COURTS IN TRANSITION

The Report of the Commission on the Future of Virginia's Judicial System

Mission

To provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the United States and Virginia Constitutions.

COMMISSION
ON THE
FUTURE
OF
VIRGINIA'S JUDICIAL SYSTEM
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219
(804) 786-6455

ROBERT M. O'NEIL
CHAIRMAN

GEORGE M. COCHRAN
VICE-CHAIRMAN

May 1, 1989

The Honorable Harry L. Carrico
Chief Justice
Supreme Court of Virginia
100 North Ninth Street
Richmond, Virginia 23219

Dear Chief Justice Carrico:

It is my privilege to transmit to you the report of the Commission on the Future of Virginia's Judicial System. This report reflects our shared vision for the future of the state's courts and the role they may play in serving the Commonwealth's needs in the coming century.

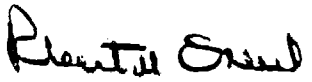
We are especially pleased that the presentation could occur on Law Day. The timing well suits the role we have envisioned for the judicial system in the rapidly changing world we foresee. While we recognize the need for continuity in the role of our courts, we have also identified a number of dimensions in which courts will be challenged to adapt and change. Planning for those challenges should begin now if Virginia's courts are to be ready for the next century.

The work of the Commission benefited greatly from the diverse background and perspective of our members. Their willingness to devote many days to the Commission's task far exceeded the expectation with which I began, and showed their deep commitment to the challenge you set before us. The citizen members made an especially valuable contribution in bringing to bear on issues of legal process and structure a vital non-legal perspective.

We also valued the counsel of several prominent officers of the Commonwealth (the Lieutenant Governor and the Attorney General) as well as three leaders of the General Assembly — the Speaker of the House of Delegates, and the chairs of the Senate Finance and House Appropriations Committees. They have made invaluable contributions to our work. They have shared with us their special understanding of state government. They have not, however, been asked or expected to sign the Commission report.

Finally, we would all commend and applaud your own vision in creating such a group and giving us both the challenge and the confidence that carried us through this task. We hope that we have met your hopes and expectations.

Very sincerely,



Robert M. O'Neil

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INTRODUCTION

Like the nation and the world, the Commonwealth is changing. Recent developments in technology, medicine, communications and other fields are transforming the way Virginians think, work and live. Reports issued almost daily predict a host of demographic, economic, environmental, political and societal changes. These trends, coupled with citizens' changing needs and expectations for services, challenge conventional assumptions and practices in every branch of government.

The judiciary will not escape the effect of these forces. Indeed, responsibility will rest squarely on the legal system and the courts to resolve many of the controversies that await us. Yet, the law's reverence for precedent and confidence in established custom pose limits to the pace and nature of change.

In order to help Virginia courts anticipate the challenges and the opportunities ahead, Chief Justice Harry L. Carrico, in 1987, appointed a 34-member Commission on the Future of Virginia's Judicial System. The Commission's charge was to develop a "vision" for an effectively functioning justice system for the Twenty-First Century reflecting the ideas, desires, and study of a diverse group of Virginians. At the Commission's first meeting in November 1987, the Chief Justice challenged the members to "assess the demands likely to confront the courts in the future and recommend a plan of action to meet the expected requirements."

The Commission's creation was a unique undertaking in the history of the courts. For the first time, a distinguished panel of Virginia citizens, business leaders, legislators, state and local officials, lawyers, judges and court personnel assembled to give careful thought to the long-term future of the court system.

In establishing the Commission, the judiciary also recognized the value of incorporating "futures research" techniques into its planning efforts. Using these techniques enabled the Commission to move beyond traditional issues and time frames and to assess internal changes the courts may face as a result of external changes in society. Developing information on "early warning signals" provided an opportunity to develop longer-term goals, strategies and plans for improving the courts to meet expected demands.

During the first phase of the Commission's work, several activities were undertaken to acquaint members with futures research and to generate lists of topics for study. Surveys were conducted to identify members' views on the critical issues facing society, the legal system and the courts in the next 25 years. They were asked to envision an optimal justice system for the next century, to describe its components and to indicate ways in which that system would differ from today's system.

The Commission began its work with a series of briefing meetings in which futurists and other experts offered forecasts of numerous societal trends and developments. Of special value was the opportunity this gave the members to assess the probable effect of these trends on the role and operation of the courts.

Four task forces then were named to study the major issues identified by the members. To broaden the perspectives, ten additional persons, including a technologist, victim-witness advocate and several law enforcement representatives were asked to join the task forces.

Formulating a vision of what justice should be in the coming decades and how courts might resolve disputes more effectively given that concept was the charge of the task force on the **Quality of Justice**. Its members sought to fulfill the charge by reviewing a number of features within the court system which promote or may impede the effective resolution of disputes. Specifically, five areas of study were identified by the task force: 1) public perception, education and access to the judicial system; 2) the effects of delay and cost on the justice system and its participants; 3) criminal justice issues; 4) substantive law changes; and 5) the role of juries.

A second task force on the **Mission, Organization, and Administration of Justice** was charged to review the mission and structure of the court system and assess its present organization in light of the changing needs of society. With regard to court administration, the task force examined the roles of the existing management and policy-making bodies to determine whether changes are required to support the future needs of the courts. It also studied the changing roles of judges, court personnel and lawyers in the administration of justice.

Recognizing that court adjudication is but one means of settling conflicts, a task force on **Alternative Paths to Justice** was asked to consider the need for and ways of developing more flexible and responsive forms of dispute resolution. Members studied the growth of alternative dispute resolution programs in Virginia and elsewhere. They also discussed the issue of privatization of justice and the various possible relationships between alternative dispute resolution mechanisms and the courts.

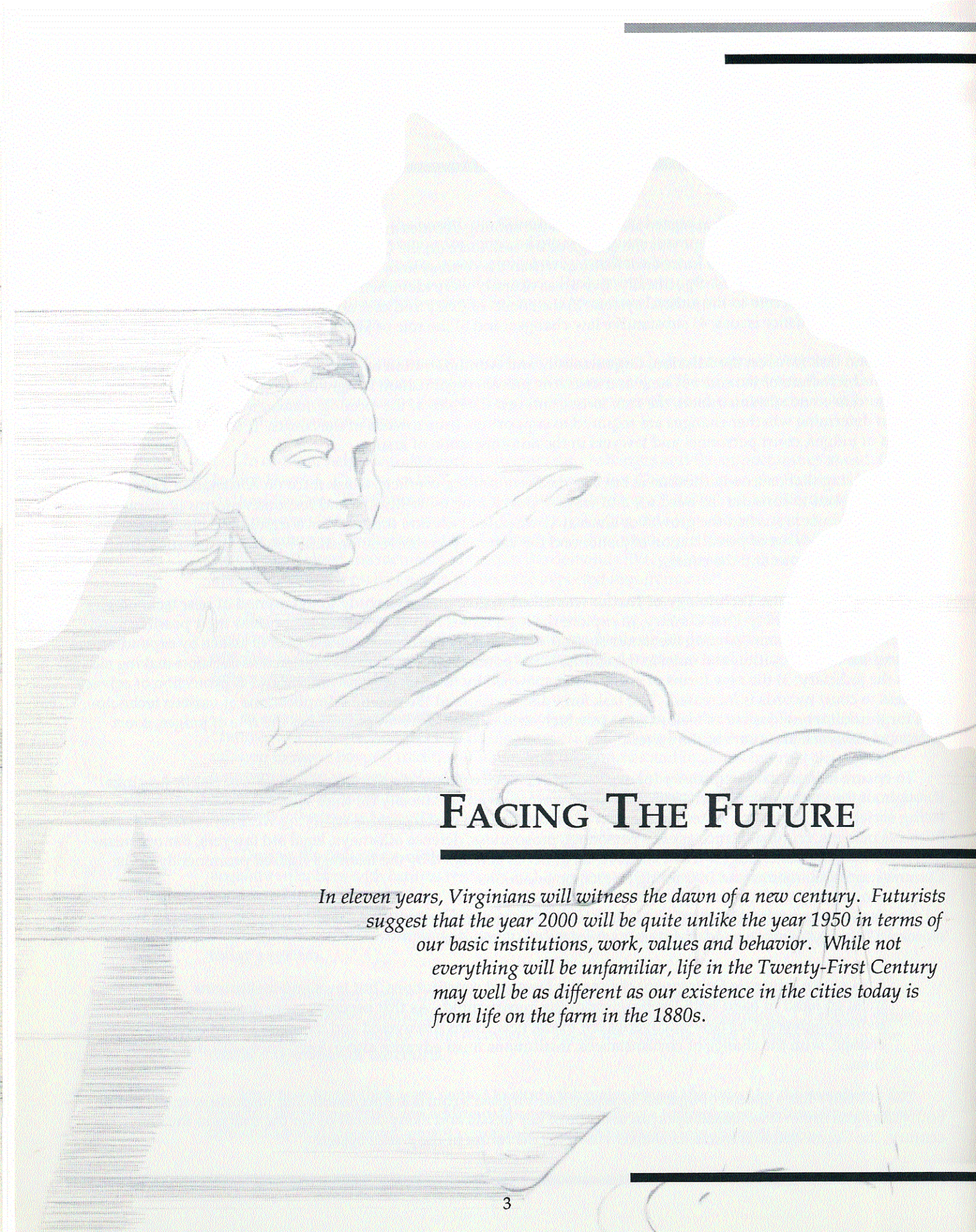
The task force on the **Technology of Justice** was asked to give intensive study to the myriad of new technologies in prospect for the Twenty-First Century, to explore the legal issues they present and to consider their possible application to the court system. Among the issues studied were: 1) methods of increasing access to justice by expanding the use of technology within and outside the courts; 2) the potential for using expert systems as decision-making aids within the judiciary; 3) the new forms of crime being spawned by technological advances; and 4) protection of privacy as access to court records is increased. The task force also considered the potential implications of various technologies for the delivery of justice as well as ways in which such innovations may aid or alter the role of judges, court personnel, lawyers, and users of the system.

To ensure substantial opportunity for expression of citizen opinion, the Commission held five public hearings throughout the state in September 1988. Participants were asked specifically for their views of the critical issues facing society and the justice system in the next 25 years. Among the 50 persons testifying were concerned citizens, business persons, criminal justice agency personnel, prosecutors, defense attorneys, legal aid lawyers, Bar organization representatives and judges. The extensive list of needs generated by the hearings figured prominently in the Commission's discussions and in framing its recommendations.

During its course of study, the Commission heard numerous calls for change within the judicial system. The words of Thomas Jefferson provided sound advice for the Commission:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.

The judiciary has a special obligation to assure that Virginia's courts are accessible and responsive to the public both today and tomorrow. Based upon an analysis of key trends and likely demands for the courts in the next century, the Commission presents its shared vision for the future of the justice system.



Facing The Future

In eleven years, Virginians will witness the dawn of a new century. Futurists suggest that the year 2000 will be quite unlike the year 1950 in terms of our basic institutions, work, values and behavior. While not everything will be unfamiliar, life in the Twenty-First Century may well be as different as our existence in the cities today is from life on the farm in the 1880s.

The Past As Prologue...

In contemplating a justice system to meet the needs and demands of the future, the Commission also reflected upon the courts' past. As Robert Penn Warren has said, examination of the past provides the opportunity ". . . to find what is valuable to us, the line of continuity to us and through us." Thus, the Commission found that while substantial change is and will be required, there is much in the special character of Virginia's judiciary that should be maintained.

Virginia's judicial system--built upon English traditions but forged anew in the struggle for independence--reflects a rich and singular history. From the earliest days of the republic, Virginia judges have shaped the course of our nation's constitutional development. Chancelor Wythe anticipated later arguments for judicial review. The sharply divergent constitutional views of Spencer Roane and John Marshall shaped many of the premises upon which our federal system is founded. Through the decades, the courts have maintained a reputation for integrity and self-restraint in the exercise of judicial power in the Commonwealth.

At the heart of a judicial system's character are its judges and court personnel. The Commission appreciates the reputation for the integrity of its judges and the dedication of its personnel that the Virginia judiciary enjoys and deserves. These judges and the system's total work force of approximately 3,000 clerks of court and magistrates, daily handle a volume and scope of litigation undreamed of by their predecessors.

Finally, and crucial for the future, Virginia's court system has an enviable record for successfully instituting change when the need for reform has emerged in different times and circumstances. During the past two decades alone, there have been dramatic changes in the operation of the courts, including a major restructuring of the entire judicial system in 1973. Through these reforms, the numerous trial courts and courts of limited jurisdiction were consolidated; part-time and non-lawyer judges were eliminated; a magistrate system was established; and, in 1985, an intermediate appellate court was instituted. Dozens of administrative services have been introduced. Continuing legal education programs have been expanded to ensure that judges and all court personnel receive ongoing and comprehensive professional training. Uniform policies and procedures have been developed to make application of the law simpler and fairer. More recently, automated systems have been installed to provide more efficient use of resources and improved services.

Exploring the roots of the judiciary's past and present provided an essential context for planning its future. A justice system must be designed to meet the needs of the society it serves. As society evolves, so do citizens' concepts of justice and equity, their sense of entitlement under the law, and their expectations of the courts.

Virginia in the Twenty-First Century...

One of the most distinguishing features of futures research is its capacity to identify the forces of change and to understand the ways in which our society is expected to evolve in the next century. While predicting the future is never possible with precision, an analysis of emerging issues and trends can create an informed prospectus of the likely directions for and developments within the Commonwealth. Forecasting potential social, economic, political and technological developments provides insight into the societal framework within which the judiciary will function in the future.

Demographics

- *Fast Growth in Virginia*

The United States will experience steady growth through the coming decades, increasing from 246 million to 300 million by the year 2030. In contrast to this 22% gain, Virginia's population will grow by 43% during this time period, from the current population of 5.8 million to 8.3 million by the year 2030.

Implications:

Virginia's courts also will experience high growth in many areas of civil and criminal litigation. This growth will demand greater efficiency on the part of all courts, expanded use of technology to enhance the convenience of justice, improved management capabilities of personnel and greater efforts to secure the required numbers of judges, personnel and court facilities. Managing this growth will be a major challenge, since backlogged cases and lengthy delays are already a prime source of public dissatisfaction with the judicial system.

Based on the current ratio of filings per 100,000 population and the expected increases in Virginia's population, the number of cases commenced in the circuit courts will jump by almost 45 percent by 2030, potentially requiring an additional 54 circuit judges to handle the volume if the current average number of cases per judge is to be maintained. In the district courts, the number of new cases should also increase by 45 percent by 2030. With the current caseload average per judge, 78 more judges might be needed to handle this increased caseload.

Year	Projected Va. Population	Circuit Courts New Filings	District Courts New Filings
1986	5,794,700	155,691	2,693,074
2000	6,664,600	179,078	3,097,368
2010	7,235,900	194,429	3,362,879
2020	7,807,200	209,779	3,628,391
2030	8,378,500	225,130	3,893,902

Projected Number of Judges Needed in Each Decade to Maintain Current (1986) Ratios of Judges to New Cases Filed

Year	Additional Circuit Court Judges Needed	Additional District Court Judges Needed
2000	18	26
2010	12	17
2020	12	17
2030	12	18
Total Increase in Next 40 Years	54	78

• *Metropolitanization*

Across the nation, population growth will be in outlying areas of major metropolitan locales. This will be the case in Virginia as well. By the year 2000, nearly 3 out of 4 Virginians will be living in urban and mini-metropolitan areas. In some metropolitan areas, multiple centers are emerging with the downtown area becoming just one of several centers within the metropolitan area rather than the dominant hub. Most of the growth will be in the "golden crescent" extending from the Washington suburbs through Richmond to Hampton Roads. In contrast, the population of certain rural regions will decline further. Tensions may continue to mount as highly stressed inner cities and rural communities lose economic and political power to affluent metropolitan areas.

Implications:

Growing disparities in human service needs and available resources between jurisdictions will likely follow shifting patterns in population and economic development. Courts will need to monitor closely the changes in caseload distribution among these jurisdictions.

As Virginia faces the need for expanded capacity in urban and suburban courts, the number of case filings in rural courts may level off or decrease. Some rural circuits and districts might, in the interest of efficiency, be consolidated. An equal but competing value will be the need to maintain convenient access to justice for rural citizens, a quality which could be adversely affected by jurisdictional consolidation.

Another expected consequence of growth in suburban business activity is increased commercial litigation in suburban courts. Correspondingly, increases in suburban crime rates can be anticipated.

In increasingly affluent areas, more litigation can be expected over commercial development and business transactions as well as traffic and environmental issues; in areas of severe unemployment, domestic disputes, juvenile crime and employee grievances will likely increase. Effective monitoring can lead to better targeting of resources as well as development of more appropriate methods of dispute resolution.

The emergence of multiple localized centers within large metropolitan areas will stimulate the development of neighborhood justice centers.

• *Population Diversity*

The rising numbers and distinctiveness of certain subgroups will have an increasing impact on all aspects of American society, including Virginia: an aging Baby Boom generation, a growing number of the elderly, greater ethnic diversity in the population and substantial increases in the number of households headed by females.

– Aging Baby Boomers

By the year 2000, the largest population group, born between 1946 and 1964, will reach middle age. These Baby Boomers are relatively more educated, more affluent and more consumption-oriented than any previous generation of Americans.

Implications:

In Virginia, as elsewhere, adults between 35-44 encounter the greatest number of legal situations. Virginia courts can thus expect more litigation as a result of a range of commercial activities revolving around contracts, consumer law, land purchases, home improvement and other business transactions.

The courts also can expect a rise in "mature crime" as the educated and sophisticated Baby Boomers engage in more white collar crime, currently estimated at anywhere between $40 and $200 billion a year across the nation.

– Increased Numbers of the Elderly

The number of those 65 and over has grown rapidly over the last few decades, now comprising 12% of the American population (32 million). Virginia has mirrored this trend: in 1960, 1 out of every 25 persons in the state was 65 and over; by the year 2020 that ratio will have changed to 1 out of 5. Yet, the fastest growing segment of the U.S. population are those 85 and over. By the year 2000, the "oldest old" in Virginia will have increased 71% over the previous two decades.

Implications:

The "graying" of Virginia's population will bring an older constituency into the courts and increase the issues relating to the elderly which the courts must address. In civil cases, the use of the courts to settle estates will increase and this use will come predominantly from women who outlive their husbands. Intergenerational conflict over the control of family assets may be brought increasingly to the courts for resolution. Requests for appointments of guardians ad litem may grow along with cases of age discrimination, retirement disputes and conflicts involving the care of elderly people. Specific types of legal problems associated with the young, such as automobile torts and violent criminal activity, should then begin to decline.

In criminal cases, higher rates of elder abuse, crimes against the elderly and allegations of mistreatment in nursing home settings can be expected. "Elder crime," criminal offenses committed by the elderly, also is rising and will likely help to fuel another trend--the movement toward alternative sentencing for special groups of criminal offenders for whom conventional sentences may not be appropriate.

A major portion of federal budget growth reflects increased expenditures for entitlement programs. Since most federal entitlement programs involve a federal/state match in funding, increased federal outlays require increased state expenditures. Because entitlement programs have grown at a faster rate than the federal budget as a whole and projected demographic trends tend to indicate a continuance of this pattern, state government should expect to see a growing proportion of its budget allocated to these programs. This situation promises to intensify competition among government agencies for limited state monies and may reduce available funding for the courts.

Increased longevity will be accompanied by complex legal questions surrounding life-sustaining technologies and right-to-die issues, the ethics of biotechnology and other medical advancements, such as organ transplants.

