The Study of Law:
A Critical Thinking Approach

The Study of Law

A Critical Thinking Approach

Fifth Edition

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Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

Cover image: iStock.com/KenHoward

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-9626-5

Library of Congress Cataloging-in-Publication Data

Names: Currier, Katherine A., 1949- author. | Eimermann, Thomas E., author. | Campbell, Marisa Szabo, author.
Title: The study of law : a critical thinking approach / Katherine A. Currier, Professor Emeritus, Elms College; Thomas E. Eimermann, Emeritus Professor, Illinois State University; Marisa S. Campbell, Director, Paralegal Program, Meredith College.
Description: Fifth edition. | New York : Wolters Kluwer, [2020] | Series: Aspen College series | Includes bibliographical references and index. | Summary: "Introduction to law text for undergraduate students"—Provided by publisher.
Identifiers: LCCN 2019056774 (print) | LCCN 2019056775 (ebook) | ISBN 9781454896265 (hardcover) | ISBN 9781543820768 (ebook)
Subjects: LCSH: Law—United States. | Legal assistants—United States—Handbooks, manuals, etc. | LCGFT: Textbooks.
Classification: LCC KF386 .C88 2020 (print) | LCC KF386 (ebook) | DDC 349.73—dc23
LC record available at https://lccn.loc.gov/2019056774
LC ebook record available at https://lccn.loc.gov/2019056775

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About the Authors

Katherine A. Currier, J.D., served as the Elms College Paralegal and Legal Studies program director for many years. She developed and taught many law-related courses, including Legal Reasoning, Research, and Writing; Introduction to Legal Studies I and II; Law Office Computer Literacy; Law Office Applications; Interviewing, Counseling, and Negotiating; and Law and Literature. In addition to the three texts she has coauthored with Professor Eimermann, Professor Currier has publications in the areas of legal ethics as applied to paralegals and law office computing.

Professor Currier has been actively involved in the development of undergraduate legal education at both the regional and the national levels, particularly through her work with the American Association for Paralegal Education (AAfPE) and the American Bar Association (ABA) Approval Commission on Paralegals. Professor Currier served on the national board of AAfPE, first as its parliamentarian and then later as the elected representative of four-year paralegal programs. She served many years as the AAfPE publications chair, charged with the final responsibility for overseeing the *Journal of Paralegal Education and Practice* and *The Educator*. Professor Currier frequently speaks at both the AAfPE Northeast regional meetings and the annual AAfPE conferences on topics as diverse as the use of computer shareware, paralegals and the unauthorized practice of law, creative teaching techniques, and conducting legal research on the Internet. Professor Currier also chaired the American Bar Association Approval Commission on Paralegals, the body charged with conducting site visits of paralegal programs that are seeking their initial ABA approval or reapproval. She also served on the Board of Directors of the International Assembly for Collegiate Business Education (IACBE), an organization dedicated to promoting excellence in business education.

Prior to teaching at Elms College, Professor Currier taught at Suffolk Law School and Western New England College School of Law. She graduated magna cum laude with her B.A. in Political Science from Carleton College, with her M.A. in Political Philosophy from the University of California, Berkeley, and with her J.D. from Northeastern University Law School.

Thomas E. Eimermann is Emeritus Professor of Political Science and a former Director of the Legal Studies Program at Illinois State University. Dr. Eimermann helped establish the paralegal program there in 1976 and served as director until 2005. He has taught the Introduction to Paralegal Studies, Legal Research and Writing, and Constitutional Law courses.

Professor Eimermann was a member of the American Association for Paralegal Education's Board of Directors from 1986 to 1993 and served as

president of that organization from 1991 to 1992. He has also served in the Certification Board and Specialty Task Force of the National Association of Legal Assistants; as a member of the Illinois State Bar Association Committee on the Delivery of Legal Services; and as a member of the Hearing Board, the Inquiry Board, and the Oversight Committee of the Illinois Attorney Registration and Disciplinary Commission. He was also a consultant for the Illinois Department of Corrections, where he designed its Uniform Law Clerk Training Program.

