10 Things I Wish I'd Known Before I Handled My First (or Last) Appeal

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1. The first appellate deadline comes in trial court.[1]

a. Your appeal begins in trial court. To preserve error, you must object contemporaneously and with reasonable certainty, in order to allow the trial court to rule intelligently on your objection. The trial court must actually rule on that objection, and you must create a record of its ruling.

b. In Virginia state courts, waiver and preservation of error have been hot-button issues for the past decade. Both of Virginia's appellate courts routinely apply their respective contemporaneous objection rules to dismiss issues or entire appeals. *See* L. Steven Emmert, *Preserving Issues for Appeal*, J. VA. TRIAL LAW. ASS'N, Spring 2005 at 23-25.

   i. *Supreme Court.* Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Va. Sup. Ct. R. 5:25.

   ii. *Court of Appeals.* No ruling of the trial court or the Virginia Workers' Compensation Commission will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal. Va. Sup. Ct. R. 5A:18.

c. The contemporaneous objection rule is intended to afford the trial court an opportunity to rule intelligently on an issue in the first instance, and to therefore avoid unnecessary appeals. A specific, contemporaneous objection also presents the opposing party an opportunity for rebuttal. *Nusbaum v. Berlin*, 273 Va. 385, 402-03, 641 S.E.2d 494, 503 (2007).

[1] Credit for this observation goes to Steve Emmert.

d. Objecting once generally is sufficient to preserve error, so long as the record shows that the issue was raised below and the trial court was given an opportunity to rule on it. *See* Va. Code § 8.01-384(A) (abolishing exception and stating that an objection or motion stated on the record need no be repeated to preserve error)[2]; *see also King v. Commonwealth*, 264 Va. 576, 580-82, 570 S.E.2d 863, 865-66 (2002) (moving to strike evidence but not objecting to subsequent jury instruction was sufficient to preserve issue for appeal); *but see Commonwealth v. Riner*, 268 Va. 296, 601 S.E.2d 555 (2004) (defendant waived double-hearsay issue on appeal even though he had raised it before the trial court, because the trial court ruled only on first-level hearsay issues).

e. It is not sufficient merely to note or state an objection on the record. The best practice is to get a ruling on those objections. *See Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007) (finding that appellant had waived objections where he objected but affirmatively stated that he was not asking the trial court to change its ruling).

f. The Court of Appeals has held that simply endorsing an order "seen and objected to" does not preserve an objection to that order for appeal. *Lee v. Lee*, 12 Va. App. 512, 404 S.E.2d 736 (1991). The Supreme Court has since ruled that, where the ground for an objection is apparent from the pleadings and briefs, noting an objection on the trial court's final order without listing the specific grounds for that objection is sufficient to preserve an issue for appeal. *Luckett v. Jennings*, 246 Va. 303, 306, 435 S.E.2d 400, 401 (1993).

g. Federal courts follow similar rules.

    i. *Federal Rule of Civil Procedure 46.* A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

    ii. *Federal Rule of Criminal Procedure 51(b).* A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

h. Practice tips:

[2] A copy of this statute is attached as Appendix A.

i. Bring a court reporter to hearings to preserve issues for appeal. To save costs, don't order a transcript unless you need it. But be ready to have one prepared.

ii. Beware of sidebars and informal conferences in chambers. Make sure that you state your objections on the record, suggest an appropriate course of action, and secure a ruling. Better yet, bring the court reporter with you.

iii. To avoid waiving issues on appeal, it is often helpful to have an appellate specialist on the trial team. At the very least, you should consult with one about post-trial motions if an appeal seems likely.

iv. When attaching written objections to an order, the best practice is to list those objections and ensure that the order rules on and preserves them by reference. *See Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 56 n.4, 662 S.E.2d 44, 50 n.4 (2008) (holding that appellant had satisfied the contemporaneous objection rule and preserved issues for appeal by attaching written objections to the trial court's order, which were expressly preserved by reference in that order).

2. Choose and frame your issues carefully.

a. "I will gladly take either side of the argument, as long as I get to pick the issues." Apocryphal, sometimes attributed to Clarence Darrow.

b. Picking your issues will be the most important decision you make in your appeal. Take your time, and do it correctly.

c. *Standard of review*. Lay people seem to share the misperception that all appellate issues are created equal, and are reviewed *de novo*. They are not. An appellate lawyer must pay careful attention to the applicable standard of review. It provides the appellate court's job description in a given case, and "determine[s] the power of the lens through which a court may examine a particular issue." RUGGIERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 56 (2d. ed. 2003) [hereinafter, "ALDISERT at __"].

i. Issues for appeal and assignments of error should be selected with an eye toward the standard of review.

