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ESSAYS

APPELLATE DELAY AS A CATALYST FOR CHANGE IN VIRGINIA

*Julie M. Carpenter**

The mischief was felt throughout the breadth of the land, in the disrepair and ruin of suitors and their families, in the disrepute drawn upon the administration of justice, and in the derogation from the frame of the Commonwealth herself.

—Justice Baldwin, 1849¹

A Virginia citizen injured in an automobile accident in 1988 who is denied compensation through trial court error will wait an average of 1,165 days (3.2 years) after trial for the Supreme Court of Virginia to rectify the matter.² Of course, that wait is only for the seventeen percent of cases that the supreme court elects to review,³ since Virginia is one of the only states that grants no right of appeal in most civil and criminal cases.⁴ By way of limited contrast, a

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1. *Sharpe v. Robertson*, 46 Va. (5 Gratt.) 518, 602-03 (1849).

2. Report on Case Disposition Time from Kathy L. Mays, Director of Judicial Planning, Supreme Court of Virginia, to Mary Devine, Staff Attorney, Division of Legislative Services (Dec. 18, 1987) [hereinafter Report on Case Disposition]. A copy of the Report on Case Disposition is available in the office of the *University of Richmond Law Review*.

3. VIRGINIA STATE OF THE JUDICIARY REPORT 30 (1987). [hereinafter JUDICIARY REPORT]. Of 782 petitions disposed of, the court granted 131 appeals. *Id.*

4. VA. CODE ANN. § 8.01-670 (Repl. Vol. 1984). This section provides that a party may petition the supreme court for an appeal if he believes himself aggrieved by a judgment concerning title to property, condemnation, probate of a will, appointment of a personal representative or the like, a mill, road, ferry, wharf or landing, the right of a governmental body to levy taxes, the construction of a law imposing taxes; or by the order of a court refusing a writ of quo warranto; or by a final judgment in any other civil case. A party may also petition in certain interlocutory situations. *Id.*

civil appeal in the North Carolina Supreme Court averages between 241 days and 257 days.⁵ The Kentucky Supreme Court averages eight and one-half to eleven months from the trial court decision to the appellate court decision, and the Kentucky Court of Appeals averages fourteen months for the same process.⁶ However, if the Virginia citizen's case is a workers' compensation claim, a domestic relations case, or an administrative agency case, that citizen will wait only eight to eleven months for an answer from the Virginia Court of Appeals.⁷

These observations lead to a dilemma that can best be encapsulated in two familiar, but competing adages: "Justice delayed is justice denied" and "Justice rushed is justice ruined." The tension between the litigants' need for a prompt resolution of the controversy and the courts' need for careful consideration has been complicated by the increasingly litigious nature of society. As a result, the problems of appellate delay are of increasing concern in nearly all states.

While the review process takes time, "delay" is used in this Essay to mean time not necessary to this process. A litigant may believe that any time not spent on his or her case means delay. Chief Justice Carrico, however, defines delay as "any elapsed time beyond what is reasonably necessary to process and to conclude a particular case."⁸

Of course, what is "reasonably necessary" is precisely the question. While there is no definitive answer, some comparisons of average appeal times may be useful. The elapsed time from a federal district court decision in the Fourth Circuit to a decision by the court of appeals is generally less than one year.⁹ The National Appellate Judges' Conference proposes that 300 days should be the standard period of time between the filing of an appeal and the

The only right to an appeal in civil cases is found in VA. CODE ANN. § 17-116.05 (Repl. Vol. 1988), which provides an appeal of right to the court of appeals in cases from an administrative agency, the industrial commission, or in a domestic relations case. *Id.* There is no right of appeal in criminal cases except where a sentence of death is imposed. *See id.* § 17-110.1.

5. Report on Case Disposition, *supra* note 2.

6. *Id.*

7. *Id.*

8. Carrico, 1988 *State of the Judiciary Message*, JUDICIARY REPORT, *supra* note 3, at 9-10.

9. Smith, *Appellate Capacity in Virginia*, VA. B.A.J. 2-3 (Fall 1987).

issuance of a decision.¹⁰ The American Bar Association suggests that the average time between argument and decision should not exceed sixty days for courts sitting in panels of more than three judges, and that the maximum time, except in cases of extraordinary complexity, should not exceed ninety days.¹¹ As noted earlier, North Carolina and Kentucky courts render decisions in slightly over a year. While comparisons are difficult in light of Virginia's unique system, the bare fact that justice takes longer in Virginia than in many other systems cannot be ignored.

Of course, this lengthy delay is only a factor in those cases that are reviewed. In Virginia, approximately eight-three percent of petitions for appeal are denied with the effect that the lower court judgments stand. The policy of the supreme court is to grant the petition for appeal "when any doubt exists as to the propriety of the decision."¹² Thus, a denial of a petition acts as a summary affirmation on the merits, however, the sheer numbers of cases disposed of by the court suggests that the "merits" standard is illusory.¹³ Thus, while Virginians whose petitions are denied may get their answer relatively quickly, they may often have been denied effective review for error.

