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C. HOW TO BRIEF

The previous section described the parts of a case in order to make it easier to read and identify the pertinent information that you will use to create your briefs. This section will describe the parts of a brief in order to give you an idea about what a brief is, what is helpful to include in a brief, and what purpose it serves. Case briefs are a necessary study aid in law school that helps to encapsulate and analyze the mountainous mass of material that law students must digest. The case brief represents a final product after reading a case, rereading it, taking it apart, and putting it back together again. In addition to its function as a tool for self-instruction and referencing, the case brief also provides a valuable "cheat sheet" for class participation.

Who will read your brief? Most professors will espouse the value of briefing but will never ask to see that you have, in fact, briefed. As a practicing lawyer, your client doesn't care if you brief, so long as you win the case. The judges certainly don't care if you brief, so long as you competently practice the law. You are the person that the brief will serve! Keep this in mind when deciding what elements to include as part of your brief and when deciding what information to include under those elements.

What are the elements of a brief? Different people will tell you to include different things in your brief. Most likely, upon entering law school, this will happen with one or more of your instructors. While opinions may vary, four elements that are essential to any useful brief are the following:

(a) Facts (name of the case and its parties, what happened factually and procedurally, and the judgment)
(b) Issues (what is in dispute)
(c) Holding (the applied rule of law)
(d) Rationale (reasons for the holding)

If you include nothing but these four elements, you should have everything you need in order to recall effectively the information from the case during class or several months later when studying for exams. Because briefs are made for yourself, you may want to include other elements that expand the four elements listed above. Depending on the case, the inclusion of additional elements may be useful. For example, a case that has a long and important section expounding dicta might call for a separate section in your brief labeled: Dicta. Whatever elements you decide to include, however, remember that the brief is a tool intended for personal use. To the extent that more elements will help with organization and use of the brief, include them. On the other hand, if you find that having more elements makes your brief cumbersome and hard to use, cut back on the number of elements. At a minimum, however, make sure you include the four elements listed above.

Elements that you may want to consider including in addition to the four basic elements are:

(e) Dicta (commentary about the decision that was not the basis for the decision)
(f) Dissent (if a valuable dissenting opinion exits, the dissent's opinion)
(g) Party's Arguments (each party's opposing argument concerning the ultimate issue)
(h) Comments (personal commentary)

Personal comments can be useful if you have a thought that does not fit elsewhere. In the personal experience of one of the authors, this element was used to label cases as specific kinds (e.g., as a case of vicarious liability) or make mental notes about what he found peculiar or puzzling about cases. This element allowed him to release his thoughts (without losing them) so that he could move on to other cases.

In addition to these elements, it may help you to organize your thoughts, as some people do, by dividing Facts into separate elements:

(1) Facts of the case (what actually happened, the controversy)
(2) Procedural History (what events within the court system led to the present case)
(3) Judgment (what the court actually decided)

Procedural History is usually minimal and most of the time irrelevant to the ultimate importance of a case; however, this is not always true. One subject in which Procedure History is virtually always relevant is Civil Procedure.

When describing the Judgment of the case, distinguish it from the Holding. The Judgment is the factual determination by the court, in favor of one party, such as “affirmed,” “reversed,” or “remanded.” In contrast, the Holding is the applied rule of law that serves as the basis for the ultimate judgment.

Remember that the purpose of a brief is to remind you of the important details that make the case significant in terms of the law. It will be a reference tool when you are drilled by a professor and will be a study aid when you prepare for exams. A brief is also like a puzzle piece. The elements of the brief create the unique shape and colors of the piece, and, when combined with other pieces, the picture of the common law takes form. A well-constructed brief will save you lots of time by removing the need to return to the case to remember the important details and also by making it easier to put together the pieces of the common law puzzle.

D. EXTRACTING THE RELEVANT INFORMATION: ANNOTATING AND HIGHLIGHTING

So now that you know the basic elements of a brief, what information is important to include under each element? The simple answer is: whatever is relevant. But what parts of a case are relevant? When you read your first few cases, you may think that everything that the judge said was relevant to his ultimate conclusion. Even if this were true, what is relevant for the judge to make his decision is not always relevant for you to include in your brief. Remember, the reason to make a brief is not to persuade the world that the ultimate decision in the case is a sound one, but rather to aid in refreshing your memory concerning the most important parts of the case.

What facts are relevant to include in a brief? You should include the facts that are necessary to remind you of the story. If you forget the story, you will not remember how the law in the case was applied. You should also include the facts that are dispositive to the decision in the case. For instance, if the fact that a car is white is a determining factor in the case, the brief should note that the case involves a white car and not simply a car. To the extent that the procedural history either helps you to remember the case or plays an important role in the ultimate outcome, you should include these facts as well.

