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January 14, 2021

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

Justices of the Supreme Court of Virginia
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219-1315

Re: 2020 Report of the Judicial Council of Virginia

Dear Members of the General Assembly and Justices of the Supreme Court of Virginia:

As Secretary of the Judicial Council of Virginia, I am pleased to submit the 2020 Report of the Judicial Council, as required by Code § 17.1-705.

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

With best wishes, I am

Very truly yours,

Karl R. Hade

KRH:jrp


cc: Division of Legislative Automated System

2020

Judicial Council of Virginia



Report to the General Assembly and Supreme Court of Virginia



The Judicial Council of Virginia
2020 Report to the General Assembly and Supreme Court of Virginia
Supreme Court of Virginia, Office of the Executive Secretary
Richmond, Virginia
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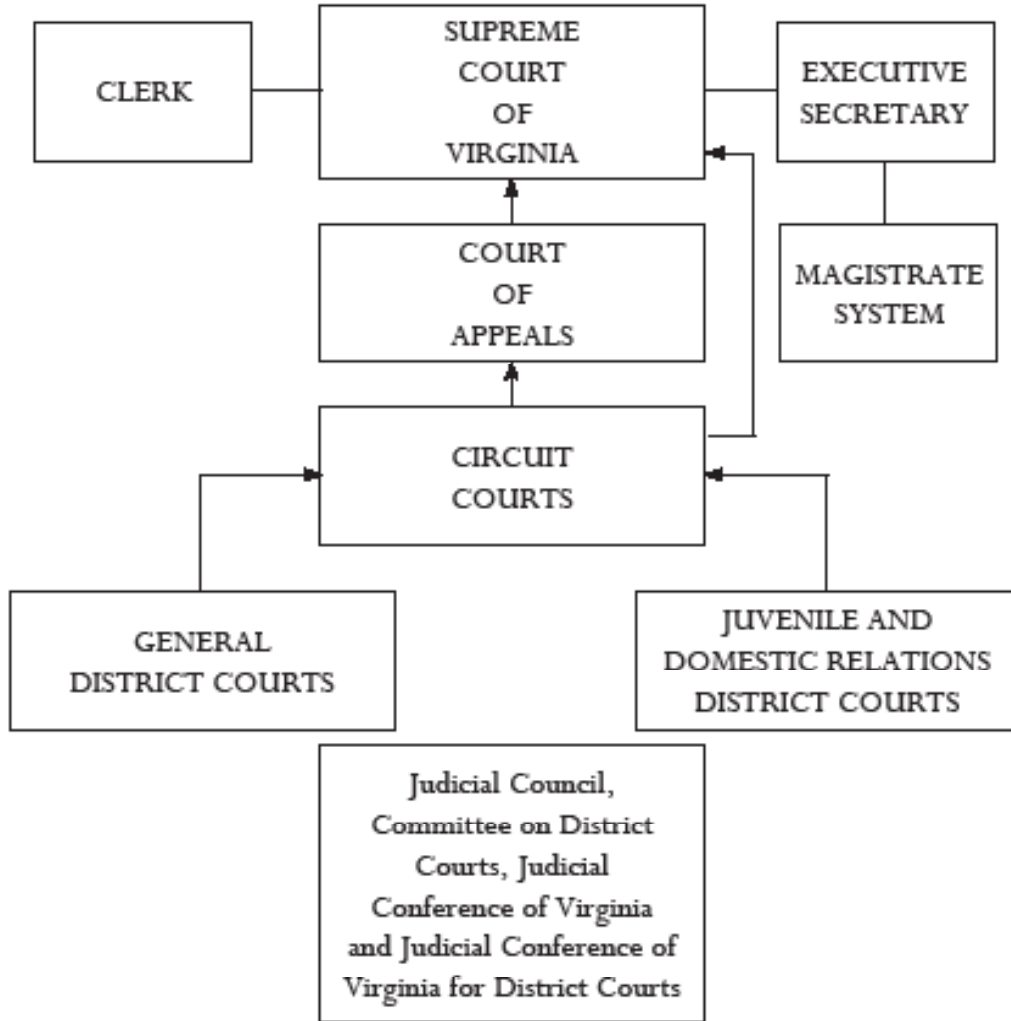
THE JUDICIAL COUNCIL OF VIRGINIA

