

# Appellate Records and Briefs After the Case Is Over

by John R. Barden



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In 1989, the Supreme Court of Virginia found itself on the horns of a dilemma. In the case of *Wingate v. Coombs*, 237 Va. 501 (1989), both appellant and appellee cited mandatory case authority on the issue of whether oral partnership agreements for the acquisition and management of real property fell within the statute of frauds. Appellees relied on *Henderson v. Hudson*, 15 Va. (1 Munf.) 510 (1810) and *Walker v. Herring*, 62 Va. (21 Gratt.) 678 (1872), in which the Court said that since real estate was at the heart of the agreement, a writing was necessary. The appellant pointed to *Miller v. Ferguson*, 107 Va. 249 (1907), in which the Court viewed the partnership interests as personalty not bound by the statute. Both precedents had been cited numerous times over the years, leaving the actual state of the law very much up in the air. "Could it be," asked the *Wingate* Court, "that the *Miller* Court was unaware of the earlier cases . . . ?" (237 Va. at 507).

In an opinion by Justice Compton, the Court looked inward. "The answer . . . to the overall question is furnished by reference to the documents in *Miller* which are

a part of the permanent records of this Court" (*Id.*) Justice Compton, by carefully examining the *Miller* briefs and the trial judge's opinion transmitted in the record of the case, determined that the *Miller* Court was "acutely aware" of the *Henderson/Walker* line of cases: "Not only were they relied upon on brief, but the very ruling under review discussed the cases. We will not speculate why the Court chose not to mention the earlier authority. Nevertheless, the Court clearly determined not to follow the earlier rule and decided to adopt the majority view, which became the law of Virginia on the subject." (*Id.* at 507-8). *Miller* had overruled, *sub silentio*, the pertinent portions of *Henderson* and *Walker*.

In a conservative judicial tradition such as Virginia's, rarely does a court look outside the "four corners" of a precedential case for guidance. The example of *Wingate*, however, illustrates that records and briefs submitted on appeal in both state and federal courts have tremendous potential as legal research tools when a lawyer or judge seeks more information about why an earlier court ruled the way it did given

the facts and legal precedents that the court had for review. This column will look at Virginia Supreme Court records and briefs from the researcher's point of view, rather than the writer's, and describe how practitioners can access these valuable records.

## Origins of Written Briefs

Written briefs and records are an integral part of the appeals process today. Early appeals rested almost entirely on oral argument. See R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 Am. J. Legal Hist. 482, 483-84 (1994). Virginia's highest court, originally styled the Court of Appeals, insisted on some form of written argument at least by 1804, when a rule required counsel on both sides to submit a "clear and concise state of the case" along with "the points insisted on, . . . printed or fairly transcribed . . ." 11 Va. (1 Hen. & M.) ii (1st ed. 1808). Early case reports usually included summaries of counsels' arguments between the statement of the case and the judges' opinions. It is difficult to determine if these summaries were drawn chiefly from the written materials or from oral arguments

Printed and written records from Virginia's oldest appellate cases often have not survived. One of the earliest briefs known to this author is from *Commonwealth v. Moore's Adm'r*, 42 Va. (1 Gratt.) 294 (1844), although a diligent search would probably turn up older ones in historical societies and rare book collections. No one knows for certain what the court of appeals held in its files at the time its records were destroyed by the fire preceding the fall of Richmond in April 1865. The oldest record set now held by the State Law Library is for *Carroll County v. Collier*, 63 Va. (22 Gratt.) 302, a case filed for appeal in 1867, but not finally decided until June 1872.

The composition of a set of records and briefs has changed only slightly over the years. Following the certification of an appeal, the appellant submits an opening brief and appendix. (Where a separate petition for appeal and brief in opposition are submitted, they are gener-

ally not preserved with record and brief sets.) Virginia Supreme Court Rule 5:32 strongly encourages the parties to produce a joint appendix encompassing all relevant portions of the record of the case below, including motions, transcripts of proceedings, exhibits and trial court orders and opinions. The appellee(s) must respond within a stated period from the filing date of the appellant's brief (although a surprising number over the years have chosen not to do so, and failure by an appellee is not automatically fatal to the case). The appellant may reply to the appellee's brief. Amici curiae may petition to file briefs supporting one party or the other or, in certain cases, make an independent assessment of the impact of the case on an area of common interest. Finally, the party aggrieved by the Supreme Court's ruling has the option of filing a petition for rehearing, suggesting the ways in which the Court has misconstrued the case. The pattern of the records and briefs varies somewhat when the cause arises on an original petition to the Supreme Court for a writ of habeas corpus, mandamus, prohibition, etc.

## Value of Records and Briefs

A set of records and briefs is full of useful information. The appendix is a full reflection of the controversial portions of the case below. As a law librarian and legal research instructor at the University of Richmond School of Law, I frequently refer students to appendices to get a flavor of trial practice. Richmond's trial advocacy students frequently need examples of direct and cross examination. I tell them to find a Virginia Supreme Court case touching on a topic near to their assign-

ment, then turn to the appendix to see how the legal issues in the case played out in real life. (The students' assessments of

the practitioners' skills are not always flattering!) The same is true when students need examples of motions and exhibits: Look to a pertinent case, and then use the appendix's table of contents to find a suitable model.

