**1. Basics of Civil Appeals in Virginia**

* 1. **Virginia’s Appellate Courts**



\*Source - <https://www.vacourts.gov/courts/cib.pdf>

* + 1. **Supreme Court of Virginia**
* Court consists of seven active justices. Court hears petitions for appeal on panels of 3, and merits cases with full court of 7. Senior Justices sit on both petition and merits cases. Typically, Court hears one writ panel session (summer) outside of Richmond, with the rest and with all merits cases heard in Richmond.
* The Justices
  + Chief Justice S. Bernard Goodwyn  
    Expiration of term: January 31, 2032
  + The Honorable William C. Mims  
    Expiration of term: March 31, 2022
  + The Honorable Cleo E. Powell  
    Expiration of term: July 31, 2023
  + The Honorable D. Arthur Kelsey  
    Expiration of term: January 31, 2027
  + The Honorable Stephen R. McCullough  
    Expiration of term: March 2, 2028
  + The Honorable Teresa M. Chafin  
    Expiration of term: August 31, 2031
  + [2022 Appointment to Court]

Expiration of term: 2034

* Senior Justices
  + The Honorable Charles S. Russell
  + The Honorable Lawrence L. Koontz, Jr.
  + The Honorable LeRoy F. Millette, Jr.

\*Source - <https://www.vacourts.gov/courts/scv/supreme.html>

* Jurisdiction
  + “Although the Supreme Court of Virginia **possesses both original and appellate jurisdiction**, its primary function is to review decisions of lower courts. Virginia does not allow an appeal to the Supreme Court as a matter of right except in cases involving the State Corporation Commission and the disbarment of an attorney.”
  + “The Court's original jurisdiction is limited to cases of habeas corpus (ordering one holding custody to produce the detained person before the Court for the purpose of determining whether such custody is proper), mandamus (ordering the holder of an office to perform his duty), prohibition (ordering a public official to stop an action), and actual innocence (based on biological testing). The Supreme Court also has original jurisdiction in matters filed by the Judicial Inquiry and Review Commission relating to judicial censure and retirement, and removal of judges.”

\*Source - <https://www.vacourts.gov/courts/scv/about.html>

* + 1. **Court of Appeals of Virginia**
* “Court of Appeals consists of seventeen judges. The Court sits in panels of at least three judges, and panel membership rotates on a random basis. Although the Clerk’s Office is based in Richmond, the Court hears arguments in four regions to provide litigants throughout the Commonwealth convenient local access to the Court.”

\*Source - <https://www.vacourts.gov/courts/cav/about.html>

* Judges
  + Chief Judge Marla Graff Decker
  + The Honorable Robert J. Humphreys
  + The Honorable William G. Petty
  + The Honorable Randolph A. Beales
  + The Honorable Glen A. Huff
  + The Honorable Mary Grace O'Brien
  + The Honorable Wesley G. Russell, Jr.
  + The Honorable Richard Y. AtLee, Jr.
  + The Honorable Mary B. Malveaux
  + The Honorable Clifford L. Athey, Jr.
  + The Honorable Junius P. Fulton, III
  + The Honorable Daniel E. Ortiz
  + The Honorable Doris Henderson Causey
  + The Honorable Frank K. Friedman
  + The Honorable Vernida R. Chaney
  + The Honorable Stuart A. Raphael
  + The Honorable Lisa M. Lorish
* Senior Judges
  + The Honorable Rosemarie Annunziata
  + The Honorable Jean Harrison Clements
  + The Honorable James W. Haley, Jr.
  + The Honorable Robert P. Frank

