GEORGE MASON AMERICAN INN OF COURT

What to Do When Things Go Wrong and Updates on the New Virginia Appellate System

September 17, 2025

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I. Senate Bill 1261

- Judges. Increases from 11 to 17. Code § 17.1-400.

- Summary Disposition. Oral arguments may be dispensed with if unanimous panel agrees the case is (i) wholly without merit or (ii) dispositive issues have been authoritatively decided, and the appellant has not argued that the caselaw should be overturned, extended, modified, or reversed. Code § 17.1-403; Rule 5A:27.
  - Previously, oral argument could be dispensed with only if the unanimous panel found the case "without merit." 17.1-403 (effective until January 1, 2022); 5A:27 (effective until January 1, 2022).

- Appendix. No appendix is required where the trial court clerk files the record electronically. Rule 5A:25.
  - Court of Appeals will issue a notice that record was received and indicate whether it was transmitted in electronic or paper format.
  - If electronic, the notice will contain a link to the trial court record.
  - You can request a record from: cavrecordrequests@vacourts.gov.

- Standard for Appeal to Supreme Court. Former heightened standard for petition to Supreme Court abandoned. Code § 17.1-411.

- Mandatory e-filing. Rule 5A:1(c).

II. Preservation of Error

1. Rule 5A:18: "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 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."

   - "Right result for the wrong reason" doctrine. Only an appellant has the duty to preserve error.
     - "[A]n appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations…or involve an affirmative defense that must be "asserted in the pleadings." *Blackman v. Commonwealth*, 45 Va. App. 633 (2005).

- "[O]ne party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection." *Linnon v. Commonwealth,* 287 Va. 92, 102 (2014).

2. How to Make Sure Things Go Right:

- Articulate each applicable objection. If the argument made in support of an objection at trial differs from the one made on appeal, appellate courts will not consider the new argument.
  - "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Kolesnikoff v. Commonwealth*, 54 Va. App. 396, 402-403 (2009).
  - "On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court." *Khakee v. Rodenberger*, No. 1030-19-4, 2020 WL 890398, at *3 (Va. App. Feb. 25, 2020) (quoting *West Alexandria Prop., Inc. v. First Va. Mort. & Real Estate Inv. Trust*, 221 Va. 134, 138 (1980)).
- Make a proffer. If the objection is to a ruling excluding evidence, make a proffer of the evidence so the appellate court can determine what was excluded and what it would have established. Rule 2:103; *Albert v. Albert*, 38 Va. App. 284, 290 n.1 (2002).
  - Proffers "achieve two purposes: to allow the trial court a fair opportunity 'to resolve the issue at trial' and 'to provide a sufficient record for…review.' On appeal, the purpose may also be dual: to allow the appellate court to determine whether the trial court erred in excluding the evidence and, if so, whether that error was harmless." *Marni v. Marni*, No. 0103-18-4, 2018 WL 5913142, at *10 (Va. App. Nov. 13, 2018) (quoting *Albert*, 38 Va. App. at 290 n.1).
  - "We will not consider testimony which the trial court has excluded without a proper showing of what that testimony might have been." *Galumbeck v. Lopez*, 283 Va. 500, 507 (2012) (quoting *O'Dell v. Commonwealth*, 234 Va. 672, 697 (1988)).
  - A "unilateral avowal of counsel, *if unchallenged*, or a mutual stipulation of the testimony expected constitutes a proper proffer." *Galumbeck*, 283 Va. at 508.
- Get a ruling. Appellate courts cannot review an objection that was never ruled on. *Duva v. Duva*, 55 Va. App. 286, 299 (2009).
  - If you have objected to evidence on more than one basis, ask for a ruling on all bases. Appellate courts will not review any basis that was not explicitly ruled on. *Riner v. Commonwealth*, 268 Va. 296, 324 (2004); *Galumbeck*, 283 Va. at 508-09.
  - If the trial court refuses to make a ruling, ensure that this is clear on the record.