Membership as of December 31, 2020

The Honorable Donald W. Lemons	Chief Justice, Supreme Court of Virginia
The Honorable Marla Decker	Chief Judge, Court of Appeals of Virginia
The Honorable Jerrauld C. Jones	Judge, Fourth Judicial Circuit
The Honorable Thomas J. Wilson, IV	Judge, Twenty-Sixth Judicial Circuit
The Honorable Douglas L. Fleming, Jr.	Judge, Twentieth Judicial Circuit
The Honorable Cheryl V. Higgins	Chief Judge, Sixteenth Judicial Circuit
The Honorable Stacey Moreau	Judge, Twenty-Second Judicial Circuit
The Honorable Deanis Simmons	Chief Judge, Twenty-Eighth Judicial Circuit
The Honorable Jay E. Dugger	Chief Judge, Eighth Judicial District
The Honorable George Barton Chucker	Judge, Fourteenth Judicial District
John S. Edwards	Chair, Senate Courts of Justice, Senate of Virginia
Charniele L. Herring	Chair, House Courts of Justice, Virginia House of Delegates
Monica Taylor Monday, Esquire	Attorney-at-Law, Member of the Bar of the City of Roanoke
Michael N. Herring, Esquire	Attorney-at-Law, Member of the Bar of the City of Richmond
Karl R. Hade*	Executive Secretary

*Ex-officio

VIRGINIA'S JUDICIAL SYSTEM



Route of Appeal →

I. PROCEEDINGS OF THE JUDICIAL COUNCIL OF VIRGINIA

INTRODUCTION

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

PROCEEDINGS OF THE JUDICIAL COUNCIL

Study of the Jurisdiction of the Court of Appeals of Virginia

Chief Justice Donald W. Lemons first constituted a Working Group in 2018 to study the appellate jurisdiction of the Court of Appeals of Virginia (“CAV”) and to make recommendations on whether it should have jurisdiction over appeals as a matter of right in all civil and criminal cases. The Working Group was reconstituted in 2020 in accordance with SJ 47, which requested that the Judicial Council of Virginia study the jurisdiction and organization of the Court of Appeals of Virginia, including any recommendations on the provision of an appeal of right from the circuit courts to the Court of Appeals, organization of the Court of Appeals into four geographic circuits, any necessary additional statutory changes, and development of a proposed budget and implementation plan.

After review of extensive background materials set forth in the Working Group’s Report, the Judicial Council on October 22, 2020, discussed and unanimously approved the report of the Working Group, which included the following recommendations:

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 appellate staff will be needed for the Office of the Attorney General.
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 the 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 of the Report.

Rules of Procedure for Filing Complaints Against Commissioners of Accounts

The Judicial Council considered and approved a report from the Standing Committee on Commissioners of Accounts requesting revisions to the current Rules of Procedure for Addressing Complaints and Inquiries to that Standing Committee. The revisions address a range of issues that were identified based upon workload increases and experiences of Commissioners of Accounts since the current Rules were adopted in 2004. The revisions will allow prescreening of complaints so that time and effort will not be expended on complaints that are inadequate for reasons stated in the Rules. In addition, the revisions will eliminate inquiries by which one party could obtain *ex parte* advantages that could both disadvantage other interested parties and result in recusal by members of the Standing Committee. The revisions also add provisions regarding conflicts of interest and rehearings for which the Rules previously had no provision. The revised Rules will go into effect April 1, 2021.

Appellate Mediation

In 2017, at the request of Chief Justice Donald W. Lemons, the Joint Alternative Dispute Resolution Committee of the Virginia State Bar and the Virginia Bar Association established a Special Committee to Study Appellate Mediation in Virginia. In 2018, the Special Committee recommended the establishment of mediation pilot projects in the Commonwealth's appellate courts. The Supreme Court approved the recommendation. The appellate mediation pilot projects began January 1, 2019, and were scheduled to end December 31, 2020. Upon the recommendation of the Special Committee, the Supreme Court approved extending the pilot projects for two years, to expire December 31, 2022.

To accompany the pilot projects, the Judicial Council adopted two new levels of certification for appellate mediators: CAV and SCV. Like the pilot projects, the new appellate certification levels were scheduled to expire December 31, 2020. The Special Committee's early research had revealed a need for additional training and expertise specific to appellate mediation in Virginia. It believed the SCV and CAV certification levels and associated training requirements bolstered expertise associated with appellate mediation in the Commonwealth. Accordingly, independent from the extension of the pilot projects, the Special Committee recommended that the Judicial Council permanently incorporate the appellate level certifications into the Virginia mediator certification scheme. Key proposals included:

- Make permanent the SCV and CAV appellate mediator certification levels; and
- Make permanent the 2-hour Appellate Training program and associated trainer qualifications.

