fines, costs, forfeiture, restitution and/or penalty of \$ plus any additional court-
appointed attorney fee, if applicable. I further acknowledge that payment of the full amount is due within 30 days of sentencing on my case
unless I enter into a deferred or installment payment plan.

I further certify that on this date this notice was read, understood by me, and I received a copy of the same, and that my driver's license

[] WAS [] WAS NOT surrendered to this Court. Reason not surrendered:

DATE DEFENDANT
State/Commonwealth of [] Virginia []
County/City of
Acknowledged before me this day by
PRINT NAME OF SIGNATORY

DATE [] JUDGE [] CLERK [] NOTARY PUBLIC
Notary Registration No. My commission expires:

READ PART I ON THE BACK OF THIS FORM FOR MORE STIPULATIONS, WHICH ARE INCORPORATED BY REFERENCE
AND ARE MADE A PART OF THIS ACKNOWLEDGMENT.

II. ORDER AND NOTICE OF DEFERRED PAYMENT OR INSTALLMENT PAYMENTS

Upon due consideration, the Defendant's Petition for deferred or installment payments is accordingly ACCEPTED, and the Defendant is
ORDERED to pay costs, fines, forfeiture, and penalty totaling \$ plus restitution
totaling \$ plus any additional court-appointed attorney fee, court reporter fee, and interest, if applicable, by:
[] making installment payments of \$ per, beginning until paid in full; or
[] making a deferred payment in full on or before

[] Restitution payments are to be paid in accordance with the court's ORDER FOR RESTITUTION previously entered.
If Deferred payment is not received by the above due date, or if the final Installment payment is not received by, the
defendant is hereby given NOTICE to return to this Court on at m.
The total listed above does not include transcript costs and any costs/damages that may be charged if you appeal from this court.

READ PART II ON THE BACK OF THIS FORM FOR MORE STIPULATIONS WHICH ARE INCORPORATED BY REFERENCE
AND ARE MADE A PART OF THIS ORDER AND NOTICE.

Entered this day of,

[] JUDGE [] CLERK
I have asked for and received a copy of this Order and Notice.

DEFENDANT

PART I

I understand that if I provide for payment of a fine or other monies due by a method other than cash and my payment fails, the Clerk will send me a written notice of my failure of payment. A penalty of \$50.00 or 10 percent of the amount of the payment, whichever is greater, may be charged if the method of payment fails.

I further understand that, if I am convicted of driving while my driver's license is suspended or revoked, I may be fined, sentenced to jail, or both.

I understand that upon suspension or revocation of my license, I may not operate a motor vehicle in the Commonwealth of Virginia until:

- (1) All periods of suspension imposed by any Court or the Department of Motor Vehicles have expired, AND
- (2) The Department of Motor Vehicles reinstates my license (if suspended) or issues a new license (if revoked) after:
 - (a) I have paid the reinstatement fee (if any) to the Department of Motor Vehicles, AND
 - (b) I have met all other administrative requirements of the Department of Motor Vehicles.

PART II

I understand that if the Court has ordered deferred or installment payments, or community service to pay all or part of the fines and costs, I must make all required payments or perform all community service on time.

I understand that:

- (1) as a condition of this agreement, I must promptly inform the Court of any change of my mailing address during the term of the agreement;
- (2) if the fines, costs, forfeiture, restitution, and/or penalty are not paid in full by the date ordered, that the Court shall proceed according to the provisions of Va. Code § 19.2-358, which state that a show cause summons or capias for my arrest may be issued;
- (3) the amount(s) listed in this agreement may be administratively amended by the Clerk of this Court in the event additional costs should be assessed;
- (4) the Court or Clerk thereof may adjust the final payment date administratively, without further notice, for installment payment agreements, if I fail to make a scheduled payment or for deferred payments, if I fail to pay in full by the date ordered, for the purposes of referring the account for action pursuant to Va. Code § 19.2-358.

I further understand that if the Court does not receive payments as ordered, my case will be referred for collection enforcement action under §§ 19.2-349, 19.2-353.5, 19.2-358, or 58.1-520 through 58.1-534 of the Code of Virginia. If my case is referred for collection enforcement action under § 19.2-349, the amount that I owe and that can be collected will be increased to reflect the additional costs associated with collection action. If any part of the amount due remains unpaid, pursuant to § 19.2-358, I may be subject to a jail sentence of up to 60 days or an additional fine of up to \$500.00.

Pursuant to Va. Code § 19.2-353.5, if interest on outstanding fines and costs owed to this court accrued during a period when I was incarcerated, I may request that the interest that accrued when I was incarcerated be waived by this Court.

This Order and Notice is provided to the Defendant pursuant to Va. Code § 19.2-354. This Order shall not be spread on the Order Book of this Court.

Notice to Defendant:

If you are required to enter into an alcohol safety action program (ASAP) as part of the disposition of your case or as a condition of a restricted driving privilege, pursuant to Va. Code § 18.2-271.1(B), you will be required to pay a fee for the program unless the court has found that you are indigent and the court has reduced or waived the fee. Any restricted driving privilege granted to you by the court may be revoked if you do not timely pay the required fee. If ASAP is required as part of your restricted driving privilege, you must enroll in ASAP within 15 days of your restricted driving privilege being granted.

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 741

An Act to amend and reenact §§ 18.2-251, 46.2-410.1, 46.2-819.2, and 53.1-127.3 of the Code of Virginia and to repeal §§ 18.2-259.1, 46.2-320.2, 46.2-390.1, 46.2-416.1, and 53.1-127.4 of the Code of Virginia, relating to driver's license suspensions for certain non-driving-related offenses.

[S 513]

Approved April 6, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-251, 46.2-410.1, 46.2-819.2, and 53.1-127.3 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-251. Persons charged with first offense may be placed on probation; conditions; substance abuse screening, assessment treatment and education programs or services; drug tests; costs and fees; violations; discharge.

Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250 or to possession of marijuana under § 18.2-250.1, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions. If the court defers further proceedings, at that time the court shall determine whether the clerk of court has been provided with the fingerprint identification information or fingerprints of the person, taken by a law-enforcement officer pursuant to § 19.2-390, and, if not, shall order that the fingerprints and photograph of the person be taken by a law-enforcement officer.

As a term or condition, the court shall require the accused to undergo a substance abuse assessment pursuant to § 18.2-251.01 or 19.2-299.2, as appropriate, and enter treatment and/or education program or services, if available, such as, in the opinion of the court, may be best suited to the needs of the accused based upon consideration of the substance abuse assessment. The program or services may be located in the judicial district in which the charge is brought or in any other judicial district as the court may provide. The services shall be provided by (i) a program licensed by the Department of Behavioral Health and Developmental Services, by a similar program which is made available through the Department of Corrections, (ii) a local community-based probation services agency established pursuant to § 9.1-174, or (iii) an ASAP program certified by the Commission on VASAP.

The court shall require the person entering such program under the provisions of this section to pay all or part of the costs of the program, including the costs of the screening, assessment, testing, and treatment, based upon the accused's ability to pay unless the person is determined by the court to be indigent.

As a condition of probation, the court shall require the accused (a) to successfully complete treatment or education program or services, (b) to remain drug and alcohol free during the period of probation and submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug and alcohol free, (c) to make reasonable efforts to secure and maintain employment, and (d) to comply with a plan of at least 100 hours of community service for a felony and up to 24 hours of community service for a misdemeanor. ~~In addition to any community service required by the court pursuant to clause (d), if the court does not suspend or revoke the accused's license as a term or condition of probation for a violation of § 18.2-250.1, the court shall require the accused to comply with a plan of 50 hours of community service.~~ Such testing shall be conducted by personnel of the supervising probation agency or personnel of any program or agency approved by the supervising probation agency.

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, and upon determining that the clerk of court has been provided with the fingerprint identification information or fingerprints of such person, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings.

Notwithstanding any other provision of this section, whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of §§ ~~18.2-259.1~~, § 22.1-315, and ~~46.2-390.1~~, and the driver's license forfeiture provisions of those sections shall be imposed. ~~However, if the court places an individual on probation upon terms~~

and conditions for a violation of ~~§ 18.2-250.1~~, such action shall not be treated as a conviction for purposes of ~~§ 18.2-259.1 or 46.2-390.1~~, provided that a court (1) may suspend or revoke an individual's driver's license as a term or condition of probation and (2) shall suspend or revoke an individual's driver's license as a term or condition of probation for a period of six months if the violation of ~~§ 18.2-250.1~~ was committed while such person was in operation of a motor vehicle. The provisions of this paragraph shall not be applicable to any offense for which a juvenile has had his license suspended or denied pursuant to § 16.1-278.9 for the same offense.

§ 46.2-410.1. Judicial review of revocation or suspension by Commissioner.

A. Notwithstanding the provisions of § 46.2-410, when the Commissioner orders a revocation or suspension of a person's driver's license under the provisions of this chapter, ~~unless such revocation or suspension is required under § 46.2-390.1~~, the person so aggrieved may, in cases of manifest injustice, within ~~sixty~~ 60 days of receipt of notice of the suspension or revocation, petition the circuit court of the jurisdiction wherein he resides for a hearing to review the Commissioner's order. Manifest injustice is defined as those instances where the Commissioner's order was the result of an error or was issued without authority or jurisdiction. The person shall provide notice of his petition to the attorney for the Commonwealth of that jurisdiction.

B. At the hearing on the petition, if the court finds that the Commissioner's order is manifestly unjust the court may, notwithstanding any other provision of law, order the Commissioner to modify the order or issue the person a restricted license in accordance with the provisions of § 18.2-271.1. For any action under this section, no appeal shall lie from the determination of the circuit court.

C. This section shall not apply to any disqualification of eligibility to operate a commercial motor vehicle imposed by the Commissioner pursuant to Article 6.1 (§ 46.2-341.1 et seq.) of this chapter.

§ 46.2-819.2. Driving a motor vehicle from establishment where motor fuel offered for sale; penalty.

A. No person shall drive a motor vehicle off the premises of an establishment at which motor fuel offered for retail sale was dispensed into the fuel tank of such motor vehicle unless payment for such fuel has been made.

B. Any person who violates this section shall be liable for a civil penalty not to exceed \$250 and applicable court costs if the matter proceeds to court.

C. The driver's license of any person found to have violated this section (i) may be suspended, for the first offense, for a period of up to 30 days and (ii) shall be suspended for a period of 30 days for the second and subsequent offenses.

~~D.~~ Nothing herein shall preclude a prosecution for larceny.

§ 53.1-127.3. Deferred or installment payment agreement for unpaid fees.

If a person is unable to pay in full the fees owed to the local correctional facility or regional jail pursuant to § 53.1-131.3, the sheriff or jail superintendent shall establish a deferred or installment payment agreement subject to the approval of the general district court. As a condition of every such agreement, a person who enters into a deferred or installment payment agreement shall promptly inform the sheriff or jail superintendent of any change of mailing address during the term of the agreement. ~~The sheriff or jail superintendent shall give notice to the person at the time the deferred or installment payment agreement is entered into and the person shall certify on a form prescribed by the local correctional facility or regional jail that he understands that upon his failure or refusal to pay in accordance with a deferred or installment payment agreement, the person's privilege to operate a motor vehicle shall be suspended pursuant to the provisions of § 46.2-320.2.~~

2. That §§ 18.2-259.1, 46.2-320.2, 46.2-390.1, 46.2-416.1, and 53.1-127.4 of the Code of Virginia are repealed.

3. That the Governor shall provide the necessary certifications required pursuant to 23 U.S.C. § 159(a)(3)(B) by September 21, 2020.

Circuit Court Form

CC-1393

SENTENCING ORDER

Abstract

It is proposed that the language addressing the “good behavior” condition of a suspended sentence be revised to clarify that this condition is automatically applied to the entire period of any suspended sentence ordered by the court. This proposal is in response to the opinion of the Virginia Supreme Court in Burnham v. Commonwealth, 298 Va. 109 (2019).

Revision

Non legislative

Form Type

Intranet master

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF

FEDERAL INFORMATION PROCESSING
STANDARDS CODE:

Hearing Date:

Judge:

COMMONWEALTH OF VIRGINIA v. _____, Defendant

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, _____ .

The Commonwealth was represented by _____ .

On _____ the defendant was found guilty of the following offenses:

Offense Tracking Number	Virginia Crime Code (For Administrative Use Only)	Code Section	Case Number
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Virginia Code § 19.2-299.

No presentence report was ordered.

Pursuant to the provisions of Virginia Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The court **SENTENCES** the defendant to:

Case No. _____ Description _____

Incarceration with the Virginia Department of Corrections for the term of: _____ years _____ months _____ days

FINE. The defendant is ordered to pay fine(s) in the amount of \$ _____.

COSTS. The defendant is ordered to pay all costs of this case.

RESTITUTION. The defendant is ordered to make restitution as set forth in the ORDER FOR RESTITUTION.

DRIVER'S LICENSE SUSPENSION: The defendant's license has been suspended
 for a period of _____ years _____ months _____ days indefinitely.

RESTRICTED DRIVER'S LICENSE: A restricted driver's license was issued by separate order.

The court **SUSPENDS** _____ years _____ months _____ days of incarceration _____ fine for a period of _____ upon the condition(s) specified in Suspended Sentence Conditions.

Case No. _____ Description _____

Incarceration with the Virginia Department of Corrections for the term of: _____ years _____ months _____ days

FINE. The defendant is ordered to pay fine(s) in the amount of \$ _____.

COSTS. The defendant is ordered to pay all costs of this case.

RESTITUTION. The defendant is ordered to make restitution as set forth in the ORDER FOR RESTITUTION.

DRIVER'S LICENSE SUSPENSION: The defendant's license has been suspended
 for a period of _____ years _____ months _____ days indefinitely.

RESTRICTED DRIVER'S LICENSE: A restricted driver's license was issued by separate order.

The court **SUSPENDS** _____ years _____ months _____ days of incarceration _____ fine for a period of _____ upon the condition(s) specified in Suspended Sentence Conditions.

Case No. _____ Description _____

Incarceration with the Virginia Department of Corrections for the term of: _____ years _____ months _____ days

FINE. The defendant is ordered to pay fine(s) in the amount of \$ _____.

COSTS. The defendant is ordered to pay all costs of this case.

RESTITUTION. The defendant is ordered to make restitution as set forth in the ORDER FOR RESTITUTION.

DRIVER'S LICENSE SUSPENSION: The defendant's license has been suspended
 for a period of _____ years _____ months _____ days indefinitely.

RESTRICTED DRIVER'S LICENSE: A restricted driver's license was issued by separate order.

The court **SUSPENDS** _____ years _____ months _____ days of incarceration _____ fine for a period of _____ upon the condition(s) specified in Suspended Sentence Conditions.

Consecutive/concurrent:

- These sentences shall run consecutively with all other sentences.
- These sentences shall run concurrently with all other sentences.
- These sentences shall run consecutively/concurrently as described:

Suspended Sentence Conditions:

Good Behavior: The defendant shall be of good behavior for ~~years~~ ~~months from the defendant's release from confinement~~ entire period of any suspended sentence ordered.

Supervised Probation: The defendant is placed on probation under the supervision of a Probation Officer to commence upon sentencing upon release from incarceration for years months days indefinite or unless sooner released by the court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

Community Corrections Alternative Program pursuant to Virginia Code § 19.2-316.4: The defendant shall successfully complete the Community Corrections Alternative Program. Successful completion of the program shall be followed by a period of supervised probation of

.....
 The defendant shall remain in custody until program entry.

Registration pursuant to Code § 9.1-903 for offenses defined in § 9.1-902 is required.

The defendant shall provide a DNA sample and legible fingerprints as directed.

Special conditions:

The defendant shall make restitution as set forth in the ORDER FOR RESTITUTION.

Post-incarceration supervision following felony conviction pursuant to Virginia Code § 18.2-10 and 19.2-295.2:

Post-Incarceration Supervised Probation: The defendant is placed on supervised probation to commence upon release from incarceration for a period of _____, unless released earlier by the court. The defendant shall comply with all the rules and requirements set by the Probation Officer.

Post-Incarceration Post-Release Supervision: In addition to the above sentence of incarceration, the court imposes an additional term of _____ of incarceration. This term is suspended and a period of post-release supervision of _____ is imposed, which is to commence upon release from incarceration. The defendant shall comply with all the rules and requirements set by the Probation Officer.

The defendant was remanded to the custody of the sheriff. The defendant was allowed to depart.

The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Virginia Code § 53.1-187.

ENTER this _____ day of _____ .

_____, Judge

DEFENDANT IDENTIFICATION:

Name: _____

Alias: _____

SSN: _____ DOB: _____/_____/_____ Sex: _____

SENTENCE SUMMARY:

Total Incarceration Sentence Imposed: _____

Total Sentence Suspended: _____

Total Supervised Probation Term: _____

Total Post-release Term Imposed and Suspended: _____

Total Fine Imposed: \$ _____ Total Fine Suspended: \$ _____

PRESENT: All the Justices

NOAH SALIM BURNHAM

v. Record No. 181096

COMMONWEALTH OF VIRGINIA

OPINION BY
JUSTICE STEPHEN R. McCULLOUGH
October 31, 2019

FROM THE COURT OF APPEALS OF VIRGINIA

Noah Salim Burnham challenges the trial court's jurisdiction to revoke two suspended sentences, one for a felony and the other for a misdemeanor. His original 2008 sentencing order imposed suspended sentences for these offenses, placed him on supervised probation for a period of one year, and contained an express condition that he be of good behavior. However, a subsequent probation revocation order concerning these same offenses, entered after a show-cause hearing a little less than one year later in 2009, did not contain an express good behavior requirement. Instead, it placed the defendant on supervised probation for an indefinite period. Burnham was later discharged from probation. Several years after this discharge from probation, the trial court issued another show-cause order based on new felony convictions. Burnham moved to dismiss, contending that the 2009 probation revocation order superseded the 2008 sentencing order and that the trial court lacked jurisdiction to revoke and re-suspend his sentence based on a failure to abide by a good behavior condition. The trial court rejected this argument and proceeded to revoke and re-suspend the remaining portions of Burnham's sentences. For the reasons noted below, we conclude that the trial court could revoke and re-suspend Burnham's felony sentence, but that the court erred in doing the same for his misdemeanor conviction. Therefore, we affirm in part and reverse in part.

BACKGROUND

On December 4, 2008, Noah Burnham was convicted in the Hanover County Circuit Court of possession of cocaine, a felony, and driving under a revoked license, third offense, a Class 1 misdemeanor. On the possession of cocaine conviction, the court sentenced him to serve three years in prison, suspended for a period of ten years. The court sentenced Burnham to a sentence of 90 days for the misdemeanor of driving on a revoked license and suspended 80 days of that sentence for a period of one year.

This sentencing order also contained the following two paragraphs:

Good behavior. The defendant shall be of good behavior for ten years on [the felony possession of cocaine] case . . . and for one year on [the driving on a revoked license] case . . . from his date of sentencing.

Supervised probation. The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer of this Court for one year, or unless sooner released by the Court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

On November 20, 2009, based on a probation violation, the Court found good cause to revoke a portion of these suspended sentences. The Court revoked the entirety of the suspended sentences and then re-suspended all but sixty days of the possession of cocaine sentence. The court also revoked and re-suspended the remaining eighty days of the previously suspended sentence for driving on a revoked license. The order did not impose a specific period of suspension. This order contained the following paragraph:

Supervised probation. The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer of this Court for an indefinite period of time or unless sooner released by the Court or by the Probation Officer. The defendant shall comply with all the rules and requirements set

by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

On January 26, 2011, Burnham was released from probation.

On January 8, 2015, Burnham was convicted in a neighboring jurisdiction of two new counts of felony possession of a Schedule I/II controlled substance. The Hanover County Circuit Court issued an order to show cause why the suspension of his sentences, as set forth in the December 4, 2008 conviction and sentencing order (J.A. 1), should not be revoked. Burnham acknowledged that he had obtained new convictions, but he objected to any revocation of his suspended sentences. He contended that the good behavior condition of suspension imposed by the original sentencing order was superseded in 2009 with a requirement of probation. Once he was released from probation, Burnham argued, the terms and conditions of his suspended sentence were extinguished. Consequently, in Burnham's view, the court lacked jurisdiction to revoke any portion of his suspended sentence. The court disagreed. It revoked and re-suspended the entirety of his suspended sentence: two years and 305 days on the possession of cocaine conviction and 80 days for the driving on a revoked license conviction. The court placed him on supervised probation for an indefinite period of time and placed him under a new period of good behavior for 10 years.

Burnham appealed to the Court of Appeals of Virginia. In a per curiam order, that Court affirmed the decision of the trial court. This appeal followed.

ANALYSIS

Burnham assigns the following error:

The trial court erred in denying the defense motion to dismiss because the trial court lacked jurisdiction to find Defendant guilty of a probation violation where Defendant had completed his term of probation and was no longer subject to terms of suspension.

The Court of Appeals erred by denying the appeal and affirming the ruling of the trial court.

We review *de novo* the legal question of whether a trial court had jurisdiction to hear a particular matter. *Hernandez v. Commonwealth*, 281 Va. 222, 224 (2011).

When a trial court suspends a sentence, it “does not make a contract with the accused, but only extends to him the opportunity which the [s]tate affords him to repent and reform.” *Richardson v. Commonwealth*, 131 Va. 802, 810 (1921). It is a “free gift” intended to spur the defendant into turning his life around. *Id.* The legislature did not enact statutes authorizing suspension of all or a portion of a sentence “without regard to the subsequent behavior of the defendant.” *Marshall v. Commonwealth*, 202 Va. 217, 220 (1960). There would be no point to suspending a portion of a sentence if that suspension carried no consequences.

Even when an order imposing a suspended sentence does not contain an express “condition of good behavior, that condition is implicit in every such suspension and *constitutes the origin and purpose of the suspension and probation statutes.*” *Id.* at 219 (emphasis added). This Court concluded that “good behavior is a condition of every suspension, with or without probation, whether expressly so stated or not.” *Id.* at 220. *See also Collins v. Commonwealth*, 269 Va. 141, 146-47 (2005).

Code § 19.2-306(A) governs the authority of a court to revoke a suspended sentence. It provides that

In any case in which the court has suspended the execution or imposition of sentence, the court may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court. If neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned.

Pursuant to the second sentence of this statute, the court’s order of 2009 did not “fix” a period of suspension or a specific period of probation. The period of probation was indefinite. For example, when a court “fixes” bail, it sets a specific amount. Similarly, the same order did not “fix” a period of suspension for the sentence. Applying Code § 19.2-306(A) according to its plain language, the court had the statutory authority to revoke Burnham’s suspended sentence “for any cause the court deems sufficient,” provided the new crime occurred “within the maximum period for which the defendant might originally have been sentenced to be imprisoned.” Burnham’s conviction for possession of cocaine under Code § 18.2-250 constituted a Class 5 felony. Class 5 felonies carry a maximum potential term of imprisonment of 10 years. Code § 18.2-10. Burnham was sentenced in 2008 and convicted of two new felonies in January of 2015, well within the 10-year window. Committing new felonies qualifies as “good cause” by any measure.

We cannot agree with Burnham’s contention that the 2009 order, by failing to mention a requirement of good behavior, eliminated that requirement altogether. Our cases consistently have held that good behavior is an implied condition of any order suspending a sentence. A condition of good behavior accompanies the period of suspension as a matter of law. *Marshall*, 202 Va. at 220; *Collins*, 269 Va. at 146-47. The fact that the good behavior condition was mentioned in the 2008 order but not included in the 2009 order is of no moment.

We also reject Burnham’s contention that “in the absence of any other period pr[e]scribed in the 2009 order, the period of good behavior was the same as his period of probation, which had ended prior to the 2017 revocation.” Appellant’s Br. 10. Probation and good behavior constitute distinct, if complementary, requirements. *See Grant v. Commonwealth*, 223 Va. 680, 685 (1982) (Virginia law distinguishes probation from suspension of a sentence, recognizing that

the two are not synonymous). Once the period of probation ended, the requirement of good behavior remained alongside the suspended sentence. To hold otherwise would transform a suspended sentence, meant to incentivize reform and rehabilitation, into a purposeless act. We consistently have resisted arguments along those lines. “[P]robation statutes are highly remedial and should be liberally construed to provide trial courts a valuable tool for rehabilitation of criminals.” *Grant*, 223 Va. at 684.

For example, in *Coffey v. Commonwealth*, 209 Va. 760 (1969), the defendant, who had received a suspended sentence, committed new crimes *before* the start of his supervised probation for a particular offense.* By its express terms, the order sentencing Coffey for statutory burglary did not contain a requirement of good behavior prior to the start of his probation. We rejected the argument that his suspended sentence could not be revoked. Drawing from our decision in *Marshall*, we explained that “good behavior is a condition of every suspension, with or without probation, whether expressly so stated or not.” *Id.* at 763. Even though the period of supervised probation had not yet begun, the condition of good behavior was implicit at the time the court imposed a suspended sentence. *Id.* We concluded as follows:

When the trial court suspended the sentence of the defendant, it could not and did not enter into an agreement with him to ignore all subsequent misbehavior on his part until his period of supervised probation had begun. The purpose of suspending the sentence was to give the defendant an opportunity to repent and reform. When the court saw that the defendant, by his involvement in the four felony offenses [before the start of his probationary period], had rebuffed the opportunity extended him

* The defendant in *Coffey* was sentenced for two crimes, concealing stolen goods and statutory burglary. *Id.* at 760. He received an active sentence for concealing stolen goods, for which he was later paroled, and a suspended sentence for statutory burglary. *Id.* at 760-61. The suspended sentence for statutory burglary was accompanied by supervised probation, to begin when he completed his sentence for concealing stolen goods. *Id.* When he committed new crimes, he was on probation for the conviction of concealing stolen goods, but his probationary period for statutory burglary had not yet begun. *Id.*

and had displayed an unwillingness to be rehabilitated, it had the power to invoke the condition of good behavior which had attached to the suspension from the beginning. The court properly withdrew from the defendant the conditional freedom which it had given him and which he forfeited by his misconduct during the period of suspension.

Id. at 764. *Coffey* dealt with misbehavior *before* the start of probation, whereas here we are dealing with misbehavior *after* the conclusion of probation. The answer, however, is the same. By committing new crimes, the defendant violated the long established implicit condition of good behavior. Consequently, the court possessed the authority to revoke his previously suspended sentence for crimes committed during the period of suspension.

Even though our cases have held for over 50 years that good behavior is an implicit condition of a suspended sentence, the better practice is to expressly include that language in an order revoking and re-suspending a sentence. An expressly stated condition of good behavior provides additional notice to a defendant and minimizes the risk of confusion.

We hold that the requirement of good behavior, implicit in every suspended sentence, does not disappear even if an earlier sentencing order contains an express requirement of good behavior and a subsequent order does not expressly carry over the good behavior requirement. Consequently, we affirm the trial court's decision to revoke and re-suspend Burnham's suspended sentence for possession of cocaine.

We reach a different conclusion, however, for Burnham's misdemeanor conviction. As punishment for that conviction, the original sentencing order imposed a sentence of 90 days, with 80 days suspended for one year, and placed him on supervised probation for a period of one year. Less than one year later, the court revoked and re-suspended the suspended sentence in its entirety. That order, however, did not specify a period of suspension or fix a definite period of probation. Under Code § 19.2-306, "[i]f neither a probation period nor a period of suspension

was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned.” Driving on a revoked license is a Class 1 misdemeanor, *see* Code § 46.2-301(C), the maximum punishment for which is 12 months’ confinement in jail. *See* Code § 18.2-11(a). Burnham was sentenced for this crime in 2008. By 2016, the one-year period of suspension had long ended. Therefore, by operation of Code § 19.2-306, Burnham could not have the misdemeanor portion of his suspended sentence revoked following an order to show cause that was issued in 2016. The court erred in revoking and re-suspending this portion of Burnham’s sentence.

CONCLUSION

The judgment is affirmed in part and reversed in part. The case is remanded for entry of a new probation revocation order in conformity with this opinion.

*Affirmed in part,
reversed in part,
and remanded.*

Circuit Court Form CC-1393(A) ADDENDUM TO SENTENCING ORDER FOR JUVENILE
ADJUDICATED DELINQUENT OR FOUND GUILTY OF
VIOLENT JUVENILE FELONY

Abstract House Bill 1150 and Senate Bill 491 require a clerk of
court to report to the Bureau of Immigration and Customs
Enforcement upon an adjudication of delinquency or finding of
guilt for a violent juvenile felony when there is evidence that
the juvenile is in the United States illegally. This new form
provides a mechanism for the court to notify the clerk when the
required report must be made.

Source House Bill 1150 (Chapter 995, effective July 1, 2020)/Senate
Bill 491 (Chapter 996, effective July 1, 2020)

Revision Legislative

Form Type Internet Master

**ADDENDUM TO SENTENCING ORDER FOR
JUVENILE ADJUDICATED DELINQUENT OR
FOUND GUILTY OF VIOLENT JUVENILE FELONY**

Commonwealth of Virginia

VA. CODE § 16.1-309.1(H)

Case No.
.....
.....

Commonwealth of Virginia

v.

The Court finds that the defendant has been [] adjudicated delinquent or [] found guilty of a violent juvenile felony as defined in Va. Code § 16.1-228, is detained in a secure facility, and there is evidence the juvenile is in the United States illegally. The clerk of the court shall report this information to the Bureau of Immigration and Customs Enforcement (ICE) of the U.S. Department of Homeland Security as required by Va. Code § 16.1-309.1(H).

.....
DATE

JUDGE

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 996

An Act to amend and reenact §§ 16.1-309.1, 19.2-83.2, 53.1-218, and 53.1-219 of the Code of Virginia, relating to inquiry and report of immigration status; persons charged with or convicted of certain crimes.

[S 491]

Approved April 9, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 16.1-309.1, 19.2-83.2, 53.1-218, and 53.1-219 of the Code of Virginia are amended and reenacted as follows:

§ 16.1-309.1. Exception as to confidentiality.

A. Notwithstanding any other provision of this article, where consideration of public interest requires, the judge shall make available to the public the name and address of a juvenile and the nature of the offense for which a juvenile has been adjudicated delinquent (i) for an act which would be a Class 1, 2, or 3 felony, forcible rape, robbery or burglary or a related offense as set out in Article 2 (§ 18.2-89 et seq.) of Chapter 5 of Title 18.2 if committed by an adult or (ii) in any case where a juvenile is sentenced as an adult in circuit court.

B. 1. a. At any time prior to disposition, if a juvenile charged with a delinquent act which would constitute a felony if committed by an adult, or held in custody by a law-enforcement officer, or held in a secure facility pursuant to such charge becomes a fugitive from justice, the attorney for the Commonwealth or, upon notice to the Commonwealth's attorney, the Department of Juvenile Justice or a locally operated court services unit, may, with notice to the juvenile's attorney of record, petition the court having jurisdiction of the offense to authorize public release of the juvenile's name, age, physical description and photograph, the charge for which he is sought or for which he was adjudicated and any other information which may expedite his apprehension. Upon a showing that the juvenile is a fugitive and for good cause, the court shall order release of this information to the public. If a juvenile charged with a delinquent act that would constitute a felony if committed by an adult, or held in custody by a law-enforcement officer, or held in a secure facility pursuant to such charge becomes a fugitive from justice at a time when the court is not in session, the Commonwealth's attorney, the Department of Juvenile Justice, or a locally operated court services unit may, with notice to the juvenile's attorney of record, authorize the public release of the juvenile's name, age, physical description and photograph, the charge for which he is sought, and any other information which may expedite his apprehension.

b. At any time prior to disposition, if a juvenile charged with a delinquent act which would constitute a misdemeanor if committed by an adult, or held in custody by a law-enforcement officer, or held in a secure facility pursuant to such charge becomes a fugitive from justice, the attorney for the Commonwealth may, with notice to the juvenile's attorney of record, petition the court having jurisdiction of the offense to authorize public release of the juvenile's name, age, physical description and photograph, the charge for which he is sought or for which he was adjudicated and any other information which may expedite his apprehension. Upon a showing that the juvenile is a fugitive and for good cause, the court shall order release of this information to the public. If a juvenile charged with a delinquent act that would constitute a misdemeanor if committed by an adult, or held in custody by a law-enforcement officer, or held in a secure facility pursuant to such charge becomes a fugitive from justice at a time when the court is not in session, the attorney for the Commonwealth may, with notice to the juvenile's attorney of record, authorize the public release of the juvenile's name, age, physical description and photograph, the charge for which he is sought, and any other information which may expedite his apprehension.

2. After final disposition, if a juvenile (i) found to have committed a delinquent act becomes a fugitive from justice or (ii) who has been committed to the Department of Juvenile Justice pursuant to subdivision 14 of § 16.1-278.8 or 16.1-285.1 becomes a fugitive from justice by escaping from a facility operated by or under contract with the Department or from the custody of any employee of such facility, the Department may release to the public the juvenile's name, age, physical description and photograph, the charge for which he is sought or for which he was committed, and any other information which may expedite his apprehension. The Department shall promptly notify the attorney for the Commonwealth of the jurisdiction in which the juvenile was tried whenever information is released pursuant to this subdivision. If a juvenile specified in clause (i) being held after disposition in a secure facility not operated by or under contract with the Department becomes a fugitive by such escape, the attorney for the Commonwealth of the locality in which the facility is located may release the information as provided in this subdivision.

C. Whenever a juvenile 14 years of age or older is charged with a delinquent act that would be a

criminal violation of Article 2 (§ 18.2-38 et seq.) of Chapter 4 of Title 18.2, a felony involving a weapon, a felony violation of Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, or an "act of violence" as defined in subsection A of § 19.2-297.1 if committed by an adult, the judge may, where consideration of the public interest requires, make the juvenile's name and address available to the public.

D. Upon the request of a victim of a delinquent act that would be a felony or that would be a misdemeanor violation of § 16.1-253.2, 18.2-57, 18.2-57.2, 18.2-60.3, 18.2-60.4, 18.2-67.4, or 18.2-67.5 if committed by an adult, the court may order that such victim be informed of the charge or charges brought, the findings of the court, and the disposition of the case. For purposes of this section, "victim" shall be defined as in § 19.2-11.01.

E. Upon request, the judge or clerk may disclose if an order of emancipation of a juvenile pursuant to § 16.1-333 has been entered, provided (i) the order is not being appealed, (ii) the order has not been terminated, or (iii) there has not been a judicial determination that the order is void ab initio.

F. Notwithstanding any other provision of law, a copy of any court order that imposes a curfew or other restriction on a juvenile may be provided to the chief law-enforcement officer of the county or city wherein the juvenile resides. The chief law-enforcement officer shall only disclose information contained in the court order to other law-enforcement officers in the conduct of official duties.

G. Notwithstanding any other provision of law, where consideration of public safety requires, the Department and locally operated court service unit shall release information relating to a juvenile's criminal street gang involvement, if any, and the criminal street gang-related activity and membership of others, as criminal street gang is defined in § 18.2-46.1, obtained from an investigation or supervision of a juvenile and shall include the identity or identifying information of the juvenile; however, the Department and local court service unit shall not release the identifying information of a juvenile not affiliated with or involved in a criminal street gang unless that information relates to a specific criminal act. Such information shall be released to any State Police, local police department, sheriff's office, or law-enforcement task force that is a part of or administered by the Commonwealth or any political subdivision thereof, and that is responsible for the prevention and detection of crime and the enforcement of the penal, traffic, or highway laws of the Commonwealth. The exchange of information shall be for the purpose of an investigation into criminal street gang activity.

H. Notwithstanding any other provision of Article 12 (§ 16.1-299 et seq.), ~~an intake officer~~ *a clerk of the court* shall report to the Bureau of Immigration and Customs Enforcement of the ~~United States~~ *U.S.* Department of Homeland Security a juvenile who has been detained in a secure facility ~~based on an allegation that the juvenile committed~~ *but only upon an adjudication of delinquency or finding of guilt* for a violent juvenile felony and ~~who the intake officer has probable cause to believe when there is evidence that the juvenile is in the United States illegally.~~

§ 19.2-83.2. Jail officer to ascertain citizenship of inmate.

Whenever any person is taken into custody at any jail *for a felony offense*, the sheriff or other officer in charge of such facility shall inquire as to whether the person (i) was born in a country other than the United States; and (ii) is a citizen of a country other than the United States. The sheriff or other officer in charge of such facility shall make an immigration alien query to the Law Enforcement Support Center of the ~~United States~~ *U.S.* Immigration and Customs Enforcement for any person *taken into custody for a felony* who (i) was born in a country other than the United States; and (ii) is a citizen of a country other than the United States, or for whom the answer to *clause* (i) or (ii) is unknown. The sheriff or other officer in charge shall communicate the results of any immigration alien query to the Local Inmate Data System of the State Compensation Board. The State Compensation Board shall communicate, on a monthly basis, the results of any immigration alien query that results in a confirmation that the person is illegally present in the United States to the Central Criminal Records Exchange of the Department of State Police in a format approved by the Exchange. The information received by the Central Criminal Records Exchange concerning the person's immigration status shall be recorded in the person's criminal history record.

§ 53.1-218. Duty of officer in charge to inquire as to citizenship; notice to federal immigration officer of commitment of alien.

Whenever any person is committed to a correctional facility *for the commission of a felony*, the director, sheriff or other officer in charge of such facility shall inquire as to whether the person (i) was born in a country other than the United States; and (ii) is a citizen of a country other than the United States. The director, sheriff or other officer in charge of such facility shall make an immigration alien query to the Law Enforcement Support Center of the ~~United States~~ *U.S.* Immigration and Customs Enforcement for any person *committed to the facility for the commission of a felony* who (i) was born in a country other than the United States; and (ii) is a citizen of a country other than the United States, or for whom the answer to *clause* (i) or (ii) is unknown.

In the case of a jail, the sheriff, or other officer in charge of such facility shall communicate the results of any immigration alien query that confirm that the person is illegally present in the United States to the Local Inmate Data System of the State Compensation Board. The State Compensation Board shall communicate, on a monthly basis, the results of any immigration alien query that results in

a confirmation that the person is illegally present in the United States to the Central Criminal Records Exchange of the Department of State Police in a format approved by the Exchange.

In the case of a correctional facility of the Department of Corrections, the director or other officer in charge of such facility shall communicate the results of any immigration alien query that results in a confirmation that the person is illegally present in the United States to the Central Criminal Records Exchange of the Department of State Police in a format approved by the Exchange.

The information received by the Central Criminal Records Exchange concerning the person's immigration status shall be recorded in the person's criminal history record.

However, notification ~~need~~ *shall* not be made to the Central Criminal Records Exchange if it is apparent that a report on alien status has previously been made to the Exchange pursuant to § 19.2-83.2 or 19.2-294.2.

§ 53.1-219. Duty of clerk to furnish copy of complaint, indictment, judgment and sentence.

Upon the official request of the United States immigration officer in charge of the territory or district in which is located any court committing any alien to any correctional facility *for the commission of a felony*, it shall be the duty of the clerk of such court to furnish without charge a certified copy, in duplicate, of the complaint, information or indictment and the judgment and sentence and any other records pertaining to the case of the convicted alien.

Circuit Court Form	CC-1395	PROTECTIVE ORDER – ACT OF VIOLENCE CONVICTION (new form)
	CC-1395(A)	PROTECTIVE ORDER – ACT OF VIOLENCE CONVICTION FIREARM CERTIFICATION (new form)
Abstract	<p>Senate Bill 144 amends § 19.2-152.10 by adding a provision that creates a new type of protective order. The legislation provides that upon conviction for an act of violence, force or threat as defined in § 19.2-297.1, upon request of the victim or the attorney for the Commonwealth, the court may issue a protective order against the defendant for any reasonable period of time, including for the lifetime of the defendant. A new protective order form has been created to address the provisions of the legislation.</p> <p>House Bill 1004 and Senate Bill 479 require that a respondent, within 48 hours after being served with a protective order, certify in writing on a form provided by the Office of the Executive Secretary, that they do not possess any firearms or that they have surrendered, sold or transferred their firearms. This form has been programmed to be automatically printed and included with the protective order form when it is served on the respondent.</p>	
Source	<p>Senate Bill 144 (Chapter 1005, effective July 1, 2020)</p> <p>House Bill 1004 (Chapter 1221, effective July 1 2020)/Senate Bill 479 (Chapter 1260, effective July 1, 2020)</p>	
Revision	Legislative	
Form Type	Intranet Master	

PROTECTIVE ORDER – ACT OF VIOLENCE CONVICTION

Case No.

Commonwealth of Virginia VA. CODE § 19.2-152.10

..... Circuit Court

Amended Protective Order Extension of Protective Order Conviction for Violation of Protective Order

PROTECTED PERSON

.....

LAST FIRST MIDDLE

PROTECTED PERSON'S DATE OF BIRTH

.....

V.

RESPONDENT

.....

LAST FIRST MIDDLE

.....
RESPONDENT'S ADDRESS
.....

RESPONDENT IDENTIFIERS (IF KNOWN)

RACE	SEX	BORN			HT.		WGT.	EYES	HAIR
		MO.	DAY	YR.	FT.	IN.			
.....

SSN

DRIVER'S LICENSE NO.	STATE	EXP.
.....

CAUTION: Weapon Involved

Distinguishing features:

THE COURT FINDS that it has jurisdiction over the parties and subject matter, that the Respondent was given reasonable notice and an opportunity to be heard, and that the Respondent has been convicted of an act of violence as defined in Va. Code § 19.2-297.1.

A hearing has been held pursuant to Va. Code § 19.2-152.10(C) on a motion to extend a protective order.

THE COURT FURTHER FINDS that the Protected Person and the Respondent are spouses/former spouses have children in common currently cohabit or have never cohabited in the past are otherwise related or not related.

THE COURT ORDERS, to protect the health and safety of the Protected Person, that:

The Respondent shall not commit acts of violence, force, or threat or criminal offenses that may result in injury to person or property.

The Respondent shall have no contact of any kind with the Protected Person

except as follows:

The Protected Person is granted possession of the companion animal described as
NAME TYPE

It is further ordered that

Supplemental Sheet to Protective Order, Form DC-653, attached and incorporated by reference. Number of supplemental pages:

The Respondent shall surrender, sell or transfer any firearm possessed by Respondent, within 24 hours after being served with this order, as follows:

- (a) surrender any such firearm to a designated local law-enforcement agency;
- (b) sell or transfer any such firearm to a dealer as defined in § 18.2-308.2; or
- (c) sell or transfer any such firearm to any person who is not prohibited by law from possessing a firearm.

The Respondent shall, within 48 hours after being served with this order:

- (a) complete the attached certification form stating either that the Respondent does not possess any firearms or that all firearms possessed by the Respondent have been surrendered, sold or transferred; and
- (b) file the completed certification form with the clerk of the court that entered this order.

THIS ORDER SHALL REMAIN IN FULL FORCE AND EFFECT UNTIL **at 11:59 p.m.**
MONTH DATE YEAR

OR

THIS ORDER SHALL REMAIN IN FULL FORCE AND EFFECT DURING THE LIFETIME OF THE RESPONDANT.

.....
DATE

.....
JUDGE

VIRGINIA FIREARMS PROHIBITIONS:

Pursuant to Code of Virginia § 18.2-308.1:4, Respondent shall not purchase, transport or possess any firearm while this order is in effect. For a period of 24 hours after being served with this order, Respondent may, however, continue to possess and transport a firearm possessed by Respondent at the time of service for the purposes of surrendering the firearm to a law-enforcement agency, or selling or transferring that firearm to a dealer as defined in § 18.2-308.2:2 or to any person who is not prohibited by law from possessing that firearm.

If Respondent has a concealed handgun permit, Respondent must immediately surrender that permit to the court issuing this order.

RETURNS: Each person was served according to law, as indicated below, unless not found.

<p>RESPONDENT:</p> <p>NAME</p> <p>.....</p> <p>ADDRESS</p> <p>.....</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;"><input type="checkbox"/> PERSONAL SERVICE</td> <td>TELEPHONE NUMBER</td> </tr> </table> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;"><input type="checkbox"/> NOT FOUND</td> <td></td> </tr> </table> <p style="text-align: center;">_____</p> <p style="text-align: center;">SERVING OFFICER</p> <p>for _____</p> <p style="text-align: center;">.....</p> <p style="text-align: center;">DATE AND TIME</p>	<input type="checkbox"/> PERSONAL SERVICE	TELEPHONE NUMBER	<input type="checkbox"/> NOT FOUND		<p>PROTECTED PERSON: (See form DC-621, NON-DISCLOSURE ADDENDUM)</p> <p>NAME</p> <p>.....</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;"><input type="checkbox"/> PERSONAL SERVICE</td> <td></td> </tr> </table> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;"><input type="checkbox"/> NOT FOUND</td> <td></td> </tr> </table> <p style="text-align: center;">_____</p> <p style="text-align: center;">SERVING OFFICER</p> <p>for _____</p> <p style="text-align: center;">.....</p> <p style="text-align: center;">DATE AND TIME</p>	<input type="checkbox"/> PERSONAL SERVICE		<input type="checkbox"/> NOT FOUND	
<input type="checkbox"/> PERSONAL SERVICE	TELEPHONE NUMBER								
<input type="checkbox"/> NOT FOUND									
<input type="checkbox"/> PERSONAL SERVICE									
<input type="checkbox"/> NOT FOUND									
<p>RESPONDENT'S DESCRIPTION (for VCIN entry):</p> <p>RACE SEX</p> <p>DOB:</p> <p>HGT WGT</p> <p>EYES HAIR</p> <p>SSN</p> <p>Tel. No.</p> <p>Relationship to Petitioner/Plaintiff</p> <p>Distinguishing features</p>	<p><input type="checkbox"/> Copy delivered to:</p> <p>.....</p> <p>.....</p> <p>by TITLE</p> <p>..... SIGNATURE</p> <p>.....</p>								

WARNINGS TO RESPONDENT:

If Respondent violates the conditions of this order, Respondent may be sentenced to jail and/or ordered to pay a fine. This order will be entered into the Virginia Criminal Information Network. Either party may at any time file a motion with the court requesting a hearing to dissolve or modify this order; however, this Order remains in full force and effect unless and until dissolved or modified by the court. **Only the court can change this Order.**

Federal Offenses: Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. § 2262). Federal law provides penalties for possessing, transporting, shipping or receiving any firearm or ammunition while subject to a qualifying protective order and under the circumstances specified in 18 U.S.C. § 922(g)(8).

Full Faith and Credit: This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, and any U.S. Territory, and may be enforced on Tribal Lands (18 U.S.C. § 2265).

DEFINITIONS:

“Act of violence, force, or threat” means any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7 (§ 18.2-61 et. seq.) of Chapter 4 of Title 18.2, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury.

**PROTECTIVE ORDER – ACT OF VIOLENCE CONVICTION
FIREARM CERTIFICATION**

Commonwealth of Virginia Va. Code § 18.2-308.1:4

Case No.

..... Circuit Court

.....
ADDRESS OF COURT

..... V.
PROTECTED PERSON RESPONDENT

I, the named Respondent, certify pursuant to Virginia Code § 18.2-308.1:4 that

I do not possess any firearms.

OR

I have surrendered, sold or transferred all firearms that were possessed by me, as required by the issued Protective Order.

I understand that I am required to file this completed certification form with the clerk of the court that entered the Protective Order within 48 hours after being served with the Protective Order.

I further understand that I am required to surrender my concealed firearm permit, if any, to the court named above that entered the Protective Order.

.....
DATE

.....
SIGNATURE OF RESPONDENT

.....
PRINTED NAME OF RESPONDENT

VIRGINIA FIREARMS PROHIBITION:
Pursuant to Virginia Code § 18.2-308.1:4, Respondent shall not purchase, transport or possess any firearm while the Protective Order is in effect.

(FOR COURT USE ONLY)

As the Respondent failed to file the required certification form with the clerk of the court, a show cause summons for contempt of court shall be issued and served on the Respondent.

.....
DATE

.....
JUDGE

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 1005

An Act to amend and reenact §§ 18.2-60.4 and 19.2-152.10 of the Code of Virginia, relating to protective orders; issuance upon convictions for certain felonies; penalty.

[S 144]

Approved April 9, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-60.4 and 19.2-152.10 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-60.4. Violation of protective orders; penalty.

A. Any person who violates any provision of a protective order issued pursuant to § 19.2-152.8, 19.2-152.9, or 19.2-152.10 is guilty of a Class 1 misdemeanor. Conviction hereunder shall bar a finding of contempt for the same act. The punishment for any person convicted of a second offense of violating a protective order, *other than a protective order issued pursuant to subsection C of § 19.2-152.10*, when the offense is committed within five years of the prior conviction and when either the instant or prior offense was based on an act or threat of violence, shall include a mandatory minimum term of confinement of 60 days. Any person convicted of a third or subsequent offense of violating a protective order, *other than a protective order issued pursuant to subsection C of § 19.2-152.10*, when the offense is committed within 20 years of the first conviction and when either the instant or one of the prior offenses was based on an act or threat of violence, is guilty of a Class 6 felony and the punishment shall include a mandatory minimum term of confinement of six months. The mandatory minimum terms of confinement prescribed for violations of this section shall be served consecutively with any other sentence.

B. In addition to any other penalty provided by law, any person who, while knowingly armed with a firearm or other deadly weapon, violates any provision of a protective order with which he has been served issued pursuant to § 19.2-152.8, 19.2-152.9, or 19.2-152.10, *other than a protective order issued pursuant to subsection C of § 19.2-152.10*, is guilty of a Class 6 felony.

C. If the respondent commits an assault and battery upon any party protected by the protective order, *other than a protective order issued pursuant to subsection C of § 19.2-152.10*, resulting in bodily injury to the party or stalks any party protected by the protective order in violation of § 18.2-60.3, he is guilty of a Class 6 felony. Any person who violates such a protective order, *other than a protective order issued pursuant to subsection C of § 19.2-152.10*, by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, is guilty of a Class 6 felony, in addition to any other penalty provided by law.

D. Upon conviction of any offense hereunder for which a mandatory minimum term of confinement is not specified, the person shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended.

