
The Revised Handbook on
Appellate Advocacy
in the Supreme Court
of Virginia and the Court
of Appeals of Virginia

2011 Edition

Edited by the Litigation Section of
the Virginia State Bar

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Forward

The Virginia State Bar is pleased to present this revised handbook on Appellate Advocacy in the Supreme Court of Virginia and the Court of Appeals of Virginia.

We are grateful to the VSB Litigation Section for the revision of this publication under the leadership of Robert L. Garnier, with the assistance of Editorial Board Chair, William E. Thro, and Appellate Committee Chair, Monica T. Monday.

Without the time, effort and expertise of these individuals, this publication would not have been possible.

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President, 2010-2011
Virginia State Bar
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Preface

This handbook was initially published in 1978 and updated in 1983, 1987, 1994, and 1998. Numerous procedural and rule changes have precipitated the need for this revised edition.

The handbook is designed to assist members of the bar in preparing themselves for appeals in the Supreme Court and Court of Appeals of Virginia. This handbook, however, is not a substitute for, or replacement of, Parts 5 and 5A of the Rules of Court. The handbook contains information and suggestions intended to promote efficiency and improve appellate advocacy in these courts. It may not reflect new revisions to the Rules of Court. Every lawyer contemplating an appeal to the Supreme Court or Court of Appeals of Virginia should become thoroughly familiar with the Rules of Court.

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General Information

The Supreme Court

The Supreme Court of Virginia is the court of last resort in the judicial system of this Commonwealth. The Virginia Constitution of 1776 established the body as the Supreme Court of Appeals. By a constitutional amendment ratified in 1928, the number of members increased from five to seven. Under the present Constitution, adopted in 1971, the name of the Court changed to the Supreme Court; the number of justices remained unchanged, subject to a provision permitting enlargement of the membership to a maximum of 11.

The Constitution provides that no decision shall become the judgment of the Court except on the concurrence of at least three justices and that the Court may not declare a statute unconstitutional under either the Constitution of Virginia or the Constitution of the United States except on the concurrence of a majority of the justices. (Art. VI, § 2). A statute also incorporates these constitutional provisions. (*Virginia Code* § 17.1-308)

Justices are chosen for terms of 12 years by vote of a majority of the members elected to each House of the General Assembly. Vacancies are filled pursuant to Art. VI, § 7 and *Virginia Code* § 17.1-303. All justices must be residents of Virginia and admitted to the bar of the Commonwealth for at least five years prior to their election or appointment. (Art. VI, § 7)

The Chief Justice is elected by a majority of the justices of the Court for a term of four years. The Chief Justice is the administrative head of the judicial system of the state. (Art VI, § 4)

Justices are selected from the state at large. All seven justices have offices in the Supreme Court Building at 100 North Ninth Street in Richmond. Those who reside elsewhere in the state also have offices in the communities where they live. A retired justice may be designated a senior justice with specified duties and compensation, provided that not more than five retired justices may serve as senior justices at any one time (*Virginia Code* § 17.1-302).

The Court holds one term annually; all sessions are held in Richmond. (*Virginia Code* § 17.1-304). In practice, the annual term begins with a September session. Each session usually is scheduled for four or five days. The Court then stands in recess for six weeks. During the recess, justices prepare opinions, review and hear petitions for appeal, review draft opinions, attend to administrative duties, and study the records and briefs in cases scheduled for oral argument at the next sitting of the Court. When the Court is sitting, it hears arguments from 9:00 a.m. until all cases set for that day have been argued. The maximum time permitted for arguments is

30 minutes for each side, unless an extension of time is granted. (Rule 5:35). Typically, the Court allots 15 minutes per side for oral arguments. Although the Court is authorized to sit in divisions of three (Rule 5:3), it does so only to hear petitions. Otherwise, the Court sits *en banc*.

The Court of Appeals

The Court of Appeals was established effective January 1, 1985, following a period of sustained debate as to its desirability and the role it should play in Virginia's appellate process. In theory, the Supreme Court remains the court of last resort in all instances, because in some cases there is a procedure for appeal from a decision of the Court of Appeals. In other cases, the Supreme Court has the power to remove a proceeding from the docket of the Court of Appeals to its own docket. (*Virginia Code* §§17.1-409, 17.1-410 and 17.1-411)

Eleven judges are chosen for a term of eight years by vote of a majority of the members elected to each House of the General Assembly. Vacancies are filled pursuant to *Virginia Code* §17.1-400. All judges must be residents of Virginia and must be licensed to practice law in the Commonwealth for at least five years prior to their election or appointment. (*Virginia Code* §17.1-400)

The judges of the Court elect a Chief Judge from among themselves. The Chief Judge serves for a term of four years. The Chief Judge is responsible for scheduling sessions to discharge the business of the Court. (*Virginia Code* §17.1-400)

The Court of Appeals is housed in Richmond in the same building as that occupied by the Supreme Court. The Court of Appeals may use any public property belonging to the Commonwealth, any of its subdivisions or any federal facility for the discharge of its functions, upon proper agreement of the applicable authorities. The Court may sit at various locations in order to provide convenient access for all geographic areas of the Commonwealth. (*Virginia Code* §17.1-402). The Chief Judge, in consultation with the other judges, designates these locations. (*Virginia Code* §17.1-402)

The Court of Appeals usually sits in panels of at least three, all of whom must be present for a quorum. The Chief Judge assigns the panel members and rotates memberships. Each panel has a presiding judge designated by the Chief Judge; the Chief Judge presides when serving as a panel member. (*Virginia Code* §17.1-402). An *en banc* sitting (eight judges or more) occurs only in limited circumstances. First, when there is a dissent in a panel and at least three other judges of the Court vote in favor of the aggrieved party's request for an *en banc* hearing. Second, when any judge certifies that he

believes a decision of his panel is in conflict with a prior decision of the Court or any panel and at least three other judges agree. The Court, sitting *en banc*, may overturn any previous decision of a panel or of the full Court. (*Virginia Code* §17.1-402).

Understanding Virginia’s Revised Rules of Appellate Procedure

I. Introduction

The rules of procedure are important in any court system. In Virginia’s appellate courts, the rules of appellate procedure are very important. On April 30, 2010, the Supreme Court of Virginia announced that revised versions of the appellate rules of Virginia would go into effect on July 1, 2010. The revisions are both substantive and stylistic. The purpose of this chapter is to highlight notable rule changes, as well as provide a general overview of the appellate system in Virginia and the importance of understanding the rules governing practice and procedure in Virginia’s appellate courts.

With a few exceptions, there is no automatic right to appeal in Virginia from the trial court of record to an appellate court. One must petition for a writ of appeal, and, if the court grants the writ, the court will hear the appeal on the merits. The procedure governing the appellate process is articulated in the Rules of the Supreme Court of Virginia. Part 5 are the rules for the Supreme Court of Virginia; Part 5A are the rules for the Court of Appeals of Virginia. These rules, including the amended versions that went into effect on July 1, 2010, are available on the website for Virginia’s courts at <http://www.courts.state.va.us/courts/scv/rules.html>.

II. Virginia’s Appellate Courts

The Commonwealth of Virginia has two appellate courts: the Supreme Court of Virginia and the Court of Appeals of Virginia. Both courts are error-correcting courts.

The Supreme Court is the highest court in Virginia. It is composed of seven Justices, but also has as many as five Senior Justices who may sit when an active Justice cannot. The Supreme Court hears merits arguments in Richmond for multiple day sessions beginning in September, returning approximately every seven weeks until the end of June. Many civil cases decided in Virginia’s trial courts are appealed directly to the Supreme Court. An aggrieved party must file a petition for appeal asking the Court to consider the case. The Supreme Court has discretion to grant or refuse the petition.

The Court of Appeals was established in 1985. It has eleven judges who sit in panels of three in various regions of the State—most usually, Alexandria, Chesapeake, Richmond, and Salem. The Court of Appeals is Virginia’s appellate court of last resort in domestic relations matters, administrative agency decisions, and final decisions of the Virginia Workers’ Compensation Commission. Civil appeals may be taken from the Court of Appeals to the Supreme Court of Virginia in extraordinary cases.

For an appellate court to entertain an appeal, the alleged error must be preserved in the trial court or agency from which the appeal arises. If objections were not timely made, if proffers of evidence were not made, or if the trial court or agency did not get a chance to rule on the matter, then the appeal may be barred. An appellant must show where in the record below the issue was preserved. Additionally, Virginia’s appellate courts value brevity and clarity--arguments should be made directly and succinctly, without flourish or fanfare.

III. An Overview Of The Appellate Process In Virginia

What follows is an abbreviated summary of the appellate process in Virginia. It is generalized to provide a brief overview, and is not intended to outline the exact process in either the Supreme Court or the Court of Appeals.

The appellate process is commenced by the filing of a notice of appeal following entry of a final order in either a trial court or agency. The party filing the notice of appeal, the petitioner, is responsible for ensuring that the trial court or agency record is complete and then files its petition for appeal. The party opposing the petition for appeal, the respondent, then files its brief in opposition to the petition for appeal. The rules for both the Supreme Court and the Court of Appeals specify the required format and contents for all briefs at both the petition and merits stages. The appellate court then convenes a hearing, called a writ panel, to listen to oral argument regarding why the petition should be granted. Only the petitioner is allowed to address the appellate court during the writ panel. In the event the petitioner files a reply brief, the appellate court does not allow oral argument; it determines whether the petition will be granted based solely on the briefs.

If the petition for appeal is granted, the appellate court will issue an order—sometimes called a writ—certifying that appeal has been granted. The date of this order determines the due date for the filing of all subsequent appellate briefs. The appellant then will file its opening brief, the appellee will file its opposition, and the appellant may then file a reply brief. The parties also must work together to file a joint appendix of only the relevant materials from the trial court or agency. After the briefing is concluded, the

case will be scheduled for oral argument. After oral argument, the appellate court will issue its opinion. Following the period in which a petition for rehearing may be filed, the appellate court will issue its mandate and the appeal is concluded before that court.

