

HOW TO AVOID THE OOPS UNDER THE **NEW** RULES!

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NEW OOPS! Or POTENTIAL OOPS!

The new rules have been promulgated effective July 1, 2010.

There are potential new OOPS as well.

LET ME START WITH A MATTER WITH SERIOUS
CONSEQUENCES:

There is an unpublished order of the Court of Appeals that raises more disturbing questions about waiver.¹ In *Scott*, the court held that complete failure to have the citation, in the question presented, of preservation in the trial court or commission [see Rule 5A:20(c)] and a complete failure to provide a statement of facts [see Rule 5A:20(d)] were EACH found to be “significant” under *Jay* and thus the penalty was waiver of the appeal.

It appears that the immediate appellate result will be the same under either a waiver theory or a dismissal theory. However, waiver of the point may preclude further appeal under the delayed appeal statutes. The criminal defendant may have to use the traditional

¹ *Scott v. Samuel I. White, P. C., et al.*, Rec. No. 2583-08-1 (Order issued August 27, 2009)

habeas corpus means to seek appellate review. Waiver in criminal cases may also impact future post-conviction review of the question waived.²

This also raises anew the issue of a conflict of interest that was discussed in LEO 1817 and alleviated by virtue of the right to a delayed appeal. However, if certain appellate flaws get your appeal DENIED rather than DISMISSED (such as late transcripts or late transcript notice or failure to cite sufficient authorities or failure to cite the place where preserved in the question presented at the Court of Appeals) than there is no delayed appeal. The Court of Appeals is doing exactly that.

BACK TO NEW RULE OOPSES!

Rule 5:1 (and also Rule 5A:1) – require a certificate showing date and manner of service on all opposing counsel. “Mailed or delivered” will not be good enough. You have to say mailed OR delivered.

Word counts in SCV include headings, footnotes and quotations count BUT cover page, tables and certificate do not.

Both courts have a new rule requiring notice of change of address to the court if different from the NOA. See Rule 5:1(e), Rule 5A:1(e)

² See e.g., *Smith v. Murray*, 477 U.S. 527, 533 (1986)(where claim was not raised at all due to prior case law it was defaulted on habeas); *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 685 (1974)(claims not raised on direct appeal cannot be raised on habeas).

A litigant may cite an unpublished decision as persuasive authority³ but must add the case to the petition or brief if it is not readily available electronically. See Rule 5A:1 for COA has identical rule.

Rule 5:1A – Dismissal of the appeal is the standard sanction for all violations of the rules but for non-mandatory deadlines or technical or formatting issues counsel may get a show cause or a letter.

The scary language is:

“Except as provided in Rule 5:17(c) regarding assignments of error, prior to the dismissal of an appeal for any defect in the filings related to formatting, curable failure to comply with other requirements, or the failure to meet a non-mandatory filing deadlines, this Court may issue a show cause order to counsel..., prescribing a time in which to cure such defect or to otherwise show cause why the appeal should not be dismissed or other penalty imposed.”

The rules DO indicate that the Court is considering dismissal of appeals for even technical violations of the rules. They may not do so but this is fair warning...

NOTE: Rule 5:6(c) permits one do-over for paper size, margins, font size and type, double spaced lines, address info such as the bar number, fax number or email, no condensed transcripts in appendix etc.

Rule 5:32(e) states no dismissal for the FIRST violation of the appendix rules

³ Here is a en banc opinion of the Court of Appeals touching the use of unpublished opinions: *Fairfax County School Board v. Rose*, 29 Va. App. 32, 38 n. 2, 509 S.E.2d 525, 528 n. 2 (1999)(en banc)

Rose holds:

“Although an unpublished opinion of the Court has no precedential value,...[citation omitted]..., a court or commission does not err by considering the rationale and adopting it to the extent it is persuasive.”)

All litigators should add *Rose* to their tool box of useful cases for courts of commissions.

BAD NEWS: (but what we already knew!) There may be a report to the VSB for dismissal OOPS.

All litigants need to have a zero tolerance for even technical rule violations in either appellate court.