To remedy both the problems of delay and the lack of appellate review, Senator Wiley F. Mitchell, Jr. introduced legislation in the Virginia Senate which would expand the Virginia Court of Appeals' jurisdiction to include all civil cases. This would transfer the bulk of appellate jurisdiction to that court. In addition, the proposal would grant both civil and criminal litigants the right to an appeal.¹⁴ This Essay considers the likely effects of that bill and offers proposals to counteract several anticipated problems. In addition, this Essay considers alternatives to the proposed bill.

It seems clear that appellate justice is delayed in Virginia. Whether justice is denied as a result raises the question of the effects of delay. Some delay can generate systemic benefits. The knowledge of both parties to a civil suit that an appellate decision

10. *Id.*

11. ABA Commission on Standards of Judicial Administration, *STANDARDS RELATING TO APPELLATE COURTS* § 3.52(b)(4) and commentary (1977) [hereinafter *STANDARDS*].

12. *McCue v. Commonwealth*, 103 Va. 870, 1008, 49 S.E. 623, 632 (1905); *see also Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1971).

13. *See Lilly & Scalia, Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 13-16 (1971) [hereinafter *Lilly & Scalia*].

14. S. 5, Va. General Assembly, 1988 Sess. (Jan. 13, 1988).

may be over three years in the making could be an incentive to a private settlement of the dispute. This benefit, however, inures only when both parties to the dispute are equally situated or when both parties can equally afford the delay. If the parties are not on substantially equal footing, the delay puts the party who can afford to wait in a superior bargaining position. Even if it is clear that one party will prevail on appeal, that party may be inclined to settle for less than the "just" amount because of the immediate need for funds. Even when parties can equally afford the delay, the lengthy time can be used for purposes of harassment.

Beyond the harm to individual litigants, extensive delay in resolving disputes adversely impacts upon the citizenry as a whole. The length of delay and the comparatively small opportunity for a full appellate review has led to an erosion of trust and confidence in the judicial system. To the extent that our constitutional system rests on societal acceptance of judicial authority rather than on police enforcement of court decisions, public confidence is crucial to a viable justice system.

Further, in a common law tradition such as Virginia's, timely analysis of the law is essential to consistent and orderly human relations. Delay of three or four years in appellate court interpretation of new rules, statutes, or principles deprives the bar, the trial judges, the parties and the public of guidance and allows them to proceed without direction. Uncertainty in the law causes increased litigation at the trial court level and permits trial courts to reach inconsistent results that take years to resolve. This delay also detracts from the court's limited ability to make or shape public policy and from its role as constitutional tailor to the General Assembly.

Another problem caused by delay relates to the economic health of the Commonwealth. Delays in specific civil cases encumber or even halt the operations of the businesses involved until the dispute is resolved. In addition, many companies that might do business in Virginia may be deterred by the obvious financial risk of any potential legal dispute given Virginia's slow appellate process. Certainly judicial factors influence business decisions regarding the expansion or contraction of business activities within the Commonwealth.

Finally, the length of delay may impede the progress of the law itself. Litigants whose lawyers have developed a novel argument or

a new distinction are discouraged from pursuing an appeal in the face of a three and one-half year wait. Because novel arguments rarely assure predictable outcomes, the supreme court may be deprived of the very type of case that results in a new development in the law. Therefore, a lengthy appellate delay impinges upon individual litigants, adversely affects the public's perception of justice, impedes economic strength and growth, and retards the development of a system of laws that encompasses modern complexities. While there may be some perceived beneficial effects, it seems plain that unreasonable delay in appellate justice is harmful.

Before considering solutions to the problem of backlog and appellate delay, its causes will be examined. The most obvious cause is the steadily increasing population in Virginia, and the resulting growth in litigation.¹⁵ Virginia's population increased by forty-four percent between 1960 and 1985 and the number of lawsuits filed in Virginia has increased from 423 in 1960 to 1,043 in 1985.¹⁶ Moreover, the supreme court's backlog of cases has increased from between seventy-five and 100 in 1960 to 1,443 in 1987.¹⁷ In addition to the numbers of citizens utilizing the legal system, the increasing complexity of governmental regulation leads to increased litigation.

Much of the delay in the Supreme Court of Virginia is the result of a backlog that has grown over the past decade. The Virginia General Assembly, however, was alerted long ago of the need for an intermediate appellate court to handle the growing caseload.¹⁸ The legislature could have avoided some of the backlog by choosing to act when it first became aware of this need.

Delay in the supreme court and in the court of appeals is also engendered in part by the system of petitions and appeals. Because the function of the petition is to demonstrate error that will merit an appeal, the content of the petition for appeal and of the brief on appeal are not likely to differ substantially. Indeed, the rule governing petitions provides that "[t]he form and contents of the petition for appeal shall conform in all respects to the requirements of the opening brief of appellant."¹⁹ Yet this process re-

15. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, series p-25, No. 970 (1985); Lilly & Scalia, *supra* note 13, at 10-11.

16. See NATIONAL CENTER FOR STATE COURTS, STATE COURT STATISTICS: ANNUAL REPORT 1985, at 184 (1985) [hereinafter STATE COURT STATISTICS]; Lilly & Scalia, *supra* note 13, at 7.

