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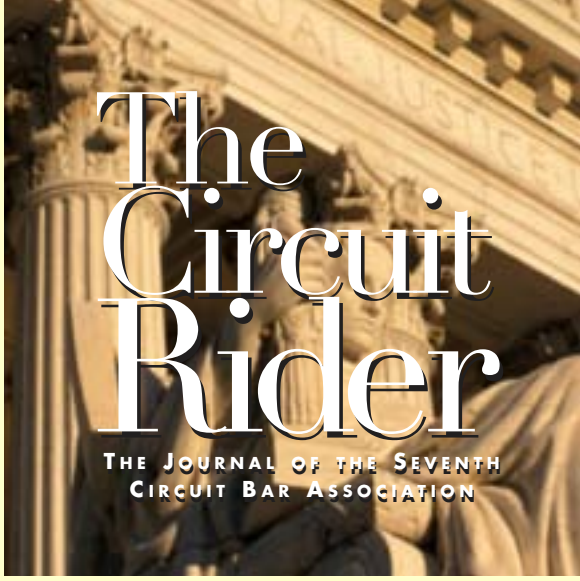

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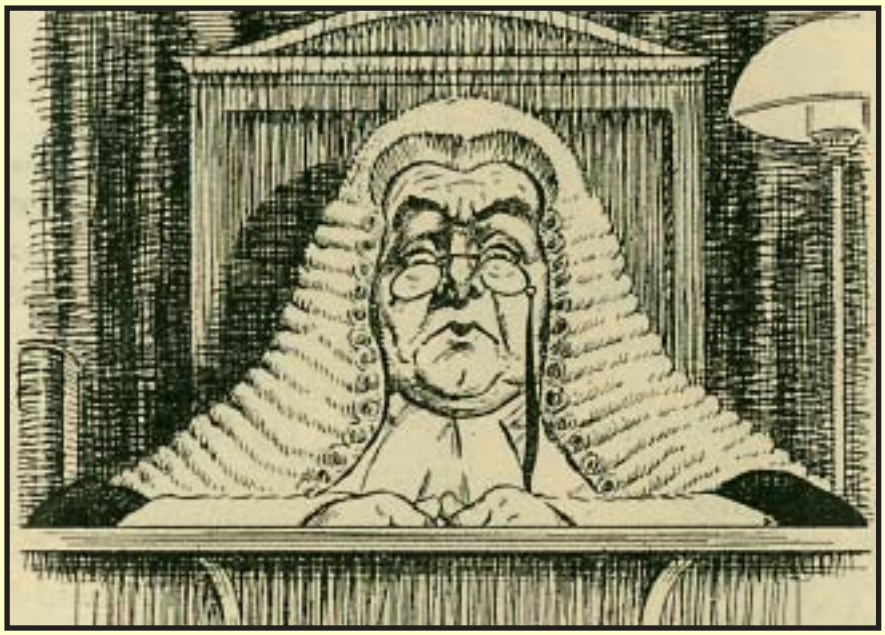

On Choosing Cases

*By Justin Weiner**

"Legal writing" is a dangerous notion. Good writing is good writing, whether it comes from Elena Kagan or David Foster Wallace. Layering the adjective "legal" onto writing is often a recipe for mischief, seducing lawyers to lard up their briefs with legalese and jargon. In general, there are no special rules for legal writing. Lawyers that write well know this.

But there's at least one thing that's unique to legal writing: its source material. Legal arguments are built from opinions from a deep (and ever-growing) reservoir of past cases. So before the legal writer can even try to explain the body of case law, he must choose what cases he intends to explain. The process for writing a brief thus often proceeds like this: (1) research the cases, (2) read them and ascertain their holdings, (3) pick out the useful cases that will get cited in the brief, and (4) craft the brief, inserting and explaining the cases when needed. Many good books are dedicated to step (4); three years of law school are dedicated to step (2); and though it receives less attention, step (1) is the focus of a few law school classes, as well as countless representatives from Westlaw and LexisNexis. But no one seems to pay attention to step (3). Cases matriculate from the results of the lawyer's search into the brief without the lawyer giving it conscious thought. Case selection is thus often a part of legal writing, taking place in the background of a lawyer's thoughts. But picking out good source material is critical to good legal writing, so it deserves some explicit discussion. In this article, I'll give a brief sketch of the art of case selection: why it's a distinct step in legal writing, why it's important, and how to do it well.

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Choosing Opinions and Legal Analysis Are Overlapping But Distinct Processes

Some lawyers may find this topic puzzling, because they don't perceive opinion selection as distinct from legal analysis (the process of reviewing cases and then explaining what the law is). To write a brief, they gather facts and then identify a legal rule that mandates a decision in their favor. Legal analysis takes place *while* gathering all of the relevant cases, and case citations find their way into the brief because they are required to explain the analysis. Perhaps in rare instances two cases support the existence of a rule, so the lawyer must choose which makes the point more eloquently. But in general the legal analysis dictates the opinion selection; lawyers craft an explanation of the law and then cite whatever cases are necessary. On this view of brief writing, there's no sense talking about opinion selection, because that's not what the lawyer is choosing. The lawyer crafts a legal analysis, the opinions cited are a mere consequence of this choice.