In addition to the three paralegal texts he has coauthored with Professor Currier, Professor Eimermann's publications include *Fundamentals of Criminal Law and Procedure for Paralegals* (co-authored with Thomas McClure), and journal articles on paralegals, jury behavior, and free speech issues. He earned his B.A. in Political Science at North Central College. He went on to receive an M.A. and a Ph.D. in Political Science from the University of Illinois-Urbana/Champaign campus.

Currier and Eimermann have also authored *Introduction to Paralegal Studies: A Critical Thinking Approach*, and *Introduction to Law for Paralegals: A Critical Thinking Approach* (co-authored with Marisa Campbell.)

Marisa S. Campbell, J.D., has served as the program director for the Meredith College Paralegal Program since 2000 and has taught the Legal Survey and Legal Research and Writing courses. In addition, she has taught Constitutional Law in the Political Science department and business law classes in both the undergraduate and MBA programs. She taught international law students introduction to American law and culture in the Summer Institute at the Fuqua School of Business at Duke University. She has spoken on a number of topics, nationally and regionally, including paralegal regulation, ethics, professionalism, and assessment.

Ms. Campbell served as President of the American Association for Paralegal Education (AAfPE) from 2007 to 2008 after serving as South East Regional Representative. She served on the American Bar Association Approval Commission on Paralegals from 2009 to 2010. She has served on the North Carolina State Board of Continuing Legal Education. From 2001 to 2004, she served on the Board of the Alliance for Paralegal Professional Standards and on a joint committee with the North Carolina State Bar to develop the North Carolina paralegal certification standards. She served on the inaugural North Carolina State Bar Board of Paralegal Certification from 2004 to 2010. She served as a member of the North Carolina Bar Association CLE Committee, as Chair of that Committee from 2014 to 2016; as a member of the Publication Committee; as a member of the Law Office Management and Technology Section Council; and as a member of the Membership Committee. In 2013, she was awarded the Women of Justice Award for North Carolina Lawyers Weekly in the Legal Scholars Award category.

In addition to this text, she coauthored the *North Carolina State Bar Paralegal Certification Exam Guide* in 2013 as well as numerous articles and manuscripts. She graduated with Honors in Political Science and Honors in Studies in Religion from the University of Michigan, Ann Arbor. She earned her Master in International Affairs from Columbia University and her J.D. from the University of Michigan Law School.

To our spouses and children
For their understanding and support

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List of Illustrations

Preface

New to This Edition

For this fifth edition, we have updated the law, the NetNotes, and the Web Exercises and added new Discussion Questions and Critical Thinking Exercises. The overall organizational structure of the book remains the same.

The following significant changes were made in the specified chapters:

- Chapter 1, Introduction to the Study of Law: enhanced explanation of how to brief a case.
- Chapter 2, Functions and Sources of Law: enhanced discussion of executive orders and memoranda.
- Chapter 5, Civil Litigation and Its Alternatives: Summary jury trial information removed.
- Chapter 6, Constitutional Law: new cases added, including *Packingham v. North Carolina; Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission; American Legion v. American Humanist Association* (replacing *Van Orden v. Perry*). In addition, material throughout the chapter enhances the discussion of the internet and the U.S. Constitution.
- Chapter 7, Torts: new material added covering contemporary torts related to the #MeToo movement, cyberbullying, and cybertorts.
- Chapter 9, Property and Estate Law: new case, *Matal v. Tam,* added, discussion of cases relating to the Lanham Act expanded.
- Chapter 10, Laws Affecting Business: information added about public benefit corporations; a new section added covering the Family Medical Leave Act; chapter coverage tightened by summarizing *Diaz, McDonnell Douglas,* and *Griggs* and by adding summaries of additional contemporary cases, including *EEOC v. Costco* and *Gross v. FBL Services*.
- Chapter 11, Family Law: expanded coverage of the implications of *Obergefell v. Hodges* throughout the chapter, added *Terrell v. Torres* (replacing *Szafranski v. Dunston*) and a discussion of DNA testing and its impact on family law.
- Chapter 12, Criminal Law: new case, *Commonwealth v. Carter,* added.
- Chapter 13, Criminal Procedure: new cases added, including *Mitchell v. Wisconsin*, addressing blood testing without a warrant, and *Carpenter v. U.S.,* addressing use of cell-site locations without a search warrant.

