

4 Briefing Cases

§4.1 Introduction

In law school, the word *brief* can mean either of two things. Within a few months, you will learn how to write an *appellate brief*, which—despite its name—is a large and complex document, written to persuade a court to rule in favor of one’s client.

Another kind of brief is a short analytical outline of a court’s opinion. Students make these outlines to prepare for class, and you are about to write one now. (In law students’ vernacular, you are about to *brief a case*.) The purpose of briefing is to figure out the logic through which the case was decided.

§4.2 How to Brief a Case

Just as no two lawyers share exactly the same thinking and working methods, no two law students brief in precisely the same way. Moreover, you will brief individual cases differently depending on the case’s complexity and the course for which you are reading it.

Think of the briefing method set out below as a starting point. Adapt it as needed to the different sorts of opinions you study, and, as you go along, modify it also to suit the work habits you find most effective in the different classes for which you must prepare.

A brief might include, in outline form, the following items:

1. the title of the case, its date, the name of the court, and the place where the opinion can be found
2. the identities of the parties
3. the procedural history
4. the facts
5. the issue or issues
6. a summary of the arguments made by each side
7. the holding and the rule for which the case stands
8. the court's reasoning
9. the judgment or order the court made as a result of its decision
10. any comments of your own that may be useful but that are not covered by any other category

Each of these categories bears explanation.

1. Title, date, court, location of opinion. This is the easiest part. For *Roberson*, a brief might begin as follows:

Case: *Roberson v. Rochester Folding Box Co.*
 (N.Y. Ct. App. 1902)
 page 29

If you were briefing a case researched in the library, however, you would use the citation (64 N.E. 442) in place of a page number in the text. The point is to identify the place where the opinion can be found.

2. Identities of parties. This requires some thought: how do the identities of the parties frame the controversy? In *Roberson*, for example, you might write:

Parties: P = a person whose picture was used in advertising
 Ds = two companies that used that picture

Should you add that one of the defendants manufactured flour and the other apparently manufactured its packaging? Should you also add that the plaintiff did not consent to the use of her picture in advertising? If you believe those are mere background facts, then you would include them in your brief only if they are needed to make sense out of the story. On the other hand, if you believe that either the nature of the defendants' businesses or the plaintiff's nonconsent is important to the court's reasoning, then you should make sure that your brief records those facts. (Because these are matters of identity as well as events in the story, it really does not matter much whether you add them under "Parties" or under "Facts.")

3. Procedural history. Here list the litigation events that are essential to the decision the court must make. Most published opinions are from

appellate courts, and an appellate procedural history includes the trial court rulings appealed from. In *Roberson*, for example:

Proc. Hist.: P sued to enjoin distribution of the picture and for damages. Ds demurred to complaint. Ct below held complaint stated a cause of action. Ds appealed.

4. Facts. Here write a short narrative limited to the determinative facts and whatever other details are necessary to make sense out of the story. Omit facts that neither are determinative nor are needed to make the story coherent. Do not just repeat the story you read in the case. Isolate and list the facts that the court considered important enough to emphasize.

5. The issue. Define the dispute before the court. Usually, the issue can be framed well in more than one way. But it can also be framed badly in more than one way. These statements of the issue in *Roberson* are technically correct but not very helpful:

Did the complaint state a cause of action?

Did the lower court correctly hold that the complaint stated a cause of action?

The *Roberson* court did have to decide whether the complaint stated a cause of action. But the first example tells us nothing about the real controversy. The second example is better because it is a little more precise. *Roberson* was an appeal, and appeals determine whether lower courts have erred. But we still do not know what all the fuss was about. This is much more helpful:

Issue: Did New York recognize a common law right to privacy?

So is this:

Issue: Could a plaintiff enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use?

These are the important questions that the *Roberson* court answered, and either would be fine in a brief for a law school class. They are the reasons why lawyers, judges, and law students would read the case a century later.

In framing issues, keep the following in mind:

First, refer to the governing rule, and if a particular element of that rule is in controversy, specify the element. You can refer to the rule explicitly ("Did New York at that time recognize a common law right to privacy?") or implicitly ("Could a plaintiff enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use?").

Second, it often helps to allude to enough of the determinative facts to make the issue concrete. The last example above refers to the picture the advertising, and the lack of consent. That is enough here. Do not pack into the issue every one of a long list of determinative facts. Include only the most central ones. But when a court is faced with the question of whether to recognize a rule that it has not recognized before, a perfectly good issue can be framed without reference to facts because the real question—whether to change the law—can be bigger than the parties' facts, even though the facts are a significant part of the court's reasoning. That is why *both* of the last two examples above are good statements of the issue.

