


2016

Judicial Council of Virginia



Report to the
General Assembly
and
Supreme Court of Virginia



The Judicial Council of Virginia
2016 Report to the General Assembly and Supreme Court of Virginia
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JUDICIAL COUNCIL OF VIRGINIA

Membership as of January 3, 2017

The Honorable Donald W. Lemons, Chief Justice, Chair

The Honorable Glen A. Huff, Chief Judge, Court of Appeals of Virginia

The Honorable Jerrauld C. Jones, Judge

The Honorable Joseph W. Milam, Jr., Judge

The Honorable Nolan B. Dawkins, Judge

The Honorable Cheryl V. Higgins, Judge

The Honorable Clifford L. Athey, Jr., Judge

The Honorable Tammy S. McElyea, Judge

The Honorable Deborah V. Bryan, Judge

The Honorable William H. Cleaveland, Judge

The Honorable Mark D. Obenshain, Member, Senate of Virginia

The Honorable William J. Howell*, Speaker, Virginia House of Delegates

The Honorable David B. Albo, Member, Virginia House of Delegates

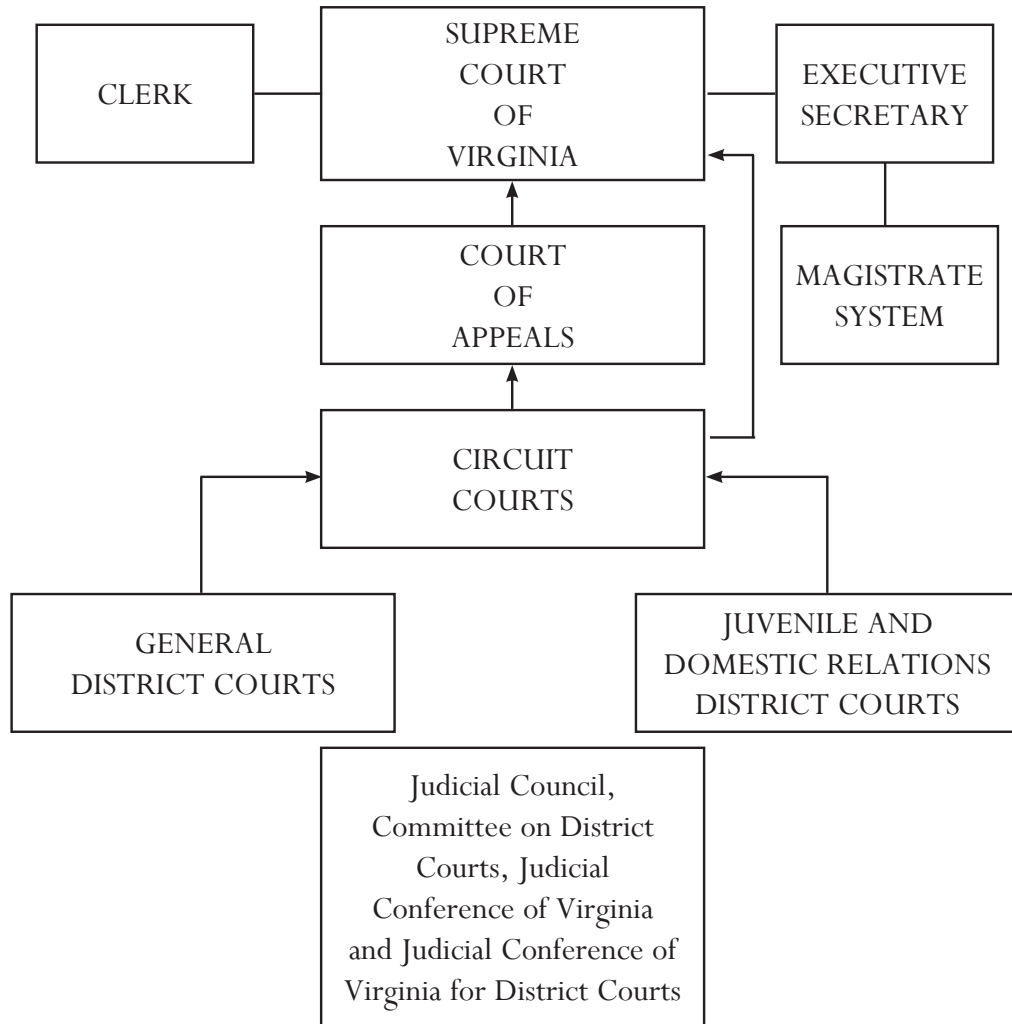
Monica Taylor Monday, Esquire

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Karl R. Hade, Executive Secretary