In other areas, a rise in the number of elderly people also may result in an enlarged employee pool for clerks' and magistrates' offices. In addition, increasing numbers of judicial system personnel will face difficulties in caring for their elderly parents. Thus, requests for benefits may well include both child care and "elder-care," as well as transportation incentives, and establishment of or access to fitness and "wellness" centers.

• *Growing Ethnic Diversity*

Blacks, Hispanics, Asians and other minorities form the fastest growing segment of American society. Virginia is experiencing similar growth with its non-white population mounting from a current 21% to 24% by the year 2010. Virginia expects a significant influx from Asia, Central America and Mexico.

Although immigrants form a small fraction of Virginia's people, their numbers are growing at many times the rate of the state's overall population, and they will have an influence on the communities where they settle.

Implications:

Public institutions, such as courts, will face great pressures to be representative of those they serve. The current number of women and minorities on the Virginia bench will need to be expanded if the courts are to mirror the diversity of legal professionals, litigants and the citizenry at large.

Growth of the black population, as a percentage of total population, may alter case filings in different ways. Historically, black citizens have not used the civil justice system as extensively as whites for the resolution of a wide array of disputes, ranging from marital disagreements to property disputes. In the future, however, as the size of the black middle class increases and its social position solidifies, a greater utilization of the civil justice system can be anticipated.

The Asian American population has a historic aversion to litigation, which may make them more likely to welcome and use alternative forms of dispute resolution.

Growing cultural diversity will continue to increase the need for interpreter services at all levels of the justice system. This trend will also require the publication of multi-lingual legal forms, at least for criminal cases. Attention must be given to ways in which other types of forms and assistance will be delivered to those not conversant in English.

Judges, lawyers, magistrates and other court personnel will need training in cross-cultural communications and a heightened sensitivity to cultural differences—a knowledge of which can help them in finding adjudicative measures needed to resolve sometimes complex and culturally defined disputes.

• *Changing Family Structure*

The entry of growing numbers of women into the work force is a trend with a profound social impact. In 1960, just over a third of Virginia's women aged sixteen and above were in the work force. However, by 2000, that number will rise to seven of ten, nearly the same as the proportion for men. The proportion of women with young children who work—now almost six in ten—will continue to increase. The workplace also will undergo a major change as only 15% of new entrants to the labor force in the year 2000 will be white males.

High divorce rates, dual income families and more poor, female-headed households are factors that will position more American families as users—rather than providers—of support services. Changing social values also have resulted in 22% of all births in the U.S. to unmarried women, and as many as 60% of all births in many inner cities. The majority of these women and children historically comprise the long-term poor and dysfunctional families that face almost impenetrable barriers to economic progress. By the year 2000, 1 out of 4 Virginia households will be headed by females.

While the proportion of the elderly in the population has grown, the proportion of those nineteen and under is falling. In 1960, 40% of Virginia's population was under twenty. By 2000, this proportion will drop to 27%.

Statistics generally indicate that, whereas white Americans have had lower fertility patterns, non-white Americans have and will sustain higher fertility rates. Higher fertility rates are associated with lower socio-economic status both for whites and non-whites. Current trends suggest that a disproportionate number of minority persons will be disadvantaged by all measures of income, education and employment.

Implications:

The 1990s will see a scarcity of eighteen to twenty-two year old young adults. Employers, including the judiciary, will compete with colleges and the military to meet their need for young, entry level workers.

Rising numbers of poor or dysfunctional families directly and indirectly affect court dockets. Domestic disputes such as divorce, child custody and allegations of child abuse will be compounded by increased percentages of "at risk" juveniles whose socio-economic conditions may heighten the chances of deviant behavior. In economically depressed areas, poverty and unemployment will further perpetuate the legal problems of what could be a permanent underclass.

Attitudes in Transition

• *Weakening of Traditional Units of Social Control/Growing Resolve to Tackle Major Social Problems*

During the past few decades, substantial erosion has occurred in the authority of the family, the church and the neighborhood to operate as informal means of dispute resolution. This weakening of authority, stability and poverty is seen as a factor contributing to increased drug usage and criminal behavior. Continuing erosion of traditional authority may be the prevailing trend for the future.

A more recent countertrend has been the emphasis on family, accompanied by community revitalization efforts, a resurgence of volunteerism, and a new focus on improving schools and parent-child relationships. The potential of these trends will depend on an extraordinary commitment to solve the problems of poverty, drugs and crime at all levels and on a scale heretofore unseen.

Implications:

Further weakening of traditional units of social control could lead to more unresolved disputes falling within the courts' purview. However, community empowerment could lead, in fact, to a decrease in court caseloads. Extensive pressure may be exerted by parents, schools and the community to support innovative measures for delinquency prevention and family counseling programs, the establishment of neighborhood justice centers and other channels of conflict resolution for society as a whole.

• *Changing Philosophies on Punishment of Criminal Offenders*

Increased rates of violence—most notably murder, rape and crime accompanying drug trafficking and usage have led to increased fear of crime and intolerance toward criminal offenders. Such fear has, in turn, led to growing demands for incarceration and lengthy sentences for these offenders. Substantial overcrowding of Virginia prisons has resulted. At the same time, taxpayers seem reluctant to pay for the construction of prison facilities. Thus, state and local corrections officials must search for less costly ways to protect the public.

Other citizens believe that the only effective deterrent to crime lies in comprehensive prevention efforts and rehabilitation of offenders. Thus, in the future, more public pressure will be placed on the judiciary and other criminal justice agencies both to assure punishment and to find more effective ways to deter repeat offenders, particularly juveniles and the chemically dependent.

Implications:

Virginia courts will likely face greater pressure to customize sentencing in ways that suit the conditions of the offense and the offender. These include creative methods to distinguish violent from non-violent offenders, individual or community restitution and community-based juvenile facilities that ward off rather than encourage hard-core criminal behavior, and possible use of electronic monitoring, drug therapies and other methods of behavior modification, as alternatives to prison.

Such reforms will require a concerted effort by the General Assembly to allocate funding and to encourage innovation from within the criminal justice system.

• *Growing Consumer Empowerment*

Consumer activism will continue to grow in the coming decades. A better informed public already holds institutions and businesses more accountable for truthfulness in advertising and product safety as well as product worthiness. Greater accountability of government is being demanded both in regard to expenditures and the quality of services rendered. Trends toward self-help, networking and the steady growth of consumer advocate groups will likely lead to further scrutiny of public institutions. Such trends may produce greater pressure for flexible and customized services.

Implications:

Higher rates of civil litigation can be expected, given trends toward more consumer empowerment, freedom of information and citizens' right-to-know legislation and a general de-mystification of professions such as law and medicine that may lead to a further increase in malpractice and other tort claims.

Baby Boomers are likely to propel this trend toward fast, affordable, equitable justice, by demanding faster adjudication of court cases as well as a variety of non-adversarial solutions to disputes. The courts may face great pressure from individuals, businesses and government to provide alternative forms of dispute resolution.

The value shift toward non-adversarial solutions to legal disputes will require more training in mediation, counseling and other alternative dispute resolution methods for court personnel—including judges, clerks and their personnel, and magistrates.

• *The Driving Force of the Future*

Technological change is acknowledged almost universally as the driving force of the future. The related technologies of automation, telecommunications, robotics, artificial intelligence and biomedicine will profoundly alter the way Virginians think, work and live. In addition, optics, space manufacturing, bionics, composite materials, aquaculture, desert greening and energy source research represent a few of the emerging areas in the technological revolution.

The promise these technologies offer—increased productivity, improved services, widespread access to data and expert knowledge, and enhanced ability to cure diseases are part of this unfolding revolution. Its darker side includes the specter of technologies causing widespread displacements of employees within the workforce, providing information systems that may jeopardize privacy and other Constitutional rights, and a fear that biotechnology will have unexpected and frightening consequences. The rapid rate of innovation and diffusion of technology has brought into being a whole new field, that of technology assessment. Courts have only begun to assess the vast opportunities and potential threats that technology will pose to justice.

Implications:

Full computerization of all court records seems a likely first step in an information revolution within the courts that will move from data collection to data management and analysis and finally, implementation of reform measures in court administration as well as within the adjudicative process itself.

Significant advances in genetic mapping will make coming decades a revolutionary period in areas of scientific evidence. Digitized DNA profiles unique to every human will be stored in central data banks, and through biotech probes link perpetrators of rape, murder or robbery with samples of blood, semen, flesh and hair.

Medical advances in causes and treatment for addicted and violent offenders could transform the nature of crime and punishment. New techniques for identifying, testing and screening for criminal behavior are emerging from studies of the chemical and genetic basis of human behavior. Profound changes may occur in the nature and concepts of individual constitutional rights should molecular biology be used to provide treatment in lieu of punishment for behavior disorders. A more informed understanding of the role of genetics, biochemistry and nutrition in crime prevention and treatment and rehabilitation of offenders could begin to have a significant impact on the courts in the next decades. The advantages and the limitations of using such techniques in the trial and punishment of offenders must be well understood by judges.

Environmental Trends

• *Environmental Problems Will Impact the Quality of Life for All Virginians.*

The coming decades will see both the public and private sectors searching for ways of addressing complex environmental problems, chiefly air and water pollution, solid waste reduction, the prevention of ocean dumping, restriction of pesticides and control of toxic exposure. Growing concern about the "greenhouse effect" will also put direct and indirect pressure on Virginia policy makers to lessen carbon dioxide emissions and the burning of fossil fuels. The replacement of deteriorating roads, bridges and water systems will be major budget items for state and county governments.

Implications:

Environmental law will become increasingly complex and time consuming to the courts as more litigation is taken up at a state rather than federal level. Many experts regard toxic exposure as the major liability of the coming decades. Toxic tort claims will grow as a result of the public's enhanced interest and knowledge of the deleterious effects of past and present chemicals in the environment. Regulations now require a manufacturer's disclosure to state and local authorities of more than 300 dangerous substances produced or emitted into the air, water or ground. This information is being made accessible deliberately to personal computers and many predict a subsequent rash of community allegations linking cancers and other physical disorders to these chemical emissions.

"Citizen's right-to-know" legislation parallels "worker's right-to-know" laws under OSHA and other state provisions for accountability and public disclosure and may create new issues for litigation.

Economic Trends

• *The Advent of a Global Economy*

Globalization of national economies will further accelerate in the future. Communications satellites and jet travel, global trade and investment; global banking, technology transfer and immigration are weaving nations together in an increasingly integrated world economy. The potentially spectacular growth of the Pacific Rim and Europe's elimination of trade barriers in 1992 will make the next decade a great challenge to U.S. competitiveness. U.S. foreign trade is expected to exceed more than 30% of GNP by the year 2000, up from 2% in 1960. States like Virginia are especially and increasingly tied to global markets. With its major port, international airports, natural resources and proximity to the nation's capital, Virginia is in a prime position to play a stronger international role in the next decades.

Implications:

The Virginia courts will see expanded litigation in such areas as international business and finance. Litigation involving multi-national companies, international patent laws, trade disputes and foreign co-production and investment will require that judges, lawyers and other court personnel have more training and expertise in international business and finance.

• *The Shift from a Manufacturing to an Information/Services Economy*

Basic manufacturing which supported the post-World War II growth of the rural south is waning. The share of workers needed for manufacturing jobs will likely decline from the current 17.3% to possibly 10% by the year 2000. In the next decade, service industries will continue to replace manufacturing—running the gamut from personal services and fast food to information technologies and financial consulting. Most of this growth will come from the creation and expansion of small businesses.

Implications:

With further declines of Virginia's manufacturing facilities, the courts may see fewer workmen's compensation cases and more cases dealing with employees' rights related to plant closings.

The growth in Virginia small business will likely result in more civil cases involving small claims and business development.

POLITICAL AND PROFESSIONAL TRENDS

• *Decentralization/Shifting Power Bases*

The ongoing transition of power between the federal and state governments is expected to continue into the Twenty-First Century. In addition to being responsible for more revenue generation, particularly support for entitlement programs, states will have increasingly greater regulatory power.

Implications:

After a slowing of regulatory enforcement at the federal level in the 1980s, there is likely to be a resurgence of government activism in areas of public safety, consumer protection and the environment in the coming decades. For example, recent state legislation provides remedies for consumers, those harmed by environmental torts, those victimized by business fraud and those aggrieved by civil rights violations. As additional state causes of action are enacted, the Virginia judiciary could see a significant increase in litigation involving these new statutes.

State courts may also be called on with increasing frequency to resolve claims that arise under federal law. Most federally created remedies, including those related to civil rights, and age and employment discrimination, may be applied in either state or federal courts. For a variety of reasons, including the convenience of state courts and familiarity of lawyers with state court proceedings, more plaintiffs who have such a choice may elect to have their cases tried in Virginia's state courts.

- *An Identity Crisis in the Professions*

In the last few decades, doctors and lawyers, as well as other professionals, have suffered a loss of public confidence and esteem. Political scandals, the frequency of malpractice suits and the close scrutiny by the media have "de-mystified" the learned professions. In the future, the public is likely to be influenced by an awareness of the limitations of professional advisers and the fallibility of authority figures, such as doctors, lawyers and judges.

Implications:

In the years ahead, the judicial system will need to work vigorously to alter the public's perceptions of the court as an overcrowded, rigid, institution in which the quality of justice is uncertain.

Undoubtedly, courts will consider more effective public relations efforts, more interaction with young people through the schools and more attention to "customer services" and the treatment of litigants and others.

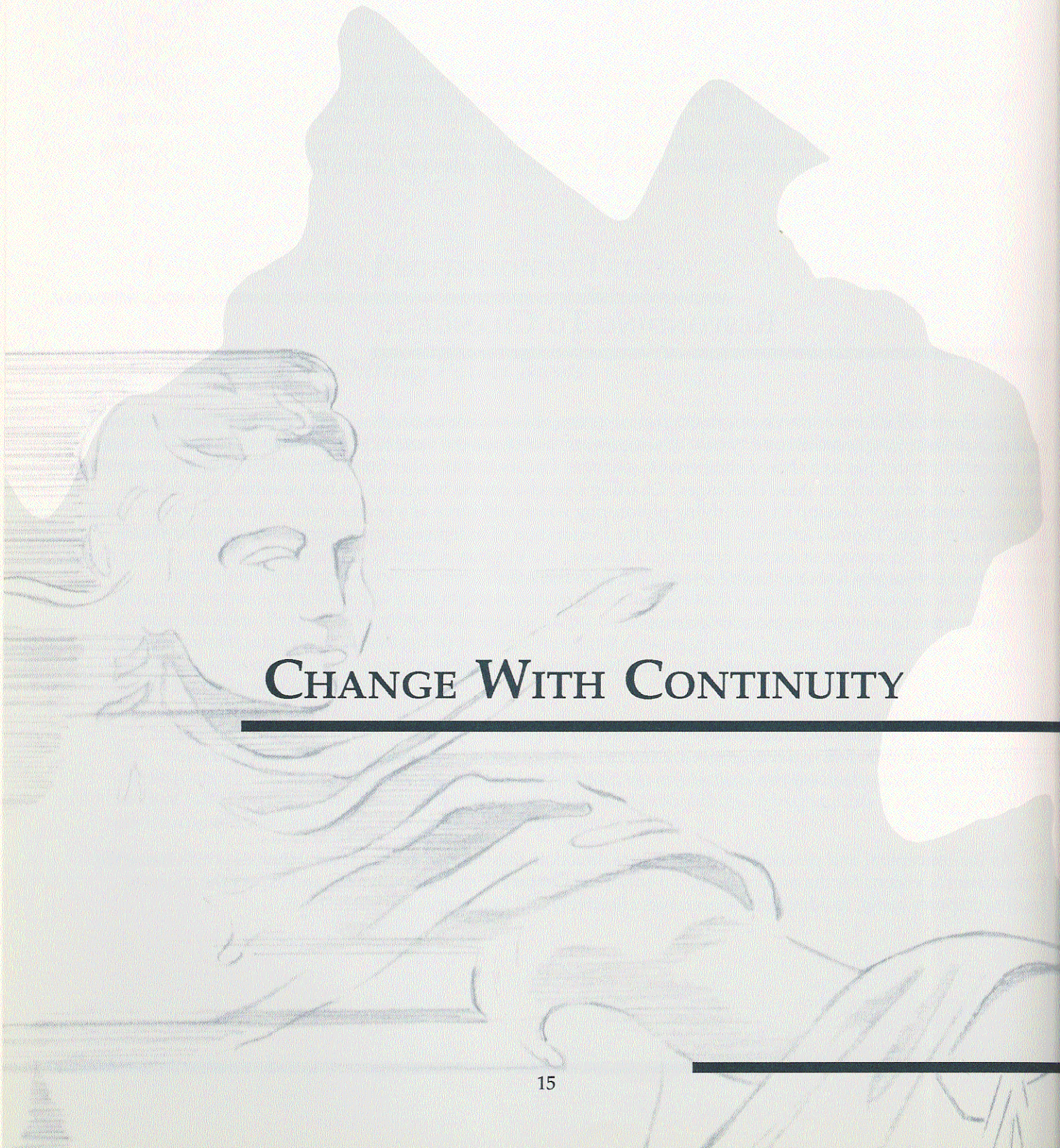
RESPONDING TO CHANGE...

The combined effects of the demographic, social, political, economic and technological trends emerging from the past and present, coupled with utterly new developments, will shape the various possible alternative futures. Each of the potential futures has as a shared component—change. Courts and all other institutions must be able to respond creatively and effectively to these challenges. Charting a precise course in advance is not possible. The judicial system, instead, must develop its underlying philosophy which will serve as a beacon even in the presence of uncertainty and change. Thomas Jefferson, in crafting the Declaration of Independence, molded a charter which has focused our nation's progress for two centuries. Likewise, the Virginia judicial system must respond to shifting forces and attitudes of society with a coherent sense of purpose and mission.

The mission of the Virginia judicial system is:

> ***To provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the United States and Virginia Constitutions.***

As the conceptual and practical guide for future direction, this mission evokes several themes which frame the Commission's visions for the next century. Twenty-First Century Virginians will need and expect the courts to resolve disputes justly, to administer themselves effectively and to preserve the public trust.



Change With Continuity

While change is inevitable, continuity is essential to all human institutions. The bridge to the future must be firmly based in the proven values of the present. A rich heritage supplies such a foundation for the Virginia judiciary. The Commission's prescription for change seeks both to preserve the historic core of the judiciary and to create the type of forums, procedures and services essential to the Twenty-First Century.

Emerging trends reflected by various modeling and forecasting techniques offer a glimpse of the future. Since mankind has the capacity to dream and to fulfill those dreams, however, the Commission on the Future of Virginia's Judicial System has enhanced its view of the future by incorporating a desired direction for the justice system. Our vision of the preferred future represents a blending of our expectations of what will occur and our dreams and aspirations for what should occur.

To Resolve Justly...

The core mission of the Virginia judicial system for over two hundred years has been to resolve disputes. Courts in the Twenty-First Century will continue to have as their primary goal the just resolution of disputes. Attention in the future will focus on how the courts address this goal and on the quality of the results. New emphasis will be placed on the methods of dispute resolutions. The mechanisms used must seek to resolve the dispute rather than simply to decide the case. Yet, the process so constructed must be at all times a just one. This precept means, at least, that all persons are afforded access to the dispute resolution forum, that the system responds to the changing demands of society, and that the proceedings are conducted in an expeditious, fair manner with equal application to all.

IN THE FUTURE, all persons will have effective access to justice, including the opportunity to resolve disputes without undue hardship, cost, inconvenience or delay.

