Commission on Virginia Courts in the 21st Century: To Benefit All, To Exclude None

Appendix

Supreme Court of Virginia
Richmond, Virginia
January 2007

This project was financially assisted by the Virginia Law Foundation.

General Information for Individuals With Disabilities

The Court System has adopted a policy of non-discrimination in both employment and in access to its facilities, services, programs and activities. Individuals with disabilities who need accommodation in order to have access to court facilities or to participate in court system functions are invited to request assistance from court system staff. Individuals (not employed by the court system) with disabilities who believe they have been discriminated against in either employment or in access may file a grievance through local court system officials. Those who need printed material published by the court system in another format or those who have general questions about the court system's non-discrimination policies and procedures may contact the Office of the Executive Secretary, Supreme Court of Virginia, 100 North Ninth Street, Third Floor, Richmond, Virginia 23219. The telephone number is 804/786-6455; communication through a telecommunications device (TDD) is also available at this number.

Commission on Virginia Courts in the 21st Century: To Benefit All, To Exclude None
Supreme Court of Virginia
Richmond, Virginia
Published January 2007

Table of Contents - Final Report (Volume 1)

Table of Contents - Final Report (Volume 1)

Table of Contents - Appendix (Volume 2)

[Page intentionally left blank]

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
1-1.1	5	11	
1-1.2	5	7	
1-1.3	8	14	
1-1.4	5	8	
1-1.5	5	9	
1-1.6	4	33	
1-1.7	4	34	
1-1.8	1	11	
1-1.9	1	10	
1-1.10	1	12	
1-1.11	1	9	
1-1.12	1	13	
1-1.13	5	2	
1-1.14	4	17	
1-1.15			Withdrawn by Task Force
1-1.16			Withdrawn by Task Force
1-1.17	8	20	
1-1.18	4	16	
1-2.1	6	2	
1-2.2	6	1	
1-2.3 (1)	6	4	
1-2.3 (2)	6	4	
1-2.3 (3)	6	4	
1-2.4	6	5	
1-2.5	6	9	
1-2.6	6	7	
1-2.7	6	8	
1-3.1	3	2	
1-3.2	3	4	
1-3.3	3	5	
1-3.4	3	6	
1-3.5	3	11	
1-3.6	9	2	
1-4.1	5	12	
1-4.2	5	16	
1-4.3	5	15	
1-4.4	5	14 and 17	
1-4.5	5	13	

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
1-4.6	5	19	
1-4.7	5	20	
1-4.8	5	12	
1-4.9	5	22	
2-1.1	4	19	
2-1.2	4	20	
2-1.3	4	20	
2-1.4	4	21	
2-1.5	4	21	
2-1.6	4	21	
2-1.7	4	28	
2-1.8	4	25	
2-1.9	4	32	
2-1.10	4	23	
2-1.11	4	29	
2-1.12	4	27	
2-1.13	4	30	
2-1.14	4	30	
2-1.15			Not adopted by Commission
2-1.16			Not adopted by Commission
2-1.17	4	31	
2-1.18	4	36	
2-1.19	4	35	
2-1.20	4	22	
2-1.21	4	24	
2-2.1	6	10	
2-2.2	6	11	
2-2.3	6	12	
2-2.4	6	12	
2-2.5	6	13	
2-2.6	6	13	
2-2.7	6	14	
2-2.8	6	15	
2-2.9	6	16	
2-3.1	4	37	
2-4.1	1	3	
2-4.2			Not adopted by Commission
2-4.3	1	4	
2-4.4	1	5	

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
2-4.5 (1)	1	6	
2-4.5 (2)			Not adopted by Commission
2-4.6 (1)	6	19	
2-4.6 (2)			Not adopted by Commission
2-4.6 (3)			Not adopted by Commission
2-4.7	6	20	
2-4.8	6	21	
2-4.9	6	22	
2-4.10	6	23	
2-4.11	6	24	
2-4.12	6	25	
2-4.13	6	26	
2-4.14 (a)	6	17	
2-4.14 (b)	6	18	
3-1.1	5	24	
3-1.2	2	3	
3-1.3	2	21	
3-1.4	2	1	
3-1.5	5	25	
3-1.6	2	2	
3-1.7	2	36	
3-1.8	2	35	
3-1.9	2	34	
3-1.10	2	37	
3-1.11	2	38	
3-1.12	2	33	
3-1.13	2	30	
3-1.14	2	28	
3-1.15	2	26	
3-1.16	2	29	
3-1.17	5	17	
3-1.18	1	18	
3-1.19	5	3	
3-1.20	5	4	
3-1.21	5	10	
3-1.22	4	5	
3-1.23	9	3	
3-1.24	2	7	
3-1.25	8	13	

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
3-1.26	3	7	
3-1.27			Not adopted by Commission
3-1.28	8	2	
3-1.29			Withdrawn by Task Force
3-1.30	2	27	
3-1.31	8	8	
3-1.32			Not adopted by Commission
3-1.33	8	9	
3-1.34	8	7	
3-1.35	8	1	
3-1.36 (1)	8	10	
3-1.36 (2)			Not adopted by Commission
3-1.36 (3)			Not adopted by Commission
3-1.37			Not adopted by Commission
3-1.38			Not adopted by Commission
3-1.39	8	11	
3-1.40	8	5	
3-1.41	8	12	
3-1.42			Not adopted by Commission
3-2.1	1	1	
3-2.2	1	2	
3-2.3	1	14	
3-2.4	1	7	
3-2.5	1	8	
3-2.6	1	15	
3-2.7			Not adopted by Commission
3-2.8	1	17	
3-2.9			Withdrawn by Task Force
3-2.10			Withdrawn by Task Force
3-2.11			Withdrawn by Task Force
3-2.12	1	16	
3-2.13			Withdrawn by Task Force
3-2.14	3	3	
3-2.15			Withdrawn by Task Force
3-2.16			Not adopted by Commission
3-2.17	9	1	
3-2.18	2	5	
3-2.19	2	19	
3-2.20	2	6	

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
3-2.21	2	18	
3-2.22	2	17	
3-2.23	3	9 and 10	
3-2.24	2	14	
3-2.25	2	15	
3-2.26			Not adopted by Commission
3-2.27	2	12	
3-2.28	2	13	
3-2.29	2	16	
3-2.30			Not adopted by Commission
3-2.31			Not adopted by Commission
3-2.32			Not adopted by Commission
3-2.33	4	18	
3-2.34	8	14	
3-2.35	2	4	
3-2.36	3	1	
3-2.37	8	15	
3-2.38	8	19	
3-2.39			Not adopted by Commission
3-2.40			Not adopted by Commission
3-2.41			Not adopted by Commission
3-2.42			Not adopted by Commission
3-2.43	1	19	
3-3.1	2	22	
3-3.2	8	16	
3-3.3	2	20	
3-3.4	8	17	
3-3.5	8	18	
4-1.1	4	1 and 4	
4-1.2 (a)	4	6	
4-1.2 (b)	4	7	
4-1.2 (c)	4	8	
4-1.2 (d)	4	9	
4-1.3	5	1	
4-1.4	4	1	
4-2.1	9	7	
4-2.2	4	3	
4-2.3	9	5	
4-2.4	9	6	

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
4-2.5	4	2	
4-3.1	4	15	
4-3.2	4	10	
4-3.3	4	12	
4-3.4	4	13	
4-3.5			Withdrawn by Task Force
4-3.6	4	11	
4-3.7	4	14	
5.1	7	1	
5.2	7	2	
5.3	6	6	
5.4	7	3	
5.5	7	4	
5.6	7	5	
5.7	7	6	
5.8	7	7	
5.9	5	21	
5.10	7	8	
5.11	5	23	
5.12	7	9 and 10	
5.13	3	8	
5.14	7	11	
5.15	8	6	
5.16	2	32	
5.17			Not adopted by Commission
5.18	2	31	
	1	20	Added Following Public Comments
	1	21	Added Following Public Comments
	2	8	Added Following Public Comments
	2	9	Added Following Public Comments
	2	10	Added Following Public Comments
	2	11	Added Following Public Comments
	2	23	Added Following Public Comments
	2	24	Added Following Public Comments
	2	25	Added Following Public Comments
	4	26	Result of Commission Discussion
	4	38	Added Following Public Comments
	5	5	Added Following Public Comments
	5	6	Added Following Public Comments

Recommendation Reference Table 1

Task Force Recommendation Number (Vision Numbers Omitted)	Vision	Final Recommendation Number	Comment
	5	18	Added Following Public Comments
	6	3	Added Following Public Comments
	7	12	Result of Commission Discussion
	8	3	Added Following Public Comments
	8	4	Added Following Public Comments
	9	4	Added Following Public Comments

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
1	1	3-2.1	
1	2	3-2.2	
1	3	2-4.1	
1	4	2-4.3	
1	5	2-4.4	
1	6	2-4.5 (1)	
1	7	3-2.4	
1	8	3-2.5	
1	9	1-1.11	
1	10	1-1.9	
1	11	1-1.8	
1	12	1-1.10	
1	13	1-1.12	
1	14	3-2.3	
1	15	3-2.6	
1	16	3-2.12	
1	17	3-2.8	
1	18	3-1.18	
1	19	3-2.43	
1	20		Added Following Public Comments
1	21		Added Following Public Comments
2	1	3-1.4	
2	2	3-1.6	
2	3	3-1.2	
2	4	3-2.35	
2	5	3-2.18	
2	6	3-2.20	
2	7	3-1.24	
2	8		Added Following Public Comments
2	9		Added Following Public Comments
2	10		Added Following Public Comments
2	11		Added Following Public Comments
2	12	3-2.27	
2	13	3-2.28	
2	14	3-2.24	
2	15	3-2.25	
2	16	3-2.29	
2	17	3-2.22	

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
2	18	3-2.21	
2	19	3-2.19	
2	20	3-3.3	
2	21	3-1.3	
2	22	3-3.1	
2	23		Added Following Public Comments
2	24		Added Following Public Comments
2	25		Added Following Public Comments
2	26	3-1.15	
2	27	3-1.30	
2	28	3-1.14	
2	29	3-1.16	
2	30	3-1.13	
2	31	5.18	
2	32	5.16	
2	33	3-1.12	
2	34	3-1.9	
2	35	3-1.8	
2	36	3-1.7	
2	37	3-1.10	
2	38	3-1.11	
3	1	3-2.36	
3	2	1-3.1	
3	3	3-2.14	
3	4	1-3.2	
3	5	1-3.3	
3	6	1-3.4	
3	7	3-1.26	
3	8	5.13	
3	9 and 10	3-2.23	
3	11	1-3.5	
4	1 and 4	4-1.1	
4	1	4-1.4	
4	2	4-2.5	
4	3	4-2.2	
4	5	3-1.22	
4	6	4-1.2 (a)	
4	7	4-1.2 (b)	
4	8	4-1.2 (c)	

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
4	9	4-1.2 (d)	
4	10	4-3.2	
4	11	4-3.6	
4	12	4-3.3	
4	13	4-3.4	
4	14	4-3.7	
4	15	4-3.1	
4	16	1-1.18	
4	17	1-1.14	
4	18	3-2.33	
4	19	2-1.1	
4	20	2-1.3	
4	20	2-1.2	
4	21	2-1.4	
4	21	2-1.5	
4	21	2-1.6	
4	22	2-1.20	
4	23	2-1.10	
4	24	2-1.21	
4	25	2-1.8	
4	26		Result of Commission Discussion
4	27	2-1.12	
4	28	2-1.7	
4	29	2-1.11	
4	30	2-1.13	
4	30	2-1.14	
4	31	2-1.17	
4	32	2-1.9	
4	33	1-1.6	
4	34	1-1.7	
4	35	2-1.19	
4	36	2-1.18	
4	37	2-3.1	
4	38		Added Following Public Comments
5	1	4-1.3	
5	2	1-1.13	
5	3	3-1.19	
5	4	3-1.20	
5	5		Added Following Public Comments

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
5	6		Added Following Public Comments
5	7	1-1.2	
5	8	1-1.4	
5	9	1-1.5	
5	10	3-1.21	
5	11	1-1.1	
5	12	1-4.1	
5	12	1-4.8	
5	13	1-4.5	
5	14 and 17	1-4.4	
5	15	1-4.3	
5	16	1-4.2	
5	17	3-1.17	
5	18		Added Following Public Comments
5	19	1-4.6	
5	20	1-4.7	
5	21	5.9	
5	22	1-4.9	
5	23	5.11	
5	24	3-1.1	
5	25	3-1.5	
6	1	1-2.2	
6	2	1-2.1	
6	3		Added Following Public Comments
6	4	1-2.3 (1)	
6	4	1-2.3 (2)	
6	4	1-2.3 (3)	
6	5	1-2.4	
6	6	5.3	
6	7	1-2.6	
6	8	1-2.7	
6	9	1-2.5	
6	10	2-2.1	
6	11	2-2.2	
6	12	2-2.3	
6	12	2-2.4	
6	13	2-2.5	
6	13	2-2.6	
6	14	2-2.7	

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
6	15	2-2.8	
6	16	2-2.9	
6	17	2-4.14 (a)	
6	18	2-4.14 (b)	
6	19	2-4.6 (1)	
6	20	2-4.7	
6	21	2-4.8	
6	22	2-4.9	
6	23	2-4.10	
6	24	2-4.11	
6	25	2-4.12	
6	26	2-4.13	
7	1	5.1	
7	2	5.2	
7	3	5.4	
7	4	5.5	
7	5	5.6	
7	6	5.7	
7	7	5.8	
7	8	5.10	
7	9 and 10	5.12	
7	11	5.14	
7	12		Result of Commission Discussion
8	1	3-1.35	
8	2	3-1.28	
8	3		Added Following Public Comments
8	4		Added Following Public Comments
8	5	3-1.40	
8	6	5.15	
8	7	3-1.34	
8	8	3-1.31	
8	9	3-1.33	
8	10	3-1.36 (1)	
8	11	3-1.39	
8	12	3-1.41	
8	13	3-1.25	
8	14	1-1.3	
8	14	3-2.34	
8	15	3-2.37	

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
8	16	3-3.2	
8	17	3-3.4	
8	18	3-3.5	
8	19	3-2.38	
8	20	1-1.17	
9	1	3-2.17	
9	2	1-3.6	
9	3	3-1.23	
9	4		Added Following Public Comments
9	5	4-2.3	
9	6	4-2.4	
9	7	4-2.1	
		1-1.15	Withdrawn by Task Force
		1-1.16	Withdrawn by Task Force
		2-1.15	Not adopted by Commission
		2-1.16	Not adopted by Commission
		2-4.2	Not adopted by Commission
		2-4.5 (2)	Not adopted by Commission
		2-4.6 (2)	Not adopted by Commission
		2-4.6 (3)	Not adopted by Commission
		3-1.27	Not adopted by Commission
		3-1.29	Withdrawn by Task Force
		3-1.32	Not adopted by Commission
		3-1.36 (2)	Not adopted by Commission
		3-1.36 (3)	Not adopted by Commission
		3-1.37	Not adopted by Commission
		3-1.38	Not adopted by Commission
		3-1.42	Not adopted by Commission
		3-2.7	Not adopted by Commission
		3-2.9	Withdrawn by Task Force
		3-2.10	Withdrawn by Task Force
		3-2.11	Withdrawn by Task Force
		3-2.13	Withdrawn by Task Force
		3-2.15	Withdrawn by Task Force
		3-2.16	Not adopted by Commission
		3-2.26	Not adopted by Commission
		3-2.30	Not adopted by Commission
		3-2.31	Not adopted by Commission
		3-2.32	Not adopted by Commission

Recommendation Reference Table 2

Vision	Final Recommendation Number	Task Force Recommendation Number (Vision Numbers Omitted)	Comment
		3-2.39	Not adopted by Commission
		3-2.40	Not adopted by Commission
		3-2.41	Not adopted by Commission
		3-2.42	Not adopted by Commission
		4-3.5	Withdrawn by Task Force
		5.17	Not adopted by Commission

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Administration
Judge Randall G. Johnson, Chair
Judge William N. Alexander II, Vice Chair

Subcommittee 1-1, OES, GAL, Indigent Defense
Judge William Newman, Chair

Recommendations for Consideration by the Commission

May 24, 2006

I. Office of the Executive Secretary

The current state of the Office of the Executive Secretary

The Chief Justice serves as the chief executive officer of the judicial system and the Executive Secretary serves as the chief operating officer of the judicial system. The Executive Secretary provides administrative assistance and overall direction to the courts of the Commonwealth and to Virginia's magistrates through ten departments which comprise the Office of the Executive Secretary (OES). Following a reorganization in 2006, these departments are Educational Services, Fiscal Services, Human Resources, Judicial Information Technology, Judicial Planning, Judicial Programs, Judicial Services, Legal Research, Legislative and Public Relations, and the Court Improvement Program-Foster Care and Adoption. In addition, there is an Assistant Executive Secretary and Legal Counsel. The OES has about 120 full-time equivalent (FTE) employees plus another 50 FTEs provided by contractors.

The major activities of the Executive Secretary are providing appropriate coordination, supervision and administrative support for operations and systems within the court and magistrate systems; maintaining liaison with, and providing support to, the legislative and executive branches on matters affecting the courts, as well as serving as liaison to the Bar and to the public; and managing the day-to-day staff operations of the OES. The OES is generally highly regarded throughout the country.

Assistant Executive Secretary and Legal Counsel. This responsibilities of this new position in the OES include most of the responsibilities of the former office of Assistant Executive Secretary as well as serving as legal counsel for the OES. The incumbent's responsibilities include arranging court designations of active and retired judges, maintaining liaison with all agencies of the state government, and coordinating the assignment of Medical Malpractice Review Panels.

Educational Services. This department provides information and continuing education opportunities for judges, clerks, magistrates, substitute judges, special justices and administrative hearing officers. This department develops, organizes, conducts, and participates in more than 30 educational programs each year.

Fiscal Services. This department provides centralized budgeting, accounting, payroll, purchasing and supply, accounts payable and grant services for the judicial system which encompasses the Supreme Court, Court of Appeals, circuit court judges, general district and juvenile and domestic relations district courts, magistrates, the Judicial Inquiry and Review Commission and the Virginia Criminal Sentencing Commission. It also prepares legislative financial impact statements; maintains court/state-owned equipment, building inventories and insurance records; processes and maintains court facility leases; and coordinates grant activities to ensure compliance with federal regulations and guidelines.

Fiscal Services has offices dealing with budget, accounting, payroll, purchasing, accounts payable, grants, and programming/computer support. It processes about $1.2 billion in revenue each year, accounting for all fees and assessments collected by the courts.

Human Resources. This department provides centralized personnel management services for approximately 2,700 employees. The principal activities of the department include developing recommendations for the policy-making body concerning human resource administration; administering the personnel management system; preparing the budget for the personnel portion of the Judicial Branch's biennial budget for the courts and magistrates; and recommending appropriate salary levels for positions.

This is the only office in the OES which does not support Circuit Court Clerks. They receive support from the Compensation Board, or the City or County in which they serve.

Judicial Information Technology. This department provides computers to all judicial system employees (currently about 5,000 plus relevant peripherals) and supports their technological needs. This department provides case management systems for the Supreme Court of Virginia, Court of Appeals of Virginia, circuit courts, general district and juvenile and domestic relations district courts. It provides all receipts for payments to courts. It provides interfaces to the electronic databases in relevant court subsystems as well as appropriate databases for executive branch agencies, such as the Department of Motor Vehicles, state police, department of taxation, and some local police. The department provides training for all technology and data processing needs of court employees.

The Department maintains a public internet presence. In addition, there is an intranet available only to court employees. The intranet has everything available to the public on the internet pages plus considerably more.

The number of staff has been constant for several years with about 50 FTE employees and another 40 FTEs who are paid by grants or work for contractors. The department supports about 5,000 employees at 450 locations and has a budget of $9 million plus salaries. The department does not collect overhead expenses for its work, except for developing land record systems for circuit court clerks. By contrast, the DMV MIS supports about 2,000 employees at 150 locations with 150 FTEs and a budget of $24 million plus salaries.

The department developed electronic records technology for the circuit court clerks. Some clerks have chosen to work with private vendors instead of using what this department developed. Some circuit courts provide online access to records. There is no statewide uniformity in respect to access to records.

Judicial Planning. This department provides planning capability for the judicial system. The department works with the Chief Justice and Supreme Court of Virginia to identify present and future needs and to develop and implement innovative programs and solutions that address those needs. It also collects statistical data and publishes data compilations annually.

Judicial Programs. This department was established in 2006 to evaluate judicial programs and services through operational and policy analysis; perform program design and development for the OES; and research programs as requested by the Executive Secretary and Chief Justice of the Supreme Court of Virginia.

Judicial Services. This department, formerly known as Technical Assistance, provides administrative and management assistance as well as best practices to the magistrates, district courts and circuit courts. Staff visit specific courts and magistrates' offices each month. The department also responds to individual inquiries, solves specific problems and coordinates activities among the magistrates, clerks, staff members and outside agencies.

The department provides a certification program and training for magistrates as well as management training for all new clerks of district courts and chief magistrates. The department prepares procedural manuals for staff and newsletters.

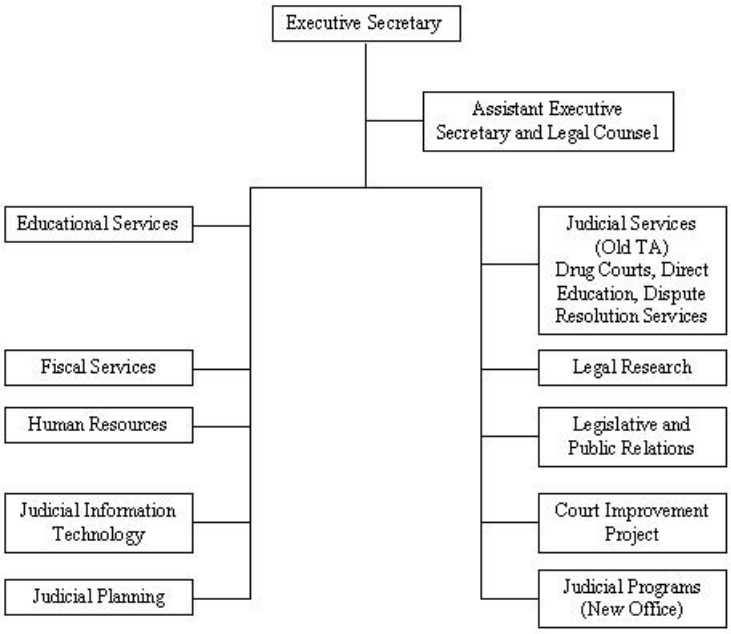
Beginning in 2006, Dispute Resolution Services became a division of this department. This division encourages and promotes the use of alternative dispute resolution (ADR) in all judicial circuits; encourages the creation of ADR programs by community providers; serves as an information clearinghouse on ADR programs and activities; maintains a library of dispute resolution resource materials; provides training and education programs to ADR practitioners, court personnel, law enforcement personnel, businesses, students, members of the Bar, judges and the general public; certifies mediators; oversees complaints regarding mediators; accounts for parent education courses and programs.

Legal Research. The department has three attorneys and acts as a law clerk to the district court and circuit court judges. The department develops forms and updates them to meet the requirements of new legislation. The Director often participates in educational conferences, training sessions and technical assistance visits. The department performs legal research to determine the effect on the judicial system of bills before the General Assembly, drafts new bills or amendments for the Executive Secretary and provides testimony on legislation as needed.

Legislative and Public Relations. This department serves as the voice of the judicial system in the General Assembly and with the media and the public. The department assists in the development of the judiciary's legislative package. The focus has been primarily legislative relations.

Court Improvement Project. The project addresses child dependency issues and works with Educational Services, Judicial Information Technology, and Judicial Services. It qualifies lawyers to serve as Guardians Ad Litem (GAL) for children and incapacitated adults.

The following is the organizational chart for the OES:



Trends which may influence the Office of the Executive Secretary

The distinguished history of the state court system in Virginia led by the Supreme Court of Virginia and including the work of the OES objectively provides a sound basis for adaptation in the new century to realities and trends which are now becoming evident and will demand continuing reevaluation and nearly constant evolution. The most fundamental of these is that in the 21st Century environment the only real constant is the fact of change itself. In that context, we can see at least these nine indications:

1. The court system of the 21st Century must have effective mechanisms to identify the increasing demands that are being placed upon the judicial system.
2. It is highly unlikely that the needs of the judicial system will ever be fully funded thus requiring disciplined choices by the judiciary including the OES as well as legislative and executive decision makers.
3. The internal structure of the OES will necessarily have to be flexible and open to shifting priorities. The structure and reporting patterns must meet the demands of and on the court system as priorities dictate, rather than any historical or preconceived arrangements.
4. In keeping with adjustments being currently made within OES, a continuing process of rationalization of organization and relationships needs be kept in motion.
5. Support to all elements of the judicial system by OES will need to increase.

6. The existence of the several non-court entities presently attached to the Supreme Court of Virginia or pertinent to it increasingly raises issues of sound management principles of span of control, prudent accountability and responsiveness to legislative and administrative mandates.
7. Full consideration of the geographic realities of the Commonwealth compels application of best technology and appropriate siting of judicial system activities and services, particularly including those of OES. Amplifying the direct contacts between Richmond offices and local judicial elements is highly desirable.
8. The clear need for increasing transparency and open access in the workings of the judicial system is becoming more evident over time and extends to OES. Without a definite point of focus within the OES, it will become even harder to respond to this environmental truth.
9. It may no longer be useful to maintain the organizational separations between the Clerks of Circuit Courts of the Commonwealth and the rest of the judicial system despite the political history that produced these circumstances.

Recommendation 1-1.8.1. The titles Executive Secretary and Office of the Executive Secretary should be changed to State Court Administrator and Office of the State Court Administrator.

Rationale

The titles of Executive Secretary and Office of the Executive Secretary mask clarity. General state and national experiences and usages encourage a change to State Court Administrator and Office of the State Court Administrator. This step represents not just semantics, but promotes professional standing as well as better understanding of actual roles.

Recommendation 1-1.5.2. The Supreme Court of Virginia, in conjunction with the Executive Secretary, should periodically examine the organization of the Office of the Executive Secretary to ensure that the organization is appropriate and effective.

Rationale

Effective management requires periodic review in all areas. For example, the departments of fiscal services, human resources, information technology, judicial services (formerly Technical Assistance), judicial planning and the new department of judicial programs have recently been reviewed and changes were implemented to improve organizational effectiveness. Such a review should be undertaken with respect to all remaining departments – educational services, assistant executive secretary and legal counsel, legal research, legislative and public relations, and court improvement project.

Recommendation 1-1.5,8.3. The Executive Secretary should create a department of public affairs.

Rationale

The creation of a definite focus on public affairs and education would provide a higher level of attention for judicial system constituencies. This step should provide a department within the OES able to concentrate on public affairs and education matters to provide greater transparency and open access.

Recommendation 1-1.5.4. Executive management training should be provided to all department managers.

Rationale

So that the court will always be aware of and implementing the most effective managerial thinking, OES department managers should participate in executive management training programs.

Recommendation 1-1.8.5. The OES should increase statewide access to its services through the use of technology, satellite offices and increased contact with judges, clerks, and the public.

Rationale

The ability of the OES to provide local services and promote state wide public acceptance of the judicial system will be enhanced by steps to move delivery as close to the publics served as may be practicable thus away from central Virginia to the several regions of the Commonwealth.

II. Guardians Ad Litem

The current state of Guardians Ad Litem

Guardians Ad Litem (GAL) are appointed for children and for incapacitated persons. The OES Court Improvement Project is responsible for certification of all GALs in Virginia.

To become a GAL for children, an attorney must (1) be an active member of the Virginia State Bar; (2) complete *Representation of Children as a Guardian Ad Litem*, a seven hour course offered by Virginia CLE; (3) submit a nomination form to the OES after having it signed by a juvenile court judge or a GAL serving as a mentor; and (4) request qualification by the OES as a GAL in a letter which documents all related experience. The initial qualification as a GAL for children is for two years. Requalification requires six hours of qualified continuing education every two years.

To become a GAL for incapacitated persons, an attorney must (1) be an active member of the Virginia State Bar; (2) complete *Representation of Incapacitated Persons as a Guardian Ad*

Litem, a six hour course offered by Virginia CLE; (3) submit a nomination form to the OES after having it signed by a circuit court judge *or* (a) serve as a GAL or provide assistance to a GAL in two cases in circuit court *or* (b) serve as counsel for the petitioner in two cases involving an incapacitated person in circuit court *or* (c) be appointed by the circuit court as a guardian or conservator for an incapacitated person in two cases; and (4) request qualification by the OES as a GAL in a letter which documents all related experience. The initial qualification as a GAL for incapacitated persons is for two years. Requalification requires six hours of qualified continuing education every two years.

There are more than 2,200 lawyers who have expressed interest in being a GAL for children; as of October of 2005, 1,237 have qualified to serve. There are more than 1,000 lawyers who have expressed interest in serving as GALs or conservators for adults; as of October of 2005, 349 have qualified to serve. There is a committee examining the work of GALs which began meeting in late 2005.

The OES has no authority to review the quality of services provided by GALs. Complaints are directed to the judges who appointed the GALs who are subjects of complaints. The Virginia State Bar responds to a limited number of complaints about GALs; it too refers complaints to the appointing judge.

Some lawyers do not pursue serving as GALs because appointments often are made to the same few people.

Trends which may influence Guardians Ad Litem

The need for GALs for children and incapacitated persons will only increase as the demographics of an aging population, significant birthrate and immigrant influx take place.

An increasing likelihood of growing demand for stronger accountability within the system will require reliable programs of certification, quality control and discipline that are uniform throughout Virginia.

Recommendation 1-1.6,8.6. The Supreme Court of Virginia should provide authority within OES or the Virginia State Bar to enforce certification, quality of services and complaint processes for GALs.

Rationale

Although GALs are certified by the Office of the Executive Secretary of the Supreme Court of Virginia, there are no formal procedures for addressing the quality of services provided by or complaints regarding GALs. This recommendation corrects that lapse and helps ensure that GALs will provide high quality representation.

Recommendation 1-1.6,8.7. The Supreme Court of Virginia should direct continuing assessments of the volume of GAL cases of all kinds with attendant programs to recruit and train attorneys for such service.

Rationale

As the demand for GALs increases, there will be a continuing need to get attorneys to serve as GALs. Although some attorneys will seek certification on their own, to ensure there will be a sufficient supply of GALs, the Supreme Court of Virginia should have a plan to recruit attorneys to serve. In addition, there should be multiple opportunities to earn certification as a GAL each year.

III. Indigent Defense

The current state of Indigent Defense

Virginia provides legal services to indigent defendants using a system of Public Defenders and court appointed attorneys. The Virginia Indigent Defense Commission (VaIDC) is directed by statute to run the Public Defender system and to train and certify court appointed attorneys.

There are currently 25 public defender offices serving 52 jurisdictions throughout the Commonwealth. These jurisdictions represent 62% of Virginia's population. In addition, there are 4 regional capital defender offices and 1 appellate defender office. In 2204-2005, these offices represented over 80,000 indigent persons.

In jurisdictions not served by public defender offices, indigent defendant cases are assigned to court appointed attorneys. Court appointed attorneys also represent defendants in jurisdictions served by public defenders when those offices have conflicts or are unable to handle additional cases. In 2004-2005 court appointed attorneys represented over 30,000 indigent persons.

Salaries for public defenders come from the budget of the VaIDC. Fees for court appointed attorneys are paid by the Virginia Supreme Court from the Criminal Fund. The amount that can be paid to court appointed attorneys is set by statute by the General Assembly and those fees cannot be waived or exceeded. Additionally, the General Assembly has never full funded the statutory fee caps as the graph below shows:

	Adult Misdemeanors or any Juvenile Charge in District Court	Misdemeanors in Circuit Court	Felonies punishable by 20 years in prison or less	Felonies punishable by more than 20 years in prison
Maximum as Stated in Code	$120	$158	$445	$1,235
Actual Maximum Paid	$112	$148	$395	$1,096
2005 Appropriation	No Change	No Change	$428	$1,186

Trends which may influence Indigent Defense

The low level of funding for both the public defender system and the system of court appointed attorneys has pushed both systems into a state of crisis.

Public defenders are paid on average 24% less than Commonwealth's Attorneys. Additionally, as a result of increasing caseloads and vacancies in public defender offices, public defenders are handling caseloads that were are nearly 70% higher than the maximum recommended by the Virginia State Bar.

Public defender offices suffer from an extraordinarily high turnover rate that affects the ability to provide quality indigent defense representation. In 2004-2005, the public defender system experienced a turnover rate of nearly 18% for all staff. (23% for assistant public defenders). Additionally, it has become increasingly difficult to hire new attorneys. This has resulted in a system in which over one half of the assistant public defenders have less than two years of experience and fully one third are in their first year of practicing law. The high turnover rate is the direct result of a non-competitive salary structure and the increasing caseloads

Public defender offices should handle about 75% of the indigent defense cases in the jurisdictions they serve. Conflicts with co-defendants and witnesses result in about 25% of the cases being assigned to private attorneys. Due to inadequate staffing and excessive caseloads, public defender offices are often required to accept significantly less than the 75% of the cases they were originally designed to handle. These additional cases are assigned to private attorneys.

The compensation paid to court appointed attorneys is grossly inadequate. In January 2004, the American Bar Association released a report, A Comprehensive Review of Indigent Defense in Virginia, prepared by the Spangenberg Group that was highly critical of Virginia's system of providing indigent defense services. According to the Spangenberg Report, Virginia ranked 50th in the nation in terms of compensation paid to court appointed counsel. That ranking remains unchanged today. Because of the low fees paid to court appointed attorneys, it is difficult to attract qualified attorneys to handle court appointed cases.

Recommendation 1-1.4,5,8.8. Virginia should reform the current system of compensation of court appointed attorneys by removing or significantly increasing and fully funding the fee caps.

Rationale

Court appointed attorneys are a vital part of Virginia's indigent defense system. Even in jurisdictions which are served by public defender offices, court appointed attorneys are needed to handle at least 25% of the indigent criminal cases due to client, witness and other legal conflicts. There are also remote jurisdictions that cannot be served economically or efficiently by public defender offices and must therefore be served by court appointed attorneys.

Virginia's current compensation level for court appointed counsel is, by any measure, unreasonable and endangers the integrity of the criminal justice system. Under the current system, attorneys are compensated for only a minimal amount of their time. This places attorneys in the position of having to work without compensation on all but the most basic of cases.

Recommendation 1-1.4,5,8.9. Public Defender offices should be funded at a level comparable to the funding provided to Commonwealth's Attorneys' offices.

Rationale

The Public Defender system is not funded at a level that is sufficient to hire and retain experienced attorneys and support staff. A recent study found that, on average, public defender salaries lagged 24% behind those of commonwealth's attorneys. Additionally, there is a great disparity in the funding available to public defenders for investigators, experts and sentencing advocates when compared to the resources available to commonwealth attorneys' offices. The increase in funding will also address the extraordinarily high turnover, inability to retain experienced attorneys, and the inability to recruit qualified attorneys.

Adequately funded public defender offices can efficiently handle 75% of the indigent criminal cases in the jurisdictions they serve. Supervision, training opportunities and access to investigators and sentencing advocates enable public defender attorneys, with reasonable caseloads, to provide high quality indigent defense.

As a result of the high employee turnover rate in public defender offices, fewer cases can be handled and more cases must be assigned to court appointed attorneys. It costs the Commonwealth more per defendant when a person is represented by a court appointed attorney than when a defendant is represented by a public defender.

Unreasonably low salaries have resulted in a system that is dangerously lacking in experienced attorneys and places too much reliance on attorneys new to the practice of law. A fully funded public defender system will save the Commonwealth money on indigent defense costs.

Recommendation 1-1.4,5,8.10. Virginia should develop maximum caseload standards for attorneys working in Public Defender offices and attorneys serving as court appointed counsel. Compliance with the caseload standards should be closely monitored to ensure that attorneys can meet their ethical responsibility of providing competent, effective representation to their clients. Public Defender offices should be adequately staffed to allow attorneys to handle all cases, except those presenting a conflict of interest, without exceeding caseload standards.

Rationale

Excessive caseloads are a major problem in Public Defender offices. They contribute to the very high turnover rates, attorney "burnout," and the risk of a lower quality of representation currently confronting many offices. High caseloads also put attorneys at risk of violating ethical standards. There currently are no uniform caseload standards addressing the practice of criminal defense in Virginia. Caseload standards need to be developed for public defenders, as well as for contract and court appointed attorneys. In addition, caseload standards for contract and court appointed attorneys should reflect the fact that these attorneys often focus on other subject areas of practice within their law firms, and have less experience in the active practice of criminal law.

Recommendation 1-1.4,5,8.11. Virginia should expand the Public Defender system to create a statewide system that is fully staffed and funded. New public defender offices should be established in every jurisdiction, except those where the low number of cases or geographical considerations make it impractical or not economically feasible.

Rationale

A statewide system will improve the quality of indigent defense throughout Virginia. Professional public defenders, when operating with fully staffed and funded offices, have inherent advantages that produce high quality and efficient indigent defense services. Public Defender offices provide:

a. Convenience and Responsiveness to the Courts. Public defenders are readily available to assist the courts when a judge determines that a criminal defendant is indigent and is entitled to counsel. Unlike court appointed attorneys, public defenders do not have separate caseloads that may interfere with their ability to respond quickly when asked by the court to do so.
b. Training. Mandatory criminal defense training is provided for all public defender attorneys. Additionally, local public defender offices provide in-house training specific to their jurisdictions and periodically send attorneys to programs designed to enhance their skills in criminal defense.
c. Oversight. All assistant public defenders are supervised by the Chief Public Defender and supervising attorneys within each public defender office. The supervisors act as mentors and provide expert advice, guidance and mentoring to less experienced attorneys.
d. Support. Many public defender offices have professional investigators and sentencing advocates who help attorneys investigate and prepare cases for trial and sentencing.

e. Specialization and Expertise. Full-time public defenders devote their entire practice to indigent criminal defense. This extensive experience in criminal defense permits the rapid development of legal skills necessary to provide an adequate defense. In addition, public defenders' continuing legal education is devoted exclusively to criminal defense.

Recommendation 1-1.4,5,8.12. The Virginia Indigent Defense Commission should be given the authority to create a system of attorneys assigned by the court to handle cases that cannot be handled by public defenders.

Rationale

There will always be a need for court appointed attorneys, and Virginia should have a system capable of ensuring that qualified attorneys are readily available to represent indigent defendants. There is currently no mechanism in place for recruiting, qualifying, and evaluating court appointed attorneys. In many jurisdictions, judges have difficulty locating attorneys to represent indigent defendants. Local attorneys who are selected may or may not have the requisite experience in criminal law. An attorney's eligibility to be a contract attorney should be based on his or her compliance with the Standards of Practice for Assigned Counsel and other standards developed by the VaIDC.

IV. Clerks of the Circuit Courts

Narrative of current state of the Clerks of the Circuit Courts

The Circuit Court Clerk is an elected Constitutional Officer who is responsible for administrative and ministerial duties that directly impact the court. The judges have no direct control over the clerk and vital court functions such as court filings, case management, record keeping, docketing procedures and the selection and management of court clerks. There have been conflicts between the judges and the elected clerk over the management of the courts.

