LAWYERING SKILLS AND STRATEGIES I
SECTIONS A-4 AND C-4

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CLASS ONE (8/29/2013)

Topic: Sources of Legal Authority

Class Preparation:

- Read chapter 2 from the *Coughlin* textbook
- Review the primary authorities table written by *Wren*
- You may choose to read (i.e., this is optional) "Basic Concepts of American Jurisprudence" by *Fine*

Assignment Due: Weight of Authority Assignment

CLASS TWO (8/30/2013)

Topic: Deconstructing Judicial Opinions

Class Preparation:

- Read Chapter 3 from the *Coughlin* textbook
- Read "How to Brief a Case"
- Read "How to Read a Legal Opinion" by *Kerr*

Assignment Due: Case Brief Assignment

CHRISTOPHER G. WREN & JILL ROBINSON WREN, *Primary Authorities: When and Where Mandatory or Persuasive, in* THE LEGAL RESEARCH MANUAL: A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS 43-44 (2d ed. 1986).

Type of Primary Authority	When and Where Mandatory	When and Where Persuasive
U.S. Constitution	Always mandatory on all federal and state courts	N/A
U.S. Supreme Court decision interpreting and applying federal law	Always mandatory on all federal and state courts	N/A
Federal statute*	Always mandatory on all federal and state courts	N/A
Federal administrative regulation**	Always mandatory on all federal and state courts	N/A
U.S. Court of Appeals decision interpreting and applying federal law	Always mandatory on federal courts within the jurisdictional boundaries of the Court of Appeals issuing the decision	May be regarded as persuasive by federal and state courts that do not need to treat the decision as mandatory
U.S. District Court decision interpreting and applying federal law	Always mandatory on specialized lower federal courts, if any, within the jurisdictional boundaries of the District Court issuing the decision and over which the District Court has appellate jurisdiction	May be regarded as persuasive by federal and state courts that do not need to treat the decision as mandatory
State constitution***	Always mandatory on all state courts within the given state	N/A
Decision of a state's highest court interpreting and applying that state's law***	Always mandatory on all lower state courts within the given state	May be regarded as persuasive by federal and state courts that do not need to treat the decision as mandatory
Decision of a state's intermediate appellate court interpreting and applying that state's law***	Always mandatory on all lower state courts within the jurisdictional boundaries of the intermediate appellate court issuing the decision; in some states, may also be mandatory on lower state courts outside those jurisdictional boundaries	May be regarded as persuasive by federal and state courts that do not need to treat the decision as mandatory
State statute†	Always mandatory on all state courts within the given state	N/A
State administrative regulation††	Always mandatory on all state courts within the given state	N/A

(continues on p. 44)

The additional comments in the following footnotes bear only on the validity of the authority, *not* on its mandatory or persuasive character:

* Assuming there is no conflict with the U.S. Constitution
** Assuming there is no conflict with the U.S. Constitution or a federal statute
*** Assuming there is no conflict with the U.S. Constitution, a federal statute, or federal administrative law
† Assuming there is no conflict with the U.S. Constitution, a federal statute, federal administrative law, or that state's constitution
†† Assuming there is no conflict with the U.S. Constitution, a federal statute, federal administrative law, that state's constitution, or any of that state's statutes

Figure P. Primary Authorities: When and Where Mandatory or Persuasive

(continued from p. 43)

Note. Figure P summarizes when specific kinds of primary authorities are considered mandatory or only persuasive in judicial decision-making. Two scenarios, however, need some further elaboration.

- First, *the law of a state may at times be mandatory on federal courts.* Frequently, a federal court has to interpret, apply, or enforce the law of a particular state. On those occasions, the federal court must accept, as the starting point for its analysis, the state's interpretation of its own law. The federal court always remains free, however, to determine whether the state's interpretation violates federal law in any respect. In other words, the question of what a state's interpretation of its law is and the question of whether that interpretation is itself consistent with federal law are separate and distinct issues.

  For instance, suppose a federal court is called upon to prohibit a state from enforcing one of its statutes because someone claims it violates his or her rights under the U.S. Constitution. Suppose also that the meaning of the state statute is not immediately clear from its language. Before the federal court can evaluate the statute's constitutional validity, it will need to know how the state has actually interpreted and applied the statute. For that information, the federal court will generally look to—and consider as mandatory—decisions from that state's appellate courts that have explained what the statute means. The federal court will then review that interpretation to determine whether the statute *as interpreted by the state courts* is constitutional.

- As a second point regarding when primary authorities are mandatory or persuasive, note that *the U.S. Supreme Court is the only federal court whose decisions on points of federal law are mandatory on state courts.* As far as state courts are concerned, interpretations of federal law made by U.S. Courts of Appeals or U.S. District Courts operate only as persuasive authority. Thus, for example, an Illinois state court would not have to follow the federal law interpretations issued by a federal court located in Illinois, though the Illinois state court would have to follow U.S. Supreme Court decisions interpreting federal law. *See, e.g., United States ex rel. Meyer v. Weil,* 458 F.2d 1068, 1070 (7th Cir. 1972); *United States ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075–76 (7th Cir. 1970), *cert. denied,* 402 U.S. 983 (1971); *Owsley v. Peyton,* 352 F.2d 804 (4th Cir. 1965); *Seatec International, Ltd. v. Secretary of the Treasury,* 525 F. Supp. 980, 982 (D.P.R. 1981); *Woodall v. Keller,* 337 F. Supp. 595, 600 (D. Md. 1972).

  As a practical matter, however, a state court will frequently follow lower federal court decisions on issues of federal law, such as how a particular federal statute should be interpreted. In general, a state court is most apt to adhere to lower federal court decisions on matters of federal law when the decisions have been rendered either by a U.S. District Court located within the state's geographic boundaries or by a U.S. Court of Appeals whose judicial circuit encompasses the state. (Recall that Chapter 1, "Sources of the Law," describes the geographical organization of the federal court system. See pp. 7–10.)

Figure P. Primary Authorities: When and Where Mandatory or Persuasive (continued)

Toni M. Fine, American Legal Systems: A Resource and Reference Guide 1-27 (1997), copied for educational purposes only.

CHAPTER I

BASIC CONCEPTS OF AMERICAN JURISPRUDENCE

A. Summary of Basic American Legal Principles

What follows are some of the fundamental principles that comprise the American legal system. Each of these is discussed in greater detail in this and other chapters of this book. They are summarized below in order to give the reader an overview of some of the basics of American common law.

1. Impact of Precedent—The Principle of *Stare Decisis*

The defining principle of common law[1] is the requirement that courts follow decisions of higher level courts within the same jurisdiction. It is from this legacy of *stare decisis* that a somewhat predictable, consistent body of law has emerged. See Chapters I.F. and II.G.

2. Court Hierarchy

Court level or hierarchy defines to a great degree the extent to which a decision by one court will have a binding effect on another court. The federal court system, for instance, is based on a three-tiered structure, in which the United States District Courts are the trial-level courts; the United States Court of Appeals is the first level court of appeal; and the United States Supreme Court is the final arbiter of the law. See Chapters I.F., I.G., I.H., II.G.1.

3. Jurisdiction

The term "jurisdiction" has two important meanings in American law. One meaning of "jurisdiction" refers to the formal power of a court to exercise judicial authority over a particular matter. Although the term most often is used in connection with the jurisdiction of a court over particular matters, one may also speak of matters being within or beyond the jurisdiction of any other governmental entity. See Chapters I.C.2., I.F., and I.H.1., 2., and 3.

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[1] See Chapter I.B. for a discussion of the term "common law."

Second, the federal court system is based on a system of "jurisdictions," the geographic distribution of courts of particular levels. For instance, while there is only one Supreme Court, the court of appeals is divided into 13 circuits, and there are 94 district courts. See Chapter I.H.3. In addition, each state court system comprises its own "jurisdiction." As indicated above, the jurisdiction in which a case arose will determine which courts' decisions will be binding precedents. See Chapter I.F.

4. Mandatory/Binding versus Persuasive Authority

Some of the various sources of law that will be examined are considered to be "mandatory" or "binding," while other sources are considered to be merely "persuasive." See Chapter I.G. Indeed, a court may completely disregard precedent that is not binding (*i.e.*, not even consider it to be persuasive). The issue of whether authority is mandatory or persuasive relates directly to the application of *stare decisis* principles. See Chapter I.F.3.