Dimensions - The quality of justice rendered by a judicial system correlates directly with citizens' ability to gain access to the courts, the cost involved in participating, the ease with which each dispute is resolved and the time required for disposal of cases. The courts must be accessible to all who desire to and are required to use them. Removal of such barriers as complex procedures, high costs, inconvenience and lack of information on available resolution mechanisms will improve access to justice. Cost, as well as delay, may create artificial barriers to court usage. The court system must work with the legal community to ensure the availability of legal services for the poor and persons of modest means. Clear language and simple procedures will open the courts to a broader range of users and will enhance their acceptance of the results. Courts should discharge their responsibilities in a timely, expeditious fashion and should avoid a backlog of cases. Delay impedes factual recall, predictability, finality, deterrence and rehabilitation. It also engenders injustice and hardship. To reduce delay courts must take control of their dockets and institute calendar management practices aimed at achieving the prompt disposition of all cases. Courts which are accessible, affordable, usable and efficient offer an appropriate forum in which to seek justice.

*1.1 **Recommendation:** Court facilities should be designed, built and renovated according to statewide standards which reflect the public's need for convenient access to the services of the judicial system.*

Rationale: The public expects reasonable access to the courts, and our federal and state constitutions guarantee equal access to the legal system. Equality of access requires the reduction or elimination of physical barriers to users who may be in wheelchairs, vision-impaired, hearing-impaired or otherwise physically challenged. Limited access to translators for persons who do not speak English represents a barrier of a different nature, as do lack of child care, parking or directional signs. The safety of the public and of court personnel must also help shape the design and staffing of these facilities. In addition, convenient access for the public may require the establishment of satellite court facilities at population centers within the community.

The Virginia Courthouse Facility Guidelines were adopted by the Judicial Council in 1987. These guidelines should form the foundation for standards to be developed, implemented and periodically updated for courts across the Commonwealth. Adoption of such standards may require state funding incentives for local court facilities. Along with the application of these standards, the State Court Administrator should begin an evaluation of all state courts to identify and eliminate barriers to equal access, notably those barriers related to physical access, safety and convenience.

"The courts must be accessible to all who desire to and are required to use them."

1.2 ***Recommendation:*** *Court forms and procedures should be simplified.*

Rationale: A valid complaint about access to our judicial system is the difficulty of reading and understanding forms that are often required to gain access to the courts, or of understanding the procedures themselves. Such forms must be written in readily intelligible language, avoiding legalese and Code citation. Court procedures should be designed with the user in mind and not for the convenience of the system or its personnel.

Along with standardization of legal forms, Virginia's courts should adopt uniform computer-generated forms for all types of cases. Automated document preparation should be used to file civil and criminal cases. With the growth of electronic filing, software should be written that takes the filer through a series of questions and eventually generates a standard form of filing. Such a program would automatically insert basic data elements on the form. This process would assure the inclusion of all essential information, aid the filer in focusing on the key issues in the case and reduce the risk of inadvertent omissions or gaps.

1.3 ***Recommendation:*** *Court records should be made more accessible by providing remote computer access from libraries and other public buildings.*

Rationale: Most court records are public, whether stored on paper, computer or videotape. Citizens should be able to use technology to gain access to court information. Without a special effort to provide access through remote computer terminals, access to court records will tend to be restricted to the "technology rich"—law firms, businesses, large institutions and to individuals with sophisticated equipment.

Citizens are not charged when they examine public records in person or when they view court records from a public access terminal at the courthouse. Thus, members of the public should not have to pay when they retrieve from remote locations public information stored on a court's automated information system. Courts should, therefore, receive funding to place terminals and computers in libraries, public schools and other public buildings. The courts, like banks and other businesses, should supply remote stations for the public. The courts might, however, recover the direct costs of special services such as reproducing videotapes or conducting customized computer searches. Moreover, the courts should be reimbursed for the cost of any special facilities such as high speed lines or computer ports and modems installed for the use of individuals, businesses or law firms.

1.4 ***Recommendation:*** *Economic barriers to legal representation for poor and middle income Virginians should be eliminated by increased support for Legal Aid services, the promotion of prepaid legal services and greater participation by members of the bar in providing pro bono services.*

Rationale: The fees of lawyers pose a significant economic barrier to many poor and middle income citizens in their attempts to access the civil side of the courts. Efforts must be made on several fronts to reduce this barrier.

Legal Aid offices are presently understaffed, underpaid and must often limit their services. These conditions will worsen in the future as the number of poor citizens increases along with the volume and complexity of litigation. To meet this growing need, participation in the Interest on Lawyer's Trust Accounts (IOLTA) program should be made mandatory. In addition to such a mandatory and comprehensive IOLTA program, a majority of the income so generated should be designated for legal aid services. In this and other ways, the Virginia General Assembly and the Virginia Law Foundation should collaborate to provide additional funding for legal aid offices throughout the Commonwealth.

The Virginia State Bar and private industry should jointly evaluate the need for prepaid legal services and develop a plan to meet the demonstrated need. The Commission endorses the work of the Legal Services Corporation of Virginia and the further exploration of support for other prepaid legal insurance vendors doing business in Virginia. The goal for such programs is to help underwrite the high costs of legal services in order to make lawyers available to the general public.

The private bar should continue to make its services available to the poor, pro bono, in civil matters. The increasing complexity and cost of litigation suggests a critical need for a greater commitment by the private bar to provide services to these citizens who cannot afford the cost of sophisticated legal services. The time and cost involved in litigation should not inhibit access to the legal system and must not dilute the quality of justice. Members of the bar, individually and collectively, should consider ways of meeting the need for legal services to the poor. The State Bar should investigate ways of providing legal services to the poor which encourage participation and service by bar members.

1.5 ***Recommendation:*** *Public defender offices should be established in each judicial circuit as the primary means of providing legal representation to indigent defendants in criminal cases.*

Rationale: Meaningful access to the courts often depends on access to legal counsel. It is well settled that indigent criminal defendants have a constitutional right to a lawyer at public expense. There is a disagreement, however, as to whether criminal defendants are better represented by court-appointed counsel or by public defenders. The Commission believes that both systems are needed and that each needs improvement to better meet the goal of equal access in criminal proceedings. The

primary channel for such representation, however, is through appropriately staffed and funded public defender offices covering the entire state. Court-appointed counsel should continue to handle those cases in which the public defender has a conflict of interest or when workload precludes the public defender from accepting the assignment.

A public defender system, with adequate staff and technical resources, should be established in each judicial circuit. Statewide training should be provided for all public defenders and court-appointed counsel by the Public Defender Commission. Standards should be established for court-appointed criminal defense, requiring, for example, some minimum level of practice under the supervision of experienced public defenders.

Since court-appointed counsel will continue to be needed, the General Assembly should increase the compensation levels for such attorneys so that experienced and capable criminal defense lawyers will be more likely to accept such assignments.

1.6 *Recommendation: Time standards and improved calendar management practices for the processing of all cases, trial and appellate, should be adopted and monitored.*

Rationale: The court system should resolve disputes in a timely and efficient manner. Unwarranted delay impedes the search for justice. The question of delay must be evaluated from the perspective of the public, as well as the operation of the system itself. The public measures delay from the date a crime is committed or a civil wrong occurs. Lawyers and judges, on the other hand, measure delay from the date a case is filed with the court. Although courts can regulate cases only from the point they enter the court system, judges and lawyers must be sensitive to these differences in perception since the justice system exists for the public, not the system itself or the people who staff it.

The first step in reducing delay is to identify the extent of the problem. Existing data show that delay exists in many Virginia courts, however, such data need to be refined in order to gauge more accurately the extent of the problem in the Virginia court system. The Commission recommends that the court management information system be augmented to provide for the collection and analysis of the additional necessary data.

Once the statistics have been refined and disseminated, each court should develop a specific plan for meeting the desired time standards. The Judicial Council should adopt the American Bar Association's Standards Relating to Court Delay Reduction. Those standards include the following goals for disposition of general civil cases:

(a) 90% completed within twelve months of filing;
(b) 98% completed within eighteen months of filing; and
(c) 100% completed within twenty-four months of filing.

Criminal cases, in accordance with the ABA standards, should be completed, from arrest to trial, as follows:

(a) of felony cases, 90% should be completed within 120 days, 98% should be completed within 180 days and 100% should be completed within one year; and
(b) of misdemeanor cases, 90% should be completed within 30 days and 100% should be completed within 90 days.

In addition, the Judicial Council should develop standards on delay reduction for juvenile and domestic relations cases and small claims matters.

The Court of Appeals and the Supreme Court should be expected to meet the American Bar Association's Standards Relating to Appellate Delay Reduction. Such standards provide that all cases shall be concluded from the filing of the notice of appeal to date of opinion, within 280 days.

A third way to reduce delay would be a firm judicial commitment to effective case management by adoption of strong calendar management practices. The judicial commitment to timely disposition of cases naturally extends to the relationship of the court to the lawyers appearing before it. While reasonably accommodating lawyers and their clients, it is the court, not the lawyers or litigants, who must control the movement of cases. Research has shown that a docket can be kept current only when the judge supervises the scheduling and progress of all phases of a case through systematic case management. The judge must have both the desire and the authority to press attorneys and litigants into resolving cases in the least time required for full consideration of the issues presented.

Courts should adopt calendar management practices which stress the need to reduce waiting time and inconvenience for the public and the expedition of litigation. Effective calendar management includes these principles:

A. Once a case is filed, it becomes the court's responsibility and is placed on the court's calendar;

B. Once a case is on the court's calendar, all interim events are monitored until the case is resolved;

C. The scheduling of events in a case should be within short time frames. Ninety days should be the maximum time to set future events;

D. Lawyers should be expected to be fully prepared so cases can be effectively concluded; and

E. The court should create both the expectation and the reality that events will occur as scheduled.

The Commission believes that the success of this recommendation would benefit from the provision of court administrators who, together with the chief judges of each court, would be trained in the means of reducing delay.

1.7 ***Recommendation:*** *The Judicial Council of Virginia should adopt trial court performance standards as a means of self-evaluation and assessment.*

Rationale: Most judicial reform focuses on the structures and machinery of the courts, not their performance. A critical element in judging that performance is the quality of the result. While performance standards for courts may be difficult to articulate and even harder to measure, the Commission believes that the Virginia judicial system can enhance its performance, credibility and respect by the adoption of such standards. Models for such standards can be found in the work of the Commission on Trial Court Performance Standards conducted by the National Center for State Courts. The performance areas in which standards should be adopted would cover the basic mission and goals of the court system. At a minimum, standards could be established in the general areas of (1) access, (2) expedition and timeliness, (3) equality, fairness and integrity, (4) independence and accountability and (5) public trust and confidence.

IN THE FUTURE, the court system will maintain human dignity and the rule of law, by ensuring equal application of the judicial process to all controversies.

Dimensions - In seeking to do justice, courts cannot guarantee that all parties will be satisfied with the courts' actions. By definition, courts deal with disputes involving opposing parties and points of view. Perfect resolution in each case is obviously not possible. What is possible, and is the duty of the courts, is providing a fair process, equally applied. To be viewed as fair, the judicial process should be consistent and reliable. Decisions and procedures should reflect faithful adherence to legally accepted principles and relevant laws. Due process and equal application of the laws should eliminate disparate treatment of participants. The dignity of the judicial process also presumes a reciprocal dignity afforded to each individual who comes before the courts. A diligent search for truth conducted in an environment of mutual respect with equality of process will allow the courts to fulfill the reasonable expectations of society and to maintain the rule of law.

"Perfect resolution in each case is obviously not possible. What is possible, and is the duty of the courts, is providing a fair process, equally applied."

2.1 ***Recommendation:*** *The goal of a just system for resolving criminal charges should be deterrence, designed to eliminate repetition of criminal behavior and to protect the public.* *

Rationale: In order to deter repetition of criminal behavior and to merit the respect of society for disposition of criminal charges, the courts must have a variety of dispositional alternatives for defendants. These alternatives should include incarceration, technological restraint, fines, restitution, reparation and education. Institutional resources should emphasize the development of work skills and treatment of physical and mental disabilities as well as of substance abuse.

The young, the mentally ill and the mentally impaired should be accorded treatment by the courts in the handling of their cases which recognizes their lack of capacity. Realistic sentencing alternatives for these special groups must be developed. While equals must be treated equally, justice also demands that persons who are not equal be treated differently.

* *Separate comments are filed in the Appendix regarding recommendations followed by asterisk.*

2.2 ***Recommendation:*** *To promote the public's trust in the sentencing process, the court should explain orally and in writing at the time of sentencing the reasons for the sentence being imposed. The Executive Branch should develop ways to inform the public and offenders about the methods used to determine release dates.* *

Rationale: This disparity between the length of sentences imposed and the length of time some convicted offenders serve in prison has created public concern and confusion. Enhancing public understanding on the length of confinement for criminal offenders will require concerted efforts both by the judiciary and the Executive Branch. Judges should assume responsibility for explaining the part of the sentencing process over which they have control. However, matters such as the opportunity for parole and other early release possibilities are determined by the Executive Branch. Therefore, in order to further the concept of "truth-in-sentencing", the Executive Branch should devise ways to inform both citizens and offenders about the methods used to determine parole eligibility including projected release dates for specific offenders.

While the Commission believes that the use of parole should continue, it urges the Executive Branch to better inform the public on the necessity for and benefits of the parole system. Parole takes into account that individuals must be evaluated at different points in their lives. A sentence may seem appropriate at the time it is imposed; later re-examination may permit a reduction of that sentence consistent with the interests of society. Parole also offers an effective tool in preserving order in correctional facilities as well as serving as protection for the public. Allowing offenders to serve their maximum sentence and then be released to the public without supervision could present a serious danger to the public. The successful transition from confinement to the free world is often dependent upon supervision and counseling by a parole officer.

2.3 ***Recommendation:*** *Jury sentencing should be abolished.*

Rationale: Current jury sentencing practices in Virginia preclude the use of critical information by juries after a determination has been made that the accused is guilty. The jury simply does not have additional background information concerning the accused, data concerning punishment in other cases for comparable offenses and the power to impose alternative dispositions to fines and/or incarceration. In order to be effective, sentences must be tailored to the offender and be comparable to other similar offenses and offenders. Inconsistency in the rendering of

jury verdicts undermines the public's confidence in the courts. Not only do judges have access to more information and broader options; by virtue of their training and experience, they have substantially greater expertise in sentencing. Only six states, including Virginia, retain jury sentencing. The Commission believes this practice no longer serves the Commonwealth's best interest.

2.4 ***Recommendation:*** *Sentence disparity should be minimized by the systematic analysis and dissemination to judges of historical sentencing data.*

Rationale: Equal application of the court process requires that defendants with similar characteristics and who commit similar crimes should receive comparable sentences. Statistical analysis can be used to identify those defendants who should receive similar sentences. Collection and dissemination of historical sentencing patterns of all Virginia courts will provide sitting judges with a valuable tool for reducing unwarranted sentence disparity and for enhancing fairness in the trial process.

2.5 ***Recommendation:*** *The jury system should be strengthened by improving the selection process and the jury's methods of operation.*

Rationale: The Commission expects the jury will remain a fundamental part of our system of resolving disputes. Steps must be taken, however, to strengthen the jury system, so that it remains viable and adapts to the changes of the Twenty-First Century.

A. Representativeness and randomness in the selection process enhance the constitutional safeguard of trial by jury. There should be statewide uniformity in jury selection procedures, so that all litigants in the Commonwealth receive the full benefits of randomness and representativeness regardless of the size or location of the area in which their case is to be tried. The Uniform Jury Selection and Service Act was developed to provide a statutory means of meeting these goals, and consideration should be given to its adoption in Virginia. Compliance with the Act should be regulated by the Virginia Supreme Court.

B. Implementation of the Standards Relating to Jury Use and Management in Virginia should be encouraged with the following standards being adopted as advisory rules of court, and with their implementation monitored by the State Court Administrator:

Standard 6: exemption, excuse and deferral
Standard 7: voir dire
Standard 8: removal from the jury panel for cause
Standard 10: administration of the jury system
Standard 11: summoning
Standard 12: monitoring the jury system
Standard 13: jury use
Standard 14: jury facilities
Standard 15: financial allowances to jurors
Standard 16: juror orientation and instruction
Standard 18: jury deliberations
Standard 19: sequestration of jurors
Standard 20: protecting jurors from employment discrimination

C. To encourage maximum participation and to minimize hardships, creative methods should be developed for compensating jurors. In addition to simple remuneration for time spent in jury service, compensation should include ways of meeting other hardships, such as the need for dependent day care, which arise from the nature of the jury service commitment. The current payment of twenty dollars per day for jury service often meets only a fraction of the actual expense incurred by jurors. The Commission believes that the cost of jury service should be a burden of government, not of the individual juror. While no system involving a flat per diem rate can ensure that every juror will be fully compensated, a significantly higher payment for each day of jury service could alleviate the burden on most jurors.

Upon application, unemployed jurors, as well as those who are not being paid by their employer during jury service, should be reimbursed for actual expenses incurred for dependent care. As an alternative to full direct reimbursement, a court might provide dependent care facilities on the courthouse premises. Expenses for child care, as well as the cost of care for elderly dependents, can greatly aggravate the burden of jury service.

D. Technology now makes it possible to orient potential jurors through videotapes on the jury process. In the future, such orientation will be possible at home by cable television programs focusing on particular courts and on the special information needed by each citizen called to serve on a jury, such as directions to the courthouse and parking. Video and computer technology may improve juror orientation and education. In addition, a new jury handbook should be developed, using a question and answer format. The handbook should address matters related to the comfort and convenience of the jurors, in addition to informing them about trial procedures. A local supplement to the statewide handbook should give specific information such as availability of public transportation and day care.

E. Trial procedures should be modified to facilitate the jury's understanding of the issues. A rule of court should be adopted to allow juror note taking. The rule should provide for a cautionary instruction alerting jurors to limitations inherent in the note taking process. A rule of court also should be adopted to provide for instruction of the jury at different points during the course of a trial. Because trials can be long and complex, flexible instruction procedures also can help the jury to understand the issues of a case, thus aiding its decision-making ability. A rule of court also should be adopted to provide for making videotaped testimony of witnesses available to the jury for use in its deliberations.

2.6 ***Recommendation:*** *All occupational exemptions, as well as the automatic right to claim exemptions from jury service, should be abolished.*

Rationale: The allowance of exemption from jury service based on occupation or status erodes the public's perception of fairness and uniformity of treatment. It also diminishes the quality and representativeness of the jury panel. To relieve the burden on citizens, the length of jury service should be reduced and individual deferrals or excuses from jury service should be permitted only on a hardship basis.

2.7 ***Recommendation:*** *Non-unanimous verdicts should be permitted in civil cases, where at least 75% of the jurors agree.*

Rationale: There is evidence that the civil jury system contributes to delay in litigation. The need for unanimity often prolongs trials. The non-unanimous verdict increases court efficiency without sacrificing jury trial safeguards. Fewer hung juries result; the unreasonable juror no longer threatens the majority consensus. Costly retrials are fewer. Jury tampering is more difficult because several jurors instead of merely one must be corrupted. More than half the states now permit non-unanimous verdicts in civil cases. With the safeguards that at least 75% of the jurors must agree on a verdict, and that the jury has deliberated for a minimum time period, Virginia also can take this step to reduce civil trial delay without sacrificing the right to a jury trial.

VISION THREE

IN THE FUTURE, the judicial system will be managed actively to provide an array of dispute resolution alternatives that respond to the changing needs of society.

