Two Centuries of Virginia in the Supreme Court

By Toby Heytens*

The first time Virginia was called to argue before the U.S. Supreme Court, no one showed up.1 Perhaps that is not surprising, because the issue in *Grayson v. Virginia* was whether (and if so how) a court could serve process on a State.2 Since then, however, the Commonwealth has hardly been absent. Rather, Virginia has frequently appeared before the Court, both to help extend the Constitution’s protections to formerly excluded groups and — sometimes famously — to oppose that expansion.

**Early Years**

Many of Virginia’s early cases reflected controversies over jurisdiction and treatment of other states’ citizens. In pre-Civil War decisions, the Court held that the Eleventh Amendment’s adoption was constitutional even without a presidential signature,3 that it had appellate jurisdiction over state proceedings against citizens of other states,4 and that Congress’s power to create criminal law was limited to the powers conferred to it by the states.5 Soon after the Civil War, Virginia successfully defended a statute requiring certain corporations of other states to obtain a license to operate in Virginia.6

**The Wrong Side of History**

The tone began to shift as the Supreme Court took more cases about the Fourteenth Amendment’s scope. In a pair of cases argued in 1879, Virginia defended its courts’ practice of excluding African-Americans from juries.7 Together with *Strauder v. West Virginia*,8 these decisions helped define the early contours of the Fourteenth Amendment’s protections from state discrimination: States could not exclude black jurors by statute,9 and Congress could legislate to penalize state agents who denied such protections,10 but defendants could not remove their case to federal court when judges excluded black jurors during trial without statutory authority.11

Virginia’s defense of race-based policies continued well into the twentieth century. Perhaps most famously, *Brown v. Board of Education* overturned Virginia’s school segregation policy,12 and *Loving v. Virginia* invalidated the Commonwealth’s ban on interracial marriage.13 As Virginia leaders engaged in a campaign of “massive resistance” against desegregation and resisted *Brown’s* requirements, *Griffin v. County School Board*14 and *Green v. County School Board*15 directed the Commonwealth to act affirmatively to ensure that public schools remained open and desegregated.16

The court also struck down other Virginia laws excluding communities from the full benefits of citizenship, from the Commonwealth’s segregation of vehicle passengers,17 to its poll tax.18 When Virginia criminalized NAACP activities by “proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys,”19 the court held that the law violated the First Amendment’s protection of “vigorous advocacy.”20 In *Davis v. Mann*, the court invalidated the General Assembly’s apportionment

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Chair's Report
By Monica T. Monday

It has been a busy and productive year for the Appellate Section. We kicked off 2019 at the VBA Annual Meeting in January by recognizing the excellent leadership of outgoing Chair Alice Armstrong. During Alice’s tenure as Chair, the Section hosted another successful Appellate Summit, providing a full day of CLE on topics of interest for appellate advocates. Thank you Alice for your service to the VBA.

We also voted in our new officers and council members. David Hargett was elected Vice Chair, and Norman Thomas was elected Secretary. The membership also welcomed new Council member Julie Palmer, and Graham Bryant, who is serving as the YLD Representative. Erin Ashwell joined the Council in a newly created position of Young Lawyer Transition member.

At the VBA summer meeting, our Section co-sponsored two popular, annual CLEs with the Litigation Section – “The 21st Annual Review of Civil Decisions of the Supreme Court of Virginia” and “The Roberts Court at Age 13: The 2018 Supreme Court Term in Review.” Section member scheme because it failed to construct districts of equivalent populations.21 And in 1996, the Court held that the Virginia Military Institute’s exclusion of women violated the Fourteenth Amendment, explaining that the government must set forth an “exceedingly persuasive justification” for gender-based classifications.22

The Virginia Solicitor General

For almost the entire twentieth century, the Office of the Attorney General of Virginia had no designated Supreme Court specialist, and the Commonwealth’s litigation before the nation’s highest court was handled by a combination of state and private attorneys. For example, in the VMI case, the counsel of record for Virginia was future U.S. Solicitor General Theodore B. Olson, then a partner at Gibson, Dunn & Crutcher.23

This system began to change in 1999, with the creation of the Office of the Solicitor General. In Virginia v. Black, the Commonwealth’s first Solicitor General, William H. Hurd, defended a Virginia statute that criminalized burning a cross with the intent to intimidate another person.24 In another case decided that same term, the court unanimously upheld a Richmond housing authority’s trespass policy against a claim that it was unconstitutionally overbroad.25

Bill Hurd, who organized and moderated the Roberts Court CLE again this year, led an impressive panel of speakers, including Marcia Coyle, chief Washington correspondent for the National Law Journal and Jeffrey Wall, the principal deputy solicitor general of the United States. If you missed the Roberts Court CLE, you may order it and other recent CLEs sponsored by our Section at the VBA’s on-line CLE bank: vba.inreachce.com.

We have also launched a database of form appellate motions. You may find these forms helpful as you engage in motions practice in the appellate courts. The forms are accessible when you log into the VBA website and select Groups and then our Section. On the housekeeping front, we amended the Section’s by-laws to reflect recent changes in our Council membership and operation.

