

Spring 3-1-1953

Streamlined Justice In Virginia

Kennon C. Whittle

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Kennon C. Whittle, *Streamlined Justice In Virginia*, 10 Wash. & Lee L. Rev. 9 (1953),
<https://scholarlycommons.law.wlu.edu/wlulr/vol10/iss1/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

STREAMLINED JUSTICE IN VIRGINIA†

KENNON C. WHITTLE*

People generally look upon medicine as one of the great professions, and the profession of law is considered equally great and important. A short comparison of the two will, I think, disclose that medicine has progressed faster than law. The medical profession in its research and study strives to keep modern and up-to-date; it is not content to remain static. It takes pride in its constant search for knowledge and new techniques which will advance the science, alleviate human suffering and prolong the span of life. This progress is not made as a result of public demand because there is nothing much the public can do about it. The progress comes from pride in the profession and the will and desire of its members to give better service and to approach the ultimate goal of perfection.

On the other hand, the legal profession apparently prides itself upon immobility and immunity to change. Any suggested improvement in procedure which will tend to lessen the pain of *the legal operation* is looked upon with disfavor. The legislative branch of government keeps the substantive law modern or it attempts to do so, but the practice and procedure which is largely in the care and under the control of the Bench and Bar remains dormant.

The public can and is doing something about this. People are unwilling to see courts run in the same antiquated fashion in which they were run a century ago. Business men today simply haven't time to tolerate inexcusable delay. When controversies arise between citizens they want them settled, and if the courts are too slow in acting, just claims will be sacrificed through compromise in order to save both time and expense.

Someone recently tabulated the average time consumed in the trial of tort cases in New York and it developed that it took 46.5 months from the beginning of a case until final judgment in the trial court. If a new trial was granted upon appeal, the time lapse would increase by several years.

This delay is not confined to New York; it prevails in many States,

†From a lecture delivered by Justice Whittle before the School of Law of Washington and Lee University on March 27, 1952, sponsored by the Phi Alpha Delta fraternity.

*Associate Justice, Supreme Court of Appeals of Virginia.

and while it is not so bad in Virginia at present, there was a time when we could have equalled this record.

Ponder the effect of such delay, the cost to the State, the trouble, bother and expense to jurors and witnesses, to say nothing of the ultimate injustice done the litigants through the possible loss or death of witnesses. As was said by Gladstone, "Justice delayed, is justice denied."

Administrative Agencies

The result of such inexcusable delay in the trial of cases has brought into being the establishment of administrative agencies set up in the executive department of government, ordained to handle matters which would normally come under the judicial branch.

These agencies cut through red tape and handle business entrusted to them in a simple, non-technical, practical way. We have seen the most lucrative practice, that involving personal injury suits by employees against employers, taken from the courts in Virginia and placed for determination with the Industrial Commission. The main reason for this demanded statutory change was brought about by the unwillingness of the courts and the profession generally to modernize trial practice and give to litigants a sensible, dignified, business-like method of adjusting their differences.

The creation of administrative agencies is the order of the day. Both the Federal government and the governments of the several States are creating them and in many instances the reason for their creation stems from the utter lack of ability of our courts to function properly and give the service demanded by the public.

Unless the profession takes constructive action to put its house in order you will see the number of administrative agencies continue to increase, causing financial loss to the legal profession and, more important, causing great loss in professional prestige.

The Combat-Adversary System

There exists in our profession a practice which tends to bring lawyers as well as courts into public disfavor, and for want of a better term we call it "The Combat-Adversary System" which is used in the trial of lawsuits.

Every lawyer should, of course, represent his client vigorously and to the best of his ability in the trial of a case. The client has a right to expect this. But no worthy member of the profession should be expected to carry into the courtroom the hatred and spleen often existing between litigants.

In many States and at times in Virginia this adversary system has existed. It goes to such lengths that litigation becomes a sort of warfare between the parties. The litigants feel they have an inherent right to use the courts as they please so long as they stay within the technical rules. Here the courts furnish the battleground for a real contest, where ruthless, cruel cross-examination of witnesses is engaged in and where the lawyer's "greatness" is measured in his client's mind by his ability to assassinate character.