IV. Notable Revisions To The Rules

The Supreme Court of Virginia may “prescribe the forms of writs and make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading and the forms of process and may prepare rules of evidence to be used in all such courts.” Code § 8.01-3(A). Pursuant to this authority, the Supreme Court created the Appellate Rules Advisory Committee and commissioned it to suggest revisions in order to promote clarity, conciseness, and uniformity in the rules of the Supreme Court (Part 5) and the Court of Appeals of Virginia (Part 5A).

The revised versions of Parts 5 and 5A went into effect on July 1, 2010. Here are the notable revisions, in order by Rule (and, where applicable, corresponding rules for the Supreme Court and Court of Appeals are listed together):

- Rule 5:1 — Amendments to this rule allow for the citation of unpublished decisions, and require the party citing an unpublished decision to include a copy with its brief or other pleading if the decision is not available in a publicly accessible electronic database.
- Rule 5:1A — This new rule states that the Supreme Court may report an attorney to the Virginia State Bar if failure to comply with the Rules results in dismissal of an appeal.
- Rule 5:5 & Rule 5A:3 — Amendments to these rules provide that extensions are now granted by “a showing of good cause sufficient to excuse the delay.” The previous standard required “the intervention of some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable.” Amendments also clarify that a post-trial motion does not alter the date of the final judgment under Rule 1:1 unless the trial court or agency modifies, vacates, or suspends the final judgment.
- Rule 5:8A — This new rule, which formalizes the common-law severable-interests doctrine, allows an appeal from a partial final judgment in multi-party cases. Similar to Federal Rule of Civil Procedure 54(b), the trial court may enter an order, expressly labeled “Partial Final Judgment,” that “contains express findings that (i) the interests of such parties, and the grounds on which judgment is entered as to them,

are separate and distinct from those raised by the issues in the claims against remaining parties, and (ii) the results of any appeal from the partial final judgment cannot affect decision of the claims against the remaining parties, and (iii) decision of the claims remaining in the trial court cannot affect the disposition of claims against the parties subject to the Partial Final Judgment if those parties are later restored to the case by reversal of the Partial Final Judgment on appeal.” No appeal, however, may be taken from the refusal to enter a Partial Final Judgment.

- Rule 5:11 — Amendments to this rule explicitly state that the Supreme Court shall not consider assignments of error if the record is incomplete, and also state that the party assigning error is responsible for ensuring that the record is sufficient to enable the Court to evaluate and resolve the assignment of error. Amendments also create a process by which the record may be supplemented.
- Rule 5:17 & Rule 5A:12 — Amendments to these rules now require the petitioner to include with each assignment of error “[a]n exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken.” Amendments also remove the requirement to provide “Questions Presented” and only require “Assignments of Error,” as well as a statement of the “standard of review” on appeal.
- Rule 5:25 & Rule 5A:18 — Although differences remain, amendments harmonized the language of these two rules, now styled as “Preservation of Issues for Appellate Review.” The rules emphasize that a “mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.”
- Rule 5:26 — Amendments to this rule prohibit arguments that attempt to incorporate by reference the arguments made in pleadings below by merely citing to them.
- Rule 5:32 — Amendments significantly reorganized this rule governing the appendix (in addition, prohibitions on the use of condensed or multi-page transcripts in the appendix and other formatting requirements are now in revised Rule 5:6). The amendments emphasize that unnecessary or irrelevant materials are not to be included in the appendix.

- Rule 5A:37 — This new rule allows for appellate mediation in certain cases in the Court of Appeals.
- Word Counts— Various rules were amended to permit a party to file a brief that comports with either page limits or a word count.

Preserving the Record for Appeal

When exactly does the appellate process begin?

While some may view it as the filing of the notice of appeal, the groundwork for an appeal occurs while the case is in the trial court. This is so because Virginia appellate courts, like any appellate court, will not consider an argument for the first time on appeal. The first step in the appellate process, then, is not the filing of the notice of appeal, but preserving the issue in the trial court.

I. The Contemporaneous Objection Rule

Rules 5A:18 and 5:25 enunciate the contemporaneous objection rules. The Court of Appeals Rule, Rule 5A:18, states “[n]o ruling of the trial court or the Virginia Worker’s Compensation Commission will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.” Similarly, Rule 5:25, pertaining to the Supreme Court of Virginia, states “[n]o ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.”

The rationale behind the contemporaneous objection rule is that judicial economy requires that the trial court have the opportunity to make an informed ruling on the issue presented in order to prevent needless appeals and reversals. Fairness to the trial court also prevents an appellate court from reversing a trial court on an issue that was not presented to it. *Cirrito v. Cirrito*, 44 Va. App. 287, 314, 605 S.E.2d 268, 281 (2004). Furthermore, the requirement of a specific argument or objection allows the opposing party the opportunity to respond to that argument or objection at the trial court level. While this rule applies to an appellant, it does not apply to an appellee, because an appellee’s position generally is not a “basis for reversal” as mentioned in Rule 5A:18. *Driscoll v. Commonwealth*, 14 Va. App. 449, 452, 417 S.E.2d 312 (1992). Although the Rule appears simple, it has several aspects that may be problematic.

First, in order to preserve an issue for appeal, a litigant must object with specificity. Simply endorsing an order as “seen and objected to” generally is not sufficient to preserve the issue for appeal except in those rare circumstances where the court’s ruling is narrow enough so that the basis for the objection is obvious. *Herring v. Herring*, 33 Va. App. 281, 286, 532 S.E.2d 923, 926 (2000). Moreover, if an appellant chooses to use a written statement of facts instead of a trial or hearing transcript, the statement of facts must specifically declare that a particular argument was presented to the trial court. Failure to declare that an argument was presented will cause the appellate court to consider the issue waived.

One standard misconception subscribed to by many trial lawyers is that a lawyer must follow up on a trial court’s adverse ruling with the words “note my exception.” Some erroneously believe that with the utterance of those words alone, any ruling of the court is preserved for further review on appeal. Conversely, another fallacy is the notion that an issue is not preserved for appeal unless the words “note my exception” are spoken, regardless of the depth of the argument made to the trial court. The truth is that all that is required is to alert the court and opposing counsel of an argument. Furthermore, it is not necessary that an appellant rely on the same authority on appeal as he or she did at trial. *Kyer v. Commonwealth*, 43 Va. App. 603, 613 n.3, 601 S.E.2d 6, 11 n.3 (2004) (“Rule 5A:18 ‘does not prohibit reliance on statutes or cases not presented to the trial court to support, on appeal, a position otherwise adequately presented at trial.’”) (Quoting *Lash v. County of Henrico*, 14 Va. App. 926, 929, 421 S.E.2d 851, 853 (1992) (en banc)).

Second, an objection or argument must also be raised in a timely fashion. In order to be timely, an argument or objection must be raised as the issue arises. This means that an objection to inadmissible witness testimony or evidence must be made at the same time the witness attempts to give that testimony or provide that evidence. “To be timely, an objection must be made when the occasion arises—at the time the evidence is offered, the statement made, [or ruling given].” *Bowman v. Commonwealth*, 30 Va. App. 298, 301, 516 S.E.2d 705, 707 (1999). It also means that a motion for a mistrial must be made when the objectionable words are spoken at trial, or jury instructions given. See *Reid v. Baumgardner*, 217 Va. 769, 774, 232 S.E.2d 778, 781 (1977).

Third, some issues require extra efforts from the lawyer to preserve the record on appeal. For instance, if an objection to a question asked on direct examination is sustained, the attorney conducting the direct examination must proffer the witness’s expected testimony. Similarly, if an objection is

sustained to a question asked on cross-examination, the attorney conducting the cross-examination must proffer the expected answer of the witness. Since the trial court has already made its ruling, the proffer is purely for the benefit of the appellate court. Moreover, it is not necessary that the proffer be contemporaneous with the court's ruling--it may be done after trial in writing. If the excluded evidence is an exhibit rather than testimony, the proposed exhibit must be marked as rejected and included in the record.

Even in situations where something may be obvious in the trial court, it may not be obvious on appeal. For example, suppose a defense attorney is challenging a prosecution's peremptory strike of a juror pursuant to *Batson v. Kentucky*, 479 U.S. 79 (1986). The race of the defendant and jurors are both important for conducting any type of *Batson* analysis and determining whether strikes are discriminatory in nature or are race-neutral. At trial, the race of the individual prospective jurors may be obvious to the parties and the court, but an appellate court will have no way of knowing unless it is on the record. "The burden is upon the appellant to provide us with a record which substantiates the claim of error. In the absence thereof, we will not consider the point." *Jenkins v. Winchester Dep't of Soc. Servs.*, 12 Va. App. 1178, 1185, 409 S.E.2d 16, 20 (1991) (citation omitted).

Similarly, when opposing counsel makes an improper argument during closing, an attorney not only must make a specific objection to the improper argument, but additionally must follow up by either moving for a mistrial or requesting a cautionary instruction from the judge. *Bennett v. Commonwealth*, 29 Va. App. 261, 280-81, 511 S.E.2d 439, 448 (1999).

Consider the following interchange during a closing argument of a criminal jury trial:

Prosecutor: Now, ladies and gentlemen, we've all got to come together, and do what is right, you, me, and the judge, we're all on the same team. We *must* find this defendant guilty. He has been convicted of crimes before, so we know he must have done this one. He would not be on trial if he were not guilty, we all know that the police do not make mistakes, and they would not have charged him if he was not the right man. Nevertheless, my biggest question is, if this man is innocent, then why did he not get on the stand and say he was innocent? The defendant has clearly not met his burden of proving his innocence beyond a reasonable doubt, and therefore, should be assumed to be guilty, as the law requires.

