INTRODUCTION TO READING

& BRIEFING CASES AND OUTLINING

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Introduction

The legal traditions followed by the federal government, the states (with the exception of the civil law tradition followed in Louisiana), and now many Indian tribal courts derive in great part from the common law traditions of England. Because of its focus on court decisions as authoritative legal sources, i.e. precedents, the common law tradition differs from the civil law tradition followed in most of Europe. In the civil law tradition the judge interprets and applies a written code, but judicial decisions generally have no authoritative force. The only authoritative law makers in the civil law tradition are the legislature and, sometimes, the executive. By contrast, under English common law traditions followed by most of Britain's former colonies, including the United States, the primary source of law in certain areas was the courts, particularly appellate courts. Courts developed law by deciding cases and reporting their opinions. A reported case opinion generally consisted of a description of the facts of the case, an announcement of the result in the case, and a legal analysis of why the court decided the case in the fashion in which it did. In some areas, such as torts (personal and property injury) or contracts, case law development represented the primary manner in which the law developed until the twentieth century. During the twentieth century statutes became increasingly important in creating new law and changing the legal solutions offered by the common law (the judge made decisions). Not surprisingly, common law lawyers reacted to the increased importance of statutes and other written sources of law (such as constitutions, treaties, and regulations) by applying their common law skills. Thus, for example, in common law countries, judicial decisions interpreting statutes impose an authoritative meaning on the statutes which must be followed by lower courts.

The skills of common law lawyers therefore center on their ability to read, analyze, present, and predict legal developments derived from decided cases. Thus most law school courses, even courses dealing with subjects heavily governed by comprehensive statutes, focus on decided cases. While often criticized, this method of instruction is often called the case method. The case method has a number of advantages. It gives law students concrete factual illustrations of the application of legal principles in the particular case decided by the court. The case method also presents both good and bad examples of legal analysis and provides classroom opportunities for analyzing and criticizing the legal analysis of the opinions. Through such analysis, law students gain a greater appreciation of the manner in which the courts approach a legal problem and hone their own analytical abilities. Finally, the case method affords students the opportunity to test out the reach of the legal analysis provided in decided cases by testing it against hypothetical sets of facts either supplied by the instructor or made up by the student. Many law school courses, including this one, will focus primarily on the legal analysis of the decided cases, while others may focus principally on the analysis of hypotheticals or various problems in light of the assigned case readings.

Most law school examinations call for analysis and application of the principles of law studied in the course to a particular problem, often a hypothetical or real fact situation not previously confronted by the student. Law students frequently find that examinations in law school differ significantly from their prior educational experiences. Rarely is the student asked to merely recall information previously memorized. More frequently, the focus of both class instruction and examinations is the meaning and application of legal principles to factual situations. The reason for this difference is evident from the nature of legal practice. Client problems do not always come neatly packaged in a precise factual context previously seen. While

some practice situations are routine and repetitive, many are not and lawyers need skills in adapting to and working with new factual situations in light of existing legal doctrine that may not provide precise predictive answers. The process of learning the law therefore is best understood as a gradual process in learning to live with structured legal uncertainty.

In order to master the case method of instruction, law students find that they must learn a more careful and structured approach to the materials they read. The core of learning that method involves (1) briefing cases and (2) outlining courses. The difference between these two skills represents the difference between micro-analysis and macro-analysis of a course. Viewing a law school course as a forest which must be studied, briefing cases represents a structured way of understanding each individual tree (case) in the forest, while course outlining, often near the end of the course or in anticipation of an examination, represents the way a student discovers the forest through the trees.

Briefing Cases

While law students often assume there is some magic formula to briefing cases that they are missing, the process is actually rather it simple. Briefing cases involves a structured way of reading and questioning individual cases by forcing yourself to respond to a prescribed form. There are in fact some differences in the way instructors suggest a case brief should be put together (thereby suggesting the absence of any magic formula), but there is common agreement on the major elements. A good case brief should contain the following elements, each of which is described in more detail below.

