

Briefing Cases & Taking Notes

If you've read anything about law school classes, you've seen references to case briefing – and nearly everyone says you should do it. But lawyers in practice don't "brief" cases, at least not the way law students are told to do it, and many students stop formally briefing cases after their first semester, if not sooner. So what, then, should you do? I'm going to give you advice, but first let me explain *why* you're told to brief cases.

Case briefing is simply a way of taking notes about things you'll need to know later. For classes other than legal writing, your most immediate concern is to be prepared if your professor asks questions about the case in class. But your larger and more important concern is to create an outline of the law covered in the course that you'll use when you study for and take the exam.

In your legal writing course – and as a practicing lawyer – your reasons for taking notes are different. You'll be assessing precisely what the law is in your jurisdiction and how it applies to the facts of a client's case. You'll also need to know how much weight you should give to a particular decision. In some situations, one decision may dictate the outcome of your client's case. In others, it may be just one small piece of an argument about how the law applies.

I have only one hard-and-fast recommendation about taking notes on a case: **Do it yourself.** Resist the temptation to use commercial briefs, the "brief this case" feature in Westlaw, or briefs created by another student. If you take notes yourself, you will understand and remember the case and the underlying law much better than you would if you rely on someone else's work.

With that in mind, I'll start with suggestions on taking notes, and follow with a concise discussion of the different things you could take notes about, and why they matter.

Core Suggestions

1. *When you're reading, take notes on a computer if you can.* Anything you write should become part of your outline for the exam. There's no point in retyping handwritten notes.
2. *Keep your typed notes to the minimum you need.* Writing a complete, formal brief is time-consuming. You have far too much to do during the semester, and not enough time.
3. *Supplement your notes by highlighting or underlining.* In most cases, even if you're reading a digital version of a case, you should be able to highlight material or add notes. If you've

taking notes for a lecture class, highlight things your professor might ask about. If you're taking notes for legal writing, highlight quotes you might want to use in your writing.

4. *If you're reading for a class, supplement your notes with notes from class discussion.* You'll often have a clearer idea of what the law is, and what's important, after class is over.

The Bare Minimum

At a minimum, your notes on a case should include the following:

1. The case name, jurisdiction, court, and year
2. The legal rules applied by the court
3. A bare minimum of facts (a sentence or two) and the court's holding

In more detail, here's what you should note and why. At the end of this file you'll find a sample set of notes for one case.

(1) The case name, jurisdiction, court, and year. For the name, it's enough to note one name: the lead plaintiff for a civil case; the defendant in a criminal case. The court and jurisdiction relate to the weight of the decision. For instance, if you're dealing with NY law, it matters if the case was decided by a NY court, and whether it was an appeals court or trial court. The year is useful because recent decisions carry more weight, and it's less likely the law has changed.

(2) The legal rule(s). First year students often confuse the "holding" of the case and the "rules." The rules are a general statement of law that can be applied to different cases. The holding is the way the court applied the rule to the specific facts of the case.

For each case, there will probably be several rules. For instance, here's the rule for third degree burglary in New York: "A person is guilty of burglary if he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." A second rule provides that burglary is second degree burglary if the building is a "dwelling." A third rule states that a "dwelling" is "a building which is usually occupied by a person lodging therein at night." Finally, a series of cases have developed a test courts will use to decide if a building is "usually occupied."

If you get nothing else from the case, you need to know the rules. On law school exams and in practice, you'll be expected to assess how the rules apply to a particular set of facts. If you include the rules in your notes, you'll focus on the core legal principles you need to analyze an exam question or your client's problem. In addition, you'll learn to state rules precisely, and during classroom discussion you'll have a chance to assess how accurately you've understand the rule.

(3) The holding and key facts. The “holding” is a short statement of how the rule applies to key facts from the case. Keep in mind that holdings are statements, not questions, and that they’re usually written in the present tense. For most cases you can state the holding as a single sentence.

When you write the holding, two points are critical. First, in contrast to the rule, it should be specific to the case (and factually similar cases like it). Second, the holding should be brief, and should focus on how the rule was applied to the most critical facts. Here’s one example, from *People v. Barney*, a NY case dealing with burglary:

Under NY’s burglary statute, a fully-furnished but unoccupied house was a “dwelling” even though the sole occupant died three days before the burglary.