Defense attorney: Objection, your honor, on multiple grounds. I do not even know where to begin. The Commonwealth is making a call for justice, is attempting to align itself with the jury, and suggesting

that the Court is an arm of the Commonwealth. This is also the worst case of burden shifting I have ever seen, the Commonwealth has misstated the law, and is therefore in clear violation of the defendant's due process rights.

The Court: This is the best closing argument I have ever heard. Have a seat counsel, objection overruled.

While this objection seems specific because counsel referred to each problem with the argument, counsel failed to move for a mistrial or to ask for a cautionary instruction. Thus, the objection is not preserved for appellate review. However, this objection may still be reviewable under the "ends of justice" exception, as discussed below.

Moreover, sufficiency of the evidence issues require specific action. In a jury trial, all legal issues, such as sufficiency of the evidence, must be addressed to the court, and not the jury. This may be done in two ways. Defense counsel may move to strike the opposing party's evidence. If defense moves to strike at the conclusion of the opposing party's evidence, and then presents evidence, counsel *must* renew the motion to strike at the conclusion of defense evidence. If not, then the issue is not preserved for appeal.

Defense counsel may preserve for appeal the question of sufficiency of the evidence by moving to set aside the verdict after a jury trial. *Fields v. Commonwealth*, 5 Va. App. 229, 236, 361 S.E.2d 359, 363 (1987). Keep in mind, however, that the only issue that can be raised post-trial in a motion to set aside the verdict is sufficiency of the evidence. If, for example, while reading transcripts of trial to prepare for an appeal, counsel notices a hearsay objection that should have been made during trial but wasn't, counsel cannot file a motion to set aside the verdict based on the hearsay objection. That should have been done during trial. Endorsing an order as simply "seen and objected to" is insufficient to preserve the issue for appeal. *Lee v. Lee*, 12 Va. App. 512, 404 S.E.2d 736, 738 (1991).

In a bench trial, counsel may preserve the issue of sufficiency of the evidence for appeal by the two methods mentioned above, or by simply raising it during the closing argument. *See Campbell v. Commonwealth*, 12 Va. App. 476, 481, 405 S.E.2d 1, 3 (1991) (en banc). However, in preserving the issue of sufficiency of the evidence for appeal, counsel cannot simply make a blanket sufficiency of the evidence argument. Instead, counsel must make an argument on each element of an offense or cause of action.

Consider this example. Ricky arrives home one night after consuming several cans of beer. As he walks up to his home, he thinks he sees a man

sneaking out the back door, pulling his shirt on as he goes, when he knows his wife is home. His suspicions are confirmed when he walks in and sees a can of Skoal chewing tobacco on the counter, when Ricky only chews Copenhagen. When Ricky confronts his wife, Lucy, about his discovery, she admits to having an affair, and the two get into an intense argument. Lucy informs Ricky that he is not “half the man” as Julian, her new paramour, tensions escalate even more, and Lucy says, “hit me with your best shot, fire away.” Ricky backhands Lucy.

At Ricky’s trial for domestic assault and battery third or subsequent offense, Ricky moves to strike the Commonwealth’s evidence, and argues that the Commonwealth did not prove the requisite prior convictions, because the judge’s signature on the back of one of the prior warrants is illegible. Ricky is convicted. On appeal, Ricky argues that the contact was consensual, because Lucy challenged him to “hit [her] with [his] best shot.”

The issue of consent will not be preserved for appellate review, because this particular element of the offense was not argued to the trial court.

II. Exceptions to the Contemporaneous Objection Rule

There are three major exceptions to the contemporaneous objection rule.

First, as the rules make clear, rulings of the trial court or commission to which counsel does not object with specificity will not be reviewed on appeal “except for good cause shown or to enable [the appellate courts] to attain the ends of justice.” The “good cause” exception relates to the appellant’s ability to make an objection to a ruling, and the reasons why such an objection was not made. *Luck v. Commonwealth*, 32 Va. App. 827, 834, 531 S.E.2d 41, 44 (2000). Consider this modified version of a previous example:

Prosecutor: Now, ladies and gentlemen, we’ve all got to come together, and do what is right, you, me, and the judge, we’re all on the same team. We must find this defendant guilty. He has been convicted of crimes before, so we know he must have done this one. He would not be on trial if he were not guilty, we all know that the police do not make mistakes, and they would not have charged him if he was not the right man. Nevertheless, my biggest question is, if this man is innocent, then why did he not get on the stand and say he was innocent? The defendant has clearly not met his burden of proving his innocence beyond a reasonable doubt, and therefore, should be assumed to be guilty, as the law requires.

Defense attorney: Objection, your honor, on multiple grounds. I do not even know where to begin. The Commonwealth is making a call

for justice, is attempting to align itself with the jury and suggesting that the Court is an arm of the Commonwealth. This is also the worst case of burden shifting I have ever seen, the Commonwealth has misstated the law, and is therefore in clear violation of the defendant's due process rights.

The Court: This is the best closing argument I have ever heard. Have a seat counsel, objection overruled. One more outburst like that and I will hold you in contempt of court. The Commonwealth may continue.

Prosecutor: And another reason that you must find the defendant guilty is because I can tell you, from all of my years of prosecuting, I know this one is guilty...

Defense attorney: Your honor, I object! Now the Commonwealth is vouching...

The Court: Counsel, I warned you, I am holding you in contempt. Defendant and defense counsel are remanded to the custody of the Sheriff.

Although defense counsel did not finish his objection, the appellate court probably would address the issue, because counsel did not have an opportunity to make an argument, and thus the "good cause" exception applies.

The second exception to the contemporaneous objection rule is the "ends of justice" exception. As with the "good cause" exception, appellate courts rarely invoke this exception, but when they do, they do so only when a clear "miscarriage of justice" has occurred. A "miscarriage of justice" that *might* have occurred is insufficient. *Mounce v. Commonwealth*, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987). Although there is no clear example or definition of a "miscarriage of justice," it can occur in criminal or civil cases, but more often will occur in criminal cases, and can apply to both the guilt and sentencing phases of trial. As the term "miscarriage of justice" suggests, appellate courts will only invoke this exception when they are certain that they will reverse the judgment of the trial court. One situation in which the exception is sometimes invoked occurs when a criminal defendant has been convicted of a crime, but the record clearly shows that no crime had taken place or that the defendant's conduct did not constitute a crime. *See Bennett v. Commonwealth*, 35 Va. App. 442, 546 S.E.2d 209 (2001) ("ends of justice" exception invoked to reverse defendant's convictions of assault on a law enforcement officer after making only threats to the law enforcement officers).

The third exception to the contemporaneous objection rule applies to situations in which the trial court had no jurisdiction to hear the case in the first place. When this happens, the ruling is essentially void, rather than voidable. A challenge to a trial court's subject matter jurisdiction can thus be raised at any time, including for the first time on appeal by the court *sua sponte*. See *Porter v. Commonwealth*, 276 Va. 203, 228-29, 661 S.E.2d 415, 427-28 (2008) (citing *Morrison v. Bestler*, 239 Va. 166, 387 S.E.2d 753 (1990)). Do not confuse this with a challenge to either *territorial* jurisdiction or venue, however, as these must be raised during trial and will be considered waived if not done.

While the prospect of an appeal may seem far off during trial preparation, remember that the issues and argument raised at trial will control the direction of the appeal. The fewer arguments that are presented to the trial court, the fewer issues are preserved for appeal. With all of the arguments made, and a final order entered by the trial court, the case is ripe for appeal.

Writing a Brief: The Rules

I. In The Supreme Court

Requirements as to the form and contents of all briefs are set out in Rules 5:6 and 5:26. See also Rule 5:17, describing the required form and contents of petitions.

II. General Requirements For All Briefs

Rule 5:6 sets out the mechanical requirements for briefs and all other documents—font size, permissible fonts, margins, spacing of text and footnotes. Some of the requirements, such as print size, vary between the Supreme Court and the Court of Appeals so the applicable rules always should be referenced. An appeal will not be dismissed for failure to conform to Rule 5:6, but the Court may require that the document be re-written to comply with this rule.

Rule 5:26 sets out the filing time and the requirements for all briefs, except for appeals in death penalty cases under Rule 5:22. Rule 5:26 also governs the requirements for briefs of *amici curiae*. Note that all briefs must contain counsel's Virginia State Bar number, address, telephone number, facsimile number (if any) and e-mail address (if any).

The requirements of Rule 5:26 are similar to, but not precisely the same as, the requirements for petitions for appeal found in Rule 5:17. Briefs in the Supreme Court must conform to either the page limit or the word limit set

out in Rule 5:26 for the opening brief, appellee’s brief, and reply brief. These limits do not include the cover page, table of contents, table of authorities, or certificate. Note that if word count, rather than page count, is used, counsel must state in a certificate that the brief complies with the word count limit.

Rule 5:26 also requires that fifteen copies be filed with the Court and three copies mailed or delivered to opposing counsel, *and one electronic version of the brief in Adobe Acrobat PDF format must be filed with the Court and served on opposing counsel*. The electronic version can be filed either on CD-ROM or by e-mail. See Rule 5:26 for the Court’s e-mail address.

The certificate of service must state that the Rule has been complied with and the method of transmission to the clerk for filing.

Arguments made in the lower court cannot be incorporated by reference to pleadings below. Arguments must be written out in the brief itself.

III. Specific Content Requirements For Opening Brief, Brief Of Appellee, Reply Brief, And Brief Amicus Curiae

These content requirements are set out in Rules 5:27 (Opening Brief), 5:28 (Brief of Appellee), 5:29 (Reply Brief), and 5:30 (Brief of Amicus Curiae).