Dimensions - Resolving disputes in a peaceful manner is a paramount obligation of government to its people. To offer the most effective, responsive and appropriate methods for resolving disputes, our justice system must be able to offer alternative dispute resolution programs along with adjudication. Delay, cost of litigation, complexity of the court process, insensitivity to litigants and lack of access weaken the current court system. Because disputes differ widely in nature, adjudication is not always the most appropriate means of resolving all cases. In the future the court system should offer a range of options for resolving disputes. Adjudication and other dispute resolution methods would continue to be available. Such a system would represent a departure from the traditional adversary system by offering disputants the chance to choose the best method for resolving their differences. That method may lie anywhere along a continuum from traditional adjudication at one end, with a third-party decision maker, to conciliation, at the other end, where the parties alone reach a decision. In fashioning non-traditional dispute resolution alternatives, either by the courts or by private enterprise, means must be developed that offer an opportunity to deal with the causes of the underlying issues in a dispute. New approaches must find ways to reduce hostility between disputants, to gain acceptance of the outcome and to restore a sense of control to the parties. Embodying these fundamental concepts in all resolution mechanisms will achieve a greater sense of justice in the individual case.

3.1 ***Recommendation:*** *Alternative dispute resolution methods should be developed both within the court system and by community-based providers.*

Rationale: Because the courts are widely perceived as our principal channel of justice, alternative dispute resolution must be part of the court system. Putting alternative dispute resolution services under the court's umbrella (1) is an efficient way to make easily available a variety of dispute processes; (2) provides these services in addition to adjudication at public expense; and (3) helps the public become familiar with the alternative mechanisms. In addition to in-house programs, the court should be able to use certified external dispute resolution services which act as agents of the court system. A justice system that offers both institutionalized and community-based alternative dispute resolution services would broaden access and encourage innovation.

"To offer the most effective, responsive and appropriate methods for resolving disputes, our justice system must be able to offer alternative dispute resolution programs along with adjudication."

At the local level, each judicial circuit should have the capacity to offer a wide array of adjudicative and consensual dispute resolution services, such as adjudication, arbitration (binding and non-binding), mini-trials, summary jury trials, mediation and negotiation. The major appeal of this combination is its flexibility; it would offer disputants an opportunity to fit the process to their particular dispute rather than requiring the parties to fit their dispute to the framework of the adversary system. Although the needs and resources of each locality may differ, each judicial circuit should have available to it the same array of dispute resolution services. Those services could be physically within the court system or under the auspices of the court.

3.2 ***Recommendation:*** *Virginia should create an Office of Alternative Dispute Resolution Services and should commit public funds to the development of alternative dispute resolution services outside the court system.*

Rationale: Because alternative dispute resolution is an emerging field and because the localities' needs are diverse, Virginia should create a centralized alternative dispute resolution resource office within the judicial branch that would (1) identify alternative dispute resolution resources throughout the state and serve as a source for referrals to competent providers; (2) encourage and promote the use of alternative dispute resolution in all judicial circuits with information and support as needed; (3) serve as a clearinghouse through which localities could share information to improve their respective programs; (4) participate with localities in structuring and evaluating experimental or pilot alternative dispute resolution programs; (5) provide materials and assist in improving public understanding about alternative dispute resolution; (6) license providers of dispute resolution services; and (7) serve as a channel to help fund and encourage the creation of alternative dispute resolution programs by community providers.

If the court system cannot completely provide the means for resolving disputes, government must be willing to subsidize such services outside the court system. Virginia also should encourage the development and use of alternative dispute resolution services outside the court system, such as those offered by the community and private institutions. These options will likely promote innovation, be responsive to public demands and increase access to alternative dispute resolution mechanisms. Courts should benefit from such outside services encouraged by the state. Thus, in addition to using court-based alternative dispute resolution, courts should have the authority to refer appropriate cases to licensed alternative dispute resolution providers outside the court system. To the extent cases are referred outside the system, remuneration should be provided for those services.

3.3 ***Recommendation:*** *Virginia should experiment with dispute resolution services such as the multi-door courthouse program.*

Rationale: Consistent with the management approach encouraged in this report, the state court system should monitor the changing needs of our society with regard to dispute resolution and should participate with localities in structuring and evaluating experimental programs, with a view toward promoting the best of them statewide. For example, Virginia should establish a pilot project for a "multi-door courthouse" program. The multi-door courthouse concept is a case administration system that helps to pair a dispute (before or after a complaint is filed) with an appropriate judicial or extra-judicial forum, including adjudication, arbitration, summary jury trial, mediation, conciliation, administrative hearing or other program. Attempting to "fit the forum to the fuss", a trained intake specialist helps the parties select the "door" or method most appropriate for resolving their dispute. All "doors" are considered equal; if the first one chosen does not resolve the problem, the parties are encouraged to try others. This pilot program exemplifies the potential of a state level Office of Alternative Dispute Resolution Services.

3.4 ***Recommendation:*** *Dispute resolution mechanisms in addition to traditional adjudication should be available for civil and, where appropriate, criminal cases.*

Rationale: Dispute classification is a complex science, and research into that process is just beginning. The types of civil disputes that may be served better by alternatives to the traditional, formal adversary system include neighborhood conflicts, complicated commercial disputes, interfamily problems, labor charges, environmental rule-making, school discipline and international conflict. Other examples include disputes involving employment, retirement, discrimination, disability, traffic matters, surrogate mothering, child custody and support, divorce, water and land use, local governments and siting of landfills and toxic or hazardous waste dumps.

For criminal offenses, alternative dispute resolution programs based primarily on conciliation, mediation and arbitration could be used to provide more timely, equitable and flexible remedies. Consistent with the need to protect constitutional rights, alternatives could be pursued in some criminal cases either before a person is charged with an offense, at the pre-trial level, or before sentence is imposed, depending on the nature of the crime. Provision for the resolution of disputes between the complaining parties in the neighborhood where they live or where the dispute arose should, for example, be an integral part of the development and location of these alternative dispute resolution programs. The establishment of such alternatives and guidelines for case referral should be within the control of the court.

3.5 ***Recommendation:*** *Consistent with the litigants' right to trial, judges should have the authority to order mandatory participation in dispute resolution programs.* *

Rationale: Where the court identifies a form of alternative dispute resolution appropriate for a pending dispute, it should be empowered to order the parties at least to try the alternative mechanism. Citizens unfamiliar with alternative dispute resolution services thus will be exposed to them and may come to appreciate the need to take responsibility for their own disputes without immediately or instinctively turning to the courts for relief through adjudication.

A mandatory referral option would be balanced by the parties' right to return to court if the alternative procedure failed to resolve the dispute. Because a case must be pending for a court to mandate referral, the court would merely postpone its consideration of the case while the parties try the alternative dispute resolution mechanism. Experience suggests that this process would not add another layer to the court system because the parties rarely return to court.

While advocating that Virginia embrace the concept of alternative dispute resolution, the Commission acknowledges that the right to trial must be preserved. This right is fundamental to the concept of justice in the United States. Even when the parties pursue an alternative, the right to trial always will remain available to them, unless they voluntarily relinquish that right by, for example, choosing binding arbitration.

3.6 ***Recommendation:*** *Technology may be used to identify the appropriate method for resolving particular disputes as well as to enhance the overall effectiveness of dispute resolution.*

Rationale: Technology may be effectively used in a multitude of areas from identifying cases that could benefit from alternative dispute resolution, and matching them with the most appropriate forum, to using computers in mediation sessions or assisting arbitrators in reaching their decisions. For example, court computers (especially with the widespread use of electronic filing of cases) could identify cases whose characteristics would make them candidates for alternative forums. The prospects for the use of technological advances in relation to alternative dispute resolution are exceeded only by the prospects for creating new methods of alternative dispute resolution to meet society's future needs.

3.7 ***Recommendation:*** *Extensive education about conflict resolution services should be offered to every segment of society.*

Rationale: Education is critical to stimulate increased use of alternative dispute resolution mechanisms, which remain relatively unfamiliar to both the legal profession and the general public despite the burgeoning interest in such options. Education about alternative dispute resolution should be widespread. Judges, lawyers, law enforcement personnel, the general public, businesses and students should be familiar with the services offered and their use.

Each segment of the population should educate its own, with the Office of Alternative Dispute Resolution Services providing coordination and materials where necessary. Law schools especially should teach students how to use consensual problem-solving techniques such as mediation. The education of elementary and secondary school students in the use of consensual problem-solving techniques may prepare future generations that are more knowledgeable about those techniques.

3.8 ***Recommendation:*** *The jurisdiction of the trial courts should be altered to permit administrative disposition of disputes which require little discretion.*

Rationale: Some matters which now require judicial attention could more effectively and efficiently be resolved by administrative means. The Commission recommends that uncontested traffic infractions, in which an individual elects to pay a fine, be processed by the Department of Motor Vehicles. Contested infractions should be heard initially by hearing officers or administrative law judges, within DMV, thus allowing judges to concentrate on cases that demand their decision-making expertise.

The Commission recommends that appeals from administrative decisions in traffic cases be taken to the trial courts under the Administrative Process Act. The administrative decision would be final unless it were not supported by substantial evidence or were otherwise not in accordance with law.

To Administer Effectively...

Once the purpose or mission of the courts is established, the challenge is to identify strategies that will accomplish this mission. This requires insightful planning, active management and sound administrative policies. Although the courts have made great strides in the development of an administrative capability, the complexity and volume of future problems will necessitate the introduction into the court system of more innovative and sophisticated management approaches. Courts must assume control of their own destiny, and must, therefore, shift from passive administration to a more active level of management and leadership.

VISION FOUR

IN THE FUTURE, Virginia's judicial system will be structured and will function in a manner that best facilitates the expeditious, economical and fair resolution of disputes.

Dimensions - The basic task of a court system is to resolve disputes. The organization of the court system and the procedures used by the system should promote the prompt, cost-effective and just discharge of this primary duty. Among the principles most often cited as contributing to this objective are unification, flexibility, efficiency, responsibility, conservation of resources and professionalism in the administration of justice. Integration of these principles into the court system's structure and procedures will allow the filing and processing of cases to be as simple and orderly as possible with even-handed consideration given to each case.

4.1 ***Recommendation:*** *The trial courts should be reorganized into a single-tiered trial court with divisions.* *

Rationale: Virginia presently has two levels of trial courts—circuit courts which are courts of general jurisdiction, and district courts which are courts not of record with limited jurisdiction. The current two-tiered trial court system inhibits the mobilization and concentration of judicial resources where they are most needed. The overlapping jurisdiction of the two tiers is unnecessary; the division of family matters between the two tiers is illogical and inefficient. De novo appeals from the district courts to the circuit courts may be unavoidably duplicative and wasteful of judicial resources.

The Commission recommends a single unified trial court of general jurisdiction. This court of record will be organized in divisions, and will provide a more flexible, efficient and cost effective system for resolving disputes in the Twenty-First Century. Suggested divisions would include one for most matters now handled by the circuit court, one for matters now handled by the general district court and one for family matters (including most matters handled by the juvenile and domestic relations district court plus other family matters such as divorce and equitable distribution presently handled by the circuit court.)

Judges will be selected generally for the trial court, and not for specific divisions. The Chief Judge of the court will be responsible for assigning judges to the divisions and will establish the rotation schedule among the divisions. Assignment to a division will be for a fixed term, long enough to enable the judge to become productive in the work of the division. Rotation periods of one to three years are recommended for this purpose. Regular rotation should reduce burnout and the sense of isolation which very long or permanent assignments may create.

"The organization of the court system and the procedures used by the system should promote the prompt, cost-effective and just discharge of its primary duty to resolve disputes."

When a vacancy exists in a family division within a court, a judge should be selected for primary assignment to that division. The family division judge may opt for an extended assignment to the family division rather than participating in the regular divisional rotation.

To meet the demands of the courts' caseload on an immediate basis, the Chief Judge will have the authority to call upon the judges of any division to help temporarily with the work of any other division.

Within the unified trial court, the family division will continue to need adequate and appropriate court services such as now are provided by the court services unit. Continued coordination with Executive Branch providers of these services will be important to effective family division operation.

4.2 ***Recommendation:*** *The jurisdiction of the Court of Appeals should be expanded to include jurisdiction over all civil appeals.* *

Rationale: The now constricted civil jurisdiction of the Court of Appeals is unusual, if not unique, among the thirty-seven states with intermediate appellate tribunals. With the existing split jurisdiction the time required to process an appeal from the circuit courts through the Supreme Court has increased to more than three years.

The Commission recommends that the Court of Appeals be recognized as the principal means by which most litigants obtain appellate review, leaving the Supreme Court free to focus on cases of major significance and to shape the substantive law of the Commonwealth. Given this focus, each appellate court could develop procedures best suited to accomplish its role in the appellate process. For example, the Court of Appeals can sit in panels, use summary dispositions, and can be expanded as the caseload increases. While such procedures are suitable for the intermediate appellate court, they would not be appropriate for the appellate court of last resort. Rearrangement of this jurisdiction together with the necessary enlargement of the Court of Appeals would contribute to reduction of appellate delay and to expansion and improvement of appellate review.

4.3 ***Recommendation:*** *Appeals from the trial courts should be to the Court of Appeals as a matter of right in both civil and criminal cases; further appellate review by the Supreme Court would be within its discretion by writ of certiorari.* *

Rationale: Virginia is the only state having an intermediate appellate court that does not grant an appeal of right in most civil and criminal cases. While some appellate review is provided under the existing system of petition to the Supreme Court, the Commission recommends that appeals go from the trial court to the Court of Appeals as a matter of right rather than by petition. Although appeals in criminal cases would lie as a matter of right, defendants still would not be able to appeal when a guilty plea had been entered.

Affording an appeal of right would significantly increase the workload of the Court of Appeals, especially in criminal cases, and would have major cost implications. Additional funding would be required for judges, support staff, court facilities and the Attorney General's office. Yet, the Commission believes that an appeal of right in both civil and criminal cases accords with the preferred vision of the judicial system of the Twenty-First Century in that there should be an opportunity for a multi-judge review of any decision by a single judge. Other states have found the fiscal resources necessary to provide appeals of right.

If litigants had an appeal of right, some appeals would be frivolous, just as today some petitions for appeal are frivolous. Some contend that the overriding need for finality of decisions would be jeopardized. The Commission thus recommends that the Court of Appeals have authority to affirm frivolous appeals summarily without oral argument and to impose sanctions on parties and their attorneys who press frivolous appeals. The Court of Appeals should also have authority to reverse summarily cases which present clear error.

Traffic and misdemeanor appeals, now final at the Court of Appeals, should remain final after this one appeal. Appeals from small claims cases should also be final after this one appeal. For all other cases, appeals to the Supreme Court from the Court of Appeals should be by certiorari only.

Allowing appeals to the Supreme Court only by certiorari permits the court responsible for the development of the common law to exercise discretion as to which cases it will review. Under the current petition system, the Court must grant any petition where there is reasonable likelihood that error was committed in the trial court. By utilizing a certiorari process, the Court could accept or reject an appeal solely on its own discretion. This practice is consistent with that of the United States Supreme Court and will allow the Supreme Court to concentrate its efforts on cases of major importance and cases in areas of the law in which the practicing bar and the trial bench need guidance.

4.4 ***Recommendation:*** *The procedural law of the Commonwealth should be modernized and simplified.* *

Rationale: Fair and equitable procedures are necessary in order to accomplish a just resolution of each case. Procedures that are simple, understandable and well-reasoned can improve the effectiveness of the entire court process while reducing costs and delay and improving access. The Commission believes that Virginia practice and procedure will be strengthened by eliminating the largely fictional distinction between law and equity. Forty-six states and the federal courts have adopted a single form of action. Concerns about preserving the right to jury trial, trial sequences and the potential for activism among judges have been addressed in other jurisdictions and could be accommodated in Virginia.

Furthermore, consideration should be given to adopting a code of evidence, clarification of the laws governing statutes of limitation and the provision of simpler and/or alternative means of handling small claims. Several options exist for handling small claims, including the current pilot project for processing small claims under relaxed rules of evidence in the district division, and providing special training for magistrates (See Recommendation 6.4) which would prepare them to arbitrate small claims. All aspects of Virginia procedure must be regularly monitored so that future improvements such as the adoption of the federal rules of civil procedure could be considered.

On the criminal side, procedural efficiency could be increased without compromising defendants' rights by providing several mechanisms for initiating felony proceedings. The current system requiring a preliminary hearing and a grand jury indictment is duplicative and produces delay. The Commission recommends that future felony prosecutions commence with a probable cause hearing in the district division, following an arrest on a warrant or following the filing of an information by the Commonwealth's Attorney. When an information is filed, an accused can be taken into custody only pursuant to an arrest warrant issued by a judicial officer. In addition, a grand jury may be convened upon written request of a citizen, or at the request of the chief judge of the trial court to respond to complaints not otherwise addressed by the other charging mechanisms. These recommendations would require changing the evidentiary rules now applicable to preliminary hearings in order to allow a finding of probable cause based on reliable hearsay evidence and extending the Commonwealth Attorney's authority to proceed to trial on a felony information and probable cause hearing without indictment or presentment by the grand jury. Criminal discovery procedures could be expanded to provide access to the information now often sought in the preliminary hearing.

IN THE FUTURE, the courts of Virginia will be administered in accordance with sound management practices which foster the efficient use of public resources and enhance the effective delivery of court services.

Dimensions - Administration of the court system exists to facilitate the substantive role of dispute resolution, and to serve the economical and fair consideration of each case. Concepts drawn from the management experiences in other organizations, public and private, can be useful to the judicial system. These concepts include the formulation and execution of plans for the administration and delivery of court services. Basic to this planning process is the development of system-wide policy which will enhance the likelihood of coordinated and uniform actions. Such plans and policies must be implemented through an administrative framework, with responsibility extending from the Chief Justice to the trial courts. The challenge for the administrative components of the judicial system is to ensure the availability of sufficient resources and the use of those resources to meet all judicial responsibilities within a cost range that is acceptable to society and to do so without interfering with the independence of the judiciary in the decision-making process. Moreover, the courts as a public entity are accountable for their use of limited public funds. Such accountability requires a constant process of self-assessment and public scrutiny. Application of these concepts will strengthen not only the quality of the result in individial cases but also the public's respect for the process.

5.1 ***Recommendation:*** *Administrative operation of the court system should be under the direction of one policy-making body.*

Rationale: In the business world, no corporation would manage itself with two boards of directors. Yet, the judicial branch of state government currently operates with two policy-making bodies—the Judicial Council and the Committee on District Courts. The Commission recommends that the Judicial Council be recognized as the sole policy body for the judicial system; the Committee on District Courts would be abolished. The present structure—under which the Judicial Council sets policy for the circuit courts and the Committee on District Courts sets policy for the district courts — divides responsibility and invites confusion and inconsistency. Moreover, the current structure of the Committee on District Courts places a body, the majority of which is composed of legislators, in a position of setting policy for the judicial branch of government. This arrangement is questionable in light of the constitutional requirement of separation of powers.

"Administration of the court system exists to facilitate the substantive role of dispute resolution, and to serve the economical and fair consideration of each case."

The Judicial Council should be concerned with establishing policy, overseeing general operations and assuring the mechanisms and resources for continuous and long range planning for the courts. Non-lawyer citizens should be added to the Judicial Council in order to assure a broader perspective in setting judicial system policy. As the policy-making entity for the courts, the role of the Judicial Council will be expanded to address many of the issues raised by these recommendations.

5.2 ***Recommendation:*** *To enhance administrative responsibility within the judicial system, the Chief Justice should be selected for a four-year term by the Supreme Court from among its members, should have the authority to approve the chief judge of each circuit selected by judges of the circuit and should have the authority to assign any judge temporarily to another court in order to fulfill that court's mission.*

Rationale: The Chief Justice is and should remain the administrative head of the judicial system. While the present seniority method of selecting the Chief Justice has worked well, the increased managerial responsibilities of the Chief Justice in the future argue for a selection process, such that administrative, managerial and leadership abilities can be considered. Selection of the Chief Justice by members of the Supreme Court, in whatever way the Court determines, for a four-year term and with the ability to serve successive terms, should permit the choice of the most qualified person to lead the judicial system.