- Specify the remedy. Even if your objection is ruled on, appellate courts may not reverse the ruling if it is unclear what remedy you sought.
  - "[E]ven though the defendant voiced an objection, his failure to seek a mistrial or other action by the trial court prevents considering this error as a basis for a reversal." *Parker v. Commonwealth*, 14 Va. App. 592, 596 (1992).
- Move to strike after putting on evidence. As a defendant, you cannot stand on a motion to strike the plaintiff's evidence after your own case-in-chief because the trial court did not have the entire record in front of it—your evidence—when it ruled.
  - When a defendant chooses to introduce evidence in his or her defense, the defendant "demonstrates 'by his conduct the intent to abandon' the argument that the [plaintiff] failed to meet its burden through the evidence presented in its case-in-chief." *United Leasing Corp. v. Lehner Fam. Bus. Tr.*, 279 Va. 510, 517 (2010) (quoting *Murillo-Rodriguez v. Commonwealth*, 279 Va. 64, 83 (2010) (quoting *Graham v. Cook*, 278 Va. 233, 248, 682 S.E.2d 535, 543 (2009))).
- Clean up at the of your case. Renew pretrial motions, move to strike your opponent's evidence, request rulings on motions taken under advisement, request to move all marked exhibits into evidence, and note objections on all orders.
  - Litigants must renew pretrial motions denied "without prejudice." *Lucas v. Riverhill Poultry, Inc.*, 300 Va. 78, 94-95 (2021).
  - Compare:
    - "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." Code § 8.01-384.
    - Appellant who endorses an order "we ask for this" does not waive appellate issues related to the order. *Cashion v. Smith*, 286 Va. 327 (2013).[1]

3. What to Do When Things Go Wrong:

- Request a suspending order. Nothing short of an order that expressly modifies, vacates, or suspends a final judgment will interrupt the 21-day time period after which the trial court loses jurisdiction over a matter. Rule 1:1.

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[1] For a discussion of preserving error when endorsing a court order, see *Be Careful What You Ask For:* Cashion v. Smith *May Not Keep You From Getting It*, VTLAppeal, Vol. 3, No. 1, at 10 (2020).

- An order stating that "this court shall retain jurisdiction over this action until such time as this court may consider and rule on" was not sufficient to toll the 21-day provision of Rule 1:1. *Super Fresh Food Markets of Va., Inc. v. Ruffin*, 263 Va. 555, 562 (2002).

- File a motion to set aside the verdict.
  - If you forget to make a motion to strike at trial, you can still timely do so in a motion to set aside the verdict.
    - "We consistently have held that while a motion to strike made during trial is an appropriate method of testing the sufficiency of the evidence, a party may also challenge the sufficiency of the evidence by a motion to set aside the verdict." *Supervalu, Inc. v. Johnson*, 276 Va. 356, 369 (2008) (citing *Little v. Cooke*, 274 Va. 697, 718 (2007); *Gabbard v. Knight*, 202 Va. 40, 43 (1960); *Norfolk S. Ry. Co. v. Trimiew*, 253 Va. 22, 24 (1997)).
  - Opportunity to provide more fulsome argument on timely objections or more clearly articulate multiple grounds of objection.
  - Do not file a motion to reconsider.
    - You do not get a hearing. "Oral argument on a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record will be heard orally only at the request of the court." Rule 4:15(d).
    - You cannot ensure that the trial court rules on your motion before it loses jurisdiction. In that case, you have not preserved error.
    - "A motion to reconsider is insufficient to preserve an argument not previously presented unless the record establishes that the court had an opportunity to rule on the motion." *Westlake Legal Grp. v. Flynn*, 293 Va. 344, 352 (2017) (citing *Brandon v. Cox*, 284 Va. 251, 256 (2012)).

- File a motion challenging jury instructions or the verdict form.
  - Jury instructions can be challenged in a motion to set aside the verdict.
    - "It is well settled in this State that on a motion for a new trial involving the correctness of the instructions, the court may reconsider the instructions, *although not objected to*, and if they are found to be incorrect and calculated to mislead the jury, may set aside the verdict. *Smith v. Combined Ins. Co. of Am.*, 202 Va. 758, 762 (1961) (emphasis added) (citing Martin P. Burks, COMMON LAW PLEADING AND PRACTICE § 306, at 550 and § 324, at 596 (T. Munford Boyd ed., 4th ed. 1952); *Stevenson v. Wallace*, 68 Va. 77, 93 (1876); *Bull v. Commonwealth*, 55 Va. 613, 625-26 (1857)); *see also Turner v. Sheldon D. Wexler, D.P.M., P.C.*, 244 Va. 124, 128 (1992) ("A trial court is

empowered to change a legal determination as long as it retained jurisdiction over the proceedings before it.")

