

# ARTICLES

## APPELLATE LAW

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Several years ago, the idea of a purely appellate practitioner was almost unheard-of in Virginia, outside government circles.<sup>1</sup> Appellate practice was widely regarded by the practicing bar as a necessary adjunct to trial practice, not as a viable separate field in which to earn a living.<sup>2</sup>

Today, the field is experiencing a modest burst of growth. Senior Justice Elizabeth B. Lacy, addressing a symposium sponsored by the Virginia State Bar's Appellate Practice Committee in 2009, noted "the rise of an appellate bar" in the Commonwealth

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1. The Solicitor General of the Commonwealth represents Virginia in purely appellate matters. See Letter of Transmittal from Attorney General Kenneth T. Cuccinelli to Governor Robert F. McDonnell (May 1, 2010), in COMMONWEALTH OF VIRGINIA OFFICE OF THE ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL, at v (2009). The position has existed since 1999 and was presumably created in response to a suggestion from former Chief Justice William Rehnquist that states should begin grooming appellate specialists for appearances before the Supreme Court. See *Earley Taps Chesterfield Republican for New Post*, RICH. TIMES-DISPATCH, Sept. 25, 1999, at B4. The United States has had a Solicitor General since 1870. PETER N. UBERTACCIO III, LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL AND EXECUTIVE POWER 1 (2005).

2. See Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 518-22 (2010) (noting that, while not as profitable as trial practice, market dynamics induced firms to develop appellate practices as an adjunct to more traditional litigation services); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1498-99 (2008) (discussing the growth of an economically feasible and highly profitable practice of representing corporate clients in the Supreme Court of the United States).

and expressed the view that this was a healthy development.<sup>3</sup> By one modern measure, interest in this field of law in Virginia has clearly expanded, as the number of websites devoted to appellate practice—of which there were none as recently as late 2004—continues to grow.

What changed? And where are we headed? This article will explore the evolution of appellate law in the courts of the Commonwealth over the past few years, and will offer some views as to where we are going.

## I. RECENT HISTORY

### A. *The State of Appellate Advocacy*

In 2005, when the author of this article was selected to head the Virginia State Bar's appellate practice group, the opinions of most appellate jurists on the quality of advocacy they saw might not be repeatable in polite company. I made a point of speaking with as many such judges and justices as possible, and the response I got was disheartening. One question I asked every jurist who would listen was, "What can we lawyers do in order to be better advocates in your court?" Most of the answers began with something like, "Well, for one, they should read the rules."

Appellate rules are not exactly hard to find, and they are, in truth, simpler than the complex array of rules that apply in trial court. A trial practitioner must master the (as yet uncodified) rules of evidence,<sup>4</sup> plus those relating to civil procedure<sup>5</sup> and discovery,<sup>6</sup> in addition to knowing the substantive law of the case she is to argue. In contrast, appellate rules are fewer in number

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3. Interview by Joe Blackburn with The Hon. Elizabeth B. Lacy, Senior Justice, Supreme Court of Va., in Richmond, Va. (Sept. 28, 2010) (on file with author). The development of an appellate-practice focus on the national level has also been recognized recently. See Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 176–77 (2007).

4. The judicial council has proposed enactment of an evidentiary code for Virginia, modeled after the Federal Rules of Evidence but incorporating Virginia's common-law evidentiary rules. Peter Vieth, *Is Evidence Code Going Off the Rail?*, VA. LAW. WKLY., Mar. 16, 2009, at 5. The suggestion has consistently failed to gain traction. *Cf. id.*

5. See VA. SUP. CT. R. pt. 3 (Repl. Vol. 2010) (outlining rules relating to practice and procedure in civil actions).

6. See *id.* R. pt. 4 (Repl. Vol. 2010) (outlining discovery rules).

and far less complex.<sup>7</sup> So why would practitioners' legal dexterity be poorer with the simpler appellate rules?

There is a two-part answer to this question. As noted above, practice in the appellate courts has long been regarded as nothing more than an adjunct to trial practice.<sup>8</sup> And since the average trial lawyer will handle a great many trials and comparatively few appeals, many lawyers, faced with the task of allocating their scarce time and their continuing legal education ("CLE") budgets, opted to attend training programs that would be of greater benefit to them—those relating to trial work. There has accordingly been a relatively small demand for appellate training programs.