17. See JUDICIARY REPORT, *supra* note 3, at 29; Lilly & Scalia, *supra* note 13, at 11.

18. See Lilly & Scalia, *supra* note 13, at 3-4.

19. VA. S. CT. R. 5:17(c).

quires that an aggrieved party in a civil action over which the supreme court has jurisdiction must file a petition for appeal not more than three months after entry of the final order. The opponent then has twenty-one days to file a brief in opposition.²⁰ The appellant is entitled to oral argument or may waive it and instead submit a reply brief. The panel considers whether the petitioner has shown harmful error that warrants an appeal. If harmful error is demonstrated, the appellant must then file an opening brief within forty days of the certification of appeal and the process of responding and arguing repeats itself.²¹ This redundancy wastes not only time in the progress of the appeal but also money, because attorney hours and printing costs for petitions and briefs mount quickly. Surely the same document could inform the court of error as well as identify it.

Finally, the addition of the Virginia Court of Appeals to the Virginia system has arguably affected the process. Although temporarily relieving the supreme court some of the pressures of its caseload,²² the court of appeals expands appellate capacity and therefore increases the number of cases appealed.²³ Significantly, although supreme court filings fell by 872 in 1985, they increased again in 1986 by 189, and in 1987 by another 211.²⁴

Concern about the problem of delay and lack of review led Senator Wiley F. Mitchell, Jr. to introduce Senate Bill 5 in the 1988 session of the Virginia General Assembly. The bill proposes to expand the jurisdiction of the court of appeals to include most civil cases and to grant an appeal of right to criminal and civil litigants. Specifically, the original bill provided that the court of appeals would have jurisdiction over:

- (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to subsection D of § 18.2-308, (iii) any fi-

20. *Id.* at 5:17, 5:18. A petition is limited to 35 typed pages while a brief may contain up to 50. *Id.* at 5:26. The rules governing the appeals process suggest no difference in content.

21. *Id.* at 5:26 to 5:35.

22. The total number of supreme court petitions filed fell from 1,915 in 1984 to 1,043 in 1985. The court of appeals opened its doors in 1985. Between 1985 and 1986, the supreme court was able to reduce its backlog from 1,270 cases to 825 cases. JUDICIARY REPORT, *supra* note 3, at 29.

23. Flango & Blair, *Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State's Highest Court?*, 64 JUDICATURE 74 (1980).

24. JUDICIARY REPORT, *supra* note 3, at 30.

*nal decision of a circuit court in a civil case, (iv) any final decision of the Industrial Commission and (v) interlocutory orders or decrees, granting or denying an injunction in any case which would fall within the appellate jurisdiction of the Court of Appeals.*²⁵

Additionally, the original bill deleted procedures for petitions in the court of appeals since the right to appeal dispenses with the need for petitions. It also left intact the provision that the decision of the court of appeals should be final in those cases specified in section 17-116.07 of the Code of Virginia.²⁶

After Senator Mitchell introduced this bill it was referred to the Senate Committee for Courts of Justice. It was reported out of that committee by a vote of nine to six in favor of the bill.²⁷ The bill was then sent to the Senate Committee on Finance for fiscal consideration. After a hearing, the Committee on Finance first voted to pass indefinitely. A week later the vote was reconsidered and the bill was carried over to the 1989 session in amended form.²⁸ The Finance Committee proposed a substitute bill which provided for three extra judges on the court of appeals. It further deleted section 17-116.07(3) of the Code of Virginia, which provides that decisions of the court of appeals on issues of domestic law should be final.²⁹ The amended bill is still active and on the docket for the 1989 General Assembly to consider.

As an effort to allay the problems caused by delay and backlog in the supreme court, and to assure judicial review of all cases, the proposed bill is surely a progressive step. The bill would bring Vir-

25. S. 5, Va. General Assembly, 1988 Sess. (Jan. 13, 1988) (emphasis added). On January 18, 1988, Senator Mitchell introduced Senate Bill 69 to accompany Senate Bill 5, which would amend other relevant sections of the Code of Virginia to reflect the change in jurisdiction.

26. Those decisions of the court of appeals which are final and without appeal to the supreme court are: traffic infractions, misdemeanor convictions in which no incarceration is imposed, cases from administrative agencies or the Industrial Commission, domestic relations cases, cases appealed by the Commonwealth pursuant to VA. CODE ANN. § 19.2-398, -401 (Repl. Vol. 1988), and cases involving involuntary treatment of prisoners. *Id.* § 17-166.07(A)(1)-(5). However, subsection B of § 17-166.07 provides for supreme court review of all these cases, except appeals pursuant to § 19.2-398, if they involve a substantial constitutional question or a matter of significant precedential value. *Id.* § 17-166.07(B).