Even for the seasoned practitioner, records and briefs have unique research value. As in the *Wingate* case, lawyers can determine "what the Court knew and when it knew it" and then use that information to argue with precision the effect of a decision on prior case law. (In researching this case, I was disappointed to learn that the *Wingate* Court had to wrestle with this issue *sua sponte*, instead of having the reasoning handed to it in appellant's brief.)

Lawyers can also use briefs and records of cited cases to distinguish the case at hand from established case law. The analysis of the law in the brief has little merit if it is not validated in the opinion. However, the full body of facts presented in the briefs and appendix can be useful in areas where the boundary of the law is still undefined or fluid. The line of cases stemming from *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985), comes to mind. Here the Court accepted or, more often, rejected "public policy" limitations on at-will employment following inquiries that are often highly fact-dependent.

I would like to point to examples other than *Wingate* in which the Court or the parties to a case have mined records and briefs in the manner I am suggesting, but finding examples is difficult. Researching briefs is not easy. The documents are not available in commercial databases, and only a few law libraries have extensive runs accessible to the public. Furthermore, even where an earlier brief has influenced a later argument, the effect may be too subtle to merit quotation or even acknowledgment. Nevertheless, I maintain that our state's court records and briefs are valuable. My enthusiasm for records and briefs as a resource has been stimulated not just by my experience as a legal research instructor, but by seeing practitioners in our law library consulting these volumes on a regular basis.

## The most accessible collections of Supreme Court records and briefs are those held by five Virginia law school libraries.

## Locating Records and Briefs

In the old days, attorneys would sometimes have their briefs and records bound in leather for their offices' shelves. Several of these sets have made their way into law library collections. The University of Richmond has four sets, including materi-

- George Mason University School of Law Library, from 1978

All these collections are generally available to practitioners, although all or part may be held in off-site storage or special collections. Researchers should call the library to determine accessibility when planning a visit.

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als for cases dating back to the 1850s. Lawyers and firms routinely keep appellate case materials with client files—a commendable office practice, but not very conducive to research.

The Virginia State Law Library has an extensive collection of Supreme Court records and briefs available to practitioners. They date from just after the Civil War. The stacks are closed to preserve the arrangement of the materials; patrons must request the sets by *Virginia Reports* citation. Another collection originating from the Court, covering the years 1866-1978 and largely duplicating the State Law Library set, was deposited by the clerk's office with the Library of Virginia and is available by written permission from the clerk of the Supreme Court.

The most accessible collections of Supreme Court records and briefs are those held by five Virginia law school libraries. The collection at the Muse Law Library, University of Richmond School of Law, goes back the farthest. It covers selected cases as far back as 1852, although we find many gaps in the early years.

Other significant holdings are as follows:

- Morris Law Library, University of Virginia School of Law, from November 1912
- Hall Law Library, Washington and Lee University School of Law, from June 1923
- Marshall-Wythe Law Library, College of William and Mary, from March 1959

## New Research Tool for Records and Briefs

Because of the fragmentary way in which Virginia Supreme Court records and briefs sets were distributed and collected, especially for sets more than 50 years old, a researcher may have to contact two or more libraries in order to find out whether a certain case is represented in their collections. If sufficient interest is generated, more libraries may undertake projects to inventory their holdings and make that data available as an on-line finding aid. The Muse Law Library at the University of Richmond School of Law is engaged in just that task. Beginning with recent cases and working backward, the library staff is identifying each piece in the records and briefs sets, noting pieces that are known to be missing and indicating the pagination of each piece (very useful when one needs to estimate the cost of reproducing a set). The results of this inventory are posted at the "Virginia Supreme Court Cases (With Records & Briefs)" Web site ([http://law.richmond.edu/library/pubs/Va\\_R&B/firstpage.htm](http://law.richmond.edu/library/pubs/Va_R&B/firstpage.htm)). The site began with cases from 251 Va. to the present and will be expanded gradually to encompass all of the law library's records and briefs holdings. Although searching is limited at present to *Virginia*

*Reports* citation, future editions may also include more search options, such as party name, S.E./S.E.2d citation, authors of opinions and other fields. This site has relieved the library staff from much "in the stacks" searching to determine holdings. Also, it is a valuable resource for researchers outside our library.

This finding aid is not the end of the road. Lately, I have been floating trial balloons to determine whether researchers are interested in access to a full-text database for Virginia Supreme Court case briefs. The database would begin with the most influential or in-demand cases. This would enhance the research potential of these important documents by enabling users to mine legal and factual information without necessarily identifying the cases ahead of time. Although many of us have used U.S. Supreme Court briefs in LexisNexis, Westlaw or elsewhere, this information is not generally available for other appellate courts. An exception is the Florida Supreme Court, whose briefs are currently being digitized by the staff of the Florida State University College of Law Library (<http://www.law.fsu.edu/library/flsupct>). (Search the site for "Bush" and "Gore," if you want to see what is available for a certain high-profile state case.) Such a database would also allow us to maximize the amount of material available by filling in gaps in one collection from the holdings of another library. At first it may not be feasible to include appendices—the *Joint Appendix to Tazewell Oil Co. v. United Virginia Bank/Crestar Bank*, 243 Va. 94 (1992) is 9,438 pages, for example. Still, having the briefs will add new dimension to Virginia case law research.

With adequate resources and your support, law librarians aspire to introduce Virginia's lawyers to a powerful new tool for digging even deeper into Virginia's rich store of legal analysis. ☺



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