Rule 5:4 and Rule 5A:2 – all motions must have a statement representing that there was notification to opposing counsel of the filing of the motion. The representation must state the position of OP.

The SCV rule has an advisory note that basically states that any matter counsel wants to raise may be raised by motion. This is the only such advisory note.

Rule 5:5 and Rule 5A:3

The “Katrina” rule has been changed to “A showing of good cause sufficient to excuse the delay”. It takes two justices of the SCV or three judges of the COA to invoke this rule.

The transcript rule (Rule 5:11) is no longer “mandatory” so you may now ask the VSC for an extension of time to file the transcript.

Important finality rule – the final order must be “modified, vacated or suspended” to toll the filing deadline for the notice of appeal. If the final order is so modified, vacated or suspended then the deadline starts from the entry of a new final order. Rule 5:5(b), Rule 5A:3(a).

NOW on to the mailing rule [Rule 5:6(c), Rule 5A:3(d)]:

Several huge OOPS attend the funeral of the old “certified mail” rule.

Here is the NEW rule:

“Any document required to be filed with the clerk of this Court shall be deemed to be timely filed if (1) it is transmitted expense pre-paid to the clerk of this Court by priority, express, registered, or certified mail via the United States Postal Service, or by a third-party commercial carrier for next-day delivery, and (2) if the official receipt therefor be exhibited upon

demand of the clerk of this Court or any party and it shows such transmission or mailing within the prescribed time limits.”

Here is how I see the elements of this new rule:

- 1) Must be a “third-party commercial carrier for next day delivery”
OR
- 2) Must be PRIORITY/EXPRESS/REGISTERED or CERTIFIED MAIL
AND
- 3) The OFFICIAL RECEIPT thereto exhibits “transmission or mailing”
on or before the due date.

I suggest:

“Third-party commercial carrier for next day delivery” means FedEx, DHL, UPS, not a private courier service.

YOU MUST get the RECEIPT from them! Not even sure if you can use the BOX!

A review of UPS and FedEx web pages shows that FedEx will send you an official receipt even by email while UPS allows you to PRINT your own official receipt.

You MAY also use PRIORITY mail – but better get the tracking or find out what receipt exists.

If there is NO official receipt – you CANNOT USE IT!

I’ll say it AGAIN: IF THERE IS NO OFFICIAL RECEIPT, YOU CANNOT USE IT!

Same goes for EXPRESS but that should be similar to UPS etc.

It might be safer to stick to the certified mail for last day filing until there is a definite decision as to what is a proper receipt. FedEx and UPS rules seem a bit too informal for my comfort.

A prior unpublished case holds that HOME GROWN receipts are NOT acceptable. See *Commonwealth v. Green*, No. 1845-03-2 (Va. Ct. App. Unpublished January 13, 2004)(The internal receipt of the City of Charlottesville showing mailing by certified mail is not such an official receipt from the USPS)

This mailing rule is again a MAJOR MAJOR OOPS!

Rule 5:5(e) states that a motion to extend the time to do something must be filed before the original deadline or any suspension period or a reasonable time if no suspension period is specified. The filing does not toll the original filing deadline.

Rule 5:6 – no change in font size (14 points), font type (Arial, Verdana and Courier), margins (one inch around), no condensed transcripts, but the VSC added the phone EXTENSION if available, the fax number and email.

Headings, assignments of error, quotations and footnotes must be single spaced. All else must be double spaced.

Rule 5A:4 requires a certificate of compliance with the word count and maintains the 12 point Times New Roman font.

The notice of appeal in the Court of Appeals will require a new certificate that will have the name/VSB number/telephone number with extension if any/fax number/email/and the address/telephone and fax numbers and email of opposing counsel.

Rule 5:8A is essential reading for anyone who does multi-party litigation. This rule determines finality in partial judgment cases.

Rule 5:9/5A:6 – Not a draft rule but a rule effective January 1, 2009 that filing the NOA in either the SCV or COA is timely filed if filed after the verbal pronouncement but before the final order is entered. Such filings are treated as if they were filed at the same time as the entry of the final order.

POTENTIAL OOPS: The “and at the same time mails or delivers a copy of such notice to all opposing counsel” is a potential OOPS in that the Court might treat that as mandatory time deadline.

