Primer #1: Reading and Briefing Judicial Opinions*

INTRODUCTION

Why study legal cases in the first place? They're long, boring, written in excruciating legalistic language and jargon, and hardly understandable. In other courses, it's enough to just read the text and discuss the material in class. Why isn't that good enough for this course? The difference is that the law is not susceptible to standard teaching methodologies and requires a different approach. There are two reasons this is the case.

Source of Law: Our legal system is largely judge-focused. Judges, and courts, make judicial law through their written opinions. In order to understand judicial law, we must study the actual decisions that judges have written. It is also instructive to study the law the way judges perceive the law. In our system of government, judges and courts only announce the law when deciding actual disputes: they can't simply hold a press conference and announce a new set of legal standards. This is sometimes referred to as the "case and controversy" requirement—the courts have no power to decide issues unless the issues are presented to them in actual cases and controversies before the court. To view the law from the same perspective as judges, we must study actual cases and controversies, just like the judges. In short, we study actual cases because they are a very important primary source of law.

Better Understanding: The second reason we use the case method to study the law is that it can be difficult to understand a particular legal doctrine or standard without applying the standard to an actual set of circumstances in the real world. It can be difficult because the English language is often ambiguous: even a legal standard that sounds clear, direct and definitive in the abstract may prove ambiguous in application. As we study particular legal standards, we will find that applying those standards to new sets of facts can expose weaknesses in the standard that we might not have observed when simply studying the standard itself. Studying actual cases and novel hypotheticals will help us understand the legal standards and doctrines a bit deeper and with more precision.

Reading judicial opinions can be tedious and slow. Most, if not all of the opinions you'll read in this course have been edited for the specific needs of the course. You are reading the excerpts from the case that are most important for you to understand for this course. However, the feature of these opinions that is often more difficult than the sheer length is the style in which they are written. Legal analysis is often very subtle and cryptic; key words, phrases, holdings and doctrines are not often emphasized or obvious. It is your assignment, as a student of the law, to crack this code, find the essence of each controversy, and identify the legal standard from the opinion. Reading the opinions with this purpose, and briefing them with the same discipline, will increase your understanding tremendously.

READING A CASE

Reading your first case is like reading a foreign language you know only slightly: you might recognize the words, but you have to translate the concepts into English.

Like a foreign language, case law contains terms not familiar to the student. Cases are written by lawyers for lawyers, consequently the writing contains technical legal jargon and is structured for the legal mind instead of the layperson. To make it even more difficult, judges often use awkward syntax or complex words where simple ones would suffice.

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* Borrowed heavily from the following sources:
- *How to Read a Judicial Opinion: A Guide for New Law Students*, Professor Orin S. Kerr, George Washington University Law School, http://hssph.net/legalrm/howtoreadv2.pdf.
- *What is a Case Brief?*, Louisiana State University at Lafayette, http://www.ucs.louisiana.edu/~ras2777/adminlaw/casebrief.html.
- *Briefing a Case*, Michigan State University College of Law, http://www.law.msu.edu/rwa/briefing-a-case.pdf).

At first, you will read the cases slowly. By the end of the quarter, you will have adopted methods for reading faster, while still comprehending all that you need. With the right technique, you might be able to increase your speed at the beginning of the quarter without sacrificing comprehension.

Speed v. Comprehension

There are two ways to measure effective reading: speed and comprehension. Generally, the faster you read, the lower your comprehension. However, if you are familiar with the subject matter, or you know the subject or the author well, then you can generally pick up the pace of the reading without losing any comprehension. Pre-reading is a strategy that achieves that goal.

Pre-Reading

Pre-reading gives you an edge by building faster comprehension into the equation. With this strategy, by the time you begin reading in earnest, you will already know a few things about the case and you will be more comfortable with the subject and the facts, thereby allowing you to read faster and retain more information. By pre-reading the case, you can decide whether to skim, skip or fully read a section. This dramatically reduces the time you spend reading unnecessary material.