27. Telephone interview with Senator Wiley F. Mitchell, Jr. (July 6, 1988).

28. *Id.*

29. S. 5, Amendment in the Nature of a Substitute, Va. General Assembly, 1988 Sess. (Feb. 23, 1988) On February 24, 1988, the Finance Committee also submitted a substitute Senate Bill 69 to implement Senate Bill 5. Both versions of Senate Bill 69 involved primarily technical changes.

ginia in line with the appellate structure of most other states as well as the American Bar Association's standards which suggest that every appellate level court should have full jurisdiction.³⁰ It would also relieve the supreme court of its present error-correcting function and allow it to choose to consider those cases necessary to the development of the law. For any lawyer who has combed the *Virginia Reports* vainly searching for a clear pronouncement of law regarding a situation they know occurs frequently, the increased opportunity for the supreme court to consider cases of public interest and precedential value may be sufficient justification alone for the bill. The bill would also help reduce delay because the supreme court's examination of petitions would be limited to whether the legal issues merit comment, rather than whether the record establishes error. A further strength of the bill is that it preserves the finality of the decisions of the court of appeals in appeals from decisions by administrative agencies, the industrial commission and misdemeanor convictions. Most important, it assures judicial review for every litigant who desires it.

Nevertheless, the potentially negative effects of the proposed bill deserve serious consideration before such a drastic change in appellate structure occurs. The initial difficulty in predicting the effect of the bill stems from its two-fold nature. Not only does the bill expand the appellate court's jurisdiction to review cases, but it significantly increases the number of cases to be reviewed by providing for an appeal as a matter of right. The immediate effect of this two-fold change is to shift the backlog of cases to the court of appeals from the supreme court. The change from petition to appeal as a matter of right will almost certainly encourage more filings. Even assuming no increase in filing occurs due to the appeal by right or due to the transfer, the bill will increase the court of appeals' caseload by approximately one-third.³¹ While the bill proposes to expand the court of appeals' size by nearly one-third, it is fallacious to assume that three new judges will simply pick up the extra work. Again, assuming the court's workload will expand by only one-third, each judge will still have to read and review an in-

30. ABA Commission on Standards of Judicial Administration, STANDARDS RELATING TO COURT ORGANIZATION § 1.13 (1974).

31. In 1986, 1,536 cases were filed in the court of appeals; in 1987 there were 1,625. In 1986, 520 civil appeals were filed in the supreme court, while 577 were filed in 1987. JUDICIARY REPORT, *supra* note 3, at 29, 33. Thus, the transfer of the civil cases filed in those years would increase the court of appeals' caseload by approximately one-third.

creased number of opinions. Thus, some slowdown in the process time of the court of appeals seems inevitable.

A more long-term effect is that the proposed bill effectively creates a two-tired appellate system that would regularly permit double appeals. The evils of this kind of system have been discussed at length. Professors Lilly and Scalia (now Justice Scalia) concluded that such a system "denies the substance of justice by delaying it; and it often destroys the appearance of justice by providing the spectacle of a judgment reversed and then reinstated."³² A litigant who faces a double appeal may face a longer delay than the three and one-half year wait now necessary, and he or she will certainly face additional costs. The judicial system itself must also bear increased costs. In terms of delay, the provision authorizing an appeal as a matter of right will have a dual effect. The actual court time spent on the appeal of a case that would formerly have been by petition will not differ significantly. In considering whether to grant a criminal petition, in which there is no appeal by right, the court of appeals currently considers the petition, any petition in opposition, the record and a brief oral argument. In considering the appeal by right in a domestic relations case, the court considers the briefs, the record, and a slightly longer oral argument. Those criminal decisions which are plainly correct and involve no precedential issue are denied an appeal with a short order. Those domestic relations cases which are plainly correct and involve no precedential issue are generally affirmed with a short order. Thus, the proposed bill would allow the court to confine each case to one hearing and one set of documents and avoid the redundancy of petitions and briefs as well as the wasted time between granting the petition and hearing oral argument on the appeal.

In addition, an appeal as a matter of right is likely to dramatically increase in the number of cases filed. In 1984, the number of petitions for appeal in civil cases filed in Virginia totalled 682.³³ When the court of appeals opened its doors in 1985, the total civil filings increased to 984.³⁴ While some of this increase is due to perceived increased appellate capacity, it seems clear that part of it was in response to the new right to appeal domestic relations, industrial commission, and administrative agency decisions. Addi-

32. Lilly & Scalia, *supra* note 13, at 46.

33. JUDICIARY REPORT, *supra* note 3, at 30.

34. JUDICIARY REPORT, *supra* note 3, at 30, 32. Five hundred and nine cases were filed with the supreme court while 475 were filed with the court of appeals.

tionally, the record of the court of appeals in deciding civil cases in an average of 285 days from the filing of opening briefs may encourage litigants who might not have appealed to the supreme court in view of its backlog.³⁵

If, in spite of the drawbacks, the legislature determines that a two-tiered system will remedy more problems than it creates, the bill should be amended to lessen some of its negative effects. First, to avoid a simple shifting of the backlog, the legislature should consider adding more than three judges to the court of appeals. In a study using four methods to project the impact of Senate Bill 5 on the court of appeals, the supreme court administrative staff concluded that at least three and as many as ten new judges would be required.³⁶ The Director of Judicial Planning did not recommend one method over another as being more reliable or having greater predictability, but did note that method three was the only one that took into account both the variables of transfer of jurisdiction and appeal by right.³⁷ Method three suggests adding six judges. Whether the decision to add three judges was reached by a careful consideration of the problems created by Senate Bill 5, by the simple determination that one-third more judges could handle one-third more cases, or by the political expediency inherent in the least expensive option, it seems certain that this provision will be significant to the issue of delay. Realistically, the addition of only three judges appears insufficient to handle the added caseload.