5. Primary versus Secondary Authority

The various sources of law may also be broken down into primary and secondary sources of law. Primary sources of law may be mandatory on a particular court, or they may be merely persuasive. Whether they are binding or persuasive will depend on various factors.

Secondary authority is not itself law, and is *never* mandatory authority. A court may, however, look towards secondary sources of law for guidance as to how to resolve a particular issue. See Chapters I.G., II.B. Secondary authority is also useful as a case finding tool and for general information about a particular issue. See Chapters I.E., 1b. and 2.

6. Dual Court Systems

The American legal system is based on a system of federalism, or decentralization. While the national or "federal" government itself possesses significant powers, the individual states retain powers not specifically enumerated as exclusively federal. Most states have court systems which mirror that of the federal court system. See Chapter I.H.

7. Interrelationship Among Various Sources of Law

One of the more complex notions of American jurisprudence is the extent to which the various sources of law, from both the state and federal systems, interrelate with one another. There is a complex set of rules that defines the relative priority among various sources of law and between the state and federal systems. See Chapters I.H. and I.

B. What Is Common Law?

The term "common law" evokes confusion and uncertainty—which is no surprise given its duality of meaning. The term "common law" may refer to any of the following:

1. Common Law as Differentiated from Civil Law

The American system is a "common law" system, which relies heavily on court precedent in formal adjudications. In our common law system, even when a statute is at issue, judicial determinations in earlier court cases are extremely critical to the court's resolution of the matter before it. See Chapter I.I.3.

Civil law systems[2] rely less on court precedent and more on codes, which explicitly provide rules of decision for many specific disputes. When a judge needs to go beyond the letter of a code in disposing of a dispute, the judge's resolution will not become binding or perhaps even relevant in subsequent determinations involving other parties.

2. Case Law

Common law may refer to "judge-made" law, otherwise known as case law. Cases are legal determinations based on a set of particular facts involving parties with a genuine interest in the controversy.

a. Case Law May Be of Several General Types:

(1) *Pure decisional case law*—Court called upon to decide cases on the basis of prior court decisions (precedent) and/or policy and a sense of inherent fairness. In cases of pure decisional law, there is no applicable statute or constitutional provision that applies. This type of decisional law is what is referred to as "judicially-created doctrine." Historically, the term "case law" referred to certain areas of law (*e.g.*, torts, property) that began as judge-made, or pure decisional law.

(2) *Case law based on constitutional provisions*—Court called upon to consider whether a particular statute or governmental action is consistent with the United States Constitution or a particular state constitution. Court interpretation may rely upon prior decisional law interpreting same or some other constitutional provision.

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[2] Civil law systems are found in many European, Eastern, and Latin American countries, as well as in Louisiana.

(3) *Case law based on statutory provisions*—Court called upon to interpret a statute. Court interpretation may rely upon prior decisional law interpreting the same or similar statute.

b. Subsequent Case History (see Chapter II.B.5):

(1) Subsequent Case History defined—What a higher level court has done with respect to a lower-level court decision on appeal.

(2) Importance of Subsequent Case History—If a higher level court has taken action on a lower level case, it is the opinion and holding of the *higher* level court that will constitute the precedent in the case. A higher level court opinion will in effect abrogate the lower level court opinion in the same case.

c. Subsequent Case Treatment (see Chapter II.B.5):

(1) Subsequent Case Treatment defined—What other cases have said about the initial case. Has it been followed? Reversed? Distinguished? Applied in a specific way?

(2) Importance of Subsequent Case Treatment—Will indicate how the same and other courts interpret the initial case.

C. The American Judicial System: A System Based on Advocacy and the Presence of Actual Controversy

The American legal system is adversarial and is based on the premise that a real, live dispute involving parties with a genuine interest in its outcome will allow for the most vigorous legal debate of the issues, and that courts should not have the power to issue decisions unless they are in response to a genuine controversy. Hence, federal courts are prohibited from issuing "advisory" opinions, or opinions that do not involve a live case or controversy.[3]

1. Threshold Issues Designed to Preclude Advisory Opinions

Given the prohibition against advisory opinions by the federal courts, there are certain threshold prerequisites which must be satisfied before a federal court will hear a case. Issues surrounding the applicability of these

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[3] These principles are based on Article III of the U.S. Constitution, which limits federal court jurisdiction to "cases and controversies."

Unlike the federal courts, some state *do* allow for the presentation of cases that are not based on live controversies, and hence do not share the federal court bias against advisory opinions.

prerequisites may also arise in state courts and on petitions for review of agency orders. See Chapter VI.C.1.

The principal prerequisites to court review are the following:

Standing—The parties must have an actual, cognizable, usually pecuniary or proprietary, interest in the litigation.

Finality—In the case of appeals or agency review, the action by the trial court or administrative body must be final and have a real impact on the parties.

Exhaustion—The parties must have exhausted any possible avenues for relief available in the trial court or administrative body.

Ripeness—The dispute must present a current controversy which has immediate rather than anticipated or hypothetical effects on the parties.

Mootness—The dispute must not have been resolved. Nor must the circumstances have changed in any way that renders the dispute no longer subject to controversy.

No Political Questions—Courts will not involve themselves in non-justiciable disputes that are between the other two branches of the federal government and are of a political nature.

While these prerequisites are well-established, the courts tend to apply them in a pragmatic way and allow exceptions to these requirements when warranted by the facts.

2. Courts Generally Confine Themselves to the Dispute Presented for Resolution

As a jurisdictional matter, courts are supposed to restrict their holdings to the narrowest terms possible in resolving a dispute.

This limitation relates to the principle of *dictum*, under which portions of the opinion not required for the resolution of the precise issues before the court on the facts presented by the parties are of diminished precedential value. See Chapter II.C.

3. Tendency to Avoid Constitutional Issues When Possible

Federal courts also tend to avoid deciding constitutional issues when they are able to decide a case on a procedural, statutory, or some other ground.

D. Institutional Roles in the American Legal System

1. Attorney

Depending upon the circumstances and the needs of the client, the lawyer may be a counselor, a negotiator, and/or a litigator. In each of these roles, the lawyer will need to engage in factual investigation.

With respect to each of these roles, the lawyer will do the following:

Counselor: Attorney will help advise the client how to order the client's affairs, how or whether to proceed with a proposed course of action, or how to proceed with respect to pending or potential litigation or settlement. Often, this is when the lawyer will prepare (or ask that someone prepare) an interoffice memorandum of law (see Chapter X.), which will examine the client's legal position and help the lawyer counsel the client.

Negotiator: Lawyer will work with opposing counsel to try to get a favorable resolution for the client with respect to a pending dispute. The parties may already be in litigation when they negotiate, or the parties, through their attorneys, may be negotiating a resolution to a dispute not yet in court. The art of negotiation involves many techniques individual to particular attorneys and the circumstances. The client always retains the right to accept or reject a settlement negotiated or offered by the opposing party.

Litigator: In litigating, the attorney will help pick a jury and participate in pre-trial motions. At trial, the attorney will present evidence through testimony of witnesses, documents and perhaps demonstrative evidence (*e.g.*, charts, diagrams). The lawyer will also present an opening statement and closing argument, and will make and respond to evidentiary objections lodged by the opposing party. The lawyer may also make motions, sometimes supported by a memorandum in support thereof (see Chapter XI) before the court, and propose to the court a set of jury instructions. See Chapter V.B.

Fact Investigator: All of the lawyer's roles require the investigation of relevant facts, including locating and interviewing witnesses.

A lawyer is to be a zealous advocate of his/her client. In this respect, the lawyer must advocate on the client's behalf and avoid conflicts of interest. The lawyer is also an officer of the court and is required to deal

fairly and honestly with the court and with its other officers, including the lawyer's opponents.

There are specific ethical rules applicable to these issues, but in most circumstances, when the client's interests and those of the lawyer as officer of the court conflict or otherwise interfere with each other, the lawyer is generally expected to favor his or her role as advocate of the client.[4]

2. Judge

The judge is the final arbiter of the law. The judge is charged with the duty to state, as a positive matter, what the law is.

