

ABA Labor Employment Section
Technology Committee
Midyear Meeting 2002
May 15-17, 2002

*How to Use
Virtual Briefs*

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Mr. Jess practices in the areas of employment law counseling and litigation, including the representation of employers in class action and multiple-plaintiff cases. He directs the Labor and Employment Client Service Group for Bryan Cave's Kansas City office. Mr. Jess is a member of the Missouri, Kansas and Arizona state bars and the bars of the federal courts of Missouri, Kansas and Colorado.

Exclusively representing management, Mr. Jess litigates employment matters, including class action discrimination and ERISA claims, and counsels businesses on related issues. He has represented employers facing allegations of race (including Section 1981 claims), sex, age, disability and national origin discrimination, as well as a claims for ERISA violations, wrongful discharge and breach of contract. He has extensive experience in counseling employers on a full range of labor and employment issues including RIFs, WARN Act compliance, wage and hour concerns, the publication of employee handbooks and properly handling employment terminations.

Mr. Jess is also active in the development of net-based employee training products for Bryan Cave. He served as a content editor in the development of the *NoZone*[™], a cutting-edge training and risk management tool designed to prevent sexual harassment and other forms of discrimination and to minimize employer liability should they occur.

Mr. Jess serves as the Management Co-Chair of the Use of Technology in Labor and Employment Subcommittee of the ABA Labor and Employment Section's Technology Committee. He also serves on the Heartland Labor & Employment Law Institute's Steering Committee.

He is a volunteer with and past board chair of Synergy Services, Inc., a not-for-profit corporation helping children and families in crisis.

Introduction

Perhaps this presentation should be entitled “Why to Use Virtual Briefs” because once a lawyer begins using them the only limitations on how to use them are her creativity.

Virtual or electronic briefs are typically presented on a CD-Rom. They contain everything one includes in a hard-copy brief except the table of contents, table of authorities, citations to legal authority, the record and internal citations are all hyperlinked so the reader can click on the link and automatically pull up the cited material. A specific cite to a case can be linked not only to the page of the case to which the author is referring, the author can even highlight in yellow (or in any other way) the particular passage she believes is important. One can even hyperlink to digital video clips (including deposition or trial testimony) or animated presentations.

As persuaders we need to begin using virtual briefs because: (1) judges love them; (2) they enhance advocacy; and, (3) in the right circumstances, our opponents already or will soon use them.

What Virtual Briefs Are Not

Virtual briefs are not the same as briefs filed over the Internet. Many federal and state courts are experimenting with the paperless filing of pleadings in PDF format using the Web. This process does not typically allow one to create a virtual brief, however, as the courts usually do not allow these briefs to contain hyperlinks to documents external to the brief being filed. The United States District Court for the Western District of Missouri, for example (which has mandated electronic filing of all pleadings in civil cases for almost two years), prohibits hyperlinks external to the filing document and will not allow attorneys to create and file one document large enough to include cases and materials cited.

Similarly, electronic briefs are not the “floppy disk” version of briefs many courts require lawyers to provide. Those disks typically do not contain enough space to hold the information necessary to create a true virtual brief.

History of Virtual Briefs

In an online article “Electronic Briefs in Trial and Appellate Courts[,]” posted in April 2000 at <http://www.jurist.law.pitt.edu/courttech3.htm>, Bradley J. Hillis, M.A., J.D., provides an excellent history on the use of virtual briefs. See also R.

Timothy Muth, *The CD-ROM Brief*, Milwaukee Bar Assoc. Messenger (July/August 1998), <http://www.milwbar.org/articles/1998articles/7-98-7.htm>.

Hillis notes Stanford Law School Professor, Joseph Grundfest, posted on the Web in August 1995 an amicus brief for the United States Supreme Court complete with hyperlinks to case law cited.

In *Yukio Ltd. v. Watanabe*, 111 F.3d 883 (Fed.Cir. 1997), counsel for appellant attempted to file a companion virtual brief. Although the court struck the virtual brief because counsel had not sought leave to file it nor had they sought appellees' consent, the court emphasized:

By no means, however, does the court intend to discourage the filing of CD-ROM briefs under appropriate rules and standards. Accordingly, the court calls on the court's Advisory Committee on Appellate Rules, the Federal Circuit Bar Association, and other interested members of the bar of this court to propose suggested rules, standards and guidelines for the filing of CD-ROM briefs for the court's consideration.

Id. at 887.

