

There's More Than One Way to Bake a Cake: Teaching Rule Synthesis and Proof with Multiple Approaches and Sources

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Rule Synthesis, Explanation and the Value of Multiple Approaches to Drafting Rule Statements

Rule statements in legal writing, both within the formal Legal Research & Writing curriculum and in doctrinal courses, usually follow a common structure: first comes a rule synthesis and then comes a rule explanation. The rule synthesis is an integrated and unified statement of the set of legal rules applicable to a given issue or legal problem, while the rule explanation provides background and detail for the rule synthesis. The rule explanation, for example, may provide information regarding the origin of the legal rules, the policies and principles that undergird the legal rules, defines relevant terms, identifies exceptions or limits to the rules, and includes an overview of relevant criticisms or critiques of the rule. The key to building an effective rule explanation is ensure that the reader has a grasp of three separate primary inquiries about the rule presented in the synthesis:

- What need does this rule address – why do we have this rule?
- How does this rule operate? – what does it do and how does it do it?
- Why has this rule been adopted as opposed to a different one – what is its policy/purpose?

The basic process of crafting a rule statement (synthesis + explanation) is usually taught using an approach that seeks to move the writer from the facts of a given problem all the way to a complete explanation of the relevant law. This approach identifies and requires the writer to work through different types of information that to properly state and explain the relevant legal rules that

apply to a fact-pattern. This process is sequential and consists of the following basic steps:

- Reading the fact-pattern to gain an understanding of the controlling facts.
- Reading through the applicable legal authority that applies to those controlling facts.
- Understanding the applicable legal authority in detail.
- Creating a rule overview that states the applicable rule from each set of legal authorities.
- Building a synthesis from the rule overview.
- Explaining the synthesis to the reader, providing context and validation for the rule.

In most Legal Research & Writing programs this process is introduced to students through assignments based on common law legal problems, rather than problems that deal with statutes and regulations. There are a number of solid reasons why rule synthesis and explanation are introduced using common law authorities:

- During the first year, students spend most of their time reading common law cases.
- Even in courses based on enacted law, those courses are often taught through the lens of case law decided by appellate judges engaging in common law-style legal reasoning.
- Case law provides detail usually lacking in statutory and regulatory texts.
- Dissents and concurrences may provide even more information through critique or alternate identification and application of legal rules.
- As a result, even sparsely-written cases often contain more information about a particular set of legal rules than what is usually encountered in statutory and regulatory codes.

In light of such considerations, using cases to introduce rule synthesis and explanation makes a good deal of sense. The student writer is provided with more detailed information that can be used to develop both the integrated synthesized statement of the rule and the explanation of that

rule. The greater detail found in case law nourishes the novice legal writer with information and context in a relatively focused number of texts.

The problem arises when transitioning from the lush fields of information provided by case law to the less verdant plains of statutory and regulatory law. While enacted codes can provide much clearer statements of rules due to the nature of statutes and regulations, they usually lack the sorts of background detail for legal rules provided in case law. Judicial opinions can and often do serve as outstanding sources of information about a statute or regulation that is the basis of a rule statement. Sometimes legislators or regulators incorporate purpose sections or intent statements in a code to provide background information but such beneficial illumination on the part of legislators and regulations is usually not the norm. Complicating this situation is the inevitable presence of human failing in drafting legal codes. Enacted laws may be incomplete, written in obtuse or opaque language, contradictory or vague in their specifics, the list goes on and on.

This being the case, multiple approaches to drafting rule statements, particularly approaches that take recourse to information providing context and purpose, can be helpful when developing a rule synthesis and explanation addressing a particular set of enacted legal rules. Legislative and regulatory history provide both doctrinal and skills teachers with a set of tools that can be used to assist student writers in improving the level of detail in the rule statements they craft in their work as students and as apprentice legal practitioners. In dusty tomes oft ignored on library shelves, and in little-surfed corners of the internet, contextual information may be found for the differing types of legal sources that legal writers need to use to compile effective rule statements beyond those based entirely on case law. And different types of legal sources – statutes, regulations and local ordinances – require different pathways towards

preparing an accurate rule synthesis supported by an effective explanation of that rule.