\*Source - <https://www.vacourts.gov/courts/cav/appeals.html>



* Jurisdiction
  + Provides “appellate review of circuit court decisions in civil, criminal, and administrative agency cases, and final decisions of the Virginia Workers’ Compensation Commission. **Most appeals to the Court of Appeals are a matter of right**. The Commonwealth must petition the Court of Appeals if it wishes to appeal a decision in a criminal case pursuant to Virginia Code §17.1-406(A).
  + “The Court of Appeals also has jurisdiction to hear interlocutory appeals and petitions for review of injunctions through a discretionary petition process. The Court has original jurisdiction to issue writs of mandamus (ordering a public official to perform their duty), prohibition (ordering a public official to stop an action), and habeas corpus (ordering the official with custody to produce the detained person to the Court so it can determine whether such custody is proper) in any case over which the Court would have appellate jurisdiction. It also has jurisdiction in writs of actual innocence based on non-biological evidence.”
  + The decisions of the Court of Appeals are final in pre-trial Commonwealth’s appeals, appeals involving involuntary treatment of prisoners, and appeals involving denial of a concealed handgun permit. In pre-trial Commonwealth’s appeals, however, if a defendant is convicted, he or she may seek review of the pre-trial appeal ruling on direct appeal. All other decisions of the Court of Appeals are appealable to the Supreme Court.

\*Source - <https://www.vacourts.gov/courts/cav/about.html>

* 1. **Mechanics of Your Appeal**
     1. **Rules, Rules, Rules**
* “This Court may dismiss an appeal or impose such other penalty as it deems appropriate for non-compliance with these Rules.” Rules 5:1A and 5A:1A.
* Curable vs. non-curable failures = show cause order vs. dismissal
* “If an attorney's failure to comply with these Rules results in the dismissal of an appeal, this Court may report the attorney to the Virginia State Bar in accordance with Rule 8.3 of the Virginia Rules of Professional Conduct.” Rules 5:1A and 5A:1A.
* Drastic and unlikely, but shows how much the Courts expect of us. No substitute for taking the time to read through the rules.
* Rules: <https://www.vacourts.gov/courts/scv/rulesofcourt.pdf>

**1.2.2 Civil Appeals of Right to the CAV**

* + What’s Covered? (Code § 17.1-405)
    - Final decision of circuit court in civil matter or administrative agency appeal;
    - Final decision of circuit court on appeal from grievance hearing under state grievance procedure (Code § 2.2-3005);
    - Final decision of Workers Compensation Commission;
    - Final judgment of circuit court involving application for a concealed weapons permit, involuntary treatment of prisoners or declaratory or injunctive relief under Religious Freedom Act.
  + What’s Not Covered?
    - Petitions to CAV:
      * Some criminal appeals must be brought by petition (§ 17.1-406);
      * Interlocutory appeals (§ 8.01-675.5) (8.01-267.8, Multiple Claimant Litigation Act);
      * Review of injunction (§ 8.01-626).
    - Original Jurisdiction in CAV:
      * Writs of mandamus, prohibition, and habeas corpus in any case in which CAV would have appellate jurisdiction (§ 17.1-404)
    - Direct appeals to SCOVA (§ 17.1-406):
      * appeals from SCC, habeas corpus appeals, proceedings under Code § 54.1-3935 (bar proceedings) and § 54.1-3937 (corporate registration revocation);
    - Original jurisdiction in SCOVA:
      * JIRC proceedings (§ 17.1-406), petitions for writs of habeas corpus, mandamus, and prohibition (§ 17.1-309), and actual innocence based on biological evidence (§ 19.2-327.2).
  + Final Order?
    - Only “final” judgments, orders, or decrees can be appealed. Rule 1:1. This is a jurisdictional requirement.
    - What is final? One that “disposes of the entire before the court, including all claims and causes of action against all parties, gives all the relief contemplated, and leaves nothing to be done except the ministerial execution of the court’s judgment.” Rule 1:1(b).
    - *See* Rule 1:1(c) (Demurrers), 1:1(d) (pleas in bar and MSJs), and 1:1(e) (Motions to Strike) for particular applications.
    - Research tip: review *Kosko v. Kramer*, 857 S.E.2d 914 (2021), and *Super Fresh Food Markets of Va. v. Ruffin*, 263 Va. 555 (2002), for review of what is a final order and interplay with Rule 1:1’s 21-day rule.
    - Practice tip 1: to avoid forfeiting appeal, bring to court your order suspending final order and granting relief of post-trial motion.
    - Practice tip 2: assume order whose finality is fuzzy is final, because while appealing a non-final order is fixable (the Court will remand for entry of final order), missing your appellate deadline is usually not.
  + Notice
    - Rule 5A:6
    - 30 days after final judgment. Perfects appeals of right (Rule 5A:16), i.e., gives appellate court jurisdiction over the appeal.
    - filed in trial court, copies to counsel and CAV clerk
    - Appeal bond of $500, per 8.01-676.1. 5A:6 and 5A:17.
    - Form in the rules
    - $50 filing fee per Rule 5A:6(c)
  + Transcript or written statement
    - Rule 5A:8
    - File transcript (60 days from final judgment) and file notice of filing transcript (10 days after that)
    - Written statement: please don’t. But if you do, 60 days after judgment.
  + The Record
  + Opening Brief
    - 40 days after filing record (5A:19)
  + Appellee Brief
    - 30 days after Opening Brief (5A:19)
  + Reply Brief
    - 14 days from Appellee (5A:19)
  + Appendix vs. digital record
    - 5A:25 says an appendix is not required when the record is filed by the clerk electronically
    - Not every clerk’s office is electronic; know if yours is before your appeal
      * “The notice this Court issues acknowledging receipt of the trial court record will indicate whether that record was transmitted to the Court of Appeals in electronic or paper format. If electronic, the notice will also contain a link to the trial court record. You will be able to download the contents of the trial court record via that link.”

