Appellate Research Lessons from the Judges

by Benjamin A. Doherty

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Know your audience. Appellate advocacy is an exercise in convincing a specific audience — judges — of the strength of your arguments. From using accurate citations, to properly representing case holdings, to successfully explaining how your case fits within a larger jurisprudence, good research can help you convince the judges to agree with you. Who better to explain what the judges would like to see in the briefs they read than the judges themselves?

Last summer, I sent a questionnaire on legal research to the justices and judges of the Supreme Court of Virginia, the Virginia Court of Appeals, and the United States Court of Appeals for the Fourth Circuit. I asked simply, "What one piece of advice would you provide to attorneys who are presenting legal research in a brief or memo to your court?" Seventeen justices and judges responded. Their advice followed several themes: using secondary sources to your advantage, focusing on analysis — not just finding — using persuasive authority as appropriate, being wary of online research traps, preserving credibility through candor, and making your arguments obvious.

Use Secondary Sources

When analyzing case law or statutes, there is no need to reinvent the wheel.

Understanding context is crucial to legal research, as judicial decisions or statutes rarely stand alone. Senior Judge Rudolph Bumgardner III of the Virginia Court of Appeals suggested that treatises are often the best resource to gain that understanding. There is no need to try to reinvent the wheel in legal research, trying to understand an unfamiliar area of law with your own searches for cases or statutes. Instead, use treatises or practice guides written by experts to point you in the right direction and allow you to understand how the major cases or laws or statutes fit together to form a coherent body of law. Equipped with that understanding, your own searches for cases that support your specific arguments will be more effective. There are many Virginia practice guides or treatises you can use. West publishes the Virginia Practice Series on a variety of topics. LexisNexis publishes several lengthy treatises on complex topics, including civil procedure, criminal law and procedure, and evidence.[1] VirginiaCLE publishes a series of Virginia Lawyers Practice Handbooks that can be useful for legal background in an area you are briefing on appeal. If you do not have a relevant book in your office or as an online subscription, ask for it at the local law library.

Should the books not address the specific issue you are briefing, try *Virginia Lawyer* or law review articles. Each *Virginia Lawyer* issue contains several articles on aspects of Virginia law. Law review articles often begin with an overview of a particular area of law before delving into arguments about law reform. In addition, remember that cases themselves can serve as good secondary sources. For example, in writing a brief to a Virginia state court, you may not want to cite to a case from the fourth circuit. However, if a fourth circuit judge has written an opinion reviewing an area of Virginia law, that opinion may be useful for your own background understanding.

Analyze the Cases, Do Not Just Find Them

"Analyze cases cited rather than just lifting quotations." — Senior Court of Appeals of Virginia Judge Rudolph Bumgardner III

Many judges suggested they would like to see more analysis in legal briefs. With the ease of full-text online case research, it is easy to forget that judicial decisions are not just strings of legal statements there to be plucked as needed to support arguments in briefs. Cases are decided in context. Too frequently ignoring that context in your brief while using only selected legal statements or quotations weakens your argument. Several judges emphasized that good legal research means more than just finding cases or quotations — it means also taking the time to synthesize and analogize the cases you have found to your client's situation. A Virginia Court of Appeals judge attributed the

need for more in-depth analysis in briefs to the fact that it is easy to do online, full-text keyword searches for good quotes. Do not allow the ease with which you can search online databases to dull your ability to think about what you have found. Finding legal materials and helpful legal language may be easier than ever, but the core of legal research and analysis remains the ability to analogize existing cases or statutes to new situations, something even the most sophisticated search engines cannot do.

In your analysis, pay attention to the facts. One Virginia Court of Appeals judge expressed a common sentiment: "I prefer when attorneys set forth case law that is both factually and legally similar to the case at bar." When discussing the cases most central to your arguments, include the relevant facts from those cases along with the legal conclusions. Make a full analysis of those cases in your brief, showing point-by-point how they compare factually and legally with the case at hand.