1. In federal court, attacking anything less than an egregious error on an abuse of discretion standard, for example, is probably futile. *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 12 (2008) [hereinafter "SCALIA & GARNER at __"].

2. The Supreme Court of Virginia seems relatively more concerned about fairness and the equity of the underlying case, and is more likely to find its way around an unfavorable standard.

ii. Do not treat the standard of review as boilerplate, to be cut-and-pasted into a brief just to satisfy Federal Rule of Appellate Procedure 28. BRYAN A. GARNER, THE WINNING BRIEF 441-43 (2d. ed. 2003) [hereinafter, "GARNER at __"].

iii. Instead, weave a favorable standard of review into your argument. If you represent an appellant facing an unfavorable standard, find a case in which the appellant met that standard. Analogize that case to your own. *Id*.; SCALIA & GARNER at 11-13.

iv. An appeal is not a fair fight. If you occupy the high ground, remind the Court of that fact at every opportunity.

v. But resist the temptation to reargue factual issues that you lost below. *See* ALDISERT at 57-58. Fact findings may as well be set in stone.

d. *Assignments of error*.

i. "Strike for the jugular, and let the rest go." Oliver Wendell Holmes, *Speeches* 77 (1934).

ii. Rule 5:17(c).

1. The petition for appeal shall include, under a separate heading entitled "Assignments of Error," a list of the specific errors in the rulings below upon which the appellant intends to rely.

2. Appeals are awarded based upon assignments of error, which are a required part of every petition for appeal. *Hamilton Dev. Co. v. Broad Rock Club*, 248 Va. 40, 44, 445 S.E.2d 140, 143 (1994).

3. If the petition for appeal does not contain assignments of error, the appeal will be dismissed. Va. Sup. Ct. R. 5:17(c).

4. The Supreme Court will not consider issues on appeal which have not been properly preserved by the assignment of error. *E.g.*, *Infant C. v. Boy Scouts of Amer*., 239 Va. 572, 579, n.1, 391 S.E.2d 322, 326, n.1 (1990).

iii. Purpose.

1. The purpose of assignments of error is to point out errors with reasonable certainty to direct the Court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points. *Harlow v. Commonwealth*, 195 Va. 269, 271-272, 77 S.E.2d 851, 853 (1953).

2. Without such assignments, the appellee would be unable to prepare an effective brief in opposition to appeal, to determine the material portions of the record to designate for the appendix, to assure herself of the correctness of the record, or to file assignments of cross-error. *Id*.

iv. Content.

1. Pick only your best issues. Try to limit yourself to two or three of them. If you are not going to win on your strongest points, you will surely lose on your weaker ones. SCALIA & GARNER at 22.

2. An assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. Va. Sup. Ct. R. 5:17(c).

3. Rather, assignments of error must identify error below with reasonable specificity. *Yeatts v. Murray*, 249 Va. 285, 455 S.E.2d 18 (1995) (refusing to consider substantive challenges to the habeas court's ruling on ineffective assistance of counsel claims where the assignment of error challenged only the court's procedural failure to order an evidentiary hearing); *Phillip Morris, Inc. v. Emerson*, 235 Va. 380, 412, 368 S.E.2d 268, 285 (1988) (refusing to take notice of the trial court's ruling regarding contractual indemnity where the assignment of error did not mention "contractual" indemnity, but challenged ruling on a different basis).

4. Assignments of error are supposed to list the specific errors in the rulings below upon which the appellant intends to rely, meaning the errors of a court in a given case. *Doherty v. Aleck*, 273 Va. 421, 426 n.*, 641 S.E.2d 93, 96 n.* (2007) (rejecting appellee's argument that an assignment of error must address the appellant's failure to comply with the contemporaneous objection rule).

5. General and unspecified assertions of error will not be considered. *E.g., Westlake Properties, Inc. v. Westlake Pointe Property Owners Ass'n, Inc*., 273 Va. 107, 124 n.5, 639 S.E.2d 257, 267 n.5 (2007) (refusing to consider that part of an assignment of error which challenged the trial court's refusal to grant a mistrial on "other grounds").

