

State of the Judiciary  
Chief Justice Donald W. Lemons, Virginia Supreme Court of Appeals  
Message to the Judicial Conference of Virginia  
2019

Not too long ago, I came home one evening and my wife, Carol, asked me if anything interesting happened at the court today. I could have answered “everything at the court is interesting every day,” but I didn’t. So I picked out one thing and told her in a “matter of fact” tone, “Well, I was sued for 10 million dollars today.” That got her attention! She was stunned. “But Don, we don’t have 10 million dollars!” After I explained that Judges are immune from suit for conduct within their official duties, she seemed satisfied and then asked the question that all of us have asked: “If they can’t get any money, why do they bother suing you?” Great question.

Several weeks later, Carol asked me if anything interesting had happened at the court. I responded that I had been sued again. Satisfied by my prior explanation, she said, “well, that doesn’t matter.” I said this one is different. “The plaintiff alleges that I committed treason. If it is found to be true, I will be placed against a wall and shot.” That got her attention.

The Constitution of Virginia provides that the Chief Justice is the head of the Judicial branch of government. Every Monday, I receive an updated list of the lawsuits and complaints currently pending that involve Virginia courts, judges, magistrates and other judicial department employees as parties. It is huge. Presently there are 71 separate matters that I monitor.

Many of you are no stranger to being named as a party in a lawsuit because of your official actions as a judge. Don’t feel alone. I am sued far more often than any of you. I have been sued practically everywhere in Virginia in state and federal courts. Interestingly, I have been sued in the United Nations, the World Court in the Hague, and the Greek Embassy. Only 3 weeks ago, I received an order signed by my law school classmate, Federal District Court Judge John Gibney. The order dismissed a petition filed by an inmate in a federal prison requesting that I be arrested and immediately imprisoned.

We live in a contentious and litigious world. It is our role to resolve disputes and controversies. Sometimes it is awkward when we are the subject of the dispute or controversy.

In recent months we have seen controversy embroil three executive branch Constitutional offices. The specter of redistricting and election of members of the General Assembly has made the legislative arena a particularly contentious place as control of the House and Senate are at stake. A friend of mine said to me “isn’t it great that the court system is above all of that.” Well the court system is not above all of that. We do have a different role in all of that, but that role is the unique contribution we make to a government with deliberately designed separation of powers, checks and balances and federalism as components.

The National Center For State Courts recently released a survey of public confidence in the judiciary. The report observed that:

Because the judicial branch relies heavily on public support to perform its role in our system of government, public trust and confidence is a precious commodity for the courts.

The general sentiment of confidence in the court system is enhanced in Virginia because our Judges are not popularly elected. Thirty-nine states have some form of popular election or retention for their judges which results in campaigns that appeal to constituencies, large amounts of money entering the process, and heightened rhetoric that itself promotes controversy and undermines civility.

I was once on a panel with several judges asked to discuss the merits and demerits of popular election of judges. A judge from a state where they are elected began his presentation in favor of their system by saying:

“I think it only appropriate to state clearly at the start of my presentation that I am a tort plaintiff’s judge. It would be a rare case where I would not rule in favor of a plaintiff. If the people of my state or the lawyers in the bar don’t like it, they can support another candidate.” Any pretense of a level playing field and impartial adjudication went right out the window.

When I was a trial judge in Richmond, I attended an educational program entitled “Common Problems for Trial Judges.” I quickly learned that so-called “common problems” in states with popularly elected judges are very different than what we experience in Virginia.

One judge asked the group to comment on how he handled a particular matter. He said that he was up for reelection in November and he was certain not to be reelected because of controversy in the community about the case. “Either way the case goes, I will be vigorously opposed by one group or the other.” It was a particularly egregious criminal case with plenty of media coverage. He called the lawyers into chambers and explained how much he liked being a judge and how concerned he was about not being reelected. And then he proposed his solution to the prosecutor and the defense lawyer: continue the case until after the election. Both lawyers were all too willing to grant the judge’s wish. A discussion among the trial judges in attendance praised this judge for his “brilliant solution.” It was then, that I registered a dissent. I asked: When did this in chambers discussion about continuing the case take place? He said, “in January.” Thinking he misunderstood my question, I made clear that the meeting I was asking about was the one before the election. He repeated: “January before the election.” I asked “Was the defendant in jail? Was a bond set?” “Of course he was in jail, he responded, “with no bond set.” “What about speedy trial considerations and the presumption of innocence,” I asked. He replied that is why he called the lawyers into chambers in the first place – to waive all the defendant’s statutory and Constitutional rights.

My friends and fellow jurists in Virginia, you should be grateful and proud that you do not hold your office in a state where a judge’s reelection concerns are more important than a defendant’s rights.

That is one of the reasons why in Virginia the judiciary enjoys an enhanced sense of confidence from its citizens. We must do everything we can to maintain it and improve it.