Remember as well that cases usually do not stand alone. "If it is not obvious how a line of cases works together to form the parameters of the court's jurisprudence in a particular area, harmonize them and set them out coherently as opposed to addressing them separately," explained a fourth circuit judge. In your research, take the time to understand how the most relevant cases fit together to form a body of law so that you can explain that jurisprudence clearly in your brief. Courts do this particularly well, so judicial opinions can serve as a good model.[2]

Find a case or other legal authority to support every argument or legal proposition you raise in your brief, however minor. One judge pointed to the language of *Fadness v. Fadness*, 52 Va. App. 833, 851, 667 S.E.2d 857, 866 (2008), on the Virginia Supreme Court Rule 5A:20(e) requirement that attorneys provide legal authority for each assignment of error: "Appellate courts are not unlit rooms where attorneys may wander blindly about, hoping to stumble upon a reversible error. If the parties believed that the circuit court erred, it was their duty to present that error to us with legal authority to support their contention."

If it is not obvious how a case supports the proposition you raise, explain it to the court so that the judges do not have to figure it out on their own. One Virginia Court of Appeals judge appreciated parentheticals following a case cite for exactly that purpose. Parenthetical explanations make reading your brief easier for judges who do not have to look up each case separately to understand its relevance, and they force you to make sure that the cases you cite do indeed say what you claim. A case citation with no explanation can be a red flag to appellate judges that you did not spend time thinking about the case and that your research never progressed beyond finding to actually analyzing.

Look for Cases from Other Jurisdictions and Unpublished Opinions When Appropriate

Persuasive authority is best for issues of first impression.

Several judges agreed that appellate attorneys should use cases from other jurisdictions for issues of first impression. There is no need to turn to other jurisdictions when Virginia courts or the fourth circuit have already squarely addressed an issue, but for an issue of first impression, analyze cases from other jurisdictions as persuasive authority in a similar manner to binding cases: Those with similar facts are the most useful. Remember that cases do not stand alone, so explain the full jurisprudence of an area of law in another jurisdiction and how it might apply similarly in Virginia instead of just picking a single case that supports your argument. Finally, be candid by acknowledging negative cases from other jurisdictions or jurisdictional splits, while persuading the court that one approach is preferable.

The same is true of unpublished opinions. A Virginia Court of Appeals judge said that, "It is my practice to read all unpublished opinions dealing with the issue about which I am to write." Each court has rules on citing unpublished opinions.[3] Within those rules you might use unpublished opinions to demonstrate to the court a particular approach you think it should adopt.

Find a case or other legal authority to support every argument or legal proposition you raise in your brief, however minor.

Watch Out for Online Research Traps

Online databases make legal research easier than ever. Don't let that ease make you careless.

Watch out for mistakes common to electronic research. A fourth circuit judge has seen instances in which attorneys who have found good quotes from full-text keyword searching have used that

wording incorrectly out of context or have even cited a dissent as if it were the opinion of the court. These are easy mistakes to make when reading cases on a computer screen, particularly when working quickly. Virginia Court of Appeals Judge Teresa M. Chafin noted frequent "cut and paste" errors, where an attorney copied sections of a brief from other sources without correcting formatting inconsistencies or even the party names. These types of electronic mistakes signal to judges that the attorney has not spent enough time preparing the brief.

Judges at all three courts pointed to the importance of focusing on your strongest arguments in your brief.

Preserve Credibility with Candor

Enable appellate judges to trust you as an advocate by being honest with your legal research.

The judges want to trust you as an advocate. They may not always agree with your arguments, but your goal should be for them to grow to trust your legal and factual analysis. Fourth Circuit Judge Paul V. Niemeyer said, "Above all else, preserve credibility. Credibility is lost by misstatement and exaggeration, among other things, of both law and fact."

"It is not helpful to simply ignore difficult cases," said a Virginia Court of Appeals judge. In fact, Virginia Rule of Professional Conduct 3.3(a)(3) requires you to disclose adverse controlling legal authority. In your legal research, spend time thinking about the unfavorable cases so that you can distinguish them in your brief. Judges will discover those cases whether or not you cite them, and your strongest position is to acknowledge them first and explain to the court how they differ from your client's situation.

