

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
SUPREME COURT RULES
PART 6, § IV
PARAGRAPH 3(c) (JUDICIAL MEMBERS)
(Petition ID: 22-4)**

PETITION OF THE VIRGINIA STATE BAR

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**TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:**

NOW COMES the Virginia State Bar (VSB), by its president and executive director, pursuant to Part 6, § IV of the Rules of this Court, and requests review and approval of the proposed amendments to Paragraph 3(c) of Part 6, § IV of the Rules governing the Organization and Government of the VSB, as set forth below. The proposed amendments were approved by unanimous vote of the VSB Council on October 21, 2022 (Appendix, p. 3).

I. Overview of the Issue

The VSB proposes amending Paragraph 3(c) of Part 6, § IV of the Rules of the Supreme Court of Virginia to clarify the requirements for judicial class membership. This issue was presented because, on multiple occasions in recent years, the VSB staff has confronted questions as to who qualifies, and who should qualify, as judicial class members. The Rule found in Part 6, § IV, Paragraph 3(c) is likely both overinclusive and underinclusive and raises concerns about how the

class should be granted. Consequently, the VSB Bench Bar Relations Committee (the “Committee”) and staff endeavored to resolve this ambiguity and create a uniform understanding.

II. Practical Examples of Concern

The following actual examples demonstrate the problems with the existing definition’s under inclusiveness resulting in surprising applicability for federal judges.

The associate justice of the Supreme Court of the United States (SCOTUS)—this judicial class member was an *associate* member of the VSB upon confirmation as a judge on the U.S. Court of Appeals for the 7th Circuit in 2018. At that time, the member was not textually eligible for judicial class membership because the member was not “a full-time judge of the state” (as the first prong of the Rule then required) and did not satisfy the other judicial class membership requirements. Notwithstanding textual ineligibility, the member was admitted to the judicial class and retained that membership upon confirmation to the Supreme Court of the United States two years later. Under the then-existing, and current, judicial class definition, the member was and would remain ineligible for the VSB judicial class, even as a Supreme Court of the United States associate justice, if not for the initial misapplication by VSB staff in 2018. The Committee and staff believe this member *should* be eligible for judicial class membership.

The judge on the U.S. Court of Appeals (CA4)—this judicial class member was an *associate* member of the VSB when the member was confirmed as a judge on the 4th Circuit in 2019 (presiding in North Carolina). At that time, the member was textually ineligible for judicial class membership because the member was not appointed as “a full-time judge of the state” (as the first prong of the Rule then required) and did not satisfy the other judicial class membership requirements. Under the then-existing, and current, judicial class definition, the member was and would remain ineligible for VSB judicial class membership, even as a 4th Circuit judge. However, the member was granted an ad hoc exception by VSB staff to confer judicial class membership to judges who have the authority to interpret Virginia law. The Committee and staff believe this member *should* be eligible for judicial class membership.

Another judge on the U.S. Court of Appeals (CA7)—this member was an *active* member of the VSB when the member was confirmed as a judge on the U.S. Court of Appeals for the 7th Circuit in 2021. Yet, in this instance, VSB staff strictly applied the requirements for judicial class membership and the same error that was made when the aforementioned associate justice was granted judicial class membership as a 7th Circuit judge was not replicated. This member was advised in 2021 that the member was ineligible for the judicial class because the member did not “preside” (as the Rule currently requires) in Virginia and did not satisfy the

other judicial class membership requirements. This was so despite being an active member of the VSB until the member's ascension to the bench. The Committee and staff believe this member *should* be eligible for judicial class membership.¹

On the other hand, the Committee and staff believe the current definition of the judicial class is overinclusive and they are uncertain whether it was meant to include the following office holders/positions despite some individuals having been granted judicial class membership: federal judges with no connection to Virginia; federal and state ALJs (Immigration, Social Security, FERC, et al.) regardless of location; non-Virginia federal and state judges who intermittently interpret Virginia law (e.g., through choice of law provisions); US Merit System Protection Board members; Armed Services Board for Contract Appeals members; private arbitrators (e.g., retired non-Virginia judges); patent examiners; and hearing examiners.

Additionally, as written, there are procedural shortfalls in the current definition. For example, according to the text, judicial class membership is automatic, i.e., by operation of Rule, without any ministerial process such as the filing of a judicial affirmation as is administratively requested by VSB staff. Unlike the active and associate classes of membership, that require an act to

¹ Though immaterial under the current Rule, both court of appeals judges were licensed after successfully passing the Virginia bar exam.

consummate membership (e.g., paying dues, completing the Carrico Professionalism Course, completing MCLE requirements, certifying election of professional liability insurance), the judicial class Rule flatly states that those individuals satisfying one of the three judicial class membership prongs, “*are* judicial members of the Virginia State Bar” (emphasis added). This could lead to an erroneous representation of judicial class membership if quasi-judicial office holders interpret the Rule to grant them automatic judicial class membership.

The Committee and staff believe that the proposed amendments address these problems by requiring judicial class members to: (i) establish judicial bona fides; (ii) establish a connection to the Commonwealth of Virginia; and, on an annual basis, (iii) file an administrative affirmation that confirms their title, address of record, and tribunal/jurisdiction.

The proposed amendments are included below in Section IV.

III. Publication and Comments

Notice of the proposed Paragraph 3 amendments was published on the VSB’s website on July 22, 2022 (Appendix, p. 6) and distributed in the VSB’s E-News on August 1, 2022. (Appendix, p. 7) The comment period for the amendments was open until September 16, 2022.