At trial, the judge takes a passive, "umpire" role in connection with the presentation of evidence by counsel. The judge must also make evidentiary rulings, and charge the jury as to the law to be applied. In addition, the judge is to maintain order in the courtroom.

Occasionally, when the parties agree, the judge may also act as trier of fact. This is known as a "bench trial." See Chapter V.B.

Judges in federal courts are appointed by the President with the "advice and consent" of the Senate. Many state court judges are elected by popular vote.

3. Jury

The jury, a group of local citizens, is the fact-finder in most trials. The jury will receive instructions from the judge as to the law, and its members will assess the facts as they perceive them in light of the law as instructed, to return a verdict. See Chapter V.B.

E. Sources of Law

1. Overview of Primary and Secondary Authority

There are many sources which comprise "the law" in the United States. At least two major divisions between sources of law may be identified. First, there are primary and secondary sources of law, which are identified and discussed immediately below and in Chapter I.E.2., respectively.

Second, there are both federal and state sources of law. State sources of primary authority are addressed together with the primary sources of

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[4] Most states have adopted some variant of either the American Bar Association (ABA) Model Rules of Professional Conduct or the ABA Model Code of Professional Responsibility. The federal bar as well as many professional bar associations have also adopted standards based on these rules. There is also a special code of conduct applicable to government attorneys.

In addition, Rule 11 of the Federal Rules of Civil Procedure requires that a lawyer have a reasonable basis for believing the allegations set forth in all writings submitted to the court. See Chapter V.B.

federal law, below. Some secondary authorities are state-specific, or have sets that relate specifically to state law. See Chapter I.E.2.

a. Primary Sources of Law Primary authority as a body constitutes "the law," the set of enforceable legal rules and principles. The following are the most significant sources of primary authority:[5]

(1) Constitutions

Constitutions are government charters. They provide the fundamental rights and obligations of citizens within the charter, and establish and ordain government systems.

U.S. Constitution: The document that establishes the federal government of the United States. No state or federal law can contravene any provision of the U.S. Constitution.

The U.S. Constitution establishes three branches of federal government:

(a) Legislative—2 houses (Congress = Senate + House of Representatives) with power to make laws.
(b) Executive—President and others to carry out laws.
(c) Judiciary—Supreme Court; Congress given authority to establish other federal courts.

State constitutions: Each state also has its own constitution. While a state constitution may confer rights greater than those conferred by the U.S. Constitution, it may not purport to limit or take away rights conferred by the U.S. Constitution or by federal statutes.

(2) Statutes

Federal: Laws passed by a majority vote of each house of Congress and then signed by the President. A presidential veto may be overriden, and in limited other situations, a bill can become law without presidential approval. See Chapters III.C. and D.

State: Each state may pass legislation according to rules applicable in that state.

No state law may contravene any provision of federal statutory or constitutional law.

State action may be preempted in certain areas when federal law so requires.

(3) Rules, Regulations, and Orders

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[5] Treaties—international agreements—are also a form of primary authority. In some cases, treaties are self-executing. In other cases, they must be given effect by implementing legislation.

Federal: Federal agencies issue rules and regulations, and adjudicate, pursuant to statutory authority. See Chapters IV.A. and B.
States: States also have administrative agencies, which act pursuant to state legislative authority.
No action by any state agency may contravene any federal law nor may it deal with any matter preempted by federal law.

(4) Executive Orders and Proclamations
U.S. Presidential issuances. See Chapter IV.E. Presidential orders cannot legislate or reverse an act of Congress.
State governors may also issue orders and proclamations.

(5) Case Law/Common Law
Judge-made law/legal doctrine.
Case law is issued by federal and state courts.

b. Secondary Sources of Law Secondary sources of law are not themselves law, but comment upon, analyze, discuss, interpret, and/or criticize primary authority. See Chapter I.E.2.

Examples of secondary authority are the following:
Treatises
Restatements
Law Reviews
American Law Reports (ALR)
Hornbooks
Legal Encyclopedias

State law may be discussed in any of the foregoing secondary authorities. Some states have their own legal encyclopedias.

c. Nature of Primary Versus Secondary Authority As Precedent Primary authority may be mandatory *or* persuasive. Secondary authority may be persuasive, but is *never* mandatory. See Chapters I.A., F. and G.

2. Secondary Sources of Law

Secondary sources are not law, but they comment upon, summarize, restate, criticize, or advocate changes to the law.*

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* Some secondary sources, such as case digests (see Chapter II.B.1), Shepard's Citators (see Chapter II.B.2.) and annotated versions of the United States Code (see Chapter III.B.) are case finding tools and do not share the functions of the secondary sources described herein. Unlike the secondary authorities discussed here, case finding tools may not be cited or quoted.

Among the purposes they serve are as case-finding tools (they cite to cases[6]), and as background information on an area of law.

Because secondary authorities are not themselves law, they are *never* binding authority. Depending upon the authority, they may be more or less persuasive, as indicated below.

Common sources of secondary authority are treatises, hornbooks, restatements, legal encyclopedias, law reviews, American Law Reports, Uniform and Model Acts, commercial looseleaf services, and litigation manuals.

a. Treatises

General Description/Overview	Specific treatment of multitude of issues in a particular area of law.
Special Features	Multi-volume; detailed; updated frequently.
Usefulness	Provides detailed information about a particular area of law.
Credibility As Authority	Certain writers considered to be most well-known authorities in a particular area. Some carry significant prestige with courts.

b. Hornbooks

General Description/Overview	Very general, background information.
Special Features	Not comprehensive; very concise and clear.
Usefulness	Useful if you have no familiarity at all with a topic.
Credibility As Authority	Generally do not carry much weight.

c. Legal Encyclopedias

General Description/Overview	Am. Jur. (American Jurisprudence) and C.J.S. (Corpus Jurus Secundum). Organized topically by legal issue, subject. Gives overview and guides user to primary authority and other resources.
Special Features	Am. Jur. has some state versions in addition to the national version.

[6] The citations provided in secondary authorities are often *not* consistent with the *Bluebook*. See Chapter IX.

Usefulness	Case-finding tool—Leads to cases in many jurisdictions. Background; good place to begin when you know little or nothing about the subject.
Credibility As Authority	Very little authoritative value—do not cite except for most basic, well-accepted propositions (even then, only if necessary).

d. Restatements

General Description/Overview	State and analyze common law on national basis; show trends, make recommendations.
Special Features	Joint effort by scholars, judges, practitioners; panels of noted specialists in area. State general principles and give comments thereto.
Usefulness	Deal with various substantive topics, focusing on overview of state approaches. Appendix volumes contain case digests and citations.
Credibility As Authority	Excellent analyses, given considerable respect by courts, often adopted as law of state. Respectable to cite as secondary authority.

e. Law Reviews

General Description/Overview	Scholarly writings on discrete, fairly specific areas of law.
Special Features	Journals are usually student edited and operated. Journals are general or specific (by theme/area of law).
Usefulness	General scholarly interest.
Credibility as Authority	Not usually used or cited by practitioners. Nor will a court often consider a law review article to have persuasive value.

f. American Law Reports (A.L.R)

General Description/ Overview	Two components: • Cases—Limited number of cases "reported" [Note: never use the ALR "citation"]; • Annotations—Discussion of reported case and related cases; detailed discussions along lines of narrow topic.
Special Features	Sets: A.L.R. FED; A.L.R. 1st; A.L.R. 2nd; etc. Federal cases are reprinted and annotated in A.L.R. 1st and A.L.R. 2nd through1969. Since 1969, (select) federal cases are reprinted and annotated in A.L.R. FED.
Usefulness	Topics in A.L.R. are discrete—many important topics are not addressed at all.
Credibility	Very little authoritative value—do not quote from or cite.

g. Additional Secondary Authorities: Looseleaf Services, Practice Guides, and Form Books

Commercial Looseleaf Services	Specialized and administrative fields. Organized by area of law—often by agency or other responsible government entity. Common commercial publishers are CCH and BNA. Often publish daily issuances of federal administrative agencies.
Practice Guides	Most common for litigation practice and procedure. Useful practice guides include those that detail various federal rules and portions of Title 28 (see Chapter I.H.3.a. note 12).
Form Books	Organized by area of law and jurisdiction. Judicious use of form books can save time/money; should be accompanied by practitioner evaluation for each potential use and modification as may be necessary.

