

**COMMON QUESTIONS ANSWERED ABOUT
AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA**

Panelists:

**The Honorable Robert J. Humphreys
The Honorable Glen A. Huff
The Honorable Junius P. Fulton, III**

Moderator:

Jennifer L. Eaton, Esq.

COMMON QUESTIONS ANSWERED ABOUT AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA

1. **What is the Court of Appeals of Virginia?**
 - a. Brief History (*See Appendix*)
 - b. Current framework
 - i. 17 judges
 - ii. Chambers across the Commonwealth
 - c. Current and expected case volume
 - i. A civil wave of cases is coming!
 - ii. Expect full or nearly full panels until the end of the year.
2. **What types of cases does the Court have jurisdiction over?**
 - a. Appeals as a Matter of Right
 - i. Final decisions of a circuit court in criminal and civil cases
 - ii. Final decision of a circuit court on appeal from a decision of an administrative agency
 - iii. Final decision from the Virginia Workers' Compensation Commission
 - iv. Final decision of a circuit court on appeal from a grievance hearing decision issued pursuant to Code § 2.2-3005
 - v. Final judgment, order, or decree of a circuit court involving
 1. Application for a concealed weapon permit
 2. Involuntary treatment of prisoners
 3. Declaratory or injunctive relief under Code § 57.2-.02
 - vi. Interlocutory decree or order
 - vii. Final conviction in a circuit court of a traffic infraction or crime
 - viii. Appeal of a partial final judgment from circuit court
 - b. Discretionary Appeals (by petition)
 - i. Criminal appeals brought by the Commonwealth, county, city, or town previously brought by writ of error
 - ii. Commonwealth appeals pursuant to Code § 19.2-398
 - iii. Multiple Claimant litigation under Code § 8.01-267.1 *et seq.*
 - iv. Certified interlocutory appeals
 - v. Immunity appeals under Code § 8.01-675.5(B)
 - vi. Injunction Petitions
 - c. Original Jurisdiction

COMMON QUESTIONS ANSWERED ABOUT AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA

- i. Writs of mandamus, prohibition, and habeas corpus
 - ii. Writs of actual innocence based on nonbiological evidence
 - d. Contrast with Supreme Court of Virginia
- 3. When is an appeal ripe?**
- a. In civil cases, focus on finality and Rule 1:1
 - b. But there are instances where a pre-trial appeal may be appropriate in both the criminal and civil context (such as with interlocutory appeals and orders)
 - c. How long does a party have to note an appeal?
 - i. The notice of appeal is due within 30 days after entry of the final judgment or an appealable order (Code § 17.1-407(a) and 5A:6).
 1. Unless a Commonwealth pre-trial appeal, then “not more than 14 days after the notice of transcript or written statement of facts required by § 19.2-405 is filed or, if there are objections thereto, within 14 days after the judge signs the transcript or written statement of facts.”
 - ii. Copies sent to all counsel and to the AG in criminal cases
 - iii. Make sure to note appeal in the right court (circuit court, not Court of Appeals), tribunal, or commission.
 - iv. Notice of appeal not needed in most interlocutory appeals. 5A:6(a2).
 - v. Pay the \$50 filing fee with the notice of appeal. Rule 5A:6(c).
 - d. What happens next?
 - i. Filing of appeal bond
 1. \$500 appeal bond is required in civil appeals *or* the filing of an irrevocable letter of credit. Code § 8.01-676.1(A).
 2. A party filing the appeal bond must give notice in writing to the appellee. Rule 5A:17(b).
 - ii. Filing of record
 - iii. Filing of assignments of error
 1. For Appellant, within 15 days of filing of the record. Rule 5A:25(d).
 2. For Appellee (if cross-errors), within 10 days after the appellant files a statement of assignments of error. *Id.*