6. Instead, in the assignment of error, the appellant must "lay his finger on the error." *First Nat. Bank of Richmond v. William R. Trigg Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907), *dismissed*, 218 U.S. 693 (1910).

v. The language of an assignment of error may not be changed after the appeal is granted. *Allstate Ins. Co. v. Gauthier*, 273 Va 416, 418 n. *, 641 S.E.2d 101, 103 n.* (2007) (it is improper to change the wording of an assignment of error); *Martin v. Howard*, 273 Va. 722, 643 S.E.2d 229 (2007) (refusing to consider an amended assignment, which added three new lines to the original assignment upon which the appeal was granted); *White v. Commonwealth*, 267 Va. 96, 103, 591 S.E.2d 662, 666 (2004) (it is impermissible to change the wording of an assignment of error from that upon which the appeal was granted); *Hamilton Dev. Co. v. Broad Rock Club*, 248 Va. 40, 44, 445 S.E.2d 140, 143 (1994) (same).

   1. The only time when the wording of an assignment of error does not remain an integral part of the appeal is on the rare occasion when the Court, in an order, posits the issue to be debated. *Hamilton Dev. Co.*, 248 Va. at 44, 445 S.E.2d at 143.

   2. The improper modification of an assignment of error, however, will not prevent the appellant from arguing and having his appeal considered on the issue actually asserted in the trial court and for which an appeal was granted, provided that he has adequately briefed that issue. *White*, 267 Va. at 103, 591 S.E.2d at 666.

vi. Remember that Rule 5:17(c) creates a mandatory and jurisdictional requirement that applies to appeals from the Court of Appeals of Virginia: "Where appeal is taken from a judgment of the Court of Appeals in a case where judgment is made final under Code § 17.1-410, the petition for appeal shall contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value. *If the petition for appeal does not contain such a statement, the appeal will be dismissed*." (Emphasis added.)

e. Practice tips:

i. With these issues in mind, we offer the following advice, which is taken from chapter headings 10-13 in *The Winning Brief* :

1. Limit your issues to 75 words apiece.

2. Write fair but persuasive issues that have only one answer. Case each issue as a syllogism. If you have several issues, give each one a concise, neutral heading.

3. Weave facts into your issues to make them more concrete.

4. If you don't open with explicit issue statements, sum up the issues and your theme in a short introduction.

ii. *An alternate approach*. Judge Aldisert offers a different take on framing issues: "If your rules permit, express the issue in the form of a simple, declarative sentence phrased so that the court may adopt it as a topic sentence in its opinion in your favor." ALDISERT at 141 (emphasis removed).

iii. Always frame your issues as narrowly as possible. ALDISERT at 155. Don't make your job any harder than it needs to be.

iv. When framing issues, don't be a "whether"-man. ALDISERT at 141. Stating the entire issue as a one-sentence interrogatory beginning with "whether" is ineffective. It results in a counterintuitive, non-chronological issue statement. Moreover, it tends toward cursory treatment of the facts and invites grammatical abuses. GARNER at 88.

v. Here are some examples of compelling issue statements:

1. Leonard Slocum Jr., a mentally retarded minor whose father has physically abused him, has become the state's ward and begun a rehabilitation program that has helped him demonstrably. His father, Slocum Sr., petitioned to become Leonard Jr.'s guardian, but the court found him unfit because of the abuse and because he has sired four illegitimate children by a 25-year-old mentally retarded woman—formerly his ward. Did the court abuse its discretion? GARNER at 88

2. Should *Enmund* be applied retroactively, or should the state be permitted one last cruel and unusual punishment before *Enmund* takes effect? ALDISERT at 141.

3. The attorney-client privilege protects from disclosure only those communications that are kept confidential within the strict confines of the attorney-client relationship. Eagle Company disclosed communications to a third party insurance broker after learning of Rush Insurance Company's denial of coverage. Can Eagle Company now refuse to disclose these communications based on a claim of privilege? GARNER at 77.

4. Maryland law prohibits the discharge of effluent to which a permit-holder has added chlorine or chlorine-containing products. Zero Corporation, a permit-holder, is discharging unaltered municipal tap water that contains chlorine added by the city. Are these discharges legal under Maryland law? GARNER at 77.