F. The Use of Precedent—The Principle of *Stare Decisis*

The use of court precedent—earlier court decisions in factually analogous cases—is one of the defining elements of the common law system. In short, the use of court precedent, known as the principle of *stare decisis*, requires that a court follow the rules of law established by the same or higher level courts in the same jurisdiction (see Chapter II.G.). Indeed, given the laudatory purposes served by the principle of *stare decisis* and its fundamental significance to our system of common law, many courts who are not required to follow precedent established in an earlier case will nevertheless apply the principle of *stare decisis*.

1. *Stare Decisis* Means "Let It [The Prior Decision] Stand"

Principle by which courts follow precedent (prior decisions in factually similar/analogous situations).

2. Rationale

a. Judicial economy
b. Fairness to parties
c. Predictability
d. Check on arbitrary behavior

3. Applies Only if Precedent is "Binding" or "Mandatory"

The principle of *stare decisis* does not apply to authority that is merely "persuasive."

4. Application of *Stare Decisis* Depends upon Two Main Factors

The determination whether the principle of *stare decisis* applies is based mainly on two factors: Jurisdiction and court level (hierarchy):

a. *Jurisdiction*—The geographic region from which the case in question arose:
   (1) State court? If so, which state?
   (2) Federal court? If so, which district or circuit?[7]

b. *Court Hierarchy*—The level of court from which the case arose:
   (1) Trial level, appellate level, or court of last resort?

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[7] If the precedent was issued by the United States Supreme Court, that precedent will be treated as binding upon all courts, with one possible exception: If the Supreme Court precedent involved a matter of state law, it will not be binding upon the highest court of the relevant State. See Chapter II.G.

Jurisdiction and court level are critical to the application of *stare decisis* because the doctrine applies only with respect to cases decided within the same *jurisdiction* by a *higher level court.*

In addition, courts from the same jurisdiction are to consider and generally will follow precedent established at the same court level.*

Courts need not but may consider precedent established by courts in other jurisdictions.

5. Additional Factors to be Considered in Applying *Stare Decisis*

a. Similarity of legal issue(s)
b. Similarity of facts
c. More recent precedent has greater persuasive value
d. Whether precedent emerged from a court that the court at hand tends to follow or that is recognized as a leader in that subject area
e. Whether precedent was well-reasoned

6. Importance to the Principle of *Stare Decisis* of Analogizing and Distinguishing Precedent

The application of *stare decisis* thus requires—in addition to a consideration of the jurisdiction and level of court of precedent—a consideration of the similarity between the issues of law and facts presented in the earlier case and those in the instant case. See Chapter II.D.

a. *Analogizing:* If the court finds that the issues of law and fact are similar as a legal matter, then the court will likely analogize to the earlier case and apply the precedent to the later case.
b. *Distinguishing:* If the court finds that the issues of law and/or fact are dissimilar from a legal perspective, then the court will probably not apply the precedent.

7. Deviations from the Principle of *Stare Decisis*

Despite the principle of *stare decisis,* courts will at times deviate (or appear to deviate) from earlier precedent.

The following points bear mentioning:

a. Courts rarely explicitly overrule earlier applicable authority. Rather, they are more likely to distinguish facts or otherwise find that the earlier precedent does not apply on the merits.
b. When courts recognize that earlier precedent in that jurisdiction should be overruled, they will rely on considerations such as the trend of other jurisdictions, newly developing policies, and the arcane nature of the earlier precedent.

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* In the case of federal circuit courts, a panel is required to follow decisions rendered by another panel within the same circuit. See Chapter II.G.3.b.

c. A court can (but rarely does) overrule its own precedent, but a court may not overrule precedent established by a higher level court in that jurisdiction. Lower courts may indicate in their opinions their preference to rule in a manner contrary to precedent established by a higher level court, but only that higher level court is empowered to overrule earlier precedent.

G. Binding/Mandatory versus Persuasive Authority

Of the many sources of American law, some are considered to be "mandatory" or "binding," and others "persuasive."

While some sources of law are mandatory in some contexts, they may be merely persuasive in other contexts. For instance, a case that is binding on one court may not be binding on a court in another jurisdiction.

In addition, if authority is considered to be "persuasive," it does not mean that a subsequent court will consider it to be persuasive—only that the court *may* consider it in evaluating a case before it.

Mandatory/Binding Authority Defined	Authority a court must/is bound to follow.
Examples of Mandatory/Binding Authority	Applicable constitutions and statutes. Cases: General Rule— *Holding* (*i.e.*, not dictum); From a *higher level court;* In the *same jurisdiction;* In a *factually similar* case; Applying the *same law* (federal; particular state). See Chapter I.F.
Persuasive Authority Defined	Authority a court may, but is not required to, follow.
Examples of Persuasive Authority	Cases that are not binding (see above). Secondary sources. See Chapter I.E.2.

Factors Court May Use in Determining Whether to Consider and Apply Persuasive Authority	Jurisdiction Court hierarchy Factual similarities Policy Intervening authority Attractiveness of reasoning Date of prior authority Split among courts
Importance of Question Whether Authority is Mandatory or Persuasive	Relates to application of *stare decisis*. See Chapter I.F.

H. Federal and State Systems

1. Dual Federal and State Systems

The American legal system is based around a system of federalism, which basically refers to shared powers among the state and federal governments. The federal government is a government of limited powers, which are prescribed in the U.S. Constitution. The states retain all powers not expressly left exclusively to the federal government.

The federal government and most state governments have court systems based on three tiers. Cases proceed from the lowest level court to two separate levels of appeal. A few states have only a trial level court and one level of appeal.

(a) U.S. Government System Based on a System of Federalism

1. Shared powers between federal and state governments
2. Federal Constitution delegates to federal government specific powers; remaining powers are reserved for the states

(b) Federalism Results in Dual Court Systems

1. Federal court system
2. State court systems

(c) Consistent With Limited Power of Federal Government, Federal Courts Have Jurisdiction to Hear Cases Involving:

1. Federal constitutional issues
2. Federal statutory issues

3. Diversity cases—disputes between citizens of different states or of a citizen of a state against a citizen of a foreign country, if they meet a certain "jurisdictional amount" (currently $75,000, exclusive of costs)
4. Cases in which U.S. is a party
5. Other cases as specified by law—*e.g.*, admiralty, antitrust, maritime
6. Removal jurisdiction—if plaintiff could have brought case in federal court but brought case in state court, defendant can "remove" case to federal court, unless case is in defendant's home state

(d) State Courts May Review the Following Types of Cases

1. Any case, including those over which federal courts have jurisdiction
2. Exceptions to state court jurisdiction: State court jurisdiction may be precluded by federal statute either expressly (*e.g.*, admiralty, patent, copyright) or implicitly (*e.g.*, antitrust damages and injunctions)

(e) Typical Federal and State Court Structure

1. Three-tier structure is most typical
2. Three-tier structure:
   (a) Lower court—fact-finding
   (b) Intermediate court—appeals from lower court
   (c) High court—appeals from intermediate court

(f) Federal Court Structure

1. District Courts—Trial-Level Courts
   (a) Factual finding and development
   (b) Each state has one or more "districts" depending upon the size of the state
   (c) Several "districts" are combined to form one "circuit"
   (d) 94 districts form 12 circuits
2. Court Of Appeals—Intermediate Level Court
   (a) Appeals from trial-level (district) courts
   (b) Original jurisdiction over orders of many federal agencies
   (c) 13 circuit courts—one for each number 1-11; D.C. Circuit; Federal Circuit for certain specialized matters
   (d) Except for Federal Circuit, circuits are geographically-based

3. U.S. Supreme Court
   (a) Supreme court of the land
   (b) Original jurisdiction in very rare cases, *e.g.*, when there is a controversy between two states
   (c) Generally hears appeals from U.S. Court of Appeals
   (d) Hears some appeals from highest state courts

See Chapter I.H.3.

(g) State Court Structure

1. Most state court systems mirror that of the federal court system, *i.e.*, they generally are three-tiered, with two levels of appeal
2. Some states have only two-tiered court systems, with only one level of appeal

See Chapter I.H.4.

