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Hon. Marla Graff Decker
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ESSAYS

APPELLATE LAW

The Honorable Marla Graff Decker *

INTRODUCTION

In every attorney's career, there is likely to be a time when that attorney believes that a judge or jury erred in a decision that negatively impacts his or her client. Virginia has a specific set of laws and rules that guide attorneys through the appellate process and provide for appropriate review of these legal challenges.

For some Virginia practitioners, appellate practice is "old hat," but for many others, appearing before either of Virginia's state appellate courts can be a daunting prospect. The purpose of this article is to help familiarize practitioners with the customs and practices of Virginia's appellate courts. While this article frequently refers to the *Rules of the Supreme Court of Virginia* ("the Rules"), the importance of familiarizing oneself with the Rules cannot be overstated. The suggestions made throughout this article are designed to aid appellate advocates, whether novices or experts, based on the notion that a better-informed appellate bar is a more effective appellate bar, ensuring quality advocacy for litigants across the Commonwealth.

Part I of this essay provides a broad description of the respective roles of Virginia's two appellate courts, a review of the basics regarding filing an appeal, and an important discussion on pre-

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serving error at the trial level. Part II focuses on the brief—the "meat and potatoes" of this piece, and of appeals generally—beginning with a discussion of the rules pertaining to briefs. This essay also offers some thoughts on brief-writing strategy. Finally, in Part III, this essay ends with a discussion of some very basic "dos" and "don'ts" of oral argument.

In short, this essay is intended to provide the reader with some basics of appellate practice as well as some more advanced concepts to consider when attempting to perfect an appeal. Hopefully, the reader will be tempted to further explore the Rules, read cases addressing appellate procedure, and consider the strategic aspects of an appeal before writing a brief.

I. THE BASICS

Appeals in Virginia involve a relatively straightforward process. This section outlines the basics and points the reader to other helpful resources for further details. The Supreme Court of Virginia and the Court of Appeals of Virginia are the two courts with jurisdiction to hear appeals in the Commonwealth.[1] The Virginia Constitution established the Supreme Court of Virginia as the court of last resort for legal challenges in the Commonwealth.[2] The Constitution did not specifically create the court of appeals but, instead, contains language that allows the General Assembly to create such a court.[3] Consistent with constitutional allowance, the General Assembly created the Court of Appeals of Virginia in 1983 (effective January 1, 1985) to address the need for expanded appellate capacity.[4] Virginia's intermediate appel-

1. Virginia's circuit courts have limited appellate jurisdiction, generally anything appealed from an "inferior tribunal," such as a general district court. VA. CODE ANN. § 17.1-513 (Cum. Supp. 2014). The focus of this article, however, is limited to appellate practice before the Supreme Court of Virginia and the Court of Appeals of Virginia.

2. VA. CONST. art. VI, § 1.

3. *Id.*

4. *See* VA. CODE ANN. § 17.1-400 (Repl. Vol. 2010); COURT OF APPEALS OF VIRGINIA, INFO. PAMPHLET, *available at* http://www.courts.state.va.us/courts/cav/cavinfo.pdf (last visited Oct. 10, 2014).

late court is thus a statutory creation,[5] with the Virginia Constitution providing the fundamentals of appellate jurisdiction.[6]

The supreme court generally hears appeals in civil cases, cases involving constitutional questions, and death penalty cases.[7] The court of appeals handles appeals of family law cases, workers' compensation cases, most criminal cases, and appeals of decisions from state administrative agencies.[8] The Virginia Code provides further jurisdictional details and refines the law as it relates to appeals. Practitioners should familiarize themselves with these jurisdictional matters before proceeding with a petition or an appeal of right.[9]

A. *Filing the Appeal*

Important differences exist between the roles and jurisdictions of the two courts. There are also many similarities in the respective rules and manner in which these courts operate. Fortunately for attorneys practicing in Virginia, the Rules, which include a section governing the Court of Appeals of Virginia, are fairly straightforward.[10] A critical rule of practice, however, is that attorneys must learn the basics and keep up-to-date with any changes in the Rules that apply to each court. Adherence to the Rules is critical to success, and while they allow some leeway for basic human error,[11] failure to follow the Rules can quickly com-

5. *See* Payne v. Commonwealth, 233 Va. 460, 473, 357 S.E.2d 500, 508 (1987) ("The right to appellate review is a statutory right . . ."); Hulvey v. Roberts, 106 Va. 189, 193–94, 55 S.E. 585, 586 (1906) (describing the constitutional underpinnings of appellate jurisdiction); West v. Commonwealth, 18 Va. App. 456, 457–58, 445 S.E.2d 159, 160 (1994) (describing the role of the Virginia Constitution and Virginia Code in determining appellate jurisdiction), *appeal dismissed*, 249 Va. 241, 455 S.E.2d 1 (1995).

6. VA. CONST. art. VI, § 1.

7. *See id.* (constitutional questions); VA. CODE ANN. § 8.01-670 (Repl. Vol. 2007 & Cum. Supp. 2014) (civil matters); *id.* § 17.1-313 (Repl. Vol. 2010 & Cum. Supp. 2014) (death penalty cases); *see also id.* § 12.1-39 (Repl. Vol. 2011) (decisions of the State Corporation Commission); *id.* § 54.1-3935(E) (Repl. Vol. 2013) (decisions to revoke an attorney's license).

8. *See* VA. CODE ANN. §§ 17.1-404 to -406 (Repl. Vol. 2010 & Cum. Supp. 2014).

9. *See, e.g.*, *id.* § 17.1-310 (Repl. Vol. 2010) (granting the Supreme Court of Virginia jurisdiction to "award writs of habeas corpus and of such appeals, writs of error and supersedeas as may be legally docketed in or transferred to the Court."); *id.* § 17.1-405 (Repl. Vol. 2010 & Cum. Supp. 2014) (outlining the appellate jurisdiction of the Court of Appeals of Virginia).

10. *See* VA. SUP. CT. R. 5:1(a), 5A:1(a) (2014).

11. For instance, the Virginia Code allows civil appeals filed in the wrong court to be

plicate your case.[12] Additional information on the procedure for filing an appeal is contained in Virginia Code, title 8.01, chapter 26.2.[13]

In order to appeal a case, there must be either a valid final judgment from the trial court or an order or decree that qualifies for interlocutory appeal (such as a temporary restraining order or preliminary injunction).[14] Once the court enters that judgment or order, the Rules dictate filing timelines to which the parties must carefully adhere.[15] Finally, upon notice of appeal, the trial court clerk will collect the record, transcripts, and other important documents and evidence for submission to the appellate court.[16] Details and current rules relating to this procedure are included in the Rules—Part 5 for the Supreme Court of Virginia, and Part 5A for the Court of Appeals of Virginia—available online and in pdf form at www.courts.state.va.us/courts/scv/rules.html.[17]

B. *Preserving the Record*

Good appellate advocacy requires an attorney to approach the case by thinking about the appeal from the very outset. This is not meant to suggest that you take a defeatist approach; rather it will ensure that you give sufficient emphasis to establishing a solid record in case of an appeal. This approach includes preparation and strategy. The attorney who wins the case needs to be able to successfully defend it on appeal just as much as the attorney who loses the case needs to be able to win on appeal. Central to this approach is proper preservation of the trial record. Virginia's appellate courts generally will not entertain new arguments or new evidence on appeal.[18] The key to maximizing potential appellate success is to keep the appeal in mind throughout the pre-trial,

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transferred to the appropriate jurisdiction with no penalty, as long as the appeal was timely filed. VA. CODE ANN. § 8.01-677.1 (Repl. Vol. 2007).