Case Name
Case Citation
Casebook Page

Statement of the Case

1. Statement of Facts
2. Procedure Below

Issue(s)

Result

Holding(s)

Analysis

The case name, citation, and page of the casebook on which the case is found are obvious components to identify the precise case being briefed. You will come to learn that the case citation found in the casebook will tell you which court, usually an appellate court, decided the case in question. You will also find that keying your case briefs to your casebook by including the page of the casebook in which the case is found will prove very useful in both class discussion and on any open book final examinations.

The statement of the case is designed to give the factual background of the case without including any legal analysis of that background. It is divided into two subsections: (1) the statement of facts and (2) the procedure below. The statement of facts should present the basic, relevant journalistic facts or events upon which the case is based -- who did what to whom. These are the facts that occurred outside the courtroom before anyone filed suit. Students are often instructed to include only the legally relevant facts in this section, a term the meaning of which will become clearer as you advance in your law school careers. For example, in an automobile accident case, it is often irrelevant that the defendant was driving a 1987 blue GMC Jimmy

4x4 (unless, of course, it was night and the color of the car plays some role in the legal analysis of the case). It generally would be sufficient to note that she was driving a motor vehicle.

The procedure below section of the brief is intended to describe the significant legal steps taken in court from the time the suit was filed until it reached the appellate court deciding the case. This section is often difficult for students to understand until they have fully mastered the rigors of civil procedure and therefore you probably will pay comparably less attention to this section early in your law school career. The goal of this section is determine the precise procedural posture of the case to ascertain what procedural error made in the court below is being challenged on appeal. The reason for this focus is that appellate courts do not sit to decide every aspect of a case anew after it was decided by a lower trial or appeals court. They hear only claims of error made in disposing of some particular motion or request -- the claimed error. Ascertaining the procedure that was part of the claimed error therefore constitutes an essential part of reading and understanding an appellate opinion.

The statement of issue(s) in a case brief is often the most difficult part of the brief to formulate. Basically the issue represents the question(s) to be disposed of by the court. It should generally be framed so that it has both a factual and a legal component. It is a good idea to begin a statement of the issue with the word whether. For example, in the Indian law case of *Talton v. Mayes*, the basic questions posed involved the extent to which the courts of the Cherokee Nation were bound by constitutional limitations on the procedure to be followed in criminal cases. A properly framed issue for that case might be "Whether the courts of the Cherokee Nation which indicted a criminally accused tribal member utilizing a grand jury composed of only five persons are bound by the fifth amendment grand jury requirement of a grand jury of 21 persons or any fourteenth amendment due process clause limitations on grand jury indictment." As you can see this statement contains both factual components (i.e. that the accused had been indicted by an Indian tribe utilizing a grand jury composed of five persons) and legal components (i.e. that the questioned centered on compliance with the fifth amendment grand jury requirement of 21 persons and the fourteenth amendment due process clause). When starting out, students often make the mistake of including only the factual component in an issue statement. For example, a less constructive and much poorer way to frame the issue in *Talton* might be, "Whether the Cherokee Nation legally can indict a criminally accused using a grand jury composed of only five people." Note that this issue statement is less useful because it does not tell the reader precisely what *legal* questions or contentions are at issue. Similarly, mistakes can be made by omitting the factual component of the issue statement. Consider the following framing of the *Talton* issue -- "Whether the court below was bound by the fifth amendment grand jury requirement and the fourteenth amendment due process clause." Note that this framing of the issue fails to inform the reader that the court below was an Indian tribal court (a fact crucial to the decision) and that the actual grand jury used was composed of five, rather than 21, persons. One last point to note about the original *Talton* issue statement presented above is that it really is perhaps not a single issue, but two (one about the fifth amendment and the other about the fourteenth amendment). Many might separate this issue into two separate issue statements for clarity. Since the facts relevant to the disposition of the legal questions are identical for both legal issues, however, combining them may provide a short cut. Generally, however, separate legal questions should be separated into separately numbered issue statements. In short, framing the issue properly is a learned skill and one that requires a careful analysis and presentation of both the factual and legal components of the case. In *Talton*, the Court actually discussed the questions separately, suggesting that one doing a brief should properly frame each part separately.