Step 1: Pre-reading

Pre-reading gives you the gist of the case to determine whether to skim, skip or thoroughly read particular paragraphs or sections. Pre-reading is not skimming. You should resist the impulse to skim the entire case as you pre-read. Think of pre-reading as a superficial skimming of the material.

HOW TO PRE-READ

Pre-reading consists of the following steps:

Step 1: *Read the case name.*

Step 2: *Read the first paragraph or two to understand who the parties are and the issue that brought them to court.*

Most cases will give the procedural history, parties and issues in the first two paragraphs.

Step 3: *Read the first sentence of each paragraph.*

By reading every topic sentence of every paragraph you should get an idea of the structure and general direction that the case is going towards.

Step 4: *Read the last paragraph or two so that you understand the holding and disposition of the case.*

Not every holding will be given in the last two paragraphs, but the author usually will sum up the ideas of the case as a conclusion in the final paragraphs.

The objective of pre-reading is to get the big picture of the opinion sooner. Once you have an overview of an opinion, you know enough of the contents to read the opinion quickly and easily. There are four elements of the opinion that you should identify as you pre-read.

1. Outcome
2. Elements of the Case
3. Legal Concepts
4. Evolution of Reasoning

Outcome: By knowing the outcome, you have a context for the analysis and reasoning. Although the suspense is gone, you know where the court is going with its decision.

Elements of the Case: You've identified where the court actually addresses the legal question, the procedural history, the facts, the law, the holding, and the conclusion. You should now have an easier time moving through the opinion in a logical and meaningful order.

Legal Concepts: Rather than revealing each legal concept one-at-a-time, you will have a big picture of the opinion before taking on each legal concept.

Evolution of Reasoning: A court might proceed carefully through its reasoning in order to ensure that the opinion has integrity and will carry legal precedent. For instance, an opinion might step through the development of the legal rule from the common law through the legislative process and several iterations in

various previous opinions along the way. Or a court might, after establishing its own reasoning, respond to each and every argument in opposition to that reasoning, made by either the attorneys for the other side or by a dissenting judge in the present case. Much of this is unnecessary for your purposes.

Step 2: Skimming, Skipping or Reading

Skipping: As a result of pre-reading, you can determine which paragraphs you can skip altogether. For instance, you might find that the court's lengthy evolution of reasoning or defense of arguments, as described above, are not helpful to you in understanding the opinion. You might decide to skip this material altogether.

Although it sounds counter-intuitive, skipping can actually increase overall comprehension. Students often become bored when they must reread the same material in order to comprehend it. By skipping through material that is already familiar, you keep the pace fresh so that your mind doesn't wander.

Here are some typical paragraphs that you can skip:

- A long discussion of the historical basis of a rule, although you might want to comprehend the primary origin of the rule.
- Ancillary legal concepts that are not relevant to the key concepts addressed in the opinion.
- The court's dicta, or statements that are not necessary to, nor reflected in the holding.
- Exhaustive defenses against counter-arguments.
- Examples of a principle that you already understand.

Skimming: Skimming is different from pre-reading. Skimming means you are reading everything lightly - giving it the once over. In skimming, you don't read every word, but you do scan every sentence. Instead of reading words as a single element, you read phrases. You use skimming when you are basically familiar with the material but need more information than what you got out of the overview.

Reading: Reading doesn't mean that you have to read every word. For most people, the mind is quicker than the eye. The mind typically gets bored if you read every word. By training your eyes to go quickly over each sentence, you can learn to read faster. It takes practice, and it's beyond the scope of this primer to offer exercises in speed reading cases. However, even if you haven't taken a class in speed-reading, you might still benefit from this pre-reading strategy.

Taking Notes While Reading

One mistake many students make is highlighting nearly everything in an opinion. It's common at first to think that everything is relevant. The trick is to pre-read *without* highlighting anything! This can be tough because as you pre-read you get a sense for what is important and naturally you'll want to note it. However, you can never really know what is important until you have read an opinion fully.

On your second pass through the opinion, identify the relevant sections and highlight the question, key facts and procedural history, rule of law, application of law to facts, holding and other elements. Identify the elements with a notation in the margin.