12. *See, e.g.*, Jay v. Commonwealth, 275 Va. 510, 517–19, 659 S.E.2d 311, 315–16 (2008) (discussing numerous cases where failure to follow Rule 5A:20(e) resulted in dismissal and/or denial of an appeal).

13. VA. CODE ANN. §§ 8.01-676.1 to -685 (Repl. Vol. 2007).

14. *See id.* § 8.01-675.3 (Repl. Vol. 2007).

15. *See, e.g.*, R. 5:9, 5A:6 (setting filing timelines).

16. *See* R. 5:10, 5:13, 5A:7, 5A:10 (setting the rules on transmitting the record).

17. *Rules of the Supreme Court of Virginia*, VA.'S JUD. SYS., www.courts.state.va.us/courts/scv/rules.html (last visited Oct. 10, 2014).

18. *See* R. 5:25, 5A:18.

trial, and post-trial process. This is particularly true in situations where the party is limited by traditional appellate principles that require that the objection or issue be raised timely and with specificity so that the trial court has the opportunity to address it, rule on it, and correct any error at a time when the trial can proceed to conclusion.[19]

At trial, counsel should be mindful of any ruling that may affect the outcome of the case. Examples include whether the judge admits or excludes a particular piece of evidence, grants or denies a motion, or errs in formulating the jury instructions.[20] In order to "preserve" the issue for appeal, an objection must be made on the record (i.e., with a court reporter taking it down). Simply mentioning an issue in conversation in chambers is not enough.[21]

1. The Contemporaneous Objection Rule

The contemporaneous objection rule applies in both the Supreme Court of Virginia and the Court of Appeals of Virginia.[22] The rule, in pertinent part, states, "No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause . . . [or] to attain the ends of justice."[23] This formulation has two basic requirements: (1) the objection was made on the record at the time of the ruling or at the time the objectionable words were spoken,[24] and (2) the objection was made with "reasonable certainty," meaning that the record is clear as to the actual objection.[25] While there are exceptions to the rule for "good cause" or to "attain the ends of justice," these exceptions are very limited and serve as a last resort to any appeal.[26]

19. *See infra* Part I(B)(1).

20. It is worth noting that obvious clerical errors can be fixed through a motion to the trial court without entering the appeals process. VA. CODE ANN. §§ 8.01-428(B), -677 (Repl. Vol. 2007); *see also* Belew v. Commonwealth, 284 Va. 173, 181, 726 S.E.2d 257, 261 (2012) (holding that a missing transcript could be made a part of the appellate record, as it was missing due only to clerical error).

21. *See* R. 5:25, 5A:18.

22. *See id.*

23. *Id.*

24. Reid v. Baumgardner, 217 Va. 769, 774, 232 S.E.2d 778, 780 (1977).

25. *Id.* at 773, 232 S.E.2d at 780.

26. Perry v. Commonwealth, 58 Va. App. 655, 667–68, 712 S.E.2d 765, 771–72 (2011).

a. Timeliness—Now or Never

According to the Supreme Court of Virginia, "To satisfy the [timeliness requirement], 'an objection must be made . . . at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error.'"[27] This naturally makes sense, as any court—both trial and appellate—would have difficulty hitting "rewind" to try to resolve a problem that could have been addressed at the time it arose. Intangibles, such as a witness's attitude, are inherently difficult to reproduce effectively in order to re-examine what was going on in the courtroom at the time the objection should have been raised (e.g., a witness's arrogance or fear would be hard to elicit from the printed record). That is why, on appellate review of witness credibility, great deference is given to the trier of fact. Opposing counsel would also be unfairly burdened by the same concerns and ought to be afforded the opportunity to address the objection as it is raised in the proceedings.[28]

b. Reasonable Certainty—Be Specific

Unlike the timeliness requirement, the "reasonable certainty" requirement can get complicated for an attorney unfamiliar with it. Failure to build an adequate appellate record on this point generally stems from inattention to detail or a casual courtroom demeanor that unwittingly leaves an attorney in hot water at the appellate stage. The central takeaway on this point is to be specific when objecting. General objections, including popular phrases such as "seen and objected to" or "note my exception,"[29] will likely be found insufficient to preserve an issue for appeal.[30]

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27. Scialdone v. Commonwealth, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) (quoting Johnson v. Raviotta, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002)); *accord* VA. CODE ANN. § 8.01-384 (Repl. Vol. 2007).

28. *See* Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991) (stating that the main purpose of the contemporaneous objection rule "is to afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals . . . [and to give] the opposing party the opportunity to meet the objection at that stage of the proceeding").

29. THE REVISED HANDBOOK ON APPELLATE ADVOCACY IN THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA 8 (Litig. Section of the Va. State Bar ed., 2011) [hereinafter VSB HANDBOOK].

30. *See, e.g.*, Schmitt v. Commonwealth, 262 Va. 127, 142, 547 S.E.2d 186, 197 (2001).

This point is perhaps best made by example. In *Schmitt v. Commonwealth*, the defendant's counsel objected to the trial court's questioning of jurors during *voir dire*, specifically alleging that the circuit court improperly asked leading questions in order to rehabilitate jurors, making them appear qualified to serve when they may well have been biased against the defendant.[31] Defense counsel objected to the questioning after fourteen jurors had been questioned, then renewed the objection at the end of *voir dire* with a general objection that the court acted "inappropriately."[32] The Supreme Court of Virginia ruled that the objections were insufficient for purposes of preserving the issue for appeal because they were neither timely nor made "with reference to the precise question at issue" and, therefore, failed both the timeliness and reasonable certainty requirements.[33]

In addition to being specific as to the particular alleged error, the objecting attorney should also make any motions, arguments, or requests for relief at the time the alleged error occurs. The Court of Appeals of Virginia addressed this specificity requirement in *Bennett v. Commonwealth*, where defense counsel timely objected to improper arguments made during the Commonwealth's closing argument but did not move for a mistrial until *after* the Commonwealth's closing argument concluded.[34] While the initial objection was timely, it was not enough to preserve the objection.[35] The court opined, "Although appellant objected to the Commonwealth's [improper comments], he withheld his motion for mistrial until after the Commonwealth completed its closing argument. . . . [Thus,] the objection to the Commonwealth's comments was waived."[36]

There could be all sorts of reasons, including politeness, which caused the delay, but the rules are the rules and at times they can be unforgiving. The takeaway is that trial attorneys must always think like appellate attorneys in order to properly preserve issues for appeal.

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31. *Id.* at 142, 547 S.E.2d at 196–97.
32. *Id.*, 547 S.E.2d at 197.
33. *Id.*
34. 29 Va. App. 261, 280–81, 511 S.E.2d 439, 448–49 (1999).
35. *Id.* at 281, 511 S.E.2d at 449.
36. *Id.* at 281–82, 511 S.E.2d at 449.

