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Dedication

This book is dedicated to P.Y., whose love,
inspiration, and guidance made this text possible.
Thank you.

This book is dedicated to B.W. for her support,
personal and technical, through this endeavor, and to Bill Putman
for the continued opportunity and belief in me.

Brief Contents

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Preface

Paralegals and law clerks are increasingly called upon to perform substantive legal research, analysis, and writing tasks. These tasks range from drafting interoffice legal memoranda summarizing the research and analysis of issues involved in a client's case, to preparing drafts of court documents and legal correspondence. This text provides the student with in-depth knowledge of the fundamentals of legal research, analysis, and writing.

The impetus for this book came from student requests for comprehensive information regarding many of the difficult areas of legal research, analysis, and writing. The desire to provide such comprehensive information has not changed, but there are many things about legal research and writing that have changed. The fundamentals of legal research do not change over time. However, the means of accessing the law and information about the law is changing at a rapid rate. Increasingly in the digital age, legal research is conducted via electronic sources. Many paralegal programs, law schools, and law offices are reducing or eliminating their paper sources in exchange for electronic sources. Although this is understandable in the modern technological era, the methods of electronically searching for law continue to be based on how paper sources are designed and organized. Moreover, if access to electronic sources is lost during a crucial time period, such as when a work or school assignment is due, or when preparing for a hearing, a deposition, or an upcoming deadline to file a document in court, legal researchers must be able to adapt and work with paper sources in their office, school, or local court library. Moreover, *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015), the citation manual most followed by courts and lawyers, "requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source." Thus, this textbook continues to provide students with knowledge of legal research methods based upon paper sources first, and electronic sources second.

Further, the fundamentals of legal writing do not change over time, but the influences over writing ability do change. Increasingly, we are subject to writing in the medium of text messages, informal email, and instant messages. Various written media have drifted away from conventional writing; therefore, many students are more familiar with informal writing than formal writing. I often provide my students with court decisions where the placement of a comma or the meaning of a word is the sole issue to demonstrate how important strong spelling and grammar skills, coupled with strong analytical skills, are in legal writing.

In addition, there is an increasing push, often from state court Access to Justice Programs, to write in a manner easily understood by the average person. Therefore, a balance between the formality of legal writing and the need for nonlegal trained persons to understand court opinions, documents, and legal forms is essential. As such, this edition not only provides in-depth information on the basics of legal analysis and writing, but highlights many techniques and tips for writing about or analyzing and discussing complex legal matters.

This text is designed for use in research and writing classes. It can be useful in schools that have separate research and writing courses, where the first course focuses primarily on research with an introduction to writing, and the second course focuses on writing with research as a secondary component. For the research course, the instructor would use Chapters 1 through 13. For the writing course, instructors would use Chapters 9 through 19. Where both researching and writing are combined in one course, instructors can select the chapters appropriate for such a combined course. Moreover, advanced assignments can be created from the many assignment fact patterns provided throughout the text and requiring students to conduct research for applicable law within the state where the student is located, or in federal law, then drafting the legal document designated by the instructor.

The text is designed to cover the topics of legal research, analysis, and writing in general. It is organized to provide students with comprehensive information about difficult areas of analysis and writing. The text is divided into the following four parts:

Part I: Introduction to Research, Analytical Principles, and the Legal Process. Part I is composed of two introductory chapters. The first chapter presents an overview of the legal system and the legal process, as well as a summary of the basic legal principles involved in the process, such as authority, precedent, stare decisis, and so on. The second chapter introduces legal analysis and the IRAC analytical process.

Part II: Legal Research. Part II consists of six chapters that provide in-depth coverage of legal research and the research process. It begins with two chapters on primary authority; that is, chapters on statutory and case law. Next are two chapters on secondary authority. Two chapters on computers and internet legal research complete Part II. All of these chapters contain brief overviews of legal citation format.

Part III: The Specifics of Legal Analysis. Part III covers matters essential to the analysis of a legal problem. It begins with a chapter on a principal component of a legal question (legal issue), the key facts, which are facts critical to the outcome of the case. Next are chapters on identifying and writing legal issues:

- Identifying the issue—The identification of the legal issue presented by a fact situation
- Stating the issue—How to present the issue

Part III concludes with two chapters on topics fundamental to legal analysis:

- Case law application—The analytical process used to determine if a court opinion applies to a legal question
- Counteranalysis—The process of discovering and considering the counterargument to a legal position or argument.

Part IV: Legal Writing. The focus of Part IV is on legal writing and the legal writing process. It covers the application of the principles presented in the previous chapters to the drafting of legal research memoranda, court briefs, and legal correspondence, with chapters on the following topics:

- Fundamentals of writing
- The legal writing process in general
- Office legal memoranda (two chapters)
- Court briefs
- Correspondence

Chapter Features

Each chapter is designed to help students completely understand and apply the concepts presented in the chapter. Chapters include the following features:

Hypothetical

Each chapter begins with a hypothetical that raises a question or questions involving the subject matter of the chapter. Following the hypothetical is a presentation of the principles, concepts, guidelines, and information concerning the subject matter. After the discussion of the subject matter, the principles and information discussed in the chapter are applied to answer the question or questions raised in the hypothetical.

The use of the hypothetical at the beginning of the chapter creates student interest in the subject matter of the chapter. The answer to the hypothetical toward the end of the chapter allows the student to see how the subject matter ties together and is applied.

Key Points Checklist

Each chapter has a list of key points that may be used as a quick reference and checklist when applying the concepts presented in the chapter. This checklist allows both the instructor and the student to make sure nothing is missed when reviewing or applying the principles presented in the chapter.

In-Depth Coverage of Topics

The greatest advantage of this text, for both teachers and students, is its comprehensive and in-depth coverage of topics not thoroughly covered in most texts. These topics include:

- Issue stating
- Issue identification (issue spotting)
- Case law analysis (whether a case is "on point")
- Counteranalysis
- Statutory analysis
- Office legal memoranda preparation

Examples

A major advantage of the text is that every principle, concept, and so on is followed by an example that illustrates it. One of my students requested that there be "plenty of examples." This text has plenty of examples. These examples help the instructor teach principles and concepts and help the student understand them.

Internet Resources

Each chapter contains a list of websites related to the chapter topic. This allows access to additional information on chapter topics from the Internet.

Assignments

There are assignments at the end of each chapter that range in difficulty. The assignments require students to apply the principles and techniques presented in the text. For example, there are numerous cases provided in Appendix A that instructors can assign to students for briefing. Chapter 13 contains five office legal memoranda assignments (based on the facts and law presented in the assignment and the court opinions in Appendix A). The answers to all the assignments are presented in the Instructor's Manual. Chapters 13, 16, and 19 also provide fact patterns for use in drafting various other legal writing assignment associated with the content of those chapters.

Appendices

The text has two appendices and a glossary of terms. Appendix A consists of court opinions that are necessary for the chapter assignments. Appendix B presents the brief of an appellant in a case filed in the Court of Appeals of the State of New Mexico, a legal memorandum and sample legal correspondence. The legal research, legal analysis, and initial drafts of the appellate brief and the legal memorandum were performed by a paralegal who, at the time, worked for one of the authors.

Readability

The text is written in a manner that a layperson can understand. The text avoids legalese, illustrates concepts with examples, and presents the subject matter simply and clearly.

New Features in This Edition

The major changes in this edition are to the legal research chapters of the text—Chapters 3 through 8. Chapters 3 through 6 are updated in regard to the increased use of online and electronic sources in legal

research. They also include updated exhibits and examples that reflect changes in recent editions of the most referenced print sources. Chapter 5 (on secondary and other research sources) is updated to reflect the use of *Shepard's* online and Westlaw's *KeyCite* to update and validate research. Chapter 7 covers the ethics of and basic research techniques for conducting legal research on noncommercial legal websites. Chapter 8, on the other hand, focuses on WestlawNext and LexisAdvance along with other significant commercial legal research sources. Because these commercial sources change their user interface often (Westlaw and LexisNexis changed the look and several basic features of their products more than once just in the time this text was being updated) the author chose to remove screenshots and step-by-step research instructions. Chapter 8 instead focuses on basic principles of searching all commercial databases to allow the content to be relevant across a variety of databases. In addition, new assignments are added to Chapters 3 through 8.

Unlike other areas of the law, such as criminal and constitutional, where there are continuous changes in the case and statutory law, the process of legal analysis and writing remains essentially the same over time. Therefore, there are few substantive changes in the legal analysis and legal writing sections of this text.

However, there are new assignments and updated assignments throughout Chapters 14, 18, and 19. In response to requests for additional material on basic writing skills, there are additions to Chapter 14 (on the fundamentals of writing). In addition, Chapter 8 (on legal citation) was deleted and the content on legal citation was moved into the end of Chapters 3 through 8 using the latest editions of *The Bluebook: A Uniform System of Citation*, and the *ALWD Citation Manual: A Professional System of Citation*.

Support Material

The text is accompanied by the following support materials designed to assist students in learning and instructors in teaching.

Paralegal MindTap

Paralegal MindTap is available for *Legal Research, Analysis and Writing*, Fourth Edition.

MindTap: Empower Your Students MindTap is a platform that propels students from memorization to mastery. It gives you complete control of your course, so you can provide engaging content, challenge every learner, and build student confidence. Customize interactive syllabi to emphasize priority topics, then add your own material or notes to the eBook as desired. This outcomes-driven application gives you the tools needed to empower students and boost both understanding and performance.

Access Everything You Need in One Place Cut down on prep with the preloaded and organized MindTap course materials. Teach more efficiently with case studies, chapter objectives, quizzes, and more. Give your students the power to read, listen, and study on their phones, so they can learn on their terms.

Empower Students to Reach their Potential Twelve distinct metrics give you actionable insights into student engagement. Identify topics troubling your entire class and instantly communicate with those struggling. Students can track their scores to stay motivated towards their goals. Together, you can be unstoppable.

Control Your Course—and Your Content Get the flexibility to reorder textbook chapters, add your own notes, and embed a variety of content including Open Educational Resources (OER). Personalize course content to your students' needs. They can even read your notes, add their own, and highlight key text to aid their learning.

Get a Dedicated Team, Whenever You Need Them MindTap isn't just a tool, it's backed by a personalized team eager to support you. We can help set up your course and tailor it to your specific objectives, so you'll be ready to make an impact from day one. Know we'll be standing by to help you and your students until the final day of the term.

Instructor's Manual

Each chapter has several exercises ranging in difficulty. The Instructor's Manual provides complete answers to each exercise, general guides for instructors, and suggested additional assignments. Among other things, the manual includes examples of briefs of court opinions office legal research memoranda, and appellate briefs. The manual also provides a test bank of true/false and multiple-choice questions for each chapter. A test bank answer key is also included.

Instructor Companion Website

Spend less time planning and more time teaching. This instructor companion website to accompany *Legal Research, Analysis, and Writing* allows you "anywhere, anytime" access to all of your resources.

- The **Instructor's Manual** contains various resources for each chapter of the book.
- The **Testbank** in Cognero, Word, and several LMS-friendly formats makes generating tests and quizzes a snap. With many questions and different styles to choose from, you can create customized assessments for your students with the click of a button. Add your own unique questions and print rationales for easy class preparation.
- Customizable **PowerPoint® Presentations** focus on key points for each chapter. (PowerPoint® is a registered trademark of the Microsoft Corporation.)

To access additional course materials (including MindTap), please go to login.cengage.com, then use your SSO (single sign on) login to access the materials.

Supplements At-A-Glance

SUPPLEMENT:	WHAT IT IS	WHAT'S IN IT:
Paralegal MindTap MINDTAP From Cengage	Customizable online interactive teaching and learning platform that provides everything you need in one place. Go to login.cengage.com to access.	Interactive teaching and learning tools, including: • MindTap Reader (interactive e-book) • Quizzing • Case studies • Chapter Objectives • Assignments • Flashcards • Weblinks • PowerPoint® presentations
Online Instructor Companion Site 	Resources for the instructor accessible via Cengage Single Sign On	• Instructors Manual with answers to text questions, assignments, and test bank and answer key • Testbank in Cognero, Word, and LMS-friendly formats, with many questions to choose from to create customized assessments for your students • PowerPoint® presentations

Please note that all Internet resources are of a time-sensitive nature; URL addresses may often change or be deleted.