*By Invitation of the Chief Justice

VIRGINIA'S JUDICIAL SYSTEM



Route of Appeal →

I. Proceedings of the Judicial Council of Virginia

INTRODUCTION

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

PROCEEDINGS OF THE JUDICIAL COUNCIL

Report of the Standing Committee on Commissioners of Accounts

The Judicial Council considered several recommendations made by the Standing Committee of Commissioners of Accounts in its December 9, 2015, "Standing Committee on Commissioners of Accounts Report to the Judicial Council." In response to the Standing Committee's recommendations, the Judicial Council sought comments on changes to the existing "Uniform Fee Schedule Guideline for Commissioners of Accounts effective July 1, 2008," as well as amendments to the Code of Virginia regarding the fee for a Statement in Lieu of Settlement of Account. After a review of the recommendations and comments, the Judicial Council approved the recommended changes to the Uniform Fee Schedule.

With respect to the fee for a Statement in Lieu of Settlement of Account, the Standing Committee explained that the current \$75 fee was set by the General Assembly in 1993 and does not adequately cover associated costs to Commissioners' offices. Council agreed in principle that the interests of regular examination of Commissioner fees and of consistency in how such fees are amended would both be better served if the fee were approved in the future as a part of the Uniform Fee Schedule. Consequently, Council approved a recommendation that legislation be submitted to the General Assembly proposing that subsection D of Virginia Code § 64.2-1314 be deleted. This legislative proposal is included with the other legislative proposals later in this report. Council also authorized staff to propose an amendment of subsection D of Virginia Code § 64.2-1314 that would increase the fee to \$150, as an alternative, if appropriate, to the deletion of subsection D.

Proposed Supreme Court Rule Regulating Specialty Dockets in Trial Courts

At the request of the Chief Justice, Council reviewed and provided input regarding a proposed Rule of Court dealing with specialty dockets. Council's recommendations were considered in the Supreme Court's adoption of a new Rule 1:25, Specialty Dockets, that will become effective January 16, 2017; http://www.courts.state.va.us/courts/scv/amendments/2016_1114_rule_1_25.pdf. Rule 1:25 identifies the criteria associated with recognized specialty dockets, recognizes three existing

types of specialty dockets (drug treatment dockets, veterans dockets, and behavioral/mental health dockets), and provides a process for the possible future recognition of other types of specialty dockets.

The Honorable Harry L. Carrico Outstanding Career Service Award

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

The latest recipient of this award, selected in 2015 for presentation in 2016, was the Honorable Lawrence L. Koontz, Jr., currently a senior justice of the Supreme Court of Virginia. A native of Roanoke, Justice Koontz served the Supreme Court of Virginia with distinction from 1995 until his retirement in 2011. Prior to his service on the high court, he was an original judge of the Court of Appeals of Virginia and served two four-year terms as the Chief Judge of that court. He served as a judge of the Twenty-third Judicial Circuit and, before that, was the Chief Judge of the Juvenile and Domestic Relations District Court in the Twenty-third Judicial District.

Justice Koontz is a past President of the Ted Dalton American Inn of Court, the Virginia Juvenile Judges Association, and the Roanoke Valley Mental Health Association. He is also a former Member of the Judicial Council of Virginia and the Board of Governors of the Family Law Section of the Virginia State Bar.

LEGISLATIVE PROPOSALS FOR THE 2017 SESSION OF THE GENERAL ASSEMBLY

Modification of Months to Days for Filing Appeals

The Judicial Council approved a proposal to change how the time frame for petitions for appeal from a final judgment of a trial court or the State Corporation Commission to the Supreme Court would be expressed. The proposal amends Va. Code § 8.01-671 and § 12.1-39 to change references to “three months” and “four months” to “90 days” and “120 days,” respectively. Expression of the time frames in months rather than days would make the statutes more consistent with other rules and statutes that express deadlines in terms of days, and would reduce any ambiguity regarding these timeframes for appeal.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-671 and 12.1-239 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-671. Time within which petition must be presented.

