

# New Rules of The Supreme Court of Virginia

## (Part one of a two-part series)

BY L. STEVEN EMMERT

In 1985, the Supreme Court of Virginia repealed Part 5 of the Rules of that court and replaced the previous provisions with a new Part 5. This followed the initial promulgation, less than a year earlier, of Part 5A, for the benefit of the brand-new Court of Appeals.

A generation later, after a comprehensive study by the Appellate Rules Advisory Committee (often referred to as the Lemons Commission, for its chair, Supreme Court Justice Donald Lemons), it was time for an overhaul. Effective July 1, 2010, the court rewrote the rules for both courts. This two-part essay will highlight some of the more important new rules and outline some of the new procedures that apply to proceedings in both courts. [The second part will appear in the next issue of the *VBA News Journal*.]

### Part 5 - The Supreme Court

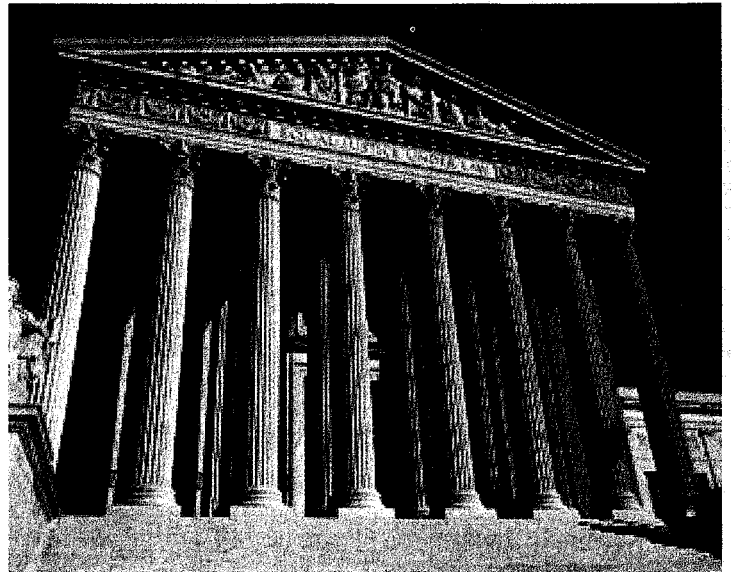
**Rule 5:1**—The revisions eliminate the distinction between the former terms "file with the clerk" and "file in the office of the clerk." The former required service on counsel of record, but the latter did not. Now, all documents that are to be filed must be served as well. The rule also includes a new subparagraph (f) that explains prior practice without changing it: Unpublished opinions may be cited in briefs to the court, but they will be considered as persuasive, not authoritative. The citer must usually provide a copy of the unpublished opinion along with the brief.

**Rule 5:1A**—This is an entirely new rule that establishes a procedure to deal with nonjurisdictional procedural defects. In the past, practitioners routinely feared that any default at all would be fatal. The new rule provides that in most instances, the court will issue an order giving the defaulting party a certain time within which to cure the error. (The new rules have been described as more user-friendly, and this provision is Exhibit A in that analysis.) The rule also describes previous practice, that a default that results in a dismissal may (note: not *must*) be reported by the court to the Virginia State Bar.

**Rule 5:4**—The new version of this rule contains a requirement borrowed from the Fourth Circuit's local rules. This salutary provision requires a statement in all motions that the movant has consulted with his or her opponent about the intended filing of the motion. It also requires an indication of whether the opponent has consented to the motion.

**Rule 5:5**—There's a small but important change to this rule, which governs timely filings of documents. In the past, when filing was done by mail, only certified mail through the US Postal Service was acceptable. Now, parties may use "a third-party commercial carrier for next-day delivery." Numerous litigants were caught in the trap of overnighting a pleading or brief on the due date, only to find that they should have used the (often slower) mail. That trap has vanished. (It's still best to file early.)