- The verdict form can also be challenged in a motion to set aside the verdict.
  - An "instruction" to the jury encompasses any statement of law given by the trial court to the jury, including the verdict form. *Atkins v. Commonwealth*, 257 Va. 160, 177 (1999).

III. Beginning Your Appeal: How to Do Things Right

1. Notice of Appeal

- File within 30 days of entry of judgment.
- File in trial court *and* Court of Appeals with filing fees.
- Traps for the Unwary:
  - The Notice of Appeal requires very specific content, so use Supreme Court Forms.
  - Some trial courts require a filing fee, others do not. Ensure you determine and submit the fee with your filing.
  - You cannot rely on representations by a clerk's office, so file as soon as possible. There is no penalty for filing early.
    - Courts may not "permit an extension of the appellate deadline based upon a verbal representation by a court clerk." *Hill v. Hill*, No. 1606-19-1, at *5-6 (Va. App. Nov. 16, 2021).
- Authority: Rule 5A:6.

2. Appeal Bond

- File with Notice of Appeal.
- $500 or a different amount as ordered by the Court.
- Traps for the Unwary:
  - "All security for appeal required under Code § 8.01-676.1 must substantially conform to the forms set forth in the Appendix to this Part Five A." In other words, use Supreme Court Forms.
- Authority: Code § 8.01-676.1; Code § 1-205; Rule 5A:6; Rule 5A:16; Rule 5A:17.

3. Transcripts/Written Statements

- Transcript:
  - File transcripts within 60 days of entry of judgment

- File notice of filing transcripts within 10 days after transcripts are filed or, if transcripts filed before Notice of Appeal, within 10 days after Notice of Appeal is filed
- Traps for the Unwary:
  - Sometimes the trial reporter will not transcribe de bene esse depositions since a transcript of the deposition already exists. Proof the transcript to ensure the trial transcript is complete and resolve any relevant errata.

- Written Statement:
  - File written statement in lieu of transcript within 60 days of entry of judgment
  - At the same time, file notice of filing written statement that presents statement to trial court no earlier than 15 days nor later than 20 days after filing
  - Traps for the Unwary:
    - Statement must be signed by trial judge. *Granado v. Commonwealth*, 292 Va. 402, 408 (2016).
    - In appeals to the Supreme Court, a written statement must be filed within 55 days of entry of judgment. Rule 5:11(e)(1).
- Objections to transcripts/statement due within 15 days of Notice of Filing/ Hearing or, if transcripts/statement filed before Notice of Appeal, within 10 days after Notice of Appeal is filed
- Authority: Rule 5A:8.

4. Record

- Transmitted to Court of Appeals no earlier than 21 days after Notice of Appeal is filed; or 21 days after transcript/statement filed; or 5 days after trial court resolves any objections; *but* no later than three months after entry of judgment
- Includes:
  - Documents filed with the trial clerk
  - Instructions, marked given or refused, initialized by the judge
  - Exhibits, admitted or not, initialed by the judge
    - Non-documentary exhibits are tagged, labeled, and initialed by judge
  - Trial court orders, opinions, and memoranda
  - Depositions and discovery, admitted or not, offered into evidence at any proceeding
  - Transcripts or written statement of facts entered through Rule 5A:8.
    - Videotaped recordings may be used under certain circumstances
  - Notice of Appeal

- Request electronic record from: cavrecordrequests@vacourts.gov
- Traps for the Unwary:
  - Documents that should be in the record may not be. Always review the Table of Contents before the Record is transmitted.
  - Disagreements over contents decided by trial court.
- Authority: Rule 5A:7; Rule 5A:10.