A. In cases where an appeal is permitted from the trial court to the Supreme Court, no petition shall be presented for an appeal to the Supreme Court from any final judgment whether the Commonwealth be a party or not, (i) which shall have been rendered more than ~~three months~~ 90 days before the petition is presented, provided, that in criminal cases, a ~~thirty-day~~ 30-day extension may be granted, in the discretion of the court, in order to attain the ends of justice, or (ii) if it be an appeal from a final decree refusing a bill of review to a decree rendered more than ~~four months~~ 120 days prior thereto, unless the petition is presented within ~~three months~~ 90 days from the date of such decree.

B. When an appeal from an interlocutory decree or order is permitted, the petition for appeal shall be presented within the appropriate time limitation set forth in subsection A hereof.

C. No appeal to the Supreme Court from a decision of the Court of Appeals shall be granted unless a petition for appeal is filed within ~~thirty~~ 30 days after the date of the decision appealed from.

§ 12.1-39. Appeals generally.

The Commonwealth, any party in interest, or any party aggrieved by any final finding, decision settling the substantive law, order, or judgment of the Commission shall have, of right, an appeal to the Supreme Court irrespective of the amount involved; provided, however, that the petition for such appeal shall be filed with the Clerk of the Supreme Court within ~~four months~~ 120 days from the final judgment or finding of the State Corporation Commission; and provided further that an appeal bond is filed pursuant to § 8.01-676.1.

No other court of the Commonwealth shall have jurisdiction to review, reverse, correct, or annul any action of the Commission or to enjoin or restrain it in the performance of its official duties; provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission.

The Commission shall, whenever an appeal is taken therefrom, file in the record of the case a statement of the reasons upon which the action appealed from was based.

Extension for petition for appeal in criminal cases.

Under current law, the Supreme Court may grant a 30-day extension to the time permitted to present a petition for appeal in a criminal appeal. The Judicial Council approved a proposed amendment to Va. Code § 8.01-671, which would permit the Court to grant extensions of time in all cases, not just criminal cases, when good cause is shown. In addition, this proposal also includes the changes approved by the Judicial Council that converts all time periods expressed as months to equivalent days to reduce any ambiguity.

Be it enacted by the General Assembly of Virginia:**1. That § 8.01-671 of the Code of Virginia is amended and reenacted as follows:****§ 8.01-671. Time within which petition must be presented.**

A. In cases where an appeal is permitted from the trial court to the Supreme Court, no petition shall be presented for an appeal to the Supreme Court from any final judgment whether the Commonwealth be a party or not, (i) which shall have been rendered more than ~~three months~~ 90 days before the petition is presented, provided, ~~that in criminal cases, a thirty-day~~ 30-day extension may be granted, in the discretion of the court, in order to attain the ends of justice, or (ii) if it be an appeal from a final decree refusing a bill of review to a decree rendered more than ~~four months~~ 120 days prior thereto, unless the petition is presented within ~~three months~~ 90 days from the date of such decree.

B. When an appeal from an interlocutory decree or order is permitted, the petition for appeal shall be presented within the appropriate time limitation set forth in subsection A ~~hereof~~.

C. No appeal to the Supreme Court from a decision of the Court of Appeals shall be granted unless a petition for appeal is filed within ~~thirty~~ 30 days after the date of the decision appealed from.

Delayed appeals in criminal cases

Judicial Council also approved a proposal to amend Virginia Code §§ 19.2-321.2 and 19.2-321.1, which would address the ability of an appellant, in both the Court of Appeals and the Supreme Court, to obtain a delayed appeal for those assignments of error that were dismissed for lack of proper form or procedure even if other assignments of error were refused on the merits.

