2018

Judicial Council of Virginia

Report to the General Assembly and Supreme Court of Virginia

The Judicial Council of Virginia
2018 Report to the General Assembly and Supreme Court of Virginia
Supreme Court of Virginia, Office of the Executive Secretary
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Table of Contents

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Membership as of December 31, 2018

The Honorable Donald W. Lemons	Chief Justice, Supreme Court of Virginia
The Honorable Glen A. Huff	Chief Judge, Court of Appeals of Virginia
The Honorable Jerrauld C. Jones	Chief Judge, Fourth Judicial Circuit
The Honorable Joseph W. Milam, Jr.	Judge, Twenty-Second Judicial Circuit
The Honorable Nolan B. Dawkins	Judge, Eighteenth Judicial Circuit
The Honorable Cheryl V. Higgins	Judge, Sixteenth Judicial Circuit
The Honorable Clifford L. Athey, Jr.	Judge, Twenty-Sixth Judicial Circuit
The Honorable Deanis Simmons	Judge, Twenth-Eighth Judicial Circuit
The Honorable Deborah V. Bryan	Judge, Second Judicial District
The Honorable George Barton Chucker	Judge, Fourteenth Judicial District
The Honorable Mark D. Obenshain	Chair, Senate Courts of Justice, Senate of Virginia
The Honorable Robert B. Bell	Chair, House Courts of Justice,Virginia House of Delegates
The Honorable James A. Leftwich, Jr. (Jay)*	Member, Virginia House of Delegates
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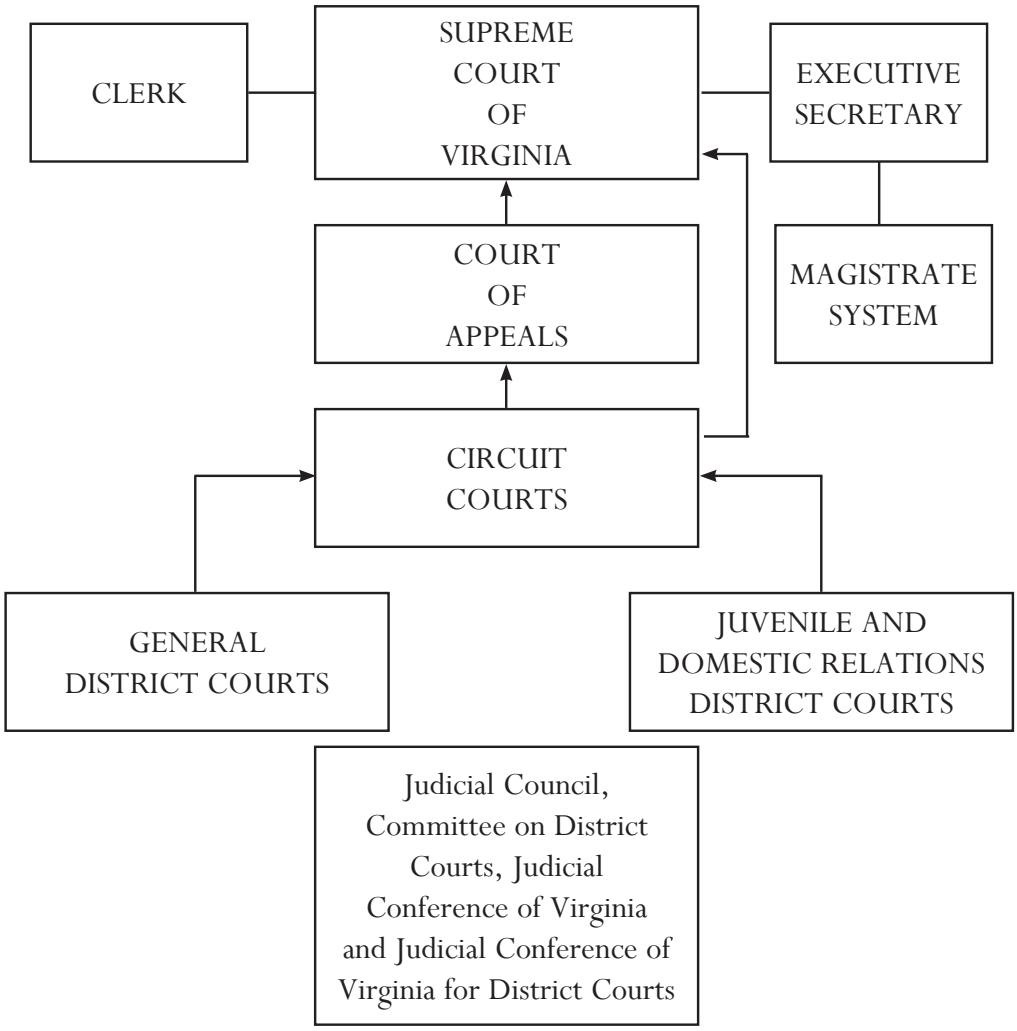
Karl R. Hade**	Executive Secretary

