WHAT USE ARE LAW REVIEWS ANYWAY?

A CONVERSATION WITH JUDGE MITCHELL S. GOLDBERG*

Judge Mitchell S. Goldberg is a judge on the U.S. District Court for the Eastern District of Pennsylvania. The Temple Law Review *presented him with a series of questions regarding the ways he uses or does not use law reviews. Below are the questions and answers.*

I. THE UTILITY OF LAW REVIEW ARTICLES

As a federal district court judge, are law review articles useful to you?

Unfortunately, the volume of cases and fast-paced nature of my docket (both criminal and civil) do not always allow for significant time to be spent with law review articles. I recently heard a colleague on the Third Circuit metaphorically compare the work of a federal district court judge to the famous candy scene in *I Love Lucy*. In that scene, Lucille Ball and Vivian Vance (Ethel) are on a factory conveyer line and fall hopelessly behind in their assigned task—wrapping candy.[1] Chaos ensues and as more work piles up, Lucy and Ethel have to eat the unwrapped candy to hide it from their supervisor.[2]

It is true that, as a trial judge, I have less time to ponder legal issues than my colleagues on the court of appeals, and this includes poring over law review articles. The scene from *I Love Lucy* can become a reality when a district court judge presides over a protracted, multiparty trial, while back in chambers voluminous discovery disputes and civil motions—the candy—continue to come down the conveyer belt.

There are, however, occasions where the law is undeveloped or the facts so unusual that consulting law review articles or treatises is beneficial. I discuss one such example below. But, as I mentioned, the nature of my work makes consulting lengthy law review articles difficult or, truth be told, impractical. And, in any event, the precedential road map is often laid out for the district court judge by the Supreme Court or the controlling Circuit.

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1. *I Love Lucy: Job Switching* (Desilu Productions television broadcast Sept. 15, 1952).

2. *Id.*

When was the last time you referenced a law review article to help analyze or dispose of a case? Can you describe the case? Can you describe the problem you were looking to solve?

I recently relied upon several law review articles to better understand a complex, nuanced, and somewhat new area of the law involving patent and antitrust principles. Because a part of the case is still ongoing I have to be a somewhat general here, but the litigation concerns what are referred to as "reverse payment settlements" in a Hatch-Waxman patent case,[3] which can give rise to a Sherman Act antitrust cause of action.[4] This type of case is now also known as an *Actavis* case.[5]

A reverse payment settlement claim arises when brand-name and generic pharmaceutical companies settle a patent dispute whereby the patent holder (the brand) pays the accused infringer (the generic) substantial sums of money that, according to the antitrust plaintiffs, only serves to keep the generic drug off the market.[6] The antitrust plaintiffs (typically direct and indirect purchasers of the brand-name drug in question) assert that such payments are illegal as the agreement requiring the generic company to keep its product off the market for a set period of time impermissibly extends the life of the patent and thus amounts to an agreement not to compete, a violation of the antitrust laws.[7] The settling parties in the patent case, who are the defendants in the antitrust case, usually respond that the settlement is nothing more than a procompetitive, patent litigation settlement.[8] The U.S. Supreme Court recently weighed in on this issue and provided some guidance on how to structure these cases.[9] To my knowledge, only two reverse payment settlement cases have ever gone to trial: one before the Honorable William Young in Boston[10] and the other before me last summer.[11]

3. Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 152 (2013) ("In reverse payment settlements, . . . a party with no claim for damages . . . walks away with money simply so it will stay away from the patentee's market."). Hatch-Waxman cases interpret the provisions of the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98–417, 98 Stat. 1585 (codified in scattered sections of 21 U.S.C. and 35 U.S.C.), which is commonly referred to as the Hatch-Waxman Act. 14A DONALD S. CHISUM, CHISUM ON PATENTS § 5673, LEXIS (database updated Dec. 2017).

4. *Actavis*, 570 U.S. at 140–41.

5. *See, e.g.*, *In re* Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 667 (D. Conn. 2016) ("The more significant issue in an *Actavis* case like this one is not whether the patented drug was sold at a supracompetitive price but whether that price was *lawfully* supracompetitive because the drug was under the protection of a patent the expected life of which was not unlawfully extended by a large and unjustified reverse payment settlement.").

6. *See Actavis*, 570 U.S. at 140–41.

7. *See, e.g.*, *id.* at 147.

8. *See id.* at 156.

9. *Id.* at 153–59.

10. *In re* Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107, 110 (D. Mass. 2015) ("I did not try this case very well."), *aff'd*, 842 F.3d 34 (1st Cir. 2016), *reh'g denied*, 845 F.3d 470 (1st Cir. 2017).