**Rule 5:6**—Court reporters have long made condensed transcripts available, showing four transcript pages per sheet of paper. This arrangement saves the lives of countless trees and makes transcripts much more portable. As of July 1, it also explicitly violates the requirement for appendices. If you're going to file a transcript, it now needs to be full-sized. If you inadvertently use a condensed transcript, the clerk will require you to file a corrected appendix with full-sized pages.



**Rule 5:8A**—This rule is brand-new, and represents a significant change from prior practice. It "codifies" (and subtly changes) the common-law severable-interests rule, involving appeals from multiparty litigation. Previously, if a court dismissed Defendant A at an early stage of the litigation but left Defendant B to face the jury, the plaintiff had a choice, assuming the claims against the two defendants were distinct from one another: He could appeal the dismissal of A immediately, or else wait until the end of the case and appeal then. Now, that plaintiff may ask the trial court to enter a "partial final judgment" in order to trigger his right to appeal immediately. If the trial court agrees to enter such an order, the plaintiff must appeal the dismissal of A immediately, or not at all; he can't change his mind and appeal at the end of the case. If the judge refuses to enter the partial final judgment, then the plaintiff has no choice but to wait; there is no appeal from a trial court's decision not to grant such a judgment.

**Rule 5:11**—This oft-cited rule gets two significant new provisions. First, it states that the appellee has the obligation to ensure that the record is sufficient to ensure that the Supreme Court can fully evaluate the assignments of cross-error. Previous caselaw placed the onus on the appellant to ensure that the record was complete, without addressing cross-error, which logically should be the appellee's responsibility. Second, it provides a short window of grace for supplementation of a transcript. The previous 60-day deadline had always been regarded as mandatory and jurisdictional, with no exceptions; but the new rule gives the appellant an extra ten days in which the appendix may be "supplemented, corrected, or modified," with no questions asked. The final effect of the rule change, however, is the provision that even after the 70th day, the transcript can be corrected if two justices concur that there's good cause. This means that the deadline is no longer jurisdictional, though sensible litigants should always regard it as mandatory.

**Rule 5:17**—The first significant change to this rule requires appellants to indicate exactly where the appellate issue has been preserved in the trial court. This provision had been in the rulebook for the Court of Appeals, and its

appearance in the Supreme Court essentially requires sensible advocacy. The new rule also adds a filing-fee requirement, removes the obligation to cite to *Southeastern Reporter*, specifies procedures for the filing of *Anders* briefs, and, for the first time, explicitly excludes "the cover page, table of contents, table of authorities, and certificate" from the page limitations in the rules. The new rule allows appellants to comply with either a page limit or a word-count limit in the petition for appeal.

**Rule 5:17A**—This seldom-used rule gets one important change: For the first time, the court requires that petitions for review of the grant or denial of temporary injunctions must comply with the briefing requirements of ordinary petitions for appeal (Rule 5:17). That means that these petitions must contain things like assignments of error, tables, and a certificate.

**Rule 5:18**—If an appellee raises cross-error, he must state as much on the cover, so the justices don't have to look inside the brief in order to discern whether cross-error is assigned. As with the petition for appeal, this brief may now comply with either a page limit or a word-count limit. The new rule also explains current practice, in that the court will only consider cross-error if it has already decided to grant a writ to the appellant.

**Rule 5:19**—The only changes to this rule relate to the length of the brief. Alternative word-count limits are inserted, and in the instance where an appellant responds only to assignment of cross-error, thus preserving the right to argue the petition orally, the limits are noticeably shorter.

**Rule 5:20**—There's a new subsection (b), dealing with rehearings of original-jurisdiction petitions. In those cases (habeas-corpus, mandamus, prohibition, and actual-innocence petitions), the appellant may file a petition for rehearing within 30 days after the original refusal of the writ. Note that this window is twice the 15-day limit for rehearing petitions in ordinary appeals.

**Rule 5:20A**—Most petitions for rehearings filed by attorneys are governed by this rule, which gets one subtle but significant change. The old rule required that the petition be no more than 3,000 words. The new rule cuts that limit back sharply, to 1,750 words, although it does add an alternative 10-page maximum.