The result of the case represents the court's disposition of the case. For appellate courts, the disposition generally will be to either affirm, reverse, or vacate (in cases of lack of jurisdiction) the decision of the court below or to do some combination of the first two for different issues.

The holding of the case is what lawyers and non-lawyers often refer to as to as the rule or legal principle extracted from the case opinion. The holding should be framed to parallel the issue statement and there should be one holding for each issue statement. The holding should be framed to succinctly explain and justify the conclusion reached by the court in the case. For example, in the *Talton* case mentioned above, the

holding might be framed as "The Cherokee Nation can legally utilize a grand jury composed of five persons to indict persons accused of crimes since the sovereignty of the Cherokee Nation derives from inherent aboriginal sovereignty and the Cherokee courts therefore are not arms of the federal government bound by the fifth amendment nor does the due process clause of the fourteenth amendment limit their actions regarding the composition of a grand jury."

The analysis portion of the case brief is perhaps the most important part of the brief and, yet, the part most overlooked by law students. In the analysis (or *rationale*, as it is sometimes called) portion of the brief, you should outline the basic flow and logic of the court. Law students often misguidedly quote large portions of the opinion in this section when first doing briefs. The goal, however, is *not* to focus on the court's language, but to understand its reasoning and analysis, a process which, of course, involves a careful understanding of the language but, also, the ability to paraphrase the court's logic. There is generally a logical flow to that analysis and your job is to extract that flow of analysis and to outline it in the analysis or rationale section of the case brief. Students who focus on the court's language without examining the court's analysis and logic carefully generally will miss central points in the case.

In attempting to understand the rationale or analysis of a court opinion, watch for two basic logical techniques courts employ in their reasoning: (1) deductive syllogistic reasoning or (2) analogical reasoning. By deductive syllogistic reasoning, we mean an approach to presentation that relies on a logical syllogism which is often symbolically presented as follows:

> If X therefore Y [The major premise]
>
> X [The minor premise]
>
> Therefore Y. [The conclusion]

Usually legal writing will not present the syllogism in simple form, but will couch it in the judge's prose. In such prose, the major premise generally constitutes a description of some legal rule and its sources derived from prior cases or a statute. The minor premise will generally involve a discussion of the facts of the case before the court. An illustration of such a syllogism might be the following:

> A driver who violates a safety law is negligent and liable for the damage (s)he creates. [Followed by a discussion of the legal sources of this rule in decided cases]
>
> Jane Doe was convicted of running a stop sign which resulted in an accident which injured the driver or the other car. [Followed perhaps by a discussion of where these facts appear in the record of the case]
>
> Jane Does was therefore negligent and liable for damage to the other driver and his vehicle.

The major premise of the syllogism (the "If X therefore Y" part) therefore generally represents the statement of a legal rule often coupled with the case or statutory source of the rule. In the example above, the major premise is the principle of law that a driver who violates a safety law is negligent and liable for the damage (s)he creates. In this example, the X part of the major premise is represented by the necessary element for liability -- violating a safety law. The Y part of the major premise, the legal conclusion, is the fact that the driver is negligent and liable for the damage (s)he created. Generally, in presenting legal analysis syllogistically courts will explain the case or statutory source from which they derive the major premise (legal rule) they are applying. The minor premise involves demonstrating the actual existence of X, in this the violation of a safety statute, in the case at hand. Obviously, this part of the court's analysis will rely heavily on the facts of the case. Finally, the last line ("Therefore Y") represents the logical conclusion of the analysis, in this case the liability of the driver for her negligent operation of a motor vehicle.

