REPORT OF THE
JUDICIAL COUNCIL OF VIRGINIA

Court of Appeals Jurisdiction Study (SJR 47, 2020)

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 7

COMMONWEALTH OF VIRGINIA
RICHMOND
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December 3, 2020

The Honorable Ralph S. Northam
Governor of Virginia
P.O. Box 1475
Richmond, Virginia 23218

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

Re: Report, Senate Joint Resolution 47

Dear Governor Northam and Members of the General Assembly:

As Secretary of the Judicial Council of Virginia, I am pleased to submit this report in response to Senate Joint Resolution 47, which was agreed to by the General Assembly of Virginia during its 2020 Regular Session.

Senate Joint Resolution 47 requested that the Judicial Council study the jurisdiction and organization of the Court of Appeals of Virginia, including recommendations on implementing an appeal of right in all cases decided by and appealed from the circuit courts.

A working group was convened to study these issues. Enclosed please find the report of the working group, which was adopted by the Judicial Council at its October 22, 2020, meeting as their final report.

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

With kind regards, I am

Very truly yours,

KRH

Karl R. Hade

KRH:jrp

Enclosure

cc: Division of Legislative Automated Systems

Report

to the

General Assembly of Virginia

Court of Appeals Jurisdiction Study – SJ 47

December 2, 2020

Prepared By The

Judicial Council of Virginia

CONTENTS OF THIS REPORT

Introduction. In 1979, at the request of the General Assembly, the National Center for State Courts prepared an extensive analysis of the Commonwealth's court system, and recommended that Virginia should change its appellate system to provide its citizens a right of appeal in all cases, civil and criminal. (*See Appendix E*). The Court of Appeals of Virginia ("CAV") was created in 1985 but was given only appeal-of-right jurisdiction in three limited areas of civil law, and appeal-by-petition-only jurisdiction for all non-capital murder criminal cases. In 1993 the Virginia Bar Association prepared a 260-page report recommending that the system be changed to allow Virginia citizens a right to appeal in all criminal and civil cases.

In 2018, after bar and business leaders in the Commonwealth requested study of the need for Virginia citizens to have a right of appeal, the Chief Justice designated a 20-person Working Group to study the appellate jurisdiction of the Court of Appeals of Virginia and to make recommendations on whether it should be given jurisdiction to hear appeals as a matter of right in all civil and criminal cases. Following the Legislature's adoption of SJ 47 in the 2020 session, the study of these issues continued with even greater intensity for many months. The study included active participation by leaders of major Virginia Bar and business groups, judges

and others. Comments on the issues raised in SJ 47 were solicited and obtained from a wide range of groups and individuals throughout the Commonwealth. (*See* Appendices A and B).

All groups that commented, and almost all individuals who submitted comments, strongly endorsed the concept of providing Virginia citizens a right to appeal circuit court judgments in criminal and civil cases, and the study group unanimously recommended that plan to the Judicial Council. After review of extensive background materials set forth in the present Report, the Judicial Council on October 22, 2020 discussed and voted on five related issues, unanimously recommending that the General Assembly take steps now to implement a right for Virginia citizens to have an appeal to the Court of Appeals of Virginia from final judgments in ordinary criminal and civil proceedings,[1] with the option for any party to seek review after a CAV decision by the Supreme Court of Virginia ("SCV") on a discretionary, certiorari petition basis.

The Judicial Council's recommendations and conclusions regarding adoption of appeal-of-right in Virginia for all criminal and civil cases are concisely set forth at pages 4 to 9 of the present Report. Thereafter, extensive background information is provided for the use by the General Assembly in addressing these issues.

The Judicial Council reviewed all of the material outlined in the **Table of Contents** of this Report (above) and in the Appendices. The information studied has included:

- judicial administration scholarship and reports on the importance and effectiveness of an appeal of right as all American states – other than Virginia – have implemented this protection for their citizens over the past several decades (recounted at pages 11 - 21);
- a broad range of statistical and descriptive material about current operation of the Virginia appellate system overall, and the Court of Appeals docket in particular, including the extent to which its operations are "regionalized" and the timeliness of its dispatch of the present caseload (pages 22 - 34 and 45 - 57); and
- the full text of all of the comments on the appeal-by-right concepts set forth in SJ 47 received from both organizations and individuals. <u>All bar and business groups, and almost all of the individuals who responded to a state-wide solicitation for comments, support implementation of an appeal of right for all civil and criminal cases.</u> The comments are summarized at pages 10 - 12 and all are reprinted in full as Appendices A and B to this Report, commencing at pages 82 and 109. During the Working Group's study of the issues the Office of the Attorney General ("OAG") joined with the other organizations responding to the inquiry regarding SJ 47 in full support of moving to a system where one level of appeal for all Virginians is a matter of right. The Judicial Council was unanimous in its conclusions, summarized here briefly on five issues, followed by a succinct statement of the fundamental considerations.

[1] The recommended structure would provide a right to obtain appellate review in the Court of Appeals of Virginia from any final judgment of the circuit courts of Virginia in ordinary criminal and civil cases. No change is contemplated in the statutes or procedures governing appeal of capital murder prosecutions, habeas corpus petitions, writs of actual innocence, and other specialized proceedings.

SUMMARY OF CONCLUSIONS and RECOMMENDATIONS

OVERALL: **The Judicial Council respectfully recommends in response to SJ 47 that the General Assembly adopt legislation providing that the Court of Appeals be given appeal-of-right jurisdiction in all ordinary criminal and civil cases.**

FIVE KEY RECOMMENDATIONS FOR THE GENERAL ASSEMBLY

1. **Appeal of Right for Criminal Cases.** **The appellate system should be restructured so that individuals convicted of crimes in Virginia have a right to seek one level of appellate review at the Court of Appeals, which will need adequate support staffing to handle any increase in criminal appeal caseload. Appeal thereafter to the Supreme Court of Virginia would be on a certiorari petition basis, as at present. Appropriate additional AG's Office appellate staff will be needed.**

2. **Appeal of Right in Civil Cases.** **All civil final judgments should be appealable for one assured level of appellate review by the Court of Appeals, which will need adequate judicial and support staffing to handle the increased caseload. Appeal thereafter to the Supreme Court of Virginia would be on a certiorari petition basis.**

3. **Necessary Judicial and Support Staffing.** **In order to prevent creation of backlogs and delays in the Court of Appeals, the number of judgeships needed to address the expected increases in caseload should be calculated to achieve a maximum caseload of 170 total filings per CAV judge. Staffing increases for Clerk's Office and Staff Attorney functions at the CAV (see Part Eight of this Report) will be required.**

4. **Statewide Rotation of CAV Judges.** **The Court of Appeals must be allowed to continue its system of having all judges rotate in panel assignments throughout the Commonwealth, providing regional convenience for parties and counsel, but not assigning individual judges permanently to any one region.**

5. **Single Appellate Standard for Supreme Court Review of Cases.** **Code § 17.1-410 – which presently creates two different standards for review of petitions for appeal to the SCV after decisions of the CAV – should be abolished or rewritten so that there is a uniform standard of discretion for the SCV to grant review after a CAV decision. Other minor statutory revisions will be needed to implement appeal of right, and suggestions are set forth in *Appendix C* to the present Report.**

OUTLINE OF THE FUNDAMENTAL CONSIDERATIONS

Specifically: the Judicial Council of Virginia reports <u>five</u> distinct recommendations. 

<u>1. Criminal Appeals</u>. The Judicial Council recommends to the General Assembly that appeal of right be adopted immediately for criminal cases, with further appeal available on a petition for certiorari basis to the Supreme Court of Virginia. Statutory amendments should preserve the option for panels of the Court of Appeals to dispense with oral argument in any case where it is determined that there would be no material benefit from that process. All criminal appeals would be reviewed by a panel of three judges. The legislation should allow for summary disposition in appropriate cases but continue the requirement that the Court of Appeals state reasons for its orders and decisions in all cases (whether oral argument is held or not). Appeal of right for general criminal cases would not alter the provisions governing appeal of death penalty cases directly to the Supreme Court, habeas corpus procedure, writs of actual innocence, or procedures for the Commonwealth's petitions for appeal from pretrial rulings limited to certain criminal contexts under §§ 19.2-398 and 19.2-401.

<u>CAVEATS and PREMISES</u>:

1-A. This unanimous recommendation supports the jurisdictional change to appeal of right *on the express assumption* that the General Assembly undertake to assure that the workload of the CAV will be monitored and supported with appropriate numbers of judicial and support personnel.

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

2. Civil Appeals. The Judicial Council Group unanimously recommends that the General Assembly provide that all general civil cases be made appealable as a matter of right to the Court of Appeals, with further appeal available on a writ of certiorari basis by petition to the Supreme Court of Virginia. Over the past three years the Working Group reviewed a wide range of information about the civil dockets in Virginia Circuit Court cases (*see* pages 77 – 81 and *Appendix F* to this Report) and unanimously concluded that piecemeal carving out of partial additional categories (to add to domestic relations and workers' compensation cases already heard in the CAV) would be quite ill-advised. The Judicial Council agrees: The goal of providing one appeal of right in all civil cases is extremely important, and an increasingly bifurcated system with some fraction of civil litigation appeals going by right to the Court of Appeals and some fraction being subject to a petition for review in the Supreme Court is illogical and ineffective. Bar leaders (and business groups) are unified in the conclusion that having all civil cases reviewable as of right in the CAV, with a possible review on petition for a writ of certiorari in the Supreme Court thereafter, would be a landmark improvement in the Virginia legal system.

3. Judicial and Support Staffing Implications.

CRIMINAL CASES.

In particular, the Judicial Council reports that implementation plans must recognize the possibility of increase in criminal appeal numbers upon a change to by-right criminal appeals:

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

  -- Different metrics suggested at pages 35 - 38 of this report, comparing the criminal appeal frequencies of other states, could be used to project anywhere from 775 criminal appeals per year in a by-right system in Virginia to upwards of 3,000. As recounted in that portion of the present report, the "middle range" of national experience with the frequency of criminal appeals of right would equate to 1,460 criminal appeals in Virginia. Hence the current actual level of 1,500 to 1,550 petitions per year may prove to be close to the experience in a by-right system, but other "middle range" estimates could suggest as many as 2,200 criminal appeals, and caution is needed to be certain that – if the volume of appeals increases from that currently experienced – caseload per judge and support staffing

in the Clerk of Court's office and Staff Attorney's office must be kept adjusted accordingly.

-- The assurance that each appeal will be considered by a full three-judge panel may increase somewhat the number of criminal appeals each year in Virginia over the experience of recent years with the petition system.

-- Legislative proposals involving jury sentencing, expected to be on the table for the 2021 General Assembly session, also could generate additional criminal appeals.

-- At a minimum, planning should assure adequate support staffing at the CAV on the assumption that criminal case filings may increase 20% upon a change to by-right appeals, rising from the present level of approximately 1,500 petitions per year, to perhaps 1,800 criminal appeals per year.

The CAV's estimated support staffing needs for the Clerk of Court's office and the Staff Attorney's office are being submitted to the General Assembly as part of this Report, reflecting varying assumptions as to the actual volume of criminal appeals that may be encountered. *Although it cannot be said with certainty the extent to which a change to appeal of right in criminal cases might result in a need for additional Court of Appeals judicial and supporting personnel, it is an express premise of the Judicial Council's recommendation that the Legislature will fund any such needed personnel to permit effective operation of the court.*

CIVIL CASES.

Considerations discussed by the Judicial Council suggest that adding jurisdiction over all civil appeals as a matter of right could produce more civil appeals per year than the present level of 400 petitions per year to the Supreme Court. Comparisons of civil appeal "rates" in other jurisdictions are set forth at pages 39 - 44 of this Report, although it is not possible to discern from comparable states any truly predictive information about the level of civil appeals that will be experienced in Virginia under a by-right system. The Legislative judgment as to the number of judgeships required for the CAV to hear and decide civil cases promptly at the highest level of quality will depend on its assessment of expected civil case filings. If the total civil appeals in a by-right system <u>increases by 25%</u> over the number of petitions in the current civil system, the total CAV civil filings would be 500 per year. If the number of civil appeals in a by-right system <u>increases by 50% over</u> the present petition volume, the number of added CAV civil filings could reach 600 per year. If

the number of appeals in a by-right system was double the present petition volume, the number of added CAV civil appeals could reach 800 per year. If Virginia civil appeals resembles those of other states in our region of the United States (0.4% of civil filings result in appeals), one could expect 650 civil appeals. If the appeal rate we have experienced in Virginia domestic relations cases were predictive of the number of civil appeals in other subject matters of civil litigation (0.7% of all filings result in appeals), the number of civil appeals could reach 1,140. Other commonly used comparisons are set forth at pages 42 - 44, and some would "predict" higher numbers of civil appeals. The number of judgeships needed to safely assign jurisdiction to the CAV over civil appeals should be established by the Legislature in service of the over-arching goal of assuring judicial staffing sufficient to assure prompt and highest-quality disposition of cases appealed in the Commonwealth, having in mind the per-judge caseload considerations discussed at pages 58 - 59 of this Report, and the timeliness considerations described at pages 60 - 63. The current CAV staffing is one judge for every 190 filings, which is at the higher end of judicial caseloads across the country, and the National Center for State Courts has recommended that 170 filings per judgeship is a preferable target in structuring a state intermediate court of appeals. Since it is recognized nationally that added civil appeals are somewhat more work-intensive than added criminal appeals, the Judicial Council strongly recommends that the General Assembly adopt **170 filings per judgeship** as a maximum total case filing load for each Court of Appeals judgeship. As summarized at pages 64 – 67 the Judicial Council recommends 4 or 5 additional Court of Appeals Judgeships to address the civil caseload that appeal of right is calculated to present.

> *SUPPORT STAFFING IMPLICATIONS*. At the request of the Judicial Council and the Office of the Executive Secretary, the Court of Appeals has prepared an assessment of staffing needs in the Clerk of Court's office and the Staff Attorney's office of that court, based on a range of different possible levels of civil appeal filings in a by-right system for civil appeals. *See pages 67 – 71. It is an express premise of the Judicial Council's recommendation that the Legislature will fund these needed personnel to permit effective operation of the court*.

4. Regional Operations of the CAV. The Judicial Council has reviewed very detailed information about the extent to which existing CAV practices serve the various regions of the Commonwealth, demonstrating impressive organizational expertise and providing excellent convenience to the bar and public by hearing cases in all geographic areas, minimizing travel and expense burdens for the parties. *See* Part Four of this Report, pages 45 - 56. With respect to the regional spread of CAV judgeships, the Judicial Council's strong recommendation is that the General Assembly should assure that regional operations for the Court of Appeals will not necessitate "stagnant" regional judicial staffing or "non-rotating" assignment of

judges and that the present system in which all judges on the CAV rotate assignments and each year sit on panels in all regions of the Commonwealth should be continued. If the General Assembly identifies a goal of assuring more rigorous geographic spread of representation among judges selected to serve on the Court of Appeals, or other measures of diversification, such goals should be achieved on the traditional ad hoc basis in the context of all other factors, and not by linking any particular seat on the CAV to any particular region. It is far better for the integrity and development of a consistent jurisprudence for the Commonwealth and its citizens, that the CAV should remain free to continue its successful randomized rotation of assignments for all of its judges to sit in the various different geographic regions each year. Existing case law doctrines and CAV procedures regarding disparate panel decisions would be unaffected by the appeal-of-right initiative.

5. Standard for Supreme Court Accepting Review of CAV Dispositions. Currently, the Supreme Court of Virginia exercises discretion in selecting circuit court civil cases to review on petitions for appeal; similarly, general criminal judgments from the Court of Appeals are reviewable on petition to the Supreme Court in its discretion. However, under § 17.1-410, decisions of the CAV are declared to be "final" in (i) traffic and misdemeanor cases, (ii) appeals from administrative agencies or the Workers' Compensation Comm'n, (iii) domestic relations cases, (iv) pretrial appeals in criminal cases pursuant to §§ 19.2-398 and 19.2-401, and (v) appeals involving involuntary treatment of prisoners pursuant to § 53.1-40.1. Subsection B of the statute then allows the Supreme Court to determine on a petition for review that the CAV decision in one of those five categories involves a substantial constitutional question or matters of significant precedential value, and to review them [except pretrial appeals in criminal cases]. As a result, no constitutional question/precedential inquiry is needed for the Supreme Court to accept criminal petitions for appeal in felony cases, but the higher standard is required for the above-listed categories of civil and criminal proceedings. *The Judicial Council recommends that § 17.1-410 be eliminated or streamlined such that all dispositions of the CAV would be subject to a petition for certiorari review to the Supreme Court on the same basis, without specifying different standards or thresholds for granting an appeal depending on predetermined subject matters.* This will allow the Supreme Court to use the traditional criteria in reviewing all applications for discretionary appeal, considering such factors as the precedential value of the case, the presence or absence of an issue of first impression, the possible existence of inconsistent interpretations by the trial courts of particular statutes or prior case law, any evident errors of law in the decisions below, and whether the issue decided by the CAV implicates any constitutional questions.

Other important suggestions.

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

● The goal of making appeals less costly by eliminating the need for an appendix in all cases where digital records are available, and (accordingly) a major improvement could be obtained if the General Assembly takes what steps it can to bring about the updating of the procedures and equipment of those 20 to 25 circuits that do not presently digitize their case records.

● The need to deter dilatory appeals by making certain that bonding and post-judgment interest requirements accord with modern American norms – protecting the party that has won below and reducing any incentive to pursue frivolous appeals. The Judicial Council supported these concerns, tempered by a recognition that waiver or exemption provisions would be needed for protection of indigent parties.

SUMMARY OF PUBLIC COMMENTS RECEIVED

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

CRIMINAL AND CIVIL APPEAL OF RIGHT

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

Va. Bar Ass'n, pg. 83
Va. Trial Lawyers Ass'n, pg. 86
Va. Ass'n Crim. Defense Lawyers, pg. 91
Va. Chamber of Commerce, pg. 93
Va. Indigent Defense Comm'n, pg. 97
Va. Acad. of Elder Law Atty's, pg. 103
Old Dominion Bar Ass'n, pg. 106
Va. Manufacturers Ass'n, pg. 107

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

- Of the individual attorneys responding

  -- nineteen favored creating an appeal of right (Brandenstein, Edmonds, Emmert, Galumbeck, Gear, Glasberg, Gunn, Gwinn, Marr, Marritz, Mullins, Phillips, Plumlee, N. Smith, Tennant, Thomas, Walker, West, Williamson)
  -- one favored appeal of right in felony conviction cases only (Sanders)
  -- one favored three-judge review without making it appeal of right (Blanch)
  -- one thought that this change was not clearly needed (Delaney)
  -- one thought it could be too expensive (Westreich)
  -- one opposed the idea due to potential expense and delay (Lawrence)
  -- one thought it would damage "analogy of judgment" [*not explained*] (Crider)

Comments of individual respondents are organized alphabetically in *Appendix B,* page 109.

REGIONAL OPERATIONS

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

Non-Rotating "Regional" Judges. On the question of having non-rotating judges located in discrete regions, only two comments were received favoring that system. (Blanch and Edmonds, who each estimated it would require perhaps 6 judges per region). Groups and individuals expressly opposing non-rotating judges located in discrete regions included: VBA, VTLA, Va. Chamber of Commerce, VAIDC.

OTHER ISSUES

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

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

1. Increases in interlocutory appeals should be avoided, to keep overall appellate costs and delay in check. VTLA

2. Bonding requirements and post-judgment interest reform could help deter unnecessary appeals, including possibly enhanced requirements for appeals that might be sought from the CAV to the SCV. VTLA

3. The inter-panel accord doctrine and use of en banc determinations should continue. VTLA, Va. Chamber of Commerce

4. Significant experiential and demographic diversity should be sought in CAV judgeships.

5. If possible, oral argument should be allowed in any criminal appeal, with the possible exception of cases after guilty pleas, revocation appeals, and *Anders* appeals (VACDL, VAIDC), and the ability to file a reply brief without waiving oral argument should be implemented.

6. Rules 5A:18 and 5:25 contemporaneous objection requirements and exceptions should be applied to achieve fundamental fairness.

7. Compensation for court-appointed criminal defense counsel should be substantially increased. VACDL, Blanch

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

DETAILED BACKGROUND DISCUSSION

Part One – BASIC CONSIDERATIONS IN STRUCTURING A SYSTEM OF APPELLATE REVIEW

Overview. Virginia moved cautiously in 1985 when the Court of Appeals began to hear cases, with its blend of limited-topic civil appeal of right jurisdictional categories, along with the bulk of all criminal appeals on a petition system. The 1985 compromise has worked remarkably well, and the Judicial Council noted that – on the civil side – the initial structure for CAV jurisdiction right-of-appeal path has significantly reduced the range and volume of appellate litigation by clarifying ambiguities in the law, particularly in domestic relations and workers compensation cases. Some 35 years later, the time has come to take the CAV's success to the next level, by allocating to this Court jurisdiction over appeals in all criminal and civil cases.

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

COMPARATIVE PERSPECTIVE

The recommendations in the present Report have been developed based on the considerations unique to the landscape of litigation in Virginia, as suggested in SJ 47.

We note at the outset, however, that the model of an appeal of right for the bulk of all civil and criminal cases is universally recognized in the American legal system. By the 1970s and 1980s, the ABA had joined Aristotle, the American Judicature Society, Roscoe Pound, and others in supporting a Standard of Judicial Administration calling for at least one appeal as a

matter of right in all civil and criminal cases. Organized bar and judicial study groups have uniformly concluded that the most beneficial appellate structure for a state's system is one providing a first-level of appellate review as a matter of right, to an intermediate court of appeals, followed by the option to petition for leave to appeal to the court of last resort. This is described as the "Model Two-Tiered Appellate System" in the seminal report of the American Judicature Society, in 1976.[2]

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

In 1990, the American Bar Association revised and re-issued its "Standards Relating to Court Organization." Standard 1.13(b) provides that the Supreme Court of a jurisdiction should have review on a petition for certiorari procedure only (with the exception of capital murder cases and resulting death sentences), and that the Court of Appeals in any jurisdiction with such a court should be available to provide "appeal as of right" in all cases. These conclusions proceed from recognition that the two principal functions of appellate review are importantly different. First, there is the goal of providing review in every case for errors in the procedure of a case or in the application of substantive law. This function requires an assured route for review. The second function, however, is lawmaking or policy application in the interpretation of legislation and common law doctrines, which of course is an authority best vested in the Supreme Court of a state. That function, however, does not require that every case be heard; it can be performed on a sampling basis, with the Supreme Court granting review as a matter of discretion based on insightful judgment about the needs of the law in the jurisdiction. In July of 1993, the American Bar Association Judicial Administration Division promulgated a Discussion of Revised Standards Relating to Appellate Courts, drafted by a distinguished panel of 15 judges and justices, including Virginia's Chief Justice Harry L. Carrico. It concluded flatly: "A party to a proceeding heard on the record should be entitled to one appeal of right from a final judgment."[3] The commentary to these national standards states:

> The appellate courts have two functions: to review individual cases to assure that substantial justice has been rendered, and to formulate and develop the law for

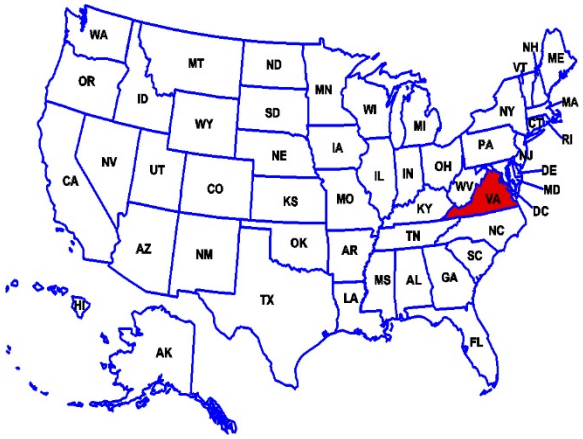
[2] INTERMEDIATE APPELLATE COURTS, (American Judicature Society, 1976) p. 36.

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

> general application in the legal system. In a court system having no intermediate appellate level, both functions are performed by the supreme court. In systems having an intermediate appellate court, these functions are differentiated to an important degree. The intermediate appellate court has primary responsibility for review of individual cases and a responsibility, subordinate to that of the highest court, for extending the application of developing law within the doctrinal framework fashioned by the highest court; the supreme court exercises a function of selective review to maintain uniformity of decision among subordinate courts and to reformulate decisional law in response to changing conditions and social imperatives.[4]

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

By the end of the Twentieth Century, only three states did not afford a routinely available appeal of right for essentially all civil and criminal cases: New Hampshire, West Virginia, and Virginia. Since the year 2000, however, the other two states have adopted appeal of right systems for civil and criminal final judgments.[5] **That leaves Virginia alone among the American states in not providing one level of appellate review as a matter of right in both civil and criminal cases**.



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

- **35 States** have Intermediate Courts of Appeal with mandatory jurisdiction in substantially all civil and criminal cases, followed by discretionary further review

[4] *Id.* at 3-4.

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

available from the State Supreme Court. The federal court system follows this model as well.

- **10 States & D.C. have no Intermediate Court of Appeals.** These state Supreme Courts exercise ***mandatory jurisdiction*** to hear all civil and criminal appeals. Delaware, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia and Wyoming use this system. The District of Columbia is similar.

- **4 States** vest their Supreme Court with mandatory jurisdiction to hear all civil and criminal appeals, but by statute the top court may reassign specific cases (called "deflecting" those appeals) to an Intermediate Court of Appeals: Idaho, Iowa, Mississippi, and Nevada currently use this structure.

- **1 State** has an intermediate Court of Appeals, but neither the Court of Appeals nor the Supreme Court has mandatory appellate jurisdiction for the bulk of all civil and criminal cases: **Virginia.**

KEY CONCEPTS OF APPELLATE ARCHITECTURE

A well-respected study by the National Center for State Courts, headquartered in Williamsburg, Virginia, concerning the need for appellate review in state court systems concluded that failure to provide "a right of review for all felony and civil cases" deprives citizens of "a substantial legal right."[6]

> [E]rrors occur in trial courts. Even if they concern only the litigants involved in the case and have no broader public impact, the prevailing perception in this country is that there should be an avenue available to the aggrieved party to seek correction of alleged errors. When there is no intermediate appellate court [review] and the volume of appellate work leads a supreme court to exercise its discretion not to review every case, some errors inevitably will go uncorrected. It is not even clear that in these circumstances a supreme court would be able to reach all cases in which matters of public interest (beyond the concerns of the immediate litigants) are involved.[7]

Around the time the Virginia Court of Appeals was created, the National Center for State Courts completed a massive study of the best operations for an intermediate court of appeals focusing on the State of Connecticut ("NCSC 1982 Court of Appeals Study").[8] It approached the estimation problems for judicial caseload (at, e.g., page 80) by focusing on judicial productivity levels in other courts, scholarly literature on intermediate appellate court caseload levels, and comparisons with other states' experience. The NCSC 1982 Court of Appeals Study made the

[6] The Nebraska Appellate System, A Review, National Center for State Courts, December 28, 1989.
[7] *Id.* at nn. 25-26. *See also* the June 11, 2018 prior report of the Working Group, providing further background.
[8] Jurisdiction, Organization and Size of Connecticut's New Intermediate Appellate Court, December 23, 1982.

following observations with general continuing applicability for analysis of the operation of the Virginia Court of Appeals:

> "An important consideration" in the operation of an intermediate appellate court "is the relationship" of the court to the State's Supreme Court. In order to organize "appellate courts to make efficient use of judicial resources and avoid confusion, congestion or delay in the final determination of cases, a sound allocation of jurisdiction and authority between the Supreme Court and the intermediate appellate court must be made."[9]
>
> "In [operating] an appellate court, one of the most basic decisions to be made is the nature and scope of its jurisdiction. A state's decision in this area reflects its judgment about the nature and volume of case on appeal that should be before the state court of last resort. "[10]
>
> "Among the . . . states currently having intermediate courts, grants of jurisdiction range from having the intermediate court hear only matters assigned by the high court, to having jurisdiction allocated according to subject matter, to having the intermediate court be the appellate court of first instance in all or almost all cases."[11]
>
> "For each of a number of states, the intermediate court has initial appellate jurisdiction of many categories of cases, although there are also a fair number of cases appealed directly to the high court."[12]
>
> "A majority of states with intermediate appellate courts give their high courts discretionary review of all intermediate court final decisions."[13]
>
> "[T]here are three basic procedures for dividing jurisdiction between intermediate courts and supreme courts: 1) routing all, or almost all, appeals initially to the intermediate court, with review thereafter by the supreme court; 2) routing some appeals to the supreme court and some to the intermediate court according to the subject matter of the cases; and 3) giving the supreme court authority to screen appeals and assign them on a case-by-case basis between itself and the intermediate court. There are, in addition, several variations within each of these categories, and a few states have adopted hybrid systems combining features of two or more. Each jurisdictional system has substantial benefits and substantial drawbacks. Selecting the best system requires a difficult balancing of policy concerns in the context of the particular needs of the state."[14]

[9] NCSC 1982 Court of Appeals Study, p. 11.
[10] *Id.* at 12.
[11] *Id.* at 13.
[12] *Id.* at 15.
[13] *Id.* at 18.
[14] *Id.* at 27.