**Rule 5:21**—This rule, which once dealt exclusively with appeals from the State Corporation Commission, has been expanded to include attorney-discipline appeals. In both kinds of appeals, appellants must now serve the Attorney General. The new provisions for disciplinary appeals contain detailed requirements for perfection, briefing, and procedure, including provisions for a stay pending the appeal.

**Rule 5:22**—Review of death sentences is largely unchanged, but there are two liberalizations of the previous rule. Appellants now get 30 days, not 10, within which to file a list of assignments of error, and briefing limits, which once matched those for other briefs, are greatly expanded, to 100 pages or 17,500 words (and half that length for reply briefs).

**Rule 5:25**—The contemporaneous-objection rule gets a modest makeover, but the substance of the rule is unchanged. Despite the subtly different wording, expect all of the court's prior caselaw interpreting the rule to survive intact.

**Rule 5:26**—This rule deals with briefs in a general sense, setting forth page limits at the merits stage. Those page limits are unchanged, but alternative word-count limits are added. New subparagraphs centralize previously scattered requirements for certificates of service and compliance with the length limits; forbid incorporating by reference argu-

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ments that were made elsewhere; and reassure practitioners that noncompliance with this rule won't result in dismissal. (Instead, you have to resubmit the brief with the noncompliance corrected.)

**Rules 5:27 and 5:28**—These two rules, containing the provisions for principal briefs on the merits, are reorganized without much substantive change. The previous requirement for citation to *Southeastern Reporter* for Virginia cases has been deleted. Both rules require that the argument section include a statement of the standard of review for each issue appealed. Experienced appellate lawyers have long been voluntarily doing that; the new rule makes that sound practice mandatory.

**Rule 5:30**—The amicus-curiae rule gets only a modest change, clarifying that such a brief can be filed at the petition, merits, or rehearing stages of the appeal.

**Rule 5:32**—This rule now gives the appellant a choice between filing 15 printed copies of the appendix, or 10 printed copies and 10 electronic copies on CD-ROMs. (In cases involving large appendixes, the CD-ROMs will be far less expensive.) It includes a new provision for filing sealed materials. There is a slight extension of time for designation of the contents of the appendix; the appellee now gets 15 days instead of 10 within which to separately designate. Briefs filed in lower courts are not to be included "unless they have independent relevance," which won't happen often. The new rule concludes by stating that if the appendix fails to comply with the requirements, the court may issue an order directing a correction within a specified time.

**Rule 5:33**—The old rule (which was designated Rule 5:35) provided that oral argument would not exceed 30 minutes per side, but the court's practice for years has been to allow 15 minutes per side. The new rule now reflects the shorter period. Parties involved in exceptionally complicated appeals may still move the court for extra time, but in reality, such requests will very seldom be granted.

**Rule 5:35**—This rule contains the provisions of the old Rule 5:37, dealing with taxation of costs in the appellate court. One subtle change is that a bill of costs could previously be filed 10 days after the issuance of the opinion, with objections thereto due 14 days later. The new rule reverses those periods, so successful litigants now have 14 days to file a bill, with objections due 10 days later. The rule also refers the parties to Rule 1:1A, by which a party can get an award of attorneys' fees in an appropriate case.

**Rule 5:37**—This rule condenses old Rules 5:39 and 5:39A, dealing with petitions for rehearings after a decision on the merits. The principal change is to shorten the permissible length for such petitions, from the old 15-page limit to a new limit of 10 pages or 1,750 words.

**Rule 5:38**—Only one small change appears to this provision, which deals with settlements pending appeal. While parties are still required to notify the Clerk promptly after reaching a settlement agreement, the new rule specifies that such notice must be in writing.

# New Rules of The Supreme Court of Virginia

## (Part two of a two-part series)

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This is the second essay in a two-part series discussing the 2010 comprehensive revisions to the Rules of Court. The changes to the rules that apply in the Supreme Court of Virginia were discussed in the Fall 2010 issue.