2. Exceptions—"Good Cause" and the "Ends of Justice"

Virginia's appellate courts strictly adhere to the rules regarding preserving issues for appeal;[37] however, as with most rules, there are exceptions. The two named exceptions to the contemporaneous objection rule are: (1) for a showing of "good cause," and (2) to enable the court "to attain the ends of justice."[38] There is also a third exception that comes into play if the trial court did not have subject matter jurisdiction to hear the case in the first place, making the ensuing judgment invalid.[39] Any party can raise this objection, or the appellate court can raise this objection sua sponte, and it can be done at any time.[40] Subject matter jurisdiction is an issue that can be raised and cured at any time, so the remainder of this section focuses on the two exceptions noted in the Rules, as they are specific to the appellate process.

a. Good Cause

The good cause exception boils down to whether the affected party had a good excuse for not raising the objection in accordance with the Rules. A good example of such an occasion is if a court proceeding occurs and counsel is not present to object.[41] In one such case, the Supreme Court of Virginia held that, because the trial court entertained and answered the jury's question without either the defendant or his attorney present, Virginia Code section 8.01-384(A) preserved the defendant's ability to appeal, which would otherwise have been waived by his lack of a timely objection.[42]

b. Ends of Justice

The ends of justice exception requires a "clear miscarriage of justice," affecting the outcome of the case and involving the appel-

37. *See, e.g., id.* at 281, 511 S.E.2d at 449 ("There appears to be no exception in Virginia law to the strict application of [the contemporaneous objection] rule.").

38. VA. SUP. CT. R. 5:25, 5A:18 (2014).

39. VSB HANDBOOK, *supra* note 29, at 13.

40. *See* Porter v. Commonwealth, 276 Va. 203, 228, 661 S.E.2d 415, 427 (2008); Thacker v. Hubard & Appleby, Inc., 122 Va. 379, 386, 94 S.E. 929, 930 (1918).

41. *See, e.g.*, VA. CODE ANN. § 8.01-384(A) (Repl. Vol. 2007).

42. Maxwell v. Commonwealth, 287 Va. 258, 265–67, 754 S.E.2d 516, 519–20 (2014).

lant's substantial rights.[43] This exception "is narrow and is to be used sparingly."[44] In *Brown v. Commonwealth*, the Court of Appeals of Virginia applied the ends of justice exception in favor of an appellant who was sentenced for a crime other than the one for which he was convicted.[45] There, the court held that the error was "so manifestly unjust that we must overlook the failure to make a contemporaneous objection [sic] and exercise our authority to consider this issue on appeal in order to attain the ends of justice."[46] The fact that the miscarriage of justice actually occurred played an important factor in the court's decision to allow Brown to use the ends of justice exception.[47] Often appellants will claim the exception based on a miscarriage of justice that *may* have occurred, only to lose that claim for failure to make the required showing that a miscarriage of justice "has clearly occurred."[48]

The timeliness and accuracy requirements of the contemporaneous objection rule should be in the back of every trial attorney's mind throughout the trial. The rules are simple if followed at the outset. Object when the objectionable action occurs, be specific as to the nature of the objection, and specify what the court should do about it. Failure to adhere to these requirements may not seem significant at the time; however, getting around the contemporaneous objection rule through the limited exceptions can be a Herculean task. The moral of the story is that the careful and cautious trial attorney will enjoy a neatly preserved record on appeal, while the cavalier or excessively casual attorney may inadvertently provide hurdles for his own appeal.

II. THE BRIEF

Once a practitioner makes it past the procedural hurdles, the brief is the most important piece of the appellate process. While different appellate courts place different emphasis on the value of oral argument, there is no dispute over the fact that the issues

43. Brown v. Commonwealth, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (1989).
44. *Id.* at 132, 380 S.E.2d at 11.
45. *Id.*
46. *Id.* at 133–34, 380 S.E.2d at 12.
47. *See id.* at 133, 380 S.E.2d at 12.
48. *See* Mounce v. Commonwealth, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987).

should be carefully fleshed out and presented to the court in the briefs.[49] This portion of the essay begins with a general overview of the Rules, which govern the mechanics and formatting of briefs in the Commonwealth's two appellate courts. Once the technical aspects are identified, the substantive "what makes a good brief" discussion can begin.

A. *Spacing and Margins and Fonts, Oh My!—The Rules for Briefs*

The Rules provide the requirements for briefs in the supreme court and the court of appeals.[50] This section consists of a general overview of the rules for briefs and where they can be found. It is beyond the scope of this article to provide a full, detailed recitation of the rules. They are self-explanatory. While errors in formatting will not be fatal to the case,[51] they may result in an embarrassing (and possibly expensive) admonishment from the appellate court, as in a case before the United States Court of Appeals for the Seventh Circuit in which Judge Easterbrook scolded attorneys for manipulating the formatting of a brief to cram seventy pages worth of material into fifty pages: "Having criticized the Board, we must do the same to [the Company's] lawyers in this court. . . . [Because they were] caught with their hands in the cookie jar, . . . [we] impose a penalty of $1,000."[52] Lastly, and significantly, practitioners should note that there are frequent differences in the formatting requirements of each court, so attorneys must always refer to the rules to ensure compliance.[53]

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49. *See, e.g.*, 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3980 (4th ed. 2008) ("Oral argument in the [federal] courts of appeals is now the exception rather than the rule."); Paul R. Michel, *Effective Appellate Advocacy*, 24 LITIG. 19, 21 (1998) ("In about 80 percent of all appeals, I reach a firm inclination just from reading the briefs. In 80 percent of those appeals, oral argument fails to 'flip' me. And whatever view I had before argument, in 80 percent of all appeals, my conference vote the day of the oral argument remains unchanged as the opinion is prepared.").

50. The specific rules will be provided in this section, but at this point it is worth pointing out that rules from Part 5 pertain to the Supreme Court of Virginia and rules from Part 5A pertain to the Court of Appeals of Virginia. VA. SUP. CT. R. Pts. 5, 5A (2014). As already mentioned, good appellate attorneys must always review the rules before writing a brief because the rules are subject to amendment by the supreme court.

51. *See* R. 5:6(c), 5:26(i), 5A:4(c), 5A:26.

52. Westinghouse Elec. Corp. v. NLRB, 809 F.2d 419, 424–25 (7th Cir. 1987).

53. *Compare, e.g.*, R. 5:6(a)(2) (requiring that briefs be written either in Courier, Ver-

1. Briefs in the Supreme Court of Virginia

Part 5 of the Rules governs briefs in the Supreme Court of Virginia. All briefs are subject to a number of general requirements governing font, margins, length, filing times, copies, and other aspects of presentation and format set forth in Rules 5:6 and 5:26.[54] The penalty for failure to comply with Rule 5:6 is that the clerk may require the document to be redone in order to comply with the rule.[55] This, of course, results in added cost. A different penalty is associated with the more procedural aspects of the brief. Failure to comply with Rule 5:26 (dealing with length, filing deadlines, certificates, etc.) will result in counsel being precluded from presenting oral argument, except upon a showing of good cause.[56] Lastly, Rule 5:31 provides the various color-coding requirements for document covers, and Rule 5:32 governs the appendix (including the responsibilities of the parties, types of material to be included, and filing requirements).[57]

There are also party-specific rules for brief writing. Rules 5:18 and 5:19 govern a brief in opposition to granting the appeal and the corresponding reply brief.[58] Other party-specific rules include: opening brief of the appellant (Rule 5:27), brief of the appellee (Rule 5:28), appellant's optional reply brief (Rule 5:29), and amicus briefs (Rule 5:30).[59] As you can see, there is a rule for every aspect of the appellate process.

The appellant's opening brief must set out the basic introductory tables (i.e., contents and authorities); a statement of the case and facts; the assignments of error, which must reference the specific pages in the appendix where the error has been preserved; the argument, which must include the standard of review; and "[a] short conclusion stating the precise relief sought."[60] The appellee's brief similarly requires the introductory tables, a

dana, or Arial font in at least 14-point font), *with* R. 5A:4(a) (requiring at least 12-point font, without specifying any particular font).

54. R. 5:6, 5:26. These rules apply to all supreme court briefs except those in death penalty cases, which have different timing and length requirements defined in Rule 5:22.