It is currently unclear whether the delayed appeal remedy applies only to a case that was dismissed as to all assignments of error, or whether, if only some assignments of error are dismissed for lack of proper form or procedure, the remedy still applies and permits the grant of a delayed appeal. These amendments make it clear that if an appeal in a criminal case was dismissed in part because an assignment of error did not adhere to the proper form or procedure, then a motion for leave to pursue a delayed appeal for those assignments of error may be filed.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-321.1 and 19.2-321.2 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-321.1. Motion in the Court of Appeals for delayed appeal in criminal cases.

A. Filing and content of motion. When, due to the error, neglect, or fault of counsel representing the appellant, or of the court reporter, or of the circuit court or an officer or employee thereof, an appeal in a criminal case has (i) never been initiated; (ii) been dismissed for failure to adhere to proper form, procedures, or time limits in the perfection of the appeal; (iii) been dismissed in part because some assignments of error contained in the petition for appeal did not adhere to proper form or procedures; or ~~(iii)~~ (iv) been denied or the conviction has been affirmed, for failure to file or timely file the indispensable transcript or written statement of facts as required by law or by the Rules of the Supreme Court; then a motion for leave to pursue a delayed appeal may be filed in the Court of Appeals within six months after the appeal has been dismissed or denied, the conviction has been affirmed, or the circuit court judgment sought to be appealed has become final, whichever is later. Such motion shall identify the circuit court and the style, date, and circuit court record number of the judgment sought to be appealed, and, if one was assigned in a prior attempt to appeal the judgment, shall give the Court of Appeals record number in that proceeding, and shall set forth the specific facts establishing the said error,

neglect, or fault. If the error, neglect, or fault is alleged to be that of an attorney representing the appellant, the motion shall be accompanied by the affidavit of the attorney whose error, neglect, or fault is alleged, verifying the specific facts alleged in the motion, and certifying that the appellant is not personally responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity for appeal.

B. Service, response, and disposition. Such motion shall be served on the attorney for the Commonwealth or, if a petition for appeal was granted in the original attempt to appeal, upon the Attorney General, in accordance with the Rules of the Supreme Court. If the Commonwealth disputes the facts alleged in the motion, or contends that those facts do not entitle the appellant to a delayed appeal under this section, the motion shall be denied without prejudice to the appellant's right to seek a delayed appeal by means of petition for a writ of habeas corpus. Otherwise, the Court of Appeals shall, if the motion meets the requirements of this section, grant appellant leave to initiate or re-initiate pursuit of the appeal.

C. Time limits when motion granted. If the motion is granted, all computations of time under the Rules of the Supreme Court shall run from the date of the order of the Court of Appeals granting the motion, or if the appellant has been determined to be indigent, from the date of the order by the circuit court appointing counsel to represent the appellant in the delayed appeal, whichever is later.

D. Applicability. The provisions of this section shall not apply to cases in which the appellant is responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity for appeal, nor shall it apply in cases where the claim of error, neglect, or fault has already been alleged and rejected in a prior judicial proceeding.

§ 19.2-321.2. Motion in the Supreme Court for delayed appeal in criminal cases.

A. Filing and content of motion. When, due to the error, neglect, or fault of counsel representing the appellant, or of the court reporter, or of the Court of Appeals or the circuit court or an officer or employee of either, an appeal from the Court of Appeals to the Supreme Court in

a criminal case has (i) never been initiated; (ii) been dismissed for failure to adhere to proper form, procedures, or time limits in the perfection of the appeal; (iii) been dismissed in part because some assignments of error contained in the petition for appeal did not adhere to proper form or procedures; or ~~(iii)~~ (iv) been denied or the conviction has been affirmed, for failure to file or timely file the indispensable transcript or written statement of facts as required by law or by the Rules of the Supreme Court; then a motion for leave to pursue a delayed appeal may be filed in the Supreme Court within six months after the appeal has been dismissed or denied, the conviction has been affirmed, or the Court of Appeals judgment sought to be appealed has become final, whichever is later. Such motion shall identify by the style, date, and Court of Appeals record number of the judgment sought to be appealed, and, if one was assigned in a prior attempt to appeal the judgment to the Supreme Court, shall give the record number assigned in the Supreme Court in that proceeding, and shall set forth the specific facts establishing the said error, neglect, or fault. If the error, neglect, or fault is alleged to be that of an attorney representing the appellant, the motion shall be accompanied by the affidavit of the attorney whose error, neglect, or fault is alleged, verifying the specific facts alleged in the motion, and certifying that the appellant is not personally responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity for appeal.

