

# Benchmarks

*The following new judges have been elected by the 2010 Virginia General Assembly:*

## SUPREME COURT:

**William C. Mims** of Richmond succeeds **Barbara Milano Keenan**, who was appointed to the Fourth U.S. Circuit Court of Appeals.

## CIRCUIT COURT:

19th Circuit (Fairfax): **Lorraine Nordlund** succeeds **Gaylord L. Finch Jr.**, who retired in December 2009; **Brett A. Kassabian** succeeds **Michael P. McWeeny**, who retired in December 2009; and **Michael F. Devine** succeeds **Stanley P. Klein**, who retired in March 2010.

*The following sitting justice and judges were elected to new terms:*

## SUPREME COURT

**Cynthia D. Kinser** of Pennington Gap

## COURT OF APPEALS

**Walter S. Felton Jr.** of Williamsburg

## CIRCUIT COURT

2nd Circuit: **Stephen C. Mahan** of Virginia Beach

3rd Circuit: **Kenneth R. Melvin** of Portsmouth

4th Circuit: **Charles E. Poston** of Norfolk

10th Circuit: **Joel C. Cunningham** of Halifax

12th Circuit: **Harold W. Burgess Jr.** and **Frederick G. Rockwell III**, both of Chesterfield

13th Circuit: **Beverly W. Snukals** and **Walter W. Stout III**, both of Richmond

22nd Circuit: **William N. Alexander II** of Rocky Mount

23rd Circuit: **Charles N. Dorsey** and **William D. Broadhurst**, both of Roanoke.

27th Circuit: **Colin R. Gibb** of Pulaski

29th Circuit: **Michael Lee Moore** of Lebanon and **Henry A. Vanover** of Clintwood

## GENERAL DISTRICT

2nd District: **Teresa N. McCrimmon** and **Gene A. Woolard**, both of Virginia Beach

3rd District: **Morton V. Whitlow** and **Douglas B. Ottinger**, both of Portsmouth

4th District: **Joseph A. Migliozzi** and **James S. Mathews**, both of Norfolk

9th District: **Jeffrey W. Shaw** of Saluda

10th District: **J. William Watson Jr.** of Halifax and **Charles H. Warren** of Boydton

11th District: **Lucretia A. Carrico** of Petersburg

13th District: **Joi Jetter Taylor** and **David Eugene Cheek Sr.**, both of Richmond

16th District: **Edward K. Carpenter** of Goochland

18th District: **Becky J. Moore** of Alexandria

19th District: **Thomas E. Gallahue** and **Mitchell I. Mutnick**, both of Fairfax

20th District: **Julia Taylor Cannon** of Leesburg

22nd District: **M. Lee Stilwell Jr.** of Danville

24th District: **Harold A. Black** of Bedford

25th District: **Gordon F. Saunders** of Lexington

27th District: **Edward M. Turner III** of Hillsville and **Randal J. Duncan** of Christiansburg

28th District: **Joseph S. Tate** of Marion

31st District: **Steven S. Smith** of Manassas

## JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

2nd District: **Deborah V. Bryan** of Virginia Beach

3rd District: **William S. Moore Jr.** of Portsmouth

4th District: **Joseph P. Massey** of Norfolk

5th District: **Alfreda Talton-Harris** of Suffolk

7th District: **Ronald Everett Bensten** of Newport News

9th District: **George C. Fairbanks IV** of Williamsburg

10th District: **Marvin H. Dunkum Jr.** of Buckingham

12th District: **D. Gregory Carr** of Chesterfield

14th District: **Stuart L. Williams Jr.** of Henrico

17th District: **George D. Varoutsos** of Arlington

19th District: **Teena D. Grodner** of Fairfax

22nd District: **Dale M. Wiley** of Danville

24th District: **Robert Louis Harrison Jr.** of Bedford

26th District: **Elizabeth Kellas Burton** of Winchester

31st District: **D. Scott Bailey** of Manassas

*Because of budget constraints, the General Assembly put a freeze on filling circuit, general district, and J&DR judicial vacancies through 2012. The following vacancies remain unfilled:*

## CIRCUIT COURT

2nd Circuit: Retirement of **A. Joseph Canada Jr.** in December 2009

5th Circuit: Retirement of **Westbrook J. Parker** in June 2010

9th Circuit: Death of **N. Prentis Smiley Jr.** in December 2008

11th Circuit: Retirement of **Thomas V. Warren** in January 31, 2010

13th Circuit: Retirement of **Theodore J. Markow** in December 2009

15th Circuit: Retirement of **Horace A. Revercomb III** in February 2010

24th Circuit: Retirement of **J. Leyburn Mosby Jr.** in January 2010

27th Circuit: Retirement of **Ray W. Grubbs** in February 2010

## GENERAL DISTRICT COURT

2nd District: Retirement of **Virginia L. Cochran** in November 2009

6th District: Retirement of **Kenneth W. Nye** in January 2010

13th District: Retirement of **Thomas O. Jones** in December 2009

19th District: Elevation to circuit court of **Lorraine Nordlund**

20th District: Retirement of **Charles B. Foley** in February 2010

25th District: Retirement of **A. Lee McGratty** in December 2008

27th District: Retirement of **Edward M. Turner III** in December 2010

## J&DR COURT

11th District: Retirement of **James E. Hume** in December 2009

14th District: Retirement of **Sharon B. Will** in April 2010

15th District: Retirement of **Larry E. Gilman** in March 2010

27th District: Retirement of **M. Keith Blankenship** in December 2008, and pro tem appointee **Harriet D. Dorsey** declined to stand for election to a full term

# How to Avoid Serious Error under the New Appellate Rules

by Elwood Earl Sanders Jr.