55. R. 5:6(c).

56. R. 5:26(i).

57. R. 5:31, 5:32.

58. R. 5:18, 5:19.

59. R. 5:27–5:30.

60. R. 5:27.

statement of the case and facts, the standard of review, and the argument, as well as any applicable assignments of cross-error.[61] If the appellant wishes to file a reply brief, it is limited to argument in reply to the contentions raised by the appellee.[62] Finally, any person may file an amicus brief with the court's permission or at the request of the court.[63] Absent that permission only the United States, the Commonwealth of Virginia, or any person with written consent of all counsel may file an amicus brief.[64]

2. Briefs in the Court of Appeals of Virginia

The rules for briefs in the Court of Appeals of Virginia are very similar to those used by the Supreme Court of Virginia. Nevertheless, some subtle differences exist, and consistent with the theme of this section, practitioners should be sure to check the appropriate rule. Rules 5A:4 and 5A:19 apply to all briefs, covering mechanics like font, margins, and spacing, as well as length and time requirements for filing.[65] Rule 5A:26 governs failure to comply with the rules, which includes a waiver of oral argument penalty for non-compliance when the other party does comply.[66] Furthermore, at the court's discretion, an appellant's failure to follow the rules may result in a dismissal, and an appellee's failure to comply may result in the court's disregarding any additional assignments of error raised by the appellee.[67] Note, however, that in recent en banc decisions, the court of appeals has relaxed Rule 5A:12, governing petitions.[68] Like the supreme court, the court of

61. R. 5:28.

62. R. 5:29.

63. R. 5:30.

64. *Id.*

65. R. 5A:4, 5A:19.

66. R. 5A:26.

67. *Id.*; *see also* Calloway v. Commonwealth, 62 Va. App. 253, 258, 746 S.E.2d 72, 74–75 (2013) (outlining the different specificity requirements for petitions and briefs, noting that 5A:12 applies to petitions and 5A:20 to briefs; that 5A:12 mandates dismissal for an insufficient assignment of error at the petition stage; and that once the petition is granted, 5A:20 applies to the assignments of error in the opening brief wherein an insufficient assignment *may* result in dismissal). In *Calloway*, the Commonwealth did not object to the sufficiency of Calloway's petition until after the petition was granted, and thus the Commonwealth waived its 5A:12 argument. 62 Va. App. at 260, 746 S.E.2d at 76.

68. *See* Brooks v. Commonwealth, 61 Va. App. 576, 586, 739 S.E.2d 224, 229 (2013) (en banc) (holding that although non-compliance with 5A:12 "do[es] not mandate the harsh sanction of dismissal," dismissal remains an option for the court when appropriate); Chatman v. Commonwealth, 61 Va. App. 618, 628–29, 739 S.E.2d 245, 250 (2013) (en

appeals also has a rule governing color-coding of covers (Rule 5A:24) and a rule addressing the appendix (Rule 5A:25).[69]

The party-specific rules in the court of appeals nearly mirror those of the supreme court. Rules 5A:13 and 5A:14 govern a brief in opposition to granting the appeal and the corresponding reply brief.[70] Other party-specific rules include: opening brief of the appellant (Rule 5A:20), brief of the appellee or guardian ad litem (Rule 5A:21), appellant's optional reply brief (Rule 5A:22), and amicus briefs (Rule 5A:23).[71] Additionally, both the supreme court and court of appeals place the same requirements on who may file amicus briefs and when they may do so.[72] Finally, it cannot be overstated that practitioners should refer to the rules pertaining to the court in which they are appearing, as there are some differences in formatting between the courts.[73]

B. *Tee Up the Issues*

The preliminary sections of the brief provide advocates the opportunity to "tee up" the issues they will analyze later in the argument section. First, the statement of the case briefly describes the procedural posture of the case. This portion can be short and to the point. Then, the statement of facts offers advocates the chance to tell the story of the case as it pertains to the issues at hand. Finally, the advocate tells the court exactly what the issues on appeal are in the assignment(s) of error section.

1. Make a Statement—Statement of the Case and Facts

The statement of the case and facts provide the first opportunity for each party to explain the case to the court. When taken together with the assignment(s) of error, the statement of the case and facts create the foundation of the party's arguments.

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banc) (holding that an appellant may amend a petition for appeal to correct a 5A:12(c)(1) deficiency, even after the deadline for filing the petition had passed, as long as the initial petition was timely filed).

69. R. 5A:24, 5A:25.

70. R. 5A:13, 5A:14.

71. R. 5A:20–5A:23.

72. R. 5A:23; *see supra* notes 62–63 and accompanying text.

73. *See supra* note 53.

By rule, the statement of the case should contain the procedural history of the case as well as the facts in the appendix as they relate to the particular assignments of error.[74] The Rules ask for "clear and concise" statements, meaning one should omit irrelevant facts and procedural filings.[75] Considering that appellate briefs have length limits, omitting irrelevant material is not only a matter of following the rules but also common sense and good strategy.

Pruning unimportant facts is particularly essential when it comes to the statement of facts. The statement of facts should include all the facts relevant to the appeal—including "bad" facts, or facts the opponent is obviously going to discuss. Likewise, irrelevant facts should simply be omitted.[76] Be careful when editing, however, to avoid cutting out *too* much. One trick to ensure that all the relevant facts are included is to keep a notepad handy when writing the argument and list each fact used in the argument section. After completing the argument section, go back to the statement of facts and check off each fact listed on the notepad. If facts on the notepad remain unchecked, add them to the statement of facts section. Facts that *were not* used in the argument section yet were present in the statement of facts should be reevaluated for relevance. Occasionally, facts that are not contained in the argument may still be necessary for context or clarity, but their sparse use is a judgment call for the writer.

The statement of facts is ultimately a story-telling exercise. There is no one correct way to organize a statement of facts section; however, a logical, easy-to-read approach is more persuasive as a matter of common sense.[77] One popular approach is to tell the story of the case in a chronological fashion, for example, by presenting a criminal case from the offense through the trial.[78] Be

74. R. 5:27, 5A:20.

75. *See id.* R. 5A:20.

76. *See* VSB HANDBOOK, *supra* note 29, at 19.

77. *See, e.g.*, Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client's to the Judge's Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 984 (2011) (stating the importance of writing a "clear, crisp, and captivating Statement of Facts").

78. *See* VSB HANDBOOK, *supra* note 29, at 19; *see also* R. 5:27-28, 5A:21 (warning that "[t]he testimony of individual witnesses should not be summarized seriatim unless the facts are in dispute and such a summary is necessary to support the appellee's version of the facts").

careful to resist the temptation to embellish facts or use argumentative language in the statement of facts—think journalist, not novelist—and save the interpretation of the facts for the argument section.[79] That being said, the statement of facts need not be entirely devoid of advocacy. One can tastefully employ subtly persuasive language when presenting the facts, but such efforts must be consistent with case law that clearly states how the facts must be viewed on appeal.[80]

2. Identify the Issues—Assignments of Error

Assignments of error are the foundation of the entire appeal and are thus central to both a petition and a brief.[81] This is the appellant's opportunity to allege particular errors made by the trial court, pointing to specific facts in support of each error alleged. The assignments of error should clearly inform both the court and opposing counsel of what ruling is being challenged and why the ruling is in error.[82] The Rules require a "clear and concise statement of the facts" pertaining to each assignment of error, including specific references to the record and appendix for support.[83] Here we see where careful preservation of the record is important, as the assignments of error must be based on the record.[84] The Rules also require parties to brief the standard of review and provide argument for each assignment of error in an organized manner, "not scattered through the brief."[85] A brief with logically constructed assignment(s) of error will lead to an efficient and effective argument section because it hones in on the specific legal issues raised by the appeal.

