CARTS AND HORSES, OR CIRCLES AND SPIRALS: RAMBLINGS AND RUMINATIONS ON LEGAL RESEARCH

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"Terrific," said Sheila Fischer, inside counsel for Wilmington Slade. John thought, "Great, I sold another one." Driving back to his downtown office at Crud & Dud, John Steinitz suddenly shouted, to no one in particular, "Burma!" That was what John always said to ward off a panic attack. He had gained the idea from an old British comedy show. Now, he seemed to say it more and more often. The immediate cause of this particular ejaculation was his having convinced Sheila to hire his firm for the appeal of a $120 million securities case, even though John knew virtually nothing about securities law. Fortunately for John, the subject of his experience with securities law had not arisen during the interview. Now facing a deadline for postjudgment motions, he needed to learn a lot of law and to learn it fast. How, and where, to begin?

Across town, Bobby Lasker was equally ecstatic. He had just been interviewed by Leroy Lullybup, the infamously hard-nosed general counsel for TweetyBird Feeders. Bobby had prepared for the worst, but it had gone remarkably smoothly. Now Bobby had two weeks in which to prepare posttrial motions in TweetyBird's tortious-interference case against Sylvester & Sons. That seemed like a lifetime, since Bobby knew contracts law as a painter knows turpentine. When he returned to the office, Bobby huddled his team and handed out assignments about specific areas to research.

Meanwhile, in the suburb of Nimzowitsch, Professor Ruy López, the Alek Alekhine Professor of Advanced Applications of Applied Appliance Law at the Capablanca University School of Law, prepared his lecture for new law students about legal research. Professor López fancied himself a pragmatic professor, rather than a theorist. Unlike most of the faculty, he even had once worked as a lawyer in a law firm, Paul & Morphy. While this caused the faculty to dismiss him as a lightweight, his students usually remembered him with warm affection. From teaching introductory legal research for years, Professor López had learned that the hardest thing to convey to his students was the need to treat each project as unique, rather than to succumb to time and billing pressures by applying cookie-cutter molds to their research projects. Yet he also had discovered certain patterns to the structures of legal research. In his own way, therefore, Ruy López was a closet theorist.

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This article addresses the tension between practice and theory. This article addresses the tension between treating each research project on its own terms, yet not running up the bill. This article further addresses the tension between starting with the facts or starting with the law, and between starting with the policies at issue and starting with the authorities. This article also addresses the tension between starting with the big picture or starting with the details. In short, this article . . . Oh, Burma!

To become wise, Grasshopper,
you must first comprehend your own ignorance.

When retained on a new matter or assigned a new project, you need to assess very quickly how much you already know about the subject. The limits of your existing knowledge will tell you what you need to learn. Usually you will not know many of the facts, but you might know a lot of background law. Other times, you won't know much, if anything, about the area of law at issue. These different situations require different approaches. Sometimes, the cart must come before the horse.

With fair knowledge of the background law, you can quickly spot many of the relevant legal issues, narrowing them down as you learn the facts. Your client may have been wise enough to retain you to attend the trial; if so, then you know the facts. Otherwise, you can learn the facts either from debriefing trial counsel, assuming they remain cooperative, or from quickly reviewing the record, assuming it is available. When you already know most of the law and have learned the facts, your initial research can be focused on finding cases with similar facts.

For a traverse through totally new territory, you will want to map the legal boundaries before learning the facts. Otherwise, you will not realize what possible issues are lurking in the case and which facts are relevant to the potential issues. You will probably want to start with general treatises, encyclopedia, articles, or even law-school study guides (yes, practicing lawyers sometimes still use study guides) to educate yourself about that field of the law. Only then will you be able even to spot the issues in the case that will deserve more detailed research. And only then will you be able to debrief trial counsel intelligently, since trial counsel notoriously wander from the subject in a posttrial

debriefing—most likely from an inability to appreciate the largely conclusive effect of the standard of review once the facts have been found.

Determining what you know and do not know may not always be so daunting as it sounds. If you have been retained as appellate counsel after the verdict, usually—though unfortunately not always—the trial counsel will have identified the key issues. You may still need general research to educate yourself and to place those issues in their proper context, but you may not have to spot the issues themselves. Conversely, if you are retained early in the case (as you preferably should be), then you may have to identify the issues from the outset. But in that instance you should have more time to do so than if you are not retained until just before the charge conference—as all too often occurs.

You do not find, Grasshopper,
because you do not know what to seek.

What you are looking for depends on what is at stake. In broad terms, cases can be classified as those that turn on (1) the application of settled law to their facts, (2) the choice between settled legal principles, or (3) the creation or adoption of new legal principles.

Even if not always easy for an appellate lawyer, the first category is usually simple: Everyone agrees about the law; the parties just disagree about the facts. Trials of these cases typically involve pattern jury charges and rely on the talents of trial counsel to persuade the jury that one side's version of the facts is more credible than the other side's.

Successful appeals of these cases usually involve only evidentiary or other procedural rulings that may have skewed the jury's determination of credibility.

The second and third categories are more complex for an appellate lawyer. They implicate the policy considerations behind the legal rules. Many lawyers, however, approach this research backwards. Too many lawyers look for a case stating the rule that they want. When they find it, they cite the authority to the court, naively expecting the cited authority to carry the day. They then express dismay when the appellate court subsequently distinguishes the case. This not infrequently leads to accusations of judicial unpredictability, incompetence, bias, or worse.

We have all heard the expression "that's a distinction without a difference." But few of us have asked the question: Why does one distinction make a difference and another does not? The answer is that one distinction affects the policy values implicated by the rule, and the other distinction does not. The former will make a difference; the latter will not.