*Designee of Delegate Robert B. Bell
**Ex-officio

Virginia's Judicial System



Route of Appeal ⟶

I. Proceedings of the Judicial Council of Virginia

INTRODUCTION

The Judicial Council of Virginia was established by statute in 1930. Council is charged with making a continuous study of the organization and the rules and methods of procedure and practice of the judicial system of the Commonwealth of Virginia, including examining the work accomplished and results produced by the judicial system. See Va. Code §17.1-703.

PROCEEDINGS OF THE JUDICIAL COUNCIL

Revisions to Mediation Governing Documents

The Judicial Council promulgates guidelines for the certification of mediators in Virginia. In 2017, at the request of Chief Justice Donald W. Lemons, the Joint Alternative Dispute Resolution Committee of the Virginia State Bar and the Virginia Bar Association (JADRC) established a Special Committee to Study Appellate Mediation in Virginia. In April 2018, the Special Committee made specific recommendations (Report of the Special Committee) to the Chief Justice, including the establishment of mediation pilot projects in the Commonwealth's appellate courts.

The Supreme Court approved the recommendations in May 2018. Beginning January 1, 2019, a mediation pilot project will be available in each appellate court in select civil cases where both parties are represented by attorneys. In those select cases, the clerk of court will notify counsel that if both parties agree to mediate, there will be an automatic stay of proceedings for 30 days to allow them that opportunity. The pilot projects will run for two years.

To support the appellate mediation pilot projects, the Special Committee recommended changes to the mediator governing documents to create new levels of appellate mediator certification. Key proposals included:

- Create Supreme Court of Virginia and Court of Appeals of Virginia appellate mediator certification levels to support the two-year pilot projects;
- Add a 2-hour Appellate Training program and associated trainer qualifications to support the appellate mediators; and
- Increase membership in the mediator Complaint Hearing Committee by one to include a mediator certified at the appellate level.

At the Judicial Council's October 18, 2018, meeting, the Special Committee sought adoption of changes to the mediator governing documents as well as minor revisions to the administration of appellate level certifications, which were requested by the Division of Dispute Resolution Services in the Department of Judicial Services in the Office of the Executive Secretary. The Judicial Council adopted the new appellate level mediator certifications and changes to the *Guidelines for the Training and Certification of Court-Referred Mediators*, the *Guidelines for the Certification of Mediation Training Programs*, and the *Procedures for Complaints Against Certified Mediators, Mediation Trainers, and Mediator Mentors.* These changes were effective November 1, 2018, to permit certification of appellate mediators before the pilot projects begin.

Revisions to the Guardians *ad litem* Performance and Appointment Standards

The *Standards to Govern the Performance of Guardians Ad Litem for Children* (Performance Standards) specify the duties expected of a guardian *ad litem* appointed to represent a child. The Performance Standards were first adopted by the Judicial Council in 2003. For the first time since then, the Judicial Council adopted two amendments on May 8, 2018. The Judicial Council approved the addition of a list of the Performance Standards without comments near the beginning of the document and added two paragraphs of Commentary to clarify the functional distinction between "shall" and "should" as those words are used in the Performance Standards. The amendments, effective May 8, 2018, were recommended by a small committee of juvenile and domestic relations district court and circuit court judges convened at the request of the Chief Justice to consider the Performance Standards and make any recommendations after the Judicial Council had declined to approve an earlier proposal to amend the Performance Standards.