Finally, at the VBA Annual Meeting in January 2020, we hosted a CLE with three outstanding speakers: UVA Law School Professor Leslie Kendrick reviewed significant First Amendment cases; Matt McGuire discussed his time as the Deputy Solicitor General of Virginia; and Doug Robelen addressed motions practice in the Supreme Court of Virginia and his insights as the new Clerk of that court.

We hope that you enjoy this edition of On Appeal. Thank you to our publications chair Jay O’Keeffe for the many hours he devoted to this project, and to our authors and contributors, Erin Ashwell, Trevor Cox, Toby Heytens, Judge Millett, and Monica Monday.

It is an honor to serve as chair of the Appellate Section. Please feel free to contact me if you have any suggestions about how we can better serve you.

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Since then, Virginia has prevailed in seven of its last nine merits cases before the Supreme Court. The issues have ranged the gamut, from the Fourth and Fifth Amendments, to redistricting, to the relationship between international law and state procedural default rules, to the constitutionality of the Virginia Freedom of Information Act. In 2015, the Commonwealth filed an amicus brief in Obergefell v. Hodges, arguing in favor of same-sex couples’ constitutional right to marry. Virginia’s most recent Supreme Court litigation has focused on disputes involving the Commonwealth’s state legislative districts and preemption challenges to state statutes. In Virginia House of Delegates v. Bethune-Hill, the Solicitor General successfully argued that the Virginia House of Delegates lacked standing to appeal a lower court’s decision that certain districts were unconstitutional racial gerrymanders. And in Virginia Uranium, Inc. v. Warren, the court rejected a preemption challenge to Virginia’s longstanding ban on uranium mining.

So far, Virginia has one case before the Supreme Court during the upcoming term. But, given its track record, it seems likely that the Commonwealth will be back again soon.

Endnotes

* Solicitor General of Virginia. Thanks to Matthew J. Disler for terrific work in helping prepare this article.

2. Id. at 320–21.
5. Id. at 428.
7. Ex parte Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1879).
8. 100 U.S. 303 (1879).
9. Id. at 310.
12. 347 U.S. 483, 386 n.1 (1954) (citing Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (1952)).
13. 388 U.S. 1, 12 (1967).
16. See id. at 442; Griffin, 377 U.S. at 225; see also Carl Tobias, Public School Desegregation in Virginia During the Post-Brown Decade, 37 WM. & MARY L. REV. 1261, 1269-81 (describing Virginia’s role in the “massive resistance” strategy and resulting litigation).
23. See id. at 518.
32. 139 S. Ct. 1894 (2019).
Will the Show Go On?

How to Deal with Unexpected Obstacles to Oral Argument

By Trevor S. Cox

We appellate attorneys are trained to answer hypothetical questions in oral argument. But would you know how to respond to this hypothetical scenario, involving whether your oral argument will even take place? Imagine that, the morning of an important argument, you wake up violently ill, to the point that you doubt you can stand up at all — let alone in court. What do you do? Is a delay possible? Will the case proceed in your absence?

After my own recent encounter with a similar issue (suffice it to say my wife was in labor during my first U.S. Supreme Court argument last January), I began to wonder how our local appellate courts react when unexpected circumstances jeopardize attorneys’ ability to appear. To find out, I spoke with Pat Connor, clerk of the U.S. Court of Appeals for the Fourth Circuit; Doug Robelen, clerk of the Supreme Court of Virginia; and John Vollino and Deborah Uitvlucht, chief deputy clerk and deputy clerk, respectively, of the court, of Appeals of Virginia. Sudden illness? Death in the family? Inclement weather? Traffic delays? These clerks have encountered a variety of circumstances that unexpectedly prevent attorneys from appearing. With characteristic openness — they and their staffs welcome attorney questions — they agreed to share the advice summarized below.

A note about initial calendaring

At the outset, I emphasize that this article focuses on circumstances that arise at the last minute. This does not concern the courts’ processes for calendaring oral argument, which occurs months before the argument session. During that process, counsel are encouraged to identify potential conflicts; clerks are willing to schedule around preexisting work obligations, medical appointments, or even vacations. Note that, while clerks have wide discretion to schedule a case within an argument session, continuing the case to a subsequent argument session requires the approval of the panel in the Fourth Circuit or Court of Appeals, or of the Chief Justice in the Supreme Court of Virginia.

Once a case has been calendared for argument, the date becomes more difficult to change. Courts are far less understanding of an attorney’s eleventh-hour predicament if the attorney could have raised the issue previously but failed to do so. Indeed, Fourth Circuit Rule 34(c) expressly states that after “a case has been scheduled for argument, any motion that would affect the argument date must show good cause for the requested relief and that the relief could not have been requested within the period set by the Court for notice of conflicts.” In the event that a professional conflict does arise after calendaring, but still well before the argument, an attorney should file a motion to continue as soon as possible, ideally before the panel has invested time in your case. Although clerks understand that scheduling conflicts can occur, know that they may attempt to 1) confirm that an actual conflict exists and 2) determine when the conflict arose. To reiterate: They will be less inclined to accommodate a conflict that arose after your argument was calendared.

Three takeaways in dealing with last-minute issues

The clerks all had similar processes for handling last-minute issues, and three high-level takeaways are worth sharing.