The opening brief must contain a table of contents and a table of authorities. Unpublished judicial dispositions, such as opinions and orders, may be cited in the brief as informative, but are not binding authority. If such disposition is not publicly accessible, a copy must be filed with the brief. Rule 5:1(f).

The opening brief also must contain a statement of the case giving the material proceedings below and a statement of facts with references to pages of the appendix. The opening brief must contain assignments of error, *the standard of review relating to each assignment of error*, argument with citation to legal authorities, and a short conclusion stating the relief sought.

Each assignment of error must be followed by “a clear and exact reference” to the pages of the appendix where the error was preserved in the court below. The assignment of error must address the findings or rulings of the trial court or other tribunal from which the appeal is taken and must relate to the arguments made in the brief. *Failure to state a sufficient assignment of error will result in dismissal of the case*. Rule 5:17(c)(1)(iii).

When an appeal is taken from a decision of the Court of Appeals, the assignments of error in the petition and the brief must relate to assignments of error presented in, or actions taken by, the Court of Appeals. If the Court of Appeals has concluded that an issue was not preserved in the trial court,

an appellant who challenges that conclusion must assign error to it. In the opening brief, the assignments of error will be those granted by the Supreme Court from among the assignments of error in the petition.

In cases in which the decision of the Court of Appeals is made final under *Virginia Code* § 17.1-410, such as those involving administrative agency decisions or traffic and misdemeanor criminal cases in which no incarceration is imposed, the petition for appeal to the Supreme Court must include a statement saying why the issue involves a substantial constitutional question or a matter of significant precedential value. Rule 5:17(c)(2).

Rule 5:28 sets out the required contents and word limits for the brief of the appellee. These are substantially the same as the required contents of appellant's opening brief. The brief of the appellee must contain tables of contents and authorities, a statement of the case if appellee disagrees with the statement in the opening brief, a statement of facts necessary to correct or amplify the facts stated in the opening brief, with references to the pages of the appendix where the facts are to be found, and the standard of review relating to each assignment of error.

Cross-error may be assigned in the appellee's brief. Each assignment of cross-error must contain a reference to the specific pages of the appendix where it is preserved, the standard of review appropriate to the cross-error and a statement of the relief sought. Rule 5:28(e).

The appellant may file a reply brief. Rule 5:29. Rule 5:26(b) and (c) sets out page or word limits and filing times.

A brief *amicus curiae* may be filed without leave of court by a non-party with the consent of all parties, or by the United States, or the Commonwealth or any person requested by the Court to file such a brief. Otherwise, a brief *amicus curiae* can only be filed by leave of the Court, granted on motion. The *amicus* brief must conform to the same requirements as the brief of the party supported, either appellant or appellee. Rule 5:30.

Rule 5:32 lists the contents that must be included in the appendix to the record, along with other portions of the record that the parties determine to be germane to the assignments of error. The Rule also prescribes the format of the appendix.

Preparing and filing the appendix is the appellant's responsibility. The appellant has fifteen days from the day the appeal is granted to file a designation of the contents to be included in the appendix. The appellee then has fifteen days to designate additional contents.

Neither party should designate material that is not relevant to the assignments of error. The Court itself or upon motion of a party may impose

the cost of such “unnecessary designation” on the party that designated the unnecessary material. Rule 5:32(b)(3).

When the opening brief is filed, the appellant also must file fifteen copies of the appendix and serve two copies on opposing counsel. However, the appellant may file instead ten “tangible” copies and ten “electronic” copies with the Court and provide one tangible copy and one electronic copy to opposing counsel. Rule 5:32(a)(3)(ii). If the appendix is not filed on time or does not comply with the rule, the Court may order that a proper appendix be filed within a specified time and may dismiss the appeal for failure to comply with the order.

IV. In The Court of Appeals

Rule 5A:4 sets out the mechanical requirements for all documents filed in the Court of Appeals—margins, line spacing, font size, and binding. If a document has a word count limitation, a certificate of compliance is required and must state the number of words the document contains. For any document filed in the Court of Appeals, the applicable word limits do not include cover page, table of contents, table of authorities and certificate. Note that the Court of Appeals (unlike the Supreme Court) prescribes font size (12 point type or larger) but not specific fonts.

Rule 5A:19 prescribes word count limits for all briefs: 12,300 words for opening brief of appellant, brief of appellee and brief amicus curiae; 3500 words for any reply brief. In addition to the number of copies required to be filed with the Court (seven) and served on opposing counsel (one), the Court of Appeals also requires, by order, the filing of four electronic copies of the brief and appendix. The electronic copies must be filed on four separate CDs or DVDs, in Adobe Acrobat PDF format.

Rule 5A:19(b) sets out the deadlines for filing briefs and reply briefs in an appeal of right, starting from the date the record is filed in the Court of Appeals. Rule 5A:19(c) sets out the same deadlines for filing briefs in a case where a petition for appeal has been granted, starting from the date of the order granting the appeal.

Rule 5A:20 sets out the content requirements for the opening brief. Note that under the new rules the Court of Appeals requires *assignments of error*, not questions presented as in the past. The assignments of error must be followed by a reference to the pages of the appendix (in granted cases) or to the transcript, written statement or record (in appeals of right), showing where the assigned error was preserved in the trial court. Rule 5A:20(c). If the assignment of error was not preserved in the trial court, the appellant

must state why the good cause or ends of justice exceptions to Rule 5A:18 are applicable. Rule 5A:20(e).

The Court of Appeals also requires a statement of the *standard of review* for each assignment of error. The standard of review should be stated in the argument portion of the brief, along with the argument on that assignment of error, principles of law and citations to appropriate legal authorities. Rule 5A:20(e).

The remainder of the required contents (tables, statement of the case, statement of facts, relief sought) are the same as the Supreme Court requirement for briefs. The certificate must contain a statement that Rule 5A:19(f) (filing and service) has been complied with and whether counsel desires to waive oral argument. The certificate must also state the number of words in the brief, exclusive of cover page, tables, and certificates. Counsel must include his or her Virginia State Bar number, address, telephone, facsimile number (if any) and e-mail address (if any).

Rule 5A:21 lists the requirements for the brief of the appellee, and brief of a guardian ad litem where applicable. The requirements are the same as for the opening brief of the appellant. Statements of the case and of the facts should be used to correct or amplify the statements in the opening brief.

Rule 5A:22 governs reply briefs. Word count must be stated as in all other briefs.

Rule 5A:23 governs briefs amicus curiae. The procedure is the same as in the Supreme Court. The brief amicus curiae must comply with the time and content requirements of the brief of the party supported.

Rules 5A:33, 5A:34, and 5A:35 govern petitions for rehearing after a panel decision on the merits and briefs on rehearing *en banc*. The petition for rehearing must be filed electronically. Rules 5A:33 and 5A:34 set forth word limits and certification and service requirements. When rehearing *en banc* is granted, the appellant files the opening brief even though the rehearing *en banc* was granted to the appellee. The briefs should address only those issues on which rehearing has been granted. Rule 5A:35 sets out the word limits, filing deadlines and the certification and service requirements.

Writing a Brief: Style and Content

Counsel who carefully complies with all rules will produce a brief that is acceptable in Virginia appellate courts. That alone, however, does not assure that the brief will be clear, relevant, and persuasive.

In the petition for appeal or opening brief of appellant, counsel must state what happened in the lower court or commission and what errors committed there require reversal. The brief begins with a statement of the nature of the case and the material proceedings below. That should be followed by a statement of facts with exact references to the page of the appendix, trial transcript or other place in the record where each fact is to be found. The argument section must be related to the particular facts of the case. Through argument, counsel must show not only that error was committed but that the error was not harmless and requires reversal of the lower court decision.

I. A Few General Tips

First, think about what you want to say before you begin to write. Outlining anticipated arguments will help identify points you want to make. Avoid clichés and technical jargon unless necessary. Avoid long quotations from testimony. Call the parties by their names, not “appellant” and “appellee.” Use short sentences and short paragraphs. Use headings. Use active voice, not passive. Finally, leave yourself enough time to revise, proofread, then revise, and proofread again.

II. Frame Assignments of Error Carefully

Properly drafted assignments of error are critical to your appeal. Each assignment of error should inform opposing counsel and the appellate judges of what ruling is being challenged and why. The assignment of error also assists the parties to determine which portions of the trial record need to be included in the appendix. If you are challenging the trial court’s denial of a motion, the assignment of error should characterize the motion (“motion to suppress evidence”). You also should state specifically why the lower court’s ruling was wrong (“the police officer did not have probable cause to arrest”). If a ruling is wrong for more than one reason, you should state every reason—either in one lengthy assignment of error or in several discrete assignments of error involving the same ruling. Several discrete assignments of error are preferable.

You may find as you are writing your argument that you need to refine your assignment of error. Re-visit your assignment of error after you have drafted your argument, to make sure your assignment of error embraces the argument you have made.

How many assignments of error should you have? Most appellate experts think three or four should be the maximum, and fewer are better, so long as you cover all the errors you need to address. The hallmark of good appellate advocacy is to focus on the points to which you believe the court will be most receptive. Numerous, even possibly frivolous, assignments of error will not increase your chances of having your appeal awarded.

III. State the Correct Standard of Review for Each Assignment of Error

If, for example, your appeal involves interpretation of a statute, the appellate court will review the lower court's decision *de novo*, without any deference to the lower court's decision. Other errors assigned in the appeal may be subject to a different standard of review, for example, either as a mixed question of fact and law, a factual issue on which the appellate court defers to the trial court, or an issue that is subject to review only for abuse of discretion by the trial court. The standards mentioned here are not exhaustive. Read appellate cases on each issue to determine the appropriate standard of review.