I am not naïve about how confrontational public policy issues can become. Our system embraces partisan elections in the legislative and executive branches that reveal real differences in policy choices. The debates are often passionate and vigorously presented. It requires respect, civility and often compromise to get anything productive accomplished. Of course, there may be a few issues where only the democratic exercise of putting your vote on the board will resolve the controversy. But most issues benefit from cooperation and compromise

This year in the General Assembly the court weighed in on many significant matters.

1. We managed to obtain authorization and funding for 435 judges. This was the culmination of several years of collaboration between the judiciary and legislature. At the legislature's request, we conducted another weighted caseload study, which reaffirmed our need for these additional positions. After receiving the data it needed, the legislature finally funded all of the judgeships recommended by the study.
2. The need for additional deputy clerks in the district courts has intensified with the addition of new judges. Although we were successful in getting an additional \$3.5 million last year for raises for these clerks, we are still significantly understaffed in our district courts. We came into the recent session of the General Assembly with 271 unfilled deputy clerk positions statewide. With the addition of new judges, the number has increased and is anticipated to be 290 positions. The court continues to make the case to the General Assembly that this issue is a priority and we fully expect relief in the next Session.
3. We obtained budget approval for the Wellness Initiative. This will allow us to create a new position and program within OES to coordinate comprehensive well-being initiatives for judges, lawyers, and law students. It will also allow Lawyers Helping Lawyers to increase its staffing and services so that it can assist more judges, lawyers, and law students on their path to wellness and recovery.
4. We issued a revised Court Rule regarding Criminal Discovery in Virginia. However, there was uncertainty regarding the money needed to fund additional assistant Commonwealth's Attorneys to carry out the mandate of the new rule as well as increased demands upon prosecutors as a result of body cameras worn by police officers. As a result, the money committees of the General Assembly requested that the court delay effectiveness of the rule until July 1, 2020. The court demonstrated cooperation when it agreed to the delay. The court remains committed to the content of the rule but recognizes that implementation may require further budget considerations.
5. The opioid crisis in the nation and in our state has required creative solutions and cooperation among the 3 branches of government. With the support of the executive and legislative branches, the Court has now established 50 drug court dockets, six veterans dockets, and 11 behavioral health dockets. These specialty dockets allow localities to tailor the individual dockets to the needs of their communities, and oversight by the Supreme Court ensures that these dockets all operate according to best practices.
6. Judicial retirement – I am aware that the current judicial retirement plans make it difficult for many qualified attorneys to leave their law practices in order to become judges. Under the current system, in order to obtain retirement benefits comparable to those in place in years past, a lawyer without prior service in Virginia government would have to go on the bench at an age far younger than before. We are working with members of the legislature on this important issue,

and we expect adjustments and improvements to judicial retirement plans in the future.

Amidst the storms and turmoil that swirl in the business of government, it is in the judicial branch that citizens seek resolution of problems and the assurance of calm, reflective, even-tempered, unbiased and respectful dispute resolution. With all the difficulties it presents, it is a challenge for the Judges of the Commonwealth to be the example of civility in government. With very few exceptions, the judges of Virginia have risen to the challenge. We must continue to promote civility in the courtrooms of the Commonwealth. And it must begin and be maintained with us.

We need to take every opportunity we have to encourage our fellow judges, to encourage the members of the bar, to encourage pro se litigants, and to encourage the employees of the court to treat all people involved in the court system with respect, dignity and civility.

Nothing less than the reputation of the judiciary, the level of confidence expressed by our citizens, and the fair administration of justice depend upon it. That is why we sought the privilege of being a judge. That is why we were chosen to wear the robe. The reputation and public confidence in the judiciary will thrive or decline depending upon our efforts.

In the judiciary, it is not sufficient to reach the correct decision if the manner in which we do it undermines confidence in the process.

I have been asked, “Does it really matter that judges and courts promote respect, dignity and civility. Isn’t it enough to get the decisions right and move on?”

Most of you are familiar with the dynamics of a small town. Some of you, like me, live in a small town. It is commonplace for businesses to provide multiple and sometimes unrelated services. The drug store is also a florist. The gas station is also where you drop off and pick up your dry cleaning.

I am aware of a small town where the local veterinarian is also a taxidermist. He has a card that reads:

Dr. Frederick Jones  
Veterinarian/Taxidermist  
“Either way, you get your dog back.”

But one way, the dog is alive and the other way the dog is dead!

And so it is with the judiciary. We are entrusted with the reputation and credibility of the Judicial branch of government. We are the ones who must promote respect, dignity and civility. If we do, citizens have confidence in the process. If we don’t, the reputation of the judiciary declines.

It is my hope that today, and every day, we will do what is necessary to make the judiciary thrive and enhance our service to the public.