There are five constitutional officers elected in each locality. The Sheriff, Commonwealth Attorney, Treasurer and Commissioner of Revenue serve a four-year term and the Clerk of Circuit Court serves an eight-year term. There are over 800 responsibilities of the Circuit Court Clerk enumerated in the Code of Virginia. Major duties include management of all transactions involving the Circuit Court System, including but not limited to civil, criminal and probate matters, as well as recording all jurisdictional land records, and maintaining a complex bookkeeping system to insure all collections are allocated to the proper state or local agency.

There are differences in the management of the offices of the District Courts and the Circuit Court. The District Court Judges employ the Clerks of their preference, and the Clerk and Deputy Clerks adhere to the rules, regulations and policies established by the Supreme Court. All District Court employees are considered State employees with full State benefits.

Because the Circuit Court Clerk is an elected official, the position and other employees are totally independent from the Supreme Court and are not subject to supervision by the Circuit Court Judges. Regarding salaries and benefits, the Circuit Court Clerks and employees are

considered a hybrid of the State and localities. A great portion of the salaries for the Clerk and employees are paid through Compensation Board funding; and all benefits are funded by the locality. The Compensation Board determines the necessary number of employees for each office; and if the staff is still insufficient in numbers, the locality may or may not choose to offset any difference in payroll funding. If the locality chooses not to compensate the personnel shortage, the Clerk's Office is forced to operate with a staff deficiency.

Trends that influence the Clerk of the Circuit Court:

Judges are expected to be responsible for the fair and efficient operation of the court system but they cannot meet that responsibility when an elected clerk controls essential court functions. The operations of the courts have grown in complexity and require professional management. In some jurisdictions, there are conflicts between judges and clerks that impair the functioning of the judiciary.

Recommendation 1-1.4,5,8.13. The constitutional office of Clerk of the Circuit Court should be eliminated. In its place, each circuit court should appoint a court administrator to perform all of the duties currently performed by the Clerk of the Circuit Court.

Rationale

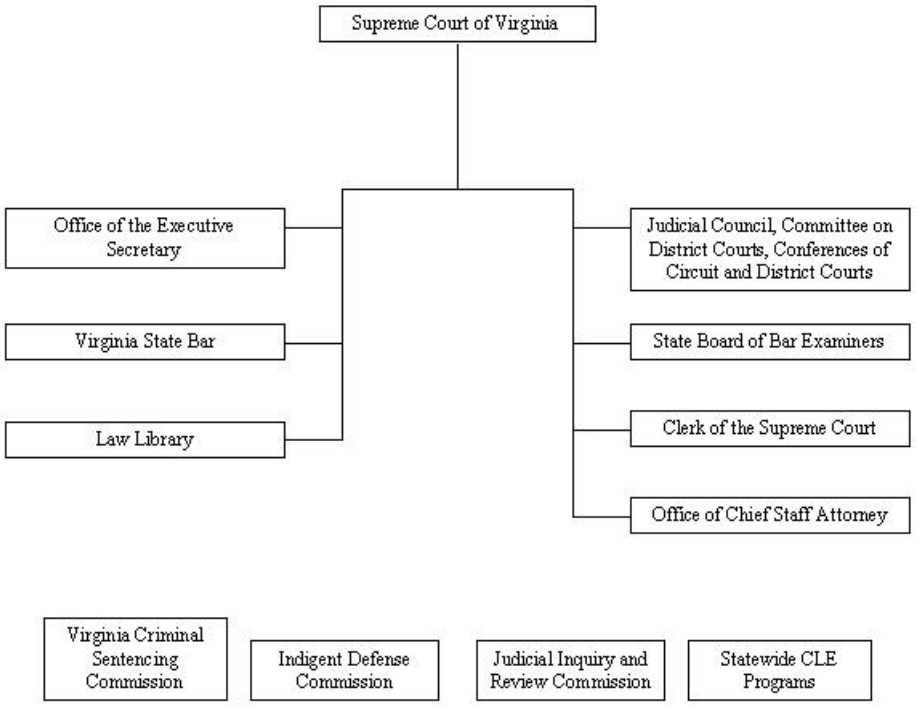
A court administrator hired by the judiciary will help judges fulfill their responsibility for the fair and efficient operation of their court. The court administrator will hire staff as appropriate for efficient operation of the court.

V. Supreme Court of Virginia Responsibilities

The current state of Supreme Court of Virginia responsibilities

The present span of control of the Supreme Court includes, beyond the courts themselves, the OES, the Virginia State Bar, the Law Library, the Judicial Council, the Committee on District Courts and the Conferences of Circuit and of District Courts, the State Board of Bar Examiners, the Clerk of the Supreme Court and the Office of the Chief Staff Attorney. Additionally there are four basically autonomous entities which bear on the administration of justice: the Virginia Indigent Defense Commission, the Virginia Criminal Sentencing Commission, the Judicial Inquiry and Review Commission, and Supreme Court of Virginia initiated statewide CLE programs.

The following is the organizational chart for the Supreme Court of Virginia:



Recommendation 1-1.5.14. The Supreme Court of Virginia should periodically examine the relationships of all entities reporting directly to it to ensure an effective span of control and that the overall organization is appropriate.

Rationale

Efficiency, structure and limits of span of control are better served by reworking the relationships of the various reporting entities in establishing a focal point for the court in dealing with them.

Recommendation 1-1.5.15. The Supreme Court of Virginia should create the position of Administrative Assistant to the Chief Justice to maintain effective exercise of authority and liaison with the several non-court entities.

Rationale

The Administrative Assistant to the Chief Justice would be a focal point for the court in dealing with all non-court entities. The Administrative Assistant to the Chief Justice of the Supreme Court of Virginia might be patterned after Administrative Assistant to the Chief Justice of the Supreme Court of the United States who "aids the Chief Justice in his [or her] overall management of the Supreme Court, provides research in support of the Chief Justice's public addresses and statements, and monitors developments in the field of judicial administration and court reform. He [or she] also assists the Chief Justice with his [or her] other statutory

responsibilities as head of the Third Branch of government."
(http://www.uscourts.gov/ttb/augttb96/duff.htm)

Recommendation 1-1.5.16. All entities within and relating to the judiciary, including the Virginia State Bar, the Judicial Inquiry and Review Commission, the Law Library, the Judicial Council, the Committee on District Courts, the Conferences of Circuit and of District Courts, the State Board of Bar Examiners, the Clerk of the Supreme Court of Virginia, the Office of the Chief Staff Attorney, the Virginia Indigent Defense Commission, and the Virginia Criminal Sentencing Commission, and Supreme Court of Virginia initiated statewide CLE programs, should be part of the organization and subject to the authority of the Supreme Court of Virginia through the Chief Justice.

Rationale

There are many entities relating to the judicial branch over which the Supreme Court of Virginia does not have actual or complete jurisdiction or direct oversight even recognizing the need for a certain degree of independence of the entities in some cases.

Recommendation 1-1.4,5,8,10.17. There should be a broadened effort beyond the profession to increase support for adequate funding of all elements of the judicial system including appropriate levels of compensation and benefits, physical facilities, advanced technology and educational efforts.

Rationale

The future of the court system in the new century depends upon adequate funding. The general public at present has little understanding of or allegiance to this concept. This must change. Steps such as creating a public affairs focus within OES are needed.

Recommendation 1-1.4.18. There should be separate space and budget for the Court of Appeals of Virginia, although it would remain under the authority of the Supreme Court of Virginia.

Rationale

The workload, space, and fiscal requirements of the court now that it is over twenty years old justify this recommendation.

The following Recommendation was not adopted by the Task Force and is presented to the Commission for informational purposes only:

The Supreme Court of Virginia should examine the mission of the Virginia State Bar (VSB) and ensure that the role and activities of the VSB are consistent with the VSB's primary missions.

Rationale

The Executive Director of the VSB is not presently chosen by the Chief Justice. The licensing (board of bar examiners) and discipline (VSB) functions are separated organizationally. Administrative functions such as fiscal, human resources and technology are handled internally within the VSB rather than by the larger offices within the OES. The VSB is also involved with commercial, social and professional association matters.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Administration
Judge Randall G. Johnson, Chair
Judge William N. Alexander II, Vice Chair

Subcommittee 1-2, Judicial Vacancies, Selection, Education, Compensation
Judge Michael Allen, Chair

Recommendations for Consideration by the Commission

May 24, 2006

I. Judicial Vacancies

Narrative of the current state of judicial vacancies in Virginia

Judicial vacancies occur under two broad circumstances. First, there is a judicial vacancy when a judge leaves the bench. Among the common reasons for a judge to leave the bench are retirement and choosing not to run for reelection. These vacancies are "routine" and, when they occur, the Office of the Executive Secretary certifies the vacancy to the General Assembly of Virginia.

Second, there is a judicial vacancy when the General Assembly of Virginia creates a new judgeship. Requests for new judgeships are initiated by the localities. The Office of the Executive Secretary reviews the statistics for the requesting locality and sends a recommendation to the Committee on District Courts or Judicial Council.

The most important consideration is the number of cases per judge. This is computed separately for urban and rural areas. The next most important consideration is whether the locality demonstrates a need in its presentation. Among the other considerations are whether the General Assembly determines that money is available and the persuasiveness of the locality's presentation. Generally, a new judgeship can be created when the judges case loads are 20% above the state average.

Trends which may influence judicial vacancies

As the Commonwealth's population grows, the courts will see an increase in cases filed. This will require more judges to hear all of the cases. In addition, there may be shifts in population, with some jurisdictions seeing their population decreasing. Where there are significant declines, some jurisdictions will have decreased case filings and may not need all of the judicial positions currently provided.

Recommendation 1-2.6.1. The Supreme Court of Virginia should have the prerogative to initiate requests for new judgeships. Individual Judicial Circuits and Districts may continue to request additional judgeships.

Rationale

Since the Department of Judicial Planning in the Office of the Executive Secretary routinely gathers caseload statistics, it is well placed to see both immediate needs for additional judges and trends in filings which suggest near-term needs for additional judges. If the Supreme Court of Virginia is able to initiate requests for new judgeships on its own, the requests for new judgeships can be presented to the General Assembly of Virginia as soon as the need is observed. Localities will continue to be involved in the requests for new judgeships, but they will no longer have to initiate all of those requests.

Recommendation 1-2.6.2. The Supreme Court of Virginia should develop objective criteria for determining the need for new judgeships. The criteria should include caseload and benchtime per judge and such other criteria as the Supreme Court of Virginia deems appropriate.

Rationale

Although there will be circumstances unique to each locality, there are many criteria used to determine the need for a new judgeship which should be uniform. The Supreme Court of Virginia should identify those criteria, such as caseload and benchtime per judge, and apply them consistently as it reviews all relevant statistics to determine the need for new judgeships.

II. Judicial Selection

Narrative of the current state of the judicial selection in Virginia

The public demands and deserves highly qualified judges. The Constitution of Virginia vests authority for selecting judges in the General Assembly of Virginia. The General Assembly of Virginia has historically selected highly qualified judges for the Commonwealth. Virginia's judges are widely respected within Virginia and across the nation.

Trends which may influence judicial selection

Although other states have different models of judicial selection, any changes by other states are not likely to have significant influence on how Virginia chooses judges. Rather, as Virginia's population grows and becomes more diverse, including more who are foreign born, the public's perception of fairness in judicial selection will become even more important than it is today.

Recommendation 1-2.6.3. Virginia has an outstanding judiciary. It is vitally important to maintain public confidence in the quality and integrity of Virginia's courts. To ensure Virginia continues to have men and women of the highest quality serve on the bench, it is recommended:

(1) For election to statewide courts:

(a) The General Assembly should appoint a Judicial Nominations Commission (JNC) which reflects the diversity of the Commonwealth. The members of the JNC shall include the Presidents (or their designees) of the Virginia State Bar and such voluntary statewide bar associations as may be selected by the General Assembly, and members of the public.

(b) The JNC shall evaluate candidates according to standards and criteria which shall include:
   a. Integrity;
   b. Legal knowledge and ability;
   c. Professional experience;
   d. Judicial temperament; and
   e. Such other factors as the General Assembly may consider appropriate.

(c) For each vacancy, the JNC shall submit to the General Assembly the names of more than one candidate deemed "qualified" or "well qualified." The General Assembly should elect judges from the slate submitted by the JNC.

(2) For election to trial courts:

(a) The process of electing trial court judges should reflect the particular circumstances and needs of each jurisdiction.

(b) In every jurisdiction, the administration of justice benefits when the selection process includes input from the local legal community. Therefore, local bar associations should communicate with their legislators to establish a process by which the local legal community may assist the General Assembly in identifying the best qualified candidates.

(3) For reelection (To be written and circulated by Subcommittee):

Rationale

This recommendation builds on the long and distinguished manner in which the General Assembly selects judges and is designed to ensure the continued confidence of the public in judicial selection.

III. Judicial Education

Narrative of the current state of judicial education in Virginia

The Educational Services Department of the Office of the Executive Secretary ("the Department") provides a wide range of services for the judicial system in Virginia. These include educational training; providing legal updates, manuals, forms, and other resources; and maintenance of a WebBoard threaded discussion/chat area. (Information about these services is provided in the Judicial Administration Manual).

Training: Continuing educational training and opportunities are offered yearly for all court personnel, including judges, magistrates, special justices, hearing officers, substitute judges, and new judges. The Department also administers a tuition reimbursement program for magistrates and district court employees who attend training seminars or pursue college-level courses and other continuing education opportunities through institutions of higher education.

There are three main types of judicial education programs: orientation programs, statewide conferences, and regional seminars. Orientation programs vary in length. They are conducted for new judges (three weeks), new magistrates (one week), new clerks (one week), and new district court employees (one week). Statewide conferences are held periodically during the year for Supreme Court justices; court of appeals, circuit court, and district court judges; circuit court and district court clerks; magistrates; and administrative hearing officers. Regional training is offered in six areas of the state for district and circuit court clerks, magistrates, and substitute judges.

In 1999, The Supreme Court Curriculum Development Project, under the auspices of the Department of Juvenile Justice Services' "Juvenile Accountability" block grant, undertook a curricula needs assessment for all circuit and district court judges, including chief judges; district court clerks; and magistrates. As a result, there was a move from short-term, ad-hoc planning to long-term educational planning. Course lists were developed for each group (see http://www.courts.state.va.us/ed/courseinfo/home.html) and are used for all conference planning. Some of the listed courses are currently available free online through Skillsoft. Course content continues to focus on a review of cases decided by the Supreme Court of the United States, Virginia appellate cases, and legislative updates.

Recent budget constraints have resulted in programs being shortened in length or offered less frequently. Some courses which were once taught face-to-face are now being offered on CD-ROMS. Sessions at judicial and other educational conferences are also being videographed and placed online for on-demand viewing by judicial system employees.

Technology will continue to play an increasingly important role. The Department has been researching webcasting technology, whereby judicial conferences and training events could be recorded, uploaded to the Supreme Court's intranet, and viewed by judicial system employees at their convenience; the development of more CD-ROM courses; and the expansion of the quantity and frequency of distance learning endeavors. Technological advances in the court system will also result in the need for judges and other court personnel to receive additional in-depth training on system hardware and software.

Resources: The Department provides a range of online resources for court personnel to keep them informed. Legal updates of United States and Virginia Supreme Court opinions, federal and state appellate and trial court opinions, and legislative summaries are provided. Manuals for use by judges, clerks, magistrates, court appointed counsel, and public defenders are maintained. Other resources include course information, online training, forms for use by the courts and the public, and a database to find service providers and resources. In addition, there is a National Online Resource Library for the Judiciary on Impaired Driving which covers a range of topics.

WebBoard Threaded Discussion/Chat Area/Q&A: The purpose of the WebBoard is to expand communication abilities for judges, clerks, and magistrates. It is a discussion board where users can seek input from colleagues with regard to questions or problems. There are eight active discussion boards designed for the following constituencies: circuit court judges, general district court judges, juvenile and domestic relations court judges, substitute judges, circuit court clerks; general district court clerks, juvenile and domestic relations court clerks, and magistrates.

Trends which may influence judicial education

Judicial educators have projected that among their greatest challenges in the next few years are getting adequate funding for judicial education, identifying trends of importance to judges, identifying innovations which will improve court management, preparing faculty to teach effectively in distance learning courses, and ensuring that courses on science and technology are as current as traditional legal updates.

Distance education has become highly sophisticated and will be an increasing part of judicial education. For some topics or types of learning, it may appropriately become the exclusive mode of providing instruction. Distance education will not, however, replace traditional face-to-face instruction. Traditionally delivered courses will remain both effective and popular because they provide immediate opportunities for participants to learn from one another and they are developed and provided with relative ease.

Recommendation 1-2.6.4. Educational training should be provided to all judges, substitute judges, senior judges, and magistrates throughout their careers.

A. Judicial education available to Virginia judges through the Supreme Court of Virginia should be comprehensive with regard to content and delivery methods; and

B. Judges should be able to attend specialized courses offered by other states or organizations.

Rationale

The curriculum should include coverage of relevant substantive and procedural law and course topics such as judicial and law clerk ethics, emerging trends, interdisciplinary courses related to

the work of the courts and the judicial system, cultural awareness, judicial administration, and court management.

Judicial support staff should have educational training provided on a regular basis. The curriculum for the support staff should include courses on their role within the courts as well as the role of the courts and training for their respective responsibilities.

Recommendation 1-2.6.5. Virginia should provide state funded law clerks for each circuit.

Rationale

The law clerk can help with education as well as the traditional law clerk functions.

IV. Judicial Compensation

Narrative of the current state of judicial compensation in Virginia

In its 2006 Survey of Judicial Salaries, the National Center for State Courts ranks the salaries paid to state court judges. Virginia was 14th for salaries paid to Supreme Court judges, 11th for salaries paid to Court of Appeals judges, and 9th for salaries (7th with a cost of living adjustment considered for each state) paid to its Circuit Court judges.

Virginia needs to recognize, however, that it is not competing with other states for judges. It is competing with the private sector and with the federal government. Top lawyers in private practice take substantial reductions in pay to become Virginia judges. Indeed, starting salaries for first-year associates at the state's leading firms are near the salaries for circuit judges having years of legal experience.

Although federal judges make $28,000 to $53,000 more than Virginia judges, compensation in the federal system has been long viewed as inadequate:

> Those lawyers who are most qualified to serve as Federal judges have opportunities to earn two and three times the amount we pay our Federal judges. While judicial salaries will never match private law practice salaries, the amount we are willing to pay our judges needs to be sufficient to attract and retain experienced and well-qualified men and women of diverse backgrounds.

American Bar Association/Federal Bar Association, "Federal Judicial Pay, An Update on the Urgent Need for Action" at 3 (May 2003).

While Virginia can continue to fill all judicial vacancies at current salary levels, Virginia's goal should be not merely to fill these vacancies, but to do so with the most qualified lawyers in the state. Unless Virginia increases judicial salaries, it may not continue to enjoy the high quality of judges it now has. A strong judiciary requires salaries that will attract the best candidates to the bench – and keep them there.

As Chief Justice Hassell of the Supreme Court of Virginia has stated, "An independent judiciary is an indispensable component of our constitutional form of government." "Virginia 2004 State of Judiciary Report" at xv. Chief Justice Roberts of the Supreme Court of the United States has warned, "[A] strong and independent judiciary is not something that, once established maintains itself. It is instead a trust that every generation is called upon to preserve, and the values it secures can be lost as readily through neglect as direct attack." "2005 Year-End Report on the Federal Judiciary" at 2.

Trends which may influence judicial compensation

Although other states have different plans for judicial compensation, any changes by other states are not likely to have significant influence on how Virginia chooses to pay its judges. Rather, the effects of inflation and increases in the gap between judicial salaries and benefits and the salaries and benefits otherwise available to the lawyers best suited to be judges will exert the most influence in Virginia.

Recommendation 1-2.6.6. Judicial salaries and benefits should be sufficient to attract and retain the best qualified people for Virginia's judiciary.

Recommendation 1-2.6.7. An independent Compensation Commission (CC) should be established to set judicial salaries and benefits. The CC's recommendations should be implemented unless the General Assembly acts affirmatively to provide different compensation.

Rationale

In 2003, the ABA adopted a resolution urging states to create independent commissions to set judicial compensation. See Resolution and Report dated August 11-12, 2003. Under the ABA proposal, the salaries set by the commission would become law unless rejected by the legislature.

While the ABA resolution recommended that commissions be used only for compensation to judges, several states also use commissions to set compensation for legislators and chief executives.

We encourage Virginia to consider using a commission for setting compensation for judges and top officials in other branches of state government. By its veto power, the General Assembly would retain ultimate control over appropriations.

Among the benefits the General Assembly should consider for judges are tuition waivers for the children of judges who attend a state-supported institution within the Commonwealth.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on the Judicial Administration
Judge Randall G. Johnson, Chair
Judge William N. Alexander II, Vice Chair

Subcommittee 1-3, ADR, Mandatory Mediation
Judge Wilford Taylor, Jr., Chair

Recommendations for Consideration by the Commission

June 1, 2006

Narrative of the current state of alternative dispute resolution in Virginia

During the last fifteen years there has been a dramatic change in the ways individuals, businesses and, indeed, governments resolve disputes. The utilization of alternative dispute resolution (ADR) methods, once thought to be ineffective and even threatening to some, has now become commonplace. The most widely used method is mediation, a process by which parties negotiate their differences with the assistance of a third party neutral. Central to the mediation process is the principle of self-determination which honors the independence of the parties to make their own decisions. This principle is important in regard to entering the process, participating in it and, ultimately, reaching an agreement. Examples of other ADR methods include binding and non-binding arbitration, and early neutral case evaluation.

In the early years, the Supreme Court of Virginia asserted leadership in ADR by establishing standards for the certification of mediators, initiating training programs, and promoting the use of ADR in a variety of ways. ADR leaders in the private sector joined in these training and promotional efforts. Many publicly funded ADR programs were instituted in the General District Courts and in the Juvenile and Domestic Relations Courts. The results have been substantial, providing litigants with ADR services at little or no cost to them.

At the Circuit Court level, the bigger story has been the activity of the private sector. Each year thousands of Circuit Court cases are settled by privately compensated ADR professionals at the Circuit Court level outside the judicial system or as a result of a referral from the judicial system. As an indicator, the number of civil jury trials concluded in Virginia decreased from 2185 in 1998 to 719 in 2005, a drop of 67%. The resulting savings to disputants and to the judicial system from such a shift are enormous.

There are now approximately 1000 private sector ADR professionals who are certified by the Supreme Court. Their individual and collective results are impressive. Typically, in excess of 80% of all mediations handled by private mediators result in settlement.

Trends which may influence alternative dispute resolution

The nineties were marked by great financial prosperity resulting in ample public coffers. After a financial dip in the early years of this decade, our state government is again on a healthy financial footing.

However, research into future trends provides reasons for concern. The volume and complexity of litigation will be increasing in the coming decade and, with it, greater demands will be imposed on our judicial system. Baby Boomers and immigrants are arriving in record numbers. Furthermore, our changing world will bring an array of different and complex disputes of first impression. All of these emerging trends will place increasing demands on the justice system.

At the same time, the research into future trends tells us that public monies will be in short supply at all levels of government. The resulting confluence of increasing demands with decreasing resources will inevitably stress our justice system.

It is clear that the challenges facing our judicial system in the future can be met only by the full utilization of ADR. This phenomenon has enjoyed dramatic growth in the last fifteen years, and this trend is expected to continue both nationally and in our Commonwealth.

Recommendation 1-3.3.1. Virginia should encourage the fullest use of ADR through complementary activities in the public and private sectors, including providing publicly funded ADR services for financially qualified parties.

Rationale

ADR is here to stay. Its use has provided substantial benefits to disputants in terms of better and quicker results, saved costs, less stress, and the maintenance or improvement of relationships among disputants. At the same time, the burdens on our court system have been reduced materially by ADR activities. ADR should be encouraged as a cornerstone in facing the challenges of the future.

In light of the projected increases in demands on our justice system and the expected decreases in resources, we must take the necessary steps to maximize our available resources to serve our citizenry to the fullest. Peaceful resolution of disputes is the paramount role of the justice system, so the Commonwealth needs to promote the most effective, responsive and appropriate methods of dispute resolution.

If the judicial system attempts to go it alone in seeking to provide ADR services to its citizens, it may fall short and, at the same time, may jeopardize its primary mission of providing quality adjudicative services. The ADR services provided by the private sector, particularly at the Circuit Court level, have provided huge relief to the Circuit Courts, with no cost to the Commonwealth, and with great savings to disputants.

The Commonwealth should leverage the availability of private sector ADR resources in combination with its own publicly funded efforts to maximize the development and usage of

ADR. By properly managing public resources in this way, it will also serve to protect and improve the fundamental adjudicative services which the Commonwealth has a constitutional duty to provide its citizens.

Recommendation 1-3.3.2. Disputants should remain free to choose whether or not to participate in ADR processes. The Commonwealth should not mandate such participation by statute, rule, order or otherwise.

Rationale

One of ADR's core values is self-determination. In the first instance, the disputant makes a choice to move away from the traditional path to the courtroom and to engage in an alternative process. In mediation, this principle of self-determination carries all the way through the process and, ultimately, to the decision to settle or not. A mandatory approach to ADR would undermine this fundamental tenet of self-determination.

As a practical matter, ADR works better when it is voluntarily chosen by the parties. As disputants make their own choices, they become invested in those choices and the results of those choices. ADR processes that are chosen by disputants produce better results and are more efficient than those that are forced upon them by others.

There are better ways to encourage the use of ADR than by mandating it. The referral statute enacted by the General Assembly in 1993 empowers judges to order disputants to an orientation session at which they are educated about ADR processes. (Even at this stage, the parties may opt out of the orientation.) Once they complete the orientation session, they choose whether to proceed with their case in court or to utilize ADR. It has been recommended by this Task Force that this referral statute be reenergized to promote the greater use of ADR (*see* Recommendation 1-3.1.3). In addition, the Task Force has recognized the need for additional education to further stimulate the growth of ADR (*see* Recommendation 1-3.1.4). Educating disputants and their attorneys will give rise to informed decisions as disputants voluntarily choose ADR as a vital tool in resolving disputes in the future.

Narrative of the current state of court referrals in Virginia

Court referral to dispute resolution proceedings is currently governed by VA. CODE ANN. § 8.01-576.4 through §8.01-576.12. Under existing VA. CODE ANN. §8.01-576.5, any court may, on its own motion, or on motion of one of the parties, refer any contested civil matter, or selected issues in that civil matter, to an orientation session. Specific provision for such referrals is further provided for in VA. CODE ANN. §20-124.4, dealing with child custody and visitation disputes. The use of these options varies from jurisdiction to jurisdiction, and among the courts in those jurisdictions which utilize the authority granted under these statutes.

Recommendation 1-3.3.3. Virginia should seek to increase the number of cases referred to ADR orientation by the revitalized use of existing legislation and by providing the services of one or more ADR coordinators in each jurisdiction.

Rationale

Existing Virginia law empowers courts to order parties to attend an orientation session at which they are educated about dispute resolution proceedings. This allows parties to learn about this highly effective and reasonably priced alternative to adjudication, and to consider using ADR to resolve the case. This process has been underutilized since its adoption in the early nineties.

The existing referral system strikes the proper balance between a mandatory ADR system and a passive one. It allows for the litigants, and their counsel, to be educated on the availability and advantages of ADR as an alternative. It is highly likely to prompt litigants to consider, favorably and voluntarily, the use of ADR and to benefit them from the strong array of private ADR professionals. Judges, lawyers, and law students should be taught ADR principles and skills.

The judicial system would take the necessary steps to increase the use of the referral system. This could be done by placing an ADR Coordinator in every court in the more populated counties and using traveling ADR Coordinators in the more sparsely populated areas. The ADR Coordinator would identify cases appropriate for referral, inform parties about the process and schedule an orientation session. In addition, the court could provide greater encouragement regarding the referral system from both the bench and the clerk's office and appropriate educational programs regarding the referral system. As a result, more ADR would occur, with favorable results, albeit with some increased costs to the Commonwealth, but with huge savings to litigants.

There are two provisions in the governing law which ensure that participation in ADR is voluntary. First, within fourteen days from the entry of an order requiring parties to attend an orientation session, any party may file a written statement with the court which declares that the dispute resolution process was explained to him or her, but that he or she objects to the referral. Second, after the orientation session, all parties must consent to continue with ADR.

Recommendation 1-3.3.4. Certain litigants should be required to attend an orientation session which explains the nature of the ADR process and which provides them with information on the availability of public and private ADR services to resolve their disputes. With the exception of cases involving domestic violence or child abuse, orientation sessions should be mandated in the following types of cases:

a. All contested civil litigation in which both parties are unrepresented by counsel.

b. All custody, support, and visitation disputes other than divorce actions and post-decree enforcement actions.

c. All civil cases seeking money damages where the amount in controversy is $15,000.00 or less, except where counsel for a party has certified that he or she has advised the client of available ADR options.

Rationale

All litigants seeking relief from a Virginia court should be guaranteed equal and open access to ADR. All persons licensed to practice law in Virginia are obligated to advise their clients of the availability of ADR as an alternative to litigation. Counsel are generally aware of the availability of public and private arbitration and mediation services, and how to access them, but the public at large is not. *Pro se* litigants must have the same opportunity to avail themselves of ADR, and the referral of all such litigants to mandatory orientation sessions will facilitate an increase in awareness and accessibility to mediation and other forms of ADR.

Certain types of cases in the family law arena have proven particularly amenable to resolution through mediation. In custody, support and visitation disputes between unmarried parents, and post-divorce decree disputes involving the same emotionally charged issues, the parties often want no more than a venue in which to express their feelings, and a controlled environment in which to reach an accommodation with the other party. Most would prefer not to litigate.

Parties who file civil lawsuits where the amount in controversy is relatively small should attend an ADR orientation session. There they would be informed of the risks and costs attendant to litigation, as well as readily available ADR processes which may provide better results in a more cost effective and less risky manner.

In mandating referrals to ADR orientation, care must be taken to insure that disputes which are inappropriate for ADR be recognized and referred back to court. For example, if the parties' prior history includes domestic violence or other abusive conduct which would render one party unable to engage freely in the ADR process without feeling threatened or intimidated, that case should not be referred to ADR, or even referred to orientation if the problem is identified at intake.

The Task Force's recommendation does not mandate participation in ADR, but simply insures that all litigants are provided equal access to information about ADR.

Recommendation 1-3.3.5. Virginia's certified mediators should be as diverse as the general population of the Commonwealth.

Rationale

Although there have been no reported problems with mediators in Virginia exhibiting either racism or cultural insensitivity, there may be some people who prefer to work with certified mediators who have their same racial or ethnic identity. All certified mediators should be aware of the importance of being sensitive to each client's unique qualities and act appropriately with respect to those unique qualities.

Current state of restorative justice in Virginia

For nearly a decade in Virginia, there has been growing interest in and use of restorative justice (RJ). RJ encompasses a number of processes that focus on repairing the harm caused by crime. One facet of RJ is bringing together victims and offenders for a dialogue that fosters the emotional healing process. RJ processes have proven records of reducing recidivism, increasing victim satisfaction in the judicial process, decreasing victim trauma, and increasing community satisfaction. "The restorative justice model incorporates the principles of accountability, community protection, competency development and balance."[1]

RJ begins with the understanding that crime harms victims, offenders, their families, and communities in very real and often lasting ways. RJ equates toughness on crime with holding offenders accountable to right the wrongs they have inflicted on their victims and the community. It responds to crime and wrongdoing by involving victims, offenders, communities, and justice professionals.

RJ processes that offer some form of victim/offender encounter have grown significantly since their inception in 1997 in Virginia. The following jurisdictions have incorporated RJ into their criminal justice systems, with the vast majority of referrals coming from direct court orders or court-sanctioned diversionary programs: the Counties of Fauquier (oldest program in the Commonwealth), Prince William, Loudoun, Rockingham, Augusta, Albemarle, Page, Shenandoah, and Warren and the Cities of Harrisonburg, Staunton, Waynesboro, Lynchburg, and Charlottesville. In addition, the following localities have emerging programs: City of Roanoke, Tidewater, and the Counties of Orange and Culpeper.

RJ programs are housed in community-based dispute resolution centers that also have court-annexed mediation programs except for those in the Counties of Prince William and Loudoun which are housed within their court systems, while the program for Charlottesville-Albermarle is housed in a private, non-profit community corrections agency.

Trends Influencing Restorative Justice

*Scan 2005: An Analysis of Emerging Trends and Issues Affecting Society and the Court*s identifies a number of trends which will impact the judicial system in general and RJ in particular:

- "If historical patterns could be trusted, then courts should prepare for the possibility of significant growth in criminal filings, particularly as this economic recovery fails to alleviate income inequalities and the number of youths and young adults rises." (p. 12)

- "Although less than one percent of the [U.S.] population was incarcerated in 2001, 10% of black men in their late twenties were in prison. Incarceration is a pervasive event in the lives of poor and minority men." (p. 14)

[1] Report of the Governor's Preventing Crime In Virginia's Minority Communities Task Force, March 22, 2005.

- "In recent years, about 45% of admissions to prison in Virginia were the result of violations of probation or parole [recidivism]." (p. 16).

- "In a shift in public attitudes, recent polling results show that the public embraces a wide array of prevention, rehabilitation and alternative sentencing approaches and is rethinking mandatory sentencing. Increasing evidence suggests that the public believes that laws should be changed to reduce the incarceration of nonviolent offenders and that rehabilitation should still be the number one purpose of the justice system." (p. 14)

Clearly, the traditional justice system by itself cannot and does not reduce crime.
Nor does it adequately meet the needs of victims and communities. Crime is more than law breaking and justice is more than punishment.

Recommendation 1-3.3.6. Statutory provisions should be enacted to authorize referrals of appropriate cases to a restorative justice process.

Rationale

Recognizing that crime harms victims, offenders, and communities and in order to meet sanctioning, public safety, and rehabilitative needs, trial courts should adopt a comprehensive balanced and restorative justice approach in the disposition of criminal charges.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Administration
Judge Randall G. Johnson, Chair
Judge William N. Alexander II, Vice Chair

Subcommittee 1-4, Security/Bailiffs

Judge Vincent A. Lilley, Chair

Recommendations for Consideration by the Commission

June 1, 2006

The current state of court security in Virginia

Security concerns related to the administration of justice are nothing new. Yet, in the entire original Futures Commission Report done seventeen years ago, there is only a single reference to safety. In its first recommendation in support of the recommendation for convenient public access to the services of the judicial system, the prior commission stated, "the safety of the public and of court personnel must also help shape the design and staffing of these facilities." (See prior Futures Commission Report, Vision One, at p. 18, Recommendation 1.1, Rationale). Interestingly, in context, the reference to personal safety had more to do with the design of courthouse buildings in conformity with the Americans with Disabilities Act than with dangers to persons and property currently associated with the terms "safety" and "security."

In discussions of courthouses today the definitions of "security" and "safety" are framed in the context of a post 9/11 world. The issue of courthouse safety and off-site security for the judiciary, both federal and state, has attracted increased attention and concern since at least 9/11. Attention has become even more focused since the tragic events of 2005 in Atlanta (murders of court personnel by an escaping prisoner) and Chicago (the slaying of a judge's family) in which both courthouse and residential security were breached.

In the context of a post 9/11 world the federal government has responded with the creation of the Department of Homeland Security. The Congress has enacted anti-terrorism laws and stepped-up funding for security issues at the federal level. The federal government has pledged cooperation with state and local governments to promote Homeland Security. The state of Virginia has passed anti-terrorism statutes, and the state government has focused more on security than ever before. Presumably, since courts and courthouses are basic government institutions symbolic of the American system of justice, they are likely targets, and cooperation between the governments can assist in making the courts more secure. Of course, traditional forms of violence and security issues due to the controversies addressed in courts and courthouses will continue.

Methodology

After the initial meeting in October, 2005, during which the Subcommittee members met in person, in person meetings ended up being canceled due to inclement weather and scheduling conflicts. However, the committee members communicated consistently through e-mail, telephone calls between the chair and individual members as well as traditional mail methods. After initial discussions, the committee decided to make research assignments connected to the areas of influence the individual committee members might have.

Consequently, we concluded that a United States Magistrate Judge (Denny Dohnal) would be most likely to receive a response from the branch offices of the United States Marshal's Service, the sitting and senior status United States Magistrate Judges and United States District Court Judges, and the 4th Circuit Court of Appeals Judges.

Further, we concluded that it made sense for a bar leader (Bob Altizer) to seek input from a wide variety of bar groups, whether state or local. They included the Virginia State Bar, Virginia Association of Commonwealth's Attorneys, Virginia Women Attorneys Association, Old Dominion Bar Association, Virginia Trial Lawyers Association, Virginia Association of Defense Attorneys, Local Government Attorneys of Virginia, Virginia Bar Association, Virginia Association of Criminal Defense Attorneys, Virginia Association of Black Women Attorneys, Asian-American Bar of Association of Virginia, Virginia Creditors' Bar Association, and the Virginia Real Estate Attorneys League.

We thought it would be most effective for a retired Circuit Judge (Everett Bagnell) to make contact with retired and active judges at every level of court in Virginia.

We thought it more likely that a regularly sitting state court judge would get a response upon contacting all 133 sheriffs in Virginia, as well as the Capitol Police, for their input, so the chair (General District Court Judge Vincent A. Lilley) agreed to do that.

Findings

The federal judiciary and United States Marshal's Service were most responsive to Judge Dohnal's request for assistance. He has summarized his findings below.

The federal judicial system is responding with initiatives that may have appeal for Virginia's judiciary. Specifically, the Judicial Council of the United States has appointed a security committee that is committed to exploring all relevant issues. A Subcommittee of that group, chaired by the Honorable Henry E. Hudson, United States District Court Judge for the Eastern District, at Richmond, and a former Director of the U.S. Marshal's Service, is exploring various avenues and has pledged its best efforts to cooperate and assist with all Virginia security initiatives. Although the reality of the situation is that any state effort will be necessarily driven by budgetary concerns, benefit can presumably be obtained for the state from at least the identification and prioritization of desired objectives, a so-called "wish list."

Several items of interest evolved from preliminary discussions with Judge Hudson. First, there is a wealth of information presently available, including numerous expert studies on every conceivable aspect of the issue. There is, accordingly, no need to reinvent the wheel. As to courthouse security, the first step is to identify and evaluate the concerns associated with each individual facility. To this end, Judge Hudson is confident that the Marshal's Service would honor any request to provide their expert analysis of any courthouse facility in the state. Once particular problems are identified, possible solutions can be prioritized and implementation costs assessed for budgetary consideration.

The consensus of expert advice is that, as a general rule, the utilization of magnetometers and security cameras are the most effective means of providing comprehensive courthouse security, combined with a firm, consistent policy of how to identify all authorized users and a determination of who is to be permitted to carry firearms within the facility. In this latter regard, a firm recommendation is to allow as few members of a designated security detail as necessary to be armed inside a facility so as to minimize the opportunity for unauthorized access to a weapon as occurred in the Atlanta situation. Another approach that should be cost effective is for as many localities as possible to interface with an evolving effort by federal authorities to improve threat assessment analysis that has the input of a range of professionals, including psychological profilers. Participation in the program would allow a locality to forward information about any particular incident and related individual to a central data databank. The information would be used to upgrade the analysis for instantaneous retrieval in the future for any participating jurisdiction to ascertain, for example, whether there was an encounter with a particular person on a prior occasion.