Analogical reasoning differs significantly from syllogistic deductive reasoning in that it proceeds mostly by drawing factual analogies between cases. In a system of equal justice factually similar cases obviously should be decided in like fashion. When factually identical cases are decided differently by courts, we have arbitrariness, rather than the rule of law. Consequently, legal reasoning often proceeds by showing that the present case is factually like other cases that the courts already have decided therefore compelling the same conclusion. Since two cases rarely are totally identical on their facts, analogical reasoning focuses significant attention on whether the factual similarities between the cases are legally significant and whether the legal distinctions that exist between cases are sufficiently important to distinguish them, i.e. to justify a different result. In that quest, carefully understanding the rationale or analysis of the first case and the role the similar or distinguishing facts played in the court's decision is critical, which helps explain the importance of briefing cases and, in particular, the importance of the analysis section of the brief.

These two types of analytical presentations are also often useful to lawyers arguing cases. For example, one way to present a cogent argument for your client's case is to do so syllogistically, i.e. to present a rule of law applicable to your case ant its source and to argue that your case is governed by this rule of law because of its facts. Another powerful weapon in the lawyer's toolkit is to argue analogically, i.e. to find cases on your own which are decided the way you want the court to rule and to argue that your case is factually analogous to these precedents.

The analysis section of your case brief should have a logical outline and should outline the court's analysis in such a way that it logically explains both the court's holding and its result, hopefully in either logical syllogistic or analogical form. Since most courts attempt to provide a logical justification for their opinion, if you cannot present that justification logically (even if you disagree with the court's conclusions), you probably have not read the case closely enough or spent sufficient time dissecting the court's analysis. At first, this process will be excruciatingly slow, but should become more efficient as your legal analysis skills improve. Remember, these are acquired legal skills which are learned over time. They are not skills with which people are born.

Since case briefing takes considerable time, many law students try to short circuit the effort by abandoning the briefing of cases early in their first year of law school. While most lawyers rarely actually brief cases in practice (although some still do), it is because the process of reading cases encouraged by case briefing techniques has for them already become second nature. By repeatedly doing the process, they internalized it. Abandoning the briefing of *every* case in your courses before such reading has become second nature for you (i.e. before you have internalized it) will undoubtedly short circuit your legal education and your performance in your law school work. At a minimum all law students should probably be briefing all primary reading cases throughout their first and, probably, most of the second semesters of law school. You will know when briefing is no longer required when you *consistently* have fully understood and anticipated almost everything that is going on in class relative to a particular case. If you stop briefing cases before that awakening occurs, it may never occur!

Outlining Courses

The nature of the law school classroom is such that in each class hour only a few cases will be discussed. Thus, each class hour tends to be spent in a microscopic examination of the trees in the legal forest. The case briefs greatly assist in that microscopic examination and, indeed, represent the lawyer's microscope into the detailed workings of the legal system. The task of supplying some larger organization and structure to the cases is generally left by design to the law student. Preparing course outlines are the way law students get "the big picture" in law school. The course outline is the way law students find the forest through the trees. Just as briefing cases trains law students to carefully read and analyze cases, so preparing course outlines trains law students to synthesize case sequences and see patterns, issues, and trends. For this reason, *preparing* course outlines is part of law school education. While law students often try to short cut this process by borrowing or copying course outlines done by other students, often very successful students, in

prior years or by purchasing commercial outlines, there really is no substitute for preparing ones own outline. Utilizing another's outline in place of one's own work skips the critical step of organizing and synthesizing the cases which is a critical part of the educational process. By skipping that step, the outline provided by another student, no matter how good it is, or a commercial outline will never substitute for the original learning done through the outlining process.