POTENTIAL COA OOPS: You MUST at the same time as the filing of the NOA in the trial court, file copy of the NOA in the office of the clerk of the COA. There is a \$50.00 filing fee for filing any appeal in the COA. THIS IS JURISDICTIONAL. I recommend you send that certified mail and keep official receipt. The Clerk’s office can ask for the receipt.

The COA under the new rule will NOT dismiss appeals in parental termination cases solely because the Guardian ad Litem was not served the NOA [Rule 5A:6(f); also see Rule 5:9(d)(SCV has identical rule)]

“No appeal shall be dismissed because the notice of appeal fails to identify a guardian ad litem or to provide notice to a guardian ad litem. Upon motion for good cause shown or by sua sponte order of this Court, the notice of appeal may be amended to identify the guardian ad litem and to provide notice to such guardian.”

Or so it says! Any time the court says “good cause shown”, that is not an easy burden to meet. Better to avoid the OOPS and cite and serve GAL in the NOA.

Rule 5:11 – A NEW transcript OOPS! This is the SCV rule only!

The COA rule – Rule 5A:8(b) – has the old transcript deadline (60 days from date of final order) with a twist: A litigant has NINETY (90) DAYS to file for an extension of time but must show “good cause to excuse the delay.” That does not sound like a blank check but offers some relief.

In the SCV: The original sixty day rule is still in effect with a slight wording change. Notice of filing the transcript is required and the first appellant to file the NOA is responsible for the notice.

The SCV now allows 70 days to do the following [Rule 5:11(d)]:

“If anything material to any party is omitted from or misstated in the transcript, or if the transcript or any portion thereof is untimely filed, by omission, clerical error, or accident, the filing may be supplemented, corrected or modified at any time within 70 days from the entry of judgment appealed from.”

What does this mean? I do not know but here’s my best guess based on a conservative reading of the rules:

It does not cover just NOT FILING IT. [See 5:11(d): “...the filing may be supplemented, corrected, or modified...” Hard to supplement, modify or correct a non-filing.] Something has to be filed or some good cause must exist to excuse the non-filing within the sixty days.

I draw by analogy to the appeal bond rule in the COA – if you file a bad bond and it is successfully challenged, you may refile a better bond but that rule does not excuse no filing at all! See Rule 5A:17 and *Burns v. C. W. Wright Const. Co.*, 1 Va. App. 256, 336 S.E.2d 908 (1985).

I suggest that if there is some flaw or defect in filing the original transcript (which MUST be filed WITHIN 60 days of the final order) that flaw can be corrected. POSSIBLE flaws (remember I have no black robe) COULD INCLUDE:

Incomplete transcript – page or pages missing

Corrected transcript – text changed

The court reporter filed a statement with the court saying he/she filed the transcript and he/she did not.

The days were miscounted (?) **[I wouldn't hang any hat on this!]**

The attorney filed the notice but neglected to file the transcript through some excusable omission.

You do not need a motion or court order – mere notice like the original notice you filed to opposing counsel is sufficient according to this rule if you are within the 70 days.

After THAT, there is a different rule:

“Thereafter, such supplementation, correction, or modification may be made, by order of this Court sua sponte or upon motion of any party, if at least two Justices of this Court concur in a finding that any such supplementation, correction, or modification is warranted by a showing of good cause sufficient to excuse the deficiency.”

This at least gives you a chance if there is catastrophic malpractice in your office. However, I will suggest this will be sparingly used by the Court. Certainly inability to rule on the merits is one aspect of the good cause shown rule. But I suggest it is not all you must show. Perhaps likelihood of success on the merits if you have that transcript(s) in the record. Clear reversible error is probably required.

The SCV and COA are in accord that other incidents of the case in a statement of facts can be motions, proffers, objections, and rulings of the trial court. See Rule 5:11(f) and 5A:8(c).

Of course ANY and EVERY statement of facts should have objections, arguments of counsel, proffers and rulings to prevent the invocation of the preservation rule.

Rule 5:17 – Petitions for appeal are radically different in both courts and we will discuss each court in turn:

In the SCV – CRUCIAL OOPS!