IV. State the Facts Fairly

Present all the facts relevant to the appeal and leave out the facts that are not relevant. The facts should tell a cohesive "story" of what happened in the case, without sounding like pure fiction. In a criminal case, a chronological framework from offense to trial usually works well, as opposed to simply summarizing the testimony presented at the trial witness by witness. Cite to the testimony or other portion of the record to support each fact. Do not make any statement unsupported by the record.

Do not overstate your case or exaggerate the facts. The place to put your interpretation on the facts is in the *argument* section of your brief, not in the statement of facts itself. The appellate court will view the evidence in the light most favorable to the party that prevailed at the trial. If there is a conflict in the evidence, the appellate court is bound by the trial court's determination of the facts.

V. Argue Concisely and to the Point

Arguments should be tailored to the assignments of error (and vice versa). Arguments should be concise and to the point. If your argument is long or complex, you may lead off with a short summary of the argument. Quotations from the record should be short.

Each argument must be related to the particular facts of the case. Each argument should be directed toward showing how the challenged court ruling was in error and why the error was prejudicial and, therefore,

reversible. Because you must abide by page and word count limits, every word used should further your argument and unnecessary words should be eliminated.

VI. Use Appropriate Legal Authority

If there are Virginia cases on point, use them to support your argument, unless they are unfavorable. If the Virginia cases are unfavorable, distinguish them. If unfavorable Virginia cases cannot be distinguished from your case, you must acknowledge them. You should then cite to favorable authority from other jurisdictions or from treatises, law review articles or other persuasive authority. Citation to unpublished opinions is permitted as “informative,” but they are not to be treated as binding authority.

Effective argument involves not just citation to authority but also discussion of the reasons why a certain case or principle should apply in your appeal. Merely quoting from a case, particularly a long passage, does not advance your argument. Analyze the law to your facts to show why the case does, or does not, control.

You should cite authority to cover every legal point you make in your brief. Do not string-cite to several cases to support the same point. Ordinarily, one or two cases will be adequate, and the appellate court will appreciate your brevity. When citing multiple cases or cases introduced by the signal “see,” use parentheticals to show the relevance of the case.

VII. Revise and Proofread Your Petition or Brief; Re-Check Your Case Authorities

Good brief writing is a process whereby you clarify legal issues for yourself and your reader. You do this by drafting and then re-drafting your arguments.

Keep in mind that although the person reading your brief is seeing the words on the page, he or she is actually hearing them in his or her head as well. If your prose is awkward, the reader will soon tire of trying to understand it and may miss the point you are trying to make. Clear and concise writing beats convoluted prose every time.

Finally, do not let a good argument be flawed by technical errors. Re-check case authorities for any recent developments. Proofread your brief one more time and have someone else proofread it also.

Standard of Review

The standard of review is fundamental to an appellate court’s analysis of a given case. It provides, in effect, the court’s job description. The standard of review limits the court’s authority, defines its level of deference to the trial judge and jury, and often determines the outcome of the appeal.

Virginia’s appellate courts review both questions of fact and questions of law. As a practical matter, however, appellate courts generally have the final say on questions of law, while trial courts get the last word on questions of fact. *See, e.g., Virginia Code* § 8.01-680. In addition, questions of trial management are generally committed to the trial court’s discretion.

The applicable standard of review reflects these distinctions.

I. Questions of Fact

Factual findings by the lower court—whether in a jury trial or a bench trial—receive the highest degree of appellate deference. Thus, parties who prevail in the trial court occupy the “most favored position known to the law.” The trial court’s judgment is presumptively correct, and it will not be set aside unless it was plainly wrong or without evidentiary support. On review, the appellate court will consider the evidence and all reasonable inferences flowing from the evidence in the light most favorable to the prevailing party below.

Significantly, an appellate court gives deference to a jury verdict even where it has been set aside by the trial court. The verdict’s recipient receives the benefit of all substantial conflicts in the evidence and all reasonable inferences that might be drawn from the evidence. In other words, if there is any credible evidence in the record to support the verdict, the appellate court will reinstate it and enter final judgment.

When the trial court has heard evidence *ore tenus*, its factual findings will receive the same degree of deference accorded to a jury verdict.

II. Trial Management

Appellate courts also defer to lower courts on questions of trial management, which generally are committed to the trial court’s discretion. The lower court’s rulings on these questions will be reversed only where the court has abused that discretion. For example, decisions to admit or exclude evidence, permit or deny the amendment of pleadings, or to otherwise control the incidents of trial are reviewed only for an abuse of discretion. Likewise, the trial court’s decision to award sanctions is committed to the trial court’s discretion.

III. Questions of Law

By contrast, Virginia's appellate courts review questions of law *de novo*. They show no deference to the trial court's legal conclusions.

When reviewing an action of the trial court sustaining a demurrer or granting a motion for summary judgment and striking the evidence of a party, the appellate courts view the evidence in the light most favorable to the non-prevailing party.

IV. Practice Tips

These basic principles yield some tips for practitioners:

- When considering potential issues to raise on appeal, be mindful of the applicable standard. In most cases, it will be futile to attack a fact finding on appeal. Use the standard of review to narrow and select issues.
- To the extent possible, frame your issues to control the standard of review. Instead of contending that the trial court abused its discretion, for example, consider arguing that it made an error of law by failing to consider a particular factor mandated by the case law.
- State the standard of review accurately and concisely in your brief, and work it into your brief and oral argument.

10 Ways to Ruin a Perfectly Good Brief

I have it on good authority that while happy families are alike, every unhappy family is unhappy in its own way. With briefs, it is just the opposite: Each good brief is unique, but miserable ones bear an awful lot in common. My job has given me the opportunity to read (and, at times, write) more than my share of bad briefs. Through careful study, I have distilled a list of ten foolproof ways to turn a good brief bad:

1. Take Shortcuts

Writing a brief is hard work, and doing it well requires you to proceed through certain stages: brainstorming, researching, brainstorming some more, outlining, writing, revising, and cite checking. Not all of these steps are fun, but skipping any one of them is the worst kind of false economy. If you do not outline, then writing will take you twice as long and your brief risks being poorly structured and repetitive. If you do not brainstorm, then you may miss a key point. If you do not cite-check, then you will be embarrassed eventually. Moreover, if you do not research or revise, then may God have mercy on your soul.

2. Keep the Court in Suspense

On brief (as in oral argument), it is important to get straight to the point. Judges are busy people. Your judge should understand the crux of your argument within sixty seconds of picking up your brief. Consider leading off with a summary of your argument, or at least an explanation of the question presented. If you launch straight into a statement of the case, your reader will struggle for pages to put everything in context.

3. Argue too Many Issues

There are rarely more than one or two, and never more than three, major points worth arguing in any brief. If you are not going to win on your strongest points, then you will certainly lose on your weaker ones. Some lawyers have told me that there is no harm in throwing in another argument or appeal point to see if it sticks. That is wrong. Judges have limited time to devote to your case, and you have few words in which to convince them. Excess argument dilutes your brief and erodes your credibility.

4. Ignore the Other Side's Best Arguments

The point of writing a brief is to help the judge arrive at the correct conclusion (*i.e.*, the one you are advocating). You cannot do that without addressing the other side's best arguments. Those arguments will come out eventually, and the judge will have to grapple with them. Give the judge the tools to do so. Ignoring the other side's best points suggests that (i) you cannot rebut them or (ii) you were not clever enough to see them coming. Neither is an impression that you want to create.

5. Call the Other Side Names

Again, the judge is trying to arrive at the legally correct result. Convincing the judge that opposing counsel is a bad person is neither a necessary nor a sufficient condition for victory. Trying to do so will only erode your message, and worse, your credibility.

6. Repeat Yourself

I know a lawyer who likes to tell judges what he's going to tell them, summarize what he's going to tell them, tell them, say it another way, repeat it for emphasis, and then conclude by telling them what he's told them. End result: his brief is about five times as long as it should be, and a real pleasure to read. You can get the same benefit in a fraction of the word count by: (1) framing the issues up front; (2) making your arguments well once; (3) giving the reader descriptive headings and subheadings to use as a road map; and (4) providing a conclusion that states the specific relief sought.

7. Use Nominalizations

Lawyers have a weird habit of taking verbs and turning them into Latinate “tion” nouns. For example, a lawyer might “conduct an evaluation” or “make an observation,” while a normal person might “evaluate” or “observe” (or better yet, “see”). The new nouns then require their own set of verbs, articles, and prepositions—all of which encourages wordiness and complicates structure. As a rule, if you can use the verb form of a word, do so. This cures about 80% of the common structural flaws in legal writing (I made that statistic up).

8. Drop Copious Footnotes

If it is not important enough to go in the text, it is not important enough to go in the brief. The only exceptions are (i) a minor subject that you have to address out of candor to the court (see above) or (ii) a citation, particularly to the record, that would break the flow of your writing if placed in the text.

9. Quote with Abandon

Block quotations are hard to read. That is bad. Splicing quotations from case law into sentences is harder to read. That is worse—especially if you are a fan of the “[a]wkward bracket and ... ellipse technique” Moreover, burying your argument in a string of parentheticals is just brutal. These are all shortcuts. They make your reader work way too hard. You are the author. Do the work yourself. Discuss your authorities. Paraphrase them and weave them into your argument.

10. Take Unreasonable Positions

The most elegant argument in the world will not do you any good if you advance it in support of an untenable position.

Oral Argument

The goal of oral argument is to convince the appellate court that your client should prevail. It is your opportunity to answer the court’s questions and confirm the soundness of your position. For this reason, counsel should waive oral argument only in exceptional circumstances. In general, waiving argument signals to the court that you do not believe in the case. Oral argument may not be the deciding factor in many appeals, but occasionally it highlights a dispositive issue not fully developed or advanced in the briefs. Do not risk the chance of losing an appeal which oral argument might have won.

Oral argument has two components: preparation and presentation. The key to a successful oral argument is thorough preparation. No matter

how dynamic or charming a speaker you are, your argument will not be successful if you are unprepared. The attorneys who look the most relaxed and sound the most persuasive at the podium are the ones who spent the most time preparing for their arguments.

