

## **JUDICIAL CLASS MEMBERSHIP IN THE VSB**

Bottom line up front: over the last few years the VSB has confronted an issue with who qualifies (and who *should* qualify) as judicial class members. The Rule found in [Part 6, Section IV, Para. 3 \(c\)](#) of the Rules of the Supreme Court is likely both overinclusive and underinclusive and raises questions about *how* the class should be granted. The VSB Bench Bar Relations Committee (the “Committee”) and staff seek to resolve the ambiguity, create a uniform understanding, and propose a Rule change to the Supreme Court of Virginia.

As shorthand, the existing Rule of Court makes satisfaction of any of the following “prongs” sufficient to qualify for judicial class membership in the VSB:

- (i) “All full-time judges presiding in the Commonwealth of Virginia (including federal judges),
- (ii) other officers qualified but forbidden by statute to practice law, and
- (iii) 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 [retired judges receiving retired pay] of the Code of Virginia.”

*The problems:*

### **1—The current definition of judicial class member is underinclusive. Some high-profile federal cases make this clear.**

- Associate justice of the U.S. Supreme Court (SCOTUS)—this judicial class member was an associate member of the VSB prior to appointment as a 7<sup>th</sup> Circuit judge in 2018. At that time, the member was *not* textually eligible for judicial class membership because the member was not “sitting in the Commonwealth” (as the first prong of the Rule required at the time and did not satisfy the other judicial class membership prongs). Under the then-existing, and current, judicial class definitions, the member would remain ineligible for VSB judicial class membership, even as a SCOTUS associate justice, if not for a misinterpretation and misapplication of the judicial class of membership by VSB staff in 2018.
- Judge on the federal Court of Appeals (CA4)—this judicial class member was an associate member of the VSB when the member was appointed to the 4<sup>th</sup> Circuit in 2019. At that time, the member was *not* textually eligible for judicial class membership because she was not “sitting in the Commonwealth” (as the first prong of the Rule required at the time and did

not satisfy the other judicial class membership prongs). Under the then-existing, and current, judicial class definitions, the member would be ineligible for VSB judicial class membership, even as a Fourth Circuit judge. The member was granted an ad hoc exception by VSB staff to grant judicial class membership to judges who have the authority to interpret Virginia law.

- Judge on the federal Court of Appeals (CA7)—this member was an active member of the VSB when the member was appointed to the 7<sup>th</sup> Circuit bench in 2021. Yet, the same error that applied when the aforementioned associate justice was granted judicial class membership as a court of appeals judge was not replicated by the VSB staff, and this member was advised in 2021 that the member was not eligible for judicial class membership because the member did not “preside” (as the Rule required at the time) in Virginia (and did not satisfy the other judicial class membership prongs). This was so despite being an active member of the VSB until the member’s ascension to the bench.

**2—The current definition of judicial class members is overinclusive as the Committee and staff are uncertain that it was meant to include the following office holders/positions despite some individuals having been granted judicial class membership.**

- Federal and state ALJs (Immigration, Social Security, FERC, et al.)
- US Merit System Protection Board members
- Armed Services Board for Contract Appeals members
- Virginia magistrates (which may, categorically, include non-lawyers)
- Private arbitrators (e.g., retired non-Virginia judges)
- Patent examiner
- Hearing examiners

**3—As written, judicial class membership is automatic, i.e., by operation of Rule, without a judicial affirmation as is administratively practiced.**

- Unlike the active and associate classes of membership, which require an administrative act to consummate their membership class (e.g., paying dues, completing the Carrico Professionalism Course, completing MCLE requirements) the judicial class rule flatly states that those 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 members within the VSB if “judges” consider themselves automatic judicial class members. Further, it could imply that

judges are not requested to file annual judicial affirmations as is currently practiced, premised on the text of the Rule that states they *are* judicial class members irrespective of any other action.

*The proposal:*

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

## 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.

### Notes

- Precludes from the judicial class Virginia licensed federal judges presiding outside the Commonwealth.
- Precludes non-Virginia licensed federal judges with the authority to interpret Virginia law.
- Includes positions that are insufficiently judicial.
- Class is self-executing, there is no requirement that a judicial class member do anything to consummate the membership (lines 6-7).

## 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; and, who are  
6 Virginia licensed lawyers at the time of application to the judicial class of  
7 membership, or preside in a tribunal located in Virginia, or, by virtue of the  
8 applicant’s official position, have the authority to, and regularly, judicially  
9 interpret Virginia law, qualify for judicial class membership in the Virginia State  
10 Bar. They may become judicial members by filing an annual affirmation with the  
11 Virginia State Bar which identifies their tribunal, address of record, and judicial  
12 title. They are not required to pay dues but are entitled to all the privileges of active  
13 members except that they cannot vote nor hold office in the Virginia State Bar.  
14 Former judges who do not engage in the practice of law and are ineligible to  
15 transfer to the retired class of membership may retain their judicial class  
16 membership by completing the annual affirmation indicating their previous title  
17 and tribunal.

### Notes

- Virginia magistrates
  - Intent is to:
    - not grandfather any non-lawyer magistrates who were previously VSB judicial class members;
    - grandfather lawyer-magistrates, who were previously VSB judicial class members;
    - preclude future lawyer-magistrates from qualifying as VSB judicial class members (would be eligible for active or associate status).
- Private arbitrators
  - Intent is not to include private arbitrators within the judicial class, thus: “other than arbitration” added in line 25 of the proposed definition.
- Substitute judges

- Intent is to preclude substitute judges from qualifying as VSB judicial class members, thus: “full-time” added in line 25 of the proposed definition.
- Retired judges
  - Intent is to allow a former judge to retain his/her judicial class eligibility unless he/she engages in the practice of law, until he/she is eligible for transfer to the retired class of membership.

## REDLINE

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