2. Illustration of the Dual American Court System

FEDERAL COURTS	STATE COURTS
Court Levels	
U.S. Supreme Court	Court of last resort
U.S. Court of Appeals [circuit courts]	Intermediate courts
U.S. District Courts	Trial courts
Court Jurisdiction	
Federal Question [Statute/ Constitution]	Anything not expressly or implicitly reserved exclusively for federal courts
Diversity	
U.S. a party	
Others as specified by law	
Parallel Systems	
A case will normally go through one system or another; there is some overlap in unusual cases.	

3. The Federal Courts: An Overview

The federal court system is a three-tiered system with one court of last resort (the U.S. Supreme Court, see chart immediately below), one intermediate court of appeals (the U.S. Court of Appeals, divided into 13 circuits, see Chapter I.H.3.b.), and a level of trial courts (the U.S. District Courts, of which there are 94, see Chapter I.H.3.c.). Several district courts are combined to form one circuit court.

a. United States Supreme Court

Formal Court Name	United States Supreme Court.[8]
Type Of Court	Court of last resort. Original jurisdiction in limited cases (*e.g.*, conflicts between states).
Basic Court Structure	One Supreme Court. Nine Justices. All justices hear and decide each case (unless recused/disqualified).[9]
Reporters	United States Reports—U.S. [official]. Supreme Court Reporter—S. Ct. [West]. Lawyers' Edition—L. Ed. [Lawyers' Cooperative]. United States Law Week/Supreme Court Bulletin—newest Court decisions.
Digests[10]	United States Supreme Court Digest [West]. Federal Practice Digest [currently in 4th series] [West]. Modern Federal Practice Digest [older cases] [West]. Federal Digest [older cases] [West].

[8] Also referred to as the "Supreme Court" or the "Court" if it is clear from the context that the reference is to the United States Supreme Court.

[9] Federal judges at all levels may be recused or disqualified for conflicts of interest (real or perceived) and other reasons. Grounds for disqualification are found at 28 U.S.C. § 455.

[10] Reporters publish cases, while digests are a case finding tool. See Chapter II.A. and B.1.

Applicable Statutes And Rules	Rules of the United States Supreme Court.[11] Title 28 of the United States Code.[12]
Access To Court	Right of appeal: Limited classes of cases, generally involving state court declaration of unconstitutionality of federal law, federal court declaration of unconstitutionality of state laws, high state court upholding state law against claim of unconstitutionality. Original Jurisdiction: Involving ambassadors, controversies between states, etc. Petition for a *writ of certiorari:* Review completely discretionary with Supreme Court. Certification: Request by Court of Appeals that Supreme Court give instructions on a question of law. The Supreme Court may give binding instructions, or may hear the entire matter in controversy. Writ of Habeas Corpus: Limited right of redress for prisoners.[13]

b. United States Court of Appeals

Formal Court Name	United States Court of Appeals; United States Court of Appeals for the __ Circuit.[14]
Type Of Court	Intermediate court of appeals. Initial court review for some cases, especially appeals from agency action.

[11] All federal courts have their own rules of practice and procedure which should be consulted by the practitioner.

[12] Title 28 of the United States Code provides important information to the practitioner regarding many issues of federal court law, including issues of jurisdiction, venue, and other areas of federal court review. Title 28 should be consulted whenever an action is taken or planned to be taken in any federal court.

[13] A petition for a *writ of habeas corpus* should normally be filed in the first instance in a United States District Court. The Supreme Court will entertain an original request for the *writ* only under exceptional circumstances, including a showing that adequate relief can not be had in any other way.

[14] Also referred to as the "Court of Appeals for the __ Circuit," the "__ Circuit," the "court of appeals," or the "circuit court," if the reference is clear from the context. The term "circuit" comes from the old practice of circuit court judges to travel around the circuit to hear cases. Now, most appellate judges are assigned to a court in a single geographic location.

Basic Court Structure	Court of Appeals divided into 13 circuits: 1-11 (geographic), District of Columbia Circuit, Federal Circuit.[15] Each circuit (except Federal Circuit) comprised of one or more districts. Each circuit has varying number of judges, from six to twenty-eight, depending upon the size of the circuit and the volume of cases. Most cases heard and decided by 3-judge panel, selected at random.[16] Entire court may hear case *"en banc."* See Chapter V.B.
Reporter	Federal Reporter—F./F.2d./F.3d [West]
Digests	Federal Practice Digest [currently in 4th series] [West]. Modern Federal Practice Digest [older cases] [West]. Federal Digest [older cases] [West].
Applicable Statutes and Rules	Federal Rules of Appellate Procedure—applicable to all circuits. Local court rules adopted by and applicable within each circuit. See Fed. R. App. Proc. 47.[17] Local operating rules adopted by and applicable within each circuit. Title 28 of the United States Code.
Access to Court	Direct appeal from determinations of district courts. Direct review of final action of some federal agencies.

[15] Unlike the other circuit courts in which venue is based on geographic considerations, the Federal Circuit has jurisdiction over specialized matters, including intellectual property, international trade, government contracts, and other miscellaneous matters. The location and composition of each of the twelve geographic circuits may be found in a diagram in the front of each volume of the Federal Reporter and the Federal Supplement. See also 28 U.S.C. § 41.

[16] On occasion, a panel may not be selected at random if there is a particular reason to call a panel comprised of specific members. For instance, if a panel has already heard the same case and ordered a remand, the same panel may be assigned to hear that case on a renewed appeal or petition for review.

[17] See 28 U.S.C. § 2071.

c. United States District Courts

Formal Court Name	United States District Court [for the District of __].[18]
Type of Court	Trial court—deals with issues of fact, including motions relating to evidentiary and other matters.
Basic Court Structure	94 District Courts—one to four districts for each state.[19] Each District has a varying number of judges, from 1-28. Cases heard by a single judge.[20] Cases may be, but are rarely, heard *en banc*.
Reporters	Federal Supplement—F. Supp. [West]. Federal Rules Decisions (selected district court cases on procedural issues)—FRD [West].
Digests	Federal Practice Digest [currently in 4th series] [West]. Modern Federal Practice Digest [older cases] [West]. Federal Digest [older cases] [West].
Applicable Statutes and Rules	Federal Rules of Civil Procedure. Federal Rules of Evidence. Local court rules adopted by and applicable within each district. See Fed. R. Civ. Proc. 83.[21] Title 28 of the United States Code.
Access to Court	Initial level of court review.
Other "Courts" at Level Similar to District Courts	U.S. Tax Court. U.S. Bankruptcy Court. Judicial Panel on Multidistrict Litigation.

[18] If the district is the only one in a particular state, the name of the district will be the abbreviation of that state's name [D. Ariz.]. If a state has more than one district, the district will have a geographical designation accompanying the abbreviation of the name of the state [S.D. N.Y.]. Also referred to as "district court" if the reference is clear from the context.

[19] See 28 U.S.C. §§ 81-131 for the location of and distribution of districts among the states.

[20] Even though cases are heard by a single judge, reference to "the court" is preferred to reference to "the judge."

[21] See also 28 U.S.C. § 2071.

4. The State Courts: An Overview

a. State Court Structure For the most part, state court systems are analogous to the federal court system in that they have three-tiered structures: a trial court, an intermediate court of appeal, and a court of last resort (a supreme court). A few states have only one appellate-level court.

At the trial court level, there may be divisions or departments for specialized matters such as family issues, probate, and juvenile matters.

Many states also have inferior courts, which are not courts of record but are very informal and handle lesser forms of recovery, such as small claims court.

States are often separated into districts or other geographic divisions for purposes of court allocation. These districts operate much like—but are completely distinct from—federal districts.

b. State Reporter Systems Each state has either and/or an official or a West case reporter which report intermediate appellate and high court cases.*

Most states' appellate and high court opinions are also published in West regional reporters, which combine the published cases of several states into West "regions." [Note: the combination of states together in a West regional digest has no bearing on the relative precedential value of the cases from the states that happen to be combined by a commercial entity (West) into a single regional reporter. These regions and the states that form them have nothing to do with jurisdiction or anything else other than the convenience of the publisher.]