Dispute Resolution Services also recommended several minor revisions unrelated to the appellate certification levels.

The Judicial Council adopted the appellate mediation certification proposals, in addition to the other recommended revisions, at its October 22, 2020, meeting. The revised *Guidelines for the Training and Certification of Court-Referred Mediators* and *Guidelines for the Certification of Mediation Training Programs* became effective November 1, 2020.

LEGISLATIVE PROPOSALS FOR THE 2021 SESSION OF THE GENERAL ASSEMBLY

Expansion of the Use of Audio/Visual Technology Beyond Pretrial Proceedings in Limited Circumstances.

The Judicial Council of Virginia recommends a proposal that would allow, not require, the court to use two-way electronic video and audio communication for (i) entry of a plea of guilty or nolo contendere and the related sentencing of the defendant charged with a misdemeanor or felony, (ii) entry of a *nolle prosequi*, or (iii) adjudication of an alleged violation of probation. Such an appearance would require the consent of the court and all parties. This proposal was recommended to Council by the Judicial Conference of Virginia.

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-3.1 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-3.1. Personal appearance by two-way electronic video and audio communication; standards.

A. Where an appearance is required or permitted before a magistrate, intake officer or, prior to trial, before a judge, the appearance may be by (i) personal appearance before the magistrate, intake officer or judge or (ii) use of two-way electronic video and audio communication. With the consent of the court and all parties, an appearance in a court for the purpose of (i) entry of a plea of guilty or nolo contendere and the related sentencing of the defendant charged with a misdemeanor or felony, (ii) entry of a nolle prosequi, or (iii) adjudication of an alleged violation of probation may be by two-way electronic video and audio communication.

If two-way electronic video and audio communication is used, a magistrate, intake officer or judge may exercise all powers conferred by law and all communications and proceedings shall be conducted in the same manner as if the appearance were in person. If two-way electronic video and audio communication is available for use by a district court for the conduct of a hearing to determine bail or to determine representation by counsel, the court shall use such communication in any such proceeding that would otherwise require the transportation of a person from outside the jurisdiction of the court in order to appear in person before the court. Any documents transmitted between the magistrate, intake officer, or judge and the person appearing before the magistrate, intake officer, or judge may be transmitted by electronically transmitted facsimile process or other electronic method. The facsimile or other electronically generated document may be served or executed by the officer or person to whom sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures thereon shall be treated as original signatures.

II. RECOMMENDED CHANGES TO RULES OF COURT

BACKGROUND

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

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

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

CHANGES TO RULES OF COURT RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2019 THAT BECAME EFFECTIVE IN 2020

At the October 17, 2019, meeting, Judicial Council considered and made recommendations regarding promulgation of a rule governing appeal of civil cases from general district court to circuit court. By Order dated November 1, 2019, effective January 1, 2020, Rule 7B:12, Appeal by One Party; Separate Notices of Appeal by Other Parties, was promulgated.

RULE CHANGES RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2020

Also at the October 17, 2019, meeting, Judicial Council was presented with amendments to Rule 1:27, Testimony by Audiovisual Means in Court Civil Cases; Rule 4:5, Depositions Upon Oral Examination; and Rule 5A:25, Appendix [for cases filed in the Court of Appeals]. These amendments, recommended by Judicial Council, were made by Order dated January 9, 2020, effective March 15, 2020.

Finally, at the October 17, 2019 meeting, Judicial Council considered and recommended to the Court a proposal to revise the Rules of Court to eliminate the use of "shall" throughout the Rules. This recommendation was effected by two separate Orders. The first, entered November 13, 2020, and effective July 1, 2021, would amend Part Two of the Rules, Virginia Rules of Evidence, consistent with the timeline set forth in Virginia Code § 8.01-3(E). The second Order, entered November 23, 2020, and effective March 1, 2021, amends the rest of the Rules, excluding Parts 2, 3B, 3C, 3D, 6, and the Medical Malpractice Rules of Practice, to eliminate the use of the word "shall."