

May 5, 2010

Appellate Rules Revisions

Background. A thirty-member Appellate Rules Advisory Committee was established by the Chief Justice in the summer of 2005 and was chaired by Justice Donald W. Lemons. He conducted initial phone interviews with each member of the committee to obtain an impression of the revisions that might be necessary and then held an organizational meeting of the full committee on September 28, 2005. At this meeting, the committee – on which served numerous sitting judges, along with more than twenty leaders of the bar and appellate specialists – was divided into five task forces: Procedure for Filing an Appeal; Perfecting the Appeal; Granted Cases; Capital Cases, Habeas Corpus, and Actual Innocence; and Original Jurisdiction/Miscellaneous. The task forces were given specific rules and subject areas to review and were asked to prepare suggested revisions, if any were deemed necessary. The committee members, each of whom participated on one or more task force, included: David B. Beach, W. Hamilton Bryson, S. Jane Chittom, Hon. Sam W. Coleman III, Joseph A. Condo, Craig S. Cooley, Bernard J. DiMuro, Steven Emmert, Eugene P. Murphy, John T. Frey, Frank K. Friedman, Patricia L. Harrington, Michael N. Herring, Hon. D. Arthur Kelsey, Hon. Elizabeth B. Lacy, Richard E. Ladd, Hon. Donald W. Lemons, R. Lee Livingston, Robert W. Loftin, Gregory E. Lucyk, Cynthia L. McCoy, Hon. William G. Petty, Hon. Jane Marum Roush, Joanne B. Rome, Kent Sinclair, Mary Lynn Tate, Ashley L. Taylor Jr., Hon. Wilford Taylor Jr., and John Charles Thomas.

Despite dealing with different aspects of the appellate process, all of the task forces shared the same set of general principles and goals. These included making the rules more fair, efficient, and user-friendly. There was a sense that the Court should consider ways to penalize lawyers instead of the clients for making procedural mistakes. Major goals of the committee were to harmonize the rules in the Court of Appeals with the rules in the Supreme Court, and ensure that the rules reflect advances in technology and incorporate more electronic filing.

The task forces met separately in a number of sessions from October 2005 to February 2006, and submitted their reports to Justice Lemons. These reports were then sent to the full committee, and two meetings of the full committee were held to discuss and vote on the suggested revisions. On March 27, 2006, the committee acted on the reports submitted by the Procedure for Filing an Appeal Task Force and the Perfecting the Appeal Task Force. On May 2, 2006, the committee acted on the reports submitted by the Granted Cases Task Force, the Capital Cases, Habeas Corpus, and Actual Innocence Task Force, and the Original Jurisdiction/Miscellaneous Task Force.

The work of the committee was then referred to an editing committee. The editing committee was charged with incorporating the suggested revisions and creating new Parts 5 and 5A that were clear, concise, and uniform. The editing committee worked throughout the remainder of 2006 and into 2007, and submitted its revised version of the rules to the full committee in October 2007. On November 7, 2007, the editing committee reconvened to approve the final draft of the rules. Additional edits were made as a result of this meeting, and the final draft incorporating these edits was completed in December 2007.

Substantive changes were made to many of the rules and almost all of the rules have had some revision made to their form. This includes changing the titles to more accurately reflect the information contained in the rules, and incorporating the use of headings for each paragraph. As such, the general appearance of the rules has been greatly altered to make them more user friendly.

The rules change package was then referred by the Chief Justice to the Advisory Committee on Rules of Court, which studied these changes, made minor edits, and approved them at its October 2, 2008, meeting. By direction of the Supreme Court, the entire set of draft rules revisions was published and disseminated to more than fifty bar leadership groups for comment.

A revision amending Rules 5:9 and 5A:6 to accommodate "early" notices of appeal, and defects in giving notice to guardians ad litem involved in litigation, was placed on a fast track at the direction of the Court, and was approved by the Judicial Council at its October 20, 2008, meeting. The Supreme Court adopted an order on October 31, 2008, making this change to the two rules effective January 1, 2009. A minor amendment to Rule 5:7B was also made.

Key Changes. Some of the more important changes are these:

RULES

IMPROVEMENTS

5:1 &
5A:1



(d) spells out certificate of service and word count requirements.
(e) adds much-needed change of address requirement.
(f) allows citation of unpublished dispositions and requires that copies be provided if not readily available on-line.