In order to do effective outlining it is important to consider the ultimate goal of the enterprise. On a final examination or in real life legal practice, you are likely to be confronted with a factual problem. These problems do not come labeled with directions as to the appropriate issue(s) to consider (or in real life the appropriate course area to evaluate). Thus, part of the skill in mastering a course is to consider it as a sequence of potential issues and subissues that could come up in that area of law on a final examination or in practice. Ideally, one would like to emerge from the course with a check list of potential issues that one could apply to any problem and a sufficient understanding of the statutes, cases, and other legal authorities in that area that one can deal with any issue which might present itself. With that goal in mind, developing a thorough outline becomes more manageable. The outline should focus its major hearings (and perhaps subheadings) on potential issues. The detailed content under those headings are the primary and note cases studied throughout the semester and the statutory, regulatory, or other legal authorities applied in each area.

The outlining process is best done throughout the semester, with a recognition that material learned at the beginning of the process may be seen in a different light when material learned at the end of the semester is added to the body of knowledge covered in the course and that revision of early portions of the outline therefore may be necessary. You may want to delay starting an outline, however, until you have your bearings in a course, often several weeks into the semester. As the course concludes (and final examinations approaches), however, the student will increasingly assume the responsibility for developing some order out the seamless web of legal doctrine covered in any course. Ideally that process should go through three stages, each of which represents an effort to condense and internalize the knowledge acquired in the prior stage. At the end of the semester, students should have prepared a full and detailed outline of the entire course, which incorporates the major issues and subissues in the course as major headings and subheadings and then weaves the cases and statutory material covered for each such issue or subissue into the fabric of the outline. The holdings and rationales of the cases (often taken directly or paraphrased from your case briefs) will be very important in this process.

Producing this large outline (often numbering between 50 and 100 pages) is really only the first step in the outlining process. The second step is to outline the large outline by learning and internalizing its details. Thus, in your second outline, the *Talton* case will no longer need to be described in detail and its holding and analysis set forth, it may be sufficient to note that it stands for the principle of inherent tribal sovereignty, relying on your memory to conjure up the remainder of the details. This second outline may be only 20% the size of the larger outline with which you started, perhaps 10 to 20 pages for a long course. Finally, you might ideally like to have a single sheet check list of issues and subissues which you could memorize for a closed book examination or take into an open book examination to apply to any factual problem presented by the question. This check list can be derived by again outlining your second stage outline, focusing only on major headings and subheadings and memorizing the details you are leaving out.

On any examination, this third stage check list should be applied systematically to determine what issues or subissues are present in the facts of the examination. Once you have identified the issue(s) to discuss, the details of the case and statutory law for each issue that formed the details of your first stage outline should come back to you in an orderly fashion through memory recall.

As you can tell, the goal of outlining is not only to produce a usable outline, it is to bring order to the trees you discovered in the forest and to make the terrain sufficiently familiar, understandable and navigable that you can easily traverse it during a law school examination or in legal practice. The law school course outline is a process not a product. You can purchase, borrow, or otherwise acquire a product called a course outline, but you will not have gone through the educational process that created it which is the key to understanding.

Three useful hints to outlining can be offered. First, most modern computer word processors have an outline function built into them to structure the process of creating multilevel headings for outlines. For the particularly disorganized, this technological assistance is often invaluable to structuring and organizing the thought process and you are encouraged to make effective use of it. Second, if you get lost during the course of the semester or in preparing your own outline near the end of a semester, most casebooks have a very useful and often overlooked *detailed* table of contents at the beginning which will often provide useful guideposts as to the way in which the cases fit together. Make effective use of these hints. Third, outlining is process, a learning technique, not a product. Purchasing commercial outline, utilizing the outline of last year's top student, or the canned outlines in the NALSA office may give you a canned product, but it does not constitute an effective substitute for the process of doing it yourself from scratch. Such products (if well done and current) may be valuable as references if you are lost in your effort to produce an outline, but they are not effective substitutes for doing it yourself.