I. Preparation

It should—but cannot—go without saying that you must be thoroughly conversant with the briefs, the record and the authorities cited in *all* the briefs sufficiently well to answer questions about the facts and law. Be prepared to answer questions concerning matters in the record; or how or why a case controls or is distinguishable from your case. It may be helpful to have case summaries available on cards or tabbed in an argument notebook for quick reference.

Know the record. As one appellate judge has said, if you adopt the attitude that “facts are for sissies and trial judges,” you are well on the way to losing the appeal. So, if you argue that a witness said x or that a document provides y , you must be able to state the page in the joint appendix or record where the testimony or document can be found. Many attorneys tab the joint appendix, note key information on the front cover or copy relevant pages into their argument notebook so the information is easily available. When you can quickly point to the information you are relying on, it enhances your argument because it is clear you are prepared.

Understand the standard of review that governs your case. Appellate courts operate within these boundaries. If you are asking an appellate court to contravene the governing standard of review, you cannot prevail. If you are defending, the standard of review often is one of your strongest arguments—use it to maximum advantage.

What decisional rule are you asking the court to apply, extend, or adopt? An appeal, particularly in the Supreme Court, is not just about your case; the appellate court is making law. Be clear on what you are asking the court to do and the broader ramifications that may follow. Bear in mind that the narrower the relief or rule of law you are asking the court to adopt, the greater your likelihood of success. When you know what rule applies, you also will be in a position to make appropriate concessions without harming your case. *Tip:* Justice Breyer often asks litigants to “fill in the blank” on what the rule of law should be to decide the case. Example: “A judgment of acquittal is final when _____.” Try to articulate the decisional rule you are seeking using the facts of your case. If you can do this succinctly, it likely will be a very powerful opening to your argument.

Determine whether courts have decided relevant cases since the filing of the briefs. The Court of Appeals renders opinions on Tuesdays and they are available on the Court's web site by noon. Do not overlook the unpublished decisions. Although they are not binding, there may be a useful analysis that helps you better distill or articulate your position. If the Court of Appeals renders an opinion on Tuesday and you are arguing on Wednesday or Thursday, you should be aware of it. The Supreme Court renders opinions on the final day of its session week and they are available on the Court's web site the same morning. Counsel should submit any new authority to the appropriate court as early as possible before oral argument by sending a letter to the clerk of the court and opposing counsel with a copy of the opinion attached. Note, however, this procedure applies to new cases *only*.

Try to do a moot court a week to several days ahead of the argument. This timetable should give you enough time to both finish your preparation and incorporate into your argument the feedback you receive at the moot. It will also allow you to complete any additional research you determine is necessary. If possible, enlist the assistance of colleagues who are knowledgeable in your field of practice but do not know the facts of your case. These folks are ideal for analyzing your case objectively. Be sure, though, that they will give you constructive criticism because the value of the moot is lost if you cannot hone in on the winning points and fine-tune your responses to any weaknesses.

II. Presentation

Always identify yourself, and who you represent, before proceeding with argument. A simple, "John Smith on behalf of XYZ" suffices; no elaborate introduction is required and it wastes your time.

Address the members of both courts as "Your Honor." This simple, respectful title saves the potential embarrassment of mispronouncing a judge or justice's name or mistakenly calling a Justice, "Judge" or vice versa. Be aware, too, that some members of the Court find the use of "sir" or "ma'am" inappropriate. Remember, you are there to persuade the court, so be respectful and correct. In that vein, do not "call out" members of either court by name on an opinion, or—more particularly—a dissent, they wrote in some other case. Such an approach may put that judge or justice in an uncomfortable position and could cost you a potential ally. If you are relying on the opinion, you should say "the Court held . . ." If you are arguing the dissent was right in a particular circumstance, just argue the reasoning advanced in the dissent and stress why, under your facts, that is the correct analysis to adopt.

Try to avoid distracting mannerisms that might divert the attention of the bench. The dramatic approach effective before a jury is invariably less persuasive on appeal and may offend some judges or justices. The appellate presentation should be calm, dispassionate, well-reasoned, and objective. It is important to capture and maintain the interest of the judges or justices, but a compelling legal argument is much more important to the appellate court than a flamboyant style. Although labeled “argument” this is your opportunity to have a conversation with the members of the court to explain your position.

Oral arguments before both Virginia appellate courts are recorded on tape and the tape is delivered to the justice or judge who will write the opinion. Therefore, the oral argument is not only heard once by the entire Supreme Court or panel of the Court of Appeals, but also may be heard again and analyzed by the opinion writer. This makes it even more important to plan and present the argument with great care. When judges ask questions during argument, counsel should answer promptly and, if possible, without equivocation. If you do not know the answer, it is best to say so immediately. If a member of the court is asking you about a case, you can be sure he or she has read it, so do not try to be creative—it will cost you much more than simply admitting you do not know the answer.

It is usually best to answer each question as soon as it is asked and some judges or justices simply will not allow you the luxury of “getting back” to a question. If you need more time to answer a question effectively, say so. The best approach is to attempt to answer as directly as possible and then give your explanation. You may find also, that during the course of your argument you can formulate a better or more comprehensive answer and it is perfectly fine to weave that back into your argument. For example, you might address the judge or justice who asked the question and say something like: “Which brings me back to the point Your Honor raised earlier . . .” Always make certain to answer every question before you conclude, even if the answer is weak.

Bear in mind that questions do not necessarily mean that the questioners are hostile to your position. Members of the court ask questions to clarify their own understanding, to emphasize points they believe to be significant, and to narrow the issues by obtaining concessions. The questions may indicate that the questioner believes the important point in the case is one on which you had not relied in your brief and you may be able to strengthen your position or make a convert in the course of argument. The questioner also may know *another* member of the court has a particular concern and is inviting you to address that concern so you may win over someone who is

on the fence. In other words, you have already convinced the questioner and he or she is trying to help you convince the other judges or justices.

Do not waste time arguing secondary or inconsequential errors that cannot cause reversal. Either state that you are abandoning specified points or that you will rely on your brief rather than argue, recognizing, however, that failure to argue a point is generally accepted as an admission of weakness as to that issue. Sometimes a member of the court will ask you if you waive a particular point; if you do so, the court will no longer consider the point.

Personalities should be avoided in argument. The appeal is not about you or opposing counsel. Likewise, no personal reflection should be cast upon the lower tribunal. Your demeanor is an important part of your argument and it enhances your presentation to maintain a professional tone and businesslike assessment of what transpired below.

As in the brief, brevity, but not levity, is appreciated in oral argument. Although each side is entitled to present full argument, it may be unnecessary to use the full time allocated, and it is a mistake to over-argue a case. Often an appeal involves only one question that is dispositive. Make your argument cogently and succinctly and conclude by stating the relief sought (e.g., reversal and final judgment; reversal and dismissal; reversal and remand with instructions; or affirm).

A. Appellants

Plan your argument in advance. State your theory of the case and the relief you seek up front, as it may be the only chance you get before the questioning begins. You may then briefly explain what happened below and state why and in what respects reversible error was committed. The facts may be summarized, but the members of the court have read the briefs, so a detailed recitation is unnecessary and you may be wasting precious minutes lingering on unimportant details. If there is a key fact or authority that is dispositive, cite it early and explain why it is dispositive.

It is best, however, not to memorize a “canned” argument because such an approach may make the inevitable interruptions from the bench disconcerting. This is not a presentation in which there is no audience participation. At its best, it is a conversation between knowledgeable colleagues on an interesting, perhaps difficult, point of law. No additional time is given to compensate for time lost in answering questions, so a flexible, albeit knowledgeable, approach works best. Proceed promptly to your strongest point and present it as succinctly and forcefully as you can.

If you run out of time, ask the court to consider your argument on brief for points not reached during oral argument.

Rebuttal may be unnecessary, but it generally is advisable to reserve some rebuttal time. The opportunity to answer or correct appellee's arguments may be critically important. It is permissible to have other counsel for appellant make the rebuttal argument. On rebuttal, correct anything you consider incorrect statements of fact or of law made by appellee's counsel in argument. Your rebuttal should be short and limited to one or two points. However, if the appellee has made a fatal concession, it is best to waive rebuttal rather than risk snatching defeat from the jaws of victory.

B. Appellees

Tailor your argument to meet the appellant's opening argument. Because you are responding it is difficult, if not impossible, to memorize an argument in advance or to prepare it in writing. In view of the opening argument and questions propounded by the bench it may appear that only one or two questions need be addressed. Note carefully any questions which appellant's counsel left unanswered or may have answered incorrectly and address these points at the beginning of your own argument. In addition, pay close attention to determine if a new "spin" is being advanced that was not properly preserved below and assert any appropriate procedural defenses. Be careful not to attribute to the lower tribunal any greater wisdom than that inferred from the usual presumption of correctness that applies to decisions of the lower tribunal.

Unless appellant's counsel has made an obviously fatal concession, waiving argument or resting entirely on your brief is a risky strategy and not recommended. A brief argument summarizing why the court should affirm should be made under most circumstances. However, you may complete your argument in considerably less than the allotted time. This is perfectly fine; as noted above, brevity is appreciated. If you have concluded, simply ask if there are additional questions from the court and then ask that the decision below be affirmed.