The Commission also recommends that the Chief Justice have the authority to approve the selection of trial court chief judges by judges of the circuit. The chief judges of the trial courts should serve four-year terms, and be eligible to serve no more than two consecutive terms. Vertical accountability to the Chief Justice should enhance the uniformity of judicial services to the public throughout the state and foster increased accountability within the judiciary for achieving statewide objectives and policies. The Chief Justice should have the authority to designate and temporarily assign any trial court judge to another court in order to fulfill the court's mission of prompt and efficient dispute resolution. This option should eliminate the need for substitute judges. The use of trial court judges to assist the Court of Appeals should also be permitted, with safeguards to prevent a judge sitting on an appeal from his or her own trial court.

At the local level, the chief judge of the trial court must assume greater responsibility for the performance of the court, not only in administrative activities (e.g., personnel, budget, fiscal management and planning) but also in caseload management. These responsibilities call for administrative abilities and leadership qualities on the part of the chief judge, as well as time to develop and implement policies to further the court's

mission at the local level. Chief judges should receive added compensation reflecting their increased administrative responsibilities. Because management responsibilities for chief judges will continue to increase, educational opportunities to develop increased proficiency in case, personnel and financial management should be available.

5.3 Recommendation: The Constitution of Virginia should be amended to abolish the office of the elected clerk of court. A trial court administrator should be appointed to perform all court-related functions. *

Rationale: To assist the chief judge with the increased administrative tasks, to assure that administrative functions do not prempt the judge's primary role as impartial decision-maker, and to ensure direct accountability, the Commission recommends that each trial court have a trial court administrator appointed by the chief judge. Each trial court administrator should serve at the pleasure of the chief judge and be a member of the judicial system's personnel system and should be selected on the basis of managerial and administrative abilities.

The Commission further recommends that the elected constitutional office of clerk of court be abolished. An elected official is not required in a position which is primarily administrative and ministerial, and does not determine public policy. The trial court administrator and deputies will perform the court-related functions (case processing) now performed by the elected clerk of court. Tasks now handled by the elected clerk of court that are not directly court-related, such as recording deeds and issuing hunting licenses, should be transferred to the Executive Branch.

Creating the position of trial court administrator will enhance each court's capacity for administrative management. Such a step would provide opportunities for recognizing and developing the capabilities of employees to improve administrative services for the court. The quality of these services will reflect both the skill and commitment of the staff. Hiring capable individuals and providing them with initial and continuing training will increase efficiency in the courts and provide professional development for the employees. At the same time, programs that identify performance expectations and provide the tools necessary for achieving them should be available to measure the effectiveness of the employees.

5.4 Recommendation: The operation of the court system should be state-funded, with the exception of court facilities.

Rationale: In 1973, Virginia adopted many court reforms which made courts a function of state government. Reflecting that change in the nature and source of court authority, the state assumed responsibility for funding a majority of the court system. The total costs of the district

court and magistrate systems, with the exception of facilities and equipment, is now state-financed. The state also funds the salaries of circuit court judges and the entire appellate court costs. Most circuit court clerk's offices are funded by fee-reimbursed state funds with such funding coming through the Compensation Board. At the present, the direct office operating expenses for circuit court judges and their secretaries are funded by the localities, although the state appropriates a small allowance of $1,500 per year per judge. As the recommendations of this Commission dealing with a single-tiered trial court (Recommendation 4.1) and elimination of the elected circuit court clerk (Recommendation 5.3) are implemented, the state should assume full funding for the court system. This step would require transfer of the budget process for circuit court clerks from the Compensation Board to the Judicial Council and assumption of the costs of the operating expenses and support staff, including law clerks and secretaries, of circuit court judges. In addition, the state should assume the costs for purchasing necessary equipment for all courts. The facilities should continue to be provided by the localities. To complete the state funding of the court system and to relieve local financial constraints, the state should also assume the cost of court-appointed counsel for defendants charged with violation of local ordinances and the costs of providing juries in civil cases and for misdemeanor cases where a local ordinance is violated.

5.5 ***Recommendation:*** *A full-time Commonwealth's Attorney should be available to each judicial circuit and be provided with sufficient training, staff and technological assistance to function effectively and efficiently.*

Rationale: Although not a part of the judicial branch, the office of the Commonwealth's Attorney plays a critical role in the criminal justice process in each locality. In addition to prosecuting criminal cases, this official advises other local law enforcement agencies, provides regional coordination for state prosecutions, keeps informed on the applicable criminal law and procedure and oversees other assistant prosecutors and office personnel. These major duties require that the Commonwealth's Attorney be committed to the position on a full-time basis. While the establishment of full-time prosecutors will require the consolidation of present part-time positions in some sparsely populated areas, such a step would be justified by the importance of professionalizing this position and providing prosecution on a statewide basis. In addition, the office cannot adequately function without the necessary staff training and support services.

5.6 ***Recommendation:*** *Matters within the court's jurisdiction should be referred to quasi-judicial officials only when the court cannot timely provide the services directly and such referrals will not impose unacceptable financial burden on the parties, jeopardize fairness or the quality of justice.* *

Rationale: In the past, the need to balance demands on judges' time and the need for special, detailed or extended attention to certain matters led to the use of quasi-judicial officials to assist the courts. Commissioners in chancery assist in several areas such as domestic relations cases and partition suits; commissioners of accounts oversee probate administration; and special justices hold civil commitment hearings. Use of the quasi-judicial officials, however, entails costs to the litigants beyond those of direct court proceedings. All decisions to refer matters out, therefore, should weigh this added financial burden to assure that all citizens receive equal access to court services. Guidelines should be developed in each circuit to cover the appointment and supervision of quasi-judicial officials, policies on orders of reference, fee schedules and control over the costs involved. Additional training should be provided to individuals appointed as special justices.

5.7 ***Recommendation:*** *The functions of the State Court Administrator should be expanded to provide effective administrative support to the Chief Justice, the Judicial Council and the local courts in meeting the public's changing needs for legal and judicial services.*

Rationale: The judicial system of the Twenty-First Century will face increasing demands from consumers for courts that are more accessible, convenient and accountable. To meet the expected requirements, the Commission has urged specific requirements to strengthen the leadership role of judges, the planning and policy-making functions of the Judicial Council and the internal management processes of the courts. Other recommendations of the Commission call for the development, expansion or improvement of a number of services to be provided by the judicial system. Among the most important of these goals is increasing citizens' knowledge and effective use of the legal system and courts through the creation of a public information capacity.

Implementation of each of these proposals is essential to the future health of the system. However, the pressures on judges and court personnel to meet the daily workload demands require that centralized administrative support be provided if the proposed services are to be developed and made available to the public. Thus, the Commission recommends that the functions of the State Court Administrator be expanded and that necessary funding and staff be provided.

5.8 ***Recommendation:*** *The management information systems for the Virginia courts should be refined and improved.*

Rationale: The Commission recommends that the State Court Administrator's office develop and refine its management information systems. In particular, that office should upgrade its data systems and expand its collection and analysis of data pertaining to the numbers and

kinds of cases reaching the courts. Emulating America's most efficient corporations, the State Court Administrator's office should improve its data systems as tools for the day-to-day management of the courts. Improved use of management information would increase management capabilities of the courts. For example, a detailed breakdown of caseloads might reveal that several jurisdictions are experiencing a high incidence of divorce cases, and those localities could expand family mediation services. Caseload and performance standards should be set, and an ongoing automatic evaluation should be conducted to see if they are being met. Statistical reporting would help to assess caseload distribution and to target resources to courts with the greatest need.

VISION SIX

IN THE FUTURE, the court system will be adequately staffed by judges and court personnel of the highest professional qualifications, chosen for their positions on the basis of merit and whose performance will be enhanced by continuing education and performance evaluations. Lawyers, who constitute an essential element in the legal system, will receive a quality pre-professional and continuing education befitting the higher professional and ethical standards to which they will be held, and the need to become increasingly service-oriented in their relationships with clients.

Dimensions - The cornerstone of any court system is its judges and non-judicial court personnel. Even though a court structure is designed expertly, it will be unsuccessful without capable and impartial judges and personnel. Three major factors influence the ability to attract and retain qualified judges and personnel: the selection process; the compensation package; and the support services, facilities and equipment. The selection process must be conducted in an open atmosphere, with major emphasis upon investigation of the professional qualifications of each candidate and with equal opportunity afforded to all. The compensation package for judges and court personnel must be designed to attract and retain persons of unquestioned integrity and those who by their training and experience show a potential to rise above acceptable levels of performance. The element of financial sacrifice common to all forms of public service must be reduced so as not to deter the truly dedicated professional. Adequate support staff and services are necessary not only to ensure the proper processing of cases but to attract capable people to the justice system. Once highly qualified individuals have agreed to service in the judicial system, their performance can be strengthened by continuing education and by regular performance evaluations. Qualified judges and court personnel can earn for the courts the respect of the citizenry and can enhance the stature and dignity of the judicial process.

A vital, dynamic and strong legal profession is central to the ability of the court system to accomplish its mission. Lawyers serve as the principal element in the legal process. The strength of that process depends upon their capability and integrity. Key components necessary for maintaining a respected profession include the preparation and qualifications of those admitted to the profession, the exceptional

"The cornerstone of any court system is its judges and non-judicial court personnel."

ethical standards set for and practiced by members and the commitment of the profession to lifelong education and improved skill development. When these ingredients are present, the practice of law is conducted in an atmosphere of courtesy and professionalism which engenders public trust and confidence. As the legal profession enhances its reputation as a service-oriented profession, the judicial system will be viewed as an increasingly effective and responsive forum for the resolution of disputes.

6.1 ***Recommendation:*** *To facilitate selecting those persons most qualified to fill the increasingly diverse role of judges in the next century, Virginia should adopt a selection process for judges which uses judicial nominations commissions.*

Rationale: Over the years judicial systems have struggled to find the method of selection that will produce the best judges. Concerns for judicial independence and public accountability are reflected in the different selection methods used, including executive appointment, legislative election and partisan or nonpartisan popular election. Virginia and South Carolina are the only two states in which all judges are elected by the legislature.

Virginia's present method of judicial selection has produced a qualified bench. This method avoids many of the objections raised by popular election of judges, although it does not completely remove politics from the selection process. As the size of the bar grows and the number of attorneys in the General Assembly declines, it may be more difficult for the General Assembly to identify the best judicial candidates. An alternate means of reaching and screening judicial candidates will be needed to assure the continued quality of the bench.

Selection based solely upon qualifications is gaining favor in many jurisdictions. The concept has been adopted in some form in at least thirty-three states. This approach creates an open atmosphere in the process, thereby resulting in greater confidence in the selected candidate. Qualifications are stressed as the main factor and politics are reduced to the greatest extent possible.

The Commission recommends that Virginia adopt a system using judicial nominating commissions chosen by the General Assembly. One statewide commission should play a part in all judicial nominations. A local commission should be established in each circuit to participate with the statewide commission in the nominating process for trial court judges in that circuit. The commission should include both lawyers and

non-lawyers and would be charged with the duty to seek out qualified candidates on its own initiative. The commission would report to the General Assembly (or to the Governor for interim appointments) the names of three persons deamed qualified for each vacancy. Such nominations would be advisory to the General Assembly or the Governor.

The judicial nominations commissions should also participate in the judicial reappointment process by reviewing the qualifications of judges for reappointment and by making recommendations to the legislature for or against reappointment.

6.2 *Recommendation: Mandatory continuing education should be established for judges.*

Rationale: Virginia recently adopted mandatory continuing legal education for attorneys. The Commission recommends that Virginia also mandate continuing education for judges, allowing credit for both in-state and out-of-state programs. With the creation of a single level trial court, in which judges would rotate through each division, access to specialized educational programs offered throughout the country will be vital.

The role of the judge is not static nor will it become so. Changes in court structure, technology, approaches to dispute resolution and perceptions of public service will all require changes in the role of the judge. While these changes will not obviate the demand for legal and decision-making skills, they will require additional skills in more general areas that affect judicial performance and improve court capabilities. Courses that improve management skills, develop sensitivity to current societal concerns or refine personnel procedures can make court operations more effective. Judges should receive ongoing training about new and emerging dispositional alternatives to facilitate treating each dispute in the most effective manner. While the existing education program is strong, formal mandatory education requirements will help keep the judicial process current and uniform.

Increasing use of computers in the courts will create another need for continued education. Judges will soon need to be computer-literate, and, along with other court staff, will need continuous training to remain current on court systems. Judges will need to know how to use personal computers and basic software packages, and how to access information data bases. They should understand how the court's data processing and storage and retrieval systems work. They will need to be trained to exploit aids to judicial decision-making—such as computer-assisted legal research and computer-assisted decision-making programs.

6.3 ***Recommendation:*** *A judicial evaluation program should be developed by the court system for the purpose of improving judicial performance.* *

Rationale: The Commission recommends that a systematic evaluation of judges be undertaken by the court system for the purpose of improving judicial performance. Development of evaluation procedures should include means to solicit input from a range of sources, including the bar. The process should be confidential, although aggregate results should be available to those providing judicial education to help identify areas of potential need or interest for future judicial education programs. Judicial evaluation should be separate from judicial discipline. The results of all evaluations should be confidential to the judicial branch, but may be used within the judicial branch for purposes of counseling judges.

The judiciary provides a unique challenge for evaluation. Judges must be independent. It is neither necessary nor appropriate to allow evaluations to affect their discretion or to evaluate them for purposes of compensation or promotion. Evaluations may, however, improve performance not only by those evaluated, but also may aid others served by those persons. Nearly twenty percent of the states are now using judicial performance evaluation or are in the final planning stages for implementing it. In addition, the ABA has published Guidelines for the Evaluation of Judicial Performance.

6.4 ***Recommendation:*** *An expanded range of magistrate services should be provided, twenty-four hours a day, by full-time employees of the judicial system.*

Rationale: Continuing shifts in population and caseloads will place different demands on magistrates in different locations. Adjustments to the provision of magistrate services should be made to accommodate these changes, while assuring that citizens in all jurisdictions retain access to necessary magistrate services. The establishment of regional offices in low volume areas or the use of interactive telecommunication systems may permit better use of magistrate services. Consideration also should be given to the involvement of magistrates in the arbitration of small claims; qualified magistrates trained in arbitration skills might provide a simpler yet quite effective way to deal with small claims. The qualifications, classifications and compensation of magistrates should therefore be reviewed and made commensurate with any shift in responsibilities. All magistrates should be full-time employees of the judicial system and should hold college degrees.

6.5 ***Recommendation:*** *Compensation, support staff, facilities and working conditions for judges should be reasonably comparable to those available in alternative employment settings.*

Rationale: The strength and quality of the judicial system largely reflects the quality and commitment of its judges. The Commonwealth must recognize the importance of attracting and retaining a strong judiciary and must consider carefully those factors that contribute to a decision to commit to public service.

Judicial salaries must be adequate to permit potential judges to choose service on the bench without excessive financial hardship. While salaries for judges will never be comparable to salaries of the most successful private attorneys, the gap between private and public service salaries must not be allowed to widen so as to preclude the choice of a judicial career. In regions where a higher cost of living significantly affects the relative value of salaries, adjustments should be made for judges in those areas. As the gap widens between judicial and alternative career path salaries, the fringe benefits (including retirement, leave, etc.) provided to judges assume greater significance. Although Virginia has developed one of the more comprehensive judicial benefit packages, it should remain among the national leaders in this area.

It would be unrealistic to expect to draw and retain highly qualified members of the bar to the bench without the prospect of basic support services and research resources. The Commission recommends that the state provide at least funding for secretaries and law clerks to support the clerical and research needs of trial court judges, and that all judges should have access to a law library. In addition, basic technology for information management and legal research should be available to the judges and their staffs.

Judges should be provided with courtrooms and offices appointed in a manner consistent with the decorum required to conduct the business of the court.

Upon assuming the bench, a judge finds many aspects of personal conduct governed by the Canons of Judicial Conduct. These Canons require the individual to limit or forgo certain activities in the interest of preserving the integrity and independence of the court. Virginia's Canons, adopted in 1973, prohibit certain activities such as raising funds for charitable organizations, commenting on cases and participating in social activities that might reflect adversely on the judicial office. As the circumstances of the world and the Commonwealth change, these Canons should be reviewed to assure that restricted or proscribed activities continue to serve the purposes for which they were designed.

As the distance between judicial and alternative career path compensation in the legal field grows, the state must enhance other facets of judicial careers that encourage judges to enter and remain in public service. For example, the proposed rotation of judges through all divisions of the trial court may lessen problems of judicial burnout among the trial judges. Some states have approached this concern by focusing on stress management for judges and by providing avenues for professional development. Virginia should follow these leads and explore creative approaches to enhance the overall career satisfaction of judges.

6.6 ***Recommendation:*** *The judicial system should ensure a compensation, reward and benefit system and a working environment that will attract highly qualified personnel to court service.* *

Rationale: The efficient and effective delivery of court services relies heavily on having well-qualified, well-trained support personnel in the courts. To attract and retain employees with the requisite skills, especially as automation progresses, the judicial system must consider ways to make employment with the courts more attractive. This includes developing career paths for positions in the clerks' and magistrates' offices.

As the composition of the work force changes (e.g., more older workers, minority workers, single parents), what the court offers its employees should also change. Salary and benefits will continue to be important, but the types of benefits sought by employees may well change to include items such as child or elder care, transportation incentives or support for wellness programs. A flexible "cafeteria style" benefit program may help address the range of concerns among an increasingly diverse work force. Both in response to worker interest and fluctuation in court workload, courts may consider job sharing and part-time positions with benefits. Recognizing that the cost of living in some areas of the state affects the relative value of salaries, salary differentials should be provided to court personnel in these areas.

Outstanding contributions by employees should always be recognized. Sometimes recognition may come through salary increases. Because fiscal constraints do not always permit such acknowledgment, the judicial system should seek alternate ways to acclaim and reward employee contributions.

All court personnel will eventually need to be computer-literate. Although training will be provided to maintain a high level of proficiency in court systems, the judicial system should recruit personnel with the skills and abilities necessary to serve in the courts' expanding technological environment.

6.7 ***Recommendation:*** *Lawyers should be trained before and after admission to the bar in the legal, practical and technological skills that will prepare them to serve the public in a diversity of roles in resolving disputes.*

Rationale: Law school curricula, bar-admission requirements and continuing legal education programs should be assessed in order to provide the best possible preparation for lifelong professional commitment and performance. Increased attention should be given to ethical responsibility, both for individuals and for the profession, and to professionalism in all attorney activities such as client relationships, office practice and courtroom decorum. Mandatory continuing legal education for attorneys should require more approved credit hours. A balance between courses germane to their field of practice and courses that promote ethical and professional development should be required of all attorneys. Some emphasis also should be placed on learning about emerging areas of law.

Lawyers will continue to use basic legal knowledge and traditional adversarial skills in their practices. Yet opportunities for lawyers to serve as counselors, mediators and negotiators should increase as alternative dispute mechanisms become more widely accepted and used. Lawyers will need to become familiar with alternative dispute resolution options and refer clients to them for resolution of some disputes. Lawyers must be trained to handle competently and comfortably this diversity of roles.

As the role of the lawyer becomes broader and more service-oriented in the next century, the Code of Professional Responsibility should be reviewed and revised as necessary, to reflect the diverse ways in which lawyers will be expected to serve the public in the future.

All lawyers should appreciate and be trained in methods of basic legal research, office management and court-related technological applications, beginning in law school and continuing through mandatory CLE programs. Law schools and CLE programs should employ technologies

such as interactive video discs and video records of actual trials in their educational programs. For practicing attorneys as for others, technology will profoundly alter the ways in which courts and individuals conduct their business.