5. Appendix & Assignment of Errors

- Appendix
  - Not required in electronically filed cases
    - Contact clerk to determine whether record will be transmitted electronically.
    - Fairfax County is one of a handful of counties that still transmit paper records.
    - Court may still enter order dispensing with appendix
  - Required contents:
    - Initial pleading, as finally amended.
    - Judgment appealed from, and related memos, opinions, and orders.
    - Testimony relevant to the assignments of error.
      - Witness names must be printed at the beginning of excerpts and at the top of each page thereafter.
    - Exhibits "necessary for an understanding of the case that can be reasonably reproduced."
    - Table of contents.
  - Designation deadline:
    - If contents are agreed to, file within 15 days after the filing of the record with the signature of all parties.
    - If contents are not agreed to, file within 15 days with assignments of error.
      - Opposing party must file designation of additional contents and statement of additional assignments of error.
      - Appellant must include these contents in appendix
  - Filing deadline: Filed with the Opening Brief of Appellant.
  - Traps for the Unwary:
    - Rules regarding format of appendix and table of contents are subject to stringent rules, so use a printer!
  - Authority: Rule 5A:25.
- Assignments of Error
  - In the opening brief, under a heading entitled "Assignments of Error," the appellant 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." Rule 5A:20(c).

- Include an "exact reference to the page(s) of the transcript, written statement of facts, record, or appendix where the alleged error has been preserved in the trial court," or if the error is a failure to rule, where the alleged error has been preserved in the tribunal below, and specifying the opportunity that was provided to the tribunal or court to rule on the issue(s)."

- Traps for the Unwary:
  - Failure to assign error or an insufficient assignment of error will result in the appeal being dismissed.
  - Failure to use a separate heading or include preservation reference will result in a rule to show cause pursuant to Rule 5A:1A.
- Authority: 5A:20(c)

IV. Beginning Your Appeal: What to Do When Things Go Wrong

1. You missed the deadline to file your notice of appeal.

- File the Notice immediately.
- File a motion for extension of time to file. Rule 5A:3(a):
  - "(a) Certain Filing Deadlines and Extensions. — The times prescribed for filing a notice of appeal (Rules 5A:6 and 5A:11)…are mandatory, except that an extension of the time to file a notice of appeal…may be granted in the discretion of this Court *in order to attain the ends of justice*. The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1, in which case the time for filing is computed from the date of the final judgment entered following such modification, vacation, or suspension."
  - Must file within 30 days after the filing deadline of the pleading for which you are requesting an extension. Rule 5A:3(c).
  - Extension may be granted in the "discretion of this Court in order to attain the ends of justice." Rule 5A:3(a).
- Inform opposing counsel and ask whether they will oppose the motion. Rule 5A:2(a)(1):
  - "(a) Motions and Responses. (1) Motions…. All motions must contain a statement by the movant that the other parties to the appeal have been informed of the intended filing of the motion. For all motions in cases when all parties are represented by counsel—

except motions to dismiss petitions in original jurisdiction proceedings—the statement by the movant must also indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition."

- These procedures apply to a petition for rehearing under Rule 5A:33 and a request for rehearing en banc under Rule 5A:34.

2. Part of the trial record is missing, or you need to add documents outside of the record.

   - If the record has not yet been transferred, file a motion in the trial court.
     - "If disagreement arises as to the contents of any part of the record, the matter must, in the first instance, be submitted to and decided by the trial court." Rule 5A:7(b).
     - "Clerical mistakes in all…parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court…upon the motion of any party and after such notice, as the court may order." Code 8.01-428.
       - An appeal of right is mature and may be docketed when the record is filed with the Clerk of the Court of Appeals. Rule 5A:16(a) and (c).
   - If appeal is pending and omission is clerical, file a motion for entry of a writ of certiorari or request leave from the appellate court for correction by trial court.
     - "The court may, in any case, after reasonable notice to counsel in the appellate court, award a writ of certiorari to the clerk of the trial court and have brought before it, when part of a record is omitted, the whole or any part of such record." Code § 8.01-675.4.
     - "During the pendency of an appeal, [clerical] mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court." Code § 8.01-428.
       - "[A]n appeal does not divest the trial court of jurisdiction over ancillary matters reserved to it by statute." *Ford v. Commonwealth*, No. 2171-13-2, 2014 WL 5328639, at *4 (Va. App. Oct. 21, 2014) (quoting *Askew v. Commonwealth*, 49 Va. App. 127, 137 (2006).
       - Trial court has authority to correct a clerical mistake only to the extent it makes the record "speak the truth" and the record itself "clearly supports such corrections." *School Bd. of Lynchburg v. Caudill Rowlett Scott, Inc.*, 237 Va. 550, 555 (1989) (quoting *Council v. Commonwealth*, 198 Va. 288, 292 (1956) and *Cutshaw v. Cutshaw*, 220 Va. 638, 641 (1979)).

