

State of the Judiciary
Chief Justice Donald W. Lemons, Virginia Supreme Court of Appeals
Message to the Judicial Conference of Virginia
May 12, 2015

Colleagues on the Supreme Court, Judges of the Court of Appeals and Circuit Courts of the Commonwealth, members of the General Assembly, judicial branch employees and guests, I am very pleased to address you this morning.

I heard of a man who came to the podium to speak to a sizeable crowd. He said, "I only speak about subjects I know very well and like very much." Then he spoke for 30 minutes all about himself – a subject he knew very well and clearly liked very much.

I will spare you any references to myself, but I will talk about a subject I know something about and to which I am deeply committed – the state of the judiciary in the Commonwealth of Virginia.

Generally speaking, we should all be pleased about the state of the judiciary. We enjoy a good and cooperative relationship with the General Assembly as well as the Executive branch. There are many things we could consider this morning. I have chosen a few to highlight.

I. Judicial Workloads

For a number of years, authorized judgeships were frozen when a vacancy occurred which resulted in increased reliance on our retired-recalled judges and attorney substitutes. During the calendar year 2014 our retired - recall judges sat 5,094 days in the circuit courts and 4,746 days in our district courts throughout the Commonwealth. In addition, attorney substitutes sat 4,371 days in the district courts.

Their assistance has allowed our courts to continue to meet basic needs of our citizens during this period of judicial vacancies. I am happy to announce that the General Assembly has recognized the contributions of our retired-recalled judges, and effective July 1, 2015, the per diem for retired-recall judges has been increased by 25% to \$250 a day. The judiciary and citizens of this Commonwealth thank you for your dedicated service.

In 2013, the National Center for State Courts completed its work on the weighted caseload study and submitted a report to the General Assembly that indicated the need for 429 judgeships at the trial court level versus the previously authorized 402. The General Assembly adopted these recommendations and the Code of Virginia was amended to reflect these changes effective July 1, 2014.

However, you may recall that the 2014 General Assembly Session went well into June before a budget was passed and the decision on which judgeships to fill was deferred to two Special Sessions in the Fall of 2014.

Between the elections made during the Special Sessions of 2014 and the recent 2015 General Assembly Session, 103 judges have been elected to fill existing vacancies or newly created judgeships - 45 to the circuit bench, 31 to the General District bench and 27 to the Juvenile & Domestic Relations bench - bringing the funded level of judgeships in the Commonwealth, effective July 1, to 405 of the authorized 429 positions in the Code of Virginia. In addition, the freeze on judicial vacancies has been eliminated. We are extremely grateful to the General Assembly for their actions in this area.

You will note that 25% of the judges in the entire Commonwealth have been elected to their current offices in the last year.

II. Raises

Effective August 10, 2015 all judges and justices will receive a 2% raise which will be reflected in your September 1 paycheck.

Also effective August 10, 2015, all other judicial branch employees will receive a 2% raise. In addition, all salaried employees, excluding judges, with five or more years of service will receive what is referred to as a compression increase. For every year of state service, the employee will receive \$65 per year of service, capped at \$1950 for 30 or more years of service.

Also, our district court deputy clerks in Pay Grades 6-8 will receive an additional 2% raise in addition to the increases previously mentioned. I am very pleased that approximately 1000 of our hard working deputy clerks will receive this extra and well deserved increase in their compensation.

III. Judicial Retirement Age

Proposals to raise the mandatory judicial retirement age have been introduced in the General Assembly every year since 2007. This session we again presented the question to the General Assembly.

We have consistently supported measures that simply raise the mandatory retirement age of all judges to 73.

The judicial retirement bills (HB 1984 (Delegate Leftwich) and SB 1324 (Senator Vogel), which was incorporated into SB 1196 (Senator Norment)) experienced many twists and turns during the Session. At the end of the Regular Session, both the House and Senate bills were passed with enactment clauses that limit the application of the new mandatory retirement age of 73 to the justices and judges of the appellate courts, and to those trial court judges who are newly elected or appointed to a new or subsequent term that commences on or after July 1, 2015. When presented to Governor McAuliffe, he recommended amendments to the bills to strike the enactment clauses. During the Reconvened Veto Session, the Governor's recommendations to remove the enactment clauses were not adopted. The bills were returned to the Governor with the enactment clauses intact, which he has signed. It will be effective on July 1, 2015.

We estimate that there are 23 judges who will reach age 70 before the end of their term and will not have an opportunity to be reappointed under the new mandatory retirement age of 73.