The second part of this answer is one that any Economics 101 student could give: With little demand, there was no incentive for CLE providers to supply programs geared toward improving appellate advocacy. Virginia CLE, a nonprofit organization that is the largest provider of CLE programs in Virginia, once offered a biennial appellate-practice program, but shelved it after the 2004 presentation due to poor attendance.

This dearth of training has sometimes produced vexing results for practitioners. Judge Robert J. Humphreys of the Court of Appeals of Virginia often relates the story of an attorney whose advocacy was so poor that a court of appeals panel determined to sanction him by requiring him to attend a specified number of hours of training in Virginia appellate advocacy.<sup>9</sup> Soon thereafter, the lawyer wrote to the court and told it that he was unable to comply with this directive, because he found that no such training programs existed.<sup>10</sup>

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7. See VA. SUP. CT. R. pts. 5, 5A (Repl. Vol. 2010) (outlining rules regulating appeals to the Supreme Court of Virginia and the Court of Appeals of Virginia as amended on April 30, 2010).

8. See Hungar & Jindel, *supra* note 2, at 518–22; Lazarus, *supra* note 2, at 1498–99.

9. L. Steven Emmert, *Training the Appellate Advocate*, VSB LITIG. NEWS, Winter 2006, at 16, available at <http://www.vsb.org/docs/sections/litigation/Winter%202006.pdf>.

10. *Id.*

### B. *The State Bar's Training Initiative*

Faced with the need to first generate demand in order to create the need for supply, the Appellate Practice Committee<sup>11</sup> began in late 2005 to offer a series of free programs geared specifically towards teaching appellate advocacy.<sup>12</sup> The programs were called symposia, and attendance was intentionally limited so as to provide an interactive environment between the presenters and the audience.<sup>13</sup> The symposia, offered twice a year at varying locations around the state, focused on one narrow aspect of appellate practice at a time and generally ran no more than three hours.<sup>14</sup>

These programs gradually caught on. As lawyers appreciated the opportunity to improve their appellate skills in discrete segments without spending any money or devoting an entire day to attend, the bar began to pique lawyers' interest in the subject. The committee continues to offer these symposia twice a year on various appellate topics.<sup>15</sup>

Virginia CLE noticed the increase in interest, and elected to reinstate its biennial program beginning in April 2009. Local bar associations began to emphasize appellate practice in their training programs and bench/bar conferences.<sup>16</sup> Statewide bar associations, such as the Virginia Trial Lawyers' Association, began to

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11. The group was known as the Appellate Practice Subcommittee until early 2009. See VA. STATE BAR, ANNUAL REPORT OF THE LITIGATION SECTION (2008–2009), <http://www.vsb.org/site/sections/litigation/view/Annual-Report> (last visited Oct. 30, 2010).

12. See VA. STATE BAR, 68TH ANNUAL REPORT FOR THE PERIOD JULY 1, 2005–JUNE 30, 2006, at 22 (2005–2006), [http://www.vsb.org/docs/68ann\\_report.pdf](http://www.vsb.org/docs/68ann_report.pdf) (discussing appellate symposia during 2005 and 2006) [hereinafter 68TH ANNUAL REPORT].

13. See VA. STATE BAR, 69TH ANNUAL REPORT FOR THE PERIOD JULY 1, 2006–JUNE 30, 2007, at 24 (2006–2007), <http://www.vsb.org/docs/69AP/2007annual-report.pdf>.

14. See 68TH ANNUAL REPORT, *supra* note 13, at 23 (showing two annual symposia); see also VA. STATE BAR, FOURTH APPELLATE PRACTICE SYMPOSIUM—CRIMINAL APPEALS, <http://www.vsb.org/site/events/item/fourth-appellate-practice-symposium-criminal-appeals> (last updated Apr. 9, 2007).

15. See Gregory J. Haley, *Letter from the Chair*, VSB LITIG. NEWS, Fall 2009, at 2, <http://www.vsb.org/docs/sections/litigation/LNews%20Fall%202009.pdf> (detailing two presentations by the Appellate Committee in 2009); see also Jennifer L. Parrish, *Getting To Know the Litigation Section*, VA. LAW., Feb. 2009, at 27 (noting the formation of two new committees to plan future symposia).