Assignments of error have always been required since about 1986. These new rules now require the assignment(s) of error and a “Separate Heading” for the assignments of error. If the petition neither has assignments of error or the SEPARATE HEADING (emphasis added) the appeal will be dismissed.

The SCV also will require the preservation citation at the assignment of error. This requires an “EXACT REFERENCE (emphasis added again) to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal”. See Rule 5:17(c)(1)[emphasis added]. This will probably be a dismissal OOPS. See Rule 5:1A(a):

“Except as provided in Rule 5:17(c) regarding assignments of error,...

Also see Rule 5:17(c)(1)(iii):

“If the assignments of error are insufficient, the petition for appeal shall be dismissed.”

In light of the preservation requirement being set in the same Rule [Rule 5:17(c)(1)] I would regard ANYTHING relating to an assignment of error to be mandatory and jurisdictional.

The assignment of error must still be specific:

“An assignment of error that does not address the findings or rulings of the trial court or other tribunal from which an appeal is taken, or which merely states that the judgment or award is contrary to the law and the evidence, is not sufficient.” Rule 5:17(c)(1)(iii).

This is to be done without “extraneous argument” Rule 5:17(c)(1)

Of course the rule requiring citation of the COA error (NOT THE TRIAL COURT OR COMMISSION) still applies: MUST cite the action of the Court of Appeals to be error in any appeal from the Court of Appeals or risk dismissal for want of jurisdiction.

The petition must have a section in the argument called the standard of review. This is true for both courts. Rule 5:17(c)(6); Rule 5A:12(c)(5)

THERE ARE NOW NO QUESTIONS PRESENTED IN ANY BRIEF OR PETITION IN ANY VIRGINIA APPELLATE COURT!

Pages (35) or word count (6,125) in certificate of compliance for SCV. Rule 5:17(f) and (i)(3).

THIS IS NOT A NEW RULE BUT – filing fee of \$50.00 is JURISDICTIONAL. There is a ten day grace period. Rule 5:17(d)

ALL authorities must have a DATE. Rule 5:17(c)(3). Va. Code Ann Section 18.2-31 (1950) probably is enough in a run of the mill appeal. Check Blue Book.

The statement of facts MUST have references to the record or appendix. Rule 5:17(c)(5).

Phone numbers of counsel MUST have an extension if there is one. Also email for counsel for all parties.

I STRONGLY RECOMMEND getting email address of a pro se opponent as the Court will ask for one. Rule 5:17(i)(1).

Turning to the COA's rule:

We will now have the Assignment of Error OOPS. This will certainly be a DISMISSAL OOPS See Rule 5A:12(c)(1)(i)(ii). The rule is virtually identical to the SCV rule.

NO QUESTION PRESENTED IN COA EITHER!

Still have need for an "exact reference" where the error was preserved at the Assignment of Error reference. See Rule 5A:12(c)(1). This will be a DISMISSAL OOPS.

Same as SCV – assignments of error must be specific or appeal is dismissed. Rule 5A:12(c)(1)(ii)

Also same as SCV – the argument needs to have a standard of review. Rule 5A:12(c)(5) and Rule 5A:20(e). Perhaps a dismissal or WAIVER OOPS!

BIG OOPS: The petition in the COA **MUST** have an oral argument request in the certificate or it is **WAIVED**. Rule 5A:15A(a)(5).

The statement of facts **MUST** also have references to the record or appendix.

No page limit but word count of 12,300. Rule 5A:12(e). Again does not include tables, cover or certificates. *Id.*

Rule 5:18 – Briefs in Opposition in SCV

The Word count is 25 pages or 4,375 words. Rule 5:18(b)

Tables required if more than ten pages or 1,750 words

Must state on cover if there is cross-error to be assigned the following words: BRIEF OF OPPOSITION AND ASSIGNMENT OF CROSS-ERROR

Rule 5A:13 – Briefs in Opposition in COA

The litigant gets 8,800 words for his/her BIO

Rule 5A:13(b)(1)

If the BIO has more than 3,500 words it requires tables

Rule 5A:13(b)(2)

The Commonwealth is no longer REQUIRED to file a BIO.