The Federal Circuit's current Local Rule governing the filing of virtual briefs is attached, as are the Local Rules for the United States First Circuit Court of Appeals and the Superior Court of the State of Delaware. Also attached is the proposed rule (published for comment) of the Washington State Bar Association.

In general the rules address issues of notice, whether a party filing a virtual brief must provide all parties' briefing on CD-ROM and whether the hyperlinks in a virtual brief must be internal or static (as opposed to hyperlinks to websites which can change).

The Courts' Reactions to Virtual Briefs

To date, Bryan Cave has filed approximately 20 virtual briefs around the country. These include electronic briefs in state and federal trial and appellate courts. We have received very positive feedback from the judges involved. For example, Judge Steve Leben of the District Court for Johnson County Kansas said this about one of our briefs:

[A] messenger dropped off at my chambers a copy of one of those motions everybody hates to get—a summary judgment motion that, with supporting materials, can only be measured in inches. By the time the motions, cross-motions, and responses all were filed over the next few weeks, we had a stack 17 inches high.

A few days later, as I recall, I received a much smaller envelope from the attorney for the defendants, who had filed the first summary judgment motion. It contained a cover letter and a single CD-ROM. The cover letter told me that these attorneys were proud to present me with what they said was the first electronic brief to be filed in a Kansas state court. Since no one I know keeps track of such things, I can't tell you whether they were right in that claim. What I can tell you, however, is that it made handling the case much, much easier.

These electronic briefs contained the entirety of the 17-inch pile of paper that had been filed with the court clerk. They also contained much more. Every case and statute cited in the briefs was included as well; these could be viewed merely by clicking on the case or statute name in the text of the brief. The same was true for factual information: all deposition transcripts, interrogatory answers, and pleading excerpts were included and easily accessible. In addition, some of the depositions had been videotaped. For those, the cited testimony excerpts actually could be viewed from videotape excerpts included on the CD-ROM.

Videotape excerpts, I can tell you, *do* make a more vivid impression than cold transcripts do. In the electronic briefs, your clue that a videotape excerpt is available would be a small box containing the photo of the witness. When you click on that box, the video excerpt would play. Whenever I would review the factual section of the brief, having those photos next to the statements was itself helpful in just keeping track of which witnesses said what.

Beyond that, the sheer convenience of having three CD-ROMs (covering briefs filed over a period of weeks), each 1/16-inch thick, rather than a 17-inch stack of paper is great. My law clerk and I were both able to take the full set of materials home—and we could both do so at the same time without the need to kill even more trees or spend a day at the copy machine.

* * *

The next time you're sitting in chambers, minding your own business, when a large stack of motion papers arrives, just hope it's accompanied by an electronic version.

S. Leben, *A Brief Article on Electronic Briefs*, Court Review, p. 45 (Winter 2001).

What Does It Cost and How Long Does It Take?

Because our firm prepares our virtual briefs in-house, we may require less lead time to convert a hard-copy to a virtual brief. We also find the in-house conversion helpful in maintaining a seamless connection between the legal expert familiar with the law and facts and the technologist creating the virtual brief. We can typically do the conversion in a day and a half to six days, depending the brief. We bill our technologists at a very (of course) reasonable hourly rate.

While many outside vendors undoubtedly will help create a virtual brief, the best known may include RealLegal (www.reallegal.com), DOAR Communications, Inc. (www.doar.com) and Counsel Press (www.counselpress.com). Renee Blahuta will be presenting and available for questioning concerning RealLegal's electronic briefing service.

Conclusion

Judicial convenience. Increased opportunities for advocacy. Can we afford not to use a virtual brief under the right circumstances?

Local Rule 32(e), United States Federal Circuit Court of Appeals

Rule 32. Form of Briefs, Appendices, and Other Papers

(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.

Local Rule 32.1, United States First Circuit Court of Appeals

Local Rule 32.1 CD-ROM Submission Allowed

In addition to filing paper briefs and the disk, a party may file a companion CD-ROM, called a CD-ROM submission. Except as specifically noted, filing of a CD-ROM submission does not affect the other requirements of this Court's rules.

(a) Conditions of Filing.

(1) If all parties are represented by counsel, a party may file a CD-ROM submission without prior notice to other parties.

(2) When a party is not represented by counsel, a CD-ROM submission may be filed

(A) by written consent of all parties;

(B) by leave of Court; or

(C) without leave or consent, if the submission includes all briefs and appendices filed by all parties to the appeal.

(b) Joint Submission. Any two or more parties may file a joint submission. Inasmuch as the Court will realize the greatest benefit by working from a single CD-ROM, adversarial as well as allied parties are encouraged to file jointly.