16. See, e.g., *Online Store*, FAIRFAX BAR ASS'N, <http://www.fairfaxbar.org/storeindex.cfm> (last visited Oct. 30, 2010) (advertising a CLE packet focusing on appellate practice).

devote presentation slots in their annual meetings to appellate programs.<sup>17</sup> The long-stalled train had finally begun to roll again.

### C. *The Appellate Summit*

In 2008, the Appellate Practice Subcommittee channeled its energy into producing a meeting of the state's premier appellate lawyers.<sup>18</sup> The half-day program featured advanced-level CLE presentations, and provided an opportunity for interaction among the growing number of lawyers with an interest in appellate practice.<sup>19</sup> The summit was so successful—attendance exceeded expectations by more than one hundred percent—that the committee expects to produce another one in late 2010 or early 2011, and will likely make these gatherings permanent fixtures on the CLE and social calendars.<sup>20</sup>

### D. *Forced Improvement*

One means by which most appellate briefs can be readily improved is by shortening them. Practitioners, ever anxious about being sued for omitting a potential winning argument, have never taken this advice to heart, and have traditionally filed briefs that jurists, the ultimate consumers of those briefs, regard as far too long.<sup>21</sup> To address this in a thinly veiled way, the Supreme Court

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17. See VA. TRIAL LAW. ASS'N., LEGACY OF LIBERTY CONVENTION AGENDA (Feb 3, 2010), <http://www.vtla.com> (search "annual meeting" in search bar; follow "Website Documents" hyperlink; follow "Agenda for 2010 Convention" hyperlink) (outlining the agenda for the 2010 Annual Convention, including an appellate practice section panel).

18. See *2008 Virginia Appellate Summit*, VA. STATE BAR, <http://www.vsb.org/site/events/item/2008-virginia-appellate-summit> (last updated Aug. 1, 2008) (inviting all Virginia appellate lawyers to attend).

19. *Id.* (discussing the schedule and location for the 2008 summit).

20. See Haley, *supra* note 15, at 2 (mentioning 2010 Richmond Appellate Summit); see also Parrish, *supra* note 15, at 27 (highlighting the formation of two committees to plan future summits).

21. Appellate jurists commonly complain that the briefs they are forced to read are far too long. For example, one outstanding treatise offers this advice:

Having lost, you are understandably disturbed. Not only are you disappointed, but you are angry—a normal reaction. You want to vent your feelings by throwing in not only the kitchen sink, but the plumbing, and street sewers as well. If you do this, and many lawyers do, you make a devastating mistake. Cool it. Calm down. Act like a lawyer, not like a client. Analyze carefully to ascertain where there is an arguable question of trial court error, not simply an imaginable one.

of Virginia in 2008 began requiring that briefs, motions, and petitions be filed in at least fourteen-point type, but did not increase the page limits.<sup>22</sup>

This change did not produce a wholesale improvement in the quality of the briefs filed in the supreme court, but at a minimum it required lawyers who really wanted to be verbose to engage in a form of triage, to weed out extraneous arguments that just would not fit within the page limits anymore.

## II. CURRENT EVENTS

### A. *Rule Changes*

Effective July 1, 2010, Virginia's appellate rules of court have been overhauled. Acting on a series of recommendations from the court's Appellate Rules Advisory Committee, the supreme court made wholesale changes in a number of the rules that govern practice in the Supreme Court of Virginia and in the Court of Appeals of Virginia.<sup>23</sup> One stated purpose of the rules is to make them more user-friendly, so practitioners—presumably those who have not attended appellate CLE programs lately—will be better able to navigate what was once regarded as a minefield.<sup>24</sup> For example, the previous hard sixty-day limit on filing a transcript is softened slightly, by giving an appellant a ten-day window to supplement, correct, or modify a noncompliant transcript.<sup>25</sup>

Another purpose is to make the courts a bit more transparent. For example, the new rules set out how an appellee can receive

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(2d ed. 2003).

22. Order Amending Rules 5:6, 5:20A, 5:26, 5:27, 5:28, 5:29, and 5:39A, Rules of the Supreme Court of Virginia (Nov. 30, 2007) (effective Feb. 1, 2008), *available at* [http://www.courts.state.va.us/courts/scv/amendments/2008\\_0201\\_rules.pdf](http://www.courts.state.va.us/courts/scv/amendments/2008_0201_rules.pdf). The change described here applies only in the supreme court; pleadings in the Court of Appeals of Virginia may still be filed using a minimum twelve-point font. VA. SUP. CT. R. pt. 5, R. 5A:4 (Repl. Vol. 2010).