Because clients seeking assistance in particular areas should have a method by which to judge an attorney's qualifications in that area, a voluntary program of lawyer specialization and certification should be adopted.

VISION Seven

IN THE FUTURE, technology will increase the access, convenience and ease of use of the courts for all citizens, and will enhance the quality of justice, by increasing the courts' ability to determine facts and reach a fair decision.

Dimensions - Many forces will shape our future. Some are political; others are economic or demographic. The driving force of the present and the immediate future, however, is technology. By careful application of emerging technologies in the court system, increased productivity and heightened responsiveness to the public's request for service can be achieved without a loss of traditional values and concepts which form the foundation for the court's search for a just resolution of disputes. Efficiency as an objective should not replace thoughtful consideration; instead, improvements generated by technology should complement tested and proven methods of administering justice. Technology can promote the highest quality of justice by reducing costs, delays and inconvenience while improving accessibility. Technology can be harnessed to bring about full and complete public access, media coverage and public education. The openness and convenience of the process can improve as courts employ state-of-the-art technology and have free exchange of information consistent with the legitimate expectations of citizens for privacy. Improved administration, better-informed decision-making, increased access and convenience are but several of the ways that technology will enhance the quality of justice in the next century.

7.1 ***Recommendation:*** *Courts should be equipped with technologies comparable to and compatible with the technologies used in law offices and businesses—technologies that optimize the use of the courts' resources and facilitate the disposition of cases.*

Rationale: The courts, law firms and businesses that become involved in litigation form a system whose efficient functioning requires that its components possess comparable levels of technology. Though courts are clearly in the information business, the judicial system has fallen behind private organizations and other government agencies in their use of automated systems. If the courts are to operate efficiently and effectively they must employ the information technologies that are commonplace in other segments of business and government.

Technology should be used in the courtroom to improve the presentation and display of evidence. Courtrooms should be equipped with screens, monitors and projection equipment to display visual information such as photographs charts, and graphs. In addition, provisions should be made to allow personal computers at counsel tables. Over-

"...improvements generated by technology should complement tested and proven methods of administering justice."

head cameras should be installed to give jurors clearer pictures of exhibits and to prepare a more complete trial record. More effective displays of evidence will give judges and jurors a better understanding of a case and thereby improve their decision-making. Moreover, as the public becomes accustomed to seeing sophisticated graphics on television, at the movies and in books and magazines, it will expect better graphic presentations in court.

To expedite proceedings, courts should institute computer programs to schedule lawyers, judges and courtrooms. The computer should record activity on all cases and report how much time has elapsed since the case was filed and the last action was taken. The computer also should be used to schedule timetables for discovery, submitting instructions, pretrial motions, along with the trial date and other steps in the litigation process including any mediation that the system might impose. In criminal cases, judges should be able to take advantage of computers to schedule arraignments, pretrial motions and trial dates. These dates would be logged in the computer's calendar from which an attorney's calendar could be produced. As cases are settled or moved, the scheduling system should fill vacancies.

The computer—with its capacity to search machine readable data bases of statutes, decisions and legal periodicals—has emerged as a useful tool for conducting legal research. Expert systems, a form of computer-based artificial intelligence, are undergoing rapid development and offer the prospect of becoming an important aid in research and decision-making. Judges in all courtrooms should have access to automated tools for decision-making and legal research.

7.2 ***Recommendation:*** *The state should provide full funding for purchases of hardware, software, computer and video equipment.*

Rationale: While the courts became primarily state-funded in 1973, the localities continue to be responsible for providing facilities and equipment. Computer and video equipment are of so specialized a nature as to require uniformity and compatibility from court to court. State government should fully fund the expense of automating all courts. This commitment will not only avoid disparity among the courts but will reduce overall governmental expenditures through the economies of scale obtained by centralized state purchases. In return, the localities must be prepared to make the necessary physical changes in courthouses, such as improved wiring and environmental conditions, to accommodate increased automation.

7.3 ***Recommendation:*** *Public records in all courts should be automated and should be retrievable by the bar, public and media.*

Rationale: Automating all court records and making them retrievable by electronic means would broaden public access; serve the public's right to

know; make access faster, cheaper and more convenient; and reduce demands on courthouse facilities. Entry to public records should be provided, in whatever form the information is stored. Except for those matters determined confidential by law or court order, members of the public should have access to court papers, videotapes and electronic data bases. As computers store more court records, the public's need to search the court's data bases will grow. Access may be by telephone dial-up or by dedicated telephone lines, and by terminals in the clerk's office or off-site. All steps which would increase public access to computerized records should be evaluated to ensure preservation of individual privacy. Likewise, the information preserved as part of the public record should be kept to a minimum. The General Assembly should, wherever possible, reduce standards for the length of record storage and should remove mandates to collect information for which there is no clear need.

In discussing public access and personal privacy, electronic searches for particular records should be distinguished from full-text searches of court data bases. Members of the public should have the same right of access to individual public records through electronic means as they would have if they were to come to the courthouse and request those records in person. Full-text searches of documents stored in computerized data bases could, however, endanger citizens' privacy. Citizens have a right to examine individual public records electronically, but they do not have a right to use the automated system to browse indiscriminately all public records maintained by the courts to see what a search might yield. Court approval should be required for subject-based, full-text searches using software that compiles or assembles the information.

7.4 Recommendation: *The courts should expand their automated systems to permit the initiation of any case by electronic filing from remote locations.*

Rationale: Compared to the conventional filing of paper documents, electronic filing would be faster, cheaper, more accurate, more convenient and would provide indexed information. Electronic filing does more than replace paper documents with electronic documents. Law firms presently use word processors to prepare filings, which are then printed and sent to the courthouse. It would be far more efficient for lawyers to file electronically from their own offices. Storage on small disks would replace stacks of paper. Electronic filing would be more accurate because the clerk's office would not have to reenter names. The court would have an electronic record available at all times. Both attorneys and court personnel would save time.

Sophisticated, high volume court users such as attorneys, hospitals, department stores and police departments could file by electronic messages sent by computer. Less frequent users could file from menu driven or touch screen systems in public areas of the courthouse or via dial-up access. The courts could collect the filing fee electronically when a case

is filed by setting up a master billing system or by charging filing fees against specially created accounts.

The court's computer should index cases automatically when they are filed and generate notices, summons and other documents. Further pleadings would be indexed properly and transferred to the case file. For simple cases, once judgment was rendered the court's computer would docket the judgment. The computer would generate the documents and store them after sending electronic copies to the participants.

Electronic filing could eliminate additional work after a case is filed. Defendants could communicate with the court's computer and electronically admit guilt or liability or offer the grounds of their defense via a menu system. For example, in criminal cases defendants could indicate what defense they plan to offer, and the computer could schedule their trial based on the court's experience with the time required to hear a case when such a defense is employed.

Since not all persons will have the skills or equipment to file electronically, the courts should continue to accept and handle cases in the traditional way.

7.5 *Recommendation: Videotape recordings of courtroom proceedings should become the official trial record.*

Rationale: The Commonwealth's trial courts should use video recording for court reporting. By installing voice-activated video systems with multiple sound tracks in Virginia's courtrooms, a complete and accurate record of the trial can be produced. This video record would be superior to an audio record or the traditional written transcript. Cameras used to record the trial could also provide live or delayed television coverage. Where a party needs a hard copy or paper transcript, it could be prepared from the video. Voice recognition systems should in time advance to the level where they can transcribe the audio portion of the video automatically. With lengthy trials, the courts should use computer-aided transcription, with its search capabilities and its ability to do immediate or quick indexing. Eventually, digital technology will integrate video, voice, text and images in one record.

The video record should be the record on appeal. The videotape of the trial, edited down to the portions that relate to the issues under appeal, should be the record forwarded to the appellate court. Judges, trial or appellate, should be able to obtain a transcript upon request.

*7.6 **Recommendation:** When testimony is offered in any hearing, under most circumstances it should be offered live in the courtroom. When no testimony is offered, or when all parties agree, hearings and trials could be conducted using interactive telecommunications video or videotape.*

Rationale: When testimony is offered in any hearing, it should be offered in the courtroom, live, in the presence of all parties. The principle of the public trial and the right to confront one's accusers require that all parties appear physically in the courtroom. Judges and jurors can better determine whether witnesses are truthful when they can see them in person. The live trial also reminds the judge and other participants of their responsibilities, and keeps them sensitive to the persons who are involved.

In the future, changes in video and telecommunications technology will make it possible to conduct a trial without having to bring the witnesses, jurors and judge together in one room. The day may come when video testimony supplants the appearance of witnesses at the courthouse. Someday even jurors may participate from their homes and offices, perhaps by viewing an edited video record rather than the live proceedings. A video trial could be cheaper, safer, less time consuming, easier to schedule, make more efficient use of judges' and attorneys' time, reduce pressures on courtroom facilities and be more considerate of and more convenient for victims and witnesses.

When all the parties agree to video testimony or under special conditions (e.g., where there are incapacitated witnesses or witnesses who live in another part of the country, child witnesses and victims of sexual assault), the court should be able to accept closed circuit video or videotaped testimony. By using video under these circumstances, courts could be more sensitive to victims and witnesses.

Although the court should retain its ability to require the parties to appear in court, when no testimony is to be offered, video should be the preferred way to conduct hearings and trials. Appellate proceedings—pretrial motions as well as arguments—should take place remotely using video conferences or teleconferences. Trial court hearings on arraignment, bond and appointment of counsel, pretrial motions, post-trial motions and other matters not requiring witnesses to testify should be conducted from the judges' and attorneys' offices rather than at the courthouse. A video link could satisfy the defendant's right to be present at hearings.

Video technology could lead to the creation of satellite courts linked by video and by computer with the courthouse. Such a system would be particularly effective in small claims or minor cases.

When hearings that would otherwise be held in a courtroom take place through video hookup, the courts must preserve public and media access through monitors in the courtroom or courthouse, cable TV hookups and direct cable access by the media.

7.7 ***Recommendation:*** *All court automated systems should possess security features to prevent tampering and should include back-up capabilities to avoid system failures.*

Rationale: As the courts increase their use of computer systems, those systems must be reliable. No computer system is 100% reliable. Hardware and software fail. Stored data get lost. Sabotage and tampering are real dangers. The design of Virginia's court computer systems should mitigate the effects of such failures. This goal is best served by having back-up hardware and software and adequate security systems. How the state's computer system should be backed up or secured will depend on the system's overall configuration but high priority should be given to these issues.

7.8 ***Recommendation:*** *The information systems of all courts should be linked in a statewide network, so that any court may read the information contained in the data bases of all other courts but may not alter those data bases. Courts and other justice agencies should be able to read each other's data bases and exchange information electronically.*

Rationale: Developing networks among and between courts and other agencies would promote the sharing of information, facilitate communication, reduce redundancy of data entry and duplication of records, foster the accuracy, currency and completeness of information.

All courts should have read-only access to the data bases of all other courts, either through direct telephone dial-up or through the mainframe computer in Richmond. Such access will permit inquiries between courts about cases, attorney's schedules, etc. Consideration should be given to a centrally maintained database containing the names of fugitives and individuals on probation.

Until a single-tiered trial court is created, the district and circuit courts within each circuit should have access to each other's data bases. A network should integrate court computers, enabling them to exchange information electronically and to forward records on cases being transferred between courts. The recipient court should be able to verify any data it receives before accepting it into its data base.

Trial courts should be connected with appellate courts, and the Court of Appeals and the Supreme Court should be linked so that data can be electronically transferred among them. In addition, all Virginia courts should be linked through a computer-based electronic mail network.

For the near term, facsimile equipment should be installed throughout the court system to promote the fast efficient transfer of documents and to enhance communication with law firms and businesses. In the future, facsimile may be used less as more information is stored in electronic form.

The courts and other public agencies related to the judicial system cannot presently share and exchange information electronically. The data bases of the agencies comprising the justice system should be integrated to make it easier to share information, to eliminate the need for different agencies to enter the same data and to reduce duplicate record keeping. Local police departments and sheriffs' offices, magistrates, prosecutors and public defenders, probation departments, the Department of Motor Vehicles, Central Criminal Records Exchange and the Department of Corrections are among the agencies whose data bases might be linked with the courts' or which might get electronic access to court records.

The individual agencies forming the integrated system should determine the level and nature of the access to the system. Some agencies only need to read information in other agencies' data bases, while other agencies might write on or copy another agency's records. External agencies, such as police departments or prosecutors' offices, may originate the records that become part of the courts' data bases. Court personnel may then modify these records as a case moves to disposition.

In proposing a system in which public agencies exchange information and data and read each other's files, what is needed is a networked system, not a monolithic system. If one agency changes its systems, other agencies would not need to change theirs. Each agency would maintain control over its own data bases. With multiple agencies involved, coordination is critical. An interagency group should work out problems and conflicts regarding the quality and control of information and procedures.

The courts and General Assembly should specify ways to authenticate electronic copies as true copies of an original. Attitudes will have to shift to accept the notion that the original of a document may be a set of electric impulses stored on a magnetic disk.

7.9 ***Recommendation:*** *Major responsibilities for managing, storing and processing automated information should be transferred from the state level to the local courts.*

Rationale: Changes in computer technology make it advisable to develop a decentralized computer system for the state's courts. A decentralized system would foster local innovation and better fit local needs. Local courts would be better able to prepare needed reports and control the processing of their own data, and would determine their own priorities. Telecommunications costs would be reduced relative to operating costs. Under a distributed system, new systems and new software could be tested in one area before being adopted statewide. A networked system with duplicate data bases would provide back up of hardware, software and data. Problems at one site would not impair the entire statewide system.

The current centralized Courts Automated Information System was designed in the early 1980s, when centralized data processing on mainframe computers was still the prevailing practice. Today, relying on personal computers, the trend is toward distributed data bases and decentralized systems that link PCs in local and wide-area networks.

Compared to a decentralized system, a centralized computer system offers greater uniformity and security. It is simpler to manage and control. Data bases are easier to protect. It makes it easier to link local courts and to connect the courts with other public agencies. Telecommunications are easier to manage, and technical support can be provided more readily.

A centralized computer system, however, would have several drawbacks: telecommunications costs are high relative to computing costs, and a system designed for the entire state may not meet the needs of all localities. Local courts are dependent on a central facility. Times when local courts can use the central system are restricted. When a centralized system crashes, all courts linked to it go down.

A decentralized system has corresponding limitations. It might require adding trained personnel. It could result in uneven data, nonconformity to standards and reduced security. Communicating with other courts and linking court data bases with those of other public agencies might be more difficult.

Virginia's courts should incorporate the best features of centralized and decentralized systems. The State Court Administrator should develop a decentralized information system based on local or regional processing and storage of data with the sharing of information through local and wide-area networks. Most court information systems, including the

current centralized case management system, should operate locally on microcomputers. Each court should manage and control its own systems and data. Localities should innovate with their systems and tailor them to their needs. Local courts should supply uniform, standardized information electronically to a centralized court data base housed on a mainframe computer in Richmond. This data base should be open to all courts via telephone lines and modems or by dedicated telephone lines.

Within a decentralized system, the clerk's office will have added responsibilities. Clerks' offices will need to employ people who can administer and maintain their systems and perform simple trouble-shooting. Automation should, however, reduce the need for added staff in other areas of the clerk's office. Clerks' offices will need technical assistance from the State Court Administrator's office to answer questions, solve problems and plan for new applications.

To Preserve The Public Trust...

"The ordinary administration of criminal and civil justice contributes, more than any other circumstance, to impressing upon the minds of the people, affections, esteem, and reverence toward government." The words of Alexander Hamilton clearly reflect one reason why courts must perform well. They are central to the American form of government. Through an independence forged over the centuries, courts serve as the primary protector of the rights and liberties guaranteed by the Constitution and as the bulwark against intrusion upon the principle of the rule of law, not of men. In order for the courts to continue to fulfill this vital role in the future, they must maintain the respect, confidence and trust of the public by being better understood, more accountable and more responsive to the concerns of citizens.

VISION Eight

IN THE FUTURE, the public's perception of the Virginia judicial system will be one of confidence in and respect for the courts and for legal authority.

Dimensions - Compliance with the law depends heavily upon public confidence in the court system as well as its legitimacy in the eyes of the citizens it serves. The deference and esteem accorded to the courts come not only from actual performance but also from how the public perceives justice to be done. The public's perception is affected in many ways. Key to the shaping of the public's view of the court system is the role of education. A general understanding of the role and responsibilities of the courts in the American system of government should come through the formal school system and must be supplemented on a continuing basis through materials disseminated by the bench, bar and media. Broad access to court proceedings and records encourages effective participation. Openness of court proceedings offers another vital channel of access. For those who do participate, the court's demeanor must convey an appreciation of the value and dignity of all individuals, not a sense of distance or indifference. Courts and their staffs must create an environment of courtesy and responsiveness to the needs of the public. Equal treatment and respect must be received by all who have contact with the court. The courts must find ways to obtain feedback on their strengths and weaknesses, and they must be ready to react to the identified needs. Through education, openness, equal treatment, respect and responsiveness, the courts can better ensure that not only is justice done but that it is seen as being done.

8.1 ***Recommendation:*** *A consumer research and service development process should be created within the court system.* *

Rationale: The public expects the legal system to protect citizens through fair procedures administered by competent personnel committed to ensuring that all participants in the system are treated equally. Nationally, there is a perception that the courts, as the central component of the legal system, are not fulfilling these expectations, thus endangering public confidence in and respect for courts.

Although perceptions of Virginia's citizens presumably match national norms, the Commission believes it would be helpful to obtain state-specific data. Information about the hopes, expectations and needs of Virginians would help in meeting their diverse needs and desires. As a service-oriented sector, the judiciary must seek to understand through research the impact of societal changes on the courts, and gather participant views on ways to improve the operations of courts. Such knowledge could shape the judiciary's strategic plans as well as development of specific consumer-oriented approaches to help citizens

"Compliance with the law depends heavily upon public confidence in the court system as well as its legitimacy in the eyes of the citizens it serves."

make better use of the judicial system. The results of such research would focus citizen opinions directly into the judiciary's strategic planning process and thus shape policy for the courts.

The State Court Administrator should establish a consumer research and service development program for the judicial system. This program would provide a new channel for citizens to voice their complaints, criticisms and questions on court services.

8.2 ***Recommendation:*** *Judges and court personnel should receive specialized training to increase their sensitivity to the needs of the public, and local courts should intensify efforts to provide public information services.* *

Rationale: The Commission is especially concerned that future users of the system feel welcome. This goal requires a commitment to basic courtesy throughout the judicial system. There must be a positive attitude on the part of all court personnel, including magistrates, attorneys, clerks and judges. The judges of each court must assume personal responsibility for setting a tone and attitude of courtesy and helpfulness toward all who come to the court. The State Court Administrator should offer regular training sessions to aid court personnel in developing and maintaining a receptive court atmosphere.

Users of the court system should have an opportunity to provide formal comments on the service they received. An easy-to-complete form, self-addressed to the State Court Administrator should be available in each clerk's office. Comments about particular court personnel and procedures, both positive and negative, should be brought to the attention of the individual(s) and the appropriate supervising authority. Where justified by the volume of litigation or by the complexity of procedures, especially in the larger court systems, a position of court information officer should be created to assist the public in using the courts.