Adding more judges, however, may actually hamper the ability of the court to perform.³⁸ A court faced with expanded jurisdiction faces a Hobson's choice. Either a court remains relatively small and maintains its collegiality and uniformity while each judge handles more cases and the backlog grows, or it expands so that the level of work for each judge remains relatively stable, but the manageability of the group as a unit is sacrificed. Because most decisions in the court of appeals are made by panels composed of three judges, the effect of the increased number would not impact on the process of conferencing most cases. In theory, an additional three

35. Report on Case Disposition, *supra* note 2.

36. ADMINISTRATIVE STAFF, SUPREME COURT OF VIRGINIA, IMPACT OF SENATE BILL #5 ON THE COURT OF APPEALS (1988). A copy of this Report is available in the office of the *University of Richmond Law Review*.

37. Telephone interview with Kathy L. Mays, Director of Judicial Planning, Supreme Court of Virginia (July 19, 1988).

38. ABA Section of Judicial Administration, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 53-55 (1961).

or six judges would simply create one or two more judicial panels. The real impact would be that each judge would have to review an increased number of opinions since each opinion is circulated first to the panel and then to the entire court. The probable effect would be a more cursory review of those cases in which a judge did not participate, and, consequently, a heavier reliance on the individual panels. The impact would also be felt in en banc sessions. While it is difficult for ten judges to confer, persuade, and reason in the limited time available at sessions, it would be nearly impossible for sixteen to reach any sort of a consensus. The solution to the problem in some states has been to divide the court into permanent divisions with divisional conflicts being resolved by the state supreme court.³⁹

To lessen the likelihood of double appeals, the legislature should strengthen the terminal quality of the court of appeals' decisions. This can be achieved without infringing on the supremacy of the supreme court. Current law provides, and the proposed bill retains the provision that notwithstanding the statutory provision for the finality of a court of appeals' decision,

in any case . . . in which the supreme court determines on a petition for review that the decision of the court of appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value, review may be had in the supreme court in accordance with the provisions of [section] 17-116.08.⁴⁰

Further, under the current statute as well as the proposed statute, the supreme court may, on its own motion, certify a case for its own review and effectively remove it from the court of appeals before review by that court.⁴¹ These two provisions ensure the supremacy of the supreme court in every case worthy of comment in spite of provisions for finality in the court of appeals. Thus, a provision stating that the court of appeals' decision is final except

39. For example, the 34 judges on the Illinois Appellate Court sit in five districts. Similarly, the 16 members of the Washington Court of Appeals sit in three divisions. ROPER, ELSENCE & FLANGO, 1984 STATE APPELLATE COURT JURISDICTION GUIDE FOR STATISTICAL REPORTING, 6, 9, table 1. [hereinafter JURISDICTION GUIDE].

40. VA. CODE ANN. § 17-116.07(B) (Repl. Vol. 1988).

41. *Id.* § 17-116.06. The section provides that the supreme court may certify a case when it determines that "[t]he case is of such imperative public importance as to justify deviation from normal appellate practice and to require prompt decision in the Supreme Court" *Id.* § 17-116.06(B)(1), or that the docket of the court of appeals requires a transfer of jurisdiction to serve the expeditious administration of justice. *Id.* § 17-116.06(B)(2).

in the above circumstances would not contravene valid supremacy, but would prevent double-level error-correction. The original bill provided that decisions of the court in domestic relations cases would be final. That provision should be reinserted and the bill should further provide that decisions in all civil cases will be final, subject to section 17-116.07 of the Code of Virginia.

Finally, the legislature could avoid the problems of the double appeal as well as the inevitable problems of delay created by a bulk transfer of jurisdiction by providing an appeal by right in civil cases directly to the supreme court and empowering the supreme court to screen those cases and to transfer to the court of appeals any cases involving simple error-correction while retaining those that require some policy analysis. The effect of this procedure would be three-fold. First, the appeal by right would be retained. Second, the transfer of jurisdiction would be less burdensome on the court of appeals because they would have fewer cases. Third, the likelihood of a double appeal is virtually nonexistent because the supreme court would presumably send to the court of appeals those cases about which it had little of substance to say.

If the General Assembly concludes that Senate Bill 5 is not the answer to appellate delay and lack of review, it nonetheless must take some action to remedy this critical situation. There are a range of possible solutions which address the problems from both the legislative and judicial level. Most of the following suggestions are aimed at only one of the changes suggested in Senate Bill 5. These changes would allow the problem of the backlog and delay to be solved first, leaving the question of appeal as a matter of right to be addressed at a later date.

The first possibility is rooted in Virginia history. In 1848, faced with a backlog of eight or nine years of cases in the supreme court, the General Assembly created a "Special Court of Appeals" to "[aid] in dispatching the business" of the supreme court.⁴² This legislative court grew out of earlier attempts to provide a substitute court which could take cases that the members of the supreme court could not hear due to a conflict of interest.⁴³ The constitutionality of this special court was challenged in *Sharpe v. Robert-*

42. Note, *The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court*, 8 WM. & MARY L. REV. 244, 254-55 (quoting SEN. DOC. NO. 36, REPORT OF THE REVISORS, Va. General Assembly, 1848-1849 Sess.).