Courts of justice were not established for this purpose and wherever such practice is permitted the profession is brought into disrepute. Fortunately for the profession, citizens who are called upon to render jury service and witnesses who are summoned to testify in lawsuits look upon this conduct with such disfavor and contempt that the practice is becoming less prevalent. A lawyer's employment covers ethical, dignified service to his client and his conduct of a case should not exceed these bounds.

Procedural Progress in Virginia

In recent years the legal profession generally has come to recognize the public demand for constructive improvement in the administration of justice. Apparently the courts are beginning to see for the first time that busy men who are compelled to serve as jurors and hapless witnesses who perchance know of some fact in a case about which they are compelled to testify, simply do not approve of the delay-provoking, technical procedural methods used in the courts. These witnesses, jurors, and other interested parties compare the slow inefficient methods used in disposing of litigation to other types of business where efficiency and dispatch are demanded.

In Virginia we are on the march and improved methods are being inaugurated.

The Judicial Council

The General Assembly in 1930 passed an Act creating the Judicial Council.¹ The members of the council are appointed by the Chief Justice of the Supreme Court of Appeals.² The council is composed of nine members, consisting of three circuit judges, two judges of other courts of record, and four attorneys qualified to practice in the Supreme Court of Appeals.³

¹ Va. Code Ann. (Michie, 1950) § 17-222 through § 17-227.

² Va. Code Ann. (Michie, 1950) § 17-223.

³ Va. Code Ann. (Michie, 1950) § 17-222.

The Chief Justice calls the meetings and presides over them.⁴ The Act provides that the council shall "make a continuous study of the organization and the rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by the system and its various parts . . ."⁵

In Virginia the General Assembly has granted rule-making power to the Supreme Court of Appeals.⁶ It is generally conceded that courts inherently have this power. Mr. Justice Brandeis, speaking for the Supreme Court of the United States, said in *Ex Parte Peterson*,⁷ our courts have an "inherent power to provide themselves with appropriate instruments required for the performance of their duties,"⁸ and recently, in the case of *Raiford v. Raiford*,⁹ Mr. Chief Justice Hudgins said: ". . . a court of general jurisdiction may adopt a rule of practice provided the subject is not regulated, or adequately provided for, by general law. Such a rule must be reasonable, must not contravene the Constitution or statutes, or affect substantive law."¹⁰ This opinion upholds the reasonable rule-making power of trial courts in Virginia.

The New Rules in Virginia

In recent years, under the leadership and inspiration of Mr. Chief Justice Hudgins, the Judicial Council of Virginia has promulgated a system of modern rules of practice and procedure in the courts of this Commonwealth. These rules are simple, free from red tape and delay-provoking technicalities. They cover Equity Practice and Procedure, Practice and Procedure in Actions at Law, Pre-Trial Conferences, and Appellate Proceedings. The rules became effective on February 1, 1950, and cover 43 pages. To know these rules is a "must" for any Virginia practitioner.

New Equity Practice

There are twenty-five rules governing equity practice.

We are told in *Minor's Institutes*,¹¹ that "the objective of rule days is to expedite the maturing of causes in the recess or vacation of the court." Many Virginia courts have not been "in vacation" for a generation; therefore, the reason for rule days having been abolished, the

⁴ Va. Code Ann. (Michie, 1950) § 17-224 and § 17-225.

⁵ Va. Code Ann. (Michie, 1950) § 17-225.

⁶ Va. Code Ann. (Michie, 1950) § 8-1.1.

⁷253 U. S. 300, 40 S. Ct. 543, 64 L. ed. 919 (1920).

⁸253 U. S. 300 at 312, 40 S. Ct. 543 at 547, 64 L. ed. 919 at 925 (1920).

⁹193 Va. 221, 68 S. E. (2d) 888 (1952).

¹⁰193 Va. 221 at 224, 68 S. E. (2d) 888 at 890 (1952).

¹¹4 *Minor, Institutes* (1875) 546.

Council abolished rule days. And now Equity Rule 2 provides that a suit in equity is instituted by filing the bill of complaint.

It is also provided that a copy of the bill shall be served upon the respondent or respondents.¹² The bill must be answered within the time prescribed,¹³ and unless answered (except in divorce cases) it is taken for confessed, and judgment is entered against any respondent who does not answer.¹⁴

These rules encourage simple pleadings with the various allegations in the bill set out in numbered paragraphs so that the simple answer can either "admit" or "deny" the allegations of the bill by referring to the paragraph number. Here, of course, the object is to speed the cause and save time and expense to all concerned.