8.3 ***Recommendation:*** *The court system should seek to detect and eliminate discrimination, ensuring that participants do not receive disparate treatment because of race, religion, gender, age, handicap or socio-economic status.* *

Rationale: The commission is especially concerned by any public perception that access to justice may be affected by race, religion, gender, age, handicap and socio-economic status. The Commission thus urges that the court system should pursue specific corrective measures. For example, an ombudsman could be established within each judicial circuit to receive and investigate complaints of discrimination by any court system personnel, including magistrates, clerks and judges, and to report

its findings and recommendations to the Judicial Council. The Council should provide a review and enforcement mechanism to resolve allegations of discrimination.

Judges and court personnel should receive training to aid them in recognizing and eliminating both overt and subtle forms of discrimination.

The Supreme Court of Virginia should work with the Virginia Commission on Women and Minorities in the Legal System to promote judicial education programs that may help reduce both the incidence and the perception of gender, racial and religious bias in the legal system.

8.4 *Recommendation: Comprehensive services should be available in each jurisdiction to meet the special needs of victims and witnesses.*

Rationale: Victims of crimes and witnesses in all cases should be treated with respect, fully informed about the processes involved, and, where appropriate, given access to counseling services affiliated with the justice system. Victims and witnesses must be viewed as significant parties in the judicial process.

Victim and witness programs should be available in every jurisdiction. There are presently 34 such programs in Virginia, which serve only 25% of the localities in the Commonwealth. The large majority of these programs focus on criminal offenses. Witnesses in civil matters also need information about court facilities, procedures and other services. Statewide training should be provided for victim-witness service providers.

The interest of the victim should be considered at each stage of the criminal process, including parole determination. Victim Impact Statements are currently discretionary. They should be considered in every case (except where expressly prohibited under constitutional law in capital murder cases) in which the victim wishes to submit one, and where the crime may have caused the victim physical, psychological or economic harm.

Additional efforts should be made to educate the public, especially victims of crime, about the Crime Victim's Compensation Program. Programs which effectively meet the needs of victims and witnesses may vary in content, form and structure, but deserve support within the court system. Special efforts should be made to convey information about these programs to the citizens they are intended to help.

8.5 ***Recommendation:*** *Educational programs should inform the public about procedures for filing complaints which allege misconduct by attorneys, judges and other court personnel.*

Rationale: Both the Virginia State Bar and the Judicial Inquiry and Review Commission have established mechanisms for the investigation and sanctioning of lawyers and judges who are charged with misconduct. This system is, however, entirely reactive and largely unknown to the general public. The Commission believes that the subject of regulation of the legal profession needs to be reexamined to create a higher level of citizen understanding of this regulatory process.

8.6 ***Recommendation:*** *A comprehensive program should be undertaken by the courts, the legal community and the General Assembly to educate Virginia children and adults about the court system.*

Rationale: Of the three branches of government, Americans admit they are least familiar with the judicial branch. Virginia has a special opportunity to improve public understanding of the court system.

The State Board of Education should adopt and implement a curriculum to teach students at every level appropriate material regarding the Virginia judicial system. This instruction could be modeled after the existing K-12 social studies supplement entitled *Journey to Justice.*

(1) All students entering junior high school should have a general understanding of basic constitutional rights, the role of the courts and of the responsibilities of various positions within the judicial system such as judges, commonwealth's attorneys, police officers, public defenders, sheriffs, parole officers, court clerks and magistrates.

(2) All students, before they leave high school, should understand how the judicial system operates, including the conduct of administrative law proceedings.

The Supreme Court of Virginia should take a leadership role in providing system-wide direction for public education about the Virginia judicial system and the American system of justice. The Commission recognizes, however, that the Supreme Court alone cannot remedy public ignorance about the courts. The entire legal community must play a part in improving public education with regard to the legal system. Information about the legal system should cover not only the courts, but also alternative dispute resolution procedures. The instruction of elementary and secondary school students in the use of consensual dispute resolution skills may create flexibility as well as better understanding among future generations.

All Virginia judges and especially the chief judge of each circuit, should take an active role in educating the community, including school children, about the courts and the legal system. The Supreme Court of Virginia should encourage the development of court docent (court visitation) programs. Each of the thirty-one judicial circuits should have such a program of its own within five years. The Virginia State Bar, all volunteer bar associations such as the Virginia Bar Association, Virginia Trial Lawyers Association, the Old Dominion Bar Association, the Virginia Women Attorneys' Association and the Virginia Association of Defense Attorneys, all local bar associations, the Virginia law schools and groups such as the Virginia Community College System, should participate in this effort.

Full use of technology should help such programs of public education about the law and courts. Cable television should have access to a video broadcast channel from the local courthouse. Courts should make available video recordings of trials to grade and high schools, and to colleges and universities. Programs about the courts should be produced for public, commercial and cable television. The courts should use computer-assisted instruction to educate the public about the courts; instructional software should be prepared and placed in schools, libraries and media centers.

8.7 ***Recommendation:*** *In order to be completely open in conducting its business, the courts should allow and encourage live coverage of court proceedings on public and cable television as well as radio.*

Rationale: In order to aid citizens' understanding of the judicial process, the courts should encourage gavel-to-gavel coverage similar to C-SPAN. The courts should retain control over any such broadcasts or telecasts to guarantee a fair trial and to protect the privacy of victims, jurors and witnesses. Technology already has minimized the intrusiveness of video coverage. Cameras are much smaller and will work under ordinary room lighting. While technical improvements will reduce further the extent to which live coverage will interfere with court proceedings, final control must rest with the courts. Except for those proceedings currently protected by statute as confidential, the goal should be the broadest possible access by the media. In some cases, trials could be shown by delayed telecast with victims or witnesses protected through editing or masking.

Both the public and the media should have full access to the video recording system that should be installed in all courts. If a trial or hearing is videotaped, then outside access should be provided by a feed off the court's taping system avoiding the need to bring extra cameras, lights and microphones into the courtroom. The courts, with the advice of the bar and media, should prepare guidelines regulating access to video records.

8.8 ***Recommendation:*** *A public information department should be established in the Office of the State Court Administrator to coordinate public education and information activities.*

Rationale: Current efforts by the court system to disseminate information about its activities, processes and resources could be strengthened. To implement the previous recommendations for improved public education and to enable both the broadcast and print media to inform the public more fully about court proceedings, the Office of the State Court Administrator should include a public information department. This department would work with the media and other appropriate agencies and groups to prepare and distribute information about the court system.

Because of the vital role of the media in the public's understanding of the legal system, the Commission believes that the efforts of the Virginia State Bar's "Bar-News Media Relations" Special Committee should be strengthened and the committee should distribute all of its educational materials available to television and print journalists throughout the state. The Commission also urges regular seminars throughout the state to inform the media about the legal system. Local bar associations should assist in the coordination of these efforts.

IN THE FUTURE, the impact of changing socio-economic and legal forces will be systematically monitored and the laws of Virginia will provide both the substantive and procedural means for responding to these changes.

Dimensions - The justice system is the product of multiple forces both internal and external. Broad socio-economic and legal developments have produced the existing justice system with its extensive and intensive use of courts. The justice system has intrinsic to it elements of supply and demand, with the system supplying its concept of justice and society demanding what it needs. The needs and demands of society change. The legal system must be able to respond to these changes. The laws should provide a framework to regulate and to ensure consistency in governmental action and should reflect the ideals and social values of the citizens of Virginia. In order to respond to both social and technological changes, the substantive and procedural law must be continually monitored. Institutionalization of this process will enable government personnel to meet more fully the aspirations of its citizens and the needs of the courts to render decisions which are seen as fair and responsive.

9.1 ***Recommendation:*** *The General Assembly of Virginia should create by statute a public corporation known as the Virginia Law Institute to conduct an ongoing study of the substantive and procedural law of the Commonwealth, and to offer recommendations for changes and additions to the law.*

Rationale: Our society is changing at an ever increasing rate. There is a clear need for an institution separate from the three branches of government to propose to the Governor and the General Assembly needed changes in the law.

Science and technology have created situations that call for new or different forms of regulation. Examples of potential target areas are new medical technologies such as complex transplants and genetic engineering. Other changes such as the "graying" of our population, growth of automation throughout our society, new patterns of immigration, changes in the roles of women and the composition of households and matters of public health such as AIDS, need careful and informed study and legislative responses. Meanwhile, broad areas of existing law need to be studied and changes proposed. Legal fields such as tort, mental health and environmental law are in need of a systematic and informed examination.

The Commission proposes that the General Assembly establish a public corporation to be known as the Virginia Law Institute. Its Board of Directors would be composed of representatives of the three

"In order to respond to both social and technological changes, the substantive and procedural law must be continually monitored."

branches of government, members of the private bar and citizens at large. This Board would govern the Institute. The Institute would solicit and study suggestions for new laws or changes in existing laws from all sources. It would report annually to the General Assembly and submit proposed changes and new laws at the appropriate time. In its work the Institute would utilize the considerable resources of the Commonwealth's colleges and universities.

9.2. ***Recommendation:*** *The strategic planning capability of the court system should be expanded and refined. Long-term futures planning and environmental scanning should be incorporated in the planning process.*

Rationale: The process of planning for the future of the courts is vital, as it is for other branches of government and for the private sector. The current two-year planning cycle for the judicial system, which yields a Judicial Plan each biennium is an effective budgetary device but does not provide a futures planning capability. The Commission recommends that the planning process include a long-term component which projects four or five years into the future. Planning for statewide matters and assisting local courts with planning for local matters will be expanded functions of the State Court Administrator's office.

The Commission further recommends that the Judicial Council ensure the judicial system's capacity to assess and use new technology by establishing a process to review and advise on the application of technology to the courts. This mechanism should carry out an ongoing program to monitor the trends and developments in technology that might affect the courts and report its findings periodically to the Judicial Council. The task of this "futures" unit would be to collect, assimilate and assess information on emerging technology, programs and projects that could affect the judiciary. Among the areas which would be monitored would be expert systems and artificial intelligence, as well as the application of computer-aided decision-making to the judiciary.

Vision Ten

***In The Future,** the judicial system will fulfill its role within our constitutional system by maintaining its distinctiveness and independence as a separate branch of government.*

Dimensions - In addition to its primary function of dispute resolution, the court system has an additional objective of maintaining itself as an independent and respected branch of government. The doctrine of separation of powers, deeply rooted in political and constitutional theory, insulates the judiciary from external pressures, protects the ability to make unpopular decisions and preserves the rule of law. The maintenance of the judiciary as an independent branch produces two concomitant responsibilities. First, the court system must respect its coequal partners in government and must not intrude upon the powers and responsibilities properly belonging to them. Second, the judicial system must be willing to manage itself in such a way as to insure effectiveness, accountability and public respect. Judicial independence can be best preserved by just disposition of cases, constant vigil against intrusion, proper administration and by comity in relations with the other branches.

"The doctrine of separation of powers, deeply rooted in political and constitutional theory, insulates the judiciary from external pressures, protects the ability to make unpopular decisions and preserves the rule of law."

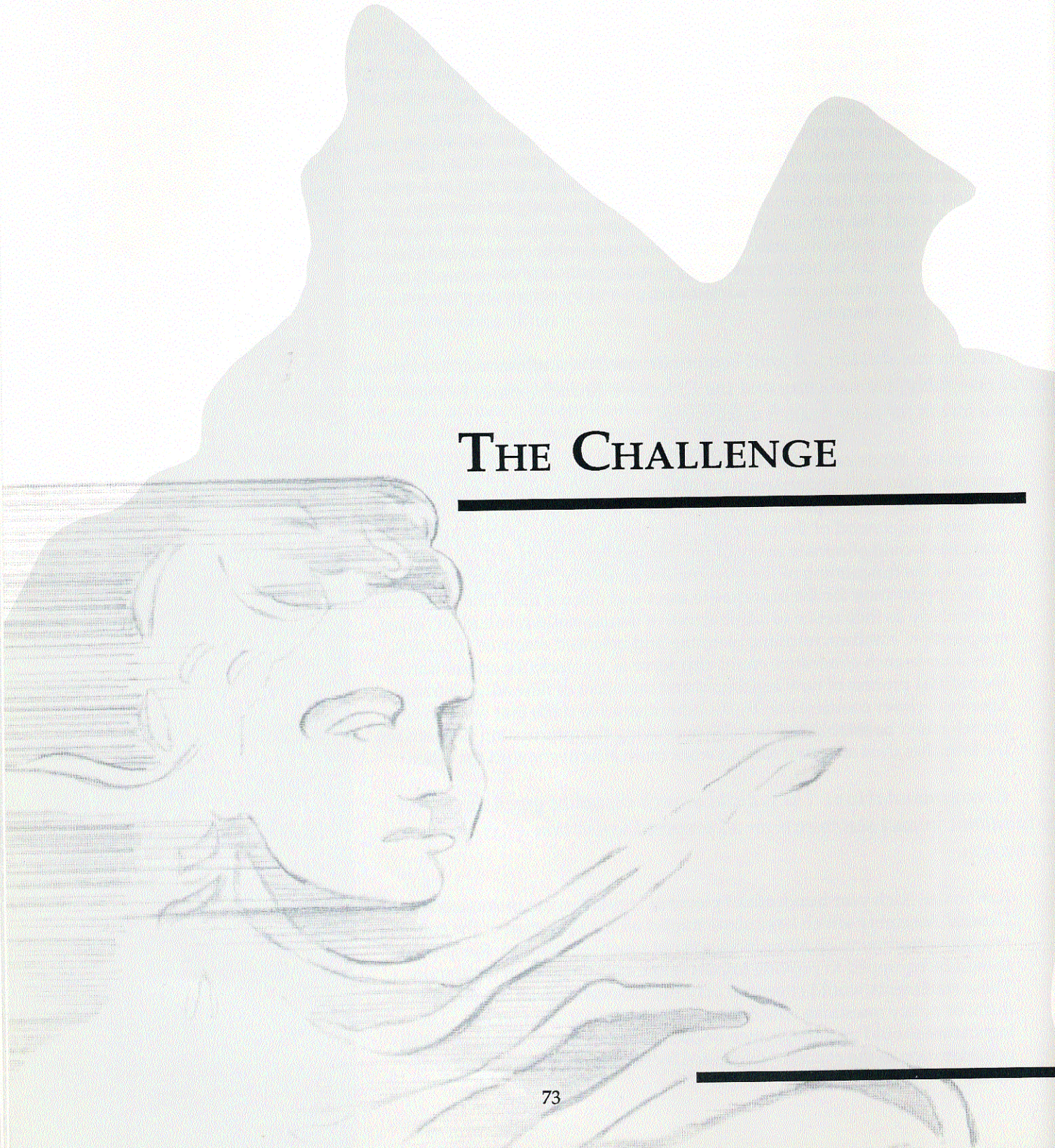
10.1 ***Recommendation:*** *A joint committee composed of members of the General Assembly, the judiciary and the Executive Branch should be established as a forum for inter-branch discussions.*

Rationale: While each branch of government has a separate mission, it is necessary that each understands the role played and problems experienced by the others. This is particularly true in the case of the judiciary which is the least understood of the branches. Improved communications among the branches would eliminate many of the misunderstandings and could improve the functioning of the government generally. Institutionalization of the opportunity for the branches to meet and discuss their chief concerns, particularly as they relate to administrative issues, could result in increased cooperation, common resource planning and balanced resource allocation. This inter-branch committee could also serve as a vehicle for orientation to the judicial process of new legislators and members of new administrations. Likewise, closer coordination by the administrative staffs that work in each branch could be established thereby improving the information flow among the branches thus allowing each to work more effectively with the other.

10.2 ***Recommendation:*** *The judicial branch should be given the opportunity to submit impact statements on all proposed legislation affecting the court system.*

Rationale: Each year hundreds of pieces of legislation are introduced in the General Assembly which have some impact on the operation of the courts. Providing testimony on all proposals is not practical. Instead, the judiciary should be equipped to provide impact statements on all such legislation. These statements would cover not only the financial impact but any procedural or policy questions which the judicial system might identify. The legislature should encourage such impact statements and should give full consideration to the concerns expressed by its coequal branch of government.

The Challenge



The Twenty-First Century is not a destination but instead represents a journey. In making this quest, the courts must be guided both by a basic set of values which engender a sense of purpose and by a general blueprint which offers a sense of direction. The Commission on the Future of Virginia's Judicial System has, through research, analysis and debate, forged such a plan. While being responsive to the anticipated needs of the New Dominion, it is sustained by the traditional values and philosophy which have made the Old Dominion a source of pride to all its citizens.

Although the work of this Commission is unique in the annals of the Virginia judiciary, it can only be taken as a beginning. Implementation of the recommendations necessary to bring to life the Commission's vision of the preferred future will require significant commitment. A coordinated effort involving not only the courts but the legislature, the Executive Branch, the bar, the media, the education system and the public is needed for a successful transition to the next century. Oliver Wendell Holmes reminds us of our obligation with these words:

> Law is the business to which our lives are devoted, and we should show less than devotion if we did not do what in us lies to improve it, and, when we perceive what seems to us the ideal of its future, if we hesitate to point it out and to press toward it with all our heart.

Finally, the Commission has, in a sense, been overwhelmed with the pure magnitude of what lies ahead, and, notwithstanding the sophistication of research capabilities, the true uncertainty of it all. Yet, the more complex the circumstances, the greater the need to plan. As we initiate our journey into the future, the insight of an ancient philosopher sheds light on our course.

> Think in anticipation, today for tomorrow, and indeed, for many days. The greatest providence is to have forethought for what comes . . . . The whole of life should be spent thinking about how to find the right course of action to follow. Thought and forethought give counsel both on living and on achieving success.

APPENDIX A

SEPARATE STATEMENTS

The following statements were submitted by Commission members.

I.

The majority report of the Commission is the product of thoughtful, conscientious, and imaginative study by a group of able, energetic, and dedicated Virginians. I admire the workmanship, I concur in most of the recommendations, in varying degrees of enthusiasm, but I disagree with some.

In my opinion, there are two critical problems in the administration of justice in Virginia—delay in the judicial process and the increasingly prohibitive cost of civil litigation. The successful administration of justice in the Twenty-First Century will depend largely upon finding satisfactory solutions to these two problems; to the extent that the majority report recommends viable solutions I endorse it. I view all other recommendations as secondary. Some are designed to improve the public relations skills of court personnel, others to apply the marketing techniques of a trade to the administration of justice, interesting but dubious concepts.

Although I approve the recommendation that the Court of Appeals be given jurisdiction over civil as well as most criminal appeals, I oppose the recommendation of an appeal of right. We were informed that giving an appeal of right may require the employment of 30 additional attorneys in the Office of the Attorney General. No estimate is given as to the additional judges that will be required. It may not be unreasonable to suggest that an increase in the number of judges of the Court of Appeals from 10 to 20 to 25 may be necessary if the jurisdiction is expanded and an appeal of right mandated.

My objection, however, is not based upon the tremendous expense incident to these proposed changes. In my view, the petition procedure applicable to appeals in the Supreme Court of Virginia, and available in the Court of Appeals, is in effect an appeal of right. The losing lawyer in the court below may make a personal appearance in support of his petition for appeal before a panel of three or more justices of the Supreme Court. His opponent may file a brief in opposition but will not be permitted to argue orally. If one member of the panel believes that the lower court may have erred, the appeal is granted. Thus, every litigant has the right to argument before a panel of the Court. If he cannot raise a doubt in the mind of at least one panel member, he can file a petition for rehearing which is reviewed by the full Court. Substantially the same procedure is available in the Court of Appeals. Code § 17-116.05:2. Under such favorable conditions the petitioner has every advantage to which he is reasonably entitled. To grant him more is to burden an already overloaded system with excess baggage without benefit to anyone. I believe the Virginia petition procedure is superior to the appeal of right provided in other states. It follows that I disagree with the recommendation that appeals from the Court of Appeals be only by certiorari. Appeals by petition should be continued at both appellate levels.