Acknowledgments

I wish to gratefully acknowledge and express my deep appreciation to a number of individuals who took time and effort to assist in the development of this book. Without their expertise, suggestions, and support, this text would not have been remotely possible. I am particularly indebted to the following individuals:

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Jennifer Van Weil for permission to reproduce the Interoffice Memorandum provided in Appendix B. Jennifer is currently working as a paralegal and she is a former paralegal student. The Interoffice Memorandum provided was used to create a brief in chief and reply brief before the New Mexico Court of Appeals.

A former student, working as a paralegal, for permission to reproduce the Client Advisory letter and Interoffice Memorandum 2 in Appendix B.

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Regina Graziani,
University of Hartford, Hartford, CT

Lisa Matich,
Northwestern College, Chicago, IL

About the Authors

William H. Putman received his Juris Doctor degree from the University of New Mexico School of Law and has been a member of the New Mexico Bar since 1975. For ten years, he was an instructor in the Paralegal Studies Program at Central New Mexico Community College in Albuquerque, New Mexico, and in the Paralegal Studies Program at Santa Fe Community College, in Santa Fe, New Mexico.

He is the author of the *Pocket Guide to Legal Writing*, the *Pocket Guide to Legal Research*, and the textbooks *Legal Research, Analysis and Writing; Legal Analysis and Writing*; and *Legal Research*. He also authored the legal writing column in *Legal Assistant Today* (James Publishing Co.) for two years, and published several articles on legal analysis and writing in the magazine.

Jennifer R. Albright is a senior policy analyst for the Arizona Supreme Court, Administrative Office of Courts. She was the Director of the Paralegal Studies and Judicial Studies programs at Central New Mexico Community College for six years and a full-time instructor in both programs for nine years. She currently teaches as an adjunct faculty member in Legal Assistant Studies at Phoenix College. Jennifer received her Juris Doctor degree from the Southern Illinois University School of Law and her Masters of Law (LL.M.) from Arizona State University. She is the co-author of *Legal Research* with William H. Putman.

Part 1

Introduction to Research, Analytical Principles, and the Legal Process

Overview

Part I presents two introductory chapters designed to provide a review of basic information fundamental to legal research, analysis, and writing. Chapter 1 is an overview of the legal system and the legal process, including a summary of basic legal principles and authorities involved in the process. Chapter 2 introduces legal research, analysis, and the research and analytical process.

Chapter 1

Introduction to Legal Principles and Authorities

Outline

Learning Objectives

After completing this chapter, you should understand:

- The main sources and types of law
- The basic structure of the state and federal court systems
- The hierarchy of the various sources of law
- The types of legal authority
- When and how legal authority applies

Renee works in a clerical position at the Addison law firm. Last fall she entered the paralegal program offered by the local community college. Renee is an excellent employee. The firm, in support of her continued education, pays her tuition and allows her to leave work early so that she can attend a late afternoon class. The firm recently reassigned Renee to work in the paralegal division and directed that she be assigned some substantive legal research and analysis tasks.

Two weeks ago, Renee started working on a gender discrimination case. In that case, the client, Mary Stone, worked for a company for 11 years. She always received excellent job performance evaluations. Her coworker, Tom, asked her on several occasions to go out with him. Ms. Stone always refused his invitations. The last time he asked her out was about a year ago. After she refused, he told her, "I'll get even with you." Nine months ago, Tom was promoted to the position of department supervisor. After his promotion, he did not ask Ms. Stone out again. On her evaluation three months ago, he rated her job performance as "poor" and stated that she was uncooperative and abrasive. He recommended that she be demoted or fired. Ms. Stone feels that she has been discriminated against, and she wants the "poor" evaluation removed from her file.

Renee's assignment is to locate the pertinent state and federal law governing gender discrimination and any other relevant information on the subject and prepare a memo summarizing her research and how it applies to the case. Renee located a federal and a state statute prohibiting discrimination in employment on the basis of gender, a federal and a state court case with facts similar to those in Ms. Stone's case, and two law review articles discussing the type of gender discrimination encountered by Ms. Stone.

While analyzing the law and preparing her memo, Renee realizes that she must determine what part of her research applies and how. She asks herself, "In which court should the claim be filed, federal or state? If a complaint is filed in state court, which statutes and court opinions must the state court follow? Why?" This chapter presents general guidelines that assist in determining when and how legal authorities apply. The Application section at the end of this chapter presents guidelines to answer Renee's questions.

I. INTRODUCTION

As attorneys become more aware of the capabilities of paralegals and legal researchers, they increasingly assign them substantive legal research, analysis, and writing tasks. **Legal research** is the process of finding the law that applies to a client's problem. **Legal analysis** is the process of determining how the law applies to the problem. The **legal writing process** is the systematic approach to legal writing. The goal of this text is to provide comprehensive coverage of the legal research, analysis, and writing process. Emphasis is on in-depth coverage of many difficult areas of legal research, analysis, and writing, such as:

- Issue and key fact identification
- Issue statement (how to write the issue)
- Location of statutory and case law
- Location of secondary authority
- Statutory and case law analysis
- Counteranalysis
- How to effectively conduct legal research and analysis
- How to present the results of legal research and analysis in writing

Before considering these areas in subsequent chapters of the text, it is necessary to have a general understanding of the law, the legal system, and some of the basic doctrines and principles that apply to legal analysis. This is essential because legal analysis involves determining how the law applies to a client's facts, which in turn requires knowledge of what the law is, how to find it, and the general principles that govern its application. This chapter presents an overview of the legal system and fundamental principles that guide its operation. The definitions, concepts, doctrines, and principles addressed are referred to and applied in the subsequent chapters and familiarity with them is essential when studying those chapters.

The term *law* has various definitions, depending on the philosophy and point of view of the individual defining it. For the purposes of this text, **law** is defined as the body of enforceable rules that govern individual and group conduct in a society. The law establishes standards of conduct, the procedures governing the conduct, and the remedies available when the rules of conduct are not followed. The purpose of the law is to establish standards that allow individuals to interact with the greatest efficiency and the least amount of conflict. When conflicts or disputes occur, law provides a mechanism for a resolution that is predictable and peaceful.

The following sections focus on the various sources of law and the principles and concepts that affect the analysis of these sources.

II. SOURCES OF LAW

The legal system of the United States, like the legal systems of most countries, is based upon history and has evolved over time. When America was settled, English law governed most of the colonies. As a result, the foundation of the American legal system is the English model, with influences from other European countries.

In England, after the Norman Conquest under William the Conqueror in 1066, a body of law called the *common law* developed. The common law consisted of the law created by the courts established by the king. When colonization of America took place, the law of England consisted primarily of the common law and the laws enacted by Parliament. At the time of the Revolutionary War, the English model was adopted and firmly established in the colonies.

After the Revolutionary War, the legal system of the colonies remained largely intact and remains so to the present time. It consists of two main categories of law:

1. Enacted law
2. Common law/case law

A. Enacted Law

As used in this text, the term **enacted law** means the body of law adopted by the people or legislative bodies. It includes:

- Constitutions—adopted by the people
- Statutes, ordinances—laws passed by legislative bodies
- Regulations—actions of administrative and regulatory bodies that have the force of law

Laws are established by two governing authorities in the United States: the federal government and the state governments. Local governments are a component of state governments and have the authority to govern local affairs. Each governing authority has the power to enact legislation affecting the rights and duties of members of society. It is necessary to keep this in mind when analyzing a problem, because the problem may be governed by more than one law. The categories of enacted law are addressed in the following subsections.

1. Constitutions

A **constitution** is a governing document adopted by the people. It establishes the framework for the operation of government, defines the powers of government, and guarantees the fundamental rights of the people. Both the federal and state governments have constitutions.

United States Constitution. The United States Constitution:

- Establishes and defines the powers of the three branches of federal government: executive (president), legislative (Congress), and judicial (courts)
- Establishes the broad powers of the federal and state governments and defines the relation between the federal and state governments
- Defines in broad terms the rights of the members of society

State Constitutions. Each state has adopted a constitution that establishes the structure of the state government. In addition, each state constitution defines the powers and limits of the authority of the state government and the fundamental rights of the citizens of the state.

2. Statutes

Laws passed by legislative bodies are called **statutes**. Statutes declare rights and duties, or command or prohibit certain conduct. As used here, *statute* includes any law passed by any legislative body: federal, state, or local. Such laws are referred to by various terms, such as *acts, codes, statutes*, or *ordinances*. The term *ordinance* usually refers to a law passed by a local government. Statutory law has assumed an increasing role in the United States, as many matters once governed by the common law are now governed by statutory law.

For Example

Criminal law was once governed almost exclusively by the common law. Now statutory law governs the majority of the criminal law, such as the definition of crimes.

Statutes are usually designed to cover a broad range of present and future situations; therefore, they are written in general terms.

For Example

Section 335-1-4 of a state's Uniform Owner Resident Relations Act provides, "If a court, as a matter of law, finds that any provision of a rental agreement was inequitable when made, the court may limit the application of such inequitable provision to avoid an inequitable result." The statute is written in general terms so that it covers a broad range of landlord–tenant rental situations and provisions. It is designed to cover all provisions of all rental agreements that may prove to be inequitable. The general terms of the statute allow a court a great deal of flexibility when addressing an issue involving an alleged inequitable lease provision. The court "may limit the application . . . to avoid an equitable result." How and to what degree the court limits the application of the lease provision is left to the court to decide.

3. Administrative Law

A third type of enacted law is **administrative law**. Legislative bodies are involved in determining what the law should be and enacting the appropriate legislation. They do not have the time and are not equipped to oversee the day-to-day running of the government and implementation of the laws. Legislatures delegate the task of administering the laws to administrative and regulatory agencies. The agencies are usually under the supervision of the executive branch of the government.

When a law is passed, the legislature includes enabling legislation that establishes and authorizes administrative and regulatory agencies to carry out the intent of the legislature. This enabling legislation usually includes a grant of authority allowing the agency to create rules and regulations necessary to carry out the law. These rules and regulations have the authority of law. The body of law that results is called *administrative law*. It is composed of the rules, regulations, orders, and decisions promulgated by the administrative agencies when carrying out their duties.

Administrative law is usually more specific than statutory law because it deals with the details of implementing the law.

For Example

The federal Environmental Protection Agency, in order to implement the Clean Air Act, adopted various regulations setting air quality standards. Many of these regulations establish specific numerical standards for the amount of pollutants that may be emitted by manufacturing plants. The Clean Air Act is written in broad terms, but the regulations enforcing it are specific. For example, the regulations define the exact amount of pollutants a new automobile may emit.

Enacted law covers a broad spectrum of the law. The process of analyzing enacted law is covered in detail in Chapter 3.

B. Common Law or Case Law

In a narrow sense, **common law** is law created by courts in the absence of enacted law. Technically, the term includes only the body of law created by courts when the legislative authority has not acted.

For Example

The courts have created most of the law of torts. Tort law allows a victim to obtain compensation from the perpetrator for harm suffered as a result of the perpetrator's wrongful conduct. From the days of early England to the present, legislative bodies have not passed legislation establishing or defining most torts. In the absence of legislation, the courts have created and defined most torts and the rules and principles governing tort law.

Case law encompasses a broader range of law than common law. Case law includes not only the law created by courts in the absence of enacted law, but also the law created when courts *interpret* or *apply* enacted law.

Often the term *common law* is used in a broad sense to encompass all law other than enacted law (i.e., law enacted by legislatures or adopted by the people). This text uses the term *common law* in the broadest sense to include case law (often called judge-made law). Throughout the remainder of this text, the term *case law* is primarily used and should be interpreted to include all law other than enacted law.