Yet another facet of the courthouse security issue, and one that could be identified in a comprehensive facility evaluation, is to establish and maintain an appropriate response effort by the courthouse security force to any security emergency. While all Sheriffs, for example, may be mindful and sensitive to the security issues involved in courthouse security generally, the sense of the Marshal's Service is that many have not developed specific reaction plans or maintained a sufficient level of training and in-service "refresher" programs to stay current with security needs. Of course, steps would have to be taken to insure that the content of any comprehensive evaluation is not available to the general public, such as from an FOIA demand. (The Supreme Court of Virginia takes the position that it is not subject to the Virginia Freedom of Information Act (VA. CODE ANN. §§ 2.2-3700 *et. seq*. (2005)). In the Supreme Court's Policy on Public Access to Commission Meetings, however, it recognizes the importance of open government and respects the spirit of the Act. Accordingly, the court has decided that minutes of all meetings will be prepared and made available for public inspection. Accordingly, the Subcommittee has decided not to include certain responses from Virginia sheriffs and the United States Marshal's Service as to specific security deficiencies in specific courthouses in the minutes of its meeting or in its report.)

The federal security experts have the same suggestion concerning a firm security reaction policy as it applies to off-site issues. Does a judge's residence have adequate security measures, ranging from dead bolts to a full alarm system? Is there a means for direct notification of a specific reaction source, or must one rely on normal law enforcement efforts? Is protective detail training in the face of a threat limited to learning how to "shadow" the jurist, or are there more

sophisticated aspects of the mission that, for example, larger jurisdictions with more resources can assist the smaller ones with? Could regional training programs be devised, implemented, and maintained so as to share, if not minimize, cost while maximizing content? Another area to explore involves the wide range of cyber-security issues, e.g., maintaining the sanctity of electronic filing and record-keeping procedures and modems.

On the next source of input, Bob Altizer found that not all of the Bar Associations were responsive. However, the associations that responded touched upon issues which were consistent with each other and were probably along the lines of what all the associations would say had they provided input. While the number of associations responding was somewhat disappointing, all of those that did were complimentary and appreciative that the Commission and the Subcommittee were considering the challenges associated with court security. Without exception, those who responded thought it was a good idea to broaden our perspective by seeking input from the lawyers.

The general consensus was that the Commonwealth should fully fund the courts' requests for security. Such security requests would include additional bailiffs and security devices and measures. The associations noted that unfunded state mandates for certain security measures that are passed on to local governments with often limited resources is unsatisfactory. They expressed the view that while local governments traditionally have provided security, given the events of recent years, additional more expensive security measures are being requested and required by the courts. Localities, big and small, are struggling with those demands.

The associations also expressed a general concern as to how lawyers are treated with regard to courthouse and courtroom access. They expressed the view that lawyers are officers of the court and should be treated as such, perhaps being allowed to circumvent certain security measures in place for the general public. However, the desires are inconsistent with expert security advice. Some Bar representatives complained that prosecutors and government lawyers are often treated preferentially compared to other lawyers in accessing the courtroom.

Finally, there appeared to be a consensus that there needs to be better assessment of individual courthouses to determine which aspects represent real security risks and which do not. The associations encouraged the use of security surveys by the United States Marshal's Service. There also seemed to be a concern over the lack of standardization of security from jurisdiction to jurisdiction.

As to the next group from whom we sought input, the responses from the sheriffs across Virginia were enthusiastic and appreciative. Of the 133 offices across the state, virtually every one responded. Many of the responses were by telephone call to the chair. Many others responded by letter. Still others responded by meeting in person with the chair. There was a general feeling that the purpose of the Subcommittee to identify security concerns was most important, but almost uniformly the sheriffs expressed concern with the reality that limited finding might make the effort somewhat in vain. Nonetheless, encouraged by the hope that the General Assembly might appropriate funds to respond to the security needs pointed out by the Commission, the sheriffs provided a remarkably consistent view of the state of security of the courthouses of Virginia. Namely, in those jurisdictions where historical courthouses are still used or where security

measures were not merely as important an issue when more recent courthouses were built even 20 or 30 years ago, the sheriffs were concerned with protecting buildings, which by their design, are difficult to protect. They were consistent in their desire to have the United States Marshal's Service evaluate their courthouses for security concerns.

The sheriffs were almost as concerned with the lack of personnel that they sometimes have, particularly in smaller jurisdictions. They would like to provide, and to the extent they can, do provide, court security officers for every civil and traffic and domestic relations cases, as well as the traditional security coverage provided in criminal settings. However, they indicated they are not required to provide a bailiff in civil cases. And yet, the sheriffs as a group recognized the volatility of certain civil cases such as landlord-tenant disputes, unmarried boyfriend/girlfriend detinue cases (the General District Court equivalent of property division in a divorce equitable distribution hearing), and cases involving former friends, family members and business partners whose relationships have gone sour to the point that they are in court.

Some sheriffs were concerned about the lack of basic security devices like magnetometers, security cameras and stun guns. The sheriffs also encouraged the judges to avail themselves of state police and local sheriffs security assessments, which are available on individual judge's homes upon request.

Virtually every office indicated a willingness and a desire to participate in surveys conducted by the Supreme Court in conjunction with the Virginia Sheriffs Association to determine the needs of the courts and how the sheriffs can meet those needs.

In surveying the various judges of the different levels of court, both active and retired, Judge Bagnell found the concerns expressed to be consistent with the concerns expressed by the federal judiciary and the United States Marshal's Service. The overriding concern of the state court judges seemed to be the elimination of firearms in the courthouse. The next greatest concern seemed to be the presence of a security officer at every hearing, whether in chambers or in the courtroom.

Recommendation 1-4.5.1. Virginia should conduct periodic security assessments of all courthouses. The courts should encourage local sheriffs to avail themselves of the assistance of the Virginia State Police, Virginia Sheriffs' Association, Virginia Capitol Police, and United States Marshal's Service in assessing courthouse security needs in coordination with the Virginia Community Policing Institute. Any security assessments should be exempt from FOIA. Any deficiencies identified in the assessments should be addressed immediately.

Rationale

Courthouse security and related concerns have become a priority for the judicial system, especially since 9/11 and the tragic events of the recent past in Atlanta (a prisoner wrestled a gun from a bailiff and killed several people, including the bailiff, a judge, and a court reporter before escaping) and Chicago (a judge's family was slain at the judge's home) when security was breached and lives were lost. In most part, Virginia courthouses have not been constructed with

such concerns in the forefront. Accordingly, it is appropriate to assess the situation as to each facility and, in that regard, the United States Marshal's Service is willing, upon request, to apply its expertise to do so. It would also be appropriate to coordinate any such effort with the Virginia Community Policing Institute that has specialized knowledge and experience with particular security needs in Virginia localities. Of course, any such security assessment should be exempted from disclosure pursuant to the Freedom of Information Act so as not to compromise the identification of security concerns as would be the focus of such assessments. In this regard, the Attorney General of Virginia has concluded that such assessments would be exempt from FOIA by statutory exemption in any event.

Recommendation 1-4.5.2. There should be panic buttons in appropriate locations throughout the courthouse. There should be emergency response teams trained to respond to emergencies in the courtroom or in chambers. Virginia courts should have a detailed emergency response plan for each courthouse. The plan should be regularly reviewed and rehearsed. Emergency response plans should be exempt from FOIA.

Rationale

Essential to any security plan for a facility would be the creation and training of designated response teams to react to security emergencies including a response plan for biological agents or pandemic infectious diseases. To that end pre-emptive planning, to include providing inoculations and vaccines to court personnel and their families, are among the types of response plans suggested for the sheriffs to consider. Such specialized training that would be involved would also require periodic drills and re-training so that the effectiveness of a particular response effort is maximized. Part of any response effort would necessarily involve "panic" buttons that are located in strategic places throughout a facility and in a sufficient number and accessibility to allow for immediate alarm without unnecessary risk of accidental activation.

Recommendation 1-4.5.3. Law enforcement officers appearing as parties in court should not carry weapons. Guns in the courtroom and courthouse should be limited to court security officers as defined by the sheriff of the locality.

Rationale

The consensus among security experts is that only designated court security officers should be permitted to be armed while inside a facility so as to minimize the chance for unauthorized access as occurred in the Atlanta situation (a prisoner wrestled a gun from a bailiff and killed several people, including the bailiff, a judge, and a court reporter before escaping). Moreover, experience teaches that there should be no exception, including when law enforcement are involved as parties in a pending matter, especially in those situations in which emotion and anger can prevail over self-control.

Recommendation 1-4.5.4. Security should be present for all proceedings. Whenever possible, separate waiting areas should be provided to prevent hostile contact between persons involved in the proceedings.

Rationale

Central to any plan is that security always be present during court proceedings as opposed to the practice in many courts of conducting matters in chambers, behind closed doors. For example, some of the most volatile situations arise in domestic cases and the common practice in many Virginia courts has been to conduct such proceedings in the court's chambers as opposed to the courtroom. Accordingly, it is a matter of common sense to require that all matters be conducted in a courtroom in a more open space with the presence of security and the availability of additional assistance in a more ready fashion.

Recommendation 1-4.5.5. Judges and sheriffs should confer on all security issues. Judges should have authority to order additional court security.

Rationale

An effective security plan is a group effort that requires the knowledge and participation of all participants. Nevertheless, each sheriff and all judges are a major focus of any plan and they should therefore maintain an open and candid line of communication on all security issues, including regular review and discussion.

Recommendation 1-4.5.6. Virginia should conduct personal security assessments for all judges who request them.

Rationale

At present, an effort is underway, with the cooperation of local sheriffs and the state police to conduct personal security assessments for any state jurist who requests same. Although any action to be taken as a result of such assessments would presumably be dictated by budgetary concerns, a purpose is served by at least having the assessment so that the jurists and related parties can prioritize needs and gain an awareness of potential problems to avoid a dilemma to the extent possible even without any other action being taken.

Recommendation 1-4.5.7. Virginia should provide adequate personal security for any judge or members of any judge's family where there are threats to the judge or a member of the judge's family.

Rationale

Situations, of course, develop in which a party, for whatever reason, issues a threat to jurists and/or a judge's family. It is obviously imperative that a ready response be available to those threats that are deemed credible, based on an objective and thorough review of the entire context

of each situation. The judicial system cannot be administered in the face of threats to the safety of its judges.

Recommendation 1-4.5.8. Sheriffs and judges should be surveyed at least biannually to determine what is needed to provide court security. The Supreme Court should assign an existing committee to oversee the process or create a new committee to address security issues.

Rationale

In addition to the importance of sheriffs and judges conferring on an as-needed basis as to any security issue, any security plan should include periodic reviews to reassess and prioritize needs for improvement. In this regard, a central source of information such as through the Office of the Executive Secretary of the Supreme Court of Virginia would be useful in gathering and disseminating information and data on at least the more common issues involving security.

Recommendation 1-4.5.9. The OES should employ the most effective methods available to secure all electronic communications and data storage systems.

Rationale

In the information age, especially with the advent of electronic filing and systems management, effective methods and procedures must be implemented and maintained to protect the integrity of all court records and the privacy of its participants. Such methods need to keep abreast of developments in the electronic age and necessitate periodic reassessments of the needs and capabilities of all systems.

Commission on Virginia Courts in the 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Functions
Judge Joanne F. Alper, Chair
Judge Randy I. Bellows, Vice Chair

Subcommittee 2-1, Probate, Commissioners of Accounts
Judge James Almand, Chair

Recommendations for Consideration by the Commission

May 30, 2006

Current State of Probate and Commissioners of Accounts in Virginia

Some states require active supervision of estate administrations. On the other hand, some states either provide for no supervision of estate administration or allow the testator or the beneficiaries to "opt out" of supervision**.** Virginia has what may be termed a semi-supervised probate system. The Circuit Court has responsibility for all probate matters. Fiduciaries qualify and give bond before the Clerk of the Circuit Court, and Inventories and Accounts are filed and recorded in the Clerk's office once they are approved by the Commissioner of Accounts. Virginia's probate system is more in the nature of monitoring. All probate litigation, other than creditors' and certain miscellaneous types of claims, is heard before the Circuit Court.

The office of the Commissioner of Accounts evolved by legislative action in the middle decades of the 19th Century. Originally Commissioners in Chancery were appointed by the Court of General Jurisdiction (currently the Circuit Court) on an *ad hoc* basis to settle accounts of fiduciaries, but when the Code of Virginia was revised in 1849, one commentator wrote that no part of the activity of the revisions gave more difficulty than the problems presented by the probate system. The Code was then amended to provide for one Commissioner in Chancery for each jurisdiction to handle all probate matters. That statute was again amended in 1873 when the Office of the Commissioner of Accounts was given its present title.

It is not practicable here to go into extensive detail about the duties and functions of the Office of the Commissioner of Accounts. It serves, in general, as the arm of the Circuit Court which supervises the administration of decedents' estates, as well as guardianships of minors, conservatorships of incapacitated adults, trustees of testamentary trusts, and trustees under deeds of trust as well as certain other entities. As with Commissioners in Chancery, at least one judge of each Circuit Court oversees the duties of the Commissioner of Accounts and she or he serves at the pleasure of the Court.

It is necessary here, however, to mention efforts to improve the Commissioners of Accounts system over the past thirteen years, because the recommendations set out below refer to portions of those improvements. In 1993, Chief Justice Harry L. Carrico appointed a Standing Committee

of the Judicial Council of Virginia on Commissioners of Accounts which exists today in virtually the same structure as initially conceived. It includes five Commissioners of Accounts; two Circuit Judges; two lawyers representing the interests of the public; one Clerk of Court; one representative of a trust department of a bank; and one law professor specializing in the area of trusts and estates. The Chief Justice originally gave the Standing Committee six charges, now increased to seven. In carrying out the Chief Justice's instructions, the Standing Committee created and has updated every two years a Manual for Commissioners of Accounts; developed a Uniform Fee Schedule for Commissioners of Accounts; developed a suggested Uniform Fiduciary Fee Schedule; and developed a procedure for receiving Complaints against Commissioners of Accounts, all of which have been approved by the Judicial Council.

Work of the Subcommittee

The Subcommittee approached its work by examining the National Probate Court Standards for their applicability to Virginia. Under the assumption that the present system, or something similar, would continue, the Subcommittee focused on recommendations for improvements in the present system, and many of the Subcommittee's recommendations which follow assume the present system will continue.

At various times during the Subcommittee's discussions, certain members of the Subcommittee voiced their opinions that the present system of "supervised administration" should be replaced with a system allowing citizens or beneficiaries to select "unsupervised administration." After discussion, all members of the Subcommittee enthusiastically endorsed in principle the concept of the "Comprehensive Review of Virginia's Probate System."[2]

Miscellaneous Findings on Commissioners of Accounts

1) Commissioners of Accounts typically have their Commissioners' offices within or adjacent to their law offices, although under the Virginia Code, a Court may provide space for Commissioners of Accounts. The City of Alexandria and the County of Arlington provide the Commissioner of Accounts with office space, and there may be others. As a matter of practice and practicality, Commissioners of Accounts normally have their offices close to the Court, and a Commissioner's Office in a law office can provide some additional access to the public.

2) Most Commissioners or their assistants are available to the public during standard working hours either in person or by telephone. Personnel in the offices of Commissioners of Accounts are much more accessible on an informal basis than court personnel for a fiduciary who otherwise would be required to file a Petition and secure a place on the docket.

3) The primary role of the Commissioner of Accounts is to protect beneficiaries and creditors. With regard to large estates, it is more normal for fiduciaries to be represented by lawyers. However, with smaller estates, the absence of counsel frequently requires more active intervention by the Commissioner of Accounts.

[2] As used in this Report, the term "Probate System" encompasses Virginia's structure applicable to the administration of estates, trusts, conservatorships, guardianships, and foreclosures under deeds of trust and the supervision of fiduciaries (executors, administrators, curators, trustees, guardians, and conservators).

4) Under Va. Code § 64.1-122.2, probate proceedings should not be sealed from beneficiaries. The Commissioner of Accounts does not have the power to seal records, and thus, although there is some debate in specific instances, in general the public has access to the records of the Commissioner of Accounts.

5) While private information such as social security numbers and bank accounts are normally not in Commissioners of Accounts reports, inclusion of certain records with Commissioners of Accounts filings can result in the publication of social security numbers and bank account numbers. Recommendation 2-1..17 is designed to deal with this problem.

6) In certain limited circumstances, inventories and accounts can be waived when the waivers are properly drafted.

7) Commissioners of Accounts receive fees based on a published schedule determined by the respective Circuit Courts for receipt and review of inventories, annual and final accounts and for other services. Normally, the Circuit Court implements its fee schedule by Court Order which is a public record. A majority of Circuit Courts have adopted a fee schedule based on a suggested Uniform Fee Schedule adopted by the Judicial Council of Virginia, on recommendation of the Standing Committee on Commissioners of Accounts. For every report by a Commissioner of Accounts filed with the Clerk of Court, there is a right to object or except on any aspect of the report, including the fee of the Commissioner of Accounts. Every account which is recorded by the Clerk of the Circuit Court becomes a public record, and it includes the fee of the Commissioner of Accounts. Because there is no audit of the office of the Commissioner of Accounts by any public body, this report contains a recommendation (2-1..11) for such an audit.

Recommendations for Improving the Current Virginia Probate System

Pending completion of the review contemplated in Recommendation 2-1..21 below, and subject to modifications in the probate system and role of commissioners of accounts flowing from such review, the following recommendations are tendered for improvement of the current Virginia probate system.

Recommendation 2-1.5.1. Virginia should ensure that information regarding the Probate System is consistent, complete, and easy to read.

Recommendation 2-1.5.2. The Virginia Courts website should have the Manual for Commissioners of Accounts available to the public.

Recommendation 2-1.5.3. The Virginia Courts website should have information on the Probate System, including procedures, easily available to the public.

Recommendation 2-1.1.4. All offices within the Probate System must provide appropriate access as defined by the Americans with Disabilities Act.

Comment

Any accommodations required under the Americans with Disabilities Act would apply to offices within the Probate System.

Recommendation 2-1.1.5. All personnel in offices within the Probate System should have access to telephone interpreters when helping those who do not speak English or do not speak it well.

Comment

Non-English speakers need help. The burden is on the fiduciary to explain what is happening or needed, but the fiduciary is required to do so in English. Telephone interpretation which is readily available would help.

Recommendation 2-1.1.6. All personnel in offices within the Probate System should have access to sign language interpreters when helping those who are deaf.

Recommendation 2-1.5.7. The fee schedule used by Commissioners of Accounts should be examined regularly and uniformity is important.

Comment

The fee schedule should be examined regularly in order for the Commissioners' fees to be high enough to permit them to operate their offices effectively but low enough to be fair to the public and not excessive. It is particularly important that the Commissioners' fees permit them to hire an adequate number of staff members for prompt service to be assured. Uniformity is also of great importance in order for members of the public to have the sense that they are being treated fairly.

Recommendation 2-1.6.8. Virginia should provide specialized continuing legal education for all personnel within the Probate System.

Recommendation 2-1.1,7.9. Virginia should provide space for Commissioners of Accounts in the courthouse of each jurisdiction, and all personnel within the Probate System should be electronically interconnected with each other and all other personnel within the Court System.

Recommendation 2-1.1.10. There should be a state-wide public fiduciary who could serve in situations where there is no family member or other representative available to serve.

Comment

Where there is no available fiduciary, the responsibilities should be assumed by a public fiduciary who will be paid by the state if the estate is insufficient to provide payment. The public fiduciary would work out of a central office and would not be required to reside in any particular

jurisdiction.

The public fiduciary should be able to receive retirement and social security payments and disburse them as appropriate. The public fiduciary should be able to serve as an executor, trustee, conservator, or guardian.

In "bad" situations, Commissioners of Accounts need to have the court remove fiduciaries who are not performing. When a fiduciary is removed, there will not always be another to serve as a replacement. In such cases, the public fiduciary would also be able to serve.

Recommendation 2-1.5.11. The Commissioners of Accounts operations and financial transactions should be audited annually or biennially either by the State Auditor or an agency which would be formed to oversee the operations of Commissioners of Accounts.

Comment

The central agency recommended to oversee and perhaps audit Commissioners of Accounts would operate on much the same basis as the Alcoholic Safety Action Program (ASAP) works with local offices and oversees their activities.

Recommendation 2-1.6.12. Virginia should adopt uniform minimum statewide standards for selection of Commissioners of Accounts.

Comment

These standards should be easily accessible to the public, including being on a website. Each Circuit could tailor the standards to its own needs but should also publish its standards. All Judges in each Circuit should make the decision on the tailoring of the standards and also make the decision on the appointment of each Commissioner of Accounts.

Recommendation 2-1.6.13. Each Commissioner of Accounts who reaches the age of 70 should be reviewed by the Judges of his or her Circuit or their designee each year to satisfy the Judges that the Commissioner remains competent to carry out the duties of the office.

Recommendation 2-1.6.14. The Chief Judge of each Circuit or his or her designee should supervise each Commissioner of Accounts. The supervision should include a review of the annual audit and the quarterly reports of the Commissioner, a meeting with the Commissioner at least annually, and seeking comments from other relevant sources concerning the Commissioner's performance.

Recommendation 2-1.1.15. As constitutional requirements concerning notice to interested parties have presumably now been met, the statute of limitations for the time when actions to surcharge and falsify can be brought should be shortened.

Recommendation 2-1.4.16. Virginia should provide for the waiver of corporate surety

unless there is good cause for such surety.

Comment

For example, there may be good cause when minors or incapacitated persons are beneficiaries. The Commissioners of Accounts should be permitted to make a recommendation with regard to corporate surety.

Recommendation 2-1.8.17. In filing documents with the Clerk of the Circuit Court, the Commissioner of Accounts should avoid, when possible, including social security numbers and other private information of the decedent, the fiduciary, creditors, or beneficiaries. In cases where the filing of such information cannot be avoided, a sealed private addendum which contains the private information should be filed.

Recommendation 2-1.1.18. Virginia should provide for the *ex parte* appointment of an Emergency Guardian under truly emergency circumstances.

Recommendation 2-1.6.19. Virginia should provide training for guardians and conservators.

Recommendation 2-1.5.20. Because probate matters are increasingly crossing state lines, Virginia should encourage interstate compacts to exchange relevant information among courts to ensure that when parties leave the original jurisdiction probate matters are properly handled.

Recommendation 2-1.5.21. There should be a comprehensive review of Virginia's system of supervising fiduciaries (executors, administrators, curators, trustees, guardians, and conservators) to determine how much supervision is appropriate and who should supervise, including the role of the Commissioner of Accounts.

Comment

As noted above, it appears that for many years persons with views similar to the members of the Subcommittee have thought a comprehensive review ("Comprehensive Review") of Virginia's probate system would be desirable, although no vehicle seemed to present itself for a thorough review.

It is not the purview of this Subcommittee nor, in fact, of the Commission to work out the details of recommendations, even those of such far-reaching import as this one. Suffice it to say, however, that the details of organizing and conducting the Comprehensive Review must be worked out carefully indeed. The review should be well funded and should be conducted by persons who are well qualified to do so and who bring an objective perspective to the matter.

The Task Force did not take a position on the majority and minority positions of the Subcommittee as presented here:

Majority Position of Subcommittee

A majority of the members of the Subcommittee believe Virginia's present Probate System is effective and economical, both for the Commonwealth and for members of the public who are involved with the system. However, they support a Comprehensive Review so that the appropriate authorities will have at their disposal objective information, based on not only Virginia's experience but the experience of other jurisdictions and the thinking of others in the field, on which they can make decisions for the Commonwealth to have the very best probate system possible. That system must take into account the interests, not only of testators and beneficiaries, but of the Commonwealth, fiduciaries, and creditors as well.

Changes in the Probate System should be made with great care and the assurance that any change will result in genuine improvement in the system. For example, Commissioners of Accounts now operate without any expenditure of public funds. The present Uniform Fee Schedule of Commissioners of Accounts is grounded on a basic rate of one-tenth of one percent (.001) of the value of the probate estate for auditing accounts, with the total charges by the Commissioner for an estate rarely exceeding one percent (.01). A request for a moderate increase in the Uniform Fee Schedule is currently pending. If approved, it would be the first in ten (10) years. A comprehensive review should compare the cost of administration in other states in order for the responsible authorities to determine what the appropriate cost of administration in Virginia should be.

In response to the position of the minority set out below, the majority further comments as follows:

1. Unsupervised Administration. As noted above, the Subcommittee has agreed that Virginia's probate system does not require active supervision of the fiduciary by the Court but provides only for monitoring the activities of fiduciaries by Commissioners of Accounts. Most types of fiduciaries must file inventories and annual accounts with Commissioners of Accounts until a final account is filed and the estate or trust is closed. In the case of foreclosures by trustees under deeds of trust, no inventory is required. With only several exceptions in connection with guardianship estates of minors, a fiduciary is not required to seek prior permission to undertake any lawful activity. Fiduciaries must only account, as they should even in unsupervised administration, and the Commissioner of Accounts simply assures that the account is accurate. All members of the majority (one Circuit Judge, one Clerk of the Circuit Court, two Commissioners of Accounts, and one Assistant Commissioner of Accounts), are aware of the potential dangers of unsupervised administration. Even when a fiduciary is honest and wants to do the right thing, any fiduciary can make mistakes which affect the size of the distributions or create other injustice. Without an audit, mistakes may go undetected. Moreover, a small percentage of fiduciaries are not totally honest. Anecdotal evidence indicates there are a significant number of substantive mistakes (those affecting who gets what or how much) that are detected and corrected through the review of accounts by

Commissioners. In many cases neither the fiduciary nor the beneficiaries are aware of such matters.

2. Cost Impact. The majority does not believe that the present system discriminates against persons of modest means. For people of modest means, the primary source of help in estate administration is the office of the Commissioner of Accounts – generally at no extra charge. Under the present Uniform Fee Schedule, the cost of an audit for an estate of $50,000 is $150 and the cost of filing an Inventory, having it audited, and having it submitted to the Clerk's Office for recording, $50. In cases where all beneficiaries are also fiduciaries, an estate can be closed by a Statement in Lieu of Settlement of Account, which is an affidavit of normally one page. The Commissioner of Accounts' fee for approving and filing the Statement with the Clerk of Court is, as set by statute, $75. Virginia small estate acts take estates of less than $15,000 ($50,000 in some cases) completely out of the Probate System and dispositions of survivorship property or transfers occurring by reason of beneficiary designation (including life insurance, annuities, retirement benefits and Paid-on-death or Transfer-on-death property) regardless of their size also occur completely outside of the current Probate System.

Even if there is no Will, where there are no children by a previous marriage, normally under current law a spouse who qualifies as Administrator may file a Statement in Lieu of Settlement of Account.

3. Consequences of Abolition. If a system of unsupervised administration should be adopted and the position of Commissioner of Accounts abolished, it is difficult to image how it could be implemented without a large additional number of Circuit Judges or the creation of a separate Probate Court. Where disagreement occurs in unsupervised systems, the only remedy for an aggrieved party is to "seek relief before the court." Aside from the added expense of paying counsel and the time lost by litigants, it is inconceivable that the present number of Circuit Judges could deal with the added workload.

In 2005 in one medium-sized jurisdiction served by one Judge and Senior Judges, as available, the Commissioner of Accounts alone (not counting the activity of two Assistant Commissioners) signed off on six hundred twenty-five matters to be filed with the Clerk of Court. Only approximately six fiduciaries actually appeared before the Court pursuant to subpoenas by the Commissioner of Accounts, and there were no exceptions filed by fiduciaries to reports by the Commissioner. While many inventories and more than half of trust accountings filed by banks were approvable essentially as submitted, approximately two-thirds of the documents filed needed corrections. Without the Office of the Commissioner of Accounts, such errors would have gone undetected or resulted in a disagreement requiring Court intervention. Even if only one-half of these filings had resulted in litigation, the burden of the increased number of cases on the Circuit Court would be overwhelming. The Comprehensive Survey should analyze the impact on the courts of the shifting to a system of unsupervised administration.

Minority Position of Subcommittee

A minority of the members of the Subcommittee believe that a decedent by will or all beneficiaries if competent by agreement should be free to select unsupervised estate administration (similar to the Tennessee probate system) without going to the expense of using probate avoidance techniques (such as funding a revocable trust). Standard 3.2.1 of the National Probate Court Standards supports this position. Standard 3.2.1 states: "Absent a need for probate court supervision, the interested persons should be free to administer an estate without court intervention."

The Commission's charge is reflected in the Commission's title: *A Virginia Courts in the 21st Century; To Benefit All and to Exclude None*. Virginia's current probate system does not accomplish that charge. The broadly shared wishes of citizens both nationwide and in Virginia are to minimize or avoid probate costs. Many jurisdictions have taken measures and developed systems that are responsive to such wishes. Virginia should acknowledge the potential benefits that may be derived by borrowing from or adopting techniques and systems used in other jurisdictions to enable economic and efficient administration and settlement of a decedent's estate.

A minority of Subcommittee members see the following problems with Virginia's present system.

1. Virginia's Probate System Penalizes the Lower and Middle Class Citizen As Well As the Ill-advised Virginia Citizen. Virginia citizens who have sufficient wealth and are represented by experienced lawyers generally try to avoid and are successful at avoiding the Commissioner of Accounts system. Thus, Virginia's probate system is for those citizens with modest assets who cannot afford to avoid probate or those citizens who are not well advised. This is not a system that benefits all and excludes none.

2. A Cumbersome Probate System Creates an Adverse Public Perception. Because some lawyers and others have made cottage industry of advertising techniques to avoid probate, the public perceives a cumbersome probate and Commissioner of Accounts system as a system devised by lawyers to protect their economic interests by continuing the judicial supervision of estate and trust administrations. The more there is involuntary supervision of estates and trusts in a probate system, the less credibility the system has in the public's mind.

3. Circumstances Have Changed Since the Adoption of Virginia's Probate System. Notwithstanding the significant changes that have occurred in our society, the present structure of Virginia's probate system has remained virtually unchanged for more than 100 years. When the Virginia General Assembly adopted the present probate and Commission of Accounts system, this was the situation in Virginia:

a. The average Virginia citizen owned real estate and few marketable securities and other assets;
b. Joint accounts, beneficiary designations, revocable trusts, and other probate avoidance devices were not available to most citizens;
c. There was no reliable mass communication system to alert beneficiaries and creditors as to the death of an individual, so beneficiaries and creditors needed protection; and
d. Society had a paternalistic approach to the distribution of wealth.

4. There May Be More Effective Systems Than Virginia's System. Although the Commissioner of Accounts system prevents abuse and is responsible for seeing that creditors are paid and beneficiaries receive their inheritances, a comprehensive study would determine whether there are more effective systems utilized by other jurisdictions.

5. Private Judicial Function Should Be Avoided. Virginia is fortunate in that almost all Commissioners of Accounts are highly respected and professional. There is a danger, however, of the public losing credibility in a judicial function administered by private citizens with little public or legislative oversight and which is fee based but without the fees received being treated as court funds or deposited in public accounts. A comprehensive study would determine whether the public has lost credibility in Virginia's probate system. Such a study would also permit a determination of whether the public interest is best served by compensating court officials supervising the probate process as a judicial employee rather than on the current fee schedule basis.

6. No Comparable System in the United States. Virginia is the only jurisdiction in the United States with a system comparable to our Commissioner of Accounts system. A comprehensive study would determine whether Virginia's system is a model that other jurisdictions should follow, or whether Virginia would be better served by borrowing from or adopting models used in other jurisdictions.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Functions
Judge Joanne F. Alper, Chair
Judge Randy I. Bellows, Vice Chair

Subcommittee 2-2, Substitute Judges
Judge Joseph Ellis, Chair

Recommendations for Consideration by the Commission

May 30, 2006

Narrative of the current state of the topic in Virginia

The substitute judge system in Virginia can be traced to the Virginia Court System Study Commission headed by former Chief Justice Lawrence W. I'Anson that was sponsored by the National Conference on the Judiciary that met in Williamsburg in March of 1971.

The 1973 Court Reorganization Act, a product of the Virginia Court System Study Commission, changed the Commonwealth's county and municipal courts to General District and Juvenile and Domestic Relations District Courts. On July 1, 1980, all district court judges became full-time judges. The exception was for substitute judges "appointed for the purpose of holding court because the regular judge is unable to perform the duties of his office . . .." (VA. CODE ANN. § 16.1-69.21 (2005)).

The Committee on District Courts "shall determine the number of substitute judges for each district which shall be necessary for the effective administration of justice." (VA. CODE ANN. § 16.1-69.14(b) (2005)). The general rule of thumb has been the appointment of one substitute judge for each full-time General District and Juvenile and Domestic Relations District Court judge. Currently, there are approximately 240 substitute judges on the Supreme Court of Virginia's payroll system, approximately the number of full-time judges in the district courts.

The Chief Judge of the Circuit Court having jurisdiction within a district appoints substitute judges for a six-year term. The Substitute Judges are appointed to serve every General District Court and Juvenile and Domestic Relations District Court in the judicial district for which their appointment is made.

Substitute Judges primarily serve "in the event of the inability of the judge to perform the duties of his office or any of them by reason of sickness, absence, vacation, interest in the proceeding or parties before the court . . . In designating a substitute judge to serve, the Chief Judge shall, wherever possible, select a substitute judge who does not regularly practice in the court requiring the substitute." (VA. CODE ANN. § 16.1 – 69.21 (2005)).

Substitute Judges in the general district system are often confused with Retired, Recalled Judges. Retired, Recalled Judges are a subgroup of all General District Court or Juvenile and Domestic Relations Court judges who have retired from full-time judicial service. To be included in this subgroup, a judge must file a petition with the Chief Justice and be approved for recall service by him. (VA. CODE ANN. § 16.1 – 69.35 (2005)).

Retired, Recalled Judges are currently paid a fixed per diem of $200. Substitute Judges who serve a full day receive the same rate of pay; however, their pay may be prorated when they serve for less than a full day of service. All Retired, Recalled Judges and Substitute Judges have required training and education; however, the requirements for Retired, Recalled Judges are more rigorous than those for Substitute Judges.

Utilizing Substitute Judges gives the district courts the ability to manage heavy caseloads and minimizing the need for new judges. Among the continuing concerns of using Substitute Judges are the appearance of a part-time judiciary and the possible questions about the fairness of the judicial system where practicing lawyers serve as judges.

Trends which may influence the topic

Assumptions:

> According to *Trends and Implications, 2005,* the large dockets currently experienced in the district courts are expected to increase each year.
>
> The pool of retired judges is insufficient.
>
> Currently, there are two levels of courts: circuit and district. Although these courts may be consolidated or a family court may be developed one day, these recommendations are based on the current structure of the courts.
>
> Substitute judges require training and expertise.

Recommendation 2-2.6.1. There should be replacement judges available for all courts.

Rationale

In order to continue to meet the demands generated by ever increasing caseloads, district courts must operate continuously notwithstanding the individual needs of those who are responsible for their administration. Judges become ill, or have personal or professional commitments that necessarily impinge upon their judicial responsibilities. According to *Virginia's State of the Judiciary Report for 2005*, substitute and retired recalled judges were used on 6,607.5 days in district courts (4,139 of those days were covered by substitute judges). This amounts to 28.4 days per sitting district court judge and, if measured in terms of full time equivalency positions, would constitute 26.4 additional full time judges. Given the incontrovertible need for replacement judges of some type, the question thus becomes not whether a system of replacement judges is necessary, but rather, what system would best address this obvious need.

Recommendation 2-2.6.2. The Commonwealth should develop a cadre of judges (nearing retirement) who would be granted "senior status" whose specific judicial responsibility would be to serve as substitute judges.

Rationale

In a perfect world, replacement judges would be as fully qualified and experienced as the judges replaced, ensuring a nearly seamless transition for those who appear before the courts. Theoretically, a system of replacement district court judges would also eliminate many of the complaints about a system of substitute judges because the replacement would be a full time judge, appointed by the legislature. Concerns about the impartiality, experience, or qualifications of "substitute" judges - lawyers appointed to replace an absent judge temporarily - simply would not exist. (*See* Recommendations 6, 7 and 8, below). Although retired judges currently used as replacements fit this model, a system relying entirely on retired judges must address concerns about the size of the pool available, the geographic distribution of these judges and, of course, their willingness to serve.

The current pool of retired judges is simply not sufficient to satisfy the routine replacement needs of the Commonwealth. Although it would require the enactment of new legislation, the administration of justice would benefit from enlarging the pool of available experienced replacement judges. Creating a cadre of senior judges designated to serve as local and regional replacement judges may accomplish this. Eligible judges, those within a few years of retirement, might be given the option to reduce their obligation to a particular court, provided that they were willing to serve on demand as replacement judges in their court or other courts nearby. Alternatively, judges who have reached seventy years of age, but who do not wish to retire, may be considered for "senior status", obligating them to sit as replacement judges as needed. The Supreme Court should designate such judges, specify the area they are to serve, and serve as the clearinghouse for any replacement request. Candidates for "senior status" may be encouraged to serve by offering them a rate of pay greater than retirement, but less than full pay. Although substitutes may still be needed in rural areas or more remote parts of the state, the overall need for these comparatively inexperienced substitutes would be diminished.

Recommendation 2-2.6.3. There should be a uniform statewide application for substitute judges.

Rationale

Currently, most jurisdictions have no formal procedure for receiving names of persons who are interested in the position of substitute judge. Based upon an informal survey by the Subcommittee, it appears that most attorneys who are interested send a letter to the chief judge of the circuit court. That judge keeps a file of those letters and when a position opens, the circuit court judges use those letters to determine the appropriate candidate for the position.

Recommendation 2-2.6.4. There should be statewide criteria for selecting substitute judges.

Rationale

As indicated in Recommendation Number 3, there is no uniform procedure for the taking of applications, and as a result, there are substantial differences in the qualifications of substitute judges among the various districts. The minimum standards should be 1) member of the Virginia State Bar in good standing; 2) minimum of 5 years in practice; and 3) competency in the General and/or Juvenile & Domestic Relations District Courts. Some additional considerations may be 1) educational background; 2) admission to practice law in other states; 3) general character of law practice; 4) prior occupations; 5) whether the applicant is an officer or director of any business organization (other than a law firm); 6) prior judicial service, service as a Commissioner of Chancery or Special Justice; 7) prior disciplinary actions by the Virginia State Bar; and 8) any recommendations from local bar associations.

Recommendation 2-2.6.5. There should be a uniform process used by the Circuit Court judges in the selection of substitute judges.

Rationale

In order to make sure that all interested candidates have an opportunity to express an interest in the position and in order to make sure that the qualifications for the substitute judges are uniform in each jurisdiction, there should be a basic process for the selection of substitute judges. Possibly the Circuit Court judges could enlist the assistance of the Human Resources Department of the Supreme Court in fashioning such a process. At a minimum, the position, time permitting, should be advertised in such a way so as to attempt to reach the largest number of practitioners (possibly in the local bar bulletin) in an attempt to obtain a wide and diverse pool of applicants.

A. The Circuit Court judges should select substitute judges by a majority vote of all judges in the circuit.

Rationale

The selection of a substitute judge should be viewed as fair and impartial by all observers and foster the public's confidence in the selection. To achieve these goals, the selection should be merit based and should avoid the appearance of any partiality in the selection. A good way to achieve these goals is selection by a majority vote of all of the judges in the circuit.