The Supreme Court of Virginia has completely updated its rules of appellate procedure — Part 5, The Supreme Court, and Part 5A, the Court of Appeals — effective July 1, 2010. The new rules reduce the chance of a fatal appellate error. However, there are areas in the new rules that can cause fatal problems for litigants bringing appeals in Virginia.

Rule 5:1A is a serious warning:

Except as provided in Rule 5:17(c) regarding assignments of error, prior to the dismissal of an appeal for any defect in the filings related to formatting, curable failure to comply with other requirements, or the failure to meet non-mandatory filing deadlines, this Court may issue a show cause order to counsel..., prescribing a time in which to cure such defect or to otherwise show cause why the appeal should not be dismissed or other penalty imposed.

I do not find that language comforting; rather it should cause all litigants to have a zero tolerance for rules violations.

## Assignments of Error

Under the previous rules, not having specific assignments of error in your petition resulted in dismissal of the appeal. This consequence still exists and has now been extended to the Court of Appeals by virtue of the change that abolished questions presented in both courts.<sup>1</sup>

The new rules also require the assignments of error to have a “Separate Heading”; failure to add the heading is grounds for dismissal of the appeal.<sup>2</sup> Finally, assignments of error in both courts must now have a reference to where the alleged error is preserved in the trial court or commission or an argument as to why the appropriate ends of justice exception applies.<sup>3</sup>

Any rule relating to assignments-of-error rules in both courts should be treated as jurisdictional requirements. Both courts now also require a “standard of review” as another separate heading

within the argument; I would also view that section to be mandatory.<sup>4</sup>

## The Mailing Rule

Submitting a pleading by certified mail has long been the requirement as an exception to the rule that a pleading must be physically filed in the court.<sup>5</sup> The new rules allow the use of a “third party commercial carrier” or even priority or express mail in addition to certified mail.<sup>6</sup> However, the “official receipt” is still required.<sup>7</sup> If you do not have the receipt or cannot get it, you must not use this means of mailing. I would be very careful using the new mailing options until the appellate courts clearly hold what is an official receipt.<sup>8</sup>

## The Transcript

In the Supreme Court, a litigant still has sixty days to file the transcript in the Clerk’s Office, however, there are two potential exceptions stated in new Rule 5:11(d):

If material is “omitted from or misstated in the transcript,” or if the “transcript of any portion thereof is untimely filed, by omission, clerical error, or accident” the litigant has the right within seventy days of the final order to supplement, correct, or modify the transcript.<sup>9</sup> There is no leave of court required — just a second notice given to opposing counsel.<sup>10</sup>

After the seventy days, there is an additional requirement that two justices must approve the tardy filing. The standards are the same.

In the Court of Appeals, it is still sixty days to file a transcript from the date of the final order, but now ninety days to ask for an extension of time “for good cause shown.”<sup>11</sup> This allows a filing after the fact for transcripts.<sup>12</sup>

These new rules on transcripts have great potential to remedy catastrophic malpractice, but should not be relied upon for day-to-day appellate practice.

## Reread the Rules

Frequent rereading of the new rules is strongly suggested.<sup>13</sup> This article is not

meant to be an exhaustive list of all issues arising under the new rules. It is still my fervent hope that all appeals in Virginia be decided on the merits.

*Author’s note: At press time, the Virginia Court of Appeals hinted that even failure to comply with the rules governing tables of contents or authorities might result in dismissal. See Smith v. Commonwealth, Record No. 0422-09-1, decided June 15, 2010 (\_\_\_ Va. App. \_\_\_, \_\_\_ S.E.2d \_\_\_).*

## Endnotes:

- 1 New Rule 5:17(c)(1)(iii) and new Rule 5A:12(c)(1)(ii) (which are identical in pertinent part) cover specificity in assignments of error. The assignments of error are to be done “without extraneous argument.” New Rule 5:17(c)(1) and new Rule 5A:12(c)(1)
- 2 New Rule 5:17(c)(1)(i). I would do the separate heading in the Court of Appeals as well. See last sentence in New Rule 5A:12(c)(1)(ii).
- 3 New Rule 5:17(c)(1) and new Rule 5A:12(c)(1)
- 4 New Rule 5:17(c)(6); Rule 5A:12(c)(5)
- 5 See e.g., *Mears v. Mears*, 206 Va. 444, 143 S.E.2d 889 (1965)
- 6 Rule 5:5(c), Rule 5A:3(d)
- 7 *Id.*
- 8 *Commonwealth v. Green*, No. 1845-03-2 (Va. Ct. App. Unpub. 2004) (Home-grown receipts are not acceptable.)
- 9 New Rule 5:11(d)
- 10 *Id.* The standard is “good cause sufficient to excuse the deficiency.”
- 11 See New Rule 5A:8(a)
- 12 Normally motions for extension of time must be filed on or before the deadline. See *Jordan v. Price*, 3 Va. App. 672, 353 S.E.2d 168 (1989) That is still true under the new rules with this exception.
- 13 The most recent posting of the rules as of this writing, with early typographical errors corrected, is on Virginia’s Judicial System website, maintained by the Supreme Court’s Office of the Executive Secretary, at [http://www.courts.state.va.us/courts/scv/amendments/2010\\_0513\\_part\\_five\\_and\\_part\\_five\\_a.pdf](http://www.courts.state.va.us/courts/scv/amendments/2010_0513_part_five_and_part_five_a.pdf). As typographical errors are discovered, the OES updates the posting. Check <http://www.courts.state.va.us/courts/scv/amend.html> for recent updates.