1. It is not unusual for situations to arise at the eleventh hour.

If some misfortune should befall you shortly before argument, the first thing to realize is that you are not alone. While unfortunate, these circumstances are not rare. In the Supreme Court of Virginia, for instance, at least every other argument session a case is bumped from one session to the next due to last-minute developments. The clerks reported that a variety of scenarios have been responsible for accommodation requests, including sudden illnesses (both of the attorney or a spouse), deaths in the family, delays due to bad traffic or canceled flights, and inclement weather.

As suggested above, the common theme is that these circumstances could not have been predicted. Courts have less sympathy when problems are avoidable. Fourth Circuit Rule 34(c) flatly states that “[c]ontinuance of an established oral argument date is not granted because of a prior professional commitment.” But clerks reported that even when an issue might have been avoided — as when an attorney shows up at the wrong location for argument — courts may endeavor to arrange last-minute accommodations.

2. When last-minute issues arise, contact the clerk and opposing counsel as soon as possible; a formal motion is not necessary.
The clerks all advised that you should contact their offices as soon as potential issues become apparent. A formal motion is not necessary—and may be impossible, given the shortness of time and the nature of the issue—and so an e-mail suffices. Depending on the circumstances, a phone call may be the most expeditious option for alerting the clerk's office to the situation (but note the clerk's office may still request something in writing). For instance, if an issue arises the morning of the argument, the clerks advise that you immediately call the following offices:

- Supreme Court of Virginia: Muriel-Theresa Pitney, chief deputy clerk (804-786-5656); if unavailable, try the clerk's office's main number (804-786-2251)  
  Note: if an attorney needs an emergency continuance in a writ-panel case, the person to call is Chief Staff Attorney Lori Lord (804-786-6491); if unavailable, try the court's main number (804-786-5651)
- Court of Appeals of Virginia: Deborah Uitvlucht, deputy clerk (804-786-6491); if unavailable, try the court's main number (804-786-5651)
- Fourth Circuit: Court calendar line (804-916-2714)

When courts consider how to handle a last-minute impediment to argument, the position of opposing counsel is critical. Therefore, when contacting the clerk's office, you should loop in opposing counsel if possible (by phone or email) or represent their position if you've already had a chance to confer. You should also let the clerk know what alternative availability you may have, even if you cannot appear in person. For example, if you are unexpectedly stranded by weather but are able to argue by telephone or video conference, it is possible (though not likely) that in the Fourth Circuit, at least, arrangements might be made for the argument to proceed on schedule.

The clerk will apprise the panel or the chief justice of your situation, sharing the information you have provided. The court will consider the position of opposing counsel, taking into account any expressed client need to move forward as scheduled, as well as any history of scheduling difficulties particular to the case or to the counsel requesting an accommodation. The court will endeavor to resolve the situation quickly, both for your sake and that of your opposing counsel (whose own schedule will be affected).

3. **There are a variety of alternatives to proceeding with the argument as scheduled.**

If an attorney is unable to appear for oral argument, one possibility, if opposing counsel and the court agree, is to submit the case on the briefs. But more often, attorneys will prefer an accommodation and, depending on the scenario, courts have a variety of options. If the attorney can participate in the argument without being physically present, then the court may entertain that option. On occasion, the Fourth Circuit has allowed counsel to appear by phone or video conference in certain circumstances, but that accommodation is neither common nor a possibility to bank on. It is also not an option available in the Supreme Court of Virginia. Even in the Court of Appeals, which regularly holds telephonic arguments outside the in-person docket when the court and counsel agree, only rarely would an appearance via telephone be permitted during the regular docket.

A court might also postpone the argument, whether to later in the argument day or to the next argument session. In the event of a simple traffic delay, the court may simply reorder the arguments on the day's docket. (Indeed, it is because of such situations that courts expressly warn that the docket may be reordered at any time.) In a more serious scenario, the court may be able to bump the case to the next day, assuming one remains in the session; that option is available in the Virginia courts, but not in the Fourth Circuit, given the daily change in panel composition. A one-day delay was the approach the Supreme Court of Virginia took in a case last year when an attorney became ill the morning of argument, and where opposing counsel's agreement made that an easy fix. In an extreme situation, the court may bump a case to the next argument session, which it is more apt to do if opposing counsel does not object.

In situations where a postponement poses an inconvenience (which is especially likely in the Fourth Circuit), note that a court may require another lawyer listed on the brief to argue the case if scheduled counsel cannot be present. As provided in Fourth Circuit Rule 28(c), the court “interpret[s] the listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable.” Virginia courts too may inquire whether an associated attorney can take the place of the absent counsel.

Finally, in situations where no accommodation is possible or justified—whether because of the nature of the situation, the urgency of deciding the case, or counsel's poor planning—a court may opt to proceed with argument and hold that counsel has waived argument time. In an extreme situation, as when an attorney's absence goes unexplained, the Court of Appeals has been known to order the attorney before the panel to show cause why he should not be held in contempt for failure to appear.