- If appeal is pending and record must be enlarged, file a motion for entry of a writ of certiorari.
  - After the record has been transmitted by the trial court and an appeal has been awarded, the record may not be enlarged except by writ of certiorari. *Thompson v. Commonwealth*, No. 1567-19-1, 2020 WL 6472551, at *3 (Va. App. Nov. 4, 2020) (citing *Old Dominion Iron v. VEPCO*, 215 Va. 658, 660 (1975)).
- If appeal was dismissed for failure to have a complete record, file a petition for rehearing. Rule 5A:33.
  - Beware of summary disposition.
  - Always retain original date-stamped copies of pleadings *and* attachments.

3. You overlooked an important case, statute, rule, or other authority in your brief or at oral argument.

- File a letter with citation to and brief explanation of supplemental authorities. Rule 5A:4A.
  - State the reason for the supplement.
  - Refer to the page of the brief where the authority should be cited, or to a point argued orally.
  - 350-word limit.
- Response may be filed within 14 days and must meet 350-word limit.
- Court may refuse to consider supplemental authority in its discretion.

ADDENDUM

1. Sample Suspending Order
2. Notice of Appeal Form 5A:6
3. Sample Code 1-205 Bond
4. *Be Careful What You Ask For:* Cashion v. Smith *May Not Keep You From Getting It*, VTLAppeal, Vol. 3, No. 1, at 10 (2020)
5. Cases:
    a. *Cherry v. Lawson Realty Corp.*, 295 Va. 369 (2018)
    b. *Hill v. Hill*, 2021 WL 5312386, Record No. 1606-19-1 (Va. App. Ct. 2021)
    c. *Jacks v. Commonwealth*, 74 Va. App. 783 (2022)
    d. *Maxwell v. Commonwealth*, 287 Va. 258 (2014)
    e. *Nusbaum v. Berlin*, 273 Va. 385 (2007)
    f. *Reid v. Bumgardner*, 217 Va. 769 (1977)
    g. *Riner v. Commonwealth*, 268 Va. 296 (2004)
6. Statues:
    a. Va. Code § 8.01-384
7. Rules
    a. Rule 1:13
    b. Rule 5A:18
    c. Rule 5:25

APPELLATE BONDS

Types of Bonds. There are two types of appellate bonds outlined in Code § 8.01-676.1: an appeal bond and a suspending bond. Subsections (A) and (B) discuss the appeal bond, also known as a bond for costs, and subsection (C) discusses the suspending bond, also known as a bond for suspension of execution of judgment. An irrevocable letter of credit may be filed in place of either bond. Code § 8.01-676.1(A) and (C). While an appeal bond is required in nearly every civil appeal, a suspending bond is not. Neither bond is required in criminal appeals. Code § 8.01-676.1(A1).

Appeal Bond. An appeal bond is required in nearly every non-criminal appeal.[1] Its purpose is to ensure that the appellant can pay the costs and fees of the appeal if the appellant does not win. The security for an appeal bond or irrevocable letter of credit is $500. *Id.*

In an appeal of right to the Court of Appeals, the bond or letter must be filed "simultaneously" with the Notice of Appeal in the trial court, Code § 8.01-676.1 and Rule 5A:16, which is due 30 days after entry of the appealable order, Rule 5A:6. The appellant must also notify the appellee of the filing. Rule 5A:17(b). In a petition for appeal to either the Court of Appeals or the Supreme Court, it must be filed within 15 days from the date the Certificate of Appeal is issued. Code § 8.01-676.1(B). These deadlines are not jurisdictional and can be

[1] Instances when an appeal bond is not required include when an appeal is "proper to protect the interest of the Commonwealth or any county, city, or town of this Commonwealth;" when an appeal is "proper to protect the estate of a decedent or person under disability;" when the appellant is indigent; or when the appellant is a VWCC claimant who has not returned to work or "by reason of his disability is unemployed." Code § 8.01-676.1(M), (N), and (O). There can be no judgment for costs against the Commonwealth. Code § 17.1-629.

extended by the appellate court for good cause. Code § 8.01-676.1(P); Rules 5A:17(b) and 5:24(b).