E. Upon conviction, the court shall, in addition to the sentence imposed, enter a protective order pursuant to § 19.2-152.10 for a specified period not exceeding two years from the date of conviction.

§ 19.2-152.10. Protective order.

A. The court may issue a protective order pursuant to this chapter to protect the health and safety of the petitioner and family or household members of a petitioner upon (i) the issuance of a petition or warrant for, or a conviction of, any criminal offense resulting from the commission of an act of violence, force, or threat or (ii) a hearing held pursuant to subsection D of § 19.2-152.9. A protective order issued under this section may include any one or more of the following conditions to be imposed on the respondent:

1. Prohibiting acts of violence, force, or threat or criminal offenses that may result in injury to person or property;

2. Prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons;

3. Any other relief necessary to prevent (i) acts of violence, force, or threat, (ii) criminal offenses that may result in injury to person or property, or (iii) communication or other contact of any kind by the respondent; and

4. Granting the petitioner the possession of any companion animal as defined in § 3.2-6500 if such petitioner meets the definition of owner in § 3.2-6500.

B. ~~The~~ *Except as provided in subsection C*, the protective order may be issued for a specified period of time up to a maximum of two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. Prior to the expiration of the protective order, a petitioner may file a written motion requesting a hearing to extend

the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. The court may extend the protective order for a period not longer than two years to protect the health and safety of the petitioner or persons who are family or household members of the petitioner at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. Nothing herein shall limit the number of extensions that may be requested or issued.

C. Upon conviction for an act of violence as defined in § 19.2-297.1 and upon the request of the victim or of the attorney for the Commonwealth on behalf of the victim, the court may issue a protective order to the victim pursuant to this chapter to protect the health and safety of the victim. The protective order may be issued for any reasonable period of time, including up to the lifetime of the defendant, that the court deems necessary to protect the health and safety of the victim. The protective order shall expire at 11:59 p.m. on the last day specified in the protective order, if any. Upon a conviction for violation of a protective order issued pursuant to this subsection, the court that issued the original protective order may extend the protective order as the court deems necessary to protect the health and safety of the victim. The extension of the protective order shall expire at 11:59 p.m. on the last day specified, if any. Nothing herein shall limit the number of extensions that may be issued.

D. A copy of the protective order shall be served on the respondent and provided to the petitioner as soon as possible. The court, including a circuit court if the circuit court issued the order, shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court and shall forthwith forward the attested copy of the protective order and containing any such identifying information to the primary law-enforcement agency responsible for service and entry of protective orders. Upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52 and the order shall be served forthwith upon the respondent and due return made to the court. Upon service, the agency making service shall enter the date and time of service and other appropriate information required into the Virginia Criminal Information Network and make due return to the court. If the order is later dissolved or modified, a copy of the dissolution or modification order shall also be attested, forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders, and upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network as described above and the order shall be served forthwith and due return made to the court.

~~D. E.~~ Except as otherwise provided, a violation of a protective order issued under this section shall constitute contempt of court.

~~E. F.~~ The court may assess costs and attorneys' fees against either party regardless of whether an order of protection has been issued as a result of a full hearing.

~~F. G.~~ Any judgment, order or decree, whether permanent or temporary, issued by a court of appropriate jurisdiction in another state, the United States or any of its territories, possessions or Commonwealths, the District of Columbia or by any tribal court of appropriate jurisdiction for the purpose of preventing violent or threatening acts or harassment against or contact or communication with or physical proximity to another person, including any of the conditions specified in subsection A, shall be accorded full faith and credit and enforced in the Commonwealth as if it were an order of the Commonwealth, provided reasonable notice and opportunity to be heard were given by the issuing jurisdiction to the person against whom the order is sought to be enforced sufficient to protect such person's due process rights and consistent with federal law. A person entitled to protection under such a foreign order may file the order in any appropriate district court by filing with the court, an attested or exemplified copy of the order. Upon such a filing, the clerk shall forthwith forward an attested copy of the order to the primary law-enforcement agency responsible for service and entry of protective orders which shall, upon receipt, enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52. Where practical, the court may transfer information electronically to the Virginia Criminal Information Network.

Upon inquiry by any law-enforcement agency of the Commonwealth, the clerk shall make a copy available of any foreign order filed with that court. A law-enforcement officer may, in the performance of his duties, rely upon a copy of a foreign protective order or other suitable evidence which has been provided to him by any source and may also rely upon the statement of any person protected by the order that the order remains in effect.

~~G. H.~~ Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Proceedings to modify or dissolve a protective order shall be given

precedence on the docket of the court.

~~H.~~ *I.* Neither a law-enforcement agency, the attorney for the Commonwealth, a court nor the clerk's office, nor any employee of them, may disclose, except among themselves, the residential address, telephone number, or place of employment of the person protected by the order or that of the family of such person, except to the extent that disclosure is (i) required by law or the Rules of the Supreme Court, (ii) necessary for law-enforcement purposes, or (iii) permitted by the court for good cause.

~~I.~~ *J.* No fees shall be charged for filing or serving petitions pursuant to this section.

~~J.~~ *K.* As used in this section:

"Copy" includes a facsimile copy; and

"Protective order" includes an initial, modified or extended protective order.

~~K.~~ *L.* Upon issuance of a protective order, the clerk of the court shall make available to the petitioner information that is published by the Department of Criminal Justice Services for victims of domestic violence or for petitioners in protective order cases.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation is \$0 for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

VIRGINIA ACTS OF ASSEMBLY -- 2020 RECONVENED SESSION

CHAPTER 1260

An Act to amend and reenact §§ 18.2-308.1:4 and 18.2-308.2:1 of the Code of Virginia, relating to protective orders; possession of firearms; surrender or transfer of firearms; penalty.

[S 479]

Approved April 22, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-308.1:4 and 18.2-308.2:1 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-308.1:4. Purchase or transportation of firearm by persons subject to protective orders; penalties.

A. It is unlawful for any person who is subject to (i) a protective order entered pursuant to § 16.1-253.1, 16.1-253.4, 16.1-278.2, 16.1-279.1, 19.2-152.8, 19.2-152.9, or 19.2-152.10; (ii) an order issued pursuant to subsection B of § 20-103; (iii) an order entered pursuant to subsection D of § 18.2-60.3; (iv) a preliminary protective order entered pursuant to subsection F of § 16.1-253 where a petition alleging abuse or neglect has been filed; or (v) an order issued by a tribunal of another state, the United States or any of its territories, possessions, or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), (iii), or (iv) to purchase or transport any firearm while the order is in effect. Any person with a concealed handgun permit shall be prohibited from carrying any concealed firearm, and shall surrender his permit to the court entering the order, for the duration of any protective order referred to herein. A violation of this subsection is a Class 1 misdemeanor.

B. In addition to the prohibition set forth in subsection A, it is unlawful for any person who is subject to a protective order entered pursuant to § 16.1-279.1 *or* 19.2-152.10 or an order issued by a tribunal of another state, the United States or any of its territories, possessions, or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to § 16.1-279.1 *or* 19.2-152.10 to knowingly possess any firearm while the order is in effect, provided that for a period of 24 hours after being served with a protective order in accordance with subsection C of § 16.1-279.1 *or* subsection C of § 19.2-152.10 such person may continue to possess and, notwithstanding the provisions of subsection A, transport any firearm possessed by such person at the time of service for the purposes of *surrendering any such firearm to a law-enforcement agency in accordance with subsection C or selling or transferring any such firearm to a dealer as defined in § 18.2-308.2:2 or to any person who is not otherwise prohibited by law from possessing such firearm in accordance with subsection C.* A violation of this subsection is a Class 6 felony.

C. *Upon issuance of a protective order pursuant to § 16.1-279.1 or 19.2-152.10, the court shall order the person who is subject to the protective order to (i) within 24 hours after being served with a protective order in accordance with subsection C of § 16.1-279.1 or subsection C of § 19.2-152.10 (a) surrender any firearm possessed by such person to a designated local law-enforcement agency, (b) sell or transfer any firearm possessed by such person to a dealer as defined in § 18.2-308.2:2, or (c) sell or transfer any firearm possessed by such person to any person who is not otherwise prohibited by law from possessing such firearm and (ii) within 48 hours after being served with a protective order in accordance with subsection C of § 16.1-279.1 or subsection C of § 19.2-152.10, certify in writing, on a form provided by the Office of the Executive Secretary of the Supreme Court, that such person does not possess any firearms or that all firearms possessed by such person have been surrendered, sold, or transferred and file such certification with the clerk of the court that entered the protective order. The willful failure of any person to certify in writing in accordance with this section that all firearms possessed by such person have been surrendered, sold, or transferred or that such person does not possess any firearms shall constitute contempt of court.*

D. *The person who is subject to a protective order pursuant to § 16.1-279.1 or 19.2-152.10 shall be provided with the address and hours of operation of a designated local law-enforcement agency and the certification forms when such person is served with a protective order in accordance with subsection C of § 16.1-279.1 or subsection C of § 19.2-152.10.*

E. *A law-enforcement agency that takes into custody a firearm surrendered to such agency pursuant to subsection C by a person who is subject to a protective order pursuant to § 16.1-279.1 or 19.2-152.10 shall prepare a written receipt containing the name of the person who surrendered the firearm and the manufacturer, model, and serial number of the firearm and provide a copy to such person. Any firearm surrendered to and held by a law-enforcement agency pursuant to subsection C shall be returned by such agency to the person who surrendered the firearm upon the expiration or dissolution of the protective order entered pursuant to § 16.1-279.1 or 19.2-152.10. Such agency shall*

return the firearm within five days of receiving a written request for the return of the firearm by the person who surrendered the firearm and a copy of the receipt provided to such person by the agency. Prior to returning the firearm to such person, the law-enforcement agency holding the firearm shall confirm that such person is no longer subject to a protective order issued pursuant to § 16.1-279.1 or 19.2-152.10 and is not otherwise prohibited by law from possessing a firearm. A firearm surrendered to a law-enforcement agency pursuant to subsection C may be disposed of in accordance with the provisions of § 15.2-1721 if (i) the person from whom the firearm was seized provides written authorization for such disposal to the agency or (ii) the firearm remains in the possession of the agency more than 120 days after such person is no longer subject to a protective order issued pursuant to § 16.1-279.1 or 19.2-152.10 and such person has not submitted a request in writing for the return of the firearm.

F. Any law-enforcement agency or law-enforcement officer that takes into custody, stores, possesses, or transports a firearm pursuant to this section shall be immune from civil or criminal liability for any damage to or deterioration, loss, or theft of such firearm.

G. The law-enforcement agencies of the counties, cities, and towns within each judicial circuit shall designate, in coordination with each other, and provide to the chief judges of all circuit and district courts within the judicial circuit, one or more local law-enforcement agencies to receive and store firearms pursuant to this section. The law-enforcement agencies shall provide the chief judges with a list that includes the addresses and hours of operation for any law-enforcement agencies so designated that such addresses and hours of operation may be provided to a person served with a protective order in accordance with subsection C of § 16.1-279.1 or subsection C of § 19.2-152.10.

§ 18.2-308.2:1. Prohibiting the selling, etc., of firearms to certain persons.

Any person who sells, barter, gives or furnishes, or has in his possession or under his control with the intent of selling, bartering, giving or furnishing, any firearm to any person he knows is prohibited from possessing or transporting a firearm pursuant to § 18.2-308.1:1, 18.2-308.1:2, or 18.2-308.1:3, subsection B of § 18.2-308.1:4, § 18.2-308.2, subsection B of § 18.2-308.2:01, or § 18.2-308.7 shall be guilty of a Class 4 felony. However, this prohibition shall not be applicable when the person convicted of the felony, adjudicated delinquent or acquitted by reason of insanity has (i) been issued a permit pursuant to subsection C of § 18.2-308.2 or been granted relief pursuant to subsection B of § 18.2-308.1:1, or § 18.2-308.1:2 or 18.2-308.1:3; (ii) been pardoned or had his political disabilities removed in accordance with subsection B of § 18.2-308.2; or (iii) obtained a permit to ship, transport, possess or receive firearms pursuant to the laws of the United States.

2. That any petition for a protective order promulgated by the Executive Secretary of the Supreme Court of Virginia shall include a provision where the petitioner may indicate whether the petitioner knows or has reason to know that the respondent owns or otherwise possesses any firearms.

3. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 854 of the Acts of Assembly of 2019 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

Circuit Court Form	CC-1414	PETITION FOR PROCEEDING IN CIVIL CASE WITHOUT PAYMENT OF FEES OR COSTS
	CC-1421	PETITION FOR PROCEEDING IN A NO-FAULT DIVORCE WITHOUT PAYMENT OF FEES OR COSTS

Abstract

Senate Bill 1032 removes the cross-reference to Va. Code § 19.2-159(B) for the factors to be considered by the court in determining a petitioner’s inability to pay fees or costs. Although the new language is similar to the provisions of § 19.2-159(B), there are a few key differences. The first is that representation by a legal aid attorney gives rise to a rebuttable presumption of inability to pay fees or costs. The new language also specifies that tax withholdings are to be deducted to determine net income, and that only liquid assets are to be considered in determining inability to pay. Forms CC-1414 and CC-1421 have been revised to reflect these changes.

The statute specifies that, in a no-fault divorce case, the presumption of inability to pay that arises from representation by a legal aid attorney or the receipt of public assistance benefits is not rebuttable. Therefore, section 1 of form CC-1421 has also been revised to reflect this presumption and lead the petitioner through the sections of the form that must be completed based on the responses in section 1.

Source	Senate Bill 1032 (Chapter 654, effective July 1, 2020)
Revision	Legislative
Form Type	Internet Master

**PETITION FOR PROCEEDING IN CIVIL CASE
WITHOUT PAYMENT OF FEES OR COSTS**

Case No.

COMMONWEALTH OF VIRGINIA VA.CODE §§ 16.1-69.48:4; 17.1-606

Juvenile & Domestic Relations District Court
 Circuit Court General District Court

v.

The undersigned petitioner(s) request the court to permit the petitioner(s) to sue or defend a civil case in this court without the payment of fees or costs and to have from all officers all needful services and process. In support of the petition, the petitioner(s) state that the following information is true:

I currently receive the following type(s) of public assistance in

CITY/COUNTY

TANF \$ Medicaid Supplemental Security Income \$
 SNAP (food stamps) \$ Other (specify type and amount)

I currently do not receive public assistance.

I am represented in this matter by a legal aid society, an attorney appearing as counsel *pro bono*, or an attorney assigned to me or referred by a legal aid society.

Names and address of employer(s) for myself and spouse:

Self

Spouse

NET INCOME:

Pay period (weekly, every second week, twice monthly, monthly) Self Spouse

Net take home pay (salary/wages, minus deductions required by law and tax withholdings) \$ \$

Other income sources (please specify) \$ \$

COURT USE ONLY

TOTAL INCOME \$ + = **A**

LIQUID ASSETS:

Cash on hand \$

Bank Accounts at: \$

Any other liquid assets: (please specify)

with a value of \$

Real estate \$ NET VALUE \$

with net value of \$

Motor Vehicles } YEAR AND MAKE with net value of \$

Other Personal Property: (describe) \$

COURT USE ONLY

TOTAL ASSETS \$ + = **B**

..... Number in household I have financial responsibility for, including myself.

EXCEPTIONAL EXPENSES (Total Exceptional Expenses of Family)

Medical Expenses (list only unusual and continuing expenses) \$

Court-ordered support payments/alimony \$

deducted from paycheck not deducted from paycheck

Child-care payments (e.g. day care) \$

Other (describe): } \$

COURT USE ONLY

TOTAL EXPENSES \$ = **C**
COLUMN "A" plus COLUMN "B" minus

ACKNOWLEDGEMENT

I understand that the court cannot provide me with legal advice, and that it may be advisable to get advice from a lawyer.

..... DATE SIGNATURE - PETITIONER PRINT NAME -PETITIONER

..... RESIDENCE ADDRESS OF PETITIONER

..... SIGNATURE - PETITIONER PRINT NAME - PETITIONER

..... RESIDENCE ADDRESS OF PETITIONER

ORDER

[] The petition is granted.

[] The petition is denied.

..... DATE JUDGE

**PETITION FOR PROCEEDING IN A NO-FAULT DIVORCE
WITHOUT PAYMENT OF FEES OR COSTS**

COMMONWEALTH OF VIRGINIA VA.CODE § 17.1-606

Case No.

..... Circuit Court

..... v.

The undersigned petitioner requests the court to permit the petitioner to proceed in a no-fault divorce case under Virginia Code § 20-91(A)(9) in this court without the payment of fees or costs and to have from all officers all needful services and process. In support of the petition, the petitioner states that the following information is true:

1. I currently receive the following type(s) of public assistance in
CITY/COUNTY
 TANF \$ Medicaid Supplemental Security Income \$
 SNAP (food stamps) \$ Other (specify type and amount)
- ~~I currently do not receive public assistance. (If this box is checked, complete section 2, below. If not checked, proceed to section 3.)~~
- I am represented in this matter by a legal aid society, an attorney appearing as counsel *pro bono*, or an attorney assigned to me or referred by a legal aid society.

If no boxes in this section are checked, complete sections 2 and 3 below. If one or both boxes in this section are checked, skip section 2 and complete only section 3 below.

2. Names and address of employer(s) for myself and spouse:
 Self
 Spouse

NET INCOME:	Self	Spouse	
Pay period (weekly, every second week, twice monthly, monthly)	
Net take home pay (salary/wages, minus deductions required by law <u>and</u> <u>tax withholdings</u>)	\$	
Other income sources (please specify)	\$	
TOTAL INCOME	\$	+	= COURT USE ONLY A

LIQUID ASSETS:	Self	Spouse	
Cash on hand	\$	
Bank Accounts at:	\$	
Any other <u>liquid</u> assets: (please specify)			
..... with a value of	\$	
Real estate \$	\$	
..... with net value of	\$	
Motor Vehicles {	\$	
..... with net value of	\$	
Other Personal Property: (describe)	\$	
TOTAL ASSETS	\$	+	= COURT USE ONLY B

..... Number in household I have financial responsibility for, including myself.

EXCEPTIONAL EXPENSES (Total Exceptional Expenses of Family)	
Medical Expenses (list only unusual and continuing expenses)	\$
Court-ordered support payments/alimony	\$
<input type="checkbox"/> deducted from paycheck <input type="checkbox"/> not deducted from paycheck	
Child-care payments (e.g. day care)	\$
Other (describe):	\$
.....	\$

COURT USE ONLY

TOTAL EXPENSES \$ = C
 COLUMN "A" plus COLUMN "B" minus
 COLUMN "C" equals available funds =

3. ACKNOWLEDGEMENT

I acknowledge that the foregoing is true and correct. I understand that the court cannot provide me with legal advice, and that it may be advisable to get advice from a lawyer.

..... DATE SIGNATURE – PETITIONER PRINT NAME –PETITIONER

..... RESIDENCE ADDRESS OF PETITIONER

..... SIGNATURE – PETITIONER PRINT NAME – PETITIONER

..... RESIDENCE ADDRESS OF PETITIONER

Commonwealth/State of

City County of

The foregoing instrument was subscribed and sworn to/affirmed before me this
 day of, 20

by
 NAME OF APPLICANT

.....
 [] CLERK [] DEPUTY CLERK
 [] NOTARY PUBLIC
 My commission expires:
 Registration No.

ORDER

The petition is

granted

denied

and the parties shall

..... DATE

..... JUDGE

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 An Act to amend and reenact § 17.1-606 of the Code of Virginia, relating to civil actions; determination
3 of indigency.

4 [S 1032]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 17.1-606 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 17.1-606. Persons allowed services without fees or costs.**

9 A. Any person who is (i) a plaintiff in a civil action in a court of the Commonwealth and a resident
10 of the Commonwealth or (ii) a defendant in a civil action in a court of the Commonwealth, and who is
11 on account of his poverty unable to pay fees or costs, may be allowed by a court to sue or defend a suit
12 therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may
13 assign him, and from all officers, all needful services and process, without any fees, except what may be
14 included in the costs recovered from the opposite party.

15 B. In determining a person's inability to pay fees or costs on account of his poverty, the court shall
16 consider the factors set forth in subsection B of § 19.2-159, provided that, whether such person is a
17 current recipient of a state or federally funded public assistance program for the indigent or is
18 represented by a legal aid society, subject to § 54.1-3916, including an attorney appearing as counsel,
19 pro bono, or assigned or referred by a legal aid society. If so, such person shall be presumed unable to
20 pay such fees or costs. Except in the case of a no-fault divorce proceeding under subdivision A (9) of
21 § 20-91, a person who is a current recipient of a state or federally funded public assistance program for
22 the indigent shall not be subject to fees and costs. In such no-fault divorce proceeding, such person shall
23 certify to the receipt of such benefits under oath such presumption shall be rebuttable where the court
24 finds that a more thorough examination of the person's financial resources is necessary.

25 C. If a person claims indigency but is not presumptively unable to pay under subsection B, or a
26 court, where applicable, finds that a more thorough examination of the financial resources of the
27 petitioner is needed, the court shall consider:

- 28 1. The net income of such person, which shall include his total salary and wages, less deductions
29 required by law and tax withholdings;
- 30 2. Such person's liquid assets, including all cash on hand as well as assets in checking, savings, and
31 similar accounts; and
- 32 3. Any exceptional expenses of such person and his dependents, including costs for medical care,
33 family support obligations, and child care payments.

34 The available funds of the person shall be calculated as the sum of his total income and liquid assets
35 less exceptional expenses as provided in subdivision 3. If the available funds are equal to or less than
36 125 percent of the federal poverty income guidelines prescribed for the size of the household of such
37 person by the federal Department of Health and Human Services, he shall be presumed unable to pay.
38 The Supreme Court of Virginia shall be responsible for distributing to all courts the annual updates of
39 the federal poverty income guidelines made by the Department.

Circuit Court Form CC-1445 SUBSTANTIAL RISK ORDER

Abstract House Bill 674 and Senate Bill 240 empower a circuit court to enter a substantial risk order for the removal of firearms from an individual whom the court has found, by clear and convincing evidence, poses a substantial risk of personal injury to self or others in the near future. This form facilitates the entry of the substantial risk order set forth in Va. Code § 19.2-152.14

Source House Bill 674 (Chapter 887, effective July 1, 2020)/Senate Bill 240 (Chapter 888, effective July 1, 2020)

Revision Legislative

Form Type Intranet Master

SUBSTANTIAL RISK ORDER

Commonwealth of Virginia Va. Code § 19.2-152.14

Court Case No.

..... Circuit Court [] Extension of Order

RESPONDENT

In re:

LAST	FIRST	MIDDLE

.....
RESPONDENT'S ADDRESS/LOCATION
.....

RESPONDENT IDENTIFIERS (IF KNOWN)

RACE	SEX	BORN			HT.		WGT.	EYES	HAIR
		MO.	DAY	YR.	FT.	IN.			
SSN									
DRIVER'S LICENSE NO.							STATE	EXP.	

RESPONDENT [] PRESENT [] NOT PRESENT

DENIAL OF SUBSTANTIAL RISK ORDER

Based upon relevant evidence, the court finds that there is not clear and convincing evidence that the Respondent poses a substantial risk of personal injury to self or others in the near future.

OR

.....
.....
.....

It is hereby ORDERED that any firearm that was previously relinquished by the Respondent be returned to the Respondent in accordance with the provisions of § 19.2-152.15.

SUBSTANTIAL RISK ORDER

The court finds that it has jurisdiction over the parties and subject matter, that the Respondent was given reasonable notice and an opportunity to be heard, and that the attorney for the Commonwealth was present at the hearing.

Based upon relevant evidence, including any recent act of violence, force, or threat as defined in § 19.2-152.7:1 by the Respondent directed toward another person or toward self, the court finds that there is clear and convincing evidence that the Respondent poses a substantial risk of personal injury to self or others in the near future by the Respondent's possession or acquisition of a firearm.

It is hereby ORDERED that

1. The Respondent is prohibited from purchasing, possessing or transporting a firearm while this order is in effect.
2. The Respondent shall surrender any concealed handgun permit to the court named above.
3. Any firearm that was previously relinquished as a result of the Emergency Substantial Risk Order shall continue to be held by the law-enforcement agency that has custody of the firearm while this order is in effect.

The Respondent is advised to voluntarily relinquish any firearm that has not already been taken into custody to the law-enforcement agency that served the Emergency Substantial Risk Order on the Respondent.

The Respondent is advised that a law-enforcement officer may obtain a search warrant to search for any firearms from the Respondent if the law-enforcement officer has reason to believe that the Respondent has not relinquished all firearms in the Respondent's possession.

Approval of Transfer of Firearm:

The court finds the following:

1. The Respondent and the person to whom the firearm is proposed to be transferred who is 21 or older ("transferee") both appeared at the hearing;
2. The attorney for the Commonwealth advised the court at the hearing that a law-enforcement agency has determined that the transferee is not prohibited from possessing or transporting a firearm;
3. The transferee does not reside with the Respondent; AND
4. The transferee has been advised by the court of the requirements and penalties under § 18.2-308.2:1.

After considering all relevant factors and any evidence or testimony from the Respondent, the court approves the transfer of the firearm by the Respondent or by the Respondent's legal representative to the transferee,

..... [] with the following restrictions:

NAME OF TRANSFEREE

The law-enforcement agency holding the firearm shall deliver the firearm to the transferee within 5 days of receiving a copy of this Order.

This Order is issued on
DATE

THIS ORDER EXPIRES ON at 11:59 p.m.
DATE

JUDGE

Notice to Respondent:

This order will be entered into the Virginia Criminal Information Network. The Respondent may file a motion to dissolve the order one time while the order is in effect; however, the motion to dissolve cannot be filed with the circuit court until 30 days after this order was issued. This order remains in full force and effect unless and until dissolved by the court.

WARNINGS TO RESPONDENT:

Pursuant to § 18.2-308.1:6, you shall not purchase, possess or transport any firearm while this substantial risk order is in effect. If you have a concealed handgun permit, you are prohibited from carrying any concealed firearms and you must immediately surrender your permit to the court issuing this order. A violation of § 18.2-308.1:6 is a Class 1 misdemeanor, for which you may be sentenced to jail and/or ordered to pay a fine.

RETURNS: Each person was served according to law, as indicated below, unless not found.

RESPONDENT	
NAME	
ADDRESS	
<input type="checkbox"/> PERSONAL SERVICE	TELEPHONE NUMBER:
<input type="checkbox"/> NOT FOUND	

SERVING OFFICER	
for _____	

DATE AND TIME	
Respondent's Description (for VCIN entry):	
RACE.....	SEX
DOB:	
HGT	WGT
EYES	HAIR
SSN	
Relationship to Petitioner/Plaintiff	
Distinguishing features	

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 18.2-308.09, 18.2-308.2:1, 18.2-308.2:2, and 18.2-308.2:3 of the Code*
 3 *of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-308.1:6, by*
 4 *adding in Title 19.2 a chapter numbered 9.2, consisting of sections numbered 19.2-152.13 through*
 5 *19.2-152.17, and by adding a section numbered 19.2-387.3, relating to firearms; removal from*
 6 *persons posing substantial risk; penalties.*

7 [S 240]

8 Approved

9 **Be it enacted by the General Assembly of Virginia:**

10 **1. That §§ 18.2-308.09, 18.2-308.2:1, 18.2-308.2:2, and 18.2-308.2:3 of the Code of Virginia are**
 11 **amended and reenacted and that the Code of Virginia is amended by adding a section numbered**
 12 **18.2-308.1:6, by adding in Title 19.2 a chapter numbered 9.2, consisting of sections numbered**
 13 **19.2-152.13 through 19.2-152.17, and by adding a section numbered 19.2-387.3 as follows:**

14 **§ 18.2-308.09. Disqualifications for a concealed handgun permit.**

15 The following persons shall be deemed disqualified from obtaining a permit:

16 1. An individual who is ineligible to possess a firearm pursuant to § 18.2-308.1:1, 18.2-308.1:2, or
17 18.2-308.1:3, or 18.2-308.1:6 or the substantially similar law of any other state or of the United States.18 2. An individual who was ineligible to possess a firearm pursuant to § 18.2-308.1:1 and who was
19 discharged from the custody of the Commissioner pursuant to § 19.2-182.7 less than five years before
20 the date of his application for a concealed handgun permit.21 3. An individual who was ineligible to possess a firearm pursuant to § 18.2-308.1:2 and whose
22 competency or capacity was restored pursuant to § 64.2-2012 less than five years before the date of his
23 application for a concealed handgun permit.24 4. An individual who was ineligible to possess a firearm under § 18.2-308.1:3 and who was released
25 from commitment less than five years before the date of this application for a concealed handgun
26 permit.27 5. An individual who is subject to a restraining order, or to a protective order and prohibited by
28 § 18.2-308.1:4 from purchasing, possessing, or transporting a firearm.29 6. (Effective until January 1, 2021) An individual who is prohibited by § 18.2-308.2 from possessing
30 or transporting a firearm, except that a permit may be obtained in accordance with subsection C of that
31 section.32 6. (Effective January 1, 2021) An individual who is prohibited by § 18.2-308.2 from possessing or
33 transporting a firearm, except that a restoration order may be obtained in accordance with subsection C
34 of that section.35 7. An individual who has been convicted of two or more misdemeanors within the five-year period
36 immediately preceding the application, if one of the misdemeanors was a Class 1 misdemeanor, but the
37 judge shall have the discretion to deny a permit for two or more misdemeanors that are not Class 1.
38 Traffic infractions and misdemeanors set forth in Title 46.2 shall not be considered for purposes of this
39 disqualification.40 8. An individual who is addicted to, or is an unlawful user or distributor of, marijuana, synthetic
41 cannabinoids, or any controlled substance.42 9. An individual who has been convicted of a violation of § 18.2-266 or a substantially similar local
43 ordinance, or of public drunkenness, or of a substantially similar offense under the laws of any other
44 state, the District of Columbia, the United States, or its territories within the three-year period
45 immediately preceding the application, or who is a habitual drunkard as determined pursuant to
46 § 4.1-333.

47 10. An alien other than an alien lawfully admitted for permanent residence in the United States.

48 11. An individual who has been discharged from the armed forces of the United States under
49 dishonorable conditions.

50 12. An individual who is a fugitive from justice.

51 13. An individual who the court finds, by a preponderance of the evidence, based on specific acts by
52 the applicant, is likely to use a weapon unlawfully or negligently to endanger others. The sheriff, chief
53 of police, or attorney for the Commonwealth may submit to the court a sworn, written statement
54 indicating that, in the opinion of such sheriff, chief of police, or attorney for the Commonwealth, based
55 upon a disqualifying conviction or upon the specific acts set forth in the statement, the applicant is
56 likely to use a weapon unlawfully or negligently to endanger others. The statement of the sheriff, chief

57 of police, or the attorney for the Commonwealth shall be based upon personal knowledge of such
 58 individual or of a deputy sheriff, police officer, or assistant attorney for the Commonwealth of the
 59 specific acts, or upon a written statement made under oath before a notary public of a competent person
 60 having personal knowledge of the specific acts.

61 14. An individual who has been convicted of any assault, assault and battery, sexual battery,
 62 discharging of a firearm in violation of § 18.2-280 or 18.2-286.1 or brandishing of a firearm in violation
 63 of § 18.2-282 within the three-year period immediately preceding the application.

64 15. An individual who has been convicted of stalking.

65 16. An individual whose previous convictions or adjudications of delinquency were based on an
 66 offense that would have been at the time of conviction a felony if committed by an adult under the laws
 67 of any state, the District of Columbia, the United States or its territories. For purposes of this
 68 disqualifier, only convictions occurring within 16 years following the later of the date of (i) the
 69 conviction or adjudication or (ii) release from any incarceration imposed upon such conviction or
 70 adjudication shall be deemed to be "previous convictions." Disqualification under this subdivision shall
 71 not apply to an individual with previous adjudications of delinquency who has completed a term of
 72 service of no less than two years in the Armed Forces of the United States and, if such person has been
 73 discharged from the Armed Forces of the United States, received an honorable discharge.

74 17. An individual who has a felony charge pending or a charge pending for an offense listed in
 75 subdivision 14 or 15.

76 18. An individual who has received mental health treatment or substance abuse treatment in a
 77 residential setting within five years prior to the date of his application for a concealed handgun permit.

78 19. An individual not otherwise ineligible pursuant to this article, who, within the three-year period
 79 immediately preceding the application for the permit, was found guilty of any criminal offense set forth
 80 in Article 1 (§ 18.2-247 et seq.) or former § 18.2-248.1:1 or of a criminal offense of illegal possession
 81 or distribution of marijuana, synthetic cannabinoids, or any controlled substance, under the laws of any
 82 state, the District of Columbia, or the United States or its territories.

83 20. An individual, not otherwise ineligible pursuant to this article, with respect to whom, within the
 84 three-year period immediately preceding the application, upon a charge of any criminal offense set forth
 85 in Article 1 (§ 18.2-247 et seq.) or former § 18.2-248.1:1 or upon a charge of illegal possession or
 86 distribution of marijuana, synthetic cannabinoids, or any controlled substance under the laws of any
 87 state, the District of Columbia, or the United States or its territories, the trial court found that the facts
 88 of the case were sufficient for a finding of guilt and disposed of the case pursuant to § 18.2-251 or the
 89 substantially similar law of any other state, the District of Columbia, or the United States or its
 90 territories.

91 **§ 18.2-308.1:6. Purchase, possession, or transportation of firearms by persons subject to substantial**
 92 **risk orders; penalty.**

93 *It is unlawful for any person who is subject to an emergency substantial risk order or a substantial*
 94 *risk order entered pursuant to § 19.2-152.13 or 19.2-152.14 or an order issued by a tribunal of another*
 95 *state, the United States or any of its territories, possessions, or commonwealths, or the District of*
 96 *Columbia pursuant to a statute that is substantially similar to § 19.2-152.13 or 19.2-152.14 to purchase,*
 97 *possess, or transport any firearm while the order is in effect. Any such person with a concealed*
 98 *handgun permit is prohibited from carrying any concealed firearm while the order is in effect and shall*
 99 *surrender his permit to the court entering the order pursuant to § 19.2-152.13 or 19.2-152.14. A*
 100 *violation of this section is a Class 1 misdemeanor.*

101 **§ 18.2-308.2:1. Prohibiting the selling, etc., of firearms to certain persons.**

102 Any person who sells, barter, gives or furnishes, or has in his possession or under his control with
 103 the intent of selling, bartering, giving or furnishing, any firearm to any person he knows is prohibited
 104 from possessing or transporting a firearm pursuant to § 18.2-308.1:1, 18.2-308.1:2, 18.2-308.1:3,
 105 18.2-308.1:6, or 18.2-308.2, subsection B of § 18.2-308.2:01, or § 18.2-308.7 shall be is guilty of a
 106 Class 4 felony. However, this prohibition shall not be applicable when the person convicted of the
 107 felony, adjudicated delinquent, or acquitted by reason of insanity has (i) been issued a permit pursuant
 108 to subsection C of § 18.2-308.2 or been granted relief pursuant to subsection B of § 18.2-308.1:1, or
 109 § 18.2-308.1:2 or 18.2-308.1:3; (ii) been pardoned or had his political disabilities removed in accordance
 110 with subsection B of § 18.2-308.2; or (iii) obtained a permit to ship, transport, possess or receive
 111 firearms pursuant to the laws of the United States.

112 **§ 18.2-308.2:2. Criminal history record information check required for the transfer of certain**
 113 **firearms.**

114 A. Any person purchasing from a dealer a firearm as herein defined shall consent in writing, on a
 115 form to be provided by the Department of State Police, to have the dealer obtain criminal history record
 116 information. Such form shall include only the written consent; the name, birth date, gender, race,
 117 citizenship, and social security number and/or any other identification number; the number of firearms

118 by category intended to be sold, rented, traded, or transferred; and answers by the applicant to the
 119 following questions: (i) has the applicant been convicted of a felony offense or found guilty or
 120 adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of a delinquent
 121 act that would be a felony if committed by an adult; (ii) is the applicant subject to a court order
 122 restraining the applicant from harassing, stalking, or threatening the applicant's child or intimate partner,
 123 or a child of such partner, or is the applicant subject to a protective order; ~~and~~ (iii) has the applicant
 124 ever been acquitted by reason of insanity and prohibited from purchasing, possessing, or transporting a
 125 firearm pursuant to § 18.2-308.1:1 or any substantially similar law of any other jurisdiction, been
 126 adjudicated legally incompetent, mentally incapacitated or adjudicated an incapacitated person and
 127 prohibited from purchasing a firearm pursuant to § 18.2-308.1:2 or any substantially similar law of any
 128 other jurisdiction, or been involuntarily admitted to an inpatient facility or involuntarily ordered to
 129 outpatient mental health treatment and prohibited from purchasing a firearm pursuant to § 18.2-308.1:3
 130 or any substantially similar law of any other jurisdiction; *and (iv) is the applicant subject to an*
 131 *emergency substantial risk order or a substantial risk order entered pursuant to § 19.2-152.13 or*
 132 *19.2-152.14 and prohibited from purchasing, possessing, or transporting a firearm pursuant to*
 133 *§ 18.2-308.1:6 or any substantially similar law of any other jurisdiction.*

134 B. 1. No dealer shall sell, rent, trade or transfer from his inventory any such firearm to any other
 135 person who is a resident of Virginia until he has (i) obtained written consent and the other information
 136 on the consent form specified in subsection A, and provided the Department of State Police with the
 137 name, birth date, gender, race, citizenship, and social security and/or any other identification number and
 138 the number of firearms by category intended to be sold, rented, traded or transferred and (ii) requested
 139 criminal history record information by a telephone call to or other communication authorized by the
 140 State Police and is authorized by subdivision 2 to complete the sale or other such transfer. To establish
 141 personal identification and residence in Virginia for purposes of this section, a dealer must require any
 142 prospective purchaser to present one photo-identification form issued by a governmental agency of the
 143 Commonwealth or by the United States Department of Defense that demonstrates that the prospective
 144 purchaser resides in Virginia. For the purposes of this section and establishment of residency for firearm
 145 purchase, residency of a member of the armed forces shall include both the state in which the member's
 146 permanent duty post is located and any nearby state in which the member resides and from which he
 147 commutes to the permanent duty post. A member of the armed forces whose photo identification issued
 148 by the Department of Defense does not have a Virginia address may establish his Virginia residency
 149 with such photo identification and either permanent orders assigning the purchaser to a duty post,
 150 including the Pentagon, in Virginia or the purchaser's Leave and Earnings Statement. When the photo
 151 identification presented to a dealer by the prospective purchaser is a driver's license or other photo
 152 identification issued by the Department of Motor Vehicles, and such identification form contains a date
 153 of issue, the dealer shall not, except for a renewed driver's license or other photo identification issued by
 154 the Department of Motor Vehicles, sell or otherwise transfer a firearm to the prospective purchaser until
 155 30 days after the date of issue of an original or duplicate driver's license unless the prospective
 156 purchaser also presents a copy of his Virginia Department of Motor Vehicles driver's record showing
 157 that the original date of issue of the driver's license was more than 30 days prior to the attempted
 158 purchase.

159 In addition, no dealer shall sell, rent, trade, or transfer from his inventory any assault firearm to any
 160 person who is not a citizen of the United States or who is not a person lawfully admitted for permanent
 161 residence.

162 Upon receipt of the request for a criminal history record information check, the State Police shall (a)
 163 review its criminal history record information to determine if the buyer or transferee is prohibited from
 164 possessing or transporting a firearm by state or federal law, (b) inform the dealer if its record indicates
 165 that the buyer or transferee is so prohibited, and (c) provide the dealer with a unique reference number
 166 for that inquiry.

167 2. The State Police shall provide its response to the requesting dealer during the dealer's request, or
 168 by return call without delay. If the criminal history record information check indicates the prospective
 169 purchaser or transferee has a disqualifying criminal record or has been acquitted by reason of insanity
 170 and committed to the custody of the Commissioner of Behavioral Health and Developmental Services,
 171 the State Police shall have until the end of the dealer's next business day to advise the dealer if its
 172 records indicate the buyer or transferee is prohibited from possessing or transporting a firearm by state
 173 or federal law. If not so advised by the end of the dealer's next business day, a dealer who has fulfilled
 174 the requirements of subdivision 1 may immediately complete the sale or transfer and shall not be
 175 deemed in violation of this section with respect to such sale or transfer. In case of electronic failure or
 176 other circumstances beyond the control of the State Police, the dealer shall be advised immediately of
 177 the reason for such delay and be given an estimate of the length of such delay. After such notification,
 178 the State Police shall, as soon as possible but in no event later than the end of the dealer's next business

179 day, inform the requesting dealer if its records indicate the buyer or transferee is prohibited from
180 possessing or transporting a firearm by state or federal law. A dealer who fulfills the requirements of
181 subdivision 1 and is told by the State Police that a response will not be available by the end of the
182 dealer's next business day may immediately complete the sale or transfer and shall not be deemed in
183 violation of this section with respect to such sale or transfer.

184 3. Except as required by subsection D of § 9.1-132, the State Police shall not maintain records longer
185 than 30 days, except for multiple handgun transactions for which records shall be maintained for 12
186 months, from any dealer's request for a criminal history record information check pertaining to a buyer
187 or transferee who is not found to be prohibited from possessing and transporting a firearm under state or
188 federal law. However, the log on requests made may be maintained for a period of 12 months, and such
189 log shall consist of the name of the purchaser, the dealer identification number, the unique approval
190 number and the transaction date.

191 4. On the last day of the week following the sale or transfer of any firearm, the dealer shall mail or
192 deliver the written consent form required by subsection A to the Department of State Police. The State
193 Police shall immediately initiate a search of all available criminal history record information to
194 determine if the purchaser is prohibited from possessing or transporting a firearm under state or federal
195 law. If the search discloses information indicating that the buyer or transferee is so prohibited from
196 possessing or transporting a firearm, the State Police shall inform the chief law-enforcement officer in
197 the jurisdiction where the sale or transfer occurred and the dealer without delay.

198 5. Notwithstanding any other provisions of this section, rifles and shotguns may be purchased by
199 persons who are citizens of the United States or persons lawfully admitted for permanent residence but
200 residents of other states under the terms of subsections A and B upon furnishing the dealer with one
201 photo-identification form issued by a governmental agency of the person's state of residence and one
202 other form of identification determined to be acceptable by the Department of Criminal Justice Services.

203 6. For the purposes of this subsection, the phrase "dealer's next business day" shall not include
204 December 25.

205 C. No dealer shall sell, rent, trade or transfer from his inventory any firearm, except when the
206 transaction involves a rifle or a shotgun and can be accomplished pursuant to the provisions of
207 subdivision B 5 to any person who is not a resident of Virginia unless he has first obtained from the
208 Department of State Police a report indicating that a search of all available criminal history record
209 information has not disclosed that the person is prohibited from possessing or transporting a firearm
210 under state or federal law. The dealer shall obtain the required report by mailing or delivering the
211 written consent form required under subsection A to the State Police within 24 hours of its execution. If
212 the dealer has complied with the provisions of this subsection and has not received the required report
213 from the State Police within 10 days from the date the written consent form was mailed to the
214 Department of State Police, he shall not be deemed in violation of this section for thereafter completing
215 the sale or transfer.

216 D. Nothing herein shall prevent a resident of the Commonwealth, at his option, from buying, renting
217 or receiving a firearm from a dealer in Virginia by obtaining a criminal history record information check
218 through the dealer as provided in subsection C.

219 E. If any buyer or transferee is denied the right to purchase a firearm under this section, he may
220 exercise his right of access to and review and correction of criminal history record information under
221 § 9.1-132 or institute a civil action as provided in § 9.1-135, provided any such action is initiated within
222 30 days of such denial.

223 F. Any dealer who willfully and intentionally requests, obtains, or seeks to obtain criminal history
224 record information under false pretenses, or who willfully and intentionally disseminates or seeks to
225 disseminate criminal history record information except as authorized in this section shall be guilty of a
226 Class 2 misdemeanor.

227 G. For purposes of this section:

228 "Actual buyer" means a person who executes the consent form required in subsection B or C, or
229 other such firearm transaction records as may be required by federal law.

230 "Antique firearm" means:

231 1. Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of
232 ignition system) manufactured in or before 1898;

233 2. Any replica of any firearm described in subdivision 1 of this definition if such replica (i) is not
234 designed or redesigned for using rimfire or conventional centerfire fixed ammunition or (ii) uses rimfire
235 or conventional centerfire fixed ammunition that is no longer manufactured in the United States and that
236 is not readily available in the ordinary channels of commercial trade;

237 3. Any muzzle-loading rifle, muzzle-loading shotgun, or muzzle-loading pistol that is designed to use
238 black powder, or a black powder substitute, and that cannot use fixed ammunition. For purposes of this
239 subdivision, the term "antique firearm" shall not include any weapon that incorporates a firearm frame

240 or receiver, any firearm that is converted into a muzzle-loading weapon, or any muzzle-loading weapon
 241 that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breech-block, or any
 242 combination thereof; or

243 4. Any curio or relic as defined in this subsection.

244 "Assault firearm" means any semi-automatic center-fire rifle or pistol which expels single or multiple
 245 projectiles by action of an explosion of a combustible material and is equipped at the time of the
 246 offense with a magazine which will hold more than 20 rounds of ammunition or designed by the
 247 manufacturer to accommodate a silencer or equipped with a folding stock.

248 "Curios or relics" means firearms that are of special interest to collectors by reason of some quality
 249 other than is associated with firearms intended for sporting use or as offensive or defensive weapons. To
 250 be recognized as curios or relics, firearms must fall within one of the following categories:

251 1. Firearms that were manufactured at least 50 years prior to the current date, which use rimfire or
 252 conventional centerfire fixed ammunition that is no longer manufactured in the United States and that is
 253 not readily available in the ordinary channels of commercial trade, but not including replicas thereof;

254 2. Firearms that are certified by the curator of a municipal, state, or federal museum that exhibits
 255 firearms to be curios or relics of museum interest; and

256 3. Any other firearms that derive a substantial part of their monetary value from the fact that they
 257 are novel, rare, bizarre, or because of their association with some historical figure, period, or event.
 258 Proof of qualification of a particular firearm under this category may be established by evidence of
 259 present value and evidence that like firearms are not available except as collectors' items, or that the
 260 value of like firearms available in ordinary commercial channels is substantially less.

261 "Dealer" means any person licensed as a dealer pursuant to 18 U.S.C. § 921 et seq.

262 "Firearm" means any handgun, shotgun, or rifle that will or is designed to or may readily be
 263 converted to expel single or multiple projectiles by action of an explosion of a combustible material.

264 "Handgun" means any pistol or revolver or other firearm originally designed, made and intended to
 265 fire single or multiple projectiles by means of an explosion of a combustible material from one or more
 266 barrels when held in one hand.

267 "Lawfully admitted for permanent residence" means the status of having been lawfully accorded the
 268 privilege of residing permanently in the United States as an immigrant in accordance with the
 269 immigration laws, such status not having changed.

270 H. The Department of Criminal Justice Services shall promulgate regulations to ensure the identity,
 271 confidentiality and security of all records and data provided by the Department of State Police pursuant
 272 to this section.

273 I. The provisions of this section shall not apply to (i) transactions between persons who are licensed
 274 as firearms importers or collectors, manufacturers or dealers pursuant to 18 U.S.C. § 921 et seq.; (ii)
 275 purchases by or sales to any law-enforcement officer or agent of the United States, the Commonwealth
 276 or any local government, or any campus police officer appointed under Article 3 (§ 23.1-809 et seq.) of
 277 Chapter 8 of Title 23.1; or (iii) antique firearms, curios or relics.

278 J. The provisions of this section shall not apply to restrict purchase, trade or transfer of firearms by a
 279 resident of Virginia when the resident of Virginia makes such purchase, trade or transfer in another
 280 state, in which case the laws and regulations of that state and the United States governing the purchase,
 281 trade or transfer of firearms shall apply. A National Instant Criminal Background Check System (NICS)
 282 check shall be performed prior to such purchase, trade or transfer of firearms.

283 J1. All licensed firearms dealers shall collect a fee of \$2 for every transaction for which a criminal
 284 history record information check is required pursuant to this section, except that a fee of \$5 shall be
 285 collected for every transaction involving an out-of-state resident. Such fee shall be transmitted to the
 286 Department of State Police by the last day of the month following the sale for deposit in a special fund
 287 for use by the State Police to offset the cost of conducting criminal history record information checks
 288 under the provisions of this section.

289 K. Any person willfully and intentionally making a materially false statement on the consent form
 290 required in subsection B or C or on such firearm transaction records as may be required by federal law,
 291 shall be guilty of a Class 5 felony.

292 L. Except as provided in § 18.2-308.2:1, any dealer who willfully and intentionally sells, rents, trades
 293 or transfers a firearm in violation of this section shall be guilty of a Class 6 felony.

294 L1. Any person who attempts to solicit, persuade, encourage, or entice any dealer to transfer or
 295 otherwise convey a firearm other than to the actual buyer, as well as any other person who willfully and
 296 intentionally aids or abets such person, shall be guilty of a Class 6 felony. This subsection shall not
 297 apply to a federal law-enforcement officer or a law-enforcement officer as defined in § 9.1-101, in the
 298 performance of his official duties, or other person under his direct supervision.

299 M. Any person who purchases a firearm with the intent to (i) resell or otherwise provide such
 300 firearm to any person who he knows or has reason to believe is ineligible to purchase or otherwise

301 receive from a dealer a firearm for whatever reason or (ii) transport such firearm out of the
 302 Commonwealth to be resold or otherwise provided to another person who the transferor knows is
 303 ineligible to purchase or otherwise receive a firearm, shall be guilty of a Class 4 felony and sentenced to
 304 a mandatory minimum term of imprisonment of one year. However, if the violation of this subsection
 305 involves such a transfer of more than one firearm, the person shall be sentenced to a mandatory
 306 minimum term of imprisonment of five years. The prohibitions of this subsection shall not apply to the
 307 purchase of a firearm by a person for the lawful use, possession, or transport thereof, pursuant to
 308 § 18.2-308.7, by his child, grandchild, or individual for whom he is the legal guardian if such child,
 309 grandchild, or individual is ineligible, solely because of his age, to purchase a firearm.