Finally, in some cases the procedural posture is important and should be part of the issue. But *Roberson* is not one of them. There, the real issue was whether New York would recognize a particular kind of cause of action. Although the court also had to decide whether a lower court had erred in refusing to dismiss the complaint, adding that aspect to the issue makes it needlessly complicated:

Did the lower court err in overruling the demurrer on the ground that New York should recognize a common law right to privacy?

You will, however, read other cases in which the procedure is important enough that it should be stated in the issue.

6. A summary of the arguments made by each side. Do not go overboard. Record the *essential* points of each side's argument.

7. The holding and the rule. *Holding* and *rule* have overlapping meanings. *The rule of a case, or the rule for which a case stands*, is a principle that can be applied to decide other controversies in the future, like the rules examined in Chapter 2 and in §3.2. When discussing cases (but not statutes), *holding* can mean that, too. Or it can mean, in a narrower sense, the answer to the issue before the court, and often that issue is put in procedural terms.

In *Roberson*, you could say that the holding was that the complaint did not state a cause of action, or that the lower court erred in overruling the demurrer. The rule, of course, would be that New York did not recognize a common law right to privacy, or that in New York at that time a plaintiff had no remedy when someone else used the plaintiff's picture in advertising, even without the plaintiff's consent. And a great many lawyers, when referring to that rule, might call it the holding.

A law school professor who asks you for the holding of a case might want to know the procedural holding, or the rule, or both. Most probably, the professor wants to know the rule, and will be interested in the procedural holding only if the nature of the case makes it important. That is understandable: after all, we read these cases to learn about that rule and for little else.

If your formulation of the issue asks—as in *Roberson*—whether a certain principle is law, it might be enough just to list the issue and its answer:

Issue: Did New York recognize a common law right to privacy?
Holding: No.

That does represent the rule of *Roberson*. There is no need for a separate statement of the rule.

But another statement of the issue might call for a separate statement of the rule. That is particularly true when the issue is expressed with specifics about the facts or the procedure:

Issue: Could a plaintiff enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use?
Holding: No.
Rule: New York did not recognize a common law right to privacy.

Just as we formulated broad and narrow principles from the apartment hypothetical in §3.2, a case's rule can be stated narrowly or broadly, depending on how you conceptualize the determinative facts:

Narrow: At that time, a New York plaintiff could not enjoin and get damages for the use of the plaintiff's picture in advertising where the plaintiff had not consented to that use.
Broad: New York did not recognize a common law right to privacy.

As with the apartment example, the narrow rule would directly govern only a smaller number of future controversies, while the broader formulation will have a wider utility. (The common law right to privacy is not limited to advertising.) Part of a lawyer's creativity is discovering deeper meaning in an opinion by devising several alternative formulations of a rule. The art is to phrase the rule broadly enough that it has a reasonably general applicability, but not so broadly that it exceeds the principle that the court thought it was following. Within these limits, many opinions will afford several different but arguable ways to phrase a particular rule.

Sometimes a court provides a succinct statement of the rule. At other times, the court merely sets out the facts and issue and then, without saying much more, decides for one party or the other. In the first kind of opinion, the court's words provide one—sometimes the only—phrasing of the rule. In the latter, you must construct the rule yourself out of the determinative facts.

8. The court's reasoning. Here summarize the court's thinking, noting both the steps of logic the court went through and the public policies the court thought it was advancing through its decision.

9. Judgment or order. What did the court do as a result of its holding? Usually, it will be enough for you to write "reversed," "affirmed," "motion denied," or whatever judgment or order the court made.

10. Comments. Did the court write any instructive dicta? Do you agree or disagree with the decision? Why? Does the briefed case give you a deeper understanding of other cases you have already studied in the same course? Does material in a concurring or dissenting opinion add to your understanding?

If an opinion resolves several issues, you will need to go through items 5 through 8 separately for each issue. For example, the middle of a brief of a two-issue decision might look something like this:

Issue #1: . . .	arguments: . . .
	holding: . . .
	rule: . . .
	reasoning: . . .
Issue #2: . . .	arguments: . . .
	holding: . . .
	rule: . . .
	reasoning: . . .

Read the entire opinion at least once before beginning to brief. You might work efficiently by making some temporary notes as you read, but you will waste effort if you start structuring your understanding—which is what briefing does—before you are able to see the decision *as a whole*.

A long-winded brief filled with the court's own words is far less useful than a short one in which you have boiled the opinion down to its essence. Briefs are a means, not an end: for you the hard work will be to understand what happened in the case and why, and the brief is only a repository for your analysis. You will waste effort if you spend too much time in writing and too little in thinking. In fact, if you do little more than edit the court's words into a brief, you have probably not understood the case. A better practice is to quote only those words that are truly essential to the case's meaning.

"You brief cases, not to get them right, but as a way of forcing yourself into the thick of things."¹ And "you learn law by struggling with it, not by memorizing it, not by buying commercial outlines."²

§4.2 1. Kenney Hegland, *Introduction to the Study and Practice of Law* 85 (2d ed., West 1995).