Procedure in Actions at Law

A reading of the twenty-two rules dealing with actions at law will disclose that pleadings have been reduced to their simplest form. Like the equity rules, these law rules do not attempt to supplant existing practice with a new system. The old procedure by writ and declaration is abolished and the rules require that all actions at law in a court of record seeking a judgment *in personam* for money only¹⁵ shall be begun by notice of motion for judgment.¹⁶ These rules are constructed upon the assumption that the aim of legal procedure is to get a case in court with as few technicalities as possible. All technical requirements that serve no purpose except as traps for the unwary have been abolished.

The law rules also abolish rule days and require the clerk to file all pleadings without a court order.¹⁷ If the paper is filed in time an order is not necessary, and if not filed in time the judge and not the clerk should rule upon the question.¹⁸

In an action at law the statute of limitations ceases to run from the date the notice is filed in the clerk's office instead of from the time it is served.¹⁹ A copy of the complaint is attached to the printed notice,²⁰ and the return of service is made upon a separate form.²¹

¹²Rules of the Supreme Court of Appeals of Virginia, Rule 2:2.

¹³Rule 2:11.

¹⁴Rule 2:11.

¹⁵Rule 3:1.

¹⁶Rule 3:2.

¹⁷Rule 3:2.

¹⁸Rule 3:2.

¹⁹Rule 3:3.

²⁰Rule 3:3.

²¹Rule 3:4.

The complaint should be reduced to the simplest form, and if it contains more than one paragraph each should be numbered. The defendant, under the rules, is required to answer or file grounds of defense,²² and all allegations not therein denied are deemed to be admitted.²³ In this way the issues for trial are greatly reduced.

The attorney who files a pleading is required to sign the same,²⁴ and he is also required to mail a copy to opposing counsel.²⁵ Bills of particulars may be required if the complaint is not specific in its allegations,²⁶ and both bills of particulars and grounds of defense are made a part of the record in the case.²⁷ Pleadings filed in the case at the same time can be incorporated on one sheet of paper.²⁸

The rules also provide for a summary judgment in cases which cannot be reached by demurrer wherein the only dispute involves a question of law.²⁹ This applies only to cases in which no factual issue is raised, and no trial by jury is necessary as evidence could not affect the result. It is also provided that all final judgments shall remain under the control of the court for twenty-one days irrespective of terms of court.³⁰

Appellate Proceedings

Under the rules of practice in both equity and law cases, the clerk of the trial court shall place the original papers in each case in a bound flat file, which on appeal is indexed and lodged with the Supreme Court of Appeals.³¹

In order to save expense, only that part of the record necessary upon appeal should be designated by counsel for printing.³² The rule provides that the Supreme Court may penalize the offending party for requiring the printing of unnecessary matter. This saves both the time of the court and expense to the litigants.

Since 1887 the Legislature has attempted to formulate some plan by which records of appeal could be shortened. A law was passed providing that only "... so much of the case ... be brought up ... as will en-

²²Rule 3:7.

²³Rule 3:11.

²⁴Rule 3:18(c).

²⁵Rule 3:15.

²⁶Rule 3:18(d).

²⁷Rule 5:1 § 3(a).

²⁸Rule 3:18(j).

²⁹Rule 3:20.

³⁰Rule 3:21.

³¹Rule 5:1 § 5(a).

³²Rule 5:1 § 6(e).

able the court . . . properly to decide the questions that may arise before it."³³ But even after the passage of this Act litigants were afraid to leave out any part of the record, fearing it would be argued that the omitted portion was decisive of the case.

Under the new rules the entire record in the trial court is filed in the Supreme Court of Appeals for examination.³⁴

It is obvious that in order to have a good record on appeal, the case should be well tried and the pleadings should be properly prepared in the trial court. All cases should be tried with the thought in mind that an appeal will be taken. Exceptions should be properly saved and incorporated in the orders.