B. Service, response, and disposition. Such motion shall be served on the attorney for the Commonwealth or, if a petition for appeal was granted in the Court of Appeals or in the Supreme Court in the original attempt to appeal, upon the Attorney General, in accordance with Rule 5:4 of the Supreme Court. If the Commonwealth disputes the facts alleged in the motion, or contends that those facts do not entitle the appellant to a delayed appeal under this section, the motion shall be denied without prejudice to the appellant's right to seek a delayed appeal by means of petition for a writ of habeas corpus. Otherwise, the Supreme Court shall, if the motion meets the requirements of this section, grant appellant leave to initiate or re-initiate pursuit of the appeal from the Court of Appeals to the Supreme Court.

C. Time limits when motion granted. If the motion is granted, all computations of time under the Rules of the Supreme Court shall run from the date of the order of the Supreme Court granting the motion, or if the appellant has been determined to be indigent, from the date of the order by the circuit court appointing counsel to represent the appellant in the delayed appeal, whichever is later.

D. Applicability. The provisions of this section shall not apply to cases in which the appellant is responsible, in whole or in part, for the error, neglect, or fault causing loss of the original opportunity for appeal, nor shall it apply in cases where the claim of error, neglect, or fault has already been alleged and rejected in a prior judicial proceeding, nor shall it apply in cases in which a sentence of death has been imposed.

Fee for commissioners of accounts for statement in lieu of the settlement of accounts

Upon the recommendation of the Standing Committee of Commissioners of Accounts, the Judicial Council approved a proposal to amend Va. Code § 64.2-1314. The proposed amendment would delete subsection D from § 64.2-1314, which sets the fee of the commissioner of accounts for a Statement in Lieu of Settlement of Account. Thereafter, such fee would be included as a part of the Uniform Fee Schedule Guideline for Commissioners of Accounts, which is approved by the Judicial Council.

Be it enacted by the General Assembly of Virginia:**1. That § 64.2-1314 of the Code of Virginia is amended and reenacted as follows:****§ 64.2-1314. Statement in lieu of settlement of accounts by personal representatives in certain circumstances.**

A. For the purposes of this section, the term "residuary beneficiary" shall not include the trustee of a trust that receives a residuary gift under a decedent's will.

B. If all distributees of a decedent's estate or all residuary beneficiaries under a decedent's will are personal representatives of that decedent's estate, whether serving alone or with others who are not distributees or residuary beneficiaries, the personal representatives may, in lieu of the settlement of accounts required by § 64.2-1304, file with the commissioner of accounts a statement under oath that (i) all known charges against the estate have been paid, (ii) six months have elapsed since the personal representatives qualified in the clerk's office, and (iii) the residue of the estate has been delivered to the distributees or beneficiaries. In the case of a residuary beneficiary, the statement shall include an itemized listing, substantiated and accompanied by proper vouchers, showing satisfaction of all other bequests in the will. The statement shall be considered an account stated and subject to all the provisions of this chapter applicable to accounts stated.

C. If the statement authorized by this section cannot be filed with the commissioner of accounts within the time prescribed by § 64.2-1304, the personal representatives, within that time, shall file either (i) an interim account or (ii) a written notice under oath that the personal representatives intend to file a statement in lieu of the settlement of accounts when all

requirements of this section have been met, which shall include an explanation of why such a statement cannot presently be filed. Second and subsequent interim accounts or notices of intent to file shall be filed annually until the statement in lieu of the settlement of accounts is filed. A commissioner of accounts who determines that the reasons offered for not presently filing a statement in lieu of settlement are not sufficient, whether in a first or subsequent written notice, may require the personal representatives to file an interim account in addition to the notice. The filing of an interim account shall not preclude the filing of a subsequent statement.