Notice that this holding includes a conclusion – the house was a “dwelling” – along with a few key facts. It’s essential to recognize that there may be no single “correct” version of the holding. In many cases, the holding can be read broadly or narrowly, and you should learn to read a case both ways. (In practice, lawyers often argue whether the holding should be read broadly or narrowly.)

Finally, it’s important to know the difference between a holding and dicta. Dicta consists of comments by the court about what the court might do if the facts were different. Courts decide only the case in front of them: they don’t issue “advisory opinions” about possible future cases. An appeals court’s holding is binding on lower courts. Dicta is not binding, but it is important: it’s a window to the court’s thinking, and a useful guide to what the court might do in future cases.

Other Things You Might Note

Following are other things you might type or highlight, depending on why you’re taking notes.

- 1. The court’s reasoning**
- 2. The procedural history**
- 3. Additional facts**
- 4. Key points from concurring or dissenting opinions**

(1) The court’s reasoning. The court’s reasoning is important for classroom discussion, your legal writing class, and in practice. You should understand *why* the court did what it did, even if you don’t use that information on the exam. We’ll discuss legal reasoning at length in class, but here are some of the things you should think about as you read a case.

- What do key words in the rule mean, and why?
- How do the facts of this case compare to the language of the rule?
- How do the facts of this case compare to the facts of other cases? Which similarities or differences are legally significant, and why?

- What are the public policies behind the rule? How does the result further those policies?
- What might happen if the court reached the opposite result?
- Did the court reject specific arguments by one of the parties? Which ones and why?

During the first weeks of the semester, we'll talk about different types of legal reasoning, including rule-based reasoning, statutory interpretation, analogical reasoning, and policy-based reasoning. As you learn more, it will help you decide which points of reasoning are most important.

(2) The procedural history. This point is short, but it's challenging for first year law students who you haven't studied civil procedure. (It helps to keep a legal dictionary handy.)

Most cases you read will be appellate decisions, and most came to the appeals court in one of three procedural situations. First, some cases were decided by a trial court on a motion to dismiss for failure to state a claim, also known as a "demurrer" or "nonsuit." When ruling on a motion to dismiss, the trial court will assume the allegations in the complaint are true, and will consider this question: If the plaintiff can prove these facts, can the plaintiff win under existing law? If the answer is "no," the court will dismiss the case – there's no point in going further.

Second, some cases were decided on a motion for summary judgment after the parties engaged in discovery. In these cases, the court will look only at facts that are not disputed, and will view them in the light most favorable to the party opposing summary judgment. The court will grant the motion if there are no genuine disputes of material fact *and* the moving party is entitled to judgment as a matter of law. Keep in mind that the point of a trial is to decide factual disputes. If disputed facts don't matter, a trial isn't needed. Motions for summary judgment and motions to dismiss are known as "dispositive" pre-trial motions – they dispose of the case before a trial begins.

Finally, some cases were decided after a trial, and the losing party has argued that the trial court did something wrong before or during the trial. For instance, the losing party may contend that the court admitted evidence the jury should not have considered, or gave the jury incorrect instructions about the law. And in some cases a party has appealed from a court's decision to grant or deny a motion for a directed verdict, or for a judgment notwithstanding the verdict.

The differences are important because they dictate how a court will approach the issue and view the facts of the case on appeal. On a motion for summary judgment, the court will consider only undisputed facts and ask whether a reasonable jury could rule for the party opposing the motion. (If it could, the motion will be denied.) But on a motion to dismiss, the court will assume all facts in the complaint are true, and will not consider whether a jury could decide otherwise.

(3) Additional facts. If you've taken notes on the holding and reasoning, you've already noted the most important facts – they're the facts the court relied on when it reached its decision. In some cases, you may need additional background facts to put the reasoning in context.

(4) Key points from concurring and dissenting opinions. Some cases include concurring or dissenting opinions. A concurring judge agrees with the majority about the outcome but has written a separate opinion. A judge might do this because the judge's reasoning is different from the majority, or because the judge wants to emphasize a point the majority didn't address. A dissenting judge, of course, disagrees with the outcome in the majority's decision.

