

Significant Changes Ahead for Civil Appeals in Virginia

By Edward J. Longosz, II, Annemarie DiNardo Cleary, and Jessica A. Glajch

OVERVIEW

On March 31, 2021, Governor Ralph Northam signed [Senate Bill 1261](#) (“S.B. 1261”), which significantly expands the scope of the Court of Appeals of Virginia. Under S.B. 1261, civil litigants will now have the right to appeal final judgments to the Court of Appeals of Virginia, beginning on January 1, 2022. This legislation will have a substantial impact on civil litigation practice in Virginia, the last state to allow an appeal as of right in civil cases.

THE APPEALS PROCESS

- Beginning January 1, 2022, litigants will have the right to appeal final judgments in civil cases to the Court of Appeals of Virginia.
- Litigants will have thirty days from the date of the Circuit Court’s decree or order to file their notice of appeal to the Court of Appeals.
- Oral argument will be held in some, but not all cases. Specifically, the new law requires the Supreme Court of Virginia to prescribe procedures permitting the Court of Appeals to dispense with oral argument if the panel 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 existing case law should be overturned, extended, modified, or reversed.
- A civil litigant can petition the Supreme Court of Virginia for the right to appeal a decision of the Court of Appeals, but the Supreme Court will retain the discretion to grant or deny the petition.
- Interlocutory appeals will still be made by petition, but they will be made to the Court of Appeals rather than to the Supreme Court. The Court of Appeals will also have jurisdiction over petitions for review of injunctions.

THE ANTICIPATED INCREASE IN BINDING PRECEDENT IN VIRGINIA

- A litigant seeking to challenge a Circuit Court (state trial court) judgment was previously required to petition the Supreme Court of Virginia. Binding precedent was only created after the Supreme Court granted an appeal and the appeal was decided by the full Court. The Supreme Court of Virginia typically grants appeals in less than 25% of civil cases in which a petition is filed, so the body of binding precedent is relatively small.

- When the new law takes effect, a party seeking to challenge a circuit court judgment will appeal to the Court of Appeals of Virginia. In the Court of Appeals, three-judge panels decide most cases. Under the interpanel accord doctrine, the decision of one of these panels becomes a predicate for application of the doctrine of *stare decisis*. The decision can only be overruled by the Court of Appeals sitting en banc or by the Supreme Court of Virginia.
- Given that a three-judge panel of the Court of Appeals will be able to issue a decision in a civil case that will be binding unless overruled by an en banc review or by the Supreme Court of Virginia, a significant increase in the number of appeals and the body of binding Virginia precedent is expected.

EN BANC HEARINGS

- The Court of Appeals previously could sit en banc: (1) when there was a dissent in the panel to which the case was originally assigned, an aggrieved party requested an en banc hearing, and at least three judges voted in favor of the hearing; (2) when a judge of a panel certified that in his opinion a decision of the panel was in conflict with a prior decision of the court or any panel of the court, and at least three other judges concurred in that view; or (3) upon the court's own motion, in any case in which a majority of the court determined it was appropriate to do so.
- The new law will require six judges rather than three judges to vote in favor of hearing a case en banc. More importantly, under the new law, a party will be able to petition for an en banc hearing even when there is no dissent in the panel, and the court may sit en banc if a majority of the court determines it is appropriate to do so.

STRATEGIC CONSIDERATIONS

Timing

- S.B. 1261 becomes effective on January 1, 2022.
- If a final order is entered on or before November 30, 2021, a litigant must appeal to the Supreme Court of Virginia.
- If a final order is entered on or after January 1, 2022, the Court of Appeals of Virginia will hear the case.
- For orders entered between December 1, 2021 and December 30, 2021, litigants can strategically choose whether they want to file a petition for appeal in the Supreme Court or whether they want to appeal to the Court of Appeals and they can time the filing of their notices of appeal accordingly. (Virginia courts are closed on December 31, 2021 and January 1, 2022).
- For example, a litigant who believes that the Supreme Court is unlikely to grant his or her petition may choose to wait until after January 1, 2022 to file his or her notice of appeal in order to ensure that he or she is guaranteed an appeal in the Court of Appeals.

Preservation of Issues for Appeal

- Although litigants have always been required to preserve alleged errors to raise them on appeal, this requirement will become increasingly important once more civil litigants have the opportunity to appeal. In particular, litigants must take care to make an adequate proffer of any excluded evidence to preserve these issues for appeal.

New Rules Are Forthcoming

- The Advisory Committee on Rules of Court in Virginia is working on proposed changes to the Rules of the Supreme Court of Virginia to address the expansion of the jurisdiction of the Court of Appeals. The Committee released a draft of the proposed changes for public comment earlier this year.
- Litigants should monitor this process and consider how any changes that are ultimately adopted will impact their appeals.



This Legal Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact authors [Edward J. Longosz, II](#) at 202.659.6619 or elongosz@eckertseamans.com, [Annemarie DiNardo Cleary](#) at 804.788.7768 or acleary@eckertseamans.com, [Jessica A. Glajch](#) at 202.659.6672 or jglajch@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.