**COMMON QUESTIONS ANSWERED ABOUT
AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA**

3. File the Assignments of Error with the Designation of the Appendix. *Id.*
- iv. Filing of Appendix (if required)
4. **What are some key rules to keep in mind while brief writing?**
 - a. Briefing Generally
 - i. What it is called is what it should be – brief!
 - ii. Deadlines (unless otherwise provided by statute or Order of the Court)
 1. Opening Brief – within 40 days after the filing of the record with the Court.
 2. Appellee Brief – within 30 days after the filing of the Opening Brief.
 3. Reply Brief – within 14 days of the Brief of the Appellee.
 4. Amicus Brief – “on or before the date on which the brief of the party supported if required to be filed.” Rule 5A:23(b).
 - iii. Word/Page Limits
 1. Opening Brief and Appellee Brief: the longer of 50 pages or 12,300 words. Rule 5A:19(a).
 2. Reply Brief: the longer of 20 pages or 3,500 words. *Id.*
 3. *Amicus* Brief: Must comply with the word limits that apply to briefs of the party being supported.
 - b. Change to Appendix requirements
 - i. in cases where there is an electronic record, no Appendix is required. Rule 5A:25(a)(1).
 - c. Know all aspects of Rule 5A
 - i. Rules 5A:7 & 5A:8 – Appellant Must Provide an Adequate Record
 1. Transcript or Written Statement of Facts and Exhibits
 - ii. Rule 5A:12 – Assignments of Error (Criminal Petitions)
 - iii. Rule 5A:18 – Specific Contemporaneous Objection Requirement
 - iv. Rule 5A:20 – Assignments of Error
 - v. Rules 5A:12 and Rule 5A:20 – Citation to Record, Standard of Review, Arguments Must Be Developed on Brief
5. **How does the Court handle continuance requests?**

COMMON QUESTIONS ANSWERED ABOUT AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA

- a. Mandatory deadlines such as time to file a notice of appeal, petition for appeal, petition for review, petition for rehearing, and request for rehearing en banc are mandatory. Rule 5A:33(a). But the Court may grant an extension of those deadlines “in order to attain the ends of justice.”
 - b. The deadlines for a notice of appeal (from the trial court (Rule 5A:6) or the Virginia Workers’ Compensation Commission (Rule 5A:11)), a petition for panel rehearing (Rule 5A:33), opening brief in a criminal case (Code § 17.1-408), and a petition for rehearing en banc (Rule 5A:34) are all mandatory but may be extended in order to attain the ends of justice.
 - i. What does “ends of justice” mean?
 - c. All other deadlines may be extended by the Court “upon a showing of good cause sufficient to excuse the delay.”
 - d. All requests for extensions of time must be made by written motion filed in the clerk’s office within the pertinent periods as set forth in Rule 5A:3(c).
- 6. How do the judges hear cases?**
- a. Oral waiver cases
 - b. Merit Panels (4 Regions, but multiple locations in each region)
 1. Chesapeake/Norfolk
 2. Richmond
 3. Salem
 4. Lexington
 5. Alexandria
 6. Bristol
 7. Winchester
 8. Loudon
 9. Leesburg
 10. Newport News
 11. Hampton
 12. Virginia Beach
 13. Williamsburg
 14. Law Schools
 - c. Standing Panels

**COMMON QUESTIONS ANSWERED ABOUT
AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA**

- i. Summary affirmance reviews
 - ii. Appeals in which oral argument is waived
 - iii. Actual innocence petitions
 - iv. Various procedural requests and motions
 - v. Petitions for review (emergency injunctions) under § 8.01-626
 - d. *En Banc*
 - i. At least 13 judges
- 7. What does oral argument look like?
 - a. Panels
 - i. Presiding Judge
 - ii. Presence of all 3 judges required
 - iii. Rotating order for assignments
 - iv. Except in extraordinary circumstances, the clerk will give at least 30 days advance notice to counsel of the date, time, and place for oral argument of panels. Although the clerk is only required to give 15 days' notice for arguments, 30 days is necessary for adequate scheduling flexibility. Rule 5A:28(a).
 - b. Time
 - i. Each side in an appeal will be allowed 15 minutes for oral argument, even in consolidated cases, but the panel may, by majority vote, grant additional time in consolidated cases and cross-appeals, if necessary.
 - c. When is there no oral argument even when requested?
 - i. When appeal is wholly without merit (resolved via “summary disposition” per Rule 5A:27); or
 - ii. “the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed.” Code §17.1-403.
- 8. **When should practitioners expect an opinion?**
 - a. Generic timeline
 - i. Oral argument
 - ii. Judges' post-argument conference
 - iii. Opinion drafting/exchange between chambers