**Conclusion**

Even the most conscientious attorneys may sometimes find themselves in these tough situations. While you should minimize the chance of misadventure—double-checking argument details, arriving the day before argument, staying healthy—you can take some comfort in the courts' experience with such scenarios and the clerks' good-faith efforts to resolve them satisfactorily.
Interview with the Honorable Patricia Millett

By Erin Ashwell

One of our board members, Erin Ashwell, recently had the opportunity to talk to the Honorable Patricia Millett of the United States Court of Appeals for the District of Columbia Circuit on writing, and her perspectives as first an appellate lawyer and now a judge. The interview has been edited for clarity.

Q You had a high-profile career as an appellate advocate before joining the D.C. Circuit and one of my first questions is how has your perspective on writing changed since you joined the Court?

A I think for the most part that it is much like I had thought or anticipated as an advocate — that the written briefs and the writing of content are absolutely critical. First impressions are lasting impressions. How you frame an issue, what arguments you present — it’s just incredibly important for every subsequent step in an appeal. It is really important that you write in ways that are reader-friendly. So briefs should not be filled with legalese but, instead, use short sentences, short paragraphs, very well-organized content that is easy to follow with lots of road maps in your writing. All of that is true.

Now I depend on those types of things because we are reading lots of briefs on complex and rather dense regulatory matters on the D.C. Circuit. It really helps when people use language carefully — it is just much more persuasive when people can carefully march through something in an organized, easy-to-read manner.

One thing I was not sure whether judges liked or not was an introduction to a brief. You already have a summary of argument. But I have found very helpful a good or well-crafted introduction that is very short, a page, page and half max, at the beginning of a brief. Before I even read the facts or procedural background, the introduction just explains directly what the case is

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all about. Then I know what lens I am looking at the rest of the brief through, including the factual section. The introduction has to be very succinct, very simply stated. It has to tell us the heart of the matter, the heart of the dispute, and why it matters. So I think that is one thing that I have learned that, for me at least, is very, very helpful.

Also, attorneys need to be very clear about what arguments they are making and not making. Trying to allude to arguments you are not so sure about, but then not developing them, in the apparent hope that maybe some judge will bite and do the work for you — that is just not a good strategy. You really need to be quite clear and explicit: Here is what we are arguing, here are the claims we are making, and the arguments we are making. If you are not arguing something, then don’t toss it in a footnote with a, “golly gee isn’t this interesting” kind of comment. That is just wasted space and it doesn’t bespeak professionalism.

Q

That makes sense to me and that kind of leads me to something I’ve wondered which is when you read a brief, do you read it sequentially or are there parts that you jump to first to get a sense of the issues?

A

I tend to be a very sequential reader, and I tend to read briefs in the order they come in. I want to let the person that is appealing tell the story as they want to tell it. They are the appellant; they are the one who is coming to us because they are aggrieved by whatever happened before an agency or in the district court, so I think they should get the first word and the last word. To be sure, I can’t say that all other judges do that. I don’t jump to the summary of argument because I think that usually is not written like a good introduction. It presupposes the knowledge you have gotten through the statement of facts and the procedural history in a way that a good introduction does not.

I think it’s really helpful if people, in their background sections, include a nonargumentative description of the statutory scheme or regulatory scheme at issue instead of saving that for the argument section. Again, not an argumentative discussion. Just say: Here is the relevant statute, here’s what it does, here’s what it says, here’s what courts have said, here is the background settled case law. Then, when we get to the argument section, we’ve already got the baseline of the law and legal framework in our heads and right in front of us.

It is also incredibly helpful when attorneys include relevant statutory provisions in an addendum to their brief — and do it in full. Don’t just include the little subsection that you are fighting about. We need to see the key language in context. You don’t have to include all of a 300-page omnibus spending bill, of course. But be sure to include the relevant pages. Provide at least the whole statutory section. If you are dealing with three or four different sections, then include a bigger block to help us understand how they all fit together. It really helps to have it right there for us. And the same for regulations. It is so that we can flip back and forth while reading the arguments about what the statute or regulation means.

I think the time is coming when we will have hyperlinks in briefs. I think some courts of appeals do already. We don’t. That will make a lot of this easier. But for now, you should always want your brief to be self-contained. Don’t make me go pick up the other party’s brief because they are the ones who did the courtesy of attaching everything to their brief that I need to have. Doing so diminishes your credibility and reliability as an advocate, because I am left to rely on the other attorney, and not you, to help understand the arguments in your brief.

So that leads me to a question, do you still read on paper or do you read on a screen?

Some of both. It just depends. I’m old enough that I generally prefer the paper. I can mark on that better. It’s what I take up to the bench. I started that way because, for a little while, we didn’t have Wi-Fi in the courtroom. So if I had marked everything up on an iPad, it wouldn’t work well for me in the courtroom. But now we have wireless and I know some judges just read on iPads and mark their comments directly on there.

I’m still a tactile learner. I prefer a paper copy when I can. But sometimes I can’t, so I’m using whatever I have. Briefs should be written for any medium that judges might use. But I do encourage people, before they file a brief, to print it out in hard copy and proofread it from there. You will see mistakes that you don’t see on a screen. And I encourage people to format their briefs for a paper brief, using more space. A lot of the briefs written for electronic reading, for example, will have only one space after a period. Remember that space is your friend when you are writing briefs. It’s a kindness to the reader to give them more space because that’s time for the brain to process the words and complex ideas being read. It separates sentences from sentences, paragraphs from paragraphs, so I think making it look nice on paper, even if it’s going to be read on a screen, is still a very good idea.