The A Note on the Use of Legislative and Regulatory History in Rule Statements

Caution is required when using legislative and regulatory history to improve rule statements, caution by the teacher leading a classroom of students and caution by the writer (be he or she a student or practitioner). The reason for this caution is clear: unless officially adopted by a law-making body, legislative and regulatory history are not themselves sources of law. Much of controversy about using legislative and regulatory history, both within the scholarly literature and within the ranks of the judiciary, has centered on this particular fact regarding the statutory and regulatory record. Legislative and regulatory history may carry persuasive weight, particularly when the meaning of a particular statute or regulation is clouded over with ambiguity or vagueness, but the legislative and regulatory record itself is not a formal part of the law unless that record is adopted by a court in a decision or incorporated by a legislative or regulatory body into the text of an enacted law. Thus a careful teacher and a careful writer must be vigilant against confusing the legislative or regulatory record with the law itself, or confusing the reader regarding the proper relationship of the legislative or regulatory history and the law.

The normal value of legislative and regulatory history functions not in setting forth the law but in providing background as to why the law has been created as it is by the legislature or by an administrative agency. It is this this background function that renders legislative and regulatory history so valuable to the legal analyst, and it is this background that makes it helpful to the legal writer preparing a statement of the law as it applies to a particular case. And at its best, this background information provided by the legislative and regulatory history is highly analogous to the kind of background information found in well-written judicial decisions. As such, the legislative and regulatory history can be helpful to a writer seeking to provide a sense

not only of what a rule says but where the rule comes from and what the rule is seeking to accomplish. Not in a way that would be binding – like if the information was to come directly from an actual source of law – but in a way that is informative and explanatory. It is in this way that legislative and regulatory history can normally serve to provide a sort of texture to the law – not a substitute for its content but as a way of adding depth to its contours.

Legislative History and Rule Statements Based on Statutes

One of the challenges in formulating and proofing a rule that derives from a statute is finding the background information necessary to provide a context to the rule. After all, when providing a rule explanation based on case law, the facts and reasoning underlying the rule may be easily ascertained by just reading the case. As a result, rule synthesis and explanation based on case law is often drafted using a fairly consistent pattern: 1) an overview of the facts of the case; 2) a summary of the holding and key rule formulation from the case; and 3) a discussion of the court's reasoning in support of the holding. With statutes, things work a bit differently. The facts and/or reasoning that serve as the basis of a statutory text are rarely provided in the statute. There are several strategies for rule formulation that seek to meet this challenge using legislative history to provide necessary detail and context.

To craft a rule synthesis and explanation for a statutory rule, one strategy is to look at the formal legislative history to try to fill in the contextual information that is critical in a fully developed rule statement. By looking at legislative history, the writer may be able to find indications of the facts that inspired a particular law, and/or and the reasoning that ground legislative gristle into statutory sausage. By looking at the statutory text along with information found in the legislative history, an approximation of the rich detail available from case law may be discerned. The purpose of the statute, the events that may have brought the subject of the

statute to the legislature's attention, considerations involving the proper legislative response to an identified problem, and the like all can be discerned if the legislature has compiled an extensive record of its deliberations in regard to the statute being discussed.

This process is made all the easier by the growing amount of legislative history materials that are available on the internet at no cost other than that of a computer with internet access. For example, the Washington State Legislature is now including on its official website not only official reports from each house of the legislature on particular bills, but the committee reports as well. The Library of Congress, through the Thomas.gov webpage, is providing even more detailed information, updating and expanding the collection of materials available on that website regularly. If a writer has access to a decently stocked law library, then there are numerous print resources available that can provide an enormous volume of information regarding statutory background and policy. For example:

- Federal print resources: USCCAN, CIS, Committee Reports on microfiche, the Congressional Record in print and on microfilm.
- Washington State print resources: House of Representative and Senate Journals.

In some instances, the legislative body may codify portions of the legislative history directly into the statute, giving those provisions the force of law. For example, Congress may include a set of findings within a statute, or a state legislature may include a purpose or intent statement in a statute. In these instances, the statutory text itself may contain sufficient codified legislative history without recourse outside the statutory code itself. This can be a particularly useful strategy for a writer to pursue if there is little or no published legislative history regarding a given statute or if the legislative history simply is not available. Look for a purpose and findings section at the beginning of the statute, along with a section that provides definitions,

when constructing a proof using the statutory text itself as the basis for the proof's information.

Textual legislative history can also be invaluable when explaining a rule based on statutes. Such textual history permits a researcher and writer to track the development of a statute over time, explaining how the statute has been revised or amended can provide a detailed evolutionary picture of a statutory scheme's development. The textual history of federal statutes can be tracked through the federal Statutes at Large, either online or in print. The individual states also publish analogous collections of their own state statutes; in Washington this is known as the Laws of Washington.