B. The Circuit Court judges should receive and consider recommendations from the judges of the General District and Juvenile & Domestic Relations District Court on the applicants.

Rationale

It would be up to the Circuit Court judges to determine the manner of obtaining the recommendations (either orally or in writing) and the timing of the recommendation (either at the beginning of the process or after the candidates had been narrowed down to a few), but the District Court judges should have input into the process since the substitute judges will be sitting in their courts.

C. There should be an active recruitment process for substitute judges.

Rationale

See Recommendation 2-2.6.5, above, addressing the advertisement of the position. The recruitment process should take into consideration the goal of increasing the diversity of substitute judges in the Commonwealth. It has also been suggested that there be recommendations from the local bar associations. That may prove to be an unwieldy process in some localities, but it is something to be considered.

Recommendation 2-2.6.6. Substitute Judges should be selected to serve either as a substitute judge for the General District Court or the Juvenile and Domestic Relations District Court or both courts based on their area of interest and expertise.

Rationale

This recommendation addresses the need to recognize that there are significant procedural and substantive differences in the two district courts. Substitute judges should be trained and experienced not only in the general principles of law that apply in all courts but also in the procedures and substantive law unique to each court. Currently the Supreme Court of Virginia has recognized the need for specific training and certification for a guardian *ad litem* depending on whether they represent a child or adult. Attorneys that are eligible to become substitute judges may have chosen to concentrate their practice in certain areas and certain courts. This recommendation recognizes the increasing specialization that is occurring among practicing attorneys and the significant differences between the two district courts. It is believed that the trend toward specialization within the bar will continue. In an effort to provide the public with the most qualified substitute judges, those attorneys that have developed expertise in a specific area unique to one or the other district courts should not be discouraged from serving. Indeed, they should be encouraged to serve. This recommendation also recognizes that some attorneys will be qualified to serve in both courts. Training for substitute judges can be improved by tailoring it to the specific court as well.

Recommendation 2-2.6.7. Substitute judges should be required to participate in a specialized training program focused on practical issues.

Rationale

On October 1, 2005, the Supreme Court issued a policy statement imposing a minimum educational requirement for substitute judges. Substitute judges must now attend a regional continuing educational program to remain current on the law. The Office of the Executive Secretary is required to make available to every substitute judge each year "by videotape, computer disk, or via some form of distance education, the substantive legal programs provided to new judges as a part of the pre-bench orientation program. These programs shall include the lectures on criminal law, criminal procedure, civil procedure, evidence and such other topics as may be designated by the Education Committee of the Judicial Conference of Virginia for District Courts. At least once in every two year period each substitute judge shall certify, in writing, to the Executive Secretary of the Supreme Court of Virginia that he/she has watched the programs distributed for review." (Emphasis supplied).

Although the Supreme Court has addressed some of the substantive concerns of this subcommittee by issuing this Policy Statement, the practical aspects of serving as a substitute judge apparently continue to be principally derived from the substitute's own experiences in Court. Among the issues most troubling to new and substitute judges are practical and procedural concerns on which little training is currently available. Given the obvious trend toward specialization among attorneys and, therefore, among lawyers who would become substitute judges, substitute judges should be trained in the procedural rudiments of every facet of the courts in which they sit. For example, it is not uncommon to find highly qualified domestic relations practitioners with minimal criminal law experience, and experienced criminal law practitioners with minimal civil or domestic relations backgrounds. In order to ensure uniformity and fairness for all who appear before the court, it is imperative that substitute judges receive training focused on the practical aspects of conducting different types of hearings. These matters should include, but not be limited to, arraignments, preliminary hearings, sentencing considerations, service of process issues, traffic laws, foster care hearings, and procedural differences between juvenile and adult criminal matters, in addition to training in courtroom and docket management.

Recommendation 2-2.8.8. When substitute judges are used, reasonable efforts should be made to try to locate a substitute judge who does not regularly practice before the court where the substitute judge is needed.

Rationale

There are many advantages to having attorneys available to serve as substitute judges in their local jurisdiction. In many cases, clerks must locate a substitute on short notice due to illness or an emergency. A local attorney may be the only one able to be available on short notice. A local attorney familiar with the local practices and procedures as well as the clerk's office may be a benefit. A local attorney who is serving as a substitute judge affords the public and the bar an opportunity to see a potential judicial candidate serve in that capacity.

On the other hand, there are significant concerns raised when an attorney sitting as a substitute judge regularly appears before that court that can affect the public's perception of the quality of justice. Concerns over the impact on the public's confidence in the system are legitimate. An attorney who also serves as a substitute judge may be perceived by the public as having an edge in matters before the court. Using a local attorney increases the likelihood that the attorneys appearing before the court may have a social relationship or pending cases with the substitute judge. The clerks are called upon to deal with the substitute judge in two distinct capacities. This recommendation is aspirational in nature.

Increasing the pool of available substitute judges through the addition of senior status judges and substitute judges that are designated to a particular district court would increase the likelihood that this recommendation can be followed. However, in order for it to be effective, the clerks that are required to secure the services of a substitute judge will have to be trained and required to use this approach. It is noted that there is some subjectivity in the term "regularly practices". This is necessary because it is impossible to fashion a bright line test for this. The likelihood that this recommendation will be followed will be increased if the number of available substitute judges is increased.

Recommendation 2-2.6.9. Substitute judge pay should be increased to a more realistic level in order to increase the number of qualified candidates.

Rationale

The courts should select and appoint the most highly qualified applicants available. Selection as a substitute judge is beneficial to both the lawyer and the bar. The substitute judge gets to evaluate whether he/she would like to pursue a judicial career after the experience, and the bar gets the opportunity to evaluate the substitute's performance before being asked to recommend that person for appointment as a full time judge. Based upon the current rate of pay, the decision to become a substitute judge is never made for economic reasons. However, the decision NOT to become one may be based purely upon economics, thereby depriving the courts and public of a highly qualified candidate.

In 2004, the cost to the Commonwealth of substitute and retired judges was approximately $1,300,000. The Commonwealth pays an attorney $112 as court appointed counsel in a misdemeanor criminal case. By comparison, the daily rate of pay for a replacement judge who may hear dozens of misdemeanors (in addition to other matters) in a single day is only $200.

The Virginia State Bar does not collect information about the hourly rates of its members. However, based upon an informal survey in the Fredericksburg area, the average attorney charges approximately $200 per hour. Obviously, senior, more experienced, and more highly qualified attorneys charge more per hour than those with less experience. If an attorney works eight hours a day at that rate, he/she may bill $1,600 per day. It should be clear that, despite the obvious incentives associated with becoming a substitute judge, an attorney sacrifices $1,400 by working only a single day as a substitute. If, as noted above, each judge used 28.4 substitute days last year, and there is one substitute for each full time judge, the economic loss to the substitute

would be enormous, approximating $34,080 annually. More realistically, if the attorney billed only four hours per day, the cost would be $17,040, still a very significant amount of money. According to the U.S. Department of Labor Bureau of Labor statistics for May 2005, the mean annual wage for all attorneys in Virginia was $119,490, and the mean hourly wage was $57.45. This amount represents actual income to the attorney exclusive of actual operating and business expenses. Even without these considerations the Substitute Judge would lose personal income of $7,373 per year.

Of course, when retired judges are used, attorney substitutes suffer no economic loss. It should be clear, however, that when attorneys replace judges, the applicants must be prepared to incur potentially serious economic losses. Therefore, in order to attract the most highly qualified substitute applicants, the daily replacement fee should be raised to ease the economic burden and attract the most highly qualified members of the bar.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Functions
Judge Joanne F. Alper, Chair
Judge Randy I. Bellows, Vice Chair

Subcommittee 2-3, Commissioners in Chancery
The Honorable J. Michael Gamble (Chair)

Recommendations for Consideration by the Commission

May 30, 2006

Narrative of the current state of the topic in Virginia

Commissioners in chancery may be appointed in each circuit court when necessary "for the convenient dispatch of the business of such court." Traditionally, commissioners in chancery have been used in equity cases involving real estate, accountings, divorces, and partnership dissolution. Prior to the 2005 amendment of Code §8.01-607, there was no statutory restriction on the appointment of commissioners in chancery to serve in particular cases. Subsequent to the 2005 legislative amendment, commissioners in chancery may be appointed only in cases when there is agreement by the parties and concurrence of the court, or upon the motion of a party or the court, together with a finding of "good cause" by the court.

The duties of a commissioner in chancery in a particular case are defined by a decree of reference entered by the judge. The commissioner in chancery submits a report to the court after taking evidence and/or settling accounts. A party must file exceptions to the report of the commissioner in chancery within ten days after the report has been filed unless, for good cause, the court grants additional time to file exceptions. Findings of fact by a commissioner in chancery should be sustained by the court if they are supported by the evidence. However, the court is not bound by the commissioner's rulings on legal principles.

Trends which may influence the topic

There is a trend by circuit courts to use commissioners in chancery less frequently than in the past. This trend is based generally on the expense of commissioners in chancery, the extra time required by the use of commissioners in chancery, and the negative public perception of the judicial system if there is use of commissioners in chancery rather than judges. However, although the frequency of using commissioners in chancery is reduced, there will be a limited future need for the use of attorneys in the role of commissioners in chancery. Further, notwithstanding the reduced use of commissioners in chancery, the types of issues referred to a commissioner in chancery should be expanded beyond the traditional chancery appointments. For instance, with the procedural merger of law and chancery in Virginia, commissioners in chancery should be used in other nonequity roles such as discovery, debtor interrogatories, and even specialized or complicated nonjury litigation.

Further, if the use of commissioners in chancery is expanded beyond the traditional equity roles, the name should be changed to "special master" to eliminate confusion resulting from of the use of the word "chancery" when nonchancery functions are performed.

Recommendation 2-3.1. The current system of commissioners in chancery should be abolished and circuit court judges given the authority to appoint special masters pursuant to procedures similar to Rule 53 of the Federal Rules of Civil Procedure.

Rationale

The merger of law and chancery in Virginia, together with the complexity of contemporary litigation, suggests the need for the use of commissioners in chancery beyond their historical use. Even though the role should be expanded, and the name changed to special master, the use of commissioners in chancery should be limited. Any rule or statute adopted should require that courts use this appointment only in limited circumstances, such as when the parties agree, or when the complexity and economic circumstances of the case justify the appointment. Also, attorneys appointed by the court should have expertise in the matter in which they are appointed.

Even though the use of commissioners in chancery should be expanded beyond traditional roles, the subcommittee believes that commissioners are no longer appropriate in divorce cases, except in complex discovery and financial matters. Commissioners in chancery should never be used in cases involving children, such as child custody, termination of parental rights, and child guardian cases. The public expects a "real judge" to preside in domestic relations and child-related cases.

Rule 53 of the Federal Rules of Civil Procedure can serve as a model for a new statute or rule of court. It does not limit the use of special masters to certain types of cases, but it does set limitations on the circumstances when it is appropriate to appoint special masters. Also, it sets requirements for the expertise of special masters, and it requires the court to state in the appointment order the basis for compensation of the special master.

Rule 53 gives the trial judge more flexibility in reviewing the report of a special master than when reviewing the report of a commissioner in chancery. The trial court makes a *de novo* review of both the factual and legal findings of the special master, unlike the reports of the commissioners in chancery where factual findings supported by the evidence cannot be reviewed. Also, under Rule 53 the trial court can take additional evidence without referral back to the special master.

A copy of Code §8.01-607 and Rule 53 of the Federal Rules of Civil Procedure are attached to this report.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Judicial Functions
Judge Joanne F. Alper, Chair
Judge Randy I. Bellows, Vice Chair

Subcommittee 2-4, Licensing and Disciplining of Lawyers
David P. Bobzien, Chair

Recommendations for Consideration by the Commission

May 30, 2006

I. Recommendations Regarding Licensing and Regulating the Bar to Facilitate Access to the Legal System in a Changing America

Narrative of the current state of the topic in Virginia

The way in which legal services are provided to the public in Virginia has remained virtually unchanged for several decades. The majority of Virginia lawyers provide legal services in a solo practitioner or small firm setting, and they are trained in law school and through mandatory continuing legal education to provide competent, general service to their clients. Unless Virginia lawyers are licensed in adjoining jurisdictions, they are limited in their ability to serve the needs of their clients as those needs may arise in those adjoining jurisdictions. Lawyers are required to represent their clients in every aspect of their clients' cases, and the lawyers are not permitted to provide discrete, limited service to their clients on particular aspects of those cases. Lawyers cannot readily partner with other professionals in order to address all of the professional needs of their clients at one place and time.

Trends which may influence the topic

Contrast those static characteristics with the needs and expectations of the modern legal services consumer. Today's consumers of legal services are generally more knowledgeable and attuned to legal matters and, as seen in the increase in individuals representing themselves in court, want to use an attorney only to undertake those tasks that they feel they cannot handle themselves. At the same time, law is becoming more specialized, and the demands on the solo and small firm practitioner to serve clients who want them alone to handle all of their legal needs are increasing. Consumers have become used to the immediate access of the Internet and the streamlined customer service that is an outgrowth of a national shift to a service-based economy. They do not understand why lawyers cannot partner with other professionals to provide one stop shopping to address all of their professional needs at the same time and in the same location. Consumers living close to adjoining jurisdictions want their attorneys to represent them in that jurisdiction and do not want to be referred to attorneys with whom they do not have an existing relationship.

The expanding population of Virginia will bring an increase in the overall demand for legal services. The aging of the baby boomers will require greater emphasis on the practice of elder law and will result in older attorneys continuing to practice law well past traditional retirement age. The growth of the immigrant population will require expanded language proficiency and the ability to counsel clients in the law of their home countries. Based on the 2000 census, Virginia's foreign-born population is ranked 11th in the nation.

Recommendation 2-4.1.1. The unbundling of legal services should be permitted.

Rationale

Increasingly, individuals are representing themselves in litigation and may want the help of an attorney with one or more discrete aspects of their cases. An attorney should be able to provide these limited services without taking on responsibility and liability for the entire matter. Unbundling legal services will afford individuals an effective opportunity to resolve disputes without undue hardship and cost.

Recommendation 2-4.1.2. Reconsideration should be given to permitting and regulating multidisciplinary practice.

Rationale

Lawyers should be permitted to practice law in entities in which non-lawyers hold a position of control or an ownership interest. Clients are likely better served by a professional service firm that can provide a multidisciplinary approach to problems. Client problems and business solutions are increasingly complex, and traditional law firms cannot satisfy all client needs. Permitting MDP will result in greater convenience and reduced costs to the client.

Recommendation 2-4.1.3. Consideration should be given to expanding the areas in which foreign legal consultants may practice law.

Rationale

The proposed foreign legal consultant rule (Rule 1A:7) limits the provision of legal advice to the law of a foreign country. The proposed rule would prohibit any advice being given regarding domestic law. Given the language barriers facing many foreign-born Virginians and their natural desire to have all of their legal needs addressed by one practitioner, consideration should be given to expanding those areas in which a foreign legal consultant would be permitted to give advice. Immigration matters are frequently the concern of foreign-born individuals and permitting advice to be given in these matters should be the first area of expansion.

Recommendation 2-4.1.4. Compacts should be created among Virginia and its bordering jurisdictions to permit those licensed in a compact jurisdiction to practice in any other compact jurisdiction.

Rationale

Virginia is bordered by five states and the District of Columbia. Clients tend to want to have their legal affairs handled by one attorney regardless of the jurisdiction in which he or she is licensed, and they do not want to be referred to an out-of-state attorney merely because the situs of a legal issue is out of state. Such an arrangement would be of specific benefit to the solo and small firm practitioner who, unlike the larger firms with offices in several states, cannot retain the matter and the client by working with a partner or associate of the firm located in an office in an adjoining jurisdiction. Compacts should be established with some, if not all, of Virginia's bordering jurisdictions to permit a lawyer licensed in one to practice in the other, provided that bar dues are paid to all jurisdictions in which the attorney elects to practice.

Recommendation 2-4.6.5. A larger pool of active lawyers should be promoted by: (1) removing the requirement that those entering practice on motion must intend to practice full time from a Virginia office, and (2) permitting senior lawyers to elect an emeritus status, with reduced bar dues, that will not confine them to practicing only on a *pro bono* basis.

Rationale

Efforts should be made to provide legal service to an expanding population in Virginia by increasing the number of practicing attorneys without lowering admissions standards. One way would be to attract more attorneys from other states by eliminating the seemingly anti-competitive requirement that one seeking to enter on motion demonstrate an intention to practice full-time in Virginia from a Virginia office. Similarly, our current requirement that senior lawyers must either continue active practice or be relegated to providing only **pro bono** services disenfranchises a rapidly growing segment of the attorney population that could be practicing in all areas of the law, even if on a limited basis, while enjoying a dues obligation commensurate with the extent of their practice.

Recommendation 2-4.6.6. Greater protection should be afforded the consumers of legal services by: (1) requiring malpractice insurance for any attorney engaged in the private practice of law; (2) requiring periodic testing of older active and emeritus attorneys to ensure mental competency; and (3) requiring newly licensed attorneys who have entered by examination to undergo a period of mentorship, education or some form of testing their mastery of certain skills.

Rationale

Many Virginians would be shocked to learn that malpractice insurance is not required to practice law in Virginia. The General Assembly, citing some statistics that indicate that the number of legal malpractice cases is increasing at a faster rate than the increase in the number of attorneys,

is currently considering a resolution encouraging the Supreme Court and the Virginia State Bar to consider the problem of uninsured attorneys. Requiring private practitioners to carry malpractice insurance would give greater protection to the public and would better educate lawyers in proper office and case management and claims avoidance.

As a result of the aging of the baby boom generation and the fact that many lawyers will have to work more years than they might have intended in order to provide for an adequate retirement, many lawyers will be working well into their senior years and past what used to be regarded as traditional retirement age. One of the concerns of Lawyers Helping Lawyers is that issues involving dementia and mental acuity will be an increasing factor within the lawyer population. Just as seniors are tested more frequently to retain their driving privileges, senior lawyers should undergo similar periodic scrutiny to ensure mental acuity.

Too often newly licensed attorneys who have entered through examination do not have the practical skills to begin adequately to represent their clients. This is especially evident in the courtroom, and the public would be better served if there existed a requirement that, before undertaking litigation or some other aspect of law requiring a specialized skill, the new attorney would have to be mentored by a seasoned attorney, receive additional education, or undergo some other form of testing to ensure that the attorney possessed a particular competency.

II. Improving the Attorney Disciplinary System

Fairness and efficiency are the watchwords of the attorney disciplinary system. To be effective, the attorney disciplinary system must fairly and efficiently serve the interests of the public, the bar and the judiciary. The following recommendations are intended to enhance the fairness and efficiency of the attorney disciplinary system, thereby increasing the efficacy of, and public confidence in, the system.

Disclosure of Charges of Misconduct

Serious charges of attorney misconduct allegedly warranting suspension or revocation of a respondent's law license are certified to the Disciplinary Board for hearing. Less serious charges of misconduct are referred to district committees for hearing. Attorney misconduct hearings are open to the public.

Currently, notice of when and where public hearings will be held is posted on the Virginia State Bar's website along with the respondent's name and address of record. The substance of charges of misconduct set for hearing at the district committee level is available to the public 21 days after service of the charges upon the respondent, unless an agreement imposing private discipline is negotiated and approved during the 21 day period. If private discipline is imposed, the substance of the misconduct charges is not disclosed to the public. If an agreement imposing private discipline is not reached, the public can ascertain the substance of the misconduct charges as soon as the 21 day period ends.

In attorney misconduct cases at the Disciplinary Board level, there is no window for negotiating private discipline because any discipline imposed must be public. By rule, the substance of

charges of misconduct certified to the Disciplinary Board for hearing cannot be disclosed to the public until after the charges have been adjudicated.

Recommendation 2-4.8.7. The substance of charges of attorney misconduct should be made available to the public via the Virginia State Bar website when public notice is posted that a hearing on the charges has been scheduled regardless of whether a district committee or the Disciplinary Board is slated to hear the charges.

Rationale

Earlier disclosure of the substance of misconduct charges at the Disciplinary Board level will help the public make better informed decisions about their choice of counsel. Disclosing less serious charges of misconduct earlier in the disciplinary process than more serious charges is illogical. Delaying disclosure of the substance of serious attorney misconduct charges deprives the public of information necessary to make informed decisions about counsel and reduces public confidence in the attorney disciplinary process.

Increased Public Participation in Attorney Disciplinary Proceedings

Hearing panels in attorney disciplinary proceedings before district committees, as well as the Disciplinary Board, currently consist of five persons, including one lay person. No lay persons participate in three-judge panel proceedings, where hearing panels consist of two retired judges and one active judge. Respondents have a statutory right to elect a three-judge panel hearing in lieu of a hearing before a district committee or the Disciplinary Board. Complainants cannot contest a respondent's election of a three-judge panel. In the last decade, growing numbers of respondents have opted for three-judge panel hearings.

Recommendation 2-4.8.8. Three-judge panels should be eliminated.

Rationale

There is a perception that three-judge panels tend to treat attorneys charged with misconduct in an inconsistent fashion. The Disciplinary Board is well equipped to handle all complaints in a consistent manner across the state. Moreover, eliminating three-judge panels in which there is no public participation would increase public confidence in the attorney disciplinary process.

Recommendation 2-4.8.9. An additional lay person should be added to district committee and Disciplinary Board hearing panels.

Rationale

There is a perception that lawyers also tend to treat attorneys charged with ethical misconduct too leniently. Adding an additional lay member to every hearing panel would increase public confidence in the attorney disciplinary process.

The Hearing Panel Should Decide Whether to Stay a Suspension Pending Appeal and if the Respondent Should Post an Appeal Bond

Respondents can appeal discipline imposed by the Disciplinary Board or a three-judge panel to the Supreme Court of Virginia and move the Court to stay a suspension of their license to practice law pending appeal.[3] Motions for stays are routinely granted. Some respondents pursue frivolous appeals simply to delay suspension of their licenses. Other respondents with lengthy disciplinary histories and numerous pending bar complaints engage in additional misconduct while appealing suspension orders. The revocation of a respondent's license cannot be stayed pending appeal.

Recommendation 2-4.8.10. Respondents' direct right of appeal from three-judge panel or Disciplinary Board decisions should be preserved, but whenever a hearing panel determines that a respondent has engaged in misconduct sufficiently egregious to warrant a suspension, the hearing panel should receive evidence on the issue of whether the suspension should be stayed pending appeal and, if a stay is granted, determine whether the respondent should post an appeal bond.

Rationale

Motions to stay suspensions are extremely rare in cases where there is clear and convincing evidence a respondent has misappropriated funds because statutes authorize the bar to obtain an injunction from a circuit court freezing the respondent's assets and suspending his or her practice privileges pending a disciplinary hearing on whether the respondent's law license should be revoked. In serious misconduct matters not involving the misappropriation of funds, the public's confidence in the attorney disciplinary process would be increased if respondents with long disciplinary records and numerous pending complaints were required to show why their licenses should not be suspended pending appeal and, if a stay is granted, why they should not be required to post an appeal bond.

Creation of a Diversion Program Including Law Office Management Training

The attorney disciplinary process currently allows imposition of private admonitions with terms upon first-time respondents who have engaged in relatively minor ethical misconduct due to, among other things, poor law office practices rather than intentional wrongdoing. The terms imposed can include mentoring by another lawyer and additional continuing legal education in relevant practice areas.

[3] These Recommendations refer to three-judge panels which the Task Force believes should be eliminated. Until they are, the Rationales make references to them as they now exist.

Recommendation 2-4.4,8.11. The attorney disciplinary rules should be amended to provide a diversionary program whereby first-time respondents engaging in minor misconduct occasioned by poor law office practices would receive no discipline if they comply with terms designed to improve their law office management skills. The Virginia State Bar should create a law office management program to assist attorneys whose law office management practices do not comport with the disciplinary rules.

Rationale

A diversion program would enable conscientious lawyers who have unintentionally violated the rules to escape the stigma of being sanctioned for ethical misconduct. While large law firms usually have procedures in place that help firm members comply with the rules, sole and small firm practitioners often do not enjoy that advantage. A law office management program would help those practitioners improve their law office management skills and comply with the rules.

Universal Bar Number

It is not uncommon for lawyers licensed to practice law in the Commonwealth of Virginia to be licensed to practice law in other states or foreign countries. Each licensing jurisdiction assigns attorneys a different bar number. No entity tracks all the jurisdictions in which a lawyer has been licensed.

Lawyers sanctioned, suspended or disbarred in one jurisdiction may move to another jurisdiction in an attempt to avoid discipline or other restrictions on their practice of law. Such lawyers might include legal consultants and lawyers from foreign countries. Without a universal bar number, there is no efficient or reliable means of verifying representations lawyers licensed in jurisdictions other than Virginia make about their identity and prior disciplinary, criminal and personal history.

Recommendation 2-4.5.12. A system should be developed whereby each lawyer is assigned a universal number used in each jurisdiction where the lawyer is licensed to practice law.

Rationale

A universal bar number would make it more difficult for unethical lawyers to avoid discipline or other restrictions on their license to practice law by moving to another jurisdiction.

Deadline for Issuing Charges of Misconduct

Aspirational guidelines currently provide that bar complaints should be investigated and either dismissed or referred for hearing within 180 days of the bar's receipt of the complaints.

The efficiency and speed with which bar complaints are addressed have great impact upon complainants, respondents and the public. Efficient resolution of bar complaints helps protect the rights of aggrieved complainants and innocent attorneys.

Recommendation 2-4.4,8.13. The disciplinary rules should be revised to include "speedy trial" provisions requiring bar complaints to be investigated and charges of misconduct issued within a reasonable period of time unless there is just cause for delay.

Rationale

Justice delayed is justice denied. Timely resolution of bar complaints will increase public confidence in the attorney disciplinary process and thereby serve the interests of the bar and the judiciary.

III. Creating a Stronger Bond between the Bench, the Bar, and the Legal Academy

Conducting Appeals at the Law Schools

The rate of litigation is increasing, because of new laws, increased regulation, increased population, higher verdicts, and a greater willingness of litigants to sue. Law schools must better prepare students to litigate. Even those lawyers who never litigate (the bulk of lawyers) benefit from learning how to think quickly in complicated situations.
Lawyers and judges have often bemoaned the perceived reduced collegiality in litigation in recent years. The bench and bar have responded in various ways, such as by creating the Inns of Court to train litigators and to increase mutually respect that lawyers should have for each other. But we can do more.

Recommendation 2-4.5.14.

(a) The Supreme Court and the Court of Appeals should endeavor to hold oral arguments at each of the state's law schools at least once a year.

(b) Law Schools in Virginia should require students to spend a designated number of hours in court to observe a variety of case types. This requirement should also apply to applicants to the Virginia Bar who did not attend law school in Virginia. These court visits should include meetings with the judges after the proceedings.

Rationale

Just as it is essential for the training of medical students that they be exposed to real patients in real hospitals before they become medical doctors, it is essential for law students that they also have similar training before they become juris doctors. Law Schools are very good at instructing law students by holding moot court, *i.e.*, hypothetical cases argued by law students as an exercise. But they cannot train students using real cases without outside help.

Students already engage in mock appellate arguments and mock trials, but they need to see real appellate arguments in the law school environment. In that academic setting, teachers and

practicing lawyers can evaluate and analyze the performance of the lawyers and judges. The participants of the oral arguments may also comment on their own performance.

Only the Virginia appellate courts can provide this assistance to law schools. The Virginia appellate courts should offer to hold court in the law schools annually or biannually. We expect that every law school in the state would be very interested in inviting the Supreme Court and the Court of Appeals to conduct actual courts proceedings in the law school. The judges should try to accept these invitations.

The appellate courts could offer to hold oral arguments in the law school once every year or two in each law school in the Commonwealth.

The benefits should be worth it. At the close of the proceedings, the participants (including the judges) could discuss and analyze their performance with the law student audience, which might ask questions. The law students would benefit from these critiques and the students will see for themselves that the best lawyers and judges are respectful of each other and are competitive without being hostile.

We expect that the yearly or biyearly demonstrations will become events for the law schools and appellate courts that choose to participate. The law schools might hold a reception or dinner for the participants after the oral arguments and after the critiques. Like the Inns of Court, the lawyers and judges (and academics and students) will break bread with each other while learning from each other. The events will also teach students the importance of collegiality and preparation.

Students attending Virginia law schools and applicants for admission to the Virginia Bar who did not attend law school in Virginia would benefit greatly from being required to attend both hearings and bench and jury trials in Virginia courts. Observing the enforcement of procedural and evidentiary rules, the give and take between lawyers and judge, and proper courtroom decorum, would put the students and applicants in good stead should their later law practices include litigation. Meetings with the judges after the proceedings, during which questions could be answered and greater background regarding the proceedings given, would enhance the experience and should be a part of the requirement.

[Page intentionally left blank]

Commission on Virginia Courts in the 21st Century:
To Benefit All, To Exclude None

Task Force on the Public and the Courts
Professor Jayne W. Barnard, Chair
Judge Cleo E. Powell, Vice Chair

Subcommittee 3-1, The Courthouse Experience
Judge Michael J. Cassidy, Chair

Recommendations for Consideration by the Commission

June 1, 2006

This subcommittee addressed the following topics:

(1) Making the courthouse experience more user-friendly, less intimidating, and more responsive to user needs;

(2) Improving the courthouse experience for specific groups of users, including elderly persons, persons with disabilities, persons whose first language is not English, and victims of crime;

(3) Improving "customer service" for all by expanding court hours, reducing delay, and increasing the use of dispute resolution services;

(4) Creating systems for obtaining useful feedback from court users – both professional and non-professional (such as litigants, witnesses, and jurors) – in order to stay in touch with their concerns;

(5) Expanding the use of court buildings to reflect the evolution of court services beyond litigation to include mediation and family counseling; and

(6) Improving the experience of jurors and improving procedures for jury service.

Narrative of the current state of the topic in Virginia:

For many people, the thought of going to the courthouse is alien and scary. Most people go to a courthouse only one or two times in their lives, and usually when something has gone wrong in their lives. For low-literacy people and people for whom English is a second language, the process of going to court is especially intimidating. Going to court is typically an emotionally-draining experience, too, and that is especially true for victims of crime and people involved in domestic disputes.

When anyone goes to court for the first time, they have to figure out where to go and what they are supposed to do. It is not possible to have someone greet every person entering the

courthouse, inquire as to his or her needs and direct them to the proper office and tell them what they should be doing there. In many Virginia courthouses, newcomers are confused by the language of the signs and instructions that are posted, and find it difficult to get useful information.

As elsewhere in the U.S., the number of litigants who are self-represented is rising in Virginia. They often conclude they can represent themselves because they have watched lots of "lawyer shows" on television and read self-help books or looked at websites. Self-represented litigants often experience difficulty in figuring out what they are supposed to do once they get to the courthouse. This imposes a major time demand on courthouse staff.

Twenty percent of all Americans have one or more disabling conditions. With the aging of the population, we can expect to see more court users with vision and hearing impairments and many with mobility limitations as well. Many of Virginia's courthouses and court offices are not hospitable to persons with disabilities. Court staff often has no idea how to accommodate their needs.

Virginia provides excellent support to crime victims through local Victim/Witness Assistance Programs. These agencies provide reminders of court dates; assistance with obtaining protective orders or restitution; and assistance with the return of property seized as evidence. Staff often accompany the victim/witness to court. Nevertheless, the experience of going to court to confront one's victimizer can be traumatic.

The 2005 telephone survey of Virginians showed a high level of respect for and confidence in Virginia's courts. Still, respondents indicated a significant concern about delay, continuances, and time required to resolve disputes. Judges and court staff, too, share a concern about delays and continuances and wasted time.

Businesses have developed systems that give them "real-time" knowledge and control of their inventories. Court administrators in pilot projects in Virginia have applied a version of this type of system – called calendar management – to increase efficiency and reduce delay.

Currently traffic tickets, like other types of cases, must be manually entered by a clerk into the Supreme Court's Case Management System [CMS]. Because of heavy work loads, many cases are not entered until a week or two before the scheduled court date. If these tickets do not appear on CMS they cannot be paid on-line in advance of the court date. The Supreme Court is regularly plagued by phone calls asking about these unposted tickets.

There is currently no uniform means of gathering feedback from court users about the quality of their experience while attending or doing business with the court.

Many Virginia courthouses were built long before the enactment of the Americans With Disabilities Act and the development of modern technology.

Many Virginia courthouses are ill-designed to accommodate new trends in dispute resolution, including alternative dispute resolution (ADR). Judge's chambers, waiting rooms, hallways,

witness rooms, and unused judges' offices are often pressed into service for ADR sessions. These can be very difficult locations for the mediators because of the noise and number of interruptions.

According an ABA study, primary caretakers of young children often have limited access to the courts because they lack affordable childcare. Those who take their children to court with them often find a crowded and unsettling atmosphere:

> For almost all children, going to court is a frightening experience, which occurs at a time of family crisis already fraught with anxiety. Courthouse corridors and even courtrooms are full of children: they accompany adults who need to be there and have no other place to leave their children, or they are there because they themselves need to appear in court.

The number of jury trials in Virginia, as in the rest of the country, has been declining. In 2004, there were 2,268 jury trials in Virginia, compared with 2,389 in 2003. Many plaintiffs have opted for a non-jury trial or an ADR method of resolving their disputes, rather than go to a jury. While bench trials or ADR are appropriate options for many litigants, the right to a jury trial is still a cherished and valuable part of our judicial system.

Researchers have generated a considerable amount of data in recent years regarding the effect on jury performance of innovative procedures such as note taking, submission of questions by jurors, providing jurors with "trial notebooks," pre-instructing jurors before the taking of evidence, and instructing jurors before closing arguments. Evaluation of these practices no longer needs to be left to anecdotal comments and the personal preferences of lawyers and judges.

Trends which may influence the topic:

The following trends may impact court users' view of the quality of their experience when visiting a courthouse and participating in a court proceeding:

A. A new trend is emerging in architecture and building development called "way finding." More than mere signage, "way finding" is a set of techniques designed to help building users – including disabled and language-challenged users – to be more self-reliant and less dependent on staff assistance.

B. Virginians – like all Americans – are getting more accustomed to design features such as color-coding, directional aids, audio equipment for seeking instant information (such as that found at many "box stores"), and total environments designed to move people efficiently from one location to another with a minimum of assistance.

C. An increasing number of service providers (cable installers, banks, retail stores, drive-through drugstores) are working hard to minimize the time and effort required to transact business.

D. An increasing number of businesses in the private sector are developing information systems that permit them to know in "real time" what the demands are on their business, so they can adapt promptly and improve customer service.

E. Divorce – particularly in families with children – continues to rise. "Toxic divorces," in which the parties demand repeated court interventions, also are increasing in number.

F. The expectations of victims of crime (regarding support services, the ability to attend and testify at proceedings, etc.) continue to rise.

G. Recognition of the value of Alternative Dispute Resolution is increasing.

H. There has been a noticeable trend across the country away from the use of a jury, in both criminal and civil cases.

I. There has been much important research in recent years about the optimal conditions under which juries are likely to reach sound judgments.

J. Virginians are getting older and increasingly diverse in terms of language, national origin, and cultural background. For example, 8 percent of Virginians today were born outside of the United States. More than 11 percent of Virginians speak a language other than English at home.

K. Traffic congestion in many areas is making it difficult to get to appointments on time – people are frustrated and looking for ways not to have to move around to transact their business.

L. People are getting more impatient, more pressed for time, and less tolerant of delay.

M. People are increasingly relying on new telecommunications devices – including Blackberry-type devices and text-messaging – to send and receive information.

1. Making the Courthouse Experience More User-Friendly, Less Intimidating, and More Responsive to User Needs

Recommendation 3-1.5.1. All Virginia courthouses – like hospitals – should be clearly marked and signed from adjacent highways.

Rationale

Though courthouses are major landmarks, it is often difficult to locate them from interstate highways and local thoroughfares. Locating parking can also present issues for users not familiar with the locale. This impacts the timeliness of court appearances and frequently frustrates all concerned. Uniform signage can help alleviate this problem.

Recommendation 3-1.5.2. The Supreme Court of Virginia should develop, in consultation with affected populations, a set of "Best Practices" addressing "way finding," signage, and clear communication about where to find services in the courthouse.

Rationale

Courthouse signage is often a product created by and directed to those who use the courts on a regular basis. Often it ignores issues such as visibility for those with disabilities, incomprehensible 'court-speak,' or the varied ways in which people decipher directional instructions. Better signage and "way finding" devices would save both court personnel and the public time. Training court personnel to use plain language and avoid "court-speak" will also help.

While signage and way finding devices may vary with the needs of the local population, a shared set of 'Best Practices' will facilitate uniformity among courts and will make it easier for a mobile population to access the courts in judicial districts other than the one in which they reside.

Recommendation 3-1.5.3. All Virginia courthouses should contain clear and legible signs and instructions in English and Spanish. Signs and instructions should be understandable by persons with a 5th grade education. In jurisdictions with a significant population of non-English and non-Spanish speakers, instructions should also be made available in additional languages, upon request. Signage and instructions should be aimed at lay users, not lawyers or those with experience with the special language of the courts (e.g., signs should say things like "file your papers over there," "pay your fines over here," or "check in as a juror on the second floor"). All written instructions should be available in LARGE PRINT.

Rationale

The population of Virginia has become increasingly diverse over the past two decades. Currently 5.5 percent of Virginia's residents are identified as Hispanic/Latino, and that number is growing. Persons whose first language is Spanish, and whose comfort level with English may vary widely, are now located in every judicial district. Providing instructions in languages other than English is a necessary public service to them. Providing instructions in LARGE PRINT will serve the growing number of people who, as they age, will need this accommodation.

Recommendation 3-1.5.4. The Supreme Court of Virginia should ensure that all courthouse personnel in Virginia are trained to be helpful and proactive, and to identify those who may need special assistance.

Rationale

Courts are being asked to cover a wide range of administrative and judicial functions with limited financial resources. Well-designed training from the Supreme Court will ensure that customer service is given priority and will encourage uniform court practices.

Recommendation 3-1.5.5. All Virginia courthouses should provide suitable "drop in" childcare facilities for young children of court users either on the premises or within walking distance of the courthouse.

Rationale

According to National Center for State Courts, "primary caretakers of children often have limited access to the courts because they lack affordable childcare." Court-based child care centers can alleviate this problem. Court-based child care centers address three important goals: (1) improving the administration of justice and reducing delays; (2) shielding children from traumatizing experiences; and (3) linking needy families with other support services.

At present, fifteen states and the District of Columbia provide short-term child care at court facilities. Many court child care facilities also coordinate with service agencies to provide families with information about needed family services. Special arrangements are made for children who are in court as witnesses.

The structure and funding sources of court-based child care centers varies. Centers may be staffed entirely by volunteers or contracted by private early childhood programs. The centers may offer a wide variety of age-appropriate activities and meals.

For further information on court-based child care, see:

Children in the Halls of Justice: A Report on Child Care in the Courts. Washington: Center for the Study of Social Policy (June 1995) (this report documents the problems caused by the presence of children in courthouses, both for the court and for the children; it also identifies and describes the range of court-based childcare programs that are currently operating across the country); Court Care: Planning Child Care for the Courts. Massachusetts Trial Court Child Care Project (1995); Court Care: Policy Guidelines and an Operating Plan for Child Care in the Courts, Massachusetts Trial Court Child Care Project (1992).