But opinion selection is a distinct phase in the legal-writing process. Mechanically speaking, legal research begins with retrieving and reviewing cases. Lawyers don't pull rules from the ether and then find cases to support them; they puzzle rules together *after* searching in Westlaw or Lexis and reading opinions, pulling pieces of legal theory from the milieu of opinions. Crafting an explanation of the law is — at least in part — making a choice of opinions that will support a theory. Consciously or not, lawyers do legal analysis in part by sifting through cases and picking out which ones they find useful. Deciding and explaining what is the law is as much about finding the opinions that form the law as it is about tying them together with sharp reasoning.

Why Case Selection Matters for a Brief

Part of the process of persuading a judge is educating her on the law. Generalist judges often approach legal problems with some background knowledge but not complete expertise, seeing some law in clear, white light and some in hazy semidarkness. In the brief, it's the lawyer's job to illuminate the dark spots in the judge's knowledge of the law. A lawyer that does this well increases his odds of winning in three ways:

- He gives sharp, clear context to his arguments, making them easier for the judge to understand.
- He gains the trust of the judge, who may now be more apt to believe the lawyer's arguments.
- He gives the judge more time to think about the merits of the case, because he has cut out the need for the judge to do further research to understand the law.

A lucid picture of the law is thus a critical component of any brief.

Painting that picture requires a lawyer to examine and select source material. In a common law system, judicial opinions are the exclusive source. But even when rules start from statutes or regulations, opinions are a source. Opinions (at least the good ones) don't just recite the words of a statute; they apply the statute's rules to facts, putting flesh on the bones of the law. *T.B. Harms Co. v. Eliscu,* 339 F.2d 822 (2d. Cir. 1964), for instance, started with a statutorily defined legal rule: federal jurisdiction exists when a matter arises under a federal law. But what did that rule mean when the subject matter of the case was a contract dispute (a creature of state law) over a copyright (a creature of federal law)? *Harms* decided that claims arise under federal law when the remedy comes from federal law, requires interpretation of

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federal law, or implicates a distinctive policy of federal law that requires federal court resolution of the claim. *Id.* at 828. A contract claim relating to a copyright was none of these things, so the claim did not arise under federal law and there was no federal jurisdiction. Notice from this summary that *Harms* didn't just apply the jurisdictional rule, it added to it. *Harms* thus becomes fodder for a lawyer's brief, a source from which the lawyer can depict federal jurisdiction for some future judge.

And a good picture of the law requires good source material. Think of cooking: even Escoffier couldn't make a great meal from bad ingredients. What comes out of the pot is a product of what goes in, no matter how much technical skill the chef applies. Legal writing is the same. No matter how ingenious a lawyer is, no matter how clear his writing, he can't properly explain the law to a judge without selecting useful opinions.

Why is this? For one thing, because opinions add to legal rules, it's necessary to cite the right ones to sketch the right picture of the law. To really know how a rule works, a judge needs more than a statement of an abstract legal rule, she needs to know how the rule is applied. Assume a case in which two parties dispute the validity of a patent license. Citing a securities case that regurgitates the "arising under" language of the statute doesn't help the judge nearly as much as *T.B. Harms*.

Case selection also matters because lawyers get only a limited amount of time to educate judges. Judges are busy; they will spend a fixed number of hours considering each brief. Wasting the judge's time with an opinion that doesn't add to her understanding of the law doesn't just frustrate the judge; it counts against the finite hours the judge will spend on the case. When the judge reviews the opinions cited in a brief, she should learn something beyond the abstract rule that's quoted or paraphrased in the brief.

Guidelines for Choosing Useful Opinions

To understand what makes an opinion useful to a judge, it's important to first understand the two basic forms of law: rules and standards. Standards are legal directives that are given content after an act occurs — a law banning "excessively loud music", for example, might be interpreted to leave it to the judge to decide what's excessively loud. Rules are legal directives that are given content before an act occurs — a law banning "music played in excess of 70 decibels." *See* Pierre J. Schlag, *Rules and Standards,* 33 UCLA L. Rev. 379 (1985) (from which these examples were taken); *see also* Louis Kaplow, *Rules Versus Standards, An Economic Analysis,* 42 Duke L. J. 557 (1992). The Armed Career Criminal Act nicely juxtaposes rules and standards within a single subsection, when it defines a "violent felony" as "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B). What is a violent felony is thus decided in part by a rule (burglary, arson, extortion, and crimes involving the use of explosives) and in part by a standard (otherwise involves conduct that presents a serious potential risk of physical injury to another). Most laws, however, don't fall neatly into either category. They have some content up front but leave the judge some discretion.

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Look for Opinions That Add Content

Useful opinions move law from the standard side of the continuum toward the rule side. Standards, by definition, give judges discretion, but in order to decide a case the judge must know how to apply that discretion. Leaving the judge without that guidance is asking her to make a decision based less on principles and more on rough justice. That is a role that is increasingly less comfortable for judges, as the law becomes increasingly dominated by statutes and codes and the common law diminishes in importance. And when binding precedent has modified the law to remove some of the judge's discretion, telling her to do rough justice is just inaccurate. Accurately portraying the law for the judge means showing her where she has discretion and where her discretion is limited. That's done by citing the opinions that give the standard content.