As mentioned, the case law system in the United States is based on the English common law, and much of the English common law has been adopted by the states. William the Conqueror established a king's court (Curia Regia) to unify the country through the establishment of a uniform set of rules and principles to govern social conduct throughout the country. The courts, in dealing with specific disputes, developed legal principles that could apply to all similar disputes.

With the passage of time, these legal principles came to embody the case law. The case law process continues to the present day in both England and the United States, with new rules, doctrines, and principles continually being developed by the courts.

For Example

There was no remedy in tort law for strict products liability (liability of manufacturers and sellers for harmful or dangerous defective products) 150 years ago. The tort was developed by the courts in the 20th century to address the needs of a modern industrial society.

The ability to research and analyze case law is an essential skill for a legal researcher. The researcher usually needs court opinions to determine how a law has been interpreted and how it might apply to specific fact situations and problems such as those of the client's case.

1. Role of the Courts

Disputes in our society arise from specific fact situations. The courts are designed to resolve these disputes. When a dispute is before a court, it is called a *case*. The role of the court is to resolve the dispute in a peaceful manner through the application of the law to the facts of the case. To accomplish this resolution, the court must identify the law that controls the resolution of the dispute and apply that law to the facts of the case.

When there is no enacted or case law governing a dispute, the court may be called upon to create new law. If the meaning or application of an existing law is unclear or ambiguous, it may be necessary for the court to interpret the law. In interpreting and applying existing law, courts often announce new legal rules and principles. The creation of new law and the interpretation and application of existing law become law itself.

The result reached by a court is usually called a *decision*. The court's written decision, which includes how it ruled in a case and the reasons for that ruling, is called an **opinion**. The case law is composed of the general legal rules, doctrines, and principles contained in court opinions.

2. Court Systems

A basic understanding of court systems is necessary for anyone analyzing a legal problem. The approach to a problem and the direction of research may depend upon whether relief is available in federal or state court or both. This section presents a brief overview of the court systems.

There are two parallel court systems, the federal court system and the state court system. A concept common to both systems is that of jurisdiction. An understanding of this concept is essential to understanding the operation of both systems.

a. Jurisdiction

The types of cases that can come before a particular court in either system are determined by the jurisdiction of the court. **Jurisdiction** is the extent of a court's authority to hear and resolve specific disputes. A court's jurisdiction is usually limited to two main areas:

1. Over persons by geographic area—personal jurisdiction
2. Over subject matter by types of cases—subject matter jurisdiction

(1) Personal Jurisdiction **Personal jurisdiction** is the authority of the court over the parties to a legal dispute. The jurisdiction of state courts is limited to the geographic boundaries of the state or to matters that have some connection with the state.

For Example

New York state courts do not have authority to decide matters that take place in the state of Ohio. Their authority is limited to the geographic boundaries of the state of New York. State courts in New York have jurisdiction over an Ohio resident if the resident is involved in an automobile accident in New York.

In addition, personal jurisdiction requires that both the plaintiff and the defendant be properly before the court. Assuming the correct court is chosen, a plaintiff properly comes before the court by filing the pleading that starts the lawsuit (the complaint in a civil case or an indictment, information, or complaint in a criminal case). A defendant is properly before the court when the defendant is notified of the lawsuit, that is, correctly served with a copy of the complaint (service of process).

(2) Subject Matter Jurisdiction **Subject matter jurisdiction** is the court's authority over the types and kinds of cases it may hear and decide. Regarding subject matter jurisdiction, there are basically two types of courts in both the federal and state court systems:

1. Courts of general jurisdiction
2. Courts of limited jurisdiction

Courts of general jurisdiction have the authority to hear and decide any matter brought before them, with some limitations. The United States District Courts are the courts of general jurisdiction in the federal system. They have the authority to hear and decide all matters involving the United States Constitution or federal law (*federal question jurisdiction*) or cases where the parties are citizens of different states and the amount in controversy exceeds $75,000 (*diversity jurisdiction*). All states have state courts of general jurisdiction that have authority over state matters. The courts of general jurisdiction are the main trial courts in both systems.

Courts of limited jurisdiction are restricted in the types of cases they can hear and decide. There are courts of limited jurisdiction in both the federal and state court systems.

For Example

1. The authority of the United States Tax Court is limited to matters involving federal tax law.
2. Most state court systems have courts whose authority is limited by dollar amount. Such courts are limited to hearing and deciding matters where the amount in controversy does not exceed a certain amount, such as $10,000. These courts are called by various names: small claims, magistrate, and so on. Some state courts are limited to hearing specific types of cases, such as matters involving domestic relations or probate.

(3) Concurrent Jurisdiction **Concurrent jurisdiction** exists when more than one court has the authority to deal with the same subject matter. In such cases, the plaintiff may choose the court in which to file the case.

For Example

1. In diversity jurisdiction (disputes between citizens of different states) in which the amount in controversy exceeds $75,000, the matter may be tried in either federal court or the state court of general jurisdiction. Both the federal and state courts have authority to try the case; they have concurrent jurisdiction. The party initiating the case must choose the court in which to file the case.

2. A state court of limited jurisdiction, such as a county court, may have authority to try cases where the amount in controversy does not exceed $10,000. Such cases may also be tried in the state's court of general jurisdiction, such as a district court, which has authority to try a claim of any dollar amount. These courts have concurrent jurisdiction over claims that do not exceed $10,000; that is, the matters may be tried in either court.

Jurisdiction is a complex subject. An exhaustive and detailed treatment of jurisdiction is the subject of many texts and is properly addressed in a separate course of study. The brief discussion here is designed to acquaint the student with the fundamentals.

b. Federal Court System

The federal court system is composed of three basic levels of courts.

(1) Trial Courts The **trial court** is where the matter is heard and decided. The testimony is taken, other evidence is presented, and the decision is reached. The role of the trial court is to determine what the facts are and how the law applies to those facts. A trial is presided over by a judge and may include a jury. If the trial is conducted before a judge and a jury, the judge decides **questions of law** such as what the law is or how it applies. The jury decides **questions of fact** such as whether a person performed a certain act. If the trial is conducted without a jury, the judge decides both questions of law and fact.

The United States **District Court** is the main trial court in the federal system. This court has jurisdiction over cases involving federal questions. This includes matters involving the United States Constitution, federal laws, United States treaties, and so on. The United States District Court also has the authority to try diversity cases. Each state has at least one United States District Court (see Exhibit 1-1).

In addition to the United States District Court are other federal courts whose authority is limited to specific matters, such as the United States Tax Court, the United States Court of International Trade, the United States Court of Federal Claims, and the United States Bankruptcy Court.

(2) Court of Appeals A party aggrieved by the decision of a trial court has a right to appeal the decision to a **court of appeals** (also referred to as an appellate court). The primary function of a court of appeals is to review the decision of a trial court to determine and correct any error that may have been made. A court of appeals only reviews what took place in the trial court. It does not hear new testimony, retry the case, or reconsider the evidence. A court of appeals reviews the record of the lower court and takes appropriate action to correct any errors made, such as ordering a new trial or reversing a decision of the trial court. The court of appeals in the federal system is called the United States Court of Appeals. These courts are also called *circuit courts*. There are 13 federal courts of appeals (see Exhibit 1-1).

(3) United States Supreme Court The United States Supreme Court is the final court of appeals in the federal system. It is the highest court in the land. With few exceptions, an individual does not have an absolute right to have a matter reviewed by the **Supreme Court**. A party who disagrees with the decision of a court of appeals

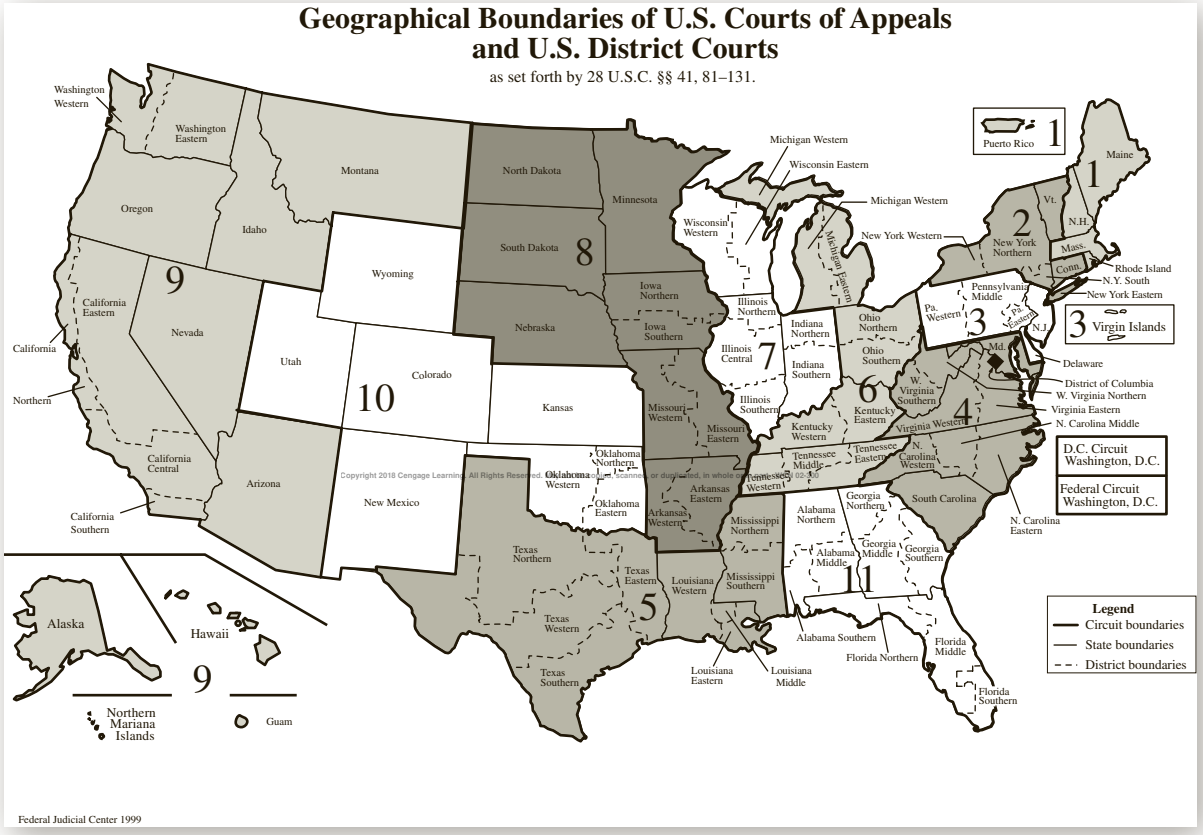

Exhibit 1-1 United States Circuit Courts of Appeals and United States District Courts *http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf*

must request (petition) the Supreme Court to review it. The request is called a **petition for writ of certiorari**. The Supreme Court has discretion to review or not review a decision of a court of appeals. If the Court denies the petition, the decision of the court of appeals stands. If the Court believes that the matter involves important constitutional issues, if the challenged decision conflicts with other federal court decisions, or if there is a conflict between the opinions of the courts of appeals, then the Supreme Court may grant the petition and review the decision of the lower court.

The organization of the federal court system and the various federal courts is presented in Exhibit 1-2.

c. State Court System

Every state has its own state court system each with unique features and variations. The names of the courts vary from state to state.

For Example

The highest court in many states is called the supreme court. In New York, however, the highest court is called the court of appeals.

Because of the unique features of each state system, it is essential that you become familiar with the court system in your state. Like the federal court system, most state court systems are composed of three basic levels of courts.

(1) Trial Courts All states have trial courts where the evidence is presented, testimony taken, and a decision reached. Usually there are trial courts of general jurisdiction and trial courts of limited jurisdiction. The court of general jurisdiction is often called a *district court* or **superior court**. There are various courts of limited jurisdiction, such as probate courts, small claims courts, domestic relations courts, magistrate courts, and county courts.