See: http://www.ncsconline.org/WC/Education/DayCarGuide.htm

We note that the Virginia Beach and Chesterfield courthouses already have some form of child care facility.

Recommendation 3-1.5.6. Performance evaluation of all courthouse personnel should include an assessment of their helpfulness and efforts to assist court users, to solve problems, and to treat all court users with respect.

Rationale

There is a useful slogan: "you can only manage what you measure." Timely and regular review of – and feedback on – the quality of employees' customer service will ensure that this aspect of their job receives due emphasis.

2. Improving the Courthouse Experience for Specific Groups of Users, Including Elderly Persons, Persons with Disabilities, Persons Whose First Language is Not English, and Victims of Crime

Recommendation 3-1.1.7. The Supreme Court of Virginia should develop, in consultation with affected populations, a set of "Best Practices" addressing ADA compliance, reasonable accommodation, adaptive technology, courthouse design, and services for persons with disabilities, including sensory impairment.

Rationale

Currently, one-fifth of all Americans have some disabling condition. This includes many older Americans whose eyesight or hearing has declined. The affected populations are diverse and there are many constituent organizations with a wide range of experiences and expertise. By involving affected populations and their representative organizations in a discussion of Best Practices, the courts are likely to be able to better serve an aging population and other court users with disabilities.

Recommendation 3-1.1.8. The Office of the Executive Secretary should provide support to all local courts regarding ADA compliance, reasonable accommodation, adaptive technology, courthouse design, and services for persons with disabilities, including sensory impairment.

Rationale

The issues and challenges presented by the need to accommodate persons with disabilities are broad and complex. Many local courts lack the expertise and experience to address them. A centralized office dedicated to ADA compliance and accommodation is likely to identify strategies that are affordable and replicable across the Commonwealth. A centralized office with professional staff can keep up with a rapidly changing field of options and approaches to better serve an aging population and other court users with disabilities.

Recommendation 3-1.1.9. The Office of the Executive Secretary should oversee an inventory and assessment of all Virginia court facilities and procedures for compliance with the Americans with Disabilities Act (ADA) and develop a statewide plan to achieve compliance.

Rationale

An inventory and assessment of courthouse facilities and procedures for compliance with the ADA is necessary as a baseline for future action. The long-term goal of this proposal is to have uniformity and consistency of access across the Commonwealth. Such an inventory can take advantage of similar steps taken in other states and of guidance from the U.S. Access Board. The results will not only be a good barometer of where we stand with respect to ADA compliance but will serve as the foundation for a state wide action plan to bring Virginia's courts into full

compliance with the Act. This plan, encompassing phased implementation of improvements, can help gain statewide commitment and funding.

Recommendation 3-1.1.10. The Office of the Executive Secretary should insure that all new or significantly-modified Virginia courthouses are ADA-compliant.

Rationale

The Americans with Disabilities Act, which is now 15 years old, is the guiding legislation governing both structural needs and programming practices in public accommodations across the country. Persons with disabilities now rely on the nation's commitment to provide them access to public services. Details for design and construction of courthouses have been elaborated and distributed by the U.S. Access Board, states, and many architectural bodies. A great deal of expertise – much of it free – is available.

The law specifically applies to new construction and/or significant modifications of existing buildings. The spirit of the law includes reasonableness in consideration of costs and historic buildings.

This recommendation in part just restates what federal law already requires. It also is intended to encourage the Court to press for improvement of all non-compliant courthouses.

Recommendation 3-1.1.11. Planning for construction of new court facilities and retrofitting of existing court facilities should include input from responsible stakeholder groups at the earliest possible stages of planning.

Rationale

Planning for new court facilities and retrofitting of existing court facilities should include stakeholder input so that consideration may be given to diverse view points, and ideas and issues that might otherwise be overlooked. This type of consultation often reduces expense (including for costly redesign and litigation). Responsible stakeholder groups – including those representing elderly persons, persons with disabilities, and victims of crimes – should be identified and invited to participate.

Recommendation 3-1.1.12 All Virginia courthouses should be accessible to all court users. Alternative accommodation should be available for those with special needs, in all public areas, including courtrooms, jury rooms, mediation facilities, and at the clerks' counters.

Rationale

Virginia has a broad range of courthouses from the historic, of which we are very proud, to the brand new. If these facilities are unable to provide for the needs of disabled court users, alternative accommodation should be provided.

The alternative accommodation could take many forms and OES support should be requested if local facilities or practices do not satisfy the needs of all court users.

Recommendation 3-1.1.13. Every Virginia courthouse should be outfitted with, or have meaningful access to, portable equipment to accommodate users with vision or hearing impairments.

Rationale

There have been significant advances in assistive technology to serve the needs of persons with disabilities. This is particularly true with technology to assist persons with vision and hearing impairment. The use of these technologies, where appropriate, should materially improve the experience of court users.

Recommendation 3-1.1.14. All court personnel should be trained to assist court users with disabilities of all types, as well as the specific needs associated with aging.

Rationale

An effective court system serves all its customers and specialized training will help court personnel improve their efficiency and sensitivity in the assistance they provide.

Recommendation 3-1.1.15. Litigants and other court users should be encouraged to disclose at the earliest possible opportunity, via a notice to the court, if they have a disability that may require accommodation. This will permit court personnel to better serve their needs.

Rationale

Litigants and others (witnesses and jurors) may appear in court and disclose – for the first time – that they have a disability which may require accommodation. A voluntary advance disclosure would allow the court to prepare and to provide appropriate accommodations in an efficient and sensitive manner. This would expedite trials and better serve the needs of all court users.

Recommendation 3-1.1.16. The Supreme Court should establish a centralized reporting procedure for persons who feel they have been denied service because of their disability or who feel they have not been reasonably accommodated.

Rationale

Today's citizens expect and deserve a proper reporting procedure for those persons who feel they have been denied service. This is particularly true of persons with disabilities or those who feel they have not been reasonably accommodated.

To avoid the perception of discrimination or not caring, a centralized reporting procedure can assure proper, prompt, and consistent handling of any oversight.

An illustration of the need for such a procedure may be found in the recent case of *Tennessee v. Lane*, 541 U.S. 509 (2004). In that case, the courthouse was not designed or equipped to accommodate the needs of a court reporter. The reporter had to literally crawl to the second floor of the courthouse to perform his work. The U.S. Supreme Court ultimately held that the 11th Amendment did not protect the state from the application of the ADA. One of the subcommittee's speakers, David Yanchulis of the U.S. Access Board, speculated that the entire suit could have been avoided if the local court or state court system had had a complaint and/or accommodation system in place for those having difficulty with the building's limited design.

Recommendation 3-1.1.17. All Virginia courthouses should have separate, secure rooms for victims and witnesses in criminal and civil cases.

Rationale

Current state law authorizes services for victims and witnesses in criminal cases. These services may need to be extended to parties and witnesses in some civil cases as well. Parties and witnesses in civil cases should have the same entitlement to protection of their privacy and treatment with dignity and respect as victims and witnesses in criminal cases. Some civil cases, *e.g.*, civil abuse orders and custody disputes, have the same potential for intimidation of parties and witnesses as criminal cases.

3. Improving "Customer Service" for All by Expanding Court Hours, Reducing Delay, and Increasing the Use of Dispute Resolution Services

Recommendation 3-1.1.18. Virginia should provide funding and support for expanded court hours, including evenings and weekends.

Rationale

On occasion, courts are overwhelmed by the volume of cases to be heard. This proposal would provide a safety valve for backed-up dockets. More generally, the trial of cases requires the presence of the parties to the litigation, and oftentimes other witnesses as well. Most people before the Court are employed, and required to work from 9 a.m. to 5 p.m. Monday through Friday. Evening and weekend hours would increase their appearance/attendance rate and reduce their need for continuances. Also, those litigants and witnesses who do not work, but have childcare or other family responsibilities, are more likely to have other family members who can offer that care in the evenings and on the weekends than during the workday. Some courthouse personnel may prefer to work on nights and weekends.

The extent and times of expanded court services may vary across jurisdictions, though ideally, basic court hours should be the same statewide.

Recommendation 3-1.4.19. The Virginia courts should provide adequate resources, and adequate training, to implement an effective calendar management system in all courts.

Rationale

Two of the most troubling responses to the 2005 Telephone Survey of Virginia residents regarding the state's court system included:

> Only 58.4% of respondents agreed with the statement "the waiting time in the courthouse before a case is heard is reasonable"
>
> Only 54.9% of respondents agreed with the statement "the entire process to complete a court case occurs in a reasonable length of time"

Obviously, courts should be making every effort to reduce the time required of the public to conduct their court business.

The Virginia courts have had great success with calendar management and delay reduction programs on a "pilot" basis. These programs are designed to coordinate the schedules of judges, prosecutors, clerks, and the police, for example, and to minimize delays, continuances, and frustration on everyone's part. Creating a useful calendar management system requires training, coordination and persistence, and ongoing leadership to keep all the pieces moving together. This proposal would centralize the function of promoting calendar management, while recognizing that each court will need to find its own solutions to calendar management issues.

Recommendation 3-1.4.20. The Virginia courts should develop realistic standards for the timely disposition of various types of cases. While these standards need not be mandatory, incentives should be developed to achieve compliance with the standards.

Rationale

Currently, there are suggested time guidelines for case disposition,[4] but there is no enforcement mechanism -- the Supreme Court relies on the best efforts of individual courts and their clerks, and the "shaming" system based upon the sharing of information about how courts are doing. Without stronger incentives, as well as adequate resources to assist the courts and clerks in meeting the standards, court users will continue to bear the brunt of inefficiencies and delay.

[4] The voluntary case processing guidelines for civil cases anticipate that 95% of all uncontested cases will be disposed of within 60 days and 100% within 120 days of filing. 90% of contested civil cases are expected to conclude within 90 days; and 100% within 180 days.

Recommendation 3-1.4.21. The Office of the Executive Secretary should create a permanent office with the expertise to provide technical assistance for calendar management in local courts. This office would consult with, train, and support courts and clerks in improving local calendar management, delay-reduction, and docket management programs. Resources also should be allocated to encourage professional calendar management leadership in the courts, either on a court-by-court, or regional basis.

Rationale

See the rationale for Recommendation 3-1.4.19.

Recommendation 3-1.4.22. The courts, the State Police, and local sheriffs and police officials should devise a system by which traffic tickets can be input directly into the court system records, so as to facilitate the prompt payment of uncontested violations and near real-time caseload information for the courts.

Rationale

Traffic offenders are generally given a notice of their charges and information as to whether an appearance in court is required at the time they are cited. Too often, however, those wishing to pay fines and resolve the matters prior to the court date are hindered by the fact that the case information has not been forwarded by the arresting officer and entered into the court's information system. A uniform system that would permit entry of the information directly into the Clerk's office information system would allow for accurate and prompt processing of case fines. It would also permit better planning of traffic court dockets.

Recommendation 3-1.4.23. The Virginia courts should develop guidelines, certification standards, and procedures for the use of "parent coordinators" in high-conflict family disputes and delinquency proceedings.

Rationale

Many court dockets are loaded with high-intensity disputes about custody, visitation, and support issues. Many of the cases involve "repeat users" who have active court orders but continue to have disputes over compliance with or interpretation of those orders. Diversion of these cases to trained parent coordinators, for prompt resolution, would free up docket time for more critical issues needing judicial intervention. The use of parent coordinators might also assist parents in finding "kinder" ways to resolve the issues festering between them, to the benefit of both parents and their children. We note that parent coordinators are being used in an increasing number of states. Maryland may provide a model.

4. Creating Systems for Obtaining Useful Feedback From Court Users – Both Professional and Non-Professional (Such as Litigants, Witnesses, and Jurors) – In Order to Stay in Touch With Their Concerns

Recommendation 3-1.5.24. The Supreme Court should develop a uniform post-trial assessment instrument to gather and tabulate information from trial participants (lawyers, litigants, witnesses, etc.) and other court users (people who visit the clerk's office).

Rationale

Only by constantly monitoring public opinion will the courts be able to spot unfavorable trends that could degrade court performance and public perception. Care should be taken to assure that opinions reflect a cross section of the public and not just those motivated to reply. Statistically valid surveys of courthouse users should be used so that results are truly reflective of the public's courthouse experience. This proposal is not designed to duplicate ongoing judicial evaluation practices.

Recommendation 3-1.5.25. The Supreme Court should devise a standardized exit survey for jurors to be administered on a regular basis in every jurisdiction.

Rationale

The purpose of this recommendation is to get systematic feedback on issues that might not surface in any other way, also to encourage sense of "ownership" of the system by persons called as jurors. This proposal is not designed to duplicate ongoing judicial evaluation practices. Jurors should be provided time to complete the survey before leaving the court.

5. Expanding the Use of Court Buildings to Reflect the Evolution of Court Service Beyond Litigation to Include Mediation and Family Counseling

Recommendation 3-1.3.26. All Virginia courthouses should have rooms suitable and available for counseling, mediation, and settlement discussions in or near the courthouse. Flexibility in the usage of the space is essential.

Rationale

A 2004 National Center for State Courts study confirms what most of us know -- that courts across the country are being required to do more with less. At the same time, courts are seeing an increase in self-represented litigants who require increased personal assistance, increased use of specialty courts, such as mental health courts and drug courts, and increased use of court-based ADR. Each of these developments places additional demands on the scheduling and utilization of courthouse space. Courthouse design and retrofitting must take these developments into account.

6. Improving the Experience of Jurors and Improving Procedures for Jury Service

Recommendation 3-1.4.27. The Supreme Court of Virginia should promulgate uniform rules for the selection, orientation, and use of juries. One goal of this process should be to widen the jury pool; another should be to improve juror engagement and comprehension.

Rationale

There has been considerable study in recent years of how best to utilize jurors and how jurors can best reach appropriate decisions. In 2005, the American Bar Association promulgated Principles for Juries and Jury Trials. Some of the suggestions in that report include expanding the jury pool, preliminary jury instructions in advance of trial, juror note-taking during trial, distribution of "trial notebooks," preliminary instructions prior to closing arguments, written instructions after closing arguments, and permitting jurors to ask written questions at the discretion of the judge.

These, and other suggestions for which there is empirical support, should be considered for adoption in the Virginia courts. The most important of the suggestions has to do with the identification of a representative jury pool, not limited to DMV or voting records, but utilizing multiple sources.

Recommendation 3-1.4.28. The Supreme Court of Virginia should standardize and publish policies and procedures for jury service from the circulation of the uniform background document to conclusion of the trial. These policies and procedures should communicate the high regard of the Court for citizen participation in the judicial process. They can also minimize opportunities for inappropriate communications or influence.

Rationale

There is a broad range of practices across the Commonwealth concerning communications with, orientation of, and practices governing the use of juries in jury trials. While some flexibility is necessary, the subcommittee believes more uniformity is desirable. For example, there should be a shared understanding about what communications are inappropriate and how jurors should be "debriefed" and thanked at the end of a trial. There should also be an effort at building consensus regarding the appropriate format for voir dire.

Recommendation 3-1.7.29. The Supreme Court of Virginia should make it possible for prospective jurors to submit the uniform background document online.

Rationale

This proposal is intended as a convenience to prospective jurors, who may prefer to communicate electronically, rather than filling out paper forms. The information so recorded would be accessible only to court staff and to lawyers for the parties. The system should be flexible enough to permit the court to require additional information beyond "the basics" in the

form, as a kind of preliminary *voir dire* so that juror conflicts of interest, biases or prejudices may be ascertained early on in the process.

Recommendation 3-1.5.30. Prospective jurors should have an opportunity to disclose in their uniform background document whether they have a disability that may require accommodation. This will permit court personnel to better serve their needs.

Rationale

See the rationale for Recommendation 3-1.1.15. The disclosure proposed here should remain confidential.

Recommendation 3-1.5.31. Orientation materials for prospective jurors should be available on the Virginia Judiciary website, and include a "virtual tour" of the courthouse, a typical courtroom, and a deliberation room.

Rationale

This proposal is intended as a convenience to prospective jurors, and to give them confidence about what to expect, especially if it will be their first experience as a juror.

Recommendation 3-1.5.32. The Virginia Judiciary website should provide a simulated (possibly animated) trial using a fictional case, so that prospective jurors can get a sense of what to expect when they get to the courthouse and what kind of behavior will be expected of them.

Rationale

This proposal would give at least some jurors a better sense of the process in which they are about to participate. It will build their confidence and help them look forward to jury service. (There should also be some alternative system for jurors who are not computer literate or who do not have access to computer services so that they can obtain the same information – possibly a DVD).

Recommendation 3-1.5.33. Each court should provide driving and public transportation instructions to prospective jurors, along with instructions on such things as when to arrive, what to bring (and what not to bring), and court security requirements. This information should be included on the Virginia Judiciary website and should also be made available in writing upon request.

Rationale

Under the current system, jurors are given very little information about directions to the courthouse, the layout of the courthouse, what they are to do when they arrive at the courthouse, what to bring when they come, etc. The subcommittee believes that information of this kind can

easily be made available to prospective jurors, and that providing this information will enhance their experience with the judicial system.

Recommendation 3-1. 8.34. Each court should provide up-to-date information by a method (e-mail, text message, automated phone message, etc.) selected by the juror about the need for the juror to come to the courthouse. If there has been a delay or settlement, the juror should be informed as soon as reasonably feasible. Comparable information should be made available to litigants and witnesses.

Rationale

When cases are settled, or where unexpected or last minute delays in trials or hearings have occurred, an information system should be established so that jurors will not unnecessarily be inconvenienced. Too frequently, cases are settled or postponed on the day before trial and jurors are brought in the next morning simply to be told that the case has been settled or postponed. The subcommittee believes that a system can be established which would provide timely notification of these developments using the juror's communication method of choice.

This proposal is no more than common courtesy and a fair way to treat people. It would discourage the resentment that often develops when jurors are brought into court unnecessarily simply to be told that their presence is not required.. Most jurors are working people and have busy schedules and employment obligations. Every effort should be made to avoid wasting their time.

Recommendation 3-1.8.35. The Virginia courts should encourage courtesy to jurors and prospective jurors and a commitment to respect their time. Among other techniques, the courts should consider assessing jury fees (and other associated costs of empanelling a jury) to the parties in civil cases, if those cases settle after the Clerk's office closes on the business day preceding the scheduled trial.

Rationale

Courts have adopted many devices to force the parties to come to a realistic assessment of their case before the day of trial and to act accordingly. These devices include scheduling orders, pre-trial conferences, discovery rules and case evaluation procedures. The use of a jury, while an important constitutional right, is a significant burden on the community and should be recognized as such. The imposition of fees when the parties fail to come to terms with the merits of their cases in a timely manner and fail to resolve their dispute until the eve of trial would not place a chill on the right to trial by jury but rather encourage an appreciation of it.

Recommendation 3-1.8.36. Virginia should eliminate all automatic exemptions from jury service and favor generous deferral of jury service for personal, family or work obligations. A web-based system should be developed by which prospective jurors could secure postponement of their jury service at least once.

Rationale

At one time, the list of juror exemptions took up several pages in the Code of Virginia. It had become somewhat of a "Christmas tree" and each year additional exemptions would be hung on it. A few years ago, the General Assembly eliminated many of those exemptions, but the recent trend has been to go back to the old ways by adding exemptions year after year. The thought of the subcommittee is that all automatic exemptions should be eliminated so that each prospective juror will be considered for service based upon his or her own merits. The subcommittee also believes that postponements of jury service should be granted without undue hassle, with the clear understanding that eventually the juror will serve.

Eliminating occupational exemptions, as has been done in many states, serves to expand the jury pool and makes obvious to all that no one is "so important" and "so busy" that they cannot serve in this essential role. Knowing that doctors, mayors, and even judges must -- like everyone else -- serve on juries helps to promote respect for the law and conveys the message that we all must contribute to the judicial process. An essential component of this system, however, is flexibility in rescheduling. Everyone should be entitled to at least one "free" rescheduling without having to show cause.

Recommendation 3-1.8.37. The Supreme Court of Virginia should promulgate uniform standards or guidelines for "hardship" exemptions from jury service.

Rationale

Though discretion is necessary in determining whether an individual should be excused from jury service, the subcommittee believes there should be a shared understanding among judges, clerks and jury management personnel, about what types of circumstances (including illness, disability, lack of transportation, etc.) constitute a hardship. Currently, there seems to be little uniformity in the handling of hardship claims. Some clerks and some courts are very accommodating on this issue and some are very strict. The system would benefit from greater uniformity.

Recommendation 3-1.8.38. The Supreme Court of Virginia should adopt a one-day/one trial system for all jurors, except in unusual circumstances.

Rationale

Courts should use a term of service for jurors of one day or the completion of one trial, whichever is longer. This is known as the one-day/one trial system. It has been successfully adopted in several states. Letting a juror know that, if he or she shows up at the courthouse as scheduled, he or she will not then be recalled to serve on a jury for at least three years is a sign of

respect. It also reduces the stress and resentment many citizens feel when they are summoned for jury service.

Many court administrators express concern that they will not have sufficient jurors to meet their trial commitments with such a rule. However, the committee's speaker, Paula Hannaford-Agor of the National Center for State Courts, indicated that many other courts, with proper planning and cooperation from the bar, have been able to meet this goal. John Frey, Clerk of the Fairfax Circuit Court, indicated that, while his court does not have 'one day/one trial' as a firm policy the court has been able to meet that objective barring unusual circumstances.

Recommendation 3-1.5.39. The Supreme Court of Virginia should ensure that jurors are paid at least the national median for their jury service, with supplements for jurors who are required to serve more than five days.

Rationale

Though jury service should be considered an obligation of citizenship, the financial burden on those serving should not unduly impact those who are paid on an hourly basis or those of limited means. Hourly employees and the self-employed should not be expected to underwrite this constitutional right of others. While all jurors feel the pinch of jury service, jurors assigned to lengthy cases should receive special consideration.

Recommendation 3-1.8.40. The courts and clerks' offices should devise a meaningful system of follow-up for those people who do not complete the uniform background document.

Rationale

Often, even minimal follow-up efforts can expand the available jury pool by 50%. The goal is to achieve a fair cross section of the population to serve on juries. Expanding the jury pool through cost-effective efforts can only help to achieve a fair cross section. In addition, ensuring that people take seriously the receipt of a jury questionnaire -- and are re-contacted if they fail to respond to the first notice, helps everyone understand the importance of jury service and reinforces the notion that all must share the burden of participation in court processes. It also will build respect for the law.

Recommendation 3-1.8.41. Virginia should eliminate the use of sheriff's service of jury notices.

Rationale

Every state (including Virginia) now authorizes service of jury notices by mail. Notice by mail is effective and works well, though appropriate follow-up procedures may also be necessary. As it is, many Virginians are shocked or embarrassed by the appearance of the sheriff at their door, either to deliver a jury summons or to inform them that a trial has been cancelled or postponed.

This tradition is not cost-effective, may occasionally lead to inappropriate communications, and may also increase resentment about participating in jury service.

Recommendation 3-1.2,4.42. Jurors in criminal cases should be informed of the appropriate sentencing guidelines before deliberating on sentencing issues.

Rationale

The objective of the courts should be to provide jurors the information they need to make informed decisions. This may be achieved in many ways -- by encouraging jurors to take notes, by permitting them to ask questions, by giving them preliminary instructions prior to closing arguments, etc. Many studies have shown that such techniques are important in reaching informed, appropriate outcomes. In the same vein, providing jurors with information about Virginia's sentencing guidelines will permit them to reach more appropriate sentencing decisions.

This proposal is not without its critics. Jury sentencing serves as a voice of the community of the appropriate sanction for criminal offenses. The existence of jury sentencing is an important feature of Virginia's criminal justice system.

The problem addressed by this proposal is the fact that jury sentences in Virginia are often significantly in excess of what would be given by a judge under the sentencing guidelines. Between 1996 and 2004, the median excess of a jury sentence over a guideline sentence in Virginia was between 30 and 60 months. For drug offenses the difference was between four and one-half to over fourteen years. Nancy J. King and Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 888 (2004).

This disparity, among other factors, has led to a startling decrease in the number of jury trials in criminal cases in Virginia. One might say that the lack of disclosure to jurors about guideline sentences has had a chilling effect on the exercise of this constitutional right. As the number of jury trials drop, so does the public input to the reasonableness of judge or guideline sentencing.

While a civil trial jury would not be allowed to speculate as to the value of damaged property without some evidence, jurors in criminal cases are asked to sentence a defendant to a term of months or years without information of what is being done in comparable cases. Jurors wishing to impose a more severe or more lenient sentence have no benchmark of what a "typical" sentence would be in a given type of case.

In order to serve as a reliable "community-based barometer" of punishment, the jury needs both the same information that judges receive and the power to impose the full range of sentencing options authorized by the legislature, whenever the prosecutor or the defendant prefers the jury's judgment to that of a judge.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on the Public and the Courts
Professor Jayne W. Barnard, Chair
Judge Cleo E. Powell, Vice Chair

Subcommittee 3-2, Access and Ease of Navigation Through the System
Hugh M. Fain, III, Chair

Recommendations for Task Force Consideration

June 1, 2006

This subcommittee addressed the following topics:

(1) Improving access to legal services for indigent and other low-income litigants;

(2) Reducing the cost of litigation for all parties;

(3) Making the system more accessible and understandable to all Virginians, including removing barriers to those with multicultural backgrounds;

(4) Making the system more accessible and understandable to self-represented litigants;

(5) Improving the quality of information provided to the public about legal rights, court procedures, and alternatives to litigation; and

(6) Planning for post-disaster delivery of legal services to all Virginians.

Narrative of the current state of the topic in Virginia

The cost of hiring an attorney is prohibitive for a substantial portion of Virginia citizens. The September 2002 report of the Supreme Court of Virginia Pro Se Litigation Planning Committee cited a recent study which found that only 20% of the legal needs of low-income Virginians are being met.

There are, of course, several sources of legal assistance for indigent litigants. As required by the U.S. Constitution, indigent defendants who face the potential of jail sentences are entitled to court-appointed legal counsel. However, Virginia's schedule of compensation for appointed counsel in criminal cases is notoriously low, often making it difficult for defendants to obtain adequate representation in areas of the state that do not have a public defender.

In civil cases, Congress established the Legal Services Corporation to fund legal aid societies to provide free legal services to low- income clients in civil cases. Legal aid societies also receive state, local, foundation, and private donations. The Commonwealth of Virginia ranks high among

states for its contributions to legal aid societies, which it makes through Legal Services Corporation of Virginia, through direct appropriations (e.g., two dollars from the filing fee for each suit filed, except in Juvenile and Domestic Relations District Courts) and from Interest on Lawyers Trust Accounts (IOLTA).

Currently in Virginia, there are no standardized diversity training programs for court personnel. Additionally, litigants who do not speak English do not currently have universal access to trained interpreters. Virginia courts offer only a limited availability of court documents and other information in foreign languages. The Commonwealth has only limited foreign language signage in court buildings.

The Virginia judicial system does not have a formally recognized, funded and structured program to educate the public about the workings of the courts. While court users and others often seek information at clerks' offices or at libraries, they are often unable to get the information and assistance they need. Some of this is due to concerns by clerks' staff or librarians about prohibitions against the unauthorized practice of law. Some of it is due simply to the increasing complexity and sheer number of laws, rules and requirements.

Public libraries in Virginia possess different materials about Virginia law in their reference collections, including copies of the Virginia Code. They do not, however, have a formal role or responsibility in disseminating information to the public about Virginia law.

Public law libraries currently exist in 25 jurisdictions of Virginia, and are staffed by law librarians to serve the courts, the legal profession and members of the general public. More than 50% of information and service requests handled by public law librarians come from members of the general public.

The legal structure and funding sources of the public law libraries vary among the jurisdictions. However, their public funding component (from court filing fees and local sources) is often unpredictable and inadequate to ensure stability of service, much less to facilitate improvements in service to the general public, including standard reference collections, services to low-literacy individuals or those for whom English is not their first language, increased hours of opening and staffing, and effective outreach or marketing to advise about the availability of law libraries for use by members of the public.

There currently exists a lack of uniformity in how trial courts treat self-represented litigants. Some judges feel compelled to assist self-represented litigants in overcoming basic procedural hurdles, while many judges do not feel comfortable providing such guidance.

The country has seen the effects of disasters, natural and otherwise, that, if repeated, could disrupt normal functioning of the judicial system in Virginia or its localities for a considerable period of time. Smaller and locally contained occurrences in Virginia over the years, such as flooding, have been attended to by the VBA-VSB Young Lawyers' Joint Disaster Relief Assistance Program pursuant to which young lawyers, trained to respond, are deployed into the stricken areas. However, Virginia does not have a comprehensive plan to deal with the delivery of emergency legal services in the case of disasters on the scale of Hurricane Katrina.

Trends which may influence the topics

The following trends may impact the ability of Virginia citizens to obtain access to and easily navigate the Commonwealth's judicial system:

A. Funding cuts to the Legal Services Corporation of Virginia, resulting in fewer attorneys, more limited eligibility and further restrictions on scope of representation;

B. Public defender salaries and fee caps on court-appointed criminal defense that are increasingly disproportionate to the market cost of legal representation, discouraging attorney involvement in indigent criminal defense;

C. An increasingly litigious society relying on courts to resolve family and neighborhood disputes;

D. An aging population, resulting in more Virginians relying on fixed income;

E. An increasing immigrant population;

F. An increase in number of non-traditional family arrangements, affecting the ability to afford legal representation while increasing the need for assistance;

G. Increasing costs of legal representation;

H. Inequality of access to and greater reliance on expensive technology and other resources necessary to ensure consistent information delivery;

I. Demographic and sociological trends indicating a public in Virginia that will be both older and increasingly diverse in language and culture, more challenged by demands of time and economics, and

more attuned to and reliant upon information presented in brief, fast, graphic, technological formats;

J. Homeland Security issues as they may affect perceived hostility toward immigrant communities or "multicultural" communities;

K. Increasing filing fees in Virginia;

L. Increasing transportation costs, making it more expensive to get to court.

1. Improving Access to Legal Services for Indigent and Other Low-Income Individuals

Recommendation 3-2.1.1. The Virginia State Bar, with the assistance of the voluntary bar associations, should create a statewide voluntary program in which lawyers would provide defined legal services for a reduced fee.

Rationale

Virginia should initiate a program whereby attorneys are recruited, trained and assigned to provide legal assistance for a reduced fee to persons who are not able to obtain legal aid or court-appointed assistance but are also unable for financial reasons to hire counsel. This program should be limited to certain defined areas of practice such as family and housing law. There are several models for such a program, including the following:

Modest Means Program, Santa Clara County (CA) Bar

Legal Corps of Los Angeles' South Central Law Center

Court Settlement Officer Project Kansas Bar Association's Reduced Fee Plan

Hunton & Williams Church Hill Office, Richmond

Rhode Island Bar Association's Legal Information and Referral Service for the Elderly/Reduced Fee Services

Recommendation 3-2.1.2. Virginia should increase and expand tax credits for lawyers who participate in the voluntary reduced-fee program.

Rationale

The General Assembly should amend the Neighborhood Assistance Act to include tax credits for lawyers participating in an organized program of reduced-fee legal assistance in order to stimulate participation in the program. The amount of these tax credits would be in addition to existing tax credits for *pro bono* legal services.

Recommendation 3-2.1.3. Virginia's courts should make it easier for low-income individuals to file petitions for leave to proceed *in forma pauperis*, with the availability of forms for such petitions posted in clerks' offices, at local law libraries and other public libraries, and on the Virginia Judiciary website. The Supreme Court of Virginia should adopt a rule authorizing the clerk of the court, in addition to the judge, to grant, upon proof of indigency, a waiver of the filing fee to initiate the action.

Rationale

Low-income individuals not represented by legal aid or other non-profit agencies seldom file for leave to proceed *in forma pauperis* in civil cases. It would be helpful if this right were posted at

clerk's offices with forms to file to seek waiver, including in courts of record and courts not of record.

Recommendation 3-2.1.4. Virginia should increase funding for legal aid and consider funding other non-profit agencies providing free legal services to low-income individuals.

Rationale

While Virginia ranks high in the country for legal aid funding, gaps still exist in the provision of fundamental legal services to low-income individuals.

Recommendation 3-2.1.5. The Supreme Court of Virginia should encourage increased *pro bono* representation by the private bar.

Rationale

Virginia lawyers have an exemplary record of providing *pro bono* services. Additional *pro bono* services should be encouraged by providing incentives such as increased MCLE credit for *pro bono* training and public recognition of individual and bar association efforts. ADD regarding appellate practice.

2. Reducing the Cost of Litigation for All Parties

Recommendation 3-2.1.6. The Supreme Court of Virginia should adopt a rule allowing judges broad discretion in waiving service of process fees in domestic relations cases.

Rationale

In domestic relations cases, often one spouse is economically disadvantaged simply because the other spouse has traditionally maintained control of and access to marital assets and funds. This new recommended rule would help to reduce costs and the economic burden imposed on such spouses.

Recommendation 3-2.1.7. The Supreme Court of Virginia should expand Rule 4:4 to allow parties to make tape recordings of *de bene esse* depositions, discovery depositions, and pre-trial proceedings in courts of record, and then allow the parties to use written statements in lieu of transcripts where all parties are in agreement on the content of the written statement.

Rationale

This recommendation for the use in trial proceedings of agreed upon written statements of the substance of what occurred at a recorded *de bene esse* or discovery deposition, or at pre-trial proceedings, would be similar to provisions that are in place for appellate practice under Rule 5:11(c) of the Rules of the Supreme Court of Virginia, and would significantly reduce litigation

costs at the trial court level. Such a rule would be similar to the standing bench order of Judge Richard L. Williams in the U.S. District Court for the Eastern District of Virginia, Richmond Division, in which counsel are required to state the substance of discovery depositions (to the extent relied upon) with an opportunity for opposing counsel to object. The rule should contain a requirement that the recorded testimony or hearing at issue be transcribed if the parties are unable to agree upon a written statement, and a cost-shifting provision if the court finds that a party unreasonably refused to agree upon a written statement.

Recommendation 3-2.1.8. Virginia should enact a statute similar to Va. Code § 8.01-416 allowing for the introduction into evidence of property damage by affidavit under procedures that provide ample notice and opportunity for reasons to show cause why such affidavits should not be allowed.

Rationale

Under Va. Code § 8.01-416, parties may introduce evidence of motor vehicle repair costs by affidavit testimony. A similar procedure is also allowed in small claims court and in hearings before the Virginia Workers' Compensation Commission and before federal administrative law judges in appeals of denials of applications for Social Security disability benefits. New legislation should be enacted to expand the use of affidavit testimony to prove property damages by allowing similar procedures to those used in § 8.01-416 which provide opposing parties ample notice and an opportunity to make appropriate objections.

Recommendation 3-2.1.9. The Supreme Court of Virginia should adopt rules that allow judges broad discretion to allow live testimony in civil cases by video-conferencing.

Rationale

Advances in video-conferencing technology should reduce concerns about allowing witnesses to testify live in court proceedings via video-conferencing. Allowing live testimony would significantly reduce litigation costs, such as travel expenses and fee payments for experts.

Recommendation 3-2.7.10. The Supreme Court of Virginia should adopt procedures to allow for voluntary electronic filing and payment of filing fees in all courts.

Recommendation 3-2.7.11. The Supreme Court of Virginia should adopt procedures to allow for online access to all materials filed in the Court of Appeals of Virginia and the Supreme Court of Virginia that are already available to the public.

Rationale

Electronic filing has been successfully implemented in the Federal Bankruptcy Court system. Many Circuit Courts already provide on-line access to all filings. Voluntary electronic filing and on-line access to all filed material would reduce costs associated with generating and managing paper files and would increase the efficiency of reviewing and accessing filings. Such a system would level the playing field for litigants outside of Richmond who do not have the same access

to the clerk's offices for the appellate courts. Electronic filing should not be mandatory, however, as such a requirement would impose a hardship on litigants who do not have access to computers or e-mail services.

Recommendation 3-2.1.12. Virginia should enact legislation expanding upon current Va. Code § 16.1-88.03, which provides the right of business entities to be represented for limited purposes by non-attorney company representatives in courts not of record.

Rationale

Currently, business entities are permitted under Va. Code § 16.1-88.03 to be represented by non-attorney representatives in limited ways in General District Court. This right should be expanded to allow businesses to be represented in the actual trial in General District Court. The prohibition against self-representation of businesses forces corporate landlords, for example, to obtain counsel in simple cases, thereby increasing their business costs, which are then passed on to tenants through higher rents. Models for the proposed legislation can be found in Maryland and North Carolina.

Recommendation 3-2.1.13. The Supreme Court of Virginia should adopt rules expanding the opportunities for discrete task representation.

Rationale

This recommendation is drawn from the report of the Supreme Court of Virginia Pro Se Litigation Planning Committee (2002). Discrete Task Representation – also known as "unbundling" – is designed to facilitate access to legal advice, even for people who cannot afford, or choose not to seek, traditional "full-blown" legal representation. The essence of the the recommendation is this: Rule 1.2 of the Rules of Professional Responsibility – Scope of Representation – should be supplemented to more expressly provide for and delineate discrete task representation such as pleading preparation, appearance at pre-trial hearings, and document preparation and review. The rule could include, for example, requirements that counsel a) fully explain to the client the options for limited and full representation and the consequences of each; b) prepare a written retainer agreement specifying the scope of representation; c) prepare a pleading including notice that the preparer is not counsel of record; and d) make only an appearance for a single hearing upon notice to the court and the opposing party.

Recommendation 3-2.3.14. The Supreme Court of Virginia should actively promote and seek funding for the development of community mediation centers ("CMCs") to increase access for all Virginians, particularly those who are low income and self-represented, and to encourage voluntary participation in mediation and other collaborative processes.

Rationale

CMCs are non-profit organizations designed to provide dispute resolution services to low-income individuals, usually by referral from the local courts. There are presently ten community

mediation centers in Virginia. Over the last decade, these Centers have successfully mediated thousands of community and court-referred disputes. They also provide preventative services in that the matters they resolve through mediation and other collaborative processes in advance of formal litigation are far less likely to be filed in court, thereby providing measurable cost savings to communities. The average settlement rate for cases that are mediated is 80 – 85% and agreements reached in mediation are more likely to be adhered to as parties are directly involved in the development of the agreement. CMCs promote more peaceful and civil communities, empower people to control the outcome of their own disputes, and improve individuals' conflict management skills. They also provide training and mentorship for a new generation of mediators, including those from diverse communities.

Current funding for CMCs in Virginia does not cover the actual cost of providing dispute resolution services. Estimates are that court-related services are underfunded by 45-60%. There is currently no state support for outreach and information programs.

Other states, including Maryland, North Carolina, Michigan, Nebraska and New York, fund CMCs through a variety of methods. Nebraska's centers receive $45,000 per year; North Carolina's receive between $40,000-$130,000 per year, depending on location and caseload.

Recommendation 3-2.3.15. Virginia should require all litigants in contested custody, visitation, and support matters to participate in a dispute resolution orientation session.

Rationale

Diversion to mandatory mediation orientation sessions will assist parties in resolving issues of custody, visitation, and support in an informal manner, thereby reducing the hostility, pain and and cost of drawn-out court proceedings.

Recommendation 3-2.1.16. The Supreme Court of Virginia should support the Department of Dispute Resolution Services in its efforts to expand ADR services through additional resources, staff, and automation.