Suspending Bond. A suspending bond, often called a "supersedeas bond," is only required where the appellant wants to stay execution of the judgment that it is appealing. Its purpose is to ensure that the appellant can pay the full judgment amount if it loses. *Tauber v. Commonwealth ex. rel. Kilgore*, 263 Va. 520, 545 (2002).

The security for a suspending bond or letter must be sufficient to cover the judgment against the appellant and "shall include an amount equivalent to one year's interest[2] calculated from the date of the notice of appeal" as damages. Code § 8.01-676.1(C) and (J); Code § 8.01-682. When the judgment is not monetary, the damages are set "as the appellate court may deem reasonable," but may not be more than $2,500 or less than $150. Code § 8.01-682. In any case, the total security is capped at $25 million, regardless of the judgment amount. Code § 8.01-676.1(J). Though not required by statute, it is a best practice—especially in cases of non-monetary judgments—to move the court to approve the form of the suspending bond. This can be done in an agreed order[3] and avoids a later motion by the appellee that the posted bond is insufficient. (See the section below on defects and modifications.)

Suspending bonds are not available in every case, however. The trial court may refuse to suspend execution of a decree for support and custody in a family law case or a decision with respect to an injunction. Code § 8.01-676.1(D); *Reid v. Reid*, 245 Va. 409, 414 (1993).

Like an appeal bond, the suspending bond is filed in the trial court. There is no deadline by which a suspending bond must be filed, but until that time, the judgment creditor may attempt

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[2] This amount is typically the statutory rate of 6%. Code § 6.2-302.

[3] A Consent Order for Suspending Bond is included in the materials.

to collect on the judgment. Since collection can begin 21 days after entry of the judgment, Code § 8.01-466, it is a good idea to make this your informal deadline. Once the suspending bond is properly filed, execution of the judgment is stayed. Code § 8.01-676.1(C).

Filing. The Rules of the Supreme Court include forms for both types of bonds and for irrevocable letters of credit.[4] All are filed in the trial court.

Each bond must be executed by a party and surety. Code § 8.01-676.1(F). The form of execution is included in the Rules.[5] Bonds are issued by surety bond insurers, or insurance companies. It is best to use a bonding company that specializes in bonds for businesses. The premiums they charge are typically far lower than, say, what a bail bondsman charges. To apply for a bond, most companies will require the appellant to fill out an application, provide copies of relevant court documents, and show collateral sufficient to cover the amount of the bond plus a premium.[6]

An appellant can use cash instead of a surety for any bond, Code § 8.01-676.1(S). In this case, it is best practice to note on the bond that the appellant is depositing cash as a "bond with surety" pursuant to Va. Code § 1-205. Many clerks will not accept a personal check, so call the trial court clerk beforehand to determine whether they will require a firm or cashier's check.

Letters of credit are issued by banks. If an appellant uses an irrevocable letter of credit, the letter must come from either a federally insured savings institution located in the

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[4] In the Court of Appeals, use Part Five A Form 1 for the appeal bond, Form 2 for the appeal and suspending bonds, and Form 9 for the irrevocable letter of credit. In the Supreme Court, use Part Five Form 1 for the appeal bond, Form 2 for the appeal and suspending bonds, and Form 10 for the irrevocable letter of credit.

[5] In the Court of Appeals, use Part Five A Form 8. In the Supreme Court, use Part Five Form 9.

[6] An example bond application is included in the materials.

Commonwealth, or a bank incorporated or authorized to conduct banking under the laws of the Commonwealth or authorized to do business in the Commonwealth under the banking laws of the United States. Code § 8.01-676.1(F).

Defects and Modifications. If the appellee has any objection to an appeal bond or letter, it must file a statement of the defect. Rules 5A:17(b) and 5:24(b).[7] In the case of an appeal bond filed in the Court of Appeals, this statement is due within 21 days of receiving the appellant's notice that the bond or letter has been filed. Rule 5A:17(b). In the case of an appeal bond filed in the Supreme Court, this statement is due 21 days after the clerk issues the Certificate of Appeal. Rule 5:24(b). The appellant has 21 days from the date of the appellee's statement to correct any defect in the appeal bond. If it does not, the appellee may move to dismiss the appeal, and it will be dismissed unless the appellant "satisfies" the appellate court that the appeal bond or letter was properly filed. Rules 5A:17(b) and 5:24(b).

