On Appeal

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Appellate Mediation

Two certified appellate mediators talk shop

Millette

Emmert

While pretrial mediation has seen tremendous growth in the past 20 years, appellant litigants have been slower to embrace this valuable process. **Senior Justice LeRoy F. Millette, Jr.** of the Supreme Court of Virginia and appellate lawyer **L. Steven Emmert** of Sykes, Bourdon, Ahern & Levy, P.C. in Virginia Beach are two of the Commonwealth's five certified appellate mediators in non-domestic-relations civil appeals. Justice Millette, who maintains a flourishing mediation practice with The McCammon Group, recently agreed to share with Steve his perspectives after having mediated several cases on appeal.

Q I know that you have an active mediation practice for cases that are still in the trial courts. How's "business" in the appellate mediation field?

A Mediation for appellate cases has not been utilized to a significant degree. Even anecdotally, there has not been a great demand to date. We have almost always had a relatively short waiting period for the disposition of appellate cases, perhaps in part because of the Supreme Court of Virginia's discretion in granting cases for appeal. Therefore, up to now, the risk of a long delay has not been a factor that might drive the use of appellate mediation.

Q Why do you think that appellate litigants hesitate to mediate? Is there something more that the courts or the appellate bar can do about that?

A I do not think that appellate litigants frequently choose mediation. It would seem that the appellant would frequently be open to an alternative way to resolve a case, especially if the appellant has given careful consideration to the outcome of the litigation to date and the appellant's increased risk after a case has already been resolved in the circuit court. I can more readily understand the appellee's reluctance to agree to mediation in a case that the appellee has already won.

There is, however, one other thing that we haven't discussed, which is my belief that appellate lawyers enjoy the process of arguing their cases before the appellate courts. I have had many occasions when lawyers would relate to me in great detail their experiences in arguing before the appellate court and their appreciation for the intellectual exercise involved in the appellate process. While I don't think that any

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Also in This Issue

Chair's Report

By Jay O'Keeffe

Welcome to the latest issue of *On Appeal*, the Appellate Practice Section's newsletter.

We are proud to offer this issue in hard copy to attendees of the section's signature event, the Appellate Summit that we hold in Richmond. This event brings together judges, clerks and top-level practitioners to discuss the latest developments in Virginia appellate practice. Topics range from the granular (such as practice tips about lesser-known corners of appellate arcana) to the overarching (like an assessment of the expansion of the Court of Appeals of Virginia). This year, we're thrilled to offer a fantastic lineup of speakers, including folks who are not yet regulars on the Virginia CLE speaking circuit, and we are especially excited to hear from some of our colleagues in public service.

But you're probably not reading this to hear a pitch for the Appellate Summit; with any luck, you're here, and even if you're not, those pitches have been flooding your inbox for weeks anyway. So let's get to the main event. This issue includes:

- An interview that Steve Emmert, dean of the Appellate Bar, conducted with Senior Justice LeRoy F. Millette Jr. about Virginia's appellate mediation program;
- Erin DeBoer on the art of storytelling in legal writing;
- Graham Bryant on interlocutory appeals; and
- Thomas DiStanislao's thoughts on practice in the 4th Circuit.

Finally, a few thank yous are in order. First, we would like to thank everyone who helped to put the summit together, including all our speakers, Megan Connor and Sunni O'Brien at the VBA, our generous hosts at McGuireWoods and the indefatigable members of our planning committee: Robert Loftin, Steve Emmert, Trevor Cox, Juli Porto and Julie Palmer.

And as always, we are hugely grateful for all the work that Graham Bryant and Marilyn Shaw devote to recruiting authors, editing submissions and pulling this whole thing together.

— Jay

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lawyer would advise his or her client to pursue an appeal based upon that factor, it makes sense that appellate lawyers have chosen this area of the practice and appreciate the opportunities to practice their craft.

Q That leads me to wonder how much influence appellate lawyers can have in addressing this reluctance.

A There may be a feeling that "I may have been open to a mediated outcome before the trial but now that I have gone to the time and expense of a trial, why should I give up my success?" This puts a real burden on the appellant or other party who is seeking the mediation to find convincing reasons as to why there is sufficient risk to go to mediation.

An interesting subset of cases that are eligible for appellate mediation may involve "re-mediation," when mediation was unsuccessfully employed to try to settle the case before trial. In those cases, there may be some interesting arguments about allocation of the risk of a retrial and the benefits to everyone to have this case resolved expeditiously through mediation. The parties may well be able to build upon any prior movement that they obtained in the earlier mediation.

An interesting subset of cases that are eligible for appellate mediation may involve 're-mediation,' when mediation was unsuccessfully employed to try to settle the case before trial.

Q What are the chief differences that you see between appellate and pretrial mediation? Do you approach the two differently?

A The biggest difference between appellate and pretrial mediation has to do with the assessment of risk in the outcome of the case. The uncertainty of the result, particularly when a jury is involved, is one of the biggest driving forces in mediation. When mediating cases before trial, the parties may have a degree of uncertainty concerning what the case will look like when it does get to the jury. That risk, along with the overall risk in the outcome of the case before a jury, is a significant factor in pretrial mediation.

In appellate mediation, I think one of the determinative factors is whether the case has resulted in a final judgment without a trial on the merits, or whether there has been a trial on the merits. I think that it is much harder for an appellant to proceed with appellate mediation when the appellee is armed with a judgment based upon a trial on the merits. On the other hand, if the case was resolved by means of a demurrer or mediation, the mediator must address the risk involved in the particular case. If there is risk of a remand for a new trial when there has not already been a trial on the merits, then many of the risks inherent in a pretrial mediation may still be in play. On the other hand, if there has been a trial on the merits, then the discussion of risk may focus more on the delay and expense as well as the risk of a different outcome involved in the appellate process.

Q Let me ask, then, about the mediator's craft. How do you, for example, prise a stubborn appellee out of the emotional shell of knowing that she's already won, and believing that she shouldn't have to settle?

A One of the ways that I attempt to address the verdict in the appellee's favor is by discussing the appellee's goal. I try to explain that if the goal is to have the verdict satisfied in a reasonable time, then we need to think about the risk before an appellate court and the possibility of reversal or remand and a new trial. I explain that we need to think about the cost involved in getting through the process and the time that it will take to work through that process. And finally I discuss the emotional and mental stress involved in the adversarial litigation process. I explain to the appellee that our goal should be to determine whether there is a result that we can reach through mediation that can be compared to the alternative of the lengthy and uncertain process inherent in an appeal.

Q Let's turn to the mechanics of the process. When do you prefer to receive a mediation request — at the outset of an appeal, or after the briefs are in?

A It is always important for the mediator to understand the issues involved in an appellate mediation, and appellate mediators are very experienced in analyzing briefs, so after the brief has been filed will often provide a comfort level to the mediator. However, in many cases there has been substantial briefing available in the circuit court, which may be all that the mediator needs.

Building upon my prior answer, if the appeal involves an issue that has disposed of the case prior to a determination after a full trial, there may be a benefit in requesting a mediation at the earliest possible time,

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when the risk of a remand for a trial on the merits can be expeditiously addressed.

Q What about the new appellate framework? In your opinion, does the appeal of right make it easier or tougher for a mediator to get warring parties together on a settlement?

A It is my opinion that the new appellate framework will provide greater opportunities for a mediator to address the alternative of mediation with appellate litigants. I believe that there will be a significant impact in the length of time that it will take to dispose of a case. The length of time that it may take for a case to be resolved, as well as the expense involved in appellate litigation and potential retrial, are significant areas of risk for litigants. The right of appeal to the Court of Appeals of Virginia as well as the potential for an appeal to the Supreme Court of Virginia are risks that many litigants may find significant in assessing whether to attempt to resolve the case through mediation.

My advice to lawyers is to emphasize the collaborative nature of the mediation process. The case is not going to be won or lost at mediation. A result can only be reached if both sides agree.

