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September 10, 2012

By E-Mail to [jwalk@hf-law.com](mailto:jwalk@hf-law.com)

John R. Walk, Esquire  
Hirschler Fleischer, P.C.  
The Edgeworth Building  
2100 East Cary Street  
Richmond, VA 23223-7078

Re: Boyd-Graves Conference; Report of Subcommittee on Hyperlinked Briefs

Dear John:

You asked me to Chair a Subcommittee to study the following topic:

Whether the *Rules of the Supreme Court of Virginia* should be amended to address the use of hyperlinked briefs in Virginia trial courts and/or appellate courts, and, if so, what rule language should be recommended?

You placed the following members on this Subcommittee:

George E. Allen, III, Esquire  
Lawrence B. Cann, III, Esquire  
L. Steven Emmert, Esquire  
William W. C. Harty, Esquire  
D. Arthur Kelsey, Judge  
Stephen M. Sayers, Esquire  
Anthony F. Troy, Esquire

I also invited Patricia L. Harrington, Clerk of the Supreme Court of Virginia, to join in our discussions.

For the few (if any) members of the Conference who may not be computer geeks, it might be useful to provide some general background information. A hyperlinked brief is a brief that contains computerized links either to other portions of the same document, to other documents, or even to materials on websites. An electronically-filed document can contain such hyperlinks. Also, a "disk copy" of a document can contain hyperlinks. For example, a Portable Document Format ("PDF") copy of a brief could be placed on a read-only-memory compact disk ("CD ROM") which contains other documents such as the entire appendix in a case on appeal. Each citation in the brief to the appendix can be hyperlinked to the pertinent page in the appendix. Thus, for example, the reader of the brief can instantly view page 257 of the Appendix by clicking on the citation to "A.257" where it appears in the

brief. The same types of links can also be provided to case authorities (copies of which would also be placed on the computer disk). The reader of the brief can then instantly view page 352 of Volume 179 in the Virginia Reports by clicking on the citation in the brief to "179 Va. at 352." This type of hyperlinked brief can be prepared by most printers but involves some additional time and expense.

Even though this type of hyperlinked brief is not required in the Supreme Court of Virginia, some lawyers feel that filing this type of hyperlinked brief on a CD disk (which is placed in the back of each appellate brief) facilitates the effective presentation of that party's position on appeal, and some appellate jurists find hyperlinked briefs to be helpful. On the other hand, some appellate jurists prefer to access the record materials and cases themselves independently.

At the present time, as will be discussed further below, there is no provision in the *Rules of the Supreme Court of Virginia* which addresses the filing of computer disks containing hyperlinked briefs. Nevertheless, so far there has been no problem with having disks containing hyperlinked briefs accepted by the Clerk's office of the Supreme Court of Virginia when they are filed with a timely-filed copy of the party's appellate brief. Court of Appeals Judge Arthur Kelsey related during our committee meeting that in his Court litigants regularly file a computer disk that contains a PDF copy of their brief and of the Appendix, and these documents are loaded onto the Court's database.

Some attorneys felt that studying this topic (and perhaps proposing a rule provision) might highlight this convenient, time-saving practice to more lawyers. Many lawyers are currently not filing hyperlinked briefs. It might be helpful to Virginia judges if this practice were encouraged in the appellate courts. Indeed, in some cases, a hyperlinked brief might well be useful to a trial court judge.

As previously noted, the current *Rules of the Supreme Court of Virginia* do not address hyperlinked briefs, except for Rule 1:17, which only addresses electronically filed documents, so it is not really "on point" with respect to filing a CD copy of a hyperlinked brief in a case which does not involve electronic filing. Moreover, Rule 1:17, which does address hyperlinking, says that you can hyperlink ONLY to other portions of the same document and to other documents in the record. It PROHIBITS hyperlinking to any "other documents." Rule 1:17(d)(10) provides:

**(10) Hyperlinks between two portions of a filed document or between two or more documents filed in the same case, are permissible, but hyperlinks to other documents, or to external websites, are prohibited.** A hyperlink is not itself a part of the official filed document and each hyperlink must contain a text reference to the target of the link.

Rule 1:17(d)(10), *Rules of the Supreme Court of Virginia* (emphasis added).