310 N. Any person who is ineligible to purchase or otherwise receive or possess a firearm in the
 311 Commonwealth who solicits, employs or assists any person in violating subsection M shall be guilty of
 312 a Class 4 felony and shall be sentenced to a mandatory minimum term of imprisonment of five years.

313 O. Any mandatory minimum sentence imposed under this section shall be served consecutively with
 314 any other sentence.

315 P. All driver's licenses issued on or after July 1, 1994, shall carry a letter designation indicating
 316 whether the driver's license is an original, duplicate or renewed driver's license.

317 Q. Prior to selling, renting, trading, or transferring any firearm owned by the dealer but not in his
 318 inventory to any other person, a dealer may require such other person to consent to have the dealer
 319 obtain criminal history record information to determine if such other person is prohibited from
 320 possessing or transporting a firearm by state or federal law. The Department of State Police shall
 321 establish policies and procedures in accordance with 28 C.F.R. § 25.6 to permit such determinations to
 322 be made by the Department of State Police, and the processes established for making such
 323 determinations shall conform to the provisions of this section.

324 **§ 18.2-308.2:3. Criminal background check required for employees of a gun dealer to transfer**
 325 **firearms; exemptions; penalties.**

326 A. No person, corporation, or proprietorship licensed as a firearms dealer pursuant to 18 U.S.C.
 327 § 921 et seq. shall employ any person to act as a seller, whether full-time or part-time, permanent,
 328 temporary, paid or unpaid, for the transfer of firearms under § 18.2-308.2:2, if such employee would be
 329 prohibited from possessing a firearm under § 18.2-308.1:1, 18.2-308.1:2, ~~or~~ 18.2-308.1:3, *or*
 330 *18.2-308.1:6*, subsection B of § 18.2-308.1:4, or § 18.2-308.2 or 18.2-308.2:01 or is an illegal alien, or
 331 is prohibited from purchasing or transporting a firearm pursuant to subsection A of § 18.2-308.1:4 or
 332 § 18.2-308.1:5.

333 B. Prior to permitting an applicant to begin employment, the dealer shall obtain a written statement
 334 or affirmation from the applicant that he is not disqualified from possessing a firearm and shall submit
 335 the applicant's fingerprints and personal descriptive information to the Central Criminal Records
 336 Exchange to be forwarded to the Federal Bureau of Investigation (FBI) for the purpose of obtaining
 337 national criminal history record information regarding the applicant.

338 C. Prior to August 1, 2000, the dealer shall obtain written statements or affirmations from persons
 339 employed before July 1, 2000, to act as a seller under § 18.2-308.2:2 that they are not disqualified from
 340 possessing a firearm. Within five working days of the employee's next birthday, after August 1, 2000,
 341 the dealer shall submit the employee's fingerprints and personal descriptive information to the Central
 342 Criminal Records Exchange to be forwarded to the Federal Bureau of Investigation (FBI) for the
 343 purpose of obtaining national criminal history record information regarding the request.

344 C1. In lieu of submitting fingerprints pursuant to this section, any dealer holding a valid federal
 345 firearms license (FFL) issued by the Bureau of Alcohol, Tobacco and Firearms (ATF) may submit a
 346 sworn and notarized affidavit to the Department of State Police on a form provided by the Department,
 347 stating that the dealer has been subjected to a record check prior to the issuance and that the FFL was
 348 issued by the ATF. The affidavit may also contain the names of any employees that have been subjected
 349 to a record check and approved by the ATF. This exemption shall apply regardless of whether the FFL
 350 was issued in the name of the dealer or in the name of the business. The affidavit shall contain the valid
 351 FFL number, state the name of each person requesting the exemption, together with each person's
 352 identifying information, including their social security number and the following statement: "I hereby
 353 swear, under the penalty of perjury, that as a condition of obtaining a federal firearms license, each
 354 person requesting an exemption in this affidavit has been subjected to a fingerprint identification check
 355 by the Bureau of Alcohol, Tobacco and Firearms and the Bureau of Alcohol, Tobacco and Firearms
 356 subsequently determined that each person satisfied the requirements of 18 U.S.C. § 921 et seq. I
 357 understand that any person convicted of making a false statement in this affidavit is guilty of a Class 5
 358 felony and that in addition to any other penalties imposed by law, a conviction under this section shall
 359 result in the forfeiture of my federal firearms license."

360 D. The Department of State Police, upon receipt of an individual's record or notification that no
 361 record exists, shall submit an eligibility report to the requesting dealer within 30 days of the applicant

362 beginning his duties for new employees or within 30 days of the applicant's birthday for a person
363 employed prior to July 1, 2000.

364 E. If any applicant is denied employment because of information appearing on the criminal history
365 record and the applicant disputes the information upon which the denial was based, the Central Criminal
366 Records Exchange shall, upon written request, furnish to the applicant the procedures for obtaining a
367 copy of the criminal history record from the Federal Bureau of Investigation. The information provided
368 to the dealer shall not be disseminated except as provided in this section.

369 F. The applicant shall bear the cost of obtaining the criminal history record unless the dealer, at his
370 option, decides to pay such cost.

371 G. Upon receipt of the request for a criminal history record information check, the State Police shall
372 establish a unique number for that firearm seller. Beginning September 1, 2001, the firearm seller's
373 signature, firearm seller's number and the dealer's identification number shall be on all firearm
374 transaction forms. The State Police shall void the firearm seller's number when a disqualifying record is
375 discovered. The State Police may suspend a firearm seller's identification number upon the arrest of the
376 firearm seller for a potentially disqualifying crime.

377 H. This section shall not restrict the transfer of a firearm at any place other than at a dealership or at
378 any event required to be registered as a gun show.

379 I. Any person who willfully and intentionally requests, obtains, or seeks to obtain criminal history
380 record information under false pretenses, or who willfully and intentionally disseminates or seeks to
381 disseminate criminal history record information except as authorized by this section and § 18.2-308.2:2,
382 shall be guilty of a Class 2 misdemeanor.

383 J. Any person willfully and intentionally making a materially false statement on the personal
384 descriptive information required in this section shall be guilty of a Class 5 felony. Any person who
385 offers for transfer any firearm in violation of this section shall be guilty of a Class 1 misdemeanor. Any
386 dealer who willfully and knowingly employs or permits a person to act as a firearm seller in violation of
387 this section shall be guilty of a Class 1 misdemeanor.

388 K. There is no civil liability for any seller for the actions of any purchaser or subsequent transferee
389 of a firearm lawfully transferred pursuant to this section.

390 L. The provisions of this section requiring a seller's background check shall not apply to a licensed
391 dealer.

392 M. Any person who willfully and intentionally makes a false statement in the affidavit as set out in
393 subdivision C 1 shall be guilty of a Class 5 felony.

394 N. For purposes of this section:

395 "Dealer" means any person, corporation or proprietorship licensed as a dealer pursuant to 18 U.S.C.
396 § 921 et seq.

397 "Firearm" means any handgun, shotgun, or rifle that will or is designed to or may readily be
398 converted to expel single or multiple projectiles by action of an explosion of a combustible material.

399 "Place of business" means any place or premises where a dealer may lawfully transfer firearms.

400 "Seller" means for the purpose of any single sale of a firearm any person who is a dealer or an agent
401 of a dealer, who may lawfully transfer firearms and who actually performs the criminal background
402 check in accordance with the provisions of § 18.2-308.2:2.

403 "Transfer" means any act performed with intent to sell, rent, barter, trade or otherwise transfer
404 ownership or permanent possession of a firearm at the place of business of a dealer.

405 CHAPTER 9.2.

406 SUBSTANTIAL RISK ORDERS.

407 § 19.2-152.13. Emergency substantial risk order.

408 A. Upon the petition of an attorney for the Commonwealth or a law-enforcement officer, a judge of a
409 circuit court, general district court, or juvenile and domestic relations district court or a magistrate,
410 upon a finding that there is probable cause to believe that a person poses a substantial risk of personal
411 injury to himself or others in the near future by such person's possession or acquisition of a firearm,
412 shall issue an ex parte emergency substantial risk order. Such order shall prohibit the person who is
413 subject to the order from purchasing, possessing, or transporting a firearm for the duration of the
414 order. In determining whether probable cause for the issuance of an order exists, the judge or
415 magistrate shall consider any relevant evidence, including any recent act of violence, force, or threat as
416 defined in § 19.2-152.7:1 by such person directed toward another person or toward himself. No petition
417 shall be filed unless an independent investigation has been conducted by law enforcement that
418 determines that grounds for the petition exist. The order shall contain a statement (i) informing the
419 person who is subject to the order of the requirements and penalties under § 18.2-308.1:6, including
420 that it is unlawful for such person to purchase, possess, or transport a firearm for the duration of the
421 order and that such person is required to surrender his concealed handgun permit if he possesses such
422 permit, and (ii) advising such person to voluntarily relinquish any firearm within his custody to the

423 law-enforcement agency that serves the order.

424 B. The petition for an emergency substantial risk order shall be made under oath and shall be
425 supported by an affidavit.

426 C. Upon service of an emergency substantial risk order, the person who is subject to the order shall
427 be given the opportunity to voluntarily relinquish any firearm in his possession. The law-enforcement
428 agency that executed the emergency substantial risk order shall take custody of all firearms that are
429 voluntarily relinquished by such person. The law-enforcement agency that takes into custody a firearm
430 pursuant to the order shall prepare a written receipt containing the name of the person who is subject
431 to the order and the manufacturer, model, condition, and serial number of the firearm and shall provide
432 a copy thereof to such person. Nothing in this subsection precludes a law-enforcement officer from later
433 obtaining a search warrant for any firearms if the law-enforcement officer has reason to believe that the
434 person who is subject to an emergency substantial risk order has not relinquished all firearms in his
435 possession.

436 D. An emergency substantial risk order issued pursuant to this section shall expire at 11:59 p.m. on
437 the fourteenth day following issuance of the order. If the expiration occurs on a day that the circuit
438 court for the jurisdiction where the order was issued is not in session, the order shall be extended until
439 11:59 p.m. on the next day that the circuit court is in session. The person who is subject to the order
440 may at any time file with the circuit court a motion to dissolve the order.

441 E. An emergency substantial risk order issued pursuant to this section is effective upon personal
442 service on the person who is subject to the order. The order shall be served forthwith after issuance. A
443 copy of the order, petition, and supporting affidavit shall be given to the person who is subject to the
444 order together with a notice informing the person that he has a right to a hearing under § 19.2-152.14
445 and may be represented by counsel at the hearing.

446 F. The court or magistrate shall forthwith, but in all cases no later than the end of the business day
447 on which the emergency substantial risk order was issued, enter and transfer electronically to the
448 Virginia Criminal Information Network (VCIN) established and maintained by the Department of State
449 Police (Department) pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52 the identifying information of
450 the person who is subject to the order provided to the court or magistrate. A copy of an order issued
451 pursuant to this section containing any such identifying information shall be forwarded forthwith to the
452 primary law-enforcement agency responsible for service and entry of the order. Upon receipt of the
453 order by the primary law-enforcement agency, the agency shall forthwith verify and enter any
454 modification as necessary to the identifying information and other appropriate information required by
455 the Department into the VCIN, and the order shall be served forthwith upon the person who is subject
456 to the order. However, if the order is issued by the circuit court, the clerk of the circuit court shall
457 forthwith forward an attested copy of the order containing the identifying information of the person who
458 is subject to the order provided to the court to the primary law-enforcement agency providing service
459 and entry of the order. Upon receipt of the order by the primary law-enforcement agency, the agency
460 shall enter the name of the person subject to the order and other appropriate information required by
461 the Department into the VCIN and the order shall be served forthwith upon the person who is subject to
462 the order. Upon service, the agency making service shall enter the date and time of service and other
463 appropriate information required into the VCIN and make due return to the court. If the order is later
464 dissolved or modified, a copy of the dissolution or modification order shall also be attested and
465 forwarded forthwith to the primary law-enforcement agency responsible for service and entry of the
466 order. Upon receipt of the dissolution or modification order by the primary law-enforcement agency, the
467 agency shall forthwith verify and enter any modification as necessary to the identifying information and
468 other appropriate information required by the Department into the VCIN and the order shall be served
469 forthwith.

470 G. The law-enforcement agency that serves the emergency substantial risk order shall make due
471 return to the circuit court, which shall be accompanied by a written inventory of all firearms
472 relinquished.

473 H. Proceedings in which an emergency substantial risk order is sought pursuant to this section shall
474 be commenced where the person who is subject to the order (i) has his principal residence or (ii) has
475 engaged in any conduct upon which the petition for the emergency substantial risk order is based.

476 I. A proceeding for a substantial risk order shall be a separate civil legal proceeding subject to the
477 same rules as civil proceedings.

478 **§ 19.2-152.14. Substantial risk order.**

479 A. Not later than 14 days after the issuance of an emergency substantial risk order pursuant to
480 § 19.2-152.13, the circuit court for the jurisdiction where the order was issued shall hold a hearing to
481 determine whether a substantial risk order should be entered. The attorney for the Commonwealth for
482 the jurisdiction that issued the emergency substantial risk order shall represent the interests of the
483 Commonwealth. Notice of the hearing shall be given to the person subject to the emergency substantial

484 risk order and the attorney for the Commonwealth. Upon motion of the respondent and for good cause
 485 shown, the court may continue the hearing, provided that the order shall remain in effect until the
 486 hearing. The Commonwealth shall have the burden of proving all material facts by clear and convincing
 487 evidence. If the court finds by clear and convincing evidence that the person poses a substantial risk of
 488 personal injury to himself or to other individuals in the near future by such person's possession or
 489 acquisition of a firearm, the court shall issue a substantial risk order. Such order shall prohibit the
 490 person who is subject to the order from purchasing, possessing, or transporting a firearm for the
 491 duration of the order. In determining whether clear and convincing evidence for the issuance of an
 492 order exists, the judge shall consider any relevant evidence including any recent act of violence, force,
 493 or threat as defined in § 19.2-152.7:1 by such person directed toward another person or toward himself.
 494 The order shall contain a statement (i) informing the person who is subject to the order of the
 495 requirements and penalties under § 18.2-308.1:6, including that it is unlawful for such person to
 496 purchase, possess, or transport a firearm for the duration of the order and that such person is required
 497 to surrender his concealed handgun permit if he possesses such permit, and (ii) advising such person to
 498 voluntarily relinquish any firearm that has not been taken into custody to the law-enforcement agency
 499 that served the emergency substantial risk order.

500 B. If the court issues a substantial risk order pursuant to subsection A, the court shall (i) order that
 501 any firearm that was previously relinquished pursuant to § 19.2-152.13 from the person who is subject
 502 to the substantial risk order continue to be held by the agency that has custody of the firearm for the
 503 duration of the order and (ii) advise such person that a law-enforcement officer may obtain a search
 504 warrant to search for any firearms from such person if such law-enforcement officer has reason to
 505 believe that such person has not relinquished all firearms in his possession.

506 If the court finds that the person does not pose a substantial risk of personal injury to himself or to
 507 other individuals in the near future, the court shall order that any firearm that was previously
 508 relinquished be returned to such person in accordance with the provisions of § 19.2-152.15.

509 C. The substantial risk order may be issued for a specified period of time up to a maximum of 180
 510 days. The order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of
 511 the 180-day period if no date is specified. Prior to the expiration of the order, an attorney for the
 512 Commonwealth or a law-enforcement officer may file a written motion requesting a hearing to extend
 513 the order. Proceedings to extend an order shall be given precedence on the docket of the court. The
 514 court may extend the order for a period not longer than 180 days if the court finds by clear and
 515 convincing evidence that the person continues to pose a substantial risk of personal injury to himself or
 516 to other individuals in the near future by such person's possession or acquisition of a firearm at the
 517 time the request for an extension is made. The extension of the order shall expire at 11:59 p.m. on the
 518 last day specified or at 11:59 p.m. on the last day of the 180-day period if no date is specified. Nothing
 519 herein shall limit the number of extensions that may be requested or issued. The person who is subject
 520 to the order may file a motion to dissolve the order one time during the duration of the order; however,
 521 such motion may not be filed earlier than 30 days from the date the order was issued.

522 D. Any person whose firearm has been voluntarily relinquished pursuant to § 19.2-152.13 or this
 523 section, or such person's legal representative, may transfer the firearm to another individual 21 years of
 524 age or older who is not otherwise prohibited by law from possessing such firearm, provided that:

- 525 1. The person subject to the order and the transferee appear at the hearing;
- 526 2. At the hearing, the attorney for the Commonwealth advises the court that a law-enforcement
 527 agency has determined that the transferee is not prohibited from possessing or transporting a firearm;
- 528 3. The transferee does not reside with the person subject to the order;
- 529 4. The court informs the transferee of the requirements and penalties under § 18.2-308.2:1; and
- 530 5. The court, after considering all relevant factors and any evidence or testimony from the person
 531 subject to the order, approves the transfer of the firearm subject to such restrictions as the court deems
 532 necessary.

533 The law-enforcement agency holding the firearm shall deliver the firearm to the transferee within five
 534 days of receiving a copy of the court's approval of the transfer.

535 E. The court shall forthwith, but in all cases no later than the end of the business day on which the
 536 substantial risk order was issued, enter and transfer electronically to the Virginia Criminal Information
 537 Network (VCIN) established and maintained by the Department of State Police (Department) pursuant to
 538 Chapter 2 (§ 52-12 et seq.) of Title 52 the identifying information of the person who is subject to the
 539 order provided to the court and shall forthwith forward the attested copy of the order containing any
 540 such identifying information to the primary law-enforcement agency responsible for service and entry of
 541 the order. Upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith
 542 verify and enter any modification as necessary to the identifying information and other appropriate
 543 information required by the Department into the VCIN and the order shall be served forthwith upon the
 544 person who is subject to the order and due return made to the court. Upon service, the agency making

545 service shall enter the date and time of service and other appropriate information required by the
 546 Department into the VCIN and make due return to the court. If the person who is subject to an
 547 emergency substantial risk order fails to appear at the hearing conducted pursuant to this section
 548 because such person was not personally served with notice of the hearing pursuant to subsection A, or
 549 if personally served was incarcerated and not transported to the hearing, the court may extend the
 550 emergency substantial risk order for a period not to exceed 14 days. The extended emergency
 551 substantial risk order shall specify a date for a hearing to be conducted pursuant to this section and
 552 shall be served forthwith on such person and due return made to the court. If the order is later
 553 dissolved or modified, a copy of the dissolution or modification order shall also be attested and
 554 forwarded forthwith to the primary law-enforcement agency responsible for service and entry of the
 555 order. Upon receipt of the dissolution or modification order by the primary law-enforcement agency, the
 556 agency shall forthwith verify and enter any modification as necessary to the identifying information and
 557 other appropriate information required by the Department of State Police into the Virginia Criminal
 558 Information Network, and the order shall be served forthwith and due return made to the court.

559 **§ 19.2-152.15. Return or disposal of firearms.**

560 A. Any firearm taken into custody pursuant to § 19.2-152.13 or 19.2-152.14 and held by a
 561 law-enforcement agency shall be returned by such agency to the person from whom the firearm was
 562 taken upon a court order for the return of the firearm issued pursuant to § 19.2-152.14 or the expiration
 563 or dissolution of an order issued pursuant to § 19.2-152.13 or 19.2-152.14. Such agency shall return the
 564 firearm within five days of receiving a written request for the return of the firearm by the person from
 565 whom the firearm was taken and a copy of the receipt provided to such person pursuant to
 566 § 19.2-152.13. Prior to returning the firearm to such person, the law-enforcement agency holding the
 567 firearm shall confirm that such person is no longer subject to an order issued pursuant to § 19.2-152.13
 568 or 19.2-152.14 and is not otherwise prohibited by law from possessing a firearm.

569 B. A firearm taken into custody pursuant to § 19.2-152.13 or 19.2-152.14 and held by a
 570 law-enforcement agency may be disposed of in accordance with the provisions of § 15.2-1721 if (i) the
 571 person from whom the firearm was taken provides written authorization for such disposal to the agency
 572 or (ii) the firearm remains in the possession of the agency more than 120 days after such person is no
 573 longer subject to an order issued pursuant to § 19.2-152.13 or 19.2-152.14 and such person has not
 574 submitted a request in writing for the return of the firearm.

575 **§ 19.2-152.16. False statement to law-enforcement officer, etc.; penalty.**

576 Any person who knowingly and willfully makes any materially false statement or representation to a
 577 law-enforcement officer or attorney for the Commonwealth who is in the course of conducting an
 578 investigation undertaken pursuant to this chapter is guilty of a Class 1 misdemeanor.

579 **§ 19.2-152.17. Immunity of law-enforcement officers, etc.; chapter not exclusive.**

580 A. An attorney for the Commonwealth or a law-enforcement officer shall be immune from civil
 581 liability for any act or omission related to petitioning or declining to petition for a substantial risk
 582 order pursuant to this chapter.

583 B. Any law-enforcement agency or law-enforcement officer that takes into custody, stores, possesses,
 584 or transports a firearm pursuant to § 19.2-152.13 or 19.2-152.14, or by a search warrant for a person
 585 who has failed to voluntarily relinquish his firearm, shall be immune from civil or criminal liability for
 586 any damage to or deterioration, loss, or theft of such firearm.

587 C. Nothing in this chapter precludes a law-enforcement officer from conducting a search for a
 588 firearm or removing a firearm from a person under any other lawful authority.

589 **§ 19.2-387.3. Substantial Risk Order Registry; maintenance; access.**

590 A. The Department of State Police shall keep and maintain a computerized Substantial Risk Order
 591 Registry (the Registry) for the entry of orders issued pursuant to § 19.2-152.13 or 19.2-152.14. The
 592 purpose of the Registry shall be to assist the efforts of law-enforcement agencies to protect their
 593 communities and their citizens. The Department of State Police shall make the Registry information
 594 available, upon request, to criminal justice agencies, including local law-enforcement agencies, through
 595 the Virginia Criminal Information Network. Registry information provided under this section shall be
 596 used only for the purposes of the administration of criminal justice as defined in § 9.1-101.

597 B. No liability shall be imposed upon any law-enforcement official who disseminates information or
 598 fails to disseminate information in good faith compliance with the requirements of this section, but this
 599 provision shall not be construed to grant immunity for gross negligence or willful misconduct.

600 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
 601 **commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the**
 602 **necessary appropriation cannot be determined for periods of imprisonment in state adult**
 603 **correctional facilities; therefore, Chapter 854 of the Acts of Assembly of 2019 requires the Virginia**
 604 **Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to**
 605 **§ 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be**

606 determined for periods of commitment to the custody of the Department of Juvenile Justice.
607 3. That the Supreme Court shall create standard forms to implement the intent of this act.

ENROLLED

SB240ER

Circuit Court Form CC-1451 PETITION FOR CHANGE OF SEX
CC-1452 ORDER FOR CHANGE OF SEX

Abstract House Bill 1041 and Senate Bill 657 replace the process of petitioning a court for an order changing the sex of an individual to a process within the Division of Vital Records. Although the bill retains jurisdiction in the courts to consider petitions involving the application of different standards based on the jurisdiction of the person’s birth, those proceedings would not lend themselves to a standardized form-based practice. The use of these forms has, therefore, been discontinued.

Source House Bill 1041 (Chapter 465, effective July 1, 2020)/Senate Bill 657 (Chapter 466, effective July 1, 2020)

Revision Legislative

Form Type CC-1451, Internet Master
CC-1452, Intranet Master

PETITION FOR CHANGE OF SEX

Commonwealth of Virginia VA. CODE § 32.1-269

Case No.

VIRGINIA: In the Circuit Court of the [] City [] County of

IN RE:
(APPLICANT'S LEGAL NAME) FIRST MIDDLE LAST SUFFIX

COMES NOW, the applicant,

and after being duly sworn states under oath as follows:

1. Applicant's Birth Name:
FIRST MIDDLE LAST SUFFIX

2. City or County of Residence:

3. Residence Address:
STREET ADDRESS

.....
CITY STATE ZIP CODE COUNTRY

4. Mailing Address:
IF DIFFERENT FROM RESIDENCE ADDRESS

5a. Date of Birth: 5b. Place of Birth:

6. Full Names of Parents

6a. Full Name:
FIRST MIDDLE MAIDEN (IF APPLICABLE) CURRENT LAST SUFFIX

6b. Full Name:
FIRST MIDDLE MAIDEN (IF APPLICABLE) CURRENT LAST SUFFIX

7. Supporting Documentation

Attach documentation from a licensed provider indicating that the sex of the individual has been changed by medical procedure.

Pursuant to § 32.1-269 of the Code of Virginia, the applicant requests that the Court enter an order indicating that the sex of the individual has been changed and their birth certificate should be reissued to reflect a sex of [] Male [] Female.



.....
APPLICANT

Commonwealth/State of [] City [] County of

Acknowledged, subscribed and sworn to/affirmed before me this day of, 20

by
PRINT NAME OF SIGNATORY

.....
DATE

.....
[] CLERK [] DEPUTY CLERK
[] NOTARY PUBLIC My commission expires
Registration No.

ORDER FOR CHANGE OF SEX

Commonwealth of Virginia VA. CODE § 32.1-269

Case No.

VIRGINIA: In the Circuit Court of the [] City [] County of

IN RE:
(APPLICANT'S LEGAL NAME) FIRST MIDDLE LAST SUFFIX

1. Applicant's Birth Name:
FIRST MIDDLE LAST SUFFIX

2. Residence Address:
STREET ADDRESS
CITY STATE ZIP CODE COUNTRY

4. Mailing Address:
IF DIFFERENT FROM RESIDENCE ADDRESS

5a. Date of Birth: 5b. Place of Birth:

6. Full Names of Parents

6a. Full Name:
FIRST MIDDLE MAIDEN (IF APPLICABLE) CURRENT LAST SUFFIX

6b. Full Name:
FIRST MIDDLE MAIDEN (IF APPLICABLE) CURRENT LAST SUFFIX

This day came the petitioner, having filed his/her verified petition requesting the change of his/her sex FROM

[] male [] female

TO

[] male [] female.

Accordingly, it is ADJUDGED and ORDERED that

[] the petitioner's sex has been changed by medical procedure

FROM

[] male [] female

TO

[] male [] female

and this cause is ended.

[] the Clerk of this Court shall transmit a certified copy of this Order and the Petition to the State Registrar of Vital Records.

[] the Petition for Change of Sex is hereby denied and this cause is dismissed.

Entered this day of, 20

JUDGE

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 466

An Act to amend and reenact §§ 32.1-261 and 32.1-269 of the Code of Virginia, relating to Board of Health; certificate of birth; change of sex.

[S 657]

Approved March 25, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-261 and 32.1-269 of the Code of Virginia are amended and reenacted as follows:

§ 32.1-261. New certificate of birth established on proof of adoption, legitimation or determination of paternity, or change of sex.

A. The State Registrar shall establish a new certificate of birth for a person born in the Commonwealth upon receipt of the following:

1. An adoption report as provided in § 32.1-262, a report of adoption prepared and filed in accordance with the laws of another state or foreign country, or a certified copy of the decree of adoption together with the information necessary to identify the original certificate of birth and to establish a new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents, or the adopted person if 18 years of age or older.

2. A request that a new certificate be established and such evidence as may be required by regulation of the Board proving that such person has been legitimated or that a court of the Commonwealth has, by final order, determined the paternity of such person. The request shall state that no appeal has been taken from the final order and that the time allowed to perfect an appeal has expired.

3. An order entered pursuant to subsection D of § 20-160. The order shall contain sufficient information to identify the original certificate of birth and to establish a new certificate of birth in the names of the intended parents.

4. A surrogate consent and report form as authorized by § 20-162. The report shall contain sufficient information to identify the original certificate of birth and to establish a new certificate of birth in the names of the intended parents.

5. *Upon request of a person and in accordance with requirements of the Board, the State Registrar shall issue a new certificate of birth to show a change of sex of the person and, if a certified copy of a court order changing the person's name is submitted, to show a new name. Requirements related to obtaining a new certificate of birth to show a change of sex shall include a requirement that the person requesting the new certificate of birth submit a form furnished by the State Registrar and completed by a health care provider from whom the person has received treatment stating that the person has undergone clinically appropriate treatment for gender transition. Requirements related to obtaining a new certificate of birth to show a change of sex shall not include any requirement for evidence or documentation of any medical procedure.*

6. *Nothing in this section shall deprive the circuit court of equitable jurisdiction to adjudicate, upon application of a person, that the sex of such person residing within the territorial jurisdiction of the circuit court has been changed. In such an action, the person may petition for the application of the standard of the person's jurisdiction of birth; otherwise, the requirements of this section shall apply.*

B. When a new certificate of birth is established pursuant to subsection A, the actual place and date of birth shall be shown. It shall be substituted for the original certificate of birth. Thereafter, the original certificate and the evidence of adoption, paternity or legitimation shall be sealed and filed and not be subject to inspection except upon order of a court of the Commonwealth or in accordance with § 32.1-252. However, upon receipt of notice of a decision or order granting an adult adopted person access to identifying information regarding his birth parents from the Commissioner of Social Services or a circuit court, and proof of identification and payment, the State Registrar shall mail an adult adopted person a copy of the original certificate of birth.

C. Upon receipt of a report of an amended decree of adoption, the certificate of birth shall be amended as provided by regulation.

D. Upon receipt of notice or decree of annulment of adoption, the original certificate of birth shall be restored to its place in the files and the new certificate and evidence shall not be subject to inspection except upon order of a court of the Commonwealth or in accordance with § 32.1-252.

E. The State Registrar shall, upon request, establish and register a Virginia certificate of birth for a person born in a foreign country (i) upon receipt of a report of adoption for an adoption finalized pursuant to the laws of the foreign country as provided in subsection B of § 63.2-1200.1, or (ii) upon receipt of a report or final order of adoption entered in a court of the Commonwealth as provided in § 32.1-262; however, a Virginia certificate of birth shall not be established or registered if so requested

by the court decreeing the adoption, the adoptive parents or the adopted person if 18 years of age or older. If a circuit court of the Commonwealth corrects or establishes a date of birth for a person born in a foreign country during the adoption proceedings or upon a petition to amend a certificate of foreign birth, the State Registrar shall issue a certificate showing the date of birth established by the court. After registration of the birth certificate in the new name of the adopted person, the State Registrar shall seal and file the report of adoption which shall not be subject to inspection except upon order of a court of the Commonwealth or in accordance with § 32.1-252. The birth certificate shall (i) show the true or probable foreign country of birth and (ii) state that the certificate is not evidence of United States citizenship for the child for whom it is issued or for the adoptive parents. However, for any adopted person who has attained United States citizenship, the State Registrar shall, upon request and receipt of evidence demonstrating such citizenship, establish and register a new certificate of birth that does not contain the statement required by clause (ii).

F. If no certificate of birth is on file for the person for whom a new certificate is to be established under this section, a delayed certificate of birth shall be filed with the State Registrar as provided in § 32.1-259 or 32.1-260 before a new certificate of birth is established, except that when the date and place of birth and parentage have been established in the adoption proceedings, a delayed certificate shall not be required.

G. When a new certificate of birth is established pursuant to subdivision A 1, the State Registrar shall issue along with the new certificate of birth a document, furnished by the Department of Social Services pursuant to § 63.2-1220, listing all post-adoption services available to adoptive families.

§ 32.1-269. Amending vital records; change of name; acknowledgment of paternity.

A. A vital record registered under this chapter, with the exception of a death certificate, may be amended only in accordance with this section and such regulations as may be adopted by the Board to protect the integrity and accuracy of such vital records. Such regulations shall specify the minimum evidence required for a change in any such vital record.

B. Except in the case of an amendment provided for in subsection D, a vital record that is amended under this section shall be marked "amended" and the date of amendment and a summary description of the evidence submitted in support of the amendment shall be endorsed on or made a part of the vital record. The Board shall prescribe by regulation the conditions under which omissions or errors on certificates, including designation of sex, may be corrected within one year after the date of the event without the certificate being marked amended. In a case of hermaphroditism or pseudo-hermaphroditism, the certificate of birth may be corrected at any time without being considered as amended upon presentation to the State Registrar of such medical evidence as the Board may require by regulation.

C. Upon receipt of a certified copy of a court order changing the name of a person as listed in a vital record and upon request of such person or his parent, guardian, or legal representative or the registrant, the State Registrar shall amend such vital records to reflect the new name.

D. Upon written request of both parents and receipt of a sworn acknowledgment of paternity executed subsequent to the birth and signed by both parents of a child born out of wedlock, the State Registrar shall amend the certificate of birth to show such paternity if paternity is not shown on the birth certificate. Upon request of the parents, the surname of the child shall be changed on the certificate to that of the father.

E. Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure and upon request of such person, the State Registrar shall amend such person's certificate of birth to show the change of sex and, if a certified copy of a court order changing the person's name is submitted, to show a new name.

F. When an applicant does not submit the minimum documentation required by regulation to amend a vital record or when the State Registrar finds reason to question the validity or sufficiency of the evidence, the vital record shall not be amended and the State Registrar shall so advise the applicant. An aggrieved applicant may petition the circuit court of the county or city in which he resides or the Circuit Court of the City of Richmond, Division I, for an order compelling the State Registrar to amend the vital record; an aggrieved applicant who was born in Virginia, but is currently residing out of State, may petition any circuit court in the Commonwealth for such an order. The State Registrar or his authorized representative may appear and testify in such proceeding.

2. That the State Registrar shall develop the form required by § 32.1-261, as amended and reenacted in this act, by September 1, 2020.

Circuit Court Form	CC-1465(B)	PETITION FOR RESTORATION OF DRIVING PRIVILEGE – HABITUAL OFFENDER
	CC-1465(D)	ORDER RESTORING DRIVING PRIVILEGE – HABITUAL OFFENDER
	CC-1470	PETITION FOR RESTORATION OF DRIVING PRIVILEGE – THIRD OFFENSE
	CC-1471	ORDER RESTORING DRIVING PRIVILEGE – THIRD OFFENSE

Abstract

House Bill 1196 and Senate Bill 1 eliminate the requirement that a petitioner for restoration of driving privilege after having been declared a habitual offender pay all outstanding fines, court costs, and judgments before a petition may be filed. Forms CC-1465(B) and CC-1465(D) have been revised to strike the language reflecting this requirement. Senate Bill 439 adds a new permissible driving condition for restricted driver’s licenses for “travel to and from the offices of the Virginia Employment Commission for the purpose of seeking employment.” All of the forms that contain restricted license conditions have been revised to include the option of authorizing the petitioner to drive to and from the Virginia Employment Commission for the purpose of seeking employment.

Source

House Bill 1196 (Chapter 964, effective July 1, 2020)/ Senate Bill 1 (Chapter 965, effective July 1, 2020)

Senate Bill 439 (Chapter 1007, effective July 1, 2020)

Revision Legislative

Form Type

CC-1465 (B), Internet Master
 CC-1465 (D), Intranet Master
 CC-1470, Internet Master
 CC-1471, Intranet Master

**PETITION FOR RESTORATION OF DRIVING
PRIVILEGE – HABITUAL OFFENDER**

COMMONWEALTH OF VIRGINIA [VA. CODE ANN. §§ 46.2-358; 46.2-359; 46.2-360; 46.2-361](#)

Case No

HEARING DATE AND TIME

Circuit Court

.....
CITY OR COUNTY

.....
PETITIONER'S NAME

.....
ADDRESS

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN			HT.		WGT.	EYES	HAIR
		MO.	DAY	YR.	FT.	IN.			

SSN _____

VA. D.L. # (IF DIFFERENT FROM SSN) _____

TO THE JUDGE OF THE ABOVE-NAMED COURT:

I respectfully represent that on, I was adjudged/determined to be an habitual offender by
DATE

the Court, the Department of Motor Vehicles,
based on the following convictions which brought me within the definition of “habitual offender”:

OFFENSE	OFFENSE DATE	CONVICTION DATE	CONVICING COURT
.....
.....
.....

I have attached a certified “Habitual Offender Restoration Transcript” of my driving record from the Department of Motor Vehicles.

CHECK ONE BOX AS THE BASIS OF YOUR PETITION:

A. Restoration under Va. Code § 46.2-360(1). (Eligibility only after five (5) years from the date of your adjudication or determination — unless you are entitled to credit under subsection (iii) below.) I have been adjudged/determined to be an habitual offender based in part on and dependent upon convictions of Va. Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs.

I represent that:

- (i) At the time of my convictions, I was addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (ii) At this time I am no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (iii) At least five years have passed from the date on which I was adjudged/determined to be an habitual offender.
[For the purposes of determining eligibility under this section, I rely on a period of credit for an administrative suspension by the Department of Motor Vehicles pursuant to Va. Code § 46.2-391(B) (for third offense drunk driving) prior to my adjudication/determination.

Yes No if yes, period of suspension under § 46.2-391(B):

..... to]; and

- (iv) I do not constitute a threat to the safety and welfare of myself or others with respect to the operation of a motor vehicle.

I request that the Court restore my privilege to operate a motor vehicle in the Commonwealth upon my evaluation by the Virginia Alcohol Safety Action Program.

B. Restricted License under Va. Code § 46.2-360(2). (Eligibility only after three (3) years from the date of your adjudication or determination — unless you are entitled to credit under (iii) below.) I have been adjudged/determined to be an habitual offender based in part on and dependent upon convictions of Va. Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs.

I represent that:

- (i) At the time of my convictions, I was addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (ii) At this time I am no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (iii) At least *three* years have passed from the date on which I was adjudged/determined to be an habitual offender [For the purposes of determining eligibility under this section, I rely on a period of credit for administrative suspension by the Department of Motor Vehicles pursuant to Va. Code § 46.2-391(B) (for third offense drunk driving) prior to my adjudication/determination:

Yes No if yes, period of suspension:

..... to]; and

- (iv) I do not constitute a threat to the safety and welfare of myself or others with respect to the operation of a motor vehicle.

I request that the Court order the issuance of a restricted license to allow me to drive to and from work and during the course of my employment, upon evaluation by the Virginia Alcohol Safety Action Program.

.....
NAME AND ADDRESS OF EMPLOYER

DAYS AND HOURS WORKED

C. Restoration under Va. Code § 46.2-361(A). (Eligibility only after three (3) years from the adjudication/determination and after all fines, court costs, forfeitures, restitution, penalties and/or judgments have been paid in full.) I have been adjudged/determined to be an habitual offender and such adjudication/determination was not based on any drunk driving conviction(s), but was based *in part* and dependent upon a conviction(s) of driving while my license or privilege to drive was suspended or revoked where the suspension or revocation was only for:

- failure to pay fines, costs, forfeitures, restitution and/or penalties; or
- failure to furnish proof of financial responsibility; or
- failure to satisfy a judgment.

~~I attach proof that all fines, costs, forfeitures, restitution, penalties and/or judgments have been paid in full, and~~
I attach proof of financial responsibility.

I represent that:

- (i) At least *three* years have passed since the date of my adjudication/determination as an habitual offender.
- (ii) I do not constitute a threat to the safety and welfare of myself or others with respect to the operation of a motor vehicle.

I request that the Court restore my privilege to operate a motor vehicle in the Commonwealth.

D. Restoration under Va. Code § 46.2-361(B). (Immediate eligibility after all fines, court costs, forfeitures, restitutions, penalties and/or judgments have been paid.) I have been adjudged/determined to be an habitual offender based *entirely* upon convictions of driving while my license or privilege to drive was suspended or revoked where the suspension or revocation was only for:

- failure to pay fines, costs, forfeitures, restitution and/or penalties; or
- failure to furnish proof of financial responsibility; or
- failure to satisfy a judgment.

~~I attach proof that all fines, costs, forfeitures, restitution, penalties and/or judgments have been paid in full, and~~
I attach proof of financial responsibility.

I represent that I do not constitute a threat to the safety and welfare of myself or others with respect to the operation of a motor vehicle. I request that the Court restore my privilege to operate a motor vehicle in the Commonwealth.

E. Restoration under Va. Code § 46.2-359. (Eligibility upon reaching eighteen years of age.) I have been adjudged/determined to be an habitual offender based in whole or in part on findings of not innocent while I was a juvenile. I am now eighteen years of age or older. I request that the Court restore my privilege to operate a motor vehicle in the Commonwealth.

F. Restoration under Va. Code § 46.2-358. (Eligibility after five (5) years from the adjudication/determination where adjudication/determination was based on no drunk driving conditions.) I have been adjudged/determined to be an habitual offender and none of the convictions which brought me within the definition of "habitual offender" were for drunk driving and at least *five* years have now passed since the date of such adjudication/determination. I represent that I do not constitute a threat to the safety and welfare of myself or others with regard to the driving of a motor vehicle. I request that the Court restore my privilege to operate a motor vehicle in the Commonwealth.

I request that the Court hold a hearing on my petition not less than thirty (30) days from the date that the petition is served on the Commonwealth's Attorney and the Commissioner of the Department of Motor Vehicles.

I understand that the Commonwealth's Attorney or the Commissioner of the Department of Motor Vehicles may object to my petition and the Court may deny my request to restore my privilege to operate a motor vehicle in the Commonwealth, may deny the issuance of a restricted driver's license or may place conditions on my privilege to operate a motor vehicle.

.....
DATE

PETITIONER'S SIGNATURE

RETURN — COMMONWEALTH'S ATTORNEY:	
SERVED ON	NAME
.....	_____
DATE	SERVING OFFICER
FOR _____	

RETURN — COMMISSIONER OF DMV:	
SERVED ON	NAME
.....	_____
DATE	SERVING OFFICER
FOR _____	

**ORDER RESTORING DRIVING PRIVILEGE –
HABITUAL OFFENDER**

Case No.

COMMONWEALTH OF VIRGINIA VA. CODE §§ 46.2-358; 46.2-359; 46.2-360, 46.2-361

..... Circuit Court
CITY OR COUNTY

.....
PETITIONER'S NAME

.....
ADDRESS

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN			HT.		WGT.	EYES	HAIR
		MO.	DAY	YR.	FT.	IN.			
SSN:									

ON THE PETITION FOR RESTORATION OF DRIVING PRIVILEGE, AND ON THE EVIDENCE HEARD, INCLUDING THE EVALUATION OF THE VIRGINIA ALCOHOL SAFETY ACTION PROGRAM, IF APPLICABLE, THE COURT FINDS THAT:

The Petitioner was adjudged/determined to be an habitual offender by

the Court

Department of Motor Vehicles on
DATE

AND THAT:

A. (Va. Code § 46.2-360(1)) The Petitioner has been adjudged/determined to be an habitual offender based in part on and dependent upon convictions of Va. Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state of jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs, and:

- (i) At the time of the previous convictions, Petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (ii) At this time he is no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (iii) *Five* years have passed from the date on which Petitioner was adjudged/determined to be an habitual offender

[A period of credit is included for administrative suspension by the Department of Motor Vehicles pursuant to Virginia Code § 46.2-391(B) (for third offense drunk driving) prior to adjudication/determination.

Yes No if yes, period of suspension under § 46.2-391(B):

..... to]; and

- (iv) Petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle; and
- (v) The Court has reviewed the evaluation of the Petitioner prepared by the Virginia Alcohol Safety Action Program and considered its recommendations.

[] B. (Va. Code § 46.2-360(2)) The Petitioner has been adjudged/determined to be an habitual offender based in part on and dependent upon convictions of Va. Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs, and:

- (i) At the time of the previous convictions, Petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (ii) At this time he is no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (iii) *Three* years have passed from the date on which Petitioner was adjudicated/determined to be an habitual offender
 [A period of credit is included for administrative suspension by the Department of Motor Vehicles pursuant to Virginia Code § 46.2-391(B) (for third offense drunk driving) prior to adjudication/determination
 Yes No if yes, period of suspension: to]; and
- (iv) Petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle.
- (v) The Court has reviewed the evaluation of the Petitioner prepared by the Virginia Alcohol Safety Action Program and considered its recommendations.

[] C. (Va. Code § 46.2-361(A)) The Petitioner has been adjudged/determined to be an habitual offender and such adjudication/determination was not based on any drunk driving conviction(s), but was *based in part* and dependent upon convictions of driving while his license or privilege to drive was suspended or revoked where the suspension or revocation was only for:

- failure to pay fines and costs; or
- failure to furnish proof of financial responsibility; or
- failure to satisfy a judgment; and
 - ~~(i)~~ — All fines, costs and/or judgments have been paid in full; and
 - ~~(ii)~~(i) Petitioner has demonstrated proof of financial responsibility; and
 - ~~(iii)~~(ii) *Three* years have passed since the date of Petitioner’s adjudication/determination to be an habitual offender; and
 - ~~(iv)~~(iii) Petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle.

[] D. (Virginia Code § 46.2-361(B)) The Petitioner has been adjudged/determined to be an habitual offender *based entirely* upon convictions of driving while his license or privilege to drive was suspended or revoked where the suspension or revocation was only for:

- failure to pay fines and costs; or
- failure to furnish proof of financial responsibility; or
- failure to satisfy a judgment; and
 - ~~(i)~~ — All fines, costs and/or judgments have been paid in full; and
 - ~~(ii)~~(i) Petitioner has demonstrated proof of financial responsibility; and
 - ~~(iii)~~(ii) Petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle.

- E.** (Virginia Code § 46.2-359) The Petitioner has been adjudged/determined to be an habitual offender in whole or in part based on findings of not innocent while Petitioner was a juvenile, and Petitioner is now eighteen years of age or older.
- F.** (Virginia Code § 46.2-358) The Petitioner has been adjudged/determined to be an habitual offender and such adjudication/determination was based on no drunk driving convictions, and five years have passed since the date of such adjudication/determination, and Petitioner does not constitute a threat to the safety and welfare of himself or others with regard to the operation of a motor vehicle.
- G.** The Petitioner has not demonstrated sufficient evidence to support the granting of his petition to have his privilege to drive in the Commonwealth restored.

IT IS THEREFORE ORDERED THAT:

- Petitioner’s privilege to drive a motor vehicle in the Commonwealth is restored under the Habitual Offender Act subject to any other requirements for restoration under other provisions of law.
- Petitioner’s privilege to drive a motor vehicle in the Commonwealth is restored subject to the following special conditions:

- Petitioner is granted a restricted license to drive a motor vehicle in the Commonwealth, until, for the purposes enumerated in the restricted driver’s license, during which time he shall be subject to the supervision of the Virginia Alcohol Safety Action Program.

- Ignition interlock
 - travel to/from the facility that installed or monitors the ignition interlock on Petitioner's vehicle(s).
- Travel to/from work Travel to/from VASAP Travel during work
- Travel to/from school Travel to/from school for child
- Travel to/from day care for child
- Travel to/from medical service facility for you minor child elderly parent
 - person residing in Petitioner’s household:
- Travel to/from court ordered visitation with child or children
- Travel to/from appointments with probation officer
- Travel to/from programs required by court or as a condition of probation
- Travel to/from a place of religious worship

.....
NAME AND LOCATION OF PLACE OF RELIGIOUS WORSHIP

.....
DAY OF WEEK AND TIME FOR TRAVEL

- Travel to/from appointments approved by the Division of Child Support Enforcement of the Department of Social Services as a requirement of participation in an administrative or court-ordered intensive case monitoring program for child support.
- Travel to/from jail to serve a sentence on weekends or nonconsecutive days.
- Travel to/from a job interview for which you have with you written proof from your prospective employer of the date, time, and location of the job interview.
- [Travel to/from the offices of the Virginia Employment Commission for the purpose of seeking employment.](#)

- The petition to restore driving privileges in the Commonwealth of Virginia is denied.
- And this cause is ended.

..... DATE JUDGE

PETITION FOR RESTORATION OF DRIVING PRIVILEGE – Case No.
THIRD OFFENSE COMMONWEALTH OF VIRGINIA

HEARING DATE AND TIME

.....

..... Circuit Court
 CITY OR COUNTY

..... PETITIONER'S NAME

..... ADDRESS

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO.	BORN DAY	BORN YR.	HT. FT.	HT. IN.	WGT.	EYES	HAIR
------	-----	-------------	-------------	-------------	------------	------------	------	------	------

SSN:

TO THE JUDGE OF THE ABOVE-NAMED COURT:

I respectfully represent that on, my driver's license was revoked by the Department of Motor Vehicles, pursuant to Virginia Code § 46.2-391 (B), based on the following convictions:

OFFENSE	OFFENSE DATE	CONVICTION DATE	CONVICING COURT
.....
.....
.....

I have attached a certified transcript of my driving record from the Department of Motor Vehicles.

CHECK A OR B BELOW TO INDICATE THE BASIS OF YOUR PETITION AND COMPLETE OTHER SECTIONS AS APPLICABLE:

A. Restoration under Va. Code § 46.2-391(C)(1). (Eligible only after five (5) years from the date of the last conviction.) My license was revoked based on and dependent upon three convictions pursuant to Va. Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs.

I represent that:

- (i) At the time of my convictions, I was addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (ii) At this time, I am no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (iii) At least five years have passed from the date of the last conviction upon which the revocation of my license was based; and
- (iv) I do not constitute a threat to the safety and welfare of myself or others with respect to the operation of a motor vehicle.

I request that the Court restore my privilege to operate a motor vehicle in the Commonwealth upon my evaluation by the Virginia Alcohol Safety Action Program.

