

**LOCAL GOVERNMENT ATTORNEYS  
OF VIRGINIA, INC.**

**FALL CONFERENCE 2007**

**APPELLATE PRACTICE  
IN THE SUPREME COURT  
AND  
THE COURT OF APPEALS OF VIRGINIA**

**“Tips on Getting a Writ”**

**George A. Somerville  
Troutman Sanders LLP  
PO Box 1122  
Richmond, VA 23218-1122  
(804) 697-1291  
fax: (804) 698-5149  
[George.Somerville@troutmansanders.com](mailto:George.Somerville@troutmansanders.com)**

## GETTING A WRIT

- (1) *Don't* assign errors to matters that weren't preserved.
- (2) *Don't* load up your Petition with too many assignments.
- (3) *Do* follow every requirement of the Rules *to the letter*, no matter how technical or obscure.
- (4) *Don't* reargue the facts, especially at length, *unless*
  - there is *no* evidence to support a finding *or*
  - legal issue involves standard or burden of proof.

Instead *focus* the *legal* issue(s) for Court to decide.

- (5) *Tell* the Court – and tell it right up front – why the case is *important*. Provide the context for all that follows.
- (6) *Don't* regard page limits as requirements. Less is more.
- (7) *Don't* assume that the Justices are familiar with the detailed statutory or regulatory scheme under which you are proceeding. Lay it out for them. Chances are you know it far better than they do.
- (8) Keep in mind that your *only* task and goal at this point is to persuade at least 1 of 3 Justices that your case warrants briefing and argument before the full Court, on the merits. You do *not* need to win the case at this stage, you *can't* win it at this stage, and that's not the goal.
- (9) If you are fortunate enough to come to the Supreme Court with a dissenting opinion in the Court of Appeals, *ride* it!

**LOCAL GOVERNMENT ATTORNEYS  
OF VIRGINIA, INC.**

**FALL CONFERENCE 2007**

**APPELLATE PRACTICE  
IN THE SUPREME COURT  
AND  
THE COURT OF APPEALS OF VIRGINIA**

**(Supplemental handout)**

**George A. Somerville  
Troutman Sanders LLP  
PO Box 1122  
Richmond, VA 23218-1122  
(804) 697-1291  
fax: (804) 698-5149  
[George.Somerville@troutmansanders.com](mailto:George.Somerville@troutmansanders.com)**

## I. Jurisdiction and related matters

Final judgment rule.

Exceptions:

- § Grant, refusal, dissolution or refusal to enlarge an injunction – Code § 8.01-626.
  - Ø Does *not* include **modification** of injunction (unlike 28 U.S.C. § 1292(a)(1)).
  - Ø Petition for review filed within 15 days, maximum 15 pages, with filing fee. Rule 5:17A. (No extension of time to submit filing fee as with petition for appeal, 10 days after filing per Rule 5:17.)
  - Ø Appeal to the Court that has appellate jurisdiction of final order in the case.
  
- § Case on an equitable claim where there is an interlocutory decree or order (1) granting, denying or dissolving an injunction (2) requiring money to be paid or either possession or title of property to be changed or (3) adjudicating the principles of a cause – Code § 8.01-670.
  - Ø Note overlap with § 8.01-626 – this is full blown petition for appeal procedure.
  - Ø *May wait* for final judgment.
  - Ø *Must* follow this procedure when injunctive order *is* final judgment
  
- § Appeal by permission – § 8.01-670.1 – similar to 28 U.S.C. § 1292(b) – requires trial court certification (“that the order or decree involves a question of law as to which (i) there is substantial ground for difference of opinion, (ii) there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) the court and the parties agree it is in the parties' best interest to seek an interlocutory appeal”) and Supreme Court permission.
  
- § Severable interests rule – *See, e.g., Thompson v. Skate America, Inc.*, 261 Va. 121, 127, 540 S.E.2d 123, 126 (2001)
  - Ø Order final as to some but not all parties.
  - Ø Appeal cannot affect determination of remaining issues in the case.
  - Ø Collateral matter, separate and distinct from the merits.
  - Ø Classic case – *Bowles v. City of Richmond*, 147 Va. 720, 129 S.E. 489 and 129 S.E. 489 (1925-26) (but still cited by the Court, at least as recently as 1994) – Motion for Judgment against City and railroad alleging negligent failure to maintain approach to a bridge. City’s demurer sustained for failure to give written notice of the claim. Held, immediate appeal of demurrer order allowed – City

and railroad had no joint interest in the matters decided, nor did those matters relate to the merits, so judgment final as to City.