The most efficient way to learn which reporters contain the opinions of a particular state court is to consult Table T.1 of the Bluebook. See Chapter IX.

c. State Court Digests Each state has its own digest.

Some state digests are published by West; other states have digests that are published by another private company or by the state itself.

Some states have a West digest *and* a digest published by some other entity.

Many published state cases are also digested in one of the West regional digests.

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* Most trial court decisions are not published because such decisions often take the form of jury verdicts which. have no precedential value in subsequent litigation.

d. State Court Rules of Practice and Procedure Each state also has its own rules of practice and procedure applicable to each court. Most states will have annotated versions of their rules of practice and procedure, or practice guides describing the application of such rules.

I. Interrelationship Among Sources of Law

1. Interrelationship Among Federal Government Institutions

a. Three Branches of Government The American federal government is comprised of three branches of government—the legislative branch, the executive branch, and the judicial branch. Each arm of the federal government has unique functions and responsibilities.

b. Federal System of Checks and Balances The federal government was designed with a system of "checks and balances," in which each branch in some way acts as a restraint on the other branches. For the practitioner's purposes, the judicial oversight function over the legislative branch is most significant.[22]

c. Authority of Federal Courts Federal courts have the authority to review acts of Congress for their constitutionality. When an act of Congress establishes and/or authorizes an agency to take action, court review may include the question of whether that delegation of authority is constitutional.

Federal courts also have the authority to review actions of administrative agencies. Inquiries a court may make of agency action include whether the agency has acted in a manner consistent with the authority granted by Congress to the agency; whether the agency's actions are consistent with other statues;[23] and whether the agency's actions are consistent with prior court and agency decisions.[24]

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[22] Other examples of checks and balances built into the federal system include congressional oversight of the executive and executive oversight over Congress. For instance, the Senate has the authority to try the President and other executives who are impeached (brought up on charges) by the House, and to approve certain presidential nominations. The President, for his part, has the authority to veto legislation passed by Congress. See Chapter III.D.

[23] Under the U.S. Constitution, Congress is charged with law-making authority. To the extent Congress is seen to have delegated excessive law-making authority to an agency (or, for that matter, any other entity), a court will invalidate such delegation. Invalidation of an act of Congress on this ground is rare, but remains a potential source of judicial inquiry of which to be aware.

[24] While agencies are not bound by strict principles of *stare decisis*, they are generally required to explain departures from earlier decisions. As for rulemaking, agencies are required to explain the need for changes to existing rules.

d. Congressional Authority To "Overrule" Court Precedent Prospectively

While the Supreme Court is largely considered to have the "last word" on the legality of acts of Congress and actions of federal agencies, Congress has authority to "overrule" or modify *prospectively* through legislation even Supreme Court precedent. But Congress cannot "overrule" a constitutional decision.

For instance, if a court has held that an agency acted beyond its statutory authority, Congress can amend the relevant legislation to more explicitly authorize the agency to take the action in question. However, if the Supreme Court holds that legislation to be unconstitutional, only a constitutional amendment can override that decision.[26]

2. The Judicial Review Function: The Interrelationship Between Congress and the Federal Courts

ACTS OF U.S. CONGRESS		FEDERAL COURT REVIEW FUNCTION
Passes laws	→	Is law constitutional?
Creates and authorizes agencies to act	→	Is delegation to agency constitutional?
ADMINISTRATIVE AGENCIES		
Issue rules and regulations	→	Is action consistent with Constitution?
Resolve disputes via adjudications	→	Is action consistent with congressional delegation and other laws?[25]
	→	Is action consistent with case law?

CONGRESS
[Prospective Only][27]
Codify case law
Modify/amend case law
Reject/"overrule" case law
(unless based on constitutional infirmity)

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[25] Agency authority is generally derived from specific statutory authority to that agency. Agency actions are also governed by the Administrative Procedure Act, a more generic statutory scheme applicable to federal agencies generally.

[26] A constitutional amendment requires a proposal by two-thirds of both houses of Congress, or two-thirds of the state legislatures, and ratification by three-quarters of the state legislatures.

[27] These actions of Congress, in turn, would likewise be subject to judicial review.

3. Relative Priority of Sources of Law: Hierarchy of Authority

In any given legal situation, many sources of law may be applicable. For instance, a case may present a federal constitutional issue, but may also implicate issues of statutory law (state or federal). There is a complex reaction to the issue of which law has "supremacy" over others.

First, there is the issue of federal supremacy over state law. A complex area of jurisprudence, this principle basically stands for the proposition that when there is conflict between a federal law and a state law, federal law supersedes the state law. In addition, there are certain fields over which federal law preempts the possibility of any state law.

In addition, even within the federal system or a state system, there are rules of supremacy governing the relative priority of sources of law applicable *within that jurisdiction.* As indicated below, the U.S. Constitution takes priority over federal statutes and regulations, which in turn take priority over federal case law. The U.S. Constitution, of course, also takes priority over state statutes, regulations, and case law.

It is critical that case law be examined *whenever* interpreting a statutory or constitutional provision. As an example, consider the sources of federal law: Although the U.S. Constitution and then federal statutes take priority (under the principles of constitutional supremacy and legislative supremacy, respectively) in interpreting the Constitution or a statute, case law will be critical; under the principle of *stare decisis,* the way in which the same or similar constitutional and statutory provisions have been interpreted in the past will have an enormous impact on the way in which a constitutional or statutory provision will be interpreted.

a. Federal Law

(1) U.S. Constitution
(2) Federal Statutes
(3) Federal Rules and Regulations
(4) Federal Cases—Cases must be consulted in interpreting Constitution, statutes, and agency issuances

b. State Law

There are several principles of law that must be considered when dealing with an issue of state law. Although a comprehensive examination of these rather complex rules is beyond the scope of this work, they are as follows:

(1) *Federal Supremacy:*
Federal law prevails over conflicting state law. State law may not be inconsistent with federal law. Nor may there be state laws covering areas that have been preempted, or fully covered, by a federal statutory scheme.

(2) Erie* *Rule:*
Federal courts will apply state "substantive" law (*e.g.*, torts, contracts) and federal "procedural" law when state law creates the cause of action.

(3) *Choice of Law Issues:*
A federal court deciding which state's law to apply to a state claim will use the choice of law rules of the state in which the federal court sits.

Apart from these issues, the following hierarchy of authority would apply to state sources of law:

(1) State Constitution
(2) State Statutes
(3) State Rules and Regulations
(4) State Cases—Must be consulted in interpreting state Constitution, statutes, and agency issuances

A Note On Citations To Authority: When citing to federal or state law, citations should include all relevant sources, in the order of their respective hierarchy. See Chapter IX.C.

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* *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

WEIGHT OF AUTHORITY ASSIGNMENT

Please answer the following questions prior to class on Thursday, August 29. You will not be required to turn in this assignment, but you must be prepared to discuss your answers in class.

Part 1 – For each question below, which primary authority carries more precedential value? Assume each listed authority addresses the same legal issue and is from the same jurisdiction.

1. A state statute or a common law rule announced by the state's highest court?

2. A state constitutional provision or an opinion from that state's highest court interpreting the meaning of the constitutional provision?

3. An agency regulation or a state statute?

4. An opinion of the state's highest court or a ruling by a state agency?

Part 2 – Your firm represents Kay Lang, who sold a piece of commercial property located in Los Angeles to Adam Kornfeld. Kornfeld claims that Lang failed to disclose to him the true condition of the property, and he has filed suit against her for damages in a California state trial court. You are researching whether under California law a seller of real property has a duty to disclose to the buyer the condition of the property.

For each of the following authorities, please state (1) **whether the authority is primary or secondary**, and (2) **whether the authority would be binding or persuasive** in the dispute between Lang and Kornfeld.

1. An opinion of the California Supreme Court deciding the duty of a seller to disclose to the buyer the condition of the property

2. An article in the University of California at Los Angeles (UCLA) Law Review discussing the applicable California rule on the seller's duty to disclose to the buyer the condition of the property

3. An opinion of the United States Court of Appeals for the Ninth Circuit applying the applicable California rule on the duty of a seller to disclose to a buyer the condition of the property

4. A California statute on the duty of a seller to disclose to a buyer the condition of the property

5. A section from a treatise explaining the applicable California rule on the duty of a seller to disclose to a buyer the condition of the property

Part 3 – For each of the following authorities, please state **whether the authority would be binding or persuasive**.