Q The Supreme Court's program allows litigants an automatic stay of briefing deadlines when the parties agree early to mediate the case. What's your sense — understanding that you aren't speaking for the Court; just for yourself — of whether the Court will allow a discretionary stay if the parties agree later to try the process? And how about a second extension, if the parties are close but not quite there yet?

A My experience with the Supreme Court leads me to believe that both courts will allow a discretionary stay if the parties agree later in the process or possibly even a second extension — as long as the court believes that the parties are making legitimate efforts toward resolution and not just using the extension as a delay factor. I think that this answer turns on a balancing of effective use of judicial resources and efficient management of dockets.

Q What are some of the more common mistakes that lawyers make in mediation sessions?

A Mediation is designed to be a collaborative process. Obviously, the facts of the case are of the utmost importance, but it is necessary to make an effort to shift from an adversarial approach to a collaborative approach. Mediation is designed to include a frank discussion and appraisal of the evidence and the legal issues involved.

I think that some lawyers are reluctant to acknowledge either strengths in their opponent's case or weaknesses in their own cases. All cases have both strengths and weaknesses, and an effective mediation addresses those factors in a collaborative manner in order to seek a resolution.

Another mistake has to do with opening presentations. In some cases, such as when it is early in the process, perhaps before a suit has been filed or prior to sufficient discovery, a presentation may be very useful. A presentation may also be useful when some new information is being presented. I don't think that a presentation is useful when a party is not really furnishing new information but instead is merely arguing the case.

Q As the mediator, you don't see the pre-mediation conversations between lawyer and client. That early exchange can make a big difference in whether the case settles. What advice do you have for advocates who are preparing their clients for the process?

A My advice to lawyers is to emphasize the collaborative nature of the mediation process. The case is not going to be won or lost at mediation. A result can only be reached if both sides agree. It really is the best opportunity to see whether there may be common areas for a meeting of the minds between the parties on some areas of disagreement if not a complete resolution.

I have had many cases where there have been partial resolutions reached during a mediation which often lead to a complete resolution. So I would suggest that lawyers urge their clients to keep an open mind and realize that this dispute is going to be resolved by either the parties themselves, or else later by a judge or jury or possibly an appellate court. It is always helpful for clients to be open with the mediator so that the mediator can understand the real goal and how that goal might be achieved.

Finally, I think that it is important for lawyers to emphasize with their clients the benefits of the confidentiality safeguards of the mediation process.

The Art of Storytelling in Legal Writing

By Erin K. DeBoer, Managing Attorney, Appellate Practice
Liberatore DeBoer & Ryan, PC

Stories are memorable. And harnessing the power of storytelling in legal writing is a useful tool. Think back to law school. Do you remember all the details of the classes you took? Probably not. Do you remember any of the stories that your law professors told you? Perhaps.

Whether it's a class, sermon, speech, conversation with a family member, or written article, we often remember the stories.

As a legal writing professor, one of the most memorable classes I taught involved a story. I would harness my inner thespian and read aloud — with as much theatrical gusto as I could muster — "The True Story of the Three Little Pigs!" by A. Wolf. It begins,

> Everybody knows the
> story of the Three Little Pigs.
> Or at least they think they do.
> But I'll let you in on a little secret.
> Nobody knows the real story,
> because nobody has ever heard
> *my* side of the story.[1]

I won't spoil the story's ending, but a takeaway point for my legal writing class was the importance of perspective and themes in writing. There are two sides to every story, even for the Big Bad Wolf.

In legal writing, we get to tell our clients' side of the story. This does not mean telling tall tales or rewriting bad facts. However, we can write an effective "story" in a legal brief, in part, by developing a strong theory of the case and writing a compelling facts section.

Developing a Theory of the Case

When asked how he came to write "The Lion, the Witch and the Wardrobe," C.S. Lewis replied that it "all began with a picture."[2] For decades he had a picture in his mind "of a Faun carrying an umbrella and parcels in a snowy wood."[3] Then, he resolved "to make a story about it."[4] Although legal briefs do not begin with a picture, they should begin by crafting a theory of the case.

Like a picture that inspires a story, a theory of the case shapes a legal brief. It paints a picture that informs all major aspects of the brief. A theory of the case is the place where facts intersect with law and policy. Thus, it's helpful to develop your theory of the case before writing your facts section.

To develop a theory of the case, take a step back before jumping into writing. Consider the core of your case. Why should your client win? If a colleague asked you this question on the way to lunch, how would you answer it? Your answer can help you craft the theory of the case. You may have sub-themes along the way, but the theory of the case can inform how you characterize the facts and legal arguments.

In addition to the facts section, there are other places in legal briefs where you can emphasize your theory of the case and related themes. If the local rules allow an introduction section or summary of the argument, such sections are prime places to set the focus for your brief. In addition, places of emphasis within the argument section — such as topic sentences, concluding sentences and argumentative headings — can link back to your theory of the case. It is the "picture" you want the court to remember.

Writing a Compelling Facts Section

The facts section of a legal brief is one of the most important sections because it highlights the client's story and lays the groundwork for the legal arguments to come. Although legal arguments are not appropriate within the facts section, your factual account can complement your theory of the case. Four strategies for telling a memorable story in the facts section are selecting a point of view, engaging the reader with key themes, organizing the content and maintaining accuracy.

Point of View

In the story of the Three Little Pigs, the pigs and the wolf had dramatically different perspectives. When writing a legal brief, particularly the facts section, consider which point of view is most favorable to your client and best supports your theory of the case.

Select a point of view that compels the reader to sympathize with your client's position. For example, in a criminal case, a prosecutor might "zoom in" and tell the facts from the perspective of the victim. In a medical malpractice case, the hospital could explain the facts through the lens of the doctor or "zoom out" and address the facts from the perspective of the hospital's policies and protocols. The point of view, whether a firsthand account or an outside perspective, sets the stage for a compelling facts section.

Engaging the Reader with Key Themes

The opening lines of a story can set the tone and interest

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the reader. Similarly, when the facts section starts with a thematic statement, it can help the reader understand the essence of the case. One of the reasons a good story is memorable is that it resonates with its readers. We can relate to it. We can learn from it. We respond to it. Themes are an important part of creating something memorable and interesting, and such themes can be evident from the start.

Briefs and legal opinions are not required to be dry and tedious. Judges and justices read hundreds, even thousands, of pages of legal documents during an average work week. Be interesting. Begin your facts section with a memorable theme — something that gets to the heart of facts and law and compels the reader to keep reading.[5] This theme should directly relate to your theory of the case. What do you want the court to remember?

Similar to briefs, legal opinions can employ good storytelling techniques. For example, consider this opening line from a 9th Circuit opinion: "If this were a sci fi melodrama, it might be called Speech-Zilla meets Trademark Kong."[6] It's both catchy and hints at the legal issues involved in an appeal between musical companies who helped produce the song "Barbie Girl" and the toy company that made the Barbie doll.

Another great opening in a judicial opinion humorously states:

> There is a well-worn simile to describe something that is rather tedious and boring — "like watching paint dry." Discovery is often like that — and worse. Indeed, we have it on the best of authority that protracted discovery, [is] the bane of modern litigation. So, imagine what discovery regarding paint drying must be like.[7]

Or how about the late Justice Antonin Scalia referring to the Court's use of the *Lemon* test as being "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"?[8]

Concededly, a theme does not need to be as dramatic as a ghoul in a horror movie, but laying the groundwork for key themes in the facts section may help your brief become more interesting, memorable, and persuasive.

Organization

Even with a powerful perspective and key themes, organization is essential to create a clear and coherent story. Often chronological order is the best organizational structure for the facts section. Tell the facts in the order they transpired. Resist the urge to recount facts witness by witness, which not only impedes readability, but may also violate the court's rules.[9] Instead, unless there is a factual dispute, focus on summarizing the sequence of events. Include all facts that directly impact the legal issues as well as facts necessary for context or that offer persuasive value.