The clarifying amendments approved by the Judicial Council in May 2018 followed the Judicial Council's rejection on October 19, 2017, of a proposal to include a certification requirement for guardians *ad litem* in the Performance Standards. Under the proposal, a guardian *ad litem* would have been required to indicate and certify on a form if he or she had fulfilled the standards in each case. This proposal was recommended by the Guardian *ad litem* Workgroup, a collaborative committee formed by the Office of the Executive Secretary in June 2016 in response to concerns that had been raised by the Family Law Section of the Virginia State Bar regarding the performance and accountability of guardians *ad litem* for children.

At the October 19, 2017, meeting, the Judicial Council approved technical amendments to the Standards to Govern the Appointment of Guardians *Ad litem* for Children Pursuant to §16.1-266 (Appointment Standards). The Appointment Standards set out the requirements that a lawyer who seeks to become qualified as a guardian *ad litem* must fulfill to be included on the list used by courts to make appointments. The Appointment Standards also set out the continuing education requirements to maintain qualification. The key technical amendments adopted by the Judicial Council streamline program administration by deleting the requirement that a prospective guardian *ad litem* provide a social security number to the Office of the Executive Secretary and other unnecessary information and by establishing a preference for electronic certification of continuing education credits. The amendments to the Appointment Standards were effective January 1, 2018.

Revisions to the Habeas Corpus Statutes

The Judicial Council at its October 18, 2018, meeting approved a proposal to revise the statutes that govern habeas corpus proceedings to modernize the statutory scheme, which has been in place for over 100 years with only minimal changes. Proposed changes were first presented to and approved by the Judicial Council at its May 8, 2018, meeting. Subsequently, additional amendments were made to the proposals, which were then approved by the Council at the October meeting.

The proposed changes reorganize several writ of habeas corpus statutes, revise outdated language and remove unused provisions. The changes reflect that, in modern practice, courts no longer issue the writ to direct the custodian to appear in court with the prisoner and show the prisoner is lawfully detained. Instead, that direction is typically accomplished by issuance of a show cause order. Similarly, in modern practice, many forms of responsive pleading are used; however, the traditional "return" is not, and references to that pleading have been omitted. Provisions dictating the necessity for and method of service have also been modernized.

In addition, the proposed changes would clarify the proper venue in cases where the petitioner is held under criminal process but the criminal proceedings have not concluded. Antiquated and unused bond and damages provisions would be repealed and provisions for identifying a proper respondent are harmonized with other statutes that govern the incarceration of individuals once they have been convicted of a crime.

Furthermore, where the petitioner has failed to name a proper respondent, courts would no longer be required to permit the petitioner to amend the petition to name a proper respondent; rather, the courts would have the discretion to do so, eliminating the need to permit amendment where it would be futile. Finally, provisions governing transfers and evidentiary hearings would be updated.

The Honorable Harry L. Carrico Outstanding Career Service Award

In 2004, the Judicial Council of Virginia created an Outstanding Career Service Award in honor of the Honorable Harry L. Carrico, Chief Justice of Virginia from 1981 to 2003. This award is presented annually to one who, over an extended career, demonstrates exceptional leadership in the administration of the courts while exhibiting the traits of integrity, courtesy, impartiality, wisdom, and humility.

The latest recipient of this award, selected in 2017 for presentation in 2018, was Juvenile and Domestic Relations District Judge William W. Sharp who presides in Warren and Frederick counties and the City of Winchester. Judge Sharp was appointed to the bench in 1994 and served as chief judge of the 26th District from 1998 to 2007. He is lead judge of the Warren County Best Practices Group and has served on the Executive Committee, Law Revision Committee, and Memorials and Resolutions Committee of the Judicial Conference of Virginia for District Courts. He has served as a panelist for continuing legal education seminars and as a lecturer and a trainer for judicial educations programs sponsored by the Office of the Executive Secretary of the Supreme Court of Virginia. In addition, Judge Sharp is a member of the National Council of Juvenile and Family Court Judges and the Virginia Council of Juvenile and Family Court Judges.