23. Order Amending Part Five and Part Five A, Rules of the Supreme Court of Virginia (Apr. 30, 2010) (effective July 1, 2010), *available at* [http://courts.state.va.us/courts/scv/amendments/2010\\_0430\\_part\\_five\\_and\\_part\\_five\\_a.pdf](http://courts.state.va.us/courts/scv/amendments/2010_0430_part_five_and_part_five_a.pdf).

24. See Memorandum from Kent Sinclair, Professor, Univ. of Va. Sch. of Law to Va. State Bar (May 5, 2010), *available at* <http://www.vsb.org/docs/SCV-appellate-rules-05-05-10.pdf> (discussing important changes to Part Five and Part Five A of the Rules of the Supreme Court of Virginia).

25. See VA. SUP. CT. R. 5:11(d) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:11(d)), *available at* <http://courts.state.va.us/courts/scv/rulesofcourt.pdf>.

notice of oral argument at the petition stage,<sup>26</sup> explain how the court of appeals treats citation of unpublished opinions,<sup>27</sup> and describe how appellate courts sequentially evaluates assignments of error and cross-error.<sup>28</sup> None of these provisions change the courts' practice; they are intended to make it clear to practitioners how the court has always handled these matters.

Some of the new rules force the lawyer into better advocacy, as with the previous change to type size. For example, briefs now must contain a statement of the applicable standard of review for each issue that is being appealed.<sup>29</sup> An advocate filing a motion must first confer with her adversary to discuss the motion and to ascertain whether it will be opposed or consented to.<sup>30</sup> And assignments of error now must be accompanied by "[a]n exact reference" to the location in the record where the claimed error was preserved for appellate review.<sup>31</sup> This requirement theoretically will weed out some stillborn appeals since the advocate must check in advance to ensure that the argument was preserved below.

### B. *Technology Arrives in the Appellate Courts*

In contrast to trial courts, where PowerPoint presentations to jurors are now almost expected, the fundamental approach to advocacy in appellate courts has been largely unchanged since the dawn of the Republic.<sup>32</sup> Lawyers still arrive at a lectern without visual aids (although they are permitted) and argue the cases in a face-to-face exchange with a panel or a full appellate court, just as their legal ancestors did.

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26. *Id.* R. 5:17(j)(4) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:17(j)(4)).

27. *Id.* R. 5:1(f) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:1(f)).

28. *Id.* R. 5:18(c)(4) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:18(c)(4)).

29. *Id.* R. 5:17(c)(6) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:17(c)(6)). Experienced advocates have long included such a statement in their briefs, but this is the first time the rules have required it.

30. *Id.* R. 5:4(a)(1) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:4(a)(1)). This provision mirrors the requirement of the United States Court of Appeals for the Fourth Circuit's Local Rule 27(a). See 4TH CIR. R. 27(a), available at <http://www.ca4.uscourts.gov/pdf/rules.pdf>.

31. R. 5:17(c)(1) (to be codified at VA. SUP. CT. R. pt. 5, R. 5:17(c)(1)).

32. See Philip A. Talmadge, *New Technologies and Appellate Practice*, 2 J. APP. PRACT. & PROCESS 363, 363 (2000).

And yet foresightful lawyers have found ways in which to use technology to their advantage. Nowadays, some experienced lawyers file not only the required printed-and-bound copies of their briefs, but fully hyperlinked CD-ROMs containing all of the briefs, the appendix, cited case law and statutes, and any other matters that would be of use to the jurists deciding the appeal.<sup>33</sup>

The advantages of this approach should be clear. On the surface, whether the audience is a jurist or a law clerk, the reader need only pop the disc into a computer, and he can then see everything relevant to the appeal without getting up out of his chair. The real value is subtler, but far more valuable than the mere convenience of the reader: it offers added credibility to the advocate. Without the discs, a skeptical reader will have to check a citation—whether to caselaw, statute, or transcript—manually. Some advocates might get sloppy in such citations, particularly where the cited material is obscure. But when the reader can click once and immediately see the cited material, the author becomes more trusted by the reader. The value of personal credibility in the appellate courts is not a new development.<sup>34</sup>

### C. *Changes in the Courts*

Nothing stays the same; not even the composition of a court that is as close to life-tenured as we are likely to see in the Commonwealth. Changes have traditionally come slowly to the composition of the justices on the Supreme Court of Virginia, but the pace has accelerated in the past three years.<sup>35</sup> Early in 2011, the

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33. See Deborah Ausburn, *Make Your Case with a Digital Brief*, TRIAL, Apr. 2006, at 40, for a thorough discussion of the use of digital briefs.