\*Source: <https://www.vacourts.gov/courts/cav/cav_faqs.pdf>

* + - Record transferred by clerk, whether paper or electronic
    - Appendix, if filed, must be filed same time as Opening Brief
      * Parties must agree and file Designation of JA within 15 days of record being filed. Rule 5A:25(d).
    - Appellant must file assignments of error if no appendix, and designation of JA contents (if no agreement) within 15 days of filing record. Appellee then has 10 days to designate and assign additional error. Rule 5A:25(d).
  + Extensions
    - Some deadlines are mandatory:
      * Notice, petition for appeal and review, petition for rehearing, request for rehearing en banc. Rule 5A:3(a).
      * “Ends of justice” extension possible for notice of appeal, petition for rehearing, petition for rehearing en banc. *Id.*
    - Briefing schedule can be extended. Motion must be filed within 10 days of expiration. Rule 5A:19(c)(4)
    - Motion for extension of time must be filed within
      * Specific time given in rules 5A:8(a), 5A:13(a), 5A:19(b), 5A:19(c), or
      * Within 30 days after deadline for which extension is sought.
    - DON’T DELAY seeking extension
  + Oral argument
    - Summary disposition: Court “may dispense with oral argument in any matter if the panel to which the matter is assigned has examined the briefs and record and unanimously agrees that oral argument is unnecessary because (a) the appeal is wholly without merit or (b) the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed.” 5A:27; Code § 17.1-403.
    - Otherwise, 15-minute argument per side. 5A:28.
    - Panels of 3 Judges, rotating membership on panels, regions across Virginia. Code § 17.1-402.
    1. **Petitions to CAV**
* For civil matters, this includes injunctions and interlocutory appeals
* Injunctions:
  + Code § 8.01-626 and Rule 5A:12A
* Interlocutory appeals
  + Multiple Claimant Litigation Act: Code § 8.01-267.8 and Rule 5A:12 govern procedure.
  + Certified Interlocutory Appeals
    - Code § 8.01-675.5(A) and Rule 5A:12 and 5A:13 govern procedure and elements
    - Must persuade circuit court to enter order certifying, then petition CAV, which has discretion to accept or deny
  + Interlocutory Immunity Appeals
    - An order “granting or denying a plea of sovereign, absolute, or qualified immunity that, if granted, would immunize the movant from compulsory participation in the proceeding” is “eligible for immediate appellate review.” Code § 8.01-675.5(B)
    - Procedure set forth in Rule 5A:12A.
    1. **Petitions for Rehearing**
* After final disposition, party may petition CAV for rehearing within 14 days. Rule 5A:33 and 5A:35.
* No oral argument; only granted if one judge who decided case adversely agrees. *Id.*
* No additional briefing by petitioner if granted; respondent can file additional brief and Court will hear oral argument by same panel “when practicable. Rule 5A:35(a).
* Rehearing en banc:
  + Permitted under Code § 17.1-402(D);
  + Must be filed within 14 days;
  + No response unless ordered to do so;
  + Court decides within 20 days of order to be reheard. Rule 5A:34 and 5A:35(b).
  + Procedures and briefing set forth in Rule 5A:35(b).
  + En banc arguments heard in Fourth Circuit until CAV gets new court.
    1. **Petitions to SCOVA**
* Jurisdiction
  + Party aggrieved by final decision of CAV may petition SCOVA. Code § 8.01-670.
* Petition Process
  + Process remains the same as before.
  + Petition due within 30 days from entry of judgment or denial of timely petition for rehearing. Rule 5:17.
  + Brief in opposition due 21 days from petition. Rule 5:18.
  + Oral argument by petitioner for 10 minutes, or waived with filing of reply brief. Rules 5:17, 5:19.