ELEMENTS OF THE JUDICIAL OPINION

Judicial opinions are the written decisions of judges and courts in which they explain their resolution of a particular legal dispute itself and their reasoning that led to that conclusion. A judicial opinion tells the story of a particular dispute: who the parties to the dispute are, the facts involved in the dispute, the law applicable to the dispute, the court's analysis, reasoning and arguments, and the court's decision in the case. Most legal opinions follow a simple formula that will seem odd at first, but will, with practice, become second nature. In this section, I'll describe the basic structure of the typical judicial opinion.

Caption

The caption is the title of the case, such as Brown v. Board of Education or Miranda v. Arizona. In most cases, the caption reflects the last names of the two parties to the dispute, or the names of the organizations involved. If Ms. Smith sues Mr. Jones, the case caption may be Smith v. Jones. In a criminal case, the government brings the case and the government itself is listed as a party. If the criminal charges are filed in state court, the caption may be State of Washington v. Jones, often abbreviated State v. Jones. If the charges are filed in federal court, the caption would be United States v. Jones or U.S. v. Jones.

Citation

Under the case name, you will find a legal citation that tells you the name of the court that decided the case, the series of books in which the opinion was published (commonly referred to as a "reporter"), the volume of that series in which you'll find the opinion, and the year in which the case was decided. For example, "Smith v. Jones, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the United States Reports, starting at page 759.

Author of the Opinion

The next bit of information is the name of the judge who authored the opinion. In most cases, the opinion will simply state a last name. On occasion, the opinion will include the Latin phrase *per curiam* instead of a judge's name. This phrase means "by the court," and generally means that the opinion reflects a common view held by all of the court's judges, rather than a single judge. Appellate opinions, especially opinions of the U.S. Supreme Court, are rarely decided unanimously. And, the opinions of the individual Justices vary so widely in some cases that a majority vote of the Justices, on a single outcome, might not even be achievable. On a nine-member court such as the Supreme Court, five votes are necessary in order to make a final decision in a case. In some cases, five Justices might be able to agree on the outcome of the case (reverse, remand affirm, etc.), but can't agree on the specific legal theory, or the correct test to be used, or the subtle reasoning, or any number of reasons for disagreement. In these cases where a majority of Justices are able to agree on the outcome in the case, but a number less than a majority come together on the reasoning in the lead opinion, this opinion is referred to as a "plurality" opinion. Plurality opinions are usually accompanied by multiple concurring and dissenting opinions, more so than in cases involving a majority opinion. Plurality opinions are, to the same extent as majority opinions, binding on lower courts, subject to review, and may be cited in future opinions as precedent.

Introduction and Legal Question

Some, but certainly not all judges, and certainly not all opinions, include a neat little introductory paragraph that sets the stage and identifies the legal question the court has been asked to resolve. You will come to appreciate these paragraphs from the courts because they are "cracking the code" for you, at least in part. The legal question is an essential component of the legal opinion, and to your understanding of the legal opinion, and when the court hands it to you on a silver platter, at the outset of the opinion, in clear and succinct terms, you'll come to expect it in every opinion and be very disappointed when it is not.

Facts of the Case

The first part of the body of the opinion is usually devoted to a presentation of the facts of the case. In other words, what happened? The presentation of facts varies widely from opinion to opinion. In some opinions, the fact section is long and detailed, and in other opinions it is short and succinct. In some opinions, the facts are presented in a clear and accurate narrative, and in other opinions they are vague or incomplete. The fact section represents the court's understanding of the evidentiary record in the case and, more importantly, it indicates which facts the court will be relying on for its particular resolution of the dispute.

The facts of a case consist mostly of the events that occurred before the lawsuit was filed in the trial court, and that led to the filing of the lawsuit. However, most opinions also include a recitation of the procedural history of the case: the procedural steps that occurred along the way as the case was being litigated and appealed. The procedural history provides much needed context for the reader, but is not necessary in deciphering the substantive legal standards.