What issues and conclusions are relevant to include in a brief? There is usually one main issue on which the court rests its decision. This may seem simple, but the court may talk about multiple issues, and may discuss multiple arguments from both sides of the case. Be sure to distinguish the issues from the arguments made by the parties. The relevant issue or issues, and corresponding conclusions, are the ones for which the court made a final decision and which are

binding. The court may discuss intermediate conclusions or issues, but stay focused on the main issue and conclusion which binds future courts.

What rationale is important to include in a brief? This is probably the most difficult aspect of the case to determine. Remember that everything that is discussed may have been relevant to the judge, but it is not necessarily relevant to the rationale of the decision. The goal is to remind yourself of the basic reasoning that the court used to come to its decision and the key factors that made the decision favor one side or the other.

A brief should be brief! Overly long or cumbersome briefs are not very helpful because you will not be able to skim them easily when you review your notes or when the professor drills you. On the other hand, a brief that is too short will be equally unhelpful because it lacks sufficient information to refresh your memory. Try to keep your briefs to one page in length. This will make it easy for you to organize and reference them.

Do not get discouraged. Learning to brief and figuring out exactly what to include will take time and practice. The more you brief, the easier it will become to extract the relevant information.

While a brief is an extremely helpful and important study aid, annotating and highlighting are other tools for breaking down the mass of material in your casebook. The remainder of this section will discuss these different techniques and show how they complement and enhance the briefing process.

Annotating Cases

Many of you probably already read with a pencil or pen, but if you do not, now is the time to get in the habit. Cases are so dense and full of information that you will find yourself spending considerable amounts of time rereading cases to find what you need. An effective way to reduce this time is to annotate the margins of the casebook. Your pencil (or pen) will be one of your best friends while reading a case. It will allow you to mark off the different sections (such as facts, procedural history, or conclusions), thus allowing you to clear your mind of thoughts and providing an invaluable resource when briefing and reviewing.

You might be wondering why annotating is important if you make an adequate, well constructed brief. By their very nature briefs cannot cover everything in a case. Even with a thorough, well constructed brief you may want to reference the original case in order to reread dicta that might not have seemed important at the time, to review the complete procedural history or set of facts, or to scour the rationale for a better understanding of the case; annotating makes these tasks easier. Whether you return to a case after a few hours or a few months, annotations will swiftly guide you to the pertinent parts of the case by providing a roadmap of the important sections. Your textual markings and margin notes will refresh your memory and restore specific thoughts you might have had about either the case in general or an individual passage. Annotations will also remind you of forgotten thoughts and random ideas by providing a medium for personal comments.

In addition to making it easier to review an original case, annotating cases during the first review of a case makes the briefing process easier. With adequate annotations, the important details needed for your brief will be much easier to retrieve. Without annotations, you will likely have difficulty locating the information you seek even in the short cases. It might seem strange that it would be hard to reference a short case, but even a short case will likely take you at least fifteen to twenty-five minutes to read, while longer cases may take as much as thirty minutes to an hour to complete. No matter how long it takes, the dense material of all cases makes it difficult to remember all your thoughts, and trying to locate specific sections of the analysis may feel like you are trying to locate a needle in a haystack. An annotation in the margin, however, will not only swiftly guide you to a pertinent section, but will also refresh the thoughts that you had while reading that section.

When you read a case for the first time, read for the story and for a basic understanding of the dispute, the issues, the rationale, and the decision. As you hit these elements (or what you think are these elements) make a mark in the margins. Your markings can be as simple as “facts” (with a bracket that indicates the relevant part of the paragraph). When you spot an issue, you may simply mark “issue” or instead provide a synopsis in your own words. When a case sparks an idea — write that idea in the margin as well — you never know when a seemingly irrelevant idea might turn into something more. Finally, when you spot a particularly important part of the text, underline it (or highlight it as described below).

With a basic understanding of the case, and with annotations in the margin, the second read-through of the case should be much easier. You can direct your reading to the most important sections and will have an easier time identifying what is and is not important. Continue rereading the case until you have identified all the relevant information that you need to make your brief, including the issue(s), the facts, the holding, and the relevant parts of the analysis.