3. Write a brief that will be helpful to the Court. Judges have a limited amount of time, and they spend more of it with briefs that make their job easier.

a. "The overarching objective of a brief is to make the court's job easier. Every other consideration is subordinate. What achieves that objective? Brevity. Simple, straightforward English. Clear identification of the issues. A reliable statement of the facts. Informative section headings. Quick access to the controlling text." SCALIA & GARNER at 59.

b. Your brief will be competing with a myriad of demands on the judge's time. In all likelihood, it will not be read in an atmosphere that invites quiet contemplation. Judge Aldisert provides a helpful—if disconcerting—reality-check on "The Brief-Reading Environment." ALDISERT at 27-28.

c. Ensure that your brief meets the 90-second test. Within a minute and a half of picking it up, the Court should know what the issue is, what you want it to do, and why. *See* GARNER at 53-56.

d. State the law and the facts accurately. Never overstate your position. Advise the Court of contrary authority and distinguish it. Anything less will cost you credibility. SCALIA & GARNER at 13-14.

e. Write with a smile. Personal attacks are neither persuasive nor helpful to the Court. State the facts accurately and dispassionately, and let the Court arrive at its own conclusions.

f. Edit your briefs mercilessly. Strike every unnecessary word and thought. Always aim for half of your allotted page or word limit. Anecdotal evidence indicates that judges appreciate concise writing—maybe more than they should. *See generally* GARNER at 175-221.

g. Your first audience likely will be a clerk. Bluebook accordingly.

4. A writ petition (or argument) is not a merits brief (or argument).

a. Arguments in favor of discretionary review—such as a petition for appeal to the Supreme Court of Virginia—do not turn on the merits of the case. Error below is neither a necessary nor sufficient condition for granting a writ. The Court may believe that the case was decided correctly, but that it presents an important question of law. An appellate court can clarify a legal issue just as easily by affirming a decision. SCALIA & GARNER at 76-77.

b. When drafting a petition, do not focus on the merits of your case. Instead, show that the court below adopted an erroneous rule of law, and that the rule it adopted was an important one. If lower courts are split on the issue, bring that split to the Court's attention. Exclude issues that will make it impossible for the Court to reach this rule of law. Address the merits only as necessary. And do so as concisely as possible—"courts don't like to spend a lot of time deciding what to decide." SCALIA & GARNER at 76-78.

c. Likewise, a brief in opposition to a petition should not focus on the merits.

   i. Rather, it should show that the decision below was fact-bound, or that prior issues will prevent the Court from reaching the issues the appellant raises. If possible, an appellee should point out that lower courts have been uniform in their approach to this question (or that they have not contradicted each other). Likewise, if other issues, which the petitioner has not raised, would allow the Court to affirm the judgment below, the appellee should advise it accordingly. SCALIA & GARNER at 79-80.

   ii. This is also the place to raise waiver and preservation of error, along with other issues that would render the case unworthy of appellate review.

5. And an appellate brief (or argument) is not a trial brief (or argument).

a. Fundamental differences exist between trial and appellate courts. Scalia and Garner summarize them as follows:

   i. Trial judges work retrospectively. They focus on getting the right result in the particular case before them, based on a defined set of

facts. They will get to this result through their treatment of facts and discretionary rulings. Trial judges strictly observe governing caselaw. A trial court generally is not focused on crafting a new rule of a law.

ii. By contrast, appellate judges tend to work more prospectively. They craft rules of law that will work "in the generality of cases" going forward.

iii. Thus, a good trial court brief will spend relatively more time on facts and precedent, while an appellate brief will focus more on reasoned argument and policy. For this reason, it is not advisable to try to "recycle" a trial court brief on appeal. *See* SCALIA & GARNER at 7.

b. Practice tips:

i. Don't limit your discussion to statutes and case law. Show that the law is on your side—but also show that justice and common sense support your position. Likewise, when you raise a procedural default or technical objection, note why the other party's argument fails on the merits as well. SCALIA & GARNER at 26-30; GARNER at 446-51.

1. When you are arguing fairness, it often helps to identify a jurisprudential maxim that supports your position. SCALIA & GARNER at 30. California has codified a number of these maxims in plain English. *See* Cal. Civ. Code §§ 3509-3548, available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=03001-04000&file=3509-3548.

ii. Allow yourself plenty of time. Writing an appellate brief is almost always harder than you'd thought it would be. It also usually takes longer than expected. It is more difficult to write a good appellate brief than a good trial brief, because a good appellate brief has to be shorter and more focused.