(2) Courts of Appeals Many states have intermediate courts of appeals that function in the same manner and play the same role in the state court system as the federal court of appeals does in the federal system.

(3) State Supreme Court Every state has a highest appellate court, usually called the supreme court. This court is the highest court in the state, and its decisions are final on all questions involving state law. In states that have intermediate courts of appeals, the state supreme court often operates like the United States Supreme Court in that

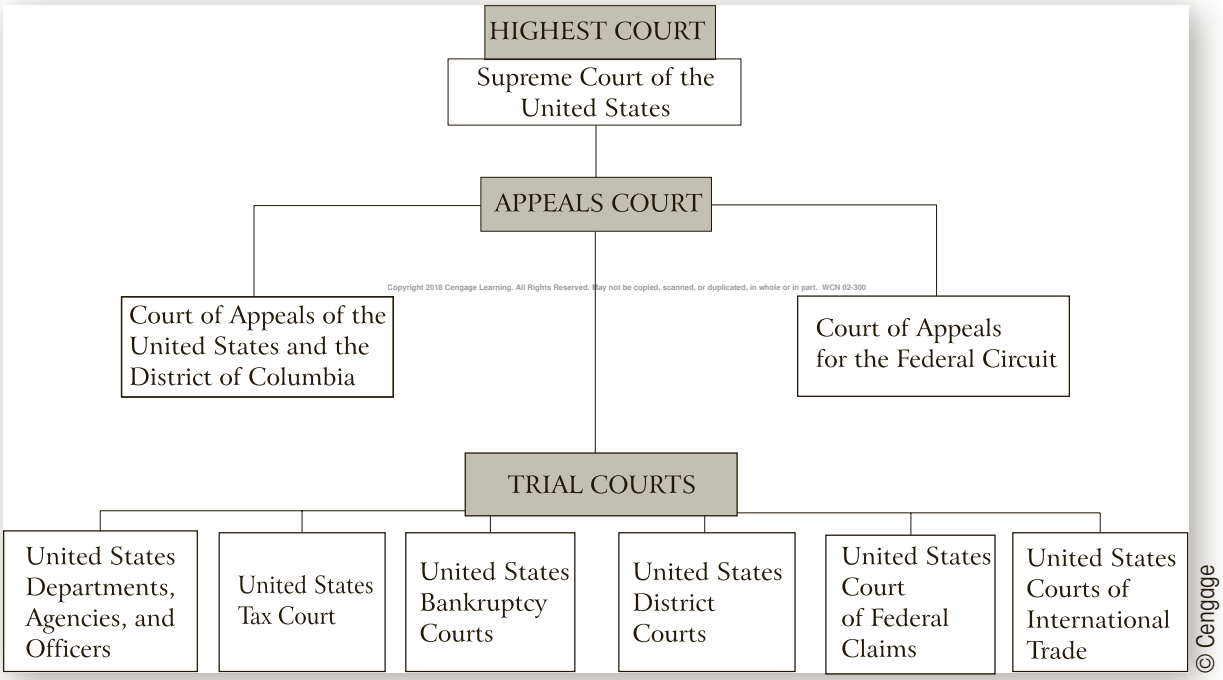

Exhibit 1-2 Organization of the Federal Court System.

there is no automatic right of appeal. Like the federal Supreme Court, the state supreme court grants leave to appeal only in cases presenting important questions of state law. In those states where there is no intermediate court of appeals, a party who disagrees with a trial court's decision has a right to appeal to the highest court. In either system, state or federal, all individuals have at least one opportunity to appeal the decision of a trial court to a higher court.

3. Precedent and Stare Decisis

It is apparent, when you consider the number of courts in the state and federal court systems, that the courts address an immense number of legal questions and problems. Often, similar legal questions and fact situations arise in the same court system or in different court systems. If a court in an earlier case has developed a legal doctrine, principle, or rule that helps resolve a legal question, then later courts addressing the same or a substantially similar question should be able to look to the earlier decision for guidance. The efficiency of the court system is greatly enhanced because courts do not have to "reinvent the wheel" in every case—they may rely on legal doctrines, principles, or rules developed over time in previous cases.

Reliance on doctrines, principles, or rules to guide the resolution of similar disputes in the future also makes the legal system more stable, predictable, and consistent. If the law governing a specific subject or legal question is established in an earlier case, then individuals can rely on a court addressing the same or a similar question to base its decision on the principles established in the earlier case. Outcomes can be predicted to some extent, and stability and consistency can become part of the court system.

Two complementary doctrines have developed to provide stability, predictability, and consistency to the case law. These doctrines are precedent and stare decisis.

a. Precedent

Precedent is an earlier court decision on an issue that applies to govern or guide a subsequent court in its determination of an identical or similar issue based upon identical or similar facts.

For Example

The state's highest court, in the case of *State v. Ahrens*, held that bail must be set in all criminal cases except when a court determines that the defendant poses a clear and present threat to the public at large or to an individual member or members of the public. If a case before a subsequent court involves a situation in which the defendant has made threats against the life of a witness, *Ahrens* applies as precedent and can serve as a guide for the court's determination of the question of whether bail must be set.

A case that is precedent is often called "on point." Chapter 12 discusses the process and steps to follow when determining if a court opinion may apply or be relied on as precedent.

b. Stare Decisis

The doctrine of **stare decisis** is a basic principle of the case law system that requires a court to follow a previous decision of that court or a higher court when the current decision involves issues and facts similar to those involved in the previous decision. In other words, similar cases will be decided in similar ways. Under the doctrine, when the court has established a principle that governs a particular set of facts or a specific legal question, the court will follow that principle and apply it in all future cases with similar facts and legal questions. In essence, stare decisis is the doctrine providing that precedent should be followed.

For Example

A statute of state X prohibits employment discrimination on the basis of gender. In the case of *Ellen v. Employer, Inc.*, an employee was fired because the employee was homosexual. The supreme court of state X interpreted "discrimination on the basis of gender" as used in the statute to include discrimination based on an individual's sexual preference. The doctrine of stare decisis requires that in subsequent cases, the supreme court of state X and all the lower courts of state X follow the interpretation of the statute given in *Ellen v. Employer, Inc*. In other words, the lower courts must follow the precedent set in *Ellen v. Employer, Inc*.

The doctrine of stare decisis, however, does not require rigid adherence to the rules or principles established in prior decisions. The doctrine does not apply if there is a good reason not to follow it. These reasons include:

1. The earlier decision has become outdated because of changed conditions or policies.

For Example

In *Plessy v. Ferguson,* 163 U.S. 537 (1896), the court adopted the "separate but equal doctrine" that allowed segregation on the basis of race. In *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Supreme Court refused to follow *Plessy* and overruled it, holding that separate educational facilities were inherently unequal and denied equal protection of the law.

2. The legislature has enacted legislation that has, in effect, overruled the decision of an earlier court.

For Example

In *Stevens v. Soro, Inc.*, a state supreme court ruled the phrase "on the job" in the Workers' Compensation Act means that an employee is "on the job" from the moment the employee leaves for work until he or she arrives home. After the decision, the state legislature amended the act, defining "on the job" to include only the time the employee is on the premises of the employer. The amendment in effect overrules the prior court decision, so courts are not required to follow that decision in subsequent cases.

3. The earlier decision was poorly reasoned or has produced undesirable results.

For Example

Review the gender discrimination example presented in the beginning of this subsection. Suppose the supreme court of state X, in a later case, decides that the reasoning in the court's decision in *Ellen v. Employer, Inc.*, was incorrect and the term *gender discrimination* should not be interpreted to include discrimination on the basis of sexual preference. The court can overrule *Ellen* and courts are not bound to follow it thereafter.

When a court follows the doctrines of precedent and stare decisis, the court can be relied on to reach the same decision on an issue as an earlier court when the cases are sufficiently similar. Without these doctrines, a similar case could be decided in an entirely different manner based upon the unique beliefs of the individual judge and jury. The result would be little or no consistency in the case law, and chaos would reign. Later in this chapter, we discuss when a decision of an earlier court may or must be relied on by a subsequent court (see section IV. Authority).

III. HIERARCHY OF THE LAW

A hierarchy of authority exists between the two primary sources of law: enacted law and case law. When a question arises concerning which source applies in a case or there is a conflict between sources, a hierarchy governs which source will apply.

In general, within each jurisdiction, the constitution is the highest authority, followed by the other enacted law (legislative and administrative law), and then case law. This means that legislative acts and court decisions must not conflict with the provisions of the constitution. A court decision may interpret a legislative act, but it cannot overrule an act unless it is determined that the act violates the constitution.

The United States Constitution separates the powers to govern between the federal and state governments. This separation of powers is called **federalism**. The **supremacy clause** of the Constitution (Article VI)

provides that between federal and state law, federal law is supreme. If an enacted law or court decision of a state conflicts with a federal law or court decision, then the state law or decision is invalid to the extent it conflicts with the federal law or decision. It is important to note not all differences between state law and federal law equal a conflict.

For Example

A state passes a law declaring that it is illegal to burn the American flag. The state supreme court upholds the statute. Both the state statute and the state supreme court decisions are invalid because they conflict with the United States Constitution. The United States Supreme Court has ruled that the freedom of speech provisions of the Constitution include the right to burn the flag. The federal law is supreme, and the state law is invalid to the extent it conflicts with federal law.

IV. AUTHORITY

To analyze the law, in addition to knowing the sources of law, you must become familiar with the concept of authority, principles relating to authority, and the various types of authority. **Authority** may be defined as anything a court may rely on when deciding an issue. It includes not only the law, but also any other nonlaw source that a court may look to in reaching a decision.

This section discusses the two types of authority and the two roles that authority plays in the decision-making process. The two types of authority are:

1. Primary authority—the law itself; constitutions, statutes, administrative law, and case law
2. Secondary authority—nonlaw sources on which a court may rely; treatises, *Restatements of the Law*, model codes, or legal encyclopedias

The two possible roles that authority may play are:

1. Mandatory authority—the authority a court must rely on and follow when deciding an issue
2. Persuasive authority—the authority a court may rely on and follow, but is not bound to rely on or follow

The following subsections first address the two types of authority (primary and secondary), then discuss the role of authority, that is, the value or weight a court must or may give to authority (mandatory and persuasive authority). (See Exhibit 1-3.)

A. Types of Authority

1. Primary Authority

Primary authority is the law itself. It is composed of the two main categories of law, enacted law and common law.

Courts refer to and rely on primary authority first when resolving legal problems.

2. Secondary Authority

Secondary authority is any source a court may rely on that is not the law, that is, not primary authority. Secondary authority consists of legal resources that summarize, compile, explain, comment on, interpret, or in some other way address the law.

Secondary authority can be used in several ways:

- To obtain a background or overall understanding of a specific area of the law. Legal encyclopedias, treatises, and periodicals are useful for this purpose.

	Types of Authority
Primary Authority	The law itself, such as constitutions, statutes, ordinances, administrative agency rules and regulations, and court opinions
Secondary Authority	A source a court may rely on that is not the law, such as legal encyclopedias, *American Law Reports (ALR), Restatements of the Law*, treatises, and law review articles
	Role of Authority
Mandatory Authority	A source of law a court must rely on when reaching a decision, such as an enacted law (statute, ordinance, etc.) that governs the legal question being addressed, or an opinion of a higher court in the jurisdiction that addressed the same or a similar legal question and facts
Persuasive Authority	Any authority a court is not bound to consider or follow but may consider or follow when reaching a decision, such as an opinion of a court in another state on the same or a similar issue, or a secondary authority source (encyclopedia article, legal dictionary definition, etc.)

Exhibit 1-3 Types and Role of Authority.

For Example

If the researcher is unfamiliar with a specific area of law, such as defamation, then a treatise on tort law will provide an overview of the area. The treatise will also include references to key court cases and enacted law (primary authority) concerning defamation.

