Getting A Writ In Virginia's Appellate Courts

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So many petitioners; so few writs. That's the harsh reality of the writ system in Virginia's appellate courts. In most cases, the writ is the key to the appellate courthouse, as it is first necessary to persuade the court to take the case. Only then may the parties address the merits of the appeal. But the overwhelming majority of petitions for appeal are denied; an alarming number are dismissed for procedural defaults. For those more accustomed to addressing jurors than justices, the system can seem a labyrinth.

This article is intended to demystify the writ process, to give the trial practitioner insight into how petitions are handled in these courts; and to give attorneys a better idea of how to maximize their chances of getting—or resisting—a writ.

Mechanics of the writ process

With few exceptions,[1] appeals to the Supreme Court of Virginia require that the appellant get a writ.[2] In the Court of Appeals of Virginia, most types of appeals are of right, and do not require a writ. Workers' Compensation cases and domestic relations rulings, for example, may be appealed immediately, without the necessity of filing a petition. But criminal and traffic appeals, which make up the largest portion of the appeals court's caseload, require a writ.

Supreme Court — Appeals from Trial Courts

The writ process in the Supreme Court begins with a notice of appeal, which is filed with the clerk of the *trial court* (not the Supreme Court) within thirty days after the judgment is entered.[3] The notice is usually very short—often no more than two sentences. It identifies the judgment you're appealing, specifies which court you're appealing to, and states whether a transcript will be filed.

The next step is the filing of the petition for appeal, which must be filed in the Supreme Court Clerk's Office not more than three months (not ninety days) after entry of the judgment order that is being appealed. Keep in mind that an order is entered on the day the judge signs it,[4] without regard to whether it is entered *nunc pro tunc*. No judge may deny you the right to appeal by the expedient of entering an order *nunc pro tunc*.

You should consult the rules for petitions[5] each time you face an appeal. This article will not attempt a line-by-line explication, but provisions relating to assignments of error merit special emphasis. First, inclusion of assignments of error is essential in the petition; omitting them results in the immediate dismissal of the appeal without leave to amend.[6] For this reason, drafting assignments of error should be the first thing you do in writing your petition. Second, merely stating that the judgment you're appealing is "contrary to the law and the evidence" will also violate the rule and result in the dismissal of the appeal.[7] You must point to some particular error in the trial court that you are appealing. As a practical matter, it is always best to get the appellate court focused, at an early point in your brief, on the exact error you are raising.

After service of the petition, the appellee may, but is not required to, file a brief in opposition, in which it urges the court not to take the case.[8] This is where the appellee can assign cross-error, if he or she chooses.[9]

The appellant may then choose to file a reply brief, but this generally results in a waiver of the appellant's right to oral argument at the writ stage.[10] The Court will either read your reply, or listen to your oral argument, but not both. The only exception is where the appellee has assigned cross-error; in that event, the appellant may file a reply that addresses only the issues raised in the cross-error, and still preserves its right to oral argument.

Supreme Court—Appeal from the Court of Appeals

The rules for an appeal from the Virginia Court of Appeals to the Supreme Court are parallel to the rules for appeals from the trial court, with a few significant distinctions. First, the notice of appeal must be filed in the Court of Appeals (again, not in the Supreme Court) Clerk's Office, within thirty days after the ruling of the Court of Appeals becomes final.[11] The anomaly is that the petition for appeal must also be filed with the Supreme Court Clerk's Office within thirty days,[12] not the three months provided in appeals from trial courts. As a practical matter, this means that the notice of appeal and the petition are often filed on the same day, albeit in different clerk's offices.

Second, in assigning error in your petition for appeal, you must assert that the Court of Appeals erred, not merely that the trial court erred. If you only assign error to the trial court's ruling, the Supreme Court will be powerless to reverse the Court of Appeals ruling.[13]

Third, there are a number of issues over which the Court of Appeals has jurisdiction, and in which that court's rulings are considered to be final and unappealable.[14] To appeal one of those matters to the Supreme Court, you must state in your petition why the case presents "a substantial constitutional question as a determinative issue or . . . matters of significant precedential value." But be warned: The cases in which this exception is actually applied are very rare.

Finally, as noted below, the Court of Appeals does not require assignments of error. But when you appeal up from the Court of Appeals to the Supreme Court, you must draft assignments to insert into your petition. Those provisions of Rule 5:17(c) are not waived merely because a different appellate court applies a different rule.