So that leads me to a question — I’ve noticed you use both footnotes and endnotes in your opinions. How

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Do you decide which to use? I couldn’t tell if it was just, for example, nontraditional legal cites that you footnote.

A I don’t believe that putting all citations in footnotes makes any sense at all. We’re lawyers. We are in a common law, stare decisis system. The cases are, in fact, the most important part of the argument and are the binding precedent that provides the scaffolding for our decision making. The cases that you are arguing can be some of the most important, if not the most important, part of the brief. So burying your authority down in a footnote does not help me. In fact, strategically it is mentally helpful when you are able to make a legal point and then I can see right there in the body of your argument all the substantiation for it. Your brief says, in effect, “Look at what the courts have said. You don’t have to just believe me.”

I think it denies the nature of our profession and the nature of our job to think that citations to authority are mere footnote material. My main concern when I am writing is to figure what is going to be digestible and most helpful to the reader; what is most communicative in this specific opinion. For that reason, I don’t have hard and fast rules. Too many footnotes and the reader’s eyes spend too much time going up and down. I was taught to read left to right. I was not taught to read up and down. It’s very distracting to have to take your eyes away from the arguments in the text and go down to the footnote, read it, and then find your place back up in the text and pick up again. That’s another reason I really don’t like too many footnotes.

Generally, if you have a lot of cites — for example, you want to say that every circuit has agreed with you — then you should put a couple citations in the text (pick your most persuasive favorites), and then drop the others into a footnote. You don’t need to spend a whole page with the cites. That is, unless strategically you think it is important to spend a whole page to show the court the volume of authority you have. That’s a strategic judgment every lawyer has to make. The important thing for opinion writing is to decide what the public, the legal audience, and the other courts most need to see. Put that right up in the body of the opinion rather than in a footnote.

Lesser authorities are another thing that can safely go down into footnotes. Perhaps also a footnoted comment just to make clear an issue that counsel is not raising or that we, as a court, are not deciding.

But too many footnotes are never good for anybody. It just makes the document hard to read. Yet, the whole goal of writing is communication. Communication is a two-way street. It doesn’t matter so much what you are thinking; what you are communicating is what matters. And that is what your audience is receiving. So the No. 1 focus for writers should be how effectively their message is coming across to the audience. That is what communication is.

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130th SUMMER MEETING
July 23-25, 2020
The Omni Homestead
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Chair Monica Monday presented outgoing Chair Alice Armstrong with a book at the January 2019 meeting.
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Q

So talking in terms of communication, do you think that humor and sarcasm have a place in brief writing?

A

It’s hard. I will never say never. Frivolous sarcasm — if you are being snarky to the opposing counsel or to the trial court or to the agency — that is not professional. But, if you’ve got some saying or maxim — a way of briefly encapsulating your argument or one on the other side — that succinctly and vividly captures the strength of your argument or the legal flaws in an opponent’s argument — that can be a helpful advocacy technique.

At bottom, humor and sarcasm are pretty dangerous turf to tread on because, even if the content is professional, it can be hard to convey effectively on paper. And the risk of things falling flat is high. There is a reason a lot of us don’t read books of jokes. We will go hear people deliver comedic jokes in person. But we don’t read them because they just don’t work without an oral delivery very often.

Also, too often, sarcasm can sound like unprofessional whining or snarkiness. You don’t want that either. So I think people should err on the side of avoiding that. I’m not picking up a brief for humor. When I read it, I’m not looking for laughs. But every now and then, someone will just have a good idiom or turn of phrase and that captures my attention and might even bring a smile to my face. Just don’t try to diminish or insult the other side. Argue and disagree over the law but don’t be disagreeable in the process.

Q

That makes sense. I was curious. Are their particular writers or jurist who have influenced your writing style?

A

I’m a perpetual learner, first of all, and I think there are people who write incredibly well. When he was an attorney even, I was involved in some cases with now-Chief Justice John Roberts who was then, and still is, a brilliant writer. Reading his opinions is always a good way to learn from him. I think Justice Elena Kagan is another brilliant writer to learn from, so I really like reading her opinions. And Justice Ruth Bader Ginsburg’s work is always fantastic.

When it comes to legal writing instruction, I’m a fan of Ross Guberman. His books, I think, are very practical and always good reminders to me to look my opinions over carefully. I have found in his books some rules to remember and follow that are very helpful for me. Justice Antonin Scalia, at times, could have a really brilliant flair for writing. Sometimes, for me, it got a little bit too harsh. But he had some really, really good opinions that I enjoyed learning from as well. I am also always reading and learning from other colleagues around me here on the D.C. Circuit. I think what the Chief Justice and Justices Kagan and Ginsburg do exceptionally well is make the law easy to follow and easy to understand. They use everyday English language and organize opinions in a way with short sentences and short paragraphs that are very easy follow. They do that even if it’s incredibly complicated material they are wrestling with. So those are top-notch role models for every lawyer to have.