**COMMON QUESTIONS ANSWERED ABOUT
AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA**

- iv. Opinion published online
 - b. Published opinions may take longer given full court review
 - c. Published opinions are available online to the public here:
<https://www.vacourts.gov/wpcap.htm>
 - d. Unpublished opinions are available online to the public here:
 - e. <https://www.vacourts.gov/wpcap.htm>
9. **What can an attorney do to challenge a ruling after an opinion has been issued?**
- a. File a Petition for Rehearing (within 14 days of decision) - Rule 5A:33.
 - i. Page Limit: the longer of 25 pages or 5,300 words.
 - b. Request an *En Banc* hearing (within 14 days of decision) - Rule 5A:34
 - i. Page Limit: the longer of 25 pages or 5,300 words.
 - c. Appeal to the Supreme Court of Virginia (within 30 days after entry of the judgment appealed from or a denial of a timely petition for rehearing)– Rule 5:17
 - i. Page Limit: the longer of 35 pages or 6,125 words.
 - ii. The Supreme Court of Virginia has appellate review of most decisions of the Court of Appeals.
 - iii. Some decisions of the Court of Appeals, however, are final:
 - 1. Appeals involving the denials of a concealed handgun permit.
 - 2. Involuntary treatment of prisoners pursuant to Code §§ 53.1-40.1 or 53.1-133.04.
 - 3. Appeals in criminal cases pursuant to subsections A or E of Code §§ 19.2-398 and 19.2-401.
 - iv. Appeals from the Court of Appeals to the Supreme Court of Virginia are generally brought by petition. Code § 8.01-670.
 - v. There are some limited rights of appeal to the Supreme Court.
 - 1. State Corporation Appeals;
 - 2. Virginia State Bar disciplinary cases; and
 - 3. Appeals from the circuit court involving a writ of habeas corpus.
 - vi. Procedure to appeal to the Supreme Court of Virginia is virtually the same as before.
10. **What are some common practitioner missteps?**
- a. Trial court v. appellate court arguments

**COMMON QUESTIONS ANSWERED ABOUT
AUTOMATIC RIGHTS OF APPEAL IN VIRGINIA**

- b. Not preserving error
- c. Using proprietary programs for video exhibits
- d. Omitting white space on briefs
- e. Waiving arguments in briefs
- f. Waiving an opportunity to argue case
- g. Not making a proper proffer
- h. Failing to note appeal in right court
- i. Relying on the "ends of justice" exception

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

Certify Your Attendance Online at www.vsb.org

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A \$100 fee will be assessed for failure to comply with either deadline.

Member Name: _____ VSB Member Number: _____
Address: _____ Daytime Phone: _____

Email: _____

City State Zip

Course ID Number: VIJJ001

Sponsor: Virginia Beach Bar Association

Course/Program Title: The Brave New World of Appellate Jurisdiction and Practice in Virginia

Live Interactive * CLE Credits (Ethics Credits): 2.0 (0.0)

Date Completed: _____ Location: _____

By my signature below I certify

- ___ I attended a total of _____ (hrs/mins) of **approved CLE**, of which (_____) (hrs/mins) were in **approved Ethics**.
Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)
- ___ The sessions I am claiming had written instructional materials to cover the subject.
- ___ I participated in this program in a setting physically suitable to the course.
- ___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.
- ___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.
- ___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

Date

Signature

This form may be mailed to:
Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
(804) 775-0577
www.vsb.org

[Office Use Only: Live]