There are, of course, exceptions in which strict chronological order doesn't work well. Sometimes facts are better organized by topic. For example, in a brief concerning a new law that implicated an individual's free speech rights, the facts section for the individual could begin with the alleged First Amendment violation. Thereafter, the story might flash back to the enactment of the law and its impact on the community, perhaps including subsections for each topic.

Organization provides a framework for the reader to understand the client's story. Aim for a logical, easy-to-understand structure that highlights the best features of your client's story.

Accuracy

The drive to be engaging and compelling must not undermine the accuracy of facts. Although we can learn from stories, legal writing isn't fiction. Even the best written facts section cannot redeem lost credibility. In the facts section, select a perspective that presents your client in a favorable light. Emphasize themes that support your theory of the case. However, do not ignore or change the difficult or "bad" facts that are material to the outcome. Trying the ostrich-like technique of placing one's head in the sand is not a recommended legal strategy. Although "[t]he ostrich is a noble animal," it is "not a proper model for an appellate advocate."[10]

You do not need to shine the spotlight on bad facts, but you do need to acknowledge them and present them accurately. Moreover, keep in mind that the facts on appeal are the facts as found by the lower tribunal. Unless a factual finding is being challenged on appeal, the appellant must accept those facts. Accuracy buttresses credibility and helps the court seriously consider your client's story.

* * *

Perhaps, in a few weeks, the main detail you'll remember about this article is that it surprisingly involved pigs, a wolf and an ostrich. If so, may the pigs and wolf remind you of the importance of perspective. May the ostrich remind you to stay credible and keep your head out of the sand. And may the animal references remind you of the power of themes and motivate you to engage the reader.

ENDNOTES

1. Jon Scieszka, The True Story of the Three Little Pigs! 1 (Puffin Books 1989).
2. C.S. Lewis, On Stories: And Other Essays on Literature, 79 (HarperCollins 1982).
3. *Id.*
4. *Id.* at 80.
5. If a procedural history is included before the statement of facts, consider placing the thematic opening there.

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An Overview of Interlocutory Appeals in Virginia's Evolving Appellate Environment

By Graham K. Bryant, Deputy Solicitor General
Office of the Attorney General of Virginia

On Appeal published a discussion of developments in interlocutory appeals over two years ago, and the state of the law has changed dramatically since then.[1] This article builds on that previous discussion with two goals. First, it will untangle the convoluted interplay of legislation and judicial decisions that led to the present statutory regime governing interlocutory appeals. And second, it will walk through the current procedure for perfecting each of the major types of interlocutory appeals, highlighting common procedural pitfalls and practice pointers.

I. Arriving at the Current Statutory Regime

Virginia law now recognizes three primary types of interlocutory appeals:

1. Petitions for appeal to the Court of Appeals from interlocutory orders certified for appeal by a circuit court (Code § 8.01-675.5);

2. Petitions for review to the Supreme Court from orders granting, denying, dissolving, or refusing to enlarge a preliminary injunction (Code § 8.01-626); and

3. Petitions for review to the Supreme Court from orders granting or denying a plea of sovereign, absolute, or qualified immunity (Code § 8.01-670.2).

Although other statutes authorize additional forms of interlocutory appeals — such as pretrial appeals by the Commonwealth (Code § 19.2-398) and appeals from certain decrees or orders in equitable claims (Code § 17.1-405(A)(5)) — those appeals are available in narrow circumstances that the average civil litigator will encounter only infrequently.[2] Many litigators, however, will encounter the three types of interlocutory appeals noted above, which have become more common due to a series of legislative changes broadening their availability and utility.[3]

A. Procedural Upheaval Before and During Jurisdiction Expansion

In 2020, the General Assembly enacted a major reform to the then-existing interlocutory appeal procedures.[4] This legislation — adopted on the Boyd-Graves Conference's recommendation[5] — eliminated the requirement that "the parties agree" that an interlocutory appeal certified by the circuit court to the appellate court is "in the parties' best interest."[6] This mutuality provision had operated as a one-party veto and stifled otherwise meritorious interlocutory appeals.[7]

The legislation also created for the first time an avenue to appeal interlocutory orders on immunity questions modeled on the federal collateral order doctrine. Unlike the federal doctrine, however, both denied and granted immunity pleas are appealable. The legislation adopted the existing petition-for-review procedure established for injunctions in Code § 8.01-626 to govern immunity petitions for review. This area of law would not remain static—the statutory regime would undergo extensive and ongoing revisions as the General Assembly enacted and revised the jurisdiction-expansion legislation in coming sessions.[8]

The initial jurisdiction-expansion legislation changed interlocutory appeals in two major ways. First, it rerouted petitions for review of injunction and immunity rulings to the Court of Appeals with a subsequent appeal to the Supreme Court, meaning each of the major types of interlocutory appeals would be subject to two levels of appellate review.[9] And second, it shuffled the Code sections governing interlocutory appeals by repealing Code § 8.01-670.1, which briefly hosted both the procedures for petitions for appeal of orders certified by circuit courts and immunity petitions for review, and transferring those provisions to new Code § 8.01-675.5 under subsections A and B respectively.

Consistent with these changes, the legislation also amended the Court of Appeals' general jurisdictional statute, Code § 17.1-405, to provide that the Court had jurisdiction over "[a]ny interlocutory decree or order pursuant to … 8.01-626, or 8.01-675.5." In doing so, however, the General Assembly inadvertently deleted longstanding language authorizing appeals of certain interlocutory decrees or orders in equitable cases—an oversight that would soon be corrected.

B. 2022 Legislation Fixes — and Causes — Problems

The sea change in Virginia civil procedure brought on by the new legislation would begin a multisession process of revisiting the Court of Appeals' jurisdiction over interlocutory appeals as courts and litigators alike began to put the new appellate regime into practice.

Petition-for-review procedures came under particular

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scrutiny. Both immunity and injunction petitions share the same procedures set forth in Code § 8.01-626, including one of the most expedited timelines in Virginia law. A party seeking interlocutory review had to file a petition for review and accompanying record within 15 days of the order at issue, and the responding party had only 7 days to prepare and file a response brief. That fast pace follows from the nature of preliminary injunctions, which affect parties' rights before a court can fully adjudicate those rights.[10] The Code Commission viewed this avenue for immediate appellate review of "the trial court's action respecting an injunction" as "an extraordinary remedy" for which "a short period [for perfecting appellate review] is deemed appropriate."[11] The abbreviated timeline may have served those goals, but requiring the Court of Appeals to decide these time-sensitive petitions before subsequent review in the Supreme Court seemed inconsistent with the expedited procedure.

In light of these considerations, the General Assembly revised Code §§ 8.01-626 and 8.01-675.5(B) in 2022 to restore the Supreme Court's exclusive jurisdiction over petitions for review of both injunction and immunity rulings.[12] Consequently, the Court of Appeals had jurisdiction over interlocutory petitions for review for only six months: from January 1, 2022, to June 30, 2022. Despite this short window, the Court of Appeals nevertheless issued a rare published order on an injunction petition for review during this time — rare because these petitions are often resolved by unpublished order issued only to the parties.[13] Importantly, however, the 2022 legislation included a savings clause providing that any petition for review filed before July 1, 2022, would be unaffected by the legislation.[14]

The General Assembly made two other changes of note in 2022. First, it added the adjectives "preliminary or permanent" to the previously unqualified word "injunction" in Code § 8.01-626, providing clarity to a longstanding question about the statute's scope.[15] In its report on the 1977 recodification of the code's civil procedure title, the Code Commission left "to the courts" the "future relationship between [the Code § 8.01-626 injunction-review procedure] and the review of an injunction ruling embedded in a final order."[16] Although the Supreme Court had long limited the Code § 8.01-626 procedure to interlocutory injunction rulings, in 2015, that Court amended Rule 5:17A to permit petitions for review of injunction rulings in final orders.[17] The 2022 legislation followed this rule change and clarified in the statute that both interlocutory and final injunction rulings were subject to the expedited appeal procedure.