6. Tell the story of the case, not the trial.

a. The statement of facts is your opportunity to tell a story. It should be straightforward and powerful. A good statement of facts expresses a "clean narrative line," in that it "progresses naturally—often dramatically—from beginning to end." GARNER at 366-67. It does *not* provide a witness-by-witness account of the trial.

i. Remember Rule 5:17(c)(3): "The testimony of individual witnesses should not be summarized seriatim unless the facts are in dispute

and such a summary is necessary to support the appellant's version of the facts." *Accord* Va. Sup. Ct. R. 5A:20(d).

b. Refer to the parties by their actual names, not their procedural labels. This makes your statement of facts more compelling and readable. Don't try to personalize your client while dehumanizing your adversary by using a label. GARNER at 182.

    i. Federal Rule of Appellate Procedure 28(d) provides sound guidance on this point: "In briefs and at oral argument, counsel should minimize use of the terms 'appellant' and 'appellee.' To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as 'the employee,' 'the injured person,' 'the taxpayer,' 'the ship,' 'the stevedore.'"

c. If possible, describe the parties' actions rather than court filings. GARNER at 348-49. Avoid larding your writing with unnecessary detail, like immaterial dates. *Id*. at 179-80, 386-87. In other words, try this:

    i. "O'Keeffe then asked the court to order Monday to produce the documents"

    rather than this:

    ii. "On March 15, 2008, Plaintiff filed a Motion to Compel Responses to Plaintiff's Second Request for Production of Documents."

d. As a general rule, *show*, don't *tell*. GARNER at 398.

7. Master the deadlines.

a. Courts of appeal are rule-driven courts of limited jurisdiction. Relevant deadlines are often mandatory and jurisdictional. Failure to meet them risks a fatal procedural default.

    i. Rule 5:5(a): "The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rules 5:20 and 5:39), are mandatory. A single extension not to exceed thirty days may be granted if at least two justices of the Supreme Court of Virginia concur in a finding that an extension for papers to be filed is warranted by the intervention of some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable."

ii. Some key deadlines:

1. The deadline for filing transcripts—60 days from the final order—is mandatory and jurisdictional. Va. Sup. Ct. R. 5:11(a); *see Towler v. Commonwealth*, 216 Va. 533, 534, 221 S.E.2d 119, 121 (1976) (per curiam) (applying a predecessor rule to dismiss an appeal where the appellant filed the transcript within 60 days, but did not provide notice; reiterating the mandatory and jurisdictional nature of the rule); *see also* Rule 5:5(a) (noting that the deadline is mandatory).

    a. The transcript will be part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment. Va. Sup. Ct. R. 5:11(a).

    b. "When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by the omission shall not be considered." Va. Sup. Ct. R. 5:11(b).

2. The deadline for filing a petition for appeal—3 months (not 90 days) from entry of the final order—is also mandatory and jurisdictional. Va. Code Ann. § 8.01-671(A) (2008) (establishing that a petition for appeal must be filed within three months of the order appealed from); Va. Sup. Ct. R. 5:17(a)(1) (same); *see Upshur v. Haynes Furniture Co., Inc.*, 228 Va. 595, 597, 324 S.E.2d 653, 654 (1985) (per curiam) (holding that the Court lacked jurisdiction to hear an appeal that was not timely filed under the jurisdictional time limits of the statute and a predecessor rule; dismissing the appeal); *see also* Va. Sup. Ct. R. 5:5(a) (stating that the time prescribed for filing a petition for appeal is mandatory).

b. Practice tips:

i. Learn the deadlines. Read the rules, every time you pursue an appeal. Prepare a checklist along the lines of Appendix B. Add relevant dates and reminders to your calendar.

ii. Extensions of mandatory deadlines are not frequently granted under the Supreme Court's "extraordinary occurrence or catastrophic circumstance" standard. This rule is strictly construed and enforced.

iii. Days is days, and months is months.

iv. The Fourth Circuit tends to be more forgiving of missed deadlines than the Virginia appellate courts. In the Fourth Circuit, the clerk also will circulate a briefing schedule to the parties at the outset of the appeal.