- Ø Again this is an option, not a requirement – you can wait for a final order in the case.

Common errors that cause appeals to be dismissed:

- § Filing Petition for Appeal but omitting Notice
- § Filing Notice of Appeal in the wrong court
- § Filing Notice of Appeal without all of the information mandated by the Rules
- § Failing to file the transcript on time, without *getting* an extension from the trial court *before* the 60 days has expired
- § Failing to file the *notice* of filing the transcript
- § Failing to state *both* Questions Presented *and* Assignments of Error (in the Supreme Court)

You may not add (or change) assignments of error after writ granted.

You can satisfy filing deadlines by sending Petitions and Briefs to the Clerk by registered or certified mail on the date due. Rules 5:5(b), 5A:3(c). (Those Rules do *not* apply to the Notice of Appeal, which is filed in the trial court.)

- § Do the Clerk the courtesy of pointing out in your cover letter that you are doing this.
- § Sending by a private courier service doesn't work – if you're sending by FedEx or UPS, it has to *arrive* by the deadline.

On appeal from the Court of Appeals to the Supreme Court, Petition for Appeal *must* include a statement that the case involves either (1) a substantial constitutional question as a dispositive issue or (2) matters of significant precedential value. Code § 17.1-410; Rule 5:17(c).

- § Requirement is jurisdictional. Without it, appeal will be dismissed.
- § But don't just comply *pro forma*. Take as an opportunity to argue for the appeal to be granted. Similar statements may be included in any case, as a persuasive matter. (Just don't cite § 17.1-410 if it doesn't apply.)

## II. Opposing a writ

- § The judgment is correct (*as opposed to* the Petition is all wrong).
- § This is a simple case, and it's not an important case. The judgment is consistent with well established, settled rules of law.

- § Tell your side of the story – don't just respond defensively (and thus allow the appellant to dictate your agenda).
- § Show that justice has been done.

### III. Assignments of Cross-error

Counsel for appellee City of \_\_\_\_\_ do not believe that the Court of Appeals erred in its disposition of the appeal below. Once it determined that the case was moot, the Court had no need to inquire further. The City nevertheless believes that it is compelled to assign cross-error to that Court's failure to decide the case on the additional grounds asserted in these Assignments, to preserve those arguments for review. *See Wells v. Shoosmith*, 245 Va. 386, 388 n.1, 428 S.E.2d 909, 910 n.1 (1993) ("The property owners also contend that the alleged lessees have no interest in the property because they were mere licensees whose license was revoked upon the death of the grantors. We will not consider this contention because the property owners, who prevailed below, failed to assign cross-error to the chancellor's failure to rule for them on this issue. Rule 5:18.")

- § Consider filing a separate Notice and Petition for Appeal.

### IV. Petitions for Appeal

Argue the broader significance of the case – the trial court's decision worked an injustice in this case *and* adherence to that rule of decision would distort the whole fabric of the law.

#### Attachments to Petitions for Appeal

- § Trial court's opinion(s)
- § Maps or diagrams
- § Statutes and regulations
- § Key document(s)
- § Unpublished opinions cited in the Petition
- § You should separate attachments from the body of the Petition (or brief), e.g., by a colored page. If using multiple attachments, use "A, B ..." tabs

**Consider** filing a reply brief in support of a Petition for Appeal (and thereby waiving writ panel argument).

If you *don't* file a Reply Brief, then *by all means* present an argument to a writ panel – and it is far better to do it in person than by telephone.

## V. Some pointers on good writing

There is no such thing as good writing, only good re-writing.

Write formally, but colorfully (if you can). An interesting Petition or Brief will go a lot further than one that is technically sound but dull. Make it “sing.”

Use shorter sentences and shorter paragraphs – for clarity and to maintain the reader’s interest and attention.

Steer clear of timid phrases like “it is the appellant’s position that ....” State your positions forcefully. Do not use language that appears to draw a line of separation between yourself and the positions you are advocating.