IV. Judicial Performance Evaluation Program

I next want to address the Judicial Performance Evaluation, or JPE, Program. Many of our current judges were not on the bench prior to 2009 when the Program was suspended, so I will provide some background.

The current JPE Program protocols are largely the product of a 27-member Task Force that was appointed by the Supreme Court of Virginia in 2000, after the General Assembly passed a resolution requesting the Supreme Court to propose evaluation criteria for judges. The Task Force included judges, lawyers, and lay people from across the Commonwealth.

The Task Force produced a report in 2001 that recommended various program features, and implementation statewide after testing by a pilot program. The JPE Pilot Program operated in 2004 and 2005. It was overseen by the Judicial Performance Evaluation Interim Commission, which was comprised of eight members: a judge from each level of the courts, a circuit court clerk, an attorney, and a lay person.

Following the Pilot Program, the Supreme Court of Virginia appointed a JPE Commission that consisted of nine members, including judges, attorneys, court clerks, and a lay person. The JPE Commission supervised the Program as it began operation and continuing through 2009. The Commission implemented recommendations of the Task Force and Interim Commission, including survey methodology and respondent groups for the different types of courts. The Program ceased operation in mid-2009 when the General Assembly withdrew funding from the Budget.

As you all know, in 2014, legislation was introduced to reinstate the JPE Program. While not court-initiated legislation, the Judicial Conference of Virginia supported the legislation, provided that adequate funding was allocated to support the Program. That legislation required the Supreme Court to provide to the General Assembly, by December of 2014, reports on judges who had been evaluated during the JPE Program prior to its suspension in 2009 and who would be subject to re-election in 2015.

Twenty judges fit the parameters dictated by the legislation, and their reports were provided as required. During 2014, 44 other judges received evaluations that were for self-improvement purposes. For 2015, there are 93 self-improvement evaluations currently underway or scheduled to take place later this year. In addition, we expect that 30 judges will have reports transmitted to the General Assembly this year, as required by the 2014 legislation. In nearly all respects, the Program uses the protocols and procedures that had been in place during operation of the Program prior to 2010:

- The survey groups remain unchanged.
- The survey questions remain unchanged.
- The periods of appearance or observation remain unchanged (one year for district court judges, three years for circuit court judges).

- The frequency of evaluation remains unchanged (three times during a judge's first term on a court; twice during subsequent terms).
- The Program's protocols continue to be applied neutrally, without distinction as to a judge's gender, race, or locality.
- Now, as previously, the attorneys who are surveyed are those who are active and in good standing with the Virginia State Bar. The Program relies upon attorneys, as officers of the court, to provide their honest observations of a judge's performance.
- Information on the respondents' gender or race is not collected.
- The contractor that distributes and collects surveys is the same one that previously served in this capacity and participated in the developmental stages of the Program.
- The Program continues to utilize retired judges to serve as facilitators to assist evaluated judges in interpreting evaluation reports.

Since 2009, two major changes have taken place as a result of the evolution and increased use of technology:

First, a primary method of identifying potential attorney survey respondents is done electronically rather than by paper sign-in sheets in courtrooms or clerk's offices. This has resulted in an increase in the pool of potential attorney respondents for each judge, and provides more consistency across the Commonwealth, and less burden on court staff.

Second, the evaluation surveys are distributed and collected electronically. This has allowed distribution of more surveys per judge and has significantly reduced the cost of the survey process.

An important change made by the 2014 legislation is that the reports that are sent to the General Assembly are public records. In fact, they were posted by the General Assembly on its website. All other reports and materials relating to a judge's evaluations are confidential, including the judges' mid-term evaluations.

As you are no doubt aware, four judges who were up for reelection were not reappointed. The survey response rate has been relatively high, many attorneys and other survey recipients have participated, and their reaction to the process has been favorable. But the Court and the Program staff have also received suggestions for ways to improve the Program.

Clearly, the JPE Program is an important tool for judges and has implications for their continuation in office. We must continue to monitor the program and seek ways to improve it. Therefore, consistent with past practice, I have appointed a JPE Advisory Committee, which will have its first meeting next month. The Advisory Committee will consider and advise me on matters related to the operation of the Program.

I am pleased and very grateful that Justice Cleo E. Powell has agreed to serve as chair of the Committee. Membership includes judges at all levels of the courts, plus a circuit court clerk and an attorney. I anticipate that, for the first year or two, the Committee will meet on a quarterly basis to discuss and make recommendations on a number of issues relevant to Program operation, including protocols for the evaluation of Virginia's appellate judges.