Rule 5A:13(b)(3)

The same rule exists with a reply brief (WARNING IT WAIVES ORAL ARGUMENT IN BOTH COURTS STILL), its word count is 5,300 words. See Rule 5:19 (no change here) and Rule 5A:14.

Rule 5:20(e) states that if you were awarded fees as the prevailing party in the circuit court, you may ask for your additional fees and costs for prosecuting this appeal in the SCV. Also see Rule 5:35(b)

Rule 5:20A is a rehearing from denial of appeal. The petition is reduced to 1750 words. Need the VSB number and fax number for counsel.

Rule 5A:15A is the electronic filing provision for a rehearing after a denial of a petition by the first judge. Va. Code 17.1-407 establishes the procedure: First judge and then a three-judge panel. No other rehearing is allowed. The only substantive change is the word count on the demand for three-judge review was cut to 350 words.

Rule 5:26(d) now states 50 pages or 8,750 words for appellant/appellee briefs and reply brief have a 15 page or 2,625 word limit. Fifteen copies of the brief to court, three to each opposing counsel and one electronic copy. Rule 5:26(e) requires specific certificates. Rule 5:26(h) requires signatures (not in handwriting) and name/VSB number/address/telephone number/fax number/email and word count compliance.

There must be a certificate of compliance with Rule 5:26 or 5A:20(h) as to the word count and the rule in general. This can be in the regular certificate.

BUT SEE Rule 5:32 – the appendix has different filing numbers!

Rules 5:27 and 5A:20 require the opening brief to be similar to the petition. If you compare 5A:12(c)(5) with 5A:20(e); the BRIEF requires argument on unpreserved issues as to what good cause/ends of justice exception applies BUT NOT in the PETITION.

Standard of Review required in both appellant's and appellee's briefs in COA. Rule 5A:20(e) and 5A:21(d)

Rule 5A:19 will require a word count INSTEAD of page numbers [Rule 5A:19(a)]:

Appellant and Appellee's briefs are limited at 12,300 words.
Reply briefs are limited to 3,500 words.
Not the cover, tables or the certificates count toward the words.

There must be served an electronic copy of the brief. It does not have to served electronically. Rule 5:26(e).

The COA will now require on briefs what the SCV has required for some time: VSB numbers, emails and fax numbers. Rule 5A:20(g).

Rule 5:32 - The appendix rules at the SCV (Rules 5:32 through 34) will be somewhat different from the COA since the COA rule (5A:25) is largely unchanged.

A party may actually move the Court to dispense with the appendix.
Rule 5:32(c)

Here is a summary of the VSC rules:

NO memoranda of law are to be designated unless they have "independent relevance" See Rule 5:32(a)(2)

The deadlines for designations are now FIFTEEN days for appellant or if filed jointly, and FIFTEEN days for the appellee after appellant files.
Rule 5:32(b)

COA designation rule is unchanged.

NEW RULE ON SEALED MATERIALS: Sealed materials MUST be placed in a separate volume or volumes. Rule 5:32(b)(2). These materials must be separately designated or designated as sealed. *Id.* MOTION must be filed to seal these items filed at the time for the filing of the DESIGNATION (not the filing of the appendix). *Id.*

No “witnessing at the top” in VSC [see Rule 5:32(a)(1)] but still in the COA [see Rule 5A:25(c)(5)] The appendix TABLE Of CONTENTS will require the listing of direct, cross, redirect, etc. in SCV [Rule 5:32(d)] but not in COA [Rule 5A:25(e)].

The table of contents of the appendix MUST have [Rule 5:32(d)]:

1. Each portion of the witness’s testimony must be stated in the TOC (e.g. Direct, Cross, Re-Direct, Voir Dire, etc.)

NOTE: No more “witnessing at the top” in SCV but still in COA

2. Parts of record are to filed in chronological order
3. Asterisks to denote breaks in pleadings and/or transcripts
4. Exhibits should have a short description in TOC

I would however suggest that in order to establish what was argued (and thus avoid the administration of the preservation rules), the memoranda may still be necessary.