If a casebook gives you a concurring or dissenting opinion, it's there for a reason. In some cases, it may help you understand the majority decision, or it may tell you how other courts have decided the same issue. In other cases, it may be there because the book's author or other scholars think the dissent represents a better rule or result.

After class, you may decide to ignore concurring and dissenting opinions when you prepare for the exam. But when you're preparing for class, you should note key points of those decisions unless it's clear that your professor isn't going to ask you about them.

What's the Issue?

Finally, professors may ask you about the "issue" in a case, and it's important to understand what they mean. The legal issue is simply whatever the court was asked to decide, and modern decisions usually state the issue clearly. A case may involve multiple issues, but often you'll read the case for one issue, and textbook editors usually delete parts of the decisions they publish.

There's an easy way to think about the issue: **it's the holding restated as a question.** For example, here's the holding from *People v Barney* restated as an issue:

Holding: Under NY's burglary statute, a fully-furnished but unoccupied house was a "dwelling" even though the sole occupant died three days before the burglary.

Issue: Under NY's burglary statute, was a fully-furnished but unoccupied house still a "dwelling" when the sole tenant died three days before the burglary?

A few important points: (1) it's usually good to include a few determinative facts as part of the issue, but don't include too many; (2) don't be too vague; (3) think carefully about which facts you include; and (4) include references to procedure only if they're critical to the issue. Below are three possible ways to state the issue from the decision in *Roberson v. Rochester Folding Box Co.*, which considered whether a company acted illegally by using a recognizable drawing of a woman's face in its advertising without her permission:

- (a) Does the complaint state a cause of action?
- (b) Does New York recognize a common law right of privacy?
- (c) Under New York common law, can a plaintiff recover damages for the unauthorized use of the plaintiff's picture in an advertising campaign?

The first statement (a) is much too vague: you could ask the same question in ANY civil case. The other two are legally correct, but (c) is more specific and more useful. (“B” assumes the reader knows what the “right of privacy” is.) If you’re stuck, try using the following formula:

Under (what law), does (the legal question), when (key facts)?

If you use that formula with *Roberson*, you might get something like this:

Under New York law, **does** a person have a claim for damages **when** a company uses the person’s picture in an advertising campaign without the person’s permission?

As with the holding, there’s no single way to correctly state the issue. Some professors prefer a more general statement; others will ask you to be more specific. Do as they ask. The important thing is to avoid the extremes: you shouldn’t be too broad, or include too many facts.

Final thoughts

If you wrote down everything I’ve discussed, it would make for a very long brief, and would take a fair bit of time. Remember that you’re taking notes for a purpose, and limit your notes to the things you’ll actually need to know.

Sample

To help you understand what’s important, what follows is a set of notes on *People v. Barney*. It’s important to recognize that when you take notes, you’re often reading a case in the context of rules you already know. For this case, for instance, you would already know that: (1) a person is guilty of burglary if they knowingly enter or remain unlawfully in a building with the intent to commit a crime therein, and (2) the penalty for burglary is enhanced if the building is a “dwelling.” The issue, then, is whether this particular building was a “dwelling.”

People v. Barney (NY Court of Appeals 2003)

Rule(s):

(1) For purposes of NY's burglary statute, a building is a "dwelling" if it is "usually occupied by a person lodging therein at night."

(2) To determine whether a building is "usually occupied," courts consider various factors, including whether the building is furnished, whether there are working utilities, the recent past use of the building, whether the occupant intends to return, and whether someone could have slept there at the time of the burglary.

Holding: Under NY's burglary statutes, a fully-furnished but unoccupied house is a "dwelling," even though the sole occupant died three days before the burglary.

Reasoning:

- At the time of the burglary, the house was still fully furnished with working utilities, and the decedent's personal property was still in the house.
- The house was "ordinarily occupied" by the decedent before his death, and it could have been occupied the night of the burglary.
- An occupant's intent to return is a factor, but it's only one factor. The fact that the occupant was dead and didn't intend to return doesn't automatically mean the house isn't a dwelling.
- The court refuses to hold that a house ceases to be a dwelling immediately after the occupant dies; to do so would reduce the criminality of a burglar who tries to exploit the occupant's death, and pose a danger to grieving family members who visit the house.