

## VIRGINIA'S NEW CIVIL APPELLATE LANDSCAPE

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### I. Introduction

Current Virginia procedure requires parties who are dissatisfied with the outcome of their non-domestic circuit court cases to submit a petition to the Virginia Supreme Court (“Supreme Court” or “Court”). Civil non-domestic circuit court appeals (“civil appeals”) may only proceed if permitted by the Supreme Court and are not appeals as of right. Few appeal petitions are granted by the Court and as a result a vast majority of circuit court decisions are final. In 2016 only 95 out of 413 (23%) civil appeal petitions were granted by the Supreme Court.<sup>1</sup>

For years, the Virginia General Assembly has wanted to create an avenue where civil appellants are afforded appeals as of right, as opposed to appeals by permission. On March 31, 2020, such an avenue was finally signed into law when Governor Ralph Northam signed [Senate Bill 1261](#) (“S.B. 1261”). S.B. 1261 allows civil appellants to appeal directly to the Virginia Court of Appeals (“COA”). This change significantly expands the jurisdiction of the Court of Appeals.<sup>2</sup> The legislation also increases the number of judges on the COA from eleven to seventeen to account for the increased workload. It is important for practitioners to not only understand the new appellate procedures for civil matters, but to also be aware of the unintended consequences that may arise because of these changes.

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<sup>1</sup> *Supreme Court of Virginia Statistical Review 2016*, SUP. CT. VA. (2017)  
[http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/scv/scv\\_caseload\\_rpt\\_2016.pdf](http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/scv/scv_caseload_rpt_2016.pdf)

<sup>2</sup> Previously, the Court of Appeals only had appellate review of domestic relations matters, administrative agency decisions, traffic infractions, and criminal cases where the death penalty was not imposed.

## II. Summary of Changes

S.B. 1261 is over forty pages long and is divided into six sections. This article mainly focuses on sections I, III, and VI of S.B. 1261, as these sections will be of particular interest to civil practitioners. The first section of S.B. 1261 provides a redline markup of the changes to the existing Code. This section is by far the longest and although there are many amendments to the Code, we will highlight only a few important details.

[Virginia Code § 8.01- 675.3](#) prescribes the timeline for appealing civil cases to the Court of Appeals. A party is allowed the same amount of time to file their notice of appeal (“notice”) to the Court of Appeals as they were to file their notice of appeal to the Supreme Court – thirty days from the date of the circuit court’s decree or order. The General Assembly also added language to this section allowing “an extension... in the discretion of the Court of Appeals, in order to attain the ends of justice.” It will be impossible to know what factors will be taken into consideration until the laws take effect and requests for extensions begin to be brought before the COA.

[Virginia Code § 17.1-405\(3\)](#) gives an aggrieved party the right to appeal to the Court of Appeals from “any final judgment, order, or decree of a circuit court,” with some limited exceptions. Whereas [Virginia Code § 8.01-670](#) confirms that appeals to the Supreme Court will still require permission.

Appeal bonds or irrevocable letters of credit are still addressed in [Va. Code § 8.01-676.1](#) of the Virginia Code. Part A now applies solely to civil cases and otherwise remains largely unchanged. Part A states that “a party filing a notice of appeal of right to the Court of Appeals in a civil case shall simultaneously file an appeal bond or irrevocable letter of credit in the penalty of \$500, or such sum as the trial court may require.” Pursuant to Part B an appellant still has 15

days from the date the Certificate of Appeal is issued by the clerk to file the appeal bond or letter of credit.

Section II of S.B. 1261 repeals [Virginia Code §§ 8.01-670.1](#) (appeal of interlocutory orders and decrees by permission; immunity) and [8.01-672](#) (jurisdictional amount).

Section III declares that any party who files their notice of appeal with the Supreme Court prior to January 1, 2022 will have their case heard, if their petition is granted, by the Supreme Court. Cases that fall into this category will not be impacted by the new provisions.

Section IV of S.B. 1261 applies only to criminal cases and section V is a directive to the Supreme Court's Executive Secretary.

The last section of Senate Bill 1261, section VI, states the "provision of this act amending 17.1-400 of the Code of Virginia shall become effective in due course and that the remaining provisions of this act shall become effective on January 1, 2022."

Read separately, sections III and IV seem unremarkable. However, if you read these two sections in conjunction with [Virginia Code § 8.01-675.3](#) several questions arise, including: 1) what is the last date a final order can be entered for an appellant to have the full 30 days to file their notice of appeal to the Supreme Court?; 2) can parties who want to be heard before the Supreme Court file a notice to the Supreme Court in December 2021?; and 3) what should you advise your client if they want to prevent the opposing party from appealing to the Court of Appeals? Answering these questions and understanding S.B. 1261's unintended consequences are important for practitioners who may face a civil appeal from the circuit court within the December 2021 timeframe.