Rationale

The Department of Dispute Resolution Services provides centralized oversight of all court-connected dispute resolution services. Over the last decade, with a staff of two individuals, the department has focused its attention on the development of mediation and the judicial settlement conference program. With additional resources, the department could seek to offer each court access to a dispute resolution specialist and implement new ADR programs in specialized areas such as truancy, child dependency, and matters affecting the elderly. The department could use automation to enhance case management and program evaluation, increase efficiency in recertification and invoice processing, as well as explore on-line dispute resolution services. Additional staff would enhance the department's ability to provide training, technical assistance, and public education, and proactively meet the changing needs of the courts and litigants

3. Making the System More Accessible and Understandable to Persons with Multicultural Backgrounds

Recommendation 3-2.1.17. The Supreme Court of Virginia should create a Multicultural Liaison Office.

Rationale

The charge to the Commission is "To Benefit All, To Exclude None." This recommendation recognizes that Virginia today has an increasingly diverse population. An Office of Multicultural Liaison should keep abreast of the changing demographics of the Commonwealth and the changing needs of the persons served due to the changing cultural/linguistic landscape. This office should issue a yearly report of the cultural landscape of the Commonwealth and include recommendations for improvements in services. This office should also oversee implementation of recommendations such as the mandatory multicultural training for Court personnel, ensuring the translation of forms and instructional materials. This office could also be charged with overseeing the training initiative recommended in 3-2.1.18. and with implementing efforts to increase diversity in the workplace recommended in 3-2.1.20.

Recommendation 3-2.1.18. The Supreme Court of Virginia should develop a comprehensive diversity training program for all court personnel.

Rationale

By increasing diversity training, court personnel will have a better understanding of all court users (including elderly persons, persons from diverse cultures, persons representing diverse religious or ethnic backgrounds, persons with disabilities, or persons for whom English is not their first language), resulting in a more inclusive and welcoming environment for everyone. The subcommittee anticipates this program will be collaborative and involve affected constituencies in its organization and delivery.

Recommendation 3-2.1.19. Virginia should offer court forms and instructional materials in languages other than English.

Rationale

Adopting this proposal would encourage linguistically diverse individuals to feel comfortable addressing their concerns in Virginia courts. In conjunction with Recommendations 3-2.1.24, 25, 26, 29, 30, and 35, information at kiosks, self-help centers, and on the Virginia Judiciary website should be provided in those languages for which there is a demonstrated demand. (For a model, see the Maryland Judiciary website, at www.peoples-law.info.) If court forms are standardized, the form submitted may be in any language, provided that the answers are in English.

Recommendation 3-2.1.20. The Supreme Court of Virginia should affirm its commitment to diversity and institute policies that will promote recruitment and retention of a diverse workforce in the judicial system.

Rationale

A diverse courthouse staff brings a multitude of perspectives, which will assist in providing better assistance to an increasingly diverse population. The subcommittee anticipates that the Multicultural Liaison Office will adopt policies to ensure that those persons responsible for hiring court personnel keep in mind the importance of a diverse workforce, especially in positions which involve direct interaction with the public.

Recommendation 3-2.1.21. The Supreme Court of Virginia should consider the advisability of salary supplements for court personnel who offer skills, such as fluency in a foreign language or ASL, above and beyond their normal responsibilities.

Rationale

Increased compensation may provide an effective incentive for court personnel to do more than is required by their job description. Developing an incentive program may encourage people with diverse backgrounds and valuable skills to seek employment in the court system.

Recommendation 3-2.1.22. The Supreme Court of Virginia should increase efforts to recruit, train, and certify foreign language interpreters for criminal and civil cases.

Rationale

Every state has wrestled with the need to have adequately trained court interpreters. To better meet the needs of the courts, the courts need to adopt (or partner with others to provide) a standardized training program in frequently used languages other than English. This training program should focus on "simultaneous translation" services. At a minimum, interpreters should be given a set of instructions such as the ones listed in the "California Standards for Using Court Interpreters" (which, for example, include instructions that communications between counsel and client should not be interpreted to the Court). *See Protecting the Rights of Linguistic Minorities*, 30 New Eng. L. Rev. 227, 349 (1996).

Recommendation 3-2.1.23. The Supreme Court of Virginia should expand the availability of ADR services to non-English speaking users of the court system and offer incentives to recruit, train and mentor bilingual and culturally diverse professionals in order that they may seek certification as court-referred mediators. The Supreme Court of Virginia should also require diversity training for all certified mediators, provide access to translators in the mediation process, and develop materials that explain dispute resolution options such as mediation in languages other than English.

Rationale

Environmental trends suggest that Virginia will continue to experience growth in the immigrant population over the next several years. Newcomers to this country may not be aware of the alternative dispute resolution options that the court system offers. Mediation is a less formal, user-friendly process that is well-suited to cases where parties are self-represented. In order to provide non-English speaking litigants meaningful access to mediation, efforts should be made to develop informational materials regarding the mediation process and its benefits in Spanish and other languages. The availability of interpreter services during mediation as well as a cadre of bilingual mediators will assist non-English speaking litigants in participating in the mediation process. In addition, the certified mediator community should reflect the diversity of the population it serves and be required to take training in multi-cultural sensitivity and diversity issues.

4. Making the System More Accessible and Understandable for Self-Represented Litigants

Recommendation 3-2.1.24. The Supreme Court of Virginia should develop a plain-language brochure that outlines for self-represented litigants, in a step-by-step "how-to" format, the various general procedures that they must follow in order to prepare for, and present, their case properly and thoroughly. This brochure should be available at clerks' offices, law libraries and other public libraries, and on the Virginia Judiciary Website.

Rationale

Self-represented litigants often have their cases dismissed due to lack of preparation and/or failure to properly follow certain procedural requirements. Educating self-represented litigants about the basic requirements for case preparation and presentation should significantly reduce the number of cases that are dismissed for these reasons.

Recommendation 3-2.1.25. The Supreme Court of Virginia should develop plain-language checklists for particular types of cases to enable self-represented litigants to review and understand, in advance of going to court, the specific information they will be required to present during the course of their legal proceeding. These checklists should be available at clerks' offices, public law libraries and other public libraries, and on the Virginia Judiciary Website.

Rationale

In addition to the generic plain language brochure recommended in Recommendation 3-2.1.24, it would be helpful for self-represented litigants to have a checklist that applies to their specific type of case. The more prepared a self-represented litigant is, the more successful he or she will be in presenting (or defending against) a prima facie case. Additionally, well-prepared litigants will take up less time and resources, thereby enabling the courts to move through their dockets more expeditiously.

Recommendation 3-2.1.26. The Supreme Court of Virginia should create video recordings of sample trials representing the types of cases, such as family law matters and minor criminal and traffic offenses, in which self-represented litigants are most often involved. These video recordings should be made available in public law libraries and other public libraries, and on the Virginia Judiciary website.

Rationale

Appearing in court is a daunting experience for almost all litigants, but is especially daunting for litigants who are self-represented and, therefore, must "go it alone." The anxiety precipitated by a court appearance will more than likely have a negative impact on the manner in which a self-represented litigant presents his case. Providing self-represented litigants the opportunity to see, firsthand, what to expect should decrease their anxiety and, conversely, enhance their ability to proceed in a succinct and procedurally-correct manner.

Recommendation 3-2.1.27. The Supreme Court of Virginia should adopt standard protocols for judges to use in cases involving self-represented litigants. Such protocols should be included in a benchbook, available to the bar and the general public, to which judges may make quick reference for appropriate guidance during the trial of these cases.

Rationale

Judges throughout the state undoubtedly have a divergence of opinions as to the level of assistance, if any, which can properly be given to self-represented litigants. The adoption of standard protocols should enhance statewide uniformity on this issue.

Recommendation 3-2.1.28. The Supreme Court of Virginia should develop a training program for judges and substitute judges to provide them guidance and direction on the effective handling and management of cases involving self-represented litigants. This training should be presented during the pre-bench orientation program for newly appointed judges, as part of the continuing educational curriculum at the voluntary and mandatory judicial conferences, and as an on-line tutorial.

Rationale

Judges would benefit from learning new ways to "assist" self-represented litigants without being perceived as being partial or creating an unlevel playing field.

Recommendation 3-2.1.29. The Supreme Court of Virginia should develop written guidelines on appellate procedures and deadlines that are understandable to self-represented litigants. These guidelines should be made available at clerks' offices, public law libraries and other public libraries, and on the Virginia Judiciary website.

Rationale

Because of the complexity involved with appellate practice, self-represented litigants will always be at a disadvantage in attempting to perfect and pursue their appeals. Virginia's judicial system should be designed to elevate form over substance to reduce the possibility that appeals are dismissed because of technical errors. Simplified brochures explaining Parts Five and Five A of the Rules of the Supreme Court of Virginia in layman's terms would help to meet this goal.

Recommendation 3-2.1.30. The Supreme Court of Virginia should develop written guidelines for conducting legal research to determine the precedents of the Supreme Court of Virginia and the Court of Appeals of Virginia that are reasonably understandable to self-represented litigants. These guidelines should be made available at public law libraries and other public libraries, and on the Virginia Judiciary website.

Rationale

In appellate practice success is most often determined by the litigant's ability to locate and analyze Supreme Court of Virginia and Court of Appeals of Virginia precedent. Self-represented litigants are at a severe disadvantage because they lack the basic skills required to conduct legal research. A brochure advising self-represented litigants how to locate applicable case law through traditional or on-line research would help to level the playing field in appellate practice.

Recommendation 3-2.1.31. The Supreme Court of Virginia should enlist law schools and *pro bono* service providers to develop an appellate brief bank which would be available to self-represented litigants at public law libraries and other public libraries, and on the Virginia Judiciary website.

Rationale

Self-represented litigants would benefit from having access to a brief bank with a simple index to help them locate legal arguments and case analysis on topics that are similar to those confronting them in their own cases. Self-represented litigants will particularly benefit from access to briefs that cover routine matters of well-settled law.

Recommendation 3-2.1.32. The Supreme Court of Virginia should develop an effective admonition to inform self-represented litigants that they are more likely to succeed in the appellate process if represented by counsel.

Rationale

Many self-represented litigants attempt to handle their own appeals without appreciating the complexity of the appellate process. Without unduly discouraging litigants from pursuing their appeals, an effective admonition should be developed to advise litigants of the benefits of engaging legal counsel to handle their appeals. This information should be delivered to the public in the Circuit Court Clerks' offices, in the Clerks' offices in the Supreme Court of Virginia and the Court of Appeals of Virginia, and on the Virginia Judiciary website.

Recommendation 3-2.1.33. The Supreme Court of Virginia and Court of Appeals of Virginia should amend the rules of appellate procedure to allow the opportunity to show good cause for missing a deadline.

Rationale

The thirty-day requirement for filing a notice of appeal must be mandatory and therefore jurisdictional to allow for finality of the legal process. Once the appeal has been properly perfected, however, the need for mandatory filing deadlines is less compelling and results in some otherwise meritorious appeals being dismissed without exploration of potential good reasons for the missed deadline. Accordingly, the Supreme Court of Virginia and the Court of Appeals of Virginia should each adopt a rule that makes all filing deadlines in the appellate process after the appeal has been properly perfected discretionary upon a showing of good cause by the party who has missed the filing deadline. Rules 5:33 and 5A:26 already provide discretion to the courts of appeal, upon good cause shown, to accept briefs that do not conform with the required brief format. A similar rule in Part Five and Part Five A for briefing deadlines should be adopted.

5. Improving the Quality of Information Provided to the Public About Legal Rights, Court Procedures, and Alternatives to Litigation

Recommendation 3-2.8.34. The Supreme Court of Virginia should establish an Office of Public Education to deliver sound and clear information to the public about legal rights, the courts' procedures, and alternatives to litigation. This Office should provide information to multiple audiences in multiple formats, through multiple information delivery systems.

Rationale

Many of the recommendations of this subcommittee reflect a significant change and increase in judicial responsibility, assigning the courts a key role in the delivery of information to the public. A centralized Office of Public Education will be essential for the effective delivery of sound and understandable information. This office will have responsibility to plan, coordinate, implement, and monitor a comprehensive program of information delivery.

The subcommittee anticipates that the program will be bold, collaborative, multi-pronged, and flexible, and will employ multiple delivery mechanisms to maximize the success of public information efforts. Some of those mechanisms are suggested in Recommendation 3-2.1.36.

The program should be designed to facilitate understanding in the face of various barriers to communication, such as unfamiliarity with the English language, low-literacy levels, inadequate access to or familiarity with certain technologies, disability, and other factors such as attention span.

As planning and implementation of this program progresses, the subcommittee recommends that the Office of Public Education seek advice from and form partnerships with public and private entities (including bar associations, non-profit organizations and for-profit communications providers) to increase efficiencies and acquire use of the latest ideas in communication delivery.[5]

Recommendation 3-2.1.35. The Office of Public Education should explore, and implement as appropriate, "self-help centers" and facilitators' offices at courthouses, information "kiosks" in public buildings (including courthouses), and interactive tutorials on the Virginia Judiciary website.

Rationale

There are now many models around the country of programs and projects designed to assist court users. These programs may focus on self-represented litigants or have a broader audience. Some, like Illinois Legal Aid Online, involve electronic communications with interactive features that permit litigants to select and fill out appropriate forms. *See* http://www.illinoislegalaid.org/. Others, like the new "help desk" program at the U.S. District Court for the Northern District of Illinois, rely on human beings who are present in the courthouse. *See Navigating the Maze: U.S. Court Opens Do-It-Yourself Help Desk*, Wash. Post, Feb. 1, 2006 at A21).

These programs typically cover one or more of the following topics: domestic relations, name changes, expungement of criminal records, reestablishing voting rights after a felony conviction, landlord-tenant issues, contracts (including consumer contracts), basic employment rights, immigration issues, court processes (including filing, jurisdiction and court costs), general courtroom procedures, and how to file and pursue an appeal. There is no one right way to deliver this type of information, but the Office of Public Education can prioritize its options and work toward their implementation.

Recommendation 3-2.1.36. All information generated by the Office of Public Education should include information about Alternative Dispute Resolution.

Rationale

Litigants should be made aware at the earliest possible opportunity about dispute resolution options available to them. Wherever and however information is delivered, it should include information about court-connected ADR as well as private and community-based services. This might include "pop-up" screens on tutorials on the Virginia Judiciary website, in brochures and

[5] There are many good resources that should be considered in the planning phase of this project, including: The Supreme Court of Virginia Pro Se Litigation Planning Committee's September 2002 Report, "Self-Represented Litigants in the Virginia Court System/ Enhancing Access to Justice" and The 2005 Report of the Public Access to Legal Information Committee of the Law Librarians Association of Wisconsin, www.aallnet.org/chapter/llaw/paliguide/PALIFullReport2005.pdf. There are also some excellent models to be considered, including: The Maryland People's Law Library, www.peoples-law.info/Home/PublicWeb The Chicago-Kent Law School web-based program providing information to pro se litigant in Illinois, www.kentlaw.edu/cajt/shwc.html.

checklists about the litigation process (see Recommendations 3-2.1.24, 25, 29 and 30), and at public law libraries and other public libraries.

Recommendation 3-2.1.37. The Supreme Court of Virginia, through its Office of Public Education, should collaborate with Virginia's public law libraries to improve the delivery of information to the public.

Rationale

Public law libraries currently serve the courts, the bar, and, increasingly, members of the general public. They are, therefore, a logical provider of reference material and information. Other states, such as Wisconsin and Maryland, provide examples of ways in which public law libraries can make a significant contribution to the delivery of accurate and useful information. Virginia's public law librarians – many of whom have also been trained as lawyers – can and should be enlisted as partners in the Court's information program.

Recommendation 3-2.1.38. The Supreme Court of Virginia, in conjunction with the Virginia Association of Public Law Libraries, should seek to increase, and improve the allocation of, funding for public law libraries statewide in order to increase the resources available to the public.

Rationale

While public law libraries are now providing information to many members of the public, the public law library system in Virginia is very uneven in terms of funding, collections, computer access, hours of operation, and staffing by law librarians. Many jurisdictions do not have public law libraries and rely on public libraries to provide these services. The Court should study ways in which the resources of law libraries and public libraries providing legal materials can be improved. Strategies may include centralizing some or all of the funding required to support these services, determining "essential resources" for law libraries and public libraries, and addressing the concerns of librarians concerning the Unauthorized Practice of Law (UPL) (See Recommendation 3-2.1.42).

Recommendation 3-2.1.39. The Virginia State Bar should provide access to its online legal research service free of charge to the public law libraries in Virginia.

Rationale

Many individuals now seek information and assistance at public law libraries. Typical inquiries involve name changes, expungement of criminal records, divorce and custody questions, and how to appeal decisions from administrative agencies and courts. In addition to the brochures, checklists and tutorials recommended elsewhere (Recommendations 3-2.1.24, 25, 26, 29 and 30), it would be useful for these library users also to have free access to an online research service.

Recommendation 3-2.1.40. The Supreme Court of Virginia should work with the bar associations to explore the feasibility and viability of a hotline staffed by a licensed attorney who can provide basic information to persons contemplating filing a suit, persons who have been served in a suit, or others seeking general information about the mechanisms of dispute resolution.

Rationale

Regardless of how inventive and useful any technology-based information delivery system can be, many Virginians will desire (and need) information directly from a human being. This may include law librarians or newly-created information delivery specialists (See Recommendation 3-2.1.41). Some individuals – particularly those who are housebound – may prefer to gather their information via the telephone.

Recommendation 3-2.1.41. The Supreme Court of Virginia should consider creating the position of Information Delivery Specialist to serve in the courts and public law libraries.

Rationale

A number of the recommendations of this subcommittee involve the expanded delivery of information to the public. (See Recommendations 3-2.1.24, 25, 26, 29, 30, 34, 35, 38). Additional personnel will be required to organize the new information delivery program, develop the materials, and execute the delivery of the information. Development of a profession of information delivery specialists will enhance recruitment and retention of competent individuals to devote their careers to such an endeavor.

This proposal may also result in the creation of a category of trained educational personnel, distinct from employees of the court clerks' offices, whose sole function is to provide information to court users. Such personnel could be placed in key locations pursuant to a statewide plan.

Training, through community colleges or other institutions, could include training to serve the special needs of many court users such as the senior or disabled members of the public; those for whom English is a second language; those with low literacy; and new citizens or residents of the United States with differing cultural backgrounds. Generating a cadre of professional educators who specialize in providing information to the public about legal rights, court procedures, and alternatives to litigation could serve several valuable judicial and societal needs.

Recommendation 3-2.1.42. The Supreme Court of Virginia should consider changes to the rules governing the Unauthorized Practice of Law (UPL) to facilitate delivery of information (not legal advice) to court users. Professional law librarians and Information Delivery Specialists should be trained and authorized to provide assistance in selecting and filling out forms, identifying which brochures and checklists (see Recommendations 3-2.1.24, 25, 29 and 30) are appropriate, and what kinds of

information must be gathered before initiating litigation, without violating the newly crafted UPL rules.

Rationale

The Supreme Court of Virginia Pro Se Litigation Planning Committee (2002) recognized that Clerk's office personnel and other court staff are often reluctant to provide useful information because of their concerns about UPL liability. Law librarians, too, are very alert to concerns about UPL, and conform their assistance carefully to what they believe is permitted. The Pro Se Litigation Planning Committee recommended the development of detailed guidelines for court personnel on proper assistance to self-represented litigants. It also recommended clarification of the UPL rules applicable to law librarians.

This subcommittee endorses the recommendations of the Pro Se Litigation Planning Committee.

6. Planning for Post-Disaster Delivery of Legal Services

Recommendation 3-2.5.43. The Virginia State Bar, in conjunction with federal and state disaster preparedness agencies, should create a volunteer corps of attorneys trained to provide fundamental legal services to Virginians in need during large-scale emergency situations. The General Assembly of Virginia should enact legislation to protect such volunteer attorneys from claims of malpractice.

Rationale

This recommendation is designed to support existing disaster plans, including the National Response Plan and the directives of the Virginia Office of Commonwelath Preparedness. Virginia already has in place the Virginia State Defense Force under Va. Code § 44-54.4, *et seq*. That organization, or another newly created organization, could be utilized to recruit, train and deploy a corps of volunteer attorneys to provide legal services in the event of a massive disaster on the scale of Hurricane Katrina or 9/11. Volunteer attorneys and substitute judges could also be called in the event of a public health emergency.

Commission on Virginia Courts in the 21st Century:
To Benefit All, To Exclude None

Task Force on the Public and the Courts
Professor Jayne W. Barnard, Chair
Judge Cleo E. Powell, Vice Chair

Subcommittee 3-3, Education, Communications and Building Respect for the Law
Judge Margaret P. Spencer, Chair

Recommendations for Consideration by the Commission

June 1, 2006

This subcommittee addressed the following topics:

(1) Providing onsite information to court users and members of the public;

(2) Engaging members of the public, including legislators, in a deeper understanding of the courts, judicial independence, and the procedures by which disputes are resolved;

(3) Utilizing the Virginia Judiciary website to promote public understanding of Virginia's courts;

(4) Interacting with media (broadcast, cable, and "new media") to promote understanding of Virginia's courts; and

(5) Preparing middle- and high school teachers to discuss issues related to the courts, judicial independence, and the procedures by which disputes are resolved.

1. Providing Onsite Information to Court Users and Members of the Public

Current situation

To our knowledge, there are no interactive kiosks or public electronic information centers in state courthouses. There may be electronic directories of daily dockets in some courthouses; however, they are not updated with case dispositions. Court users generally obtain public information about courts and cases from posted paper dockets and employees in the clerks' offices. Some courts already use interactive technology with the I-CAN! project, which is currently limited to domestic violence cases. (The I-CAN! Project is an online self-help program for persons seeking assistance with protective orders.)

Trends

Persons born between 1979 and 1994 – collectively referred to as "Generation Y" – grew up with technology and are more accustomed to obtaining information electronically than from traditional sources. With the hope of fostering a life-long commitment to volunteerism and community involvement, the high school and college experiences of Generation Y students typically include a community service component.

The emphasis on work/life balance is likely to continue. Employees, including courthouse employees, will expect flexible employment arrangements and employers should provide those arrangements to keep and retain valuable employees. Technology will be used to free employees from repetitive tasks (including the dispensing of information), permitting a more efficient use of personnel.

The electronic conduct of business and government will continue to accelerate. The expectation that all successful organizations have a sophisticated electronic component will intensify. Courts must meet that public expectation not only with respect to the "business" of the court, but also with respect to dockets and case status.

As electronic access to the courts increases, public transactions physically occurring at the courthouse will decrease. Nevertheless, there will always be issues which can only be resolved in a courthouse proceeding as well as a segment of society whose only point of contact with the courts will be at the courthouse itself.

Recommendation 3-3.7,8.1. All courthouses should have interactive kiosks and electronic information centers available to the public (including non-English speakers) with information on judicial procedures and court cases, e.g., directions to courtrooms, daily dockets, daily case dispositions, information for self-represented litigants, access to magistrates, and "help desk" materials.

Rationale

Court facilities must change to meet improvements in technology and demands from court users. The public has rising expectations for customer service. Courts need to present a customer-focused image and be more responsive in improving accessibility and providing information. Courts could also use these kiosks to obtain instant feedback from customers about their experiences, and to identify problems and successes.

Kiosks should be located in a convenient and comfortable central area, providing all users (including non-English speakers) with computerized access to information unique to that courthouse (e.g., directions), general information on court procedures, specific information available to the public on the status of specific cases as well as educational information on the American legal system. Vision 7 recognizes the role technology can play in enhancing the public's use of its courthouses. Providing information to court users in the language most familiar to them makes their experience with the court most meaningful. Providing opportunities to learn more about the unique role courts play in American society is valuable for both first time

and repeat court users. Virginia courts should seize every opportunity to educate court users not only about court administrative procedures but also about the rule of law underpinning American jurisprudence.

2. Engaging Members of the Public, Including Legislators, in a Deeper Understanding of the Courts, Judicial Independence, and the Procedures by Which Disputes are Resolved

Current situation

There are currently no judicial education programs for the general public (non-lawyers or persons with no involvement in the legal system) sponsored solely by the courts. There are public judicial education programs sponsored by bar associations, law schools, and other private and public entities. For example, the Hampton Commonwealth's Attorney sponsors a Citizens Court Academy and the Virginia State Bar's Senior Lawyers Conference sponsors a Senior Citizens Law Day program. Judges frequently speak to public groups, and participate in programs sponsored by other agencies. They also visit schools, and middle and high school students visit courtrooms. However, visitation has decreased during the last few years.

Trends

Fewer legislators are attorneys. With fewer lawyers in the General Assembly, there are fewer legislators with hands-on knowledge of the appropriate role of the judiciary and court processes, which could negatively impact the state of the law.

The increase in unrealistic law-related television shows and movies provides a distorted view of Virginia's justice system. As a result of limited personal experience with the judicial system, many citizens develop impressions and expectations about how the system works from the vast array of "legal" programming. Whether the show is reality based (such as Court's TV's showing of real trials) or fictional, the information communicated by those shows is often at odds with the reality of the Virginia courts.

There will be an increase in racial, ethnic and cultural diversity and an increase in active citizens over age 65. As our population base changes, the courts need to respond to the increasing number of non-English speaking and elderly participants in the system. The courts need to educate all citizens, especially those from countries or cultures where the courts are perceived to be – or are in fact – unfair to those who come before them. Also, as the Baby Boomers continue to age, they have time to devote to lifelong learning, and are a willing audience for continuing education of this type.

The public's expectation of accountability from all branches of government, including the courts, continues to rise. Most members of the public develop their impressions of the courts from either their limited personal experience (in which one side of the case wins and the other loses) or through the media in its various forms. As the public increasingly questions the fallibility of its institutions, a neutral and factual forum should be available to the public to develop a better

working relationship with the public and to improve the perception of equality, fairness and integrity in the justice system.

Recommendation 3-3.8.2. The courts should sponsor, with other judicial system agencies, public judicial education forums and seminars in every circuit.

Rationale

Courts, with members of the bar and other court agencies, have a responsibility to educate the public about the legal system. Courts must find a way to ensure that the unique role of judges as impartial decision makers is not compromised by the political agenda of either the legislative or executive branches, or by interest groups. To minimize controversy and adverse effects from sensitive decisions, state courts must educate the public and other branches of government.

Courts should provide more information to the public by community outreach, and offer standardized judicial education to everyone, including officials in the legislative and executive branches of government. The Supreme Court of Virginia could also organize a biennial education program, a sort of judicial "ride-along," and invite all elected and appointed public officials, and community leaders. The Court could invite these officials to visit the courthouses and sit in on court proceedings. (This is currently done regularly in Maryland.) Judges from all levels of the court system should participate, to foster greater understanding of the court's role, challenges, and accomplishments. The program will also strengthen cooperation between the legislative, executive and judicial branches of state government.

The Supreme Court should also encourage local Citizens Court Academies, a series of local presentations involving the bar, the bench, and the agencies supporting the courts to educate the public about the legal system. The Supreme Court should develop a standardized format for the judicial education program, which then would be presented in each circuit by the local bench and bar, to explain the functions of the different local courts and discuss the roles of various agencies (i.e., Juvenile Court Services, magistrates, Alcohol Safety Action Program (ASAP), local community corrections, state probation and parole) in providing resources and assistance to the judicial system. Aspects of the program could be presented in schools, civic clubs, senior citizen's centers, nursing homes, etc. to educate everyone about the judicial system. Citizens and legislators should be invited to observe court proceedings, in the biennial "ride-along," after attending the educational sessions.

Often, a negative opinion of the court system comes not from individuals' own experiences, but from a lack of understanding of the functions of the court. The public has been led to believe the courts are like "Judge Judy" or "Judge Joe Brown." It is incumbent upon the legal community to take the message to the people that the courts are not political nor are they biased. The court system settles disputes in a fair and equitable manner, using settled law and distinct rules of evidence. Since these concepts are not thoroughly explored in schools, the public will have no access to the facts about the court system unless the court system undertakes to present them.

3. Utilizing the Virginia Judiciary Website to Promote Public Understanding of Virginia's Courts

Current situation

Virginia's judicial system maintains a web presence with a Virginia Judiciary Website and several lower court web sites.

Trends

See "Trends which may influence the topic" under Topic 1 above.

More individuals will routinely use the Internet, and the expectation of convenient 24-hour access to court information and services will increase. The Internet, bloggers, 24-hour cable news channels, and other new media outlets will provide coverage of notorious trials, in addition to information about the judicial systems in other states. The merger between news and entertainment will confuse the public about the reality of actual court proceedings.

More court functions will no longer demand an in-person presence, and web-based document preparation tools and electronic filing will be commonplace. There will also be more self-represented litigants.

Recommendation 3-3.7,8.3 The Virginia Judiciary Website should be multi-lingual and more user–friendly, with (1) understandable information for the general public and court users, including jurors and witnesses; (2) distance learning classes and "low-literacy tutorials" for the public; (3) interactive video games; and (4) short videos of common court proceedings.

Rationale

The Virginia Judiciary Website site must be enhanced for the benefit of the judiciary, court users and the public. The 2005 telephone survey of Virginia residents, conducted by the Supreme Court of Virginia, showed that 78.9% of the citizens know little or nothing at all about their courts. Approximately 37% of the citizens who responded said they would prefer to learn about Virginia's courts through the Internet. But a stronger Internet presence is just the beginning. To be accessible, Virginia's justice system must be convenient, understandable, and timely to everyone. To be responsible, it must anticipate and respond to the needs of all members of society, including the elderly, non-English speaking persons, disabled persons, and uneducated persons. To be accountable, it must use public resources efficiently, and in a way that the public can understand.

An enhanced web presence will assist in accomplishing these goals, by making accurate, helpful and understandable information immediately available, at no cost, to court users and members of the general public.

4. Interacting With Media (Broadcast, Cable, and "New Media") to Promote Understanding of Virginia's Courts

Current situation

Across the Commonwealth there are cable television franchises that provide government access channels. The programming on these channels tends to be limited to public meetings of local governmental bodies. In addition, there are public television and radio stations that provide coverage of all branches of state government, but coverage of the judiciary is limited to discussions of selected trials and appellate decisions. The media provide coverage of "newsworthy" stories and access that is required by law or franchise agreement. There is currently no collaboration between the courts and the media to educate the public about the courts.

Trends

Virginia is growing, but much of that growth is from people who have completed their education and will not be exposed to Virginia's schools. Many of these people are first generation Virginians. These new Virginians should learn how Virginia's judicial system differs from their home state's system. For first generation Virginians who are also first generation Americans, learning about Virginia's courts may require learning everything about the system. Moreover, for some, it may require learning to trust government and to accept that the courts will dispense justice.

Recommendation 3-3.8.4. The Supreme Court should partner with media to produce informative and interactive programming about the legal system.

Rationale

In the 2005 telephone survey of Virginia residents conducted by the Supreme Court of Virginia, 91.2% believe that the courts treat people politely and respectfully; 86.2% believe that the courts protect people's constitutional rights; and 81.7% believe the courts make decisions based on the facts. These statistics reflect a citizenry that knows about the courts and has confidence in them.

The survey also found that 82% believe the courts should develop better ways to assist people who do not have a lawyer and 78.2% believe the courts should exercise more leadership in addressing societal problems, such as drug abuse, treatment of the mentally ill, and foster care. These statistics reflect a citizenry that believes courts should be proactive in providing education and creative in the application of restorative justice.

When asked about court procedures and decisions, only 67.7% believed that court rulings and decisions are understood by the people involved in cases and 63.3% believe the courts effectively inform the public about court procedures and services.

It appears that Virginia's citizens are asking for more transparent courts and for more information about what the courts do and how what they do concerns them. It has long been

accepted that an educated citizenry will be better able to participate in government and, with regard to the courts, be better able to bring appropriate disputes before the courts for resolution.

The Supreme Court of Virginia has access to, and indeed promulgates, a wealth of information on the courts of the Commonwealth. Other than the Court's Virginia Judiciary Website, the Court does not have routine opportunities to bring that information to the public. Conversely, public television and radio exist to present information to the public and have shown a strong interest in developing educational programming about the courts of the Commonwealth. In addition, cable television franchises have shown a similar interest with regard to programming for their governmental public access channels.

In a partnership between the Supreme Court of Virginia and the media, the Court would contribute expert information regarding all aspects of the court and be able to highlight programs of interest to the public, such as drug treatment courts and youth courts. The media would contribute technical expertise in translating that information into programming (television, radio, and print) that will appeal to citizens, and through their understanding of marketing, ensure that variations of the programming will reach citizens of all ages.

Among the programming which should be considered are how trials are conducted, possibly with contrasts to the "judge" shows; how juries are selected; how juries "work;" where the courts are applying restorative justice principles; the role of judges, on and off the bench; and town hall meetings with judges, clerks, and staff from the Office of the Executive Secretary.

5. Preparing Middle- and High School Teachers to Discuss Issues Related to the Courts, Judicial Independence, and the Procedures by Which Disputes are Resolved

Current situation

School teachers in the Commonwealth receive a comprehensive education with state-mandated curricular guidelines. Social studies teachers learn about government, but there is very little, if any, instruction in the operation of the courts. Instruction tends to be broad, with emphasis given to constitutional issues, such as the separation of powers, and the effect of specific court decisions. There is no organized, unified instruction regarding the details of the courts of the Commonwealth provided for teachers.

Trends

With the increase in Virginia's population, more teachers, including social studies teachers, will be needed. Beginning in middle school, the social studies teacher provides the foundation for instruction in state and local government, including the Virginia court system. The state certifies middle and high school teachers; however, there is no requirement that teachers have a detailed knowledge of Virginia's courts. Therefore, the ability of teachers to provide comprehensive instruction on the court system may be limited.

Recommendation 3-3.8.5. The Supreme Court should establish a program to educate middle and high school teachers about the organization of the Virginia courts, including courtroom visits, interactions with judges, judicial visits to classrooms, mock trials and jury deliberations, arbitration and mediation. The Court should also consider developing materials for training of elementary school teachers.

Rationale

The Commonwealth has comprehensive Standards of Learning. In middle and high school courses, instruction focuses on the American political process at the local, state, and national levels of government. High quality professional development related to the Virginia court system will enable teachers to enhance instruction. The more teachers know about the courts, the more fully they can develop their instructional approaches to help their students understand the court system.

Since people learn best through a variety of activities, the educational programs for teachers should be interactive. By visiting courts, they can observe the roles of all participants and develop a more complete understanding of how individual cases are decided. By participating in mock trials, they can understand the importance of rules and procedures. By participating in mock jury deliberations, they can better understand the importance of evidence. By interacting with judges, they will come to understand the role of judges, both in and out of court. By examining alternative dispute resolution, they will see how it may reduce conflict and how restorative justice may apply in the resolution of conflicts.

With a broader knowledge of the courts, good teachers will provide even better instruction to their students, ensuring that those students will understand the roles of the courts for all of Virginia as well as for them as individuals.

[Page intentionally left blank]

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on the Structure of the Judicial System
Judge Walter S. Felton, Jr., Chair
Judge R. Edwin Burnette, Jr., Vice Chair

Subcommittee 4-1 Structure of the Trial Court
Judge Pam Baskervill, Chair

Recommendations for Task Force Consideration

May 10, 2006

Recommendation 4-1.4.1. The trial courts should be a single tier with divisions. Consideration should be given to reconfiguring the jurisdictional boundaries of the trial courts to assure an efficient use of judicial resources.

Narrative of the current state of Trial Courts in Virginia

Virginia's trial courts are structured in a two-tier system of (1) courts of record with general jurisdiction (Circuit Courts) and (2) courts not of record with limited jurisdiction (General District Courts and Juvenile and Domestic Relations Courts). Concurrent jurisdiction over certain matters and *de novo* appeals from the district court to the Circuit Court can result in multiple proceedings of the same or related issues involving the same parties. Population density has changed in the thirty years since boundaries of the circuits and districts were last drawn, resulting in a wide variance of workload among judicial districts and within courts in the same jurisdiction. The current structure results in an inefficient use of judicial resources, inhibiting the mobilization and concentration of judicial resources where they are most needed. Multiplicity of courts is a prime cause of public confusion about the judicial branch and a frequent source of frustration for citizens, agencies and the bar when conducting business with the courts.

Trends which may influence Trial Courts

The overall caseload of Virginia courts is increasing despite the decrease in civil filings, which is in part due to the significant increase in the use of ADR in civil disputes. Demographic, environmental and technological changes will require the judicial system to be proactive, flexible and innovative. The public will continue to increase its expectation that the courts more promptly and adequately address docketed cases, adapt to meet the needs of cultural and language differences of its diverse user population, adopt procedures to enhance the utilization of ADR, and incorporate cutting edge case management and technological systems.

Rationale

Within the United States, the judiciary manifests independence in both decisional processes and institutional operations. With respect to the institutional aspect of independence, a key component is the ability of the judiciary to effectively manage its own operations and resources, independent of the executive or legislative branch. John Jay, the first chief justice of the Supreme Court of the United States, recognized the importance of accountability to the function of the judiciary when he quoted a celebrated writer saying "next to doing right, the great object in the administration of justice should be to give public satisfaction."[6]

The public's trust and confidence in the courts depend on the efficiency and effectiveness with which the courts *actually* administer justice and whether they are *perceived* to do so. Conditions that cause confusion over where to file cases or transact court business, delays in the resolution of disputes, and poor service by clerical staff erode the public's confidence in the fairness and accessibility of the courts. Conditions that appear to increase the expense of court operations without demonstrable benefit encourage public complaint and critical scrutiny by the other branches of government.

In most states, 70-90% of court system resources are devoted to personnel matters. In Virginia, in 2004, 88.5% of the court system's state-funded operating budget was personnel-related [2004 AR, p. A-14]. The entire judicial system, however, historically receives a very small percentage of overall government appropriations (1% in Virginia's 2004-2006 budget [AR, p. A-15]). Therefore, the performance of the court system and its ultimate accountability is largely dependent on people – on judges and clerks, working with a relatively small budget to process effectively millions of cases each year.

Salaries of trial court personnel, particularly deputy clerks, are extremely low, and the resources available for training clerks and judges are limited. The impending retirement of baby boomers threatens to reduce both the numbers and experience levels of the court system's workforce. Meanwhile, court caseloads continue to increase, particularly in criminal and domestic matters. It is imperative that the courts maximize the productivity of the limited resources available to them, employ technology to decrease workloads and streamline court procedures, provide improved training and technical assistance, and reduce bureaucratic obstacles to a user friendly system.

The ability to avoid duplicative efforts and allocate available resources – again, principally judges and clerical staff – where they are needed is a major component of effective management. The current two-tier structure of Virginia's trial courts inhibits the most effective and efficient use of resources due to concurrent jurisdiction, *de novo* appeals, and jurisdiction in different courts of a circuit over related matters. Inevitably cases and parties shuttle from one court to another. Delay in finality of court resolution systematically occurs, especially in family related matters. Clerks in all the courts are required to have the same expertise to perform duplicative functions. Pro se litigants as well as attorneys must frequently navigate the operations of two or more courts over the same or related issues. Confusion, delay and waste pervade the current two-tiered system.

[6] John Jay, Draft of Letter from Justices of the Supreme Court to George Washington, September 15, 1790.

Clearly, the adoption of a single-tier court system in the Commonwealth will minimize confusion, eliminate duplication and maximize the use of judicial resources as follows:

1. A one tier centrally managed system in each circuit will allow the mobilization and concentration of judicial resources where most needed within the circuit, depending on case loads, expertise and personnel availability.