34. The primacy of ethos (a speaker's personal credibility) as a tool of persuasion was recognized by Aristotle in his *Rhetoric*. ARISTOTLE, RHETORIC 6–7 (W.D. Ross ed., W. Rhys Roberts trans., Cosimo, Inc. 2010) (1910). Much more recently, Judge Charles D. Breitel phrased the importance of credibility in this way:

[P]erhaps the most valuable thing the lawyer brings into the courtroom when he is an advocate is his reputation. His reputation for candor and soundness is worth three points in his brief and a marvelous opening for his oral argument. If his reputation is bad, I don't care what he says or how he says it—he is climbing a glass mountain in shoes covered with oil.

ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 205 (2008) (quoting The Hon. Charles D. Breitel).

35. See *State of Virginia: Members of the Highest Court*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/justices\\_of\\_the-supreme\\_court.cfm?state=VA](http://www.judicialselection.us/judicial_selection/methods/justices_of_the-supreme_court.cfm?state=VA) (last visited Oct. 30, 2010) [hereinafter Supreme Court of Va. Members].

court will see its fourth new justice in as many years, as Justice Lawrence L. Koontz, Jr. reaches mandatory retirement age.<sup>36</sup> Previous departures include Justice Elizabeth B. Lacy, who retired late in 2007, and Justices G. Steven Agee and Barbara Milano Keenan, both of whom left for the United States Court of Appeals for the Fourth Circuit, which really does offer life tenure.<sup>37</sup>

In that time, the court has welcomed Justices S. Bernard Goodwyn, LeRoy F. Millette, Jr., and William C. Mims.<sup>38</sup> The man or woman who will replace Justice Koontz will be the 101st justice in the court's long history and will signal a greater than fifty percent turnover in the court in just over thirty-six months' time. The result of this widespread, almost sudden change for practitioners will be that preconceived notions about how the court "thinks" are probably outmoded. Until court-watchers have a substantial body of opinions from each new justice, it will be more difficult to predict the court's composite view of a given legal issue, or of a particular style of argumentation. This is not to suggest that the new crop of justices will bring radical changes to the court; this *is* Virginia, after all, and as noted above, things change slowly here. But with the impending retirement of Justice Koontz, only one member of the court—current Chief Justice Leroy Rountree Hassell, Sr.—will be left from the court that decided cases as recently as 1997.<sup>39</sup>

In the April 2010 Judicial Council meeting in Norfolk, Chief Justice Hassell announced that he would not seek a third four-year term in the center chair.<sup>40</sup> In September 2010 the supreme

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36. In Virginia, an active judge must retire twenty days after the beginning of the new regular General Assembly session following her seventieth birthday. VA. CODE ANN. § 51.1-305(B1) (Repl. Vol. 2009). Justice Koontz will reach seventy years of age in 2010. See *Koontz Sworn in to High Court*, RICH. TIMES-DISPATCH, Aug. 20, 1995, at C4.

37. See Dale Eisman, *Warner, Webb to Join to Usher in Judge, Confirmed Despite Partisan Sparring*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk), May 21, 2008, at 5 (Justice Agee); Frank Green & Jeff E. Schapiro, *Keenan Confirmed to U.S. Appeals Court*, DAILY PRESS (Newport News), Mar. 5, 2010, at A9; Michael Hardy, *Virginia High Court Justice Says She'll Retire*, RICH. TIMES-DISPATCH, June 12, 2007, at B1 (Justice Lacy);

38. See Larry O'Dell, *Virginia Supreme Court Justice Takes Oath*, DAILY PRESS (Newport News) Oct. 19, 2007, at B5 (Justice Goodwyn); Jeff E. Schapiro, *Millette Takes Seat on Virginia High Court*, RICH. TIMES-DISPATCH, Sept. 6, 2008, at B1; *What Richmond Can Teach Washington*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk), Apr. 14, 2010, at 6 (Justice Mims).