Court of Appeals

The process in the Court of Appeals is parallel to that in the Supreme Court, but there are important differences. First, a copy of the notice of appeal must be filed in the Court of Appeals clerk's office.[15] (In the Supreme Court, a copy of the notice is mailed to each counsel of record, but not to the Supreme Court.) Second, the time for filing the petition is calculated differently; it's within three months in the Supreme Court, but in the Court of Appeals, it's not more than forty days after the record is filed in that clerk's office.[16] As this date will vary, the clerk will notify counsel of record of the date on which the record is filed, so counsel can calculate when the petition is due.

The Court of Appeals also requires that the petition specify where in the record the appellant preserved his or her objection to the ruling that is being appealed. In the future, the Supreme Court may adopt this requirement as well, but for now the preservation requirement only applies to petitions filed in the Court of Appeals.

Preparation for Oral Argument—Supreme Court

After the briefs are in, each appeal is assigned to an attorney in the office of the Chief Staff Attorney. That attorney will review the record and the briefs and prepare a report summarizing the case, the record, and the arguments. The report also generally recommends whether the writ should be granted.

In case you skimmed over that last paragraph, go back and read it again. Most attorneys have no idea that their briefs are, in essence, prescreened. This process means that the first person who will read your petition (or brief in opposition) is not a justice and not a law clerk, but a staff attorney who deals with hundreds of such petitions each year. The Court does not always follow the attorney's recommendations, but the "conformance" rate is very high. Any fear that may accompany this information is unfounded; the justices do not decide the case merely on the basis of the summaries. You should assume that the Court has read your brief, and your adversary's, in preparation for oral argument on the petition.

In cases in which no oral argument is demanded, the staff attorney's summary is provided to a panel of the court for action in conference.

Oral Argument

Assuming oral argument is requested in the petition, both courts assure counsel of the right to argue. The procedures, however, are different.

In the Supreme Court, counsel for the appellant will receive a notice of the scheduling of oral argument approximately one month before the writ panel meets. The petition is then considered by a panel of three current or senior justices, any one of whom may grant the writ.[17] The goal of oral argument is thus not to persuade a majority of the panel that your position is right. Your goal is to persuade *one* justice that the case deserves attention. If you do that, you'll get your writ.

In the Court of Appeals, the briefs are first presented to a single judge of the court, who may, if she feels it is appropriate, grant the writ immediately without any oral argument.[18] If that happens, the parties proceed directly to the merits stage. If not, the court will issue a *per curiam* order denying the petition, and explaining the reasons why. The appellant may then demand consideration by a three-judge

panel by filing a demand that generally must include a short statement of the reasons why the appellant believes the *per curiam* order is incorrect. As with the Supreme Court, a single judge of the panel can grant the writ.[19]

Decision And Rehearing

The courts generally decide which petitions to grant the same day they are argued. News of these decisions may take some time to reach the practitioner, though, due to the volume of cases and the need for the clerks to prepare an order in each case. Counsel may expect to receive a decision on the writ a few days to a few weeks after oral argument.

In both courts, petitions for rehearing must be filed electronically, by attaching a PDF file to an e-mail addressed to the clerk.[20] You'll receive an almost instantaneous receipt by return e-mail. Paper filing is restricted to unrepresented inmates and others who can obtain leave of court.[21]

Statistics

Each appellate court releases caseload statistics annually. Those figures provide insight into an appellant's chances of getting a writ, and how a case may play out once a writ has been granted.

The first thing one must do in evaluating the statistics is to segregate criminal and civil appeals. Both courts deal with a large volume of criminal appeals, and the overwhelming majority of those petitions are denied. In the Court of Appeals, the percentage of writs granted[22] has been steadily declining for at least fifteen years. In 1990, 22.4 percent of such petitions were granted. By 2004,[23] that figure was down to 9.4 percent. On average, then, a criminal appellant has about one chance in eleven of getting a writ from the Court of Appeals.

The figure for criminal appeals in the Supreme Court is even smaller—only 2.5 percent of criminal petitions were granted in 2004. This reflects the reality that most criminal appeals[24] have been filtered through the Court of Appeals. The Supreme Court grants only about two or three criminal writs per month.

The outlook is significantly brighter for civil appellants; they received writs nearly 20 percent of the time.[25] And even this figure is affected by procedural dismissals. When one factors out those cases (in which, for example, a notice of appeal was filed late, or a petition was filed without assignments of error), appellants' success rate jumps to nearly 25 percent. This provides an answer to the most frequent question posed by losing civil litigants: "What are our chances on appeal?" The answer is roughly one in four chances of getting a writ, if the attorney does his job right.

