

Feeling Short-Circuited?

Assessing the Availability of Virginia Circuit Court Opinions

by Jeanne Ullian

Virginia Chief Justice Leroy R. Hassell Sr. is determined that the Virginia State Bar fulfill its mission “to advance the availability and quality of legal services provided to the people of Virginia.”

Much to Hassell’s credit, the legal research product Fastcase was added as a VSB member benefit in 2006. At the March 1, 2008, Virginia State Bar Council meeting, Ed Walters, chief executive officer of Fastcase, reported that, as a result, almost ten thousand active-status Virginia lawyers have logged onto the service. Building upon this success “[t]he bar is looking at adding circuit court opinions and Virginia model jury instructions to the searchable database.” (Highlights of VSB Council Meeting, http://www.vsb.org/docs/valawyer-magazine/vl0408_news.pdf.) Virginia State Law Librarian Gail Warren confirmed that, based upon a fall 2007 request from Hassell, she has been exploring the feasibility of adding circuit court opinions to the Fastcase database.

Even though Virginia has the oldest continuous judicial system in the country, the number of reported cases is limited due to the structure of the court system. The Supreme Court of Virginia has always been a discretionary court that decides which appeals it will accept. Except in limited areas, appeal is not a matter of right — thus preserving the Court’s status as a single body concentrating on the development of the law. The Court of Appeals, instituted in 1985 as an intermediate appellate court between the circuit courts and the Supreme Court, has limited jurisdiction. It serves primarily to relieve the Supreme Court’s caseload of criminal, domestic relations, and workers’ compensation cases. Therefore, unless the circuit courts make an error for which one of the higher courts certifies an appeal, circuit court decisions remain as the sole judicial examination of many areas of Virginia

law. With 157 judges in 120 courts in 31 circuits, considerable law is being decided at this level.

William Hamilton Bryson, a professor of law at the University of Richmond and an eminent Virginia legal scholar, provides this perspective on the value of Virginia circuit court opinions:

Although these opinions may not be binding, they are nevertheless persuasive authority; certainly the opinion of a Virginia circuit court judge is better authority for the law of Virginia than an opinion by a judge from another state. *Virginia Circuit Court Opinions* (Preface), The Dietz Press Inc., 1985

Or consider the reasoning in this federal district decision:

[If] the Virginia Supreme Court has not ruled upon a case ... [a federal] Court must determine what the Virginia Supreme Court would do if presented with the question. One way of determining what the Court would do is to look at previous decisions of the Virginia Circuit Courts.” *Kollsman v. Cubic Corp.*, 800 F. Supp. 1381, 1382 (E.D. Va. 1992)

Circuit court opinions were published in several nineteenth century legal journals. However, the *Opinions of Brockenbrough Lamb*, which appeared in two volumes in 1955 and 1964, was the most significant collection within the current half-century until the publication in 1985 of the first volume of *Virginia Circuit Court Opinions*.

Edited by Bryson, *Virginia Circuit Court Opinions*, which by May 2008 numbered seventy-three volumes, began as a personal quest to find more case law examples for his course in civil procedure at the University of Richmond School of Law and for his treatise, *Bryson on Virginia Civil Procedure*.

The advent of desktop publishing made publishing these cases economically feasible for what

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was perceived as a limited audience. However, after just three volumes, a major publisher assumed responsibility. Early volumes contain opinions from the Richmond court, as well as significant past opinions from as early as 1877. Through relationships established over the years with judges and lawyers all over the state, Bryson continues to read, edit, and headnote cases that meet the following selection criteria:

It is the purpose of this publication to furnish judicial authority where there is none and to provide more recent judicial opinions than the nineteenth century cases, which must still be resorted to. We have selected for inclusion as many opinions as possible dealing with points of civil procedure and discovery, which, being harmless error, are infrequently ruled upon by the Supreme Court. We have also looked for cases involving the Commercial Code. We have inclined towards opinions that analyze the law and away from those that primarily develop the facts. We have not included opinions that do not sufficiently state the facts of the case so that those not actively connected with the case can grasp the significance of the rulings of law. It is beyond our resources to summarize pleadings and arguments.

Virginia Circuit Court Opinions
(Preface), The Dietz Press, Inc., 1985

Lucinda Harrison-Cox, who has been working with Bryson since Volume 9, indexes each volume. She also compiles the cumulative index for the current publisher, LexisNexis

Matthew Bender. Each volume contains approximately 125 cases; two to three volumes are issued each year.

Along with the print *Virginia Circuit Court Opinions*, two digital products developed in the early 1990s form the basis of the collections available today.

DiscLaw, developed by Ian Wilson, an attorney who formerly practiced at Hirschler Fleischer, entered the market in 1992 with his company, DiscSense. A 1997 Internet Archive (<http://www.archive.org>) of the DiscSense website describes the product as Virginia cases and

statutes on CD-ROM with Virginia circuit court decisions from 1980. Wilson and his marketing partner, Jim Renehan, contacted every circuit court in the state and inspected every local collection (readily accessible cases on file in the court, as opposed to all of the cases in the court's official files). Opinions with authority or analysis that would be useful to a researcher were added to the DiscLaw database. In late 1998, West Publishing acquired the DiscLaw opinions.