11. King Drug Co. of Florence v. Cephalon, Inc., No. 2:06-cv-1797, 2017 WL 3705715, at *1 (E.D. Pa. Aug. 28, 2017).

My sense is that for purposes of understanding newer, complex areas of the law, like how the patent and antitrust laws interact in an *Actavis* case, law review articles can be very useful. Indeed, I relied on several law review articles and treatises to gain the deeper understanding of patent law and antitrust law that was needed to effectively manage and preside over this type of case.[12]

One hundred twenty years ago, Holmes said "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[13] *Holmes, thus, put you—the trial judge—at the center of the legal universe. Is that still true today?*

I think the Justices on the Supreme Court would probably quibble over the premise of your question, which is that district court judges are "at the center of the legal universe."[14] In a great majority of the cases that are on a federal district court's docket, the controlling precedent is fairly clear. There are, however, some instances where district court judges get the first crack at novel legal disputes, and that's always an exciting opportunity.

For instance, I was the district court judge in the case of *Conestoga Wood Specialties Corp. v. Sebelius*,[15] the companion case to *Burwell v. Hobby Lobby Stores, Inc.*[16] *Hobby Lobby* argued that the Religious Freedom Restoration Act (RFRA) allowed it (a for-profit business) to opt out of the Affordable Care Act's requirement that employer health plans include coverage for contraceptive care.[17] If my memory is correct, my clerks and I reviewed certain law review articles in preparing our opinion that analyzed RFRA and related First Amendment cases.

By way of another example of where a district court judge could set precedent, my colleague, the Honorable Wendy Beetlestone, recently issued an opinion that may reach the Supreme Court, depending on how the Third Circuit and other circuits deal with the issue. Judge Beetlestone's opinion, in the case of *Pennsylvania v. Trump*,[18] concerned whether federal agencies may permit employers to opt out of the Affordable Care Act's contraceptive mandate based

12. For instance, *Rutgers University Law Review* recently devoted almost an entire issue to drug patent settlements after the *Actavis* ruling, and several antitrust and patent scholars contributed articles. *See* Symposium, *Drug Patent Settlements After* Actavis, 67 RUTGERS U. L. REV. 543 (2015). Antitrust treatises authored by Phillip E. Areeda & Herbert Hovenkamp were also extensively consulted to assist with my understanding of antitrust law. *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW (4th ed. 2013 & Supp. 2015); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (4th ed. 2011).

13. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

14. *Id.*

15. 917 F. Supp. 2d 394 (E.D. Pa.), *aff'd sub nom.* Conestoga Woods Specialties Corp. v. Sec'y of U.S. Dept. of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

16. 134 S. Ct. 2751 (2014).

17. *See Hobby Lobby*, 134 S. Ct. at 2759–60.

18. 281 F. Supp. 3d 553 (E.D. Pa. 2017), *appeal filed*, No. 17-3752 (3d Cir. Dec. 21, 2017).

on a sincerely held religious belief or a "moral" objection.[19]

But, truthfully, precedent-setting opportunities are rare for trial judges. The law is settled in most of legal disputes that come across my desk. To the extent that any judge does make policy, I would argue (with ample support) that the Supreme Court Justices obviously have the greatest opportunities. My humble opinion? Good trial judges should avoid making policy, leaving that work to elected officials, and when needed, interpretation of the law should be undertaken by the appellate courts.

The Holmes piece did remind me, though, that people come to the courthouse with tremendous problems, oftentimes life changing. As a district court judge, I am given the awesome responsibility of trying to untangle and resolve disputes on "the front line." I think it is for this reason that most federal magistrate judges love their job so much—they truly get the greatest latitude to problem solve, often interacting with the parties, during the mediation process.

From your perspective, how have law reviews changed during your career? What role did law reviews play when you were a law student and early on in your career?

When I graduated from Temple Law School in 1986, for better or for worse, I had tunnel vision and wanted to immediately get into a courtroom, either through the Philadelphia District Attorney's or the Public Defender's Office. At that time, being on law review was not viewed as a necessary credential to get a job in either of those offices. With that mindset, I frankly never thoroughly considered writing onto law review. In retrospect, I now realize that that decision was a bit shortsighted because the law review experience provides significant opportunities to hone writing skills.

In my first few years as a lawyer, working in the Philadelphia DA's office, law review played no role in the somewhat rough and tumble trial waiver and violent crime jury programs at City Hall. The volume of cases was so great and the pace so hectic that there often was no time for lawyers and judges to engage in any type of in-depth legal analysis.

The same principles also held true, maybe to a lesser extent, when I worked at Cozen O'Connor, a high-pressure, fast-paced law firm atmosphere. At least in my experience, unless a case had considerable exposure or presented a novel issue, billing a client for the extensive time it would take to pore over law review articles was frowned upon.