- To locate primary authority (the law) on a question being researched. *American Law Reports (ALR)*, legal encyclopedias, and treatises can be used for this purpose. See Chapter 5. All secondary authority sources include references to primary authority.
- To be relied on by the court when reaching a decision, but only when there is no primary authority governing a legal question or it is unclear how the primary authority applies to the question. Treatises, law reviews, and *Restatements of the Law* are relied on for this purpose.

There are literally hundreds of secondary sources. An in-depth discussion of all of them is beyond the scope of this text; therefore, only some of the major secondary sources are summarized here.

a. Annotations

Annotations are notes and comments on the law. A well-known annotation is the *American Law Reports (ALR)*. The *ALR* is a series of books that contain the complete text of selected court opinions, along with scholarly commentaries explaining and discussing issues raised in the case. The commentaries also include an overview of how the issues are treated nationally, focusing on the majority and minority views, and a list of cases from other jurisdictions dealing with the same issues. The *ALR* is useful for obtaining an in-depth overview of the courts' treatment of specific questions and issues. These annotations are also useful as an aid in locating court decisions dealing with specific issues.

b. Law Dictionaries

Legal dictionaries include definitions of legal terms and guides to pronunciation. The two major legal dictionaries are *Black's Law Dictionary* (West, a Thomson Reuters business) and *Oran's Dictionary of the Law* (Delmar Cengage Learning).

c. Law Reviews

Law reviews are scholarly publications usually published by law schools. They contain articles written by professors, judges, and practitioners and include commentaries written by law students. The articles usually discuss specific topics and legal questions in great depth and include references to key cases on the subjects. These reviews are useful as a source of comprehensive information on specific topics.

d. Legal Encyclopedias

A *legal encyclopedia* is a multivolume set of books that provides a summary of the law. The topics are arranged in alphabetical order, and the set includes an index and cross-references. The two major legal encyclopedias are *Corpus Juris Secundum (CJS)* and *American Jurisprudence* (now *American Jurisprudence Second*) (*Am. Jur*. or *Am. Jur. 2d*), both published by West, a Thomson Reuters business. An encyclopedia is a valuable source when seeking an overview of a legal topic.

e. Restatements of the Law

Published by the American Law Institute, the *Restatements of the Law* present a variety of topics and discuss what the law is on each topic, or what it should be. Following a presentation of the law is a "Comment" that explains the rule of law presented, discusses why the rule was adopted, and gives examples of how the rule applies. The *Restatements* are drafted by authorities and experts in specific areas and are often relied on and adopted by legislatures and courts.

f. Treatises

A *treatise* is a single- or multi-volume work written by an expert in an area that covers that entire area of law. A treatise is a valuable resource because it provides a comprehensive treatment of a specific area of law, reference to statutes and key cases in the area, and commentaries on the law.

B. Role of Authority

After the types of authority have been identified, it is important to understand the role these sources play in the decision-making process. Not all authority referred to or relied on by a court when deciding an issue is given equal weight. Authority is divided into two categories—mandatory authority and persuasive authority—for the purpose of determining its authoritative value, or the extent to which it must be relied on or followed by a court (see Exhibit 1-3).

1. Mandatory Authority

Mandatory authority is any source that a court must rely on or follow when reaching a decision (e.g., a decision of a higher court in the jurisdiction on the same or a similar issue). Primary authority can be mandatory authority because courts are required to follow the law itself. As discussed earlier, primary authority is composed of enacted law and case law. Secondary authority can never be mandatory authority. A court is never bound to follow secondary authority because it is not the law.

Not all primary authority, however, is mandatory authority. Primary authority becomes mandatory authority only when it governs the legal question or issue being decided by the court.

The factors involved in deciding when enacted law and case law are mandatory authority are briefly discussed here.

a. Enacted Law

Chapter 3 details the process for determining whether an enacted law applies to govern a legal question or issue before a court. The three-step process presented in that chapter is summarized here.

STEP 1: ***Identify all the laws that may govern the question.*** This requires locating all statutes or laws that might possibly govern the legal question.

For Example

Some legal questions and fact situations, such as gender discrimination, are governed by both state and federal law, and occasionally by more than one state or federal law.

Once you identify the laws that may govern the question, determine which of these laws applies to the specific legal area involved in the dispute. This requires an analysis of the law.

For Example

In the preceding example, an analysis of the law may reveal that even though both federal and state law govern the question of gender discrimination, the federal law requires that the matter be tried in state court before being pursued in federal court. The federal law, therefore, does not apply until the remedies available under state law have been pursued in the state courts.

STEP 2: ***Identify the elements of the law or statute.*** Once you determine the specific law or laws that govern the question, identify the elements of the law or statute, that is, the specific requirements that must be met for the law or statute to apply. It is necessary to identify the elements before moving on to step 3, which is determining whether the requirements of the law or statute are met by the facts of the case.

For Example

Mary bought a toaster at a local store. It did not work when she plugged it in. The store owner refused to replace the toaster or give her a refund when she returned it. The legal question is whether Mary can get a new toaster or her money back. Assume that, after performing the first step of the analysis, you determine that article 2 of the state's commercial code is mandatory authority because article 2 applies to the sale of goods and a toaster is considered goods. Article 2 provides that a warranty is created if:

1. The transaction involves the sale of goods, and
2. The seller of the goods is a merchant.

These are the elements of the statute. These elements must be identified to determine what the section requires for the warranty to exist. It is necessary to identify these requirements before it can be determined how the section applies to the client's facts. The statute further provides that the seller must replace the item or refund the purchase price if the item does not work.

STEP 3: ***Apply the facts of the case to the elements.*** The final step is to apply the facts of the client's case to the elements to determine how the law or statute applies. If the elements match the facts raised by the legal issue, then the law applies and governs the outcome. Even if some of the elements are not met, the law still applies, but the outcome may be different.

For Example

Referring to the previous example, the warranty exists if the two elements are met. In this case, the first element is met because a toaster is considered goods. The second element is met because the store owner is considered a merchant because he routinely sells toasters. The elements are met and Mary is entitled to a new toaster or a refund.

If the transaction does not involve the sale of goods, such as the sale of land, or the seller is not a merchant (the toaster was purchased at a yard sale), the elements of article 2 are not met, there is no warranty, and Mary is not entitled to a new toaster or a refund.

After you determine that an enacted law governs a legal question, the law is mandatory authority, and a court must apply the law unless the court rules that the law is unconstitutional.

b. Case Law

For a court opinion to be mandatory authority (often referred to as *mandatory precedent*) that binds another court to follow the rule or principle of law established in the opinion, three conditions must be met:

1. The court opinion must be on point.
2. The court opinion must have been issued by a higher court in that jurisdiction.
3. The court opinion must be "published" or a "precedential" opinion.

For Example

If the highest court in state A defines malice as used in the state's murder statute, then all the lower courts in state A (intermediate appellate and trial courts) are bound to follow the highest court and apply the highest court's interpretation of the term in cases involving the statute.

Regarding this example, is the highest court in state A, in later cases, bound to follow its own earlier definition of malice? No. The highest court is always free to overturn the opinion and change the definition. The court will follow its earlier decision unless it overturns it or in some way amends it. The lower courts do not have this option.

What if the decision of the highest state court is different from the decision of a federal court? If a state court decision conflicts with the Constitution or federal law, then the state court must follow the dictates of the federal law. State courts usually have the final say over interpretations of state law. If a federal court is addressing an issue involving state law, then the federal court usually follows the interpretation of the state law rendered by the state's highest court.

Chapter 12 presents an in-depth discussion of case law analysis and the process involved in determining whether a case is on point.

2. Persuasive Authority

Persuasive authority is any authority a court is not bound to consider or follow but may consider or follow when reaching a decision. When mandatory authority exists, persuasive authority is not necessary, although its use is not prohibited. Persuasive authority consists of both primary authority and secondary authority.

a. Primary Authority as Persuasive Authority

On occasion, courts look to enacted law as persuasive authority.

For Example

A court, when interpreting a term not defined in an act, may apply the definition of the term that is given in another act. Suppose the term *gender discrimination* is not defined in the state's fair housing act but is defined in the state's fair loan act. The fair loan act is not mandatory authority for questions involving the fair housing act because it does not govern housing. It can, however, be persuasive authority. The court may follow or be persuaded to apply the definition given in the fair loan act.

Primary authority represented by case law is often used as persuasive authority (often referred to as *persuasive precedent*). Even though case law is primary authority, it may not be mandatory authority in a specific situation if it does not apply to govern the situation. The court is not required to follow such authority. A court may, however, be guided by and persuaded to adopt the rule or principle established in another court opinion.

For Example

1. The courts in state A have not addressed a legal issue. Therefore, there is no mandatory authority that state A courts must follow. State A courts may consider and adopt the rules and reasoning of federal or other state courts that have addressed the issue. It is not mandatory that state A follow the primary authority of the other federal or state courts, but state A may be persuaded to adopt the primary authority of these courts.
2. Neither the legislature nor the courts of state A have adopted strict liability as a cause of action in tort. State A's highest court can look to and adopt the case law of another state that has adopted this tort.
3. A trial court in state A has written an opinion on a legal issue. A higher court in state A is not bound by the lower court opinion (it is not mandatory authority), but it may consider and adopt the rule and reasoning of the lower court.

When no mandatory authority exists that a court is bound to follow, as in the preceding examples, the court may look to and rely on other primary authority as persuasive authority.

b. Secondary Authority as Persuasive Authority

As discussed earlier, secondary authority is not the law and, therefore, can never be mandatory authority. When mandatory authority on an issue exists, it is not necessary to support it with secondary authority, although it is permissible to do so. Secondary authority should not be relied upon when there is mandatory authority. In such situations, the mandatory authority governs. If there is no mandatory authority but there is persuasive primary authority, the secondary authority may be used in support of the primary authority.

For Example

The courts in state A have never addressed a certain issue. The courts in state B have addressed the issue. The rule of law established by the state B courts can be persuasive primary authority for state A courts. Secondary sources, such as *ALR* commentaries and law review articles, may be submitted to a state A court in support of the persuasive primary authority from state B. Secondary authority also may be submitted to the court for the purpose of opposing the adoption of the persuasive authority from state B.

Secondary authority is most valuable when there is no primary authority, either mandatory or persuasive. However, this situation is rare. Few matters have never been addressed by either some legislature or some court. As noted earlier, secondary authority is also valuable because it is useful in locating primary authority. Some secondary authority is given greater weight or considered to have greater authoritative value than other secondary authority.

For Example

A court will more likely rely on and give greater weight to a *Restatements of the Law* drafted by experts in the field than to a law review article written by a local practitioner in the field.

Always locate the available primary authority and exhaust all avenues of research in this direction before turning to the location of secondary authority. There are two reasons for this:

1. Courts must look to and consider primary authority before considering secondary authority.
2. Primary authority will often lead to key secondary authority sources.

V. INTRODUCTION TO LEGAL CITATION

At the conclusion of your legal research, you often are required to present the results in writing, as discussed in the chapters of this text explaining the legal writing process. In doing so, you must include citations to the legal authorities you have identified. Legal citation is akin to citation in other forms of writing in that it serves to alert the reader that the content is from another source and not the author's own thoughts. However, legal citation has the added task of demonstrating to the reader the strength of the law and whether a court is bound by the source cited (primary, mandatory authority versus persuasive authority).

It is important that the person reading the written document, whether it is an internal office memorandum or a legal document filed in court, be able to easily identify the source cited and quickly locate the source itself. As such there must be a uniform method of citation. There are two manuals that provide the rules and format of legal citation: *The Bluebook: A Uniform System of Citation*, 20th ed. (2015) and the *ALWD Guide to Legal Citation*, 5th ed. (2014). It is also important to know the local standard or rule regarding which manual to use. There are some differences between the two manuals although the differences are generally related to how words are abbreviated in citations, rather that the citation format itself.