Review of Applicable Law

After the court has presented the facts in the opinion, it will then discuss the applicable law. This section of the opinion describes the sources of applicable law and the legal standards that the court will rely on in deciding the case and reaching a particular outcome. The section of the opinion devoted to the law will contain passages from the four primary sources of law: constitutions, statutes, case law, and regulations.

Standard of Review

Some, but certainly not all, opinions contain a statement of the applicable standard of review. The standard of review is the measure of the extent to which the substantive legal standards must be met in order to prevail. In a trial court, it's the burden of proof: how much evidence is necessary to prove a finding of guilt or to prevail on a claim ("preponderance of the evidence", "beyond a reasonable doubt", etc.). In an appellate court, the standard of review measures the "amount of law", if you will, rather than the amount of evidence, necessary to prevail. Examples of appellate standards of review include "sufficiency of the evidence", "abuse of discretion", "harmless error", and "*de novo*".

Reasoning

The previous sections in the opinion—the facts and the applicable law—are primarily objective in nature. Courts don't add their own perspective to those two elements, at least not explicitly. But as soon as the court has established those objective elements, it turns to the somewhat more subjective elements of the opinion. In its reasoning section, the court lays out the how and the why of its decision. Here, it is working through the logical, legal and interpretive steps it has gone through to reach its decision. The court is also conducting an important legal skill that you will eventually acquire: legal analysis, the application of the law to the facts.

Courts provide legal reasoning for a number of reasons. First, it provides credibility and support for their decisions. Without it, judicial opinions would not carry the authority and weight that the judiciary must have in order to enforce their judgments. Second, it aids the entire profession in providing arguments and justification in other cases. Lawyers often point to the court's reasoning in an opinion for persuasive arguments in other cases. Finally, a court might strategically provide reasoning in one case in order to rely on those arguments and reasoning in later cases.

Holding / Rule of Law

Perhaps the most important element of an opinion is its holding. The holding is the core legal principle that the case represents. It is the conclusion that the court has reached in the case, the resolution of the legal dispute and the answer to the legal question. But it is more than the mere conclusion or outcome of the dispute. The holding is a legal principle that can be contained in its own distinct statement and applied as an authoritative statement of the law in other cases. In other words, the holding in a particular case is the embodiment of the rule of law from that case and it enters the lexicon of case law to be passed down and relied upon in future cases as binding or persuasive precedent.

The holding in a particular case might not be readily obvious or apparent. Courts, for whatever reason, often do not provide a clearly identified holding in each case. One of the more important functions you'll perform in reading and briefing these cases, and one of the more important skills you'll learn here, is the function of discerning the holding in each case. The holding is, after all, the nugget from the case that practitioners and observers pull from it to be used in other cases, so it does have some subjective characteristics to it. Proof of

the subjective nature of the holding is found in the often long debates that critics and academics indulge in over what the court in a particular case actually held.

Disposition / Outcome

The disposition usually appears at the end of the opinion, and it tells you what action the court is taking in the case. For example, an appeals court might affirm or uphold the lower court decision; it might reverse or overturn the lower court decision; it might reverse the lower court decision and remand it, sending it back to the lower court for further proceedings; and it might decide to order a combination of those actions. For now, you should keep in mind that when an appellate court "affirms" or "upholds" the lower court decision, it means that the appealing party lost and the appellate court agrees with the lower court. Words like "reverse", "remand", and "vacate" indicate that the appealing party prevailed and the appellate court disagrees with the lower court.

Concurring and/or Dissenting Opinions

Concurring and dissenting opinions are the opinions written by judges who do not agree, either in part or entirely, with the opinion written by the majority. Some judges may wish to express a slightly or even dramatically different view of the case. In general, a concurring opinion is an opinion written by a judge who would have reached the same outcome as the majority, but based on different reasoning. And in some cases, a judge might issue a concurring opinion where she simply wishes to highlight different arguments that she might find more persuasive than the majority. A dissenting opinion is an opinion by a judge who disagrees with the outcome of the decision, and might also disagree with the reasoning of the majority opinion either in part or in whole. In most cases, dissenting opinions try to persuade the reader that the majority's opinion is incorrect.