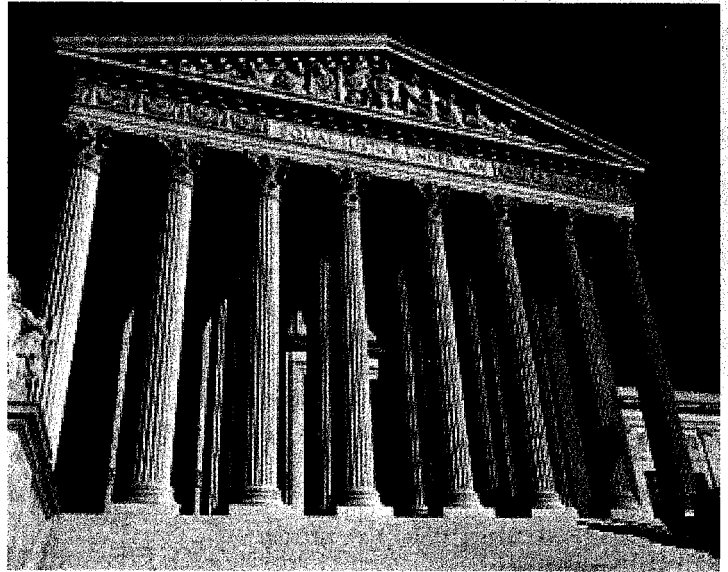
### Part 5A— The Court of Appeals of Virginia

**Rule 5A:1**—Most of the definitions in this introductory section remain unaffected by the overhaul of the appellate rules. The changes have eliminated obsolete references to "plaintiff in error" and similar terms that haven't seen the light of day often since the days of *Burks Pleading and Practice*. New provisions are added requiring service of all documents filed in the appellate court; requiring notices of address changes; and describing the procedure for citing unpublished opinions. Unlike Rule 5:1, applicable in the Supreme Court, Rule 5A:1 still includes (probably by oversight) the distinction between the phrases "file with the clerk" and "file in the office of the clerk." (The former requires service on all counsel; the latter does not.) In light of the new mandatory-service requirement in subsection (d), that distinction is no longer meaningful except in documents filed in other clerk's offices (for example, the trial court).

**Rule 5A:2**—This rule gets three major additions. First, like its counterpart, the Supreme Court's Rule 5:4, the rule now requires that anyone filing a motion must advise the opposing party in advance of the intended filing. If the other side has counsel, the statement must also indicate whether the motion will be opposed. This salutary addition comes from the Federal Rules of Appellate Procedure, and will streamline the process of presenting motions to the court. Second and third, the rule includes brand-new provisions for review of pre-trial and post-trial bail orders in criminal cases. These two new procedures give a criminal defendant a meaningful opportunity to secure review of what they perceive to be unfair bail determinations. Practitioners should keep in mind that such rulings will be reviewed using a lenient standard - abuse of discretion. Given the appellate court's inability to gauge the in-person presentation of the evidence or to see the defendant in person, reversals under these provisions will likely be quite rare.

**Rule 5A:3**— There are a couple of significant changes here; the one that will have the greatest practical effect for most practitioners is the approval of express-mail filing. Previously, the only alternative to in-person filing was certified mail, return receipt requested, on or before the due date. Now litigants may file by delivery to commercial carriers. (As before, hold onto the receipt if you're filing on or near the last day.) There's also a new provision detailing how and when to file a motion for extension of time. The new subsection concludes with a warning that merely filing the motion within the time permitted doesn't toll the running of the deadline; that means that you must file the motion far enough in advance of the deadline that you can get a ruling before that date looms. As a practical matter, any such motion should be filed as soon as you recognize the need for it.