II. THE STUDENT LAW REVIEW PROJECT

In your view, what have been the successes or failures of the student law review project? What are your thoughts on whether articles should be reviewed by professors or law review student members?

My sense is that the law review experience slightly misses the mark in that it

19. *Trump*, 281 F. Supp. 3d at 560.

instills a "more is better" writing philosophy. My quick view on legal writing is this: Less is better! My favorite quote about effective writing, which surely applies to legal writing, is from Mark Twain, who said, "I didn't have time to write you a short letter, so I wrote a long one instead."[20]

Busy decision makers necessarily have short attention spans. Maybe it's time to rethink the heavy, three-hundred-footnote law review article as a model for good legal writing. Practically speaking, judges do not have time to read lengthy, heavily-footnoted briefs, and busy lawyers do not have time to produce that kind of writing in practice, nor are clients typically willing to pay for such work.

Your second question asked who is best suited to edit law review work, professors or law review student staff. Professors, who hopefully have practiced law, understand the concept of practical writing better than law students and, consequently, my feeling is that professors should be frontline editors.

What are your thoughts about student-run law reviews as training grounds for future law clerks and lawyers?

I know that some of my colleagues in the Eastern District of Pennsylvania will only hire law clerks that are on law review from Ivy League-type schools. This is not my model, and I think the trend now is to hire law clerks that have practiced law for a few years. Generally, I have found that some type of experience in the legal field better equips an individual to serve as a district court law clerk than a law review experience. This is not to say that some clerks that have come right out of law school and served on their law review have not been outstanding. At the risk of sounding old, law clerks are very much like children: they all have strengths and weaknesses, but you love each of them like family.

III. IMPROVING LAW REVIEWS

When you were a student at Temple Law, you were on the inaugural trial team but did not write on for law review. Do you have any second thoughts about either path? Do you see any overlap in the skill set learned from either experience?

Most of the practice of law is centered on advocating for a client. To the extent that law review teaches good writing and trial team teaches good courtroom advocacy, then the two are comparable. In some ways writing skills can be more beneficial to a client than courtroom skills because most cases never see a courtroom. To me, the best lawyer is someone who can write a concise, understandable brief and then persuasively argue that position in a courtroom.

20. This adage is often attributed to Mark Twain. *E.g.*, Alejandro Jenkins, *Who Wrote the Quote "If I Had More Time, I Would Have Written You a Shorter Letter."?*, QUORA (May 18, 2017), http://www.quora.com/Who-wrote-the-quote-If-I-had-more-time-I-would-have-written-you-a-shorter-letter [perma: http://perma.cc/C8V6-TUCJ]. But it more likely comes from Blaise Pascal. *See* Blaise Pascal, *Letter 16 from Blaise Pascal to Reverend Fathers of the Society of Jesus (Dec. 4, 1656)*, *in* LES PROVINCIALES, OR, THE MYSTERY OF JESUITISME 267, 292 (2d rev. ed. 1658) ("I had not made this longer then [sic] the rest, but that I had not the leisure to make it shorter then it is.").

My best lesson from the Temple Law School trial program and its founder, the late Professor Eddie Ohlbaum, was not so much about courtroom technique, but rather hard work and preparation. Many lawyers are good writers, some are good on their feet, but what Eddie Ohlbaum taught me is that the best advocacy is achieved through meticulous preparation. I would posit that the same theory applies to being a good judge, at any level—trial or appellate.

Jessie Shields, a 2016 graduate of Temple Law and a member of the law review, published as her Comment a "guide" that asked and answered several questions concerning partial verdicts and partial verdict instructions.[21] *What do you think about scholarship published in that form?*

I think Shields's Comment is terrific. She writes, "By summarizing existing case law and offering a practical guide of best practices—in the form of *A Series of Practical Questions Answered*—this Comment seeks to advise district court judges on the appropriateness of issuing partial verdict instructions and receiving partial verdicts."[22] Shields's piece is practical because partial verdicts do occur, especially in complex, multidefendant criminal matters. The Comment is useful because it offers solutions. This is a great example of a scholarly piece that could be used as guidance for both judges and lawyers.

How can law reviews better assist federal judges and practitioners?

If law review organizations want to be more relevant in the actual practice of law they need to select topics that are more practical, align better with how law is actually practiced, and be far less verbose. Judge Timothy Rice's piece for the *Temple Law Review @ 90* concisely makes this point.[23]

21. Jessie D. Shields, Comment, *On the Subject of Partial Verdicts: A Series of Practical Questions Answered for District Court Judges*, 88 TEMP. L. REV. 579 (2016).

22. *Id.* at 582.

23. *See* Timothy R. Rice, *A Missed Opportunity*, 90 TEMP. L. REV. S15 (2018).