"Before analyzing the benefits and drawbacks of the appellate jurisdictional systems, it is necessary to specify the policy concerns that will be used to evaluate the systems. Five such concerns have been identified: 1) division of workload, 2) the precedent-setting function, 3) double appeals, 4) attractiveness of intermediate court judgeships, and 5) expense."[15]

"The uncertainty of appellate caseload trends greatly complicates the maintenance of firm appellate jurisdictional lines. States quite often set jurisdictional lines according to the caseload size and composition existing at the time, but the size and composition often change drastically. . . . The lesson, therefore, is that the jurisdictional lines and transfer procedures must be sufficiently flexible to permit adjustment of caseloads by surfacing cases appropriate for Supreme Court consideration."[16]

"Precedential concerns. A very important feature of appellate court decision making is the distinction between the precedential and dispute-deciding (or decisional) function. The purpose of the first is to maintain consistency of law, to develop the law in areas not covered by existing law, and at times to change court-made law. The dispute-deciding function involves the application of present law to the facts of a particular case to determine whether the trial court or administrative agency committed reversible error. There is no clear line between these two functions. Nevertheless, it is generally accepted that these are the two major functions of appellate courts – decision- and precedent-making – and that the precedential function arises in only a small minority of appeals. The important point with respect to jurisdictional alignment is that the supreme court is primarily responsible for establishing precedents; the court of last resort alone can insure that the body of precedential law is consistent. . . . The bulk of the work of the intermediate court is to decide cases within the doctrinal framework established by the high court."[17]

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

[15] *Id.* at 27-28.
[16] *Id.* at 29.
[17] *Id.* at 29.

court can serve to winnow issues for more incisive consideration by the supreme court."[18]

"In most states with intermediate courts review is sought from less than half of the intermediate court decisions, and most supreme courts grant less than 15 percent of petitions for review. In all, depending on the state, only some 3 to 10 percent of the intermediate court decisions are reviewed by the supreme court. "[19]

"Attractiveness of intermediate court judgeships. The fourth general principle is that intermediate court judgeships should be as attractive as possible so that the court will attract and retain competent judges. . . . Jurisdictional alignment, along with other factors such as salary level, plays an important role in determining the attractiveness of intermediate court judgeships. Division of the caseload . . . is a key factor here."[20]

"Expense. The final principle concerning the division of jurisdiction between appellate courts is that the expense of the appellate system should be minimized to the extent possible without threatening the quality of appellate review. The cost of an appellate system depends substantially on whether initial appeals are properly allocated to the intermediate or supreme court. First, by reducing the number of double appeals, one reduces duplication of effort by appellate judges. Second, by apportioning caseloads efficiently between the two courts, one reduces waste by ensuring that neither court has unused capacity. Both affect the number of judges needed for the intermediate appellate court, which in turn is the prime determinant of the cost of that court."[21]

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

[18] *Id.* at 30. *See also* Thomas B. Marvell, *The Problem of Double Appeals*, Appellate Court Administration Review (1979).
[19] NCSC 1982 Court of Appeals Study, p. 30.
[20] *Id.* at 31.
[21] *Id.* at 32.
[22] Citing ABA Standards Relating to Appellate Courts 16 (1977).

through the exercise of discretionary jurisdiction over intermediate appellate court cases before or after decision, the cases it will decide."[23]

"There are no objective criteria to determine just how many appeals contain substantial precedential issues, but the general consensus is that they comprise only a small portion of the total number of appeals. "[24]

2,000 or More Appeals. The model of appeal of right to the intermediate appellate court has generally been adopted in "states with appellate caseloads of over two thousand cases per year."[25] [*Appellate filings in Virginia are currently approximately 2,500 per year in the two appellate courts*.]

A "common system for dividing jurisdiction between supreme courts and intermediate courts is to specify that certain types of appeal go directly to the supreme court and that other types go to the intermediate court, with provision for review hereafter by the supreme court. . . . Under this arrangement, the supreme court's workload consists largely of direct appeals, but a substantial number of cases are reviews of intermediate appellate court decisions. [The] types of cases taken directly to the supreme court vary greatly from state to state."[26]

Subject Matter Allocations. "The drawbacks of dividing jurisdiction along subject matter lines generally outweigh the benefits. It is argued that an important benefit of such a division is that it apportions the workload between the supreme court and the intermediate appellate court more equitably than the ABA model, and hence permits a smaller and less expensive intermediate court. On the other hand, the division of jurisdiction over initial appeals based on the state's appellate caseload at one period typically leads to an overburdened supreme court several years later."[27]

"Jurisdictional alignments are typically based on judgments that specific types of appeals are important enough to merit immediate consideration by the Supreme Court, without initial review by the intermediate appellate court. As a result, some important cases are routed to the supreme court, and there are fewer double appeals than under the ABA model. But the jurisdictional alignment based on subject matter is an uncertain predictor of the importance of an appeal, as is indicated by the wide variety of criteria used in the states. Thus some appeals with important issues are initially filed in the intermediate appellate court, requiring double appeals, while the Supreme Court may be overburdened with routine appeals."[28]

[23] *Id.* at 32-33.
[24] *Id.* at 33.
[25] *Id.* at 34. As noted in the statistical data, pages 17 – 20, Virginia currently has approximately 2,500 appeals, and would likely have more if conversion of civil appeals to by-right instead of petition is undertaken.
[26] *Id.*
[27] *Id.* at 35.
[28] *Id.* at 36.

Avoiding Separate Criminal and Civil Courts. Regarding specialized courts of appeal for criminal cases "[s]tudies of the Alabama and Tennessee appellate systems have strongly recommended merger of the states' separate intermediate courts. Exhaustive studies of the appellate systems in several other states have looked into the possibility of criminal appellate courts, and all recommend against them. . . . First, the division of the appellate system hinders efficient caseload apportionment among appellate courts when the volume of civil or criminal appeals increase at disproportionate rates. . . . Second, specialized courts of appeals have lower prestige than courts with wider jurisdiction. . . . Third, the judges' interest may become too narrow; they may lose touch with overall trends in legal thought and develop arcane language and overly technical rules. Fourth, specialized judges may believe that their knowledge of the area entitles them to establish policy without due regard to present legislative and decisional law. Finally, the appointment of judges to specialized courts may be dominated by special interested groups, particularly prosecutors or the defense bar."[29]

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

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

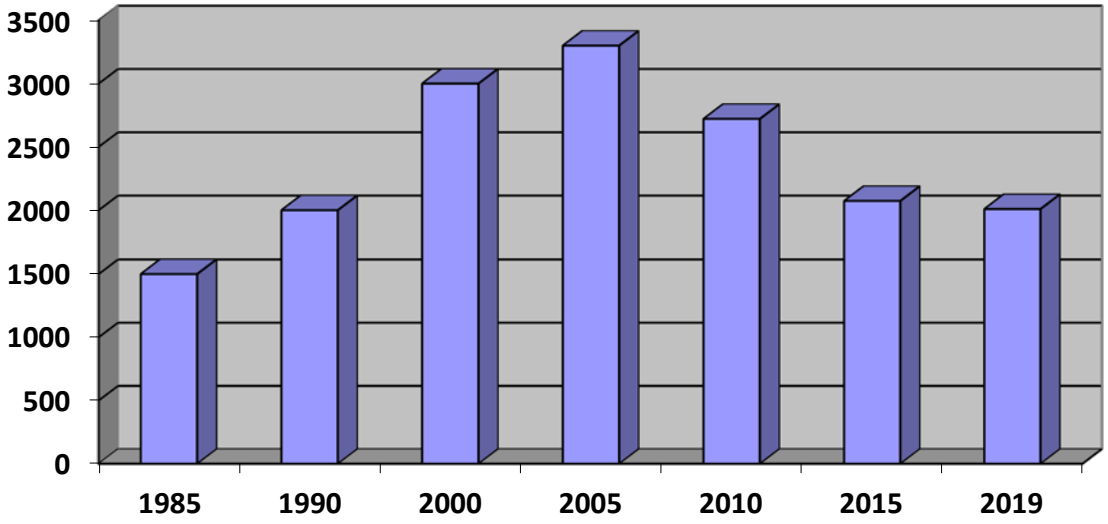
The great majority of states follow this policy."[30]

[29] *Id.* at 43.
[30] *Id.* at 49.

Part Two – OVERVIEW OF VIRGINIA APPEALS IN THE MODERN ERA

The Court of Appeals has four principal areas of appellate jurisdiction: criminal cases (by petition); state administrative agency cases (but no jurisdiction over local administrative agency decisions); workers compensation; and domestic relations cases. The Court also has jurisdiction over non-biologically-based writs of actual innocence.[31] By statute the Court has jurisdiction over certain habeas corpus cases but under prevailing case law the volume of such petitions is limited. The declining docket numbers and prompt disposition times considered by the Working Group in 2018 have been continued and somewhat clarified by information updated through 2019.

Total Filings in the Court of Appeals



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

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

THE COURT OF APPEALS OF VIRGINIA

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

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

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

Disposition Time Snapshots. With the help of Chief Judge Decker and CAV Clerk of Court Cindi McCoy, the disposition time displays have been prepared based on the most-recent years for which statistics are available. These are presented in Part Seven of the present report. The disposition times are quite prompt. One possible inference from comparison of the 2005 disposition times (when the total filings of the CAV "maxed out" at some 3,500 annually) and the most recent figures, might be that if a jurisdictional change might increase the total number of filings that does not necessarily suggest that disposition times would be materially slowed. *See* pages 59 – 63 below.

THE SUPREME COURT OF VIRGINIA

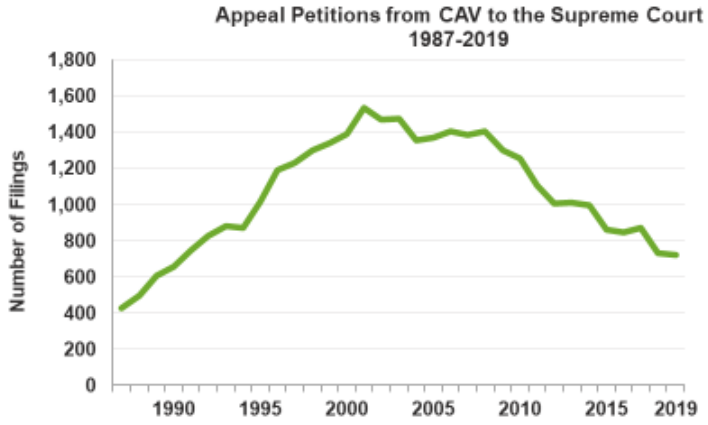
The Supreme Court of Virginia receives some 1,800 combined civil, criminal, and other filings per year, and it has responsibility for ***myriad*** forms of proceedings. It is not the mission of the Judicial Council to attempt any assessment of the Supreme Court's caseload overall, or its procedures and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

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

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

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

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



Part Three – CAV PROCEDURES & PRESENT CASELOAD PATTERNS

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

Over the past five years, on average roughly 1,500 to 1,550 petitions for appeal in criminal cases have been filed each year with the Court of Appeals. (*See* table, page 23). In most of these cases the local Commonwealth's Attorneys file an opposition to the petition for appeal, but the Judicial Council has been informed that in some of the cases the Commonwealth's Attorneys do not file any response.

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

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

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

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

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

- the appellant is allowed to supplement the previously filed petition for appeal with only a 350-word statement of why the one-judge denial of appeal is wrong.

- where the appellant has requested (and not later waived) oral argument, oral argument will be heard by the three-judge panel considering whether full appeal should be granted.

- if no oral argument is requested, the review is conducted on the petition, any opposition that has previously been filed by the Commonwealth's Attorney, and

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

- in a large majority of cases, three-judge reviews confirm the one-judge denial of an appeal.

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

Full Merits Panel Hearings. In total, full merits hearings are held as a result of appeals granted by one-judge or three-judge review of the petitions in around 12% of the petitions for criminal appeal. (*See* table, page 23).

B. Appeals of Right in Domestic Relations and Workers Compensation

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

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

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

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

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

● Cases decided without oral argument could be affirmed or reversed (under a revised Rule 5A:27, which today only speaks of summary affirmance in appeal-of-right cases) and dispositions would in every instance be accompanied by an order or short-form memorandum opinion giving reasons for the disposition.

● Oral argument would be scheduled in those cases where the CAV panel of judges determines that it could be helpful. Statutes and/or rules could provide options for supplemental briefing by both sides, and the Court could enter any necessary orders regarding preparation of an appendix (or designating specific aspects of the broader record to be submitted, as currently contemplated in Rule 5A:25).

● Cases decided after oral argument would be accompanied by a full opinion.

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

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

D. Topics Addressed Today in Certain Rules of Court

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

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

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

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

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

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

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

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

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

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

Rule 5A:19 says

- the appellant in appeals of right has 40 days from the date the record is filed with the CAV to file an Opening Brief (limited to 12,300 words), with detailed requirements spelled out in Rule 5A:20.

- the Brief of the Appellee (limited to 12,300 words), and any guardian's brief, are due 25 days after the filing of the opening brief, with detailed requirements found in Rule 5A:21.

- the appellant may file a Reply Brief (maximum 3,500 words) within 14 days of the filing of the Brief of Appellee, with further requirements found in Rule 5A:22.

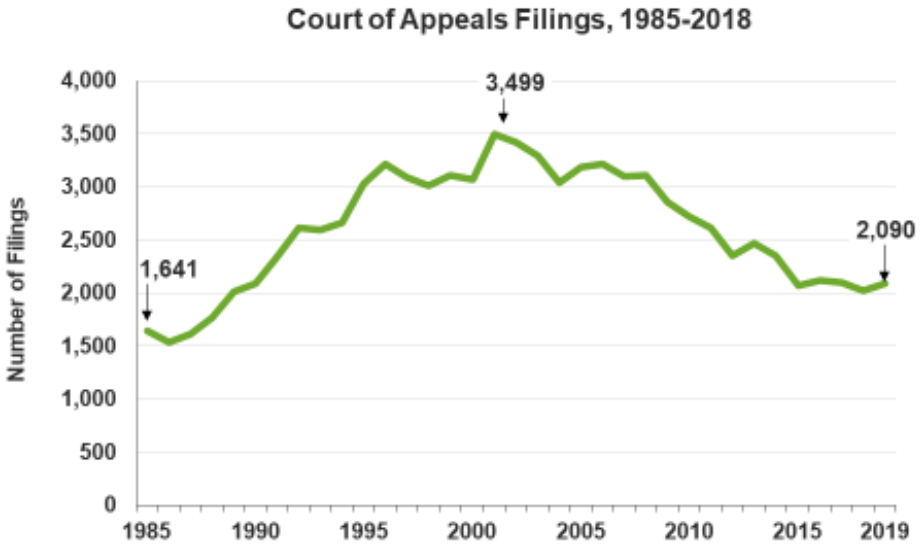
Rule 5A:25 requires appellant to file an appendix no later than the date for the Opening Brief, but under paragraph (b) the CAV may order dispensing with an appendix, so that the appeal proceeds on the original record or any part thereof that the court orders the parties to file.

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

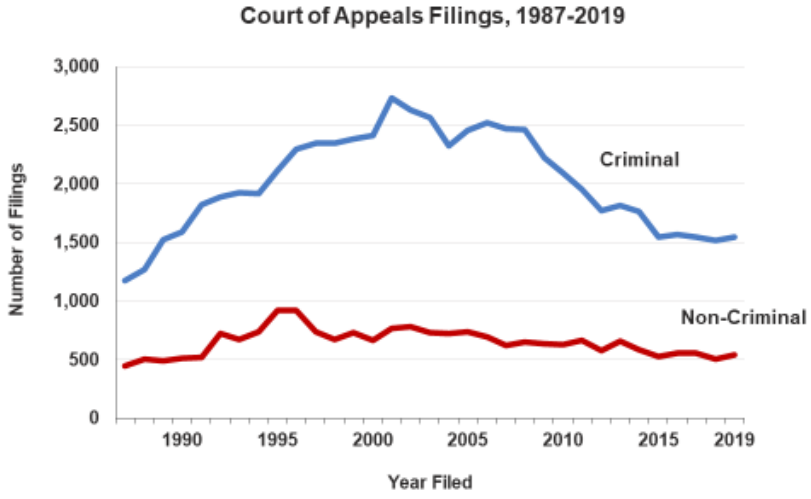
Rule 5A:28 states that in appeals of right (or granted petitions) "oral argument shall be permitted except in those cases disposed of pursuant to Rule 5A:27."

E. Graphic Breakdown of the CAV Caseload

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

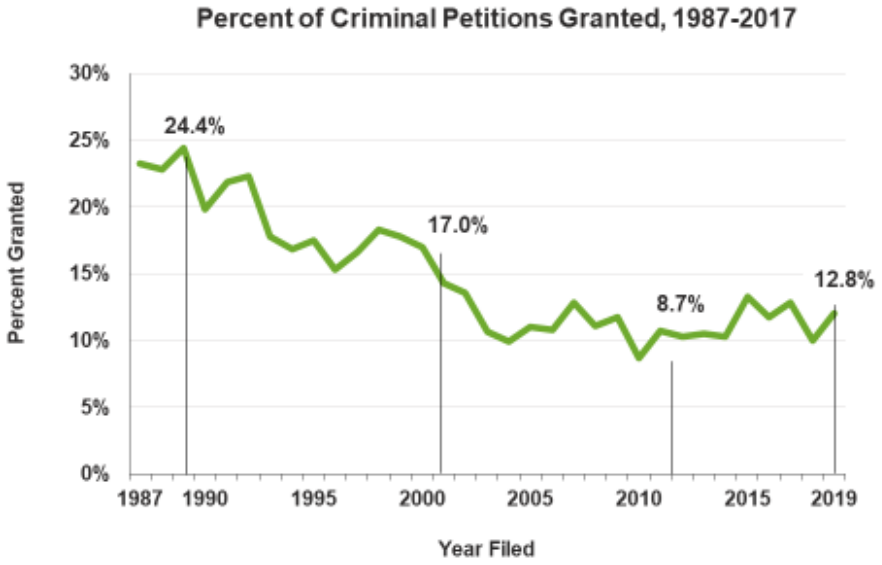


Since 1987, Criminal Cases have Comprised Between 70% and 80% of filings in the Court of Appeals (today 75%)



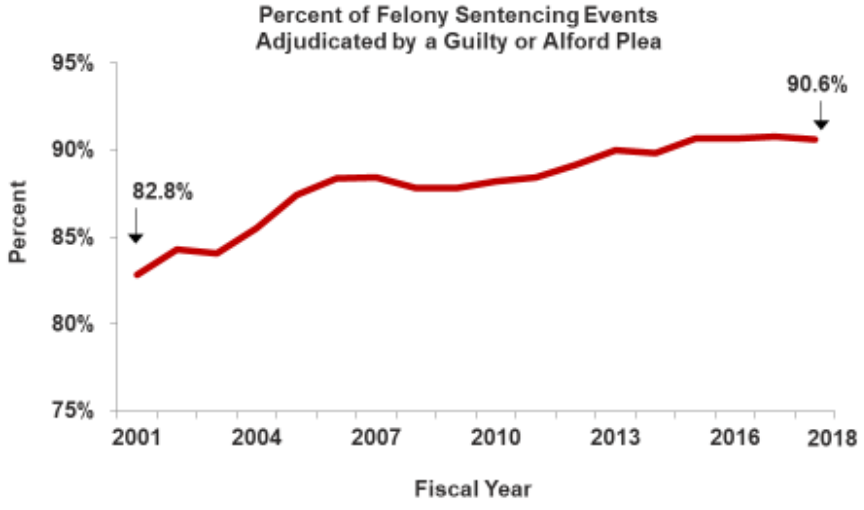
Note: Pretrial criminal appeals classified in STARS as civil cases were reclassified as criminal cases.

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



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

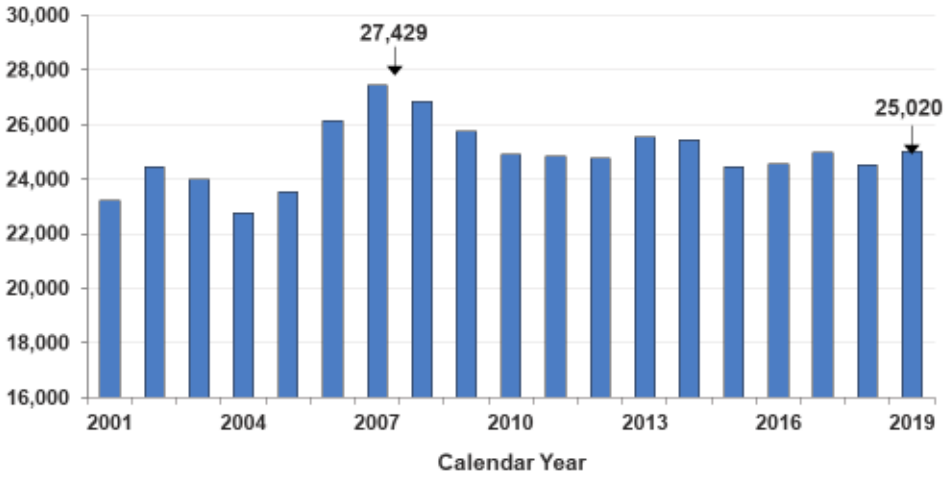
The proportion of felony conviction cases adjudicated by guilty or Alford pleas has increased steadily since 2001.



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

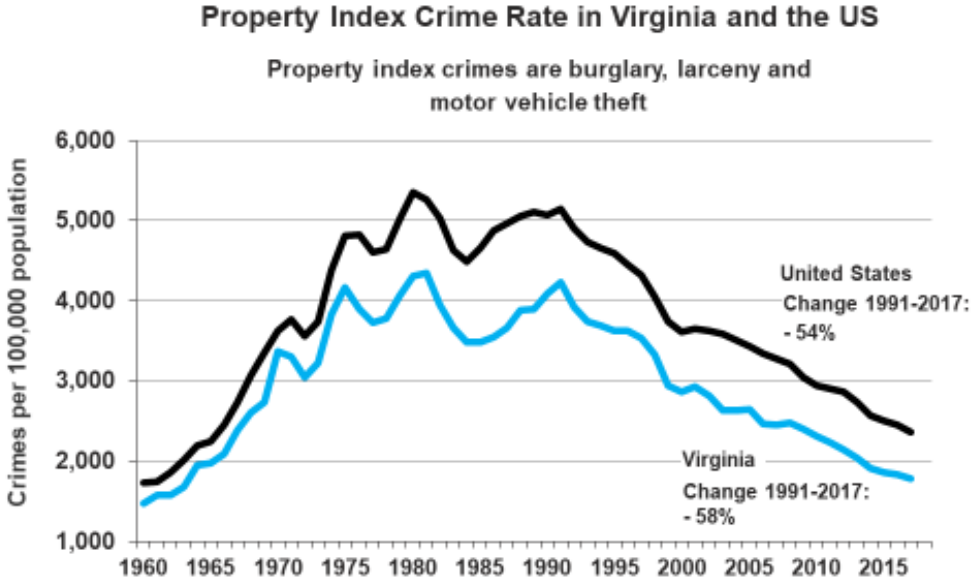
Source: Virginia Criminal Sentencing Commission's Sentencing Guidelines Database

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



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

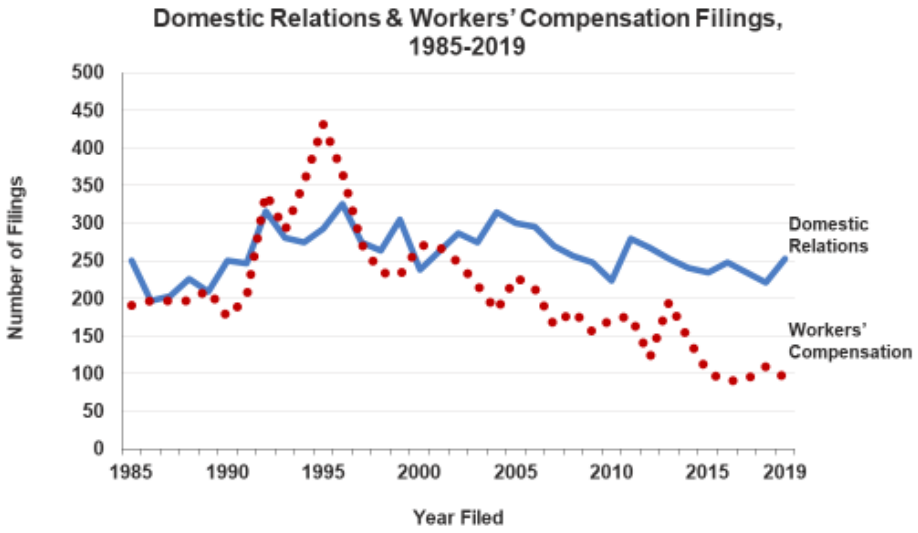
Virginia's property crime rate has fallen since the early 1990s, reaching levels not seen since the late 1960s.