5:1A



(a) creates a "show cause" procedure to avoid procedural dismissal, with time to cure the defects.
(b) allows (but does not require) report to the State Bar when the Rules are violated. (*A warning of existing power*).

5:5 &
5A:3



(Using Part Five subsections as references):
(a) continues availability of a single 30 day extension of some deadlines, if 2 Justices concur, and a good excuse is shown, harmonizing standards with the Court of Appeals.
(b) an important alert to the non-effect of post-trial motions, and how to count the 30 days for a notice of appeal.
(c) modernizes delivery options to include common carriers.
(e) spells out that extension requests should be made before the time period runs out.

5:8A



Creates a partial-final-judgment procedure for complex or multi-party cases, to avoid "severable interests" confusion.

5:11



(a)(1) emphasizes initial responsibility of appellant to provide a record sufficient to allow issues to be decided.
(a)(2) notes parallel duties of the appellee.
(d) creates an important mechanism for correcting and supplementing the record.

5:11 &
5A:8



(e) fleshes out the term "incidents of the case" in an effort to improve the content of written statements.
(This is found in subpart (c) of the Court of Appeals rule)

RULES

IMPROVEMENTS

5:17 & 5A:12	▶	<p>(item (d) is only in the Part Five rule)</p> <p>(c) tightens up the specification requirement for showing where assignments of error were preserved below.</p> <p>(d) provides leeway to cure failure to submit fee initially.</p> <p>(h) spells out <u>Anders</u> appeal obligations and procedures.</p> <hr/>
5:18	▶	<p>(c) spells out important aspects of cross-error practice: the need to assign such error and <u>the choices facing the appellee</u> are for the first time spelled out.</p> <hr/>
5:25 5A:18	▶	<p>The wording of the contemporaneous objection rule, which has been stated in different ways by the Supreme Court and the Court of Appeals, is unified using the version that most clearly directs the bar to make specific objections. No change in substance is made.</p> <hr/>
5:32	▶	<p>The Appendix Rules are consolidated, organized in a logical sequence, and clarified to fix numerous practical issues that arise regularly.</p> <p>(a)(1) and (2) clarify contents requirements.</p> <p>(a)(3) adds a requirement for filing an electronic copy of the Appendix in "PDF" format.</p> <p>(b) on <u>responsibility of the parties</u> is restated, and deals with both <u>sealed materials</u> and costs of over-designation.</p> <p>(e) in keeping with the trap-avoidance goal of the revisions, this section provides the mechanism for curing defects.</p>

Other Improvements. Other improvements of note, and a new appellate settlement project being undertaken in the Court of Appeals by one of the new rules, are listed below:

RULE	IMPROVEMENT
Supreme Court Rules	
5:1	Certificate of service, and word count certification Requirement of notifying the clerk of address changes is added
5:4	Pre-motion discussion certification is added
5:6	Specification of appendix requirements is enhanced
5:7	Habeas and mandamus petition requirements are restated clearly
5:18	Adds highlighting/warnings re error preservation specifications
5:21	Specifically addresses disciplinary appeal mechanics
5:30	Amicus briefs can be filed at any stage with permission.
5:35	Bills of costs will now be "notarized"
Court of Appeals Rules	
5A:4	Word count certification is added
5A:6	Guardian ad litem provisions added
5A:26	Procedural error rule re-edited
5A:35	Rehearing provisions improved in structure and detail
5A:37	New settlement Conference Rule added

Discussion at the Judicial Council meeting in March of 2009 noted that, to generalize, the following are the overall effects of the proposed rules revision:

- ▶ Clarification by better wording and use of “outline format” to emphasize the logic and structure of each rule.
- ▶ Creation of more forgiving mechanisms in certain aspects of appellate procedure, to reduce dismissal of cases for “procedural defaults.”
- ▶ Highlighting for practitioners the risks that remain in any appellate system, and spelling out more clearly the requirements and procedures to avoid them in Virginia appeals.
- ▶ Unification of some important aspects of Court of Appeals and Supreme Court procedures. For example, the Court of Appeals will be switching under these revisions to the "Assignment of Error" system and terminology traditionally used by the Supreme Court, so that the appellate process has similar concepts at each level.
- ▶ The changes address myriad practical issues that have surfaced in the last 15 years of appellate practice in Virginia.

The Judicial Council endorsed and approved the proposals unanimously and the Supreme Court adopted them in April 2010.