

**The Virginia Bar Association**

**Virginia Trial Lawyers Association**

**Old Dominion Bar Association**

**Virginia Association of Defense Attorneys**

**American Academy of Matrimonial  
Lawyers**

**Virginia Family Law Coalition**

May 5, 2020

Hon. Donald W. Lemons  
Chief Justice  
Supreme Court of Virginia  
P.O. Box 1315  
100 North Ninth Street  
Richmond, VA 23219-1315

Re: Civil Motions and Discovery Practice During the Judicial Emergency

Dear Chief Justice Lemons:

As leaders of statewide bar associations, we write on behalf of our members to request the Court consider loosening the restrictions currently imposed on civil cases so as to increase access to justice and mitigate the significant backlog of cases accumulating during the judicial emergency.

In the face of uncertainty surrounding the monumental public health threat associated with the spread of the Novel Coronavirus the declaration of states of emergency by both the executive and judicial branches and restrictions on gatherings were of critical importance. As matters have evolved over the past six weeks, it has become apparent that the availability of technological resources at the courts, at law offices, and at the homes of legal practitioners provide necessary infrastructure to allow for the resumption of significant elements of civil cases.

Through its orders, the Court has taken necessary steps to ensure the safety of the citizens of the Commonwealth. Unfortunately, as a result civil cases have been significantly delayed since the Court's Order of March 16, 2020. Thousands of hearings and trials have been continued, many of which have not yet been rescheduled. When the courts reopen, trial judges will face a tidal wave of motions to be heard which has the potential to overwhelm the already heavily-burdened dockets of the circuit and district courts. We respectfully suggest there are measures the Court could consider that will allow civil cases to move forward safely during the judicial emergency and alleviate some of the pressure on the trial courts' dockets once it ends, to wit:

1. **Clarify the Status of Discovery in Civil Cases:** Many attorneys and courts are interpreting this Court's Orders to provide that all discovery deadlines are tolled during the judicial emergency. Several other courts have expressed an opposite

view and maintain discovery should be ongoing. Completing discovery is essential to trying nearly any civil case. Ideally, attorneys would be using this time away from their busy trial schedules to complete discovery and position their cases to be ready to be tried. Further delays in discovery will result in continuing cases that are set for trial after the courts reopen. These continuances and motions for continuances will burden and complicate courts' dockets at a time when their caseload will already be strained. Most, if not all, discovery can be safely completed during the judicial emergency while maintaining compliance with Governor Northam's restrictions on gathering in large groups. In a unique circumstance where discovery cannot be completed while maintaining compliance with the Governor's restrictions, such an objection may be made and considered by the trial courts.

As such, we request the Court issue an Order providing the following:

In all civil cases, any tolling of deadlines and obligations arising out of Part Four of the Rules of the Supreme Court of Virginia shall terminate as of the date of this Order. All discovery issued with a deadline to respond during the judicial emergency shall be due within twenty-one (21) days of this Order.

2. **Resume Hearings Electronically for Civil Motions Not Requiring Evidence *ore tenus***: In addition to discovery, there are a number of pretrial motions and hearings that can safely take place during the judicial emergency. In its April 10, 2020 letter to Judges and Clerks, this Court clarified that lower courts can hear non-emergency civil matters if all parties consent. Since that letter, these types of hearings have begun taking place in courts throughout the Commonwealth. As you can imagine, there are numerous contested matters in which one party refuses to agree because they are benefited by the delay. When there are specific reasons a hearing may not be appropriate in a given matter, the trial court can convene a telephone conference ahead of the noticed hearing to allow counsel for a party that objects to an electronic hearing to present that objection and the trial court can consider whether good cause exists to delay the hearing.

In an effort to build upon the access provided in the April 10<sup>th</sup> letter, we request the Court issue an Order providing the following:

The circuit and district courts shall docket and hear by two-way electronic audio-visual communication system using a secure communication platform such as Polycom or WebEx, or by telephone, any duly noticed motion in a civil case, where all parties are represented by counsel and which does not require testimonial evidence to be taken, including, but not limited to, motions to compel, motions *in limine*, *demurrers*, special pleas, motions for entry of QDRO, civil pretrial conferences, motions for vocational

evaluations and independent medical examinations and custody evaluations, motions to appoint a GAL, motions for summary judgment, Petitions to Approve wrongful death and infant settlements, and/or any other matter that does not require the taking of *ore tenus* evidence.

3. **Begin Rescheduling Matters Continued During the Emergency:** There are a significant number of circuit and district court matters which have been continued or postponed that need to be reset. In order to avoid a deluge of requests for new hearing or trial dates after the emergency is lifted, these courts should begin resetting these matters for hearings and trials now.
4. **Authorize the Signing and Filing of Pleadings and Other Documents by Electronic or Scanned Signature:** Some courts/judges are permitting pleadings, orders and other documents to be e-signed, or are accepting scanned signatures, while others are not. A clear directive authorizing e-signing or scanned signatures will provide consistency and help facilitate the filing of documents requiring signatures.

It is unlikely that the public life, including the courts, will reopen in a full capacity with the flip of a switch. It is likely that we will be facing a staggered resumption of governmental and social life. These types of electronic hearings, reopening discovery, rescheduling hearings and trials, and permitting electronic or scanned signatures are safe and effective means by which the Court can move justice forward during the judicial emergency and allow a measured and staggered resumption of civil litigation. Not only will it position cases to be ready for trial upon re-opening, but completion of discovery and resolution of these types of motions often leads to settlement, which will thin the courts' dockets even further. If there are reasons, relating to the pandemic or otherwise, where a party may not be able to meet a discovery deadline or participate in an electronic hearing, the local judges are best positioned to hear from the objecting party and evaluate such concerns on a case by case basis.

We appreciate your leadership throughout this trying and unprecedented time. Our suggestions recognize that the courts face myriad challenges in balancing the need for preserving public health and the access to the courts by litigants in the Commonwealth. We offer the above as suggested solutions that provide reasonable access to justice to our members and their clients, and also to ease the impending burden on the courts. We thank you for your consideration of these matters.

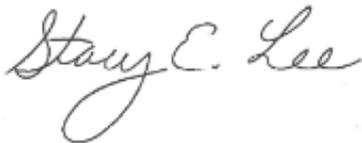
With Regards,



Alison M. McKee, Esq.  
President  
**The Virginia Bar Association**



Elliott M. Bucker, Esq.  
President  
**Virginia Trial Lawyers Association**



Stacy E. Lee, Esq.  
President  
**Old Dominion Bar Association**



Melissa H. Katz, Esq.  
President  
**Virginia Association of Defense Attorneys**



Daniel L. Gray, Esq.  
President, Virginia Chapter  
**American Academy of Matrimonial Lawyers**  
Chairman  
**Virginia Family Law Coalition**

cc: The Honorable S. Bernard Goodwyn  
The Honorable William C. Mims  
The Honorable Cleo E. Powell  
The Honorable D. Arthur Kelsey  
The Honorable Stephen R. McCullough  
The Honorable Teresa M. Chafin