The next sections will provide general information on citation in *Bluebook* and *ALWD Guide* format on specific sources covered in this text. Below is a brief overview of both citation manuals, with information on citing specific resources provided in later chapters. More specific references to citation format for various legal sources is included in the chapters on those specific sources. However, it is not the place of this text to provide the detailed rules of legal citation. Always be sure you consult with the latest edition of either citation manual, and any local rules governing citation of state sources to determine the exact citation format required for the particular sources you are citing and the specific venue for which you are writing.

A. *The Bluebook: A Uniform System of Citation* (*The Bluebook*)

The *Bluebook* is organized into four main parts: Introduction, Bluepages, Rules, and Tables. The Introduction explains how the *Bluebook* is organized and it is essential to understanding how to navigate the manual. Although the *Bluebook* contains instructions for citing legal resources in legal practice ("basic" citation rules) and citing resources in academic documents such as law journals, it is primarily designed for use in the latter. For this reason many lawyers and students find the *Bluebook* difficult to use. However, some courts require the *Bluebook* format be followed and even where there is no requirement to follow a specific format, most lawyers are taught the *Bluebook* format in law school and require their paralegals to follow that format unless a local rule dictates otherwise. As such, students must understand the organization and interplay between the different parts of the *Bluebook* to ensure they are citing resources properly for a document drafted for use in legal practice.

One major improvement in the *Bluebook* has been that its content is available online for a fee. Many students and legal practitioners now subscribe, for a fee, to the *Bluebook* online rather than in print. Advantages of online

access to the *Bluebook* include keyword and phrase searching, as well as the ability of the subscriber to annotate or make notes which are searchable. In addition, the *Bluebook* is now available via the Rulebook app for all Apple iOS devices.

Citing legal resources in *Bluebook* format requires students to become familiar with three essential components, described next.

1. The Bluepages and Bluepage Tables

The Bluepages summarize the rules for citing legal resources in documents prepared for filing in court or for use in a law office. This part of the *Bluebook* contains specific information on citing statutes, case law, secondary authority, and other legal resources in a format and typeface commonly used by the legal profession. Bluepages rule B2 provides detail regarding typeface for court documents. Bluepages Table BT.1 contains abbreviations commonly used in titles of court documents. Bluepages Table BT.2 contains references to sources for local citation rules. Remember both local citation rules and the applicable citation manual must be consulted to determine the required citation format for a given jurisdiction.

2. Citation Rules

There are rules of citation for each type of legal source, which are explained in the white pages section of the *Bluebook*. This section is referred to as the Rules section. The rules in the Bluepages and the Rules section have some overlap. If the citation is covered in the Bluepages, you may not need to consult the Rules section. It is important to note the explanations in Rules 1 through 9 use general standards of citation used in all forms of legal writing. Rules 10 through 21 present rules for specific types of authority and the examples are printed in a typeface standard used for law journals, not court documents.

3. Tables

Tables are on pages with blue borders. They list necessary abbreviations for use in citations. The Tables section is extensive, covering not only federal and state sources, but also international sources. It is important to use the proper abbreviation and the proper table for the type of citation being drafted.

B. The *ALWD Guide to Legal Citation* (*ALWD Guide*)

The *ALWD Guide* is used in many colleges and law schools, even when the Bluebook is the citation manual deemed the official citation manual for a particular jurisdiction. The *ALWD Guide* is often preferred by instructors over the *Bluebook* because of its ease of use and in-depth explanations of the various citation rules. The fifth edition expanded its appendices to include abbreviations of more legal sources. Unlike the *Bluebook, the ALWD Guide* is focused on citation format for legal documents instead of legal periodicals and law reviews. However, the fifth edition does include explanations and examples of how to modify citation formats from those used for legal documents to those used for scholarly writing side-by-side with the format used in legal documents. The *ALWD Guide* also has an online companion that is designed to allow students to address the most common challenges and errors in legal citation through extensive exercises.

The *ALWD Guide* is organized into seven parts. The following components of the *ALWD Guide* are essential to its effective use.

1. Part 1: Introductory Material

Part 1 explains several key aspects of effective citation. In particular, it explains how to use the manual, how word processor settings affect citation format, and the overall organization of the manual. Importantly, Part 1 explains that the *ALWD Guide* focuses on citation format of United States federal and state legal sources and does not address foreign or international sources as the *Bluebook* does.

2. Text of Citation Rules

Parts 2 and 3 provide detailed explanations of the citation rules. Part 2, Citation Basics, emphasizes key concepts for all citation formats. Part 3, Citing Specific Sources, contains numerous examples and templates that diagram the citation format for specific legal sources, such as court opinions, statutes, constitutions, and many secondary

sources. These specific formats cover both print and internet sources. In addition, Part 3 contains fast-format pages and side bar pages that act as quick references, contain tips, information on common errors, and cross-references to other rules that may affect citation format. The rules are divided according to the type of authority. Use the Table of Contents and Index to locate particular rules.

3. How to Use Citations

Part 5, Incorporating Citations into Documents, explains and provides examples of the placement of citations in text. This part covers both legal documents used in court and scholarly legal text. In addition, this section provides guidance on how to choose which source to cite when there is more than one source and how to organize citations when citing multiple sources in a single citation.

4. The Appendices

There are eight appendices in the *ALWD Guide*. Most of them provide abbreviations for use in various citation formats, much like the Tables in the *Bluebook*. There are two other appendices that are very helpful. One is the Table of Primary Authority, which details which legal sources are official and unofficial sources, and the abbreviation for those sources. Official sources are those published by or published at the direction of the government. Unofficial sources are published by a commercial publisher. The content of the law in official and unofficial sources is the same. The difference is that unofficial sources often contain extra content, such as cross-references to other sources, annotations, and historical information not usually included in official sources. There is also an appendix containing each state's local citation rule. Many states have adopted local rules dictating the citation format required when citing that state's primary law, such as statutes, administrative regulations, and court opinions.

VI. KEY POINTS CHECKLIST: Legal Principles and Authorities

- ✓ When analyzing a legal question or issue, always identify the primary authority (the law) that governs the question. First consider primary authority, then look to secondary authority. As a general rule, courts will rely on primary authority before considering secondary authority.
- ✓ When you are searching for the law that governs a topic, always consider all the possible sources of law:
  1. Enacted law—constitutions, statutes, ordinances, administrative and regulatory law, and so on
  2. Case law—law created by courts in the absence of enacted law or in the process of interpreting enacted law
- ✓ Remember that there are two court systems operating in every jurisdiction: state and federal. A legal problem may be governed by either federal or state law or both. Both sources of law and both court systems must be considered when analyzing a problem.

- ✓ Keep in mind the hierarchy of primary authority. Constitutions are the highest authority, followed by other enacted law, then by case law. When there is a conflict between federal and state law, federal law governs.
- ✓ The doctrines of stare decisis and precedent provide that doctrines, rules, or principles established in earlier court decisions should be followed by later courts in the same court system when addressing similar issues and facts. Therefore, when researching a question, always look for and consider earlier cases that are on point.
- ✓ Courts are required to follow mandatory authority; therefore, always attempt to locate mandatory authority before searching for persuasive authority.
- ✓ Do not rely on persuasive authority if there is mandatory authority. No matter how strong the persuasive authority, the court will apply mandatory authority before persuasive authority. Secondary authority is never mandatory authority.

VII. APPLICATION

The following example illustrates principles discussed in this chapter. The example addresses the questions raised in the hypothetical presented at the beginning of the chapter.

Renee's research on the subject of gender discrimination identified the following authority that might apply to the issues raised in the client's case:

1. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of gender
2. Section 59-9-4 of the state statutes, which prohibits employment discrimination on the basis of gender
3. *Erik v. Coll, Inc.*, a federal court case with facts almost identical to Ms. Stone's, which held that the conduct of the employer constituted gender discrimination in violation of Title VII
4. *Albert v. Conrad Supplies*, a state supreme court case with facts almost identical to those presented in Ms. Stone's case, which held that the employer's conduct violated the state statute
5. Two law review articles addressing gender discrimination, which concluded the type of conduct encountered by Ms. Stone constituted gender discrimination. One article addressed the question in the context of Title VII, and one article focused on the question in the context of the state statute.

Renee's assignment is to prepare a memo that includes a summary of her research and an analysis of how the law applies to the client's case. She realizes that she must organize and analyze her research before she can draft the memo. After reviewing the principles and concepts presented in this chapter, she proceeds with the following steps.

STEP 1: ***Identify and separate primary authority and secondary authority.*** This step is important because the court will rely on and consider primary authority before referring to secondary authority.

1. Primary authority:
   - Enacted law—Title VII and Section 59-9-4 of the state statutes
   - Case law—*Erik v. Coll, Inc.* and *Albert v. Conrad Supplies*
2. Secondary authority: the two law review articles

STEP 2: ***Organize the presentation of the primary authority.*** The highest authority in the hierarchy of primary authority is the enacted law, followed by the case law; therefore, Renee organizes her summary of the law with a presentation of the enacted law first. (She did not locate applicable constitutional law.)

1. *Enacted Law*. Regarding the enacted law, Renee determines which law applies to govern the situation. It is possible that both the state and federal laws apply and that a potential cause of action exists in both federal and state court. It is also possible that the federal law requires that the state remedies be exhausted before a claim in federal court can be pursued. This means that the federal law requires that any remedy available under state law be completely pursued before a claim can be brought under federal law. It is possible that the federal act does not apply to the specific legal question raised by the facts of the dispute, or the federal act may apply exclusively and there may be no possible cause of action under the state law. All of these possibilities must be considered when she analyzes the enacted law.

   Once Renee concludes this part of the analysis, she must identify the elements or requirements of the law or laws that do apply. She then applies the elements to the facts of the client's case to determine how the laws apply and what remedies are available. In her memo, she will include a summary of the law and her analysis. Chapter 3 provides guidelines to follow when analyzing enacted law.

2. *Case Law*. Renee next addresses the relevant case law. She first determines whether the cases are on point. A case is on point if there is a sufficient similarity between the key facts and legal issue addressed in the court opinion and the client's case for the court opinion to apply as precedent. If a case is on point, it provides the present court with guidance in resolving a legal question or issue.

If the enacted law is clear and there is no question about how the enacted law applies to the facts of the client's case, then there is usually no need to refer to case law.

For Example

A client is ticketed for driving 90 mph in a 60-mph zone. The statute establishing the speed limit at 60 mph is clear, and there is no need for case law to interpret the statute. A speed of 90 mph is clearly in violation of the statute.

Even if there appears to be no question about how the statute applies, always be sure to check the case law for possible interpretations of the statute.

If Renee concludes that federal law exclusively governs the area, then the state case, *Albert v. Conrad Supplies*, does not apply. If she concludes that only state law applies, then the federal case does not apply.

Once Renee has analyzed the case law, she includes in the memo a summary of her case analysis, discussing whether each case applies and how.

STEP 3: ***Organize the presentation of the secondary authority.*** The secondary authority is summarized last in the memo because it has the least authoritative value. In the client's case, there is primary authority, so the secondary authority will be used, if at all, in support of or opposition to arguments based on the primary authority. Renee includes a summary of each law review article, emphasizing those aspects of the articles that focus on questions and issues similar to those in the client's case. Even if the articles will not be used in court as secondary authority, a summary is included in the memo because it may provide Renee's supervising attorney with information that proves helpful in the case.

Renee's understanding of the primary and secondary sources of law, and the hierarchy of the sources, is an essential aid in her organization of the research, analysis of the issues, and preparation of the memo. Chapter 15 through Chapter 17 provide useful information concerning the actual preparation of legal memoranda.

Summary

The process of legal analysis and legal writing requires a determination of what law applies to a legal question and how it applies. To engage in the process, you must have an understanding of the law and the basic doctrines and principles that govern and guide the analysis of the law.