(c) Time of Filing. CD-ROM submissions shall be filed no later than ten days after the briefs or papers they accompany. Joint submissions by adversarial parties shall be filed no later than fourteen days after the final brief. Submissions under section (a)(2)(C) shall be filed no later than ten days after the final brief. This rule does not affect deadlines for paper briefs.

(d) Form of Filing.

(1) Parties shall file exactly nine copies of each CD-ROM submission. For all en banc filings, including petitions for rehearing en banc, responses to such petitions, and any filings on the grant of en banc hearing, parties shall file exactly nineteen copies of each submission. Parties filing a joint submission need file only one set of nine or nineteen copies.

(2) Parties shall serve one copy of each submission on each party represented by separate counsel and on each pro se party, except for parties participating in the submission. Each submission shall be accompanied by a certificate indicating such service.

(3) Each copy of a submission shall be packaged in a standard CD-ROM container, commonly known as a "jewel box." If a submission comprises more than one CD-ROM, each copy shall be packaged in a jewel box that holds, as a unit, the number of CD-ROMs in the submission.

(4) Each submission shall be labeled with the short name of the case, the docket number on appeal, the date of filing, and the most recent papers filed with the submission (e.g., appellant's brief, appellee's brief, appellant's reply brief). Joint submissions shall be labeled with the foregoing information as well as with a list of the parties participating in the submission. This label shall appear on the top surface of the CD-ROM itself, on the outside front cover of the jewel box, and on the front and back spines of the jewel box. If it is impractical to include the full label, a location may include an abbreviated label, but shall in all circumstances include the docket number, short name, and date of filing.

(5) For submissions including more than one CD-ROM, the label on each CD-ROM shall also indicate the number of the CD-ROM and the total number of CD-ROMs in the submission, e.g., "CD-ROM 1 of 2."

(e) Contents of Submission.

(1) Each submission shall contain the following:

(A) all briefs and motions filed in the current appeal by the party or parties to the submission, including addenda thereto;

(B) the appendix or appendices to such briefs; and

(C) any materials included in a prior submission that the filing party or parties made in the same appeal.

(2) Each submission may contain the following:

(A) briefs and appendices of parties not participating in the submission;

(B) briefs of amici curiae filing under Fed. R. App. P. 29;

(C) the entire record on appeal or portions of the record;

(D) materials cited by papers filed in the submission;

(E) any documents included by any party in a prior submission.

Parties are encouraged to file the entire record.

(3) All documents contained in a submission shall be precise copies of the corresponding paper documents filed with the Court, including, but not limited to, identical pagination. To satisfy this requirement as well as that of section (f)(6), parties should convert their word-processing documents to PDF format before printing, from the PDF-format document, the final paper versions of their filings.

(4) Documents filed under section (e)(2)(D), for which there are no corresponding papers filed with this Court, shall include unambiguous notation of their pagination in appropriate publications.

(5) If the documents required by sections (e)(1)(A)-(e)(1)(B) do not exceed the capacity of a single CD-ROM, they shall be included on the first CD-ROM of any submission comprising multiple CD-ROMs.

(6) To comply with section (e)(1)(C), parties may use files copied from their own prior submissions; under section (e)(2)(E), parties may copy files from prior submissions made by other parties. All such copies shall be verbatim copies, shall have the same file names, and shall reside in the same directories as in the submissions from which they were copied.

(7) All papers requiring a signature shall be signed on paper and in the CD-ROM submission. Signatures may appear on a separate signature page, which shall not be included in the page limits required by these rules. Section (f)(6) does not apply to such signature pages.

(f) Format.

(1) CD-ROMs in a submission shall be formatted according to ISO-9660, Level 1. Official copies of ISO-9660 are available for purchase at

<http://www.iso.ch/cate/d17505.html>.

(2) Files on the submission shall be in Adobe PDF format, version 1.2 or later. The current PDF specification is available for download under "Developer Resources" at <<http://www.adobe.com/prodindex/acrobat/adobepdf.html>>.

(3) Filenames shall end with a period, followed by "pdf".

(4) Except as required by section (e)(6), no file or directory in a submission shall have the same path as a file or directory in a prior submission.

(5) Except for the table of contents required by section (h), all files on the submission shall reside in directories other than the root directory.

(6) Whenever possible, documents shall be prepared through direct conversion from the word processor, not through scanning.

(7) Files shall be configured to allow selecting and printing. All fonts used in a file shall be embedded in that file. Files shall be optimized.