Notwithstanding the fact that the appellate rules are made as simple as possible, some attorneys will not follow them. As evidence of this fact read the cases of *Vick v. Siegel*,³⁵ *Avery v. County School Board of Brunswick County*.³⁶

Pre-trial Conferences

Rules 4:1 and 4:2 are short and concise. They provide for the pre-trial of cases in Virginia courts. Pre-trial rules were adopted by the Federal courts several years ago. Rule 16 of the Rules of the U. S. District Courts covers "Pre-trial Procedure" in Federal courts. It would be impossible to estimate the time and expense saved by following these simple rules. Every practicing attorney should read and study the splendid book on the subject written by Hon. Harry D. Nims of the New York City Bar.³⁷

Judge McDermott of the Tenth U. S. Circuit Court of Appeals discussed in the *Journal of the American Judicature Society*³⁸ a new method accidentally discovered. He said, "Quite by accident . . . I stumbled into a method of getting at the nub of a case at the beginning of the litigation instead of at the end. . . . I see no reason why a rule requiring a few minutes face-to-face conference between the parties, their counsel, and a trial judge, within a few days after a case is filed, shouldn't extend the practice to all cases in this country." Judge McDermott's observation has been justified by the results obtained in jurisdictions where pre-trial is used.

To understand the function of pre-trial we must first determine

³² Va. Code Ann. (Michie, 1950) § 8-446.

³⁴Rule 5:1 § 7.

³⁵191 Va. 731, 62 S. E. (2d) 899 (1951).

³⁶192 Va. 329, 64 S. E. (2d) 767 (1951), noted (1952) 9 Wash. and Lee L. Rev. 138.

³⁷Nims, *Pre-Trial* (1950).

³⁸December, 1934.

the real purpose of courts of justice. Should courts confine their efforts to trials in the courtroom or should they attempt to render real assistance to litigants involved in the cases on their dockets, whether the cases have been set for trial or whether they will not be tried for months or years to come on account of congestion?

If the court's function is to mete out justice to litigants with dispatch, then pre-trial is the answer. The conference should be informal, and this simple form of procedure may be followed:

1. The rule of the trial court should require all attorneys employed in a case to notify the clerk immediately of their employment, and require the clerk to mark them as attorneys of record.
2. When the judge desires a conference in the case the clerk notifies the attorneys of record the day and hour of such conference.
3. The clerk also notifies the attorneys to bring with them to the conference the following:
 - (a) All exhibits which they intend to introduce in the case.
 - (b) Any additional pleadings which they intend to file.
 - (c) A statement of facts which they intend to prove and rely upon.
 - (d) The names and addresses of all witnesses which they intend to call.
 - (e) A written list of authorities upon which they intend to rely in support of their position on the law of the case.

It will be noted that nothing is here required other than information available to any lawyer who expects to try a lawsuit.

4. The conference is held in the judge's chambers with only the judge, the clerk, and the attorneys of record present. The parties to the suit should be close at hand but should not participate in the conference unless necessary.
5. The order of business for the conference can be as follows:
 - (a) The plaintiff's attorney, with his notice of motion before him, gives the judge a full resumé of his client's case.
 - (b) Then defendant's attorney, with his grounds of defense before him, informs the judge as to his defense.
 - (c) The judge then asks questions of attorneys on either side and attempts to reconcile the differences.
 - (d) Any additional pleadings, demurrers or amendments to pleadings can now be considered.
 - (e) A brief general discussion of the case then takes place.

- (f) A stipulation of all facts not in controversy is agreed upon and set out in the pre-trial order. Exhibits are also agreed to if possible and marked for the record.
- (g) Any unusual question of law can be raised and ruled upon or taken under advisement by the judge.
- (h) The trial date is fixed and entered in the order.

When the trial date arrives the jury is sworn and the judge explains to the jury the nature of the case and states to them such facts as have been stipulated and are not in dispute. Thus the issues for the jury to decide are made as narrow as possible. From this point on the case proceeds in regular order.

Here it will be observed that you can eliminate many witnesses; for example, photographers need not appear when the picture exhibits are agreed to, the surveyor need not appear when the map is agreed to, doctors need not appear if they can furnish agreed statements concerning injuries. Many witnesses are at times needlessly summoned to testify to facts which can be agreed upon.

Having presided over the conference the judge knows exactly what he is called upon to try. He has ruled upon controversial issues regarding the admissibility of evidence and upon questions of law, and exceptions have been saved to these rulings. He knows as much about the case as do the lawyers and the litigants.