Once a civil writ is granted, the appellant is generally in the driver's seat. The Supreme Court reverses (in whole or in part) in about 65 percent of cases where a writ is granted. This number, more than any other, illustrates the importance of the writ in the appellate process.

Improving Your Chances of Getting (or Resisting) a Writ

The first and most important thing you can do to improve your chances of getting a justice's attention at the writ stage is to *preserve your objections in the trial court.* A detailed discussion of preservation of error is beyond the scope of this essay, but Rules 5:25 and 5A:18 routinely massacre more appeals each year than all other procedural land mines put together. As noted above, in the Court of Appeals, counsel must specify where in the record the objection was preserved.[26]

Appellees should be sensitive to this issue as well. If you believe that the appellant has not adequately preserved error in the trial court, you should not sit idly and expect the court to notice the default; bring the defect to the attention of the court in a prominent place in your brief in opposition. It is even worth taking this position in close cases, where the objection was not stated with clarity in the trial court.[27]

The next most important aspect of appellate success is *case and issue selection.* Not every losing case justifies an appeal, and one sure way to increase your odds of getting writs is to screen cases carefully for appellate merit. The lawyer also should restrict the number of appellate issues presented in any given petition. Appellate jurists, who are the "consumers" of lawyers' briefs, uniformly state that they prefer focused briefs that address comparatively few issues forcefully but concisely.

The appellate lawyer is likely to encounter cases in which a disgruntled litigant wants to appeal a long-shot case, or to throw in as many appellate issues as possible, theoretically in order to improve his chances of getting a writ on at least one issue. The lawyer faces several competing interests here—following the client's directives versus maximizing the chances of success; zealously advocating a client's position versus filing an appeal the lawyer believes has no likely merit; appealing every possible issue so as to prevent a claim that the lawyer has abandoned a potentially winning argument; and sacrificing the lawyer's personal credibility with the court in the interest of advancing a client's desire to press on.

In such situations, the lawyer is advised to consider the following factors:

- No civil client has the right to compel you to note an appeal that you believe has no appellate merit.[28]

- While omitting weaker, fallback position arguments may expose the lawyer to criticism in hindsight, you are more likely to get your writ if you appeal the fewest issues possible. In these cases, the lawyer should review with the client the reasons why only some possible issues will make the final cut in the petition.

- Your credibility *does* matter; in fact, personal credibility is probably the most powerful tool an appellate lawyer can bring into the courtroom. If you routinely file hopeless appeals, you will get

at least an informal reputation with the court for doing so, which will diminish your effectiveness in otherwise meritorious cases.

- That being said, a desire to take only obviously winning cases may dissuade the lawyer from taking important cases that require cutting-edge legal positions. Where important societal interests are at stake, the lawyer should consider taking even a case she regards as a potential loser, on the chance of fashioning important case law that can last for generations.[29]

In brief writing, for both appellants and appellees, remember that shorter is almost always better. A ten-page petition is more likely to be read carefully than one that comes in at the thirty-five-page maximum. In this context, editing becomes the most important part of brief writing. An appellate lawyer should revise the draft of a petition ten or more times, if that makes the brief concise and forceful. The most important arguments should be placed in the beginning of the petition, not buried near the end.

While the rules state what must be included in a petition, they do not prohibit other matters. Two important features that are not required but are strongly recommended are a preliminary statement and a statement of the standard of review. In a *preliminary statement*, the lawyer summarizes in a few short sentences what the appeal is about and why it is important. Remember that you are competing with hundreds of other petitions for the interest of the staff attorney and the judge or justice. A nutshell summary, at the very beginning of the brief, can help you to get that attention. The *standard of review* is cited near the beginning of virtually every appellate opinion. If the court thinks it's that important, you should, too. A superior brief will include a short section at the beginning of the argument section that sets forth the lawyer's contention as to what the applicable standard of appellate review is, with citations to support it. Far more cases than generally recognized are won or lost on this factor, which most trial lawyers view as an unimportant bother.

The rules do not require that briefs at the writ stage be bound; they may merely be stapled in the upper left corner. But binding produces a professional look that can enhance the credibility of the litigant and the attorney. It cannot hurt to make your presentation look more formal.