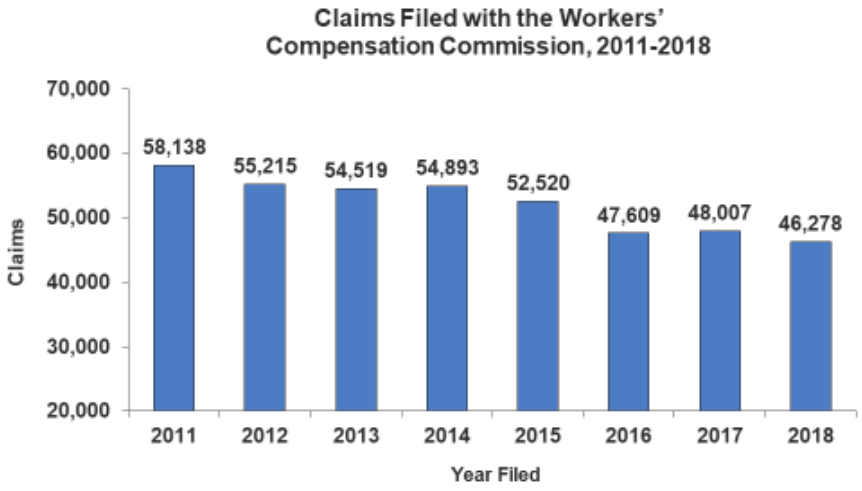
Sources: FBI – *2017 Crime in the United States*,
Virginia Dept. of Criminal Justice Services - *Virginia Crime and Arrest Trends 2008 - 2017*

DOMESTIC RELATIONS AND WORKERS' COMPENSATION BACKGROUND

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



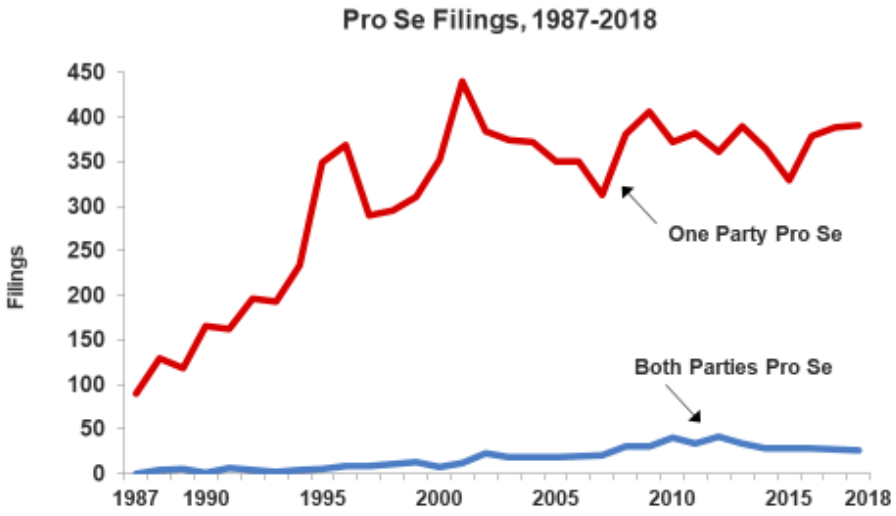
The number of claims filed with the Workers' Compensation Commission declined by 20% between 2011 and 2013.



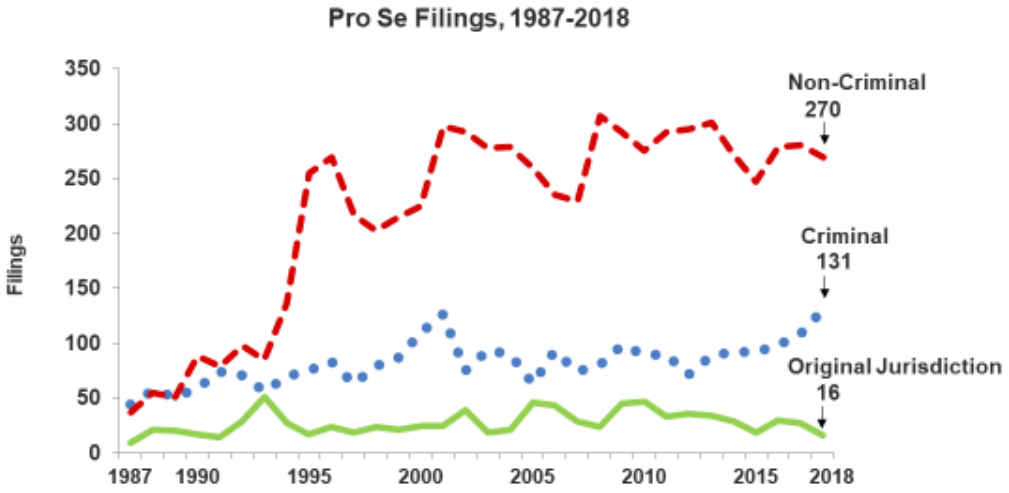
Source: Virginia Workers' Compensation Commission *Annual Reports*

PRO SE LITIGATION IN THE COURT OF APPEALS

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



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



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

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

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

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

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

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

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

The following table presents some national averages for the volume of appellate filings:[32]

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

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

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

Criminal Appeals – The Range of National and Regional Experience Summarized

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

Criminal Appeals as % of total criminal cases commenced in full-jurisdiction trial courts each year, in states with by-right appeal to an intermediate court of appeals:	**Percent Appealed**
	Average: 1.8%
	Median: 1.3%
Lowest quartile of appeal rates for all reporting states:	Lowest ¼: 0.4%
Middle range (omitting bottom quarter and top quarter):	Middle range: 1.4%

Criminal appeals per million of population in states with by-right appeal of criminal cases to an intermediate court of appeals:	**Number Appealed/yr/million**
	Average: 182 per million
	Median: 164 per million
Lowest quartile of appeal rates for all reporting states:	Lowest ¼: 74 per million
Middle range (omitting bottom quarter and top quarter):	Middle range: 172 per million

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

Criminal appeals as % of total criminal cases commenced in the trial courts each year, in states with by-right appeal available to an intermediate court of appeals:	**Percent Appealed**
	Average: 1.4%
	Median: 1.2%
Criminal appeals per million of population in states with by-right appeal of criminal cases to an intermediate court of appeals:	**Number Appealed/yr/million**
	Average: 97 per million
	Median: 91 per million

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

PROJECTIONS FOR **VIRGINIA CRIMINAL APEALS OF RIGHT**

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

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

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

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

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

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

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

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

WHAT STUDIES SHOW ABOUT CIVIL APPEAL ISSUES

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

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

National Center for State Courts, Caseload Highlights, Vol. 14 No. 1, March 2007.
Figure 2: RATE OF APPEAL BY CASE TYPE

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

TORTS

Product liability	32%
Professional Malpractice	32%
Other tort	22%
Medical Malpractice	17 %
Intentional torts	12 %
Premises liability	11 %
Motor vehicle torts	5.5 %

CONTRACT BASED

Employment disputes	34 %
Fraud	23 %
Other Contract	21 %
Buyer plaintiff	19%
Seller plaintiff	18 %
Rental/lease agreement	16%

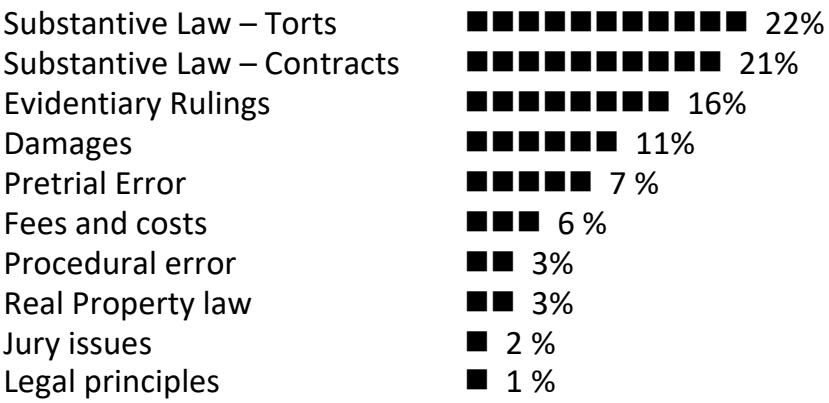
REAL PROPERTY	24 %

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

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

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

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



ACTUAL VIRGINIA EXPERIENCE: CIVIL CASES IN RECENT YEARS

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

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

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

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

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

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

Civil Appeals – Summarizing the Range of National and Regional Experience

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

Civil Appeals as % of total civil cases commenced in full-jurisdiction trial courts each year, in states with by-right appeal to an intermediate court of appeals:	**Percent Appealed**
	Average: 0.7%
	Median: 0.6%
Lowest quartile of appeal rates for all reporting states:	Lowest ¼: 0.3%
Middle range (omitting bottom quarter and top quarter):	Middle range: 0.6%

Civil appeals per million of population in states with by-right appeal of criminal cases to an intermediate court of appeals:	**Number Appealed/yr/million**
	Average: 217 per million
	Median: 226 per million
Lowest quartile of appeal rates for all reporting states	Lowest ¼: 114 per million
Middle range (omitting bottom quarter and top quarter):	Middle range: 212 per million

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

Civil appeals as % of total civil cases commenced in the trial courts each year, in states with by-right appeal available to an intermediate court of appeals:	**Percent Appealed**
	Average: 0.6%
	Median: 0.4%

Civil appeals per million of population in nearby states with by-right appeal of civil cases to an intermediate court of appeals:	**Number Appealed/yr/million**
	Average: 206 per million
	Median: 181 per million

The Domestic Relations Experience in Virginia

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

As noted in the statistical update table above (page 23) the number of domestic appeals under the existing appeal-by-right system for such cases is running **around 250 per year.**

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

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

P R O J E C T I O N S FOR **V I R G I N I A C I V I L A P E A L S OF R I G H T**

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

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

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

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

Part Six – ASSESSING THE REGIONAL OPERATIONS OF THE CAV

To date, the Court of Appeals of Virginia has organized its operation in four regions:

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

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

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

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

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

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

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

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

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

> "Permanent Divisions or Rotating Panels. A very important issue concerning intermediate court structure is whether judges should sit in rotating panels or in separate divisions that, because the judicial assignments do not change, operate largely as separate courts. . . . Territorial divisions exist in 14 states [and this system] clearly saves travel time and costs for both the judges and lawyer[s]. Also, it is often said, the judges are more knowledgeable about the particular problems of the local litigants than when the court is centralized."[33]
>
> "Another argument for permanent divisions is that judges often desire to work with only a limited number of colleagues because, it is claimed, small numbers facilitate working arrangements. [However,] permanent divisions or sections are not recommended. Territorial divisions are appropriate only for large states, where travel by lawyers and judges to the capitol is . . . burdensome."[34]
>
> "There are two major problems with intermediate court divisions. First, the separateness of the divisions can foster divergent lines of authority, until resolved by the Supreme Court. Secondly, and probably more important, the caseloads of the divisions tend to become very uneven [resulting in] variations in filings, decisions and backlog [and] the productivity of the divisions, in terms of cases decided per judge, varies almost as much. [Thus,] the divisional system typically leads to uneven distribution of workload and misallocation of the court's resources."[35]
>
> "System for Rotating Judges in Panels. The next issue concerning the panel system is the mechanism for rotating judges between panels. . . . [Most states] rotate the panels quite often [and] Rules in several

[33] NCSC 1982 Court of Appeals Study, p. 60.
[34] *Id.*
[35] *Id.* at 62.

states specify that each judge on the court should sit with each other judge about equally frequently [and] Many courts change panel assignments for each sitting."[36]

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

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

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

Court of Appeals Regional Operations Report

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

- The CAV operates – today – on a regional basis: it manages all aspects of the appellate process on a regional basis, which appears to address the focus of SJ 47 in both form and substance.
- The convenience entailed in scheduling and holding oral argument in courthouses located in the four regions provides the public and the practicing bar with significant convenience, minimizing travel time and expense for the parties.
- The system, as it has been operated by the Court of Appeals for many years, calls upon all members of that Court to "rotate" in regional assignments, such that each member of the Court, over time, will sit in each of the regional benches The Judicial Council may wish to make a recommendation on issues such as:

  -- if the CAV were maintained at approximately the present size, or expanded perhaps no more than 16 total judgeships, there are significant problems that could be entailed if the judges were permanently assigned to a particular region. With "static" assignments, division splits in jurisprudential approach could be problematic.

[36] *Id.* at 66.

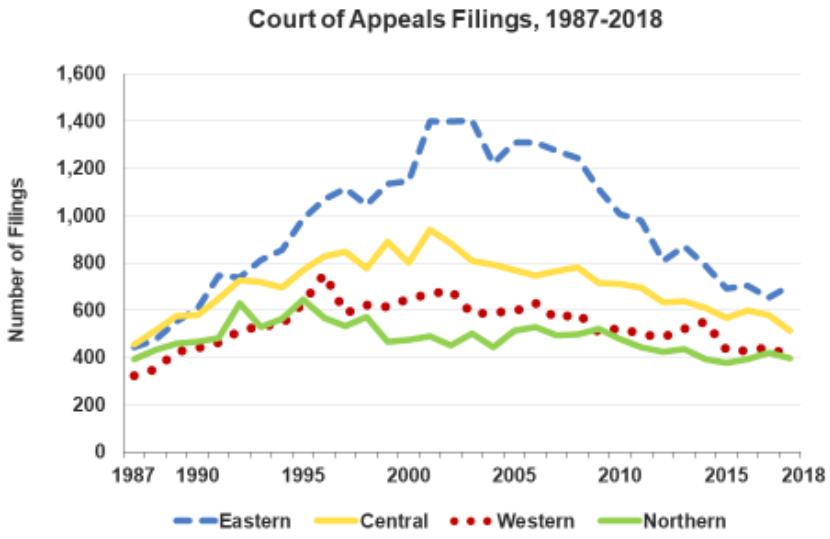
It is also possible that judge-shopping would be encouraged if a particular region were perceived to be more plaintiff or defense favorable in any particular domain of law.

-- even if the CAV were expanded to 24 judges, averaging 6 per region, there is no assurance that such increased expense and expansion of the system would be sufficient to mitigate the effects of stagnant or non-rotating judge assignments in the regions.

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

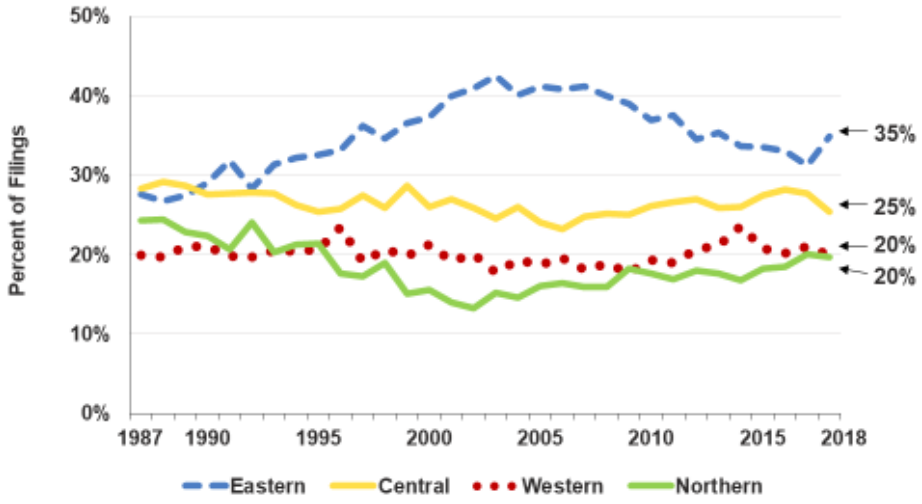
The extent of current regionalization in the operations of the Court of Appeals is illustrated in the following graphic displays:

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



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

Court of Appeals Filings, 1987-2018



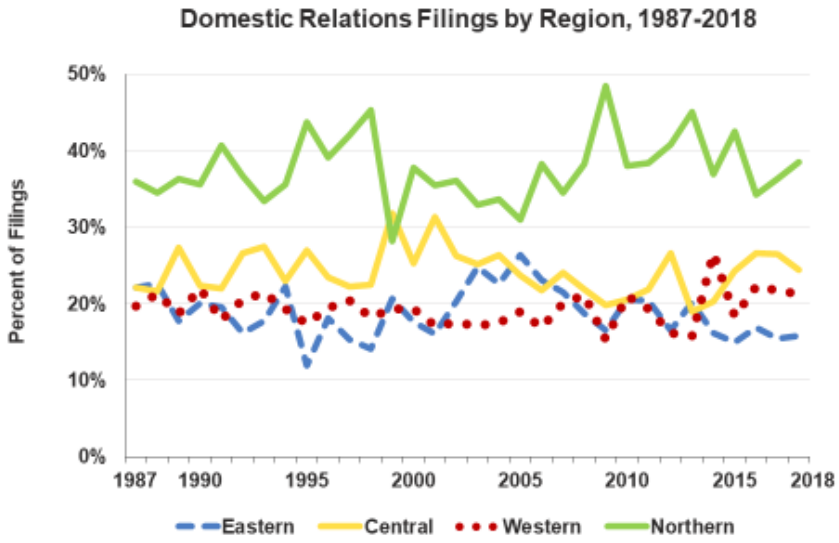
Since 1990, the Eastern Region has contributed the largest share of criminal cases.

Criminal Filings in the Court of Appeals, 1987-2018

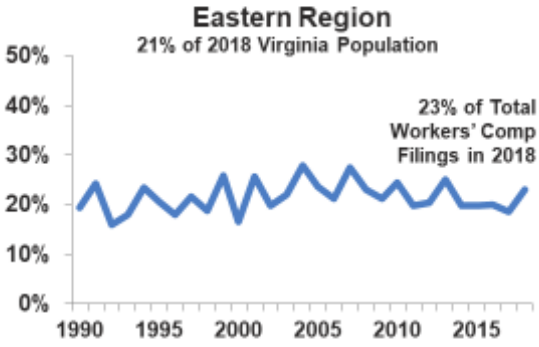
Years	Eastern Region	Central Region	Western Region	Northern Region
1987 – 1989	30.5%	30.5%	19.3%	19.8%
1990 – 1994	34.5%	29.1%	19.4%	17.1%
1995 – 1999	39.9%	27.1%	19.6%	13.3%
2000 – 2004	45.4%	25.5%	18.7%	10.3%
2005 – 2009	45.3%	24.0%	18.3%	12.4%
2010 – 2014	39.9%	26.7%	21.0%	12.4%
2015 – 2018	37.8%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

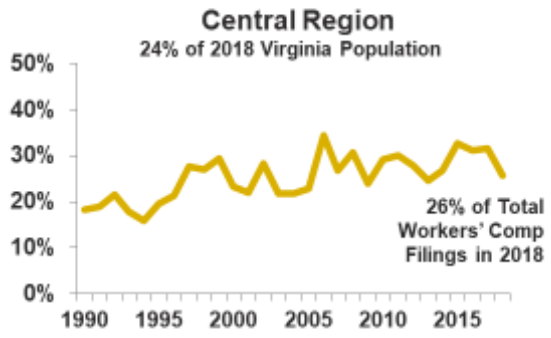
Note: Pretrial criminal appeals classified in STARS as civil cases were reclassified as criminal cases.

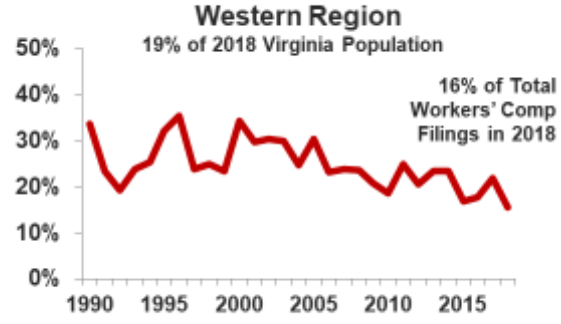
The Northern Region has contributed the largest percentage of Domestic Relations cases nearly every year since 1987.

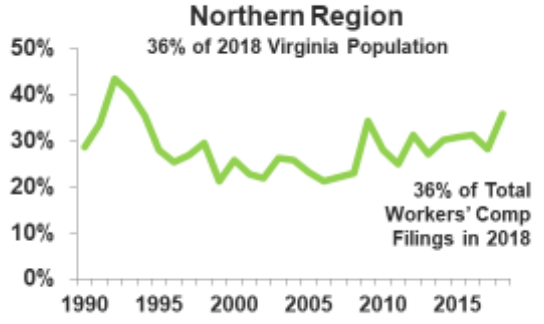


Workers' Compensation Filings by Region, 1990-2018

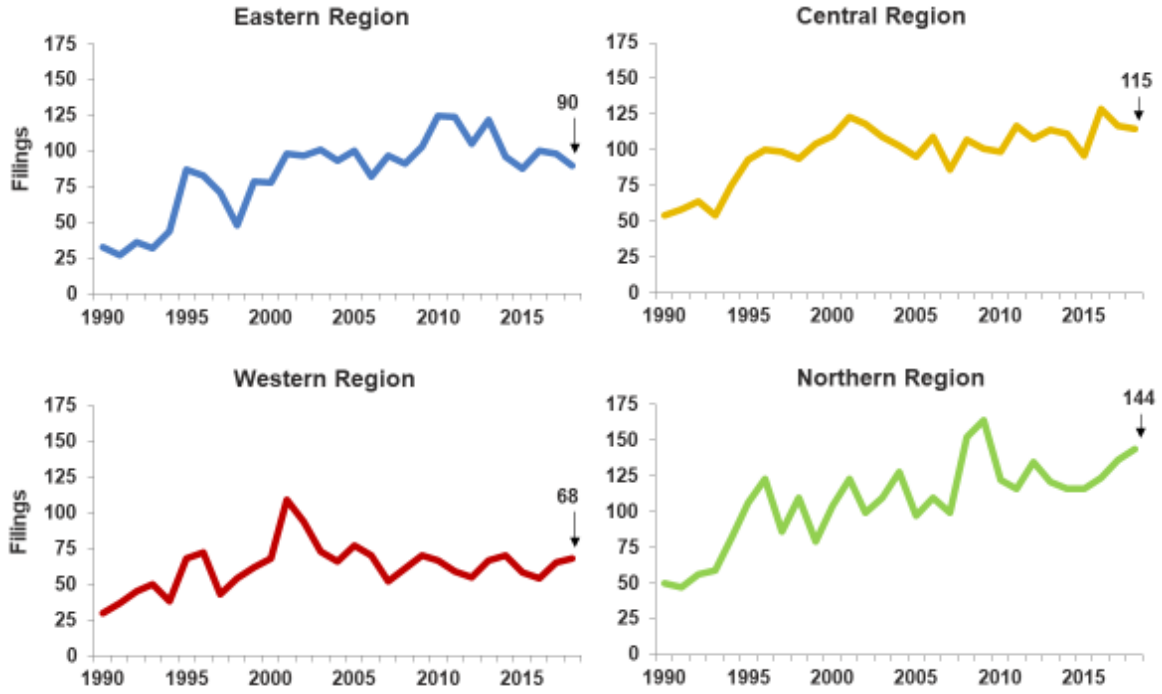








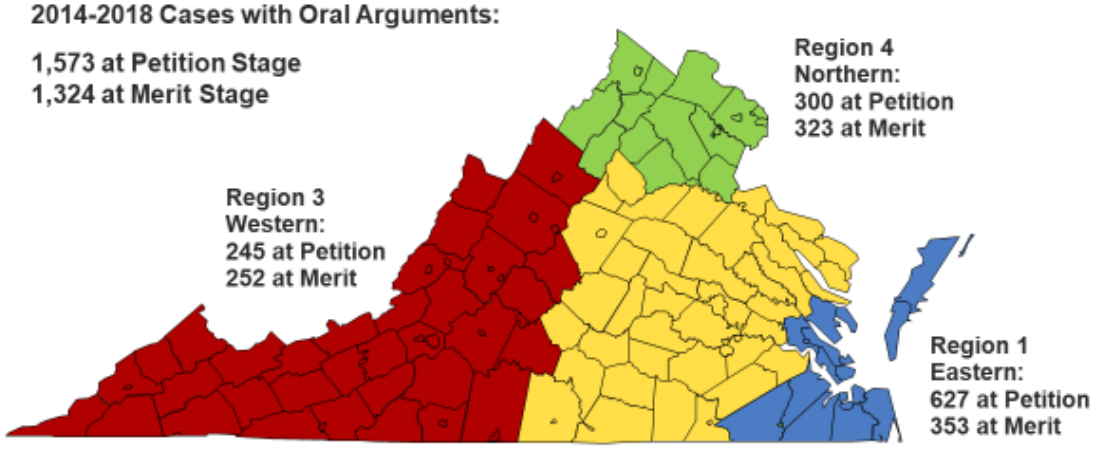
Pro Se Filings by Region, 1990-2018



Court of Appeals Filings, 2014 – 2018
Oral Arguments

2014-2018 Cases with Oral Arguments:

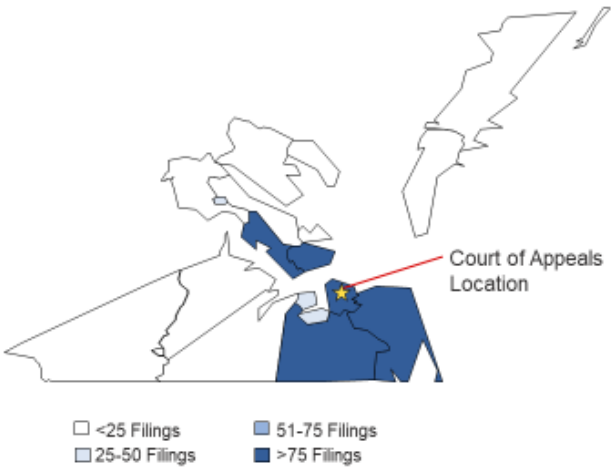
1,573 at Petition Stage
1,324 at Merit Stage



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

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

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

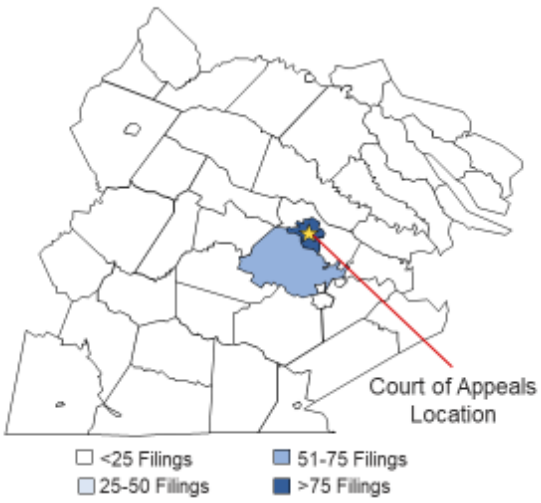


Court of Appeals Filings, 2014 – 2018
Central Region
Oral Arguments at Petition Stage

Jurisdiction	Cases
Albemarle	8
Amelia	5
Appomattox	1
Brunswick	4
Buckingham	1
Caroline	6
Charles City	3
Charlotte	4
Charlottesville	10
Chesterfield	72
Colonial Hghts	16
Cumberland	2
Dinwiddie	1
Essex	0
Fluvanna	1
Fredericksburg	16
Goochland	0
Greene	4
Greensville	1
Halifax	9
Hanover	19

Jurisdiction	Cases
Henrico	24
Hopewell	4
King and Queen	0
King George	1
King William	3
Lancaster	3
Louisa	6
Lunenburg	0
Madison	2
Mecklenburg	7
Middlesex	6
New Kent	4
Northumberland	1
Nottoway	9
Orange	3
Petersburg	22
Powhatan	8
Prince Edward	4
Prince George	7
Prince William	0
Richmond City	87
Richmond Co.	0

Jurisdiction	Cases
Spotsylvania	11
Surry	0
Sussex	3
Westmoreland	3
Total	401

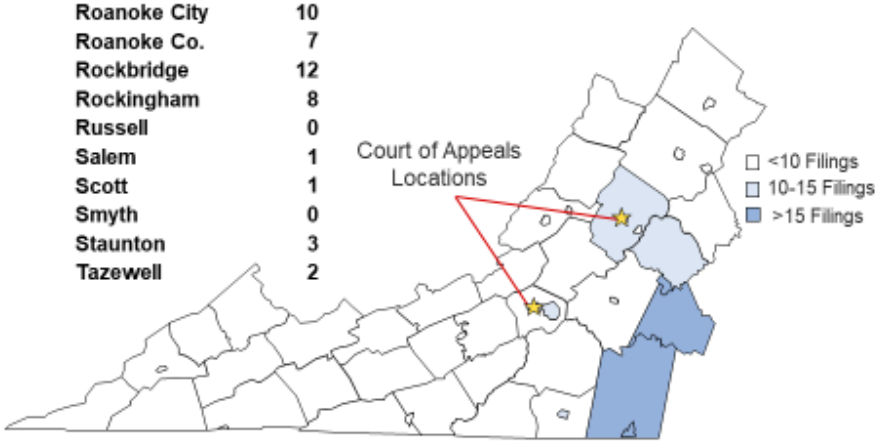


Court of Appeals Filings, 2014 – 2018
Western Region
Oral Arguments at Petition Stage