2. A single-tier court can more easily adapt to growth in particular types of case or new types of litigation to accommodate the needs of the public and the bar.

3. The elimination of *de novo* appeals will reduce duplication and waste of resources and promote finality of resolution, especially in family disputes, where this is most critically needed.

4. The elimination of concurrent jurisdiction and jurisdiction in different courts over related matters will significantly reduce confusion by the public, the bar and public agencies as to how to use the court system

5. A single-tier system will promote the use of one integrated technological system that is user friendly. It will enable the employment in each circuit of one IT staff to manage the system for the court, train judges and clerks, implement new systems, promote use of available software, promote and implement use of electronic filing, video conferencing and generally insure swift response to technological changes and advancements in a unified manner within each circuit.

6. A single-tier court will enable the implementation in each circuit of one case management system, which will promote uniformity and will allow the tracking and coordinated docketing of all cases involving one family, one entity or one litigant, as deemed appropriate. All clerks will be utilizing one consistent system for all types of cases, allowing for more efficient docketing.

7. A single-tier system allows for uniform court policies, forms, procedures and rules of court to be adopted and effectively communicated to affected constituencies.

8. A single-tier system would enable greater efficiency in training/educating the judiciary and court personnel in dealing with emerging cultural, language and aging issues of the population before the courts, as well as in the use of technology, procedural systems, case management improvements, as well as substantive law changes.

9. A more streamlined system with central management would promote the public's confidence and respect for the court system and provide effective justice with fewer resources.

10. In the long run fewer judges and clerks will be needed to run a single-tier judicial system.

11. A single-tier system permits the presentation of a consistent, organized, well run and user friendly system to the public, the bar, local and state government and all constituency groups of the courts.

Recommendation 4-1.5.2. The procedural law of the Commonwealth should be modernized and simplified.

(a) Rules of Evidence should be adopted for civil and criminal proceedings.

(b) Infractions and small claims matters should be handled through administrative proceedings.

(c) The practice of obtaining a grand jury indictment after a finding of probable cause at a preliminary hearing should be discontinued.

(d) The rules of discovery should be reformed to permit meaningful defense preparation and to promote the fair and expeditious resolution of criminal cases.

Narrative of the current state of procedural law in Virginia

The law of evidence is now set forth in over one thousand published decisions from the Supreme Court and Court of Appeals and scattered sections of the Code of Virginia. The advisory committee on rules of court to the Judicial Council of Virginia is currently in the process of publishing for comment proposed rules based on a publication by the evidence committee of the Boyd-Graves Conference "A Guide to Evidence in Virginia."

Infractions and small claims matters are currently handled initially in courts not of record. Some jurisdictions have separate dockets for small claims as provided in Code Section 16.1-122.1 *et seq*.

The current system requiring a grand jury indictment after the certification in a preliminary hearing is an administrative undertaking lacking any substantive benefit. The virtually useless step results in substantial delay and a waste of resources, particularly the manpower hours of police officers who merely recite an abbreviated summary of the evidence presented at preliminary hearing to the grand jury.

Virginia currently has the most restrictive criminal discovery rules in the nation. No state allows prosecutors to provide less discovery than is required in Virginia. Criminal defendants are not entitled to the names and addresses of witnesses or to copies of police investigative reports. Often, the identity of trial witnesses is not known until the day of trial. This practice of "trial by ambush" often leads to trial disruptions and delays which burden judicial resources, victims and witnesses.

Trends which may influence procedural law

The mobility of the population and the expanded geographical scope of attorney practice coincide with the increasing expectation of the citizens for consistency in application of the law and access to the system.

Rationale

Fair procedures are essential to improving access to the courts and assuring a just resolution of every case. Procedural rules must be readily available, easily understood and reasonably designed to accommodate both the parties and the court administration. Simplified procedures can reduce costs while improving access.

(a) There remains a great need for rules of evidence, both for civil cases and criminal prosecutions, to promote efficiency and predictability. The use of standardized motions and forms, available on the internet, should also be encouraged. For certain proceedings in which the parties frequently proceed *pro se*, the provisions of Va. Code § 16.1-122.5 concerning the suspension of formal rules of evidence during informal hearings should continue to apply.

(b) Uncontested traffic infractions, in which an individual elects to pay a fine, could be processed by the Department of Motor Vehicles. Uncontested violations of other state or local laws or ordinances could be processed by state or local officials of the appropriate agency, such as the Marine Resources Commission. For greatest efficiency, the state should consider creating a centralized infractions bureau such as has been successful in Connecticut for over 15 years.

Two alternatives are suggested for the handling of contested matters. Matters might be heard initially by hearing officers or administrative law judges within the appropriate state or local agency, such as the DMV for traffic infractions. Alternatively, such matters might be heard by a hearing officer within the courts, such as a magistrate. Both alternatives might be appropriate depending upon the subject matter in question (e.g., civil matters such as support or small claims might remain in the courts while legal offenses would not). Implementation of this recommendation would allow judges to concentrate on cases that demand their decision-making expertise and might also reduce some of the burden of financial transactions that the courts currently handle but that are arguably more appropriate to the executive branch.

Appeals from decisions by administrative agencies in traffic and other cases as recommended above should be taken to the trial courts under the Administrative Process Act. The administrative decision would be final unless it were not supported by substantial evidence or were otherwise not in accordance with law.

Caution: Virginia should learn from and avoid problems encountered by other states that have restructured their trial courts with an eye to the appropriate coverage for the case types that are relatively high-volume and routine and also for cases that are viewed as especially taxing emotionally. Where such matters continue to be handled by the courts, national research on court performance and structure has revealed efforts to avoid the marginalization of those cases – or the appearance of such marginalization – by promoting the fiction that judges are

interchangeable and should be eligible for assignment to any and all case dockets. What frequently occurs is opposition by some judges to assignments involving dockets they view as undesirable or for which they feel unqualified. Invariably, even in states whose policy resists the employment of quasi-judicial officers, the courts find ways to employ specialist judicial officers to hear these cases. This development then leads to concerns about the qualifications of these individuals and their role in the larger administration of the courts.[7] This recommendation would allow Virginia to avoid any problems associated with the pretense of judicial fungibility; however, if the state commits to an expanded use of hearing officers within the courts for handling specialized dockets, then significant attention should be given to their qualifications for recruitment and to the meaningful inclusion of these individuals in decisions regarding court policy and management.

(c) On the criminal side, procedural efficiency could be increased without compromising defendants' rights by providing several mechanisms for initiating felony proceedings. The Commission recommends that future felony prosecutions commence with an indictment or a probable cause hearing in the district division, following an arrest on a warrant or following the filing of an information by the Commonwealth's Attorney to a judicial officer.

(d) The gathering of evidence in criminal case is normally done by law enforcement. Defense access to information about the prosecution's evidence against an accused is essential to making sure that an innocent person is not convicted and that justice is done. Discovery of this information is critical for defense counsel to assess the strength of the prosecution's case and to adequately prepare for trial. The rules of discovery should provide defendants with sufficient information to make informed plea decisions and to permit meaningful preparation for trial.

Recommendation 4-1.5.3. The operation of the court system should be fully funded by the state. These funds may be supplemented by localities.

Narrative of the current state of court funding in Virginia

The state funds the total costs of all district court and magistrate systems except equipment and facilities. It also funds the salaries for Circuit Court judges and provides $1500.00 annual allowances to the Circuit Court judges. Administrative support staff for Circuit Court judges is funded by the localities. The Compensation Board allocates funding and approves budgets of the constitutional officers including the Clerk of the Circuit Court. The locality supplements the funding provided by the Compensation Board for such budget needs as employee benefits, part-time employee wages, equipment and facilities.

Trends which may influence court funding

As people move from one part of the state to another, they have an increasing expectation that all Virginia courts will have consistency in application of the law and will provide equal access to the system. With localities funding the courts, those with growing populations and thriving economies are likely to fund their courts fully. Those localities with shrinking populations and

[7] David B. Rottman and William E. Hewitt, *Trial Court Structure and Performance: A Contemporary Reappraisal* (Williamsburg, VA: National Center for State Courts, 1996), pp. 6-7.

less vibrant economies may struggle to provide the bare necessities of their courts and will certainly not provide the range of court services of the more wealthy localities.

Rationale

State funding of the court system would provide uniformity throughout the state and set minimal standards of quality in services and technology. In addition, state funding would minimize attempts by the locality to exert political pressure through control of the purse strings. The removal of direct funding by the locality should also limit any perceived conflicts of interest when circuit judges hear cases in which localities are a party.

Recommendation 4-1.5.4. Where needed, a trial court administrator should serve to assist the judges of a single-tier trial court by effectively managing the judges' caseloads and staff.

Narrative of the current state of trial court administration in Virginia

The Clerk of the Circuit Court is a constitutional officer. The Code of Virginia lists over 800 separate responsibilities for the Clerk, including recorder of deeds, probate judge, issuer of marriage licenses, and manager of the Circuit Court. In the day-to-day operations of a Clerk's office, staff are not necessarily divided into court and non-court workers. Instead, individuals may work on court responsibilities for one day or part of a day and on other responsibilities of the office another day or part of a day. The staff of the Clerk are neither state nor local employees; rather, they are appointees of a locally elected constitutional officer and serve at the will and pleasure of that officer, concurrent with his or her term of office. The numbers of positions and compensation levels of Clerks' offices are determined by the state's Compensation Board based on staffing standards and salary scales used by the Board. The funding responsibility for Clerks and their staffs is divided between the state and the localities in which individuals serve.

Trends which may influence trial court administration

Demographic and technological changes are coinciding with the public's expectation that the courts will maximize their resources for administration of the system for the public benefit.

Rationale

In a single-tier trial court system, where needed, a court administrator should be hired by the judiciary to implement modern management methods to assist the courts with the ultimate goal of better serving the judges and the public as a complement to the existing position of Clerk of the Circuit Court.

It is expected that this office would be staffed by a judicially hired professional administrator with an undergraduate or graduate degree in some area of business management and, ideally, experience in the court system.

A trial court administrator would work directly for the courts and answer primarily to the judges. He or she would focus primarily on improving the court's efficiency through increased efficiency in the administration of the single-tier court trial court docket. It is anticipated that the administrator would assist the Chief Judge in assigning judges, managing and training judges' staff, allocating staff, developing and implementing efficient case management systems with expanding caseloads, and serving as an effective liaison between the judges and the clerks.

These recommendations would have the advantage of strengthening the management of the judges' dockets which studies have indicated should improve the setting of dates certain and reduce case processing delays. Furthermore, inconvenience for litigants, witnesses, and others who often face considerable waiting times in court should be reduced with better docketing.

These recommendations highlight the administrative responsibility of the judges, particularly the chief judge, for court operations, the most fundamental of which is case management. Although this reality may not be to the liking of all judges and many may not have developed managerial knowledge or skills, a generation of research has established that a basic tenet of sound caseflow management is that the court, and not the other case participants, should control the progress of cases.[8] To be certain, it is the non-judicial staff who handle most of the day-to-day responsibilities of case management, and how those individuals are organized and supervised is critical to effective operations. Nevertheless, it is the judge who must establish the expectations that will govern the actions of court staff, the bar, litigants, etc. and see that they are ultimately met.

[8] David C. Steelman, John A. Goerdt, and James E. McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, VA: National Center for State Courts, 2000), p. 3.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on the Structure of the Judicial System
Judge Walter S. Felton, Jr., Chair
Judge R. Edwin Burnette, Jr., Vice Chair

Subcommittee 4-2, Special Dockets within Trial Courts or Specialty Courts
Judge Diane Strickland, Chair
M. Bruce Wallinger, Esquire, Co-Chair

Recommendations to the Commission

May 6, 2006

Recommendation 4-2.1,3,4,5,6,8.1. Virginia's judicial system should evaluate specialty business dockets and courts.

Narrative of the current state of the topic in Virginia

There are no business courts in the Commonwealth.

Trends which may influence the topic

A trend is evident in Virginia and elsewhere that business disputes are becoming increasingly complex. Demands of these cases for specialized knowledge, efficient case administration, early alternative dispute resolution options and sometimes protracted evidentiary hearings strain the resources of traditional, general purpose trial courts. A recent study reported that this trend has lead to the establishment of business courts in ten states and complex litigation courts in two states. Fourteen other states were reported as engaging in discussions or studies related to the establishment of business courts.

Advancements in science and technology, development of new business models and a more diverse and mobile population present courts with new and unique commercial issues. In some states, inability of state court systems to meet these challenges and their lack of consistent, predictable and legally correct decisions are leading commercial litigants to avoid those states' courts by using private alternative dispute resolution services, bringing actions in federal courts where jurisdiction exists, or forum shopping for states with more business-friendly court systems.

Commentators report that reactions in those states that have implemented business courts have been enthusiastic. Although little study has been conducted to determine whether a significant number of businesses considered the existence of business courts as a factor in deciding where to locate, the reaction of the business community and the bar to business courts appears to have been positive. Criticisms of business courts focus primarily on concerns that these courts may be perceived as elitist tribunals that favor large businesses and tend to compromise the importance

of civil juries in the decision-making process, and that preferential treatment of commercial cases could adversely impact the quality of judicial services in other areas of law.

Statistical data are insufficient to allow a determination of the volume of complex business disputes being processed through Virginia courts. A limited inquiry of circuit court clerks in metropolitan areas did not reveal a large volume of these cases on the dockets. The Subcommittee also noted that there has been no call for the establishment of business courts by members of bar. It is generally known, however, that significant numbers of business disputes are being resolved through private arbitration and mediation services, and this raises a concern that the business community may perceive the judicial system as a less desirable forum.

Rationale[9]

The Subcommittee recommends that a pilot program be implemented in which a small number of sitting or retired circuit court judges who have special expertise and experience in business disputes are designated as business law judges to be provided specialty training and assigned to complex business cases. We suggest that these judges not be limited to assignments of cases within their home circuit and that they be given latitude to develop case management procedures that are best suited for these cases. This approach should help determine whether there is a need for business courts in Virginia, and if such a need is found to exist the pilot project would serve as a first step toward implementation.

Cost efficiencies can be realized by moving complex civil cases off the general court docket and assigning them to judges with specialized knowledge, experience and training in commercial and related areas of law. Many models exist among states that have implemented business courts which vary in methods and criteria used for case selection, locations of business courts, use of expedited pre-trial and trial procedures, early options for use of alternative dispute resolution, and the use of technology to reduce costs and delays. Implementation of a state-wide system that relies upon a cadre of judges with special interest and expertise in business law to conduct hearings and trials in venues where cases are properly filed should not add a significant financial

[9] References:

Colorado Governor's Task Force on Civil Justice Reform: *Report of the Committee on Business courts*, available at http://www.state.co.us/cjrtf/report/report1.htm.

*Maryland Business and Technology Court Task Force Report (*2002), available at http://www.courts.state.md.us/finalb&treport.pdf.

University of Maryland School of Law: *Taking Care of Business: Business and Technology Courts in the 21st Century*, Conference materials from Nov. 7, 2003.

About the North Carolina Business Court, available at http://www.ncbusinesscourt.net/new/aboutcourt/Default.htm.

National Center for State Courts: *Focus on Business and Complex Litigation Courts*, Civil Action, Vol.1, Number 1 (2000), available at http://www.ncsconline.org/wc/publications/Res_SpePro_CivilActionV1N1Pub.pdf.

National Center for State Courts: *Resource Guide for Business Courts*, available at http://www.ncsconline.org/WC/Education/BusCtsGuide.htm

Michigan State Bar: *Report of Business Court Executive Committee* (2002), available at http://www.bodmanllp.com/publications/articles/pdfs/BusinessCourtExecutiveCommittee.pdf ; see also April 2005 Update at http://www.bodmanllp.com/publications/articles/pdfs/business_court_2005update.pdf.

burden on the Commonwealth and could ease pressures on circuit court dockets. Often, business courts represent a reallocation of case loads among existing judges.

The positive experiences of other states and the enthusiastic endorsement in those states by members of the business community, the judiciary and the bar support the establishment of business courts. The Subcommittee believes the implementation of business courts could improve the quality of judicial administration by reducing delays and producing more efficient, legally correct and predictable decisions by judges with specialized knowledge of complex business issues, working within a system designed to allow application of specialized case management techniques. With time, the presence of business courts could become another reason for businesses to find Virginia an attractive business venue.

Recommendation 4-2.3.2. The Drug Treatment Court case management system operational in the majority of the circuits of the Commonwealth should be expanded to include all remaining circuits.

Narrative of the current state of the topic in Virginia

By action of the 2004 General Assembly, Drug Treatment Courts have been codified and permanent oversight responsibility has been assigned to the Supreme Court of Virginia. Since the first drug court was implemented in 1989 in Miami, and the first in Virginia in 1995, the number of drug courts has steadily increased. The model is operational in more than 1200 courts in all 50 states, with 27 in Virginia. The research and literature on the drug treatment court model consistently suggest a positive impact on the offender and the justice system. Reported benefits of specialized drug court dockets include: 1) enhanced public safety as a result of the coordinated efforts of court, criminal justice, and treatment agencies that cooperate to effectively address alcohol abuse, drug use, and recidivism; 2) reduction of overcrowding in local jails; 3) expedited drug case docketing resulting in additional court time for other types of cases; 4) more cost effective drug case management; and 5) expedited drug treatment referral at the crisis point of arrest. All Virginia drug court localities report improved communication and greater camaraderie between agencies charged with handling and treating substance abusing offenders.

Drug courts are not separate courts, but rather specialized dockets. Drug court judges spend an hour or two per week presiding over their drug court docket, while the remainder of their time is spent on a traditional caseload. Because program graduates have greatly decreased recidivism and higher levels of recovery, drug courts are an appealing answer to the revolving door of drugs and crime. Drug courts combine accountability and immediacy of legal sanctions with intensive supervision and treatment. They are developed through a multidisciplinary and interagency effort between judges, Commonwealth's Attorneys, defense attorneys, treatment professionals, local law enforcement, jail staff, and personnel from the Department of Corrections and local Community Corrections and Pretrial programs.

The drug court model includes: a) judicial supervision of structured community-based treatment; b) timely identification of defendants in need of substance abuse treatment and referral to treatment resources soon after arrest; c) regular status hearings before the judge to monitor treatment progress and program compliance; d) increased defendant accountability through a

series of graduated sanctions and rewards; e) mandatory periodic drug testing; and f) payment of court costs and fees.

The Drug Court Treatment Coordinator for the Supreme Court's Department of Judicial Planning has been overseeing Virginia's operational Drug Treatment Courts. The Department has contracted with independent researchers to perform an evaluation of the programs. According to the National Drug Court Institute, drug court impact studies indicate that graduates of drug court programs have recidivism rates averaging between 5% and 19%. Drug offenders who were not referred to drug court or removed from the program due to non-compliance have recidivism rates averaging between 24% and 66%. Without direct court monitoring that ensures offender accountability for treatment progress, only 10% to 30% of addicts finish drug treatment. In contrast, 60% to 70% of drug court clients complete a rigorous regimen of substance abuse treatment for an average period of one year to 18 months. Research indicates that addicts who stay in treatment over one year have twice the recovery rates as those who fail to stay in treatment at least one year, thereby increasing public safety and reducing the demand these offenders place on the taxpayers.

Trends which may influence the topic

The first five years of the "New Millennium" have witnessed nationwide efforts to expand the concept of multi-door courthouses. Judicial Systems are utilizing therapeutic and restorative justice programs to provide an array of alternative dockets responding to the changing needs of society. Therapeutic justice and restorative justice are philosophically related processes that protect society's interest in holding offenders accountable and insuring public safety, while also offering opportunities for education, healing and restoration of victims. These systems promote public trust and confidence in the courts and our justice system. Both bring an ethic of caring to the law and require the collaboration of the court, counsel, law enforcement and community service providers.

Rationale

Drug courts appear to be one of the most promising crime reduction strategies now being implemented in the United States. Because much of the power of these programs comes from their placement in the court system due to the authority of the judge; the judge serves as a part of the team administering justice. A unified system of Drug Courts operational in all circuits would better serve the citizens of the Commonwealth and assure equal access to the resources of the justice system. A unified system of Drug Courts operational in all circuits would better serve the citizens of the Commonwealth and assure equal access to the resources of the justice system. Federal funding for Drug Courts has been significantly reduced and is currently available only for planning and start up costs. Increased operational funds will be required from the Commonwealth.

The judicial system of Virginia should continue to take a leadership role in collaborating with the Governor, the General Assembly, law enforcement, prosecution, defense, probation and treatment providers to expand the availability of this effective case management program to all circuits in the Commonwealth.

Recommendation 4-2.1,8.3. The Department of Judicial Planning of the Office of the Executive Secretary of the Supreme Court of Virginia should establish additional pilots and continue to evaluate therapeutic, and alternative dockets and programs such as the Mental Health Court docket in Norfolk, the DUI Court docket in Rappahannock County, the Domestic Violence docket in Roanoke County and the Youth Court programs in Roanoke City to determine the appropriateness of implementation in other jurisdictions.

Narrative of the current state of the topic in Virginia

The goals of the Norfolk Mental Health Court Program are to: 1) reduce the contact of persons with mental illness and/or co-occurring disorders with the criminal justice system; 2) ensure that persons with mental illness and/or co-occurring disorders do not languish in jail because of lack of available treatment; 3) enhance effective interactions between the criminal justice and mental health systems; 4) increase public safety by ensuring that Mental Health Court program participants are engaged in community treatment and follow-up services, thus reducing the potential for re-offending. Participants are required to meet all terms of their conditional release plans and attend regular court reporting sessions. Noncompliance may result in admonishment from the bench, more intensive supervision and/or treatment, incarceration for a limited period or removal from the program and sentencing.

Thirty-one persons were enrolled in the Norfolk Mental Health Court during the period of February 2004-February 2005. Six participants were terminated and sentenced. Of the 25 participants remaining only three had to be hospitalized for psychiatric care.

The Rappahannock Regional DUI Court is a partnership among the courts, Commonwealth Attorneys, Public Defenders, the Rappahannock Area Alcohol Safety Action Program (RAASAP) and local licensed substance abuse treatment providers. Since May 1999, 922 DUI offenders have been placed in the Regional DUI Court. The DUI Court is mandatory with a goal of addressing the reoccurrence rate of driving under the influence by promoting substance abuse intervention with immediate judicial sanctions. The RAASAP monitors each offender throughout the probationary periods ordered by the Court. The judges receive performance reports and address violations with immediate sanctions.

The Roanoke County Juvenile and Domestic Relations court has been operating a special docket for domestic violence cases which has processed 300 cases with zero recidivism. The offender enters a plea of guilty and is placed on two years probation monitored by Court Community Corrections. The batterer receives counseling for anger control and substance abuse. The Department of Social Services works with the children to assure safety and to assess reunification. The court retains the right to sentence any offender who is not compliant. The program is being evaluated by a professor from Radford University.

Youth Courts are court and school-based specialty dockets that hold youthful offenders accountable for their actions while educating them about the legal system. The courts promote long-term behavioral changes for juvenile offenders and build competencies in youth by

developing problem-solving, communication and analytical skills. They reinforce the concept that violations of laws and rules create obligations and liabilities while teaching participants about the principles of restorative justice and the needs of victims.

Nationally, the vast majority of Youth or Peer Court proceedings occur within the Juvenile and Domestic Relations Court under the supervision of the Juvenile Judge. A panel of teens serves as the jury to determine guilt and sanctions. The judge or court service unit personnel determine which cases are appropriate and Juvenile Probation oversees sentence compliance. The two programs operational in Roanoke are based in high schools and conducted under the supervision of members of the bar association. Non-felony cases are referred by school administrative personnel and by the Juvenile Court for the peer jury to determine sanctions only. Compliance with sanctions is monitored by a school principal and reported to the court. Upon completion of sanctions, offenders may be required to participate in training to become jurors for a future cases.

Trends which may influence the topic

Additional Youth Court projects are in the planning stage in Prince William County, Richmond, Petersburg and Virginia Beach. Some of these communities are exploring the adoption of a court based model.

Rationale

Therapeutic and restorative jurisprudence is now integral to all justice systems responding to changing socio-economic and legal needs. The expansion of these modalities must be actively evaluated and managed to encourage efficient use of public resources and to enhance effective delivery of court services. Because of the potential for cost savings and reduction of recidivism, it is recommended that the Supreme Court's Department of Judicial Planning establish additional pilots in order to generate comprehensive data and coordinate the evaluations currently being conducted by independent contractors on the above described programs. The Department can assess the desirability of expansion of these modalities of case management to other areas of the Commonwealth.

Recommendation 4-2.3.4. A new forum or process should be created to address tax disputes.

Narrative of the current state of the topic in Virginia

A taxpayer seeking to resolve his state or local tax dispute must begin with an administrative appeal. The Virginia Department of Taxation and local governments have administrative appeals systems in place for the appeals process. If the taxpayer is unsatisfied with the resolution of the administrative appeal and satisfies all requirements under the Code to pursue judicial recourse, then the taxpayer may file his claim in circuit court. It should be noted that suits for injunctions of tax assessments are prohibited unless the party does not have an adequate remedy at law. The circuit court proceeding is conducted as an action at law, and the rules that control the proceeding are the same as the rules that are applicable in a non-tax related civil case tried in

Virginia. The applicant carries the burden of proof in the proceeding. Appeals of the findings of the circuit court can be made to the Supreme Court of Virginia.

Issues with the Current Framework

The current process for resolving tax disputes presents various issues with regard to conflicts of interest, efficiency and expense. The most prevalent of these issues are listed as follows:

The current role of the Tax Commissioner could appear to some to create an inherent conflict of interest because he not only hears the appeals of the assessment of taxes and the protests regarding the denial of tax refunds, but pursuant to Virginia Code section 58.1-202(1) he is also responsible for collecting the main sources of revenue for the Commonwealth.

A taxpayer often does not receive a response to his appeal to the Virginia Department of Taxation for a year or more after submitting the application.

The current appeals system has made compliance with tax laws increasingly difficult for individuals and businesses who wish to pay the taxes they owe because:

(a) the Department of Taxation does not consistently promulgate regulations. Instead, it adopts policies and provides interpretations of tax laws through its responses to taxpayer disputes via Rulings of the Tax Commissioner.

(b) interpretations of the tax laws via Rulings of the Tax Commissioner result in a lack of due process to the general public. Rulings of the Tax Commissioner do not provide the formal notice of a new rule that would be provided when a regulation is promulgated under the Administrative Process Act. See Va. Code Ann. § 5 2.2-4000 et al.

(c) the numerous Rulings of the Tax Commissioner make it difficult to use the rulings as guidance for proper compliance with Virginia's tax laws.

Circuit court proceedings yield many inefficiencies and expenses due to:

(a) parties conducting discovery to collect information that was collected previously during the audit associated with the appeal to the Tax Commissioner.

(b) the application of rules that govern a non-tax related civil case to the circuit court tax proceedings A lack of uniformity exists among the local governments in how they interpret and administer the taxes they impose.

The Proposed Legislation As Drafted By the Virginia Bar Association Tax Section

The proposed legislation, which was drafted to amend and reenact section 17.1 - 503 of the Code of Virginia and amend the Code of Virginia by adding to Title 58.1 a Subtitle numbered V consisting of Chapters 41, 42, and 43, seeks to address the issues listed above and improve the

tax dispute resolution process. (A copy of the proposed legislation is attached as an appendix.) Any current rule regarding tax disputes will remain in effect unless a proposed rule supersedes it.

The new legislation will apply only to tax disputes involving taxes administered by the Department of Taxation and the local governments of Virginia. In addition, the new legislation will apply only to taxes administered by the Department of Taxation and local governments and will exclude utility taxes and insurance taxes administered by the State Corporation Commission. The following summarizes the procedural provisions of the proposed legislation, which we believe should be incorporated into any new forum or process.

A. Discovery in General

All methods of discovery will be available to both parties with the exception of depositions.

B. Expert Interrogatories

Expert Interrogatories will be available to parties to determine those persons whom the adversary intends to call at trial as expert witnesses. By written means, a party may require the other party to identify the intended expert and the person's background information, state the subject matter and the substance of the facts and opinions to which the expert is expected to testify, and summarize the grounds for each opinion. In lieu of creating and providing a separate statement, the party responding to the interrogatories may furnish a copy of a report in which the expert provides the information outlined in the section.

C. Depositions

Depositions will be available by the consent of both parties, which must be set forth in a stipulation filed with the court, or by court order. Under the proposed rules, depositions of the parties as well as non-parties may be taken upon oral examination or through written questions. Depositions by written questions, are not favored, however, and should not be taken absent a special reason.

Depositions of nonparty witnesses may be taken without the consent of the parties to the action. This method of discovery is deemed "extraordinary" by the proposed rules, however, and can be used only upon a court order and under special circumstances. A party or nonparty can object to a deposition in either instance.

D. Stipulation Requirement

The proposed legislation requires the parties to stipulate to all facts that are uncontested and relevant to the tax dispute. The stipulation also will cover all papers and other evidence not in dispute. Stipulations must be in writing and signed by the parties or their counsel and filed according to the provisions of the proposed legislation. The stipulation will be treated as a conclusive admission by the parties to the stipulation unless the court permits otherwise or the parties agree to a different arrangement.

If a party fails to comply with the stipulation requirement by refusing or failing to confer with the opposing party to enter into a stipulation as outlined by the rules of this section, the party proposing to stipulate may file a motion to compel stipulation. An order to show cause will be issued to the noncompliant party unless the court directs otherwise. The noncompliant party must file a response to the order to show cause in accordance with the rules. The noncompliant party's failure to file a response or provide a satisfactory response will result in the proposed stipulation or portions thereof being deemed admitted.

E. Bifurcation of Issues

Under this provision, a court is permitted to hear disputed issues separately prior to trial. Bifurcation of issues may occur upon a motion of the parties or by court order.

F. Small Tax Cases

The provisions under this section apply to tax disputes of $50,000.00 or less. The petitioner may elect to have his case treated as a small tax case at the time the petition is filed or at any time after the petition is filed and before trial. The court, on its own motion or on the motion of a party to the case, may order the removal of the small tax case designation at any time before the trial commences.

Anyone admitted to practice before the court may represent the petitioner in a small tax case. An answer (or other responsive pleading) should be required to be filed except on issues that the respondent bears the burden of proof or the court directs otherwise. Similarly, a reply answer should be required unless the court directs otherwise. Small tax case proceedings will be conducted as informally as is possible and consistent with orderly procedure. The court will admit evidence that it deems to have probative value. Briefs and oral arguments are not required unless the court directs otherwise.

Trends which may influence the topic

Rationale

Based on discussions with practitioners in this area, there is a clear need to implement new rules to improve the efficiency of the proceedings relating to tax disputes and to reduce the costs related to resolving such disputes, particularly as it pertains to disputes involving small amounts. However, given the relative focused nature of this practice, the Subcommittee anticipates that there may be some reluctance to establish a new court for such disputes. That said, the issues addressed herein and the issues addressed in the legislative proposal drafted by the Virginia Bar Association are not simply focused upon the creation of a new court, but rather the creation of a new procedure to address the concerns more efficiently. For that reason, our recommendation is that some process be crafted to address these disputes, even if the process does not entail the creation of a new court system.

As our Subcommittee considered this matter, we did not lose sight of the important issues that tax practitioners have raised through the Virginia Bar Association Tax Section's legislative

proposal. Hence, we recommend that every opportunity be taken to incorporate a mechanism to address those concerns relating to tax disputes into any new court or procedure the larger Commission may ultimately adopt.

Recommendation 4-2.4.5. A Family Court should be established as a court of record in Virginia as either a separate court or as a division of the Circuit Court.

Narrative of the current state of the topic in Virginia

At present, Virginia Juvenile and Domestic Relations District Courts have jurisdiction over a wide variety of matters involving children, familial offenses, spousal abuse and spousal support. Circuit Courts are responsible for divorces (including support and custody issues) and matters such as adoptions and annulments.[10] In certain proceedings, the Juvenile and Domestic Relations District Courts have concurrent jurisdiction with the Circuit Courts. Decisions of the Juvenile and Domestic Relations District Courts are also appealable to the Circuit Court on a *de novo* basis.

The concurrent jurisdiction of Circuit and Juvenile and Domestic Relations District Court often has litigants in two different courts at the same time on the same issue and/or related matters. Also, *de novo* appeal causes the parties to re-try the same issue before a new tribunal. This system is confusing, redundant, inefficient, unduly expensive, and continues instability within the family by delaying a final resolution of the issues.

In 2005, the Chief Justice of the Supreme Court of Virginia established an Advisory Committee on the Establishment of a Family Court in Virginia ("Advisory Committee"). On October 18, 2005, the Advisory Committee filed a final report concerning its recommendations regarding the structure of the proposed Family Court. Although the Chief Justice has decided not to present any particular Family Court proposal to the General Assembly during the 2006 session, a proposal will be presented in the future after additional evaluation of the Advisory Committee's recommendations.

Trends which may influence the topic

Rationale

Virginia's experience with pilot Family Courts in the early 1990's revealed that Family Courts were faster and cheaper than the present system. A survey of litigants revealed great satisfaction with the Family Court system. Furthermore, the quality of the judicial opinions in the experimental Family Courts was outstanding. There were seven appeals from decisions of the experimental Family Courts: six were affirmed in their entirety and one was affirmed in part and reversed in part.

[10] No attempt is made to exhaustively list the complete universe of the original and concurrent jurisdictions of the Juvenile and Domestic Relations District and Circuit Courts.

A Family Court would merge into one court all domestic relations and family matters. The Family Court system would then have before it all juvenile and family law cases involving a particular family. This would result in a more efficient and thorough resolution of these cases as the Family Court may then be aware of and consider all aspects of the family when deciding issues before it.

The establishment of a Family Court would also eliminate the *de novo* appeal process for all cases within the Family Court's jurisdiction. Litigants would then have to endure only a single trial. This would minimize costs, decrease inconvenience of witnesses, and reduce delay in reaching a final decision thereby decreasing the time during which the family is in turmoil because of ongoing litigation. The parties would retain a right to appeal Family Court decisions but this would be an appeal of right to the Court of Appeals of Virginia on the record as opposed to a *de novo* appeal.

The Subcommittee also recommends that the Family Court be created as a court of record. As matters would be appealed "on the record" to the Court of Appeals of Virginia, this designation will properly reflect the Court's work. Such a designation will also recognize the importance of this Court to the citizen's of the Commonwealth and increase respect for the Court and its decisions.

A Family Court would also promote a better system and greater litigant satisfaction by having family matters handled by judges who focus exclusively on juvenile and family cases as it is anticipated that over time Family Court judges will develop greater expertise in dealing with such cases.

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on the Structure of the Judicial System
Judge Walter S. Felton, Jr., Chair
Judge R. Edwin Burnette, Jr., Vice Chair

Subcommittee 4-3, Structure of the Intermediate Appellate Court
The Honorable R. Edwin Burnette, Jr., Chair

Recommendations for Consideration by the Commission

May 25, 2006

Narrative of the current state of the topic in Virginia

The Court of Appeals of Virginia, established in 1985, was created "to increase the appellate capacity of the court system and expedite the appellate process."[11] Consisting of eleven judges, the Court of Appeals sits in panels of at least three judges in various regional locations. The Chief Judge rotates the composition of the panels to promote homogeneity of case law and to prevent regionalization of the appellate court system. The civil appellate jurisdiction of the Court of Appeals is limited to cases involving administrative agency determinations and public employee grievances, workers compensation and domestic relations.

The Court of Appeals sits *en banc* in certain circumstances, including where there is a dissent in a panel to which a case was originally assigned and an aggrieved party requests an *en banc* hearing and at least three other judges of the Court of Appeals vote in favor of such a hearing.

The Court of Appeals has authority to hear appeals as a matter of right from:

- any final judgment, order or decree of a circuit court involving affirmance or annulment of a marriage, divorce, custody, spousal or child support or control or disposition of a child, as well as other domestic relations cases;
- any final decision of the Virginia Workers' Compensation Commission;
- any final decision of a circuit court on appeal from a decision of an administrative agency; and
- any interlocutory order granting, dissolving, or denying an injunction or adjudicating the principles of a cause in any of the cases listed above.

[11] The text of this overview has been liberally copied from the official website of the Court of Appeals of Virginia (www.courts.state.va.us/coa/coa.htm)

The Court of Appeals has authority to consider petitions for appeal from:

- final orders of conviction in criminal and traffic matters, except where a death penalty is imposed;
- final decisions of a circuit court on an application for a concealed weapons permit; and
- certain preliminary rulings in felony cases when requested by the Commonwealth.

The Court of Appeals has original jurisdiction to issue writs of mandamus, prohibition and habeas corpus in any case over which the Court of Appeals would have appellate jurisdiction and a writ of actual innocence upon petition of a person who was convicted of a felony upon a plea of not guilty.

All criminal cases that are within the Court of Appeals' jurisdiction and all traffic infraction cases are presented to the Court of Appeals by petition for appeal.

Each petition for appeal in a criminal case is referred to a judge of the Court of Appeals for review to determine if an appeal should be awarded. The judge may grant the petition for appeal in whole or part. An appellant may request a panel of three judges of the Court of Appeals to review a petition for appeal that was denied, either in whole, or part, by the judge who initially reviewed the petition. As long as oral argument was preserved in the petition for appeal and a reply brief was not filed, the appellant may present oral argument on the petition for appeal before a panel of three judges. Any one of the three judges may grant the petition on the basis of the record without oral argument. If the petition is granted, briefs are filed by both parties. The clerk of the Court of Appeals refers each granted appeal to a panel of the Court of Appeals. Oral argument is permitted and may be waived.

All other appeals (domestic relations, Virginia Workers' Compensation Commission and those from administrative agencies) are heard as a matter of right. These cases do not go through the petition process. Briefs are filed by both parties and the case is referred by the clerk of the Court of Appeals to a panel of three judges. Oral argument is permitted and may be waived. The Court of Appeals may summarily affirm an appeal without oral argument if a panel of three judges determines that it has no merit.

In 2004 the Court of Appeals recorded 3,044 case filings, 148 fewer than 2003. The majority of filings in 2004 (75.3%) consisted of criminal petitions (not including contempt). The number of petitions involving domestic relations petitions totaled 317 (10.4%) while petitions involving the Workers' Compensation Commission totaled 183 (6 %).[12]

A party aggrieved by a decision of the Court of Appeals may petition the Supreme Court of Virginia for an appeal. All civil decisions of circuit courts not in the Court of Appeals' jurisdiction can only be appealed by petitioning the Supreme Court of Virginia for an appeal. In all civil cases, the granting of petitions for appeal is a matter solely within the discretion of the Supreme Court.

[12] These statistics were derived from the *2004 Virginia State of the Judiciary Report*, "Year in Review" for the Court of Appeals (page A-40).

Trends which may influence the topic

Total case filings in the Court of Appeals decreased between 2001 and 2004. Although domestic relations filings increased from 266 to 317 cases, criminal petitions decreased from 2,704 to 2,291, and workers compensation filings decreased from 269 to 183. While no specific data explain this trend, one part of the explanation is the body of work done over two decades by the Court of Appeals clarifying the law in those fields.