**Rule 5A:4**—Here is the first of several key differences between the rules applicable in the two appellate courts: The CAV does not employ the Supreme Court's 14-point-type requirement. Pleadings and briefs in the Court of Appeals



must be in at least 12-point type, as before. In a bow to progress, the cover now must contain not only the address and phone number of counsel, but also a Virginia Bar Number, a fax number, and an e-mail address. There's also a new subsection requiring a certification of compliance with word-count limits.

**Rule 5A:5**—This rule, dealing with original-jurisdiction proceedings, gets only one change, and that will affect government law offices. Previously, the rule provided that no response was required when a pro se prisoner filed a petition. That exception is removed, signaling that the court expects at least some kind of response to all petitions.

**Rule 5A:6**—One significant difference in procedures in the two courts remains, and it's a trap for the unwary if you don't practice in the CAV often. When you appeal to the Supreme Court, you file your notice of appeal with the clerk of the trial court only. But in an appeal to the Court of Appeals, you are required to send an additional copy to the clerk of the CAV. There are minor changes in the information required in the certificate, and a new provision that no appeal will be dismissed merely because the appellant fails to identify or notify a guardian ad litem. In that event, the appellant can correct the notice by identifying and serving the GAL.

**Rule 5A:8**—In the past, the failure to file a transcript within 60 days after date of judgment was generally fatal; only if the appeal could be considered without a transcript could the appeal proceed. The deadline could be extended prospectively but never retroactively. Now, for the first time, the court has a curative provision to allow a late filing, as long as the motion is filed within 90 days after the judgment date. But practitioners beware: The extension is not automatic. You have to show "good cause to excuse the delay." Just asking politely without having truly good cause will likely get you an equally polite refusal. You should also know that once the original deadline passes, the requirement for "good cause" effectively jumps to something like "extraordinary cause," a far tougher standard. This distinction isn't spelled out in the rules, but it's the way the court applies the

rule. The best advice for practitioners is to order your transcripts early, and file a motion as soon as you perceive that you'll need the extension. If you file the motion *before* the expiration of the original deadline, you have a good chance of getting it granted for some of the more common reasons (e.g., a crushing trial schedule; preexisting vacation plans). If you ask for relief after the deadline has passed, you'll need a substantially more serious reason.

**Rule 5A:10**—The only significant change to this rule relates to clerks, not lawyers. The trial-court clerk is specifically directed not to transmit to Richmond certain listed contraband items, weapons, biological evidence, and bulky exhibits. The previous rule gave the local clerk the option of whether to package those materials with the record. The appellate court can still order the transmission of such evidence upon motion.

**Rule 5A:11**—The only noticeable change in this rule, dealing with Workers' Compensation appeals, is to update the required information for counsel of record, as was done in Rule 5A:4.

**Rule 5A:12**—This very important rule sees several changes. First, one previous schism between the two appellate courts is closed, as the Court of Appeals now requires assignments of error instead of questions presented. In previous practice, many appellants were thwarted when they appealed from the CAV to the SCV by merely repackaging their CAV briefs, and neglecting to convert the questions presented to assignments of error. According to the Supreme Court's inflexible Rule 5:17(c), such appeals were immediately dismissed. (Of course, with the good comes the bad: That inflexible rule now occupies a prominent place in the new Rule 5A:12, so clear assignments are essential in the Court of Appeals, too.) Just slapping *something* into the assignments section won't help; the court may now dismiss an appeal if the assignments are insufficient. The rule also includes a word-count limit, which practitioners must use in lieu of the old page limits. The rule clarifies that the word-count limit doesn't apply to your cover page, tables, and certificate. A new closing paragraph sets out in detail the procedures for filing an *Anders* brief, just as appears in the Supreme Court's counterpart to this rule.