Decorum, Professionalism and Ethics

All the papers you file with an appellate court should reflect a high degree of professionalism and the appropriate decorum. While trial courts may tolerate some argumentative language, where you are in the heat of battle, the appellate courts are deliberative and detached. Intemperate language is not tolerated and you may find yourself quoted in the published reporter, along with a contempt finding. You should be particularly careful

not to direct inappropriate language toward the lower court, opposing counsel or the appellate court itself. Hyperbolic language characterizing the actions of the trial judge or the conclusion of the tribunal as “irrational,” “incredible,” “dark and ill-conceived,” “inexcusable,” “wholly untenable under fundamental concepts of . . . law” or “preposterous” likely will result in your being sanctioned. See *Taboada v. Daly Seven, Inc.*, 272 Va. 211, 636 S.E.2d 889 (2006); *Williams & Connolly v. PETA*, 273 Va. 498, 643 S.E.2d 136 (2007).

In this same vein, you should bear in mind that although you remain a partisan, you have specific obligations to the appellate court. For example, the appellant has a duty to designate *all* parts of the record that are “germane” to the issue on appeal for inclusion in the joint appendix—it is not appropriate to simply cherry-pick the items in the record or portions of the transcript that support your arguments. On the other hand, the appellate courts do not wish to wade through a mire of irrelevant papers, so simply designating the entire record is generally ill advised. Likewise, the standard of review on appeal always requires that the evidence be viewed and recited in the light most favorable to the prevailing party. Where there is a dispute regarding evidence or the evidence is subject to more than one interpretation, you may note that or what the appellant’s contentions below were; but it is improper to stretch or massage the facts to fit your legal theory.

Remember that filing *any* paper for an improper purpose, including increasing the cost of the litigation, is subject to sanctions. *Virginia Code* § 8:01.271.1 does not limit itself to pleadings or motions in a trial court. Thus, it is improper, and you risk sanctions, to file a frivolous appeal in an effort to force the prevailing party to “settle” the case for less than a jury award.

Independent of statutory authority, all courts of record in Virginia have inherent power in a proper case to suspend or annul the license of an attorney practicing in the particular court that pronounces the sentence of disbarment. The Court of Appeals, in particular, has taken this step recently when attorneys have failed to comply with the Rules of Court; including, failing to file briefs on time and failure to appear for oral argument. You should also be aware that the Virginia appellate courts refer attorneys to the Virginia State Bar when dismissing a case for failure to follow the procedural rules.

Counsel in criminal cases are constitutionally obligated to consult with the defendant about an appeal when there is reason to believe *either* (1) a reasonable person in the defendant’s position would want an appeal, or (2) this particular defendant is actually interested in appealing. In Virginia, every criminal defendant has the right to file a petition for appeal to the

Court of Appeals of Virginia. This right attaches irrespective of whether the defendant pleaded guilty or not guilty at trial. While the effect of a guilty plea is to waive all claims except those addressing jurisdiction and sentencing, the Supreme Court of Virginia has made clear that this waiver applies to claims when asserted on appeal, and not to the right to seek an appeal in the first instance. Thus, when a criminal defendant requests an appeal, you must note the appeal. You are not constitutionally obligated, however, to raise every possible claim on appeal. The courts give appellate counsel “significant latitude” to develop an appellate strategy, so that counsel may omit even meritorious claims “to avoid burying issues in a legal jungle.”

If, having noted the requested appeal, you determine there are no non-frivolous arguments; you must still diligently and thoroughly search the record for any arguable claim that might support the appeal. You should acknowledge that controlling case law does not support the defendant’s position. In addition, you should move for leave to withdraw and for an extension of time for the defendant to file a supplemental brief. In this situation, the Court of Appeals independently reviews the entire record in the case. If the court ultimately dismisses the appeal as frivolous, the courts grants counsel leave to withdraw. In that circumstance, the Court of Appeals will expressly note in its opinion that the defendant is now proceeding without the assistance of counsel. Occasionally, the Court awards an appeal and, in that circumstance, generally appoints new counsel.

However, once you have made any appearance in the appellate court, you are not relieved unless or until the court grants a motion to withdraw. Therefore, an adverse ruling in the Court of Appeals requires additional consultation with the defendant. Counsel may not simply abandon an appeal after the Court of Appeals has ruled.

If the actions (or inactions) of anyone other than the defendant himself causes an appeal never to be initiated or dismissed for failure to follow the procedural rules, either you or the defendant may file a motion seeking a delayed appeal in the appropriate appellate court. Counsel must file this motion within six months after final judgment in the circuit court or of the dismissal, whichever is later. The motion must state the circuit court and the style, date, and circuit court record number of the judgment sought to be appealed. If an appellate court assigned a record number, the motion must include that information as well. *Virginia Code* §§ 19.2-321.1 & 19.2-321.2

The motion must specifically state the facts establishing the error, neglect, or fault. If you caused the loss of the right to appeal, an affidavit verifying the facts alleged in the motion must accompany the motion and

you must certify that the appellant is not personally responsible, in whole or in part, for whatever caused the loss of the original opportunity for appeal or the dismissal.

Note that it is a conflict of interest to allege your own ineffectiveness in a petition for a writ of habeas corpus. If a criminal defendant alleges you were ineffective in your representation, you are not a party to the proceedings, you are a witness. As with fee disputes or malpractice claims, there is a waiver of attorney-client privilege to the extent necessary to address the allegations in the petition. You may wish to consult with your malpractice carrier prior to conceding any deficient representation as a finding of ineffective assistance and a grant of habeas corpus relief may preclude you from defending a malpractice allegation—other than the determination of damages.

Some authorities:

Roe v. Flores-Ortega, 528 U.S. 470 (2000).

Smith v. Robbins, 528 U.S. 259 (2000).

McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429 (1988).

Evitts v. Lucey, 469 U.S. 387 (1985).

Jones v. Barnes, 463 U.S. 745 (1983).

Anders v. California, 386 U.S. 738 (1967).

Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Williams & Connolly v. PETA, 273 Va. 498, 643 S.E.2d 136 (2007).

Taboada v. Daly Seven, Inc., 272 Va. 211, 636 S.E.2d 889 (2006).

Miles v. Sheriff of Va. Beach City Jail, 266 Va. 110, 581 S.E.2d 191 (2003).

Brown v. Warden, 238 Va. 551, 385 S.E.2d 587 (1989).

Townes v. Commonwealth, 234 Va. 307, 320, 362 S.E.2d 650, 657 (1987).

In Re: Davey, 54 Va. App. 228, 228, 677 S.E.2d 66 (2009).

In Re: Lynch, 53 Va. App. 351, 352, 672 S.E.2d 115 (2009).

Fitzgerald v. Bass, 6 Va. App. 38, 366 S.E.2d 615 (1988) (*en banc*).

§ 19.2-159(C)

§§ 19.2-321.1 & 19.2-321.2

Rules 5:32 and 5A:25

Answers to Frequently Asked Questions

DISCLAIMER: While the information provided here is intended to be accurate and helpful to lawyers and the public, it should be understood that the Supreme Court of Virginia is the ultimate interpreter of the statutes and rules cited herein. The information provided here should be considered as a starting point, and not a substitute, for your own legal research. Additionally, the citation to rules and statutes do not reflect any changes that may be made after July 1, 2010.

General

1. What is the authority for the weekend/legal holiday filing rule?

Legal Holiday Statute and Saturday to Monday due date rule – **Code § 1-210 (Code § 2.2-300 sets the actual holidays).**

2. What is the statutory authority for the Supreme Court of Virginia’s \$50 filing fee?

Code § 17.1-328 - This code section also sets out the other fees charged by the Supreme Court of Virginia (hereafter “SCV”) for copies, certified copies, etc.

3. Are there any non-indigent parties who do not have to pay the filing fee?

The Commonwealth does not have to pay a filing fee. In cases filed in the SCV, sheriffs and other constitutional officers, like clerks of court, have to pay the filing fee – **Code § 17.1-266**

4. How can I submit a pleading to the SCV to ensure that it will be considered timely-filed?

Rule 5:5(c) provides that a pleading will be considered timely if it is sent, on or before the due date, by priority, express, certified, or registered mail via the USPS, or by third-party commercial carrier for *next day delivery*. Keep your receipt!

5. Is there a statutory provision that addresses the correction of clerical mistakes by circuit courts?

The correction of clerical errors by circuit courts is addressed in **Code § 8.01-428(B)**. This same statute also authorizes the circuit court to modify, vacate or suspend a final order, or to grant a party leave to appeal where the circuit court fails to notify a party of entry of such an order.

6. I was permitted to proceed in the circuit court in a civil case without paying a filing fee. Will I also be exempt in the SCV?

Not necessarily. **Code § 17.1-606** provides that indigent residents of the Commonwealth may proceed without fees or costs; however, this

statute does not apply to appeals. *See Tyler v. Garrison*, 120 Va. 697, 91 S.E. 749 (1917).

7. What rule governs filing an extension of time in the SCV?

Rule 5:5(a). The Court may grant an extension of time upon a showing of “good cause.” Note that, where both sides are represented by counsel, the motion for the extension of time must contain a statement indicating whether opposing counsel objects to the relief requested and, if so, whether opposing counsel intends to file a response to the motion. *See Rule 5:4(a)(1).*

8. What if I need an extension of time to file or correct a transcript?

Rule 5:11(d) recites that a transcript filing can be “supplemented, modified, or corrected” up to 70 days from the final judgment date. Thereafter, such issues can be addressed to and by the SCV, which has the authority to grant the filing party relief upon a showing of good cause.

9. I did not receive the circuit court’s final order in a timely manner. Do I have a remedy if I want to appeal?

Under **Code § 8.01-428(C)**, where a party has not received notice of entry of a final order, a circuit court is authorized to enter an order allowing leave to appeal. The circuit court’s order granting such leave must be entered within 60 days of final order. *See also Code § 8.01-429* for an appellate court’s jurisdiction over cases subject to redress under **Code § 8.01-428**.

10. What statute provides for suspending execution of a judgment in a criminal case pending appeal?

Code § 19.2-322.1.

11. What statute provides for the certification of a case from the Court of Appeals (hereafter “CAV”) to the SCV?

Code § 17.1-409.