LEGISLATIVE PROPOSAL FOR THE 2019 SESSION OF THE GENERAL ASSEMBLY

Be it enacted by the General Assembly of Virginia:

1. That §§8.01-654, 8.01-658 and 8.01-662 of the Code of Virginia are amended and reenacted as follows:

§8.01-654. When and ~~by whom writ granted~~ where petition filed; what petition to contain.

A. 1. A petition for a ~~The~~ writ of habeas corpus ad subjiciendum ~~shall be granted forthwith by~~ may be filed in the Supreme Court or any circuit court, ~~to any person who shall apply for the same by petition,~~ showing by affidavits or other evidence ~~probable cause to believe~~ that ~~he~~ the petitioner is detained without lawful authority.

2. A petition for writ of habeas corpus ad subjiciendum, other than a petition challenging a criminal conviction or sentence, shall be brought within one year after the cause of action accrues. A habeas corpus petition attacking a criminal conviction or sentence, except as provided in §8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

B. 1. With respect to any such petition filed by a petitioner ~~held~~ whose detention originated under criminal process, and subject to the provisions of subsection C of this section and of §17.1-310, only the circuit court which entered the original judgment or order ~~of conviction or convictions~~ resulting in the detention complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment or order ~~of conviction or convictions~~ resulting in the detention complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition. The provisions of this section shall not apply to a petitioner's first petition for a writ of habeas corpus when the sole allegation of such petition is that the petitioner was deprived of the right to pursue an appeal from a final judgment of conviction or probation revocation, except that such petition shall contain all facts pertinent to the denial of appeal that are known to the petitioner at the time of the filing, and such petition shall certify that the petitioner has filed no prior habeas corpus petitions attacking the conviction or probation revocation.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

2. Hearings conducted in a circuit court pursuant to an order issued under the provisions of subdivision 1 of this subsection shall be limited in subject matter to the issues enumerated in the order.

3. The circuit court shall conduct such a hearing within 90 days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within 30 days after the report is filed.

§8.01-658. When and from whom response required; ~~How writ served~~; dismissal of habeas petition without prejudice.

A. ~~The writ shall be served on the person to whom it is directed or, in his absence from the place where the petitioner is confined,~~ Except as may be provided in the Rules of the Supreme Court of Virginia, no response to a petition for a writ of habeas corpus shall be required except upon an order of the court, directed to the person in whose custody the petitioner is detained or on the person having the immediate or potential custody of him, and made returnable as soon as may be before the court ordering the same.

B. When the petition challenges a criminal conviction or sentence:

1. If the petitioner is in jail, prison, or other actual physical restraint due to the conviction or sentence he is attacking, the named respondent shall be (i) the Director of the Department of Corrections or the warden or superintendent of the state correctional facility where the petitioner is detained if the ~~sentence is one year or more~~ petitioner has been committed to, or is subject to transfer to, the Department of Corrections, or (ii) the sheriff or superintendent of a local or regional jail facility if the petitioner's sentence ~~is less than one year~~ will be served in such local or regional jail facility.

2. If the petitioner is on probation or parole due to the conviction or sentence he is attacking, the named respondent shall be the probation or parole officer responsible for supervising the applicant or the official in charge of the parole or probation agency.

3. If a petitioner has a suspended sentence and is not under supervision by a probation or parole officer, the respondent shall be (i) the local sheriff if the judgment of conviction the petitioner challenges has a suspended sentence of less than one year or (ii) the Director of the Department of Corrections if the judgment of conviction the petitioner challenges has a suspended sentence of one year or more.

~~B~~C. The petitioner shall name a proper party respondent, and if he fails to do so, the court ~~shall~~ may allow amendment of the petition. If the petitioner fails to amend the petition by naming a proper party respondent in the time provided by the court, the court in which the petition is filed shall dismiss the habeas petition without prejudice.

D. If the court in which the petition was filed determines petitioner's allegations present a case for the determination of unrecorded matters of fact relating to a previous judicial proceeding in any circuit court, the court may transfer the petition to the circuit court in which such judicial proceeding occurred, or if the petition was filed in the Supreme Court, the Court may require the circuit court in which such judicial proceeding occurred to conduct an evidentiary hearing, in accordance with such procedures as may be set forth in the Rules of the Supreme Court of Virginia.

§8.01-662. Judgment of court or judge trying it; payment of costs and expenses when petition denied.