Conferences invariably expedite the trial of cases, eliminating hardship and saving expense. The records show that in some courts using the pre-trial conference from sixty to ninety per cent of the cases pending are never tried. The plaintiff either finds out that he has no case and withdraws his suit or the defendant learns that the plaintiff has a better case than he originally thought and a settlement is made.

At these conferences the judge simply informs the attorneys that "the cards are down" and he expects them to divulge to him then and there the full case.

The advantage of this procedure is extremely important and it is becoming generally used. Every trial lawyer should familiarize himself with the practice and should conform to the rules of the courts in which he is engaged.

There are many courts in Virginia presided over by able judges who could not carry their workload if they did not utilize the pre-trial conference.

The Judicial Conference

The study of judicial reform continues in Virginia. In 1950 the Leg-

islature passed an Act³⁹ establishing the Judicial Conference of Virginia. This Act provides that the active members shall be the Chief Justice and Justices of the Supreme Court of Appeals, all judges of the courts of record, and all retired justices and judges of such courts. The Act further provides that the honorary members of the conference, without voting privilege, shall be the Judges of the Fourth Circuit Court of Appeals, the Judges of the Federal District Courts of the State the Attorney General, the Chairmen of the Courts of Justice Committees of the Senate and House of Delegates, the President and Secretary of the Virginia State Bar, and the President and Secretary of the Virginia State Bar Association. The Chief Justice of the Supreme Court of Appeals is the presiding officer.

The Act further provides that the Conference shall meet at least once in each calendar year at the call of the president, and at such other times as may be designated by him. The purpose of the Conference is "to consider means and methods of improving the administration of justice in this state."⁴⁰

Under the provisions of this Act the judicial branch of our government is called together for the purpose of considering any matters which may be helpful to the speedy administration of justice, and to improve the judicial system.

Since the passage of the Act we have had two meetings at which matters of far-reaching importance have been discussed. The judges get together and exchange ideas on how to meet problems arising in their courts. These conferences will undoubtedly have a lasting and beneficial effect upon the judicial system in Virginia.

The Executive Secretary

The 1952 session of the General Assembly approved an Act establishing in Virginia the office of Executive Secretary to the Supreme Court of Appeals.⁴¹ The duties of this officer shall be to help coordinate the procedure in the various trial courts of the Commonwealth. Some judges run their courts in one way and some in another, and while the Executive Secretary will have no control over the operation of trial courts, he can study the methods used by them and suggest improvements.

The Executive Secretary is to visit the various trial courts in the Commonwealth and is to tabulate the work done by each. This infor-

³⁹ Va. Code Ann. (Michie, 1950) § 17-228.

⁴⁰ Va. Code Ann. (Michie, 1950) § 17-230.

⁴¹ Va. Code Ann. (Michie, 1950) § 17-111.1.

mation will be passed on to the Supreme Court of Appeals. It will disclose the caseloads in the various courts and will enable the Court of Appeals to fill temporary vacancies more equitably.

In explaining the necessity for an Administrative Officer, Judge Harold R. Medina, speaking before a section of the American Bar Association in Dallas, Texas, in April, 1951, said: "It is my judgment that the most pressing need in the judicial administration today . . . is that of an integrated court system and the adoption of some sort of efficient business organization in every system of courts, state and federal. . . .

"Every successful business has a business manager who knows the condition of his business and then plans for the future. He knows his inventory at any time; he knows the amount of income and out-go; he also knows the speed of operation. Also he knows his personnel and the workload in each department. He has meetings of his officers and department heads to consult about the condition of the business as a whole. The Administrative Office Act . . . was designed to take care of similar duties in the judiciary.

"The thing first in mind was to speed up the administration of justice by clearing up the dockets and to bring this about by making periodic reports showing the condition of business in every district and circuit, thus calling attention to arrears."

Through the efforts of this valuable assistant the Supreme Court of Appeals will keep in close touch with the trial courts of Virginia and will learn more of their problems.

Conclusion

While we have not here dealt with the administration of the criminal laws of the State, you may be assured that progress is also being made in this most important field. Virginia has inaugurated a modern probation and parole system, and study will continue to improve criminal practice and procedure.

In Virginia the Bench and Bar are awake to the duties and responsibilities which are theirs to give to the people a dignified, expeditious, and inexpensive Judicial System.