43. See *id.* at 252.

son.⁴⁴ In dismissing the challenge, Justice Baldwin held, “[t]he Special Court is a subordinate tribunal, as much so as any other Superior Court which the legislative department may, in its discretion, from time to time establish; and is as much bound to defer to the authoritative decisions of the Supreme Court of Appeals.”⁴⁵ Perhaps in response to the constitutional challenge, the Constitutional Convention of 1851 made the special court a constitutional court which could be convened by legislative act.⁴⁶ Through several further changes, the constitutional provision finally came to authorize the legislature to provide a special court of appeals

to try any cases on the docket of [the supreme court of appeals], in respect to which a majority of the judges thereof may be so situated as to make it improper for them to sit on the hearing of the same; and also to try any cases on the said docket which cannot be otherwise disposed of with convenient dispatch.”⁴⁷

Three such courts were convened by legislative act between 1872 and 1928.⁴⁸ The revision of the constitution in 1971 resulted in deletion of the special court provision.

Although the revised constitution no longer provides for the special court of appeals, it still vests the legislature with the power to create courts with appellate jurisdiction subordinate to the supreme court.⁴⁹ The General Assembly exercised this power when it created the 1848 court whose constitutionality was upheld in *Sharpe*. It also exercised this power in creating the Virginia Court of Appeals in 1984. Similarly, it could use this power to create a temporary court which could, in a structure similar to that suggested earlier, take cases the supreme court has screened and passed on to them. This court would present no challenge to the supremacy of the supreme court because it would derive its cases from the supreme court, and its jurisdiction would be limited to appellate review which the legislature is free to vest in any court.⁵⁰

44. 46 Va. (5 Gratt.) 518 (1849).

45. *Id.* at 608.

46. VA. CONST. art. VI, § 12 (1851).

47. VA. CONST. art. VI, § 3 (1869).

48. Act of Feb. 28, 1872, ch. 124, 1871-72 Va. Acts 98; Act of March 15, 1924, ch. 264, 1924 Va. Acts 391; Act of April 18, 1927, ch. 56, § 1, 1927 Va. Acts 148.

49. VA. CONST. art. IV § 1.

50. For a discussion of this constitutional supremacy, see Justice Baldwin's discussion in *Sharpe v. Robertson*, 46 Va. at 603-10. The constitution provides that “[t]he judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of origi-

The particularly attractive aspect of this court is its impermanence. The legislature could create and dissolve it when necessary or allow it to expire by operation of law. The additional cost would be minimal since the system would require few permanent arrangements, and would incur costs only when operating.

In light of the figures that suggest that the supreme court's backlog is not increasing but rather remaining constant,⁵¹ this temporary solution may provide a means of solving the delay problem quickly without introducing the unpredictable complications of the appeal as a matter of right. Once both courts are functioning at reasonable capacities without the burden of a crushing backlog, the issue of appeal by right could be addressed in more detail with more predictable results.

A less dramatic and probably less controversial means of solving the delay problem before addressing appeal as a matter of right, is to temporarily transfer civil jurisdiction to the court of appeals. This temporary transfer would provide the supreme court an opportunity to update its caseload. While this would probably result in a slowdown in the court of appeals, it would allow caseloads to adjust. After the temporary transfer period expired, the legislature could examine caseload figures and determine whether to continue civil jurisdiction in the court of appeals and further consider the issue of an appeal as a matter of right.

Another alternative in lieu of Senate Bill 5 is to add justices to the supreme court. The Virginia Constitution authorizes a seven member supreme court but provides that the General Assembly may increase the size to no more than eleven justices.⁵² Although additional justices would not necessarily result in a proportionately increased case disposition, it would probably result in some increase. In 1987, the justices of the supreme court issued about twenty-one opinions apiece. In 1985, the figure was eighteen opinions per justice, and only six states had a lower per judge output.⁵³ This figure must be analyzed in light of the time the justices ex-

nal or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish." VA. CONST. art. VI, § 1. The constitution vests the supreme court with original jurisdiction in matters of mandamus, habeas corpus, and prohibition as well as judicial censure, retirement and removal. The General Assembly has the power to determine the appellate and original jurisdiction of all the courts, subject to that vested by the constitution. *Id.*

51. See JUDICIARY REPORT, *supra* note 3, at 29.

52. VA. CONST., art. VI, § 2.

53. STATE COURT STATISTICS, *supra* note 16, at 204, table 6.

pend on the petition procedure which is unnecessary in most other states. However, it illustrates the need for more justices and more efficient judicial output. The size of the court would still be well within the bounds of easy collegiality and manageability.⁵⁴

Regardless of the legislature's decision regarding Senate Bill 5 or any other measure, Virginia appellate courts have a responsibility to seek ways to render efficient justice. The concern with burgeoning litigation and its impact on the appellate courts nationwide has spawned a variety of innovative judicial responses. Although different courts may require different measures, internal reform may yield dramatic results. What follows is a discussion of measures adopted by other states. This discussion is not exhaustive, but it is illustrative of judicial reforms undertaken by other jurisdictions. While not every measure is appropriate or adaptable to the Virginia system, the variety may serve to spark the Virginia imagination to create a Virginia solution.