The two primary sources of law in the United States are:

1. Enacted law
2. Case law

Enacted law, as used in this text, consists of constitutions, laws passed by legislative bodies, and administrative law adopted by administrative and regulatory bodies to aid in the enforcement and application of legislative mandates. Case law is composed of the law created by the courts in two situations:

1. When there is no law governing a topic
2. Through interpretation of enacted law where the meaning or application of the enacted law is unclear

There are two court systems in the United States: the federal court system and the state court system. Although there are differences in each system, they have basic similarities. Both systems have trial courts where matters are initially heard, trials held, and judgments rendered, and both have courts of appeals where the judgments of trial courts are reviewed and possible errors corrected.

To provide consistency and stability to the case law, two doctrines have evolved:

1. Precedent
2. Stare decisis

Precedent is an earlier court decision on an issue that applies to govern or guide a subsequent court in its determination of identical or similar issues based on identical or similar facts. The doctrine of stare decisis provides

that a court must follow a previous decision of a higher court in the jurisdiction when the current decision involves issues and facts similar to those involved in the previous decision.

The two sources of law, enacted and case law, are called primary authority. Primary authority is the law itself. Any other authoritative source a court may rely on in reaching a decision is called secondary authority. Secondary authority is not the law but consists of authoritative sources that interpret, analyze, or compile the law, such as legal encyclopedias and treatises. Courts always rely on and look to primary authority first when resolving legal issues.

If primary authority governs the resolution of a legal question, it must be followed by the court. This type of primary authority is called mandatory authority. Secondary authority can never be mandatory authority. Any authority the court is not bound to follow, but that it may follow or consider when reaching a decision, is called persuasive authority. Both primary authority and secondary authority can be persuasive authority.

The remaining chapters of this text address the application of the basic concepts and principles presented in this chapter. Each concept and principle plays a critical role in legal analysis and writing.

Quick References

Internet Resources

http://www.findlaw.com
Considered one of the best sites for finding legal resources in general.

http://www.uscourts.gov
Information about federal court justices, statutes, court procedures; access to forms, court opinions, and links to other sites.

http://www.law.cornell.edu
Cornell University Law School Library; links to primary law and U.S. and international legal reference websites

https://web.law.asu.edu
Arizona State University, Ross Blakley Law Library; go to the law library page and the materials for visitors include research guides, forms, state court information, how to research specific areas of law, and information about Arizona laws.

http://www.gpo.gov/
This is the official site for the Government Printing Office; access to FDsys (Federal Digital System) which includes searchable databases of federal law and federal legislative history.

https://www.justia.com/
Links to federal and state law, legal forms, legal blogs and news.

Exercises

ASSIGNMENT 1

Answer the following questions regarding the courts in your state:

1. Are there limited jurisdiction courts in your state?
   a. Name those courts.
   b. What types of cases can each of those courts preside over?
2. What is the general jurisdiction court in your state?
   a. How are those courts organized—by county, district, etc.?
   b. Does that court have appellate jurisdiction over cases from any limited jurisdiction courts?
3. What are the appellate jurisdiction courts in your state?
   a. Is there an intermediate appellate court? What is it called and is it a single court or are there multiple divisions?
   b. What is the highest appellate court?

ASSIGNMENT 2

Describe the differences between a trial court and a court of appeals.

ASSIGNMENT 3

When is a court opinion considered precedent?

ASSIGNMENT 4

Facts

The researcher is analyzing a problem involving the sale of goods on credit in state A.

Authority

The following authority has been located concerning the problem:

1. State A's Uniform Commercial Code Act
2. State A's Consumer Credit Act
3. State B's Uniform Commercial Code Act
4. A federal statute—Consumer Credit Act
5. *Iron v. Supply Co.*—a decision of the highest court in state A
6. *Milk v. Best Buy, Inc.*—a decision of the highest court in state B
7. *Control Co. v. Martin*—a decision of an intermediary court of appeals in state A
8. *Lesley v. Karl Co.*—a decision of a trial court in state A
9. *Irene v. City Co.*—a federal case involving the federal Consumer Credit Act
10. Regulations adopted by state A's Corporation Commission that apply to consumer credit and the sale of goods
11. *Restatements of the Law* defining sales, consumer credit, and other terms related to the problem
12. An *ALR* reference that directly addresses the issues in the case

Assume that all the cases are on point, that is, they are sufficiently similar to the facts and issues involved in the problem to apply as precedent.

Questions

a. Which authority is primary authority, and which is secondary authority?
b. Which authority can be mandatory authority? Why? What would be required for any of the sources to be mandatory authority?
c. Which authority can be persuasive authority? Why?
d. Assuming that all the primary authority applies to the issues raised by the facts of the client's case, list the authority in the hierarchical order of its value as precedent;

that is, authority with greatest authoritative value will be listed first, followed by other authority in the order it will be looked to by the court.

ASSIGNMENT 5

Facts

Your client is the plaintiff in a workers' compensation case. She was injured in 2008 in state A. In 2010, her employer destroyed all the business records relating to the client. The destruction of the records was apparently accidental, not intentional. They were destroyed, however, while the client's workers' compensation claim was pending.

Authority

You have located the following authority, all of which is directly related to the issues raised by the facts of the client's case:

1. *Idle v. City Co.*—a 1995 decision by the highest court of state A in which the court created a cause of action in tort for the wrongful destruction of business records. The court ruled that a cause of action exists if the records were destroyed in anticipation of or while a workers' compensation claim was pending. The court also held that a cause of action exists if the destruction was intentional or negligent.
2. A 2004 state A statute—a law passed by the legislature of state A that created a cause of action in tort for the intentional destruction of business records. The statute provides that a cause of action exists if the destruction occurs in anticipation of or while a workers' compensation claim is pending.
3. *Merrick v. Taylor*—a 2005 decision of the court of appeals of state A. The court of appeals is a lower court than the state's highest court. The court held that the term *intentional*, within the meaning of the 2004 statute, includes either the intentional destruction of records or the destruction of records as a result of gross negligence.
4. *Davees v. Contractor*—a decision of the highest court of state B interpreting a state B statute identical to the 2004 state A statute. The court held that the term *intentional*, as used in the statute, includes gross negligence only when the gross negligence is accompanied by a "reckless and wanton" disregard for the preservation of the business records.
5. A 2006 federal statute—the statute is identical to the 2004 state statute but applies only to contractors with federal contracts.
6. An *ALR* reference—addresses specific questions similar to those raised in the client's case.

Questions

a. Which authority is primary authority, and which is secondary authority? Why?

b. Which authority can be mandatory authority? Why? What would be required for any of the sources to be mandatory authority?

c. Which authority can be persuasive authority? Why?

d. Can *Idle v. City Co.* be authority at all? Why or why not?

e. If *Idle v. City Co.* is authority, to what extent?

f. Discuss the impact of *Merrick v. Taylor* in regard to the 2004 state A statute.

g. Discuss the authoritative value of *Davees v. Contractor*.

h. Assuming that all the primary authority applies to the issues raised by the facts of the client's case, list the authority in the hierarchical order of its value as precedent; that is, authority with greatest authoritative value will be listed first, followed by other authority in the order it will be looked to and relied on by the court.

Chapter 2

Introduction to Legal Research and Analysis

Outline

I. Introduction

II. Legal Analysis Defined

III. Legal Research and the Analysis Process

IV. General Considerations

V. Key Points Checklist: Legal Research and Analysis

VI. Application

Learning Objectives

After completing this chapter, you should understand:

- The definition of legal analysis
- Legal research and the elements of legal analysis
- How the elements of legal analysis apply in specific situations
- The importance of focus and intellectual honesty
- When and how legal authority applies

Marian has worked as Robert Walker's paralegal for the past four years. She conducts initial client interviews, manages the case files, and performs basic research. Robert, a solo practitioner, always determines the merits of a case and performs the substantive research. Marian started law school last fall and now works only part-time at the law firm.

Robert called Marian into his office one morning. "Marian," he said, "I'm going to hire another paralegal to do your assignments." Robert continued, "Now that you are in law school, I want you to take over some of the more substantive legal work. I want you to start performing the legal analysis of some of the new cases and determine what, if any, possible causes of action exist. Your new responsibilities will be to study the cases and provide me with memoranda of law identifying the legal issues and analyzing how the law applies to the issues. This will free me to concentrate more on trial work. Start with Mr. Lietel's case."

Marian remembered the initial interview with Mr. Lietel. Jerry Lietel has a hot temper. He got into an argument with his neighbor, Tom Spear. Mr. Lietel's temper got the best of him. He punched Tom and a fight ensued. Steve Spear, the father of Tom and a retired deputy sheriff, came out of the house and announced that he was placing Mr. Lietel under citizen's arrest. After a short struggle, Steve Spear subdued and handcuffed Mr. Lietel. After Mr. Lietel was handcuffed and had ceased resisting, Steve Spear kicked him about six times, cracking one of his ribs. Mr. Lietel incurred medical bills and lost two days of work. Since the incident, Mr. Lietel has had a lot of trouble sleeping, and he is taking sleeping pills on his doctor's advice. He is fearful of Steve Spear whenever he sees him.

Jerry admits that he punched Tom without provocation and that the citizen's arrest was probably justified, but he wants to sue for his medical bills and the loss of work.

Marian realizes that this, her first analysis assignment, is very important: the quality of her product will determine whether she continues to be assigned this type of substantive legal work. She asks herself, "What's the best way to approach a legal problem? What is a systematic way to analyze a client's problem that will produce the best result in the least amount of time?" The Application section at the end of this chapter presents an analysis of Mr. Lietel's case and the answers to Marian's questions.

I. INTRODUCTION

As discussed in the preface, the focus of this text is on the process of analyzing legal questions raised by the facts of a client's case, legal research, and the process of communicating research and analysis in written form. This chapter presents an overview of the process of legal analysis and some concepts and considerations involved in that process.

Most cases begin like the Lietel case. A client relates a set of factual events that the client perceives entitle him or her to legal relief. The client seeks a solution to what he or she believes is a legal problem. The problem may be as simple as the need for a power of attorney or as complex as a question involving multiple parties and several legal issues. The problem may be one for which there is no legal remedy, or it may not be a legal problem at all.

For Example

An individual is fired in retaliation for disclosing a defect in the employer's product. The state where this occurs does not have a statute prohibiting retaliatory discharge, nor have the state courts adopted a cause of action in tort for retaliatory discharge. Therefore, it may be that no legal remedy for this type of discharge is available under state law. It is possible that the client's only recourse is political; that is, the client may have to attempt to get legislation passed prohibiting retaliatory discharge, or to exert social pressure through the media.

The purpose of legal analysis and legal research is to analyze the factual event presented by the client and determine:

1. The legal issue (question) or issues raised by the factual event
2. The law that governs the legal issue
3. How the law that governs the legal issue applies to the factual event, including what, if any, legal remedy is available

Once this is accomplished, the client can be advised of the various rights, duties, and options available.

II. LEGAL ANALYSIS DEFINED

Before addressing the steps involved in the legal analysis process, it is necessary to understand what is meant by legal analysis. The term has different meanings, depending on the context of its usage (the type of legal analysis being performed).

For Example

The term *legal analysis* can refer to, among others, statutory analysis (discussed in Chapter 3), case law analysis (Chapter 12), and counteranalysis (Chapter 13).

In this chapter, **legal analysis** is used in a broad sense to refer to the process of identifying the issue or issues presented by a client's facts and determining what law applies and how it applies. Simply put, legal analysis is the process of applying the law to the facts of the client's case. It is an exploration of how and why a specific law does or does not apply. Legal research is the part of the legal analysis process that involves finding the law that applies to the legal question raised by the facts of a client's case.

III. LEGAL RESEARCH AND THE ANALYSIS PROCESS

A **legal analysis process** is a systematic approach to legal research and analysis. It is an organized approach that helps you develop research skills. It makes legal research easier, saves time, and helps develop research skills.