39. See Supreme Court of Va. Members, *supra* note 35.

40. See Peter Dujardin, *Hassell Stepping Down as Chief Justice of Virginia Supreme*

court selected Justice Cynthia Kinser to serve as the twenty-fifth chief justice (and the first female chief justice) in the long history of the institution.<sup>41</sup> Thus, in addition to a fairly comprehensive makeover of court personnel, the court will get a new principal voice, and the benches of Virginia will get a new leader, beginning in early 2011.<sup>42</sup>

The Court of Appeals of Virginia, with its roster of eleven active judges, has changed more steadily over the years;<sup>43</sup> the two most recent appointees are Judges Cleo E. Powell (September 2008) and Rossie D. Alston, Jr. (March 2009), both of whom came to the appellate bench from trial court seats.<sup>44</sup> On average, the court gets a new judge about once every year or two.<sup>45</sup>

### III. A PEEK INTO THE FUTURE

#### A. *Proposals for Improvement in Appellate Advocacy*

The problem noted at the beginning of this report, a judicial perception that the quality of appellate advocacy is poor, remains. True, the development of a cadre of seasoned appellate advocates means that some cases are briefed and argued by experts. But others—and these are the ones that tend to stick out in jurists' minds—come in sloppily briefed and get poorly argued. The result is more work for the jurists, who have to sort through the record themselves to find evidence and objections, essentially turning them into de facto advocates for the position that has been weakly presented. In turn, this poor presentation can produce skewed results. Often a case with lopsided lawyering skills, where one side is represented by a capable appellate advocate and the other is not, can result in the announcement of a decision that is unclear, or that is not good for the body of caselaw.

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*Court*, DAILY PRESS (Newport News), May 12, 2010, at A3.

41. Frank Green, *Kinser To Lead Virginia's High Court; Lee County Native Is First Woman Chosen To Be Chief Justice*, RICH. TIMES-DISPATCH, Sept. 1, 2010, at A1.

42. *See id.*

43. *Compare* Facsimile from the Clerk's Office of the Court of Appeals of Va. to the *University of Richmond Law Review* (sent Sept. 21, 2010) [hereinafter *Court of Appeals Facsimile*] (on file with author), *with* Supreme Court of Va. Members, *supra* note 35.

44. *See New Judge Joins State Appeals Court*, RICH. TIMES-DISPATCH, Nov. 18, 2008, at B1 (Judge Powell); *What's Happening at the Legislature?*, RICH. TIMES-DISPATCH, Feb. 12, 2009, at A7 (Judge Alston, Jr.).

45. *See* Court of Appeals Facsimile, *supra* note 43.

One recurring proposal has been for the creation of a certified specialty in appellate advocacy, comparable to what the National Board of Trial Advocacy does for its civil advocates at the trial level.<sup>46</sup> The American Academy of Appellate Lawyers (“AAAL”) recently published a set of recommendations for an improved appellate system that included appellate-practice certification on the state level.<sup>47</sup> According to the AAAL, “the best way to address continuing shortfalls of attorney performance [in appellate courts] is to augment the market evolution of appellate specialization by developing processes that require lawyers who appear in appellate courts to have certain basic knowledge of what they are doing.”<sup>48</sup>

One would think that such a proposal would be welcomed by a corps of appellate jurists who have been collectively clamoring for better advocacy in their courts. But no specialization effort in this field has ever gained traction within the Virginia State Bar. As of the date of this writing, the Rules of Professional Conduct sharply limit the areas within which a lawyer may claim to be a specialist,<sup>49</sup> and the supreme court has been silent about the principle in recent years.

This reticence should change. Certification would achieve several objectives, primarily the very thing the appellate jurists have wanted for so long: an improvement in the quality of appellate

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46. The National Board of Legal Specialty Certification currently certifies only civil and criminal trial advocates, family lawyers, and social security disability lawyers. See NATIONAL BOARD OF LEGAL SPECIALTY CERTIFICATION, <http://www.nblsc.us> (last visited Oct. 30, 2010).

47. Am. Acad. of Appellate Lawyers, *Statement on the Functions and Future of Appellate Lawyers*, 8 J. APP. PRACT. & PROCESS 1, 12–14 (2006) [hereinafter *Future of Appellate Lawyers*].

48. *Id.* at 13.