However, merely alleging the error is not enough for appellate success. Each assignment of error needs to be supported with ad-

79. *See* VSB HANDBOOK, *supra* note 29, at 19; James R. Wolf, *Taking a Swing at Appellate Brief Writing*, 85 FLA. B.J. 39, 42 (2011).

80. *See infra* Part II(C)(1) (discussing standards of review).

81. *See* R. 5:17(c)(1), 5:27(c).

82. Carroll v. Commonwealth, 280 Va. 641, 649, 701 S.E.2d 414, 418 (2010) (quoting Yeatts v. Murray, 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995)) (describing the purpose of assignments of error); VSB HANDBOOK, *supra* note 29, at 18.

83. R. 5A:20(d); *see also* R. 5:27(c) (requiring a "clear and exact reference to the pages of the appendix where the alleged error has been preserved").

84. *See, e.g.*, R. 5A:18.

85. R. 5A:20(e) (2014); *see* R. 5:27(d).

equate and persuasive argument in the brief.[86] The consequences for simply asserting an error without explaining it can be significant. In the "D.C. Sniper" case, John Allen Muhammad asserted 102 assignments of error, a number of which simply stated the error and pointed to a page in the record, lacking any further argument or development of the particular issues.[87] The Supreme Court of Virginia determined that Muhammad inadequately briefed several assignments of error and therefore waived the errors.[88] This is simply one of many cases that demonstrate that while it may be necessary to assert a variety of arguments in the course of vigorous representation, it is equally important to ensure that, on appeal, the brief is not cluttered with unsupported assertions that frustrate and distract the court as well as detract from the advocate's ability to focus in on the most legitimate issues. As the Court of Appeals of Virginia articulated, "[t]he Supreme Court recently announced that when a party's 'failure to strictly adhere to the requirements of Rule 5A:20(e)' is significant, 'the Court of Appeals may . . . treat a question presented as waived.'"[89]

C. *Drive the Point Home—The Argument*

A concept that seems sometimes to be overlooked is that when it comes to briefs, the best writing is the clearest writing. That means avoiding typical pitfalls like clichés, complicated "legalese," lengthy recitations of the record, and distracting typographical and grammatical errors.[90] Along with the fact that the writing should be clear, the legal argument should be equally clear. This means using intuitive headings to guide the flow of the argument, short paragraphs, succinct sentences, clear definitions of the issues at hand, and citations to appropriate authority.[91] Clarity of

86. *See* Moore v. Commonwealth, 276 Va. 747, 761, 668 S.E.2d 150, 158 (2008) (noting that the appellate system of review generally requires litigants to make the arguments in an appeal, as it is not the court's duty to step in and reframe issues poorly presented by the litigants).

87. Muhammad v. Commonwealth, 269 Va. 451, 478, 619 S.E.2d 16, 31 (2005).

88. *Id.* ("Failure to adequately brief an assignment of error is considered a waiver.") (citing Powell v. Commonwealth, 267 Va. 107, 135, 590 S.E.2d 537, 554 (2004)).

89. Parks v. Parks, 52 Va. App. 663, 664, 666 S.E.2d 547, 548 (2008) (quoting Jay v. Commonwealth, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008)).

90. *See* VSB HANDBOOK, *supra* note 29, at 18.

91. *See id.*

argument not only promotes effective advocacy but also keeps the judges from getting distracted by vagueness and incomplete research. As the Court of Appeals of Virginia once stated, "[t]he appellate court is not a depository in which the appellant may dump the burden of argument and research."[92] Finally, a strong argument will address three important factors: (1) the standard of review; (2) the key legal issues; and (3) the harm suffered, as well as the remedy requested. Addressing these factors using clear writing and precise argument supported by proper authority will present your brief, and thus your client's case, in the best light possible for appellate success.

1. Standard of Review

The standard of review can be a tricky subject for appellate advocates. In fact, entire treatises have been written to explain it.[93] However, this legal principle is an essential component of the brief and is critical to the analysis contained in the argument. Consequently, an understanding of the ins and outs of specific standards of review will serve appellate advocates well as they seek their intended result in the appellate court.

Why is the standard of review important? The appellate court gives varying degrees of deference to the circuit court and jury based on the applicable standard of review. Understanding how this deference affects the case is vital to structuring the appellate argument. For example, the appellee who just won at trial will rely on the well-established standard of review that gives significant deference to the decision below. Additionally, with regard to certain circuit decisions, the appellee will be entitled to deference to the circuit court under an abuse of discretion standard. On the flip side, the appellant trying to get the circuit court's ruling reversed will benefit from a standard of review that provides for independent, or de novo, review by the appellate court, such as in a case challenging interpretation of a statute. These standards also should guide decisions regarding which alleged errors to pursue on appeal.

92. Jones v. Commonwealth, 51 Va. App. 730, 734, 660 S.E.2d 343, 345 (2008) (quoting People v. Trimble, 537 N.E.2d 363, 364 (Ill. App. Ct. 1989)).

93. *See, e.g.*, 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (4th ed. 2010).

There are effectively three categories of standards of review[94] with general rules for when they apply: (1) de novo review for errors of law;[95] (2) "plainly wrong," or "clearly erroneous," review for errors of fact;[96] and (3) abuse of discretion review for evidentiary rulings and narrow "arbitrary or capricious" errors by the circuit court.[97] Additionally, the courts will generally give substantial deference to the prevailing party below.[98]

De novo review is the least deferential to the circuit court and essentially operates as a "do-over" where the appellate court takes the evidence in the record and reviews anew the application of the law to the evidence.[99] Clear error review, by contrast, tasks

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94. *See* SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n, 718 F.2d 365, 381–83 (Fed. Cir. 1983). Each standard encompasses varying numbers of sub-standards, a full discussion of which is beyond the scope of this article.

95. *See, e.g.*, Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 62 Va. App. 678, 708, 752 S.E.2d 554, 568 (2014).

96. *See, e.g.*, United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); Young v. Commonwealth, 275 Va. 587, 590–91, 659 S.E.2d 308, 310 (2008) ("On appeal, great deference is given to the factfinder who, having seen and heard the witnesses, assesses their credibility and weighs their testimony. Thus, a trial court's judgment will not be disturbed on appeal unless it is plainly wrong or without evidence to support it.") (citing Walton v. Commonwealth, 255 Va. 422, 426, 497 S.E.2d 869, 871 (1998)). Technically, under Virginia law, questions of fact are binding on appeal unless "plainly wrong." VA. CODE ANN. § 8.01-680 (Repl. Vol. 2007). "Clear error," by contrast, "'is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure[] and applies when reviewing questions of fact' *in the federal system*." McGee v. Commonwealth, 25 Va. App. 193, 198 n.1, 487 S.E.2d 259, 261 n.1 (1997) (en banc) (quoting Ornelas v. United States, 517 U.S. 690, 694 n.3 (1996)) (emphasis added). In practical terms, however, these standards are viewed as synonymous. *See, e.g.*, Little v. Cooke, 274 Va. 697, 714, 652 S.E.2d 129, 139 (2007); Mills v. Commonwealth, 14 Va. App. 459, 468, 418 S.E.2d 718, 723 (1992).

97. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *rev'd on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977); James v. City of Falls Church, 280 Va. 31, 42, 694 S.E.2d 568, 574 (2010) (defining "arbitrary and capricious" acts as "'willful and unreasonable' and taken 'without consideration or in disregard of facts or law or without determining principle,' or when the deciding body 'departed from the appropriate standard in making its decision'") (citations omitted).