### III. Unintended Consequences

Before we explore the unintended consequences of the new legislation it is important to review two important facts. First, pursuant to [Virginia Code § 8.01-675.3](#), a party has 30 days to file a notice with the trial court. Second, the new amendments go into effect on January 1, 2022. Therefore, it can be concluded that the last date for when a final order can be entered and an appealing party *must* appeal to the Supreme Court of Virginia, as opposed to the Court of Appeals, is November 30th, 2021.<sup>3</sup> It is also clear that an appeal from a final order entered on or after January 1, 2022 will be heard by the Court of Appeals. Parties appealing from final orders entered between December 1, 2021 and December 30, 2021 have the option of filing their notice before the 30 day deadline, and therefore invoking the jurisdiction of the Supreme Court, or waiting until after January 1, 2022 to be guaranteed an appeal as of right<sup>4</sup>.

One might ask why a party who disagrees with a final order entered between December 1, 2021 and December 30, 2021 would opt to file their notice of appeal prior to the January 1, 2022 change. There are two potential answers to this question.

The first, least complicated answer, is that a party may opt to file their notice before January 1, 2022 if they are confident that their appeal will be granted by the Supreme Court and they do not want to risk having to go through a second round of appeals (from the Court of Appeals to the Supreme Court). Legal minds may differ, however, attorneys of XLP would rarely bet on the Supreme Court granting an appeal, as this approach is incredibly risky.

The second answer is to employ a defensive litigation tactic. Say you, an attorney representing Party A, have a trial or other final hearing against Party B in December 2021. The final order is entered at some point in December and your client is reasonably happy with the

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<sup>3</sup> All Virginia courts are closed on December 31 for New Year's Eve.

<sup>4</sup> All Virginia courts are closed on January 1 for New Year's Day.

outcome. Civil practitioners know that judges rarely award either party exactly what they seek in civil cases, however one party typically ends up much more satisfied with the outcome than the other. If Party B expresses dissatisfaction with the ruling and you wish to prevent them from appealing to the Court of Appeals, it would be to your client's advantage to file a notice of appeal to the Supreme Court before January 1, 2022. The likelihood that Party A's Petition will be granted by the Supreme Court is low, whereas Party B will be guaranteed an appeal as of right to the Court of Appeals if you do not file Party A's notice before January 1, 2022.

It should be noted that nothing in S.B. 1261 directly addresses what would happen if one party to a case files a notice prior to January 1, 2022 and an opposing party submits their notice after January 1, 2022. We are assuming for the purposes of this analysis that the Party who files a notice prior to January 1, 2022 would bind the second party to the Supreme Court's jurisdiction, as it seems unlikely that the later filed notice would be given preferential treatment.

To take the defensive analysis one step further let us consider what would happen if the Supreme Court granted your client's appeal and Party B filed a cross appeal. In this situation your client would still have the upper hand. Once your client withdraws their appeal, the cross appeal will automatically be dismissed.<sup>5</sup>

This defensive strategy, although very niche in application, can increase the likelihood that a circuit court's final order will stand, and may dramatically reduce the potential risks and costs of future litigation.

#### **IV. Conclusion**

Senate Bill 1261 alters civil appeals procedure, expands the jurisdiction of the Court of Appeals, and increases the number of judges appointed to the Court of Appeals. The legislation's

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<sup>5</sup>See VA. R. Sup. Ct. 5:18(4)(iii), unless the arty filing a petition for Cross Appeal also filed its own notice to the Supreme Court.

impact on the judicial landscape will be substantial as appeals become more frequent, cases spend more time in the court system, and attorneys' fees rise.

Before Senate Bill 1261 goes into effect there are unintended consequences for a small group of litigants, namely those who receive a circuit court's final order between December 1, 2021 and December 30, 2021. Disgruntled parties who have the opportunity to appeal within this time frame have a unique opportunity to either file their notice before the 30-day deadline and invoke the jurisdiction of the Supreme Court (which we generally do not recommend) or file their notice after January 1, 2022 to ensure their appeal will be heard by the Court of Appeals. Conversely, parties who would otherwise become appellees before the Court of Appeals have the ability to play defense. By filing a notice with the circuit court before the January 1, 2022 deadline a party who is happy with the circuit court's decision can prevent an opposing party from appealing to the Court of Appeals.

It is crucial for practitioners to think through the implications of any procedural change, as solid understanding, effective strategies, and swift execution will save clients money and attorneys unnecessary headaches. We anticipate that client appellate demands will increase substantially come January 1, 2022 and that firms who have a working knowledge of the new appellate procedure before S.B. 1261 takes effect will have a distinct advantage over firms who are unprepared.