  + Panel of 3, grant by 2.
  + Petition for Rehearing:
    - Goes to full court, not only 3 on panel
    - Due within 14 days of denial order. Rule 5:20.
* Merits Process
  + Opening Brief due within 40 days of certificate of appeal. Rule 5:26.
  + Appellee brief due 25 days later, Reply Brief due 14 days later. Rule 5:26.
  + Oral argument is 15 minutes per side, to full Court.
    1. **Assignments of Error**
* Petition and brief must “list, clearly and concisely and without extraneous argument, the specific errors in the rulings below-or the issue(s) on which the tribunal or court appealed from failed to rule-upon which the party intends to rely, or the specific existing case law that should be overturned, extended, modified or reversed.” Rules 5:17 and 5A:20.
* Include specific reference to page number where error was preserved or failure to rule can be found
* Dismissal for failure to assign or insufficient assignments
* Show cause for failure to use separate heading or including preservation reference
  + 1. **Briefs**
* Requirements for length, formatting, etc. are in Rules 5A:19 and 5:26
* Don’t try to reference/incorporate arguments from trial court (5A:19, 5:26(f)
  + 1. **Electronic filing**
* CAV
  + “Except as otherwise provided, **all documents to be filed in this Court must be filed electronically**, in Portable Document Format (PDF), with the clerk of this Court and electronically served on opposing counsel. Pro se litigants may file by non-electronic means. Others may file by non-electronic means only by leave of Court. Electronic pleadings must be filed through the Virginia Appellate Courts Electronic System ("VACES") in the manner prescribed by the Guidelines and User's Manual. All electronic filings are governed by Rule 1:17.” Rule 5A:1.
  + “no paper copies are to be filed for any electronically filed documents” 5A:1.
* SCOVA:
  + “**All documents** - other than the record on appeal - **must be filed electronically**, except for filings by pro se prisoners or a litigant who has been granted leave by the Court to file documents in paper form. Documents to be filed electronically include, but are not limited to, all notices, motions, pleadings, petitions, briefs, appendices, letters, exhibits, or other items to be filed or served during an appeal. All such documents must be filed with the clerk of this Court electronically” in PDF “in the manner prescribed by” VACES Guidelines and User’s Manual.
  + VACES Manual is on the Court’s website: [https://eapps.courts.state.va.us/help/robo/vaces/index.htm#t=VACES.htm.](https://eapps.courts.state.va.us/help/robo/vaces/index.htm%23t=VACES.htm.)
* If you haven’t yet, create your VACES account to iron out the kinks before a filing deadline
  + 1. **Appellate Mediation**
* Pilot project extended to 2023 and available in both courts
* Letter from Clerk notifying of option to mediate with certified appellate mediator
* Stays briefing schedule
* Not available in appeal related to best interests of the child.
  1. **Preparing (Early) for an Appeal** 
     1. **Standards of Review**
  + Shapes your future appeal, decision whether to appeal, and likelihood of success. Know them early.
  + “Our analysis begins, as always, by framing the issues before us within the context of the governing standard of appellate review.” *Fitzgerald v. Loudoun Cty. Sheriff's Off.*, 289 Va. 499, 504 (2015).
  + “The purpose of standards of review is to focus reviewing courts upon their proper role when passing on the conduct of other decisionmakers. Therefore it is incumbent upon the parties and the appellate court to correctly identify and apply them.” *Lawlor v. Commonwealth*, 285 Va. 187, 211 (2013).
  + **De Novo**

