



Litigation Practice Tip - July 2022

Best Case[s] Scenarios: 12 Tips for Best Use of Opinions in Your Briefs

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A federal magistrate once said to me, during an argument on a motion I thought was a sure winner, “Mr. Rothschild, you have logic, equity, and common sense on your side. But the government arguably has a case on point. In my experience, the case usually wins.” He was right; case law is the lifeblood of litigation. But we don’t often think about how best to use favorable cases or to minimize the impact of unfavorable ones. There are three main reasons for citing opinions: the cited opinion states a legal principle helpful to your case; the cited opinion reaches a result similar to the result you seek in your case on similar facts; or your opponent cited an opinion you need to refute or distinguish.

Citing opinions for legal principles

- *Use short quotes from the cited case rather than merely paraphrasing an important legal principle.*

Quotes have more impact and immediately enhance the credibility of your point, much more than a paraphrase would.^[1] For example, a recent lawsuit challenged on due process grounds an agency’s notices denying emergency rental assistance with little to no explanations. The petitioners’ brief stated:

Simply notifying tenants that they will not receive rental assistance and that they can appeal is not enough. “Notice sufficient to enable a meaningful response is an indispensable element of due process.” *Gresher v. Anderson*, 127 Cal. App. 4th at 109.

The quote made the point more persuasively than any paraphrase might have.

- *Avoid string cites.* Usually, a relevant citation to a single opinion, or at most two, is sufficient to support a proposition. Anything more is unnecessary and interrupts the flow of your argument.
- *Read the whole opinion.* Doing so is necessary to ensure that your quote from the opinion is not out of context. And the opinion might contain language on a separate issue that could cause your side more harm than the quote would do good. For instance, you might not want to cite an opinion supporting your entitlement to an attorneys’ fees award when another portion of the same opinion would support reducing your hourly rate by 70%. In that situation, look for a different helpful opinion.
- *If the legal principle cited is important to your case but the facts in the cited case are substantially different, briefly acknowledge the difference.* For example, a brief arguing that denying the opportunity for oral testimony violates constitutional due process rights quoted a California Supreme Court case emphasizing the importance of such testimony. But it was necessary to note that in the cited case, “the Supreme Court struck down on *statutory* grounds a local court rule that prohibited certain

litigants from providing oral direct testimony.” (Emphasis added.) That minimized the damage the opposing side could have caused with the obvious factual distinction

Citing opinions for their factual holdings

Stating an applicable rule of law, then applying it to your case is necessary, but often insufficient. Your opposing counsel may cite the same rule, then apply it to the case with a plausible opposite conclusion. To seal the deal, search for favorable opinions with facts similar to those in your case. When you find them, here are four tips for best use:

- *Always include the basics: the facts of the cited opinion, its holding, and [when available] its reasoning.* As discussed above, when describing the holding and the reasoning use short quotes for maximum effect.
- *Edit, edit, edit.* Editing is particularly important when describing the facts of the cited case. To keep the reader’s focus on what is important about the cited case, make the summary of the facts as short as possible. Delete usually unnecessary details such as the names of the parties (descriptions such as “the plaintiffs” or “the defendant” are enough); the dates events occurred; and what happened in the lower courts in the cited case.
- *Then explain how the facts in your case command the same result.*
- *Don’t over-sell the cited opinion.* The gold standard, of course, is finding a case directly on point, but that’s very rare.[2] Short of that, you can describe the cited opinion as “illustrative” or words to that effect; or simply report the opinion.

Here is an example from the due process case described earlier:

Gresher is instructive. In *Gresher*, statutes prohibited employment in community care facilities for persons with certain criminal records unless the Department of Social Services[3] granted an exemption. The Department notified affected individuals that it had “received criminal history” about them, and asked the applicants to explain the circumstances of the convictions, along with what they had done to prevent re-occurrences. *Id.* at 104. The Court of Appeal held that these notices were constitutionally deficient because “due process requires the Department to tell individuals what convictions they must address to obtain an exemption.” *Id.* at 110.

By comparison, the notices received here are even less informative than the *Gresher* notices. While the plaintiff in *Gresher* at least knew that the problem was past criminal convictions, tenants in this case are only told that something is wrong with their “information” or “documents,” leaving them completely in the dark. The Court of Appeal’s conclusion that the *Gresher* notices violated due process compels a similar conclusion here.[4]

Dealing with your opponents’ cited opinions

- *Read all the cases your opponent cited, and respond to those that purport to be outcome-dispositive.* Neither page/word limit rules nor the constraints of effective advocacy permit you to respond to every case cited by your opponent. Most are either minor or unimportant. But if the opposing party cites an opinion as commanding an adverse result in your case, you can **never** ignore it. If the opinion is cited as controlling authority, you need to distinguish it. And if it’s from another jurisdiction and cited only as persuasive authority, you should either distinguish it if you can or explain why it’s wrong.
- *Always include the basics in your counterargument:* that your opponents have cited the case (with pin cite to their brief); the facts of the cited opinion; the court’s holding; and why it’s distinguishable.
- *Be candid.* If the opinion really hurts your case, the judge will figure that out. Distinguish it, minimize its importance, or argue that it’s wrongly decided, without insulting the judge’s intelligence or trying the judge’s patience.
- *Be strategic on length of discussion, quotes, and paraphrasing.* Usually it’s best to tersely summarize the facts and holding of the cited adverse opinion. But if there is

language in the opinion that actually helps your case, quote it.

Here is an example:

The Department's reliance on *Bergeron v. Department of Health Services*, 71 Cal. App. 4th 17 (1999) (cited Opp. at 16, 17), is misplaced. In *Bergeron*, the Department of Health Services temporarily withheld payments to a dentist pursuant to a fraud investigation. The Court of Appeal held that due process did not require a detailed explanation of the allegations to justify a temporary withholding of payments to those "believed to be engaged in fraudulent billing practices until there can be a criminal investigation" *Id.* at 27. *Bergeron* bears no relationship to this case, where the deprivation is permanent, not temporary, and is imposed not just on the handful of tenants believed to be engaged in fraud, but on *all* tenants. The interest in fraud prevention does not justify HCD's constitutionally deficient notice.

Citing opinions skillfully, like all legal writing, takes lots of practice. These tips should get you started; exercise these skills as often as you can. If you have any questions, please feel free to reach out to [me](#).

[1] See my litigation practice tip, [The Use of Quotations in Briefs](#) (Nov. 2020).

[2] In the case described in the first paragraph, the government's cited opinion turned out not to be on point. In hindsight, I think the judge knew that, but wanted to make a [then]young attorney squirm a little. That is a federal judge's idea of fun.

[3] Though, as discussed above, it's usually better to skip the names of the parties in the cited opinion, here the name was included because the later quote from the opinion referred to "the Department."

[4] When we say, "edit, edit, edit," we practice what we preach. This paragraph was not copied verbatim from the brief. I recently rewrote the paragraph to improve upon the earlier version. The Editor of these Tips then improved the paragraph with further edits. Readers may judge for themselves the life priorities of people who edit a brief that was already filed on a motion that was already decided.



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