[*Special note:* Rule 5A:12 is also particularly noteworthy for what didn't change. As before, the due date for a petition for appeal is 40 days after the clerk's receipt of the record from the trial court. This continues the divide between the CAV and the SCV; in the latter court, the deadline is always three months from date of judgment, which is easy for appellant and appellee alike to calculate. In the Court of Appeals, there is no reliable way to calculate the due date for a petition for appeal merely by knowing when the judgment was entered; that due date is still measured from an entirely different event. *Caveat appellant.*]

**Rule 5A:13**—Briefs in opposition also get new word-count limits. The rule is amended to permit, rather than require, local prosecutors to file briefs in opposition. This reflects previous practice (if not the previous rule), where the local prosecutors often found themselves without sufficient time to respond to petitions and still perform their day jobs. If an appellee misses the filing deadline (or realizes before the deadline that she'll need more time), a motion to extend can be filed no later than 10 days after that expiration.

**Rule 5A:14**—As with briefs in opposition, reply briefs get word-count limits and a 10-day grace period to seek additional time to file. They are still used in lieu of oral argument; the court will read your reply brief or listen to your writ argu-

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ment, but not both.

**Rules 5A:15 and 5A:15A**—These two rules, dealing with petitions for rehearing at the writ stage, contain minor rewordings and reorganization, but the only substantive changes are to replace page limits with word limits. Your demand for consideration by a three-judge panel is now capped at 350 words instead of the old one-page limit; the briefs themselves are now limited to 5,300 words instead of 15 pages.

**Rule 5A:16**—The only change here is to add termination-of-parental-rights appeals to the list of those cases to be given priority on the argument docket.

**Rule 5A:18**—This fire-breathing dragon gets a modest revision. The previous contemporaneous-objection rule required you to state your objection "together with the grounds therefor at the time of the ruling." Now you have to state your objection "with reasonable certainty at the time of the ruling." Some members of the court will probably regard this change as stylistic only, with the court's prior jurisprudence remaining intact. That's probably correct, but you should keep in mind that, even within the court, there is a spectrum of opinion as to just how exact your objection below must be. Some judges will be satisfied if your appellate argument is somewhere in the same zip code as the one you made below, while others take a far stricter approach.

**Rule 5A:19**—The general requirements for briefs on the merits get comparable changes to those provided for petitions for appeal. There are now word-count limits, against which your cover, tables, and certificate don't count. There's an important new provision that allows late-filing litigants to seek an extension of the filing deadline, but it's a quick turnaround: The motion must be filed no more than ten days after the deadline date. The rule doesn't specify what standard the court will use in evaluating such requests, but I believe it will use the same guidelines as for extensions of the filing of the transcript (see the discussion of Rule 5A:8 above). Finally, the rule forbids incorporation by reference of pleadings and memoranda filed elsewhere, so you can't get around the word-count limit by incorporating your trial-court briefs.

**Rules 5A:20 and 5A:21**—In briefs on the merits, the former requirement to cite Southeastern Reporter for Virginia cases is eliminated. You're free to include the parallel cites if you wish, of course. (When citing decisions from other jurisdictions, it's a good idea to include the unofficial reporter.) References in this rule to the old questions presented are replaced with assignments of error, and the rule now requires you to set forth the applicable standard of review for each assignment. The required elements of signature blocks for counsel are expanded to include things like State Bar numbers and e-mail addresses.

**Rule 5A:23**—Reflecting the court's previous unwritten practice, this rule now specifies that amicus briefs may be

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filed at any stage of the appeal—petition, merits, or rehearing.

**Rule 5A:26**—There's a new provision here, specifying that if the appellant fails to file a rules-compliant brief, the court "may dismiss the appeal." Similarly, if the appellee doesn't file a proper brief, any assignments of cross-error may be deemed waived. The rule continues the old provision that if only one party has complied with the rules, the other party can't deliver oral argument, "except for good cause shown." This rule contains an anomaly in that if the appellee isn't assigning cross-error, rules compliance is technically optional for that party. That's because the rule says nothing about disregarding the arguments in (or even striking) a noncompliant brief of appellee; the court just disregards the assignments of cross-error. Appellees should take this anomaly with a large grain of salt; I suspect that the court may feel free to ignore a noncompliant brief in its entirety if the breach of rules is serious.