(g) Hyperlinks. Parties may insert hyperlinks corresponding to citations made by papers contained in the submission. Each hyperlink shall link to the document and page referenced by the corresponding citation. Hyperlinks shall be platform-independent and shall use relative file specifications, as discussed in the PDF specification. Hyperlinks shall link only to documents on the same CD-ROM, and not to any other location, including, but not limited to, other CD-ROMs or the Internet.

(h) Table of Contents.

(1) Each CD-ROM shall contain a table of contents, which shall reside in its root directory. The table of contents shall be named "contents.pdf" unless this name has been used a prior submission, in which case the end of "contents" shall be replaced with an incrementing number (e.g., "content1.pdf", "content2.pdf", "content14.pdf").

(2) The table of contents shall contain hyperlinks to the first page of each document on the CD-ROM, and may contain hyperlinks to pages within documents. The table of contents shall be well organized and each hyperlink within it shall clearly identify the document it references.

(i) Indication of filing. Parties shall prominently indicate on their paper briefs their intention to file a CD-ROM submission. Papers to be included in a joint submission shall indicate the parties participating in the submission.

(j) Quotation of Copyrighted Materials. Counsel are responsible for obtaining any permission needed to quote copyrighted materials. The text of opinions released by a court are not copyrighted materials; law review articles typically are.

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE ORDER
AMENDING RULE 107 OF THE SUPERIOR COURT CIVIL RULES OF
PROCEDURE**

This 28th day of July, 2000, **IT IS ORDERED** that:

(1) Superior Court Civil Rule 107 is amended by adding the following subparagraph:

(h) Unless otherwise ordered by the Court, any party may serve and file identical copies of any brief and exhibits on CD-ROM. The conditions applicable to the use of such CD-ROM briefs are set forth in the following paragraphs:

(1) The cover page of the brief shall include the following legend in bold type immediately beneath the Civil Action number in the caption: **“CD-ROM Version To Be Filed.”**

(2) Multiple parties which are filing a brief jointly may file such a brief on CD-ROM. Joinders to a brief may also be filed on the same CD ROM.

(3) Four (4) copies of the CD-ROM shall be filed with the Court within fourteen (14) calendar days of the filing and service of the brief, two of which shall be sent directly to the Judge as courtesy copies.

(4) Any party filing a CD-ROM in accordance with this Order shall take all steps that are reasonable and necessary to make it free of any computer virus.

(5) The CD-ROM shall contain a label that includes the following information:

- (a) the name of the case;
- (b) the Civil Action number;
- (c) the docket number;
- (d) the title of the brief; and
- (e) the name of filing counsel and their law firm(s).

(6) The CD-ROM shall include an imaged version of the signed brief and images of all exhibits. Video versions of exhibits (such as video depositions), that are otherwise properly included as exhibits to a brief, may be included on the CD-ROM.

(7) The CD-ROM shall include imaged or text copies of all legal authorities cited, both reported and unreported.

(8) All images and all text copies of authorities shall be in PDF [portable document format] format and references within the briefs shall be linked as follows:

(a) Each title or subtitle in the Table of Contents shall be linked to the appropriate page of the brief.

(b) Each citation in the Table of Authorities shall be linked so that:

(i) When the user clicks on the case name or citation in the Table of Authorities, the opinion or other authority appears; and

(ii) When the user clicks on the brief page referenced to the right of the citation in the Table of Authorities, the brief page appears.

(c) All references in the brief to exhibits in an appendix or otherwise shall be linked to the first-cited page of the exhibit.

(d) All references in the brief to cases, orders, or bench rulings shall be linked to the first page of such cases, orders, or bench rulings. Cites to specific pages within such cases, orders, or bench rulings in the brief will be linked to the first page cited.

(9) The CD-ROM shall also include a text version of the brief in the format in which it was created and in RTF [Rich Text Format].

(2) This amendment shall be effective August 1, 2000.

(3) An original of this Order shall be filed with the Prothonotary for each county.

Purpose Statement

GR 9(d) Cover Sheet

Proposal to Adopt a New RAP 10.9 Concerning "Corresponding" Briefs (Submitted on CD-ROM)

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: This proposed new rule would "allow and encourage" a party to file a "corresponding brief" on CD-ROM, as a supplement to, rather than as a replacement for, the traditional printed brief. Such briefs, especially if they are "hyperlinked," would provide the appellate courts and the parties with a powerful tool for arguing and deciding cases. (Hyperlinked briefs contain textual links to the report of proceedings, clerk's papers, and citations of authority.) They can also be much more convenient to use than printed materials, lessening the court's preparation time.

