

# Virginia Lawyer

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VIRGINIA LAWYER REGISTER

The Official Publication of the Virginia State Bar



## The Litigation Issue

Sanctions for ESI Spoliation

Animal Bites on the Job

Avoiding Waiver in Unanticipated Rulings

A Tale of Two Litigators



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# Appellate Mediation Comes to Virginia

by Monica T. Monday

The Supreme Court of Virginia has approved a pilot program for limited appellate mediation in the Court of Appeals of Virginia and Supreme Court of Virginia beginning January 1, 2019. The Court's announcement recognizes the importance of expanding the availability of alternative dispute resolution to all levels of Virginia's court system.

The pilot program will run for two years. It is designed to support mediation in Virginia's appellate courts so litigants may make informed decisions about resolution of their disputes and fashion creative solutions, even after entry of a final or appealable order.

Appellate mediation will be available in certain civil cases where both parties are represented by counsel. Appeals where one or both parties are *pro se* are not eligible for appellate mediation through the pilot program. In the Court of Appeals, mediation will be available in equitable distribution and/or related attorney fee disputes. In the Supreme Court, mediation will be available only where a petition for appeal has been granted; motions to vacate criminal convictions and petitions for actual innocence are not eligible for appellate mediation.

## How appellate mediation will work

Appellate mediation is entirely voluntary. In the Supreme Court of Virginia, the parties will be informed of the availability of appellate mediation when a writ is granted. At that time, the clerk of the Supreme Court will send a letter to the parties describing mediation and explaining that if all parties agree to mediation and notify the clerk in writing of their agreement within 14 days, any further appellate deadlines (except the statutorily-required bond deadline) will be stayed for a period of 30 days to allow the parties an opportunity to mediate. The clerk's letter will attach a list of certified appellate mediators but will explain that the parties may choose any mediator, whether or not the mediator is on the list.

In the Court of Appeals, appellate mediation is not available until the Court receives the record in a domestic relations



case. At that time, the clerk of the Court of Appeals will send the parties a letter similar to that sent by the Supreme Court clerk. As in the Supreme Court, if the parties agree to mediate, there will be an automatic stay of the proceedings for 30 days to provide an opportunity to mediate. If the Court of Appeals issues a stay, the clerk will notify the parties of the deadline for filing the next document.

## Appellate mediation will promote access to justice

Chief Justice Donald W. Lemons initiated the study of mediation in the appellate courts last year when he asked the Joint Alternative Dispute Resolution Committee to appoint a group to consider the issue. The Joint ADR Committee appointed the Special Committee to Study Appellate Mediation, which includes members of the appellate bench, appellate litigators from the Virginia Bar Association and VSB, and members of the Joint ADR Committee.

Following months of study, the special committee issued a report in June 2018, recommending that the Supreme

Court and Court of Appeals undertake the pilot program. According to the special committee's report, appellate mediation is "a vehicle" to provide "viable appellate mediation for economically disadvantaged litigants" in an effort to promote access to justice at the appellate level of the commonwealth's court system.

*To become a certified appellate mediator in Virginia, one must be certified as a mediator in Virginia or complete the 20-hour basic mediation course.*

### Training and certification of appellate mediators

The special committee also recommended that the Judicial Council of Virginia approve specific training and certification for appellate mediators during the pilot projects. To date, there is no special training in Virginia for mediators regarding the unique aspects of appeals in Virginia's courts. The special committee hopes to close this gap by offering a new two-hour course focusing exclusively on appellate litigation in Virginia. This course will be required for individuals (except those who have served on the Supreme Court and Court of Appeals) who seek to be certified as appellate mediators.

To become a certified appellate mediator in Virginia, one must be certified as a mediator in Virginia or complete the 20-hour basic mediation course. The special committee has also recommended additional minimum qualifications for certification of appellate mediators in each appellate court to ensure that mediators have the skills necessary to effectively mediate disputes at the appellate level.

The Joint ADR Committee is holding a training program for interested appellate mediators on November 14-16, 2018, in Richmond. For information about the training course, go to the events section of the VSB website. The report of the special committee can be found at: [https://cdn.ymaws.com/www.vba.org/resource/resmgr/adr/report-special\\_cmte\\_to\\_study.pdf](https://cdn.ymaws.com/www.vba.org/resource/resmgr/adr/report-special_cmte_to_study.pdf).



**Monica T. Monday** is the managing partner of Gentry Locke, and leads the firm's appellate practice group. She chairs the Appellate Practice Committee of the Virginia State Bar Litigation Section and the Fourth Circuit Rules Advisory Committee, and is Vice-Chair of the Virginia Bar Association's Appellate Practice Section Council. Monica is a Fellow of the American Academy of Appellate Lawyers, and is a member of the Judicial Council of Virginia, the Boyd-Graves Conference, and the Virginia Model Jury Instruction Committee.