Second, the 2022 legislation again amended Code § 17.1-405 by removing the references to Code §§ 8.01-626 and 8.01-675.5 in the list of the Court of Appeals' statutory grounds for interlocutory appeals given that both kinds of petitions for review now went directly to the Supreme Court. In addition, the General Assembly realized that the 2021 changes to Code § 17.1-405 had "unintentional[ly] eliminated … reviews of interlocutory decrees or orders involving certain equitable claims from the jurisdiction of the Court of Appeals," so the 2022 legislation restored the Court of Appeals' jurisdiction over these equitable interlocutory orders in Code § 17.1-405(5).[18]

As 2022 ended, litigators could be forgiven for thinking interlocutory appeal procedure had settled. In fact, the 2022 legislation had sown the seeds for even more changes. For one thing, the statutory structure for immunity petitions for review to the Supreme Court was a source of confusion. This type of appeal was authorized by subsection B of Code § 8.01-675.5 — a statute situated in the chapter of Title 8.01 governing "Appeals to the Court of Appeals" that otherwise governed petitions for appeal to the Court of Appeals from orders certified by a circuit court — and it incorporated by reference the petition-for-review procedures set forth at Code § 8.01-626.

For another, the seemingly ministerial amendment removing the reference to interlocutory appeals pursuant to Code § 8.01-675.5 from the Court of Appeals' general jurisdictional statute, Code § 17.1-405, created a question whether the reference in Code § 8.01-675.5(A) to petitioning the Court of Appeals for appeal of orders certified by circuit courts, without more, was adequate for that Court to exercise jurisdiction over such petitions.

C. 2023 Legislation Helps Settle the Law

Recognizing these potential issues, the Judicial Council of Virginia in its 2022 Report proposed technical corrections for the General Assembly to consider during its 2023 session.[19] But before the legislature could act on those recommendations, its deliberations were outpaced by events.

On February 16, 2023, the Court of Appeals issued an unpublished order interpreting the General Assembly's 2022 "amendment to Code § 17.1-405(4) that deleted Code § 8.01-675.5 from its explicit list of appealable statutes" "as removing petitions for interlocutory review under Code § 8.01-675.5(A) from this Court's jurisdiction."[20] The Court rejected the argument that "Code § 8.01-675.5 itself provides a jurisdictional grant to this Court," instead viewing the statute "as merely providing *a procedural framework* through which to appeal to this Court."

Once word of this order spread — it was an unpublished order issued to the parties alone — it caused a shockwave in the appellate bar. Interlocutory petitions for appeal of orders certified by a circuit court were no longer cognizable in any court, and attorneys throughout the Commonwealth found themselves without a key litigation tool. Fortunately, the timing of the order allowed the General Assembly to act promptly.

The General Assembly unanimously adopted substantial

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gubernatorial amendments to Senate Bill 810 — previously introduced and passed legislation adjusting the Code § 8.01-626 procedure — restoring Code § 8.01-675.5 to the list of statutes over which the Court of Appeals possessed jurisdiction in Code § 17.1-405(4).[22] S.B. 810 also included an enactment clause stating that this change was "declarative of existing law" to indicate that the General Assembly had never intended to divest the Court of Appeals of jurisdiction over Code § 8.01-675.5(A) appeals.[23] The legislation also included an emergency clause. As a result, orders certified by a circuit court have once again been appealable to the Court of Appeals since the General Assembly passed the legislation on April 12, 2023.

Beyond revitalizing Code § 8.01-675.5(A) appeals, S.B. 810 implemented the technical corrections proposed by the Judicial Council, including once again moving the statutory home of petitions for review of immunity rulings. The legislation repealed Code § 8.01-675.5(B) and moved the language establishing immunity petitions for review to a new statute situated in the code chapter governing Appeals to the Supreme Court, Code § 8.01-670.2. This new statute retains the language from former Code § 8.01-675.5(B) at subsection A and reproduces the same trial-level procedural provisions applicable to petitions for appeal of orders certified by circuit courts at subsections B and C. Petitions for review of immunity rulings continue to incorporate the appellate procedures set forth at Code § 8.01-626.

Finally, S.B. 810 made two important procedural tweaks to Code § 8.01-626. First, returning to the longstanding debate over which types of injunctions should be appealable, the legislation repealed the 2022 language authorizing petitions for review of permanent injunctions, restoring the 1981-to-2015 status quo in which only rulings on preliminary injunctions could be immediately appealed.[25] Because permanent injunctions are generally the products of final orders, they are subject to appeal of right to the Court of Appeals in the ordinary course, and the expedited petition-for-review procedure is unnecessary.[26] And second, recognizing the substantial burden of responding to a potentially unforeseen petition for review — including reviewing the brief and record, researching, and drafting a response of up to 20 pages — the legislation expanded the former 7-day deadline to 15 days.

But S.B. 810 was not the General Assembly's only significant change to interlocutory appeals with an emergency clause in 2023. Senate Bill 895 picked up where the 2022 legislation's amendments left off. The 2022 amendments had restored the Court of Appeals' jurisdiction in Code § 17.1-405 over interlocutory appeals of equitable orders "requir[ing] money to be paid or the possession or title of property to be changed" or "adjudicat[ing] the principles of a cause."[27] In 2023, S.B. 895 added a new subsection B to that statute carving out interlocutory appeals in domestic-relations cases from that grant of jurisdiction.[28] As with S.B. 810, the General Assembly unanimously passed S.B. 895, which became effective immediately on April 12, 2023, as the very next chapter in the Acts of Assembly.

A recent case demonstrates the immediate and startling effect of S.B. 895. In *Choi v. Choi*, the appellant filed a notice of appeal to the Court of Appeals from a pendente lite — and thus inherently interlocutory — spousal- and child-support order on May 22, 2022.[30] In a published order, the Court of Appeals held that it lacked jurisdiction over the appeal. Even though the 2022 legislation had restored its jurisdiction over interlocutory equitable orders before the appellant appealed, the court explained that "the General Assembly further amended Code § 17.1-405 to prohibit [it] from hearing interlocutory appeals in orders involving divorce, custody, support, or "any other domestic relations matter arising under Title 16.1 or 20."[31] This amendment, the court held, "clearly exclude[s] this appeal from our appellate jurisdiction."[32]

That the notice of appeal was filed while the court had jurisdiction did not rescue the appeal. Unlike the 2022 legislation removing immunity petitions for review from the Court of Appeals' jurisdiction, "the General Assembly chose not to include a savings clause in [the] jurisdiction stripping legislation" at issue in *Choi*.[33] Because "[j]urisdiction stripping statutes are procedural and therefore apply to cases pending at the time of enactment," the court dismissed the interlocutory appeal for lack of subject matter jurisdiction.

II. Perfecting Particular Interlocutory Appeals

The remainder of this article describes the current procedures for perfecting the most common interlocutory appeals: circuit-court certified appeals and petitions for review of injunction and immunity orders.

A. Petitions for Appeal of Orders Certified by a Circuit Court

Unlike petitions for review, which are limited to a narrow class of injunction and immunity rulings, a Code § 8.01-675.5 appeal has no subject-matter limitation: The statute permits a pretrial appeal in civil cases of any order or decree that is not otherwise appealable, provided that the circuit court certifies the order or decree for appeal.

First enacted in 2002, the procedure for certification set forth in Code § 8.01-675.5 was modeled on 28 U.S.C. § 1292(b). This federal statute authorizes a district judge, sua sponte or on motion of a party, to certify an issue for immediate appellate review by finding that an interlocutory order "involves a controlling question of law as to which as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Once certified, the appropriate court of appeals may, "in its

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discretion, permit an appeal to be taken" from that order.[35] Following the 2020 legislative reforms discussed above — including elimination of the mutuality provision — the Virginia procedures now largely mirror their federal inspiration.