2. *Id.* at 58.

Exercise. Briefing Costanza v. Seinfeld

Using the techniques described above, write out a brief of *Costanza v. Seinfeld*.³

COSTANZA v. SEINFELD
181 Misc. 2d 562, 693 N.Y.S.2d 897
(Sup. Ct., N.Y. County 1999)

HAROLD TOMKINS, J.

A person is seeking an enormous sum of money for claims that the New York State courts have rejected for decades. This could be the plot for an episode in a situation comedy. Instead, it is the case brought by plaintiff Michael Costanza who is suing the comedian, Jerry Seinfeld, Larry David (who was the cocreator of the television program "Seinfeld"), the National Broadcasting Company, Inc. and the production companies for \$100 million. He is seeking relief for violation of New York's Civil Rights Law §§ 50 and 51. . . .

The substantive assertions of the complaint are that the defendants used the name and likeness of plaintiff Michael Costanza without his permission, that they invaded his privacy, [and] that he was portrayed in a negative, humiliating light. . . . Plaintiff Michael Costanza asserts that the fictional character of George Costanza in the television program "Seinfeld" is based upon him. In the show, George Costanza is a long-time friend of the lead character, Jerry Seinfeld. He is constantly having problems with poor employment situations, disastrous romantic relationships, conflicts with his parents and general self-absorption.

. . . Plaintiff Michael Costanza points to various similarities between himself and the character George Costanza to bolster his claim that his name and likeness are being appropriated. He claims that, like him, George Costanza is short, fat, bald, that he knew Jerry Seinfeld from college purportedly as the character George Costanza did and they both came from Queens. Plaintiff Michael Costanza asserts that the self-centered nature and unreliability of the character George Costanza are attributed to him and this humiliates him.

The issues in this case come before the court [through] a preanswer motion to dismiss. . . . [P]laintiff Michael Costanza's claims for being placed in a false light and invasion of privacy must be dismissed. They cannot stand because New York law does not and never has allowed a common-law claim for invasion of privacy, *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993); *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985). As the New York Court of Appeals explained,

While legal scholarship has been influential in the development of a tort for intentional infliction of emotional distress, it has had less success in the

3. This case was suggested by Julie Close, together with Grace Tonner, Kenneth Chestek, and Jo Anne Durako.

development of a right to privacy in this State. In a famous law review article written more than a century ago, Samuel Warren and Louis Brandeis advocated a tort for invasion of the right to privacy. . . . Relying in part on this article, Abigail Marie Roberson sued a flour company for using her picture, without consent, in the advertisement of its product (*Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538). Finding a lack of support for the thesis of the Warren-Brandeis study, this Court, in a four to three decision, rejected plaintiff's claim.

The *Roberson* decision was roundly criticized. . . . The Legislature responded by enacting the Nation's first statutory right to privacy (L. 1903, ch. 132), now codified as sections 50 and 51 of the Civil Rights Law. Section 50 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent. . . . Section 50 provides criminal penalties and section 51 a private right of action for damages and injunctive relief.

Howell at 122-123. In New York State, there is [still] no common law right to privacy, *Freihofer v. Hearst Corp.* at 140, and any relief must be sought under the statute.

The court now turns to the assertion that plaintiff Michael Costanza's name and likeness are being appropriated without his written consent. This claim faces several separate obstacles. First, defendants assert that plaintiff Michael Costanza has waived any claim by [personally] appearing on the show. [This defense fails because the] statute clearly provides that written consent is necessary for use of a person's name or likeness, *Kane v. Orange County Publs.*, 232 A.D.2d 526 (2d Dept. 1996). However, defendants note the limited nature of the relief provided by Civil Rights Law §§ 50 and 51. It extends only to the use of a name or likeness for trade or advertising, *Freihofer v. Hearst Corp.*, at 140. The sort of commercial exploitation prohibited and compensable if violated is solicitation for patronage, *Delan v. CBS, Inc.*, 91 A.D.2d 255 (2d Dept. 1983). In a case similar to this lawsuit involving the play "Six Degrees of Separation," it was held that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade,'" *Hampton v. Guare*, 195 A.D.2d 366 (1st Dept. 1993). The *Seinfeld* television program was a fictional comedic presentation. It does not fall within the scope of trade or advertising. . . .

Plaintiff Michael Costanza's claim for violation of Civil Rights Law §§ 50 and 51 must be dismissed. . . .

After briefing a decision, ask yourself how it fits into the subject you are learning. Why did the editor of the casebook include the decision you briefed? What lesson does it teach you about the law? If the preceding decision or decisions involve similar issues, how does the one you have just briefed expand on what you learned from the others? What, for example, did you learn about the right to privacy from *Roberson*, and how does *Costanza* add to that? In other words, step back far enough to see the larger picture.