Obviously, one convenient use of hyperlinking in briefs is to include hyperlinks to cited cases. It might be useful to have a rule provision that makes clear that in cases not involving electronic filing, the filing of a CD containing a hyperlinked brief is permitted (or perhaps even encouraged) and stating that hyperlinking to any other parts of the record and to any cases cited is allowed. As noted at the outset, it appears that this is already an accepted practice in the Supreme Court of Virginia but it might

be useful to have a rule provision that spells that out more clearly, that specifies what type of hyperlinking is and is not allowed, and that addresses the procedures to be used. For example, must the hyperlinked CD copy of the brief be filed at the same time as the official hard copy, or can it be filed a week or 10 days later? Some extra time to prepare the hyperlinked disk copy might help encourage the practice. It might also be helpful to include a provision requiring a certification of counsel that the disk copy is free of viruses and contains no links to webpages or anything other than case authorities or documents in the record. A few federal circuit courts have adopted rule provisions of this type. For example, the United States Court of Appeals for the Federal Circuit has adopted the following provisions as part of its Rule 32:

**(e) Filing Corresponding Brief on Compact Disc.** In addition to the filing of a paper brief, a party may file a corresponding brief contained on a compact disc - read only memory (CD-ROM), subject to the following requirements.

**(1) Consent; Motion.** Within 14 days of docketing an appeal, a party intending to file a corresponding brief must ascertain whether any other party consents or objects. If the other parties consent, the filing party must promptly file with the court a notice of intent to file a corresponding brief. If any other party does not consent, the party seeking to file a corresponding brief must promptly file a motion for leave with the court. If no response is filed within 7 days, the clerk will grant the motion for leave to file a corresponding brief. The court will deny a motion for leave to file a corresponding brief only if an opposing party demonstrates substantial prejudice.

**(2) Content.** A corresponding brief must be identical in content to the paper brief. A corresponding brief may provide hypertext links to the complete versions of material that was part of the record below. Hypertext links to other material must be confined to materials such as cases, statutes, treatises, law review articles, and similar authorities. A corresponding brief must be self-contained and static.

**(3) Statement Concerning Instructions and Viruses.** A corresponding brief must be accompanied by a statement, preferably within or attached to the packaging, that:

(A) sets forth the instructions for viewing the brief and the minimum equipment required for viewing; and

(B) verifies the absence of computer viruses and lists the software used to ensure that the brief

is virus-free.

(4) **Time for Filing.** A corresponding brief, if any, must be filed no later than the time for filing the joint appendix.

(5) **Filing and Service.** Except for the time of filing, a corresponding brief must be filed and served in the same manner and the same number of copies as the paper brief.

(6) **Single CD-ROM.** All parties to an appeal who intend to file a corresponding CD-ROM brief are encouraged to cooperate in placing all such briefs on a single CD-ROM.

(7) **Table of Contents.** Parties filing a corresponding brief are encouraged to include a table of contents with links to all of the items required in a joint appendix under Federal Rule of Appellate Procedure 30 and Federal Circuit Rule 30 and to all other parts of the record contained on the corresponding brief.

(8) **Labeling.** A label with the caption of the case, the number of the case, and the types of briefs included on the CD-ROM must be included on both the packaging and the CD-ROM.

*Rule 32(e), Rules of the United States Court of Appeals for the Federal Circuit.*

Our Subcommittee met and discussed whether to recommend adoption of any additional rule provisions regarding hyperlinked briefs. The consensus of the Subcommittee was not to recommend any rule changes at this time. The Subcommittee members agreed that hyperlinked briefs could be useful to judges, law clerks, and litigants, and the use of them should be encouraged. Although a number of lawyers who regularly handle appellate matters are filing hyperlinked briefs on computer disks with their printed briefs, many lawyers are apparently unaware of this practice. It is hoped that this Subcommittee Report may lead to an increased awareness of and use of hyperlinked briefs. Computer disks containing such briefs are regularly being accepted by the Court of Appeals of Virginia and the Supreme Court of Virginia without any particular difficulty, and the Subcommittee members thus felt that there is no pressing need for any further rule provisions. Additionally, the Advisory Committee on Rules of Court, a Committee of the Judicial Council, has proposed for comment additional rule provisions regarding electronic filing of documents. Our Subcommittee members felt that it would be wise to await developments in this area before considering any further changes addressing hyperlinked briefs.

Sincerely yours,

/s/

Roger T. Creager

Letter to John R. Walk, Esq.

September 10, 2012

Page 5 of 5

Cc: George E. Allen, III, Esquire  
Lawrence B. Cann, III, Esquire  
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