“afresh” and “anew”; when the “reviewing court can perform the task as capably as the decisionmaker under review.” *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 321 n. 1 (4th Cir. 2008).

Applies to pure questions of law, like interpretation of statute/rule/constitution, insurance policy, burdens of proof, measure of damages, contents of jury instructions.

* **Abuse of Discretion**

“The three principal ways a court abuses its discretion are when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

It includes review to determine that the exercise of discretion was not guided by erroneous legal conclusions; a court also abuses its discretion if it inaccurately ascertains the outermost limits of the range of choice available to it. The boundary of the range of choice available to the court is itself a relevant factor for the court to consider when exercising its discretion.” *Lambert v. Sea Oats Condo. Ass'n, Inc*., 293 Va. 245, 253 (2017) (cleaned up).

Applies to most trial rulings, like decisions on admissibility of evidence, continuance/transfer motions, voir dire, sanctions, whether to grant jury instructions, estoppel, remittitur,

* **Plain Error**

“When a circuit court approves a report by a commissioner in chancery who heard evidence *ore tenus,* we will affirm the court's decree unless it is plainly wrong or without evidence to support it. [W]e look at the commissioner's conclusions, as approved by the circuit court, and determine whether the conclusions are supported by credible evidence.” *Glasser & Glasser, PLC v. Jack Bays, Inc.*, 285 Va. 358, 369 (2013).

Applies to findings of fact, board of zoning appeals decisions, court’s decision affirming jury verdict, decision whether to grant injunction, decision at ore tenus hearing.

* **Arbitrary and Capricious**

“A decision is arbitrary and capricious, we have said, when it is willful and unreasonable and taken without consideration or in disregard of facts or law or without determining principle.” *Virginia Commonwealth Univ. v. Zhuo Cheng Su*, 283 Va. 446, 453 (2012).

Applies to many administrative decisions because decision maker is presumed to have competence in area.

* **Fairly Debatable**

“An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.” *Bd. of Sup'rs of Rockingham Cty. v. Stickley*, 263 Va. 1, 7 (2002).

Applies to deference to legislative process of governing body, such as zoning ordinances and granting special use permits.

* **Substantial Evidence**

“On appeal of an agency decision, the sole determination as to factual issues is whether substantial evidence exists in the agency record to support the agency's decision. The reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable mind necessarily would come to a different conclusion.” *Chippenham & Johnston–Willis Hosps., Inc. v. Peterson*, 36 Va.App. 469, 475 (2001).

Applies to many agency decisions, such as VSB disciplinary proceedings, DMV decisions, etc.