A potential Code § 8.01-675.5 appeal begins when the circuit court enters any otherwise unappealable interlocutory order. Any party to the circuit court action may initiate the interlocutory appeal process by filing a motion asking the circuit court to certify that order for interlocutory appeal. Not just any order is a strong candidate for a Code § 8.01-675.5 appeal. The party moving for certification must include an analysis of the authorities it believes are determinative of the issues in the order and ask the circuit court to certify that the order involves a question of law — not fact — that satisfies four elements:

1. **"[S]ubstantial ground for difference of opinion" exists.**[36] A circuit court is unlikely to certify an appeal grounded on lopsided issues or strained legal theories.

2. **No Virginia appellate court has issued a "clear, controlling precedent on point."**[37] This language leaves open the possibility that a circuit court could certify an interlocutory appeal despite an otherwise on-point unpublished opinion but, as a practical matter, any appellate decision on the question will likely limit a circuit court's inclination to certify an interlocutory appeal.

3. **"[D]etermination of the issues will be dispositive of a material aspect" of the circuit court proceeding.**[38] This materiality element is akin to, but narrower than, the federal requirement that an appeal "may materially advance the ultimate termination of the litigation."[39] It is not enough that the issue might facilitate resolution of the litigation — this element requires that an appellate decision on the issue "will" settle a material question. It need not be dispositive of the entire case, but issues like those in a plea in bar that will determine, for instance, whether a cause of action or affirmative defense applies, are more likely to be certified.

4. **"[I]t is in the parties' best interest to seek an interlocutory appeal."**[40] This element allows the circuit court, in its discretion, to serve a "gatekeeping function" by considering the circumstances particular to the issue and underlying case in determining whether to certify the case for interlocutory appeal.[41]

If any party opposes the motion for certification, the statute provides that the parties may brief the motion consistent with the ordinary circuit court briefing rules. This familiar process of briefing a contested issue replaced the former one-party veto in which any party's dissent would defeat certification. Notably, Code § 8.01-675.5 does not set a deadline for filing the motion to certify an order for interlocutory appeal — but prudence suggests striking while the iron is hot.

Once the circuit court enters an order certifying a case for interlocutory appeal, a 15-day time limit begins running in which the appealing party must file a petition for appeal in the Court of Appeals containing the contents set forth in Rule 5A:12.[42] The petition for appeal cannot exceed the greater of 35 pages or 7,500 words and, as with all appellants' principal briefs, must contain assignments of error.[43] An appeal pursuant to Code § 8.01-675.5 is one of the few remaining discretionary appeals within the Court of Appeals' newly expanded jurisdiction. Thus, the Court of Appeals "may, in its discretion," grant the petition for appeal if it "determines that the certification by the circuit court has sufficient merit."

The trial-level case proceeds in the ordinary course while the interlocutory appeal is pending — even if the Court of Appeals grants the appeal. Code § 8.01-675.5(B) provides that an interlocutory appeal will not stay proceedings in the circuit court unless either the circuit court or Court of Appeals orders a stay based on a finding that (1) the appeal could be dispositive of the *entire* action or (2) good cause — other than the pending appeal — exists to stay proceedings.

Relatedly, and in stark contrast to the expedited procedures governing petitions for review, a granted Code § 8.01-675.5 appeal proceeds like any other appeal to the Court of Appeals and does not take precedence on the Court of Appeals' docket.[44] This means that, as part of the "growing pains that the Court is experiencing following the recent expansion of its jurisdiction," the parties can expect the case to be "docketed for oral argument six to seven months from [its] maturity for a decision" — that is, after merits briefing has concluded — rather than the "previous three to four months."[45] The appellate timeline for resolving an interlocutory appeal is among the factors counsel should consider in deciding whether to move for certification.

B. Petitions for Review

Other than their interlocutory nature, petitions for review have little in common with Code § 8.01-675.5 appeals. Only a narrow class of orders are potentially appealable in a petition for review, the procedures are designed for expedited review and the appeal proceeds directly to the Supreme Court rather than winding through multiple levels of appellate review. Petitions for review of injunction and immunity rulings both follow the same procedure. They differ only in what circuit court orders are appealable.

For petitions for review of injunctions pursuant to Code § 8.01-626, only rulings on *preliminary* injunctions are appealable. If the circuit court grants, denies, or having granted one, dissolves or refuses to enlarge a preliminary injunction, then a party aggrieved by the order may petition the Supreme Court for review.

The Supreme Court narrowly construes the scope of

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petitions for review: "[T]he only part of the order under review is the part that orders or refuses to order injunctive relief. 'All other issues are governed by the normal rules and timetables that apply to appeals.'"[46] Distinguishing part of one petition for review as exceeding the statute's scope, the Court observed that "[t]his is not a situation where the court examined the factors for granting an injunction and then exercised its discretion to grant or refuse to grant the injunction," which are characteristics of preliminary-injunction orders typically appealable under Code § 8.01-626.[47]

This reference to the "factors for granting an injunction" merits a short sidebar about another important upcoming change in the law. The standards governing preliminary injunctive relief in Virginia have long been elusive, with courts often looking to the federal factors articulated in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), for guidance.[48] To remedy this uncertainty, the Boyd-Graves Conference proposed adoption of new Rule 3:26 setting forth the standard for granting preliminary injunctions. The Advisory Committee on Rules of Court in Virginia is considering public comments it received on that proposal, so practitioners should stay tuned for the eventual promulgation of a final Rule 3:26 settling the Virginia preliminary injunction standard.[49]

Returning to the petition-for-review procedure, interlocutory appeals of immunity rulings pursuant to Code § 8.01-670.2 also have limited scope. Only orders "granting or denying a plea of sovereign, absolute, or qualified immunity that, if granted, would immunize the movant from compulsory participation in the proceeding" are cognizable in a petition for review.[50] Citing this circumscribed language, the Supreme Court has dismissed a petition for review "to the extent the petitioner raises arguments that are not encompassed within" Code § 8.01-670.2's narrow scope.[51]

Unlike federal collateral order appeals, which are available only to defendants asserting immunity defenses, "[a]ny person aggrieved" by an order enumerated in Code § 8.01-670.2(A) may file a petition for review. Plaintiffs stymied by circuit court orders granting immunity to one or more defendants can thus avail themselves of expedited appellate review so that, if the immunity ruling is reversed, the previously immune defendant can be included at trial.[52]

Procedures for perfecting a petition from review from either a preliminary injunction or immunity order are identical and governed by Code § 8.01-626 and Rule 5:17A. The aggrieved party has 15 days from entry of the challenged order to file a petition for review with the clerk's office of the Supreme Court via VACES and to serve it on counsel for the opposing party by email. A $50 filing fee is due alongside the petition and must be paid within 10 days to avoid dismissal.[53]

The petition must be "accompanied by a copy of the proceedings before the circuit court," which, according to the rule, comprise "the pertinent portions of the record of the lower tribunal(s)," including any relevant transcripts and orders.[54] The rule's specification that the "pertinent portions" of the record are necessary makes compiling the petition-for-review record a similar task to preparing the appendix in an ordinary appeal, in which the goal is to provide the Court with a one-stop shop with all the materials it needs to decide the appeal — but *only* those materials actually needed to decide the appeal.

Once served, the opposing party also has 15 days to file a response brief to the petition. This 15-day deadline is a recent and welcome improvement from the prior 7-day deadline. Note, however, that the Supreme Court may determine a shorter response deadline, "but absent exceptional circumstances, the Court will not grant a petition for review without affording the respondent an opportunity to file a responsive pleading."[55]

Neither the petition for review nor response brief may exceed the greater of 20 pages or 3,500 words. There is no reply brief, nor is there an option for rehearing. Once filed, the petition for review is assigned to a panel of at least three justices, who may "may take such action thereon as it considers appropriate under the circumstances of the case."[56] This open-ended statutory language provides the Court broad discretion regarding further steps on a petition for review. Usual rulings on petitions for review include dismissals for procedural defects such as failing to file the petition within the 15-day period, short denials or refusals or longer decisions on the merits with extensive discussion.