What is more a lawyer that leaves the outcome of his case to a judge's sense of right and wrong is foolish — not because judges have poor moral compasses, but because paying clients should get more for their money than a lottery ticket. Leaving an outcome to a judge's discretion is a gamble, because it's impossible to know how the judge will weigh the equities. But adding content to a standard narrows the range of a judge's discretion, increasing the odds of victory.

Some examples can illustrate how opinions give standards content and make them more rule-like. The Supreme Court in *Chambers v. United States,* 129 S. Ct. 687 (2009), decided that crimes that "otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another" are those that result in violence in a certain percentage of cases. *Chambers* also held that failing to report to prison is not a crime of violence. The molten liquid of a standard is replaced with a rigid steel bar — "serious potential risk" becomes "greater than X percent."[1] Failing to report gets added to a list of crimes that are not violent felonies.

Courts don't always fully distill the standard into a rule. Often, they give the standard some content but leave more for future cases to decide. So in *Peters v. West,* Case No. 11-1708 (7th Cir. 2012), the Court held that a plaintiff can prove copyright infringement by showing that the defendant had access to the copyrighted work and that the alleged knock-off is substantially similar to the original. The Court added content to substantial similarity, defining it to mean "that the two works share enough unique features to give rise to a breach of the duty not to copy another's work." That fills in some detail of what substantial similarity means, but it leaves more to be decided later — how many shared unique features are enough to breach the duty not to copy another's work?

Avoid Banal Statements of Law

Citations to banal restatements of the standard do nothing to light the judge's path. Choosing an opinion that merely recites a standard before picking a side doesn't show the judge the true bounds on her discretion. So when briefing the question of who is a state actor in § 1983 litigation, it does little good to cite *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349 (1974) for the proposition that an individual is a state actor when her actions are "fairly attributable to the state." As *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.,* 531 U.S. 288, 296 (2006) notes, what is "fairly attributable" is itself a vexing question that the Supreme Court has tried to explain with several opinions. So citing *Jackson's* "fairly attributable" standard does little for a judge deciding whether someone is a state actor, as does citing opinions from lower courts that merely cite *Jackson* and decide their particular case without any further analysis.

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The problem is even more acute in multi-factor tests. It's all too common for opinions to bog down in the application of these tests, relying on this factor or that one but not explaining how the factors ought to be weighed or why they're relevant to the ultimate test. Citing such an opinion doesn't help the judge understand how to apply the test. Even if one factor in the opinion overlaps substantially with a lawyer's case, others may not. Any difference between the opinion and the current case casts the judge back into the dark, wondering how all of the factors are to be put together to reach a decision.

Three kinds of opinions can assist a judge with a multi-factor test: (1) opinions that specify how the factors are to be weighed; (2) opinions that make certain factors dispositive; and (3) opinions that explain the goal in weighing the multiple factors. Type (1) casts light on how to apply discretion. Type (2) narrows that discretion. Type (3) is not so much an explanation of a multi-factor test as it is a replacement for it. *Top Tobacco v. North Atlantic Operating Co.,* 509 F.3d 380 (7th Cir. 2007) is a good example. It shucked the seven-factor test for likelihood of confusion in trademark infringement and went back to the meat of the statute, asking simply whether there was evidence that anyone was confused. Opinions like *Top Tobacco* move away from fact-laden balancing and toward a standard that judges can apply. These are exactly the cases a lawyer should cite when confronting a multi-factor test.

Find Opinions That Clearly Delineate What Has Been Decided and What Is Still Undecided

Even when some areas of the law appear completely rule-like, when all content seems completely pre-defined, there's a role for careful case selection. Even when statutes and regulations set out rules, there can be doubts about the level of generality at which the rule applies. And because the U.S. Constitution prohibits judges from issuing advisory opinions, even when an opinion creates a rule, the rule may not extend to every set of facts. Gaps exist in the law's content, leaving it to this judge to fill in that content in this case.

So here's a final guideline for opinion selection: find opinions that delineate what has been decided and what the judge in this case needs to decide. Think of the law as a jigsaw puzzle. What helps a puzzle solver most is seeing the surrounding pieces, so that he has additional visual clues to help him find the missing piece. Find the holdings that trace the broader outlines of the rule, and the judge will not only have a well-defined problem, she'll also have a good sense of how to solve it.

Conclusion

Selecting opinions is an important first step in writing a brief. Useful opinions will certainly follow from a sharp legal analysis, and advice on that topic is certainly beyond the scope of this short article. But having an eye for what's useful to a judge can be helpful when clicking through results on Westlaw, sifting wheat from chaff. Even if you intend to use this article for kindling, remember that last point: your goal is to help the judge decide the case. Plant that goal in the background of your mind, and you'll draw out the best source material for your legal writing.

[1] The example is simplified for purposes of this discussion. The meaning of "serious potential risk" is still in doubt, as is the rigidity of the "greater than X percent" rule.