Currently in Virginia there are no suggested guidelines to encourage judges to promptly render decisions. In California, Alaska, and Washington, a judge's paycheck is withheld if he or she fails to meet deadlines for decisions.⁵⁵ In several states, the state constitution establishes the time period within which an appeal must be concluded.⁵⁶ Other states provide guidelines by statute, standard, or court rule.⁵⁷ Even if there is no "sanction" for failure to meet the deadline, its mere existence establishes a standard by which a particular judge's work can be objectively measured. Also, the subtle motivation that stems from the printed word and from peer expectations is effective in encouraging judicial efficiency. After examining guidelines in other states and adapting them as necessary to cover Virginia appellate procedure, each court should establish a reasonable timetable for issuing opinions and endeavor to follow it.

Trial courts often set settlement conferences as a matter of course to encourage a settlement before the litigants and the state incur the expense and time of a trial. At the appellate level, however, Virginia judges are not involved in the settlement process although 242 petitions and appeals were settled or withdrawn from

54. See *supra* notes 36-39 and accompanying text.

55. JURISDICTION GUIDE, *supra* note 39, at 98-1012, table 17.

56. Those states include California, Georgia and Maryland. *Id.*

57. Those states are Hawaii, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Mexico, North Carolina, South Carolina and Washington. *Id.*; see also STANDARDS, *supra* note 11, § 3.52(b)(4).

both appellate courts in 1987.⁵⁸ A number of appellate courts have instituted settlement processes at the appellate level to encourage settlement and lessen the appellate caseload. The basic framework involves a meeting between appellate counsel and a mediator (usually a trial judge, a retired judge, or perhaps a staff attorney) to discuss settlement options. The meeting is confidential so that if no settlement occurs, the reviewing appellate judges will not know the substance of the conference.⁵⁹ Even if the parties do not settle, the court may benefit from a narrowing of the issues to be argued on appeal.⁶⁰ Further, if an expedited appeal process is available, the prehearing settlement conference can be a screening tool for cases that are suitable for that process. A voluntary prehearing settlement conference has been available in the Third District of the California Court of Appeals since 1977.⁶¹ It has been credited with doubling the percentage of cases dismissed in the first three years of its existence; over half of the cases that went to conference settled.⁶² Similarly, in a settlement conference experiment in Rhode Island, twenty-six percent of the cases were settled while only four percent of the control group which did not go to conference settled.⁶³ Although the procedure requires an investment of judicial system time and resources, even moderate success could recoup those expenses.

Particularly if Senate Bill 5 becomes law, and the appeal of right becomes effective, the Virginia Court of Appeals should establish a procedure for expediting appeals. This "fast track" should be available for cases suitable to a streamlined procedure. A variety of features can characterize this process, but the most important is the aspect of choice. The decision to pursue an expedited appeal is a decision to forgo the full and extensive analysis of the traditional appeal. Thus, this decision should be made by the litigant, not the court. In general, an expedited appeal process seeks to reduce the minimum permissible time for the briefing process. In return, the court accelerates its handling and scheduling. The techniques to accomplish this goal are several.

58. JUDICIARY REPORT, *supra* note 3, at 29, 33.

59. See Wasby, *Appellate Delay: An Examination of Possible Remedies*, 6 JUST. SYS. J. 325, 332 (1981).

60. *Id.*

61. Janes, Paras & Shapiro, *The Appellate Settlement Conference Program in Sacramento*, 56 CAL. ST. B.J. 110 (1981).

62. Wasby, *supra* note 58, at 333.

63. Wiesberger, *Appellate Caseload: Meeting the Challenge in Rhode Island*, 16 U. MICH. J.L. REF. 527, 533 (1983).

One possibility in a expedited appeal procedure is to limit or eliminate either oral arguments or briefs. Members of the bar may jealously guard both avenues of communication with the court, but the redundancy that so often permeates this combination wastes money and time. Currently, oral argument in both Virginia appellate courts is limited to thirty minutes per side.⁶⁴ Limiting the arguments to fifteen minutes, for example, would not make a significant difference. Eliminating the arguments altogether, would not only save travel time for the court of appeals which is geographically dispersed, and sitting time, it would also allow judges to begin disposing of cases immediately following briefing without the delay of scheduling oral arguments.⁶⁵ Several commentators, however, urge that elimination of all oral arguments is harmful because it reduces visibility and public confidence in the personal attention of the judges as well as deprives the court and counsel of the focus that argument can provide.⁶⁶ Additionally, even judges who are convinced that most oral argument sheds little light on a case would probably not say that no case is suitable for argument. A procedure by which judges request that the parties waive oral argument in cases where it is not warranted would answer all these concerns while allowing some time savings.

On the other hand, the expedited procedure could retain the oral argument but reduce the significance of the brief. By limiting the brief to a short document, the court could reduce the time necessary for preparation as well as compress the time allowed for filing. The oral argument should be scheduled promptly and enough time should be allowed for the arguments to be sufficiently developed.⁶⁷ The procedure would force attorneys and judges to be more dependant on and thus better prepared for oral argument. In addition, the redundancy of the process would be reduced.