* * *

Interlocutory appeals are powerful litigation tools in the right circumstances, but the whirlwind of changes over the past few years has made it difficult for counsel to keep up. Now that the law governing interlocutory appeals in Virginia is hopefully becoming settled once again, practitioners should become familiar with how interlocutory appeals can advance their advocacy.

ENDNOTES

1. Graham K. Bryant, *Recent Developments Make Interlocutory Appeals More Accessible*, 6 On Appeal (Va. Bar Ass'n), Spring 2021, at 8–9, 17, https://tinyurl.com/yc6w4zyy.
2. For example, other types of interlocutory appeals authorized by statute include appeals in litigation under the Multiple Claimant Litigation Act (Code § 8.01-267.8) and from an order denying an application to compel arbitration (Code § 8.01-581.016).
3. See *generally* Bryant, *supra* note 1.
4. 2020 Acts ch. 907, https://tinyurl.com/2p9y439e.
5. Comm. on Interlocutory Appeals, Boyd-Graves Conference, Comm. Report 1, 5 (Aug. 30, 2019), https://tinyurl.com/mr44j52r.
6. Code § 8.01-670.1 (2019).
7. *See, e.g.*, *Vesilind v. Edwards*, 292 Va. 510 (2016) (defendants

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opting to be held in contempt to generate an appeal when mutuality provision defeated certification of an interlocutory appeal); Comm. on Interlocutory Appeals, *supra* note 5, at 3 (discussing *Vesilind* as illustrating the need for reform).

8. For a more detailed discussion of changes made to interlocutory appeal procedures in the 2021 Court of Appeals jurisdiction-expansion legislation, see Graham K. Bryant, *Appeals of Right in Virginia: Preparing for the New Appellate Landscape*, 33 J. Civ. Litig. 427 (2021), https://tinyurl.com/y3534c3u.

9. 2021 Acts ch. 489 (2021 Special Sess. I), https://tinyurl.com/52af5cvd.

10. Code § 8.01-626 (2022).

11. Va. Code Comm'n, *Revision of Title 8 of the Code of Virginia*, H. Doc. No. 14, at 347 (1977), https://tinyurl.com/239brck3.

12. 2022 Acts ch. 307, https://tinyurl.com/3npmxabu.

13. *NAACP (Hanover Cnty. Chapter) v. Commonwealth ex rel. Va. Water Control Bd.*, 74 Va. App. 702 (2022).

14. 2022 Acts ch. 307, cl. 2, https://tinyurl.com/3npmxabu.

15. *Id.*; 2022 Acts ch. 714 (2022 Reconvened Sess.), https://tinyurl.com/4vnk8k8t.

16. *NAACP*, 74 Va. App. at 710 n.2 (quoting Va. Code Comm'n, *supra* note 11, at 347).

17. *Id.*; *see Omega Corp. v. Cobb*, 222 Va. 875, 876 (1981) ("The ... summary procedure authorized by Code Sec. 8.01-626 may not be employed as a substitute for an appeal under Code Sec. 8.01-670 when a final judgment within the meaning of the latter statute has been entered in the circuit court.").

18. Summary as Enacted, S.B. 143 (2022 Reconvened Sess.), enacted at 2022 Acts ch. 714 (2022 Reconvened Sess.), https://tinyurl.com/yejhhpk7.

19. Judicial Council of Virginia, 2022 Report to the General Assembly and Supreme Court of Virginia 1, 5–7 (Jan. 9, 2023), https://tinyurl.com/mryetvzy.

20. *J.M. and S.M. v. A.A. and F.A.*, Record No. 1855-22-2, at *2, 4 (Feb. 16, 2023) (unpublished), https://tinyurl.com/yc8mtt2b.

21. *Id.* at 5.

22. S.B. 810 (2023 Reconvened Sess.), enacted at 2023 Acts ch. 741 (2023 Reconvened Sess.), https://tinyurl.com/4vjp5e99.

23. *Id., see Virginia Int'l Gateway, Inc. v. City of Portsmouth*, 298 Va. 43, 54 n.1 (2019) ("The term 'declarative of existing law' is used occasionally by the General Assembly when it wishes to clarify a statute or correct an interpretation of a statute with which it disagrees. It typically is placed in a second enactment clause rather than in the codified statutory language.").

24. 2023 Acts ch. 741 (2023 Reconvened Sess.), https://tinyurl.com/y5fbc4mn.

25. *See supra* note 17 and accompanying text.

26. Code § 17.1-405(A)(3) ("[A]ny aggrieved party may appeal to the Court of Appeals from ... any final judgment, order, or decree of a circuit court in a civil matter.").

27. 2022 Acts ch. 714 (2022 Reconvened Sess.), https://tinyurl.com/4vnk8k8t.

28. S.B. 895 (2023 Reconvened Sess.), enacted at 2023 Acts ch. 742 (2023 Reconvened Sess.), https://tinyurl.com/y6xzf9nh.

29. 2023 Acts ch. 742 (2023 Reconvened Sess.), https://tinyurl.com/24e6f74r.

30. ___ Va. App. ___, Record No. 0727-22-4, 2023 WL 4872477, at *1 (Aug. 1, 2023).

31. *Id.*

32. *Id.*

33. *Id.* at *3.

34 *Id.* at *2–*3.

35. 28 U.S.C. § 1292(b).

36. Code § 8.01-675.5(A).

37. *Id.*

38. *Id.*

39. 28 U.S.C. § 1292(b).

40. Code § 8.01-675.5(A).

41. Comm. on Interlocutory Appeals, *supra* note 5, at 5.

42. Code § 8.01-675.5(A); Rule 5A:12(a)(2).

43. Rule 5A:12(c).

44. Code § 8.01-675.5(A).

45. *Bleakley v. Commonwealth*, Record No. 0106-23-2, Order Denying Mtn. to Expedite at *2 (Feb. 16, 2023) (unpublished) (Humphreys, J., concurring), https://tinyurl.com/59yn3pvt.

46. *Loudoun Cnty. Sch. Bd. v. Commonwealth*, Record No. 220497, at *2 (Sept. 2, 2022) (unpublished) (quoting Rule 5:17A(f)(i)), https://tinyurl.com/yc26kptb.

47. *Id.*

48. *See generally, e.g.*, Stuart A. Raphael, *What Is the Standard for Obtaining a Preliminary Injunction in Virginia?* 57 U. Rich. L. Rev. 197 (2022); David W. Lannetti, *The Test — Or Lack Thereof — For Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. Rich. L. Rev. 273 (2015).

49. Advisory Comm. on Rs. of Ct., Proposed Rule Specifying Standard for a Preliminary Injunction (April 25, 2023), https://tinyurl.com/mua4wnja.

50. Code § 8.01-670.2(A).

51. *Town of Windsor v. Commonwealth*, Record No. 220734, at *1 (Dec. 6, 2022) (unpublished), https://tinyurl.com/2p9b5zyf.

52. Comm. on Interlocutory Appeals, *supra* note 5, at 5.

53. Rule 5:17A(e).

54. Code § 8.01-626; Rule 5:17A(c).

55. Rule 5:17A(g).

56. Code § 8.01-626; Rule 5:17A(f).

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6. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898 (9th Cir. 2002).

7. *Garrard v. Rust-Oleum Corp.*, No. 20-C-00612, 2023 U.S. Dist. Lexis 89755, at *1–2 (N.D. Ill. May 23, 2023) (internal citation and quotation marks omitted).

8. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

9. *See* Va. Sup. Ct. Rs. 5:17, 5:28, 5A:20, 5A:21.

10. *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (including ostrich and head-in-sand pictures in the opinion); *see also United States v. Arroyo-Blas*, 783 F.3d 361, 362 (1st Cir. 2015) (comparing the appellant to the "proverbial ostrich").

10 Tips From a Former Clerk

How To Become a Better 4th Circuit Practitioner

By P. Thomas DiStanislao III, Senior Counsel
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The U.S. Court of Appeals for the 4th Circuit has developed a reputation for being one of the most expedient and least reversed courts in the country. Its judges and staff work hard to efficiently handle the ever-growing docket before them.

Like most Virginia-based courts, the 4th Circuit is steeped in tradition and collegiality. It is one of the few courts in the United States where advocates do not learn the identity of the panel before which they will be arguing until the morning of. *See* Local R. 34.1. After every argument, the judges step down from the bench to shake counsels' hands and show their appreciation for the important role advocates play in protecting and carrying out the rule of law.

Having spent three years clerking on the 4th Circuit, I had the opportunity to see it all — the good, the bad and the flagrant malpractice. In doing so, I kept notes on various pitfalls to avoid and strategies to adopt to enhance my own chances of success whenever I appear before the Court. Here are 10 of them.

BRIEFS

The 4th Circuit decides nearly 90% of its cases on the briefs. As a result, nothing is more important for an attorney's reputation and a client's chances of prevailing than ensuring the issues on appeal are squarely presented as coherently and logically as possible. That means counsel need to wrestle with their briefs (and the record) to provide the cleanest pathway possible for the Court to rule in their favor. Put another way, in almost all cases, the briefs will be a party's lone opportunity to state its position to the Court. It is a massive disservice to all involved when counsel fail to capitalize on this opportunity.

1 Targeted Briefs and Joint Appendices Make Happy Judges

Fourth Circuit judges are known for their high level of preparation for and engagement with every case. The judges read the briefs and the record in their entirety. That is no small task. Given the sheer volume of cases that come across their desks, any given judge may read hundreds if not thousands of pages on a given day. To that end, clear and targeted briefs and appendices — those that perform their full function without superfluous language and documents — go a long way to engender goodwill from the Court. In short, it behooves all practitioners to make the judges' job as easy as possible in convincing a panel to rule in their client's favor.

In its Local Rules, the "Fourth Circuit encourages short, concise briefs." Local R. 32(b). The Federal Rules of Appellate Procedure provide that principal briefs (the Opening and Response) may not exceed 30 pages or 13,000 words. Fed. R. App. P. 32(a)(7)(A)–(B). Reply briefs are acceptable if they are 15 pages or less in length or contain no more than 6,500 words. *Id.* The Court strictly enforces these limits, making clear that "[u]nder no circumstances may a brief exceed" these limitations without prior approval. Local R. 32(b).

Of course, there are exceptions to every rule. But in a typical case, attorneys should aim to be well under the page/word maximum. The judges are sophisticated and well-versed in a large number of judicial doctrines. Parties don't need to spend multiple pages setting out the standard of review (unless it is in dispute). Nor is there any benefit in block quoting the district court's judgment ad nauseam. Get to the heart of your argument and spend the most time there. Don't waste your paper belaboring points that are not in dispute.

The same goes for joint appendices. Though the appellant has to prepare and file an appendix to the briefs, all parties are responsible for agreeing to its contents, which must contain, at a minimum: (A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention." Fed. R. App. P. 30(a)(1).

Although appendices may contain more, the Court has made its preference clear that even though "there is no limit on the length of the appendix … it is unnecessary to include everything in the appendix." Local R. 30(b)(1). Notably, "[m]emoranda of law in the district court should *not* be included in the appendix unless they have independent relevance." Fed. R. App. P. 30(a)(2). Much like briefs, an unnecessarily long appendix detracts from your client's arguments and position and unnecessarily distracts the Court from what is at issue in the case.

In sum, shorter is (almost) always better.

2 Appeal All Alternate Holdings

One of the most important decisions for an appellant

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deciding which (and how many) issues to appeal. Of course, "[c]ounsel is not obligated to assert all nonfrivolous issues on appeal." *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc). This decision is immensely important, and counsel's goal should be to raise only "the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Indeed, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Advocates, therefore, must strike a balance between presenting too many or too few issues, either of which is a disservice to the client and the Court. On the one hand, practitioners should avoid the so-called "spaghetti approach" where one "heaves the entire contents of a pot against the wall in hopes that something [will] stick." *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). On the other hand, counsel cannot rely on the Court to wrestle with every hint of an argument in their brief. After all, judges "are not like pigs, hunting for truffles buried in briefs. Similarly, it is not [the court's job to] make arguments for either party." *Hensley v. Price*, 876 F.3d 573, 581 (4th Cir. 2017).

From these principles, an important question emerges: Are there any issues that *must* be appealed? The short answer is a resounding "yes." For example, consider the situation where the district court entered alternative holdings. In that case, appellants must appeal from and argue against both. Failure to do so could lead to the same result faced by the appellant in *Foodbuy, LLC v. Gregory Packaging, Inc.*, 987 F.3d 102 (4th Cir. 2021). There, Foodbuy appealed from the district court's judgment after a bench trial holding it liable for breach of contract. The trial court entered alternate holdings to support its decision. First, the court reasoned that the contract between the parties was unambiguous and, under its plain language, required Gregory Packaging Inc. to pay a lower amount than Foodbuy had charged. Alternatively, the court found that even if the contract were ambiguous, rules of contractual interpretation would lead to the same result. Although Foodbuy appealed from the entire judgment, it only presented argument on the first ground. "At no point in its Opening Brief" did "Foodbuy engage with the district court's alternative holding should the [contract[be deemed ambiguous." *Id.* at 119.

Unfortunately for Foodbuy, the 4th Circuit determined it had "thrown all of its eggs in the wrong basket because [the Court] found the [contract was] ambiguous." *Id.* at 120. By failing to dispute this alternate holding, the Court concluded that Foodbuy had "waived any challenge to the district court's judgment on that ground." *Id.* (citing *Brown v. Nucor Corp.*, 785 F.3d 895, 918 (4th Cir. 2015) ("Failure of a party in its opening brief to challenge an alternate ground for a district court's ruling waives that challenge." (alteration omitted))).

The moral of this story is to avoid finding yourself in Foodbuy's position by inadvertently waiving the crux of an appeal from a $6 million judgment.

3 No Arguments in Footnotes

Suppose you have presented two issues for the Court on appeal. You have primary and secondary arguments for both, and even a tertiary argument for the first. Unfortunately, you have not followed my first tip, and your brief is running long. So, in an act of desperation, you relegate your tertiary argument to a footnote. That should be fine right? After all, the argument is still there. You've just limited it to the space you could afford.

Wrong. The 4th Circuit has made clear that it will never consider arguments solely presented in footnotes. *See Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009) (holding that an issue raised in a footnote and addressed with only a single declarative sentence asserting error is waived); *see also Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015) (same for footnotes with argument). Do not find yourself in a position where you have waived what would otherwise be a meritorious argument (assuming it was preserved before the district court) because you failed to allocate enough paper to make it.

4 Parties Must Respond to All Opposing Arguments

Another common mistake occurs when a party fails to either make or respond to an argument. All practitioners know that "[a] party waives an argument by failing to present it in its opening brief or by failing to develop its argument — even if its brief takes a passing shot at the issue." *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (cleaned up). Arguments raised for the first time in reply briefs will generally be considered waived. And the court will likely reach the same result for conclusory arguments for the same reason.

What many fail to grasp is that waiver can occur even after filing an opening brief. For example, an appellee who fails to respond to one of the appellant's arguments will be found to have waived that point. *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) ("[A]n outright failure to join in the adversarial process would ordinarily result in waiver."); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument results in waiver.").