After hearing the matter both upon the ~~return~~ response and any other evidence, the court ~~before whom the petitioner is brought~~ shall either discharge or remand ~~him,~~ the petitioner, grant him any other relief to which he is entitled, or admit him to bail and adjudge the cost of the proceeding, including the charge for transporting the prisoner.

Provided, however, that if the petition is denied, the costs and expenses of the proceeding and the attorney's fees of any attorney appointed to represent the petitioner shall be assessed against the petitioner. If such cost, expenses and fees are collected, they shall be paid to the Commonwealth.

When relief is granted upon a petition for a writ of habeas corpus, the order granting relief on the writ shall be served on the respondent and the petitioner. Service may, in the court's discretion, be accomplished by personal service or by transmitting a certified copy of the order to the parties via regular or certified mail, a third-party commercial carrier, or electronic delivery.

2. That §8.01-656, §8.01-657 and §8.01-659 of the Code of Virginia are repealed.

II. Recommended Changes to Rules of Court

Background

Article VI, Section 5 of the Constitution of Virginia authorizes the Supreme Court of Virginia to promulgate rules governing the practice and procedures in the courts of the Commonwealth.

In 1974, the Judicial Council of Virginia established the Advisory Committee on Rules of Practice and Procedure in Virginia Courts to provide members of the Virginia State Bar and other interested participants a means of more easily proposing Rule changes to the Council for recommendation to the Supreme Court. The duties of this committee include: (a) evaluating suggestions for modification of the Rules made by the Bench, Bar, and public, and recommending proposed changes to the Judicial Council for its consideration; (b) keeping the Rules up-to-date in light of procedural and legislative changes; and (c) suggesting desirable changes to clarify ambiguities and eliminate inconsistencies in the Rules.

Rules recommended by the Council and subsequently adopted by the Supreme Court are published in Volume 11 of the Code of Virginia. All orders of the Supreme Court amending the Rules, along with an updated version of the Rules that incorporates the amendments as they become effective, are posted on Virginia's Judicial System website at http://www.vacourts.gov/courts/scv/rules.html.

CHANGES TO RULES OF COURT RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2017 THAT BECAME EFFECTIVE IN 2018

At the October 19, 2017, meeting of Judicial Council, the Advisory Committee on Rules of Court presented a recommendation to amend Rule 2:606, Juror's Competency as a Witness, in response to the United States Supreme Court's decision in Peña-Rodriguez v. Colorado, 137 S.Ct. 855 (2017).

Pursuant to Virginia Code §8.01-3(E), there is a long lead-time on amendments to Rules of Evidence that are not made to conform the Rule to a legislative change in an underlying statute:

> Any amendment or addition to the rules of evidence shall be adopted by the Supreme Court on or before November 15 of any year and shall become effective on July 1 of the following year unless the General Assembly modifies or annuls any such amendment or addition by enactment of a general law.

For this reason, the Virginia Rule of Evidence 2:606 was amended by Order dated October 20, 2017, and became effective July 1, 2018.

RULE CHANGES RECOMMENDED BY THE JUDICIAL COUNCIL AND ADOPTED BY THE SUPREME COURT OF VIRGINIA IN 2018

At the May 8, 2018, meeting, Judicial Council considered and made recommendations regarding adoption of the following proposed amendments. By Order dated October 31, 2018, the following Rules were amended, to be effective January 1, 2019.

- Amendment to Rule 1:7, Computation of Response Dates, and Rule 1:12, Service of Papers after the Initial Process. These Rules were amended to clarify deadlines for responding to different methods of delivery of pleadings and papers.
- Amendment to Rule 4:1, General Provisions Governing Discovery. This Rule was amended to improve discovery procedures for electronically stored information.
- Amendment to Rule 4:9, Production by Parties of Documents, Electronically Stored Information, and Things; Entry on Land for Inspection and Other Purposes; Production at Trial. This Rule was amended to require that an objection to a request for production must state whether any responsive materials are being withheld based on the objection.
- Amendments to Rules 5:11 and 5A:8, Record on Appeal: Transcript or Written Statement. These Rules were amended to clarify that a transcript must be filed with the clerk of the trial court no later than 60 days after entry of judgment.