I read that you are a black belt in Tae kwon do?

A

I am, yes.

Q

Does exercise take any part of your writing process, or of your thinking process in a case?

A

It really helps the thinking process about the law and sometimes how to write it. They’re related. Your thinking and writing both have to be clear. I think there is something about just getting away from the desk that brings clarity and fresh ideas to the fore. I often get ideas while driving a car. My husband used to laugh because I always kept a pen and paper near my bedside when I was getting ready for oral arguments. That’s because I would lie down and then, boom, suddenly the right thought would pop into my head and I would, in the dark of night, be scribbling on this notepad to make sure I would have it in the morning. I wouldn’t remember it otherwise.

Exercise, for me, whether it’s jogging, swimming, or Tae kwon do, helps because you are out away from the computer, you are away from law books, and you just let your brain clear a little bit and process things in a fresh way. I don’t know why it is. I’m sure there is some neuroscientist who can explain it all. But I find a lot of times that something I have been struggling with will suddenly become clear in my head — exposing a new approach I can try or a better articulation or framing of a point.

So this is the first interview I have done but if they let me do more, I want to note that I would raise this question with both men and women. One of your colleagues described you as a ferocious worker and I...
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understand you are also a parent — and I wondered if you had any thoughts on how you have had both elements in your life and how you have balanced the two?

A

I don’t know if I balance well or not. I don’t know if there is a balance. I think you just do the best you can on all fronts each day. It’s gotten better over the course of my career with the improved acceptance of women and mothers in the workplace, and the recognition of male and female attorneys both having childcare and familial responsibilities. I feel very fortunate that people like Justice Ginsburg blazed a trail for all of us in this area, showing that you can be a working mother and have a satisfying career in the legal profession.

The reality is that I’ve got two wonderful things to juggle and balance: a rewarding career and an incredible, supportive family. Whenever I’m juggling, I’m juggling blessings. And I keep reminding myself that I am juggling blessings. Of course, a lot of times, the reality is there’s not a lot of extra time for me personally. I’m not going to spas. I’m not often getting nails done unless I’m doing it with my daughter. It takes me a long time to read a non-work book unless we are on vacation. Even then, sometimes, I’m still working just depending on what is going on. So something has to give. Letting some of those personal things go is well worth the trade-off.

I love my family, my children. They are what makes my heart beat. I also really enjoy the work I do, and I take it very seriously. I take the law, I take our profession, I take this job as a jurist with immense seriousness because I think it is incredibly important that people trust the judicial branch to solve their problems in a peaceful way. Other countries don’t have a justice system to trust, and I have to earn the trust of both parties in every single case that I am on and in every single opinion that I am writing. I have to maintain that trust as a steward for the entire judicial branch. So that’s why I take it very seriously.

Getting a supportive partner is incredibly important.

Justice Ginsburg said it all along about her husband, Marty Ginsburg. I have told the Justice that my husband, Bob, is my Marty. He is deeply and persistently supportive, and my children are a great source of love and understanding as well. They recognize that I am who I am. They are passionate about their own things as well. So we all get to find our passions in life and support each other as we try to pursue them. To be sure, it’s hard; it’s exhausting; I don’t get enough sleep. But we are in it together.

Q

Are there any sorts of last words that you’d offer as advice for people just beginning their journey in appellate law, something that looking back when you started your career, now that you regularly hear advocates, that you wish you’d known?

A

I think I would generally say to people just starting out that it is good to look at different styles and study from people who have been very successful advocates or currently are very successful advocates. But always remember that the goal is to develop your own voice. You need to trust that you are a talented, smart, hardworking attorney and you have your own voice and should find what is comfortable for you. Always remember that the goal is communication. So find the best way for you to communicate.

It’s the same for oral advocacy. There isn’t one single right way to do oral advocacy. To be sure, there are basic rules and guardrails. For example, before you answer questions, understand what the judges want and need, both from your briefing and your oral argument. But, after that, you have to be your own person. No one expects everybody to come in sounding the same or doing the exact same things. That would seem very artificial. What matters is your substantive content, your devotion to your client’s cause, and your commitment to doing the hard work of zealous advocacy. Genuineness is important. Candor, too, is incredibly important with courts. Don’t try to cover things up, because you do quickly lose credibility. I’ve discovered that people’s memories for attorneys that are not credible last a really long time. You don’t want that reputation.

Finally, remember that everything you do, every paper you sign, every argument you give, every word you say to a court and to opposing counsel is a statement about who you are as a professional. So too is everything you do to care for your clients. That defines you as a professional. You need to take that very seriously. Don’t let something go out with your name on it that you are not comfortable with as a professional.

Q

That’s great advice. I really appreciate your time. Thank you for doing this.