Approach

As the title indicates, in this book we use a critical thinking approach to introduce readers to the study of law. We designed this book for use in introductory law courses for students in any major, but particularly for those in business, criminal justice, paralegal, prelaw, and political science.

Rather than taking an approach that emphasizes the memorization of definitions and rules, *The Study of Law: A Critical Thinking Approach* focuses on the basic foundations of the law and on the legal reasoning process. In addition to presenting an overview of the legal system, this book teaches the basic skills necessary to read and understand statutes and court cases.

We use this critical thinking approach because we believe it is the best way for students to learn the fundamental principles of law. By learning how to read and interpret statutes, cases, regulations, and court documents, students will be better able to learn how the American legal system functions. Therefore this book emphasizes careful reading for detail, analytical thinking, and presentation of arguments. The hypothetical cases, Discussion Questions, and Critical Thinking Exercises incorporated throughout the text all serve to help develop students' critical thinking skills.

Organization of the Book

Part 1, The American Legal System, introduces students to the study of law and the organization of the legal system. It covers such topics as sources of the law, the different ways in which law is classified, and various stages involved in litigation.

Part 2, Substantive Law and Ethical Issues, introduces students to basic concepts and terminology used in the most prominent substantive areas of law. This section leads off with a chapter on constitutional law, because constitutional law stands at the top of the hierarchy of law and establishes the framework within which the legal system operates. We then go on to cover key fundamental concepts in torts, contracts, property and estate law, business law, family law, and criminal law. In each chapter we blend traditional case law with a discussion of cutting-edge developments to give students a solid foundation in traditional concepts and an appreciation of the dynamic nature of law. The final chapter probes the ethical dilemmas attorneys face in the context of our adversary system.

Instructors may wish to alter the sequence in which they cover the chapters, or even skip parts when time is limited. However, it is best if instructors plan on covering Part One before selecting from the substantive law chapters contained in Part Two.

Key Features

Among the many features that set this book apart are

- The nature of the included cases
- Marginal definitions of key terms

- NetNotes
- Critical Thinking Exercises
- Discussion Questions integrated into each chapter
- Web Exercises
- Review Questions

Because this book stresses the critical thinking approach, we illustrate our points with hypothetical situations and with real case decisions that students will understand and to which they can relate. The cases cover such topics as AIDS-infected blood transfusions, battered woman's syndrome, same-sex marriage, flag burning, the insanity defense, search and seizure of automobiles, sexual harassment, surrogate motherhood, and spousal immunity. We have also included such "classics" as *McBoyle v. United States, Palsgraf v. Long Island Railroad*, *Brown v. Board of Education,* and *Mapp v. Ohio*. Our philosophy in editing these and other cases was to retain enough of the court's wording to give students a realistic feel for how judges actually write and to allow students to develop their critical thinking skills. We deleted nonessential information in order to keep each case a reasonable length.

Furthermore, the cases are fully integrated into the text. Many times, these cases are cross-referenced in other cases and used to show how the courts build on precedent and modify it in response to changing societal conditions. Discussion Questions and Critical Thinking Exercises call on students to carefully analyze these cases and apply them to hypothetical situations.

Also of special note are the appendixes. Appendix A includes a complete copy of the U.S. Constitution and Appendix B contains a convenient listing of websites for legal resources.

An instructor's manual that includes suggested answers for all the Discussion Questions, Review Questions, and Critical Thinking Exercises, as well as teaching tips, is available to help teachers make the most effective use of this book. Also available are PowerPoint slides to assist with classroom lectures and a computerized test bank.

Relationship to the Authors' Other Texts

Those familiar with *Introduction to Law for Paralegals: A Critical Thinking Approach* and *Introduction to Paralegal Studies: A Critical Thinking Approach* will recognize many similarities to this text. All three books emphasize the "critical thinking approach" to understanding the law. All three include excerpts from court cases, discussion questions, NetNotes, and references to ethical questions. Topics such as sources of law, classification of the law, structure of the court system, overviews of civil and criminal litigation, overviews of torts, contracts, property law, and criminal law, and analysis of statutes and cases are also covered in all three books.

However, where the other two books focus on the role of paralegals, this text is designed for use in general education courses about the nature of law and the operation of the legal system. In addition to dropping the appendices on legal research and writing, and references to tasks performed by paralegals, we

have increased our coverage of constitutional law and placed more emphasis on general education objectives.