You probably won't believe it at first, but concurrences and dissents are very important. When they are made available by the case editor, you should read them carefully. When these opinions are not important, in the eyes of the editor, then they are removed, primarily to keep the length of the case down. When they are included, it means that they offer some valuable insights and raise important arguments. Sometimes your instructor believes that the concurrence or dissent provides even better arguments in the case than the majority opinion. Sometimes, a strong dissent points out a fatal flaw in the majority's reasoning which, in turn, influences later courts and convinces them to decide the same question differently. And, sometimes the concurring or dissenting opinions are assigned because they present a better opportunity for teaching the legal principles than the majority opinion alone.

PREPARING A SIMPLE CASE BRIEF

A case brief is a condensed, concise outline or summary of a judicial opinion. Hence, the term "brief." It is primarily used for more efficient self-study, but it can also come in handy in presenting the case to others. In other words, a case brief boils down a judicial opinion to the key elements and discusses the essence of the court's decision. The case brief should be written *in your own words*. This allows you to understand the court's opinion much more deeply.

There are many different methods used in briefing cases, but all methods have the same basic goal: to help you understand and explain the significance of a judicial opinion. In the end, choose the method that works best for you. Below is a set of recommended items for your case briefs:

1. <u>Case Name, Court and Year</u>

Identify the parties. Who is the plaintiff? Who is the defendant? Who is the appellant (or petitioner)? Who is the appellee (or respondent)? Which courts decided the case in the decisions below and what were those decisions? When were those decisions issues? What's the legal citation for the case?

2. Brief Procedural History

Briefly describe the procedural steps in the case leading up to the decision. What was the result at the trial court level, who prevailed, and on what grounds? Who filed the appeal and on what grounds? Has the appellant appealed the entire decision by the trial court or a portion of it? What was the result in the appellate court below, who prevailed and on what grounds?

3. Facts

Capture a brief and concise summary of the facts from the case. The facts include all the objective details that occurred before the parties arrived in court. Include only those facts that are necessary or relevant to the court's decision, but be sure to include all such necessary and relevant facts. Chronological order is usually the best method for ensuring clarity and efficiency.

4. Legal Question / Issue

Identify the precise legal question the court must resolve in order to decide the case. If there is more than one legal question in the case, number them. Always phrase the legal question in the form of a question. When framing the question, narrow it to the specific issue the court must resolve. If a question is phrased too broadly, it may not be useful to you when you refer to it later.

5. Holding

Capture the legal principle the court has settled on in answering the legal question. The holding is the court's statement of the rule of law that you will draw from the case and apply in other cases. The challenge is in phrasing the holding as both an abstract statement that can be applied to novel fact patterns, on the one hand, and, on the other, including enough of the facts and context from the case to be able to compare the holding to those fact patterns. The holding should be stated in one sentence. Occasionally, a particular opinion might require multiple sentences, but this is the exception.

In the process of discerning and capturing the court's holding, be sure to phrase it in your own words. The temptation is to simply insert a quote from the court here. Don't do this. This is where, in some respects, the key learning of the course occurs. On your own, you'll attempt to capture the holding from the case to the best of your ability. You'll bring it into class and we'll discuss it. You'll hear the perspectives of other students and the instructor and you'll either incorporate those perspectives or not. It is in this process of forming your own judgment about the law, comparing it against the judgments of others, communicating your judgment with others, and modifying your own judgment, that you will really understand the law.

6. Reasoning

Reconstruct and summarize *in your own words* (again) the central reasoning or arguments used by the court to answer the legal question in the case. Why and how did the court reach the conclusion that it did? Explain the justification the court used to support its holding. Courts often include *dicta* in their opinion, language that is not necessary to the holding.

7. Disposition

Describe the final action of the court, the actual outcome for the parties (*e.g.*, reversed, remanded, affirmed, vacated, etc.).