I hope that if you have suggestions for this Advisory Committee, you will contact Pat Davis, the JPE Program Director, at the Office of the Executive Secretary.

V. Access to Justice Commission

The Access to Justice Commission was created by order on September 13, 2013. Its mission is to promote equal access to justice, with particular emphasis on the civil legal needs of Virginia residents. Over the past year, this Commission has worked to:

- a. coordinate access to justice activities,
- b. mobilize more legal professionals to provide legal services to low income individuals,
- c. encourage the development of auxiliary resources for under-served populations, and
- d. make the courts more accessible for all citizens.

The Commission continues to meet quarterly. It is currently studying the websites of other state courts that use technology to promote access to justice for self-represented litigants. These websites feature on-line availability of court forms and instructions, including forms translated into plain English (6th grade level) and other languages, along with links to informational resources and document assembly programs. The Committee on Self-Represented Litigants has been tasked with exploring ways to improve Virginia's website. This Committee is also gathering data from trial judges about handling pro se litigants who appear before them, and is conducting a survey of clerks concerning assistance to pro se litigants. We expect the results of these surveys to inform the Commission's future work.

Later today, Judge Mary Jane Hall and Judge Robert Turk will be leading a panel discussion on "The Challenges and Ethical Balances to Consider in Advancing the Disposition of Cases Involving Pro-se Litigants." I hope that many of you will have an opportunity to attend this break-out session.

On February 27, 2015, the Court amended the Comments on Judicial Canons 3(B)(3) and 4(B) to:

1. clarify that a judge may explain the judicial process and inform pro se litigants of free legal aid and similar assistance that is available, while maintaining impartiality, and
2. to clarify that a judge may promote broader access to justice by encouraging lawyers to participate in pro bono services.

The Judicial Education Committee is also in the process of revising its "Practice Points for Civil Matters Involving Self-Represented Litigants" for district and circuit court judges to include suggested guidance from the Court.

The Commission continues to work on many other projects and I would like to thank everyone involved in the Commission, particularly Justice Bernard Goodwyn and John Whitfield, the executive director of Blue Ridge Legal Services, who serve as co-chairs of this Commission.

VI. Problem Solving Courts

House and Senate Bills [Bill 1630 (Delegate Lingamfelter) and Senate Bill 903 (Senator Puller)], were introduced during the 2015 Session and would have created a Problem-Solving Court Act, closely modeled after the existing Drug Treatment Court Act. The bills were introduced with the support of the Department of Veterans Affairs and the Virginia Bar Association. Both bills failed to pass out of the Criminal Law Subcommittee of the House Courts of Justice Committee.

The nomenclature that has developed nationally around these efforts is "courts", but in reality these efforts are really dockets that group together certain cases, bringing together the resources that are necessary to address the needs of these defendants before the courts.

Unfortunately, the terminology of "court" has been widely used, including by the Federal Government. Grant funds that are available to assist veterans are available only to a specialty or a veterans "court", making it appealing to states and localities to adopt similar terminology. We must remember that it is the prerogative of the legislature to create courts. It is the prerogative of the courts to maintain their dockets.

There are 37 active drug court dockets in Virginia. I am aware of mental health dockets in Norfolk Circuit Court, Petersburg General District Court, Richmond General District Court, and the Roanoke General District Court. I am aware of a veterans docket in Fairfax General District Court, and two veterans' tracks within the adult drug treatment courts in the cities of Hampton and Norfolk.

VII. E-filing in the Supreme Court and Court of Appeals

Until now, electronic filing in the Supreme Court was only permitted for petitions for rehearing. Starting on July 1, 2015, parties will be required to file electronic briefs and appendices for appeals of right, all granted petitions for appeal, and all docketed original jurisdiction cases. Although parties will still have to file paper copies of the briefs and appendices, the number of paper copies of the appendix has been reduced from 10 to 3.

Electronic briefs and appendices will now be emailed to opposing counsel simultaneously with the electronic filing in the Clerk's Office. Parties will no longer be required to provide any paper copies of briefs and appendices to opposing counsel.

Electronic briefs and appendices will be required in the Court of Appeals for all granted cases and appeals of right. Paper copies of appendices of briefs have been reduced from 7 to 4.

Electronic briefs and appendices will all be bookmarked and have searchable text, which should be very useful to appellate judges and their staff.