**Rule 5A:28**—The old rule governing oral argument provided that each side got up to 30 minutes to argue. The new rule is in line with the court's long-standing practice to allow 30 minutes per case, divided equally between the parties. The court can allow a longer time in appropriate cases, but practitioners should expect that such leave will be very infrequently given. The new rule also specifies how an amicus curiae can share in the oral argument, and incorporates the Supreme Court's non-waiver rule for briefed issues that are not addressed in oral argument.

**Rule 5A:30**—There's only one significant change here. The old rule allowed a successful party 10 days to file a bill of costs, and gave the "loser" of the appeal 14 days within which to object. The new rule reverses those time limits; now the victors get 14 days to file the bill, and the vanquished have just 10 days to object.

**Rule 5A:33**—This rule collapses two first cousins, the former Rules 5A:33 and 5A:33A, into a single rule governing rehearings after decisions on the merits. Other than converting a page limit to a word-count limit, most of the changes amount to reorganizing the same provisions that were in place before.

**Rule 5A:34**—As with the previous rule, this new rule condenses the provisions of former Rules 5A:34 and 5A:34A into a single rule for those seeking en banc rehearings. Word-count limits are similarly inserted for the previous page limits.

**Rule 5A:35**—The changes here are subtle but important. For the first time, the rules provide that the Court of Appeals can grant en banc rehearing "in whole or in part," and briefing is limited to those issues on which the court grants such rehearing. Another provision in the new rule states that the grant of en banc rehearing—even on a partial basis—acts to stay the mandate of the panel's decision as to *all* issues. Thus, it's possible to leave one or more issues in a sort of limbo, where those issues are not up for review, but they can't be appealed onward to the Supreme Court for the time being.

**Rule 5A:36**—There's a very minor change here. When the parties settle a case after the notice of appeal is filed, they must notify the Clerk in writing. The old rule only required such a notice where the settlement occurred after the record was received in Richmond. Those two events are often a month or more apart.

**Rule 5A:37**—The last rule in the CAV's rulebook is brand-new: It provides for a settlement conference, something that doesn't exist by rule in the Supreme Court. Those are now available in the CAV, with proceedings conducted by "a senior or retired appellate judge." The court may order them upon informal motion (a letter to the Clerk will suffice) by a party or *sua sponte*. The usual rules that govern settlement conferences and mediations apply, including confidentiality of statements made in the course of the proceedings, and the rule gives the court the authority to issue orders to implement any agreement arising out of a conference. The court may consolidate related appeals for the purpose of a single conference, but it can't order conferences in criminal cases, termination-of-parental-rights appeals, or any cases involving the court's original jurisdiction. Finally, the ordering of a settlement conference does *not* automatically stay other deadlines in the appeal, but the settlement judge can order such a stay, presumably if he or she seems some meaningful chance of cooperation and eventual settlement.

I perceive some potential problems here. For example, if one party proposes a conference and the other objects, the objecting party must notify the court in writing of the objection. To this point, that parallels the provisions of Code §8.01-576.6, governing referrals to ADR-orientation sessions in the trial court. But the new appellate rule goes beyond the statute; it requires the objecting party to *explain the basis of his objection* in a letter that goes into the appellate court's file. There is nothing in the rule that makes that letter confidential (unless the court goes ahead and orders a conference anyway), so members of the court can read it to learn whether one party or the other refuses out of pure stubbornness to talk. In my opinion, that's a strong incentive to go along with the order, even if the party has no interest in negotiating in good faith once he gets to the conference.

Second, in the trial court, if either party objects, then there's no settlement conference, recognizing the near-futility of compelling an unwilling party to participate. (I'm aware that federal courts occasionally order settlement conferences without regard to consent—see FRAP 33 for one illustration—but in my view, those are inherently limited by one party's unwillingness.) Now in the CAV, the court may order a settlement conference over one party's objection, and even over both parties' objection in the event of a *sua sponte* order. It's foreseeable that a few of these conferences will result in unexpected settlements, but I perceive that far more of them will only expend the litigants' and the settlement judge's time.

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