64. VA. S. Ct. R. 5A:28, 5:35.

65. Most federal courts have severely curtailed oral argument. See J. HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIARY SYSTEM* (1981).

66. Chapper & Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal*, 42 MD. L. REV. 696, 697 (1983).

67. The procedure adopted by the Third District includes the following features:

1. Brief limited to 10 double-spaced pages, exclusive of facts. No reply brief.
2. Appellant's brief due 20 days after scheduling order of expedited appeal.
3. Respondent's brief due within 20 days after appellant's deadline.
4. Oral argument set within 30 days of close of briefing with no time limit on argument.
5. Opinion filed within 10 days after argument. *Id.* at 701-02.

A technique which also emphasizes oral argument is one in which briefs are filed and read by the judges who issue a short memorandum outlining their tentative position to the attorneys. This procedure has two benefits. First, the panel must have considered the case sufficiently before argument to take a tentative position. Therefore, the judges will be familiar enough with the facts and the law for precise, helpful questioning at oral argument. Second, the attorneys will be able to tailor their arguments to address the concerns expressed in the memorandum and correct misconceptions of law or fact expressed by the court. In addition, the memorandum may function as a settlement tool. While it must be clear that the memorandum is not binding on the judges, a party whose precarious position is not embraced in the memorandum may see the handwriting on the wall and forego the appeal or attempt to settle the case prior to appellate decision.

Aside from measures regarding oral arguments and briefs, there are several other means of expediting appeals. The prehearing conference discussed earlier can serve to narrow the issues for an expedited appeal. A party who may be able to allege several grounds of error may wish to confine review to only one or two primary issues. Thus, the case could be placed on an expedited schedule. Criminal appeals can also be expedited although settlement techniques of course, would play no role. Provisional Order No. 16 in Rhode Island provides a prebriefing conference based on a five-page statement from each party. At the conference, the judge considers both positions and may then order full briefing and argument, consolidation of appeals, remand for an evidentiary hearing or entry of a necessary trial court order, or order one of the parties to appear before the full court to show cause why the appeal should not be summarily affirmed or reversed.⁶⁸ Other techniques may include summary disposition in appropriate cases, use of abbreviated records and use of a special expediting panel. The material available on these procedures is voluminous.⁶⁹ Thus, both courts can easily investigate many attractive options and implement them.

68. R.I. S. Ct. R. 12 (Provisional Order No. 16).

69. *E.g.*, OHIO A.P.R., 11.1 (allows appellate courts to operate on an accelerated calendar); OR. A.P.R., 6.5 (allows parties to file an agreed upon narrative statement in lieu of the transcript of lower court proceedings); UTAH C.A.R., 31 (upon agreement of the parties and the court, the case is set for expedited decision without a written opinion within 45 to 60 days of the granting of the appeal).

Although both appellate courts in Virginia are improving their case management in terms of automation, there are case management techniques that have been overlooked. Virginia appellate courts should accept full responsibility for cases on the filing of a notice of appeal. In particular, the appellate courts ought to be concerned with and work towards the prompt filing of transcripts because delay in that area is responsible for substantial appellate delay, and attorneys are unable to address the problem. Currently, the trial court may grant extensions for preparing and filing transcripts as well as records. Because the record is for the appeal, the trial courts have little incentive to ensure timeliness.

Problems also stem from the semi-autonomous status of the court reporters. As private operators, they are not directly accountable to either the trial court or the appellate court. The resulting delays are out of reach of the appellate court. Both trial courts and appellate courts should work together to monitor the production of transcripts and provide incentives or sanctions to promote promptness by court reporters.⁷⁰ Kentucky has taken the unusual step of allowing untranscribed mechanical recordings that are made under the supervision of the court to constitute part of the record.⁷¹ Presumably, this includes traditional audio taping as well as videotaping. Besides eliminating the time now required to transcribe proceedings, this procedure potentially offers the reviewing court a more complete picture of the lower court proceedings.

In conclusion, the efforts of the General Assembly to remedy the problems of appellate delay and lack of review in Virginia are laudable. The legislature has created an intermediate court of appeals that has functioned smoothly and has reduced the supreme court's caseload. Unfortunately, the delay in creating the court of appeals caused the already overburdened supreme court to develop an intolerable backlog of cases which threatens to undermine efficiency and public confidence in the Commonwealth's highest court. The current situation is quite serious and calls for immediate action. However, to drastically alter the structure of the court of appeals after only three years to remedy the backlog problem may prevent that court from reaching its full potential. The legislature should

70. See Wasby, *supra* note 59, at 335. Robert Leflar suggests that court reporters should be employed and supervised by the appellate court since their work is primarily for use in the appellate process. R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 17-18 (1976).

71. KY. REV. STAT. ANN. R. 72.04 (Michie/Bobbs-Merrill 1988).

consider implementing interim measures designed to take care of the supreme court's backlog. When that problem is solved, it should then consider how best to implement the appeal as a matter of right. In any case, both the Virginia Court of Appeals and the Supreme Court of Virginia must examine the problem of judicial delay and respond with innovative solutions because the amount of trial court litigation and subsequent appeals shows no signs of abating.