Jurisdiction	Cases
Alleghany	9
Amherst	11
Augusta	6
Bath	2
Bedford	4
Bland	0
Botetourt	3
Bristol	1
Buchanan	1
Buena Vista	0
Campbell	19
Carroll	2
Craig	0
Danville	29
Dickenson	3
Floyd	3
Franklin	9
Giles	1
Grayson	2
Henry	8
Highland	1
Lee	0
Lynchburg	18

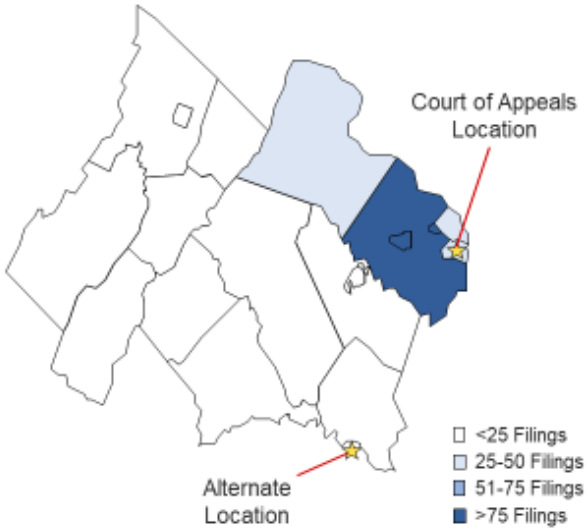
Jurisdiction	Cases
Martinsville	12
Montgomery	7
Nelson	5
Patrick	4
Pittsylvania	27
Pulaski	3
Radford	3
Roanoke City	10
Roanoke Co.	7
Rockbridge	12
Rockingham	8
Russell	0
Salem	1
Scott	1
Smyth	0
Staunton	3
Tazewell	2

Jurisdiction	Cases
Washington	3
Waynesboro	3
Wise	2
Wythe	0
Total	245



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

Jurisdiction	Cases
Alexandria	46
Arlington	26
Clarke	0
Culpeper	9
Fairfax	91
Fauquier	16
Frederick	6
Loudoun	49
Page	2
Prince William	23
Rappahannock	0
Shenandoah	5
Stafford	21
Staunton	1
Warren	2
Winchester	3
Total	300



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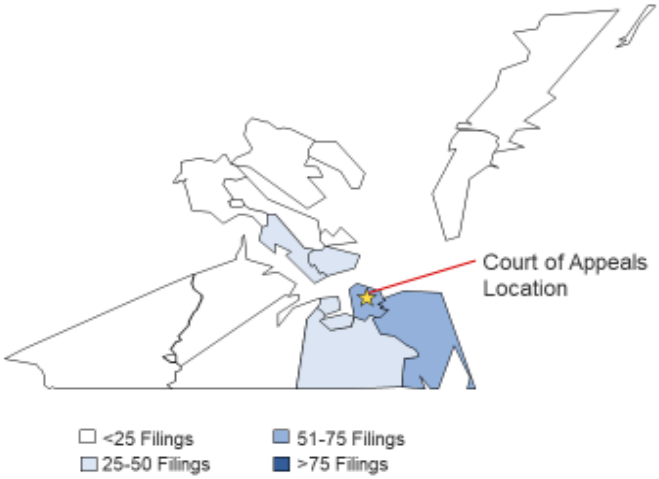
Court of Appeals Filings, 2014 – 2018
Eastern Region
Oral Arguments at Merit Stage

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



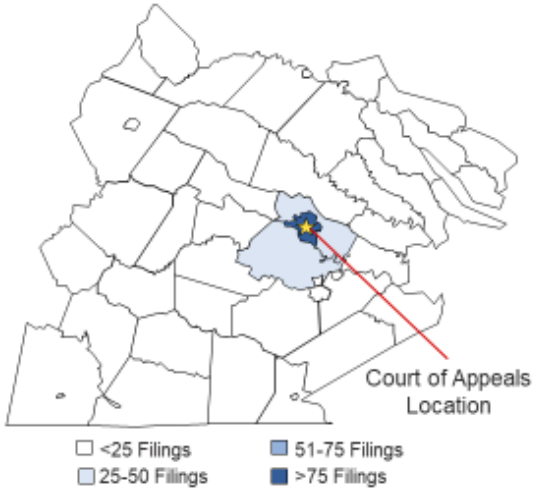
* "No locality specified" includes Workers' Compensation Commission and Original Jurisdiction cases.

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

Jurisdiction	Cases
Albemarle	19
Amelia	2
Appomattox	4
Brunswick	3
Buckingham	1
Caroline	3
Charles City	1
Charlotte	1
Charlottesville	2
Chesterfield	46
Colonial Hghts	3
Cumberland	2
Dinwiddie	9
Essex	0
Fluvanna	0
Fredericksburg	11
Goochland	3
Greene	0
Greensville	3
Halifax	6
Hanover	8

Jurisdiction	Cases
Henrico	30
Hopewell	6
King and Queen	1
King George	2
King William	3
Lancaster	1
Louisa	4
Lunenburg	0
Madison	3
Mecklenburg	5
Middlesex	2
New Kent	1
Northumberland	0
Nottoway	3
Orange	5
Petersburg	12
Powhatan	11
Prince Edward	2
Prince George	7
Prince William	0
Richmond City	104
Richmond Co.	0

Jurisdiction	Cases
Spotsylvania	21
Surry	0
Sussex	4
Westmoreland	2
No Locality Specified	40
Total	396

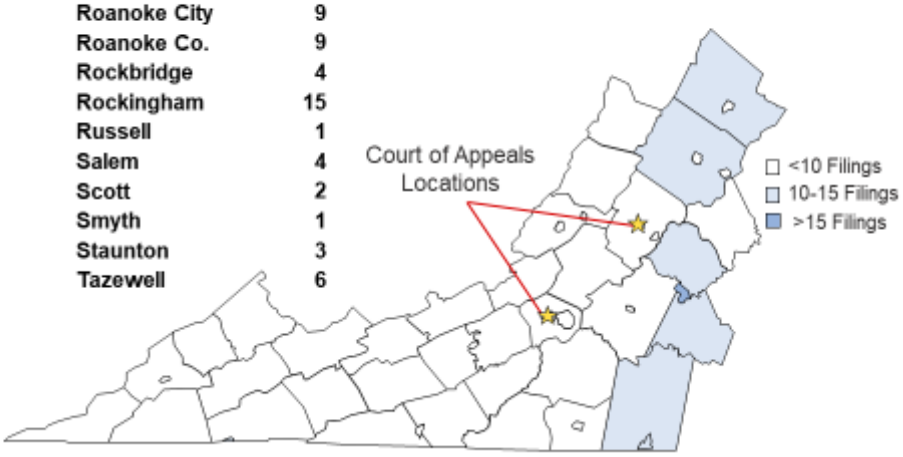


Court of Appeals Filings, 2014 – 2018
Western Region
Oral Arguments at Merit Stage

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

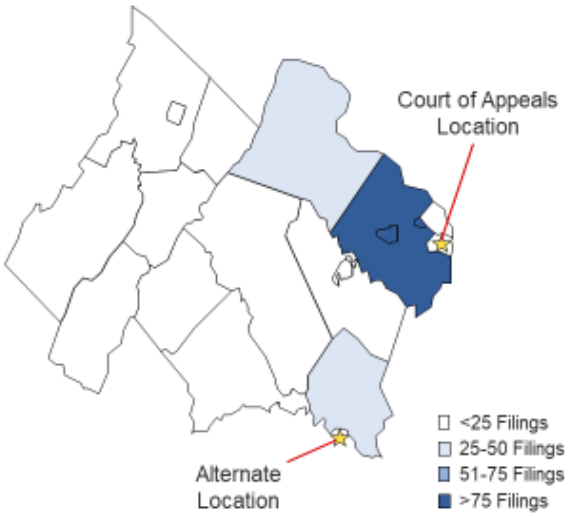
Jurisdiction	Cases
Martinsville	1
Montgomery	7
Nelson	2
Patrick	4
Pittsylvania	12
Pulaski	2
Radford	1
Roanoke City	9
Roanoke Co.	9
Rockbridge	4
Rockingham	15
Russell	1
Salem	4
Scott	2
Smyth	1
Staunton	3
Tazewell	6

Jurisdiction	Cases
Washington	5
Waynesboro	4
Wise	4
Wythe	1
No Locality Specified	29
Total	252



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

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



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

ASPIRATIONAL EXAMPLES

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

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

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

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

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

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

ESTABLISHING A TARGET MAXIMUM CASELOAD PER JUDGE

[SIZE OF THE INTERMEDIATE APPELLATE COURT]

Recommended size of an intermediate court "is based on many factors: the present and projected volume of appeals filed, the size of the present backlog, the numbers of judges on intermediate courts in other states, standards concerning case dispositions in appellate courts, and the particular circumstances" of the state.[37]

170 Filings Per Judge. With a projected "caseload of 1,200 appeals. . . it is estimated that the [intermediate] court should have seven judges."[38] This rule-of-thumb equates to a maximum target filing level of 170 new cases annually per judgeship on an intermediate court of appeals.

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

> "First, Professors Carrington, Meador, and Rosenberg suggest a hundred dispositions on the merits per year per judgeship as 'the most efficient number' in state intermediate courts.[39] This estimate, however, assumes that the court often uses summary procedures – that a third of the cases are decided without oral argument, and that three-quarters of the cases are decided by memorandum opinions (and a quarter by full opinion).
>
> Second, Professor Leflar states that 'no appellate judge should be expected to write more than 35, or conceivably 40, full-scale publishable opinions per year.'"[40]
>
> "To apply these standards . . . one must estimate the number of cases to be decided each year."[41]

[37] NCSC 1982 Court of Appeals Study, p. 74
[38] *Id.* at 79.
[39] Carrington, Meador, & Rosenberg, *Justice on Appeal* 143-46 (1976).
[40] NCSC 1982 Court of Appeals Study, p. 80, quoting Robert Leflar, Internal Operating Procedures of Appellate Courts, 8-9 (1976).
[41] NCSC 1982 Court of Appeals Study, p. 81.

Assuming the availability of "summary procedures" for some segment of the caseload, "a standard of 60 decisions per judge is suggested for the Court of Appeals, which is half again as many opinions per judge as Leflar's upper limit, but substantially less than the 100 decisions per judge recommended [as a ceiling] by Carrington, Meador, and Rosenberg (who assume frequent use of summary procedures)."[42]

"Experience in other courts. [Looking at] caseload statistics for appellate courts in other states with intermediate courts . . . shows a wide variation in caseload. The median number of *filings per judge* is about 165, and the median number of cases *decided* per judge is about 95, a figure very similar to the 100 suggested by Carrington, Meador, and Rosenberg."[43]

"[C]riminal cases . . . are generally believed to require less judge time on the average than civil cases. . . . Courts with predominantly civil caseloads . . . usually are at or below the 60 decisions-per-judge level."[44]

"Although it is difficult to compare situations existing in different states . . . the size of those courts elsewhere is at least illustrative of what might be appropriate."[45]

CASELOADS PER JUDGE AFFECT COURT DELAY

In general, structuring an intermediate appellate court with excess caseloads for the judges is a recipe for delays in dispositions, and creation of appellate backlogs. In Virginia, it appears from the case processing experience reported in the charts set forth below at pages 62 - 63 of this Report, the case processing times were not materially slower in the year 2000, when total filing numbers exceeded 3,000 per year.

The table on page 65 below, however, reflects the fact that very few state legislatures have chosen to saddle their intermediate court of appeals judges with more than 200 total filings per year.

To assure the continued timeliness and high quality of Court of Appeal dispositions in Virginia, and the Court's ability to offer explanatory orders in all cases identifying reasons for the dispositions, the General Assembly is strongly encouraged to avoid significantly exceeding 170 to 190 filings per year in assessing the needed staffing of the CAV to take on additional categories of cases.

[42] *Id.*
[43] *Id*. at 82.
[44] *Id.* at 82-83.
[45] *Id.* at 86.

● Thus it is probable that any marginal increase in the number of criminal appeals that might result from converting the present petition system to appeals of right would neither overwhelm the presently authorized complement of judges of the Court of Appeals nor result in significantly increased case-processing times, assuming that support staff is provided to commensurate with any increase in criminal appeals experienced in the coming years.

● Imagining the impact of allocating some or all civil appeals to the Court of Appeal for review as a matter of right in the first instance requires more assumptions than predicting criminal case volume under an appeal-of-right system.

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

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

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

> The relative workload of a court may be determined by taking the total number of cases decided by the court and dividing that number by the number of justices sitting on the court. The resulting number may be compared with the number of cases that experts consider to be the optimum for an appellate judge to decide in a year. Taking into account the other duties of a judge, experts suggest that an appellate court with the "usual mix" of cases . . . should be required to dispose of no more than 100 cases per judge per year.[46]

In this context, "the optimum relative workload number of 100 is based upon the number of cases in which each [appellate judge] must prepare a written decision. . . ."[47]

[46] Citing Carrington, Meador, and Rosenberg, *Justice on Appeal* 146 (1976).
[47] Institute for Court Management, *Jurisdiction of the Proposed Nevada Court of Appeals* 38 (May 2009).

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

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

For intermediate appellate courts[48] the consensus standards summarized in this joint report were as follows for the number of days from filing a notice of appeal, and disposition:

Criminal cases, granting or denying appeal or summary adjudication

75% of the cases decided within 150 days

95% of the cases decided within 180 days

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

75% of the cases decided within 300 days

95% of the cases decided within 450 days

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

Criminal cases

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

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

Civil cases

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

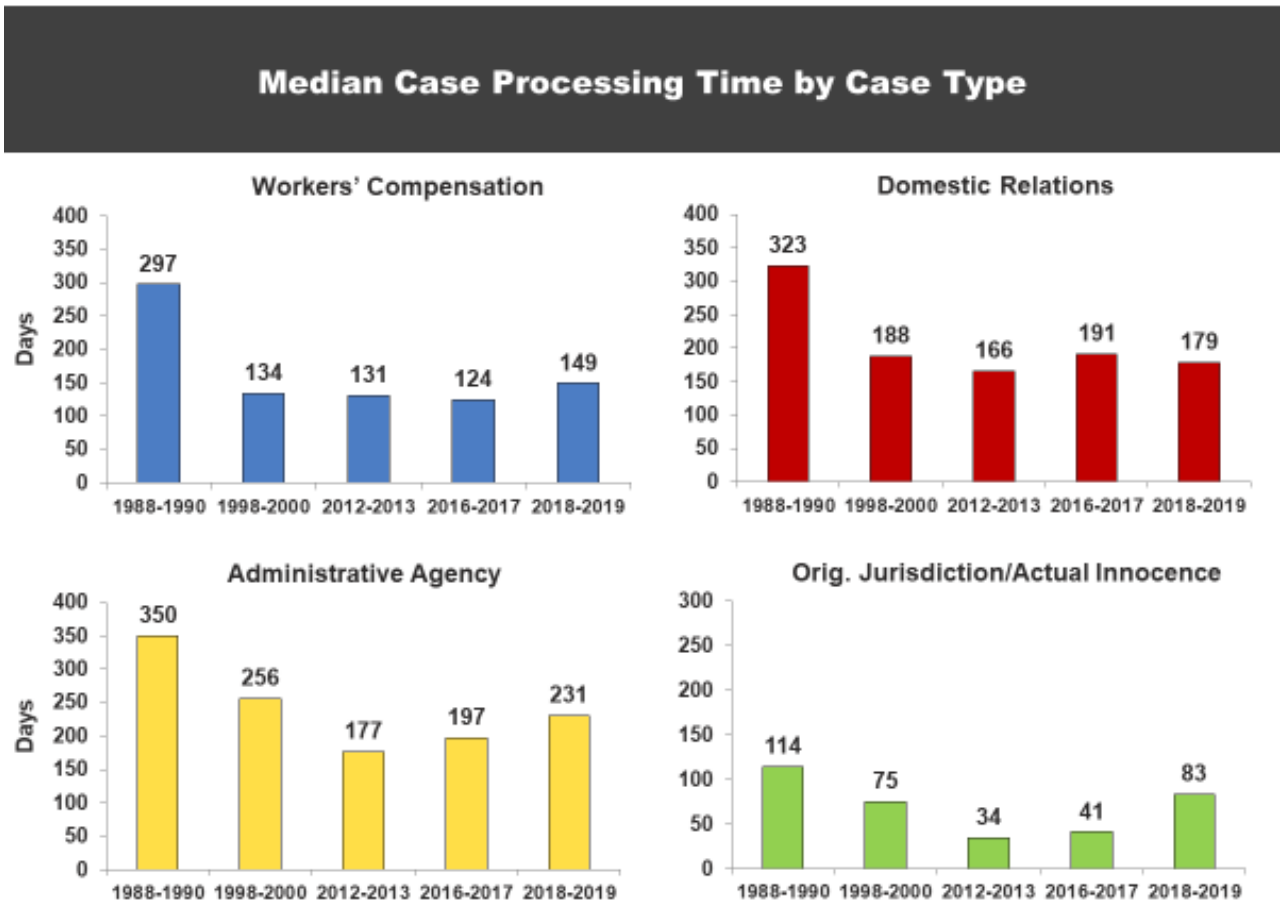
95% of the cases decided within 450 days of filing the notice of appeal

[48] Tabulated at page v of the NCSC joint Model Time Standards report.

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

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

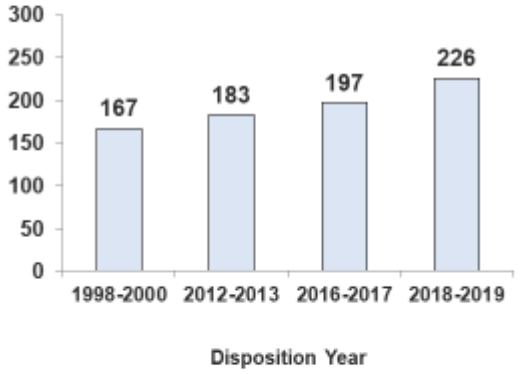
CURRENT CAV PROCESSING TIME SUCCESS



Criminal Petitions – Median Case Processing Times

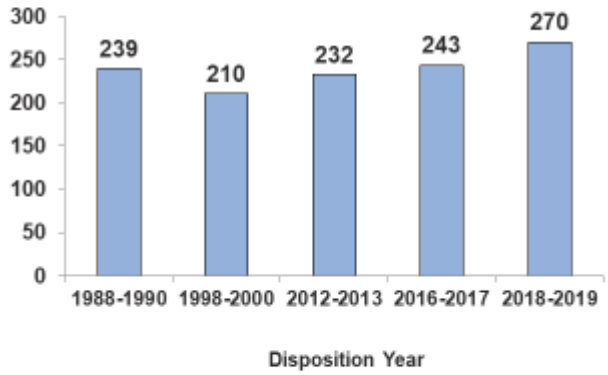
Petitions Resolved at
One Judge Level

Median Case Processing Time (Days)



Petitions Resolved at
Three Judge Level

Median Case Processing Time (Days)

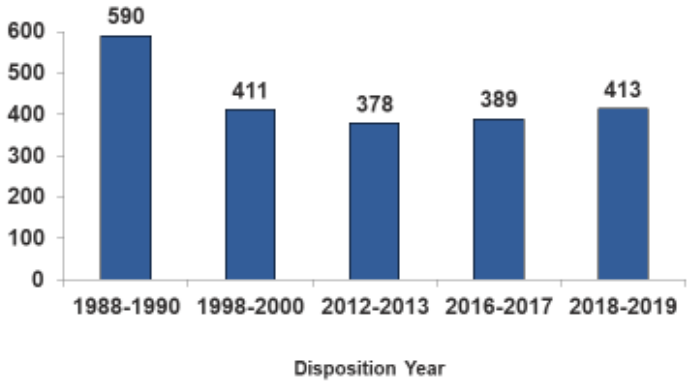


Note: Appeals still pending in the Court of Appeals were excluded.

Criminal Petitions – Median Case Processing Times

Granted Criminal Petitions –
Resolved by Merit Panel

Median Case Processing Time (Days)



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

Part Eight – RECOMMENDED JUDICIAL AND SUPPORT STAFFING

CRIMINAL APPEALS OF RIGHT – JUDGESHIP NEEDS

As indicated in Part Four of this Report, the most likely estimates of criminal appeal volume in an appeal-of-right system suggest that the number of filings could range from the same level as in recent years, approximately 1,500 to 1,550 per year, to perhaps 20% additional criminal filings (for a total of 1,800 criminal case filings per year).

Judgeship Needs re Criminal Caseload. The timeliness of the CAV's discharge of its duties in recent years suggests that – if the vacant 11th seat currently authorized for the Court of Appeals is promptly filled – it is most likely that an additional judgeship would not be required by the change to appeal-of-right processing of criminal appeals. *If criminal appeals under the by-right system exceed 1,800 cases per year in future years, an additional judgeship for every 190 annual criminal filings above that number will be needed.*

CIVIL APPEAL OF RIGHT – JUDGESHIP NEEDS

As reported in Part Five of this Report, if the volume of civil appeals experienced in recent years under the current system (some 400 petitions for appeal to the Supreme Court each year) increases with the availability of an assured appeal of right to the Court of Appeals, it is expected that the civil filing load that would be added to the docket of the Court of Appeals could range from 600 (allowing for a 50% increase in civil appeals over present levels) to 800 (assuming a doubling of the number of civil appeals presented to the SCV in recent years, once appeal to the Court of Appeals is a matter of right for any civil litigant). A massive increase in civil appeals to 1,200 per year (tripling current civil appeal levels) is not inconceivable, but appears less likely.

Judgeship Needs re Added Civil Caseload. At the recommended maximum of 170 civil filings per year for each intermediate appellate judgeship, a minimum of four additional judgeships will be needed at the Court of Appeals, with five being a safer staffing level. The Judicial Council reports that no state with a population in the range from 5.5 million to 10.5 million other than Virginia has fewer than 15 or 16 court of appeals judgeships, and the average number of authorized judgeships for the other states in this broad range of population is 22.

A National Center for State Courts comparison of caseloads of intermediate appellate courts tabulated the modern experience of seven states a few years ago.[49] In 2020, the Working Group supplemented this information for the Judicial Council with the most current Court of Appeals statistics for other publicly reporting states, based on official Annual Reports from their court systems:

State	Ct. of Appeal Judgeships	Total Filings	Filings Per Judge
Tennessee Ct of Appeals,[50] **civil**	12	1,029	86
North Carolina Court of Appeals[51]	15	1,300	87
Massachusetts Appeals Court	28	2,784	99
Tennessee Ct of Appeals, **criminal**	12	1294	108
Kansas Court of Appeals[52]	14	1717	123
Arizona Court of Appeal[53]	22	2,954	134
Iowa Court of Appeals[54]	9	1227	136
Kentucky Court of Appeals[55]	14	1913	137
Illinois Court of Appeals (5 districts)	54	7,730	143
Maryland Court of Special Appeals[56]	15	2,223	148
Wisconsin Ct of Appeals[57] (4 districts)	16	2377	149
Washington State Court of Appeals[58]	22	3797	173
New Jersey Appellate Division	37	6,606	179
Virginia Court of Appeals[59]	**11**	**2,090**	**190**
Michigan Court of Appeals	28	6,257	223
California Ct of Appeal (4th district)	25	6,041	242
Indiana Court of Appeals	15	3,988	266
Pennsylvania Superior Court	20	8,000	400
Florida Ct of Appeal (5 districts)	61	25,906	425

[49] National Ctr. for State Cts., "*Michigan Court of Appeals: Assessment of Operations & Technology*" Table 2, p. 4.
[50] Tennessee maintains two Courts of Appeals, one exclusively criminal. The statistics here reflect the judicial capacity and caseloads broken out by the official Annual Report of the Judiciary. From tncourts.gov/courts/court-appeals/about. Annual Report of the Tennessee Judiciary, Fiscal Year 2018-2019, p. 10.
[51] North Carolina Judicial Branch (website visited July 6, 2020).
[52] Kansas Appellate Reports, 2019 Appellate Courts, p. 2. (June 30, 2019).
[53] Annual Report of the Arizona Judicial Branch (2018) at azcourts.gov (website visited July 6, 2020).
[54] Iowa Judicial Branch 2018 Report, iowacourts.gov (website visited July 6, 2020).
[55] 2020 Kentucky Court of Appeals Statistics, July 7, 2020 (from Counsel to the Clerk of the Court).
[56] From mdcourts.gov/cosappeals (website visited July 6, 2020); 2019 Strategic Plan, p. 54.
[57] From wicourts.gov (Court of Appeals Annual Report 2018, p. 2).
[58] State of Washington Appellate Courts, Operational and Procedural Review, June 2016, p. 8.
[59] Based on 2019 filing data. Note that for the past year only 10 seats on the Court of Appeals have been filled.

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

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

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

Adding 4 or 5 Court of Appeals judgeships would therefore place Virginia in accord with the most thinly staffed of the States with comparable appellate systems and population, and would continue to embrace a fairly high caseload per judge. Thus these recommendations appear to be the minimum judicial staffing that would be prudent in planning the

architecture of the new appellate system for Virginia, and if civil appeals (added to existing domestic relations, workers' compensation and administrative matters already assigned to the CAV) exceed 800 cases/year in future years, an additional judgeship for every 170 annual civil filings above that number will be needed.

SUPPORT STAFF NEEDS FOR ADDED CASELOAD

The Judicial Council also reviewed, and now endorses, the estimated needs for the CAV's Chief Staff Attorney's Office and Clerk's Office, as follows:

ESTIMATED STAFFING NEEDS OF COURT OF APPEALS'
CHIEF STAFF ATTORNEY'S OFFICE AND CLERK'S OFFICE
IF THE COURT'S JURISDICTION IS EXPANDED

- **SCENARIO ONE:** Estimate of the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right.

Chief Staff Attorney's Office Summary: 20% increase in criminal appeals (300 cases)

2 Staff Attorney I positions
1 Administrative Staff Attorney position

Clerk's Office Summary: 20% increase in criminal appeals (300 cases)

1 Deputy Clerk position
1 Assistant Clerk position

- **SCENARIO TWO:** Estimate of the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right and its civil jurisdiction is expanded to include subject matters approximately equivalent to an additional 800 up to 1,200 cases per year.

Chief Staff Attorney's Office Summary:

20% criminal increase (300 cases), plus 800 civil cases

1 Staff Attorney II position
7 Staff Attorney I positions
1 Administrative Staff Attorney position
1 Paralegal position

20% criminal increase (300 cases), plus 1,200 civil cases

2 Staff Attorney II positions
9 Staff Attorney I positions
1 Administrative Staff Attorney position
2 Paralegal positions

Clerk's Office Summary:

20% criminal increase (300 cases), plus 800 civil cases:

3 Deputy Clerk positions
3 Assistant Clerk - Paralegal positions
3 Assistant Clerk positions

20% criminal increase (300 cases), plus 1,200 civil cases:

4 Deputy Clerk positions
3 Assistant Clerk – Paralegal positions
5 Assistant Clerk positions

Court Operations:

One Full-Time Civil Reporter of Decisions

Three Information Technology Specialists for IT support

BACKGROUND INFORMATION REGARDING ESTIMATED STAFFING REQUIREMENTS FOR PROPOSED SCENARIOS

We have been asked to address the additional staffing needs for the Office of the Chief Staff Attorney (CSA) and the Clerk's Office under two scenarios involving legislative changes to the Court's jurisdiction:

- **The first scenario** is to estimate the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right.

- **The second scenario** is to estimate the staffing needs if the Court's jurisdiction changes from a criminal appeal by petition to a criminal appeal of right **and** its civil jurisdiction is expanded to permit an appeal of right in all civil cases, with an expected additional 800-1,200 cases per year.