If the Court does not restore my privilege to operate a motor vehicle in the Commonwealth as requested above, I further request, as indicated by completing the next section, that the Court authorize the issuance of a restricted license in lieu of restoring my privilege to drive as provided in Va. Code § 46.2-391(C)(1). I request that the Court grant the restricted driver's license for travel to and from the following locations for the following purpose(s):

- Travel to/from the facility that installed or monitors the ignition interlock on your vehicle(s), if ignition interlock is ordered.
- Travel to/from work Travel to/from VASAP Travel during work
- Travel to/from school Travel to/from school for child
- Travel to/from day care for child
- Travel to/from medical service facility for you minor child elderly parent
 person residing in household:
- Travel to/from court ordered visitation with child or children
- Travel to/from appointments with probation officer
- Travel to/from programs required by court or as a condition of probation
- Travel to/from a place of religious worship

.....
NAME AND LOCATION OF PLACE OF WORSHIP

.....
REQUESTED DAY OF WEEK AND TIME FOR TRAVEL

- Travel to/from appointments approved by the Division of Child Support Enforcement of the Department of Social Services as a requirement of participation in an administrative or court-ordered intensive case monitoring program for child support
- Travel to/from jail to serve a sentence on weekends or nonconsecutive days
- Travel to/from a job interview for which you have with you written proof from your prospective employer of the date, time, and location of the job interview.

.....
NAME AND ADDRESS OF EMPLOYER DAYS AND HOURS WORKED

[Travel to/from the offices of the Virginia Employment Commission for the purpose of seeking employment.](#)

- B. Restricted License under Va. Code § 46.2-391(C)(2). (Eligible only after three (3) years from the date of your last conviction.)
My license was revoked based on and dependent upon three convictions pursuant to Va. Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs.
I represent that:
 - (i) At the time of my convictions, I was addicted to or psychologically dependent on the use of alcohol or other drugs; and
 - (ii) At this time I am no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
 - (iii) At least three years have passed from the date of the last conviction upon which the revocation of my license is based; and
 - (iv) I do not constitute a threat to the safety and welfare of myself or others with respect to the operation of a motor vehicle.

I request that the Court order the issuance of a restricted license to allow me to drive to and from my home to the place of my employment, upon evaluation by the Virginia Alcohol Safety Action Program.

.....
NAME AND ADDRESS OF EMPLOYER DAYS AND HOURS WORKED

I request that the court hold a hearing on my petition.

.....
DATE

.....
PETITIONER'S SIGNATURE

**ORDER RESTORING DRIVING PRIVILEGE –
THIRD OFFENSE** COMMONWEALTH OF VIRGINIA

Case No.

..... Circuit Court
CITY OR COUNTY

.....
PETITIONER'S NAME

.....
ADDRESS

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN	HT.	WGT.	EYES	HAIR
		MO. DAY YR.	FT. IN.			

SSN:
.....

ON THE PETITION FOR RESTORATION OF DRIVING PRIVILEGE, AND ON THE EVIDENCE HEARD, INCLUDING THE EVALUATION OF THE VIRGINIA ALCOHOL SAFETY ACTION PROGRAM, IF APPLICABLE, THE COURT FINDS THAT:

The Petitioner's driver's license was revoked by the Department of Motor Vehicles

on pursuant to Virginia Code § 46.2-391(B)
DATE

AND THAT:

[] **A.** (Va. Code § 46.2-391(C)(1)) The Petitioner's driver's license was revoked based on and dependent upon at least three convictions pursuant to Virginia Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs, and;

- (i) At the time of the previous convictions, Petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (ii) At this time he is no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
- (iii) *Five* years have passed from the date of the last conviction upon which revocation of the Petitioner's license was based; and
- (iv) Petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle; and
- (v) The Court has reviewed the evaluation of the Petitioner prepared by the Virginia Alcohol Safety Action Program and considered its recommendations.

- B.** (Va. Code § 46.2-391(C)(2)) The Petitioner’s driver’s license was revoked based on and dependent upon at least three convictions pursuant to Virginia Code § 18.2-266, § 18.2-51.4 or Subsection A of § 46.2-341.24 or valid local ordinance or law of another state or jurisdiction relating to operating a motor vehicle under the influence of intoxicants or drugs, and:
 - (i) At the time of the previous convictions, Petitioner was addicted to or psychologically dependent on the use of alcohol or other drugs; and
 - (ii) At this time he is no longer addicted to or psychologically dependent on the use of alcohol or other drugs; and
 - (iii) Three years have passed from the date of the last conviction upon which revocation of the Petitioner’s license was based; and
 - (iv) Petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle.
 - (v) The Court has reviewed the evaluation of the Petitioner prepared by the Virginia Alcohol Safety Action Program and considered its recommendations.

IT IS THEREFORE ORDERED THAT:

- Petitioner’s privilege to drive a motor vehicle in the Commonwealth is restored under Virginia Code § 46.2-391(C) subject to any other requirements for restoration under other provisions of law.
- Petitioner’s privilege to drive a motor vehicle in the Commonwealth is restored subject to the following special conditions:
.....
.....

- Petitioner is granted a restricted license to drive a motor vehicle in the Commonwealth pursuant to Virginia Code § 46.2-391(c)(1), until, for the purposes enumerated in the restricted driver’s license, during which time he shall be subject to the supervision of the Virginia Alcohol Safety Action Program.

- Ignition interlock
 - travel to/from the facility that installed or monitors the ignition interlock on Petitioner's vehicle(s).
- Travel to/from work Travel to/from VASAP Travel during work

- | NAME AND ADDRESS OF EMPLOYER | DAYS AND HOURS WORKED |
|---|-----------------------|
| <input type="checkbox"/> Travel to/from school <input type="checkbox"/> Travel to/from school for child | |
| <input type="checkbox"/> Travel to/from day care for child | |
| <input type="checkbox"/> Travel to/from medical service facility for <input type="checkbox"/> you <input type="checkbox"/> minor child <input type="checkbox"/> elderly parent
<input type="checkbox"/> person residing in Petitioner’s household: | |
| <input type="checkbox"/> Travel to/from court ordered visitation with child or children | |
| <input type="checkbox"/> Travel to/from appointments with probation officer | |
| <input type="checkbox"/> Travel to/from programs required by court or as a condition of probation | |
| <input type="checkbox"/> Travel to/from place of religious worship | |

- | NAME AND LOCATION OF PLACE OF WORSHIP | DAY OF WEEK AND TIME FOR TRAVEL |
|---|---------------------------------|
| <input type="checkbox"/> Travel to/from appointments approved by the Division of Child Support Enforcement of the Department of Social Services as a requirement of participation in an administrative or court-ordered intensive case monitoring program for child support | |
| <input type="checkbox"/> Travel to/from jail to serve a sentence on weekends or nonconsecutive days | |
| <input type="checkbox"/> Travel to/from a job interview for which you have with you written proof from your prospective employer of the date, time, and location of the job interview. | |
| <input type="checkbox"/> <u>Travel to/from the offices of the Virginia Employment Commission for the purpose of seeking employment.</u> | |

- Petitioner is granted a restricted driver’s license to drive a motor vehicle in the Commonwealth pursuant to Virginia Code § 46.2-391(c)(2) for the purpose of driving to/from or in the course of the petitioner’s employment.

- | NAME AND ADDRESS OF EMPLOYER | DAYS AND HOURS WORKED |
|--|-----------------------|
| <input type="checkbox"/> The petition to restore driving privileges in the Commonwealth of Virginia is denied. | |
| <input type="checkbox"/> And this cause is ended. | |

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 965

An Act to amend and reenact §§ 19.2-258.1, 19.2-354, 19.2-354.1, 33.2-503, 46.2-203.1, 46.2-301, 46.2-361, 46.2-383, 46.2-391.1, 46.2-416, 46.2-819.1, 46.2-819.3, 46.2-819.3:1, 46.2-819.5, 46.2-940, and 46.2-1200.1 of the Code of Virginia; to amend the Code of Virginia by adding a section numbered 46.2-808.2; and to repeal § 46.2-395 and Article 18 (§§ 46.2-944.1 through 46.2-947) of Chapter 8 of Title 46.2 of the Code of Virginia, relating to suspension of driver's license for nonpayment of fines or costs.

[S 1]

Approved April 9, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-258.1, 19.2-354, 19.2-354.1, 33.2-503, 46.2-203.1, 46.2-301, 46.2-361, 46.2-383, 46.2-391.1, 46.2-416, 46.2-819.1, 46.2-819.3, 46.2-819.3:1, 46.2-819.5, 46.2-940, and 46.2-1200.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 46.2-808.2 as follows:

§ 19.2-258.1. Trial of traffic infractions; measure of proof; failure to appear.

For any traffic infraction cases tried in a district court, the court shall hear and determine the case without the intervention of a jury. For any traffic infraction case appealed to a circuit court, the defendant shall have the right to trial by jury. The defendant shall be presumed innocent until proven guilty beyond a reasonable doubt.

When a person charged with a traffic infraction fails to enter a written or court appearance, he shall be deemed to have waived court hearing and the case may be heard in his absence, after which he shall be notified of the court's finding. ~~He shall be advised that if he fails to comply with any order of the court therein, the court may order suspension of his driver's license as provided in § 46.2-395 but; however,~~ the court shall not issue a warrant for his failure to appear pursuant to § 46.2-938.

§ 19.2-354. Authority of court to order payment of fine, costs, forfeitures, penalties or restitution in installments or upon other terms and conditions; community work in lieu of payment.

A. Whenever (i) a defendant, convicted of a traffic infraction or a violation of any criminal law of the Commonwealth or of any political subdivision thereof, or found not innocent in the case of a juvenile, is sentenced to pay a fine, restitution, forfeiture or penalty and (ii) the defendant is unable to make payment of the fine, restitution, forfeiture, or penalty and costs within 30 days of sentencing, the court shall order the defendant to pay such fine, restitution, forfeiture or penalty and any costs which the defendant may be required to pay in deferred payments or installments. The court assessing the fine, restitution, forfeiture, or penalty and costs may authorize the clerk to establish and approve individual deferred or installment payment agreements. If the defendant owes court-ordered restitution and enters into a deferred or installment payment agreement, any money collected pursuant to such agreement shall be used first to satisfy such restitution order and any collection costs associated with restitution prior to being used to satisfy any other fine, forfeiture, penalty, or cost owed. Any payment agreement authorized under this section shall be consistent with the provisions of § 19.2-354.1, including any required minimum payments or other required conditions. The requirements set forth in § 19.2-354.1 shall be posted in the clerk's office and on the court's website, if a website is available. As a condition of every such agreement, a defendant who enters into an installment or deferred payment agreement shall promptly inform the court of any change of mailing address during the term of the agreement. If the defendant is unable to make payment within 90 days of sentencing, the court may assess a one-time fee not to exceed \$10 to cover the costs of management of the defendant's account until such account is paid in full. This one-time fee shall not apply to cases in which costs are assessed pursuant to § 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, or 17.1-275.9. Installment or deferred payment agreements shall include terms for payment if the defendant participates in a program as provided in subsection B or C. The court, if such sum or sums are not paid in full by the date ordered, shall proceed in accordance with § 19.2-358.

B. When a person sentenced to the Department of Corrections or a local correctional facility owes any fines, costs, forfeitures, restitution or penalties, he shall be required as a condition of participating in any work release, home/electronic incarceration or nonconsecutive days program as set forth in § 53.1-60, 53.1-131, 53.1-131.1, or 53.1-131.2 to either make full payment or make payments in accordance with his installment or deferred payment agreement while participating in such program. If, after the person has an installment or deferred payment agreement, the person fails to pay as ordered, his participation in the program may be terminated until all fines, costs, forfeitures, restitution and penalties are satisfied. The Director of the Department of Corrections and any sheriff or other

administrative head of any local correctional facility shall withhold such ordered payments from any amounts due to such person. Distribution of the money collected shall be made in the following order of priority to:

1. Meet the obligation of any judicial or administrative order to provide support and such funds shall be disbursed according to the terms of such order;
2. Pay any restitution as ordered by the court;
3. Pay any fines or costs as ordered by the court;
4. Pay travel and other such expenses made necessary by his work release employment or participation in an education or rehabilitative program, including the sums specified in § 53.1-150; and
5. Defray the offender's keep.

The balance shall be credited to the offender's account or sent to his family in an amount the offender so chooses.

The Board of Corrections shall promulgate regulations governing the receipt of wages paid to persons participating in such programs, the withholding of payments and the disbursement of appropriate funds.

C. The court shall establish a program and may provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work before or after imprisonment. The program shall specify the rate at which credits are earned and provide for the manner of applying earned credits against the fine or costs. The court assessing the fine or costs against a person shall inform such person of the availability of earning credit toward discharge of the fine or costs through the performance of community service work under this program and provide such person with written notice of terms and conditions of this program. The court shall have such other authority as is reasonably necessary for or incidental to carrying out this program.

D. When the court has authorized deferred payment or installment payments, the clerk shall give notice to the defendant that upon his failure to pay as ordered he may be fined or imprisoned pursuant to § 19.2-358 and his privilege to operate a motor vehicle will be suspended pursuant to § 46.2-395.

E. The failure of the defendant to enter into a deferred payment or installment payment agreement with the court or the failure of the defendant to make payments as ordered by the agreement shall allow the Tax Commissioner to act in accordance with § 19.2-349 to collect all fines, costs, forfeitures and penalties.

§ 19.2-354.1. Deferred or installment payment agreements.

A. For purposes of this section:

"Deferred payment agreement" means an agreement in which no installment payments are required and the defendant agrees to pay the full amount of the fines and costs at the end of the agreement's stated term.

"Fines and costs" means all fines, court costs, forfeitures, and penalties assessed in any case by a single court against a defendant for the commission of any crime or traffic infraction. "Fines and costs" includes restitution unless the court orders a separate payment schedule for restitution.

"Installment payment agreement" means an agreement in which the defendant agrees to make monthly or other periodic payments until the fines and costs are paid in full.

"Modified deferred payment agreement" means a deferred payment agreement in which the defendant also agrees to use best efforts to make monthly or other periodic payments.

B. The court shall give a defendant ordered to pay fines and costs written notice of the availability of deferred, modified deferred, and installment payment agreements and, if a community service program has been established, the availability of earning credit toward discharge of fines and costs through the performance of community service work. The court shall offer any defendant who is unable to pay in full the fines and costs within 30 days of sentencing the opportunity to enter into a deferred payment agreement, modified deferred payment agreement, or installment payment agreement.

C. The court shall not deny a defendant the opportunity to enter into a deferred, modified deferred, or installment payment agreement solely (i) because of the category of offense for which the defendant was convicted or found not innocent, (ii) because of the total amount of all fines and costs, (iii) because the defendant previously defaulted under the terms of a payment agreement, (iv) because the fines and costs have been referred for collections pursuant to § 19.2-349, or (v) because the defendant has not established a payment history, or (vi) because the defendant is eligible for a restricted driver's license under subsection E of § 46.2-395.

D. In determining the length of time to pay under a deferred, modified deferred, or installment payment agreement and the amount of the payments, a court shall take into account the defendant's financial resources and obligations, including any fines and costs owed by the defendant in other courts. In assessing the defendant's ability to pay, the court shall use a written financial statement, on a form developed by the Executive Secretary of the Supreme Court, setting forth the defendant's financial resources and obligations or conduct an oral examination of the defendant to determine his financial resources and obligations. The court may require the defendant to present a summary prepared by the Department of Motor Vehicles of the other courts in which the defendant also owes fines and costs. The

length of a payment agreement and the amount of the payments shall be reasonable in light of the defendant's financial resources and obligations and shall not be based solely on the amount of fines and costs. The court may offer a payment agreement combining an initial period during which no payment of fines and costs is required followed by a period of installment payments.

E. A court may require a down payment as a condition of a defendant entering a deferred, modified deferred, or installment payment agreement. Any down payment shall be a minimal amount to demonstrate the defendant's commitment to paying the fines and costs. In the case of an installment payment agreement, the required down payment may not exceed (i) if the fines and costs owed are \$500 or less, 10 percent of such amount or (ii) if the fines and costs owed are more than \$500, five percent of such amount or \$50, whichever is greater. A defendant may make a larger down payment than what is provided by this subsection.

F. All fines and costs that a defendant owes for all cases in any single court may be incorporated into one payment agreement, unless otherwise ordered by the court in specific cases. A payment agreement shall include only those outstanding fines and costs for which the limitations period set forth in § 19.2-341 has not run.

G. Any payment received within 10 days of its due date shall be considered to be timely made.

H. At any time during the duration of a payment agreement, the defendant may request a modification of the agreement in writing on a form provided by the Executive Secretary of the Supreme Court, and the court may grant such modification based on a good faith showing of need.

I. A court shall consider a request by a defendant who has defaulted on a payment agreement to enter into a subsequent payment agreement. In determining whether to approve the request for a subsequent payment agreement, the court shall consider any change in the defendant's circumstances. A court shall require a down payment to enter into a subsequent payment agreement, provided that the down payment required to enter into a subsequent payment agreement shall not exceed (i) if the fines and costs owed are \$500 or less, 10 percent of such amount or (ii) if the fines and costs owed are more than \$500, five percent of such amount or \$50, whichever is greater. When a defendant enters into a subsequent payment agreement, a court shall not require a defendant to establish a payment history on the subsequent payment agreement before restoring the defendant's driver's license.

§ 33.2-503. HOT lanes enforcement.

Any person operating a motor vehicle on designated HOT lanes shall make arrangements with the HOT lanes operator for payment of the required toll prior to entering such HOT lanes. The operator of a vehicle who enters the HOT lanes in an unauthorized vehicle, in violation of the conditions for use of such HOT lanes established pursuant to § 33.2-502, without payment of the required toll or without having made arrangements with the HOT lanes operator for payment of the required toll shall have committed a violation of this section, which may be enforced in the following manner:

1. On a form prescribed by the Supreme Court, a summons for a violation of this section may be executed by a law-enforcement officer, when such violation is observed by such officer. The form shall contain the option for the operator of the vehicle to prepay the unpaid toll and all penalties, administrative fees, and costs.

2. a. A HOT lanes operator shall install and operate, or cause to be installed or operated, a photo-enforcement system at locations where tolls are collected for the use of such HOT lanes.

b. A summons for a violation of this section may be executed when such violation is evidenced by information obtained from a photo-enforcement system as defined in this chapter. A certificate, sworn to or affirmed by a technician employed or authorized by the HOT lanes operator, or a facsimile of such a certificate, based on inspection of photographs, microphotographs, videotapes, or other recorded images produced by a photo-enforcement system, shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation under this subdivision 2. Any vehicle rental or vehicle leasing company, if named in a summons, shall be released as a party to the action if it provides to the HOT lanes operator a copy of the vehicle rental agreement or lease or an affidavit identifying the renter or lessee prior to the date of hearing set forth in the summons. Upon receipt of such rental agreement, lease, or affidavit, a summons shall be issued for the renter or lessee identified therein. Release of this information shall not be deemed a violation of any provision of the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) or the Insurance Information and Privacy Protection Act (§ 38.2-600 et seq.).

c. On a form prescribed by the Supreme Court, a summons issued under this subdivision 2 may be executed as provided in § 19.2-76.2. Such form shall contain the option for the owner or operator to prepay the unpaid toll and all penalties, administrative fees, and costs. A summons for a violation of this section may set forth multiple violations occurring within one jurisdiction. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first-class mail a copy thereof to the address of the owner or, if the owner has named and provided a valid address for the operator of the vehicle at the time of the violation in an affidavit executed pursuant to subdivision e, such named operator of the vehicle. Such summons shall be signed either originally or by electronic signature. If the summoned person fails to appear on the date of return set out in the

summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3.

d. No summons may be issued by a HOT lanes operator for a violation of this section unless the HOT lanes operator can demonstrate that (i) there was an attempt to collect the unpaid tolls and applicable administrative fees through debt collection not less than 30 days prior to issuance of the summons and (ii) 120 days have elapsed since the unpaid toll or, in a summons for multiple violations, 120 days have elapsed since the most recent unpaid toll noticed on the summons. For purposes of this subdivision, "debt collection" means the collection of unpaid tolls and applicable administrative fees by (a) retention of a third-party debt collector or (b) collection practices undertaken by employees of a HOT lanes operator that are materially similar to a third-party debt collector.

e. The owner of such vehicle shall be given reasonable notice by way of a summons as provided in this subdivision 2 that his vehicle had been used in violation of this section, and such owner shall be given notice of the time and place of the hearing and notice of the civil penalty and costs for such offense.

It shall be prima facie evidence that the vehicle described in the summons issued pursuant to subdivision 2 was operated in violation of this section. Records obtained from the Department of Motor Vehicles pursuant to § 33.2-504 and certified in accordance with § 46.2-215 or from the equivalent agency in another state and certified as true and correct copies by the head of such agency or his designee identifying the owner of such vehicle shall give rise to a rebuttable presumption that the owner of the vehicle is the person named in the summons.

Upon the filing of an affidavit with the court at least 14 days prior to the hearing date by the owner of the vehicle stating that he was not the operator of the vehicle on the date of the violation and providing the legal name and address of the operator of the vehicle at the time of the violation, a summons will also be issued to the alleged operator of the vehicle at the time of the offense. The affidavit shall constitute prima facie evidence that the person named in the affidavit was driving the vehicle at all the relevant times relating to the matter named in the affidavit.

If the owner of the vehicle produces a certified copy of a police report showing that the vehicle had been reported to the police as stolen prior to the time of the alleged offense and remained stolen at the time of the alleged offense, then the court shall dismiss the summons issued to the owner of the vehicle.

3. a. The HOT lanes operator may impose and collect an administrative fee in addition to the unpaid toll so as to recover the expenses of collecting the unpaid toll, which administrative fee shall be reasonably related to the actual cost of collecting the unpaid toll and not exceed \$100 per violation. The operator of the vehicle shall pay the unpaid tolls and any administrative fee detailed in a notice or invoice issued by a HOT lanes operator. If paid within 60 days of notification, the administrative fee shall not exceed \$25. The HOT lanes operator shall notify the owner of the vehicle of any unpaid tolls and administrative fees by mailing an invoice pursuant to § 46.2-819.6.

b. Upon a finding by a court of competent jurisdiction that the operator of the vehicle observed by a law-enforcement officer under subdivision 1 or the vehicle described in the summons for a violation issued pursuant to evidence obtained by a photo-enforcement system under subdivision 2 was in violation of this section, the court shall impose a civil penalty upon the operator of such vehicle issued a summons under subdivision 1, or upon the operator or owner of such vehicle issued a summons under subdivision 2, payable to the HOT lanes operator as follows: for a first offense, \$50; for a second offense, \$100; for a third offense within a period of two years of the second offense, \$250; and for a fourth and subsequent offense within a period of three years of the second offense, \$500, together with, in each case, the unpaid toll, all accrued administrative fees imposed by the HOT lanes operator as authorized by this section, and applicable court costs. The court shall remand penalties, the unpaid toll, and administrative fees assessed for violation of this section to the treasurer or director of finance of the county or city in which the violation occurred for payment to the HOT lanes operator for expenses associated with operation of the HOT lanes and payments against any bonds or other liens issued as a result of the construction of the HOT lanes. No person shall be subject to prosecution under both subdivisions 1 and 2 for actions arising out of the same transaction or occurrence.

c. Notwithstanding subdivisions a and b, for a first conviction of an operator or owner of a vehicle under this section, the total amount for the first conviction shall not exceed \$2,200, including civil penalties and administrative fees regardless of the total number of offenses the operator or owner of a vehicle is convicted of on that date.

d. Upon a finding by a court that a resident of the Commonwealth has violated this section, in the event such person fails to pay the required penalties, fees, and costs, the court shall notify the Commissioner of the Department of Motor Vehicles, who shall suspend all of the registration certificates and license plates issued for any motor vehicles registered solely in the name of such person and shall not issue any registration certificate or license plate for any other vehicle that such person seeks to register solely in his name until the court has notified the Commissioner of the Department of Motor Vehicles that such penalties, fees, and costs have been paid. Upon a finding by a court that a nonresident of the Commonwealth has violated this section, in the event that such person fails to pay the required penalties, fees, and costs, the court shall notify the Commissioner of the Department of Motor

Vehicles, who shall, when the vehicle is registered in a state with which the Commonwealth has entered into an agreement to enforce tolling violations pursuant to § 46.2-819.9, provide to the entity authorized to issue vehicle registration certificates or license plates in the state in which the vehicle is registered sufficient evidence of the court's finding to take action against the vehicle registration certificate or license plates in accordance with the terms of the agreement, until the court has notified the Commissioner of the Department of Motor Vehicles that such penalties, fees, and costs have been paid. Upon receipt of such notification from the court, the Commissioner of the Department of Motor Vehicles shall notify the state where the vehicle is registered of such payment. The HOT lanes operator and the Commissioner of the Department of Motor Vehicles may enter into an agreement whereby the HOT lanes operator may reimburse the Department of Motor Vehicles for its reasonable costs to develop, implement, and maintain this enforcement mechanism, and that specifies that the Commissioner of the Department of Motor Vehicles shall have an obligation to suspend such registration certificates or to provide notice to such entities in other states so long as the HOT lanes operator makes the required reimbursements in a timely manner in accordance with the agreement.

e. An action brought under subdivision 1 or 2 shall be commenced within two years of the commission of the offense and shall be considered a traffic infraction. Except as provided in subdivisions 4 and 5, imposition of a civil penalty pursuant to this section shall not be deemed a conviction as an operator of a motor vehicle under Title 46.2 and shall not be made part of the driving record of the person upon whom such civil penalty is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. ~~The provisions of § 46.2-395 shall not be applicable to any civil penalty, fee, unpaid toll, fine, or cost imposed or ordered paid under this section for a violation of subdivision 1 or 2.~~

4. a. The HOT lanes operator may restrict the usage of the HOT lanes to designated vehicle classifications pursuant to an interim or final comprehensive agreement executed pursuant to § 33.2-1808 or 33.2-1809. Notice of any such vehicle classification restrictions shall be provided through the placement of signs or other markers prior to and at all HOT lanes entrances.

b. Any person driving an unauthorized vehicle on the designated HOT lanes is guilty of a traffic infraction, which shall not be a moving violation, and shall be punishable as follows: for a first offense, by a fine of \$125; for a second offense within a period of five years from a first offense, by a fine of \$250; for a third offense within a period of five years from a first offense, by a fine of \$500; and for a fourth and subsequent offense within a period of five years from a first offense, by a fine of \$1,000. No person shall be subject to prosecution under both this subdivision and subdivision 1 or 2 for actions arising out of the same transaction or occurrence.

Upon a conviction under this subdivision, the court shall furnish to the Commissioner of the Department of Motor Vehicles, in accordance with § 46.2-383, an abstract of the record of such conviction, which shall become a part of the person's driving record. Notwithstanding the provisions of § 46.2-492, no driver demerit points shall be assessed for any violation of this subdivision, except that persons convicted of a second, third, fourth, or subsequent violation within five years of a first offense shall be assessed three demerit points for each such violation.

5. The operator of a vehicle who enters the HOT lanes by crossing through any barrier, buffer, or other area separating the HOT lanes from other lanes of travel is guilty of a violation of § 46.2-852, unless the vehicle is a state or local law-enforcement vehicle, firefighting truck, or emergency medical services vehicle used in the performance of its official duties. No person shall be subject to prosecution both under this subdivision and under subdivision 1, 2, or 4 for actions arising out of the same transaction or occurrence.

Upon a conviction under this subdivision, the court shall furnish to the Commissioner of the Department of Motor Vehicles in accordance with § 46.2-383 an abstract of the record of such conviction, which shall become a part of the convicted person's driving record.

6. No person shall be subject to prosecution both under this section and under § 33.2-501, 46.2-819, or 46.2-819.1 for actions arising out of the same transaction or occurrence.

7. Any action under this section shall be brought in the general district court of the county or city in which the violation occurred.

§ 46.2-203.1. Provision of updated addresses by persons completing forms; acknowledgment of future receipt of official notices.

Whenever any person completes a form for an application, certificate of title, registration card, license plate, driver's license, and any other form requisite for the purpose of this title, or whenever any person is issued a summons for a violation of the motor vehicle laws of the Commonwealth, he shall provide his current address on the form or summons. By signing the form or summons, the person acknowledges that (i) the address is correct, (ii) any official notice, including an order of suspension, will be sent by prepaid first class mail to the address on the signed form with the most current date, and (iii) the notice shall be deemed to have been accepted by the person at that address. ~~In addition, upon signing a summons for a violation of the motor vehicle laws, the person shall acknowledge that his failure to appear in court and pay fines and costs could result in suspension of his operator's license.~~

§ 46.2-301. Driving while license, permit, or privilege to drive suspended or revoked.

A. In addition to any other penalty provided by this section, any motor vehicle administratively impounded or immobilized under the provisions of § 46.2-301.1 may, in the discretion of the court, be impounded or immobilized for an additional period of up to 90 days upon conviction of an offender for driving while his driver's license, learner's permit, or privilege to drive a motor vehicle has been suspended or revoked for (i) a violation of § 18.2-36.1, 18.2-51.4, 18.2-266, 18.2-272, or 46.2-341.24 or a substantially similar ordinance or law in any other jurisdiction or (ii) driving after adjudication as an habitual offender, where such adjudication was based in whole or in part on an alcohol-related offense, or where such person's license has been administratively suspended under the provisions of § 46.2-391.2. However, if, at the time of the violation, the offender was driving a motor vehicle owned by another person, the court shall have no jurisdiction over such motor vehicle but may order the impoundment or immobilization of a motor vehicle owned solely by the offender at the time of arrest. All costs of impoundment or immobilization, including removal or storage expenses, shall be paid by the offender prior to the release of his motor vehicle.

B. Except as provided in §§ 46.2-304 and 46.2-357, no resident or nonresident (i) whose driver's license, learner's permit, or privilege to drive a motor vehicle has been suspended or revoked or (ii) who has been directed not to drive by any court or by the Commissioner, or (iii) who has been forbidden, as prescribed by operation of any statute of the Commonwealth or a substantially similar ordinance of any county, city or town, to operate a motor vehicle in the Commonwealth shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in the Commonwealth until the period of such suspension or revocation has terminated or the privilege has been reinstated or a restricted license is issued pursuant to subsection E. ~~A clerk's notice of suspension of license for failure to pay fines or costs given in accordance with § 46.2-395 shall be sufficient notice for the purpose of maintaining a conviction under this section.~~ For the purposes of this section, the phrase "motor vehicle or any self-propelled machinery or equipment" shall not include mopeds.

C. A violation of subsection B is a Class 1 misdemeanor. A third or subsequent offense occurring within a 10-year period shall include a mandatory minimum term of confinement in jail of 10 days. However, the court shall not be required to impose a mandatory minimum term of confinement in any case where a motor vehicle is operated in violation of this section in a situation of apparent extreme emergency which requires such operation to save life or limb.

D. Upon a violation of subsection B, the court shall suspend the person's license or privilege to drive a motor vehicle for the same period for which it had been previously suspended or revoked. In the event the person violated subsection B by driving during a period of suspension or revocation which was not for a definite period of time, the court shall suspend the person's license, permit or privilege to drive for an additional period not to exceed 90 days, to commence upon the expiration of the previous suspension or revocation or to commence immediately if the previous suspension or revocation has expired; ~~however, in the event that the person violated subsection B by driving during a period of suspension imposed pursuant to § 46.2-395, the additional 90-day suspension imposed pursuant to this subsection shall run concurrently with the suspension imposed pursuant to § 46.2-395 in accordance with subsection F of § 46.2-395.~~

E. Any person who is otherwise eligible for a restricted license may petition each court that suspended his license pursuant to subsection D for authorization for a restricted license, provided that the period of time for which the license was suspended by the court pursuant to subsection D, if measured from the date of conviction, has expired, even though the suspension itself has not expired. A court may, for good cause shown, authorize the Department of Motor Vehicles to issue a restricted license for any of the purposes set forth in subsection E of § 18.2-271.1. No restricted license shall be issued unless each court that issued a suspension of the person's license pursuant to subsection D authorizes the Department to issue a restricted license. Any restricted license issued pursuant to this subsection shall be in effect until the expiration of any and all suspensions issued pursuant to subsection D, except that it shall automatically terminate upon the expiration, cancellation, suspension, or revocation of the person's license or privilege to drive for any other cause. No restricted license issued pursuant to this subsection shall permit a person to operate a commercial motor vehicle as defined in the Commercial Driver's License Act (§ 46.2-341.1 et seq.). The court shall forward to the Commissioner a copy of its authorization entered pursuant to this subsection, which shall specifically enumerate the restrictions imposed and contain such information regarding the person to whom such a license is issued as is reasonably necessary to identify the person. The court shall also provide a copy of its authorization to the person, who may not operate a motor vehicle until receipt from the Commissioner of a restricted license. A copy of the restricted license issued by the Commissioner shall be carried at all times while operating a motor vehicle.

F. Any person who operates a motor vehicle or any self-propelled machinery or equipment in violation of the terms of a restricted license issued pursuant to subsection E of § 18.2-271.1 is not guilty of a violation of this section but is guilty of a violation of § 18.2-272.

§ 46.2-361. Restoration of privilege after driving while license revoked or suspended for failure to furnish proof of financial responsibility or pay uninsured motorist fee.

A. Any person who has been found to be an habitual offender, where the determination or

adjudication was based in part and dependent on a conviction as set out in subdivision 1 c of former § 46.2-351, may, after three years from the date of the final order of a court entered under this article, or if no such order was entered then the notice of the determination or adjudication by the Commissioner, petition the court in which he was found to be an habitual offender, or the circuit court in the political subdivision in which he then resides, for restoration of his privilege to drive a motor vehicle in the Commonwealth. In no event, however, shall the provisions of this subsection apply when such person's determination or adjudication was also based in part and dependent on a conviction as set out in subdivision 1 b of former § 46.2-351. In such case license restoration shall be in compliance with the provisions of § 46.2-360.

B. Any person who has been found to be an habitual offender, where the determination or adjudication was based entirely upon a combination of convictions of § 46.2-707 and convictions as set out in subdivision 1 c of former § 46.2-351, may, after ~~payment in full of all outstanding fines, costs and judgments relating to his determination,~~ and furnishing proof of (i) financial responsibility and (ii) compliance with the provisions of Article 8 (§ 46.2-705 et seq.) of Chapter 6 ~~of this title~~ or both, if applicable, petition the court in which he was found to be an habitual offender, or the circuit court in the political subdivision in which he then resides, for restoration of his privilege to drive a motor vehicle in the Commonwealth.

C. This section shall apply only where the conviction or convictions as set out in subdivision 1 c of former § 46.2-351 resulted from a suspension or revocation ordered pursuant to (i) *former* § 46.2-395 for failure to pay fines and costs, (ii) § 46.2-459 for failure to furnish proof of financial responsibility, or (iii) § 46.2-417 for failure to satisfy a judgment, provided *that* the judgment has been paid in full prior to the time of filing the petition or was a conviction under § 46.2-302 or former § 46.1-351.

D. On any such petition, the court, in its discretion, may restore to the person his privilege to drive a motor vehicle, on whatever conditions the court may prescribe, if the court is satisfied from the evidence presented that the petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle, ~~and that he has satisfied in full all outstanding court costs, court fines and judgments relating to determination as an habitual offender~~ and *has* furnished proof of financial responsibility, if applicable.

E. A copy of any petition filed hereunder shall be served on the attorney for the Commonwealth for the jurisdiction wherein the petition was filed, and shall also be served on the Commissioner of the Department of Motor Vehicles, who shall provide to the attorney for the Commonwealth a certified copy of the petitioner's driving record. The Commissioner shall also advise the attorney for the Commonwealth whether there is anything in the records maintained by the Department that might make the petitioner ineligible for restoration, and may also provide notice of any potential ineligibility to the Attorney General's Office, which may join in representing the interests of the Commonwealth where it appears that the petitioner is not eligible for restoration. The hearing on a petition filed pursuant to this article shall not be set for a date sooner than ~~thirty~~ 30 days after the petition is filed and served as provided herein.

§ 46.2-383. Courts to forward abstracts of records or furnish abstract data of conviction by electronic means in certain cases; records in office of Department; inspection; clerk's fee for reports.

A. In the event (i) a person is convicted of a charge described in subdivision 1 or 2 of § 46.2-382 or § 46.2-382.1 ~~or~~, (ii) a person fails ~~or refuses to pay any fine, costs, forfeiture, restitution or penalty, or any installment thereof, imposed in any traffic case,~~ or (iii) a person forfeits bail or collateral or other deposit to secure the defendant's appearance on the charges, unless the conviction has been set aside or the forfeiture vacated, ~~or (iv)~~ (iii) a court assigns a defendant to a driver education program or alcohol treatment or rehabilitation program, or both such programs, as authorized by § 18.2-271.1, ~~or (v)~~ (iv) compliance with the court's probation order is accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271 as provided in § 18.2-271.1, or ~~(vi)~~ (v) there is rendered a judgment for damages against a person as described in § 46.2-382, every district court or clerk of a circuit court shall forward an abstract of the record to the Commissioner within 18 days after such conviction, ~~failure or refusal to pay,~~ forfeiture, assignment, or acceptance, and in the case of civil judgments, on the request of the judgment creditor or his attorney, within 30 days after judgment has become final. No abstract of the record in a district court shall be forwarded to the Commissioner unless the period allowed for an appeal has elapsed and no appeal has been perfected. On or after July 1, 2013, in the event that a conviction or adjudication has been nullified by separate order of the court, the clerk shall forward to the Commissioner an abstract of that record.

B. Abstract data of conviction may be furnished to the Commissioner by electronic means provided that the content of the abstract and the certification complies with the requirements of § 46.2-386. In cases where the abstract data is furnished by electronic means, the paper abstract shall not be required to be forwarded to the Commissioner. The Commissioner shall develop a method to ensure that all data is received accurately. The Commissioner, with the approval of the Governor, may destroy the record of any conviction, forfeiture, assignment, acceptance, or judgment, when three years has elapsed from the date thereof, except records of conviction or forfeiture on charges of reckless driving and speeding,

which records may be destroyed when five years has elapsed from the date thereof, and further excepting those records that alone, or in connection with other records, will require suspension or revocation or disqualification of a license or registration under any applicable provisions of this title.

C. The records required to be kept may, in the discretion of the Commissioner, be kept by electronic media or by photographic processes and when so done the abstract of the record may be destroyed.

D. The Code section and description of an offense referenced in an abstract for any juvenile adjudication obtained from a district court or clerk of circuit court pursuant to subdivision A 9 of § 16.1-278.8, § 16.1-278.9, clause (iii) of subdivision 1 of § 46.2-382, or any other provision of law that does not involve an offense referenced in subsection A or an offense involving the operation of a motor vehicle shall be available only to the person himself, his parent or guardian, law-enforcement officers, attorneys for the Commonwealth, and courts.

§ 46.2-391.1. Suspension of registration certificates and plates upon suspension or revocation of driver's license.

Whenever the Commissioner, under the authority of law of the Commonwealth, suspends or revokes the driver's license of any person upon receiving record of that person's conviction, ~~or whenever the Commissioner is notified that a court has suspended a person's driving privilege pursuant to § 46.2-395,~~ the Commissioner shall also suspend all of the registration certificates and license plates issued for any motor vehicles registered solely in the name of such person and shall not issue any registration certificate or license plate for any other vehicle that such person seeks to register solely in his name. ~~Except for persons whose privileges have been suspended by a court pursuant to § 46.2-395, the~~ The Commissioner shall not suspend such registration certificates or license plates in the event *that* such person has previously given or gives and thereafter maintains proof of his financial responsibility in the future, in the manner specified in this chapter, with respect to each and every motor vehicle owned and registered by such person. In this event it shall be lawful for said vehicle or vehicles to be operated during this period of suspension by any duly licensed driver when so authorized by the owner.

§ 46.2-416. Notice of suspension or revocation of license.

A. Whenever it is provided in this title that a driver's license may or shall be suspended or revoked either by the Commissioner or by a court, notice of the suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Department by certified mail to the driver at the most recent address of the driver on file at the Department. ~~If the driver has previously been notified by mail or in person of the suspension or revocation or of an impending suspension for failure to pay fines and costs pursuant to § 46.2-395, whether notice is given by the court or law-enforcement officials as provided by law, and the Department has been notified by the court that notice was so given and the fines and costs were not paid within 30 days, no notice of suspension shall be sent by the Department to the driver.~~ If the certificate of the Commissioner or someone designated by him for that purpose shows that the notice or copy has been so sent or provided, it shall be deemed prima facie evidence that the notice or copy has been sent and delivered or otherwise provided to the driver for all purposes involving the application of the provisions of this title. In the discretion of the Commissioner, service may be made as provided in § 8.01-296, which service on the driver shall be made by delivery in writing to the driver in person in accordance with subdivision 1 of § 8.01-296 by a sheriff or deputy sheriff in the county or city in which the address is located, who shall, as directed by the Commissioner, take possession of any suspended or revoked license, registration card, or set of license plates or decals and return them to the office of the Commissioner. No such service shall be made if, prior to service, the driver has complied with the requirement which caused the issuance of the decision or order. In any such case, return shall be made to the Commissioner.

B. In lieu of making a direct payment to sheriffs as a fee for delivery of the Department's processes, the Commissioner shall effect a transfer of funds, on a monthly basis, to the Compensation Board to be used to provide additional support to sheriffs' departments. The amount of funds so transferred shall be as provided in the general appropriation act.

C. The Department may contract with the United States Postal Service or an authorized agent to use the National Change of Address System for the purpose of obtaining current address information for a person whose name appears in customer records maintained by the Department. If the Department receives information from the National Change of Address System indicating that a person whose name appears in a Department record has submitted a permanent change of address to the Postal Service, the Department may then update its records with the mailing address obtained from the National Change of Address System.

§ 46.2-808.2. Violations committed within highway safety corridor; report on benefits.

Notwithstanding any other provision of law, the fine for any moving violation of any provision of this chapter while operating a motor vehicle in a designated highway safety corridor pursuant to § 33.2-253 shall be no more than \$500 for any violation that is a traffic infraction and not less than \$200 for any violation that is a criminal offense. The otherwise applicable fines set forth in Rule 3B:2 of the Rules of the Supreme Court shall be doubled in the case of a waiver of appearance and a plea of guilty under § 16.1-69.40:1 or 19.2-254.2 for a violation of a provision of this chapter while operating a motor vehicle in a designated highway safety corridor pursuant to § 33.2-253. The Commissioner of Highways

shall report, on an annual basis, statistical data related to benefits derived from the designation of such highway safety corridors. This information may be posted on the Virginia Department of Transportation's official website. Notwithstanding the provisions of § 46.2-1300, the governing bodies of counties, cities, and towns may not adopt ordinances providing for penalties under this section.

§ 46.2-819.1. Installation and use of photo-monitoring system or automatic vehicle identification system in conjunction with electronic or manual toll facilities; penalty.

A. For purposes of this section:

"Automatic vehicle identification device" means an electronic device that communicates by wireless transmission with an automatic vehicle identification system.

"Automatic vehicle identification system" means an electronic vehicle identification system installed to work in conjunction with a toll collection device that automatically produces an electronic record of each vehicle equipped with an automatic vehicle identification device that uses a toll facility.

"Debt collection" means the collection of unpaid tolls and applicable administrative fees by (i) retention of a third-party debt collector or (ii) collection practices undertaken by employees of a toll facility operator that are materially similar to a third-party debt collector.

"Operator of a toll facility other than the Department of Transportation" means any agency, political subdivision, authority, or other entity that operates a toll facility.

"Owner" means the registered owner of a vehicle on record with the Department of Motor Vehicles or with the equivalent agency in another state. "Owner" does not include a vehicle rental or vehicle leasing company.

"Photo-monitoring system" means a vehicle sensor installed to work in conjunction with a toll collection device that automatically produces one or more photographs, one or more microphotographs, a videotape, or other recorded images of each vehicle at the time it is used or operated in violation of this section.

B. The operator of any toll facility or the locality within which such toll facility is located may install and operate or cause to be installed and operated a photo-monitoring system or automatic vehicle identification system, or both, at locations where tolls are collected for the use of such toll facility. The operator of a toll facility shall send an invoice or bill for unpaid tolls to the owner of a vehicle as part of an electronic or manual toll collection process pursuant to § 46.2-819.6 prior to seeking remedies under this section.

C. Information collected by a photo-monitoring system or automatic vehicle identification system installed and operated pursuant to subsection B shall be limited exclusively to that information that is necessary for the collection of unpaid tolls. Notwithstanding any other provision of law, all photographs, microphotographs, electronic images, or other data collected by a photo-monitoring system or automatic vehicle identification system shall be used exclusively for the collection of unpaid tolls and shall not (i) be open to the public; (ii) be sold and/or used for sales, solicitation, or marketing purposes; (iii) be disclosed to any other entity except as may be necessary for the collection of unpaid tolls or to a vehicle owner or operator as part of a challenge to the imposition of a toll; and (iv) be used in a court in a pending action or proceeding unless the action or proceeding relates to a violation of this section or upon order from a court of competent jurisdiction. Information collected under this section shall be purged and not retained later than 30 days after the collection and reconciliation of any unpaid tolls, administrative fees, and/or civil penalties. Any entity operating a photo-monitoring system or automatic vehicle identification system shall annually certify compliance with this section and make all records pertaining to such system available for inspection and audit by the Commissioner of Highways or the Commissioner of the Department of Motor Vehicles or their designee. Any violation of this subsection shall constitute a Class 1 misdemeanor. In addition to any fines or other penalties provided for by law, any money or other thing of value obtained as a result of a violation of this section shall be forfeited to the Commonwealth.

The toll facility operator may impose and collect an administrative fee in addition to the unpaid toll so as to recover the expenses of collecting the unpaid toll, which administrative fee shall be reasonably related to the actual cost of collecting the unpaid toll and not exceed \$100 per violation. Such fee may be levied upon the operator of the vehicle after the first unpaid toll has been documented. The operator of the vehicle shall pay the unpaid toll and any administrative fee detailed in an invoice for the unpaid toll issued by a toll facility operator. If paid within 60 days of notification, the administrative fee shall not exceed \$25.

D. If the matter proceeds to court, the owner or operator of a vehicle shall be liable for a civil penalty as follows: for a first offense, \$50; for a second offense within one year from the first offense, \$100; for a third offense within two years from the second offense, \$250; and for a fourth and any subsequent offense within three years from the second offense, \$500 plus, in each case, the unpaid toll, all accrued administrative fees imposed by the toll facility operator, and applicable court costs if the vehicle is found, as evidenced by information obtained from a photo-monitoring system or automatic vehicle identification system as provided in this section, to have used such a toll facility without payment of the required toll.

E. Notwithstanding subsections C and D, for a first conviction of an operator or owner of a vehicle

under this section, the total amount for the first conviction shall not exceed \$2,200, including civil penalties and administrative fees regardless of the total number of offenses the operator or owner of a vehicle is convicted of on that date.

F. No summons may be issued by a toll facility operator for a violation of this section unless the toll facility operator can demonstrate that (i) there was an attempt to collect the unpaid tolls and applicable administrative fees through debt collection not less than 30 days prior to issuance of the summons and (ii) 120 days have elapsed since the unpaid toll or, in a summons for multiple violations, 120 days have elapsed since the most recent unpaid toll noticed on the summons.

G. Any action under this section shall be brought in the general district court of the county or city in which the toll facility is located and shall be commenced within two years of the commission of the offense. Such action shall be considered a traffic infraction. The attorney for the Commonwealth may represent the interests of the toll facility operator. Any authorized agent or employee of a toll facility operator acting on behalf of a governmental entity shall be allowed the privileges accorded by § 16.1-88.03 in such cases.

H. Proof of a violation of this section shall be evidenced by information obtained from a photo-monitoring system or automatic vehicle identification system as provided in this section. A certificate, sworn to or affirmed by a technician employed or authorized by the operator of a toll facility or by the locality wherein the toll facility is located, or a facsimile of such a certificate, based on inspection of photographs, microphotographs, videotapes, or other recorded images produced by a photo-monitoring system, or of electronic data collected by an automatic vehicle identification system, shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images or electronic data evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation under this section. A record of communication by an automatic vehicle identification device with the automatic vehicle identification system at the time of a violation of this section shall be prima facie evidence that the automatic vehicle identification device was located in the vehicle registered to use such device in the records of the Department of Transportation.

I. On a form prescribed by the Supreme Court, a summons for a violation of this section may be executed as provided in § 19.2-76.2. A summons for a violation of this section may set forth multiple violations occurring within one jurisdiction. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first-class mail a copy thereof to the address of the owner or, if the owner has named and provided a valid address for the operator of the vehicle at the time of the violation in an affidavit executed pursuant to this subsection, such named operator of the vehicle. Such summons shall be signed either originally or by electronic signature. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3.

Upon a finding by a court of competent jurisdiction that the vehicle described in the summons issued pursuant to this subsection was in violation of this section, the court shall impose a civil penalty upon the owner or operator of such vehicle in accordance with the amounts specified in subsection D, together with applicable court costs, the operator's administrative fee, and the toll due. Penalties assessed as the result of action initiated by the Department of Transportation shall be remanded by the clerk of the court that adjudicated the action to the Department of Transportation's Toll Facilities Revolving Account. Penalties assessed as the result of action initiated by an operator of a toll facility other than the Department of Transportation shall be remanded by the clerk of the court that adjudicated the action to the treasurer or director of finance of the county or city in which the violation occurred for payment to the toll facility operator.

The owner of such vehicle shall be given reasonable notice by way of a summons as provided in this subsection that his vehicle had been used in violation of this section, and such owner shall be given notice of the time and place of the hearing as well as the civil penalty and costs for such offense. The toll facility operator may offer to the owner an option to pay the unpaid toll and fees plus a reduced civil penalty of \$25 for a first or second offense or \$50 for a third, fourth, or subsequent offense, as specified on the summons, provided the owner actually pays to the toll facility operator the entire amount so calculated at least 14 days prior to the hearing date specified on the summons. If the owner accepts such offer and such amount is actually received by the toll facility operator at least 14 days prior to the hearing date specified on the summons, the toll facility operator shall move the court at least five business days prior to the date set for trial to dismiss the summons issued to the owner of the vehicle, and the court shall dismiss upon such motion.

It shall be prima facie evidence that the vehicle described in the summons issued pursuant to this subsection was operated in violation of this section. Records obtained from the Department of Motor Vehicles pursuant to § 46.2-208 and certified in accordance with § 46.2-215 or from the equivalent agency in another state and certified as true and correct copies by the head of such agency or his designee identifying the owner of such vehicle shall give rise to a rebuttable presumption that the owner of the vehicle is the person named in the summons.