1. A federal district court in Houston is considering whether an employee's termination violated Title VII of the Civil Rights Act of 1968. The defendant relies on a Fifth Circuit case with similar circumstances. Is this Fifth Circuit opinion binding or persuasive?

2. The Ninth Circuit is considering whether the University of Washington's admission scheme violates the Fourteenth Amendment of the United States Constitution. The Fifth Circuit recently decided a similar case involving the University of Texas. Is the Fifth Circuit opinion binding or persuasive?

3. A state district court in Houston is considering whether an affidavit filed by a party is proper summary judgment evidence under the common law sham affidavit doctrine. The Fifth Circuit recently addressed the Texas sham affidavit doctrine in a case with very similar facts. Is the Fifth Circuit opinion binding or persuasive?

4. A state district court in Houston is considering whether a father negligently entrusted a vehicle to his sixteen-year-old son. An appellate court in Texarkana considered the very same issue 6 years ago. Is the Texarkana decision binding or persuasive?

5. The First Court of Appeals in Houston is considering whether a Houston trail court improperly granted summary judgment based on deemed admissions. Several years ago, the same court decided a remarkably similar case. Is the prior decision by the First Court of Appeals binding or persuasive in the current case?

CASE BRIEF ASSIGNMENT

Please brief the following case prior to class on Friday, August 30. You will not be required to turn in this assignment, but you must be prepared to discuss this case in class.

To help with this assignment, I have attached a document entitled "How to Brief a Case" and an article entitled "How to Read a Legal Opinion." There are many different ways to brief a case – some people write notes in the margins of the case, others use a method involving highlighting the various aspects of the case with different colors of highlighters, and others do a separate written analysis of the case complete with headings. Over the next few weeks you will determine what method (or combination of methods) works best for you. No individual method is required for this assignment.

119 L.R.R.M. (BNA) 2187
Supreme Court of Texas.

SABINE PILOT SERVICE, INC., Petitioner,
v.

Michael Andrew HAUCK, Respondent.

No. C-3312.April 3, 1985.

Action was brought alleging wrongful termination of employment. The 58th District Court, Jefferson County, Ronald L. Walker, J., rendered summary judgment for former employer, and former employee appealed. The Court of Appeals, 672 S.W.2d 322, reversed and remanded, holding that former employee stated cause of action based on allegation he was discharged for failing to heed employer's direction to commit an illegal act. Employer appealed. The Supreme Court, Wallace, J., held that narrow exception to the employment-at-will doctrine exists for employee who is discharged for sole reason that the employee refused to perform an illegal act.

Judgment of the Court of Appeals affirmed.

Kilgarlin, J., filed a concurring opinion in which Ray, J., joined.

West Headnotes (5)

1 **Appeal and Error**🔑Judgment

In reviewing grant of a summary judgment the Supreme Court must accept as true nonmovant's version of the evidence and make every reasonable inference in the nonmovant's favor.

30 Cases that cite this headnote

2 **Judgment**🔑Existence or non-existence of fact issue

To sustain summary judgment the movant must establish as a matter of law that no genuine issue of material fact exists.

14 Cases that cite this headnote

3 **Courts**🔑Highest appellate court

Supreme Court is free to judicially amend a judicially created doctrine.

11 Cases that cite this headnote

4 **Labor and Employment**🔑Refusal to Engage in Wrongdoing
Labor and Employment🔑Causal connection; temporal proximity

Public policy requires a narrow exception to the employment-at-will doctrine for an employee who was discharged for the sole reason that the employee refused to perform an illegal act.

466 Cases that cite this headnote

5 **Labor and Employment**🔑Presumptions and burden of proof
Labor and Employment🔑Exercise of rights or duties; retaliation

In wrongful discharge action brought by employee at will based on allegations that the employee was discharged for refusal to perform an illegal act, it is the employee's burden to prove by preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

390 Cases that cite this headnote

Attorneys and Law Firms

*734 Orgain, Bell & Tucker, Gilbert I. Low and Robert J. Hambright, Beaumont, Long, Parker, Doyle & Cichowaki, Carl A. Parker, Port Arthur, for petitioner.
Provost, Umphrey, McPherson & Swearingen, Greg Thompson, Port Arthur, for respondent.

Opinion

WALLACE, Justice.

This is a suit for wrongful discharge brought by an

employee, Michael Andrew Hauck. The trial court rendered summary judgment for Sabine Pilot Service, Inc., the employer. The court of appeals reversed the judgment of the trial court and remanded the cause for trial. 672 S.W.2d 322. We affirm the judgment of the court of appeals.

Hauck was a deckhand for Sabine. He testified in deposition that he was instructed that one of his duties each day was to pump the bilges of the boat on which he worked. He observed a placard posted on the boat which stated that it was illegal to pump the bilges into the water. He called the United States Coast Guard and an officer confirmed that pumping bilges into the water was illegal; therefore, he refused to do so. He further testified that he was fired for refusing to illegally pump the bilges into the water.

Sabine testified through one of its officers that Hauck was discharged because he refused to swab the deck, man a radio watch and other derelictions of duty.

1 2 In reviewing the granting of a summary judgment we must accept as true the non-movant's version of the evidence and make every reasonable inference in the non-movant's favor. *Gulbenkian v. Penn,* 151 Tex. 412, 252 S.W.2d 929 (1952). To sustain the summary judgment the movant must establish as a matter of law that no genuine issue of material fact exists. *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671 (Tex.1979).

The sole issue for our determination is whether an allegation by an employee that he was discharged for refusing to perform an illegal act states a cause of action. This court in *East Line & R.R.R. Co. v. Scott,* 72 Tex. 70, 75, 10 S.W. 99, 102 (1888), held that employment for an indefinite term may be terminated at will and without cause. The courts of Texas have steadfastly refused to vary from that holding. However, in the last 30 years the courts of 22 states have made exceptions to the employment-at-will doctrine and numerous commentators have advocated exceptions to the doctrine. The exceptions advocated by the commentators and adopted by various courts range from very liberal and broad exceptions to very narrow and closely defined ones. *See* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 Baylor L.Rev. 667 (1984) for a thorough discussion of the reasoning and decisions of other states concerning this issue.

3 Sabine contends that any exception to the employment-at-will doctrine should be statutorily created. The Legislature has created exceptions to this doctrine. TEX.REV.CIV.STAT.ANN. art. 8307c (discharge for filing a worker's compensation claim); TEX.REV.CIV.STAT.ANN. art. 5207a (discharge based on union membership or nonmembership); TEX.REV.CIV.STAT.ANN. art. 5765 § 7A (discharge because of active duty in the State Military Forces); TEX.REV.CIV.STAT.ANN. art. 5207b (discharge because of jury service); *735 TEX.REV.CIV.STAT.ANN. art. 5221k § 1.02, Texas Commission on Human Rights Act (discharge based on race, color, handicap, religion, national origin, age or sex). Although the Legislature has created those exceptions to the doctrine, this court is free to judicially amend a judicially created doctrine.

4 5 Upon careful consideration of the changes in American society and in the employer/employee relationship during the intervening 97 years since the *East Line & R.R.R. Co. v. Scott* decision, we hold that the situation which led to that decision has changed in certain respects. We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in *East Line & R.R.R. Co. v. Scott.* That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

The judgment of the court of appeals is affirmed.

KILGARLIN, J., files a concurring opinion in which RAY, J., joins.

KILGARLIN, Justice, concurring.

I concur with this judgment which gives Michael Hauck an opportunity to prove to a trier of fact that he was discharged for refusing to violate a law. Moreover, I heartily applaud the court's acknowledgement of the vital need for a public policy exception to the employment at will doctrine. Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law. As it was a judicially promulgated doctrine, this court has the burden and the duty of amending it to reflect social and economic changes. Our duty to update this doctrine is particularly urgent when the doctrine is used as leverage to incite violations of our state and federal laws. Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of our society.