Pencil or pen — which is better to use when annotating? Our recommendation is a mechanical pencil. Mechanical pencils make finer markings than regular pencils, and also than ballpoint pens. Although you might think a pencil might smear more than a pen, with its sharp point a mechanical pencil uses very little excess lead and will not smear as much as you might imagine. A mechanical pencil will also give you the freedom to make mistakes without consequences. When you first start annotating, you may think that some passages are more important than they really are, and therefore you may resist the urge to make a mark in order to preserve your book and prevent false guideposts. With a pencil, however, the ability to erase and rewrite removes this problem.

Highlighting

Why highlight? Like annotating, highlighting may seem unimportant if you create thorough, well constructed briefs, but highlighting directly helps you to brief. It makes cases, especially the more complicated ones, easy to digest, review and use to extract information. Highlighting takes advantage of colors to provide a uniquely effective method for reviewing and referencing a case. If you prefer a visual approach to learning, you may find highlighting to be a very effective tool.

If annotating and highlighting are so effective, why brief? Because the process of summarizing a case and putting it into your own words within a brief provides an understanding of the law and of the case that you cannot gain through the process of highlighting or annotating. The process of putting the case into your own words forces you to digest the material, while annotating and highlighting can be accomplished in a much more passive manner.

What should you highlight? Similar to annotating, the best parts of the case to highlight are those that represent the needed information for your brief such as the facts, the issue, the holding and the rationale. Unlike annotating, highlighting provides an effective way to color code, which makes referring to the case even easier. In addition, Highlighters are particularly useful in marking off entire sections by using brackets. These brackets will allow you to color-code the case without highlighting all the text, leaving the most important phrases untouched for a more detailed highlight marking or underlining.

Highlighting is a personal tool, and therefore should be used to the extent that highlighting helps, but should be modified in a way that makes it personally time efficient and beneficial. For instance, you might combine the use of annotations in the margins with the visual benefit of highlighting the relevant text. You may prefer to underline the relevant text with a pencil, but to use a highlighter to bracket off the different sections of a case. Whatever you choose to do, make sure that it works for you, regardless of what others recommend. The techniques in the remainder of this section will describe ways to make full use of your highlighters.

First, buy yourself a set of multi-colored highlighters, with at least four, or perhaps five or six different colors. Yellow, pink, and orange are usually the brightest. Depending on the brand, purple and green can be dark, but still work well. Although blue is a beautiful color, it tends to darken and hide the text. Therefore we recommend that you save blue for the elements that you rarely highlight.

For each different section of the case, choose a color, and use that color only when highlighting the section of the case designated for that color. Consider using yellow for the text that you tend to highlight most frequently. Because yellow is the brightest, you may be inclined to use yellow for the Conclusions in order to make them stand out the most. If you do this, however, you will exhaust your other colors much faster than yellow and this will require that you purchase an entire set of new highlighters when a single color runs out because colors such as green are not sold separately. If instead you choose to use yellow on a more frequently highlighted section such as the Analysis, when it comes time to replace your yellow marker, you will need only to replace your yellow highlighter individually. In the personal experience on one of the authors, the sections of cases that seemed to demand the most highlighter attention were the Facts and the Analysis, while the Issues and Holdings demanded the least. Other Considerations and Procedural History required lots of highlighting in particular cases although not in every case.

Experiment if you must, but try to choose a color scheme early on in the semester and stick with it. That way, when you come back to the first cases of the semester, you will not be confused with multiple color schemes. The basic sections of a case for which you should consider giving a different color are:

- Facts
- Procedural History
- Issue (and questions presented)
- Holding (and conclusions)
- Analysis (rationale)
- Other Considerations (such as dicta)

Not all of these sections demand a separate color. You may find that combining Facts and Procedural History or Issues and Holdings works best. Furthermore, as mentioned above, some sections may not warrant highlighting in every case (e.g., dicta probably do not need to be highlighted unless they are particularly important). If you decide that a single color is all that you need, then stick to one, but if you find yourself highlighting lots of text from many different sections, reconsider the use of at least a few different colors. Highlighters make text stand out, but only when used appropriately. The use of many colors enables you to highlight more text without reducing the highlighter's effectiveness. Three to four colors provides decent color variation without the cumbersomeness of handling too many markers.

Once you are comfortable with your color scheme, determining exactly what to highlight still may be difficult. Similar to knowing what to annotate, experience will perfect your highlighting skills. Be careful not to highlight everything, thus ruining your highlighters' effectiveness; at the same time, do not be afraid to make mistakes.

Now that we have covered the basics of reading, annotating, highlighting, and briefing a case, you are ready to start practicing. Keep the tips and techniques mentioned in this chapter in mind when you tackle the four topics in the remainder of this book. If you have difficultly, refer back to this chapter to help guide you as you master the case method of study and the art of using the common law.