The decrease in filings between 2001 and 2004 should not be the basis for future planning. Predicted increases in the size of Virginia's population alone can be expected to increase the volume of civil litigation and an accompanying rise in appeals. In addition, with an expanded jurisdiction and more appeals as of right, the Court of Appeals should expect increased filings. It is also likely with the changes in technology and science which are coming, the Court of Appeals will hear more novel and complex issues than have been historically encountered.

A more urban, diverse and heterogeneous population will probably spawn civil controversies different from what has historically been presented to the courts. The ever more rapidly evolving technologies and business practices will bring a host of questions lacking certain answers in the existing precedents. The efficiencies imposed by new technologies and the globalization of commerce will make timely and reliable civil judicial precedent a more pressing necessity.

Appellate trends nationally and in Virginia suggest that the Court of Appeals should anticipate and plan for the impact of technology on the Court of Appeals itself. Evolving practices of electronic filings, video conferencing, the expanded availability of user-friendly Web-based services, and technology management will become increasingly important. The Clerk of the Court of Appeals will need personnel who are proficient in the use of the hardware and software which will be needed to support enhanced case management and electronic filing. One benefit of electronic filing is that the Court of Appeals' need for filing space will not increase as quickly as it would with the current paper-based filing.

Videoconferencing will lessen the need for three-judge panels to sit in various venues around the Commonwealth, reducing travel time and cost. A large number of remote locations for video appearances will allow counsel and their clients to reduce travel time, travel costs, and fees.

As the number of computer literate citizens of the Commonwealth increases, the Court of Appeals will increase its use of Web-based services to advise the public and counsel on how to proceed in and what to expect from the appellate process.

Electronic management systems will allow the Court of Appeals to evaluate its own processes, identify caseload problems, make adjustments where needed, and identify factors that inhibit timely resolutions of individual cases.

Recommendation 4-3.1,4,5,7.1. Virginia should take advantage of emerging technologies to reduce costs and delays resulting from transcript preparation, transmission of the record and other "up front" steps in the appellate process. Specifically, Virginia should:

a. provide for near-real-time electronic transcripts of trials and other proceedings and electronic records of all court documents;

b. provide for immediate and automatic transmission of the electronic trial record to the Court of Appeals as soon as an appeal is filed;

c. simplify the preparation of the appellate "appendix" by relying on designations linked to a searchable electronic record.

Rationale

The Court of Appeals has remained current in processing its docket. Despite the efficiency of the Court of Appeals, it still takes about a year from final judgment for an appeal to be decided on the merits. Much of that time is consumed in the "up front" period between final judgment and the filing of the record in the Court of Appeals, before the matter is ready for review by any judge.

The Rules of the Supreme Court of Virginia call for filing of a transcript within 60 days of final judgment (Rule 5A:8), but allow for extensions of time for good cause. The rules provide for an additional delay of 21 days after filing of the transcript before the record is transmitted to the Court of Appeals (Rule 5A:10(d)). Under this system, in the best of cases, it is about three months after final judgment before the time period for filing a petition for appeal even begins. In cases with substantial transcripts and busy court reporters, delays can be much longer. Given the time allowed for filing the petition and the brief in opposition, a minimum of six months typically passes before a petition for appeal is ready even to be considered by a judge.

This system may have made sense in times when transcript production was a long, labor-intensive process. Given emerging technologies that allow for near-real-time production of electronic transcripts, and parallel technologies that allow for electronic filing and electronic reproduction of documentary exhibits, there is little reason for our system to build in months of delay at the beginning of the appellate process.

Technologies that exist today could largely eliminate those up-front delays. Undoubtedly, advances in the coming years will allow for near-real-time production of a trial court record that could be available electronically to the Court of Appeals literally at the instant a notice of appeal is filed. We should begin the planning necessary to equip Virginia's Circuit Courts with that technology. We should also modify the appellate rules to provide for quick electronic transmission of the record as soon as those technologies are in place.

Electronic filing of records would have added benefits in the appellate process. Rather than requiring parties to designate, compile, copy and mail an appendix, electronic filing would allow parties to designate electronically any portions of the record which they would want to call to the

attention of the Court. Exhibits and transcript pages would be accessible to appellate judges at the click of a mouse. The time and expense of reproducing an appendix would become unnecessary. Of course, in designing technology for creating an electronic appendix, we must take care to create a product that can be searched, highlighted and annotated in ways that accommodate the needs of appellate judges in writing opinions and preparing for argument.

There may be initial costs associated with equipping courts and clerks' offices with the necessary technology. Over the longer term, however, it seems likely that the electronic production and transmission of trial records would save money when compared to the current system which requires court reporters to produce a typed transcript, clerks to assemble and ship a voluminous record, and counsel to designate, copy and file an appendix.

Recommendation 4-3.1,4,5,8.2: Virginia should streamline the Court of Appeals' current two-stage discretionary appeals process by providing a single appeal as of right in all cases, with appropriate summary processes to screen less meritorious appeals.

Rationale

In criminal cases, which account for the bulk of the Court of Appeals' docket, the current appellate process involves two stages: the "petition" stage and the "merits" stage.

At the petition stage, in filing the Petition and the Brief in Opposition, counsel for both parties effectively brief the case "on the merits." A single judge initially reviews and decides to grant or deny the petition. In cases where the petition is denied, the judge issues a short per curiam opinion (typically drafted in the Staff Attorney's office) explaining the reasons for denial, effectively addressing the "merits" of the appeal. Counsel for the petitioner then has a right to an oral argument before a "writ panel" of three judges, see Rule 5A:15, which again decides whether to grant or deny the petition and issues an opinion stating its reasons in cases of denial. The substantial majority of petitions are denied. Currently, the majority of those denials involve oral argument before a writ panel. Thus, under the current system, the process of screening nonmeritorious appeals typically involves two levels of judicial review, the second after an oral argument before three judges.

When the petition is granted, the process effectively starts over for the "merits" stage. At the "merits" stage, the issues are briefed a second time, argued (perhaps for a second time) before a panel of three judges, and decided by an opinion "on the merits" of the appeal.

In theory, this system of discretionary review was intended to provide a screening mechanism for nonmeritorious appeals and to allow a more searching review of cases which appear to present the substantial possibility of trial error. In practice, however, the system creates unnecessary duplication of effort for the Court of Appeals and for counsel. Further, in cases where the Court of Appeals grants the writ and hears an appeal "on the merits," the two-stage process adds months to the processing of an appeal.

The subcommittee believes that the duplication of effort inherent in the current system could be eliminated and that appeals could be concluded more quickly and at lower cost by moving to a

one-stage system with appeals as of right. Each appeal would be briefed once – not twice – and decided once – not twice – on the merits. In essence, the subcommittee recommends that criminal appeals should be subject to the same one-stage review that now applies to the civil cases within the jurisdiction of the Court of Appeals (i.e. workers compensation and domestic relations cases).

Under a one-stage system, the parties would brief the case once (essentially as they do now at the petition stage). The Staff Attorney's Office initially would review all cases (just as it does currently). In cases where the appeal lacks substantial merit, the Staff Attorney's office would draft a per curiam opinion (just as it does now for the denial of a writ). The case, with proposed opinion, would then be reviewed by three judges. If all three agreed, the panel would issue its per curiam opinion affirming the judgment below. In essence, this is the same "summary affirmance" process that the Court of Appeals currently employs in its civil cases. It is also essentially the process employed in the United States Court of Appeals for the Fourth Circuit.

At the initial review stage, in cases where appeals appeared to present substantial issues, the Staff Attorney might recommend, and any single judge could decide, to place the case on the Court of Appeals' calendar for oral argument. In substance, these would be the same cases where the Court of Appeals currently grants the writ. Under a one-stage system, however, these cases would not require a second round of briefing and a second oral argument. That would eliminate not only the costs associated with that duplicative effort by counsel, but it would also allow those cases to be calendared immediately for oral argument without the substantial delay (roughly two months) now required for a second round of briefing. A one-stage process would save judicial resources as well. Currently, there are about 30 three-judge "writ panels" per year, hearing 18 cases per panel. That roughly duplicates the number of merit panels hearing oral arguments annually. Finally, a one-stage process would provide an appeal as of right. The subcommittee believes that an appeal as of right, in contrast to a purely discretionary system, would enhance public confidence in our judicial system by ensuring that all trial court judgments are reviewed on the merits. In practice, the Court of Appeals currently undertakes such review in the writ denial process in any event. Changing to an appeal-as-of-right system would allow the public perception of justice to match the reality of current practice.

The subcommittee heard some concerns that a one-stage appellate process might add substantial burdens to the Office of the Attorney General, which currently handles criminal appeals only after they reach the "merits" stage. Local Commonwealth's Attorneys handle the "petition" stage. While a new system might cause some realignment of labor between the Attorney General and the local Commonwealth's Attorneys, the subcommittee believes that the end result would be an overall reduction of the burden on prosecutorial resources. Whichever office took on the responsibility for an appeal, the appeal would be briefed once and argued no more than once.

Recommendation 4-3.1,4,5.3. Virginia should streamline the appellate process by exploring means to limit *en banc* review in the Court of Appeals.

Rationale

En banc review absorbs substantial resources in the Court of Appeals, which assembles all of its judges to sit *en banc* about six times per year. The subcommittee recognizes that *en banc* review can serve the important purpose of promoting uniformity and avoiding conflicting rulings by different panels. Nevertheless, the substantial judicial resources devoted to *en banc* review often turn out to be duplicative, since *en banc* review by the Court of Appeals sometimes serves as an invitation for the Supreme Court to grant a writ and review the Court of Appeals decision in any event. The subcommittee recommends that the courts consider rules or practices that would reduce the number of cases where *en banc* review is merely a prelude to final review by the Supreme Court. In cases pending before the Court of Appeals, the Supreme Court already possesses the power to certify a case for immediate appeal to the Supreme Court. See Rule 5:14(b). In cases designated for *en banc* review, relatively minor adjustments in rules or practices might allow that certification power to be exercised more regularly. For example, Virginia might adopt a rule allowing parties in cases designated for *en banc* review to request immediate certification by the Supreme Court under Rule 5:14(b). Or the Court of Appeals might itself suggest immediate certification in appropriate cases.

Recommendation 4-3.1,8.4: Virginia's appellate courts should reduce procedural defaults by:

a. simplifying appellate rules and making them more flexible;

b. harmonizing the rules of Virginia's two appellate courts.

Rationale

In 2004 the Washington Post reported that the Court of Appeals dismissed eleven percent of criminal appeals on procedural grounds. Data provided to the subcommittee by clerks of court and statements by appellate judges and other personnel confirm that Virginia's appellate courts dismiss appeals for procedural reasons at an unusually high rate.

Rules allowing "delayed appeals" have reduced the number of cases where criminal defendants are denied access to appellate review because of mistakes by their lawyers. But delayed appeals can add extra burdens for the courts and the parties, burdens that could be eliminated by a more flexible process from the outset. A better solution is to simplify the rules that lead to procedural defaults in the first place, and to provide flexibility in existing rules. The goal should be to decide cases on the merits, fairly and efficiently, not to seek procedural mechanisms for reducing dockets.

A committee, chaired by Supreme Court Justice Donald Lemons, already has begun a detailed study aimed at simplifying appellate procedure in order to reduce procedural default. Rather than duplicate that effort, our subcommittee chose simply to encourage support for that committee's

ongoing efforts. We also encourage that committee to consider steps that will harmonize the rules of Virginia's two appellate courts. Differences in procedure between the Supreme Court and the Court of Appeals contribute to procedural defaults in the current system.

In addition to modifications of existing rules, we encourage that committee to consider alternative, informal appellate processes, especially for unrepresented litigants. We have seen examples of such informal processes in the Fourth Circuit's informal briefing procedure for unrepresented parties, and in informal methods employed in New Hampshire and New Mexico.

Recommendation 4-3.1,2,6,8.5. All attorneys engaged in appellate practice before the Court of Appeals and the Supreme Court should be required to undergo specialized appellate continuing legal education.

Rationale

The simplification of rules alone will not be sufficient to address the problem of procedural default. The goal to decide cases on the merits fairly and efficiently requires competent counsel in addition to a relaxation of existing procedural requirements. Moreover, in cases where counsel's errors lead to procedural default, delayed appeals can add extra burdens for the courts and the parties, burdens that could be eliminated not only by a more flexible process from the outset, but by an assurance that competent counsel will adequately represent litigants.

The quality of representation must be commensurate with the expectation that all persons will have effective access to justice and will better insure an equal application of the judicial process to all controversies and litigants. Required training in appellate practice is consistent with Virginia's Mandatory Continuing Legal Education Rules which aim not merely to promote lawyer competence, but to insure competence in any specialized area in which a lawyer chooses to practice. A requirement of professional and continuing education in appellate practice will promote higher professional and ethical standards for appellate attorneys and will foster increasingly service-oriented relationships between attorneys and clients. Capable and professional counsel will only enhance the perception of the Virginia judicial system as one of confidence in and respect for the courts and for legal authority.

Recommendation 4-3.1,4.6. Virginia should expand the civil appellate jurisdiction of the Court of Appeals to include all appeals from circuit courts and administrative agencies with the exception of the State Corporation Commission and appeals involving attorney disciplinary matters with an accompanying allocation of resources to ensure accessible, responsive, effectively administered appellate opportunity for the citizens of the Commonwealth.

Rationale

The Recommendation to expand the civil appellate jurisdiction of the Court of Appeals would conform Virginia appellate practice to the structure found in virtually all other states with a two tiered appellate court system. It recognizes the paramount role of the Supreme Court of Virginia in decisively articulating and interpreting the law governing all affairs of the Commonwealth

while furthering the twin objectives of ensuring all civil judgments receive a prompt and thoughtful appellate review for error and crafting a well developed body of precedent to guide the conduct of citizens and inform the advice of their counsel.

In 1994, the Judiciary Committee of the Virginia Bar Association concluded, after a thoughtful and thoroughly researched study, that all civil cases should be made appealable to the Court of Appeals in the first instance. *Appellate Review in Virginia: A Report of the Judiciary Committee of the Virginia Bar Association,* iii (1994). The Report identified the bedrock goals of an appellate system:

> First, it must provide authoritative rulings on the evolving legal issues facing the Commonwealth, resolving conflicts and ambiguities, establishing precedent and making key interpretations of statutory and constitutional mandates. This function can only be established by a unitary Supreme Court . . .. The second function of the appellate system, however, is commonly called "error correction" and entails the application of established law to specific facts, generally through appellate review of trial court dispositions to assure adherence to the significant procedures of fair litigation and proper application of settled law.
>
> *Id.* at 4.

The demographic pressures and accelerated pace of commerce, innovation and other transformative forces influencing the conclusion reached in 1994 have intensified with the passage of time. Future years will witness no diminishment of this trend.

The predicted effect of adopting this recommendation would be the development of a much richer civil jurisprudence in Virginia. The advent of the Court of Appeals in 1985 has enhanced the number and breadth of judicial opinions addressing issues in the fields of criminal law, domestic relations and workers compensation. Practitioners in these areas have been able to draw upon this new wealth of judicial precedents to predict outcomes to clients and to present cases to tribunals with a clarity and certainty previously lacking. Some observers believe the work product of the Court of Appeals in the areas of domestic relations and workers compensation has been responsible for a stabilization in the volume of litigation in these areas because many questions now have a definitive answer.

A similar result would almost certainly follow if the Court of Appeals would be given jurisdiction over commercial and tort appeals. The beneficial impact of answering questions in these areas will be especially great in a future demanding speed and efficiency greater than what is deemed acceptable now.

Adoption of this recommendation would not diminish the role of the Supreme Court. It would still be empowered to grant a petition for appeal in all cases decided by the Court of Appeals. The Supreme Court may also become more active in transferring to its jurisdiction cases pending before the Court of Appeals when it determines that a prompt, ultimate resolution of the controversy would be justified under the criteria specified in a future and perhaps more liberal version of Va. Code §17.1-409. An expanded jurisdiction for the Court of Appeals will require

an expansion of the number of judges, law clerks, and court personnel to accommodate the increased responsibility of the Court of Appeals.

Recommendation 4-3.3.7. The Court of Appeals, with consent of the parties, should consider referring any civil case before it to mediation and provide for extensions of time for filing deadlines if necessary and appropriate.

Rationale

Referral of civil litigants to mediation in the Court of Appeals is rare. However, the Court does have the power to do so under existing law. Chapter 20.2 of Title 8.01 of the Code of Virginia gives every "court" in the Commonwealth, including the Court of Appeals, the power, on its own motion or on motion of one of the parties, to refer any contested civil case, or any issue(s) in such case, to an orientation session in order to encourage settlement. The session is to be conducted by a "neutral or intake specialist", and dispute resolution options, including mediation, are explained to the parties. Participation in mediation, however, is only with consent of the parties. Nevertheless, the parties are required to report to the Court on the result of the session. In the event the Court of Appeals, with the consent of the parties, approves mediation of the civil case, it may be necessary to extend filing deadlines in order to complete the process. Rule 5A:3 of the Rules of the Supreme Court of Virginia, applicable to extensions of time in the Court of Appeals, provides the Court with the right to extend some filing deadlines for good cause shown and to attain the ends of justice. Although use of the Court's existing referral power and filing extension rule to promote mediation are rarely used, the Court of Appeals should consider, in proper civil cases, encouragement of settlement through mediation using available statutes and rules. To the extent that existing statutes and rules may prove inadequate, changes to permit the use of mediation in proper civil cases, with the consent of all parties, should be considered. See Recommendation 1-3.3.1.

[Page intentionally left blank]

Commission on Virginia Courts In The 21st Century:
To Benefit All, To Exclude None

Task Force on Technology and Science
Judge John E. Wetsel, Jr., Chair
Judge Thomas S. Shadrick, Vice Chair

Subcommittee 5-1, Web page, OES IT, IT Infrastructure,
Delivery of Services, Court Reporters
Judge Clifford Weckstein, Chair

Subcommittee 5-2, Confidentiality, Access to IT, Courtroom Technology
Judge Jane Roush, Chair

Recommendations for Consideration by the Commission

May 15, 2006

Vision Seven: In the future, technology will increase the access, convenience, and ease of use of the courts for all citizens and will improve the quality of justice by increasing the courts' ability to determine facts and reach a fair decision.

I. Technological Change in the Court System

Present Conditions

All change occurs incrementally, but with the advent of the computer age the rate at which change occurs has increased exponentially. The life span of new technologies is rapidly decreasing, and adaptation to these constant changes and innovations requires a technologically facile court system. Technology facilitates but should never control the administration of justice.

Despite the dramatic increase in the number of cases and transactions handled each day by the court system, the use of modern technology has significantly enhanced the managerial efficiency of the courts' docket management system and has improved the speed and reliability with which records and information are retrieved. Information management technology is the lifeblood of the court system without which it would grind to a halt.

Trends

The Supreme Court of Virginia maintains one of the largest electronic data storage systems in the state government. In 1995, 3,288,706 cases were commenced in the general district, juvenile, and circuit courts. By 2000, the number of cases had grown to 4,020,162, and it is projected that 4,631,153 cases will be filed in 2020. In 1995, the courts collected $218,173,142 in fees, costs and restitution payments. By 2005, these receipts had grown to $891,352,559, and it is projected that total receipts will exceed three billion dollars in 2020. Given the daily increase in the

volume of the court system's myriad transactions, the implementation of state of the art technology is necessary to meet the ever increasing demands imposed upon the system.

New technologies like wireless local area networks (WLAN) technology are being implemented, which dramatically affect the computer systems of both business and government. Wireless networks use radio frequency signals rather than wire. In the future the use of wireless systems in the courthouse will increase and perhaps replace the internal wire systems now being used. While the freedom to move about the courthouse using a personal digital assistant to access the court's data, do research, and send e-mails will be emancipating, the security problems attendant to such open air systems are apparent and must be addressed.

Wireless technology may improve access to court information. With proper security, it permits relocation of court staff within the courthouse without the cost and constraints imposed by hardwired network connections. At the same time, the public is increasingly assuming the availability of wireless information access, and to the extent feasible, the courts should use wireless not only for communication by staff within the courthouse but also to assist members of the public while they are in the courthouse.

Recommendation 5.7.1. Courts should be equipped with modern technologies that optimize the use of court resources and facilitate the disposition of cases while at the same time maintaining the security of internal court systems.

Rationale

The simplicity of wireless systems, and their comparatively low cost and reliability are such obvious improvements over landline systems, that their use will become widespread. The courts must develop systems that will permit wireless access to court records by the public. Robust security systems must be developed to ensure the security of confidential information being transmitted within the courthouse, such as e-mails between the judges and their clerks. Personal computers on the bench permit judges to have immediate access to e-mail, note taking, and instant messaging software. Judges and court personnel can communicate in real time with their staffs during testimony and have access to legal research tools and staff input to answer questions. The courts must ensure the security of all confidential information, including e-mails.

Recommendation 5.5,7.2. A Technology Advisory Committee should be instituted comprised of public and private information technology specialists to advise the Office of the Executive Secretary of the Supreme Court in implementing new technology applications for the courts.

Rationale

Technology is rapidly evolving, and the court system has frequently lagged behind the business world in adapting to new innovations. As new technologies emerge and are applied in the business world, these new applications should be reviewed at least annually to consider their implications for the court system. Courts are in the information business, and they should be equipped with modern technologies that optimize the use of court resources and facilitate the

disposition of cases while at the same time maintaining the security of internal court systems. There should be members on this committee from governmental agencies with which the court system regularly interacts to ensure that there is a seamless interface between the courts' electronic record system and those of other governmental agencies.

II. Science in the Courtroom

Present Conditions

All judges in the state now have access to computer based research tools. These have exponentially increased the speed at which the law or scientific issues may be researched.

Trends

Developments in science present complex medical and scientific issues to be resolved in court, and judges must be intellectually equipped to understand the issues presented in order to rule intelligently. E-learning will increase as an education medium to train court personnel and educate judges.

Electronically recorded biometric measures, like voice prints, retinal scans, facial recognition systems, and digital fingerprints will increase and improve personal identification procedures and present new evidentiary issues to be decided by the courts.

Recommendation 5.6.3. The education programs provided to judges should be expanded to include education in the principles governing the assessment of scientific information.

Rationale

Both the scientific laboratory and the courtroom are engaged in the fact finding business. Both science and the law share a common belief that the more reliable and rigorous the process by which their fact finding mission is accomplished, the better the result. Rules of evidence govern the courts in their quest for the truth, and the scientific method governs the pursuit of truth in the laboratory. The advent of DNA testing has presented many new issues in criminal cases and paternity actions, and the principles of scientific certainty and evidentiary probability are becoming inextricably intertwined. The seminal case of Daubert v. Merrill Dow Pharmaceuticals has imposed a gatekeeper duty on federal judges when they are required to assess new or competing scientific theories. The same issues which precipitated the judicial concern in the federal system over the validity of scientific theories are being confronted by the judges in our state courts, who are being asked to assess the reasoning and methodology underlying expert testimony before admitting it into evidence. The judges must be intellectually equipped to make these increasingly sophisticated scientific judgments.

III. Information Management System

Present Conditions

While a few circuit courts have begun to implement imaging systems to store their civil and criminal cases in an electronic format, most court records are not stored electronically and are not accessible through electronic media with the exception of the basic case identifying information stored in the various case management systems within the state. These case management systems enable the courts to control their ever-expanding dockets, to efficiently schedule trials and hearings, and with their financial management systems to account for the millions of dollars received annually by the courts. Access to these case management systems is available through the Internet for the Supreme Court, Court of Appeals, most circuit courts, and the General District Courts. Because the records of the Juvenile and Domestic Relations District Court are confidential, they are not accessible through the Internet.

Effective January 1, 2005, an e-filing system has been implemented for filing petitions for rehearing with the Supreme Court. Counsel or parties who are not incarcerated file these petitions through the e-filing system. Upon written motion, the Court can waive the e-filing requirement. An e-mail address is dedicated to these filings, and petitioners e-mail a message to that address and attach a PDF version of the petition for rehearing. The Court of Appeals has the same e-filing requirement.

The expansion of the courts' electronic information system and the increase in the ease with which that information may be accessed have raised legitimate questions about the security of personal information now stored in the courts' records. Currently, most case files maintained at the courthouse are completely open for inspection by the public, and this has been the rule since the inception of the courts. This paper system has resulted in practical obscurity for these records, because of the logistical effort in going to the courthouse, retrieving the file, and examining its contents. There are recognized policy reasons for denying access to some case files; consequently, case records such as grand jury and juvenile proceedings are not open to the public, and there are provisions for the sequestration of the record in domestic cases. Technological advances have contributed to a growing public concern about identity theft, invasion of privacy, and other misuse of personal information electronically stored and readily retrievable from court records. There is obvious tension between the public's right to information stored in the court's data system and the individual's right to privacy.

Trends

Electronic filing of court pleadings is increasing and over time will become the preferred method of filing. The ability to view the court file over the Internet reduces the time that lawyers would otherwise spend traveling to the clerk's office, which will reduce the cost of litigation and which will also ensure that lawyers and litigants receive prompt notice of pleadings and orders filed in their cases. The courts will benefit from the reduced number of clerks needed to physically deal with paper filings. Additionally, continuity of court operations in the event of a disaster will be enhanced by the ability of a fully electronic filing system to readily maintain a current back-up copy of the court files on a replication server in a secure off-site location.

Fully automated court record systems provide the basis for producing better court management reports. By importing data from the system, local clerks of court and court administrators can analyze the case flow process in their courts to determine their effectiveness in managing their dockets and disposing of cases within the time constraints suggested by the Supreme Court.

Automated decision making software will be developed to provide guidance on legal matters such as legal form selection and preparation, to do child support and criminal sentencing guideline calculations, and to prepare equitable distribution schedules. While such interactive, automated decision making systems are potentially of great benefit to the public, implementation of such systems raises serious questions about whether the courts are becoming legal advisors as opposed to their historic role of adjudicators.

Libraries serving courts will digitize rare and scarce materials in their collections into forms that may be delivered to users via intranets and the Internet. One of the next major trends in library modernization is the creation of digital collections based on a library's own distinctive resources.

Recommendation 5.7,8.4. All but the most personally sensitive court records should be maintained in electronic form and should be accessible by the public from remote locations. Legal pleadings and actual transcripts should be accessible from remote locations. Personally sensitive trial exhibits and certain specified personal and financial information contained in court files should only be accessible at the courthouse.

Rationale

Electronically storing court records and making them accessible by the public from remote locations, like the private home, will greatly increase public access and satisfaction with the court system. Such a system would provide the public with around the clock access to court records and case files. As information in court records becomes more accessible, greater concern must be given to the protection of personally sensitive information in court files. Filters must be developed to prevent unwarranted access to personal information such as birth dates, social security numbers, and detailed family and financial information. Some exhibits, particularly in domestic cases and criminal cases involving sexual crimes, contain highly personal and sometimes embarrassing information. While exhibits containing such material may be viewed at the courthouse, there is no compelling reason to have such material accessible from remote locations or providing it in a format which makes it readily disseminated over the Internet. For example, the dissemination of the graphic exhibits in a child pornography case over the Internet would be committing the very crime for which the defendant was being prosecuted. Because restricting this information is a policy decision, a uniform, statewide policy on the distribution of information should be promulgated by the Supreme Court similar to the proposed amendment to Federal Rule of Civil Procedure Rule 5:2 -- Privacy Protection for Filings Made with the Court.

Recommendation 5.1,7.5. The courts should permit e-filing of legal pleadings.

Rationale

Electronic filing is faster, more convenient, and can provide the public and litigants with immediately accessible and indexed information about court files. The court's computer system should index cases automatically when they are filed, and generate notices and other documents. When orders are entered, they can be automatically recorded and indexed and confirmation of that entry sent to the parties. Similarly, when judgments are entered, they can be automatically docketed and confirmation sent to the parties. Provision must be made for court filing fees to be paid electronically.

Recommendation 5.7.6. An e-ticketing system for traffic infractions should be developed.

Rationale

An e-ticketing system is an electronic citation system in which the arresting officer creates the traffic summons on a personal digital assistant device which can transfer the pertinent data to the appropriate court contemporaneously with the issuance of the summons. This would permit a seamless flow of information from the police department to the court system. The number of Uniform Traffic Summonses issued each year continues to escalate. Data entry of citations is a labor intensive task that is subject to human error. Electronic interfaces between law enforcement and the courts will streamline processes, reduce data entry errors, and assist with the timely collection of fines and costs.

Recommendation 5.1,7.7. The courts' e-payment system should be expanded to permit any payments to the court system to be made electronically.

Rationale

While users of the current e-payment system can prepay traffic fines and costs, other fines and costs, which cannot be prepaid or which are paid in installments, must now be paid in person or by mail. At present, the public is not able to check the status of payments, current amount due, and payment history on line. The system should be expanded to permit this, thereby reducing the time which court personnel spend in responding to inquiries about the status of fines and costs.

Recommendation 5.1,7.8. The use of electronic forms using intelligent forms processing should be implemented.

Rationale

Intelligent forms processing is a process in which documents are scanned or accepted in digital form and then verified for accuracy and authenticity by the use of optical character recognition (OCR) or intelligent character recognition (ICR). District court procedure is form intensive, and this process would allow courts to scan completed forms into an image database and with the use of optical character recognition, extract, interpret and store handwritten and typewritten entries.

To safeguard against potential misinterpretations of handwritten characters, the application is equipped with a "smart key" technology that allows human operators to review marginal characters so that errors can be corrected immediately. This system has been proven to reduce the labor costs of data entry, data management, and data storage.

Recommendation 5.8.9. The Supreme Court should adopt a comprehensive policy on access to court records consistent with the recommendations of the Guidelines for Public Access to Court Records published by the National Center for State Courts and the Justice Management Institute.

Rationale

Requests for information from the court system are not limited to the public in Virginia. Increasingly, requests will be received from national organizations and ad hoc groups, so to the extent that Virginia adopts a policy consistent with that of most other states, the problems encountered by information requests will be diminished.

Recommendation 5.7.10. A computer based electronic document management system should be implemented in each level of court.

Rationale

An electronic document management system is an institutional system in which all of the documents regularly used by an enterprise are created, indexed, stored, and maintained on the enterprise's computer system. Such a system facilitates the initial creation and filing of the documents, and their retrieval from the system's file server. With the increasing number of forms, pleadings, motions and other court documents being filed in the courts, a document management system is essential to the management of documents in the court and to provide on line access. Implementation of such a system will improve productivity, will avoid duplication of documents thus reducing costs, and will significantly expedite locating, sharing, and retrieving documents.

Recommendation 5.7.11. Technology for encryption of electronic data should be implemented.

Rationale

Encryption, the conversion of data into a secure form so that it can be read only by authorized persons, can be used to restrict access to certain portions of a court file. This is necessary when access to personally sensitive information in court files is to be restricted. Other portions of the file can be viewable but not printable or downloadable.

IV. Videoconferencing

Present Conditions

Videoconferencing is in general use throughout the state for remote, preliminary court appearances, such as the first appearance before a magistrate, appointment of counsel, and arraignment. The receipt of testimony from locations remote from the courtroom is comparatively rare, but it is becoming more frequent.

Trends

As videoconferencing becomes more available, it will be more widely utilized. As is currently true in the corporate world, videoconferencing can be expected to replace personal appearances in court in appropriate cases. Its use may become commonplace for some forms of alternative dispute resolution.

Recommendation 5.7.12. All courtrooms should be equipped for video conferencing, and court rules and statutes should be promulgated to permit electronic appearances in all civil cases. All detention facilities in the state should be equipped with video conferencing equipment to avoid the expensive transportation of prisoners for short, pretrial matters, like appointment of counsel, setting of trials, and motions.

Recommendation 5.7.13. The use of technology-enabled alternative dispute resolution should be explored as a means of inexpensively and efficiently resolving some civil cases.

Rationale

Electronic appearances by witnesses are more convenient for the witness than appearing at the courthouse and waiting hours and in some instances days before testifying. The latitude for such testimony is greater in civil cases than in criminal cases. As mediation increases, the demand for video conferencing can be expected to increase. In the future, a hologram witness may sit in the witness chair. Video appearances by prisoners for preliminary court appearances is both more cost effective and more secure than the current system of physically transporting prisoners, sometimes across the state, for what are frequently very short court appearances.

V. Courtroom Technology

Present Conditions

Approximately one fourth to one third of the nation's United States District Court courtrooms are technologically enabled. An increasing number of lawyers use electronic means to visually display and annotate evidence. Although the number of Virginia courtrooms with permanently installed evidence presentation technology is unknown, it is clear that lawyers are increasingly using document cameras and computer-originated displays, including PowerPoint, at trial; however, the use of computers in the courtroom by trial attorneys in the Commonwealth is not yet widespread. The most technologically advanced courtroom in the world is at the William & Mary Law School. The Courtroom 21 Project there has designed a prototype, high-technology courtroom for the Fairfax courts which plan a more comprehensive implementation of courtroom technology in the future.

Realtime court reporting technology permits near instant access by judge and counsel to the court transcript. The transcript can potentially be made available to counsel, and if desirable, to the public, via the Internet. Realtime can be combined with digitalized audio, video, and exhibits to permit a comprehensive multi-media record. While there are a few courts which use electronic court reporting systems, the vast majority of courts still use private court reporting services. While the Rules of Court permit the acceptance of the official videotape recording of any proceeding from those circuit courts authorized by the Supreme Court to use videotape recordings, the traditional, typed transcript of court proceedings is still the general rule.

Trends

The use of voice technologies including voice recognition and voice response systems is increasing. These systems are being used both as an identification tool and to translate text to voice and voice to text. Such systems increase access to those persons who cannot physically type. Voice response systems interact with the caller through the telephone, asking questions and assessing verbal responses to provide general information. Both speech recognition and voice response technology, if sufficiently refined, could expand public access to the court system and improve staff productivity.

Electronic evidence such as e-mail logs and electronically stored financial records and business records will increasingly be introduced into evidence. The ease with which this can be done will result in an increase in the volume of evidence which is potentially part of the record to be maintained by the courts.

Recommendation 5.7.14. Courts of record should use modern technology, especially computer assisted transcription, to efficiently produce text transcripts that can be searched and transmitted electronically and which can include links to the case's evidence.

Rationale

Consideration of the requirements for a proper court record requires distinguishing between capturing what takes place during the trial or hearing and the use to be made of that information. Modern technology permits reliable and accurate electronic audio, recording, audio-video recording, and stenographic and voicewriter court reporter-originated court records. An ideal court record should not only provide a sufficiently accurate record of what takes place during a trial or hearing to permit a timely and efficient appeal, it should also provide a contemporaneous draft of the trial transcript to counsel and to the judge for their use during the trial or hearing. The resulting transcript should permit the electronic search, retrieval, and use of the record when needed. There is no known or reasonably predictable technology that can convert with sufficient accuracy an electronic recording to a text transcript without human involvement. Accordingly, although electronic recording should be considered for hearings in which neither appeals or contemporaneous use of the record will be needed, court reporter originated realtime computer-assisted transcription (CAT), which generates a near-contemporaneous draft electronic transcript, ordinarily should be used by courts of record.

In addition to permitting easy search and retrieval, electronic court records can be transmitted over the Internet and can incorporate hypertext links to the case's evidence and other documents. Courtroom 21 experimental trials have linked realtime transcription to digitized audio, video, and evidence images to provide comprehensive multi-media transcripts which use text as the entry to the audio and video.

VI. Jury Management

Current Conditions

Prospective jurors' first contact with the court system is when they receive by mail a juror questionnaire which requires them to provide certain personal information about their qualifications to serve. This questionnaire also asks them to indicate whether they are requesting an exemption. Based upon the information provided in the responses to the questionnaires, jurors are then selected for the upcoming terms of court. The qualified jurors are then summoned for their actual jury service. In some jurisdictions the summons is mailed, but in others the summons is actually served by a sheriff's deputy. The information which the juror receives with the initial questionnaire and summons varies among the various jurisdictions. In some jurisdictions, when the prospective jurors are summoned, they receive an information brochure generally describing their jury service duties, but in others they do not. When the initial questionnaire and summons are received, many prospective jurors have questions about their potential jury service and their eligibility for an exemption, which need to be answered. Currently, these inquiries are generally handled by phone or letter by an employee of the Clerk's office or, in larger jurisdictions, by the jury administrator.

Trends

As the population has become more computer literate, the court webpage is increasingly the first source that potential jurors check for information about jury service.

Recommendation 5.7,8.15. An automated jury management system should be implemented to enable local courts to inform and to manage their jury panels more effectively.

Rationale

Jury service is the last mandatory call to public service. Jurors are both inconvenienced and underpaid, so it is critical that they be properly informed about the importance of their service and that modern management tools be used to effectively control the amount of time that they devote to their jury service thereby minimizing their inconvenience. Each court should have a juror webpage on which the prospective juror may complete his questionnaire on line, if he wishes, and may request information about any potential excuse or exemption to his service which he believes may exist, and on which the jury administrator may respond to that request or provide other information. After a juror has been assigned to a particular case, this website should also contain juror orientation information as well as information about the status of the case for which the juror has been summoned. Since some jurors do not have Internet access, such

a jury management system should also have an interactive, voice component to permit jurors to make inquiries about their service via the telephone.

VII. Court Webpage

Present Conditions

The Supreme Court website has a link to a website for each court in the state. The information available on the local court websites varies. The public can access these websites. In most jurisdictions, a person can obtain information about specific cases and case dispositions. On the more developed court websites, the public can also access court opinions and court forms.

Trends

Websites accessed through the Internet are becoming the courts' primary window to the public and increasingly are the preferred method for the citizen's first request for information about or from the court system.

Webcasting of court proceedings will increase and improve the public's access to and understanding of court procedures and decisions.

Recommendation 5.7.16. Court webpages should be expanded using nonproprietary technology, where appropriate. Technology in the development of webpages should be expanded to facilitate public access to the court system to include access devices that enlarge and read aloud text information for novice users, seniors, and impaired vision users.

Rationale

To the extent practical the courts' webpages should be based on open standards, that is public domain software or software available at little cost. Each local circuit court should have a webpage for its jury panels. This should be used to educate participants in the court system, such as jurors and witnesses, and to keep them informed as to the status of the cases in which they are involved. Interactive webpages should be used at the local and state level to orient new employees, dispense personnel information, and to educate judges and court personnel.

Recommendation 5.7,8.17. The Supreme Court webpage should be expanded to include a public comment section.

Rationale

The court should encourage public input about the courts through the development of a public comment system through electronic means. Seeking public input on ease of access, services provided, and support given through an automated process will streamline data collection and provide the public with a vehicle by which they may interact directly with the judicial system.

VIII. Assistive Technology

Present Conditions

Most courthouses are now accessible by persons whose physical mobility is limited, but there are few resources in the courthouse to assist persons with visual or hearing impairments.

Trends

As life expectancy increases, the number of persons over age 65 will increase. Consequently, the number of persons with physical, visual, and hearing limitations who are required to interact with the court system will increase.

Recommendation 5.7.18. The courts should adopt assistive technology to more readily accommodate the hearing, visual, and mobility impairments of participants in the legal process and to provide assistance in the examination of court records.

Rationale

The courts have an obligation to assist participants in the legal process who have a disability. This requires more than structural modifications to permit wheelchair use. Limitations on mobility, sight, and hearing increasingly can be compensated for or assisted by a wide variety of technologies. Use of these technologies is important not only to accommodate the needs of staff members and of the public, but also to the increasing number of participants in the legal process who require access to these technologies to participate effectively in the administration of justice. In light of the aging of the baby boom generation, the need for technology can be expected to increase in the future.