Looking for a large conference room, a place for a cup of coffee during a recess, a small room for a client meeting or a quiet respite for focused work, VBA on Main was designed with the goal of flexibility.
Drawing Jurisdictional Lines:
New Virginia Rules 1:1B and 1:1C

By Monica T. Monday

Who has jurisdiction after an appeal is filed — the appellate court or the circuit court? This issue has lurked in the grey areas of Virginia procedure, causing confusion and frequently disrupting the orderly administration of justice. But, two new Rules of the Supreme Court of Virginia provide clarity on this sticky issue by drawing clear lines defining the jurisdiction that each court enjoys after an appeal is noted. And, these new rules appear to be part of a developing — and welcome — trend, where the Supreme Court of Virginia has amended existing rules or adopted new rules to provide guidance and clarity in other grey areas. The new jurisdiction rules are therefore another step toward demystifying difficult areas of Virginia law.

Overview of the new rules

New Rule 1:1B deals with “Jurisdictional Transfer During Appeal of Final Judgment.” It explains which court – circuit or appellate — has jurisdiction from the time an appeal is noted until resolution of the appeal. A companion rule, Rule 1:1C, addresses this issue in the context of interlocutory appeals. These rules, which became effective on September 1, 2019, will make it easier to determine what the circuit court can do after an appeal is noted. And, by defining the respective roles of the circuit court and the appellate court after a notice of appeal is filed, the new rules will eliminate confusion about the respective roles of those courts during the pendency of an appeal.

Rule 1:1B explains that when a notice of appeal is filed, the appellate court acquires jurisdiction over the case, but the circuit court retains concurrent jurisdiction. The nature and extent of the circuit court’s jurisdiction depends on whether the notice of appeal is filed before or after the expiration of the 21-day period under Rule 1:1.1

A circuit court’s plenary jurisdiction before expiration of the 21-day period

When a notice of appeal is filed before expiration of the 21-day period, “the circuit court retains plenary,2 concurrent jurisdiction over the case until the expiration of that period.”3 Thus, consistent with Rule 1:1, the circuit court enjoys complete and unlimited jurisdiction for 21 days after entry of the final order even after an appeal has been noted.

A circuit court’s limited jurisdiction after expiration of the 21-day period

By contrast, when the appeal is noted after expiration of the 21-day period, the circuit court has “limited” concurrent jurisdiction.4 Under these circumstances, the circuit court may exercise jurisdiction to address certain motions enumerated in Rule 1:1B, including motions: 1) to stay the judgment pending appeal;5 2) to enforce a final judgment, including motions for contempt;6 and 3) relating to the amount or form of an appeal or suspending bond pursuant to Code § 8.01-676.1 in civil cases.7 Additionally, with leave of the appellate court, the circuit court retains jurisdiction to correct clerical mistakes in a final judgment pursuant to Code § 8.01-428(B).8

In criminal cases, the circuit court retains limited concurrent jurisdiction “under Code § 19.2-306 to revoke suspended criminal sentences and to pronounce judgment pending appeal of Final Judgment.” It explains which court – circuit or appellate — has jurisdiction from the time an appeal is noted until resolution of the appeal. A companion rule, Rule 1:1C, addresses this issue in the context of interlocutory appeals. These rules, which became effective on September 1, 2019, will make it easier to determine what the circuit court can do after an appeal is noted. And, by defining the respective roles of the circuit court and the appellate court after a notice of appeal is filed, the new rules will eliminate confusion about the respective roles of those courts during the pendency of an appeal.

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Interlocutory appeals

Interlocutory appeals are addressed in Rule 1:1C. When a party files a petition for review challenging a trial court’s interlocutory ruling on an injunction,13 “the appellate court shall have exclusive jurisdiction over the appealable interlocutory order and the circuit court shall retain jurisdiction over any part of the case that has not been appealed.”14 However, in such an appeal, the circuit court or the appellate court may enter an order staying the circuit court proceedings.15 For all other appeals of interlocutory orders, “the circuit court shall retain concurrent jurisdiction over the case unless the circuit court or the appellate court enters an order staying all or part of the proceedings in the circuit court.”16

Motions to dismiss and for the appointment of counsel

Rule 1:1B also deals head-on with motions to dismiss an appeal. Before the implementation of Rule 1:1B, no rule or statute expressly authorized a party to move to dismiss an appeal
appeal. Now, a party may file a motion to dismiss an appeal in the appellate court at any time after both the filing of an appeal and the expiration of the 21-day period. But, the new rule provides that the failure to file a motion to dismiss does not bar a party from raising the grounds for the dismissal in the appellate briefs. Thus, the litigant retains control over the timing and presentation of arguments to dismiss an appeal.

And, if resolution of the motion to dismiss requires fact-finding, the appellate court may remand the case to the circuit court for that limited purpose: “The appellate court may decide the motion based upon the existing record or, in its discretion, issue a temporary remand of the matter to the circuit court for the purpose of making findings of fact regarding factual issues relevant to the motion.”

Similarly, Rule 1:1B also directs that, in appropriate cases, a party may file in the appellate court a motion for the appointment of appellate counsel after an appeal is noted and the 21-day period has expired. “The appellate court may act upon the motion or may, in its discretion, refer the motion to the circuit court for appointment.”