The same is true for reply briefs that fail to engage with arguments raised in the response. *See Mahdi v. Stirling*, 20 F.4th 846, 905 n. 42 (4th Cir. 2021); *United States v.*

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Farris, 532 F.3d 615, 619 (7th Cir. 2008) ("Farris failed to respond to the Government's argument in a Reply Brief, and accordingly, we find that Farris waived his" claim).

Thus, both appellants and appellees can waive arguments by failing to fully engage in the exchange of opposing positions. In fact, appellants have two opportunities to do so.

ORAL ARGUMENT

Let's assume your case is among the lucky 10% scheduled for oral argument. As a general rule, you won't find out the panel until the morning you are scheduled to appear (more on that below). But there are plenty of 4th Circuit-specific things you can do to prepare. These tips focus on making the most out of your argument time and maximizing your potential to effectively persuade the panel that your position is the correct one.

5 Predicting the Panels

The composition of the 4th Circuit's argument panels is a closely held secret until the morning of the hearing. There are stories around the courthouse of watching lawyers scramble up to the Clerk's office to get a glimpse of their panels, with some walking away smiling and others anxiously wringing their hands, trying to figure out how to persuade what looks like a skeptical panel.

This tradition is meant to emphasize that reasoning on the merits is more important than the judges who hear a given case. In other words, the panel composition shouldn't matter. To achieve this, "[t]he Clerk of Court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three-judge panels provided by a computer program designed to achieve total random selection." Local Rule I.O.P. 34.1.

Of course, for most practitioners, the panels do matter. At a minimum, it is comforting to have some idea of who will be deciding your case before you walk through the courthouse doors.

To that end, Local Rule I.O.P. 34.1 offers a way to gain at least a little insight. There, the Court states that "[e]very effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a preargument motion or prior appeal in the matter, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to a hearing panel." So, assuming your case has not been before the Court before, it is possible to gain some clarity by looking at the other cases on the docket for that day.

First, check the other cases that will be before the same panel as you. See if any of them have been argued before or whether the Court has entered any substantive rulings preargument with the judges' names attached. If that doesn't work, start looking to the other panels and conduct the same analysis. While you likely will be unable to narrow down your list to guess your exact panel, you will be able to cross off a few potential judges from your list.

6 Avoid Pleasantries

In most cases, each side is allowed 20 minutes (even in consolidated cases) to present their argument. *See* Local Rule 34(d). While some presiding judges may relax this time limit depending on the issues before the panel, most will stick closely to it. In other words, don't plan to get more than 20 minutes, but be grateful if you do. In truth, you will likely get much less depending on how "hot" the bench is and the composition of the panel. Some judges are known for asking longer questions than others.

With that in mind, attorneys should generally avoid the pleasantries of introducing yourself, your client and those in attendance in the courtroom to cheer you on. During my time clerking, I saw everything from the client's representatives being called out in the gallery to the practitioner's parents who were there to watch their child's first appellate argument. I don't mean to be disparaging. Getting to argue in front of the 4th Circuit is an honor and an accomplishment for which anyone should be proud. But save the champagne for after the Court rules rather than wasting 5% to 10% of your client's precious argument time on irrelevant distractions. The Court knows who you are and who you represent. Jump in and get to the crux of your position.

7 Don't Read Your Briefs

You can also assume that the Court is familiar with the facts of the case and your arguments. One of the biggest time killers — which seems almost inevitable in every court session — happens when an attorney recites the facts as stated in the client's brief. Although the judges are likely eager to get to the merits of the case, they also recognize that they are not advocates, meaning they will not help you save yourself by asking a targeted question when you are five minutes into your summation of the case. This is an appellate argument, not a jury trial. The Court is often much more concerned with the legal principles at issue than the specific factual details of the dispute.

Similarly, you do not serve your client by simply reading your argument section out loud. The Court knows your positions — it wouldn't have granted oral argument if it couldn't figure them out. Unfortunately, too many lawyers I watched at argument didn't know enough about their cases to be succinct and cogent. Oral argument is the place to shine. Directing the Court's attention to the key issues before

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it — i.e., the principles with which it needs to agree for your client to prevail — will help you immensely by establishing the scope of your argument and effectively cabining your opponent's response or rebuttal time.

On that note, advocates should always consider the possibility that the Court granted argument for reasons other than the ones they briefed. For example, the Court may have spotted a jurisdictional defect on which it would like the opportunity to rule. Or it could have spotted a waiver issue that warrants circuit-wide clarification. Normally the Court will give attorneys a heads up if it intends to ask questions outside the scope of the briefs — but no rule requires it to do so. This practice is inconsistent and panel-dependent. Therefore, counsel would be wise to take a step back from the briefs entirely and ask themselves: Is there any other reason the Court may have granted oral argument in my case? At a minimum, this will go a long way to ensuring you aren't left flat-footed when asked a question you did not anticipate.

8 Answer the Questions Asked

Another issue that can detract from an otherwise great argument is when an attorney tries to dodge a question from the bench. This Court simply will not let a party get away so easily. Some judges turn into veritable prosecutors on the bench — no doubt due to their professional backgrounds — and will cross-examine counsel until they get a firm answer to the question as asked. Other judges will pose their questions in as many variations as possible to gain necessary clarity into a tricky legal issue.

Dodging hard questions only antagonizes the Court and ends up minimizing the time you have to steer it in the right direction. It is always better to confront bad facts and bad law head-on.

9 Be Collegial

Unsurprisingly for a Court that steps down and shakes attorneys' hands to thank them after each argument, collegiality and formality are important to the 4th Circuit. There are a few unwritten rules that all advocates should follow. First, show respect for the lower court, even if you disagree with its decision. At one argument, I heard appellant's counsel say repeatedly that the district court had "totally screwed up" in ruling the way it did. The judges — sitting en banc, no less — did not take this breach of decorum lightly, constantly bringing it up for the rest of the attorney's time at the podium.

Second, always respect opposing counsel. In a case in which appellant's counsel consistently referred to appellee's lawyer as "she" and "her," one of the judges was quick to call him out, reminding him that the proper terms were "colleague on the other side … counsel even?"

Third, never interrupt or talk over a judge. It is always tempting to want to jump in and answer the question as soon as possible. At the same time, it is not always easy to determine when a judge is finished asking his or her question. But it is better to err on the side of caution. Watch the judge's physical cues and, if necessary, take a deep breath before answering to ensure that he or she is ready to hear your answer.

In short, be respectful. Regardless of our roles as zealous advocates, it is not hard. And it goes a long way in the 4th Circuit.

AFTER ARGUMENT

Suppose you've followed all my tips so far. You drafted a stellar brief and maximized your argument time to best serve your client. Despite all of that, the panel rules against you. At this point, you have three options: (1) petition for panel rehearing; (2) petition for rehearing en banc; or (3) petition for a writ of certiorari to the Supreme Court.

The chances of success on all three options are small. They are practically nonexistent for options (1) and (3). To that end, the Court has trended toward granting more en banc arguments as of late. Thus, (2) remains the option with the highest likelihood of success.

10 Uptick in En Banc Arguments

As a general rule, en banc hearings or rehearings are "not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Still, the Court has heard argument en banc in 21 cases since 2019. For context, that is the same number that the Court heard from 2010 through 2018. In other words, there has been a massive uptick in granting rehearings en banc that will likely continue given the current composition of the Court.

Thus, if you are "down for the count," rehearing en banc is your client's best chance to breathe life back into the case. Nothing is guaranteed, but the cost of filing — especially when there is a split panel decision — is becoming increasingly worth the effort.

* * *

There is no guaranteed formula for success in the 4th Circuit.

Following these tips may not lead to victory in every case. But they will ensure — as much as possible — that you avoid committing "unforced errors" during your appeal.

As lawyers, our collective goal is to give our clients their best possible day in Court. The advice here should help you serve your client to the best of your abilities.