Several comments were received from Virginia magistrates and organizations representing magistrates voicing opposition to the omission of

magistrates from express inclusion as judicial class members. (Appendix, p. 10 et seq.) Representative of these sentiments were remarks from Avnel A. Coates, President of the Virginia Magistrates Association, who stated that magistrates should be included as judicial class members because “1.) those with magistrate authority (magistrate regional supervisors, chief magistrates, and magistrates) are judicial officers who perform judicial functions, and 2.) maintaining good standing membership of the Virginia State Bar is required for a chief magistrate.” (Appendix, pp. 18-19)

As a result of Ms. Coates’ comments, and those similar, the Committee revisited the proposed definition at its meeting on September 21, 2022, and unanimously voted (with one abstention) to revise the definition to explicitly include Virginia magistrates. This revision, incorporated below, serves to clarify that Virginia magistrates are included in the definition of those eligible for judicial class membership.

Comprehensively, this proposal resolves ambiguity in the existing Rule and makes clear how the class of membership should be applied by VSB staff in the future.

IV. Proposed Amendments

Additions are denoted by underlining and deletions by stippling.

Pt. 6, Sec. IV, Paragraph 3

EXISTING

1 Judicial Members—All full-time judges presiding in the Commonwealth of
2 Virginia (including federal judges), other officers qualified but forbidden by statute
3 to practice law, and all retired judges who are receiving retirement benefits and are
4 prohibited from appearing as counsel in any case in any court of the
5 Commonwealth under section 51.1-309 of the Code of Virginia are judicial
6 members of the Virginia State Bar. They are not required to pay dues but are
7 entitled to all of the privileges of active members except that they cannot vote nor
8 hold office in the Virginia State Bar and must comply with any statutory
9 limitations regulating their practice of law.

PROPOSED

1 Judicial Members—Lawyers who are admitted to practice law in any U.S.
2 jurisdiction and who establish their authority to adjudicate the rights and liabilities
3 of parties in adversarial proceedings other than arbitration on a full time basis, and
4 who make final decisions affecting the rights and liabilities of parties,
5 notwithstanding a right of appeal of the non-prevailing party, including Virginia
6 magistrates; and, who are Virginia licensed lawyers at the time of application to
7 the judicial class of membership, or preside in a tribunal located in Virginia, or, by
8 virtue of the applicant's official position, have the authority to, and regularly,
9 judicially interpret Virginia law, qualify for judicial class membership in the
10 Virginia State Bar. They may become judicial members by filing an annual
11 affirmation with the Virginia State Bar which identifies their tribunal or
12 jurisdiction, address of record, and judicial title. They are not required to pay dues
13 but are entitled to all the privileges of active members except that they cannot vote
14 nor hold office in the Virginia State Bar. Former judges who do not engage in the
15 practice of law and are ineligible to transfer to the retired class of membership may
16 retain their judicial class membership by completing the annual affirmation
17 indicating their previous title and tribunal or jurisdiction.

REDLINE

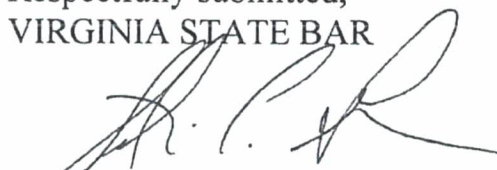
Judicial Members—~~All full time judges presiding in the Commonwealth of Virginia (including federal judges), other officers qualified but forbidden by statute~~Lawyers who are admitted to practice law, and all retired judges who are receiving retirement benefits and are prohibited from appearing as counsel in any case in any court of the Commonwealth under section 51.1-309~~U.S. jurisdiction and who establish their authority to adjudicate the rights and liabilities of parties in adversarial proceedings other than arbitration on a full time basis, and who make final decisions affecting the rights and liabilities of parties, notwithstanding a right of appeal of the Code of non-prevailing party including Virginia magistrates; and, who are Virginia licensed lawyers at the time of application to the judicial class of membership, or preside in a tribunal located in Virginia~~are, or, by virtue of the applicant's official position, have the authority to, and regularly, judicially interpret Virginia law, qualify for judicial class membership in the Virginia State Bar. They may become judicial members of by filing an annual affirmation with the Virginia State Bar which identifies their tribunal or jurisdiction, address of record, and judicial title. They are not required to pay dues but are entitled to all of the privileges of active members except that they cannot vote nor hold office in the Virginia State Bar and must comply with any statutory limitations regulating their.~~Former judges who do not engage in the practice of law and are ineligible to transfer to the retired class of membership may retain their judicial class membership by completing the annual affirmation indicating their previous title and tribunal or jurisdiction.~~

V. Conclusion

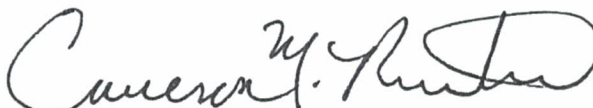
“The Supreme Court may promulgate rules and regulations organizing and governing the Virginia State Bar.” Va. Code § 54.1-3910. Pursuant to this statutory authority, the Court has established Part 6, § IV of the Rules of Court relating to the organization and government of the VSB. After notice to the VSB membership and a comment period publicized through VSB publications, the proposed amendments were then unanimously approved by the Executive Committee and Council on October 20 and 21, 2022, respectively.

THEREFORE, the VSB, by its president and executive director, respectfully requests the Court to adopt the foregoing amendments to Part 6, § IV, Paragraph 3 for the reasons set forth above.

Respectfully submitted,
VIRGINIA STATE BAR



By: Stephanie E. Grana, President



By: Cameron M. Rountree, Executive Director

Dated this 7th day of November, 2022