An appellee may also object to the form or issuer of a suspending bond, Code § 8.01-676.1(E)(1), though the Rules do not set a deadline for the filing of that motion.

Both the trial and appellate courts have leeway to modify the amount and terms of an appeal or suspending bond. Code § 8.01-676.1(E) and (L).[8] Any party can file a motion in the trial court to either increase or decrease the amount of a bond for good cause shown, and the trial court can act on the motion until the Court of Appeals or the Supreme Court acts on a similar motion. Code § 8.01-676.1(E)(1). The trial court's decision is reviewable by the appellate court in which the case is pending. *Id.* Alternatively, a party can file a motion in the appellate court to

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[7] Trial courts retain concurrent jurisdiction with appellate courts to address motions "relating to the amount or form of an appeal or suspending bond pursuant to Code § 8.01-676.1." Rule 1:1B.

[8] The parties may also agree to waive or decrease the amount of the security for a suspending bond. Code § 8.01-676.1(L).

modify the amount of the bond for good cause shown. Code § 8.01-676.1(E)(2). The parties may file affidavits of facts in support of their positions. Code § 8.01-676.1(E)(3).

If a suspending bond requirement has been limited or waived and an appellee can show by a preponderance of evidence that the appellant is intentionally dissipating assets to avoid judgment, the court must rescind the limitation or waiver and may require the appellant to post a suspending bond up to the amount of the full judgment. Code § 8.01-676.1(K).

If an increase is ordered in a suspending bond, and the appellant fails to effect the increase within 15 days of the order, the suspension of execution of the judgment will be discontinued. Code § 8.01-676.1(E)(4). If an increase is ordered in an appeal bond, and the appellant fails to effect the increase within 15 days of the order, the appeal will be dismissed. *Id.*

Post-Appeal. After the appeal has concluded, a mandate will be issued to the trial court. If the appellant prevails, it will move the trial court for an order releasing the bond. This typically occurs through a consent order.[9] If the bond was secured by surety or a letter of credit, the appellant will provide documentation to the surety that it is fully released from any obligation, and the bond or letter will be canceled.

If the appellee prevails and the appellant fails to pay, the appellee can make a claim on the bond or draw on the letter of credit.[10] If it is a cash bond, the appellee will obtain an order of payment from the court and present it to the clerk's office.[11]

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[9] An Agreed Order for Payment and Consent Order for Release of Suspending Bond are included in the materials.

[10] Instructions on how to draw on a letter are detailed within the text of the letter. Part Five A Form 9 and Part Five Form 10.

[11] A sample Order of Payment from Fairfax County is included in the materials. If the appellee prevails but is not entitled to the full amount of the bond, then the remainder will be returned to the appellant.

B&K Blankingship & Keith PC
Results. That's our focus.

Beginning Your Appeal in the Court of Appeals

If you're the appellant, it may seem like the first step in your appeal is filing your Opening Brief of Appellant, but there are several critical steps to follow before you get there. Find out what they are and how to avoid traps.

1 Notice of Appeal

- File within 30 days of entry of judgment.
- File in trial court and Court of Appeals with filing fees.
- ***Traps for the Unwary***
  - The Notice of Appeal requires very specific content, so use Supreme Court Forms.
  - Some trial courts require a filing fee, others do not. Ensure you determine and submit the fee with your filing.
  - You cannot rely on representations by a clerk's office, so file as soon as possible. There is no penalty for filing before a final order is entered, so long as the court has already announced its decision.
  - Courts may not "permit an extension of the appellate deadline based upon a verbal representation by a court clerk." Hill v. Hill, No. 1606-19-1, at *5-6 (Va. App. Nov. 16, 2021).
- Authority: Rule 5A:6.

2 Appeal Bond

- File with Notice of Appeal.
  - $500 or a different amount as ordered by the Court.
  - ***Traps for the Unwary***
    - "All security for appeal required under Code § 8.01-676.1 must substantially conform to the forms set forth in the Appendix to this Part Five A." In other words, use Supreme Court Forms.
- Authority: Code § 8.01-676.1; Code § 1-205; Rule 5A:6; Rule 5A:16; Rule 5A:17.