I. Scenario One - Criminal Appeal of Right

The change to a criminal appeal of right presents the most difficult scenario for estimating staffing needs. We have no way to know how many additional cases will result from changing to a criminal appeal of right, so staffing calculations must be based on some logical assumptions. Every effort has been made to provide realistic estimates. Based on Sentencing Commission figures that show approximately 23,600 defendants were sentenced for at least one felony offense per calendar year and taking into account the current number of criminal petitions filed annually, we will assume an increase in the number of appeals filed by approximately 20%. Based on the average number of petitions filed from 2014 through 2019 (1,500), we estimate that the jurisdictional change may result in a total of approximately 300 ***additional*** filings per year. We

note this estimate (even at the 20% projection) is extremely conservative considering the data provided at pages 36 to 38 of this Report, projecting total possible criminal filings between 1,460 and 2,220 using calculations "[b]ased on the middle range of American states with appeals by right (omitting the lowest quarter and the highest quarter)."[60] Consequently, for purposes of the estimated staffing needs, we will assume a 20% annual increase, or **300 additional criminal cases** (making the total criminal filings 1,800).

The Office of the Chief Staff Attorney (CSA) is responsible for preliminary processing of approximately 85% of the total court filings (other cases are addressed by the Clerk's Office). CSA personnel can process an average of 115 criminal cases annually per attorney, in an average time of 21.4 days per case under the current petition system. In addition, one support staff member is necessary per approximately every four to five attorneys.

*** Note that our formula of **115 criminal cases per attorney** can be used to estimate staffing needs if it is determined that more or fewer cases are anticipated.

To maintain the quality, efficiency, and quantity of the work the CSA produces annually, assuming a 20% increase in criminal case filings, **two additional Staff Attorney I positions** would be necessary to accommodate the anticipated increased caseload from the change to an appeal of right. We have also added **one Administrative Staff Attorney position** to track cases, compile data, conduct targeted research, and screen unique legal issues processed through the Chief Judge. This position is important to continued efficiency and is included in all the assumed scenarios to changes in the Court's jurisdiction.

CSA Summary (20% increase): 2 Staff Attorney I positions
1 Administrative Staff Attorney position

Further, personnel in the Clerk's Office can process in an accurate and timely manner an average of 125 cases annually per staff member.

*** Note that our formula of **125 cases per staff member** can be used to estimate staffing needs if it is determined that more or fewer cases are anticipated.

To maintain the quality, efficiency, and quantity of the cases the Clerk's office can process in a timely manner, assuming a 20% increase in criminal case filings, **one additional Deputy Clerkposition** and **one additional support staff position** would be necessary.

Clerk Summary (20% increase): 1 Deputy Clerk position
1 Assistant Clerk position

[60] The metrics canvassed in Part Four of this Report include projections of criminal filings as high as 3,500 cases based on "the national average of the percentage of all criminal cases commenced that are appealed to the court of appeals in appeal-of-right jurisdictions." *See* page 38, *above*.

II. Scenario Two - Criminal Appeal of Right and Civil Appeal of Right

As set forth above, assuming a 20% increase, we estimate that a jurisdictional change to a criminal appeal of right will result in a total of approximately **300 *additional*** criminal filings per year. Thus, to maintain the quality, efficiency, and quantity of the work the CSA produces, **two additional Staff Attorney I positions and one Administrative Staff Attorney position** would be necessary to accommodate the anticipated increased caseload from the change to an appeal of right. To maintain the quality, efficiency, and quantity of the cases the Clerk's Office can process in a timely manner, **one additional Deputy Clerk position** and **one additional support staff position** would be necessary to accommodate the anticipated increased caseload from the change to an appeal of right.

Given that civil cases frequently have significantly larger records and that due to the diversity of the cases we do not have staff with subject-matter expertise in the assumed expanded jurisdictional areas, we estimate that the CSA staff attorneys would process an average of **95 civil cases annually per attorney**. Therefore, in addition, based on the instruction to assume an expanded jurisdiction that results in **800-1,200 *additional*** civil filings per year, in order to process this additional civil caseload in approximately the same time as the Court's current caseload and to ensure the same efficiency and quality of the work product that the CSA produces, **one to two additional Staff Attorney II (supervisor) positions** and **five to seven additional Staff Attorney I positions**, as well as **one to two additional support staff positions**, would be necessary.

Thus, to adequately provide for the maximum number of total projected cases under Scenario Two (1,500 additional cases), a total of **eleven additional Staff Attorney positions**, including supervisory attorneys, **one Administrative Staff Attorney**, and **two additional support staff positions** would be necessary.

CSA Summary (800 additional civil cases and a 20% increase in criminal cases):

1 Staff Attorney II position
7 Staff Attorney I positions
1 Administrative Staff Attorney position
1 Paralegal position

CSA Summary (1,200 additional civil cases and a 20% increase in criminal cases):

2 Staff Attorney II positions
9 Staff Attorney I positions
1 Administrative Staff Attorney position
2 Paralegal positions

In addition, personnel in the Clerk's Office can process in an accurate and timely manner an average of **125 cases annually per staff member**. Therefore, to process this additional civil caseload and maintain the quality, efficiency, and quantity of the cases the Clerk's office can process in a timely manner, **two to three additional Deputy Clerk positions** and **five to seven additional support staff positions** would be necessary.

Thus, to adequately provide for the maximum number of total projected cases under Scenario Two (1,500 additional cases), a total of **four additional Deputy Clerk positions**, **three additional Assistant Clerk – Paralegal positions**, and **five additional Assistant Clerk positions** would be necessary.

Clerk's Office Summary (800 additional civil cases and a 20% increase in criminal cases):

3 Deputy Clerk positions
3 Assistant Clerk - Paralegal positions
3 Assistant Clerk positions

Clerk's Office Summary (1,200 additional civil cases and a 20% increase in criminal cases):

4 Deputy Clerk positions
3 Assistant Clerk – Paralegal positions
5 Assistant Clerk positions

Further, under the current structure of the Court, the Civil Reporter of Decisions and the Criminal Reporter of Decisions are each a part-time position. In light of the significant increase in civil caseload it is imperative to have a full-time Civil Reporter of Decisions. It is also likely necessary to have a full-time Criminal Reporter of Decisions but since the increase in criminal cases is more tentative that is not included in the current proposed budget.

One Full-Time Civil Reporter of Decisions

Finally, in order to ensure proper technology support for the anticipated expansion of personnel and cases, as well as the increased necessary use of technology on a day-to-day basis which will require setup and maintenance, three information technology specialist assigned to the Office of the Executive Secretary are essential.

Three Information Technology Specialists

FISCAL IMPACT

The following spreadsheet pages prepared by the Office of the Executive Secretary detail the projected fiscal impact of the various scenarios described above.

Virginia Court of Appeals
Office of the Chief Staff Attorney

SCENARIO I (20% crim, 300 cases)		Staff Attorney II	Staff Attorney I	ninistrative Staff Atto	Paralegal	
Salary		$ 82,000.00	$ 74,082.00	$ 74,082.00	$ 42,000.00	
Retirement	14.46%	$ 11,857.20	$ 10,712.26	$ 10,712.26	$ 6,073.20	
Group Life	1.34%	$ 1,098.80	$ 992.70	$ 992.70	$ 562.80	
Retire Health	1.12%	$ 918.40	$ 829.72	$ 829.72	$ 470.40	
FICA	7.65%	$ 6,273.00	$ 5,667.27	$ 5,667.27	$ 3,213.00	
VSDP	0.61%	$ 500.20	$ 451.90	$ 451.90	$ 256.20	
Health		$ 21,624.00	$ 21,624.00	$ 21,624.00	$ 21,624.00	
Def Comp		$ 480.00	$ 480.00	$ 480.00	$ 480.00	
Total		$ 124,751.60	$ 114,839.85	$ 114,839.85	$ 74,679.60	
Number of Positions		0.00	2.00	1.00	0.00	
		$ -	$ 229,679.70	$ 114,839.85	$ -	**$ 344,519.54**

Virginia Court of Appeals
Clerks Office

		Deputy Clerk	Assistant Dep Clerk		Paralegal	
Salary		$ 57,000.00	$ 37,000.00		$ 42,000.00	
Retirement	14.46%	$ 8,242.20	$ 5,350.20		$ 6,073.20	
Group Life	1.34%	$ 763.80	$ 495.80		$ 562.80	
Retire Health	1.12%	$ 638.40	$ 414.40		$ 470.40	
FICA	7.65%	$ 4,360.50	$ 2,830.50		$ 3,213.00	
VSDP	0.61%	$ 347.70	$ 225.70		$ 256.20	
Health Insurance		$ 21,624.00	$ 21,624.00		$ 21,624.00	
Def Comp		$ 480.00	$ 480.00		$ 480.00	
Total		$ 93,456.60	$ 68,420.60		$ 74,679.60	
Number of Positions		1.00	1.00		0.00	
		$ 93,456.60	$ 68,420.60		$ -	**$ 161,877.20**
				Total Costs		**$ 506,396.74**

Virginia Court of Appeals
Office of the Chief Staff Attorney

SCENARIO IIA (20% crim + 800 civil)		Staff Attorney II	Staff Attorney I	ninistrative Staff Atto	Paralegal	
Salary		$ 82,000.00	$ 74,082.00	$ 74,082.00	$ 42,000.00	
Retirement	14.46%	$ 11,857.20	$ 10,712.26	$ 10,712.26	$ 6,073.20	
Group Life	1.34%	$ 1,098.80	$ 992.70	$ 992.70	$ 562.80	
Retire Health	1.12%	$ 918.40	$ 829.72	$ 829.72		
FICA	7.65%	$ 6,273.00	$ 5,667.27	$ 5,667.27	$ 3,213.00	
VSDP	0.61%	$ 500.20	$ 451.90	$ 451.90	$ 256.20	
Health		$ 21,624.00	$ 21,624.00	$ 21,624.00	$ 21,624.00	
Def Comp		$ 480.00	$ 480.00	$ 480.00	$ 480.00	
Total		$ 124,751.60	$ 114,839.85	$ 114,839.85	$ 74,209.20	
Number of Positions		1.00	7.00	1.00	1.00	
		$ 124,751.60	$ 803,878.93	$ 114,839.85	$ 74,209.20	**$ 1,117,679.58**

		Court Reporter	IT Support			
Salary		$ 84,000.00	$74,000			
Retirement	14.46%	$ 11,857.20	$ 10,700.40			
Group Life	1.34%	$ 1,098.80	$ 991.60			
Retire Health	1.12%	$ 918.40	$ 828.80			
FICA	7.65%	$ 6,426.00	$ 5,661.00			
VSDP	0.61%	$ 500.20	$ 451.40			
Health		$ 21,624.00	$ 21,624.00			
Def Comp		$ 480.00	$ 480.00			
Total		$ 126,904.60	$ 114,737.20			
Number of Positions		1.00	3.00			
		$ 126,904.60	$ 344,211.60			**$ 471,116.20**

Virginia Court of Appeals
Clerks Office

		Deputy Clerk	Assistant Dep Clerk		Paralegal	
Salary		$ 57,000.00	$ 37,000.00		$ 42,000.00	
Retirement	14.46%	$ 8,242.20	$ 5,350.20		$ 6,073.20	
Group Life	1.34%	$ 763.80	$ 495.80		$ 562.80	
Retire Health	1.12%	$ 638.40	$ 414.40		$ 470.40	
FICA	7.65%	$ 4,360.50	$ 2,830.50		$ 3,213.00	
VSDP	0.61%	$ 347.70	$ 225.70		$ 256.20	
Health Insurance		$ 21,624.00	$ 21,624.00		$ 21,624.00	
Def Comp		$ 480.00	$ 480.00		$ 480.00	
Total		$ 93,456.60	$ 68,420.60		$ 74,679.60	
Number of Positions		3.00	3.00		3.00	
		$ 280,369.80	$ 205,261.80		$ 224,038.80	**$ 709,670.40**
					Total Costs	**$ 2,298,466.18**

Virginia Court of Appeals
Office of the Chief Staff Attorney

SCENARIO IIB (20% crim + 1200 civil)		Staff Attorney II	Staff Attorney I	ninistrative Staff Atto	Paralegal	
Salary		$ 82,000.00	$ 74,082.00	$ 74,082.00	$ 42,000.00	
Retirement	14.46%	$ 11,857.20	$ 10,712.26	$ 10,712.26	$ 6,073.20	
Group Life	1.34%	$ 1,098.80	$ 992.70	$ 992.70	$ 562.80	
Retire Health	1.12%	$ 918.40	$ 829.72	$ 829.72	$ 470.40	
FICA	7.65%	$ 6,273.00	$ 5,667.27	$ 5,667.27	$ 3,213.00	
VSDP	0.61%	$ 500.20	$ 451.90	$ 451.90	$ 256.20	
Health		$ 21,624.00	$ 21,624.00	$ 21,624.00	$ 21,624.00	
Def Comp		$ 480.00	$ 480.00	$ 480.00	$ 480.00	
Total		$ 124,751.60	$ 114,839.85	$ 114,839.85	$ 74,679.60	
Number of Positions		2.00	9.00	1.00	2.00	
		$ 249,503.20	$ 1,033,558.63	$ 114,839.85	$ 149,359.20	**$ 1,547,260.88**

		Court Reporter	IT Support			
Salary		$ 84,000.00	$74,000			
Retirement	14.46%	$ 11,857.20	$ 10,700.40			
Group Life	1.34%	$ 1,098.80	$ 991.60			
Retire Health	1.12%	$ 918.40	$ 828.80			
FICA	7.65%	$ 6,426.00	$ 5,661.00			
VSDP	0.61%	$ 500.20	$ 451.40			
Health		$ 21,624.00	$ 21,624.00			
Def Comp		$ 480.00	$ 480.00			
Total		$ 126,904.60	$ 114,737.20			
Number of Positions		1.00	3.00			
		$ 126,904.60	$ 344,211.60			**$ 471,116.20**

Virginia Court of Appeals
Clerks Office

		Deputy Clerk	Assistant Dep Clerk		Paralegal	
Salary		$ 57,000.00	$ 37,000.00		$ 42,000.00	
Retirement	14.46%	$ 8,242.20	$ 5,350.20		$ 6,073.20	
Group Life	1.34%	$ 763.80	$ 495.80		$ 562.80	
Retire Health	1.12%	$ 638.40	$ 414.40		$ 470.40	
FICA	7.65%	$ 4,360.50	$ 2,830.50		$ 3,213.00	
VSDP	0.61%	$ 347.70	$ 225.70		$ 256.20	
Health Insurance		$ 21,624.00	$ 21,624.00		$ 21,624.00	
Def Comp		$ 480.00	$ 480.00		$ 480.00	
Total		$ 93,456.60	$ 68,420.60		$ 74,679.60	
Number of Positions		4.00	5.00		3.00	
		$ 373,826.40	$ 342,103.00		$ 224,038.80	**$ 939,968.20**
					Total Costs	**$ 2,958,345.28**

Court of Appeals Expansion **10/22/2020**

Fiscal Impact - Chief Staff Attorney & Clerks Offices

Scenario I: 20% increase, additional 300 criminal cases			
	Chief Staff Attorne	2 Staff Attorney I positions & 1 Administrative Staff Attorney	$ 344,519.54
	Clerks Office	1 Deputy Clerk and 1 Assistant Deputy Clerk	$ 161,877.20
			$ 506,396.74
Scenario IIA: 20% increase, additional 300 criminal cases plus 800 civil cases			
	Chief Staff Attorne	1 Staff Attorney II, 7 Staff Attorney I, 1 Administrative Staff Attorney, 1 Paralegal	$ 1,117,679.58
	Clerks Office	3 Deputy Clerks, 3 Assistant Deputy Clerks, 3 Paralegals	$ 709,670.40
	Court Reporter	1 full-time court reporter	$ 126,904.60
	IT	3 PC/Video support technicians	$ 344,211.60
			$ 2,298,466.18
Scenario IIB: 20% increase, additional 300 criminal cases plus 1200 civil cases			
	Chief Staff Attorne	2 Staff Attorney II, 9 Staff Attorney I, 1 Administrative Staff Attorney, 2 Paralegals	$ 1,547,260.88
	Clerks Office	4 Deputy Clerks, 5 Assistant Deputy Clerks, 3 Paralegals	$ 939,968.20
	Court Reporter	1 full-time court reporter	$ 126,904.60
	IT	3 PC/Video support technicians	$ 344,211.60
			$ 2,958,345.28

Note: If Scenario IIA or IIB are funded, additional space in the downtown Richmond area would need to be leased for these employees, cost is unknown.

Court of Appeals Expansion

Fiscal Impact - Court of Appeals Judge's Chambers

Cost for Each Additional Court of Appeals Judge		
CAV Judge		$ 279,986.18
Law clerks (2)		$ 229,679.70
Admin		$ 93,732.00
	Annual Staffing	**$ 603,397.88**
Office Lease and IT Network Charges		
Annual Office Lease (Current Average)		$ 36,926.00
Annual IT Network & Software Charges		$ 4,116.25
		$ 41,042.25
	Annual Costs Staff & Office	**$ 644,440.13**
Initial Office Setup Costs		
Furniture, files, telephones, etc		$ 30,000.00
IT Hardware/Software purchases (Judge plus staff, **replace every 4-5 years**)		$ 28,854.75
	Initial Office Setup	**$ 58,854.75**

Court of Appeals Expansion **10/22/2020**

Fiscal Impact Summary - Chief Staff Attorney Office, Clerks Office, Judges Chambers

CAV -- Staff Attys

	& Clerks' Offic	Judge's Chambers	Total Annual Costs	Initial Office Setu	Total Year 1 Costs
Scenario I:					
1 Additional Judge	$ 506,396.74	$ 644,440.13	$ 1,150,836.87	$ 58,854.75	$ 1,209,691.62
2 Additional Judges	$ 506,396.74	$ 1,288,880.26	$ 1,795,277.00	$ 117,709.50	$ 1,912,986.50
3 Additional Judges	$ 506,396.74	$ 1,933,320.39	$ 2,439,717.13	$ 176,564.25	$ 2,616,281.38
4 Additional Judges	$ 506,396.74	$ 2,577,760.52	$ 3,084,157.26	$ 235,419.00	$ 3,319,576.26
5 Additional Judges	$ 506,396.74	$ 3,222,200.65	$ 3,728,597.39	$ 294,273.75	$ 4,022,871.14
Scenario IIA:					
1 Additional Judge	##########	$ 644,440.13	$ 2,942,906.31	$ 58,854.75	$ 3,001,761.06
2 Additional Judges	##########	$ 1,288,880.26	$ 3,587,346.44	$ 117,709.50	$ 3,705,055.94
3 Additional Judges	##########	$ 1,933,320.39	$ 4,231,786.57	$ 176,564.25	$ 4,408,350.82
4 Additional Judges	##########	$ 2,577,760.52	$ 4,876,226.70	$ 235,419.00	$ 5,111,645.70
5 Additional Judges	##########	$ 3,222,200.65	$ 5,520,666.83	$ 294,273.75	$ 5,814,940.58
Scenario IIB:					
1 Additional Judge	##########	$ 644,440.13	$ 3,602,785.41	$ 58,854.75	$ 3,661,640.16
2 Additional Judges	##########	$ 1,288,880.26	$ 4,247,225.54	$ 117,709.50	$ 4,364,935.04
3 Additional Judges	##########	$ 1,933,320.39	$ 4,891,665.67	$ 176,564.25	$ 5,068,229.92
4 Additional Judges	##########	$ 2,577,760.52	$ 5,536,105.80	$ 235,419.00	$ 5,771,524.80
5 Additional Judges	##########	$ 3,222,200.65	$ 6,180,545.93	$ 294,273.75	$ 6,474,819.68

Note: If Scenario IIA or IIB are funded, additional space in the downtown Richmond area would need to be leased for these employees, cost is unknown.

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

Piecemeal Civil Appeal Expansion – Considered and Rejected. Since the Judicial Council was requested by SJ 47 to report to the Legislature on behalf of the court system by addressing the estimated number of CAV judge positions that might need to be added, the Judicial Council *initially considered* five sequencing options that could be recommended. Thus, it considered whether the Legislature should be invited to make the following jurisdictional changes **at the very outset** of restructuring CAV jurisdiction:

1. Criminal cases only in the first stage of jurisdictional expansion for the CAV. All observers unanimously favor this step, leaving only the issue whether civil jurisdiction can be expanded at the same time.

2. Criminal cases plus just a few selective categories of additional civil cases to CAV as of right in the first phase of jurisdictional expansion for the CAV.

3. Criminal cases plus all civil cases pleading for less than $100,000 (or some other dollar amount) in damages to the CAV as of right in the first stage of jurisdictional expansion.

4. Criminal cases plus almost all civil cases to CAV in the first stage (omitting personal injury, asbestos, products liability, wrongful death and med mal cases, to deflect opposition from the plaintiff's bar).

5. Criminal cases plus all civil cases (except habeas corpus petitions) from the very outset of the expansion of CAV jurisdiction.

The Judicial Council examined in some detail the civil docket load of the circuit courts of Virginia, by subject matter and in terms of the *ad damnum* amount of recovery for which complaints filed each year in the system pray for relief. These statistics have been broken down into numerous separately tabulated topic areas of litigation, which can be consolidated roughly into six categories but could be differently aggregated to identify a large

number of possible candidate topic-groups for piecemeal assignment of civil cases to the CAV in a by-right system:

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

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

Details of the volume of civil cases in the circuit courts each year are set forth in *Appendix F* to this Report. The Office of the Executive Secretary of the Supreme Court also provided the Judicial Council with the following tabulation of the levels of damages sought in complaints filed annually in the circuit courts.

ACTUAL EXPERIENCE WITH THE AMOUNT OF DAMAGES SOUGHT IN CIVIL COMPLAINTS

Civil Filings in Virginia Circuit Courts
By Amount of Damages Sought

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

Thus, 77.4 % of the civil cases begun in circuit court annually are pled below $ 100,000.

***Conclusions*.** After considering numerous such "phase in" possibilities – reallocating portions of the civil appellate docket among the Court of Appeals and Supreme Court, whether divided by *subject matter* or *dollar value* – the Judicial Council (like the Working Group before it) was unanimous in concluding that piecemeal additions to the civil caseload of the Court of Appeals was **not a desirable plan**. There is an inherently illogical structure if some civil subject matters are appealable *as a matter of right* to one appellate tribunal while others are appealable *by petition only* to the other, and increasing the divergence that has existed concerning domestic relations and workers' compensation matters makes little sense.

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

RECAP OF THE RECOMMENDATION REGARDING APPEALS OF RIGHT

Having looked in detail at the breakdown of civil cases in the circuit courts (as shown above and in greater detail in *Appendix F* to this Report), the Judicial Council is unanimous in recommending that appeal of right to the Court of Appeals should include all civil cases, not merely some increased "carving out" of topics (or dollar sizes) of the civil cases that would otherwise be heard in the Supreme Court under the present petition-for-appeal system.

Neither the plaintiff's bar nor the defense bar supports the allocation of merely "some" of the civil caseload to the Court of Appeals. Rather, a clear system making all cases appealable as of right to the intermediate court makes the most sense, and best serves the interests of the litigants and the public. "Both the criminal defendant who is wrongly convicted and the civil defendant facing a potentially bankrupting judgment hold on dearly to the promise of error correction in a higher court," and a robust appellate system serves many functions, "including correcting legal and factual errors; encouraging the development and refinement of legal principles; increasing uniformity and standardization in the application of legal rules; and promoting respect for the rule of law. In criminal cases, appellate rights play an additional role in guarding against wrongful conviction of the innocent."[61]

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

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

> Both civil and criminal appeals protect against arbitrary or erroneous application of the law; both promote the development and standardization of legal doctrine; and both assist in standardizing outcomes for similarly situated litigants. The risks of withholding appellate remedies are also more similar than different. On the criminal side, scholars have pointed out that because of the high error rate at trial, appeals are critical to maintaining institutional legitimacy: The degree of error reported, if left uncorrected because of the elimination of a right of appeal that is merely statutory, would be intolerably high and would delegitimate any punishment imposed through such an adjudicatory process. Others have made a similar legitimacy argument in support of civil appeals: As the framers of the Constitution recognized, the absence of a guaranteed appeal in cases involving substantial deprivations of property would undermine confidence in the judicial system; were there no appeal guaranteed for civil judgments, every man would have reason to complain, especially when a final judgment, in an inferior court, should affect property to a large amount.[62]

It is clear that a major aspect of this proposal, particularly the extension of the right of appeal to civil cases, is tied to the need to properly fund the judicial and support staff needed to handle the expected caseload without creating a backlog at the CAV. As some of the comments received from the VTLA and others have suggested, enactment of a recast system of appellate jurisdiction would likely need to be undertaken during a General Assembly long session as part of the overall budget and implemented thereafter. The next budget session is 2022, but it is unknown whether that cycle would be realistic given current fiscal realities. Thus, at least some of the comments received by the Judicial Council have proposed having a Legislative Study finalize the details of the appeal-of-right architecture for Virginia criminal and civil appeals by early 2023, such that it could be submitted for budget purposes prior to the 2024 budget session. The implementation would then become effective in July of 2024.

The Judicial Council does not purport to specify what steps the Legislature may deem most effective in considering and, we hope, implementing the appeal-of-right system for all

[62] *Id.* at 1230 (citations, internal quotation marks and brackets omitted).

cases in the Virginia court system. The Council does believe firmly, however, that this reform would remedy a fundamental defect in the Virginia appellate system.

> The right to appeal at least once without obtaining prior court approval is nearly universal – within the universe bounded by the Atlantic and Pacific Oceans, Mexico and Canada [and] the right has become, in a word, sacrosanct.[63]

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

> It is almost axiomatic that every losing litigant in a one-judge court ought to have a right to appeal to a multi-judge court. Most do not appeal, but the right is a protection against error, prejudice, and human failings in general. . . . Justice and good law are needed for little cases as well as for big ones, and even frivolousness is a matter of opinion. One appeal is enough, but one should be allowed in almost any case.[64]

As noted at the outset of this Report, a similarly summary is found in the comment of the American Bar Association's Commission on Standards of Judicial Administration in support of a standard mandating appeal of right for all general criminal and civil cases: "The right of appeal . . . is a fundamental element of procedural fairness as generally understood in this country."[65]

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

SUBMISSION OF THE REPORT

We express our deep appreciation for the General Assembly's consideration of this very important improvement in the Virginia court system and its solicitation of recommendations on behalf of the judicial system for its implementation. This report was reviewed by the Supreme Court on December 2, 2020 and approved for submission to the General Assembly.

Judicial Council of Virginia

By Karl R. Hade
Secretary

[63] Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously,* 95 Yale L. J. 62, 63 (1985).
[64] Robert Leflar, *Internal Operating Procedures of Appellate Courts* 4, 9-10 (1976).
[65] ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary at 12 (1977).

Appendix A
Comments by Legal & Business Groups

The Virginia Bar Association

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

Executive Director
R. Yvonne Cockram
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August 17, 2020

BY ELECTRONIC MAIL
SJ47study2020@vacourts.gov

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

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

Dear Mr. Hade:

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

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

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

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

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

• An expansion of the Court of Appeals' jurisdiction will be an empty change, and potentially counterproductive, if that court is inadequately staffed. The court will foreseeably require additional judges, and commensurate increases in its staff. For criminal appeals, the framework will require added funding for court-appointed counsel or the resurrection of the Appellate Defender's Office.

• Our members support the concept of regional courts, but oppose purely resident judges within regions. That is, we believe that all judges of the court should continue to sit in panels statewide. We also strongly support the court's retaining the interpanel accord doctrine. Virginia law should not vary from region to region.