Certiorari Versus Error Correction

Some appellate courts—notably the Supreme Court of the United States—are considered courts of certiorari. Those courts only accept for review those cases that present issues of sufficient importance that they merit a precious space on the court's argument docket. The other kind of appellate court is one of error correction. These courts will accept any case, no matter how insignificant the implications of the decision under review, as long as they perceive that error has occurred.[30]

Both Virginia appellate courts act as courts of error correction. You do not need to show that your case presents an important issue with implications for society at large, or a legal issue of first impression in the commonwealth. You merely need to persuade one judge or justice that the court below was likely wrong on one significant aspect of your case.[31]

Conclusion

If you have ever argued a petition to a writ panel, you will no doubt have listened to a number of very persuasive arguments by appellants' lawyers. Many present compelling justifications for granting writs, and you may come away from your court date thinking that several of the cases will ultimately be reversed.

The truth is far harsher. In a typical day, the average Supreme Court writ panel hears twenty to twenty-five petitions; six hundred to eight hundred get argued per year. The odds are that of the twenty or so petitions your panel hears, probably only one to three will result in writs.[32] Keep in mind that of all those persuasive presentations you hear, precious few will bear fruit.

In order to succeed at the petition stage in Virginia's appellate courts, a petitioner must start with a sound record; master the appellate rules; file a concise, persuasive petition; argue succinctly and forcefully at oral argument; and, even then, occasionally get lucky. The presentation that stands out from the great mass of petitioners has the greatest chance of blooming into a writ. ⚖

Endnotes:

1 The exceptions are death penalty appeals, State Corporation Commission appeals, attorney disciplinary appeals, and original jurisdiction cases, such as petitions for writs of mandamus filed originally in the Supreme Court.

2 In the parlance of the Rules of Court and the appellate statutes, this is referred to as being awarded an appeal. In this article, the informal term "getting a writ" will be used for simplicity.

3 Rule 5:9.

4 Rule 5:1(b)(13).

5 Rule 5:17.

6 Rule 5:17(c).

7 *Id.*

8 Rule 5:18.

9 Note that the appellee can assign cross-error even if he does not file a notice of appeal. As long as one party brings the case to the appellate court, the court is free to adjudicate the claims of both sides.

10 Rule 5:19.

11 Rule 5:14.

12 Rule 5:17(a)(2).

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13 It is acceptable, if it will make you feel better, to allege, "The Court of Appeals and the trial court erred in ruling that Smith's testimony was admissible."

14 *Code of Virginia* (1950) § 17.1-410. Examples include traffic cases where no incarceration is imposed, and spousal support rulings.

15 Rule 5A:6(a).

16 Rule 5A:12(a).

17 In a few instances, you may have a panel of four justices. You should regard this as good news, keeping in mind that you only have to persuade one to grant the writ.

18 *Code* (1950) § 17.1-407(C).

19 *Code* (1950) § 17.1-407(D).

20 Rules 5:39A and 5A:33A.

21 The courts initiated this requirement as a pilot program in 2005 and have been so pleased with the results that the program has been extended indefinitely. This is probably a harbinger of a more general e-filing requirement.

22 All of which are necessarily criminal or traffic convictions.

23 2004 is the last year for which statistics were available as of the date of preparation of this article.

24 Excluding the death penalty cases, where Supreme Court review is automatic and no writ is necessary.

25 115 writs granted out of 597 acted upon in 2004.

26 In either court, it is strongly advisable that counsel preparing for oral argument make a note of where such objection was made, so she can respond quickly to the court's question if one arises.

27 Appellate jurists vary in how strictly they require an appellant to note the specific grounds of an objection; some require that the exact argument be made in the trial court, while others are satisfied if you're reasonably in the ballpark. You won't know who is on the panel when you file your brief in opposition, so you may as well raise the issue.

28 Criminal clients have the power to decide whether to appeal, and the lawyer must carry out the client's wishes. But even in this context, the lawyer retains control of which issues and arguments to advance on appeal.

29 *See, e.g.*, A. Dershowitz, *Letters to a Young Lawyer* (Basic Books 2001), ch. 26.

30 Because of this, the Supreme Court of the United States no doubt turns down many cases in which the justices believe the ruling is wrong, but perceive that the case just isn't important enough.

31 This is not to say that the attorney should ignore important or first-impression issues. It is always advisable to mention to the court where you perceive that an important issue arises in your case. That makes it more likely that the court will grant the writ. But keep in mind that this offers an additional "hook" for your case, and is not necessary if you can convince the court that error has occurred.

32 The odds are comparable in the Court of Appeals.