The parties want, or should want, to limit their briefs to factual statements supported by the record. They want the judges and their law clerks to be able to check the briefs of both sides against the record, and to easily verify whether their legal arguments are supported by cited authorities. Particularly useful in cases with a lengthy report of proceedings or many documents, hyperlinked briefs allow the court to check the briefs against the record and the legal authorities without the inconvenience of searching through the transcript or the law library.

Because the appellate rules don't authorize these kind of briefs, parties desiring to use them may face an objection that the court shouldn't accept something for filing if it is not authorized by the rules. The proposed rule would eliminate that hurdle. The Committee was concerned, however, that a party lacking the resources of another party could be forced to choose between paying for something beyond its means and being at a disadvantage in the appellate process. As a policy matter, it was believed that any rule should neither force a party to prepare a corresponding brief nor be required to pay for it (i.e., have it imposed as a cost) after the fact. The rule was drafted to address these concerns.

Section (a) authorizes such briefs, subject to the conditions of the rule itself and any general orders that may be adopted by the Supreme Court or the divisions of the Court of Appeals. Section (d) provides that no party is required to submit a corresponding or hyperlinked brief, although the party is required to cooperate in good faith with another party seeking to do so by providing a computer readable version of its brief(s). Section (b)(1) requires that a CD-

ROM with corresponding briefs must contain all briefs filed by all parties, and that if any of the briefs are hyperlinked, all must be. The submitting party must prepare, and bear the cost of, the hyperlinking. Section (f) makes clear that the costs of preparing and filing corresponding briefs are not recoverable as costs or attorney fees under the appellate rules. The Committee's thinking was that, absent a joint effort, the party desiring to

submit a hyperlinked brief would make an informed economic decision on whether it was worth the cost to do so for all parties - including those with presumably lesser resources.

Other sections of the proposed rule address notice, format, and timing requirements. Section (b)(2) requires that corresponding briefs be accompanied by a statement setting forth instructions for viewing the briefs, including the minimum equipment necessary for viewing. Section (b)(3) requires an accompanying statement that is to verify the absence of computer viruses and list the software used to ensure that the CD-ROM briefs are virus-free.

RULE OF APPELLATE PROCEDURE 10.9 [Proposed New Rule] CORRESPONDING BRIEFS ON CD-ROM

(a) Filing Corresponding Briefs on Compact Disc. The submission of briefs and appendices on compact disc read-only memory (CD-ROM), referred to in this rule as corresponding briefs, filed as companions to printed briefs is allowed and encouraged, provided that the Supreme Court and each Division of the Court of Appeals may by general order vary any of the conditions of this Rule, and may prohibit the filing of corresponding briefs.

(b) Conditions of filing. A party may file corresponding briefs upon 14 days notice to all other parties and the court, subject to the following requirements:

(1) *Content.* A CD-ROM with corresponding briefs must contain all appellate briefs filed by all parties. Corresponding briefs must be identical in content to the paper briefs. Corresponding briefs may provide hypertext links to the report of proceedings and clerks papers and to materials cited in the briefs such as cases, statutes, treatises, law review articles, and similar authorities. If any briefs are hyperlinked, all briefs must be similarly hyperlinked by the submitting party.

(2) *Format.* Corresponding briefs must come fully equipped with their own viewing program; or, if the disk does not contain its own viewing program, the briefs must be viewable within a version of a program such as Adobe Acrobat, Microsoft Word Viewer, or WordPerfect that is downloadable from the Internet at no cost to the user.

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

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

(B) verifies the absence of computer viruses and lists the software used to ensure that the briefs are virus-free.

(c) Joint Submission. Upon receiving notice of intent to file corresponding briefs, within 14 days any other party may file notice of intent to join in the submission. When one or more parties join in the submission, the parties shall cooperate in preparing a joint submission. Absent agreement to the contrary, each party shall arrange for preparation of its own briefs for the joint submission and the party first giving notice shall create the CD-ROM.

(d) Non-Joint Submission. No party is required to prepare a corresponding brief. A party shall cooperate in good faith in the preparation of corresponding briefs

by expeditiously providing the submitting party with the party's brief or briefs in electronic format, if available.

(e) Time of Filing. Corresponding briefs must be filed no later than 60 days after the final reply brief. This rule does not affect deadlines for paper briefs. Additional time may be granted for completion of the corresponding briefs.

(f) Costs. The costs incurred in preparing and filing corresponding briefs are not recoverable costs under Title 14 or as attorney fees under Title 18 of these Rules.