• The principle underlying this proposal is that each litigant should have the right to one of-right appeal. While support within the association for this principle is strong as it relates to civil litigation, our members recognize that the need for change is less acute in the realm of criminal appeals. There, the Court of Appeals currently generates a reasoned decision on each petition for appeal, and a dissatisfied appellant may appeal by right to a three-judge panel.

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

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

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

Very truly yours,

Alison M. McKee

Alison M. McKee
President, The Virginia Bar Association

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August 20, 2020

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

Dear Mr. Hade,

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

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

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

Very truly yours,

Valerie M. O'Brien

Attachment

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

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

1. Concerns About the Proposal

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

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

2. Perceived Benefits of the Proposal

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

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

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

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

B. Conditions of Implementation

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

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

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

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

- First, the Judicial Council should consider the tools available to dissuade unnecessary appeals, primarily bonding requirements and post-judgment interest. Based on VTLA's examination of other states, Virginia appears to be on the low end of the post-judgment interest scale and of appellate bonding requirements. VTLA thus encourages an increase to these mechanisms to prevent unnecessary appeals or appeals used only as a delay tactic.

- Second, to mitigate against increased litigation costs VTLA proposes doing away with the requirement of an appendix in appeals of right to the Court of Appeals. The appendix is usually a significant cost in an appeal, but given recent developments it is also unnecessary. Most, and perhaps all, circuit courts are now preparing and transmitting the records in PDF format with pagination. The record on appeal is already digitized, paginated, and easily searchable. In the vast majority of cases there is simply no compelling need to create a new document that contains some subset of the

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

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

C. Structure and Composition of the Expanded Court

1. Regional organization

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

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

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

2. Composition of the Court

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

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

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

D. Implementation Schedule

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

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

Virginia Association of Criminal Defense Lawyers
3126 W. Cary Street, #615, Richmond, Virginia 23221
Tel. (804) 262-8223 Fax (804) 262-8225
Website: www.vacdl.org
Email: vacdlawyers@gmail.com

August 19, 2020

By Email: SJ47study2020@vacourts.gov

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

To Mr. Hade and the Judicial Council of Virginia:

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

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

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

1. An opportunity to present oral argument in every criminal appeal, whether it be in person or otherwise on the record;

2. A recognition that the contemporaneous objection "exceptions" as set forth in Rules 5A:18 and 5:25 -- "good cause shown" and "ends of justice" -- should apply to achieve fundamental fairness rather than act as an almost-absolute bar to relief on appeal;

3. Achieving equity and leveling the playing field by disallowing the Commonwealth from taking inconsistent positions on appeal (e.g. holding the

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

4. The elimination of "technical" procedural defaults by establishing a mechanism to "correct" the record when the record is incomplete, (e.g. transcripts filed late, exhibits not included, etc.), as well as a procedure to "correct" the brief before any dismissal if the brief is technically deficient under the Rules of Court for one reason or another;

5. The elimination of an "appendix" as unnecessarily expensive and burdensome, especially when most records are in digital form;

6. An increased and reasonable time frame to identify issues to be raised and the time for filing the brief (i.e., beyond which is currently established for appeals of right). Note that this is especially important regarding either newly appointed or retained counsel;

7. A substantial increase in compensation for court-appointed representation, which is woefully inadequate by any standard;

8. The establishment (or re-establishment) of the Office of the Appellate Defender as part of the IDC to improve the overall quality of appellate advocacy; and,

9. Automatic review by the Virginia Supreme Court if there is error below (i.e., not merely "discretionary" review if there is error below).

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

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

Sincerely,

Elliott B. Bender
VACDL President, 2020

August 20, 2020

By Electronic Mail

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

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

Dear Executive Secretary Hade:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Organizing the Court of Appeals into Four Geographic Circuits

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

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

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

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

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

[7] *Id*.

[8] *Id*. at 1223.

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

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

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

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

* * *

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

Best regards,

Barry DuVal
President & CEO

August 17, 2020

Judicial Council of Virginia

SJ47 Study

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

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

Appeal of Right to the Court of Appeals

Minimum Requirements for an Appeal of Right

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

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

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

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

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

Benefits of an Appeal of Right

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

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

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

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

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

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

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

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

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

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

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

The Availability of Oral Argument Must Not Be Reduced or Eliminated

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

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

Possible Exceptions to Appeals of Right

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

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

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

Conclusion Regarding Appeal of Right

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

Organization of the Court of Appeals into Geographical Circuits

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

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

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

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

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

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

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

Sincerely,

David Johnson
Executive Director

Catherine French Zagurskie
Chief Appellate Counsel

VAELA

Virginia Academy of Elder Law Attorneys

Virginia Chapter of the National Academy of Elder Law Attorneys

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August 17, 2020

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

Dear Secretary Hade:

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

Guardianship and Conservatorship Actions

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

Costs

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

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

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

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

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

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

Finality of Orders

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

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

Impact on the Respondent

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

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

Estate Litigation

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

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

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

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

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

Division of the Court of Appeals into Four Geographic Circuits

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

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

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

Angela M. Griffith
President

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

Re: ODBA Comments to Senate Joint Resolution 47

Dear Mr. Hade:

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

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

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

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

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

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

With best regards,

Bruce C. Sams
ODBA President

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

August 20, 2020

By Electronic Mail

Karl Hade, Secretary of the Judicial Council
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Virginia Manufacturers Association Comments on SJ 47 (Court of Appeals of Virginia)

Dear Executive Secretary Hade:

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

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

The VMA strongly endorses the creation of an

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

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

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

Best Wishes,

Brett

Brett A. Vassey
President & CEO
Virginia Manufacturers Association
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APPENDIX B

COMMENTS FROM INDIVIDUALS (alphabetical by commenter)

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

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

1. **Appeal of right**

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

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

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

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

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

the court appointed appellate attorney gets about $500, total. I have in the past received $250 for an appeal that required over 100 hours of work. That's $2.50 per hour. Most attorneys will not do court appointed appeals because they are a genuine danger to the attorney's ability to operate their business.

The court appointed appellate attorney is often the defendant's trial lawyer. Most of these trial lawyers have no prior appellate experience. These attorneys often do not know the rules for appeals, nor do they know how to properly frame arguments on appeal. As a consequence, a large portion of the criminal case law made in Virginia is the product of an inexperienced and underfunded trial lawyer representing the defendant, while the Commonwealth is represented by career appellate attorneys with endless resources at the Office of the Attorney General. It is no surprise that the Commonwealth wins a disproportionate share of criminal appeals. It is also not surprising that many defendants whose appeals have merit lose in the Court of Appeals anyway[1] because their lawyer does not know the rules.

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

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

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

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

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

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

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

These changes should be made as expeditiously as possible.

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

From: **Brandenstein, Henry F.**
Subject: Senate Joint Resolution 47
Date: Tuesday, August 18, 2020 12:35:26 PM

I have been admitted to practice in Virginia since 1981.

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

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

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

Thank you for the opportunity to comment.

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

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

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

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

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

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

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

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

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

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

To Whom It May Concern,

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

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

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

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

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

With kind regards,

Henry G. Crider

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

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

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

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

From: Raighne Delaney
Subject: Expansion of Court of Appeals
Date: Wednesday, July 01, 2020 1:55:46 PM

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

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

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

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

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

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

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

Thus, I think it is a bad idea.

Raighne C. Delaney
Bean, Kinney & Korman, Arlington, VA 22201

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

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

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

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

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

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

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

Respectfully submitted, Thomas A. Edmonds

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you,

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

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

Re: the question for an appeal of right

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

K Gear

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

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

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

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

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

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

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

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

Regarding Proposal (1):

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

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

Regarding Proposal (2):

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

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

Best Regards,

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

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

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

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

Mike Gwinn
Smith Pachter McWhorter PLC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

risks and benefits of seeking recourse to the courts.

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

Thank you for your consideration.

Michael T. Marr
Sands Anderson PC McLean

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

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

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

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

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

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

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

HONORABLE Members of the Judicial Council:

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

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

Sincerely,

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

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

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

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

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

Jonathan Phillips, Esq. VSB # 77188
LEFFLERPHILLIPS PLC | Office: 703-293-9300 |

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

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

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

Thank you

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I appreciate the opportunity to comment. Thank you,

J. Christian Tennant
Commonwealth Tax Law, Richmond, Virginia 23242 (804) 360-0033

Norman A. Thomas, PLLC
Re: SJ 47 Study

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

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

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

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

Nevertheless, if the Judicial Council or the General Assembly perceives

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

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

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

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

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

Thank you for the opportunity to make these comments.

Norman A. Thomas

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

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

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

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

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

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

Get this done, folks.

JAMES W. WALKER
O'Hagan Meyer, Richmond.

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

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

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

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

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

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

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

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

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

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

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

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

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

Jonathan Westreich
604 Cameron Street, Alexandria, Virginia 22314

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

Dear Secretary Hade:

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

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

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

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

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

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

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

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

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

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

Sincerely,

Thomas W. Williamson, Jr.

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

Appendix C
Statutes Relevant to CAV Jurisdictional Change

§ 2.2-511. Criminal cases

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

REVISION NOTES:

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

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

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

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

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

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

§ 8.01-670. In what cases awarded

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

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

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

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

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

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

§ 8.01-676.1 Security for appeal . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

end of this paragraph of the statute, "The rules shall prescribe procedures governing the summary disposition of appeals in appropriate circumstances ~~which are determined to be without merit~~, authorizing the Court of Appeals to prescribe truncated record or appendix preparation, and allowing the Court of Appeals to omit oral argument if the panel determines that it would not be helpful."

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

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

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

§ 17.1-405. Appellate jurisdiction

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

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

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

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

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

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

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

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

§ 17.1-407. Procedures on appeal . . . .

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

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

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

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

> *REVISION NOTES:* It would appear that subsections C and D would be abrogated in any system of appeal of right in criminal cases. Subsection A does not appear to require any amendment. Subsection B could be amended to state in substance:
>
> B. Appeals pursuant to § 17.1-405 and § 17.1-406 are appeals of right. The clerk of the Court of Appeals shall refer each case for which a notice of appeal has been filed~~, other than appeals in criminal cases,~~ to a panel of the court as the court may direct.

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

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

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

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

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

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

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

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

§ 17.1-409. Certification to the Supreme Court

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

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

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

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

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

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

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

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

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

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

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

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

§ 17.1-411. Review by the Supreme Court

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

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

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

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

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

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

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

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

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

§ 17.1-414. Facilities and supplies

A. The Court of Appeals shall be housed in the City of Richmond and, if practicable, in the same building occupied by the Supreme Court. When facilities are required for the convening of panels in other areas of the Commonwealth, the chief judge of the Court of Appeals shall provide for such physical facilities as are available for the operation of the Court of Appeals. The Court of Appeals may use any public property of, or any property leased or rented to, the Commonwealth or any of its political subdivisions for the holding of court and for its ancillary functions upon proper agreement with the applicable authorities. The Court of Appeals also may use any federal courtroom, the moot courtroom of any accredited law school located in the Commonwealth, or any other facility deemed adequate for the holding of court and for its ancillary functions upon proper agreement with the applicable authorities. Any expense incurred for use of such facilities may be paid from the funds appropriated by the General Assembly to the Court of Appeals.

REVISION NOTES: No changes appear to be needed in this section unless the decision is made by the Legislature to require permanent brick-and-mortar locations in various regions.

STATUTORY AND CONSTITUTIONAL NOTES ON HABEAS CORPUS AND OTHER MATTERS

Article VI, Section 1, of the Constitution of Virginia provides: "The Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of habeas corpus, mandamus, and prohibition; to consider claims of actual innocence presented by convicted felons in such cases and in such manner as may be provided by the General Assembly; in matters of judicial censure, retirement, and removal under Section 10 of this Article; and to answer questions of state law certified by a court of the United States or the highest appellate court of any other state.

Section 1 ends by stating that, "***subject to" that "limitation***[]" and others, "the General Assembly [has] the power to determine the original and appellate jurisdiction of the courts of the Commonwealth."

When proposing modifications to the Constitution for its 1971 general revision, the Commission on Constitutional Revision recommended removing habeas from the Supreme Court's original jurisdiction, and the General Assembly rejected that change. Thus, it appears the General Assembly may not remove the Supreme Court's original habeas jurisdiction without an amendment to the Constitution.

In addition, to reassign habeas responsibilities the General Assembly would be required to retool Code § 8.01-654 et seq. and Code § 17.1-310, which define the Supreme Court's current statutory habeas jurisdiction.

The Legislature also might consider amending or abolishing Code § 17.1-404 if it elected to transfer original habeas jurisdiction to the Court of Appeals. That statute provides that "in such cases over which the [Court of Appeals] would have appellate jurisdiction, the court shall have original jurisdiction to issue writs of mandamus, prohibition, and habeas corpus." The Court of Appeals has construed this section narrowly, however, limiting it to extraordinary matters.

Appendix D

The Role of State Intermediate Appellate Courts

Principles for Adapting to Change

November 2012

A White Paper produced by the Council of Chief Judges of the State Courts of Appeal

This white paper has been prepared under an agreement between the Council of Chief Judges of the State Courts of Appeal and the National Center for State Courts. Financial support was provided by the State Justice Institute. The points of view and opinions offered in this white paper are those of the authors and do not necessarily represent the official policies or position of the Council of Chief Judges of State Courts of Appeal, the National Center for State Courts, or the State Justice Institute.

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I. INTRODUCTION

A. Objectives and Overview

The majority of states have one or more intermediate appellate courts (IACs), with over ninety such courts nation-wide. IAC jurisdiction varies from state to state, as does their role in each state's judicial system. In most states, however, intermediate appellate courts were established to relieve the workload of the state's highest court by serving as the courts where most litigants obtain review of adverse decisions from trial courts and various administrative agencies. IACs primarily provide an appeal of right and most do not have discretion to decline to hear an appeal filed with the court. Because IACs must hear virtually all cases that are properly before them, they typically have extremely heavy workloads and are often referred to as the "workhorses" of the appellate justice system.

The role of IACs has changed over time as a result of steadily rising appellate filings and an expansion of their jurisdiction through statutory enactments and state constitutional amendments. States' highest courts, most of which do have primarily discretionary jurisdiction, do not have the resources to review every decision in which an IAC addresses an issue of first impression or clarifies or develops existing law. Thus, while IACs continue to serve their traditional role as error correction courts, their role has evolved to include significant responsibility for the definition and development of the law, a role that had historically been served only by the states' highest courts.

Although the role of the IACs has changed over time, the fact that they have mandatory jurisdiction and no ability to control the size of their workload has not. In addition, most IACs have experienced significant increases in the number of annual filings since the 1980s. As a result of the increased caseload, many IACs were successful in obtaining legislative approval for additional judges and non-judicial staff members. But courts at all levels have experienced significant budgetary reductions since 2008 due to the widespread fiscal crisis. These budgetary limitations have necessitated reductions in staffing levels for many courts and have placed a significant burden on them as they work to maintain timely and high quality service to the public while managing high volume caseloads with shrinking resources. Courts have responded to these challenges in a variety of ways, including re-evaluating the use of staff, making technological improvements, and adopting organizational and operational changes designed to resolve cases more efficiently. Through these challenges, IACs remain steadfast in their commitment to meet these increased demands without compromising their ability to render quality jurisprudence.

Against this background, the Council of Chief Judges of the State Courts of Appeal (CCJSCA) and the National Center for State Courts (NCSC) jointly undertook this effort to study the evolution of the role played by the intermediate appellate courts and their core functions and principles. The study also examined the effect of the recent fiscal crisis on IACs, and how they have adapted to new budgetary realities. Funding was provided by the State Justice Institute (SJI).

B. Data Collection Process

The NCSC assigned a consultant team who worked closely with a project committee composed of CCJSCA member representatives.[1] Together, they developed an on-line survey designed to collect data regarding the historical and modern roles of respondent courts; changes to their jurisdiction over time; the courts' goals, objectives, and core principles; how courts measure their fulfillment of those goals and objectives; the extent and effects of budgetary reductions; the level of state legislatures' understanding of the work of the courts and the effect of budget cuts on the courts' ability to function effectively; and operational and managerial strategies courts have adopted in response to budget reductions. This survey was administered to the full membership of the CCJSCA. In all, thirty-one intermediate appellate courts responded to the survey.

Following collection of the data, the NCSC compiled and analyzed the survey results which were presented to and discussed with the project committee. The team also conducted additional research regarding the establishment and role of IACs in state judiciaries and compared the values expressed by the IACs with the recently published *Principles for Judicial Administration*.[2]

II. ROLE OF STATE INTERMEDIATE APPELLATE COURTS

A. History, Purpose, and Jurisdiction

Appellate courts have two primary roles: to review individual decisions of lower tribunals for error and to interpret and develop the law for general application in future cases filed in all levels of the legal system. The legal systems in most states initially contemplated a single appellate court that served both functions. But throughout the twentieth century, appellate courts experienced significant increases in workload as a result of various factors, including population growth, expanded post-conviction and appellate rights in criminal cases, increases in legislation and government regulation, expansion of appellate jurisdiction to include the review of agency decisions, and a societal trend toward resolving social and economic controversies through the legal system. The burgeoning workload resulted in a backlog of appellate cases and a growing lack of confidence in the judicial system.

To relieve the pressure of the workload and ensure the timely resolution of appeals, forty states [3] and the

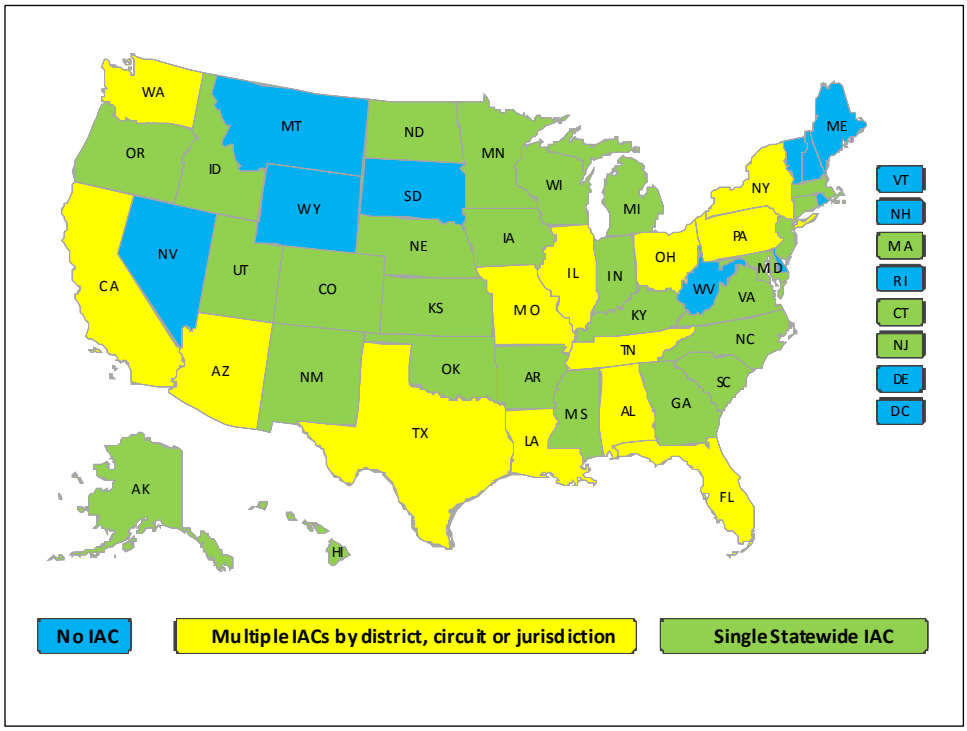
[1] CCJSCA member representatives were: Chief Judge David Brewer, Oregon Court of Appeals; Judge Ann Scott Timmer, Arizona Court of Appeals, Division 1; Judge Gary Lynch, Missouri Court of Appeals, Southern District; Chief Judge William Murphy, Michigan Court of Appeals; Chief Justice Jim Worthen, 12th Texas Court of Appeals; and Judge James Davis, Utah Court of Appeals

[2] http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1891

[3] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky,

Commonwealth of Puerto Rico established one or more intermediate appellate courts – typically by constitutional amendment -- with over ninety such courts now existing nation-wide. The District of Columbia and ten states have only a court of last resort.[4] The intermediate appellate court structure by state is depicted in Illustration 1 below:

Illustration 1 –
Intermediate Appellate Courts by State



Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

[4]Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

Of the thirty-one intermediate appellate courts that participated in this study, nine were established between 1875 and 1915, and twenty-two were established between 1963 and 1996.

States that have both a court of last resort and one or more intermediate appellate courts vary considerably in how they structure their appellate court systems and divide jurisdiction among the courts. The scope of intermediate appellate court jurisdiction is defined by each state's substantive law, whether by constitutional provisions or legislative enactments. Several respondent courts indicated that, when first established, their jurisdiction was limited by case type or geographic territory, but that it expanded over time to meet the changing needs and demands of the state's judicial system.

In most states, the majority of appeals of trial court and administrative decisions are reviewed in the first instance by the intermediate appellate courts, whose mandatory jurisdiction requires them to accept such appeals for review.[5] Appeals in capital cases and a limited number of other case types[6] are usually filed directly with the higher courts. The higher courts generally have discretionary jurisdiction to review cases already decided by the intermediate appellate court, selecting the cases they review in order to address novel legal issues, reformulate decisional law, and maintain consistency in lower court decisions. In a few states, all appeals are initially filed in the court of last resort, which retains some cases while transferring others to the intermediate appellate court.[7] For example, the North Dakota Court of Appeals hears only the cases assigned to it by the Supreme Court, and in some years the Supreme Court assigns no cases to the Court of Appeals. Similarly, the Idaho Court of Appeals hears cases assigned by the Idaho Supreme Court (except capital murder convictions and appeals from the Public Utilities Commission or Industrial Commission, which must be heard by the Supreme Court); appellants may petition the Idaho Supreme Court to rehear a Court of Appeals decision, but the Supreme Court is not required to grant such a petition.

Most state intermediate appellate courts have general jurisdiction, but some states have multiple intermediate courts of appeal with distinct subject-matter jurisdiction. Alabama, New York, and Tennessee, for example, have separate intermediate appellate courts for civil and criminal matters. Indiana has one

[5] Some states have procedures that permit courts of last resort to select appeals initially filed in the intermediate appellate court for transfer or that allow intermediate appellate courts to request the court of last resort to accept direct appellate jurisdiction over certain appeals, such as those involving issues of significant public interest or significant issues of first impression.

[6] In most states, death penalty cases are taken directly from the trial courts to courts of last resort, bypassing the intermediate appellate courts. Alabama, Ohio, and Tennessee are exceptions to this general practice; in those states, death penalty cases are appealed directly to the intermediate appellate courts. Other appeals that are typically filed directly with the court of last resort include election disputes and habeas corpus, mandamus, and quo warranto proceedings.

[7] Idaho, Iowa, Mississippi, North Dakota, Oklahoma, and South Carolina.

intermediate appellate court for tax matters and another for all other appeals, and Pennsylvania has two intermediate appellate courts, one that hears non-criminal matters brought by and against the government and one that is a general court of appeal.

State intermediate appellate courts also differ with respect to their geographic jurisdiction and degrees of independence from each other. Most have statewide jurisdiction, though some of those courts have multiple sites. Several state intermediate appellate courts, however, have multiple courts with regional jurisdiction and independence or a single court with multiple locations and geographically assigned cases.[8]

B. Evolution and Contemporary Role

Most intermediate appellate courts are cast primarily in the role of error correction, following precedent established by the courts of last resort, and error-correcting opinions typically affect only the parties to the cases in which the opinions are issued. But not all cases involve pure legal questions based on settled law or cases in which the legal issues are settled and resolution of the appeal requires the application of established law to straightforward facts. There is often an absence of binding precedent, and many cases involve either conflicts between statutes or previous court decisions, or the application of existing law to new fact patterns. In those cases, intermediate appellate court do not function solely as error-correcting courts, but also have responsibility -- subordinate to that of the higher court -- for announcing new rules of law, expanding or modifying existing legal principles, and resolving conflicts in authority. Opinions in such cases have precedential value and a broader impact on the legal system, affecting not only the litigants in the cases in which the opinions are announced, but also parties in future cases.

Although litigants in most states may petition the court of last resort for further review of adverse decisions of intermediate appellate courts, such review is generally discretionary and is exercised in a small percentage of cases – typically less than ten percent of cases heard by the intermediate appellate courts. Courts of last resort generally do not grant petitions for review in cases that involve only error correction, and most do not have the capacity to grant review in all cases in which intermediate appellate courts have issued opinions formulating and developing the law. Thus, by virtue of sheer volume, intermediate appellate courts are the court of last resort for most litigants, and their role in the appellate system has evolved from the original purpose of relieving the workload of higher courts by absorbing their error-correcting function to also playing a significant role in advancing the law in cases of first impression.

C. Shared Values

Despite significant differences in size, structure, jurisdiction, and internal governance, the survey responses reveal

[8] Arizona, California, Florida, Illinois, Louisiana, New York, Ohio, Texas, and Washington.

that intermediate appellate courts share the common goal of rendering quality decisions clearly and efficiently, thereby preserving public confidence in the judiciary. These courts have also identified both explicitly and implied in the comments, shared institutional values and objectives for accomplishing that basic goal, including:

- Adopting effective internal management and operational structures that maximize public resources;
- Implementing case management processes that promote the timely and efficient disposition of cases;
- Promoting public awareness about the judicial system and avenues for access to the courts;
- Maintaining judicial integrity by promoting transparency regarding court processes; and
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court.

Twenty-four of the respondent courts reported that they have adopted performance goals and objectives, including establishing timelines for the case resolution, minimum annual clearance or disposition rates, and individual production expectations for judges.[9] Half of those courts did so internally, two reported that their performance goals and objectives were imposed by statute or rule, and six courts indicated that their performance goals and objectives were promulgated in coordination with state court administrators, legislatures, or rule-making bodies, sometimes as part of the budget negotiation process.

Several courts reported that the impetus for adopting performance goals and objectives was the American Bar Association model time standard recommendation that appellate courts resolve ninety-five percent of all cases within one year of the notices of appeal being filed.[10] Three of the respondent courts (the Oregon Court of Appeals and both divisions of the Arizona Court of Appeals) have adopted and implemented modified versions of the Appellate CourTools performance measurement system developed by the NCSC.

Of the twenty-four courts that have adopted performance goals and objectives, about half indicated that they periodically distribute statistics reflecting their performance results internally, while the other half make that information publicly available, either through state court administrators' offices, state legislatures, or on court websites.

Summaries of three courts' survey responses regarding their performance goals and objectives are featured in the break-out boxes on the following pages.

[9] These performance goals and objectives are in addition to timelines established by legislation or court rule requiring the expedited handling of appeals in parental termination and other time-sensitive case types.

[10] See ABA Judicial Admin. Div., *Standards Relating to Appellate Courts*, 1994 ed., § 3.52, at 101.

Arizona Court of Appeals

Like the other respondent courts, the Arizona Court of Appeals reported that one of its primary goals is continued excellence in processing and deciding appellate matters. In furtherance of that overarching goal, the two divisions of the Court of Appeals, along with the Arizona Supreme Court, adopted many of the formal performance measures known as the Appellate CourTools.

A working committee reviewed performance statistics from a period of years relating to different performance criteria for the various types of appeals the court hears. The committee then developed performance targets for completion of the court's work. For example, Arizona adopted the CourTools measure of the time from notice of appeal to ultimate disposition, and subsets of that time frame, including measuring from the time an appeal is at-issue (the completion of briefing) until disposition, and from the time the appeal is submitted following conference and/or oral argument until disposition. The courts also measure case clearance rates and the age of pending caseloads. CourTools statistics are reviewed quarterly, and the statistics and an explanatory report are published annually. The report is provided to the Arizona Supreme Court and the state court administrator's office, and is posted on the Court of Appeals' website for easy public access.