8. Prepare for oral argument conscientiously—but do not overprepare.

a. "Does oral argument change a well-prepared judge's mind? Rarely. What often happens, though, is that the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference." SCALIA & GARNER at 139.

b. Oral argument is, in some ways, the beginning of the Court's decision conference. And it is your only opportunity to participate in that conference. SCALIA & GARNER at 33.

c. Master the record—but do not go outside of it. The Court will be familiar with general principles of law. It will look to you for the facts of this case. If the Court should ask you a question that requires you to do so, respond, "It's not in the record, Your Honor, but I understand that…" SCALIA & GARNER at 151.

d. Begin preparing for oral argument while you are writing your brief.

   i. Prepare a list of "Tough Questions" and outline your best answers as you write your brief. Refine this list as you prepare for argument.

   ii. Master the cases discussed on brief. If necessary, prepare law-school style case briefs. Know the holdings of the cases merely cited on brief. Prepare an alphabetized cheat sheet. SCALIA & GARNER at 152-53.

e. Organize and index your key materials. You may need to find them in a hurry.

f. If possible, run moot courts.

   i. Schedule a moot court early enough to incorporate its results into your presentation.

   ii. Run through the moot court several times. The first time, let it continue until the panel runs out of questions.

   iii. Record your moot court sessions on video, and learn from your mistakes.

g. Pay attention to logistics. If you have to travel a significant distance to the court, consider staying over the night before. Allow yourself plenty of time. You do not want to arrive at court after a mad rush through Richmond morning traffic. Several hotels are located within a few blocks of the Supreme Court of Virginia and the Fourth Circuit, including

   i. The Berkeley Hotel, 804-225-5105;

   ii. The Omni Richmond Hotel, 866-539-0036; and

   iii. The Commonwealth Park Suites Hotel--Richmond, 866-539-0036.

h. If you cannot answer the following questions (taken from ALDISERT at 325-27), then you are not prepared for oral argument:

   i. What are you asking for? What is the mandate you seek? What are you asking the Court to hold?

   ii. How will the rule work? What are its limiting principles and practical consequences—both in the broad run of cases, and in your particular case?

   iii. What are the legal arguments in favor of your proposed rule? How does it square with existing precedent?

   iv. What are the policy concerns that would be advanced or frustrated by your argument?

   v. Why is your rule superior to the one advanced by your opponent, or employed by the trial court?

   vi. Is the Court in a position to grant the relief you seek? Is it in the appropriate procedural posture? Is the record sufficiently developed?

   vii. Must the Court reach all of your points? Are they independent, or will deciding one dispose of the entire case?

i. But do not overprepare. The tone of your argument should be conversational, not rehearsed. Avoid memorizing anything more than the first 90 seconds of your argument. And no matter how nervous you are, never, ever read your argument. SCALIA & GARNER at 181-82.

9. A successful oral argument should be a conversation between equals.

a. A successful oral argument should be a respectful conversation between equals. Think of it as a conversation with a highly intelligent senior partner, who is less familiar with the case. SCALIA & GARNER at 33.

b. Your objectives in oral argument should be:

   i. To answer the Court's questions, and address its doubts and concerns;

   ii. To answer new and telling points raised by your opponent;

   iii. To emphasize and clarify the crucial points from your brief;

   iv. To correct misapprehensions of the facts or the law;

   v. To show the Court that your position is logically sound and holds up under the weight of hypotheticals; and

   vi. To demonstrate to the Court that you are trustworthy, forthright, and likeable. *See* SCALIA & GARNER at 140-41; ALDISERT at 32-35.

c. Be aware that the Court may have slightly different objectives, including:

   i. To clarify the issues;

   ii. To clarify the record;

   iii. The determine the scope of claims or defenses;

   iv. To test the practical impact of claims and defenses;

   v. To test the logic of your position;

   vi. To cut through the underbrush, in order to decide as narrow an issue as possible; and

   vii. To lobby internally for a given position. *See* ALDISERT at 31-32.

d. Practice tips:

   i. If you are the appellant, reserve time for rebuttal. SCALIA & GARNER at 167-68.

   ii. Lead with your strongest point. You might not get past it. If you are the appellee, deal with the appellant's argument as necessary, then proceed to your strongest point immediately. SCALIA & GARNER at 169-71.

   iii. Limit your discussion of facts, procedural history, and precedent. They are better addressed on brief. SCALIA & GARNER at 168-71.