~~D. For examining and approving a statement and vouchers or a written notice under the provisions of this section, the commissioner of accounts shall be allowed a fee not to exceed \$75.~~

II. Recommended Changes to Rules of Court

BACKGROUND

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

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

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

CHANGES TO RULES OF EVIDENCE RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2015 THAT BECAME EFFECTIVE IN 2016

Pursuant to Virginia Code § 8.01-3(E) there is a long lead-time on amendments to the Rules of Evidence:

Any amendment or addition to the rules of evidence shall be adopted by the Supreme Court on or before November 15 of any year and shall become effective on July 1 of the following year unless the General Assembly modifies or annuls any such amendment or addition by enactment of a general law.

For this reason, the following change to Rule 2:408, Compromise Offers and Conduct or Statements During Negotiations made by Order dated October 30, 2015, became effective July 1, 2016.

Virginia Rule of Evidence 2:408 was re-written to provide better and more predictable protection for statements made during settlement discussions. The Rule was also restyled to an outline format for greater ease of reference and clearer application.

RULE CHANGES RECOMMENDED BY THE JUDICIAL COUNCIL IN 2015 AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2016

At the November 30, 2015, meeting, Judicial Council voted to recommend proposed amendments to Part Eight of the Rules, governing Juvenile and Domestic Relations District Courts. The changes included adopting new Rule 8:8A, Filing Documents Electronically, and an amendment to Rule 8:7, Format for Filing, to cross-reference new Rule 8:8A. These changes were designed to lay the groundwork for pilot projects allowing state agencies that frequently appear before the juvenile courts to submit pleadings and documentation electronically. The Supreme Court adopted this change by Order dated March 1, 2016.

RULE CHANGES RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2016

At the May 26, 2016, meeting, Judicial Council voted to support the following recommendations from the Advisory Committee on Rules of Court. These recommendations seek to conform the Rules to legislation passed during the 2016 Session of the Virginia General Assembly. These changes were adopted by Order dated September 30, 2016, and became effective immediately.

- New Rule of Evidence 2:803.1, Statements by Child Describing Acts Relating to Offense Against Children (Derived from Code § 19.2-268.3), to track the hearsay exceptions set forth in the new statute, Virginia Code § 19.2-268.3, Admissibility of statements by children in certain cases, 2016 Acts of Assembly, ch. 542, 553.
- Amending Rule 2:615(a) governing exclusion of witnesses to track the language of Virginia Code §8.01-375 (from which the Rule is derived) which was amended by 2016 Acts of Assembly, ch. 281
- Amended Rule 7C:3, The Complaint, Warrant, Summons and Capias, to accommodate changes to the law made by 2016 Acts of Assembly, ch. 753, which now allows multiple charges on a single summons for certain toll violations.

At that same meeting in May, Judicial council recommended adoption of the following non-legislative Rule amendments. These were adopted by Order dated November 1, 2016, effective January 1, 2017.

- Proposed Amendments to Rule 1:5, Counsel, designed to address issues raised by Virginia trial judges concerning difficulties in obtaining (and updating) accurate addresses for pro se litigants.
- Revision of condemnation discovery cost-shift language in Rule 4:1, General Provisions Governing Discovery, to make explicit the requirement that a condemnee's cost recovery from the condemnor for discovery matters be "reasonable."
- Relocation of Partial Final Judgment Rule 5:8A, Appeal From Partial Final Judgment in Multi-Party Cases, to Part One where it is renumbered as Rule 1:2.
- Revisions to Rules 5:24 and 5A:17, addressing Security for Appeal, regarding the non-jurisdictional nature of appeal bond defects.

RULE CHANGES RECOMMENDED BY THE JUDICIAL COUNCIL IN 2016 PENDING ACTION BY THE SUPREME COURT OF VIRGINIA

The Advisory Committee on Rules of Court presented another recommendation to Judicial Council at Council's November 7, 2016, meeting to adopt a new rule addressing signature defects and filings by attorneys not authorized to practice law in the Commonwealth. That new rule, proposed Rule 1:5A, Filing of a Pleading, Other Paper, or Notice of Appeal by a Person Not Authorized to Practice Law in the Commonwealth, was recommended for adoption by Council and is currently pending consideration by the Supreme Court of Virginia.