49. See VA. SUP. CT. R. pt. 6, § II, R. 7.4 (Repl. Vol. 2010). Exceptions exist for patent and admiralty practice, and for specific certifications by the Supreme Court of Virginia or by a named organization. *Id.* R. 7.4(a), (b) (Repl. Vol. 2010). In theory, the last classification could permit an attorney to advertise as a certified appellate specialist by a nationwide organization, but the rule also requires a disclaimer “that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.” *Id.* R. 7.4(d) (Repl. Vol. 2010). For now, the Commonwealth is effectively out of the certification business. See *id.* R. 7.4 (Repl. Vol. 2010). The Virginia State Bar’s Standing Committee on Legal Ethics recently proposed to eliminate Rule 7.4, stating that the rule is both unnecessary and redundant as “any claim or statement of specialization should be measured by the ‘false’ or ‘misleading’ standard used in Rule 7.1.” *Professional Guidelines—Rule Changes—Rules 7.1–7.5*, VA. STATE BAR, [http://www.vsb.org/pro-guidelines/index.php/rule\\_changes/item/rules-71-75-regulating-lawyer-advertising-and-solicitation](http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/rules-71-75-regulating-lawyer-advertising-and-solicitation) (last updated Apr. 30, 2010).

advocacy.<sup>50</sup> Especially when combined with an effective mentoring program to groom the next generation of appellate specialists, this process would enhance collegiality as well as the appellate lawyer's work product.<sup>51</sup>

### B. *Cameras in the Appellate Courtroom*

There is a reason why television and film depictions of litigation almost never venture into appellate courts: from the perspective of the viewing public, all of the fireworks are in the trial courts, where lawyers spew rhetorical fire and witnesses melt into tears on the stand, confessing to be the real killers. This kind of showboating is traditionally regarded as the primary reason why cameras are rare sights inside courthouses; judges might justifiably fear that lawyers would turn each court proceeding into a media event for the benefit of the lawyer's client (or, more ominously, for the lawyer's advertising image).

Appellate practice is not like that, of course; it is usually a cerebral exercise in often arcane legal doctrines. But cameras are not allowed in Virginia's appellate courtrooms. Why not? A cynic might note that there were no cameras around when George Wythe<sup>52</sup> argued cases in Virginia courts, so the modern practice is an act of deference to this legal giant.

But some appellate courtrooms across the country are beginning to record and broadcast appellate arguments. Arkansas Supreme Court Associate Justice Robert L. Brown observed in 2007 that twenty-one states made video of oral arguments available, and another three made video available on a delayed basis.<sup>53</sup> Another eight broadcast audio only.<sup>54</sup> Justice Brown noted that another four states were then "primed and ready to begin [broadcasting] in the immediate future."<sup>55</sup> Virginia, of course, is on none of these lists.<sup>56</sup>

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50. See *Future of Appellate Lawyers*, *supra* note 47, at 15.

51. See *id.* at 13.

52. George Wythe begin practicing law in Virginia 1746. JOYCE BLACKBURN, *GEORGE WYTHE OF WILLIAMSBURG* 12-13 (1975).

53. Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1, 7 n.31 (2007).

54. *Id.*

55. *Id.* at 7-8 & n.32.

56. See *id.* at 8 & n.32 (omitting Virginia from lists of states making live, delayed, or

The Supreme Court of Virginia should consider this innovation, which has generated rave reviews in the courts that have adopted it.<sup>57</sup> The primary benefit, in this instance, is to better educate the public about the appellate courts and their functions.<sup>58</sup> Unsurprisingly, many Virginians may have little idea what goes on inside appellate courtrooms, despite the fact that all such proceedings are open to the public.<sup>59</sup> For educational purposes, high-school government students in, say, Buchanan County should have the same ability to see the supreme court in action as do their counterparts in Henrico County. Broadcasting supreme court and court of appeals arguments would bring greater openness to this long-cloistered branch of Virginia government.

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audio broadcasts available).

57. *Id.* at 8 (“The public’s response, according to those state supreme courts that provide these video broadcasts, borders on the exuberant.”). Justice Brown cites several appellate jurists who gave uniformly positive reviews of the practice. *Id.*

58. *Id.*

59. This reflects the supreme court’s practice, not a provision in the Virginia Code or Constitution. At the trial level, the public has a First Amendment right to attend criminal, and probably civil, trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