Acknowledgments

Naturally, we owe a great deal of thanks to the many students, educators, paralegals, and attorneys who contributed ideas for this book. We would also like to recognize Victoria Joseph for her contribution to the criminal law chapter.

We would also like to thank the staff at Wolters Kluwer Law & Business for the excellent support we have received on the books we have done with them. We especially want to thank Betsy Kenny for the key role that she played in handling this fifth edition.

Finally, a special thanks goes to our spouses and children for their continued support and understanding of our professional activities.

Katherine A. Currier
Thomas E. Eimermann
Marisa Campbell
September 2019

PART 1

The American Legal System

Chapter 1

Introduction to the Study of Law

The study of the law qualifies a [wo]man to be useful to self, to neighbors, and to the public.
Unknown

Chapter Objectives

After reading this chapter, you should be able to:

- Explain why it is important to study law.
- Define *cause of action* and explain why one does not always exist.
- Discuss why enacted law frequently contains ambiguities.
- Contrast mandatory with persuasive authority.
- Define *stare decisis* and explain why it is important.
- Use case briefing to summarize court opinions.

Introduction

The purpose of this text is to provide you with a general introduction to the nature of our legal system. Our main goals are to help you understand how the American legal system operates and to introduce you to the legal principles that

form the basis of our law in areas such as criminal law, torts, contracts, property, business organizations, and family law. You will also develop the critical thinking skills you will need to understand statutes, court opinions, constitutional provisions, and administrative regulations.

In an effort to make difficult legal concepts more understandable, we illustrate those concepts with references to "famous cases" you may have heard about and to short factual scenarios created to illustrate how people and businesses are affected by the law. Let's get started by introducing the first two of these hypothetical cases. Then keep them in mind as you read the rest of this chapter and the chapters that follow.

Case 1: The Distressed Grandfather

Approximately one year ago, Donald Drake and his six-year-old grandson, Philip, were walking down a residential road on their way home from visiting one of Philip's friends. Philip was walking on the sidewalk approximately 30 feet in front of Mr. Drake. Suddenly, a car sped past Mr. Drake, seemingly went out of control, jumped the curb, and hit Philip. Mr. Drake ran to Philip's side, but it was too late. Philip had been killed instantly. The driver of the car, Mrs. Wilma Small, was unhurt. Based on skid marks and testimony from both Mrs. Small and Mr. Drake, the police investigation following the accident determined that excessive speed was the cause of the accident.

Mr. Drake said that at the time of the accident his only concern was for the welfare of his grandson because he himself was clear of the danger. Naturally, Mr. Drake suffered a great deal of mental pain and shock because of seeing his grandson killed. While being driven home from the accident, he suffered a heart attack that necessitated a lengthy hospital stay.

One year later, he still does not feel completely recovered and often suffers from nightmares reliving the accident and his grandson's death. He wonders if he can sue Mrs. Small to recover for his hospital bills and for his pain and suffering.

Case 2: The Harassed Student

Wanda Smith, a twenty-two-year-old college student, was walking past a construction site on campus when several of the construction workers began to whistle and make cat calls. Wanda did not appreciate being treated as a sex object and greatly resented the way in which these construction workers were behaving.

After talking it over with a few of her friends, Wanda decides to talk to one of the attorneys at Darrow and Bryan to see if she can take legal action. She does not want other women to have to undergo similar treatment and wonders if she can collect damages for mental suffering.

A. WHY STUDY LAW

Why study law? First, law plays an essential role in everyone's life. It provides guidelines on how people should interact with one another. The criminal codes prohibit theft, assault, battery, rape, murder, and many other offenses. The tax codes require that individuals and businesses give part of their income to the government. Environmental laws prohibit the dumping of raw sewage into lakes and rivers. Civil rights laws protect against discrimination and harassment.

In addition to defining what constitutes appropriate behavior, the law provides a mechanism for resolving the conflicts and disagreements that arise among us without resorting to personal violence. When individuals violate a section of the criminal law, the government takes responsibility for bringing them to trial and for administering an appropriate punishment. If one person's negligence injures others, that person can be required to compensate the injured parties for the damages caused by this negligent act. When persons fail to carry out the terms of a contract, the state can either force them to do so or force them to pay damages that resulted from their failure to live up to their agreement.