In addition, the courts conduct surveys every two years of the attorneys who have appeared before the court, and the trial judges whose decisions have been reviewed, regarding case management issues and the quality of judicial review.

Utah Court of Appeals

The Utah Court of Appeals captures detailed data on all of its cases, providing the court with the tools it needs to make sound management decisions. In addition, the court has developed many internal operating procedures concerning time standards once a case has been submitted for decision.

For example, the court adopted internal procedures for the circulation of opinions which require that the first draft of the majority opinion must be circulated to the other judges on the panel within 90 days of the date of the initial case conference. Concurring or dissenting opinions must be circulated within 30 days of circulation of the majority opinion. Judges are encouraged to provide the author judge with "action slips" -- written comments and proposed changes to the draft -- within 7 days, which the author judge may accept or reject. Within 21 days after voting is completed on the majority and any concurring or dissenting opinions, a draft is circulated to all judges, law clerks, and central staff, who must convey any concerns or comments about the draft to the author of the opinion or the presiding judge within 7 days. The author judge then has 14 days to review suggestions and incorporate changes.

Michigan Court of Appeals

The impetus for the Michigan Court of Appeals' adoption of performance goals and objectives was the ABA's 1994 publication of model time standards recommending that appellate courts resolve 95% of all cases within one year of the notices of appeal being filed.

In 1998, a workgroup of judges and staff, along with representatives of the Michigan Supreme Court and state court administrative office, met to address the ABA model as applied to this court. Because Michigan court rules allow a full ten months for transcript preparation, briefing, and record production, they concluded that the ABA model was unrealistic. Instead, they established the goal for the court of deciding 95% of all appeals within 18 months, but little headway was made in meeting this goal in the ensuing years.

At the end of 2001, another committee of Court of Appeals judges and staff met to address the backlog and delay in deciding cases. In 2002, they issued a report that (1) set forth a specific plan to increase the number of dispositions, and (2) established measurement standards and time frames for resolving 95% of all appeals within 18 months. In response, the judges of the court unanimously adopted a delay reduction plan that sought to increase the number of dispositions by assigning additional cases to panels without the benefit of staff reports and proposed opinions, and by producing summary reports or draft opinions only in routine cases.

The plan also sought to decrease the time to disposition by establishing time frames for issuing opinions according to the type of case and/or hearing panel and by proposing several court rule amendments designed to hasten the time in which appeals become ready for decision, especially those involving the termination of parental rights. The Supreme Court adopted many of the proposed rule amendments. Although the court is still a couple percentage points shy of reaching the "95-in18" goal, it has set new goals of eliminating the backlog of appeals and deciding 95% of all cases within 15 months. Increased appropriations and disciplined spending has enabled the court to increase its central research staff in an effort to reach the new goals within a reasonable period of time.

Finally, in 2004, the Michigan Supreme Court authorized the court to conduct a pilot program with an expedited track for appeals from orders granting or denying summary disposition, which account for about half of the court's civil case docket. Implementation of the expedited track, known as the "90/90 Plan," began in 2005. Under the plan, transcript preparation and briefing were to be completed in 90 days. The court would then have 90 days to review the briefs and record, hear oral argument (if any), and issue an opinion. Unfortunately, the expedited track was terminated in 2007 because budget cuts and resulting decrease in staff made it impossible for the court to decide the appeals within the promised timeframe.

The chief clerk prepares weekly reports that measure (1) the average time to disposition by case category, and (2) the percentage of dispositions in increments from 10to 24 months. The clerk also prepares monthly reports that measure certain caseload factors and track the status of pending cases to ensure timely processing. These weekly and monthly reports are only published internally. From the late 1990s through the mid 2000s, the court prepared annuals reports that contained sections on court performance, including the average age of opinion cases at disposition, the number of dispositions by opinion and order, the clearance rate of cases, the percentage of pending cases that were 18 months or younger, and the percentage of cases that were decided within 18 months. The reports had been suspended for the past several years due to budget cuts but one was prepared for 2011 and is available on the court's website.

III. THE NEW BUDGET PARADIGM

Because the intermediate appellate courts provide an appeal of right in most cases and do not have discretion to decline to hear such appeals, they must consider and issue decisions in virtually all cases that are properly before them, absent a transfer of jurisdiction to the state's higher court. Thus, intermediate appellate courts have no control over the size of their workload as measured both by annual case filings and the number of decisions issued each year. Over the past few decades, most appellate courts across the country have experienced a steady increase in the number of annual case filings and a corresponding increase in workload, generating the need for additional judges and support staff.

At the same time, however, courts of all levels have experienced significant budgetary reductions since 2008 due to the widespread fiscal crisis, effects of which are likely to continue for some time. Twenty-two of the respondent states reported reductions in their budgets in recent fiscal years, and six indicated that their budgets have been generally flat, with no appreciable cuts but also no increases to meet inflation and the corresponding increase in the costs of doing business. Courts typically have relatively low actual operating expenses and the vast majority of a court's budget is for personnel expenses. Thus, budgetary limitations have resulted in reductions to staffing levels – both judicial and support staff -- placing a significant burden on courts as they work to maintain timely and high quality service to the public.

State governments have paid increased attention in recent years to the details of appropriated budgets and how their various state agencies, departments, and judicial branches operate. Virtually all states now require or encourage higher degrees of organizational accountability, transparency and a performance management mindset. These changes describe a "new budget paradigm" that is increasingly affecting the management and operations of the intermediate appellate courts, separate from the recent recession that continues to affect court budgets.

This new budget paradigm has highlighted the need for intermediate appellate courts to ensure that legislatures understand their core functions and principles, and appreciate the demands placed on them, including the inability to control increasing workload, and the impact on the public of continued budgetary reductions, both in terms of the quality of the services provided and the public's confidence in the judiciary. Four of the respondent courts reported that their state legislatures have a clear understanding of those issues, and twelve indicated that their legislatures have a more limited understanding of those issues. But almost half of the respondent courts reported that their legislatures have little or no understanding of the core functions of intermediate appellate courts, the operational challenges they face, and the effect of budget cuts on the timeliness and quality of services provided.

The new budget paradigm has also highlighted the need to ensure that courts are operating as efficiently as possible. Most respondent courts reported that they continually examine their organizational structures, operational and workflow processes, allocation and utilization of staff, and application of technology, in an effort to adapt to their growing caseloads and improve the efficiency of court operations, without compromising their ability to provide quality jurisprudence for their citizenry.

IV. EFFECTS OF BUDGETARY REALITIES

While a few courts reported that budgetary issues have had little or no effect on court staffing levels and operations, over half of the responding courts indicated that budgetary limitations and the new budget paradigm have impacted employee compensation, and have required some reductions in staffing levels and changes to court operational systems.

A. Staffing Levels and Employee Compensation

With respect to staffing levels and employee compensation, the responding courts consistently reported that the most significant impact has been on non-judicial staff -- clerk's office staff, secretaries, and legal staff (both law clerks and central staff attorneys), but several courts also reported reductions in judicial resources. More specifically, courts reported that that budget limitations have required them to:

- freeze non-judicial salaries by eliminating merit, automatic step, and cost of living increases;
- impose mandatory furlough days on non-judicial staff and/or encourage employees to take voluntary furlough days;
- reduce work hours for some employees;
- lay off non-judicial staff;
- eliminate judicial and non-judicial positions vacated through attrition;
- delay filling judicial and non-judicial positions vacated through attrition;
- eliminate or delay filling judicial positions vacated when judges retire or resign; and
- reduce the number of days for which retired judges may be compensated.

B. Organizational and Operational Changes

Not surprisingly, courts also reported that reductions in personnel have required significant organizational and operational changes, including the re-distribution of work and realignment of job duties among remaining staff to accommodate reductions in staffing levels, and more judicial involvement in work previously performed by law clerks and central staff attorneys. One court indicated that it achieved significant savings by

consolidating separate Clerk of Court offices for its supreme and intermediate appellate courts into one combined Appellate Court Clerk's Office.

Because the vast majority of intermediate appellate courts' budgets are for personnel expenses, there are few areas of discretionary spending where courts can achieve savings. Nevertheless, courts reported that they have implemented a variety of cost-saving measures to reduce discretionary spending, such as reducing library resources (particularly print holdings), eliminating in-house settlement programs, reducing the number of hours the court is open to the public, deferring technological improvements and equipment updates, delaying the purchase of office supplies, limiting travel and continuing legal education allowances.

C. Effects on Performance

Courts reported that budgetary limitations and the new budget paradigm have had both positive and negative effects on court performance. As discussed below in Section V, the focus by legislatures, as the primary funding authority for most courts[11], and the public's interest in organizational accountability, transparency, and performance has caused many courts to streamline their procedures to become more efficient and maximize the use of public resources. Some courts reported that these measures have not only improved overall court operations, but have also had a positive effect on morale.

But many courts reported that the budgetary challenges, particularly reductions in staffing levels, have had negative effects on morale and the quality of the court's written opinions; decreased productivity, backlogs, and clearance rates; and sharply increased the time required to resolve appeals. Courts also reported that budget reductions in trial courts and government agencies have resulted in delays in filing records and briefs, contributing to delays in the resolution of appeals.

V. STRATEGIES FOR RESPONDING TO THE NEW BUDGET PARADIGM

Intermediate appellate courts have developed a wide range of strategies to deal with modern budget realities and resultant staffing reductions in an effort to maximize efficiency and productivity, ensure the timely resolution of appeals, continue to produce quality written opinions, and maintain public confidence in the judiciary. The strategies reported most frequently focused on the use of legal staff, case screening and differentiation, technological advancements, imposition of internal case processing deadlines, and improved coordination with legislatures and state court administrators

A. Use of Legal Staff

Intermediate appellate courts employ several types of legal staff to help manage their heavy workloads, including law clerks, central staff attorneys, and other

[11] Some courts receive funding from county funding authorities rather than from state legislatures but because most intermediate appellate courts are funded by state legislatures, this report refers to funding authorities as legislatures.

court attorneys, and several respondent courts indicated that they are re-evaluating their attorney support structures and exploring more cost-effective ways to utilize legal staff and increase their productivity.[12] This process has led many courts to turn increasingly to permanent legal staff instead of relying solely on short-term law clerks.

Courts have historically relied primarily on law clerks (often referred to as "elbow clerks"), who work for an individual judge and have no direct responsibilities to the court as a whole, to provide legal research and writing support for the judges to whom they are assigned. Under the traditional hiring model, law clerks work for an individual judge for one or two years to gain additional legal research and analytical skills before practicing law. But many appellate courts reported that because the learning curve for new law school graduates is steep, most law clerks do not produce consistently high quality work until well into their terms. Accordingly, although most courts continue to have some short-term law clerk positions, many have begun to allow judges to employ long-term or permanent law clerks in an effort to maximize the usefulness of law clerks to the judges they serve.

Consistent with the recognition that long-term law clerks produce higher quality work and are generally more useful to the judges they serve than short-term law clerks, most intermediate appellate courts also employ central staff attorneys who serve indefinite terms and work for the court as a whole rather than for an individual judge. Central staff lawyers serve as research attorneys who may prepare memoranda or draft opinions on cases, sometimes without the initial involvement of judges, and also perform other chambers support, such as opinion editing, and administrative functions, often in conjunction with the Clerk of Court's Office. Central staff attorneys tend to stay employed with the courts for which they work for many years -- often their entire legal careers -- and develop valuable expertise and institutional knowledge. Although central staff attorneys are typically paid more than short-term law clerks, courts have found -- even in tight budgetary circumstances -- that the salary differential is worth the significant productivity, efficiency, and work quality benefits provided by permanent legal staff.

Several courts indicated that they have reduced the number of law clerks assigned to each judge and/or the size of their central staff and that judges have had to assume responsibility for some of the work previously done by legal staff and accept some portion of their caseload without bench memoranda or draft opinions. But courts also reported that they have adapted the way they use legal staff to maximize their effectiveness and productivity and ensure that they provide the legal support services necessary to enable courts to manage their burgeoning caseloads. Specifically, courts reported using central staff attorneys to accomplish

[12] A 2011 white paper commissioned by the CCJSCA summarizes data collected from thirty-four intermediate appellate courts across the country regarding the various ways in which they use legal staff. *See Comparative Attributes of Legal Staff in Intermediate Appellate Courts*, Council of Chief Judges of the State Courts of Appeal, April 2011.

various operational efficiencies, such as streamlining motions, screening cases early in the appeal process for jurisdictional and procedural defects, and assessing case difficulty for purposes of identifying cases appropriate for summary disposition and equalizing case assignments among judges. A brief description of how the Colorado Court of Appeals uses staff attorneys for these purposes is discussed in more detail below.

Colorado Court of Appeals

The Colorado Court of Appeals rules on over 13,000 motions per year. **It combines its motions practice with a screening process designed to identify appeals with jurisdictional defects before briefing begins.**

A staff attorney screens every case for jurisdictional defects shortly after the notice of appeal is filed. In cases with a possible jurisdictional defect, the screening attorney issues an order directing the appellant to cure the defect or explain why the appeal should not be dismissed. Screening files and motions are then divided into three general categories.

Certain types of motions, including dispositive motions and most motions for stay, are decided by a three-judge motions panel, which rotates on a monthly basis. Other matters, including uncontested motions involving ministerial or procedural issues, are ruled on under the Chief Judge's signature by a central staff attorney. All other motions are decided by one judge, usually the Chief Judge.

At separate one- and three-judge motions meetings scheduled weekly, a staff attorney orally presents motions to the judges and makes a recommendation regarding the disposition of each motion. The staff attorney then prepares written orders or, in some cases, drafts opinions for publication.

Another method courts reported using to maximize the usefulness of central staff attorneys is encouraging or requiring them to develop one or more areas of specialization, particularly in cases involving administrative law or statute-driven subjects, such as domestic relations, workers compensation, and parental termination. As a corollary to staff attorney specialization, a significant number of courts indicated that there are subject matter areas for which staff attorneys write all or most of the initial opinions. Courts that reported using one or both of these approaches indicated that doing so is more efficient and results in higher quality

opinions than having short-term law clerks with generally limited experience in those areas getting bogged down in trying to understand complex statutory and administrative law or side-tracked by irrelevant issues that are easily identified by an attorney who specializes in those areas.

B. Screening and Case Differentiation

Most respondent courts indicated that they employ a process of screening cases for jurisdictional and other procedural defects (such as lack of a final order or subject matter jurisdiction, or failure to timely appeal) at some point in the appeal process. The timing of the screening varies among courts, as does the person responsible for conducting the screening, but in most courts the screening is done by a staff attorney or other court attorney (not a law clerk) before briefing begins -- either shortly after the appeal is filed or after the record is filed. In a few courts, the jurisdictional screening is done after briefing is complete, often by a law clerk, as part of the opinion-drafting process, primarily because those courts do not have the staffing resources to screen cases earlier.

Courts that screen cases for jurisdictional and other procedural defects early in the appeal process do so for several reasons. The identification and potential dismissal of cases with incurable jurisdictional defects before briefing helps manage the courts' dockets and saves both time and money for the court and the parties. In addition, identifying and notifying the parties of potential defects gives them an opportunity to resolve the problem or clarify the record and can sometimes narrow the scope of the issues on appeal.

Courts also use case screening to balance the difficulty of case assignments among judges. For example, a case screening process that assesses overall case complexity and assigns a difficulty rating to each case based on factors such as the size of the record, length of the briefs, number of issues raised, and complexity of the issues presented, can be used to balance not only the difficulty of cases assigned to each panel but also the difficulty of writings assigned to individual judges.

Case screening can also be part of differentiated case management programs and expedited calendars designed to resolve certain classes of cases more expeditiously, reduce or avoid backlogs, and redirect judicial resources to more demanding cases. The key to the success of differentiated case management programs is identifying cases appropriate for placement on an accelerated calendar early in the appellate process. The screening and case differentiation systems adopted by the New Mexico and Michigan courts of appeal are highlighted in the breakout boxes on the following pages.

New Mexico Court of Appeals

The ten-member New Mexico Court of Appeals pioneered an accelerated docket program that, unlike the California and Rhode Island models, emphasizes briefing in the form of "docketing statements" and deemphasizes oral hearings. Established in 1975, New Mexico's summary calendar is one of the most enduring instances of procedural differentiation in state appellate courts.

The summary calendar was initially aimed at expediting criminal appeals and reducing transcript volume and cost. However, the scope of the calendar has been expanded to include all other case types in the court's jurisdiction, including workers' compensation, domestic relations, and routine civil appeals.

Within ten days after a notice of appeal is filed in the New Mexico Court of Appeals, trial counsel is required to file a "docketing statement" that outlines the relevant facts, lists the issues on appeal, indicates how the issues were preserved in the trial court and identifies relevant authorities.

After the trial court or administrative agency record (without transcripts) is filed, a central staff attorney reviews the record, docketing statement, and applicable law, then prepares a memorandum recommending a calendar assignment. A single judge reads the memorandum and either adopts the recommended calendar assignment or makes a different calendar assignment.

Cases placed on the summary calendar include those with issues governed by settled New Mexico law or that otherwise have obvious outcomes. They are decided without transcripts, a 20-day briefing time and no oral argument. Cases that are not assigned to the summary calendar are assigned to either the legal calendar or the general calendar. Legal calendar cases are also decided with no transcripts, but have 30-day full briefing. General calendar cases have transcripts and 45 day full briefing time. Oral argument in non-summary calendar cases is by the granting of an attorney's request for oral argument.

During the calendaring process, a central staff attorney reviews the file for jurisdictional defects (such as no final judgment or order, or an untimely notice of appeal), and also reviews the docketing statement, record, and applicable law. The staff attorney then prepares, for a single judge's signature, a calendar notice or notice of proposed disposition briefly setting forth the Court's understanding of the facts and issues, and the rationale for its proposed decision. The parties may file memoranda in response to the calendar notice within 20 days. The failure to oppose the Court's proposed disposition constitutes acceptance of the proposed decision. The central staff attorney reviews any memoranda received in response to the calendar notice and recommends to the single calendaring judge a further notice of assignment to a non-summary calendar or to resolve the case by opinion. If an opinion is to be filed, a three-judge panel is assigned and must agree.

The New Mexico Court of Appeals resolves from 55 to 65% of its appeals on the summary calendar.

Michigan Court of Appeals

The Michigan Court of Appeals provided the following description of its use of legal staff both for traditional research and writing functions and for case screening and differentiation.

Before cases are assigned to a panel, central staff attorneys prepare research reports for most cases and draft opinions for those cases expected to be resolved by unpublished opinion. Research reports contain neutral statements of the relevant facts, summaries of the parties' arguments, legal analyses of the issues raised, and recommendations as to dispositions. The draft opinions typically include a short recitation of the relevant facts and a succinct analysis of each issue. The assigned judge will accept, revise or reject the drafts and produce final opinions, with assistance from a law clerk. Judges may request additional staff attorney assistance in limited situations to take advantage of particular areas of expertise. Law clerks draft opinions for cases that are submitted to panels without research reports

The court uses a two-step difficulty assessment process, one for assigning cases to central staff, then for achieving balance in the judges' workload. The first assessment, or day evaluation, is performed by a senior staff attorney after briefing is completed. The attorney estimates in days the amount of time each case will require for preparation of a research report based on factors such as the type of case, the length of the briefs and record, and the number and complexity of issues. Career track attorneys work on those cases expected to take 7 days or more and less experienced limited tenure attorneys work on cases of that are more routine and expected to take 4 to 6 days. Contract attorneys work primarily on termination of parental rights appeals but will also work on other routine appeals on occasion. These assessments are also used to identify appropriate cases to assign to judges on case call without research reports, which is done to advance the court's delay reduction goals.

The second assessment, focusing on difficulty, is made by a supervising staff attorney. Each case with a research report is rated on a 1 to 6-point scale usually assessing factors such as the number of issues presented, whether the issues are routine, whether publication is recommended, the experience of the authoring attorney and the length of the research report. These assessments are distinct from the day evaluation and are used to balance the workload for judges on case call. Judicial caseloads typically consist of from 19 to 23 aggregate difficulty points. Different judges may have varying numbers of cases assigned to them but a similar number of difficulty points.

Most courts that have implemented such systems indicated that they typically use central staff attorneys to screen case filings and identify appropriate cases, and most expedited review programs involve abbreviated briefing. Six examples of procedural and case differentiation programs are described below. Any of these programs can be adjusted to fit the particular needs and circumstances of other intermediate appellate courts, and can be used for any case type or for particular subjects (civil, criminal, worker's compensation, etc.).

- **Limited Brief, Expanded Oral Argument Calendar.** Under this system, a court attorney identifies routine cases before briefing begins based primarily on the notices of

appeal and underlying trial court order. For courts that have in-house settlement or mediation programs, cases suitable for the limited brief/expanded oral argument calendar can also be selected from among those that remain unsettled after a settlement conference. The parties file briefs with a page limit substantially less than the rules would otherwise allow, and the court holds expanded oral argument (for example, instead of fifteen minutes per side, the court might allow thirty minutes per side). Participation in such programs is generally voluntary, but courts can encourage participation by committing to issue a decision within two weeks after argument.

- **Show Cause Calendar.** The show cause calendar is based on the same principle as the limited briefing, expanded oral argument calendar: full briefing is not necessary in routine appeals, and judicial resources should be allocated among cases in proportion to their complexity. Selection of cases for the show cause calendar is a two-step process. After the lower court record is filed, appellants are required to submit written statements of up to five pages summarizing the issues presented in the appeal; appellees may file similar summary statements. After reviewing the parties' summary statements, a judge holds a conference with the attorneys and parties to evaluate the complexity of the case and its appropriateness for the show cause calendar. Cases the conference justice concludes do not warrant full briefing are set on the show cause calendar and assigned to a panel for oral argument. The parties are permitted to file supplemental statements of ten pages or less, and the cases are orally argued shortly thereafter. Show cause dispositions, which require unanimity, result in a one-page order and summary affordance or summary reversal.

- **Summary Calendar.** The summary calendar program adopted by the New Mexico Court of Appeals is described in more detail in the break-out box on page 15, but the gist of the program is that the court identifies cases early in the process that involve straight-forward issues that can be resolved on settled law based not only on limited briefing, but also on a limited record. This program recognizes that the preparation and filing of the trial court record often causes significant delays, and cases identified for participation in the program are those that can be resolved without transcripts. For those cases, the court submits written proposed dispositions to the parties who are given an opportunity to respond. If the panel to which a summary calendar cases assigned disagrees with the response or if the parties agree that the proposed disposition is appropriate, the court issues a memorandum opinion consistent with the proposed disposition without briefing or oral argument.

- **No-Argument Calendar.** The examples of procedural differentiation programs described above rely on systems of tracking cases early in the appellate process. A more common form of procedural differentiation, used to some degree by most state intermediate appellate courts, is to decide a portion of their appeals without oral argument. The intended and observed effect of "no argument calendars" is to reduce the time judges spend on non-argued appeals. A common practice is for central staff attorneys to prepare memoranda or draft opinions in cases that are not orally argued, and for chambers staff to prepare draft opinions in orally argued cases. While directing cases to a non-orals calendar can reduce the time from close of briefing to issuance of an opinion, it does not reduce the time between the date the notice of appeal is filed and the date briefing is completed.

- **Sentencing Calendar.** For many intermediate appellate courts, although criminal cases represent a majority of the court's filings and can contribute to the accumulation of significant backlogs, the majority of criminal cases are relatively straight-forward and can be resolved on settled law. Accordingly, several of the case differentiation systems respondent courts described involved primarily criminal cases. Among the programs described included one that focuses on cases in which the only issues raised are challenges to the sentence imposed, because the legal issues are settled, and questions regarding the application of law to case-specific facts can be resolved based on a review of a limited record – typically just the judgment of conviction, pre-sentence investigation report, and sentencing hearing transcript – that can be prepared on an expedited basis.

  Under one example of a sentencing calendar program, cases are placed on an orals calendar dedicated solely to sentencing appeals, the court holds abbreviated arguments (for example, instead of fifteen minutes per side, the court might allow only ten minutes per side), and decisions are announced in an order, not an opinion. Like the other expedited calendar programs described above, sentencing calendars enable courts to resolve a portion of their criminal caseloads more expeditiously and allocate judicial resources among cases in proportion to their complexity. Moreover, by concentrating criminal sentencing appeals on a separate calendar, courts can improve the quality of their decision-making in those appeals by achieving greater consistency in the resolution of similar issues.

- **Limited Briefing, No-Argument Criminal Per Curiam Calendar.** This system is designed to identify criminal cases that can be resolved based on the record and the

appellant's opening brief, with no response brief, thereby eliminating or reducing the sometimes significant delay in filing responsive briefs. One court's system is structured as follows. A central staff attorney with experience in criminal law reviews every opening brief and record filed in criminal cases to identify cases that may be appropriate for summary disposition without an answer brief. The types of cases selected for this program are typically sentence appeals and appeals of trial court orders denying post-conviction motions that are governed by settled law or are procedurally barred (time-barred or successive). The staff attorney prepares a summary draft opinion, usually within one or two weeks after the opening brief is filed, and the cases are then assigned to the per curiam division, which meets weekly. Membership on the panel rotates regularly, and the judges who sit on the per curiam division also sit on a "regular" division. If the panel agrees with the proposed disposition, it issues an opinion without holding oral argument, usually within two weeks of the meeting. If the division concludes that an answer brief is necessary or that the case is not appropriate for summary per curiam disposition, the court orders that a response brief be filed and assigns the case a regular division.

By resolving identified cases without answer briefs, courts can reduce backlogs, redirect judicial resources to more complex cases, and, by reducing the number of briefs states Attorneys General are required to file, allow them to likewise reduce their backlogs and redirect their resources to more complex cases. Courts can also accomplish those dual goals by having a staff attorney review all criminal opening briefs to determine which issues, if any, merit a response brief and which can be resolved based only on the opening brief and record and ordering that the answer brief address only those issues identified by the court as meriting a response.

These are just a few examples of case differentiation systems used in intermediate appellate court which acknowledge that judicial resources should be allocated among cases in proportion to their complexity: the most difficult cases consume a disproportionately large amount of attorney and judicial time, while the least difficult cases consume a disproportionately small percentage.

C. Technological Advancements

Technological advancements have been a significant factor in allowing many courts to maintain high clearance rates, avoid backlogs, and issue opinions on a timely basis in most appeals. Although obtaining the equipment or programs necessary to accomplish technological improvements in court systems always presents a budget challenge, many courts

have found that the short-term investment is cost effective in the long-term because it enables them to streamline operations and save money in other areas, including personnel, copying and mailing expenses.

The technological advancement mentioned most frequently by respondent courts is the adoption of electronic filing systems allowing lower courts to e-file or provide digital versions of the record, and that require parties to e-file briefs, motions, and other case related documents. [13] Several courts indicated that they are in the planning stage and have not yet actually implemented e-filing systems, but have begun to require parties to file digitized copies (either on disk or through an email delivery system) of their briefs and pleadings along with the paper originals. Requiring digital filings – whether through an e-filing system or by requiring simultaneous filing of paper and digital documents – reduces the number of paper documents that must be handled and docketed by clerk's office staff, allows legal staff and judges to access records, briefs, and other pleadings remotely, and gives them the option of printing those materials or reviewing them electronically.

Although the implementation of e-filing systems is costly and requires extensive up-front training of court personnel, courts that have made the investment report that the initial expense is well spent in the long-term because of the significant efficiencies and ongoing cost savings achieved through e-filing systems. Moreover, some courts charge a filing fee for each document in addition to the initial case filing fee to offset the cost of the e-filing system.