Upon either (i) the filing of an affidavit with the toll facility operator within 14 days of receipt of an

invoice for an unpaid toll from the toll facility operator or (ii) the filing of an affidavit with the court at least 14 days prior to the hearing date by the owner of the vehicle stating that he was not the operator of the vehicle on the date of the violation and providing the legal name and address of the operator of the vehicle at the time of the violation, an invoice and/or summons, as appropriate, will also be issued to the alleged operator of the vehicle at the time of the offense.

In any action against a vehicle operator, an affidavit made by the owner providing the name and address of the vehicle operator at the time of the violation shall constitute prima facie evidence that the person named in the affidavit was operating the vehicle at all the relevant times relating to the matter named in the affidavit.

If the owner of the vehicle produces for the toll facility operator or the court a certified copy of a police report showing that the vehicle had been reported to the police as stolen prior to the time of the alleged offense and remained stolen at the time of the alleged offense, then the toll facility operator shall not pursue the owner for the unpaid toll and, if a summons has been issued, the court shall dismiss the summons issued to the owner of the vehicle.

J. Upon a finding by a court that a person has two or more unpaid tolls and such person fails to pay the required penalties, fees, and unpaid tolls, the court shall notify the Commissioner of the Department of Motor Vehicles, who shall refuse to issue or renew any vehicle registration certificate of any applicant or the license plate issued for the vehicle driven in the commission of the offense or, when the vehicle is registered in a state with which the Commonwealth has entered into an agreement to enforce tolling violations pursuant to § 46.2-819.9, who shall provide to the entity authorized to issue vehicle registration certificates or license plates in the state in which the vehicle is registered sufficient evidence of the court's finding to take action against the vehicle registration certificate or license plates in accordance with the terms of the agreement, until the court has notified the Commissioner that such penalties, fees, and unpaid tolls have been paid. Upon receipt of such notification from the court, the Commissioner of the Department of Motor Vehicles shall notify the state where the vehicle is registered of such payment. If it is proven that the vehicle owner was not the operator at the time of the offense and upon a finding by a court that the person identified in an affidavit pursuant to subsection I as the operator violated this section and such person fails to pay the required penalties, fees, and unpaid tolls, the court shall notify the Commissioner, who shall refuse to issue or renew any vehicle registration certificate of any applicant or the license plate issued for any vehicle owned or co-owned by such person or, when such vehicle is registered in a state with which the Commonwealth has entered into an agreement to enforce tolling violations pursuant to § 46.2-819.9, who shall provide to the entity authorized to issue vehicle registration certificates or license plates in the state in which the vehicle is registered sufficient evidence of the court's finding to take action against the vehicle registration certificate or license plates in accordance with the terms of the agreement, until the court has notified the Commissioner that such penalties, fees, and unpaid tolls have been paid. Upon receipt of such notification from the court, the Commissioner of the Department of Motor Vehicles shall notify the state where the vehicle is registered of such payment. Such funds representing payment of unpaid tolls and all administrative fees of the toll facility operator shall be transferred from the court to the Department of Transportation's Toll Facilities Revolving Account or, in the case of an action initiated by an operator of a toll facility other than the Department of Transportation, to the treasurer or director of finance of the county or city in which the violation occurred for payment to the toll facility operator. The Commissioner shall collect a \$40 administrative fee from the owner or operator of the vehicle to defray the cost of processing and removing an order to deny registration or registration renewal.

K. Any vehicle rental or vehicle leasing company, if it receives an invoice or is named in a summons, shall be released as a party to the action if it provides the operator of the toll facility a copy of the vehicle rental agreement or lease or an affidavit identifying the renter or lessee within 30 days of receipt of the invoice or at least 14 days prior to the date of hearing set forth in the summons. Upon receipt of such rental agreement, lease, or affidavit, a notice shall be mailed to the renter or lessee identified therein. Release of this information shall not be deemed a violation of any provision of the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) or the Insurance Information and Privacy Protection Act (§ 38.2-600 et seq.). The toll facility operator shall allow at least 30 days from the date of such mailing before pursuing other remedies under this section. In any action against the vehicle operator, a copy of the vehicle rental agreement, lease, or affidavit identifying the renter or lessee of the vehicle at the time of the violation is prima facie evidence that the person named in the rental agreement, lease, or affidavit was operating the vehicle at all the relevant times relating to the matter named in the summons.

L. Imposition of a civil penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the driving record of the person upon whom such civil penalty is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. ~~The provisions of § 46.2-395 shall not be applicable to any civil penalty, fee, unpaid toll, fine, or cost imposed or ordered paid under this section for a violation of this section.~~

M. The operator of a toll facility may enter into an agreement with the Department of Motor Vehicles, in accordance with the provisions of subdivision B 21 of § 46.2-208, to obtain vehicle owner

information regarding the owners of vehicles that fail to pay tolls required for the use of toll facilities and with the Department of Transportation to obtain any information that is necessary to conduct electronic toll collection. Such agreement may include any information that may be obtained by the Department of Motor Vehicles in accordance with any agreement entered into pursuant to § 46.2-819.9. Information provided to the operator of a toll facility shall only be used for the collection of unpaid tolls and the operator of the toll facility shall be subject to the same conditions and penalties regarding release of the information as contained in subsection C.

N. No person shall be subject to both the provisions of this section and to prosecution under § 46.2-819 for actions arising out of the same transaction or occurrence.

§ 46.2-819.3. Use of toll facility without payment of toll; enforcement; penalty.

A. For purposes of this section:

"Debt collection" means the collection of unpaid tolls and applicable administrative fees by (i) retention of a third-party debt collector or (ii) collection practices undertaken by employees of a toll facility operator that are materially similar to a third-party debt collector.

"Operator of a toll facility other than the Department of Transportation" means any agency, political subdivision, authority, or other entity that operates a toll facility.

"Owner" means the registered owner of a vehicle on record with the Department of Motor Vehicles or with the equivalent agency in another state. "Owner" does not include a vehicle rental or vehicle leasing company.

B. The toll facility operator may impose and collect an administrative fee in addition to the unpaid toll so as to recover the expenses of collecting the unpaid toll, which administrative fee shall be reasonably related to the actual cost of collecting the unpaid toll and not exceed \$100 per violation. Such fee shall not be levied on a first unpaid toll unless the written promise to pay executed pursuant to subsection F remains unpaid after 30 days. The person who executed the written promise to pay pursuant to subsection F shall pay the unpaid toll and any administrative fee detailed in an invoice or bill issued by a toll facility operator. If paid within 60 days of notification, the administrative fee shall not exceed \$25.

C. If the matter proceeds to court, the owner or operator of the vehicle shall be liable for a civil penalty as follows: for a first offense, \$50; for a second offense within one year from the first offense, \$100; for a third offense within two years from the second offense, \$250; and for a fourth and any subsequent offense within three years from the second offense, \$500 plus, in each case, the unpaid toll, all accrued administrative fees imposed by the toll facility operator and applicable court costs if the vehicle operator is found, as evidenced by information obtained from the toll facility operator, to have used such a toll facility without payment of the required toll.

D. Notwithstanding subsections B and C, for a first conviction of an operator or owner of a vehicle under this section, the total amount for the first conviction shall not exceed \$2,200, including civil penalties and administrative fees regardless of the total number of offenses the operator or owner of a vehicle is convicted of on that date.

E. No summons may be issued by a toll facility operator for a violation of this section unless the toll facility operator can demonstrate that (i) there was an attempt to collect the unpaid tolls and applicable administrative fees through debt collection not less than 30 days prior to issuance of the summons and (ii) 120 days have elapsed since the unpaid toll or, in a summons for multiple violations, 120 days have elapsed since the most recent unpaid toll noticed on the summons.

F. A written promise to pay an unpaid toll within a specified period of time executed by the operator of a motor vehicle, accompanied by a certificate sworn to or affirmed by an authorized agent of the toll facility that the unpaid toll was not paid within such specified period, shall be prima facie evidence of the facts contained therein.

G. The operator of a toll facility shall send an invoice or bill to the owner of a motor vehicle using a toll facility without payment of the specified toll as part of an electronic or manual toll collection process pursuant to § 46.2-819.6, prior to seeking remedies under this section. Any action under this section shall be brought in the general district court of the county or city in which the toll facility is located and shall be commenced within two years of the commission of the offense. Such an action shall be considered a traffic infraction. The attorney for the Commonwealth may represent the interests of the toll facility operator. Any authorized agent or employee of a toll facility operator acting on behalf of a governmental entity shall be allowed the privileges accorded by § 16.1-88.03 in such cases.

H. Upon a finding by a court of competent jurisdiction that the operator of a motor vehicle identified in the summons issued pursuant to subsection J was in violation of this section, the court shall impose a civil penalty upon the operator of a motor vehicle in accordance with the amounts specified in subsection C, together with applicable court costs, the operator's administrative fee, and the toll due. Penalties assessed as the result of action initiated by the Department of Transportation shall be remanded by the clerk of the court that adjudicated the action to the Department of Transportation's Toll Facilities Revolving Account. Penalties assessed as the result of action initiated by an operator of a toll facility other than the Department of Transportation shall be remanded by the clerk of the court that adjudicated the action to the treasurer or director of finance of the county or city in which the violation occurred for

payment to the toll facility operator.

I. The toll facility operator may offer to the owner an option to pay the unpaid toll and fees plus a reduced civil penalty of not more than \$25 for a first or second offense or not more than \$50 for a third, fourth, or subsequent offense, as specified on the summons, provided the owner actually pays to the toll facility operator the entire amount so calculated at least 14 days prior to the hearing date specified on the summons. If the owner accepts such offer and such amount is actually received by the toll facility operator at least 14 days prior to the hearing date specified on the summons, the toll facility operator shall move the court at least five business days prior to the date set for trial to dismiss the summons issued to the owner of the vehicle, and the court shall dismiss upon such motion.

J. A summons for a violation of this section may be executed as provided in § 19.2-76.2. A summons for a violation of this section may set forth multiple violations occurring within one jurisdiction. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first-class mail a copy thereof to the address of the operator of a motor vehicle as shown on the written promise to pay executed pursuant to subsection F or records of the Department of Motor Vehicles. Such summons shall be signed either originally or by electronic signature. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this subsection, the summons shall be executed in the manner set out in § 19.2-76.3.

K. Upon a finding by a court that a person has three or more unpaid tolls and such person fails to pay the required penalties, fees, and unpaid tolls, the court shall notify the Commissioner of the Department of Motor Vehicles, who shall refuse to issue or renew any vehicle registration certificate of any applicant or the license plate issued for any vehicle owned or co-owned by the offender or, when the vehicle is registered in a state with which the Commonwealth has entered into an agreement to enforce tolling violations pursuant to § 46.2-819.9, who shall provide to the entity authorized to issue vehicle registration certificates or license plates in the state in which the vehicle is registered sufficient evidence of the court's finding to take action against the vehicle registration certificate or license plates in accordance with the terms of the agreement. Upon receipt of such notification from the court, the Commissioner of the Department of Motor Vehicles shall notify the state where the vehicle is registered of such payment. The Commissioner shall collect a \$40 administrative fee from the owner or operator of the vehicle to defray the cost of processing and removing an order to deny registration or registration renewal.

L. Imposition of a civil penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the driving record of the person upon whom such civil penalty is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. ~~The provisions of § 46.2-395 shall not be applicable to any civil penalty, fee, unpaid toll, fine, or cost imposed or ordered paid under this section for a violation of this section.~~

M. No person shall be subject to both the provisions of this section and to prosecution under § 46.2-819 for actions arising out of the same transaction or occurrence.

§ 46.2-819.3:1. Installation and use of video-monitoring system and automatic vehicle identification system in conjunction with all-electronic toll facilities; penalty.

A. For purposes of this section:

"Automatic vehicle identification device" means an electronic device that communicates by wireless transmission with an automatic vehicle identification system.

"Automatic vehicle identification system" means an electronic vehicle identification system installed to work in conjunction with a toll collection device that automatically produces an electronic record of each vehicle equipped with an automatic vehicle identification device that uses a toll facility.

"Debt collection" means the collection of unpaid tolls and applicable administrative fees by (i) retention of a third-party debt collector or (ii) collection practices undertaken by employees of a toll facility operator that are materially similar to a third-party debt collector.

"Operator" means a person who was driving a vehicle that was the subject of a toll violation but who is not the owner of the vehicle.

"Operator of a toll facility other than the Department of Transportation" means any agency, political subdivision, authority, or other entity that operates a toll facility.

"Owner" means the registered owner of a vehicle on record with the Department of Motor Vehicles or with the equivalent agency in another state. "Owner" does not mean a vehicle rental or vehicle leasing company.

"Video-monitoring system" means a vehicle sensor installed to work in conjunction with a toll collection device that automatically produces one or more photographs, one or more microphotographs, a videotape, or other recorded images of each vehicle at the time it is used or operated in violation of this section.

B. The operator of any toll facility or the locality within which such toll facility is located may install and operate or cause to be installed and operated a video-monitoring system in conjunction with an automatic vehicle identification system on facilities for which tolls are collected for the use of such toll facility and that do not offer manual toll collection. A video-monitoring system shall include, but not be limited to, electronic systems that monitor and capture images of vehicles using a toll facility to

enable toll collection for vehicles that do not pay using a toll collection device. The operator of a toll facility shall send an invoice for unpaid tolls in accordance with the requirements of § 46.2-819.6 to the owner of a vehicle as part of a video-monitoring toll collection process, prior to seeking remedies under this section.

C. Information collected by a video-monitoring system in conjunction with an automatic vehicle identification system installed and operated pursuant to subsection B shall be limited exclusively to that information that is necessary for the collection of unpaid tolls and establishing when violations occur, including use in any proceeding to determine whether a violation occurred. Notwithstanding any other provision of law, all images or other data collected by a video-monitoring system in conjunction with an automatic vehicle identification system shall be protected in a database with security comparable to that of the Department of Motor Vehicles' system and used exclusively for the collection of unpaid tolls and for efforts to pursue violators of this section and shall not (i) be open to the public; (ii) be sold and/or used for sales, solicitation, or marketing purposes other than those of the toll facility operator to facilitate toll payment; (iii) be disclosed to any other entity except as may be necessary for the collection of unpaid tolls or to a vehicle owner or operator as part of a challenge to the imposition of a toll; and/or (iv) be used in a court in a pending action or proceeding unless the action or proceeding relates to a violation of this section or upon order from a court of competent jurisdiction. Except as provided above, information collected under this section shall be purged and not retained later than 30 days after the collection and reconciliation of any unpaid tolls, administrative fees, and/or civil penalties. Any entity operating a video-monitoring system in conjunction with an automatic vehicle identification system shall annually certify compliance with this section and make all records pertaining to such system available for inspection and audit by the Commissioner of Highways or the Commissioner of the Department of Motor Vehicles or their designee. Any violation of this subsection shall constitute a Class 1 misdemeanor. In addition to any fines or other penalties provided for by law, any money or other thing of value obtained as a result of a violation of this section shall be forfeited to the Commonwealth.

If a vehicle uses a toll facility without paying the toll, the owner or operator shall be in violation of this section if he refuses to pay the toll within 30 days of notification. The toll facility operator may impose and collect an administrative fee in addition to the unpaid toll so as to recover the expenses of collecting the unpaid toll, which administrative fee shall be reasonably related to the actual cost of collecting the unpaid toll and not exceed \$100 per violation. Such fee shall not be levied upon the owner or operator of the vehicle unless the toll has not been paid by the owner or operator within 30 days after receipt of the invoice for the unpaid toll, which nonpayment for 30 days shall constitute the violation of this section. Once such a violation has occurred, the owner or operator of the vehicle shall pay the unpaid tolls and any administrative fee detailed in the invoice for the unpaid toll issued by a toll facility operator. If paid within 60 days of the toll violation, the administrative fee shall not exceed \$25.

The toll facility operator may levy charges for the direct cost of use of and processing for a video-monitoring system and to cover the cost of the invoice, which are in addition to the toll and may not exceed double the amount of the base toll, provided that potential toll facility users are provided notice before entering the facility by conspicuous signs that clearly indicate that the toll for use of the facility could be tripled for any vehicle that does not have an active, functioning automatic vehicle identification device registered for and in use in the vehicle using the toll facility, and such signs are posted at a location where the operator can still choose to avoid the use of the toll facility if he chooses not to pay the toll.

A person receiving an invoice for an unpaid toll under this section may (a) pay the toll and administrative fees directly to the toll facility operator or (b) file with the toll facility operator a notice, on a form provided by the toll facility operator as required under subsection B of § 46.2-819.6, to contest liability for a toll violation. The notice to contest liability for a toll violation may be filed by any person receiving an invoice for an unpaid toll by mailing or delivering the notice to the toll facility operator within 60 days of receiving such invoice for an unpaid toll. Upon receipt of such notice, the toll facility operator may issue a summons pursuant to subsection I and may not seek withholding of registration or renewal thereof under subsection L until a court of competent jurisdiction has found the alleged violator liable for tolls under this section.

D. If the matter proceeds to court, the owner or operator of a vehicle shall be liable for a civil penalty as follows: for a first offense, \$50; for a second offense within one year from the first offense, \$100; for a third offense within two years from the second offense, \$250; and for a fourth and any subsequent offense within three years from the second offense, \$500; plus, in each case, the unpaid toll, all accrued administrative fees imposed by the toll facility operator, and applicable court costs if the vehicle is found, as evidenced by information obtained from a video-monitoring system in conjunction with an automatic vehicle identification system as provided in this section, to have used such a toll facility without payment of the required toll within 30 days of receipt of the invoice for the toll.

E. Notwithstanding subsections C and D, for a first conviction of an operator or owner of a vehicle under this section the total amount for the first conviction shall not exceed \$2,200, including civil penalties and administrative fees regardless of the total number of offenses the operator or owner of a vehicle is convicted of on that date.

F. No summons may be issued by a toll facility operator for a violation of this section unless the toll facility operator can demonstrate that (i) there was an attempt to collect the unpaid tolls and applicable administrative fees through debt collection not less than 30 days prior to issuance of the summons and (ii) 120 days have elapsed since the unpaid toll or, in a summons for multiple violations, 120 days have elapsed since the most recent unpaid toll noticed on the summons.

G. Any action under this section shall be brought in the general district court of the county or city in which the toll facility is located and shall be commenced within two years of the commission of the offense. Such action shall be considered a traffic infraction. The attorney for the Commonwealth may represent the interests of the toll facility operator. Any authorized agent or employee of a toll facility operator acting on behalf of a governmental entity shall be allowed the privileges accorded by § 16.1-88.03 in such cases.

H. Proof of a violation of this section shall be evidenced by information obtained from a video-monitoring system or automatic vehicle identification system as provided in this section. A certificate, sworn to or affirmed by a technician employed or authorized by the operator of a toll facility or by the locality wherein the toll facility is located, or a facsimile of such a certificate, based on inspection of photographs, microphotographs, videotapes, or other recorded images produced by a video-monitoring system or of electronic data collected by an automatic vehicle identification system, shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images or electronic data evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation under this section. A record of communication by an automatic vehicle identification device with the automatic vehicle identification system at the time of a violation of this section shall be prima facie evidence that the automatic vehicle identification device was located in the vehicle registered to use such device in the records of the Department of Transportation.

I. On a form prescribed by the Supreme Court, a summons for a violation of this section may be executed as provided in § 19.2-76.2. A summons for a violation of this section may set forth multiple violations occurring within one jurisdiction. Notwithstanding the provisions of § 19.2-76, a summons for a violation of unpaid tolls may be executed by mailing by first-class mail a copy thereof to the address of the owner or, if the owner has named and provided a valid address for the operator of the vehicle at the time of the violation in an affidavit executed pursuant to subsection J, such named operator of the vehicle. Such summons shall be signed either originally or by electronic signature. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3.

J. Upon a finding by a court of competent jurisdiction that the vehicle described in the summons issued pursuant to subsection I was in violation of this section, the court shall impose a civil penalty upon the owner or operator of such vehicle in accordance with the amounts specified in subsection D, together with applicable court costs, the operator's administrative fee, and the toll due. Penalties assessed as the result of action initiated by the Department of Transportation shall be remanded by the clerk of the court that adjudicated the action to the Department of Transportation's Toll Facilities Revolving Account. Penalties assessed as the result of action initiated by an operator of a toll facility other than the Department of Transportation shall be remanded by the clerk of the court that adjudicated the action to the treasurer or director of finance of the county or city in which the violation occurred for payment to the toll facility operator.

The owner of such vehicle shall be given reasonable notice by way of a summons as provided in subsection I that his vehicle had been used in violation of this section, and such owner shall be given notice of the time and place of the hearing as well as the civil penalty and costs for such offense.

It shall be prima facie evidence that the vehicle described in the summons issued pursuant to subsection I was operated in violation of this section. Records obtained from the Department of Motor Vehicles pursuant to subsection P and certified in accordance with § 46.2-215 or from the equivalent agency in another state and certified as true and correct copies by the head of such agency or his designee identifying the owner of such vehicle shall give rise to a rebuttable presumption that the owner of the vehicle is the person named in the summons.

Upon the filing of an affidavit by the owner of the vehicle with the toll facility operator within 14 days of receipt of an invoice for unpaid toll or a summons stating that such owner was not the operator of the vehicle on the date of the violation and providing the legal name and address of the operator of the vehicle at the time of the violation, an invoice for unpaid toll or summons, whichever the case may be, will also be issued to the alleged operator of the vehicle at the time of the offense.

In any action against a vehicle operator, an affidavit made by the owner providing the name and address of the vehicle operator at the time of the violation shall constitute prima facie evidence that the person named in the affidavit was operating the vehicle at all the relevant times relating to the matter named in the affidavit.

If the owner of the vehicle produces for the toll facility operator or the court a certified copy of a police report showing that the vehicle had been reported to the police as stolen prior to the time of the alleged offense and remained stolen at the time of the alleged offense, then the toll facility operator

shall not pursue the owner for the unpaid toll contained in the invoice for unpaid toll or the court shall dismiss the summons issued to the owner of the vehicle.

K. Upon a finding by a court that a person has two or more unpaid tolls and such person fails to pay the required penalties, fees, and unpaid tolls, then the court or toll facility operator shall notify the Commissioner of the Department of Motor Vehicles, who shall refuse to issue or renew any vehicle registration certificate of any applicant or the license plate issued for the vehicle driven in the commission of the offense or, when the vehicle is registered in a state with which the Commonwealth has entered into an agreement to enforce tolling violations pursuant to § 46.2-819.9, who shall provide to the entity authorized to issue vehicle registration certificates or license plates in the state in which the vehicle is registered sufficient evidence of the court's finding to take action against the vehicle registration certificate or license plates in accordance with the terms of the agreement, until the court has notified the Commissioner that such penalties, fees, and unpaid tolls have been paid. Upon receipt of such notification from the court, the Commissioner of the Department of Motor Vehicles shall notify the state where the vehicle is registered of such payment. If it is proven that the vehicle owner was not the operator at the time of the offense and upon a finding by a court that the person identified in an affidavit pursuant to subsection J as the operator violated this section and such person fails to pay the required penalties, fees, and unpaid tolls, the court shall notify the Commissioner, who shall refuse to issue or renew any vehicle registration certificate of any applicant or the license plate issued for any vehicle owned or co-owned by such person or, when such vehicle is registered in a state with which the Commonwealth has entered into an agreement to enforce tolling violations pursuant to § 46.2-819.9, who shall provide to the entity authorized to issue vehicle registration certificates or license plates in the state in which the vehicle is registered sufficient evidence of the court's finding to take action against the vehicle registration certificate or license plates in accordance with the terms of the agreement, until the court has notified the Commissioner that such penalties, fees, and unpaid tolls have been paid. Upon receipt of such notification from the court, the Commissioner of the Department of Motor Vehicles shall notify the state where the vehicle is registered of such payment. Such funds representing payment of unpaid tolls and all administrative fees of the toll facility operator shall be transferred from the court to the Department of Transportation's Toll Facilities Revolving Account or, in the case of an action initiated by an operator of a toll facility other than the Department of Transportation, to the treasurer or director of finance of the county or city in which the violation occurred for payment to the toll facility operator. The Commissioner shall collect a \$40 administrative fee from the owner or operator of the vehicle to defray the cost of processing and removing an order to deny registration or registration renewal.

L. If an owner of a vehicle has received at least one invoice for two or more unpaid tolls in accordance with § 46.2-819.6 by certified mail and has (i) failed to pay the unpaid tolls and administrative fees and (ii) failed to file a notice to contest liability for a toll violation, then the toll facility operator may notify the Commissioner, who shall, if no form contesting liability has been timely filed with the toll facility operator pursuant to this section, refuse to issue or renew the vehicle registration certificate of any applicant therefor or the license plate issued for any vehicle driven in the commission of the offense until the toll facility operator has notified the Commissioner that such fees and unpaid tolls have been paid.

If the vehicle owner was not the operator at the time of the offense and the person identified in an affidavit pursuant to subsection J as the operator has received at least one invoice for two or more unpaid tolls in accordance with § 46.2-819.6 by certified mail and such person has (a) failed to pay the unpaid tolls and administrative fees and (b) failed to file a notice to contest liability for a toll violation, then the toll facility operator may notify the Commissioner, who shall, if no form contesting liability has been timely filed with the toll facility operator pursuant to this section, refuse to issue or renew any vehicle registration certificate of any applicant therefor or the license plate issued for any vehicle owned or co-owned by such person until the toll facility operator has notified the Commissioner that such fees and unpaid tolls have been paid.

The Commissioner may only refuse to issue or renew any vehicle registration pursuant to this subsection upon the request of a toll facility operator if such toll facility operator has entered into an agreement with the Commissioner whereby the Commissioner will refuse to issue or renew any vehicle registration of any applicant therefor who owes unpaid tolls and administrative fees to the toll facility operator. The toll facility operator seeking to collect unpaid tolls and administrative fees through the withholding of registration or renewal thereof by the Commissioner as provided for in this subsection shall notify the Commissioner in the manner provided for in his agreement with the Commissioner and supply to the Commissioner information necessary to identify the violator whose registration or renewal is to be denied. The Commissioner shall charge a \$40 fee to defray the cost of processing and withholding the registration or registration renewal, and the toll facility operator may add this fee to the amount of the unpaid tolls and administrative fees. Any agreement entered into pursuant to the provisions of this subsection shall provide for the Department to send the violator notice of the intent to deny renewal of registration at least 30 days prior to the expiration date of a current vehicle registration and such notice shall include a form, as required under subsection B of § 46.2-819.6, to contest liability

of the underlying toll violation. The notice provided by the Commissioner shall include instructions for filing the form to contest liability with the toll facility operator within 21 days after the date of mailing of the Commissioner's notice. Upon timely receipt of the form, the toll facility operator shall notify the Commissioner, who shall refrain from withholding the registration or renewal thereof, after which the toll facility operator may proceed to issue a summons for unpaid toll. For the purposes of this subsection, notice by first-class mail to the registrant's address as maintained in the records of the Department shall be deemed sufficient.

M. Any vehicle rental or vehicle leasing company, if it receives an invoice for unpaid toll or is named in a summons, shall be released as a party to the action if it provides the operator of the toll facility a copy of the vehicle rental agreement or lease or an affidavit identifying the renter or lessee within 30 days of receipt of the invoice or summons. Upon receipt of such rental agreement, lease, or affidavit, an invoice for unpaid toll shall be mailed to the renter or lessee identified therein. Release of this information shall not be deemed a violation of any provision of the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) or the Insurance Information and Privacy Protection Act (§ 38.2-600 et seq.). The toll facility operator shall allow at least 30 days from the date of such mailing before pursuing other remedies under this section. In any action against the vehicle operator, a copy of the vehicle rental agreement, lease, or affidavit identifying the renter or lessee of the vehicle at the time of the violation is prima facie evidence that the person named in the rental agreement, lease, or affidavit was operating the vehicle at all the relevant times relating to the matter named in the summons.

N. Imposition of a civil penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the driving record of the person upon whom such civil penalty is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. ~~The provisions of § 46.2-395 shall not be applicable to any civil penalty, fee, unpaid toll, fine, or cost imposed or ordered paid under this section for a violation of this section.~~

O. The toll facility operator may offer to the owner an option to pay the unpaid toll and fees plus a reduced civil penalty of \$25 for a first or second offense or \$50 for a third, fourth, or subsequent offense, as specified on the summons, provided the owner actually pays to the toll facility operator the entire amount so calculated at least 14 days prior to the hearing date specified on the summons. If the owner accepts such offer and such amount is actually received by the toll facility operator at least 14 days prior to the hearing date specified on the summons, the toll facility operator shall move the court at least five business days prior to the date set for trial to dismiss the summons issued to the owner of the vehicle, and the court shall dismiss upon such motion.

P. The operator of a toll facility may enter into an agreement with the Department, in accordance with the provisions of subdivision B 21 of § 46.2-208, to obtain vehicle owner information regarding the owners of vehicles that fail to pay tolls required for the use of toll facilities and with the Department of Transportation to obtain any information that is necessary to conduct electronic toll collection. Such agreement may include any information that may be obtained by the Department of Motor Vehicles in accordance with any agreement entered into pursuant to § 46.2-819.9. Information provided to the operator of a toll facility shall be used only for the collection of unpaid tolls, and the operator of the toll facility shall be subject to the same conditions and penalties regarding release of the information as contained in subsection C.

Q. No person shall be subject to both the provisions of this section and to prosecution under § 46.2-819 for actions arising out of the same transaction or occurrence.

§ 46.2-819.5. Enforcement through use of photo-monitoring system or automatic vehicle identification system in conjunction with usage of Dulles Access Highway.

A. A photo-monitoring system or automatic vehicle identification system established at locations along the Dulles Access Highway, in order to identify vehicles that are using the Dulles Access Highway in violation of the Metropolitan Washington Airports Authority (Authority) regulation regarding usage, which makes violations of the regulation subject to civil penalties, shall be administered in accordance with this section. The civil penalties for violations of such regulation may not exceed the following: \$50 for the first violation; \$100 for a second violation within one year from the first violation; \$250 for a third violation within two years from the second violation; and \$500 for a fourth and any subsequent violation within three years from the second violation. In the event a violation of the Authority regulation is identified via the photo-monitoring system or automatic vehicle identification system, the operator of the Dulles Access Highway shall send a notice of the violation, of the applicable civil penalty and of any administrative fee calculated in accordance with subsection C to the registered owner of the vehicle identified by the system prior to seeking further remedies under this section. Upon receipt of the notice, the registered owner of the vehicle may elect to avoid any action by the operator to enforce the violation in court by waiving his right to a court hearing, pleading guilty to the violation, and paying a reduced civil penalty along with any applicable administrative fee to the operator. Should the recipient of the notice make such an election, the amount of the reduced civil penalty shall be as follows: \$30 for the first violation; \$50 for a second violation within one year from the first violation; \$125 for a third violation within two years from the second violation; and \$250 for a fourth and any subsequent violations within three years from the second violation.

B. Information collected by the photo-monitoring system or automatic vehicle identification system referenced in subsection A shall be limited exclusively to that information that is necessary for identifying those drivers who improperly use the Dulles Access Highway in violation of the Authority regulation. Notwithstanding any other provision of law, all photographs, microphotographs, electronic images, or other data collected by a photo-monitoring system or automatic vehicle identification system shall be used exclusively for the identification of violators and shall not (i) be open to the public; (ii) be sold or used for sales, solicitation, or marketing purposes; (iii) be disclosed to any other entity except as may be necessary for the identification of violators or to a vehicle owner or operator as part of a challenge to the imposition of a civil penalty; or (iv) be used in a court in a pending action or proceeding unless the action or proceeding relates to a violation of the Authority regulation governing usage of the Dulles Access Highway or upon order from a court of competent jurisdiction. Information collected by the system shall be protected in a database with security comparable to that of the Department of Motor Vehicles' system, and be purged and not retained later than 30 days after the collection and reconciliation of any civil penalties and administrative fees. The operator of the Dulles Access Highway shall annually certify compliance with this subsection and make all records pertaining to such system available for inspection and audit by the Commissioner of Highways or the Commissioner of the Department of Motor Vehicles or their designee. Any violation of this subsection shall constitute a Class 1 misdemeanor. In addition to any fines or other penalties provided for by law, any money or other thing of value obtained as a result of a violation of this subsection shall be forfeited to the Commonwealth.

C. The operator of the Dulles Access Highway may impose and collect an administrative fee, in addition to the civil penalty established by regulation, so as to recover the expenses of collecting the civil penalty, which administrative fee shall be reasonably related to the actual cost of collecting the civil penalty and shall not exceed \$100 per violation. Such fee shall not be levied upon the operator of the vehicle until a second violation has been documented within 12 months of an initial violation, in which case the fee shall apply to such second violation and to any additional violation occurring thereafter. If the recipient of the notice referenced in subsection A makes the election provided by that subsection, the administrative fee shall not exceed \$25.

D. If the election provided for in subsection A is not made, the operator of the Dulles Access Highway may proceed to enforce the violation in court. If the matter proceeds to court, the registered owner or operator of a vehicle shall be liable for the civil penalty set out in the Authority regulation governing usage of the Dulles Access Highway, any applicable administrative fees calculated in accordance with subsection C and applicable court costs if the vehicle is found, as evidenced by information obtained from a photo-monitoring system or automatic vehicle identification system as provided in this section, to have used the Dulles Access Highway in violation of the Authority regulation; provided, that the civil penalty may not exceed the amount of the penalty identified in subsection A.

E. Any action under this section shall be brought in the General District Court of the county in which the violation occurred.

F. Proof of a violation of the Authority regulation governing the use of the Dulles Access Highway shall be evidenced by information obtained from the photo-monitoring system or automatic vehicle identification system referenced in subsection A. A certificate, sworn to or affirmed by a technician employed or authorized by the operator of the Dulles Access Highway, or a facsimile of such a certificate, that is based on inspection of photographs, microphotographs, videotapes, or other recorded images or electronic data produced by the photo-monitoring system shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images or electronic data evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation under this section.

G. A summons issued under this section, which describes a vehicle that, on the basis of a certificate referenced in subsection F, is alleged to have been operated in violation of the Authority regulation governing usage of the Dulles Access Highway, shall be prima facie evidence that such vehicle was operated in violation of the Authority regulation.

H. Upon a finding by a court that the vehicle described in the summons issued under this section was in violation of the Authority regulation, the court shall impose a civil penalty upon the registered owner or operator of such vehicle in accordance with the penalty amounts specified in subsection D, together with any applicable court costs and applicable administrative fees calculated in accordance with subsection C. Civil penalties and administrative fees assessed as a result of an action initiated under this section and collected by the court shall be remanded by the clerk of the court that adjudicated the action to the treasurer or director of finance of the county or city in which the violation occurred for payment to the operator of the Dulles Access Highway.

The registered owner of a vehicle shall be given reasonable notice of an enforcement action in court by way of a summons that informs the owner that his vehicle has been used in violation of the Authority regulation governing the use of the Dulles Access Highway and of the time and place of the court hearing, as well as of the civil penalty and court costs for the violation. Upon the filing of an

affidavit with the court at least 14 days prior to the hearing date by the registered owner of the vehicle stating that he was not the driver of the vehicle on the date of the violation and providing the legal name and address of the operator of the vehicle at the time of the violation, a summons shall be issued to such alleged operator of the vehicle.

In any action against such a vehicle operator, an affidavit made by the registered owner providing the name and address of the vehicle operator at the time of the violation shall constitute prima facie evidence that the person named in the affidavit was operating the vehicle at all the relevant times relating to the matter addressed in the affidavit.

If the registered owner of the vehicle produces a certified copy of a police report showing that the vehicle had been reported to the police as stolen prior to the time of the alleged offense and remained stolen at the time of the alleged offense, then the court shall dismiss the summons issued to the registered owner of the vehicle.

I. Upon a finding by a court that a person has three or more violations of the Authority regulation governing the use of the Dulles Access Highway and has failed to pay the required civil penalties, administrative fees and court costs into the court, the court shall notify the Commissioner of the Department of Motor Vehicles, who shall refuse to issue or renew any vehicle registration certificate to or for such person or the license plate for the vehicle owned by such person until the court has notified the Commissioner that such civil penalties, fees, and costs have been paid. The Commissioner shall collect a \$40 administrative fee from such person to defray the cost of responding to court notices given pursuant to this subsection.

J. For purposes of this section, "operator of the Dulles Access Highway" means the Metropolitan Washington Airports Authority; "owner" means the registered owner of a vehicle on record with the Department of Motor Vehicles; "photo-monitoring system" means equipment that produces one or more photographs, microphotographs, videotapes, or other recorded images of vehicles at the time they are used or operated in violation of the Authority regulation governing the use of the Dulles Access Highway; "automatic vehicle identification system" means an electronic vehicle identification system that automatically produces an electronic record of each vehicle equipped with an automatic vehicle identification device that uses monitored portions of the Dulles Access Highway; and "automatic vehicle identification device" means an electronic device that communicates by wireless transmission with an automatic vehicle identification system.

K. Any vehicle rental or vehicle leasing company, if named in a summons, shall be released as a party to the action if it provides the operator of the Dulles Access Highway with a copy of the vehicle rental agreement or lease, or an affidavit that identifies the renter or lessee, prior to the date of hearing set forth in the summons. Upon receipt of such rental agreement, lease, or affidavit, a summons shall be issued to such renter or lessee. Release of this information shall not be deemed a violation of any provision of the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) or the Insurance Information and Privacy Protection Act (§ 38.2-600 et seq.). In any action against the renter or lessee, a copy of the vehicle rental agreement, lease, or affidavit identifying the renter or lessee of the vehicle at the time of the violation shall be prima facie evidence that the person named in the rental agreement, lease, or affidavit was operating the vehicle at all the relevant times relating to the matter named in the summons.

L. Imposition of a civil penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made a part of the driving record of the person upon whom such civil penalty is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. ~~The provisions of § 46.2-395 shall not be applicable to any civil penalty, administrative fee, or cost imposed or ordered paid under this section.~~

M. On a form prescribed by the Supreme Court, a summons for a violation of the Authority regulation governing the use of the Dulles Access Highway may be executed pursuant to § 19.2-76.2. The operator of the Dulles Access Highway or its personnel or agents mailing such summons shall be considered conservators of the peace for the sole and limited purpose of mailing such summons. Pursuant to § 19.2-76.2, the summons for a violation of the Authority regulation governing usage of the Dulles Access Highway may be executed by mailing by first-class mail a copy thereof to the address of the owner of the vehicle as shown on the records of the Department of Motor Vehicles or, if the registered owner or rental or leasing company has named and provided a valid address for the operator of the vehicle at the time of the violation as provided in this section, to the address of such named operator of the vehicle. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3.

N. The operator of the Dulles Access Highway may enter into an agreement with the Department of Motor Vehicles, in accordance with the provisions of subdivision B 21 of § 46.2-208, to obtain vehicle owner information regarding the registered owners of vehicles that improperly use the Dulles Access Highway. Information provided to the operator of the Dulles Access Highway shall only be used in the enforcement of the Authority regulation governing use of the Dulles Access Highway, and the operator shall be subject to the same conditions and penalties regarding release of the information as contained in

subsection B.

O. Should other vehicle recognition technology become available that is appropriate to be used for the purpose of monitoring improper usage of the Dulles Access Highway, the operator of the Dulles Access Highway shall be permitted to use any such technology that has been approved for use by the Virginia State Police, the Commonwealth of Virginia, or any of its localities.

P. All civil penalties paid to the operator of the Dulles Access Highway pursuant to this section shall be used by the operator of the Dulles Access Highway only for the operation and improvement of the Dulles Corridor, including the Dulles Toll Road.

§ 46.2-940. When arresting officer shall take person before issuing authority.

If any person is: (i) believed by the arresting officer to have committed a felony; (ii) believed by the arresting officer to be likely to disregard a summons issued under § 46.2-936; or (iii) refuses to give a written promise to appear under the provisions of § 46.2-936 or ~~§ 46.2-945~~, the arresting officer shall promptly take him before a magistrate or other issuing authority having jurisdiction and proceed in accordance with the provisions of § 19.2-82. The magistrate or other authority may issue either a summons or warrant as he shall determine proper.

§ 46.2-1200.1. Abandoning motor vehicles prohibited; penalty.

No person shall cause any motor vehicle to become an abandoned motor vehicle as defined in § 46.2-1200. In any prosecution for a violation of this section, proof that the defendant was, at the time that the vehicle was found abandoned, the owner of the vehicle shall constitute in evidence a rebuttable presumption that the owner was the person who committed the violation. Such presumption, however, shall not arise if the owner of the vehicle provided notice to the Department, as provided in § 46.2-604, that he had sold or otherwise transferred the ownership of the vehicle.

A summons for a violation of this section shall be executed by mailing a copy of the summons by first-class mail to the address of the owner of the vehicle as shown on the records of the Department of Motor Vehicles. If the person fails to appear on the date of return set out in the summons, a new summons shall be issued and delivered to the sheriff of the county, city, or town for service on the accused personally. If the person so served then fails to appear on the date of return set out in the summons, proceedings for contempt shall be instituted.

Any person convicted of a violation of this section shall be subject to a civil penalty of no more than \$500. ~~If any person fails to pay any such penalty, his privilege to drive a motor vehicle on the highways of the Commonwealth shall be suspended as provided in § 46.2-395.~~

All penalties collected under this section shall be paid into the state treasury to be credited to the Literary Fund as provided in § 46.2-114.

2. That § 46.2-395 and Article 18 (§§ 46.2-944.1 through 46.2-947) of Chapter 8 of Title 46.2 of the Code of Virginia are repealed.

3. That the Commissioner of the Department of Motor Vehicles shall reinstate a person's privilege to drive a motor vehicle that was suspended prior to July 1, 2019, solely pursuant to § 46.2-395 of the Code of Virginia and shall waive all fees relating to reinstating such person's driving privileges. Nothing in this act shall require the Commissioner to reinstate a person's driving privileges if such privileges have been otherwise lawfully suspended or revoked or if such person is otherwise ineligible for a driver's license.

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 1007

An Act to amend and reenact §§ 18.2-270.1, 18.2-270.2, 18.2-271.1, and 18.2-272 of the Code of Virginia, relating to driving under the influence; remote alcohol monitoring; penalty.

[S 439]

Approved April 9, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-270.1, 18.2-270.2, 18.2-271.1, and 18.2-272 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-270.1. Ignition interlock systems; penalty.

A. For purposes of this section and § 18.2-270.2:

"Commission" means the Commission on VASAP.

"Department" means the Department of Motor Vehicles.

"Ignition interlock system" means a device that (i) connects a motor vehicle ignition system to an analyzer that measures a driver's blood alcohol content; (ii) prevents a motor vehicle ignition from starting if a driver's blood alcohol content exceeds 0.02 percent; and (iii) is equipped with the ability to perform a rolling retest and to electronically log the blood alcohol content during ignition, attempted ignition, and rolling retest.

"Remote alcohol monitoring device" means an unsupervised mobile testing device with the ability to confirm the location and presence of alcohol in a person and that is capable of scheduled, random, and on-demand tests that provide immediate, or as-requested, results. A testing device may be worn or used by persons ordered by the court to provide measurements of the presence of alcohol in their blood.

"Rolling retest" means a test of the vehicle operator's blood alcohol content required at random intervals during operation of the vehicle, which triggers the sounding of the horn and flashing of lights if (i) the test indicates that the operator has a blood alcohol content which exceeds 0.02 percent or (ii) the operator fails to take the test.

B. In addition to any penalty provided by law for a conviction under § 18.2-51.4 or 18.2-266 or a substantially similar ordinance of any county, city, or town, any court of proper jurisdiction shall, as a condition of a restricted license, prohibit an offender from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system for any period of time not to exceed the period of license suspension and restriction, not less than six consecutive months without alcohol-related violations of the interlock requirements. The court shall, *as a condition of a restricted license* for a conviction under § 18.2-51.4, a second or subsequent offense of § 18.2-266 or a substantially similar ordinance of any county, city, or town, or as a condition of license restoration pursuant to subsection C of § 18.2-271.1 or § 46.2-391, require that such a system be installed on each motor vehicle, as defined in § 46.2-100, owned by or registered to the offender, in whole or in part, for ~~such~~ *any* period of time *not less than six consecutive months without alcohol-related violations of the interlock requirements*. Such condition shall be in addition to any purposes for which a restricted license may be issued pursuant to § 18.2-271.1. ~~The~~ *Whenever an ignition interlock system is required, the* court may order the installation of an ignition interlock system to commence immediately upon conviction. A fee of \$20 to cover court and administrative costs related to the ignition interlock system shall be paid by any such offender to the clerk of the court. The court shall require the offender to install an electronic log device with the ignition interlock system on a vehicle designated by the court to measure the blood alcohol content at each attempted ignition and random rolling retest during operation of the vehicle. The offender shall be enrolled in and supervised by an alcohol safety action program pursuant to § 18.2-271.1 and to conditions established by regulation under § 18.2-270.2 by the Commission during the period for which the court has ordered installation of the ignition interlock system. The offender shall be further required to provide to such program, at least quarterly during the period of court ordered ignition interlock installation, a printout from such electronic log indicating the offender's blood alcohol content during such ignitions, attempted ignitions, and rolling retests, and showing attempts to circumvent or tamper with the equipment. The period of time during which the offender (i) is prohibited from operating a motor vehicle that is not equipped with an ignition interlock system or (ii) is required to have an ignition interlock system installed on each motor vehicle owned by or registered to the offender, in whole or in part, shall be calculated from the date the offender is issued a restricted license by the court; however, such period of time shall be tolled upon the expiration of the restricted license issued by the court until such time as the person is issued a restricted license by the Department.

C. *However, upon motion of an offender, if (i) a conviction was under § 18.2-266 or a substantially similar ordinance of any county, city, or town; (ii) the conviction was for a first offense; (iii) the offender was an adult at the time of the offense; and (iv) the offender's blood alcohol content was less*

than 0.15, the only restriction of a restricted license that the court shall impose is to prohibit the offender from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system for not less than 12 consecutive months without alcohol-related violations of the interlock requirements.

D. In any case in which the court requires the installation of an ignition interlock system, the court shall order the offender not to operate any motor vehicle that is not equipped with such a system for the period of time that the interlock restriction is in effect. The clerk of the court shall file with the Department of Motor Vehicles a copy of the order, which shall become a part of the offender's operator's license record maintained by the Department. The Department shall issue to the offender for the period during which the interlock restriction is imposed a restricted license which shall appropriately set forth the restrictions required by the court under this subsection and any other restrictions imposed upon the offender's driving privilege, and shall also set forth any exception granted by the court under subsection ~~F~~ I.

~~D.~~ E. The court may, upon motion of an offender who is ineligible to receive a restricted license in accordance with subsection C, order that the offender (i) use a remote alcohol monitoring device for a period of time coextensive with the period of time of the prohibition imposed under subsection B and (ii) refrain from alcohol consumption during such period of time. Additionally, upon such motion and pursuant to § 18.2-271.1, the court may issue a restricted license to operate a motor vehicle for any purpose to a person who is prohibited from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system when such person is ordered to use a remote alcohol monitoring device pursuant to this subsection and has a functioning, certified ignition interlock system installed on each motor vehicle, as defined in § 46.2-100, owned by or registered to the offender, in whole or in part.

A fee of \$20 to cover court and administrative costs related to the remote alcohol monitoring device shall be paid by any such offender to the clerk of the court. The offender shall be enrolled in and supervised by an alcohol safety action program pursuant to § 18.2-271.1 and shall comply with all conditions established by regulation under § 18.2-270.2 by the Commission during the period for which the court has ordered the use of a remote alcohol monitoring device. The offender shall be further required to provide to such program, at least quarterly during the period of time the offender is ordered to use a remote alcohol monitoring device, a copy of the data from such device indicating the offender's blood alcohol content and showing attempts to circumvent or tamper with the device. The period of time during which the offender is required to use a remote alcohol monitoring device shall be calculated from the date the offender is issued a restricted license by the court; however, such period of time shall be tolled upon the expiration of the restricted license issued by the court until such time as the person is issued a restricted license by the Department.

F. The offender shall be ordered to provide the appropriate ASAP program, within 30 days of the effective date of the order of court, proof of the installation of the ignition interlock system, and, if applicable, proof that the offender is using a remote alcohol monitoring device. The Program shall require the offender to have the system and device monitored and calibrated for proper operation at least every 30 days by an entity approved by the Commission under the provisions of § 18.2-270.2 and to demonstrate proof thereof. The offender shall pay the cost of leasing or buying and monitoring and maintaining the ignition interlock system and the remote alcohol monitoring device. Absent good cause shown, the court may revoke the offender's driving privilege for failing to (i) timely install such system or use such device or (ii) have the system or device properly monitored and calibrated.

~~E.~~ G. No person shall start or attempt to start a motor vehicle equipped with an ignition interlock system for the purpose of providing an operable motor vehicle to a person who is prohibited under this section from operating a motor vehicle that is not equipped with an ignition interlock system. No person shall tamper with, or in any way attempt to circumvent the operation of, an ignition interlock system that has been installed in the motor vehicle of a person under this section. Except as authorized in subsection ~~F~~ I, no person shall knowingly furnish a motor vehicle not equipped with a functioning ignition interlock system to any person prohibited under subsection B from operating any motor vehicle ~~which~~ that is not equipped with such system. A violation of this subsection is punishable as a Class 1 misdemeanor.

H. No person shall tamper with, or in any way attempt to circumvent the operation of, a remote alcohol monitoring device that an offender is ordered to use under this section. A violation of this subsection is punishable as a Class 1 misdemeanor.

Any person who violates this subsection shall have his restricted license issued pursuant to subsection E, as it shall become effective on July 1, 2021, revoked. The court may, in its discretion and for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle in accordance with the terms of a restricted license issued pursuant to subsection E of § 18.2-271.1.