12. What is the process for filing a motion for a delayed appeal in the SCV?

See Code § 19.2-321.2 (for a delayed appeal to the CAV *See Code § 19.2-321.1*). Such motions are governed by Rules 5:4(a)(1) and 5:6. Where the failure to perfect the appeal is attributable to counsel, the motion must be accompanied by an affidavit setting forth how the appellant was not at fault.

NOTE: Once a delayed appeal has been granted, unless retained, counsel must be re-appointed by trial court.

13. I just discovered that the circuit court did not transmit its entire record to the SCV. What do I do?

Code § 8.01-673 provides for the filing of a petition for a writ of certiorari with the SCV, asking the Court to order the circuit court to transmit withheld portions of record (**Code § 8.01-675.4** provides for the same relief for cases pending in the CAV).

14. What is the process for admitting an attorney *pro hac vice* in a case?

See **Rule 1A:4**.

Jurisdiction

15. What is the statute that sets forth, generally, the SCV's appellate jurisdiction?

Code § 8.01-670.

16. What statutes set forth the CAV's jurisdiction?

Code §§ 17.1-404, -405 & -406.

17. What is the minimum jurisdictional amount for an appeal to the SCV?

\$500.00 (**Code § 8.01-672**).

18. What court has initial appellate jurisdiction over contempt appeals from circuit courts?

Civil and criminal contempt cases are appealable to the CAV – **Code § 19.2-318**. See, e.g., *Bagwell v. UMW*, 244 Va. 463, 423 S.E.2d 349 (1992).

19. What if I file my appeal in the wrong appellate court?

Pursuant to **Code § 8.01-677.1**, an appeal filed in the wrong appellate court can be transferred to the proper court.

20. Are all cases appealable from the CAV to the SCV?

Under **Code § 17.1-410**, in certain types of cases the decision of the CAV is final absent a showing that the case has significant precedential value or turns upon a substantial constitutional issue. These cases include traffic and misdemeanor cases involving no jail time (active or suspended); administrative agency and workers' compensation cases; divorce/custody/support cases; and criminal cases under **Code § 19.2-398** (Commonwealth appeal in a felony case) and **Code § 19.2-401** (cross-appeal in a Commonwealth appeal case).

Pursuant to **Rule 5:17(c)(2)**, the petition for appeal **must** contain a statement setting forth how the case has significant precedential value or involves a substantial constitutional issue. Furthermore, if the SCV

finds that neither of these elements has been satisfied, then the appeal will be dismissed for lack of jurisdiction.

21. What is the statutory authority for an appeal by the Commonwealth in a criminal case?

Appeals by the Commonwealth in criminal cases – **Code §§ 19.2-317 and 19.2-398 et seq.** See **Code § 19.2-408** (providing that, for purposes of pretrial appeals under **Code §§ 19.2-398 and 19.2-401**, the CAV’s decision is final and cannot be appealed to the SCV).

See also **Code § 19.2-317(B)** (regarding appeals by a city, county or town to appeal to the SCV from a circuit court decision declaring an ordinance unconstitutional or otherwise invalid).

22. What is the statutory authority for appealing an expungement case to the SCV?

Code § 19.2-392.2(F).

23. To what court can I appeal a circuit court order denying a concealed weapons permit?

Concealed weapon permit cases are appealable to the CAV. See **Code § 17.1-406**. The CAV’s decision is considered final under **Code § 17.1-410**. See also **Code § 18.2-308(L)**.

24. Which court has initial appellate jurisdiction over an involuntary civil commitment case?

An appeal of an involuntary commitment (whether in civil or criminal context) is taken to the SCV. See *Antzes v. CW*, 13 Va. App. 172, 409 S.E.2d 172 (1991).

25. Does a writ of *quo warranto* still exist in Virginia?

Yes. See **Code § 8.01-635 et seq.** Pursuant to **Code § 8.01-637**, the circuit court has jurisdiction over such writs and a judgment in such a case can be appealed to the SCV. The SCV does not have original jurisdiction over the writ. See *Watkins v. Venable*, 99 Va. 440, 39 S.E. 147 (1901).

26. Is there statutory authority for appealing an interlocutory order to the SCV?

Statutory authority for interlocutory appeals includes **Code § 8.01-670.1**: The trial judge must certify that the interlocutory order/decrece can be appealed. Within 10 days of the circuit court’s certification, the appellant must file the petition for appeal with the SCV (if the SCV would have jurisdiction over an appeal of the final judgment in the

case). *See also* **Code § 8.01-670(B)** and **Code § 8.01-267.8** (addressing interlocutory appeals under the Multiple Claimant Litigation Act).

27. Is an adjudication of guilt for refusing to take a blood or breath test (in the context of a DUI arrest) appealable to the CAV or to the SCV?

Appeals of cases in which defendant refuses to take a blood or breath test (suspected of DUI) are considered to be civil in nature and are appealable to the SCV. *See Commonwealth v. Rafferty*, 241 Va. 319, 402 S.E.2d 17 (1991). A second or subsequent adjudication of guilt in a refusal case, however, constitutes a misdemeanor, the conviction for which is initially appealable to the CAV. *See Code § 18.2-268.3(D)*.

Appeals

28. If my petition for appeal in the CAV is granted in part and refused in part, at what point do I appeal the refused issues?

Under *Headley v. Commonwealth*, 342 S.E.2d 65 (1986), when some assignments of error are granted and others are refused, the appellant must appeal all issues at the conclusion of the CAV case (i.e. after the CAV has adjudicated the granted issues).

29. What are the requirements for filing an *Anders* appeal in the SCV?

See Rule 5:17(h); *see also Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1988) and *Brown v. Warden*, 238 Va. 551, 385 S.E.2d 587 (1989). Counsel must file the petition for appeal, a motion to withdraw as counsel, and a motion for extension of time for the appellant to file pro se supplemental petition for appeal (certificate of service to appellant on *all* three pleadings).

30. What is the process for appealing a trial court's decision declining to release a criminal appellant on bond, pending appeal?

See Code § 19.2-120 et seq., especially **Code § 19.2-124** regarding jurisdiction. *See also Code § 19.2-319* (capital murder). Appellant must appeal from circuit court to the CAV, then from the CAV to the SCV. While appeals from the circuit court to the CAV may be handled by motion, the appeal to the SCV is a formal appeal governed by Rules 5:14 and 5:17. *See Rule 5:14(c)*.

31. When appealing a case from a circuit court or the CAV, should I file a copy of my notice of appeal with the SCV?

No. Rules 5:9 and 5:14 only require that the notice of appeal be filed with the clerk of the court from which the appeal is being taken. Filing a copy of that notice with the SCV is unnecessary and only creates more work for the Clerk's office (the same applies to notices of filing of transcripts).

32. What are the provisions for appealing a bond validation case to the SCV?

Code § 15.2-2656 – appeals of bond validation cases: notice of appeal due in circuit court within 15 days of the circuit court's order. The record and the petition for appeal are due in the SCV within 30 days.

33. Do I get extra time to file a brief in opposition or other responsive pleading when the petition for appeal or other pleading is mailed to me?

The “three-day day mailing rule” applies in the SCV only to briefs in opposition (the additional amount of time allotted varies based on how a pleading is served on opposing counsel) – **Rule 1:7**.

34. May I file a brief in opposition to a petition for appeal in an appeal from a decision of the State Corporation Commission (“SCC”)?

A brief in opposition is only filed in an SCC case where the petition for appeal requests suspension of the SCC's judgment.

If there are multiple appellees in a case and they file briefs in opposition (or appellees' briefs) on different dates, when is the reply brief due?

35. Where multiple appellees file briefs on different dates, then the due date for reply brief is based on last appellee's brief filed (the appellant may only file one reply brief).

36. Can appendix pages be double-sided?

Yes. **Rule 5:6(a)(3)**.

Bonds and Costs

37. My petition for appeal was granted by the SCV. How do I go about posting the \$500 appeal bond referenced in the order?

The appeal bond (often referred to as a “cost” bond) is filed with the clerk of the trial court (or the clerk of the State Corporation Commission in appeals from that tribunal). The forms are in the appendix immediately following Part 5 of the Rules of the Supreme Court of Virginia (generally, appellants will use bond forms 3 and

10). The State Corporation Commission publishes a list of acceptable sureties. If posting a \$500 cash bond, then “\$500 cash” is the surety. You must still post the appropriate bond form when posting a cash bond.

38. Are any parties exempt from posting an appeal cost bond upon the granting of a petition for appeal (or in an appeal of right)?

See Code § 8.01-676.1(M) – Parties exempt from posting a cost bond: person suing on behalf of an individual under a disability (executor, administrator/administratrix, guardian, next friend, personal representative). Counties and other political subdivisions are also exempt.

39. What costs are recoverable by a substantially prevailing party?

- Printing costs for all briefs – **Code § 17.1-604 & -60** up to \$500.00
- Attorney’s fees to prevailing party – **Code § 17.1-624** \$50.00
- Damages to prevailing party – **Code § 8.01-682** (\$30 - \$100) (if the losing side consists of more than one party or one counsel, then the attorney’s fee or damages are split between counsel or parties)
- Transcript costs – **Code § 17.1-128**
- Filing Fee—Rule 5:35(c); 5A:30(b)

40. I prevailed in my appeal against the Commonwealth. Can I now seek to have costs assessed against the Commonwealth?

Pursuant to **Code § 17.1-629**, the Commonwealth is exempt from being assessed costs.

41. If the criminal defendant loses on appeal, to whom are costs and damages paid?

Damages awarded in a criminal appeal that was granted are payable to the Attorney General (along with costs assessed).

42. How are multiple court-appointed attorneys paid upon the conclusion of an appeal?

When more than one attorney is appointed in a case and the final order references a “total” fee, the attorneys share that total amount (and they decide how to divide it).

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