Second, you have no doubt heard the saying "Ignorance of the law is no excuse." Every educated citizen should have a basic understanding of our legal system and our laws.

Third, learning about the law and how the legal system works is a lot of fun. Although most legal disputes never make it to trial, those that do often involve high drama, with captivating rhetoric and surprising testimony. When a select few of those cases reach the appellate level, we see judges crafting new law that can have a tremendous impact on our lives. One only needs to think of the United States Supreme Court case *Roe v. Wade* and the continuing controversy over a woman's right to abortion.

Finally, the study of law is a challenging and rewarding intellectual exercise. Interpretation of the law involves the application of logic and other critical thinking skills. These critical thinking skills can be usefully applied in many different fields of endeavor.

B. LEGAL ANALYSIS

The critical ability to understand the relevant law and apply it to a new fact situation is known as **legal analysis**. Legal analysis will help you develop the critical thinking skills needed to understand statutes, court opinions, constitutional provisions, and administrative regulations. These critical skills include analyzing the facts, identifying the appropriate legal rules, and applying the legal rules to the facts.

Legal analysis
The process of applying the law to specific facts. Also known as legal reasoning.

Keep the stories of the two hypothetical cases from the beginning of the chapter in mind as we discuss the three basic steps in analyzing a legal situation.

- Reviewing the underlying situation that is creating the legal problem and analyzing the "relevant" facts;
- Reading and understanding the appropriate legal rules; and
- Applying those legal rules to the relevant facts.

1. Identifying the Relevant Facts

The first step in legal analysis is to review and identify the relevant facts. The answer to any legal question depends on the specific facts of the individual case. Even a minor change in the facts can alter the outcome of the case.

Just as a medical doctor cannot give a competent medical diagnosis without a thorough examination of the patient, a lawyer cannot render legal advice without a complete understanding of all the relevant facts. Some areas of the law, such as those dealing with negligence or landlords and tenants, are particularly **fact bound.** For example, assume a stranger approaches an attorney at a party with a question such as: "My landlord is trying to evict me. Can he do that?" or "My husband is trying to get custody of my kids. Will he succeed?" It would be impossible for the attorney to answer without gathering a lot more information and personally reviewing key documents.

Fact bound
When even a minor change in the facts can change the outcome.

2. Reading and Understanding the Appropriate Legal Rules

After meeting with a potential client, the first thing that an attorney needs to determine is whether the client has a valid cause of action or, if the client is charged with a crime or is being sued, a valid defense. A **cause of action** can be defined as a claim that, based on the law and the facts, is sufficient to support a lawsuit. For example, in Wanda Smith's case, she was clearly upset and disturbed by what had happened to her. However, that does not mean she has a legal remedy. Her lawyers will have to prove not only that the construction workers harassed and upset her but also that these actions violated some law. It is important to understand that not every problem is a problem for which the courts will supply a remedy.

Cause of action
A claim that, based on the law and the facts, is sufficient to support a lawsuit.

Thus, the second stage of legal analysis involves the identification of the specific provisions of the law that are applicable to the situation. Because there are so many laws at the federal, state, and local levels, and because the law covers such a wide variety of topics, it is impossible for anyone to know everything there is to know about the law. The law is far too complex for any individual to be able to commit it all to memory. Furthermore, because the law is constantly changing, one's legal knowledge must be continually updated. Therefore, even lawyers who specialize and strive to keep current by reading legal newspapers, journals, and bar publications on a daily basis may still need to do legal research. Law books and online computer databases are the tools of the trade for the legal professional.

When conducting legal research, attorneys focus on the two main sources of law:

1. enacted law and
2. court-made law (common law).

Enacted law
Constitutions, statutes, ordinances, and regulations.

Enacted law can be further subdivided into constitutional, statutory, and administrative law.

What follows is a brief overview of enacted law and court-made law. We will continue this discussion on the sources of law in Chapter 2.

a. Understanding Enacted Law: Constitutions, Statutes, Ordinances, and Regulations

While some of the most important laws, such as freedom of speech, can be found in the U.S. and state **constitutions**, most everyday legal problems are governed by statutes, local ordinances, or agency regulations. **Statutes** are enacted by the U.S. Congress or state legislatures; **ordinances** are laws enacted by local governments; and **regulations** are laws promulgated by state and federal administrative agencies. All these different forms of law are general rules that apply to future conduct.