At about this same time, Geronimo Development Corporation, a Virginia corporation based in Minnesota, launched CaseFinder (<http://www.casefinder.com>), introduced as a CD-ROM research product targeted specifically to the Virginia legal community and Geronimo's only product. It is currently available as a CD-ROM and an online product (CaseFinder Web) by subscription to individuals or groups. Its Virginia circuit court opinion library includes an estimated 5,500 opinions that date back to 1992. CaseFinder collects new opinions through contacts within the legal community and adds opinions requested by its users or cited in other materials in the collection. CaseFinder is unique in that it provides a hierarchical view of each library in the collection, which means you can drill down into the circuit court library to see exactly which and how many cases are included from a specific circuit court.

To no one's surprise the largest collections of Virginia circuit court opinions are found in LexisNexis and Westlaw products. As part of the publishing family of *Virginia Circuit Court Opinions*, only the LexisNexis databases include all of the Bryson opinions. Today, both giants of legal publishing provide digital access to thou-

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sands of Virginia circuit court opinions in five products. Both services continue to build their databases by acquiring cases from the courts, from other legal professionals, and in response to user requests. The collections include:

- Lexis.com (<http://www.lexis.com>) — According to information provided by LexisNexis in March 2008, more than

ten thousand opinions and orders primarily from 1957 to current, with some earlier back to 1855, are included in the file VACIR (Virginia Circuit Court Cases from 1855).

- Westlaw.com (<http://www.westlaw.com>) — A search by a West reference attorney in May 2008 identified more than 9,000 circuit court opinions, which are found in the broader Virginia Cases (VA-CS) database, with “selective coverage of cases that are not scheduled to be reported by West, beginning 1976 through the most recently released cases.”
- LexisNexis — Virginia Primary Law (on CD) is updated quarterly and has the same Virginia circuit court opinions content and editorial enhancements found in Lexis’s online product.
- West — Virginia Reporter and West’s Annotated Code of Virginia Premise CD is updated quarterly. Disk 3 contains the opinions found in the online product but without editorial enhancements.
- lexisONE (<http://www.lexisone.com>) provides a five-year rolling database of the Virginia circuit court opinions found on Lexis.com. Only the text from the court is provided. Free registration is required.

One other new source of significant Virginia circuit court opinions is *Virginia Lawyers Weekly* (<http://www.virginialaw.com>). In February 2008 the publishers announced subscribers would have free access to PDF copies of all Virginia circuit court opinions digested in the paper from a database covering 2007 to current.

So, how does Fastcase — the provider of choice for the VSB and a product devoid of circuit court opinions — fit into this picture as a potential provider to the VSB legal community?

Fastcase, founded in 1999, is an online provider of state and federal legal materials, which are available to the public in a standard package via several subscription options. The company also partners with other legal providers to deliver customized content to specific subscriber groups, such as the product it provides to the VSB. On February 13, 2008, Fastcase launched the Public Library of Law (<http://www.plol.org>) — the largest free law library on the Web. Fastcase was also involved in a transaction with Public.Resource.org (<http://public.resource.org>), which has placed a database of 1.8 million pages of federal case law on the Web, free of copyright and ripe for use by developers. With this track record of partnering in both free and for-profit environments, it appears that Fastcase has the capability required to develop a methodology for adding Virginia circuit court opinions to its current databases.

On the VSB side, the project is moving forward. Warren, in response to Chief Justice Hassell’s request, has compiled extensive statistical data (courts currently included in existing data-

bases, number of cases, etc.) and is compiling lists of issues that may arise, with possible resolutions or compromises in order to get from “is this feasible?” to “this is how we can make this work.” On Warren’s short list are:

- Procedures for uploading cases from the courts
- Policies and procedures for adding cases
- Preservation of intellectual property rights by the VSB
- Potential costs at the local level
- Currency
- Authentication
- Editing and standard enhancements
- Consideration of existing intellectual property rights of current providers of circuit court opinions

Of utmost importance to the success of this endeavor is the cooperation of the Virginia circuit courts. Hassell has indicated he will seek the support of circuit judges, urging them to participate. Perhaps it would be persuasive to remind them that, since the days of St. George Tucker, “bar and bench cooperated with each other in circulating their notes, memoranda, and opinions.” (47 Wm. & Mary L. Rev. 1245, February 2006, Institute of Bill of Rights Law Symposium: St. George Tucker and His Influence on American Law, St. George Tucker’s Law Papers by Charles F. Hobson)

Virginia circuit court opinions are cited widely, including in hundreds of law review articles and a U.S. Supreme Court case last term (*Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1978 n.5 2007). The *Code of Virginia* now includes annotations of Virginia circuit court opinions — perhaps in reaction to an article in the April 2002 issue of *Virginia Lawyer* in which the authors pointed out that neither the “new” West code nor the official version was referencing these opinions. (West’s New Annotated Code of Virginia, *Virginia Lawyer*, April 2002, p.44, 47-49, by Virginia Association of Law Libraries Ad Hoc Committee on Annotated Codes – Kent Olson et al.) Donna Bausch, director of the Norfolk Law Library, ranks requests for these opinions at the top of her list of most requested cases.

It is said that information wants to be free. With more than ten thousand Virginia circuit court opinions available online, the time is ripe to free some up. I encourage bar members to use your collective power to help define where the bar should place its efforts in this endeavor.

Author’s note: Thank you to Professor Hamilton Bryson, Lucinda Harrison-Cox, and Lyn Warmath, and special thanks to Kent Olson for his diligent editorial suggestions. ■