The court admittedly carves out but one exception to

employment at will, but I do not fault the court for the singleness of its exception. The issue before the court was whether a cause of action existed under this particular fact situation: termination of an employee for his refusal to violate a law with a criminal penalty. There was no need for the court to create any other exception to employment at will in order to grant Hauck his requested relief. But, our decision today in no way precludes us from broadening the exception when warranted in a proper case.

As the court opinion recognizes, over twenty-two jurisdictions have carved exceptions to the employment at will doctrine in the last thirty years. The characteristics of the cause of action for wrongful discharge in those states vary. For example, Wisconsin has instituted a narrow contract-based exception to the employment at will doctrine. *Brockmeyer v. Dun & Bradstreet,* 113 Wis.2d 561, 335 N.W.2d 834, 838 (1983). Wisconsin law now implies into each employment at will contract a provision that the employer will not "discharge an employee for refusing to perform an act that violates a clear mandate of public policy." 335 N.W.2d at 841. The Wisconsin court narrowly defined public policy to include constitutional and statutorily enunciated public policy only. The employee has to show that the dismissal violated such a policy. Then it becomes the employer's burden to go forward with evidence to show that the firing resulted from just cause, not from the employee's refusal to commit an illegal act. Hawaii has a similar exception, but uses a broader definition of public policy. Judicial decisions are included in the scope of public policy which an employer is not permitted to ask an employee *736 to violate. *Parnar v. Americana Hotels, Inc.,* 65 Hawaii 370, 652 P.2d 625 (1982).

Washington uses the same definition of public policy as Hawaii, but the burden of proof varies slightly. The Supreme Court of Washington requires the employee to plead and prove that a public policy may have been contravened. Once the employee has met this relatively easy task, "the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee." *Thompson v. St. Regis Paper Co.,* 102 Wash.2d 219, 685 P.2d 1081, 1089 (1984).

On the opposite end of the scale are New Hampshire and Massachusetts. New Hampshire may have announced the broadest of exceptions to the employment at will doctrine when it recognized a cause of action for terminations resulting from "bad faith, malice or retaliatory motives." *Monge v. Beebe Rubber Co.,* 114 N.H. 130, 316 A.2d 549 (1974). Massachusetts simply implies a good faith and fair dealing clause into each employment contract. *See Fortune v. National Cash Register Co.,* 373 Mass. 96, 364 N.E.2d 1251 (1977).

The court opinion today does not extend an employee's protection as far as any of the other states and Texas may never extend the exception to the *Monge* limit. Yet, the examples of other states will be valuable in examining exactly how broadly the exception in Texas can evolve. In the meantime, an employee in Texas finally has a cause of action when he can show that his employer fired him for his refusal to commit an illegal act.

The employee has the burden of proof and persuasion. The judge will then have to determine if a statute with a criminal penalty is involved. The jury or fact finder then must decide if the employer sought to have the employee commit an illegal act. Finally, the jury will have to answer a question similar to the following:

> Do you find from a preponderance of the evidence that the only reason for the employee's termination was his (her) refusal to commit an illegal act?

Finally, because of the limited issues presented in this case, the court does not address the matter of Hauck's measure of damages. Logically, Tex.Rev.Civ.Stat.Ann. art. 8307c (prohibition of firing an employee for filing a worker's compensation claim) should serve as a guide. If so, damages would include loss of wages, both past and those reasonably anticipated in the future, and employee and retirement benefits that would have accrued had employment continued. It would also include punitive damages. *See Carnation Co. v. Borner,* 610 S.W.2d 450 (Tex.1980).

Although I might have defined the employment at will exception differently, I concur in the court's result and am pleased that an antiquated doctrine has been overcome by the realization that modern times require modern law. I, too, would affirm the judgment of the court of appeals.

RAY, J., joins in this concurring opinion.

Parallel Citations

119 L.R.R.M. (BNA) 2187, 102 Lab.Cas. P 55,493, 1 IER Cases 733

End of Document

HOW TO BRIEF A CASE

I. Distinctions

A. A case brief is a dissection of a judicial opinion -- it contains a written summary of the basic components of that decision.

B. Persuasive briefs (trial and appellate) are the formal documents a lawyer files with a court in support of his or her client's position.

II. Functions of case briefing

A. Case briefing helps you acquire the skills of case analysis and legal reasoning. Briefing a case helps you understand it.

B. Case briefing aids your memory. Briefs help you remember the cases you read (1) for class discussion, (2) for end-of-semester review for final examinations, and (3) for writing and analyzing legal problems.

Do not try to memorize case briefs. Learning law is a process of problem solving through legal reasoning. Cases must be read in light of the series of cases with which they appear in your casebook or on the class syllabus.

III. Briefing a case: The steps

Although the exact form of your briefs may and can vary from case to case, the following parts should appear somewhere in your brief in a way that helps you understand the case and recall the needed information.

1. Read through the opinion first so you will understand the overall story and identify important facts, etc., before beginning to brief the case on paper.

2. Heading:

    a. Case name (to identify the parties)
    b. Court name
    c. Date of the decision
    d. Page number where the case appears in the textbook

3. Statement of Facts

   a. Identify the relationship/status of the parties (Note: Do not merely refer to the parties as the plaintiff/defendant or appellant/appellee; be sure to also include more descriptive generic terms to identify the relationship/status at issue, e.g., buyer/seller, employer/employee, landlord/tenant, etc.)

   b. Identify legally relevant facts, that is, those facts that tend to prove or disprove an issue before the court. The relevant facts tell what happened before the parties entered the judicial system.

   c. Identify procedurally significant facts. You should set out (1) the cause of action (C/A) (the law the plaintiff claimed was broken), (2) relief the plaintiff requested, (3) defenses, if any, the defendant raised.

4. Procedural History (PH): This is the disposition of the case in the lower court(s) that explains how the case got to the court whose opinion you are reading. Include the following:

   a. The decision(s) of the lower court(s).

      NOTE: If the case was decided by a trial court and reviewed by an intermediate appellate court before reaching the court whose decision you are now reading, be sure to note what each court decided.

   b. The damages awarded, if relevant.

   c. Who appealed and why.

5. Issues:

   a. Substantive issue: A substantive statement of the issue consists of two parts --

      i. the point of law in dispute
      ii. the key facts of the case relating to that point of law in dispute (legally relevant facts)

      You must include the key facts from the case so that the issue is specific to that case. Typically, the disputed issue involves how the court applied some element of the pertinent rule to the facts of the specific case. Resolving the issue will determine the court's disposition of the case.

b. Procedural issue: What is the appealing party claiming the lower court did wrong (e.g., ruling on evidence, jury instructions, granting of summary judgment, etc.)?

6. Judgment: This is the court's final decision as to the rights of the parties, the court's response to a party's request for relief. Generally, the appellate court will either affirm, reverse, or reverse with instructions. The judgment is usually found at the end of the opinion.

7. Holding: This is a statement of law that is the court's answer to the issue. If you have written the issue statement(s) correctly, the holding is often the positive or negative statement of the issue statement.

8. Rule of Law or Legal Principle Applied: This is the rule of law that the court applies to determine the substantive rights of the parties. The rule of law could derive from a statute, case rule, regulation, or may be a synthesis of prior holdings in similar cases (common law). The rule or legal principle may be expressly stated in the opinion or it may be implied.

9. Reasoning: This is the court's analysis of the issues and the heart of the case brief. Reasoning is the way in which the court applied the rules/ legal principles to the particular facts in the case to reach its decision. This includes syllogistic application of rules as well as policy arguments the court used to justify its holding (why the decision was socially desirable).

10. Concurring/Dissenting Opinions: A judge who hears a case may not agree with the majority's decision and will write a separate dissenting opinion. Another judge may agree with the decision but not with the majority's reasoning and will write a separate concurring opinion. Note the concurring/dissenting judge(s)' reasons for refusing to join in the majority opinion.

11. Additional Comments/Personal Impressions: What are your reactions to and critique of the opinion? Anything you like? Dislike? How does this case fall in line with the other cases you have read? Do not accept the court's opinion blindly. Assess the reasoning in each case. Is it sound? Is it contradictory? What are the political, economic or social impacts of this decision?

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. What You Need to Learn from Reading a Case

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

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[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. Why Do Law Professors Use the Case Method?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!