98. *See, e.g.*, Congdon v. Congdon, 40 Va. App. 255, 258, 578 S.E.2d 833, 835 (2003) (stating that in reviewing a trial court's decision on appeal, courts view the evidence in the light most favorable to the prevailing party below, granting it the benefit of any reasonable inferences, and disregarding the appellant's conflicting evidence) (citing Wactor v. Commonwealth, 38 Va. App. 375, 380, 564 S.E.2d 160, 162 (2002); Wright v. Wright, 38 Va. App. 394, 398, 564 S.E.2d 702, 704 (2002); Donnell v. Donnell, 20 Va. App. 37, 39, 455 S.E.2d 256, 257 (1995)).

99. *See* Lewis v. Lewis, 53 Va. App. 528, 536, 673 S.E.2d 888, 892 (2009) ("On interpretations of the law . . . , we review the trial court's ruling *de novo*, without deference to the prevailing holding below."); *see also* Sharpe v. Bell, 593 F.3d 372, 375 (4th Cir. 2010) (using the phrase "*de novo* do-over"). To be clear, the *de novo* "do-over" is not a new trial but rather a fresh examination of the trial court's application of the law to the facts as found in the trial court. *See SSIH Equip.*, 718 F.2d at 381.

the appellate court with examining the trial court's findings for a "definite and firm" showing that it made a mistake.[100] For example, in a traffic case in which one witness claimed the light was red but other witnesses testified that the light was green and video evidence confirms that the light was green, a circuit court finding that the light was red is very likely to be deemed "clearly erroneous" by the appellate court. Finally, the Supreme Court of Virginia has identified three general types of abuse of discretion: (1) when the court fails to consider a factor that should have been given "'significant weight'"; (2) when the court gives significant weight to "'irrelevant or improper factor[s]'"; and (3) even if all the factors considered are proper, the court clearly errs in how it weighs them.[101] As a general rule, rulings on voir dire,[102] rulings on the admissibility of evidence or witnesses,[103] and any other matter decided at a trial court's discretion[104] will be analyzed under the abuse of discretion standard.

General rules are just that—general—so be sure to research what standard of review is most appropriate for your case. In Virginia, either the "law of the case" or applicable statutes will dictate the standard of review.[105] For example, in civil or criminal cases in which the appellant wishes to appeal on the ground that the decision of the circuit court or jury was contrary to the evidence, the Virginia Code sets out the standard of review: "[t]he judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."[106]

Standards of review are frequently found in published opinions and may be applied easily to analogous cases. Sometimes, howev-

100. *U.S. Gypsum*, 333 U.S. at 395.

101. Lawlor v. Commonwealth, 285 Va. 187, 213, 738 S.E.2d 847, 861 (2013) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 353, 717 S.E.2d 134, 137 (2011)).

102. *Id.* at 212, 738 S.E.2d at 861.

103. *Id.* at 245, 738 S.E.2d at 880.

104. *Id.* at 212–13, 738 S.E.2d at 861.

105. *See, e.g.*, Miller-Jenkins v. Miller-Jenkins, 276 Va. 19, 26, 661 S.E.2d 822, 826 (quoting Steinman v. Clinchfield Coal Corp., 121 Va. 611, 620, 93 S.E. 684, 687 (1917)) (describing the "'law of the case' doctrine").

106. VA. CODE ANN. § 8.01-680 (Repl. Vol. 2007 & Cum. Supp. 2014); *see* Davison v. Commonwealth, 18 Va. App. 496, 502, 445 S.E.2d 683, 686 (1994) ("Unless the finding of the trial court is plainly wrong or without evidence to support it, we will not disturb its findings.") (citing VA. CODE ANN. § 8.01-680).

er, it is difficult to determine the standard of review and that matter becomes a part of the argument on appeal. Occasionally, statutes set out specific standards of review. For instance, the standard of review for appeals from administrative decisions is defined in the Virginia Administrative Process Act.[107]

It is critical for the appellate advocate to identify the proper standard of review in his or her case, set it out clearly in the brief, provide legal authority for its use, and apply it in the analysis in the argument portion of the brief. Application of a faulty standard of review is likely to be fatal to the argument. If the standard of review is not clear, legal arguments suggesting the proper standard should be provided by the advocate. In any case, the standard of review is the foundation upon which the argument portion of the brief is built.

2. Identifying the Key Legal Issues

An appellate judge in Florida took a survey of his fellow appellate judges concerning the number of issues one ought to raise in a brief.[108] The "overwhelming majority" felt it appropriate to raise three or four issues at the most, and the polling judge added that he rarely saw cases with more than three key legal issues.[109] He concluded that "[u]nnecessary issues in briefs, like unnecessary walks in baseball, will come back to haunt you."[110] Good appellate advocacy is about quality over quantity—figuring out which issues are the keys to a winning argument, and then arguing them as effectively as possible without distraction. The United States Supreme Court clearly agrees that "[t]his process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy."[111] The Court of Appeals of Virginia also makes this point: "The 'throw everything at the wall and hope something sticks'

107. VA. CODE ANN. § 2.2-4027 (Cum. Supp. 2014); Turner v. Jackson, 14 Va. App. 423, 429–30, 417 S.E.2d 881, 886 (1992) ("[T]he scope of review is limited to ascertaining whether there was substantial evidence in the agency record to support the [agency's] decision.").

108. Wolf, *supra* note 79, at 41.

109. *Id.*

110. *Id.*

111. Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751–52 (1983)).

approach . . . is as unappreciated as it is ineffective. If the parties were unable to find legal support for any of their eleven questions presented, or their numerous sub-questions, they should not have included those questions presented in their brief."[112] It is logical that the commonsense approach of clear, concise, well-tailored argument, unburdened by needless distraction, is going to be more effective before appellate courts than an unwieldy "shotgun" approach.[113]

So, which issues are "key" issues? The best way to determine whether an issue is key is to look at the assignments of error. If an issue does not fall within the assignments of error, it is not "key" to the appeal. Another way to filter out unimportant issues is to look for harmless error. In Virginia courts, an error is generally considered harmless if it had little to no effect on the fact finder or if the merits of the case were unaffected.[114] The rationale here is as sensible as it is obvious; you may have a winning argument as to several issues in the case, but if winning the appeal on those issues will not change the outcome, you have wasted your time—time that could be spent litigating an issue that may actually affect the outcome of the case.

3. Know the Available Remedies

Throughout the appellate process, the appellant is asking the court to do something particular, such as granting a particular writ, granting a stay, reversing and dismissing a case, or reversing and remanding a case. The appellant needs to be clear in this request. Simply asserting that an error occurred without asking the court to do something about it is not a recipe for success. The Rules only require a precise statement of the relief sought in the conclusion of the petition and the brief.[115] Determining the remedy is related to the notions of key legal issues and harmless error. It also relates back to the earlier discussion on jurisdiction, specifically that the appellate court in which one chooses to lodge an

112. Fadness v. Fadness, 52 Va. App. 833, 850–51, 667 S.E.2d 857, 866 (2008).

113. *Cf.* Fullman v. Graddick, 739 F.2d 553, 557 (11th Cir. 1984) (discussing a "'shotgun'" approach to litigation at the summary judgment stage).

114. *See* VA. CODE ANN. § 8.01-678 (Rep. Vol. 2007 & Cum. Supp. 2014); Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731–32 (2001); Sargent v. Commonwealth, 5 Va. App. 143, 154, 360 S.E.2d 895, 901 (1987).