* + 1. **Preservation and Waiver**
* **Rule 5:25. Preservation of Issues for Appellate Review.** “No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard 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 shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.”
* **Virginia Code Section 8.01-384** Formal exceptions to rulings or orders of court unnecessary; motion for new trial unnecessary in certain cases:

“A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

B. The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.”

* The purpose of this rule is well-established. It “afford[s] the trial judge a fair opportunity to rule intelligently on objections while there is still an opportunity to correct errors in the trial court.” *Vasquez v. Mabini*, 269 Va. 155, 163 (2005).
* Must preserve all reasons for objections. It is not sufficient to object on the basis of relevance but then seek an appeal that the evidence should have been excluded on the basis of hearsay. *See Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526, 636 S.E.2d 416, 420 (2006); *Fisher v. Commonwealth*, 236 Va. 403, 413–14, 374 S.E.2d 46, 52 (1988)
* Rule 5:17(c)(1): “An exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken must be included with each assignment of error. If the error relates to failure of the tribunal or count below to rule on any issue, error must be assigned to such failure to rule, providing an exact reference to the page(s) of the record where the issue was preserved in the tribunal below, and specifying the opportunity that was provided to the tribunal or court to rule on the issue(s).”
* Rule 5:17(c)(1)(iv): “If there is a deficiency in the reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken - including, with respect to error assigned to failure of such tribunal to rule on an issue, an exact reference to the page(s) of the record where the issue was preserved in such tribunal, specifying the opportunity that was provided to the tribunal to rule on the issue(s) - a rule to show cause will issue pursuant to Rule 5:1A.”
* Failure to preserve objections and arguments 🡪 waiver. This is true at trial and on appeal.
* Virginia appellate courts LOVE a good waiver argument to dispose of assignments of error or entire cases. Court can’t review/reverse error when you did not raise the error!
  + 1. Tracking the Elements for Causes of Action and Defenses
* Prepare for your potential appeal, or the other side’s, by tracking the elements, evidence, preservation. Build the records and arguments well in advance of the appeal.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Cause of Action and Elements** | **Evidence to Support** | **Motions and Objections to Evidence** | **Response** | **Notes** |
| **Negligence** |  |  |  |  |
| 1. **Duty** |  |  |  |  |
| 1. **Breach** |  |  |  |  |
| 1. **Causation** |  |  |  |  |
| 1. **Damage** |  |  |  |  |

* + 1. Consider Amicus
* Depending on case, Court and parties may benefit from additional briefing
* Permitted in both courts. Rule 5A:23, Rule 5:30.
* Generally due at same time as brief whose position is being supported
* The art of the amicus:
  + not repetitive of parties’ briefs;
  + a more focused angle, another perspective, a deeper dive on more narrow issue to help Court resolve the appeal;
  + organizations and appellate counsel available depending on circumstances.

**2. Fundamentals of Appellate Advocacy**

**2.1. How is this different?**

* + 1. **Standard of review**
  + SoR, not whether you’re right or not, anchors your appeal
  + SoR is the lens court looks through
  + Your argument may be great, the Court might even agree. But it has to be viewed through the right lens
    1. **Record**
  + Record is set
  + Unless you can point to fact in record, you can’t raise it.
  + Knowing your record is what matters, not persuading a jury on facts.
    1. **Workload of appellate court**
* Appellate judges read A LOT. Write like it.
* Goal is to persuade a very busy judge to believe and trust you, not the other smart person also invested in the outcome. Trust comes from getting the facts accurately stated and cited as well as accurately stating and citing the law. If there is controlling case against you, you have to acknowledge and distinguish or acknowledge and say why the law should be changed.
* That judge will read hundreds of pages of briefs every day in preparing for court. Make yours stand out—in a good way—and make their job easier.
  + 1. **Your case vs. the rest**
* Appellate court has not just your case to consider, but all the other cases to come.
* Court will need to know, and thus so do you, how the ruling you want in your case will affect the law and other cases that will come to the court.
* Step back. Equities and facts matter, but Court is not wrapped up in them the way you are at trial. This should impact how you present issues on appeal.
* The Court will not just be considering your case but how your case will impact the rest of the cases in the Commonwealth of Virginia – think about implications down the road and from a practical perspective.
  + 1. **Familiarity**
* Appellate court doesn’t know anything about your case, its facts or issues.
* Unlike at trial, appellate court is getting first and only look at your case.
* No long history of pleadings, hearings, knowledge of counsel or parties.
* Things long familiar to you are new to the Court, including law, facts, procedural posture, etc.
* Your brief and oral argument must reflect these