~~F.~~ I. Any person prohibited from operating a motor vehicle under subsection B may, solely in the course of his employment, operate a motor vehicle that is owned or provided by his employer without installation of an ignition interlock system, if the court expressly permits such operation as a condition of a restricted license at the request of the employer; such person shall not be permitted to operate any

other vehicle without a functioning ignition interlock system and, in no event, shall such person be permitted to operate a school bus, school vehicle, or a commercial motor vehicle as defined in § 46.2-341.4. This subsection shall not apply if such employer is an entity wholly or partially owned or controlled by the person otherwise prohibited from operating a vehicle without an ignition interlock system.

~~G.~~ J. The Commission shall promulgate such regulations and forms as are necessary to implement the procedures outlined in this section.

§ 18.2-270.2. Ignition interlock system and remote alcohol monitoring device; certification by Commission on VASAP; regulations; sale or lease; monitoring use; reports.

A. The Executive Director of the Commission on VASAP or his designee shall, pursuant to approval by the Commission, certify ignition interlock systems for use in ~~this~~ the Commonwealth and adopt regulations and forms for the installation, maintenance and certification of such ignition interlock systems.

The regulations adopted shall include requirements that ignition interlock systems:

1. Do not impede the safe operation of the vehicle;
2. Minimize opportunities to be bypassed, circumvented or tampered with, and provide evidence thereof;
3. Correlate accurately with established measures of blood alcohol content and be calibrated according to the manufacturer's specifications;
4. Work accurately and reliably in an unsupervised environment;
5. Have the capability to provide an accurate written measure of blood alcohol content for each ignition, attempted ignition, and rolling retest, and record each attempt to circumvent or tamper with the equipment;
6. Minimize inconvenience to other users;
7. Be manufactured or distributed by an entity responsible for installation, user training, service, and maintenance, and meet the safety and operational requirements promulgated by the National Highway Transportation Safety Administration;
8. Operate reliably over the range of motor vehicle environments or motor vehicle manufacturing standards;
9. Be manufactured by an entity which is adequately insured against liability, in an amount established by the Commission, including product liability and installation and maintenance errors;
10. Provide for an electronic log of the driver's experience with the system with an information management system capable of electronically delivering information to the agency supervising the interlock user within ~~twenty-four~~ 24 hours of the collection of such information from the datalogger; and
11. Provide for a rolling retest of the operator's blood alcohol content.

B. *The Executive Director of the Commission on VASAP or his designee shall, pursuant to approval by the Commission, certify remote alcohol monitoring devices for use in the Commonwealth and adopt regulations and forms for the installation, maintenance, and certification of such remote alcohol monitoring devices.*

C. Such regulations shall also provide for the establishment of a fund, using a percentage of fees received by the manufacturer or distributor providing ignition interlock services *or remote alcohol monitoring devices*, to afford persons found by the court to be indigent all or part of the costs of an ignition interlock system *or remote alcohol monitoring device*.

D. The Commission shall design and adopt a warning label to be affixed to an ignition interlock system *or remote alcohol monitoring device* upon installation. The warning label shall state that a person tampering with, or attempting to circumvent the ignition interlock system ~~shall be~~ *or remote alcohol monitoring device is* guilty of a Class 1 misdemeanor and, upon conviction, shall be subject to a fine or incarceration or both.

E. The Commission shall publish a list of certified ignition interlock systems *and remote alcohol monitoring devices* and shall ensure that such systems *and devices* are available throughout the Commonwealth. The local alcohol safety action program shall make the list available to eligible offenders, who shall have the responsibility and authority to choose which certified ignition interlock company *and certified remote alcohol monitoring company* will supply the offender's equipment. A manufacturer or distributor of an ignition interlock system *or a remote alcohol monitoring device* that seeks to sell or lease the ignition interlock system *or remote alcohol monitoring device* to persons subject to the provisions of § 18.2-270.1 shall pay the reasonable costs of obtaining the required certification, as set forth by the Commission.

~~B.~~ F. A person may not sell or lease or offer to sell or lease an ignition interlock system *or a remote alcohol monitoring device* to any person subject to the provisions of § 18.2-270.1 unless:

1. The system *or device* has been certified by the Commission; and
2. The warning label adopted by the Commission is affixed to the system.

~~C.~~ G. A manufacturer or distributor of an ignition interlock system *or remote alcohol monitoring device* shall provide such services as may be required at no cost to the Commonwealth. Such services shall include a toll free, ~~twenty-four-hour~~ 24-hour telephone number for the users of ignition interlock

systems or remote alcohol monitoring devices.

§ 18.2-271.1. Probation, education, and rehabilitation of person charged or convicted; person convicted under law of another state or federal law.

A. Any person convicted of a first or second offense of § 18.2-266, or any ordinance of a county, city, or town similar to the provisions thereof, or provisions of subsection A of § 46.2-341.24, shall be required by court order, as a condition of probation or otherwise, to enter into and successfully complete an alcohol safety action program in the judicial district in which such charge is brought or in any other judicial district upon such terms and conditions as the court may set forth. However, upon motion of a person convicted of any such offense following an assessment of the person conducted by an alcohol safety action program, the court, for good cause, may decline to order participation in such a program if the assessment by the alcohol safety action program indicates that intervention is not appropriate for such person. In no event shall such persons be permitted to enter any such program which is not certified as meeting minimum standards and criteria established by the Commission on the Virginia Alcohol Safety Action Program (VASAP) pursuant to this section and to § 18.2-271.2. However, any person charged with a violation of a first or second offense of § 18.2-266, or any ordinance of a county, city, or town similar to the provisions thereof, or provisions of subsection A of § 46.2-341.24, may, at any time prior to trial, enter into an alcohol safety action program in the judicial district in which such charge is brought or in any other judicial district. Any person who enters into such program prior to trial may pre-qualify with the program to have an ignition interlock system installed on any motor vehicle owned or operated by him. However, no ignition interlock company shall install an ignition interlock system on any such vehicle until a court issues to the person a restricted license with the ignition interlock restriction.

B. The court shall require the person entering such program under the provisions of this section to pay a fee of no less than \$250 but no more than \$300. A reasonable portion of such fee, as may be determined by the Commission on VASAP, but not to exceed 10 percent, shall be forwarded monthly to be deposited with the State Treasurer for expenditure by the Commission on VASAP, and the balance shall be held in a separate fund for local administration of driver alcohol rehabilitation programs. Upon a positive finding that the defendant is indigent, the court may reduce or waive the fee. In addition to the costs of the proceeding, fees as may reasonably be required of defendants referred for intervention under any such program may be charged.

C. Upon conviction of a violation of § 18.2-266 or any ordinance of a county, city or town similar to the provisions thereof, or subsection A of § 46.2-341.24, the court shall impose the sentence authorized by § 18.2-270 or 46.2-341.28 and the license revocation as authorized by § 18.2-271. In addition, if the conviction was for a second offense committed within less than 10 years after a first such offense, the court shall order that restoration of the person's license to drive be conditioned upon the installation of an ignition interlock system on each motor vehicle, as defined in § 46.2-100, owned by or registered to the person, in whole or in part, for a period of six months beginning at the end of the three year license revocation, unless such a system has already been installed for six months prior to that time pursuant to a restricted license order under subsection E. Upon a finding that a person so convicted is required to participate in the program described herein, the court shall enter the conviction on the warrant, and shall note that the person so convicted has been referred to such program. The court may then proceed to issue an order in accordance with subsection E, if the court finds that the person so convicted is eligible for a restricted license. If the court finds good cause for a person not to participate in such program or subsequently that such person has violated, without good cause, any of the conditions set forth by the court in entering the program, the court shall dispose of the case as if no program had been entered, in which event the revocation provisions of § 46.2-389 and subsection A of § 46.2-391 shall be applicable to the conviction. The court shall, upon final disposition of the case, send a copy of its order to the Commissioner of the Department of Motor Vehicles. If such order provides for the issuance of a restricted license, the Commissioner of the Department of Motor Vehicles, upon receipt thereof, shall issue a restricted license. The period of time during which the person (i) is prohibited from operating a motor vehicle that is not equipped with an ignition interlock system ~~or~~, (ii) is required to have an ignition interlock system installed on each motor vehicle owned by or registered to the person, in whole or in part, or (iii) is required to use a remote alcohol monitoring device shall be calculated from the date the person is issued a restricted license by the court; however, such period of time shall be tolled upon the expiration of the restricted license issued by the court until such time as the person is issued a restricted license by the Department of Motor Vehicles. Appeals from any such disposition shall be allowed as provided by law. The time within which an appeal may be taken shall be calculated from the date of the final disposition of the case or any motion for rehearing, whichever is later.

D. Any person who has been convicted under the law of another state or the United States of an offense substantially similar to the provisions of § 18.2-266 or subsection A of § 46.2-341.24, and whose privilege to operate a motor vehicle in this Commonwealth is subject to revocation under the provisions of § 46.2-389 and subsection A of § 46.2-391, may petition the general district court of the county or city in which he resides that he be given probation and assigned to a program as provided in subsection A and that, upon entry into such program, he be issued an order in accordance with subsection E. If the

court finds that such person would have qualified therefor if he had been convicted in this Commonwealth of a violation of § 18.2-266 or subsection A of § 46.2-341.24, the court may grant the petition and may issue an order in accordance with subsection E as to the period of license suspension or revocation imposed pursuant to § 46.2-389 or subsection A of § 46.2-391. The court (i) shall, as a condition of a restricted license, prohibit such person from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system for a period of time not to exceed the period of license suspension and restriction, not less than six consecutive months without alcohol-related violations of interlock requirements, and (ii) may, upon request of such person and as a condition of a restricted license, require such person to use a remote alcohol monitoring device in accordance with the provisions of subsection E of § 18.2-270.1, as it shall become effective on July 1, 2021. Such order shall be conditioned upon the successful completion of a program by the petitioner. If the court subsequently finds that such person has violated any of the conditions set forth by the court, the court shall dispose of the case as if no program had been entered and shall notify the Commissioner, who shall revoke the person's license in accordance with the provisions of § 46.2-389 or subsection A of § 46.2-391. A copy of the order granting the petition or subsequently revoking or suspending such person's license to operate a motor vehicle shall be forthwith sent to the Commissioner of the Department of Motor Vehicles. The period of time during which the person (a) is prohibited from operating a motor vehicle that is not equipped with an ignition interlock system or (b) is required to use a remote alcohol monitoring device shall be calculated from the date the person is issued a restricted license by the court; however, such period of time shall be tolled upon the expiration of the restricted license issued by the court until such time as the person is issued a restricted license by the Department of Motor Vehicles.

No period of license suspension or revocation shall be imposed pursuant to this subsection which, when considered together with any period of license suspension or revocation previously imposed for the same offense under the law of another state or the United States, results in such person's license being suspended for a period in excess of the maximum periods specified in this subsection.

E. Except as otherwise provided herein, whenever a person enters a certified program pursuant to this section, and such person's license to operate a motor vehicle, engine or train in the Commonwealth has been suspended or revoked, the court may, in its discretion and for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle for any of the following purposes: (i) travel to and from his place of employment; (ii) travel to and from an alcohol rehabilitation or safety action program; (iii) travel during the hours of such person's employment if the operation of a motor vehicle is a necessary incident of such employment; (iv) travel to and from school if such person is a student, upon proper written verification to the court that such person is enrolled in a continuing program of education; (v) travel for health care services, including medically necessary transportation of an elderly parent or, as designated by the court, any person residing in the person's household with a serious medical problem upon written verification of need by a licensed health professional; (vi) travel necessary to transport a minor child under the care of such person to and from school, day care, and facilities housing medical service providers; (vii) travel to and from court-ordered visitation with a child of such person; (viii) travel to a screening, evaluation and education program entered pursuant to § 18.2-251 or subsection H of § 18.2-258.1; (ix) travel to and from court appearances in which he is a subpoenaed witness or a party and appointments with his probation officer and to and from any programs required by the court or as a condition of probation; (x) travel to and from a place of religious worship one day per week at a specified time and place; (xi) travel to and from appointments approved by the Division of Child Support Enforcement of the Department of Social Services as a requirement of participation in an administrative or court-ordered intensive case monitoring program for child support for which the participant maintains written proof of the appointment, including written proof of the date and time of the appointment, on his person; (xii) travel to and from jail to serve a sentence when such person has been convicted and sentenced to confinement in jail and pursuant to § 53.1-131.1 the time to be served is on weekends or nonconsecutive days; (xiii) travel to and from the facility that installed or monitors the ignition interlock in the person's vehicle; ~~or~~ (xiv) travel to and from a job interview for which he maintains on his person written proof from the prospective employer of the date, time, and location of the job interview; or (xv) travel to and from the offices of the Virginia Employment Commission for the purpose of seeking employment. However, (a) any such person who is eligible to receive a restricted license as provided in subsection C of § 18.2-270.1 or (b) any such person ordered to use a remote alcohol monitoring device pursuant to subsection E of § 18.2-270.1, as it shall become effective on July 1, 2021, who has a functioning, certified ignition interlock system as required by law may be issued a restricted permit to operate a motor vehicle for any lawful purpose. No restricted license issued pursuant to this subsection shall permit any person to operate a commercial motor vehicle as defined in the Virginia Commercial Driver's License Act (§ 46.2-341.1 et seq.). The court shall order the surrender of such person's license to operate a motor vehicle to be disposed of in accordance with the provisions of § 46.2-398 and shall forward to the Commissioner of the Department of Motor Vehicles a copy of its order entered pursuant to this subsection, which shall specifically enumerate the restrictions imposed and contain such information regarding the person to whom such a permit is issued as is reasonably necessary to identify such person. The court shall also provide a copy of its order to the

person so convicted who may operate a motor vehicle on the order until receipt from the Commissioner of the Department of Motor Vehicles of a restricted license, if the order provides for a restricted license for that time period. A copy of such order and, after receipt thereof, the restricted license shall be carried at all times while operating a motor vehicle. Any person who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be *is* guilty of a violation of § 18.2-272. Such restricted license shall be conditioned upon enrollment within 15 days in, and successful completion of, a program as described in subsection A. No restricted license shall be issued during the first four months of a revocation imposed pursuant to subsection B of § 18.2-271 or subsection A of § 46.2-391 for a second offense of the type described therein committed within 10 years of a first such offense. No restricted license shall be issued during the first year of a revocation imposed pursuant to subsection B of § 18.2-271 or subsection A of § 46.2-391 for a second offense of the type described therein committed within five years of a first such offense. No restricted license shall be issued during any revocation period imposed pursuant to subsection C of § 18.2-271 or subsection B of § 46.2-391. Notwithstanding the provisions of § 46.2-411, the fee charged pursuant to § 46.2-411 for reinstatement of the driver's license of any person whose privilege or license has been suspended or revoked as a result of a violation of § 18.2-266, subsection A of § 46.2-341.24 or of any ordinance of a county, city or town, or of any federal law or the laws of any other state similar to the provisions of § 18.2-266 or subsection A of § 46.2-341.24 shall be \$105. Forty dollars of such reinstatement fee shall be retained by the Department of Motor Vehicles as provided in § 46.2-411, \$40 shall be transferred to the Commission on VASAP, and \$25 shall be transferred to the Commonwealth Neurotrauma Initiative Trust Fund.

F. The court shall have jurisdiction over any person entering such program under any provision of this section until such time as the case has been disposed of by either successful completion of the program, or revocation due to ineligibility or violation of a condition or conditions imposed by the court, whichever shall first occur. Revocation proceedings shall be commenced by notice to show cause why the court should not revoke the privilege afforded by this section. Such notice shall be made by first-class mail to the last known address of such person, and shall direct such person to appear before the court in response thereto on a date contained in such notice, which shall not be less than 10 days from the date of mailing of the notice. Failure to appear in response to such notice shall of itself be grounds for revocation of such privilege. Notice of revocation under this subsection shall be sent forthwith to the Commissioner of the Department of Motor Vehicles.

G. For the purposes of this section, any court which has convicted a person of a violation of § 18.2-266, subsection A of § 46.2-341.24 or any ordinance of a county, city or town similar to the provisions of § 18.2-266 shall have continuing jurisdiction over such person during any period of license revocation related to that conviction, for the limited purposes of (i) referring such person to a certified alcohol safety action program, (ii) providing for a restricted permit for such person in accordance with the provisions of subsection E, and (iii) imposing terms, conditions and limitations for actions taken pursuant to clauses (i) and (ii), whether or not it took either such action at the time of the conviction. This continuing jurisdiction is subject to the limitations of subsection E that provide that no restricted license shall be issued during a revocation imposed pursuant to subsection C of § 18.2-271 or subsection B of § 46.2-391 or during the first four months or first year, whichever is applicable, of the revocation imposed pursuant to subsection B of § 18.2-271 or subsection A of § 46.2-391. The provisions of this subsection shall apply to a person convicted of a violation of § 18.2-266, subsection A of § 46.2-341.24 or any ordinance of a county, city or town similar to the provisions of § 18.2-266 on, after and at any time prior to July 1, 2003.

H. The State Treasurer, the Commission on VASAP or any city or county is authorized to accept any gifts or bequests of money or property, and any grant, loan, service, payment or property from any source, including the federal government, for the purpose of driver alcohol education. Any such gifts, bequests, grants, loans or payments shall be deposited in the separate fund provided in subsection B.

I. The Commission on VASAP, or any county, city, town, or any combination thereof may establish and, if established, shall operate, in accordance with the standards and criteria required by this subsection, alcohol safety action programs in connection with highway safety. Each such program shall operate under the direction of a local independent policy board chosen in accordance with procedures approved and promulgated by the Commission on VASAP. Local sitting or retired district court judges who regularly hear or heard cases involving driving under the influence and are familiar with their local alcohol safety action programs may serve on such boards. The Commission on VASAP shall establish minimum standards and criteria for the implementation and operation of such programs and shall establish procedures to certify all such programs to ensure that they meet the minimum standards and criteria stipulated by the Commission. The Commission shall also establish criteria for the administration of such programs for public information activities, for accounting procedures, for the auditing requirements of such programs and for the allocation of funds. Funds paid to the Commonwealth hereunder shall be utilized in the discretion of the Commission on VASAP to offset the costs of state programs and local programs run in conjunction with any county, city or town and costs incurred by the Commission. The Commission shall submit an annual report as to actions taken at the close of each

calendar year to the Governor and the General Assembly.

J. Notwithstanding any other provisions of this section or of § 18.2-271, nothing in this section shall permit the court to suspend, reduce, limit, or otherwise modify any disqualification from operating a commercial motor vehicle imposed under the provisions of the Virginia Commercial Driver's License Act (§ 46.2-341.1 et seq.).

§ 18.2-272. Driving after forfeiture of license.

A. Any person who drives or operates any motor vehicle, engine or train in the Commonwealth during the time for which he was deprived of the right to do so (i) upon conviction of a violation of § 18.2-268.3 or 46.2-341.26:3 or of an offense set forth in subsection E of § 18.2-270, (ii) by § 18.2-271 or 46.2-391.2, (iii) after his license has been revoked pursuant to § 46.2-389 or 46.2-391, or (iv) in violation of the terms of a restricted license issued pursuant to subsection E of § 18.2-271.1, *subsection C of § 18.2-270.1, or subsection E of § 18.2-270.1, as it shall become effective on July 1, 2021*, is guilty of a Class 1 misdemeanor except as otherwise provided in § 46.2-391, and is subject to administrative revocation of his driver's license pursuant to §§ 46.2-389 and 46.2-391. Any person convicted of three violations of this section committed within a 10-year period is guilty of a Class 6 felony.

Nothing in this section or § 18.2-266, 18.2-270, or 18.2-271 shall be construed as conflicting with or repealing any ordinance or resolution of any city, town or county which restricts still further the right of such persons to drive or operate any such vehicle or conveyance.

B. Regardless of compliance with any other restrictions on his privilege to drive or operate a motor vehicle, it shall be a violation of this section for any person whose privilege to drive or operate a motor vehicle has been restricted, suspended or revoked because of a violation of § 18.2-36.1, 18.2-51.4, 18.2-266, 18.2-268.3, 46.2-341.24, or 46.2-341.26:3 or a similar ordinance or law of another state or the United States to drive or operate a motor vehicle while he has a blood alcohol content of 0.02 percent or more.

Any person suspected of a violation of this subsection shall be entitled to a preliminary breath test in accordance with the provisions of § 18.2-267, shall be deemed to have given his implied consent to have samples of his blood, breath or both taken for analysis pursuant to the provisions of § 18.2-268.2, and, when charged with a violation of this subsection, shall be subject to the provisions of §§ 18.2-268.1 through 18.2-268.12.

C. Any person who drives or operates a motor vehicle without a certified ignition interlock system as required by § 46.2-391.01 is guilty of a Class 1 misdemeanor and is subject to administrative revocation of his driver's license pursuant to §§ 46.2-389 and 46.2-391.

D. Any person who drives or operates a motor vehicle who has tampered with, or in any way attempted to circumvent the operation of, a remote alcohol monitoring device that an offender is ordered to use under § 18.2-270.1 is not guilty of a violation of this section but is guilty of a violation of subsection H of § 18.2-270.1.

2. That the provisions of subsection E of § 18.2-270.1 of the Code Virginia, as amended and reenacted by this act, shall become effective on July 1, 2021.

3. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 854 of the Acts of Assembly of 2019 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

Circuit Court Form CC-1508 CERTIFICATE OF RELEASE OF PROHIBITED
COVENANTS (new form)

Abstract House Bill 788 sets out the required form for release of prohibited covenants. Form CC-1508 has been created to facilitate the filing of this certificate.

Source House Bill 788 (Chapter 748, effective July 1, 2020)

Revision Legislative

Form Type Internet Master

CERTIFICATE OF RELEASE OF CERTAIN PROHIBITED COVENANTS

Commonwealth of Virginia VA. CODE § 55.1-300.1

..... Circuit Court

Place of Record

Date of Instrument containing prohibited covenant(s):

Instrument type: Instrument no.

..... DEED BOOK PAGE NO. or PLAT BOOK PAGE NO.

..... PARCEL IDENTIFICATION NUMBER/TAX MAP NUMBER

Name(s) of Grantor(s):

Name(s) of Current Owner(s):

Real property description:

.....

Brief description of prohibited covenant:

.....

The covenant in the above-mentioned instrument is released from the above-described real property to the extent that it contains terms purporting to restrict the ownership or use of the property as prohibited by subsection A of Va. Code § 36-96.6.

The undersigned is/are the legal owner(s) of the property described herein.

Given under my/our hand(s) this day of, 20.....

..... CURRENT OWNER

..... CURRENT OWNER

[] City [] County of State/Commonwealth of

The foregoing instrument was subscribed, sworn to, and acknowledged before me this day

of, 20.....

by

PRINT NAME OF SIGNATORY

..... PRINTED NAME

[] CLERK [] DEPUTY CLERK [] NOTARY PUBLIC

My commission expires

Registration no.

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 748

An Act to amend and reenact §§ 55.1-300 and 58.1-810 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 55.1-300.1, relating to restrictive covenants, deeds of reformation.

[H 788]

Approved April 6, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 55.1-300 and 58.1-810 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 55.1-300.1 as follows:

§ 55.1-300. Form of a deed.

Every deed and corrected or amended deed may be made in the following form, or to the same effect: "This deed, made the _____ day of _____, in the year _____, between (here insert names of parties as grantors or grantees), witnesseth: that in consideration of (here state the consideration, nominal or actual), the said _____ does (or do) grant (or grant and convey) unto the said _____, all (here describe the property or interest therein to be conveyed, including the name of the city or county in which the property is located, and insert covenants or any other provisions). Witness the following signature (or signatures)."

No deed recorded on or after July 1, 2020, shall contain a reference to the specific portion of a restrictive covenant purporting to restrict the ownership or use of the property as prohibited by subsection A of § 36-96.6. The clerk may refuse to accept any deed submitted for recordation that references the specific portion of any such restrictive covenant. The attorney who prepares or submits a deed for recordation has the responsibility of ensuring that the specific portion of such a restrictive covenant is not specifically referenced in the deed prior to such deed being submitted for recordation. A deed may include a general provision that states that such deed is subject to any and all covenants and restrictions of record; however, such provision shall not apply to the specific portion of a restrictive covenant purporting to restrict the ownership or use of the property as prohibited by subsection A of § 36-96.6. Any deed that is recorded in the land records on or after July 1, 2020, that mistakenly contains such a restrictive covenant shall nevertheless constitute a valid transfer of real property.

§ 55.1-300.1. Certificate of Release of Certain Prohibited Covenants.

Any restrictive covenant prohibited by subsection A of § 36-96.6 may be released by the owner of real property subject to such covenant by recording a Certificate of Release of Certain Prohibited Covenants. The real property owner may record such certificate (i) prior to recordation of a deed conveying real property to a purchaser or (ii) when such real property owner discovers that such prohibited covenant exists and chooses to affirmatively release the same. Such certificate may be prepared without assistance of an attorney, but shall conform substantially to the following Certificate of Release of Certain Prohibited Covenants form:

"CERTIFICATE OF RELEASE OF CERTAIN PROHIBITED COVENANTS

Place of Record: _____
Date of Instrument containing prohibited covenant(s): _____
Instrument Type: _____
Deed Book _____ Page _____ or Plat Book _____ Page _____
Name(s) of Grantor(s): _____
Name(s) of Current Owner(s): _____
Real Property Description: _____
Brief Description of Prohibited Covenant: _____

The covenant contained in the above-mentioned instrument is released from the above-described real property to the extent that it contains terms purporting to restrict the ownership or use of the property as prohibited by subsection A of § 36-96.6.

The undersigned is/are the legal owner(s) of the property described herein.
Given under my/our hand(s) this _____ day of _____, 20__.

(Current Owners)
Commonwealth of Virginia,
County/City of _____ to wit:

Subscribed, sworn to, and acknowledged before me by _____ this _____ day of _____, 20__.

My Commission Expires: _____

NOTARY PUBLIC

Notary Registration Number: _____

The clerk shall satisfy the requirements of § 17.1-228."

§ 58.1-810. What other deeds not taxable.

When the tax has been paid at the time of the recordation of the original deed, no additional recordation tax shall be required for admitting to record:

1. A deed of confirmation;
2. A deed of correction;
3. A deed to which a husband and wife are the only parties;
4. A deed arising out of a contract to purchase real estate; if the tax already paid is less than a proper tax based upon the full amount of consideration or actual value of the property involved in the transaction, an additional tax shall be paid based on the difference between the full amount of such consideration or actual value and the amount on which the tax has been paid; ~~or~~
5. A notice of assignment of a note secured by a deed of trust or mortgage; *or*
6. A *Certificate of Release of Certain Prohibited Covenants pursuant to § 55.1-300.1.*

Circuit Court Form CC-1643 CERTIFICATE OF PROPOSED GUARDIAN (new form)

Abstract Senate Bill 1072 prohibits the court from appointing as a guardian an attorney who has represented the petitioner in the last three years or an employee of a law firm that represented the petitioner within the same time period. The proposed guardian must certify to the court that they have disclosed any such conflicts of interest. This new form facilitates the certification of the proposed guardian and provides documentation to the court that any potential conflicts of interest have been disclosed.

Source Senate Bill 1072 (Chapter 649, effective July 1, 2020)

Revision Legislative

Form Type Internet Master

CERTIFICATION OF PROPOSED GUARDIAN
Commonwealth of Virginia VA. CODE § 64.2-2007

Court File No.

In the Circuit Court of the [] City [] County of

.....
NAME OF PROPOSED GUARDIAN

.....
NAME OF RESPONDENT

.....
NAME OF PETITIONER

I, the undersigned proposed guardian, certify the following:

[] Yes [] No I am an attorney and I have represented the petitioner within the last three calendar years. If yes, explain representation below.

.....
.....
.....
.....

[] Yes [] No I have been employed by a law firm that represented the petitioner within the last three calendar years. If yes, explain employment relationship below.

.....
.....
.....
.....

I hereby state that the above information is correct to the best of my knowledge.

.....
DATE

.....
SIGNATURE OF PROPOSED GUARDIAN

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 649

An Act to amend and reenact § 64.2-2007 of the Code of Virginia, relating to prohibition against appointing certain persons as guardian or conservator.

[S 1072]

Approved April 2, 2020

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-2007 of the Code of Virginia is amended and reenacted as follows:

§ 64.2-2007. Hearing on petition to appoint.

A. The respondent is entitled to a jury trial upon request, and may compel the attendance of witnesses, present evidence on his own behalf, and confront and cross-examine witnesses.

B. The court or the jury, if a jury is requested, shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones it for cause. The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

C. In determining the need for a guardian or a conservator and the powers and duties of any guardian or conservator, if needed, consideration shall be given to the following factors: (i) the limitations of the respondent; (ii) the development of the respondent's maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including advance directives and durable powers of attorney; (iv) the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; (v) the actions needed to be taken by the guardian or conservator; (vi) the suitability of the proposed guardian or conservator; and (vii) the best interests of the respondent.

D. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person, who may be the spouse of the respondent, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent. *Except for good cause shown, including a determination by the court that there is no acceptable alternative available to serve, the court shall not appoint as guardian or conservator for the respondent an attorney who has been engaged by the petitioner to represent the petitioner within three calendar years of the appointment. Such prohibition also applies to all other attorneys and employees of the law firm with which such attorney is associated. The court shall require the proposed guardian or conservator to certify at the time of appointment that he has disclosed to the court any such representation of the petitioner or association with a law firm that represented the petitioner within the three calendar years preceding the appointment. Compensation paid by a petitioner to an attorney or law firm for serving as a guardian or conservator shall not constitute representation of the petitioner by such attorney or law firm. In the case of a petitioner that is a medical care facility as defined in § 32.1-102.1, the court may, for good cause shown, order that the reasonable costs for the guardian or conservator be paid by the petitioner during the time the respondent is under the care of such medical care facility.*

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered.

Circuit Court Form	CC-1644	REPORT OF GUARDIAN FOR INCAPACITATED PERSON
	CC-1644 (SAMP)	SAMPLE REPORT OF GUARDIAN FOR INCAPACITATED PERSON
	CC-1682	ACCOUNT FOR INCAPACITATED ADULT
	CC-1682 (SAMP)	SAMPLE ACCOUNT FOR INCAPACITATED ADULT
	CC-1683	ACCOUNT FOR MINOR
	CC-1683 (SAMP)	SAMPLE ACCOUNT FOR MINOR

Abstract House Bill 1166 and Senate Bill 261 require that fiduciary accountings and reports of guardians be filed under oath. The language on the above-referenced forms has been revised to include the statement required by Va. Code § 8.01-4.3 to comply with the oath requirement.

Source House Bill 1166 (Chapter 372, effective July 1, 2020)/ Senate Bill 261 (Chapter 190, effective July 1, 2020)

Revision Legislative

Form Type Internet Master

REPORT OF GUARDIAN FOR AN INCAPACITATED PERSON

COMMONWEALTH OF VIRGINIA

VA. CODE § 64.2-2020

Name of Incapacitated Person:			
Address of Incapacitated Person:			
Circuit Court where Guardian appointed:		Age:	
Circuit Court Case No.:			
Date of Order of Appointment:		Date Qualified by Clerk:	
Guardian's Name:	.....	
Address:	.....	
Telephone Number:	.....	
Conservator's Name:	.....	
Address:	.....	
<input type="checkbox"/> Same as Guardian	.....	
Telephone Number:	.....	

Initial four-month report Annual report Final report

REASON FOR FILING FINAL REPORT

The period covered by this report is: to

1. Describe the incapacitated person's living arrangements:

.....

2. Describe the current mental, physical and social condition of the incapacitated person (attach additional pages if necessary):

Mental:

Physical:

Social:

State any changes in the condition of the incapacitated person in the past year:

.....

3. Describe all medical, educational, vocational and professional services provided to the incapacitated person for the period covered by this report, and state your opinion of the adequacy of the care received by the incapacitated person:

.....

4. State the number of times you visited the incapacitated person, the nature of your visits and describe your activities on behalf of the incapacitated person (Guardians are required to visit the incapacitated person as often as necessary to know of his or her capabilities, limitations, needs and opportunities):

.....
.....

5. State whether or not you agree with the current treatment or care plan:

.....
.....
.....

6. State your recommendation as to the need for continued guardianship, any recommended changes in the scope of the guardianship, and the steps to be taken to make those changes, and any other information useful, in your opinion, to a consideration of the guardianship:

.....
.....
.....
.....
.....

7. If you incurred expenses in exercising your duties as guardian and if you requested reimbursement or compensation for those expenses, itemize the expenses and list the person(s) from whom you requested reimbursement or compensation.:

.....
.....
.....
.....
.....

I ~~certify~~ declare, under penalty of perjury, that the information contained in this Annual Report is true and correct to the best of my knowledge.

.....
DATE

.....
SIGNATURE OF GUARDIAN

DSS Use Only:	
Date Received:	Date Reviewed:
..... REVIEWER'S SIGNATURE AND TITLE	

SAMPLE REPORT OF GUARDIAN FOR AN INCAPACITATED PERSON
COMMONWEALTH OF VIRGINIA
 VA. CODE § 64.2-2020

Name of Incapacitated Person:	Anna Jones		
Address of Incapacitated Person:	123 Charming Avenue, Little Town, Virginia 22000		
Circuit Court where Guardian appointed:	Fairfax, VA	Age:	48
Circuit Court Case No.:	00-000		
Date of Order of Appointment:	January 1, 2000	Date Qualified by Clerk:	January 1, 2000
Guardian's Name:	Jennifer Andrews		
Address:	200 Main Street Little Town, Virginia 22000		
Telephone Number:	(540) 555-0000		
Conservator's Name:	.....	
Address:	.....	
<input checked="" type="checkbox"/> Same as Guardian	.....	
Telephone Number:	.....	

Initial four-month report Annual report Final report

REASON FOR FILING FINAL REPORT

The period covered by this report is: May 1, 2018 to April 30, 2019

- Describe the incapacitated person's living arrangements:
 Ms. Anna Jones currently resides in her own apartment located in Little Town, VA. Anna previously resided in a group home but requested a more independent home. Anna is well supported and receives intensive support from residential staff. Additional support and monitoring are provided by her guardian, county case manager, and employer to ensure her safety.
- Describe the current mental, physical and social condition of the incapacitated person (attach additional pages if necessary):
 Anna is stable and receiving appropriate support for her mental, physical, and social needs.
 Mental: Moderate developmental disability, bi-polar disorder.
 Physical: Diabetes, sleep apnea.
 Social: Many friendships with neighbors and co-workers and her cousin out-of-state.
 State any changes in the condition of the incapacitated person in the past year:
 Anna moved to her new apartment in the last year. She continues to share that she is glad she made this move.
- Describe all medical, educational, vocational and professional services provided to the incapacitated person for the period covered by this report, and state your opinion of the adequacy of the care received by the incapacitated person:
 Anna continues to attend all of her medical, vocational, psychiatry, and psychology appointments. Anna receives appropriate services to help her with her daily routine and activities. Anna is interested in exploring a paying job in the coming year. Anna also receives case management services through Little Town Community Services Board. Her team, which includes a medical professional, her guardian, vocational staff and CSB staff, has proven to be effective at meeting Anna's needs and ensuring she has the life she desires.

4. State the number of times you visited the incapacitated person, the nature of your visits and describe your activities on behalf of the incapacitated person (Guardians are required to visit the incapacitated person as often as necessary to know of his or her capabilities, limitations, needs and opportunities):

The guardian saw Anna 15 times during the last 12 months and talked to her by phone weekly. Meetings take place at Anna's home and vocational programs where we discussed her life and her wishes for the future. The guardian reports this to her support team.

5. State whether or not you agree with the current treatment or care plan:

The current/treatment plan is appropriate and meets Anna's needs and abilities.

6. State your recommendation as to the need for continued guardianship, any recommended changes in the scope of the guardianship, and the steps to be taken to make those changes, and any other information useful, in your opinion, to a consideration of the guardianship:

Anna continues to need significant support from her guardian to make medical, health, social, housing, and employment decisions. She is working well with her guardian and team and her independence is growing. It is our hope that Anna's skills continue to advance, and she moves towards a more limited guardianship in future years.

7. If you incurred expenses in exercising your duties as guardian and if you requested reimbursement or compensation for those expenses, itemize the expenses and list the person(s) from whom you requested reimbursement or compensation.:

I am not requesting reimbursement for my work as Anna's guardian.

I ~~certify~~ declare, under penalty of perjury, that the information contained in this Annual Report is true and correct to the best of my knowledge.

DATE

SIGNATURE OF GUARDIAN

DSS Use Only:

Date Received: Date Reviewed:

REVIEWER'S SIGNATURE AND TITLE

ACCOUNT FOR INCAPACITATED ADULT
COMMONWEALTH OF VIRGINIA
 VA. CODE §§ 64.2-1206, 64.2-1308, 64.2-1305

Court File No.

Circuit Court of

Estate of, an incapacitated adult

Residence of incapacitated person:

Type of Fiduciary: Conservator Guardian Committee
 Trustee for ex-service person Limited Conservator

Name of fiduciary Day telephone

Mailing address

Name of other fiduciary Day telephone

Mailing address

This is account number one two three Is this a final account? yes no.

From (date of qualification or end of last account) to (end of this account)

ACCOUNT SUMMARY

1. Beginning Assets	\$
(from Parts 1, 2 and 5 of the inventory or from the prior account)	
2. Receipts*	.....
3. Gains on Asset Sales (attach itemized list)	.....
4. Adjustments (attach itemized list)	.....
5. Total of 1, 2, 3 and 4 (must equal Total on Line 10)	\$
<hr/>	
6. Disbursements (attach itemized list)	\$
7. Losses on Asset Sales (attach itemized list)	.....
8. Distributions (final account only) (attach itemized list)	.....
9. Assets on Hand (attach itemized list) (carrying value)	.....
10. Total of 6, 7, 8 and 9 (must equal Total on Line 5)	\$
<hr/>	

* Any amounts received as Designated Representative but not included in 2 above (see Va. Code § 64.2-1312). \$

** Market Value of Assets on Hand \$

I (We) certify/declare, under penalty of perjury, that this is a true and accurate accounting of the assets of this estate for the period described and that to the best of my/our knowledge all taxes have been paid or provided for.

Date Fiduciary's signature

Date Fiduciary's signature

NOTE: Virginia law requires that every account be signed by all fiduciaries.

SAMPLE ACCOUNT FOR INCAPACITATED ADULT
COMMONWEALTH OF VIRGINIA
 VA. CODE §§ 64.2-1206, 64.2-1308, 64.2-1305

Court File No.

Circuit Court of

Estate of, an incapacitated adult

Residence of incapacitated person:

Type of Fiduciary: Conservator Guardian Committee
 Trustee for ex-service person Limited Conservator

Name of fiduciary Day telephone

Mailing address

Name of other fiduciary Day telephone

Mailing address

This is account number one two three Is this a final account? yes no.
 From (date of qualification or end of last account) to (end of this account)

ACCOUNT SUMMARY

1. Beginning Assets (from Parts 1, 2 and 5 of the inventory or from the prior account)	\$ 102,306.65
2. Receipts*	\$ 37,328.08
3. Gains on Asset Sales (attach itemized list)	\$ 1,125.00
4. Adjustments (attach itemized list)	\$ 4,375.00
5. Total of 1, 2, 3 and 4 (must equal Total on Line 10)	\$ 145,134.73
6. Disbursements (attach itemized list)	\$ 34,085.00
7. Losses on Asset Sales (attach itemized list)	\$ 0.00
8. Distributions (final account only) (attach itemized list)	\$ 0.00
9. Assets on Hand (attach itemized list) (carrying value)	\$ 111,049.73
10. Total of 6, 7, 8 and 9 (must equal Total on Line 5)	\$ 145,134.73
* Any amounts received as Designed Representative but not included in 2 above. (See Va. Code Section 64.2-1312; Instruction III.A.)	\$ 3,000.00
** Market Value of Assets on Hand (See Instruction IX.D.)	\$ 111,799.73

I (We) certify/declare, under penalty of perjury, that this is a true and accurate accounting of the assets of this estate for the period described and that to the best of my/our knowledge all taxes have been paid or provided for.

Date Fiduciary's signature

Date Fiduciary' signature

NOTE: Virginia law requires that every account be signed by all fiduciaries.

RECEIPTS:

LMN Bank interest

6/25/06	53.51
7/25/06	54.17
8/25/06	55.73
9/25/06	56.59
10/25/06	56.82
11/25/06	57.80
12/25/06	58.99
1/25/07	59.40
2/25/07	60.10
3/25/07	60.95
4/25/07	61.44
5/25/07	62.30

STU Corporation, dividends

6/30/06	50.00
9/30/06	50.00
12/31/06	65.00
3/31/07	65.00

Employer's disability payments –	10 months @ \$490	4,900.00	
	2 months @ \$510	1,020.00	5,920.00

CDO Annuity – 12 months @ \$2,400	28,800.00
-----------------------------------	-----------

ABC Bank, interest

6/30/06	415.10
9/30/06	418.55
12/31/06	420.92
3/31/07	425.71

TOTAL RECEIPTS	37,328.08
----------------	-----------

GAINS ON ASSET SALES:

6/14/06 Net Proceeds of sale of 80 shares of NOP Company	5,125.00
less carrying value of	4,000.00
TOTAL GAINS	1,125.00

ADJUSTMENTS:

Correct 500 shares of STU Corp. from \$119.75 per share on Inventory to true Inventory value of \$128.50/share	59,875.00	
	<u>64,250.00</u>	
TOTAL ADJUSTMENTS:	4,375.00	

DISBURSEMENTS:

Check #			
#008 ABC Agency, bond premium Sunshine Nursing Home 6/06-5/07, 12 months @ \$2,785/month	490.00		
#009 Dr. John Doe	33,420.00		
#015 Dr. John Doe	50.00		
#024 Dr. Mary Roe	50.00		
	<u>75.00</u>		
TOTAL DISBURSEMENTS:	34,085.00		
LOSSES ON ASSET SALES – none			0.00
DISTRIBUTIONS – none			0.00

ASSETS ON HAND:

Fifth National Bank, Money Market Acct. #123789	20,907.73		
500 shares of STU Corp. at carrying value of \$128.50/share (5/31/07 market value of \$130/share = \$65,000)	64,250.00		
Third National Bank, Savings Acct.	25,892.00		
TOTAL ASSETS ON HAND			111,049.73

ACCOUNT FOR MINOR
COMMONWEALTH OF VIRGINIA
 VA. CODE §§ 64.2-1206, 64.2-1308

Court File No.

Circuit Court of

Estate of, a minor

Minor's date of birth: Is either parent alive? Yes No

Type of Fiduciary: Guardian Temporary Guardian

Name of Fiduciary Day telephone

Mailing address

Name of Co-fiduciary Day telephone

Mailing address

This is account number one two three or Is this a final account? yes no

From (date of qualification or end of last account) to (end of this account)

ACCOUNT SUMMARY

1. BEGINNING ASSETS (from Parts 1 and 2 of the inventory or from the prior account): \$

2. RECEIPTS* \$

..... \$

.....

.....

.....

.....

.....

Total Receipts \$

3. GAINS ON ASSET SALES:

..... \$

.....

Total Gains \$

4. ADJUSTMENTS:

..... \$

.....

Total Adjustments \$

GRAND TOTAL OF 1, 2, 3 and 4 (must equal GRAND TOTAL of 5-9) \$

* Any amounts received as Designated Representative but not included in 2 above (see Va. Code Section 64.2-1312). \$

5. DISBURSEMENTS FOR ADMINISTRATIVE EXPENSES:

..... \$
.....
.....
Total Administrative Expenses \$

6. DISBURSEMENTS FOR CARE OF THE MINOR:

..... \$
.....
.....
Total Care Disbursements \$

7. LOSSES ON ASSET SALES:

..... \$
.....
Total Losses \$

8. DISTRIBUTIONS

..... \$
.....
Total Distributions \$

9. ASSETS ON HAND:

..... \$
.....
.....
Total Assets on Hand \$

GRAND TOTAL (must equal GRAND TOTAL of 1-4) \$

I (We) hereby ~~certify~~ declare, under penalty of perjury, that this is a true and accurate accounting of the assets of this guardianship for the period described and that to the best of my (our) knowledge all taxes have been paid or provided for.

Date Guardian

Date Guardian

Date Guardian

SAMPLE ACCOUNT FOR MINOR
COMMONWEALTH OF VIRGINIA
VA. CODE §§ 64.2-1206, 64.2-1308

Court File No.

Circuit Court of

Estate of, a minor

Minor's date of birth: Is either parent alive? yes no.

Type of Fiduciary: Guardian Temporary Guardian

Name of Fiduciary

Day telephone

Mailing address

Name of Co-fiduciary Day telephone

Mailing address

This is account number one two three or Is this a final account? yes no

From (date of qualification or end of last account) to (end of this account)

ACCOUNT SUMMARY

1. BEGINNING ASSETS (from Parts 1 and 2 of the inventory or from the prior account):		\$ 39,460.15
2. RECEIPTS*		
Interest, XYZ Bank, CD, 9/30/06	\$ 600.24	
Interest, XYZ Bank, money market		
7/26/06	2.41	
8/26/06	2.43	
9/26/06	2.46	
10/26/06	2.51	
Dividend, ABC Stock, 3 rd quarter	97.42	
Total 2 Receipts		707.47
3. GAINS ON ASSET SALES:		
Sold 50 shares ABC stock on 10/15/06 for	11,016.18	
Carried at	10,000.00	
Total Gains		1,016.18
4. ADJUSTMENTS:		
100 shares DEF stock on 7/1/06	5,250.00	
incorrectly shown on Inventory at	5,000.00	
Total Adjustments		250.00
GRAND TOTAL (of 1, 2, 3 and 4 must equal GRAND TOTAL of 5-9)	\$ 41,433.80	41,433.80

* Any amounts received as Designated Representative but not included in 2 above. (See Va. Code Section 64.2-1312; Instruction III.A.) \$ 3,000.00

5. DISBURSEMENTS FOR ADMINISTRATIVE EXPENSES:

7/15/06 Safety Insurance Co., bond premium	\$ 79.00	
8/20/06 Commissioner of Accounts, inventory filing fee	113.00	
Total Administrative Expenses		\$ 192.00

6. DISBURSEMENTS FOR CARE OF THE MINOR:
(See Instruction VII., Note 1)

10/10/06 (description of qualifying expense)	211.50	
Total Care Disbursements		211.50

7. LOSSES ON ASSET SALES:

None	0.00	
Total Losses		0.00

8. DISTRIBUTIONS:

None	0.00	
Total Distributions		0.00

9. ASSETS ON HAND:

XYZ Bank, CD due 7/15/07	20,000.00	
XYZ Bank, Money Market Acct.	15,780.30	
DEF Stock, 100 shares @ 52.50/sh. (10/31/06 market value)	5,250.00	
(\$57.50/sh. = \$5,750.00)		
Total Assets on Hand		41,030.30

GRAND TOTAL of 5-9 (must equal GRAND TOTAL of 1-4)	\$ 41,433.80
--	--------------

I (We) hereby ~~certify~~ declare, under penalty of perjury, that this is a true and accurate accounting of the assets of this guardianship for the period described and that to the best of my (our) knowledge all taxes have been paid or provided for.

Date Guardian _____

Date Guardian _____

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 190

An Act to amend and reenact §§ 64.2-1305 and 64.2-2020 of the Code of Virginia, relating to accounts filed by fiduciaries and reports filed by guardians; civil penalty.

[S 261]

Approved March 6, 2020

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-1305 and 64.2-2020 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-1305. Conservators, guardians of minors' estates, committees, trustees under § 64.2-2016, and receivers.

A. Within six months from the date of the qualification, conservators, guardians of minors' estates, committees, and trustees under § 64.2-2016 shall exhibit before the commissioner of accounts a statement of all money and other property that the fiduciary has received, has become chargeable with, or has disbursed within four months from the date of qualification.

B. After the first account of the fiduciary has been filed and settled, the second and subsequent accounts for each succeeding 12-month period shall be due within four months from the last day of the 12-month period commencing on the terminal date of the preceding account unless the commissioner of accounts extends the period for filing upon reasonable cause.

C. For fiduciaries acting on behalf of Medicaid recipients, the fees charged by the commissioners of accounts under subsection A or B shall not exceed \$25.

D. Any account filed with the commissioner pursuant to this section shall be signed under oath by the fiduciary making such filing. If a fiduciary makes a false entry or statement in such a filing, he shall be subject to a civil penalty of not more than \$500. Such penalty shall be collected by the attorney for the Commonwealth or the county or city attorney, and the proceeds shall be deposited into the general fund.

§ 64.2-2020. Annual reports by guardians.

A. A guardian shall file an annual report in compliance with the filing deadlines in § 64.2-1305 with the local department of social services for the jurisdiction where the incapacitated person then resides. The annual report shall be on a form prepared by the Office of the Executive Secretary of the Supreme Court and shall be accompanied by a filing fee of \$5. The local department shall retain the fee in the jurisdiction where the fee is collected for use in the provision of services to adults in need of protection. Within 60 days of receipt of the annual report, the local department shall file a copy of the annual report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case. Twice each year the local department shall file with the clerk of the circuit court a list of all guardians who are more than 90 days delinquent in filing an annual report as required by this section. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 64.2-1305.

B. The annual report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person;
2. A description of the incapacitated person's living arrangements during the reported period;
3. The medical, educational, vocational, and other professional services provided to the incapacitated person and the guardian's opinion as to the adequacy of the incapacitated person's care;
4. A statement of the frequency and nature of the guardian's visits with and activities on behalf of the incapacitated person;
5. A statement of whether the guardian agrees with the current treatment or habilitation plan;
6. A recommendation as to the need for continued guardianship, any recommended changes in the scope of the guardianship, and any other information useful in the opinion of the guardian; and
7. The compensation requested and the reasonable and necessary expenses incurred by the guardian.

The guardian shall certify by signing under oath that the information contained in the annual report is true and correct to the best of his knowledge. If a guardian makes a false entry or statement in the annual report, he shall be subject to a civil penalty of not more than \$500. Such penalty shall be collected by the attorney for the Commonwealth or the county or city attorney, and the proceeds shall be deposited into the general fund.