115. VA. SUP. CT. R. 5:27(e), 5A:12(c)(6) (2014).

appeal will be determined by the nature of the appeal.[116] Recall that the Supreme Court of Virginia can grant writs of habeas corpus, mandamus, and prohibition and hears civil appeals through a petition process.[117] The Court of Appeals of Virginia generally has jurisdiction over criminal, domestic, workers' compensation, and administrative appeals.[118] So, the initial decision about which court has jurisdiction over the appeal plays a role in the remedies available to the party. Finally, as winners below, the appellees will not be seeking a "remedy" per se; instead, they will be arguing for the appellate court to affirm the ruling below and in appropriate circumstances may suggest cross-error. Consequently, this section will focus on the remedies available to appellants.

a. Writs

One type of remedy available to appellants is a remedial writ, which generally comes in three types: writs of mandamus, writs of prohibition, and writs of habeas corpus.[119] The Supreme Court of Virginia is the appellate court with the ability to grant these writs.[120] The writ of habeas corpus (literally "that you have the body") is used as a procedural remedy allowing state or federal prisoners an additional method of collateral attack of their convictions.[121] A writ of mandamus (Latin for "we command") or prohibition is available for appellants seeking to have the court command a lower court or other governmental officer or body to do (or not do) something.[122] These writs are "extraordinary remed[ies]"[123] and rare in Virginia.[124]

116. *See supra* notes 7–9 and accompanying text.

117. VA. CODE ANN. §§ 17.1-309 to -310 (Repl. Vol. 2010); *see supra* note 7 and accompanying text.

118. *See supra* note 8 and accompanying text.

119. *See generally* VA. CODE ANN. §§ 8.01-635 to -668 (Repl. Vol. 2007 & Cum. Supp. 2014) (containing the related statutes covering extraordinary writs).

120. *Id.* § 17.1-309 to -310 (Repl. Vol. 2010).

121. *Habeas Corpus*, LEGAL INFO. INST., CORNELL U. L. SCH., http://www.law.cornell.edu/wex/habeas_corpus (last visited Oct. 10, 2014).

122. BLACK'S LAW DICTIONARY 1046–47 (9th ed. 2009).

123. Richlands Med. Ass'n v. Commonwealth, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985).

124. *See* L. Steven Emmert, *Implications of* In Re Horan, Commonwealth's Attorney—*For Foreign Nationals and U.S. Citizens Alike*, VA. APP. NEWS & ANALYSIS (2006), http://www.virginia-appeals.com/aspbite/categories/index.asp?intCatID=132.

b. Reverse and Dismiss or Reverse and Remand

Perhaps most commonly, an appellant seeks to have the appellate court reverse the judgment of the lower court and then either dismiss the case or remand it for further proceedings. This option is available to appellants in both the Supreme Court of Virginia and the Court of Appeals of Virginia.[125] The appellate court may reverse a case in whole or in part, and has the flexibility to enter a final judgment upon the merits if the facts are such "as to enable the court to attain the ends of justice."[126] A well-preserved record and an accurate statement of the facts are critical in enabling the court to enter a final judgment. Absent these items, an appellant may not get a final judgment dismissing the case.

c. Injunctions

Injunctions are yet another extraordinary remedy and are granted with judicial discretion, typically requiring proof of irreparable harm to the aggrieved part and no adequate remedy at law.[127] Judges generally use injunctions to preserve the status quo or to stop an ongoing tort or trespass.[128] By statute, whenever a circuit court grants, refuses, dissolves, or refuses to adjust an injunction, the aggrieved party has fifteen days from the court's order to appeal that decision through a petition to a judge or justice of either appellate court depending upon which court has appellate jurisdiction over the underlying case.[129] This expedited process is used only for temporary injunctions, as any permanent injunction would be considered a final judgment.[130]

125. *See* VA. CODE ANN. § 8.01-681 (Repl. Vol. 2007).

126. *Id.*

127. *See* Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 60–61, 662 S.E.2d 44, 53 (2008).

128. *Injunction*, LEGAL INFO. INST., CORNELL U. L. SCH., http://www.law.cornell.edu/wex/injunction (last visited Oct. 10, 2014).

129. VA. CODE ANN. § 8.01-626 (Cum. Supp. 2014).

130. *See* L. Steven Emmert, *Virginia's Standard for Granting Preliminary Injunctions (Why Isn't There One?)*, VA. APP. NEWS & ANALYSIS (Aug. 13, 2013), http://www.virginia-appeals.com/essay.aspx?id=220.

III. ORAL ARGUMENT

The petitions or briefs have been filed, an appearance is scheduled on the docket, so now what? How one prepares for oral argument before a writ panel, merits panel, or the full court is as much art as it is science. This section briefly addresses the technical aspects of the procedure involved in getting to oral argument and closes with some suggested "dos" and "don'ts" to improve delivery of an oral argument. It is important to understand, however, that at the appellate stage of the justice system, a phenomenal petition or brief and a wonderful oral argument will not ensure a win but will ensure excellent representation of your client.

A. *Is This Thing On?—How to Be "Heard" at Oral Argument*

As with any part of the appellate process, being awarded the opportunity to be heard before the court requires knowledge of the basic rules on the subject and compliance with those rules. A petitioner has the right to present oral argument, in person or by phone, at the early stage of the proceeding when attempting to convince the court to grant the appeal.[131] This appearance must be requested specifically in the certificate at the end of the petition.[132] Of course, the petitioner may rest on the petition.[133] Additionally, appearing in person provides counsel with the opportunity to answer questions that a judge or justice may have about the case. Appellees are not generally permitted oral argument at the petition stage.[134] Instead, they must rely on a brief in opposition to the appeal.[135]

If the petition is granted or if the court through original jurisdiction or as a matter of right decides to hear an appeal, then a briefing schedule must be followed and the court clerk will ultimately schedule oral arguments.[136] The rules govern this process. Once the court grants the appeal, counsel must ensure that briefs

131. VA. SUP. CT. R. 5:17(j), 5A:12(g) (2014).
132. R. 5:17(i)(5), 5A:12(c)(8).
133. *See* R. 5:17(j), 5A:12(g).
134. R. 5:17(j)(1); *see* R. 5A:12(g).
135. R. 5:18, 5A:13.
136. R. 5:33(a).

and other filings accord with the Rules. Failure to comply with the Rules may in some instances cause an attorney to forfeit oral argument.[137] Again, the importance of the Rules of the courts cannot be overstated.

The rules for both the Supreme Court of Virginia and the Court of Appeals of Virginia are very similar regarding oral argument.[138] Unless otherwise directed by the court, each side has fifteen minutes to argue its case.[139] The allotted time may be divided among counsel for the same side at their discretion (however, in the court of appeals, only one counsel may present the opening argument for the appellant).[140] Amicus curiae may argue with leave of the court upon the joint written request of the amicus curiae and the party it supports, as the supporting party will be yielding a portion of its time to the amicus curiae.[141]

Oral advocacy is a skill and, honestly, it too is an art. The advocate must think strategically and maximize use of the allotted time. Do not worry about getting to every argument raised in the briefs. A party does not waive an argument simply because the point is not addressed in oral argument; it just means that the advocate relies on the written argument to support it.[142]

B. *How to be Persuasive in a Short Amount of Time— Suggested Dos and Don'ts of Oral Argument*

The whole point of oral argument is to convince the court that it should either affirm or reverse the decision below. While an oral argument may not prove decisive, it offers one more opportunity to zealously advocate for a client. It also allows counsel to highlight the strengths of the case for his or her position and the weaknesses of the opposition.[143] Good advocacy requires both in-

137. R. 5:26(i), 5A:26.

138. *Compare* R. 5:33 (setting forth the rules for oral argument in the Supreme Court of Virginia), *with* R. 5A:28 (setting forth the rules for oral argument in the Court of Appeals of Virginia). Nevertheless, always re-read all the rules for the specific court when your appeal has been granted.