Similarly, "Do not spin the facts. Absolute candor and fairness is essential in the factual presentation of the case," pointed out Virginia Court of Appeals Judge Glen A. Huff. Candor with your factual analysis is also important[4] and may be more difficult. An appellate record is often built at trial in a disjointed and duplicative manner, so it can take time to construct your brief's factual recitation coherently and accurately. If judges sense that you have left out important facts or portrayed the facts inaccurately, it can affect how they perceive your legal arguments. Just as with the cases you find, give yourself time to understand the facts of your case so that you can present them in a way that reads well and is accurate.[5]

A couple of judges noted the importance of maintaining credibility by updating your research up through oral arguments. A fourth circuit judge explained that filing supplemental authority is not appropriate when you simply missed an existing case in preparing your brief, but is essential if a new case comes out between when you filed your brief and oral argument.[6] Judges will know of any new case law, so preserve your credibility by acknowledging new developments, favorable or unfavorable, in advance, rather than waiting for a judge to bring it up during your argument.

Focus and Make Your Arguments Apparent

Judges read a lot of briefs. Make your arguments easy to follow and eliminate unnecessary references.

"Come to the point. No long windups," said Fourth Circuit Judge J. Harvie Wilkinson III. Another fourth circuit judge said, "Spend whatever time is necessary to boil your argument down to its essentials." Judges at all three courts pointed to the importance of focusing on your strongest arguments in your brief. Lead with those arguments without unnecessary introduction, and spend most of your brief on them. Your job as an appellate advocate is to help the judges focus on those central arguments without being distracted by side issues that are unlikely to determine the outcome. The importance of brevity extends to your recitation of the facts as well. Virginia Court of Appeals Senior Judge James W. Haley Jr. explained, "Only relate the facts necessary to crystallize the issues raised." Distilling your arguments and facts down to the essentials means stepping away from online databases to spend time thinking about your research findings and the factual record.

Once you have taken the time for research analysis, construct your brief in a way that makes it easy for the judges to follow your argument. Virginia Supreme Court Senior Justice Charles S. Russell advocated a simple technique suggested to him by one of the permanent law clerks at the Court: Use headings and subheadings to your advantage. Use a simple heading for each of the arguments in your brief, followed by subheadings that provide a very brief summary of the logic of your argument. That way the judges will know the logical flow of your arguments by simply scanning through your brief and will have that logic in mind as they focus on your analysis.

Finally, retired Virginia Court of Appeals Judge Larry G. Elder suggests having "someone unfamiliar with the case read your writing in order to make sure your arguments are clear." You could even have a non-lawyer read your brief. Your analysis may be nuanced, but your main arguments should be clear enough that even someone without legal training can discern their basic logic.

I am grateful to all of the justices and judges who took time from their busy schedules to provide the terrific legal research advice discussed in this article. I also thank my colleagues Kristin Glover and Kent Olson for their helpful comments on an earlier draft.

Endnotes:

1 Charles E. Friend & Kent Sinclair, *The Law of Evidence in Virginia* (7th ed. 2012); Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* (5th ed. 2008); and John L. Costello, *Virginia Criminal Law and Procedure* (4th ed. 2008).

2 For example, *see Surles v. Mayer*, 48 Va. App. 146, 173-75, 628 S.E.2d 563, 576-77 (2006), in which Judge Robert J. Humphreys draws on a variety of cases from the Virginia Supreme Court and Court of Appeals to explain Virginia's jurisprudence on the relocation of a custodial parent. Note that after setting forth the legal background, Judge Humphreys engages in a specific factual analysis, comparing the facts of the case at hand to the facts of the most relevant Court of Appeals decisions. *See id.* at 175-76, 628 S.E.2d at 577-78.

3 *See* Va. Sup. Ct. R. 5:1(f) & 5A:1(f); Fed. R. App. P. 32.1; 4th Cir. R. 32.1. Note that the Fourth Circuit rule is dependent on the date of the decision.

4 *See* Va. Rules of Prof'l Conduct R. 3.3(a)(1).

5 As with legal propositions, which must be supported by citation, remember that factual statements must be supported by reference to the record or appendix. *See* Va. Sup. Ct. R. 5:17, 5:27, 5:28, 5A:20 & 5A:21; and Fed. R. App. P. 28.

6 *See* Fed. R. App. P. 28(j); 4th Cir. R. 28(e).