

TO: THE BAR AND THE BENCH OF VIRGINIA
FROM: Advisory Committee on Rules of Court

May 2, 2022

PROPOSED RULE REGARDING INTERVENTION BY THE COMMONWEALTH WHERE THE
CONSTITUTIONALITY OF A LAW IS CHALLENGED

The Advisory Committee on Rules of Court in Virginia seeks public comment on a proposed Rule 3:14A, Intervention by the Commonwealth where constitutionality of law challenged.

Federal law requires notice to a state attorney general—and an opportunity for the attorney general to intervene—when a lawsuit in federal court draws into question the constitutionality of a state statute. *See* 28 U.S.C. § 2403(b); FED. R. CIV. P. 5.1(a); FED. R. APP. P. 44(b). At least 29 states currently have rules or statutes requiring similar notice to the state attorney general and an opportunity to intervene when a case in state court questions the constitutionality of a state law. The Boyd-Graves Conference has recommended that the Supreme Court of Virginia adopt a similar procedure for cases in Virginia that challenge the constitutionality of a Virginia law.

The Advisory Committee seeks comment on this proposed Rule 3:14A:

Rule 3:14A. Intervention by the Commonwealth where constitutionality of law challenged.

- (a) *Intervention of right by the Commonwealth.* In any civil action in any circuit court, the Court of Appeals, or the Supreme Court in which a party challenges the constitutionality of a statute or regulation of the Commonwealth or of a provision of the Constitution of Virginia, and in which no party is represented by the Office of the Attorney General, the Attorney General, on behalf of the Commonwealth, is entitled to intervene in the action.
- (b) *Notice to the Attorney General.* A party who files a pleading, written motion or other paper challenging the constitutionality of a statute or regulation of the Commonwealth or of a provision of the Constitution of Virginia must promptly (i) file with the court a notice stating the nature of the challenge and identifying the filing in which it was raised and (ii) serve a copy of the notice and the filing on the Attorney General by certified or registered mail, return receipt requested, to Notices of

Constitutional Challenges, Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, or by electronic mail to noticesofappeal@oag.state.va.us.

- (c) *Time to Intervene.* The Attorney General, on behalf of the Commonwealth, may intervene in such action by filing a motion to intervene within 30 days after being served with a copy of the notice required by subsection (b), unless the court extends the time to intervene.
- (d) *Further proceedings.* Before the expiration of the time to intervene in subsection (c), or if the party has failed to give the notice required by subsection (b), the court may reject the constitutional challenge but may not enter a final judgment holding the statute, regulation, or constitutional provision unconstitutional.

Email Comments: Please send comments on this proposed rule on or before August 1, 2022 to:

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