A welcome trend

The adoption of Rules 1:1B and 1:1C comes on the heels of several other rules the Court has promulgated to tackle thorny issues that have perplexed judges and tripped up lawyers and litigants. For example, in 2017, the Court adopted new Rule 1:5A to address the recurring problem of signature defects in pleadings. The new rule attempts to alleviate the harsh consequences of such defects — which can be fatal to a case — by providing a mechanism for curing such defects. Then, in 2018, the Court overhauled Rule 1:1 to eliminate confusion over when an order is final — a problem that had resulted in untimely, and therefore defaulted, appeals. The Supreme Court’s proactive approach to using the Rules of Court to define the contours of the law will make it easier for lawyers to avoid procedural traps — but only if they read the rules.

Endnotes

1. Rule 1:1 provides that a case remains within the jurisdiction of the circuit court for 21 days after the entry of a final order and may not thereafter be “modified, suspended or vacated” by the circuit court.

2. The word “plenary” is defined as “complete in every respect : absolute, unqualified.” https://www.merriam-webster.com/dictionary/plenary.

3. Rule 1:1B(a)(2).

4. Rule 1:1B(a)(3).


12. “If a notice of appeal has been filed after the expiration of the 21-day period prescribed by Rule 1:1, the circuit court retains limited, concurrent jurisdiction during the pendency of the appeal solely for the purposes of: ... taking any other action authorized by statute or Rule of Court to be undertaken notwithstanding the expiration of the 21-day period prescribed by Rule 1:1, which actions include, but are not limited to, those authorized by Code §§ 8.01-392 to -394, 8.01-428, 8.01-623, 8.01-654(A)(2), 8.01-677, 19.2-303, 20-107.3(K), 20-108, and 20-109 and Rules 1:1A, 5:10(b), 5:11, 5A:7(b), and 5A:8, so long as the party requesting the action complies with the applicable time limitation in the statute or Rule authorizing such action.” Rule 1:1B(a)(3)(H).

13. Under Virginia Code § 8.01-626, a party may file a petition for review when “a circuit court (i) grants an injunction or (ii) refuses an injunction or (iii) having granted an injunction, dissolves or refuses to enlarge it.” A party aggrieved of such a ruling “may, within 15 days of the court’s order, present a petition for review to a justice of the Supreme Court” or to a judge of the Court of Appeals “if the issue concerning the injunction arose in a case over which the Court of Appeals would have appellate jurisdiction.”


15. Id.

16. Rule 1:1C(b).

17. Rule 1:1B(b).

18. Id.

19. Id.

20. Rule 1:1B(c).

21. Id.
Appellate Mediation in Virginia

By Monica T. Monday

In 2019, the Supreme Court of Virginia launched a pilot program for limited appellate mediation in the Court of Appeals of Virginia and Supreme Court of Virginia. The two-year pilot program recognizes the importance of expanding the availability of alternative dispute resolution to all levels of Virginia’s court system. It is designed to support mediation in Virginia’s appellate courts so litigants may make informed decisions about resolution of their disputes and fashion creative solutions, even after entry of a final or appealable order.

Appellate mediation is available in certain civil cases where both parties are represented by counsel. Appeals where one or both parties are pro se are not eligible for appellate mediation through the pilot program. In the Court of Appeals, mediation is available in equitable distribution and/or related attorney’s fees disputes. In the Supreme Court, mediation is available only where a petition for appeal has been granted; motions to vacate criminal convictions and petitions for actual innocence are not be eligible for appellate mediation.

Although there is a robust training and certification program for those who wish to be certified as mediators in Virginia, there previously was no separate certification program for mediators resolving disputes at the appellate level. To further support the pilot appellate mediation program, the Supreme Court has now approved a training and certification program for appellate mediators during the pilot project.

How appellate mediation works

Appellate mediation is entirely voluntary. In the Supreme Court of Virginia, the parties are informed of the availability of appellate mediation when a writ is granted. At that time, the Clerk of the Supreme Court sends a letter to the parties describing mediation and explaining that if all parties agree to mediate and notify the Clerk in writing of their agreement within 14 days, any further appellate deadlines (except the statutorily-required bond deadline) will be stayed for a period of 30 days to allow the parties an opportunity to mediate. The Clerk’s letter attaches a list of certified appellate mediators, but explains that the parties may choose any mediator, whether or not the mediator is on the list.

In the Court of Appeals, appellate mediation is not available until the Court receives the record in a domestic relations case. At that time, the Clerk of the Court of Appeals sends the parties a letter similar to that sent by the Supreme Court Clerk. As in the Supreme Court, if the parties agree to mediate, there is an automatic stay of the proceedings for 30 days to provide an opportunity to mediate. If the Court of Appeals issues a stay, the Clerk notifies the parties of the deadline for filing the next document.

Appellate mediation promotes access to justice

Appellate mediation is “a vehicle” to provide “viable appellate mediation for economically disadvantaged litigants” in an effort to promote access to justice at the appellate level of the Commonwealth’s court system. Because the appellate mediation process is initiated before the preparation and filing of the joint appendix and merits briefs, parties who elect to mediate may resolve their dispute before embarking on the most expensive part of the appeal. In this way, appellate mediation is an attractive alternative for cost-conscious litigants. Appellate mediation, then, is another tool to close the justice gap in Virginia.

Endnotes

For information about becoming a certified appellate mediator, go to: http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/certification_process/certification_requirements.html.


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