1. The Supreme Court of Virginia rarely requests a recitation of the facts, and typically will advise counsel that the Court is familiar with the facts.

iv. Answer the Court's questions directly and forthrightly. Start with a "yes" or "no" if at all possible.

1. "Yes, unless…"

2. "No, except that…"

v. Pay attention to the Court's questioning of opposing counsel. Understand its concerns. Address them directly at your next opportunity to speak.

vi. Know the Court's etiquette. Carefully observe the lawyers who argue before you. If necessary, arrive early and speak with the Clerk.

vii. If the Court assigns opinions before oral argument (as, for example, the Supreme Court of Virginia does), identify who is writing the opinion.

viii. Learn to disengage from a difficult judge.

1. "Your Honor, I cannot respond to your question with anything other than what I have already said."

2. "With the Court's permission, I would like to turn now to…"SCALIA & GARNER at 196-98

ix. Close when you have addressed all of your key points, or when you are out of time.

1. "Unless the Court has any questions, I have nothing further to add to your deliberations. Thank you."

x. Do *not*

1. Compliment the Court on an excellent question. You are not allotted enough time to be obsequious. SCALIA & GARNER at 194. Further, the question may not accurately represent the individual judge's point of view.

2. Respond to a hypothetical by pointing out "That is not this case, your honor." That's the point of the hypothetical—the Court is exploring the logical consistency and necessary implications of your argument. Embrace the hypothetical,

and (if necessary) remind the Court of your limiting principle. *See* SCALIA & GARNER at 194-95.

3. Try to tell a joke. The Court is funny. You are not funny. *See* SCALIA & GARNER at 186-87.

4. Dissemble or attempt to weasel out of a question.

5. Lose your temper.

6. Interrupt a judge or justice.

7. Speak after your time has expired, except to say "Thank you—I see that my time is up" or "I see that my time has expired. May I briefly conclude?" or to otherwise finish responding to a question.

10. Anything that doesn't help, hurts.

a. This seems to be Justice Scalia's golden rule of appellate advocacy. On brief, you are allotted a limited number of words (in federal court) or pages (in state court). At oral argument, you are offered very little time for your presentation. Anything you write or say that does not affirmatively advance your case dilutes and weakens it.

Appendix A

§ 8.01-384. Formal exceptions to rulings or orders of court unnecessary; motion for new trial unnecessary in certain cases.— A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

B. The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.

(Code 1950, §§ 8-225, 8-225.1; 1970, c. 558; 1977, c. 617; 1992, c. 564.)

Appendix B

Gentry Locke Rakes & Moore LLP
Virginia Supreme Court Appellate Checklist

Final Order — Date _____

Notice of appeal [Rule 5:9]: — Due _____ Filed _____

Transcript ordered from court reporter: — Date _____

Transcript filed with circuit court clerk [Rule 5:11], 60 days after final order: — Due _____ Filed _____

Notice of filing of transcript [Rule 5:11]:

(1) Transcript filed *prior* to Notice of Appeal; Notice of filing given within 10 days of filing Notice of Appeal: — Done on _____

(2) Transcript filed *after* Notice of Appeal; Notice given within ten (10) days after filing transcript: — Done on _____

Objections to transcript [Rule 5:11]: — Due _____ Filed _____

Record reviewed in circuit court: — Date _____

Petition for appeal 3 months from date of final order [Rule 5:17]: — Due _____ Filed _____

Filing fee paid: — Date _____

Brief in opposition 21 days after service [Rule 5:18]: — Due _____ Filed _____

Reply Brief (Cross-error) [Rule 5:19]: — Due_____ Filed _____

Petition for appeal granted/denied: — Date _____

Appeal bond [Rule 5:24]: — Due _____ Filed _____

Appendix [Rule 5:32]:

Agreed designation of contents - Due _____ Filed _____
Appellant's designation - Due _____ Filed _____
Appellee's designation - Due _____ Filed _____

Briefs [Rule 5:26]:
Appellant's opening brief due - Date _____
Appellee's brief due (25 days after filing) - Date _____
Appellant's reply brief due - Date _____

Oral argument scheduled: Date _____

Opinion received: Date _____

Bill of costs: Due _____ Filed _____

Petition for rehearing: Due _____ Filed _____

If Appellant, file Motion/Order for Circuit Court to release appeal bond