It is not easy to oppose a recommendation that merely states that certain changes should be considered. Nevertheless, I do oppose giving consideration to incorporating the federal rules of civil procedure and having the Supreme Court by rule promulgate a code of evidence. In 1987, after a lengthy study, the Supreme Court unanimously recommended to the General Assembly that no code of evidence should be adopted. Whatever demand exists for this innovation and for incorporation of the federal rules of civil procedure may be traced to lawyers who would prefer, for their own convenience in litigation, to federalize Virginia procedure and even substantive Virginia evidentiary law. I am aware of no widespread desire of either bench or bar for such drastic action.

The recommendation that the performance of judges be constantly evaluated is highly questionable. No elected officials in Virginia are subjected to such evaluation except when considered for reelection. To single out the judiciary for this kind of review is unjustified. It could impair the independence of the judicial branch by causing some judges to seek popularity at the expense of objectivity.

For the same reason, I question the recommendation that the Supreme Court establish a consumer research and service development program for the judicial system and provide forms for users of the courts to submit comments on the service received in the court system. I readily agree that all court personnel should be trained and expected to deal courteously and efficiently with users of the court facilities. I do not believe, however, that every disgruntled litigant or his relatives should be encouraged to complain about inconsequential slights allegedly received in the judicial process.

The judicial system in administering justice does provide an important service to the public generally and to litigants especially. Generally, in litigation there are winners and losers. There is no way to make the loss of a case pleasant to the loser. Litigation is civilized warfare in which antagonists have been strenuously engaged; no exchange of pleasantries, even those devised by consumer research specialists, is going to ease the disappointment of defeat. Comments on the service at a hotel may be helpful to the management; comments on the service in the judicial system may be a needless embarrassment to those who administer justice. Some critics fear that the introduction of advertising and marketing techniques has tended to convert the practice of law from a profession into a trade. Many of those engaged in the administration of justice are reluctant, I believe, to welcome such techniques into the courthouses.

I do not approve the recommendation that a system be established in each judicial circuit to receive, investigate, and report to the Judicial Council allegations of discrimination by court personnel. Complaints of discrimination or other improper conduct by judges should be made to the Judicial Inquiry and Review Commission. Complaints of discrimination or other improper conduct by other court personnel should be made to the chief judge of the circuit court or Court of Appeals, or in respect to complaints against personnel of the Supreme court, to the Chief Justice.

A judge at any level should hope to inspire respect rather than affection. In a consumer-oriented society, the danger is that a judge become a salesman who may succumb to the pressures of public opinion rather than apply the law fairly, objectively, and evenly, whether the results are popular or unpopular. The best safeguard against judicial arrogance is tenure for a fixed term rather than for life.

Lastly, I object to the recommendation that cost of living adjustments be made in the compensation of all personnel in the judicial system. For years, local political subdivisions were permitted to supplement judicial salaries at the trial court level. Many did so, giving rise to inevitable conflicts of interest when decisions of the local governing bodies were challenged in court. It took years for the General Assembly to eliminate what was widely criticized as an unwise policy. Since then judicial salaries have been uniform throughout Virginia, although it is apparent that the purchasing power of the salary continues to vary from place to place.

Undoubtedly, acceptance of a judicial position may require financial sacrifice. There will always be some qualified persons who are unable or unwilling to serve. Judicial service does not now and never will offer an attractive career for one who seeks wealth. For those motivated to pursue such careers, however, in Virginia, where the traditions of public service are strong, there are incomparable intangible rewards.

George M. Cochran

NOTE: Joining in Justice Cochran's separate statement were Judge Persin and Mr. Parkerson. Judges Daffron and Trabue concur with Justice Cochran's opposition to the recommendation calling for an appeal of right to the Court of Appeals. Judges Daffron, Kent, Trabue and Mr. Roberts concur with Justice Cochran's opposition to the establishment of a consumer research and service development program and the creation of an ombudsman as proposed in Recommendation 8.3.

II.

I take exception to Recommendation 3.5 which would give judges authority to order mandatory participation by litigants in arbitration, mediation or other alternative dispute resolution mechanisms (ADR). Let me hasten to say, I fully support the use of ADR. Having served on the Task Force on Alternative Paths to Justice, I am firmly convinced that, in appropriate cases, such mechanisms can and should be used to resolve many conflicts. However, I am equally convinced that litigants and their respective counsel are the parties best suited to determine what cases are appropriate, not judges aided by computers (See Recommendation 3:6).

Compulsory authority would be a fertile ground for abuse. It is neither necessary nor desirable. Abuse would lead to another layer of expense and bureaucratic delay. Mandatory ADR would threaten the right to trial by jury. It would undermine matters best left to the discretion of counsel and their clients. In many

cases, of various kinds and descriptions, attorneys for the parties know much more than judges about the intricacies and needs of their particular problems. Generally, attorneys are much better situated to determine what is "an appropriate case" than may be a particular judge. To some judges every case might well be "appropriate for ADR." As a practical matter, if a case is bona fidely appropriate for a trial of ADR, there will be very few situations in which attorneys will blatantly defy the Court and refuse helpful suggestions. In short, there is simply no evidence that any need for mandatory ADR exists, or is likely to exist in the foreseeable future.

Robert W. Mann

NOTE: Joining in Mr. Mann's statement were Commission members Ms. Tillar and Judges Persin, Trabue, and Daffron.

III.

The proposal by a majority of the Future's Commission to abolish the Constitutional Office of clerk of the circuit court is the one proposal which, if adopted, will bring the most radical change in the administration of justice as we have known it for the past 200 years for the office of clerk and sheriff are the two oldest offices in the Commonwealth, pre-dating the courts and judges as they now exist. And while many of the problems addressed by the Commission demand radical changes, I am far from certain that the abolition of an elected clerk will bring about a judicial system that is responsive and successful in meeting the myriad of problems addressed.

The abolition of an elected clerk is the one proposal in the entire report by the Commission that is not based on any empirical evidence of a problem. Informal discussion among Commission members brought stories of isolated personality conflicts between a clerk and judge, but these stories were not buttressed by any specific evidence that these courts were being administered poorly or inefficiently by the clerk. The proposal stems, evidently, from some management philosophy or concept that indicate that an administrator should not be elected but should be appointed by someone within the system being administered. However, if there was any evidence to support this philosophy, it was not shared with the entire Commission.

The overall Commission report envisions a judicial system that will be expanded in size and authority to meet the anticipated explosion of case filings and the diversity of filings. Alternative dispute resolution mechanisms will be a part of the system with mediation, fact-finding and arbitration panels brought on board to assist the courts. While less formal, they will be a part of the system with trained professionals providing services in conflict and dispute resolution. The paradox is that these programs will enable more people to use the judicial system but these very people will have no say in the running of the system. Even jury sentencing is to be eliminated. We are to have a judicial system in a free society but where basic democratic participation will be eliminated from the system.

The new system will have no elected clerk of court as a representative of the people who has retained, and should retain, the unwritten but actual communication between the public and the bench and between the public and the bar. The public will pay the salaries of the judges and the

court administrators but they will have no voice as to how the system works or a voice of one of their own to explain how the system works.

The proposal to eliminate the clerk and to split off the judicial duties from administrative duties leaves more questions than it answers. For example, in small or rural areas where case filings are not numerous and the court only meets a few days per month, what will the court administrator do during these "slow times"? What salary will be necessary to attract a professional manager and how will it be paid? The court functions of the current elected clerk show in all courts the only constant negative financial operation of the offices. The fees charged are so low and the collection of fines and costs such a failure that the non-judicial or administrative fees collected by clerks of court fund the court operation of every court in the Commonwealth.

Other questions raised with the split of offices and duties also pose interesting financial questions. Will local governments be required to build buildings for the non-judicial functions now performed by clerks? Will state recording standards be eliminated and each locality allowed to impose fees and costs and set different recording standards? Will the courts and the localities be required to buy, equip and operate the records storage methods now done by a single clerk?

The clerk of court, being elected and performing both judicial duties and administrative duties, has provided service to the Commonwealth and to the local governing bodies and to the judiciary. These services have enabled these agencies not just to survive in an age of increased and, at times, overwhelming demands, but has enabled them to prevail. This has been accomplished despite erratic and insufficient staffing and funding. (Compare the staffing of the offices of Commissioner of the Revenue, the Treasurer and the Sheriff with each respective court clerk.) An elected clerk can preserve an element of democracy within a professional judiciary that ought to remain apart from politics but which must be answerable to those they serve. With modest increases in revenue with the funds earmarked for education of clerks and their personnel, the judiciary of the Twenty-First Century will be able to meet its mandate of quality justice for all, backed by a qualified and competent administrative arm headed by an elected clerk of court.

Michael M. Foreman

IV.

We disagree with the majority's recommendation that full civil jurisdiction be given to the Court of Appeals (Recommendation 4:2). Instead, we believe that the present division of jurisdictional responsibility provides a unique and preferable structure for the development of the law. The legislature has assigned each appellate court given areas of primary responsibility. This affords each court the opportunity to develop an expertise in those areas, thereby helping insure the development of cohesive and internally consistent bodies of case law. Further, this system achieves these goals at a minimum cost to the public.

The benefits which the present appellate structure provides must not be overlooked. We believe that the present structure has resulted in an equitable and manageable division between the two appellate courts. Between 1985 and 1988 an average of 1,239 cases per year were filed in the Supreme Court (mostly civil), while an average of 1,123 cases were filed in the Court of Appeals. More significantly, under the current model the appellate capacity expanded dramatically with minimal duplication. Between 1981 and 1985 the Supreme Court acted upon an average of 1,995 cases per year; between 1986 and 1988 the two courts combined acted upon an average of 2,703 cases per year. Additionally, the body of law available to provide guidance to the bench, bar, administrative agencies, municipalities and the public dramatically increased. An average of 176 opinions per year were

issued by the Supreme Court between 1981 and 1985; since the two courts have been in existence, an average of 408 opinions per year have been issued.

Before more costly measures are taken to restructure the entire appellate system, we believe that both the Supreme Court and the Court of Appeals should strive to meet the ABA time standards for disposition of appellate cases. Only if the appellate courts are unable to meet these standards, and access to the appellate process has not been materially increased by the reduction of delay, should consideration be given to restructuring the jurisdiction of the appellate system.

Lawrence L. Koontz, Jr.
Barbara M.. Keenan

NOTE: Joining in the separate statement filed by Judges Koontz and Keenan was Judge Trabue.

V.

We believe that providing an appeal of right from all cases in the trial courts will result in greater delay and restrict the ability of the appellate system to do quality work in a timely manner (Recomendation 4:3). Based on projections from the Director of Judicial Planning for the Supreme Court, a system providing an appeal of right with full civil jurisdiction in the Court of Appeals would probably result in a 28% increase in civil cases filed. Since the Supreme Court has experienced difficulty in timely disposing of the civil cases filed there, it is unrealistic to assume that transfer of all of these cases plus the estimated 28% increase in filings would not result in additional delay and backlog in the Court of Appeals. We also believe that providing an appeal of right in criminal cases would produce a similar burden of backlog and delay.

Increased access to the appellate system can be achieved without placing the equilibrium of the entire system at risk. Delay reduction is the key predicate to increasing the appellate courts' capacity. Until that goal is achieved, no responsible construct for change can be devised. Further, we agree with Justice Cochran's statement that the petition procedure used in the Virginia appellate courts provides a merits review of cases which is effectively the same as an appeal of right. Changing this procedure before analyzing the beneficial impact of delay reduction could result in an actual restriction of access through additional delay, as well as a reduction in the quality of attention now given each case during the petition process.

Other states which provide appeals of right to their intermediate appellate courts have often found it necessary to have a large amount of case screening and recommendations made by non-judicial personnel. Further, the right to oral argument is often drastically limited in these courts to minimize case processing time. We strongly believe that implementation of the appellate system envisioned by the majority report would result in similar unavoidable problems. Unfortunately, experience has shown that the reality of limited resources actually increases the problems sought to be solved when theoretically pure systems, such as the one proposed in the majority report, are implemented. We believe that Virginians deserve a quality oriented system, rather than a numbers-driven structure of appellate review. For this reason, we dissent from the implementation of an appeal of right with full civil and criminal jurisdiction in the Court of Appeals.

Lawrence L. Koontz, Jr.
Barbara M. Keenan

NOTE: Joining in the separate statement filed by Judges Koontz and Keenan was Judge Trabue.

VI.

I wish to note my preference for the addition of language in Recommendation 2.1 to specify that punishment is an important consideration in criminal sentencing to express society's condemnation of the criminal act. In Recommendation 2.2, I wish to note my support for the addition of language indicating that a sentence of confinement should be substantially served.

Further, I believe that the public's proper concern with sentencing disparity is primarily a result of the disparity between the sentence imposed and the sentence actually served. To remove the perception that sentences imposed or affirmed by courts are largely meaningless, discretionary parole should be abolished. Crime victims, defendants, and the public should know the probable duration of a sentence of confinement.

John F. Daffron, Jr.

NOTE: Joining with Judge Daffron in this separate statement were Judges Kent and Trabue.

VII.

We oppose that portion of the rationale in Section 4.1 which infers that rotation periods be mandatory except in the family division within a court. In our opinion, the assignment to each division should be treated identically with the recommendation for assignment to the family division.

We oppose recommendation 5.6 as stated. Commissioners in chancery, substitute judges, judges pro tem, and special justices should not be used except with the concurrence of the parties and their counsel. In our opinion, this recommendation encourages the archaic continuation of a system of referral of judicial decision making to nonelected judges.

Kenneth E. Trabue
Donald H. Kent

APPENDIX B

Commission on the Future of Virginia's Judicial System

Chairman

Robert M. O'Neil, President
University of Virginia
Charlottesville

Vice-Chairman

George M. Cochran
Retired Justice
Staunton

Members

Lawrence Douglas Wilder
Lieutenant Governor of Virginia
Richmond

Mary Sue Terry
Attorney General of Virginia
Richmond

A. L. Philpott
Speaker
Virginia House of Delegates
Bassett

Hunter B. Andrews
Chairman
Senate Finance Committee
Hampton

Dorothy S. McDiarmid
Chair
House Appropriations Committee
of Virginia
Vienna

Vivian E. Watts
Secretary of Transportation and
Public Safety
Richmond

John Charles Thomas
Justice
Supreme Court of Virginia
Richmond

Lawrence W. Koontz, Jr.
Chief Judge
Court of Appeals
Salem

Barbara M. Keenan
Judge
Court of Appeals of Virginia
McLean

Nicholas E. Persin
Chief Judge
Buchanan Circuit Court
Grundy

Donald H. Kent
Chief Judge
Alexandria Circuit Court
Alexandria

John F. Daffron, Jr.
Chief Judge
Chesterfield Circuit Court
Chesterfield

Kenneth E. Trabue
Judge
Roanoke County Circuit Court
Salem

J. R. Zepkin
Chief Judge
Williamsburg/James City County
General District Court
Williamsburg

Dale H. Harris
Chief Judge
Lynchburg Juvenile and Domestic
Relations District Court
Lynchburg

William F. Parkerson, Jr.
Former Member
Senate of Virginia
Richmond

Phillip H. Davidson
Executive Vice President
Signet Bank
Richmond

Robert W. Mann
1988 President
Virginia Trial Lawyers Association
Martinsville

Joseph V. Harbaugh
Dean
T. C. Williams School of Law
University of Richmond
Richmond

R. Gordon Smith
1987 President
Virginia Bar Association
Richmond

Robert H. Spilman
Chief Executive Officer
Bassett Furniture Industries, Inc.
Bassett

John W. Scott
1986-1988 President
Old Dominion Bar Association
Fredericksburg

James C. Roberts
Attorney
Mays and Valentine
Richmond

James A. Payne
Executive Director
Virginia Interfaith Center for
Public Policy
Richmond

Roderick B. Mathews
1987 President
Virginia State Bar
Richmond

Darrel L. Tillar
Attorney
Long, Long and Tillar
Blacksburg

Peter C. Manson, Jr.
1986/1987 President
Virginia Association of Defense
Attorneys
Virginia Beach

John R. Morison
President and General Manager
WHRO-TV
Norfolk

Michael M. Foreman
Clerk
Winchester Circuit Court
Winchester

Jacquelyn G. Epps
Attorney
Browder, Russell, Morris and Butcher
Richmond

Merlin M. Renne
1989 President
Commonwealth's Attorney's Association
Yorktown

Additional Task Force Members

Tristam T. Hyde, IV
Chief Judge
Northumberland County General District Court
Heathsville

Edwin Bernette, Jr.
Attorney
Edmonds and Williams
Lynchburg

J. DeKoven Bowen
Chief of Police
Charlottesville

Gerald McCarthy
Executive Director
Virginia Environmental Endowment Fund
Richmond

Robert S. Hill, Jr.
Chief Magistrate
Second Judicial District
Virginia Beach

Marion Mason
Comptroller
Leggett Stores, Inc.
Lynchburg

Sylvia Clute
Attorney
Clute and Shilling
Richmond

John Levy
Director of Clinical Education
Marshall Wythe Law School
The College of William and Mary
Williamsburg

Linda Sauer Curtis
Assistant Commonwealth's Attorney
Hampton

Robert N. Beury
General Counsel
Center for Innovative Technology
Herndon

Nancy Lake
Clerk
Fairfax General District Court
Fairfax

Alvin J. Schexnider
Association Vice President of Academic Affairs
Virginia Commonwealth University
Richmond

William K. Slate, II
1987-1989 Executive Director
Virginia State Bar
Richmond

Karl R. Hade
Chief, Court Management Systems Branch
Supreme Court of Virginia
Richmond

Richard D. Balnave
Professor
University of Virginia Law School
Charlottesville

Commission Staff

From the Marshall Wythe School of Law
College of William and Mary:

Timothy J. Sullivan, Dean
Counsel to the Commission

Rene R. Bowditch
Staff Counsel
Task Force on Alternative Paths to Justice

Lelia B. Hopper
Staff Counsel
Task Force on the Quality of Justice

From the National Center for State Courts:

Beatrice P. Monahan
Staff Counsel
Task Force on the Mission, Organization, and Administration of Justice

From the University of Virginia:

Robert M. de Voursney
Professor
Center for Public Service
Staff to the Task Force on Technology of Justice

Charles L. Cappell
Assistant Professor
Department of Sociology
Staff to the Task Force on Technology of Justice

From the Supreme Court of Virginia:

Robert N. Baldwin
Executive Secretary

Kathy L. Mays
Director of Judicial Planning

Lee K. Harizanoff
Senior Planning Analyst

M. Lisa Manns
Secretary

APPENDIX C

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Dr. James Dator
Professor
Department of Political Science
University of Hawaii
Honolulu, Hawaii

Mr. Johnathan Peck
Mrs. Heather Kurrent
Institute for Alternative Futures*
Alexandria

Dr. Gene Stephens
Professor
College of Criminal Justice
University of South Carolina
Columbia, South Carolina

* *The Institute assisted with the preparation of the trend analysis section of this report.*

Mr. Edward B. McConnell
President
Mr. Geoff Gallas
Director of Research and Special Services
National Center for State Courts
Williamsburg

Dr. Daphne Spain
Assistant Professor
Division of Urban and Environmental Planning
University of Virginia
Charlottesville

Mr. David I. Tevelin
Director
Mr. Richard Van Duizend
Assistant Director
State Justice Institute
Alexandria

Mr. Richard N. Harris
Director
Department of Criminal Justice Services
Richmond

Mr. Dennis W. Dohnal
Attorney
Bremner, Baber and Janus
Richmond

Dr. Frank Sander
Professor of Law
Harvard Law School
Cambridge, Massachusetts

Dr. Daniel K. Meador
Professor of Law
University of Virginia
Charlottesville

Chairman's Note

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