Case law can also be a rich source of information regarding statutes and legislative history. A court may have already done the heavy lifting in regard to assembling and discussing relevant background material interpreting and applying a particular statute or statutory scheme. In such an instance, a writer has the benefit not only of having an already-assembled presentation of what might be difficult or time-consuming to find legislative history provided by the court, a writer also has the benefit of a judicially-sanctioned overview of the relevant legislative history. At the same time, a writer should be cautious about accepting a court's overview of legislative history as exhaustive – the court may have overlooked something in the legislative record that might be helpful in understanding what a particular statute does or requires, or the court may have deliberately disregarded a critical part of the legislative record in its analysis. Judicial interpretations of legislative history should be acknowledged and where adopted by a court as binding, noted as such when explaining a rule. Nevertheless, to avoid a truncated or inaccurate view of the legislative record a prudent writer will look beyond judicially acknowledged legislative history to the actual record compiled by the legislature, if record is available.

Rule Synthesis and Explanation With a Regulation

Synthesizing and explaining a rule using a regulation is similar to formulating a rule statement using statutory sources. Generally, a rule statement based on regulations will include information taken from: 1) the appropriate regulatory code (federal or state); 2) the enabling act or similar statutory text providing the authority for or limitations on the regulation; and 3) any case law interpreting or applying the regulation. As with rule statements formulated primarily from statutory sources, regulatory history can come into play in both the synthesis and the rule explanation as a source of context and background.

The use of regulatory history in formulating a rule statement may be particularly helpful for the simple reason that it is common to find a dearth of case law discussing regulations. In many instances regulations and statutes govern an entire area of law, with little or no applicable case law. In such an instance, a legal writer has no choice but to synthesize and explain the law with the sources that he or she has at hand. In such a situation, the information contained in the regulatory record is invaluable to a researcher who is seeking to understand and convey to a reader the origin, policy and practical considerations underlying the governing regulatory provisions. Fortunately, the regulatory records at both the state and federal level contain abundant information for a writer working on either stating or explaining a rule that arises out of regulatory information. Consequently, when working with the regulatory history, there usually is little difficulty in discerning the mechanism by which a particular regulatory provision operates, the reasoning and policy that undergirds the regulation, and the broader statutory authorization that provides the regulation with its legal authority.

The best source of background information about a regulation is the applicable register for a given jurisdiction, e.g., the Washington State Register, the Federal Register, etc. The register will contain information analogous to the legislative history for a statute. Looking

through the relevant material in the register can provide a considerable amount of detail about a given regulation: its background, the reason why the regulation has been drafted, the policy behind the regulation, the regulation's purpose, etc. Contact information can often be found as well, providing a person within a given government agency who is tasked with answering inquiries about a particular regulatory scheme. Textual history, which as with statutes can be helpful in explaining any revisions or alterations in the regulation from either its proposed form or earlier enacted forms of the regulation, can be tracked through the applicable register.

Rule Synthesis and Explanation with Local Ordinances

Moving from statutes and regulations, each with its own increasingly-available record to mine for background detail, to local ordinances can be something like moving back in time as far as the research sources available as concerned. While the ordinances for a local government are almost always available online nowadays, the background information to those ordinances – precisely the information that makes legislative and regulatory history so valuable to the legal writer – is often not. Major metropolitan areas may have records available online detailing the textual and substantive history of a particular ordinance, but such information is difficult to find for ordinances for smaller cities and counties. In this context, strategies for drafting effective rule statements must be largely textual in nature, gleaning as much context as possible from the applicable ordinances and any administrative or judicial decisions that have addressed their underlying context, purpose and function. When an extensive background record to an ordinance is available, the same basic strategies that can be used when using legislative or regulatory history are available.

Conclusion

Rule synthesis and explanation are critical components of legal writing, both within the

legal writing curriculum and within the broader curriculum of any law school. When faced with a situation where the background and context of a set of enacted laws is only sparsely known, teachers can improve their students' composition of rule statements by working with the students to incorporate multiple tactics in drafting rule statements. The use of legislative and regulatory history, as well as analogous background material for local ordinances when available, can provide a very effective approach to providing sufficient background information to produce more complete overviews of applicable law. The legislative and regulatory record can provide information analogous to that found within case law to assist in a writer in providing a sufficiently detailed overview of the law applicable to a given problem. In so doing, the basic structure and pattern of a rule statement (synthesis + explanation) can be followed with little difficulty and with a great deal of awareness of the deeper context in which enacted law develops. Given the less contextually rich nature of statutes, regulations and ordinances, it can be helpful to expand the scope of information used to understand and explain those enacted legal sources when available, always keeping in mind that the normal role of the record of an enacted law is to explain the law, not serve as a substitute for it.