C. If the local department of social services files notice that the annual report has not been timely filed in accordance with subsection A with the clerk of the circuit court, the court may issue a summons or rule to show cause why the guardian has failed to file such annual report.

**Standing Committee on Commissioners of Accounts
For the Virginia Judicial Council of The Supreme Court of Virginia**

**Leighton S. Houck, Chair
P. O. Box 1257
Lynchburg, VA 24505
Email: lhouck@caskiefrost.com
Phone: 434-846-2731**

September 9, 2020

VIA EMAIL: sabernathy@vacourts.gov

Ms. Sharon L. Abernathy
Chambers of Chief Justice Donald W. Lemons
Supreme Court of Virginia
100 North 9th Street
Richmond, VA 23219

Re: Proposed Revision of Rules of Procedure for Filing
Complaints Against Commissioners of Accounts

Dear Ms. Abernathy:

Thank you for speaking with me today concerning the Standing Committee's proposed Revision of the Rules of Procedure for Filing Complaints Against Commissioners of Accounts.

The Standing Committee on Commissioners of Accounts is requesting that the Rules of Procedure for Filing Complaints Against Commissioners of Accounts be revised. Enclosed is the Report of the Standing Committee dated September 9, 2020, with Attachment #1, the current Rules and Attachment #2, the proposed Revised Rules.

We request that this matter be considered for approval by the Judicial Council at the meeting now scheduled for October 20, 2020. If this matter is accepted for consideration, I would be pleased to appear at the October 20 meeting to present this matter to the Judicial Council.

I look forward to hearing from you and thank you for your consideration of the above.

Yours truly,



Leighton S. Houck, Chair
Standing Committee on
Commissioners of Accounts

LSH/sks
Enclosures

cc: Mr. Karl R. Hade (email: khade@vacourts.gov)
Ms. Alisa Padden, Esq. (email: apadden@vacourts.gov)

BEFORE THE JUDICIAL COUNCIL OF THE SUPREME COURT OF VIRGINIA

**REPORT OF THE STANDING COMMITTEE ON COMMISSIONERS OF ACCOUNTS
RE: REVISION OF RULES OF PROCEDURE
FOR FILING COMPLAINTS AGAINST COMMISSIONERS OF ACCOUNTS**

Comes now Leighton S. Houck, Chair of the Standing Committee on Commissioners of Accounts for the Judicial Council of Virginia and reports as follows.

On behalf of the Standing Committee, I am pleased to present to The Judicial Council of the Supreme Court of Virginia, this Report requesting revision of the current Rules of Procedure for Addressing Complaints and Inquiries to the Standing Committee on Commissioners of Accounts. The current Rules, adopted July 1, 2004 by the Judicial Council, are published in Chapter 3 of the Manual for Commissioners of Accounts (2019 Edition). See Attachment #1 labeled “Current Rules”. The Current Rules are also published on the Virginia Courts website at http://www.courts.state.va.us/courts/circuit/resources/coa/coa_complaints_chapter.pdf.

One of the primary functions of the Standing Committee is to receive and review Complaints filed against Commissioners of Accounts.¹ Most of these Complaints are filed by fiduciaries of estates or beneficiaries of estates. Most Complaints are filed *pro se*. The procedures for filing and handling of Complaints is now governed by the Current Rules. See Attachment #1.

Much has occurred since the adoption of the Current Rules. The volume of Complaints filed has increased significantly. During 2019, thirteen new Complaints and one Inquiry were

¹ The Standing Committee has 15 members, consisting of Circuit Court Judges, Commissioners of Accounts, Circuit Court Clerk, trust and estate attorneys and trust officers.

referred to the Standing Committee. During 2020, seven new Complaints and one Inquiry have been referred to the Standing Committee as of this time. I have served on the Standing Committee for over seven years and I do not remember the volume of Complaints being this large prior to 2019.

The Complaint or Inquiry is filed with the Executive Secretary of the Supreme Court of Virginia and then sent to the Chair of the Standing Committee. The Complaint is then referred by the Chair to a Subcommittee consisting of a Subcommittee Chair and two other Members. The Subcommittee processes the Complaint by reviewing it, then giving the opportunity to the Commissioner of Accounts to file a response, then meeting to discuss the Complaint and response. The Subcommittee then prepares its Report and then submits the Report to the entire Standing Committee for a review and decision. A telephone conference of the Standing Committee is then held to decide the matter. If the Standing Committee decides the matter in the Complaint should not go forward, then the matter is ended. If the Standing Committee decides the matter in the Complaint should go forward, then a copy of the Subcommittee Report is mailed to the Chief Judge of the Circuit Court and to the Chief Justice of the Supreme Court. The time spent by the Subcommittee and Standing Committee to process a Complaint is significant.

A Committee from the Standing Committee Members was formed to study revision to the Current Rules. The Committee consists of six Members who are also Commissioners of Accounts, namely, Jeannie Dahnk (Stafford County), Gary Lonergan (Alexandria), Jeff Garnett (Louisa County), Cullen Gibson (Norfolk), Frank Thomas (Orange County) and Leighton S. Houck (Lynchburg). The sessions began in January, 2020. Numerous drafts and redrafts were prepared and exchanged. The Committee labored through some five telephone conferences to arrive at our

final draft. The latest draft, dated June 25, 2020, is attached as and labeled “Proposed Revised Rules”. See Attachment #2.

The Standing Committee has authorized the Chair to present the Proposed Revised Rules to the Judicial Council and to request their adoption by the Judicial Council.

THE CURRENT RULES NEED TO BE REVISED

It is the view of the Standing Committee that the Current Rules should be revised. The reasons include the following:

1. The Current Rules require that all Complaints and Inquiries be referred to a Subcommittee for processing. The Current Rules do not address screening of the Complaint by the Chair prior to the Complaint being referred to a Subcommittee. The Current Rules do not authorize the Chair to screen the Complaint and to decline to accept it if it is determined to be inadequate. Complaints are received from time to time that are, clearly, not worthy of being submitted to a Subcommittee and the entire Standing Committee. The time and effort that the Subcommittee and Members put into processing Complaints is substantial. It is believed that some of this time would and should be reduced by adopting the Proposed Revised Rules. There is limited screening by the Executive Secretary’s Office as to new Complaints that are filed. The Proposed Revised Rules give flexibility to the Chair to make a preliminary review of a Complaint before it is referred to a Subcommittee and to decline to accept a Complaint that is inadequate for the reasons stated in the Rules.

2. Also, the Proposed Revised Rules do not include “Inquiries” which are included in the Current Rules. The term “Inquiries” is vague and indefinite. Inquiries provide a way for a

potential Complainant to make *ex parte* contacts with the Standing Committee seeking information and positions which might disadvantage other interested parties if a Complaint is subsequently filed with the Executive Secretary. The Standing Committee is not able to ascertain why the inquiry is requested until after the matter is heard and until it becomes obvious that the inquirer is seeking *ex parte* advantages which could disadvantage other interested parties and which could result in recusal by the Members of the Standing Committee. It is improper for a potential Complainant to first seek an “Inquiry”, the answer to which might affect the merits of a subsequent Complaint.

The Current Rules, IV(C), require the Chair “to refer the Complaint or **Inquiry...** (emphasis added)” to a three-member Subcommittee. The Current Rules require the Inquiry to be processed exactly like a Complaint. This is an awkward process.

Inquiries should be eliminated.

3. Members of the Standing Committee have commented that they believe the Current Rules, in a number of respects, are ambiguous, vague and indefinite. The Proposed Revisions rewrite the Rules to eliminate the ambiguities, vagueness and indefiniteness and to make the Rules more understandable for persons considering filing a Complaint.

4. The Current Rules have no provision for conflicts of interest. The Proposed Revised Rules provide procedures to be used in the event of a conflict of interest or other situations where the Chair declines or is unable to act. The Proposed Revised Rules provide for a Vice Chair who can handle a matter when the Chair declines or is unable to act.

5. The Current Rules make no mention of a request for a rehearing by a Complainant or the Commissioner. The Proposed Revised Rules provide that a rehearing is not permitted except within the sole discretion of the Chair.

6. The Proposed Revised Rules provide that issues pending before, or issues decided by, the Circuit Court should not be included in a Complaint to the Standing Committee.

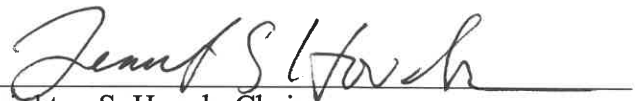
The Proposed Revised Rules will provide Complainants who are contemplating filing a Complaint a clearer view of the issues which will qualify for review by the Standing Committee.

CONCLUSION

Thank you for the opportunity to bring this matter before the Judicial Council. The Standing Committee respectfully states that the Current Rules should be replaced and that the Proposed Revised Rules should be adopted.

The Chair requests that he be permitted to appear before the Judicial Council at its next meeting to present this Report.

DATED: September 9, 2020.



Leighton S. Houck, Chair
Standing Committee on Commissioners of Accounts
P. O. Box 1257
Lynchburg, VA 24504

CHAPTER 3

COMPLAINTS AGAINST COMMISSIONERS

The Standing Committee on Commissioners of Accounts has been charged by the Supreme Court of Virginia with seven functions, one of which is the investigation of complaints against commissioners of accounts. This charge specifically requires the Standing Committee:

To receive complaints and inquiries concerning the performance of commissioners of accounts and to evaluate the complaints and inquiries; attempt to resolve the issues and for any complaint deemed worthy, refer the complaint with or without recommendations, to the chief judge of the circuit court having jurisdiction over the commissioners of accounts, with a copy of the referral being sent to the Chief Justice of the Supreme Court of Virginia.

Based on the complaints received over the years, the Committee observes that they fall into several categories, including:

1. Failure to employ the enforcement tools (e.g., the Summons, the Report to the Court, and the Petition to Show Cause) that are available to commissioners to enforce timely filing of inventories and accounts, which ensures that interested parties are informed as to the progress of administration;

- 2 Failure to resolve issues or objections by conducting hearings (e.g., on inventories and accounts pursuant to Va. Code § 64.2-1204 or 64.2-1209) with reports to the court to which disgruntled beneficiaries can file exceptions with the court; and

- 3 Failure to have a viable system to allow lay fiduciaries, attorneys, and accountants to communicate cooperatively with commissioners about the often complicated task of completing filings (e.g., staff reluctance to provide instructional information, failure to return telephone calls, and use of enforcement procedures rather than preliminary communication efforts).

The manner in which a commissioner's office interacts with fiduciaries, beneficiaries, creditors, or other's having an interest in an estate can be instrumental in avoiding a complaint and the additional time, embarrassment, and effort required of a commissioner in resolving it.

Paragraph 2.202 of this Manual describes the duties of a commissioner, which include educating users about the system, and lists a number of aspirational characteristics. These traits include "high quality service"; "a temperament that is patient and understanding, yet firm and impartial"; "an

ability to deal courteously with the public and fiduciaries of all types” as well as court personnel, attorneys, and the court; and “the ability to find practical solutions to problems.”

This chapter contains the “Rules for Addressing Complaints and Inquiries to the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia.” As the introduction shows, these rules were developed pursuant to an additional charge received by the Standing Committee from the Chief Justice of the Supreme Court of Virginia and additional instructions from the Judicial Council. The rules set forth in this chapter were given final approval by the Standing Committee on June 2, 2004 and were approved by the Judicial Council on June 21, 2004.

RULES FOR ADDRESSING COMPLAINTS AND INQUIRIES TO THE STANDING COMMITTEE ON COMMISSIONERS OF ACCOUNTS OF THE JUDICIAL COUNCIL OF VIRGINIA

I. INTRODUCTION

By letter of June 18, 2002, the Chief Justice of the Supreme Court of Virginia added an additional charge to the six charges already given the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia with regard to the performance of Commissioners of Accounts. In that charge he enjoined the Standing Committee:

To review and investigate complaints concerning the performance of Commissioners of Accounts.

To implement the additional charge, the Judicial Council resolved:

(1) that the Standing Committee’s charge be expanded to give it authority to receive, directly or by referral from the Virginia State Bar, complaints and inquiries concerning the performance of Commissioners of Account, (2) authorize it to evaluate such complaints and inquiries, (3) authorize it to attempt to resolve the issues with the Commissioners of Accounts, and (4) authorize it to refer the complaint or inquiry with or without recommendations to the chief judge of the circuit court having jurisdiction over the Commissioner of Accounts with a copy of the referral being sent to the Chief Justice.

The following Rules have been adopted by the Standing Committee on Commissioners of Accounts in order to implement in an orderly way the additional charge of the Chief Justice and the resolution of the Judicial Council.

II. RULES

A. Applicability. These Rules shall govern procedures for addressing Complaints and Inquiries to and handling them by the Standing Committee on Commissioners of Accounts.

B. Gender. The words “he,” “him,” “his,” or similar words as used in these Rules are intended to include both the feminine and the masculine.

C. Exceptions. When the interests of justice require and for good cause, the Standing Committee may waive the requirements of all or any portion of these Rules.

III. DEFINITIONS

A. Standing Committee shall mean the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia.

B. Member or Members shall mean a member or members of the Standing Committee.

C. Commissioner or Commissioner of Accounts shall mean the person, including a Commissioner of Accounts, an Assistant Commissioner of Accounts, or a Deputy Commissioner of Accounts, concerning whom the Standing Committee is reviewing, investigating and evaluating a complaint or inquiry.

D. Meeting shall include a gathering of individuals either in person or by telephone conference call.

E. Document shall mean any writing including but not limited to a letter, notice, exhibit, chart, table, photograph or any of the above preserved in electronic form.

F. Presiding member shall mean the Chair or any other Standing Committee member who presides at any meeting conducted by the Standing Committee or a Subcommittee thereof pursuant to these Rules.

IV. PROCEDURE FOR HANDLING COMPLAINTS AND INQUIRIES

A. The Standing Committee requests that all Complaints and Inquiries be submitted in writing to the Executive Secretary of the Supreme Court of Virginia, 100 N. 9th Street, Richmond, VA 23219. A Complaint or Inquiry must be made in writing, be legible, state as clearly and succinctly as possible its basis, be signed by the person or persons making it, and be

submitted with the name, address and daytime telephone number of the Complainant. If a Complaint or Inquiry shall come into the possession of the Standing Committee from a source other than the Executive Secretary of the Supreme Court, the Standing Committee shall, at its discretion, handle the Complaint or return it to the Complainant with instructions that it be sent to the Executive Secretary of the Supreme Court.

B. The Executive Secretary shall promptly acknowledge receipt of the Complaint or Inquiry and forward it to the Chair of the Standing Committee.

C. The Chair of the Standing Committee shall refer the Complaint or Inquiry to a Subcommittee consisting of three members of the Standing Committee and shall specify which of the three shall be the Chair. The Subcommittee shall consist of one Member of the Standing Committee who is a Commissioner of Accounts and two Members of the Standing Committee who are not Commissioners of Accounts. The Chair of the Standing Committee shall send a copy of the Complaint or Inquiry to all three Members of the Subcommittee.

D. Upon receipt of a referral from the Chair of the Standing Committee, the Chair of the Subcommittee shall begin the Investigation or Evaluation. The Chair and Members of the Subcommittee shall have broad discretion as to the procedure which they shall employ in conducting the investigation. At a minimum, however, one or more Members (a Member of the Subcommittee noted herein shall include the Chair of the Subcommittee) must make contact with the Complainant either personally, by telephone, in writing, or more than one of the above, and must give the Complainant a full opportunity to amplify his Complaint or Inquiry. The Commissioner must be given a copy of the Complaint or Inquiry and the amplification furnished the Subcommittee. Upon receipt of the amplification of the Complaint or Inquiry, the Members of the Subcommittee shall consult with one another, either in a meeting or by an exchange of written correspondence forwarded by mail, facsimile, private delivery or e-mail, at the conclusion of which a vote shall be taken on the question of whether or not the Investigation shall proceed further. The question shall be resolved by majority vote.

E. If the Subcommittee shall decide not to proceed further, it shall prepare a Report to that effect to the Standing Committee, which Report will embody enough detail of the Subcommittee's Findings to inform the Standing Committee of the grounds for its decision. Thereafter, the Standing Committee shall decide by majority vote whether to confirm or reject the Report of the Subcommittee. If the Standing Committee shall decide to confirm the Report of the Subcommittee, the Chair of the Standing Committee shall

instruct the Subcommittee to draft a letter to the Complainant for the signature of the Chair of the Standing Committee setting out the decision of the Subcommittee and the Standing Committee. The Chair of the Standing Committee shall have the power to make editorial changes and changes in style to the letter before it is sent to the Complainant. A copy of the letter shall be sent to the Commissioner of Accounts. If the Standing Committee shall decide to reject the Report of the Subcommittee, the Chair of the Standing Committee shall, following the Instructions of the Standing Committee, re-refer the matter to the same Subcommittee or refer the matter to another Subcommittee with the Instructions that the Commissioner of Accounts be asked for a response.

F. In investigating and evaluating the Complaint or Inquiry, the Subcommittee may request written submissions from the parties and/or confer with the parties. Additional information—verbal, written, or both—may be obtained from outside sources. All information obtained shall be made available to the Complainant and the Commissioner. The Subcommittee, in carrying out the authority granted the Standing Committee in Paragraph (3) of the Resolution of the Judicial Council (“ . . . to attempt to resolve the issues with the Commissioners of Account”) may attempt to reach such a resolution by consulting with the Complainant and the Commissioner separately and/or convening them together for one or more mediation sessions.

G. If the matters of disagreement between the Complainant and the Commissioner are resolved by agreement between the Complainant and the Commissioner, a brief written summary of the agreement shall be signed by the Complainant, the Commissioner, and the Chair of the Subcommittee, and a copy shall be furnished to each person. A copy shall also be furnished by the Chair of the Subcommittee to the Chair of the Standing Committee who shall inform the other Members of the Standing Committee that the matter has been resolved by agreement but shall not circulate copies of the Document to the other Members of the Standing Committee unless he finds there is a particular reason to do so.

H. If the matters of disagreement are not resolved by agreement between the Complainant and the Commissioner, the Subcommittee shall proceed with its Investigation and Evaluation and reach a decision based thereon. The decision shall be reached by a majority vote of the Subcommittee.

I. When the Subcommittee has reached a decision, the Chair of the Subcommittee shall prepare or request another Member of the Subcommittee to prepare a Report setting forth the Subcommittee’s decision and its reasons therefor. The Report shall be submitted to the Subcommittee, and when it shall have been approved by the Subcommittee—either as originally drafted

or as subsequently revised—it shall be submitted to the Chair of the Standing Committee. Any Member of the Subcommittee who voted against the Report shall have the right to submit a Minority Report to the Chair of the Standing Committee.

J. The Chair of the Standing Committee shall promptly circulate the Report to all Members of the Standing Committee who are not Members of the Subcommittee. At the following meeting of the Standing Committee, whether a regularly scheduled meeting or a meeting called specifically for the purpose, the Standing Committee, including the Members of the Subcommittee, shall consider the Subcommittee Report and the Minority Report, if any. The Standing Committee may approve the Report; conduct a further investigation following which it may approve the original Report or amend the Report and approve it as amended; or reject the Report and either prepare its own Report, recommit the matter to the Subcommittee which has previously acted, or refer the matter to another Subcommittee with such instructions as it shall decide to give. The Reports of the Subcommittee and the Standing Committee must contain a recommendation as to whether the matter should be referred to the Chief Judge of the Circuit from which the Commissioner has been appointed, and if so whether or not such Report shall contain a recommendation.

V. PROCEDURE FOR REFERRING A DECISION OF THE STANDING COMMITTEE

Regardless of the Decision of the Standing Committee in its final Report, the Report shall be transmitted by Certified Mail, Return Receipt Requested, to the Complainant and the Commissioner of Accounts. In addition to those notifications, if the Standing Committee shall decide to refer the Complaint, with or without recommendations, to the Chief Judge of the Circuit Court having jurisdiction over the Commissioner, the Report shall be transmitted by Certified Mail, Return Receipt Requested, to such Chief Judge and to the Chief Justice of the Supreme Court of Virginia.

VI. EFFECTIVE DATE

These Rules shall be effective July 1, 2004.

DRAFT OF PROPOSED REVISED RULES

STANDING COMMITTEE

ON

COMMISSIONERS OF ACCOUNTS

OF THE

JUDICIAL COUNCIL OF VIRGINIA

**RULES FOR ADDRESSING COMPLAINTS
AGAINST COMMISSIONERS OF ACCOUNTS**

The Standing Committee on Commissioners of Accounts has been charged by the Supreme Court of Virginia to investigate Complaints against Commissioners of Accounts.

These Rules establish and govern the procedures of the Standing Committee on Commissioners of Accounts for addressing and handling Complaints properly received against any Commissioner.

Members of the Standing Committee are appointed to serve as such by the Chief Justice of the Supreme Court of Virginia for a term set by the Chief Justice.

When the interests of justice or necessity require, the Chair of the Standing Committee may waive the requirements of any portion of these Rules.

All questions before the Standing Committee shall be resolved by majority vote of a Quorum of those present.

DEFINITIONS

A. Gender. The pronouns "he", "him", "his", "she", "her", "hers" or similar words as used in these Rules are intended to include both the masculine and the feminine, or vice versa.

B. "*Standing Committee*" shall mean the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia.

C. "*Member*" or "*Members*" shall mean a Member or Members of the Standing Committee or any Subcommittee thereof, duly appointed as such by the Chief Justice of the Supreme Court of Virginia.

D. "*Commissioner*" or "*Commissioner of Accounts*" shall mean the person, including a Commissioner of Accounts, an Assistant Commissioner of Accounts, a Deputy Commissioner of Accounts or an Acting Commissioner of Accounts appointed pursuant to a court order, concerning whom the Standing Committee is reviewing, investigating and evaluating a Complaint.

E. "*Meeting*" shall include a gathering of Members either in person, by electronic communication, internet conference or by telephone conference call.

F. "*Document*" shall mean any writing or true copy thereof, including, but not limited to, a letter, electronic communication, memorandum, writing, notice, exhibit, chart, table, photograph, transcript of sworn testimony, public record, private record or court record; or any of the above preserved in electronic form.

G. "*Chair of the Standing Committee*" shall mean a Member appointed as such by the Chief Justice of the Supreme Court of Virginia.

H. "*Vice Chair*" shall mean a Member appointed as such by a majority of the Members of the Standing Committee. The duly appointed Vice Chair, when so directed by the Chair, or

when the Chair is unavailable to act, shall enjoy the same rights, powers and authorities of the Chair.

I. *"Presiding Member"* shall mean the Chair, or Vice Chair, who presides at any meeting conducted by the Standing Committee.

J. *"Complainant"* shall mean an individual or entity having an interest in any estate or other matter pending before a Commissioner.

K. *"Complaint"* shall mean a written objection to an action taken by a Commissioner, or a written assertion of the failure of a Commissioner to take some required action, which is alleged to be in violation of the statutory duties imposed by the Code of Virginia, (1950), as amended, or the requirements of the Circuit Court exercising jurisdiction over the Commissioner.

L. *"Quorum"* shall mean a majority of all of the then appointed Members of the Standing Committee.

PROCEDURE FOR RECEIVING COMPLAINTS

A. All Complaints shall be submitted in writing to the Executive Secretary of the Supreme Court of Virginia, 100 North 9th Street, Richmond, VA 23219-2334.

B. Once the Complaint has been submitted, all correspondence regarding the Complaint shall be addressed only to the Chair of the Standing Committee or to the Chair of the Subcommittee to which the investigation has been assigned and not to the Executive Secretary's office.

C. A Complaint must be made in writing, name the Commissioner against whom the Complaint is being filed, be legible, state clearly and succinctly its basis, be signed by the individual or individuals, or on behalf of the entity making it, and be submitted with the name,

address and daytime telephone number of the Complainant. When a Complaint and any amplification is filed, the Complaint and amplification (if any) must include legible copies of any and all documents referred to in the Complaint and amplification (if any).

D. The Executive Secretary shall promptly acknowledge to the Complainant receipt of any Complaint and forward it to the Chair of the Standing Committee by written or electronic communication.

E. In the event the Chair, for any reason, declines to:

1. Participate in the review of a Complaint; or
2. Serve as Presiding Member over the Complaint; or
3. Participate in any other matter before the Standing Committee then the Chair shall notify the Standing Committee of such decision and the Vice Chair will serve as Presiding Member with respect to the Complaint or such other matter.

PRELIMINARY REVIEW OF A COMPLAINT

A. The Chair of the Standing Committee shall have the right and power, at the Chair's discretion, to review the Complaint and determine if it is appropriate for referral to a Subcommittee. With the written concurrence of one other Member, who cannot be a Commissioner, the Chair of the Standing Committee may decline to accept the Complaint for investigation by a Subcommittee if the Chair determines, *inter alia*:

1. The Complaint is not against a specific Commissioner; or
2. The Complainant does not have an interest in the subject estate or in the subject matter of the Complaint; or

3. The Complaint states only dissatisfaction with a decision of a Commissioner which is properly reviewable on exceptions to a Commissioner's report filed with the Circuit Court or could have been reviewed on exceptions to a Commissioner's report filed with the Circuit Court; or

4. The Complaint fails to allege a violation of, or failure to perform, a duty the Commissioner is obligated to perform; or

5. The facts, or issues, alleged in the Complaint have been the subject of a Circuit Court hearing on which the Judge of the Circuit Court has already ruled; or

6. The facts, or issues, alleged in the Complaint are at the time the subject of a pending Circuit Court proceeding; or

7. The Standing Committee has previously considered the facts of the Complaint; or

8. The Complaint fails to clearly and succinctly state a claim for which relief can be granted by the Standing Committee.

9. The Complaint is not filed by, or on behalf of, an eligible Complainant.

B. In the event that after a preliminary review, the Chair determines that the Complaint is not appropriate for investigation by the Standing Committee, a letter from the Chair shall be addressed to the Complainant, with a copy to the Commissioner referenced in the Complaint and to the Executive Secretary of the Supreme Court of Virginia stating the reason(s) why the Standing Committee declines to take further action on the Complaint.

C. The Chair shall have the further discretion to make contact with a Complainant and/or the Commissioner before referring a Complaint to a Subcommittee to determine if an accommodation between the Complainant and Commissioner can be reached without the necessity

of further consideration of the Complaint. If an accommodation is reached, a written or electronic confirmation of the accommodation shall be consented to by both parties and upon such mutual consent the Complaint shall be considered resolved without further action to be taken by the Standing Committee. If the Complaint is resolved in this manner the Members of the Standing Committee shall be advised of such resolution.

REFERRAL OF A COMPLAINT TO A SUBCOMMITTEE

A. The Chair of the Standing Committee shall refer an appropriate Complaint, not otherwise resolved, to a Subcommittee consisting of three Members of the Standing Committee and shall specify which of the three shall be the Chair.

B. The Subcommittee shall consist of at least one Member of the Standing Committee who is a Commissioner of Accounts and at least one Member of the Standing Committee who is not a Commissioner.

C. The Chair of the Standing Committee shall send a copy of the full Complaint and all included documentation to all three Members of the Subcommittee.

D. Upon receipt of the Complaint from the Chair of the Standing Committee, the Subcommittee shall select one or more of its Members to collect the factual information which is either necessary or appropriate to investigate and analyze the Complaint. The Chair and Members of the Subcommittee shall have broad discretion as to the procedure which they shall employ in conducting the investigation.

1. One Subcommittee Member shall make contact with the Complainant, in person, by telephone, by electronic mail, in writing, or more than one of the above, and shall give the Complainant an opportunity to amplify the Complaint, by a date certain. The

Complainant shall be notified, in writing, of the Complainant's right to file an amplification.

2. Upon receipt by the Subcommittee, the Commissioner must be given a copy of the Complaint, and the amplification, if any, and any documents submitted therewith. In addition, the Commissioner shall be given the opportunity to respond to the Complaint and any amplification, in person, by telephone, by electronic mail, in writing, or more than one of the above, by a date certain.

3. Upon receipt by the Subcommittee, any response by the Commissioner, together with any documents submitted therewith, shall be provided to the Complainant, without the right of further reply unless specifically granted by the Subcommittee after a written request by the Complainant.

4. The Subcommittee may, in its sole discretion, attempt to reach a resolution by consulting with the Complainant and the Commissioner separately and/or together:

a. If the matters of disagreement between the Complainant and the Commissioner are resolved by agreement, a brief written summary of the agreement shall be signed by the Complainant, the Commissioner, and the Chair of the Subcommittee, and a copy shall be furnished to the Complainant and Commissioner.

b. A copy shall also be furnished by the Chair of the Subcommittee to the Chair of the Standing Committee who shall inform the other Members of the Standing Committee in summary manner that the Complaint has been resolved by agreement. Copies of the agreement may be circulated to the other Members of the Standing Committee, in the sole discretion of the Chair.

**CONSIDERATION OF THE COMPLAINT, AMPLIFICATION AND
COMMISSIONER'S REPLY**

A. Following the dates set for the Complainant's amplification of the Complaint and the Commissioner's reply, all information submitted shall be given to all Subcommittee Members for review, analysis and consideration.

B. In investigating and evaluating a Complaint, the Subcommittee may request written submissions from the parties and/or confer with the parties. Additional information may be obtained from outside sources. All written information obtained shall be made available to the Complainant and the Commissioner.

C. Members of the Subcommittee shall consult together, in a meeting, by telephone or internet conference, or by the exchange of written correspondence by mail, facsimile, private delivery or electronic communication.

D. At such time as all information has been fully considered, the Subcommittee shall vote on the following question: "whether or not the investigation shall proceed further?".

E. The question shall be resolved by majority vote.

REPORT OF THE SUBCOMMITTEE

A. The Subcommittee shall report its findings to the Chair of the Standing Committee by written report.

B. All reports of a Subcommittee or the Standing Committee shall embody enough detail of the facts determined and findings made during the investigation to reasonably inform the Complainant and Commissioner of the grounds for its decision.

C. The report of the Subcommittee, in addition to stating the facts and findings supporting the decision, shall include one of the following recommendations:

1. "The investigation should not proceed further"; or
2. "The investigation should proceed further"; in which event the report may include a recommendation as to the action believed appropriate to respond to the Complaint; and including, but not limited to, a recommendation as to whether or not the findings should be referred to the Chief Judge of the Circuit Court having jurisdiction over the Commissioner.
3. A dissenting report may be made by any Subcommittee Member, which shall be submitted to the Chair of the Standing Committee at the same time as the majority report of the Subcommittee.

CONSIDERATION OF THE SUBCOMMITTEE REPORT
BY THE FULL STANDING COMMITTEE

A. The Chair of the Standing Committee, within a reasonable period of time after receipt of the report(s) of the Subcommittee, shall send copies of the report(s), and any documentation made a part of a report, to all Members of the Standing Committee for review, analysis and consideration.

B. The Standing Committee, at a regular or special meeting, shall consider the report(s) and shall decide whether to confirm, amend or reject the report approved by a majority of the Subcommittee.

1. A Quorum shall be required for the consideration of any report(s) by the Standing Committee. A Quorum shall be a majority of all of the then appointed Members of the Standing Committee.

2. Provided there is a Quorum, the majority vote of those Members in attendance at a meeting of the Standing Committee shall prevail.

In the event there is no Quorum or majority vote, a subsequent meeting shall be scheduled for consideration of the Subcommittee report(s).

3. If the Standing Committee shall vote to confirm, with or without amendment, the findings and recommendation set forth in the majority or minority report, the report may be adopted, as submitted or as amended by the Standing Committee, in whole or in part. If a report is adopted, the Chair of the Standing Committee shall draft a letter to the Complainant and Commissioner advising of and enclosing the report of the Standing Committee.

The Chair of the Standing Committee shall have the power to make editorial changes and changes in style to the report before it is sent to the Complainant and Commissioner.

4. If the Standing Committee shall vote to reject the report(s) of the Subcommittee, the Chair of the Standing Committee shall re-refer the Complaint to the same Subcommittee, or refer the Complaint to another Subcommittee for reconsideration and a new report, to be thereafter re-considered by the Standing Committee, all in accordance with the foregoing procedures.

ADVISING OF DECISION AND REPORT OF THE STANDING COMMITTEE

The decision of the Standing Committee and its final report shall be transmitted to the Complainant and the Commissioner of Accounts via any one or more of the following methods: (1) regular mail; (2) registered mail; (3) certified mail, return receipt requested; (4) a recognized overnight delivery service, such as (a) the United States Postal Service; (b) Federal Express; (c) United Parcel Service (d) DHL, etc.

If the Standing Committee shall decide to refer the Complaint, with or without recommendations, to the Chief Judge of the Circuit Court having jurisdiction over the Commissioner, the report shall be transmitted by: (1) regular mail; (2) registered mail; (3) certified mail, return receipt requested; (4) a recognized overnight delivery service, such as (a) the United States Postal Service; (b) Federal Express; (c) United Parcel Service; (d) DHL, etc., to such Chief Judge with a copy to the Chief Justice of the Supreme Court of Virginia.

RECONSIDERATION OF A COMPLAINT AFTER REPORT

Once a Complaint has been considered by the Standing Committee, no written report of the Standing Committee, or its findings and/or recommendations, shall be subject to reconsideration unless determined proper, in the sole discretion of the Chair of the Standing Committee. Upon such determination, the Chair of the Standing Committee shall so advise the Complainant, the Commissioner and the Standing Committee Members of such decision.

EFFECTIVE DATE

These Rules shall supersede and replace the Rules of the Standing Committee effective July 1, 2004, and shall be in effect as to all Complaints filed, or under consideration, by the Standing Committee or any Subcommittee on or after the ____ day of _____, 2020.

ADOPTION DATE

These Rules were adopted by Resolution of the Judicial Council of the Supreme Court of Virginia on the ____ day of _____, 2020.

Attest:

Executive Secretary of the Supreme Court of Virginia

Proposed Revisions to Mediation Governing Documents to Incorporate Appellate Certification Levels Permanently

Dear Judicial Council Members,

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 ([Report of the Special Committee](#)) 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 will end December 30, 2020. To accompany the pilot projects, the Judicial Council adopted two new levels of certification for appellate mediators: CAV and SCV. Like the pilot projects, the new appellate certification levels expire December 30, 2020.

The Special Committee recently recommended that the Judicial Council incorporate the appellate level certifications into the Virginia certification scheme independently of the pilot projects. The Special Committee's early research revealed a lack of training and expertise specific to appellate mediation. The Committee believes providing the CAV and SCV certification levels and associated training requirements has lessened the need.

Revisions to the Guidelines for the Training and Certification of Court-Referred Mediators and the Guidelines for the Certification of Mediation Training Programs, redlined on the following pages, are proposed to permanently incorporate the appellate level certification levels. Unrelated to the appellate certification, Dispute Resolution Services also requests the Judicial Council adopt several redlined housekeeping revisions suggested in the documents.

Please contact Sally Campbell, Dispute Resolution Services Manager, (804-371-6063) (spcampbell@vacourts.gov) or the Honorable Deborah W. Blevins, Chair of the Special Committee, (540-598-3603) (Deborah.Blevins@workcomp.virginia.gov) if you have questions or need clarification.

Sincerely,
Dispute Resolution Services
Department of Judicial Services
Office of the Executive Secretary

Certification Guidelines

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

**GUIDELINES FOR THE
TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS**

Adopted by the Judicial Council of Virginia October ~~18???~~, 20~~18~~20
Effective Date: November 1~~???~~, 20~~18~~20

STATEMENT OF INTENT: It is the desire and expectation of the citizens of Virginia to have access to a highly competent and responsive judiciary. Where the judicial system includes dispute resolution alternatives such as mediation, citizens are entitled to expect the same level of service. The following Guidelines for the Training and Certification of Court-Referred Mediators are intended to ensure that court-referred mediators also meet a high standard of competence and ethical responsibility.

A. SCOPE OF THE GUIDELINES

All mediators receiving referrals from a court should be certified pursuant to guidelines promulgated by the Judicial Council of Virginia. The following sets forth the eligibility requirements for certification.

I. B. PRIVILEGE TO MEDIATE

Certification to mediate confers no vested right to the holder thereof, but is a conditional privilege subject to the oversight of Dispute Resolution Services of the Office of the Executive Secretary (DRS).

C. APPLICATION FOR INITIAL CERTIFICATION AS A MEDIATOR

1. Application Process

- a. An applicant for certification shall make application to the Office of the Executive Secretary of the Supreme Court of Virginia on OES Form ADR-1000. Form ADR-1000 is available on the web site at www.vacourts.gov or upon request from DRS.
- b. An application for certification shall be accompanied by an administrative handling fee of \$25.00. Checks should be made payable to: Treasurer of Virginia.
- c. An applicant for certification 1) shall have a bachelor's degree from an

accredited college or university or 2) shall request a waiver of this requirement. *If the applicant needs to request a waiver, it is recommended that the applicant do so before beginning the required coursework and mentorship process.* To request a waiver, the applicant must submit a letter to DRS describing relevant work and life experience, accompanied by a resume and two letters of recommendation that address the applicant's oral and written communication skills. Additional information may be requested.

- d. An applicant must meet all certification requirements and submit an application within twenty-four (24) months after completion of the mediation training necessary for the desired certification, or after the first observation, whichever occurred first. DRS may grant a waiver of this requirement upon special request and may require additional or advanced training, observations and/or co-mediations as a condition of any waiver.

Information and documentation required to complete OES Form ADR-1000 includes:

- 1) statement of educational background;
- 2) evidence of successful completion of appropriate mediation training for level of certification requested;
- 3) evidence of completion of mentorship requirements;
- 4) evaluations by trainers;
- 5) evaluations by mentors, including Mentee Portfolio Forms, with specific recommendations that the applicant be certified and statements to support such recommendation;
- 6) statement of experience/areas of expertise;
- 7) statement of adherence to ethical standards; and
- 8) statement certifying accuracy of information contained in application.

- e. Notification of certification shall be made through letter and certificate. A letter denying certification shall state the grounds for the denial and make reference to the right of the applicant to make a written request for reconsideration to the Executive Secretary of the Supreme Court of Virginia within thirty (30) calendar days of the date of the notification of denial of certification. The written request must be received by the Executive Secretary within five (5) calendar days after expiration of the thirty (30) day time period. An applicant's request for reconsideration must include a statement as to the reasons certification is warranted. If the Executive Secretary decides it would be helpful, the Executive Secretary may convene a meeting as part of the reconsideration process. Meetings with the Executive Secretary are confidential. Within forty-five (45) calendar days of receipt of the written request, the Executive Secretary shall reconsider the denial. Within fifteen (15) calendar days of

reconsideration, the Executive Secretary shall render a decision on certification. A decision by the Executive Secretary is final.

2. Training Requirements

- a. General District Court Mediation: An applicant for certification to mediate cases filed in General District Court must submit evidence of successful completion of twenty (20) hours of training in basic mediation skills offered by a certified trainer. See also Section C.2.e. for a description of the required Virginia's judicial system training and Section C.3 for the mentorship requirements.
- b. Juvenile and Domestic Relations District Court Mediation: An applicant for certification to mediate cases filed in Juvenile and Domestic Relations District Court must demonstrate successful completion of forty (40) hours of mediation training. This training must be twenty (20) hours of basic mediation training and twenty (20) hours of training in family mediation, provided by a certified trainer. The training may also be received in one forty (40)-hour certified family mediation course. See also Sections C.2.e. and C.2.f. for a description of the required Virginia's judicial system training and domestic abuse training and Section C.3 for the mentorship requirements.
- c. Circuit Court-Civil Mediation: An applicant for certification to mediate non-family cases filed in the Circuit Court must submit evidence of successful completion of forty (40) hours of mediation training. The training must be twenty (20) hours of basic mediation training and twenty (20) hours of advanced training in skills necessary to handle procedurally complex cases provided by a certified trainer. The training may also be received in one forty (40)-hour certified mediation course. See also Section C.2.e. for a description of the required Virginia's judicial system training and Section C.3 for the mentorship requirements.
- d. Circuit Court-Family Mediation: An applicant for certification to mediate family cases filed in the Circuit Court must submit evidence of successful completion of fifty-two (52) hours of mediation training. The training must be twenty (20) hours of basic mediation training, twenty (20) hours of family mediation training, and twelve (12) hours of advanced mediation training in family finance and economic issues including equitable distribution and spousal support provided by a certified trainer. The training may also be received in combined certified mediation course units. See also Sections C.2.e. and C.2.f. for a description of the required Virginia's judicial system training and domestic abuse training and Section C.3 for the mentorship requirements.

- e. Virginia Judicial System Training: An applicant for certification at ~~all~~ ~~levels~~ must also submit evidence of successful completion of at least four (4) hours of certified training in Virginia's judicial system or experience sufficient to justify a waiver of this requirement. Members in good standing of the Virginia State Bar do not have to take this training.
- f. Domestic Abuse Training: An applicant for certification as a Juvenile and Domestic Relations District Court mediator as well as a Circuit Court-Family mediator must have eight (8) hours of certified training or education in screening for and dealing with domestic abuse, or must demonstrate sufficient experience or familiarity with dealing with domestic abuse in the mediation context to justify a waiver of the training requirement.
- g. For purposes of these Guidelines, a circuit court case, whether family or general, is a case that is filed in Circuit Court or a case that meets the jurisdictional requirements of the Circuit Court.

Commented [SC1]: Qualified applicants for certification at the CAV and SCV levels are exempt from this requirement, so it is no longer true that "all levels" must submit evidence of completing the training.

3. **Mentorship (Observation and Co-Mediation) Requirements**

- a. In addition to meeting the training requirements set forth above, applicants must submit evidence of successful completion of case observations and co-mediations, which must be conducted under the guidance of certified mediators who have mentor status. Unless otherwise stated, mentor(s) must have mentor status at the certification level sought by the mentee. (See Mentor Guidelines for complete description of mentor qualifications and responsibilities, definition of a "case" for mentorship purposes (Section II.3.), etc.)
- b. Certified mediators who have been awarded mentor status are encouraged to provide supervision, evaluation, and mentorship to individuals seeking certification.
- c. The final co-mediation must be conducted primarily by the mentee.
- d. DRS may require applicants to conduct more than the minimum number of co-mediations, depending on the evaluations by the mentors.
- e. An applicant must work with at least two (2) mentors during the mentorship.
- f. Each mentor's evaluation shall include a recommendation by the mentor as to whether the applicant should be certified, along with reasons for the recommendation.
- g. The applicant must submit with the certification application at least one

memorandum of agreement/understanding for which the applicant was the primary scrivener.

h. Specific Requirements for Each Certification Level

1) General District Court Specific Requirements:

- a) observation of at least two complete cases, at least one of which must be general (defined as non-family), conducted by GD mentor(s) (See Mentor Guidelines for mentor qualifications and responsibilities); or,
- b) where applicants encounter difficulty in meeting the requirement of two observations, successful completion of an additional eight (8)-hour certified training in mediation practice during which the applicant has the opportunity to observe two mediations, either general or family, at least one of which is a live demonstration and conducted by a mentor; and,
- c) supervised co-mediation of at least five (5) hours of mediation including a minimum of three (3) complete general cases, evaluated by GDC mentor(s).
- d) During the course of meeting the observation and co-mediation requirements, the following guidelines apply:
 - i) The mentee must complete basic mediation training before co-mediations may begin. It is recommended, but not required, that the mentee complete judicial training prior to beginning the co-mediations.
 - ii) The observations must be completed before beginning the co-mediations. The observations may take place before or after the basic mediation training.

2) Juvenile and Domestic Relations Specific Requirements:

- a) observation of at least two complete family cases conducted by JDR mentor(s) (See Mentor Guidelines for mentor qualifications and responsibilities); or,
- b) where applicants encounter difficulty in meeting the

requirement of two (2) observations, successful completion of an additional eight (8)-hour certified training in domestic relations mediation practice during which the applicant has the opportunity to observe at least two family mediations, one of which must be a live demonstration and conducted by a mentor; and,

- c) supervised co-mediations of at least ten (10) hours of family mediation including a minimum of five (5) complete family cases, evaluated by JDR mentor(s).
- d) During the course of meeting the observation and co-mediation requirements, the following guidelines apply:
 - i) Basic mediation training must precede any family mediation training. The mentee must complete family mediation training before the co-mediations may begin. It is recommended, but not required, that the mentee complete domestic abuse training and judicial training prior to beginning the co-mediations.
 - ii) The observations must be completed before beginning the co-mediations. The observations may take place before or after the family mediation training.
 - iii) During the course of meeting the co-mediation requirements, applicants must obtain experience in the following areas: custody, parenting and visitation issues and child support matters.
 - iv) The mentee must complete at least one child support worksheet by hand, using a calculator and the statute, as part of a co-mediation and submit it with the application for certification.

3) Circuit Court-Civil Specific Requirements:

- a) observation of at least two (2) complete circuit court cases, either general or family, conducted by Circuit Court mentor(s) (See Mentor Guidelines for mentor qualifications and responsibilities); or,
- b) where applicants encounter difficulty meeting the requirement of two (2) observations, successful completion

of an additional eight (8)-hour certified training in mediation practice in which the applicant observes two circuit court cases, either general or family, one of which must be a live demonstration and conducted by a mentor; and

- c) supervised co-mediation of at least ten (10) hours of mediation including a minimum of five (5) complete circuit court (non-family) cases; alternatively, at least twenty (20) hours of mediation including a minimum of two (2) complete cases; evaluated by Circuit Court-Civil mentor(s).
- d) During the course of meeting the observation and co-mediation requirements, the following guidelines apply:
 - i) The mentee must complete basic and circuit court-civil mediation training before co-mediations may begin. It is recommended, but not required, that the mentee complete judicial training prior to beginning the co-mediations.
 - ii) Mediators certified as General District Court mediators who later apply for Circuit Court-Civil certification must complete the training requirements for circuit court-civil mediation described in Section C.2.c., but need observe only one circuit court mediation case, either general or family, and co-mediate only two (2) circuit court-civil cases (non-family) in order to meet the training and mentorship requirements for Circuit Court-Civil mediation certification.
 - iii) The observations must be completed before beginning the co-mediations. The observations may take place before or after the circuit court-civil mediation training.

4. Circuit Court-Family Specific Requirements:

- a) observation of at least two (2) complete circuit court-family cases conducted by Circuit Court-Family mentor(s) (See Mentor Guidelines for mentor qualifications and responsibilities); or
- b) where applicants encounter difficulty meeting the requirement of two (2) observations, successful completion

of an additional eight (8)-hour certified training in mediation practice in which the applicant observes two (2) circuit court-family cases, one of which must be a live demonstration and conducted by a mentor; and

- c) supervised co-mediation of at least ten (10) hours of family mediation including five (5) complete circuit court-family cases, evaluated by Circuit Court-Family mentor(s).
- d) During the course of meeting the observation and co-mediation requirements, the following guidelines apply:
 - i) Basic mediation training must precede any family mediation training. The mentee must complete family mediation training and circuit court-family training before co-mediations may begin. It is recommended, but not required, that the mentee complete domestic abuse and judicial training prior to beginning the circuit court-family co-mediations.
 - ii) Mediators certified as Juvenile and Domestic Relations District Court mediators who later apply for Circuit Court-Family certification must complete training requirements for circuit court-family mediation described in Section C.2.d., but need observe only one circuit court-family case and co-mediate only two (2) circuit court-family cases in order to meet the training and mentorship requirements for circuit court-family mediation.
 - iii) The observations must be completed before beginning the co-mediations. The observations may take place before or after the circuit-court family mediation training.
 - iv) During the course of meeting the co-mediation requirements, applicants must obtain experience in equitable distribution and support matters.
 - v) The mentee must complete at least one child support worksheet by hand, using a calculator and the statute, as part of a co-mediation and submit it with the application for certification, unless the mentee is currently a certified JDR mediator.

4. Waivers / Reciprocity

- a. DRS may waive or partially waive training and mentorship requirements based on an applicant's background and experience, and may require additional or advanced training, observations and/or co-mediations as a condition of any waiver. Waivers may be granted only when, in the sole judgment of DRS, the waiver will not undermine the high standard of competence and ethical responsibility required of Virginia certified mediators.
- b. An applicant for certification who was certified, licensed, or registered as a mediator in another state or country and who desires to have all or part of the training and mentorship requirements waived on the basis of previous training and experience may request such exception by:
 - 1) submitting a completed OES Form ADR-1000 along with an administrative handling fee of \$25.00. Checks should be made payable to: Treasurer of Virginia;
 - 2) demonstrating current competence in mediation and equivalent mediation training and experience as required in Virginia by:
 - a) providing evidence of an equivalent number of hours of mediation training as required in Virginia based on the type of certification sought through certificates or letters from instructors,
 - b) providing copies of mediation training outlines, agendas, and materials substantively equivalent to training required in Virginia,
 - c) providing evidence of an equivalent number of mediation hours/cases as required in Virginia based on the type of certification sought through letters from clients, courts personnel or mediation programs, and
 - d) submitting two references that may be contacted regarding the applicant's performance and skills as a mediator.
- c. An applicant who attended a mediation training program outside of Virginia and who desires to have Virginia training requirements partially waived on the basis of this outside training may request such exception by:
 - 1) submitting evidence of successful completion of mediation training through certificates or a letter from the instructor; and

- 2) submitting an outline, agenda, and materials from the mediation training to assist in assessing whether the training was substantively equivalent to training required in Virginia.
- d. In general, all applicants under Section C.4 must also provide evidence of the following:
- 1) successful completion of a four (4)-hour course on Virginia's judicial system;
 - 2) successful completion of a two (2)-hour course on Virginia's Standards of Ethics; and
 - 3) if Juvenile and Domestic Relations or Circuit Court-Family mediation certification is sought, successful completion of eight (8) hours of training on screening for and dealing with domestic abuse in the mediation context and six (6) hours of training in Virginia child and spousal support.