I will report one bit of good news: The OOPS of “if it ain’t in the appendix (sorry English teachers!), it ain’t being considered” has been expressly overruled in the SCV. See below:

“Parts of the record may be relied on by this Court or the parties even though not included in the appendix.” Rule 5:32(a)(2).

Try this language as the clincher [Rule 5:32(b)(1)]:

“The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the Court.”

The COA’s rule may be unchanged for now but counsel caught in the *Patterson* OOPS⁴ should now use the SCV language to suggest that the COA should now abandon this case.

⁴ The Patterson OOPS is that if it is not in appendix it is not to be considered. Here are cases to cite if on either side:
See Patterson v. City of Richmond, 39 Va. App. 706, 576 S.E.2d 759 (2003)(“ Because the appendix filed in this case does not contain parts of the record that are essential to the resolution of the issue before us, we will not decide the issue.”)

Other OOPS or potential issues:

Service of appendix [Rule 5:32(a)(3)]:

15 Copies to Court and must NOW serve TWO copies on each opposing counsel or pro se party.

Counsel has a choice: Instead of the 15 copies, counsel may file 10 paper copies and 10 electronic copies. Electronic copies MUST be PDF on CD-ROMs. If counsel takes this route, an electronic copy must be served on each OP. See Rule 5:32(3)(ii)

The COA did not change their rule.

The old “prepay” rule that forced the appellee to prepay for items the appellant considers not germane has been modified to require the appellant to notify the Clerk of the SCV prior to requiring payment. See Rule 5:32(b)(3).

A bit of good news: There is a one time fix for issues with the appendix but only one time. The Court may dismiss the appeal for a violation of the order requiring changes to the appendix. See Rule 5:32(e).

New Rule 5:37 (formerly Rule 5:39 and 5:39A) – Rehearings

This ONLY applies to rehearings after a merits decision – NOT denial of a petition for appeal. (That is governed by Rule 5:20 and 5:20A)

The Patterson case is not clear if the item was in the RECORD but since it was not in the APPENDIX it was not considered. *Accord Shaffer v. Shaffer*, No. 1945-03-2 (Va. App., Unpub, June 8, 2004).

But see Rule 5A:25(h), 5:32(h)(Both Virginia appellate courts may consider parts of the record not in the appendix.) and this contrary authority (albeit unpublished) distinguishing *Patterson: Lewis v. Culpeper County Department of Social Services*, No. 2575-06-4 (Va. App., Unpub., July 31, 2007)(Panel of the Court of Appeals distinguished *Patterson* in that *Patterson* did not discuss or cite Rule 5A:25[h]).

10 day notice to Court of intent to file for rehearing – See Rule 5:37(b)

30 day deadline to electronically file the petition – See Rule 5:37(d)

The word count has been reduced to 1750 words. It must be 14 point type and double spaced. Of course all briefs must follow Rule 5:6. Rule 5:37(d)(1).

FINALLY ONE LAST OOPS UNDER ANY RULES, NEW OR OLD:

You never want as a litigant to be in a position of having the appellate court question your integrity. There is a great article by L. Steven Emmert, Esq. at www.virginia-appeals.com entitled The Top Ten Ways to Lose Your Appeal. The number one way cited is to “Squander your ethos”. Here is a relevant excerpt:

“If personal credibility is thus so important..., you can make considerable headway toward losing, by squandering yours. There are limitless ways to do this, but the most effective are:

- Playing footsie with the facts;
- Mis-citing cases;
- Failing to mention and address controlling, adverse authority; and
- Making excuses for weaknesses in your case (“Your Honor, I didn’t try the case below; that mistake was made by the trial lawyer.”).

But why is this #1? It’s because of its ruthless efficiency. When you squander your ethos, and the court comes to recognize that it can’t trust you, you won’t just lose your appeal; you’ll lose your appeals. A reputation as someone who cuts corners, or is willing to mis-state the record, will not be forgotten by the time your next case is called, even years later. They **will** remember, and they **will** hold it against you the next time. A reputation for honesty is a fragile thing, easily broken and very difficult and time-consuming to repair.