139. R. 5:33(b), 5A:28(b).

140. *Id.*

141. R. 5:33(d), 5A:28(d).

142. R. 5:33(e), 5A:28(e).

143. *See* VSB HANDBOOK, *supra* note 29, at 24; *see* David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for*

depth preparation and quality presentation by an advocate.[144] Further, it involves different preparation than for an argument to a trial court or jury.

In order to be prepared for argument, an advocate must know all of the materials in the briefs, the record, and the appropriate authorities.[145] Fumbling through various materials to try to find a fact or a case that should be available upon immediate recall is poor form and a terrible way to use your very limited time before the court. Further, reading a pre-written script with your head down in your notes will not impress the court or your client. During argument, the court will generally want to engage you in a dialogue through questions. You can only appropriately participate in this interaction with the court if you have a complete understanding of the case.[146]

Thorough knowledge of the record and the ability to either distinguish or analogize the facts of your case as they relate to the facts of important cases can be crucial. Indeed, a judge may have been prepared to go your way until a damaging case came up that you could not distinguish.[147] Conversely, a judge might think that a particular precedent does not apply to your case until you convince the judge that it does control. Also, as discussed in the section on briefs, a sound knowledge of the applicable standard of review is important because oftentimes the difference between de novo and plain error can make or break a case.[148] Finally, recognizing exactly what it is you are asking the court to do and then clearly stating that request is crucial to a good argument.[149] If you are clear about what you want the court to do, you can then prepare by putting yourself in the court's shoes and trying to think of

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Reform, 13 J. APP. PRAC. & PROCESS 119, 140 (2012); J. Thomas Greene, *From the Bench: Oral Argument in the District Court*, 26 LITIG. 3, 3–4 (2000).

144. *See* VSB HANDBOOK, *supra* note 29, at 24.

145. *Id.* at 25.

146. *See* Stephen J. Dwyer, Leonard J. Feldman & Robert G. Nylander, *Effective Oral Argument: Six Pitches, Five Do's, and Five Don'ts from One Judge and Two Lawyers*, 33 SEATTLE U. L. REV. 347, 356–57 (2010); Richard A. Posner, *From the Bench: Convincing a Federal Court of Appeals*, 25 LITIG. 3, 62–63 (1999).

147. *See* Dwyer, Feldman & Nylander, *supra* note 146, at 353.

148. *See* VSB HANDBOOK, *supra* note 29, at 25; *see also supra* Part III(C)(1).

149. *See* VSB HANDBOOK, *supra* note 29, at 25.

all the questions the court will have regarding the position you propose.[150]

Moot courts or practice arguments are a great way to test an argument and make sure all of the preparatory pieces are in place before heading to court.[151] If you have the luxury of time, setting aside a few hours to observe the appellate court can be an invaluable learning experience. Let's face it, though; oftentimes counsel simply does not have the time or resources to engage in a full blown practice or hours of observation. If that is the case, practice in your mind and think about how you will deploy the written outline of your argument. Consider what questions the court is likely to have and decide how best to answer them. Be your own critic.

All the preparation in the world will be for naught if it is not bolstered by a competent presentation. This begins with showing up for court in a timely manner and in professional attire.[152] If you are the appellant, you will want to ensure that you reserve an adequate but brief amount of rebuttal time; otherwise you lose the opportunity to have the last word. Remember, you can always waive your rebuttal if the appellee has offered nothing to sway the court or that dictates a response or clarification.[153] A brief introduction, such as "May it please the court, Denny Crane on behalf of XYZ, before the court in this case involving ABC," is really all one needs before beginning the argument.[154] Eye contact and clarity are key to your opening. These first few seconds of argument are important and present an opportunity for the advocate to give the court a road map of the argument, laying out what you want and why you want it.[155]

After the introduction and a very brief road map, it is likely that the judges or justices will begin asking any questions that concern them. The key here is to remain respectful and conversational—don't "speechify." Additionally, you must answer the

150. *See* Dwyer, Feldman & Nylander, *supra* note 146, at 351–52; Posner, *supra* note 146, at 3.

151. *See* VSB HANDBOOK, *supra* note 29, at 26; Posner, *supra* note 146, at 63.

152. *See* Posner, *supra* note 146, at 62.

153. *Id.*

154. *See* VSB HANDBOOK, *supra* note 29, at 26.

155. *See* Greene, *supra* note 143, at 4.

court's questions.[156] You should generally answer "yes," "no," or "maybe," and then explain. The court expects the answer before any explanation. This also allows for stronger advocacy. If you don't know an answer, definitely do not make something up. This should be obvious, but surprisingly it is not. Guessing or making up an answer will destroy your credibility with the court and may hurt your client and your future.[157] Your argument has one purpose—to provide the court with the correct information. A collateral impact will hopefully be to convince the court to rule your way. Consequently, worry more about following the court's line of questioning than following your outline. Remember, you are the only one who knows what you intended to cover, so if you do not get through your complete outline, you are the only one who will be aware of it. Finally, while argument can be passionate and the stakes may be high, always retain your personal decorum. This means you should not talk over the court, raise your voice at the court, or personalize the arguments.[158] Avoid sarcasm and ridicule, and always use "Your Honor" when addressing a judge or justice.[159]

A quote from the late Chief Justice Rehnquist provides a good way to summarize a discussion about oral advocacy:

> [T]he All American oral advocate . . . will realize that there is an element of drama in an oral argument. . . . But she also realizes that her spoken lines must have substantive legal meaning. . . . She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions. . . . She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and not an impression of *fin de siècle ennui*.[160]

In other words, you are not a mere robot reciting the law before the court, nor are you competing for a role in the movies. Quality presentation of a sound legal argument is the goal.

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156. *See id.*

157. *See id.*; Posner, *supra* note 146, at 63.

158. *See* Dwyer, Feldman & Nylander, *supra* note 146, at 357; Greene, *supra* note 143, at 4; *see also* VSB HANDBOOK, *supra* note 29, at 28.

159. *Id.*

160. Dwyer, Feldman & Nylander, *supra* note 146, at 359 (quoting WILLIAM H. REHNQUIST, THE SUPREME COURT 248 (1987)). "*Fin de siècle ennui*" is a French expression used here to refer to the "aura of boredom" present in French art at the end of the nineteenth century. Walter Laqueur, *Fin-de-siècle: Once More with Feeling*, J. CONTEMP. HIST., Jan. 1996, at 5, 5–6.

CONCLUSION

Appellate advocacy can be one of the most exciting and exhilarating experiences in a lawyer's career. It is not every day that one has the chance to advocate for a specific interpretation of the law or change the course of a case through high-level legal argument before the Commonwealth's highest courts. This article is intended to help attorneys make the most of these opportunities. Hopefully, some of the pointers included in this article will prove useful for appellate advocates of all experience levels, and in particular those advocates appearing before Virginia's appellate courts. The clear moral of the story is, when in doubt about procedure, just remember to check the Rules, then check them again; when in doubt about the law, read and review the cases. When presenting to an appellate court–either in writing or at an oral argument–follow the Rules, be professional when advocating for your client, and know the facts, law, and record applicable to your case. Appellate advocacy is another opportunity to zealously represent your client.

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