The determination whether a particular fact affects a policy value in a case is all too often made implicitly rather than explicitly. Nevertheless, it is the heart of the common-law process. The common law evolves as legal rules are modified in the face of new fact patterns. Two principles usually guide that evolution: (1) a desire to do justice between the parties at bar; and (2) a desire to reach a sensible, pragmatic resolution of the dispute that will likely work for future parties in a similar situation. *See* Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 238 (1960). Sometimes these

two principles are in harmony; sometimes they are in tension. Different judges, moreover, may demonstrate a marked preference for one principle over the other. (When they do, they are said to have a "judicial philosophy.") More commonly, a judge will be influenced more by one principle in one case and the other principle in another case, depending on the judge's "judgment" about the case at bar.

The lesson to take from this discussion is that it may be more important first to identify the policy or value that seems fair between the parties at bar and that will work for similar parties in the future. After you have clearly articulated a workable, fair policy, you will almost always find authority to support it. In blunt terms, if the policy is really that good, the odds are that it has already been enacted by some legislature, adopted by some court, or proposed by some commentator.

Further, even when no authority can be found for that policy, its logic will likely carry the day so long as it is not contravened by binding precedent. When you have the sound and fair policy value in your favor, lesser precedents will be distinguished. And, occasionally, even binding precedents will be overruled in the face of a compelling policy argument to the contrary.

Not to know when enough is enough, Grasshopper, will lead to disaster.

In this era of globalized competition, clients are finally realizing that the commodity of legal services is exchanged through a buyer's market. In other words, the potential supply for legal services generally exceeds the demand, which means clients are

becoming conscious of costs. Few areas of appellate work can cost more than research. To know when to stop legal research, it is again necessary to know which type of case you are handling. It also is necessary to keep track of your results.

With regard to the type of case you are handling, if the case will turn on the facts, then a leading case from your jurisdiction's highest court will often be enough. If the case is ancient, which in this age of judicial turnover and rapid acceleration now seems to be defined as more than 15 years old, you may wish also to cite a more recent authority that follows the binding case. A more recent authority from the forum you are in will usually be the best choice—unless it was controversial in that court.

If your case is one of competing policies, then your research will need to be more extensive. While you will wish to cite authorities from your jurisdiction, it can be helpful to show what the majority of jurisdictions are doing with the issue. Legal treatises, annotations, and law reviews that are directly on point can also be helpful.

When your case is one of first impression in your jurisdiction, then your research must be expanded in scope. Almost anything is fair game—especially authorities from other jurisdictions and even, perhaps, from other nations. Treatises, law reviews, and analogies from other areas of the law can be particularly helpful. Social-science materials, historical records, or other matters that would meet the test for judicial notice could be useful.

It also is necessary to keep track of your results, so that (1) you don't have to duplicate your efforts, and (2) you know when your research is becoming redundant. For both, a research log is a good practice.

A research log has no particular format, though a spreadsheet may be most effective. The important thing is to record the relevant information, such as the style, authoring judge, procedural posture, key issues, material facts, holdings, interesting dicta, and any concurrences and dissents. In the column containing the holdings, I would cite any controlling cases relied upon by the court. A column for your notes about how to use the case or qualifications about it can also be useful. Key language from the cases can be quoted in a separate document or on the spreadsheet itself. With the advent of computerization, however, printouts of copies of cases are neither necessary nor environmentally friendly.

When you keep finding references to the same authorities you have already studied, you can presume that your research is nearing completion. Of course, before the brief is filed or oral argument is presented, you will update your research for any late-breaking developments.

I have not commented on string citations. That is a problem with writing, not with research. Typically your research should have string citations to ensure that your point remains valid with little contradiction. But that does not mean that you should include everything you have found in your written brief. In short, your research should not traverse a circle; it should rise like a spiral.

You will learn, Grasshopper,
that people do not always mean what they say.

Does precedent really matter? In all courts it does, but the degree to which it matters varies from court to court, judge to judge, and case to case. Certainly in theory and usually in practice, *binding* precedent always matters to lower courts. And binding precedent in its guise of stare decisis sometimes matters to the court with the power to overrule it. The importance of persuasive precedents vary. Some lower courts can't wait to latch on to them, while others dismiss persuasive precedents derisively. Usually the reaction depends on a court's sense of the how it believes the present case should be decided and whether the persuasive precedent supports that outcome. The highest court in a jurisdiction usually has little interest in persuasive authorities unless it is facing an issue of first impression. But occasionally an opinion by a legendary judge from another court will be followed.

The importance of dicta is unpredictable. Some courts blindly follow it; some eschew it. Some assert that everything the highest court says is binding, no matter how extraneous to the case at bar. (The author of the opinion that contains the dicta is particularly likely to share this view.) Other courts distinguish between judicial dicta and obiter dicta. The former has some relationship to the case at bar, but is not part of the discussion essential to the holding. The latter are idle judicial musings on any subject that crossed the opinion writer's mind that day. In some courts, however, perspicacious advocates who try to distinguish between obiter and judicial dicta may soon observe a

look of the most profound perplexity on the faces of the judges hearing, or at least pretending to hear, the argument.

Nevertheless, because the quality of the precedent and the type of dicta does matter to some courts, you need to be aware of what type you are finding and using. But in terms of evaluating your case, you will usually be better served by concentrating on an analysis of the policies underlying the authorities and how they will be served or disserved by the case at bar.

Go forth and prosper, Grasshopper, but with humility.

The theme to this article has been to think before you research, provided you have enough background knowledge to be able to think intelligently. If not, then you must research to educate yourself to recognize the policy values implicated in your case. When you understand those values, think hard about what is fair for the parties at bar and pragmatic for similarly situated parties in the future. When you grasp that policy fully, go forth and research to your heart's content—or at least to the extent of your client's budget.