3 Transcripts/Written Statements

- Transcript:
  - File transcripts within 60 days of entry of judgment.
  - File notice of filing transcripts within 10 days after transcripts are filed or, if transcripts filed before Notice of Appeal, within 10 days after Notice of Appeal is filed.
  - ***Traps for the Unwary***
    - Sometimes the trial reporter will not transcribe de bene esse depositions since a transcript of the deposition already exists. Proof the transcript to ensure the trial transcript is complete and resolve any relevant errata.
- Written Statement:
  - File written statement in lieu of transcript within 60 days of entry of judgment.
  - At the same time, file notice of filing written statement that presents statement to trial court no earlier than 15 days nor later than 20 days after filing.
  - ***Traps for the Unwary***
    - Statement must be signed by trial judge. Granado v. Commonwealth, 292 Va. 402, 408 (2016).
    - In appeals to the Supreme Court, a written statement must be filed within 55 days of entry of judgment. Rule 5:11(e)(1).
- Objections to transcripts/statement due within 15 days of Notice of Filing/ Hearing or, if transcripts/statement filed before Notice of Appeal, within 10 days after Notice of Appeal is filed.
- Authority: Rule 5A:8.

Juli M. Porto, Partner
Appellate and Trial Consulting Practice

4 Record

- Transmitted to Court of Appeals no earlier than 21 days after Notice of Appeal is filed; or 21 days after transcript/statement filed; or 5 days after trial court resolves any objections; but no later than three months after entry of judgment.
- Includes:
  - Documents filed with the trial clerk.
  - Instructions, marked given or refused, initialized by the judge.
  - Exhibits, admitted or not, initialed by the judge.
    - Non-documentary exhibits are tagged, labeled, and initialed by judge.
  - Trial court orders, opinions, and memoranda.
  - Depositions and discovery, admitted or not, offered into evidence at any proceeding.
  - Transcripts or written statement of facts entered through Rule 5A:8.
    - Videotaped recordings may be used under certain circumstances.
  - Notice of Appeal.
- Request electronic record from: cavrecordrequests@vacourts.gov.
- ***Traps for the Unwary***
  - Documents that should be in the record may not be. Always review the Table of Contents before the Record is transmitted.
  - Disagreements over contents decided by trial court.
- Authority: Rule 5A:7; Rule 5A:10.

5 Appendix & Assignments of Error

- Appendix
  - Not required in electronically filed cases.
    - Contact clerk to determine whether record will be transmitted electronically.
    - Court may still enter order dispensing with appendix.
  - Required Contents:
    - Initial pleading, as finally amended.
    - Judgment appealed from, and related memos, opinions, and orders.
    - Testimony relevant to the assignments of error.
      - Witness names must be printed at the beginning of excerpts and at the top of each page thereafter.
    - Exhibits "necessary for an understanding of the case that can be reasonably reproduced."
    - Table of contents.
  - Designation deadline:
    - If contents are agreed to, file within 15 days after the filing of the record with the signature of all parties.
    - If contents are not agreed to, file within 15 days with assignments of error.
      - Opposing party must file designation of additional contents and statement of additional assignments of error.
        - Appellant must include these contents in appendix.
    - Filing deadline: Filed with the Opening Brief of Appellant.
    - ***Traps for the Unwary***
      - Rules regarding format of appendix and table of contents are subject to stringent rules, so use a printer!
  - Authority: Rule 5A:25.
- Assignments of Error
  - In the opening brief, under a heading entitled "Assignments of Error," the appellant 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." Rule 5A:20(c).
    - Include an "exact reference to the page(s) of the transcript, written statement of facts, record, or appendix where the alleged error has been preserved in the trial court," or if the error is a failure to rule, where the alleged error has been preserved in the tribunal below, and specifying the opportunity that was provided to the tribunal or court to rule on the issue(s)."
  - ***Traps for the Unwary***
    - Failure to assign error or an insufficient assignment of error will result in the appeal being dismissed.
    - Failure to use a separate heading or include preservation reference will result in a rule to show cause pursuant to Rule 5A:1A.
  - Authority: 5A:20(c).