**2.2. Research**

* + 1. **Persuasion is your goal.**
* Appellate practice demands building trust and reliability. You want the judge/justice to believe you and your job is to persuade them.
* Legal research is invaluable for building this trust. Your appeal is built on the foundation of finding the right cases to persuade.
  + 1. **Do’s and Don’ts**

Do’s Don’ts

|  |  |
| --- | --- |
| * Cite SCOVA first where possible, especially on civil matters * Use Google to get background information, understanding, terminology * Cite recent case where possible * Read entire case, not just headnote or choice quote * Figure out what you need before you start looking * Consider whether other jurisdictions are appropriate * Cite federal cases for federal law or when state law tracks it (VA. Constitution, for example) * See what secondary sources Court relies on for your area of law * Build the analytical framework for the opinion you want written * Subscribe to court’s opinions/newsletters | * Cite federal cases for Virginia law * Cite circuit court cases unless necessary to prove your point (circuit split etc.) * Cite out-of-state authority unless needed for your point * Cite unreliable sources like Wikipedia * Overstate usefulness of case * Lose trust by stripping useful quote from context * Ignore bad cases * Rely on other side’s or trial court’s research * Limit yourself to other side’s cases * Forget there are somewhere between 6-9 people checking your research |

* + 1. **Resources**
  1. Westlaw/Lexis/Bloomberg
  2. <https://parallelsearch.casetext.com/>
  3. Law libraries and law library websites
  4. Supreme Court of Virginia library
  5. Court’s news emails with opinions
  6. Google for background and understanding

**2.3. Writing**

* + 1. **Good writing is good writing**
  + Guideposts/headers
    - For facts as much as law
    - TOC as coherent analysis-at-a-glance
  + Readability is key
    - Get rid of legalese and needlessly fancy words
  + Declutter
    - Acronyms
      * avoid if possible unless well known (FBI, SCC, etc.)
    - Citations
      * One case is all you need for undisputed propositions
      * Avoid string cites as general rule
      * Shorten your parantheticals
    - Redundancies
      * A well organized and well edited brief eliminates them
  + Introductions and Conclusions
    - Introductions: Engage, quickly put case into context, and concisely state why you win
    - Conclusions: what you are asking
  + Variety
    - In transition
    - Paragraph and sentence length
  + Don’t use max number of pages
  + What does judge want?
    - Remember your audience
    1. **Appellate Style issues**
  + Anchor your analysis and organization to the applicable SoR
  + Assignments of error
    - Your brief is to explain why you’re right to assign error.
    - So argument framework is built around them
  + Tone
    - Respect your opponent, the trial court, and the appellate court (if any) you are disagreeing with
    - Eliminate “disingenuous,” “mischaracterize,” and other pejoratives
    - Persuasion, not scoring points, is goal
  + Digital reading
    - At both courts, majority of judges/justices are reading the briefs digitally
      * Consider hyperlinking TOC, briefs to record.
    - Think about how you read or would read digitally:
      * More distracted
      * Flipping back and forth less frequently
      * Skimming vs. in-depth reading
      * Relying more on guideposts and hyperlinks (TOC, bookmarks)
    - Footnotes are cumbersome
    - Good paragraph breaks, white space and formatting to make reading easier on the eyes and brain
    - Clear guideposts
    1. **Edit – Make the time**
* Time consuming work, but excellent briefing requires many hours spent editing
  + Do not try to edit everything in one read. Try using multiple reads; one read to look at citations, one read to look at overall themes and readability, one read to look at typos, etc.
* Set internal deadlines to allow for it
* Macro vs. micro
  + Big picture: headings, organization, theme
  + Details: citations, word choice, transitions, redundancies
    1. **The Reply**
* Don’t just regurgitate your Opening Brief
* Narrow issues, consolidate agreement
* Distinguish Appellee’s brief
* Prioritize; cannot and should not address every argument
  + 1. **Resources**
* *Plain English for Lawyers* and *The Winning Brief*, Bryan Garner
* *Point Made*, Ross Guberman
* *Typography for Lawyers*, Matthew Butterick
* *Plain English for Lawyers*, Richard Wydick and Amy Sloan
* Briefs of top Appellate advocates
* A dictionary
* A thesaurus