5. Appellate Mediation ~~Pilot Project 1/1/19 through 12/31/20~~

- a. ~~The Supreme Court of Virginia (SCV) and the Court of Appeals of Virginia (CAV) have established mediation pilot projects to run January 1, 2019 through December 31, 2020.~~ Appellate mediator certification ~~became~~ is available for the two-year period concurrent with appellate mediation the pilot projects, from January 2019 through December 2020. It is now a permanent level of certification. .-after which time appellate certification shall lapse. Given ~~that appellate mediation experience still is growing, e new projects and the new certification level,~~ mentorship (observation and co-mediation) requirements are waived currently. All other Guidelines provisions apply to certified appellate mediators. For Court of Appeals of Virginia (CAV) pilot program-certified mediators, successful completion of the 8-hour Domestic Abuse Training (screening for and dealing with domestic abuse in the mediation context) is recommended, but not required.
- b. An applicant for certification as an appellate mediator must be a member in good standing of the Virginia State Bar. An applicant further must 1) be certified as a mediator in Virginia, or 2) successfully complete twenty (20) hours of training in basic mediation skills.
- c. Certification for the Supreme Court of Virginia (SCV) pilot project certification requires the following additional minimum qualifications:
 - i. Service on the SCV or the CAV or

- ii. Successful completion of the 2-Hour Appellate Training offered by a certified trainer and
 - 1. Service as a jurist on another court in Virginia or
 - 2. Litigation of at least 10 cases in the appellate courts of Virginia, the U. S. Court of Appeals for the 4th Circuit and/or the United States Supreme Court within the last 10 years.
- d. ~~Certification for the CAV certification pilot project~~ requires the following additional minimum qualifications:
 - i. Service on the SCV or the CAV or
 - ii. Successful completion of the 2-Hour Appellate Training offered by a certified trainer and
 - 1. Certification as a Circuit Court Family mediator or
 - 2. Service as a jurist on another court in Virginia or
 - 3. Litigation of at least 10 cases in the appellate courts of Virginia, the U. S. Court of Appeals for the 4th Circuit and/or the United States Supreme Court within the last 10 years, at least 5 of which were equitable distribution cases.

D. APPLICATION FOR RECERTIFICATION AS A MEDIATOR

1. To maintain certification, a mediator must recertify every two (2) years on November 1. Note the first recertification may come less than two years after initial certification. (For example, all mediators initially certified between November 1, 2019~~7~~ and October 31, 2020~~8~~ must recertify as of November 1, 2021~~9~~. Their next recertification date would be November 1, 2023~~+~~.)

a. ~~SCV and CAV mediators who certified before November 1, 2020 and are not certified at another level will be due for recertification on November 1, 2021.~~

a.b. ~~SCV and CAV mediators who certified before November 1, 2020 and are certified at another level will be due for recertification in the year their other certification level is due.~~

Commented [SC2]: This change is not related to appellate certification. It merely keeps these example dates somewhat current. DRS asks that the Judicial Council approve this change to the Guidelines.

2. Submit OES Form ADR-1003. [Recertification forms and instructions](#) are available on the court web site. Each summer DRS will notify by email all mediators whose recertification is due on October 31st of that year.
3. **Continuing mediation education (CME) training must be completed during the two-year certification period that falls between the previous recertification date and October 31 of the year currently due for recertification. Depending on the previous recertification date, a mediator may have less than two years to complete the CME requirements.**
4. CME Requirements:
 - a) For single and multiple certifications, submit objective evidence of having completed ten (10) hours of approved mediation training during the certification period.
 - b) At least two (2) of the ten (10) hours of training must be mediator ethics training. Only *mediator* ethics trainings satisfy this requirement.
 - c) In place of some or all CME approved trainings, mediators may take entire core courses (Basic Mediation, Family Mediation, Circuit Court-Civil Mediation, Circuit Court-Family Mediation, Orientation to Virginia’s Judicial System, Screening for and Dealing with Domestic Abuse, Observation Course, Mentoring Individuals Seeking Certification as a Court-Referred Mediator, 2-Hour Appellate Training).
 - ~~d) Mediators with multiple certifications who recertify every year may reuse trainings as long as they take place during the two year certification period.~~
5. Credit hours accrued during the certification period in excess of the requirement may be carried over to meet the next two-year certification period requirement, except for the ethics requirement. A maximum of eight (8) credit hours may be carried forward. A mediator must complete two (2) hours of mediator ethics training during each certification period.
6. A mediator should exercise discretion in choosing those approved trainings most likely to enhance his or her mediation skills and improve delivery of mediation services.
7. Mediators may request DRS approval of other learning opportunities to meet CME requirements. Possibilities include online or in person training from organizations such as the Association for Conflict Resolution, the American Bar Association Section on Dispute Resolution, and Virginia CLE.
8. Mediators participating in approved Mediation Peer Consultation (MPC) sessions may receive up to six (6) hours of CME credit for attendance at such sessions.

Commented [SC3]: This change is not related to appellate certification. No mediators certify every year anymore, so the sentence is no longer applicable. DRS asks that the Judicial Council remove it from the Guidelines.

9. Mediators may request up to three (3) hours of CME credit for up to three (3) hours of co-mediation followed by self-reflection. To request credit, mediators must complete a Mediator Self-Reflection Form (ADR-1011) for each co-mediation, including the number of hours spent in the co-mediation (self-reflection hours do not count toward CME credit), and submit the form to DRS. Requests should be made soon after the co-mediation and well in advance of the recertification deadline. To qualify for CME, forms must demonstrate 1) thoughtful and thorough self-reflection; and 2) mediator insight and/or new learning. Otherwise, credit will be denied.
10. Mediators who deliver a CME course or CLE seminar related to the subject of mediation may receive up to six (6) hours of ethics or other CME credit. Objective evidence of providing such training, the length of the training, the number of times the training was offered during the certification period as well as the number of hours spent preparing the training must be provided.
11. Forms ADR-1002 (Evaluation of Mediation Session(s) and Mediator(s)) received by DRS and/or any other written communication concerning the performance of the mediator may also be considered in the recertification process.
12. Notification of recertification shall be made through letter and certificate. A letter denying recertification shall state the grounds for the denial and make reference to the right of the applicant to make a written request for reconsideration to the Executive Secretary of the Supreme Court of Virginia within thirty (30) calendar days of the date of the notification of denial of recertification. The written request must be received by the Executive Secretary within five (5) calendar days after expiration of the thirty (30) day time period. An applicant's request for reconsideration must include a statement of the reasons recertification is warranted. If the Executive Secretary decides it would be helpful, the Executive Secretary may convene a meeting as part of the reconsideration process. Meetings with the Executive Secretary are confidential. Within forty-five (45) calendar days of receipt of the written request, the Executive Secretary shall reconsider the denial. Within fifteen (15) calendar days of reconsideration, the Executive Secretary shall render a decision on recertification. A decision by the Executive Secretary is final.
13. A mediator denied recertification may reapply for initial certification after six (6) months from the date of the final denial. In the sole discretion of DRS, deviations from the initial certification requirements may be allowed or required on a case-by-case basis.
14. Mediators who do not meet the recertification requirements may not hold themselves out as certified mediators, mediation mentors, or certified mediation trainers.
15. A mediator whose certification lapsed as a result of not meeting the recertification requirements in a timely manner must reapply for initial certification. In the sole

discretion of DRS, deviations from the initial certification requirements may be allowed or required on a case-by-case basis.

II. E. BARS TO INITIAL CERTIFICATION OR RECERTIFICATION

1. Determination of Bar

- a. DRS shall consider conduct unbecoming to the profession of mediation in determining whether an applicant should be certified or recertified, including any complaints filed against the applicant.
- b. If an applicant has a conviction of, or a guilty or nolo contendere plea to, a misdemeanor involving moral turpitude or a felony, and/or if a professional privilege has been revoked or relinquished to avoid revocation, DRS shall deny the applicant certification or recertification. Upon written request as described in Section C.1.e., the Executive Secretary may reconsider the denial upon the showing of extraordinary circumstances.
- c. DRS may require that an applicant provide additional information or meet with the staff of DRS to discuss information contained within the application.
- d. DRS will determine whether an applicant should be certified or recertified based on whether certification would reflect positively on the integrity of the profession, or whether the applicant could act with competence, or whether any conduct implicated would not undermine the Standards of Ethics and Professional Responsibility for Certified Mediators.

2. Self-Reporting Requirements

- a. Applicants for recertification or initial certification must disclose to DRS any of the following:
 - 1) convictions of, guilty pleas to, or nolo contendere pleas to violations of the law (to include the specific code section(s) violated), including traffic violations resulting in suspension or revocation of a driver's license and DUI offenses;
 - 2) disciplinary action related to a profession, including but not limited to mediation;
 - 3) curtailment of professional privileges; or
 - 4) relinquishments of any professional privilege or license while

under investigation.

- b. An applicant against whom charges are pending that may result in any of the above actions shall likewise disclose to DRS that fact.
- c. Where an applicant discloses any event described in Section E.2.a. above, the applicant must also provide:
 - 1) information concerning the background of the offense which led to conviction, plea, discipline, curtailment of professional privileges and/or relinquishment of professional privilege or license;
 - 2) information concerning the length of time which has elapsed since the conviction, plea, discipline, curtailment and/or relinquishment;
 - 3) the age of the applicant at the time of the conviction, plea, discipline, curtailment and/or relinquishment; and
 - 4) evidence of rehabilitation since the conviction, plea, discipline, curtailment and/or relinquishment.
- d. If an applicant for certification fails to disclose any event as required in Section E.2.a. or Section E.2.b. above, DRS has the discretion to deny the applicant certification or recertification.

F. MEDIATOR COMPLIANCE

- 1. If at any time DRS has reason to believe a certified mediator may have engaged in conduct inconsistent with these Guidelines,
 - a. DRS may inform the mediator of any concerns.
 - b. On a case-by-case basis, depending upon the gravity and/or frequency of the concerns raised, DRS may offer in writing a course for improvement to be completed within a specified time period. The offer may include curtailment, modification or suspension of mediator certification during the time period for the improvement goal to be met.
 - c. If a mediator is provided such offer, the mediator shall accept or reject the offer in writing within ten (10) calendar days from the date thereof. The written response must be received by DRS within five (5) calendar days after the expiration of the ten (10) day time period.

- d. If the mediator accepts the offer of DRS, the mediator shall inform DRS when the agreed course for improvement is completed. If the mediator's certification was curtailed, modified or suspended, DRS will reinstate it once completion is reviewed and DRS is satisfied the agreed goal for improvement has been met.
 - e. If the mediator does not accept the offer of DRS, DRS has the option of filing a formal complaint against the mediator pursuant to the Complaint Procedures.
2. The procedures available herein for improvement of mediator conduct shall be offered solely at the discretion of DRS. The availability herein of procedures for improvement of mediator conduct shall not be construed to preclude any complainant's ability to file a formal complaint under the Complaint Procedures, even when a course for improvement has begun. However, if a formal complaint is filed after a course for improvement has begun, any steps taken by the mediator under this section toward the goal for improvement shall be considered when determining possible sanctions under the Complaint Procedures.

G. MISCELLANEOUS PROVISIONS

1. A mediator certified hereunder shall provide mediation services consistent with the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators.
2. A mediator certified hereunder shall not intentionally or knowingly misrepresent a material fact or circumstance in the course of a mediation or related to a mediation; in the course of applying for certification, recertification, trainer certification, and/or mentor status.
3. At the conclusion of every court-referred mediation, the mediator shall give the parties an evaluation form (OES Form ADR-1002) to complete and return to the mediator or the mediation program, or to forward directly to the Office of the Executive Secretary. The substance of the responses provided on these forms may be considered by DRS in making determinations regarding the continuing certification of the mediator.
4. Mediators must inform the DRS office of changes in mailing address, email address, and phone number promptly.
5. Mediators must inform DRS in writing of any of the following events within thirty (30) calendar days of the event. The written notice must be received by

DRS within five (5) calendar days after the expiration of the thirty (30) day time period.

- a) convictions of, guilty pleas to, or nolo contendere pleas to violations of the law, including traffic violations resulting in suspension or revocation of a driver's license and DUI offenses;
- b) discipline by a professional organization;
- c) curtailment of professional privileges; or
- d) relinquishment of any professional privilege or license while under investigation.

A mediator against whom charges are pending that may result in any of the above actions shall likewise inform DRS of this fact within thirty (30) calendar days.

6. If a mediator fails to disclose any event as required in Section G.5. above, DRS has the discretion to revoke his or her certification. The mediator may request reconsideration by the Executive Secretary as described in Section C.1.e. of these Guidelines.
7. When a mediator discloses an event in Section G.5. above, DRS may curtail, modify, suspend or revoke his or her certification. If a mediator has a conviction of, or a guilty or nolo contendere plea to, a misdemeanor involving moral turpitude or a felony, and/or if a professional privilege has been revoked or relinquished to avoid revocation, the mediator's certification shall be revoked. For other events, DRS will make a determination based on whether continued certification would reflect positively on the integrity of the profession, or whether the mediator could act with competence, or whether the conduct implicated would not undermine the Standards of Ethics and Professional Responsibility for Certified Mediators. DRS shall promptly notify the mediator in writing of the action taken. The mediator may request reconsideration by the Executive Secretary as described in Section C.1.e. of these Guidelines.
8. "Revocation" and "decertification" as used in these Guidelines mean that the mediator is no longer certified and will NOT automatically be certified or recertified once the period of time for the revocation/decertification has expired. When the revocation/decertification period expires, the mediator is uncertified. If the uncertified mediator seeks certification, he or she must go through the initial certification application process.
8. A mediator whose certification was revoked may reapply for initial

certification after two (2) years from the date of the revocation/decertification, or after the time frame otherwise imposed by the revoking entity. In the sole discretion of DRS, partial waivers of training and mentorship requirements may be granted on a case-by-case basis.

9. Conviction of or guilty or nolo contendere plea to a misdemeanor involving moral turpitude, conviction of or guilty or nolo contendere plea to a felony, and/or revocation or relinquishment to avoid revocation of a professional privilege are permanent bars to certification or recertification as a mediator. (Upon written request as described in Section C.1.e., the Executive Secretary may reconsider the permanent bar upon the showing of extraordinary circumstances.)

Training Program Guidelines

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

**GUIDELINES FOR THE CERTIFICATION OF MEDIATION
TRAINING PROGRAMS**

Adopted by the Judicial Council of Virginia October 18~~???~~, 20~~18~~20
Effective Date: November 1, 20~~2018~~

A. SCOPE OF THE GUIDELINES

A mediation training program must be certified according to the requirements specified herein to count toward mediator certification and recertification. Certification of the training program attaches to the trainer responsible for conducting the program, and the training materials must be approved. These Guidelines apply to both the training program and trainer designated to teach the training program. These Guidelines set forth the eligibility requirements for trainer certification and approval of materials.

B. PRIVILEGE TO TRAIN

Certification to train mediators confers no vested right to the holder thereof, but is a conditional privilege subject to the oversight of Dispute Resolution Services in the Office of the Executive Secretary (DRS).

**C. CERTIFICATION AS TRAINER OF “CORE COURSE” MEDIATION
TRAINING PROGRAMS**

1. “Core courses” are the courses required for certification as a mediator at the various certification levels or to achieve mentor status: the 20-Hour Basic Mediation Training, the 20-Hour Family Mediation Training, the 20-Hour Circuit Court-Civil Mediation Training, the 12-Hour Circuit Court-Family Mediation Training, the 8-Hour Screening for and Dealing with Domestic Abuse in the Mediation Context Training, the 4-Hour Virginia Judicial System Training, the 8-Hour Observation Course, the 4-Hour Mentoring Individuals Seeking Certification as a Court-Referred Mediator Training, ~~and~~ the 2-Hour Appellate Training.
2. The certification levels are General District Court (GD), Juvenile and Domestic Relations District Court (JDR), Circuit Court–Family (CCF), Circuit Court–Civil (CCC), ~~and Appellate CAV and/or SCV~~ Court of Appeals of Virginia (CAV) and Supreme Court of Virginia (SCV).
3. An applicant seeking certification as a trainer of a core course shall submit a completed OES Form ADR-2000 along with an administrative handling

fee of \$25.00. Checks should be made payable to: Treasurer of Virginia.

4. **Applications for certification must be submitted at least thirty (30) days in advance of the training date. DRS will review applications within thirty (30) calendar days of receipt. Please note that extra time should be allotted beyond the thirty days for the applicant to make any changes/revisions that may be necessary.**
5. An instructional hour is equal to fifty (50) minutes. The core courses require the following minimum instructional hours:
 - a. Basic Mediation twenty (20)
 - b. Family Mediation twenty (20)
 - c. Circuit Court-Civil Mediation twenty (20)
 - d. Circuit Court-Family Mediation twelve (12)
 - e. Orientation to Virginia's Judicial System four (4)
 - f. Screening for and Dealing with Domestic Abuse eight (8)
 - g. Observation Course eight (8)
 - h. Mentoring Course four (4)
 - i. 2-Hour Appellate Training two (2)
6. In addition to completing the OES Form ADR-2000, the applicant shall submit a description of the course, including:
 - a. the course agenda with exact times to be spent on each subject specified;
 - b. the outline of subject matter to be covered;
 - c. an explanation of where in the agenda and in the course materials the information required to be covered in these courses (as listed in the course content outline attached at the end of these Guidelines) is reviewed and the length of time spent on the required subjects;
 - d. all course materials, handouts, exercises, role-plays, and student manual(s);
 - e. the course evaluation form that will be used; and
 - f. the resume(s), experience, and qualifications of the proposed trainers (more specific information on trainer qualifications is provided below).
7. An applicant for trainer certification must be a Virginia certified mediator in good standing with DRS.
8. Prior to teaching a core course, a) an applicant must be certified as a trainer for the course by DRS and b) DRS must approve the training materials. Otherwise,

the training will not count towards the trainee's mediator certification requirements.

9. Required course content for each of the core courses is attached for applicants to use in developing courses. Courses should include a mixture of lecture, discussion, exercises, and role-plays.
10.
 - a. Sufficient experienced certified mediators must be available during trainings to observe, critique, and evaluate the performance of trainees in role-plays. Trainers are strongly encouraged to utilize one mediator observer per role-play. If that is not possible, each mediator shall be responsible for observing no more than two role-plays at any one time. For Basic Mediation, an observer must be certified at any level; for Family Mediation, at the JDR or CCF level; for Circuit Court–Family, at the CCF level; and for Circuit Court–Civil, at the CCC level.
 - b. For the 20-hour Basic Mediation, the 20-hour Family Mediation, and the 8-hour Screening for and Dealing with Domestic Abuse courses, the trainer must ensure that each trainee acts as a mediator in at least two role-plays.
11. If an applicant proposes to use the course manual of another organization or trainer, the applicant must submit written permission to use the manual.
12. Listed below are the minimum qualifications for the certified trainer for each training program. Please note that “adult education experience” may be met through degrees in Education, through demonstrated teaching of adults in other fields and/or through experience teaching in ADR/mediation. To request a waiver of an educational requirement, the applicant must submit a letter to DRS describing relevant work and life experience, accompanied by a resume. Additional information may be requested.

Assistant trainers must be certified mediators and must be listed on the application, but need not have the experience listed below for the certified trainer. For Basic Mediation, an assistant trainer must be certified at any level; for Family Mediation, at the JDR or CCF level; for Circuit Court–Family, at the CCF level; and for Circuit Court–Civil, at the CCC level. Subject matter specialists must be listed on the application and do not have to be certified mediators. Assistant trainers and subject matter specialists work under the direct supervision of the certified trainer, who is responsible for their roles in the training.

Basic Mediation

- a. Certification as a mediator at any level
- b. Recertification as a mediator at least one time
- c. Objective evidence of completion of at least 20 hours of mediation training above the training necessary to receive GD certification
- d. A minimum of a bachelor's degree (a waiver may be requested)
- e. Objective evidence of participation in at least 20 mediations and 40 hours of mediation
- f. Proof of at least four (4) hours of training in educating adults or evidence of adult education experience

Family Mediation

- a. Certification as a JDR mediator or as a CCF mediator
- b. Recertification as a JDR mediator or CCF mediator at least once
- c. Objective evidence of completion of at least 20 hours of family mediation training above the training necessary to receive JDR certification
- d. Juris Doctor or Masters in Social Work, Counseling, Psychology, Conflict Resolution or other related area (a waiver may be requested)
- e. Objective evidence of participation in at least 20 family mediations and 40 hours of family mediation
- f. Proof of at least four (4) hours of training in educating adults or evidence of adult education experience

Circuit Court-Family Mediation

- a. Certification as a CCF mediator
- b. Recertification as a CCF mediator at least once
- c. Objective evidence of completion of at least 20 hours of family mediation training above the training necessary to receive CCF certification
- d. Juris Doctor or Masters in Social Work, Counseling, Psychology, Conflict Resolution or other related area (a waiver may be

requested)

- e. Objective evidence of participation in at least 20 circuit court-family mediations and 40 hours of circuit court-family mediation
- f. Proof of at least four (4) hours of training in educating adults or evidence of adult education experience

Circuit Court-Civil Mediation

- a. Certification as a CCC mediator
- b. Recertification as a CCC mediator at least once
- c. Objective evidence of completion of at least 20 hours of mediation training above the training necessary to receive CCC certification
- d. A minimum of a bachelor's degree (a waiver may be requested)
- e. Objective evidence of participation in at least 20 circuit court-civil mediations and 40 hours of circuit court-civil mediation
- f. Proof of at least four (4) hours of training in educating adults or evidence of adult education experience

Orientation to Virginia's Judicial System

- a. Juris Doctor and member of Virginia State Bar (a waiver may be requested)
- b. Certification as a mediator (a waiver may be requested)
- c. Proof of at least four (4) hours of training in educating adults or evidence of adult education experience

Screening for and Dealing with Domestic Abuse

- a. J.D. or Masters in Social Work, Counseling, Psychology, Conflict Resolution or related area (a waiver may be requested)
- b. Certification as a JDR or CCF mediator (a waiver may be requested)
- c. Demonstrated knowledge of domestic abuse matters
- d. Proof of at least four (4) hours of training in educating adults or

evidence of adult education experience

Observation Course

- a. General Observation course: must meet the qualifications of a Basic Mediation instructor listed above, but must have GD certification
- b. Family Observation course: must meet the qualifications of a Family Mediation instructor listed above
- c. Circuit Court-Family Observation course: must meet the qualifications of a Circuit Court-Family Mediation instructor listed above
- d. Circuit Court-Civil Observation course: must meet the qualifications of a Circuit Court-Civil Mediation instructor listed above

Mentoring Individuals Seeking Certification as a Court-Referred Mediator

- a. Certification as a GD, JDR, CCC, or CCF mediator
- b. Status as a mentor
- c. Minimum of a bachelor's degree (a waiver may be requested)
- d. Proof of at least four (4) hours of training in educating adults or other evidence of adult education experience

2-Hour Appellate Training for SCV and CAV 2-Year Mediation Pilot Projects

- a. Juris Doctor and member of Virginia State Bar
 - b. Certification as a mediator (a waiver may be requested)
 - c. Appellate experience:
 - 1) Service on the Supreme Court or the Court of Appeals of Virginia
- OR

- 2) Objective evidence of litigating at least 10 cases in the appellate courts of Virginia, the U.S. Court of Appeals for the 4th Circuit and/or the United States Supreme Court within the last 10 years
 - d. Proof of at least four (4) hours of training in educating adults or other evidence of adult education experience
13. Notification of certification shall be made through letter. A letter denying certification shall state the grounds for the denial and ~~make reference~~ to the right of the applicant to make a written request for reconsideration to the Executive Secretary of the Supreme Court of Virginia within thirty (30) calendar days of the date of the notification of denial of certification. The written request must be received by the Executive Secretary within five (5) calendar days after expiration of the thirty (30) day time period. An applicant's request for reconsideration must include a statement as to the reasons certification is warranted. If the Executive Secretary decides it would be helpful, the Executive Secretary may convene a meeting as part of the reconsideration process. Meetings before the Executive Secretary are confidential. Within forty-five (45) calendar days of receipt of the written request, the Executive Secretary shall reconsider the denial. Within fifteen (15) calendar days of reconsideration, the Executive Secretary shall render a decision on certification. A decision by the Executive Secretary is final.

D. CORE COURSE TRAINER RESPONSIBILITIES

1. The certified trainer must:
 - a. Ensure that the approved training agenda is followed and that all the areas listed on the course content outline are covered fully
 - b. Ensure that the certified trainer is in attendance at all times
 - c. Ensure that course evaluations are completed by all trainees and sent to DRS within twenty-one (21) days of completion of the training (or provide a statement as to why any evaluations are missing)
 - d. Provide DRS with a calendar of all training programs that will be offered as soon as such schedule is determined.
 - e. Provide all trainees who successfully complete the course a completed form ADR-1006 indicating that they have successfully completed the training program
 - f. Submit requests in writing for any changes to 1) assistant trainers,

2) subject matter specialists, 3) course name or 4) course outline and/or materials, including changes in the law that affect the written materials, to DRS for approval. Allow at least thirty (30) days for DR to process the request. Approval in writing of the requested changes must be received from DRS prior to holding a training incorporating the changes.

2. All certified trainers of core courses must notify trainees of the following in writing prior to the commencement of each training (the notice may be prominently displayed at the beginning of the training materials):

This course is certified by the Office of the Executive Secretary of the Supreme Court of Virginia. However, please note that mere attendance at this training does not guarantee successful completion of the course for mediation certification purposes. Recommendations by the certified trainer that a participant receive additional training before continuing in the certification process will be given great consideration by the Office of the Executive Secretary in evaluating a candidate for certification.

3. Additional Training: It is the responsibility of the trainer to recommend a specific remedial course of action for trainees who do not successfully complete the course.
4. It is a violation of the Training Guidelines to present a core course that fails to substantially conform to the course structure and content approved by DRS. It is a violation of the Training Guidelines to present a training program not taught by the training staff approved by DRS.
5. A certified trainer must demonstrate continued competency through the use of effective training methods and techniques, including those of the assistant trainers and subject matter specialists, to maintain certification. The trainer is responsible for maintaining ethical business practices.
6. Trainers may discuss the mediator certification requirements during training, but must limit such discussion to no more than fifteen minutes.

E. CERTIFICATION OF CONTINUING MEDIATION EDUCATION (CME) COURSES

1. CME courses are not considered in the initial certification of mediators, but are used toward recertification training requirements.
2. All CME courses must be certified by DRS to count toward recertification training requirements. The applicant must be certified to train the course and the course materials must be approved. DRS reviews applications for certification of CME courses on a case-by-case basis.

3. DRS will determine whether the applicant must be a certified mediator depending on the nature of the CME course. For most CME courses, the trainer will be required to be a certified mediator.
4. Requirements based on length of CME course:
 - a. Applicants seeking DRS certification for a CME course two (2) hours or more in length must submit the following on ADR Form 2001:
 - 1) the course title and description
 - 2) the course agenda with exact times to be spent on each subject specified
 - 3) the course outline
 - 4) the course materials, including any handouts, exercises, manuals, role-plays
 - 5) the course evaluation form that will be used
 - 6) the resume(s), experience, and qualifications of the trainer(s)
 - b. For a CME course less than two (2) hours in length, applicants must submit the following on ADR Form 2001:
 - 1) the course title
 - 2) statement summarizing the course content
 - 3) the course evaluation form that will be used
 - 4) names and qualifications of trainers
5. An applicant may not hold out a CME course as approved until it has been formally certified by DRS. **Applications for CME certification must be submitted at least thirty (30) days in advance of the training date. DRS will review applications within thirty (30) calendar days of receipt. Please note that extra time should be allotted beyond the thirty (30) days for the applicant to make any changes/revisions that may be necessary.**

F. CME COURSE TRAINER RESPONSIBILITIES

1. CME trainers are encouraged to provide DRS with a calendar of all training programs that will be offered as soon as such schedule is determined.

2. CME trainers must ensure that course evaluations are completed by all trainees and sent to DRS within twenty-one (21) days of completion of the training (or provide a statement as to why any evaluations are missing).
3. CME trainers must submit requests in writing for any changes to 1) the name of the course or 2) course outline and/or materials, including changes in the law that affect the written materials, to DRS for approval. Allow at least thirty (30) days for DRS to process the request. Approval in writing of the requested changes must be received from DRS prior to holding a training incorporating the changes.

G. BARS TO TRAINER CERTIFICATION

1. Determination of Bar

- a. DRS shall consider conduct unbecoming to the profession of mediation in determining whether the applicant should be certified as a trainer, including any complaints filed against the applicant.
- b. If an applicant has a conviction of, or a guilty or nolo contendere plea to, a misdemeanor involving moral turpitude or a felony, and/or if a professional privilege has been revoked or relinquished to avoid revocation, the applicant shall be denied trainer certification. Upon written request as described in Section C.13, the Executive Secretary may reconsider the denial upon the showing of extraordinary circumstances.
- c. DRS may request that an applicant provide additional information or meet with the staff of DRS to discuss information contained within the application.
- d. DRS will determine whether an applicant should be certified as a trainer based on whether certification would reflect positively on the integrity of the profession, or whether the applicant could act with competence, or whether any conduct implicated would not undermine the Standards of Ethics and Professional Responsibility for Certified Mediators.

2. Self-Reporting Requirements

- a. Applicants for trainer certification must acknowledge any of the following:
 - 1) convictions of, guilty pleas to, or nolo contendere pleas to violations of the law (to include the specific code section(s))

- violated), including traffic violations resulting in suspension or revocation of a driver's license and DUI offenses;
- 2) disciplinary action related to a profession, including but not limited to mediation;
 - 3) curtailment of professional privileges;
 - 4) relinquishment of any professional privilege or license while under investigation.
- b. An applicant against whom charges are pending that may result in any of the above actions shall likewise acknowledge that fact.
- c. Where an applicant acknowledges any event described in Section G.2.a. above, the applicant must also provide:
- 1) information concerning the background of the offense which led to conviction, plea, discipline, curtailment of professional privileges and/or relinquishment of professional privilege or license;
 - 2) information concerning the length of time which has elapsed since the conviction, plea, discipline, curtailment and/or relinquishment;
 - 3) the age of the applicant at the time of the conviction, plea, discipline, curtailment and/or relinquishment; and
 - 4) evidence of rehabilitation since the conviction, plea, discipline, curtailment and/or relinquishment.
- d. If an applicant for trainer certification fails to disclose any event as required in Section G.2.a. or Section G.2.b. above, DRS has the discretion to deny the applicant trainer certification.

H. TRAINING COMPLIANCE

1. DRS will review course evaluations and results of DRS live course observations to ensure trainers of core and CME courses comply with these Guidelines. Trainees, DRS staff or its representative, other trainers and mediators may raise concerns about the trainer.
2. DRS may inform trainers of any concerns, including but not limited to concerns regarding presentation, training content, structure, course evaluations and business practices.

- a. On a case-by-case basis, depending upon the gravity and/or frequency of the concerns raised, DRS may offer in writing a course for improvement to be completed within a specified time period. The offer may include curtailment, modification or suspension of a trainer's certification to train mediators during the time period for the improvement goal to be met.
 - b. If a trainer is provided such offer, the trainer shall accept or reject the offer in writing within ten (10) calendar days from the date thereof. The written response must be received by DRS within five (5) calendar days after the expiration of the ten (10) day time period.
 - c. If the trainer accepts the offer of DRS, the trainer shall inform DRS when the agreed course for improvement is completed. If the trainer's certification to train was curtailed, modified or suspended, DRS will reinstate it once completion is reviewed and DRS is satisfied the agreed goal for improvement has been met.
 - d. If the trainer does not accept the offer of DRS, DRS has the option of filing a formal complaint against the mediation trainer pursuant to the Complaint Procedures.
3. The procedures available herein for improvement of training shall be offered solely at the discretion of DRS. The availability herein of procedures for improvement of mediator training shall not be construed to preclude any complainant's ability to file a formal complaint under the Complaint Procedures, even when a course for improvement has begun. However, if a formal complaint is filed after a course for improvement has begun, any steps taken by the trainer under this Section toward the goal for improvement shall be considered when determining possible sanctions under the Complaint Procedures.

I. MISCELLANEOUS PROVISIONS FOR CORE AND CME COURSES

1. A trainer certified hereunder shall provide materials and present the class in a manner consistent with the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators.
2. A trainer certified hereunder shall not intentionally or knowingly misrepresent a material fact or circumstance in the course of presenting a mediation training program or in the course of applying or reapplying for certification of the program.
3. Trainers must inform the DRS office of changes in mailing address, email address, and phone number promptly.

4. In addition to the initial application for certification and on-going submission of course evaluations, all certified courses shall be subject to observation and evaluation by DRS staff or its representative. Failure to allow observation and evaluation by DRS staff or its representative is a violation of the Training Guidelines.
5. Trainers must inform DRS in writing of any of the following events within thirty (30) calendar days of the event. The written notice must be received by DRS within five (5) calendar days after the expiration of the thirty (30) day time period.
 - a) convictions of, guilty pleas to, or nolo contendere pleas to violations of the law, including traffic violations resulting in suspension or revocation of a driver's license and DUI offenses;
 - b) discipline by a professional organization;
 - c) curtailment of professional privileges; or
 - d) relinquishment of any professional privilege or license while under investigation.

A trainer against whom charges are pending that may result in any of the above actions shall likewise inform DRS of this fact within thirty (30) calendar days.

6. If a trainer fails to disclose any event as required in Section I.5. above, DRS has the discretion to revoke his or her certification. The trainer may request reconsideration by the Executive Secretary as described in Section C.13 of these Guidelines.
7. When a trainer discloses an event in Section I.5 above, DRS may curtail, modify, suspend or revoke his or her certification. If a trainer has a conviction of, or a guilty or nolo contendere plea to, a misdemeanor involving moral turpitude or a felony, and/or if a professional privilege has been revoked or relinquished to avoid revocation, the trainer's certification shall be revoked. For other events, DRS will make a determination based on whether continued certification would reflect positively on the integrity of the profession, or whether the trainer could act with competence, or whether the conduct implicated would not undermine the Standards of Ethics and Professional Conduct for Certified Mediators. DRS shall promptly notify the trainer in writing of the action taken. The trainer may request reconsideration by the Executive Secretary as described in Section C.13 of these Guidelines.
8. If a certified trainer loses his or her mediator certification, or is no longer in good standing with DRS (for example, the trainer's mediator certification has been "curtailed"), that action shall automatically result in the revocation of the trainer's certification to train. For the course to be taught, another certified mediator

would have to apply for and receive trainer certification to use the course materials.

9. “Revocation” and “decertification” as used in these Guidelines mean that the trainer is no longer certified and will NOT automatically be certified once the period of time for the revocation/decertification has expired. When the revocation/decertification period expires, the trainer is uncertified. If the uncertified trainer seeks trainer certification, he or she must reapply.
10. A trainer whose certification was revoked may reapply for initial certification after two (2) years from the date of the revocation/ decertification, or after the time frame otherwise imposed by the revoking entity.
11. Conviction of or guilty or nolo contendere plea to a misdemeanor involving moral turpitude, conviction of or guilty or nolo contendere plea to a felony, and/or revocation or relinquishment to avoid revocation of a professional privilege are permanent bars to certification as a trainer. (Upon written request as described in Section C.13., the Executive Secretary may reconsider the permanent bar upon the showing of extraordinary circumstances.)

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

20-Hour Basic Mediation Training

- I. Mediation in Context (minimum 1 hour)
 - A. Conflict Theory
 - 1. Understanding Conflict
 - 2. Conflict Styles
 - B. Conflict Resolution Continuum
 - 1. Definitions and Comparisons of Different Forms of Dispute Resolution
 - a. Negotiation
 - b. Hybrids
 - c. Arbitration
 - d. Litigation
 - 2. Where Particular Dispute Resolution Processes are Appropriate
 - C. History and Theory of Mediation
 - 1. What is Mediation?
 - 2. Why Mediation Works
 - 3. When Mediation is Appropriate
 - D. Styles of Mediation
 - 1. Broad to Narrow
 - 2. Evaluative to Facilitative
 - 3. Transformative
 - 4. Directive
- II. Mediation Process (minimum 3 hours)
 - A. Case Management and Determination of Appropriateness
 - B. Stages of Mediation
 - C. Mediator Roles and Responsibilities in Each Stage
 - D. Process Followed by the Mediator
 - E. Impact of Lawyers and Other Professionals on the Process
 - F. Mediation Statutes (including statutes regarding mandatory reporting of child abuse and to whom to report)
- III. Role-plays (minimum 8 hours)
 - A. Preparation
 - B. Role-playing
 - C. Debriefing
- IV. Mediation Skills and Techniques (minimum 3 hours)
 - A. Communication – Verbal and Non-verbal
 - B. Barriers to Communication (e.g.i.e., angry parties, cultural differences)
 - C. Active Listening
 - D. Paraphrasing and Reframing

- E. Use of Questions
- F. Building Rapport
- G. Summarizing
- H. Caucus
- I. Empowering Parties
- J. Reality Testing
- K. Dealing with Difficult Issues
- L. Impasse

- V. Agreement Writing (minimum 2 hours)
 - A. Elements of Clear and Comprehensive Agreements
 - B. Unauthorized Practice of Law Issues

- VI. Standards of Ethics (minimum 2 hours)

- VII. Certification Requirements Including Mentorship Component (maximum 15 minutes)
(indicate where guidelines for certification and mentorship guidelines are available online)

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

4-Hour Virginia Judicial System Training

The overview of the sections could be done in straight lecture. Although every trainer has a different style in designing a training program, it is clear that adults do best with a variety of training methodologies. Thus, it is suggested that the lecture portion of the training be kept to a minimum. Having a panel available to answer questions would be helpful, as would the idea of a mediator, judge, and local attorney dialogue on particular topics. Issue spotting exercises and flow charts may also be considered, depending on the size of the audience. If a videotape is used, it should be no longer than one hour in length.

I. Jurisdictional Issues

- A. Overview of each level of court and possible method of referral from each (with a focus on Juvenile and Domestic Relations District, General District, and Circuit Courts; mention appellate levels and briefly distinguish federal system)
- B. Discussion of how a referral to mediation may be generated by the Magistrate system
- C. Discussion of the role of the courts' support personnel (clerks, intake, court service units, and others) and the critical role these individuals play in integrating mediation into the system
- D. Overview of Sections 8.01-576.4 et. seq. in the Code of Virginia

II. Procedural Issues

- A. Discussion of specific process issues (note local court procedures) including:
 - 1. Normal course of a case from filing to appeals
 - 2. Referral process to mediation from each court
 - 3. What happens after an agreement is reached (consent order is entered, charges are dropped, continuance granted)
 - 4. How parties get a continuance for the purpose of pursuing mediation
 - 5. How criminal cases may be involved in mediation (i.e. the role of the Commonwealth's Attorney, how charges may be dropped if a case is referred and resolved)
 - 6. How to handle protective orders
 - 7. How to handle mediator communications with the court
 - 8. Role of Commissioners in divorce cases
 - 9. How court appearances are scheduled at each level (continuance, return date)

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

20-Hour Family Mediation Training

- I. Review of Mediation Process (minimum .5 hour)
 - Overview of Mediation Process/Stages
 - Brief Comparison of Family Mediation with General Mediation

- II. Overview of Custody and Visitation (minimum 1 hour)
 - A. Family Systems
 - 1. Never Married Parents
 - 2. Absent Parents
 - 3. Grandparents and Other Relatives
 - B. Social, Emotional, and Psychological Aspects of Custody and Visitation
 - 1. Adult Issues
 - 2. Child Issues
 - C. Values and Bias Awareness
 - 1. Personal
 - 2. Societal

- III. Overview of Divorce and Separation (minimum .5 hour)
 - A. Grounds for Divorces
 - B. Contested and Uncontested
 - C. Stages of Divorce
 - D. Role of Lawyers, Experts, Guardians ad Litem

- IV. Assessing Appropriateness for Mediation (minimum 1 hour)
 - A. Conducting the Dispute Resolution Orientation Session
 - B. Screening for Domestic Abuse, Child Abuse, Alcohol Abuse, Mental Competency and Capacity, and Other Factors
 - C. Mediation Ethics and Statutes (including statutes regarding mandatory reporting of child abuse and to whom to report)

- V. Parenting Issues (minimum 1 hour)
 - A. Types of Custody
 - 1. Best Interests of the Child
 - 2. Child Development
 - 3. Statutes
 - B. Parenting Arrangements

- VI. Support Issues (minimum 2 hours)
 - A. Child Support
 - 1. Guidelines (calculation by hand, using a calculator and the statute)
 - 2. Deviation

- 3. Impact of DCSE Involvement
 - B. Spousal Support
 - C. Special Issues About Orders
- VII. Property Issues (minimum .5 hour)
 - A. Assets
 - B. Liabilities
- VIII. Communication and Specialized Techniques (minimum 1 hour)
 - A. Impasse
 - B. Dealing with Strong Emotions
 - C. Caucus
- IX. Memorandum/Agreement Writing (minimum 1 hour)
 - A. Writing Clear, Comprehensive Memoranda
 - B. Unauthorized Practice of Law Issues
- X. Ethics (minimum 1 hour)
- XI. Role-play (minimum 8 hours)
 - A. Demonstration
 - B. Role-plays
 - C. Debriefing

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

**8-Hour Screening for and Dealing with Domestic Abuse
in the Context of Mediation Training**

- I. Overview (minimum 1 hour)
 - A. Spectrum of domestic abuse and the cycle of violence
 - B. Scope of the domestic abuse problem
 - C. Views regarding the use of mediation in cases in which domestic abuse has existed
 - D. How to identify cases where there has been domestic abuse
 - E. Relevant statutes related to domestic violence, the mediation statutes regarding the dispute resolution orientation session, and the ethical rules related to assessing the appropriateness of a case for mediation
 - F. Model Code on Domestic Violence, the AFM Guidelines regarding domestic violence, and the Commission on Family Violence Reference Manual
- II. Initial Screening (minimum 2 hours)
 - A. Why screening is important (the ethical obligation to determine issues related to balance of power, coercion, and voluntariness and assess appropriateness of case for mediation)
 - B. How to conduct screening (use of separate sessions, screening instruments)
 - C. What to do with information once screening is conducted
 - 1. Deciding not to mediate where abuse is disclosed
 - 2. Deciding to mediate where abuse is disclosed, but with procedural modifications (conditional mediation)
 - D. Referral to other sources
- III. Ongoing Screening (minimum 2 hours)
 - A. How to address abuse issues that are disclosed or suspected during mediation
 - B. When and how to terminate where the decision is made that mediation is inappropriate
- IV. Safety Issues (minimum 1 hour)
 - A. Setting up the mediation
 - B. Conducting the mediation
 - C. Terminating the mediation
 - D. Mediator safety
 - E. Safety of other parties at the mediation
- V. Other Issues (minimum 1 hour)
 - A. How to deal with allegations of child abuse (statute regarding mandatory reporting of child abuse and to whom to report)

- B. Legal issues around domestic violence (protective orders, court process)
- C. Power issues (voluntary participation, good faith, ability to negotiate)
- D. Confidentiality of mediation proceedings
- E. Other types of domestic abuse (elder abuse, sibling abuse, cultural awareness)
- F. Mediation versus crisis intervention
- G. How to network with domestic violence advocates/shelters

An experiential component is required to assist trainees in understanding the complexity of these issues. It is recommended that a screening demonstration be provided. All trainees must participate in a role-play in which they serve as a screener. A second role-play involving abuse discovered during the mediation and subsequent termination must also be offered.

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

8-Hour Mediation Observation Training

Each observation course should be designated as appropriate for those seeking certification at a particular level; i.e., the General District Court level, the J&DR District Court level, the Circuit Court-Family level or the Circuit Court-Civil level. An individual seeking Circuit Court-Civil level, for example, will not be given credit for attending a General District Court level observation training. The demonstrations and role-plays must be specific to the level of court for which the observation course is intended.

- I. Review of the mediation process
- II. Opportunity for students to view two complete mediations, at least one of which is a live demonstration conducted by a certified mediator
- III. Opportunity for students to debrief following the mediations

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

20-Hour Circuit Court-Civil Mediation Training

- I. Overview of Mediation Process
- II. Negotiation Theory and Practice
- III. Mediating Complex Civil Disputes
 - A. Planning and Preparation
 - 1. Roles of Lawyers
 - 2. Collaborative Negotiating
 - B. Role of Experts/Other Third Parties
 - C. Skills and Techniques
 - 1. Caucus/Shuttle Diplomacy
 - 2. Role of/Need for Substantive Knowledge
 - 3. Impasse
- IV. Facilitating Multi-Party Meetings
 - A. Planning and Preparation
 - 1. Logistics/Information Gathering
 - 2. Getting the Right People to the Table
 - 3. Developing the Agenda and Ground Rules
 - 4. Settlement Authority, Hidden Agendas
 - B. Skills and Techniques
 - 1. Building Rapport and Credibility
 - 2. Facilitation Skills
 - 3. Multiple Parties
 - 4. Dealing with Resource People
 - 5. Consensus Building
 - 6. Understanding the Relationship of a Defense Attorney and His/Her Client to the Client's Insurance Carrier
 - 7. Recognizing Common Negotiation Techniques and Tactics and How to Handle Them
- V. Agreement Writing
- VI. Standards of Practice

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

12-Hour Circuit Court-Family Mediation Training

- III. Legal and Procedural Aspects of Divorce in Virginia
 - A. Grounds for Divorce
 - B. Contested and Uncontested Divorce
 - C. Stages of Divorce
- IV. Overview of Child Support
- V. Overview of Spousal Support
- 1. Overview of Legal Issues in Equitable Distribution
 - A. The Four-Step Model
 - B. Issue of Marital and Separate
- 2. Debt Issues and Bankruptcy Issues
- 3. Specific Assets
 - A. Tangible Personal Property
 - B. Real Estate
 - C. Bank Accounts
 - D. Stocks, Bonds, Miscellaneous Investments
 - E. Business Interests
 - F. Life Insurance
 - G. Retirement/Deferred Compensation
- 4. Tax Issues
- 5. Process Issues and Facilitating Decision Making
 - A. Planning/Information Gathering
 - B. Identification of Issues/Goals/Options
 - C. Dealing with Impasse
 - D. Caucusing
 - E. Balancing Power
 - F. Empowering Parties
 - G. Enhanced Communication Techniques
 - H. Handling Anger and Strong Emotions
- 6. Use of Experts, Role of Attorneys, Multi-Party Mediation
- 7. Agreement Writing

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

**4-Hour Mentoring Individuals Seeking Certification
as a Court-Referred Mediator Training**

As with other certified courses, a mixture of lecture, role-play, demonstration, exercises, and discussion is useful.

- I. Review of Mentor Guidelines/Procedures (1 hour)
How to Complete Mentee Evaluation Form and Mentee Portfolio Form

(This segment must include the entire Mentor Guidelines packet developed by Dispute Resolution Services and available on the Supreme Court of Virginia website)

- II. Role of Mentor (30 minutes)
Mentor Responsibilities to Mentee

- III. Pre-Mediation Planning (30 minutes)
Co-Mediation Model
Post-Mediation Debriefing

- IV. Tips and Techniques for Providing Constructive Feedback (2 hours)

(This segment should include role-plays or vignettes to enable the trainees the opportunity to consider challenging mentoring situations and practice providing feedback effectively to mentees)

**OFFICE OF THE EXECUTIVE SECRETARY
SUPREME COURT OF VIRGINIA**

2-Hour Appellate Training

- I. Rules and Procedures (minimum .5 hours)
 - A. SCV
 - B. CAV
- II. Current Practices / Standards of Review (minimum .5 hours)
 - A. SCV
 - B. CAV
- III. Recent Statistical Outcomes by Case Type (minimum .5 hours)
 - A. SCV
 - B. CAV

SUPREME COURT OF VIRGINIA 2020 PAY AND HOLIDAY CALENDAR FOR SALARY PAYROLL Revised May 2020

January						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
			H	2	3	4
5	6	7	8	9	10	11
12	13	14	15	\$	H	18
19	H	21	22	23	24	25
26	27	28	29	30	\$	

February						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12	13	\$	15
16	H	18	19	20	21	22
23	24	25	26	27	\$	29

March						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	\$	17	18	19	20	21
22	23	24	25	26	27	28
29	30	\$				

April						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	\$	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

May						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
					\$	2
3	4	5	6	7	8	9
10	11	12	13	14	\$	16
17	18	19	20	21	22	23
24	H	26	27	28	29	30
31						

June						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
	\$	2	3	4	5	6
7	8	9	10	11	12	13
14	15	\$	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

July						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
			\$	2	H	4
5	6	7	8	9	10	11
12	13	14	15	\$	17	18
19	20	21	22	23	24	25
26	27	28	29	30	\$	

August						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12	13	\$	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

September						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
		\$	2	3	4	5
6	H	8	9	10	11	12
13	14	15	\$	17	18	19
20	21	22	23	24	25	26
27	28	29	\$			

October						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1	2	3
4	5	6	7	8	9	10
11	H	13	14	15	\$	17
18	19	20	21	22	23	24
25	26	27	28	29	\$	31

November						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	H	4	5	6	7
8	9	10	H	12	13	14
15	\$	17	18	19	20	21
22	23	24	25	H	H	28
29	30					

December						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
		\$	2	3	4	5
6	7	8	9	10	11	12
13	14	15	\$	17	18	19
20	21	22	23	H	H	26
27	28	29	30	\$		

H Denotes Full Day Holiday

H Denotes Half Day Holiday

\$ Denotes Payday

State Holidays:

- | | |
|-------------|-------------------------------------|
| January 1 | New Year's Day |
| January 17 | Lee-Jackson Day |
| January 20 | Martin Luther King, Jr. Day |
| February 17 | George Washington Day |
| May 25 | Memorial Day |
| July 3 | Independence Day |
| September 7 | Labor Day |
| October 12 | Columbus Day & Yorktown Victory Day |
| November 3 | Election Day |
| November 11 | Veterans Day |
| November 25 | 4 hours additional holiday time |
| November 26 | Thanksgiving Day |
| November 27 | Day After Thanksgiving |
| December 24 | 8 hours additional holiday time |
| December 25 | Christmas Day |