Omit immaterial information. The dates when pleadings and motions were filed and the dates of hearings and trials are classic examples of extraneous information that most lawyers nevertheless include in appellate briefs. They are a waste of ink and a distraction. (Exceptions: demonstrate compliance with a statute of limitations or the filing deadline for taking the appeal.)

*Don’t* write to “sound like a lawyer.” Write in plain English. If your teenage son or daughter can’t understand what you’re saying, you need to consider re-writing.

Use direct quotations whenever possible, but limit use of extended block quotations. If you need to use extended quotes, italicize key language for emphasis (without overdoing it).

Write in active voice.

Captions: See attachment.

*Never* make a personal attack on the trial judge or opposing counsel, and proceed with extreme caution before personally attacking an opposing litigant. Do it only if the record convincingly supports the attack; and then, it is best to rely on understatement and objective presentation of the facts in the record. Let the judges draw their own conclusions. Purple prose wins no friends.

*Never* use sarcasm, either in petition, briefs, or oral argument.

Focus on purely legal issues, which are decided *de novo* (with no presumption of correctness) on appeal. Factual and discretionary issues are seldom grounds for reversal, and “mixed questions” of law and fact are best addressed by specifically

disavowing any challenge to the trial court's or jury's findings of historical fact and addressing only the legal component(s).

Acknowledge contrary authority, then argue against it – distinguish it if you can, argue that the reasons underlying the contrary rule don't apply in the circumstances of your case, and as a last resort argue that it should be overruled – but *don't ignore* it. That's the worst thing you can do. *Even if* the opposing lawyer is so poor that he doesn't find it, there's a pretty good chance that the Court will. By trying to hide from it, you *both* lose your best chance to argue against it *and* damage your own credibility with the Court.

The same rule applies equally to “bad facts.”

Be open to the possibility that because the law is clear and adverse, or because the findings of facts below are hostile and at least minimally supported by the evidence, this is a case in which affirmance is inevitable and therefore a case that should not be appealed. That may be a difficult message to deliver to your client, but it may be a matter of professional duty (as well as maintaining your reputation with the judges of the appellate court).

Understand the respective roles of the trial and appellate courts. The trial court's job is to find the truth and do justice. The appellate court's job is to ensure that the trial was fundamentally fair – *not error-free*, but *reasonably* free of *prejudicial* errors. Stated another way: the appellate courts' duties are (1) to correct trial court errors and (2) to develop the law.

## VI. Preservation pointers

Appellate practice begins even before the trial, with preservation of arguments for appeal and otherwise building the record for review. You should always have the possibility (or likelihood) of appellate review in mind, at every stage of pre-trial and trial.

Insist on a ruling. *See, e.g., Nusbaum v. Berlin*, 273 VA. 385, 402-07 641 S.E.2d 494, 503-06 (2007).

Document preservation of your arguments (by citation to the record) in the Petition for Appeal.

- I. **THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE INJURY TO ROGER REGENT BECAUSE THE INCIDENT WAS NOT SUBSTANTIALLY SIMILAR IN PLACE, CIRCUMSTANCES, AND DEFECT ALLEGED TO ALFRED ALBERTUS' INJURY TO CONSTITUTE ADMISSIBLE EVIDENCE OF NOTICE**
  
- II. **THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE INJURY TO ROGER REGENT BECAUSE THE INCIDENT WAS NOT SUBSTANTIALLY SIMILAR IN PLACE, CIRCUMSTANCES, AND DEFECT ALLEGED TO ALFRED ALBERTUS' INJURY TO CONSTITUTE ADMISSIBLE EVIDENCE OF NOTICE**
  
- III. **The Trial Court Properly Excluded Evidence Of The Injury To Roger Regent Because The Incident Was Not Substantially Similar In Place, Circumstances, And Defect Alleged To Alfred Albertus' Injury To Constitute Admissible Evidence Of Notice**
  
- IV. **The trial court properly excluded evidence of the injury to Roger Regent because the incident was not substantially similar in place, circumstances, and defect alleged to Alfred Albertus' injury to constitute admissible evidence of notice**
  
- V. **The trial court properly excluded evidence of Regent's injury because the incident was not substantially similar to Albertus' injury**