VIII. Digital Records Transmission

Also starting on July 1, 2015, circuit courts that utilize the Case Imaging System developed by

OES will have the option of creating a digital appellate record instead of a paper record to be transmitted to the Court of Appeals and the Supreme Court. Currently, at least 73 circuit courts have this capability.

Starting January 1, 2016, the option of transmitting a digital record will be extended to circuit courts that don't use OES's imaging system, and to other state agencies, including the State Corporation Commission and Workers' Compensation Commission.

We expect the digital records transmittal will lead to significant savings for the lower courts and the appellate courts since electronic filing of the record will eliminate the shipping fees for transmittal of records between courts. It will also reduce the risk of the record, or portions thereof, getting lost or damaged in shipment. Additionally, it will provide appellate court judges and staff with instant access to lower court records.

IX. The 30th Anniversary of Lawyers Helping Lawyers

Lawyers Helping Lawyers celebrated its 30th anniversary this year, and a recognition ceremony was held at the Supreme Court on April 14, 2015. The mission of this organization is to help lawyers, judges, and law students who are dealing with substance abuse problems and other mental health disorders including depression. This organization was started in 1985 as a joint effort of the Virginia State Bar and the Virginia Bar Association. It has developed into an independent, nonprofit organization with licensed professional substance abuse and mental health staff resources. The organization's services are available to people in the legal community, and are confidential and free. The strength of this organization is found in its volunteers, who have, for over thirty years now, continued to offer their time and compassion to the members of the legal profession dealing with serious problems of substance abuse and mental health disorders. We should all be grateful to Lawyers Helping Lawyers for the great work they continue to perform for the profession.

X. The Court of Appeals

The Court of Appeals is celebrating its 30th Anniversary this year. The Court of Appeals has promoted access to justice in the Commonwealth by deciding thousands of petitions for appeals, fulfilling the legislature's goal of increasing the appellate capacity of the court system and expediting the appellate process. The Court of Appeals has had 39 judges during its 30-year history, and eight of those judges later served as Justices of the Supreme Court of Virginia, and three of its judges have served on federal courts.

The Court of Appeals has helped develop a significant body of jurisprudence in the areas of criminal, family, workers' compensation and administrative law. Showing their respect for the Court of Appeals, various bar groups approached the Court of Appeals and asked to sponsor a reception in recognition of this anniversary.

The Supreme Court of Virginia will hold a special session of Court on June 2, 2015, in order to recognize the Court of Appeals and all that it has contributed to the Commonwealth in its 30 years of existence.

XI. Conclusion

It is a high honor to be a Judge in the Commonwealth of Virginia. I am proud to serve with all of you. As I close my remarks on this first occasion that I have had to deliver a State of the Judiciary Address to the Judicial Conference, I hope you will not mind if I share a few observations about the role of a judge and the characteristics I see in the vast majority of the Judges in the Commonwealth.

A Judge should be animated and informed by allegiance, deference, courage and humility.

The allegiance is to an oath of office that requires adherence to the rule of law in the affairs of our citizens and fidelity to the commands of our constitutions and statutes. A judge must never substitute personal views for those expressed in our laws;

The deference I speak of is to the executive and legislative branches of government which by their method of selection and breadth and scope of powers are closer to the will of the people and far better able to arrive at democratic solutions to problems and issues than the judiciary is intended to be;

A Judge must have courage to make decisions consistent with the oath of office – decisions that may be unpopular and may be in tension with the other branches of government. Our system of government presumes majority rule; however, embedded in our collective values is respect for and protection of minority rights. If we are candid we will confess that at times in our history we have failed to adhere to these principles. But our episodic failures must not keep us from renewing our commitment to these principles and striving to do better. When basic rights and freedoms are at issue, our citizens often seek relief in the judicial branch of government. On these occasions, which should be infrequent, a judge must have courage to fulfill the oath of office, however unpopular it may be.

Finally, a judge must demonstrate humility – jurisprudential and personal humility. Of course the judge must resist temptation to usurp the roles and prerogatives of coordinate branches. It is not ours to promote social agendas or broad public policy initiatives. A deliberate and measured restraint is required of a judge. There are enormous responsibilities that come with the robe. Chief among these is the attitude and demeanor of humility. One who wears the robe must understand that we are the servants – servants of the law and servants of the people. Simply stated, all participants in the judicial system expect, deserve and must receive courtesy and respect from those who are privileged to wear the robe.

I thank you for the long hours you devote to your position as a Judge. I thank you for the sacrifices you have made to be a judge. And I thank you for your continued commitment to serving the people of this great Commonwealth.

Thank you.