The most common approach to legal analysis involves a four-step process:

STEP 1: ***Issue.*** The identification of the issue(s) (legal question) raised by the facts of the client's case

STEP 2: ***Rule.*** The identification of the law that governs the issue(s)

STEP 3: ***Analysis/Application.*** A determination of how the rule of law applies to the issue(s)

STEP 4: ***Conclusion.*** A summary of the results of the legal analysis

An acronym commonly used in reference to the analytical process is **IRAC**. It is composed of the first letter of the descriptive term for each step of the legal analysis process. The use of the acronym is an easy way to remember the four-step legal analysis process—*i*ssue, *r*ule, *a*nalysis/*a*pplication, and *c*onclusion.

The research component of this process involves steps 1 and 2. Steps 3 and 4 of the process involve the analysis of the research results once the research is complete. The subsequent sections of this chapter address steps 1 and 2 in detail. Steps 3 and 4 are summarized in this chapter and then discussed in detail in Chapter 15 in the legal writing section of the text.

Before the legal analysis of a case can properly begin, however, the following preliminary preparation must take place:

1. All the facts and information relevant to the case should be gathered.
2. Preliminary legal research should be conducted to gain a basic familiarity with the area of law involved in the case.

A. Facts and Key Terms

1. Facts

It is important to keep in mind the crucial role the **facts** play in the analytical process. The four steps of the analysis process involve the facts of the client's case, and the facts play a major role in each step:

1. ***Issue***. The key facts are included in the issue. The issue is the precise question raised by the *specific facts* of the client's case. A properly stated issue requires inclusion of the key facts. This is discussed in detail in Chapters 10 and 11.

For Example

Under the provisions of the state battery law, is a battery committed by an individual, *present at the scene of a battery, who encourages others to commit the battery but does not actively participate in the actual battering of the victim?* The key facts of this issue are italicized.

2. ***Rule***. The determination of which law governs the issue is based on the applicability of the law to the facts of the client's case.

For Example

If the issue involves oppressive acts by a majority shareholder against the interests of minority shareholders in a closely held corporation, then the facts govern the determination of which corporation statutes apply. Only those statutes that address acts by majority shareholders can apply. In most states, this is limited to a few statutes.

3. ***Analysis/Application***. The **analysis/application** step is the process of *applying the rule of law to the facts*. It obviously cannot take place without the facts. Without the facts, the law stands in a vacuum.

For Example

The client was ticketed for driving 65 mph in a 55-mph zone. The client believes that the speed limit was actually 65 mph and that the officer made a mistake. A determination of whether the client violated the law requires the application of the rule of law to the facts of the client's case. Was the speed limit where the ticket was given 65 mph or 55 mph? The *facts are essential* to the process. Without the facts, one cannot make a determination of how the law applies.

4. ***Conclusion***. The **conclusion** is a summation of how the law applies to the facts, a recap of the first three steps. It too requires the facts.

In every case, the analytical process involves a determination of how the law applies to the facts. In court opinions, courts determine how the law applies to the facts presented to the court. Very often students pay too little attention to the facts, focusing on what the law is and what it requires. They ignore the crucially important role the facts play.

In a sense, cases are fact driven—the facts determine the outcome of the case. Often, if a single fact is changed, the outcome is different. The application of the law results in a different conclusion.

For Example

In a murder case, the degree of the offense can depend on a single fact. First-degree murder requires specific intent. It requires not only that the defendant intended to shoot the victim but also that the defendant intended the shooting to kill the victim. If the facts of the case show that the defendant intended to shoot but not kill the victim, the offense is not first-degree murder. The defendant's intent is a fact, and changing this single fact changes the outcome of the case. The application of the law results in a different conclusion. The offense is not first-degree murder but a lesser offense.

With this in mind, the analysis process should begin with a consideration of the facts of the client's case. *Identify and review the facts at the outset*. This preliminary step should include the following:

1. Be sure you have all the facts. Ask yourself if you have all the interviews, files, statements, and other pieces of information that have been gathered concerning the case. Are the files complete? Are facts or information missing? As discussed in the murder case example, a single fact can determine the outcome of a case. If key facts are missing, your analysis may result in an erroneous legal conclusion.
2. Study the available facts to see if additional information should be gathered before legal analysis can properly begin.
3. Organize the facts. Group all related facts. Place the facts in a logical order, such as in the sequence in which they occurred (chronological order) or according to topic (topical).
4. Weigh the facts. The value of some factual information, such as hearsay, may be questionable.
5. Identify the key facts. Determine which facts appear to be critical to the outcome of the case. Chapter 9 discusses the importance of key facts and the process for identifying key facts.

2. Key Terms

All legal resources, print or electronic, primary or secondary authority, are indexed according to key terms. Many sources, such as statutory codes, legal encyclopedias, legal treatises, and digests, contain one or more indexes. These and other sources also may contain a table of contents, or a table of contents may be the only method of indexing. To use indexes and tables of contents effectively, in print or electronically, you must identify the relevant terms in the client's case. These are the **key terms,** or **search terms,** that help guide the researcher in the

area being researched. Regardless of whether you are researching in print or electronically, searches are conducted using key terms.

Key terms are identified by reviewing the case file and listing all the terms relevant to the legal questions raised by the facts of the case. When preparing this list, keep in mind the following:

- Parties involved (e.g., private citizen, corporation, public official)
- Places and things (e.g., public or private property [places]; cars or computers [things])
- Actions or omissions that form the basis of the case. These are often referred to as potential claims (e.g., negligence, intentional acts)
- Defenses available (e.g., self-defense)
- Relief sought (e.g., money, injunction)

Key terms may be broad terms you use as a guide to perform preliminary research to gain a familiarity with the area of law governing the client's case, or narrow terms if you are already familiar with the area of law and want to focus your research on a specific aspect.

For Example

The client's case involves a question about child custody and the researcher is unfamiliar with this area of law. The researcher decides to read about the topic in a legal encyclopedia. The first step is to list all the terms that the subject "child custody" might be indexed under, such as *divorce, marriage, custody, parent and child, child custody, children,* and *domestic relations*. By listing the terms, you focus the search in the index and avoid having to scan the entire index. The topic will be under at least one of the search terms.

Because the key term may not be indexed in the way you think it should be, it is important to think of all the terms or categories that may apply. One role of legal education is to teach key terms and the categories where they fit.

Key terms may include key facts from the client's case. This often occurs when the researcher is familiar with the general area of law and is seeking the specific law that governs the client's fact situation.

For Example

The assignment is to locate the federal law the client may be charged with breaking. The client placed a bomb made of nitroglycerin under a bridge. Assume these are the key facts. The researcher, based on her legal education and previous experience, knows that the general research topic is "federal criminal law" and the subtopic is "explosives." By identifying the key search terms *nitroglycerin* and *bridges*, the researcher is guided to the specific law within the general area of "federal criminal law" and "explosives."

Develop a list of key terms while you are reviewing the client's case and identifying the key facts. If you are unfamiliar with the area of law, use a list of terms related to the general topic of the case to perform general research and become familiar with the area of law (see the preceding child custody example). Once you are familiar with the area of law, identify the key facts and the legal issue before conducting research.

B. Preliminary Research

Before conducting any research, check the office research files for previous memos or research that may have addressed the issue(s) you are researching. This may obviate the need for further research, or provide a basis for narrower research specific to the client's case.

It may, however, be necessary to conduct some basic research in the area(s) of law that govern the issue or issues in the case. You may be unfamiliar with the area of law in general or with the specific aspect of the area that

STEP 1: Issue	Identify the issue (legal question) or issues raised by the facts of the client's case.
STEP 2: Rule	Identify the law that governs the issue.
STEP 3: Analysis/ Application	Determine how the rule of law applies to the issue.
STEP 4: Conclusion	Summarize the results of the legal analysis.

Exhibit 2-1 Steps in the IRAC Legal Analysis Process. *Source: http://www.uscourts.gov*

applies in the client's case. You may obtain a general overview of the law by referencing a legal encyclopedia or a single-volume treatise. If the specific question or area is known at the outset, use of the *American Law Reports* or a multivolume treatise may be appropriate.

C. IRAC Analysis

Once the facts have been gathered and reviewed, follow the four steps of the IRAC legal analysis process in Exhibit 2-1 and outlined below.

STEP 1: **Issue.** Identify the issue(s) (legal question) raised by the facts of the client's case. The **issue** is the precise legal question raised by the facts of the dispute. The first and most important step in the analytical process is to identify the issue. You must identify the problem before you can solve it. The issue is the starting point. If it is misidentified, each subsequent step in the process is a step in the wrong direction. Time is wasted, and malpractice may result.

For Example

A client complains the individual who sold and installed the tile in his bathroom installed it in a defective manner. After a few months, the tile began to fall off the wall. The person who installed the tile gave no oral or written warranty covering the quality of the installation or the quality of the tile.

The researcher assumes, without conducting research, the entire transaction is a sale of goods covered by state statutes governing the sale of goods. The researcher makes this assumption because the transaction involved the sale of goods—the tiles. Under the sale of goods statutes is a section creating an implied warranty that goods are merchantable when sold, which in this case means the tiles will not fall apart.

The statute as interpreted by the state courts, however, does not apply to the service portion of such transactions, which, in the client's case, is the installation of the tile. Based on an incorrect assumption, the researcher identifies the issue as a question of whether the implied warranty of merchantability was breached. The identification of the issue is incorrect because of the erroneous assumption. The question is not about the quality of the tile but about the quality of the installation. Research on the existence of an implied warranty of merchantability is misdirected.

The case may be lost because the issue is incorrectly identified. The laws governing the sale of a service are different from those governing the sale of goods. A lawsuit claiming breach of an implied warranty of merchantability will probably not prevail because the implied warranty of merchantability statute does not apply.

The client does not pay to have the wrong question answered. The subjects of issue identification and presentation are of such importance that Chapters 10 and 11 are devoted to them. Some important considerations involving issues are discussed briefly here.

a. Multiple Issues

The client's fact situation may raise multiple legal issues and involve many avenues of relief. The implied warranty example involves one issue, but there may be several issues in a case. You should be aware of and keep in mind that one set of facts may raise multiple issues and include multiple causes of action.

For Example

Mr. Elvan rear-ended the client's car at a stoplight. After the impact, Mr. Elvan exited his car, approached the client's car, and started yelling at the client, threatening to hit the client. He grabbed the client's arm but never struck him. As a result of the incident, the client's car was damaged. The client suffered whiplash from the collision and a bruise on his arm from being grabbed, and since the wreck, he has been upset and has had trouble sleeping.

The client may have several causes of action against Mr. Elvan: a claim of negligence arising from the rear-end collision, civil assault for his conduct of approaching the client in a threatening manner, battery for grabbing the client, and intentional infliction of emotional distress for his conduct after the collision. Each of these potential causes of action may raise legal issues or questions that must be addressed. This example is referred to in this chapter as the rear-end collision example.

b. Separate the Issues

Analyze and research each issue separately and thoroughly. If you try to research and analyze several issues at once, it is easy to get confused and frustrated. If you find information relevant to another issue, make a reference note and place it in a separate research file.

c. Focus on the Issues of the Case

Keep your focus on the issues raised by the facts of the client's case or on those issues that you have been assigned to research.

For Example

In the rear-end collision example, assume there was a passenger in the vehicle with the client and the passenger is represented by another law firm. Although there may be many interesting issues involving potential legal claims available to the passenger, the passenger is not the client. The focus should be on the issues in the client's case. The issues involving the passenger are outside the scope of the problem and should not be allowed to become a distraction.

Avoid getting sidetracked and wasting time on interesting aspects or issues of a case you were not assigned to address.

STEP 2: **Rule.** Identify the law that governs the issue (legal research). The second step in the IRAC analytical process is to identify the **rule of law** that applies to the issue; that is, to solve the client's problem you must find the law that applies to the problem. This is the legal research component of legal analysis. The three-part process presented in Exhibit 2-2 is recommended for conducting legal research.

The first part is locating the general law, such as a statute, that governs the question. The second part is locating the law, such as a court opinion, that interprets how the general law applies to the specific fact situation of the issue. The third part is to update the research sources.