**2.4. Oral argument**

* + 1. **Appellate Difference**
  + 3 (or 7) vs. 1
  + They’re often talking to each other – and often ask questions targeted at addressing concerns of other judges or justices
  + They likely haven’t conferenced yet
  + This is a conversation with several very smart people; interest in and knowledge of your case and the law governing it varies.
  + You’re on the clock
    - Court has read your briefs; don’t waste time.
    - Court will push you where you need to go; follow it.
    - One shot: conclude with primary points.
    - If they ask a question, you really need to answer it.

**2.4.2 Preparation**

* + Find theme.
  + Do not recite the facts of the case – get into argument
  + Openers and closers.
  + Re-read cases; have them organized and readily available. Know the important cases by heart.
  + Know how any judge/justice who may be hearing your case voted on the important cases. You may not know your panel before argument.
  + Know your record in and out; tab appendices and have a record cheat sheet.
  + Practice, practice, practice.
    - Talk to yourself. Or a friend.
    - You will not effectively present argument or answer questions unless you have practiced speaking the words you need.
  + Moot: make it real, make it hard, and do several.
  + List of questions. List every question you can think of, both for and against your position, and practice answering them.
  + Shuffle topics. Know how each interacts with the other.
  + Listen to recordings of Court’s oral arguments.
  + Materials to bring, cheatsheets, and outlines
  + DO NOT WRITE YOUR ARGUMENT

**2.4.3 Strategy**

* + This is a conversation; unlike written argument. DO NOT READ
  + Cadence and pace
  + Zoom-specific
    - camera, eye contact, pace
  + opener and closer
  + handling questions
    - softballs
    - “not this case”
    - transitions
    - answer the question when asked, then explain, distinguish, etc.
    - do not say, “I will get to that later”
  + appellant vs. appellee
    - listen. Especially as appellee, as appellant’s argument and questions may adjust your own.
    - opening
    - rebuttal. Was there error about record? An exchange that opens opponent to attack? An exchange that opened your argument up for attack that needs a response? End with relief you want.
  + safety of “your Honor” if you can’t learn their names.
  + DO NOT INTERRUPT. Stop talking when a judge or justice begins to ask a question; answer when they are done even if you know what they’re asking.
  + Prioritize: you will not be able to reach every issue, so decide what is most important.
    1. **Resources**
  + CAV audio: <https://www.vacourts.gov/courts/cav/oral_arguments/home.html>
  + SCOVA audio: <https://www.vacourts.gov/courts/scv/oral_arguments/home.html>
  + CA4 audio: <https://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments>
  + SCOTUS audio: <https://www.supremecourt.gov/oral_arguments/argument_audio/2021>
  + Supreme Court of Virginia “The Art of Appellate Advocacy” <https://appellate.law.wm.edu/watch-the-conversation/>
  + Recent CAV/SCOVA argument in same area of law
  + *Making Your Case*, Justice Antonin Scalia and Bryan Garner
  + *The Articulate Advocate*, Brian K. Johnson and Marsha Hunter