Courts have adopted other technological advancements, both with respect to interactions with litigants and the public, and with respect to internal operation systems. Examples of technological advancements that respondent courts (or state judicial branches) reported adopting to improve filing systems and other interactions with litigants and the public include:

- Eliminating court reporters statewide and simultaneously implementing an automated transcript management system, which significantly reduces the traditionally significant delay between the filing of the notice of appeal and the filing of the record;

- Linking e-filed or digital versions of documents in the court's case management system so they are directly accessible by court staff and judges;

- Conducing all written correspond-dence with litigants, attorneys, and lower court personnel electronically;

- Issuing orders and opinions electronically;

- Posting opinions and dispositive orders online;

[13] Courts with e-filing systems typically allow pro se parties to continue to file their pleadings and briefs on paper. Court personnel then scan the documents and store the electronic version with e-filed materials.

- Developing and posting self-help forms that help litigants (particularly pro se parties) prepare pleadings that are clear and comply with applicable rules; and

- Improving and updating court websites to enhance litigants' access to public court records and provide up-to-date information to the public (thus reducing telephone calls requesting information from court staff) about court rules, internal court procedures, and other court operations.

Courts also reported adopting technological advancement designed to streamline internal operations, minimize administrative burdens on judges and staff, maximize the speed and portability of digital text, and reduce the costs associated with document-driven systems (such as copying and mailing expenses) including:

- Storing draft opinions and other court documents in shared databases;

- Circulating draft opinions electronically;

- Commenting on and editing opinions electronically; and

- Conferencing and voting electronically in cases in which in-person or extensive discussions are unnecessary.

D. Imposition of Internal Case Processing Deadlines

For many courts, budget limitations and staffing reductions have caused sometimes significant backlogs and that can prevent courts from achieving the goal of ensuring the timely resolution of all appeals. Some jurisdictions have taken various measures to improve the management of pending cases in their courts by establishing aspirational timelines and benchmarks for the preparation and issuance of opinions, including:

- Requiring judges to circulate draft opinions within a certain number of days (often 90 days) after case assignment and requiring concurring or dissenting opinions to be circulated within a certain number of days (often 30 days) thereafter;

- Preventing judges who still have excessive outstanding writings from sitting on any new cases;

- Internally circulating reports showing the number of cases each judge has outstanding and the number of days each case has been pending since the assignment date;

- Internally circulating the number of decisions issued as well as the average number of days cases were pending between the assignment date and the date the opinion was announced, for each judge;

- Establishing timelines for panel members to comment on draft

opinions or requiring panel members to comment on other judges' draft opinions before circulating draft opinions of their own for comment by the other panel members; and

- Requiring panel members to meet with the Chief Judge to re-conference and discuss the status of cases that have been pending for more than ninety days.

5. Improved Coordination with Legislatures and State Court Administrators

A number of respondent courts expressed concern that their state legislatures view the judicial branch as a department or agency, rather than a separate co-equal branch of government, and as a result, courts have historically not been fully and adequately funded. Others commented that their legislatures continue to pass laws that increase the court's workload without providing funding. These concerns, combined with the ongoing effects of the recession and increasing attention to the details of appropriated budgets and court operations, emphasize the importance of ensuring that legislatures understand the budgetary needs of intermediate appellate courts and the effect on courts and the public of further budget reductions.

To that end, courts reported making increased efforts to be as transparent as possible and educate legislatures about court operations at all levels to ensure that legislators and their staffs understand the difficult structural and fiscal decisions required to enable courts to enhance the quality of justice while facing increased caseloads with fewer resources. Courts indicated that they often coordinate with their state court administrators' offices during the budget negotiation process with legislatures. The specific measures judicial systems and intermediate appellate courts have taken in this regard include:

- Hiring and working closely with knowledgeable and experienced state court administrators and budget staff;

- Providing legislatures with statistical reports of the court's operations;

- Preparing and distributing annual reports explaining the nature and extent of the work of the court and reiterating the standards against which court performance is measured;

- Providing timely and accurate information regarding court operations throughout the budgetary process;

- Encouraging chief judges and court administrators to engage regularly in straightforward communications with key budget decision makers; and

- Assessing operations to evaluate alternatives and to develop improvements to the court's efficiency. These can be shared with legislators and others responsible for court appropriations.

For courts in states with multiple courts of appeal, the appropriation process used by the fourteen Texas Courts of Appeal might be of particular interest. Specifically, the Texas Courts of Appeal reported that they have developed a unified approach for working with the legislature to secure appropriate funding for the judicial branch as a whole, including the appellate courts. They submit appropriation requests based on the concept of "similar funding for same size courts." This unified approach has fostered solidarity among the courts of appeal, simplified the requests for appropriations, and reduced competition and acrimony between courts during the legislative budget process.

All budget requests should be based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models and application of appropriate performance measures. The requests should focus on obtaining funding sufficient to allow the court to resolve cases in accordance with recognized time standards; have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facilities guidelines; and have access to technologies comparable to those used in other governmental agencies and private businesses.

VI. PRINCIPLES FOR JUDICIAL ADMINISTRATION APPLIED TO THE INTERMEDIATE APPELLATE COURTS

The new budget paradigm and changing socioeconomic factors have created shifting demands on our judicial institutions, requiring courts at all levels to continually find solutions that provide quality judicial services more efficiently. To maintain public confidence in the judiciary, efforts by court leadership to address the long-term budget shortfalls and the inevitable restructuring of court services must be guided by overarching practical operational principles. In response to this need, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) jointly adopted 25 *Principles for Judicial Administration* in July 2012.

The *Principles for Judicial Administration* provide the context in which operational as well as budgetary and funding principles, originating from a variety of organizations such as NCSC, CCJ, and COSCA and the reengineering experiences of the judicial branches in several states, are unified. While the principles are interdependent, they are grouped into four categories:

- Governance;
- Decision-Making and Case Administration;
- Developing and Managing the Judicial Budget; and
- Providing Adequate Funding.

The first two categories are foundational principles that can enable courts to manage their resources efficiently and effectively. They are necessary pre-conditions for the second two categories that address court budgets and funding.

While the principles are focused on state judicial systems generally, they are also applicable to the functional aspects of intermediate appellate courts. They are explicitly intended to help chief judges and court administrators as they seek to address long-term budget shortfalls and the inevitable restructuring of court services. Many of the principles are directly related to the common objectives, strategies and actions taken by intermediate appellate courts to address tightening budgets and the new budget paradigm, and performance management issues previously discussed. A summary of the principles for Judicial Administration is included as an appendix to this white paper.

In Section II (C), we identified 5 shared values among the intermediate appellate courts. These shared values are:

- Adopting effective internal management and operational structures that maximize public resources;
- Implementing case management processes that promote the timely and efficient disposition of cases;
- Promoting public awareness about the judicial system and avenues for access to the courts;
- Maintaining judicial integrity by promoting transparency regarding court processes; and
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court.

Many of the Principles for Judicial Administration directly connect with these shared values. The remainder of this section discusses selected judicial administration and their application to the shared values of intermediate appellate courts.

A. Governance Principles

Principle 1: Effective court governance requires a well-defined governance structure for policy formulation and administration for the entire court system.

Principle 2*:* Judicial leaders should be selected based on competency.

Principle 3: Judicial leaders should focus attention on policy level issues while clearly delegating administrative duties to court administrators.

Principle 4: Court leadership, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.

Related Shared Value:

- Adopting effective internal management and operational structures that maximize public resources

The shared value of adopting effective internal management and operational structures that maximize public resources speaks directly to the governance of the IAC in concert with Principles 1 through 4. Effective governance of an IAC requires a well-defined structure for formulating policy as well as administering the day-to-day operations of the court. Court leadership should possess a high level of administrative competence and demonstrate a commitment to the mission and values of the judiciary and the court's responsibilities to its justice system partners and the general public.

In an effective governance model, the chief judge provides leadership for the court, directs its administration, and serves as the principal intermediary between the court and the judicial system of which it is a part, the other branches of government, the bar, and the public. Effective leaders in all organizations, whether private or public, should focus their attention on policy level issues concerning the court's internal operations and external matters affecting the court, while clearly delegating the administrative duties to staff.

B. Decision-Making and Case Administration Principles

Principle 9: Court leadership should make available, within the court system or by referral, alternative dispositional approaches, including:

a. The adversarial process.
b. A problem-solving, treatment approach.
c. Mediation, arbitration or similar resolution alternative that allows the disputants to maintain greater control over the process.
d. Referral to an appropriate administrative body for determination.

Principle 10: Court leadership should exercise control over the legal process.

Principle 11: Court procedures should be simple, clear, streamlined and uniform to facilitate expeditious processing of cases with the lowest possible cost.

Principle 12: Judicial officers should give individual attention to each case that comes before them.

Principle 13: The attention judicial officers give to each case should be appropriate to the needs of that case.

Principle 14: Decisions of the court should demonstrate procedural fairness.

Principle 15: The court system should be transparent and accountable through the use of performance measures and evaluation at all levels of the organization.

Related Shared Values:

- Implementing case management processes that promote the timely and efficient disposition of cases
- Maintaining judicial integrity by promoting transparency regarding court processes
- Producing high quality work product in the form of well-reasoned, clearly written decisions that respond to the issues before the court

The primary function of intermediate appellate courts is to review appealed decisions of lower tribunals, but they also have responsibility -- subordinate to the higher court -- for announcing new rules of law, expanding or modifying existing legal principles, and resolving conflicts in authority. All decision-making and case administration procedures should support those functions while also advancing these principles and shared values.

Intermediate appellate courts usually sit in panels of three judges when hearing and deciding cases. In accordance with Principle 14, membership on the panels should change periodically, and panel assignments should be made randomly, such that each judge sits with every other judge as often as practicable. To ensure objectivity and fairness, cases should be assigned to panels in a random process after judges with a disqualifying conflict of interest, as defined by the state's rules of judicial conduct, have been eliminated from the list of potential panel members. The random assignment of cases to panels does not preclude the differentiation of cases according to their urgency, complexity, common subject matter, common parties, and other relevant criteria. Indeed, cases involving the same parties and/or related lower court proceedings should be assigned to the same panel whenever possible. Differentiated case management programs, summary calendars, alternative dispute resolution services such as mediation, and other case administration procedures that allocate judicial resources among cases according to their relative urgency and complexity can be greatly beneficial to their expeditious resolution. These programs and procedures are addressed and discussed in Principles 9 through 13. However, as stated in Principle 12, the panel assigned to determine the merits of an appeal must ultimately make a collective and deliberative decision in each case, including cases identified as appropriate for summary disposition. This helps to avoid the appearance of cursory consideration, which can undermine public confidence in the integrity of the judiciary.

When reviewing the merits of a lower court decision, IACs determine whether that court correctly applied and interpreted the law, conducted the proceeding fairly and deliberately to avoid substantial prejudice to the parties, and made its decision based on factual findings that are reasonably supported by the evidence. Appellate courts should not consider an issue that was not raised below unless it relates to the court's jurisdiction or must be addressed to prevent manifest injustice.

The parties to an appeal have the opportunity to request oral argument on the merits of the case, and the court usually has the authority to order oral argument when it deems necessary, even if the parties do not request it. Some IACs also have authority to deny a request for oral argument if the panel concludes that it would not assist the court in its deliberation of the case. Rules are usually in place allowing each side a specific length of time for oral argument. The panel can adjust the allotted time commensurate with the relative difficulty of the questions presented for review. Principles 10, 11 and 13 are reflected in these practices.

The judges assigned to decide a case should confer reasonably soon after argument or submission on the briefs. Although opinions may be issued by one designated author judge, all panel members should participate equally in the consideration of the case and the determination of the appropriate outcome. Responsibility for authoring opinions should be assigned among the judges by the presiding judge on the panel pursuant to a rotational system that can be adjusted to balance the difficulty of overall writing assignments and equitable workloads.

IACs should ordinarily provide a reasoned explanation of the court's dispositional decision, though a decision can be issued in a variety of forms and lengths, including orders, memorandum opinions, and published opinions. All parties to an appeal should be provided with a copy of the court's decision. Courts that sit in more than one panel should strive for decisional consistency, though the ultimate responsibility for consistency among panels rests with the state's higher court.

Even when explicit time standards for the resolution of cases do not exist, IACs should adopt aspirational internal time frames for the disposition of cases.[14] To ensure transparency and accountability, these established time frames should be openly available and related statistics published on a regular and timely basis. Annual reports should include the extent of compliance with the court's established time frames for case resolution. Principle 15 supports these types of efforts to ensure transparency regarding overall court performance and accountability.

VII. CONCLUSION

Appellate courts serve a dual role in state judicial systems: 1) reviewing individual decisions of lower tribunals for error and, 2) interpreting and developing the law for general application in future cases filed in all levels of the legal system. The former is traditionally the primary role of intermediate appellate courts, while the latter is the primary role of courts of last resort. But due to the rising number of intermediate appellate court decisions without a corresponding increase in the capacity of the courts of last resort to review all cases in which an IAC has announced a new rule or expanded on existing law, IACs have become the court of last resort for the vast majority of litigants. While a large percentage of IAC decisions involve error correction, a large number also address issues of first impression. Although data specifically addressing this evolution in the role of IACs are not currently available, it is generally understood that most IAC decisions – estimated at over 90% in many states – do not undergo further review. As a result, many of those decisions no longer affect only the parties to the case in which the opinion was rendered but instead may establish precedent that develops and

[14] In order to efficiently measure actual court performance relative to such time frames, the court must necessarily utilize a case management system that includes all appropriate data relative to the filing and disposition of cases, as well as the achievement of various milestones, for the various case types.

clarifies the law on important issues of broader impact.

IACs serve these dual roles in the context of a societal trend toward relying on the judiciary to resolve social and economic controversies, as reflected by increased legislation and governmental regulations at both the federal and state levels that create and expand upon legal rights. While federal courts also serve an important function, state courts are more frequently the courts in which issues that affect individuals and their local communities are resolved, including criminal, domestic relations, child welfare, education, property rights, ballot initiatives, unemployment, and disability matters. IACs play a vital role in most states' judicial systems. The failure of IACs to remain current in resolving their caseloads and rendering effective, well-reasoned decisions, would likely have a negative effect on the ability of both trial courts and courts of last resort to perform their respective functions adequately. The pressure on IACs to resolve appeals expeditiously despite budgetary limitations and resultant staffing reductions is exacerbated by the growing trend in both state and federal legislation to require expedited handling of certain categories of cases, thus further delaying resolution of non-expedited appeals. Beyond effects on the judiciary, individuals, commercial enterprises and governmental agencies would likely also be negatively impacted. Thus, IACs need to ensure that the public and state legislatures understand the work of the court, efforts of the court to improve its organizational performance, and the effects of adding unfunded mandates and statutorily expedited case types. In addition, because the vast majority of an IAC's budget is for personnel expenses, opportunities are limited for budget reduction without corresponding impacts to court performance.

But even if legislatures fully understand the effect of budget cuts on courts and the administration of justice, courts will not be immune from the realities of the recent fiscal crisis and the new budget paradigm. They must strive to work more efficiently and effectively with shrinking resources. IACs should be mindful that they are part of a bigger enterprise of state government and of their role within the judicial system. Courts should thus re-examine their organizational structures and operational practices with an eye toward improving efficiencies while continuing to produce justice that resolves individual cases promptly, provides clear guidance to lower court judges, and fosters the public's ongoing confidence in the judiciary as a whole. The *Principles for Judicial Administration* provide a framework for IACs adapting to change.

Public confidence in the judiciary depends not only on the timely resolution of individual cases and the quality of opinions, but also on public perceptions regarding the internal workings of courts, the establishment and fulfillment of performance objectives, their adherence to broadly accepted court principles, and the selection and retention of qualified and capable judges. Transparency and accountability are thus critical to a well respected judiciary and can foster an environment in which the public and other branches of government understand the judiciary's role, are more likely to support

adequate funding, and are less likely to interfere with court governance. Courts should promote a culture of transparency and accountability by making information readily available to the public regarding access to the courts, internal court operations, achievement of performance objectives, and how courts are using public resources.

This white paper is intended to stimulate discussion and the sharing of ideas among intermediate appellate courts regarding the various ways in which they have adapted to budgetary limitations and to encourage discussion among chief judges and court administrators regarding the unique approaches they have adopted to solve common problems. It is presented as one in a series of analytical projects that will examine various aspects of intermediate appellate court operations and management issues. Future studies may include topics such as technological applications and solutions; case differentiation systems; the establishment of performance objectives, including how they are measured and reported; and the impacts of intermediate appellate court performance on other levels of the judicial system, other branches of government, the business community, and the public.

Appendix E

NATIONAL CENTER FOR STATE COURTS

FINAL REPORT:

VIRGINIA COURT ORGANIZATION STUDY

SUBMITTED TO THE

JUDICIAL COUNCIL OF VIRGINIA

JUNE 1979

[Pages 271-277]

Jurisdiction of the Intermediate Court

Decisions about jurisdiction in a two-tiered appellate system are difficult and complex. This report recommends that Virginia adopt the streamlined jurisdictional arrangement proposed by the ABA Appellate Standards. In general, appeals from the circuit court should be appeals of right to the intermediate court, and the Supreme Court should have discretionary jurisdiction over all intermediate court decisions.

Several major topics are encompassed by this general recommendation: whether there should be appeal of right to the intermediate court, whether some cases should be appealed directly from the trial courts to the Supreme Court, and whether the intermediate court should be a court of last resort in some types of appeals. These will be discussed in this section. An additional jurisdictional question, whether the intermediate court should be divided into divisions with separate territorial jurisdictions, will be addressed in the following section, which describes the proposed structure of the intermediate court.

Appeal of Right and Review Procedures. There should be appeal of right to the intermediate court from all final decisions of the circuit court. Under present standards of fairness in this country, "it is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court . . . [as] a protection against error, prejudice, and human failings in general."[11] But an appeal of right, as is discussed below, does not require a long, cumbersome appellate process.

The distinction between appeal of right and discretionary review is not always clear. Appeal of right implies that the appellate court makes a single decision in each case. Discretionary review implies that the court makes an initial decision whether to let the lower court result stand or to study the case to make a decision on merits. Appeal of right also implies more thorough consideration of the case than most courts give when exercising discretionary review.

In recent years, however, procedures in appeals of right have approached those used in discretionary review. Traditionally, judges decided an appeal only after reading the briefs and record, hearing lengthy oral argument, and preparing a published opinion. But in the past two decades, the appellate workload explosion has caused many courts, especially intermediate courts, to curtail elements of the traditional procedure. Study of the record, or even the briefs, is left to staff attorneys and law clerks. Oral arguments are shortened and frequently not allowed at all. Decisions are announced in short, unpublished memoranda opinions. In a few courts, many cases are decided without any opinion. That is, the procedures in appeals of right have approached those used in discretionary review, such as in the petition stage at the Virginia Supreme Court.

In recommending an appeal of right, therefore, this report does not suggest that the intermediate court use all elements of the traditional appellate procedure. The court may wish to decide many cases without oral argument or without full-length published opinions.

Decisions could be made with short memorandum opinions, which might refer simply to a prior decision that controls the issues raised. Decisions by simple order, such as those in the petition stage in the Supreme Court, are also possible (though ABA Appellate Standard 3.36 advises against such a procedure). The briefs in the Court of Appeals would be the same short, photocopied briefs now submitted to the Supreme Court with petitions to appeal.

Appeal of right does mean, and this report recommends, that the court not have two separate decision stages (one to decide whether to grant review and a second to decide appeals granted). More important, appeal of right means that the intermediate court should satisfy certain minimum standards for the thoroughness of review. Here we rely upon the ABA Appellate Standards to provide guidelines. These were mentioned in the previous paragraph and earlier in this chapter when discussing procedures in the petition for appeal stage in the Supreme Court. A basic reason for the proposed intermediate court, in fact, is to supply judicial capacity sufficient to meet the ABA Standards.

Division of Jurisdiction. The states have designed a great many ways to divide jurisdiction over initial appeals between supreme courts and intermediate courts. This report recommends that Virginia substantially comply with the ABA Appellate Standards in this regard. Standard 3.10 states that initial review should ordinarily be taken to the intermediate court, and not the supreme court. The rationale given (and the rationale stated earlier by the Court Study Commission for its recommended appellate court jurisdiction) is that the Supreme

Court should concentrate on the law-making function of appellate courts and the intermediate court should concentrate on the error-correcting function. Original jurisdiction writs, because they seldom involve important issues, should also be filed in the intermediate court instead of the Supreme Court.

Standard 3.10 gives two exceptions to the general rule that all initial appeals be filed in the intermediate court: a) states may provide for direct appeal to the supreme courts in death penalty cases, and b) supreme courts should be permitted to bypass the intermediate court in "cases of great and immediate public importance," either at the request of a party or on the court's own motion. The division of jurisdiction between the Virginia Supreme Court and intermediate court should deviate from the ABA model in two respects.

First, the Supreme Court should continue to have mandatory jurisdiction over those cases in which it now has mandatory jurisdiction. Besides death penalty cases, permitted by the ABA Standards, the Court should also have sole, mandatory jurisdiction over appeals from the Corporation Commission, and original jurisdiction in bar discipline cases and Judicial Review and Inquiry Committee matters. It is presently believed that these cases are worthy of full-scale treatment by the Supreme Court; whatever the reasons for this belief, they would not be affected by the creation of an intermediate court. We emphasize, however, that cases in these categories constitute a small portion of the Court's present caseload and would continue to account for a minor part of the Court's workload after an intermediate court is created.

Second, the Supreme Court should have authority to bypass the intermediate court in any appeal, not just cases of great and immediate public importance, as suggested by the ABA Standards. This authority, which is often given to state supreme courts, would allow the Supreme Court to relieve the intermediate court whenever caseloads temporarily rise beyond the new court's capacity to decide cases expeditiously. The bypass authority however, should not be used as a substitute for expansion of the intermediate court necessitated by increased volume.

The division of appellate jurisdiction recommended here, essentially the ABA model, is in accord with the trend among other states. Maryland, for example, recently adopted the ABA model. Nevertheless, it should be recognized that in most states with intermediate courts a large number of initial appeals go to the supreme court. Certain types of cases--for example, appeals from major felony convictions--may go directly to the supreme court; or the supreme court may screen all appeals, apportioning some to itself and some to the intermediate court. These arrangements have the advantage of limiting the number of second appeals. But they have numerous disadvantages. The most important problem when jurisdiction is divided along subject-matter lines is that the supreme court's caseload becomes excessive as the volume of appeals falling within its mandatory jurisdiction increases. The major problem when the supreme court itself divides cases between itself and the intermediate court is that the top court tends to pass on only the dull, routine cases, making intermediate court judgeships unattractive.

Review of Intermediate Court Decisions. The Supreme Court should have discretionary review of intermediate court decisions. That is, there should be no appeal of right from the intermediate court, and the supreme court should have the authority to review any intermediate court decision upon request of a party. Both recommendations are in accord with ABA Appellate Standard 3.10.

Appeal of right from intermediate courts in a few states is available in several circumstances: a) when the case contains certain specified issues, b) when there is a dissent in the intermediate court, or c) when the intermediate court certifies the case to the supreme court. The basic problem with all these arrangements is that they can require second appeals in cases that do not have sufficient law-making importance to justify Supreme Court review. For example, there is little reason for the Supreme Court to review a non-unanimous intermediate court decision concerning sufficiency of evidence. Also, the Supreme Court may disagree with the intermediate court's judgment when the latter certifies that the issues in a case are sufficiently important to merit a ruling by the top court. Dissents below and non-binding certifications, however, would be valuable indications to the Supreme Court that it should grant discretionary review.

It is very important that the Supreme Court not be precluded from reviewing certain types of intermediate court decisions. The Court should have authority to manage and develop the state's jurisprudence in all areas of the law. Only one state, Florida, has attempted to vest a significant amount of final jurisdiction in intermediate courts. The result has been nothing short of chaos; the Florida Supreme Court has strained to expand its control over the Courts of

Appeals, creating a confusing body of law intended to regulate when it will or will not review the lower appellate court.[12]

Organization and Cost of the Intermediate Court

This section will discuss several important details of the workings of the proposed intermediate court. The National Center recommends that the court be centralized: it should be based in Richmond, and to the extent possible it should share Supreme Court facilities, such as the clerk's office. The court should have 12 judges initially, although more judges will be needed later if caseloads continue to expand at their present rate. The new court will cost about $1,353,500 a year at present prices, and the initial start-up costs will be about $120,000.

Centralization and Panels. The court should be centralized, and the administrative functions and judges' offices should be located in Richmond. The court, however, would sit in three-judge panels, the procedure used by almost all intermediate courts in the country. Panel assignments would rotate; each judge should sit regularly with each of his colleagues. The court should not hold en banc hearings, since panel conflicts can be resolved by the Supreme Court. The court should be empowered to hold panel hearings outside the capitol.

There are two major reasons for the centralization recommended here--to ensure caseload balance among judges and panels, and to reduce the court's cost.

Appendix F

Breakdown of Civil Case Categories in the Circuit Courts of Virginia

Contract Cases

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

Real Property, Landlord Tenant & Condemnation

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

Wills & Trusts Cases

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

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

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

Administrative Agency Review

Filing Code	Subject	Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
AAPL	ADMINISTRATIVE APPEALS	**82**	**44**	**12**	**26**
ABC	APPEAL - ABC BOARD	**4**	**3**	**0**	**1**
ACOM	APPEAL - COMPENSATION BOARD	**5**	**3**	**2**	**0**
AGRI	APPEAL - AGRICULTURE & CONSUMER SERVICES	**1**	**0**	**0**	**1**
AVOT	APPEAL - VOTER REGISTRATION	**37**	**21**	**9**	**7**
DRIV	REINSTATE DRIVING PRIV.	**879**	**397**	**184**	**298**
EMP	APPEAL - EMPLOYMENT COMMISSION	**21**	**13**	**1**	**7**
GRV	GRIEVANCE PROCEDURES	**8**	**8**	**0**	**0**
MAR	APPEAL MARINE RESOURCES	**1**	**1**	**0**	**0**
REST	RESTORE DRIVING PRIVILEGE	**1,225**	**344**	**387**	**494**
		2,263		**595**	**834**

Other General Civil Cases

CASE CATEGORY		Circuit Ct. Cases ended in 2019	Ended by Settlement or w'drawn	Ended by Trial, thus Appealable	Other Case Closings Possibly by Appealable Rulings (Maximum Estim.)
ACCT	ACCOUNTING	28	19	2	7
ATT	ATTACHMENT	11	6	4	1
CC	COUNTER CLAIM	348	238	29	81
CCON	CIVIL CONTEMPT	270	237	15	18
CJ	CONFESS JUDGM'T	344	41	40	263
COM	COMPLAINT - CATCH-ALL	3,339	2,263	442	634
COMP	APPROVE SETTLM'T (INJURY/ DEATH)	3,211	2,504	269	438
CROS	"CR" CROSS CLAIM	92	54	15	23
CSVP	CIVIL COMMITMENT OF SEXUAL PRED	24	4	10	10
CTP	THIRD PARTY DEF'T IMPLEADED	56	50	2	4
DECL	DECLARATORY JUDGMENT	630	375	153	102
GACC	COUNTERCLAIM	35	18	4	13
GAMJ	GAPL-MOTION FOR JUDGMENT	54	39	12	3
GARN*	GARNISHMENT	11,752	9,326	446	1,800
GAWD	WARRANT IN DEBT	804	533	192	79
IC	INVOL. COMMTM'T	211	152	8	51
INJ	INJUNCTION	263	186	37	40
INTD	INTERDICTION	133	47	19	67
INTP	INTERPLEADER	172	71	33	68
INTR	INTERROGATORY SUMMONS	501	452	1	48
MJ & MJAL	MOTION FOR JUDGMENT	211	111	0	100
PET	PETITION Catch-all	7,660	3,855	448	3,357
REM	REMOVAL	19	8	4	7
SS	TRANSFER STRUCT. SETTLEMENT	191	64	45	82
ST	STATUS PETITIONS	13	10	3	0
VEND	ENFORCE VENDOR'S LIEN	4	3	0	1
		30,376		2,233	7,297

Injury and Death Actions

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