Constitutions
Documents ratified by the citizens of a state or nation that establish the organizational structure and the powers granted to different governmental units.

Statutes
Laws that are enacted by a state legislature or by Congress.

Ordinances
Laws similar to statutes but enacted by a local governments.

Regulations
Laws promulgated by administrative agencies.

The challenge faced by those drafting enacted law is to precisely describe what they want to require or prohibit without being able to fully anticipate all the circumstances in which the law may be applied in the future. Trying to lay down rules today for situations that will arise in the future is a difficult task.

Consider a situation in which a town council received citizen complaints about a group of teenagers who had been riding their motorcycles on the paths of the town's parks. Not only are motorcycles noisy, but the citizens were afraid that one day an accident would occur and a child walking down one of the paths could be injured. So to deal with this problem, the council passed the following ordinance:

> It shall be unlawful to operate any vehicle on town park paths. Violators will be subject to a $100 fine for the first offense and up to a $500 fine for each additional offense.

Following the passage of this ordinance the following five events took place in a town park:

1. For a "lark," two teenagers drove a Jeep Cherokee down one of the park paths.
2. The garbage collector backed his truck approximately six feet down one of the park paths to pick up garbage from one of the trash receptacles.
3. A child pushed a doll's baby carriage along a park path.
4. An ambulance drove down one of the park paths to pick up a man who had collapsed in the middle of the park.
5. An adult rode a bicycle along the park path.

Based on a literal reading of the town's new ordinance, all five of these situations are violations of the law. All five involve a "vehicle" being on a park path. However, while the town council undoubtedly wished to ban joyriding Jeep Cherokee drivers as much as it wanted to ban joyriding motorcycle riders, it is highly unlikely that it actually wished to prohibit situations two, three, four, and five. The problem is that the language they chose was more inclusive than they had really intended, and now all five parties are technically guilty of violating the ordinance.

This example illustrates how difficult it is to draft a law that encompasses only what you are trying to prohibit. It also illustrates how ambiguities in a statute may not appear until new, unanticipated events occur. Therefore, although on its face a statute may seem straightforward, always remember that even the most seemingly clear language can be ambiguous when applied to a new factual situation.

In addition to statutory ambiguities resulting from sloppy draftsmanship or applications to unanticipated circumstances, there are also times when the

Mandatory authority
Court decisions from a higher court in the same jurisdiction involving similar facts and law.

Persuasive authority
Court decisions from an equal or a lower court from the same jurisdiction or from a court in a different jurisdiction.

Precedent
One or more prior court decisions that involve the same legal issue.

Stare decisis
The doctrine stating that normally once a court has decided one way on a particular issue, it and other courts in the same jurisdiction, given similar facts, will decide the same way on the issue in future cases, unless the court can be convinced of the need for change.

Substantive facts
Things that happened to the parties before the litigation began and that are relevant to their claims.

Procedural facts
Facts that relate to what happened procedurally in the lower courts or administrative agencies before the case reached the court issuing the opinion.

drafters purposely write the ambiguity into the statute in order to provide a basis for compromise by glossing over conflicts among the legislators. In situations where such ambiguities occur, it ultimately falls to the courts to interpret the language in the context of specific cases. Throughout this text, we will see examples of the courts grappling with such problems of statutory interpretation.

b. Understanding Court Opinions

In this text, you will be reading many court opinions. In court opinions, the judge drafting the opinion will give a summary of the relevant facts—the law that is being applied to those facts and the court's decision as to the outcome of the case. The law being discussed could be based upon enacted law, a constitutional provision, statutory language, or a regulation, or it could be based on something known as the common law. Common law is court-made law created when there is no enacted law covering the situation.

(1) How to read a court opinion

The first thing you need to do, when reading a court opinion, is to take note of the court—for example, whether it is a state or federal court—and the date on which the case was decided. These are critical factors because they relate to the very important differences between **mandatory authority** and **persuasive authority**. Whereas judges are expected to decide cases consistently with those of higher courts in the same system, they can consider but do not have to follow the decisions of other courts at their same level or from another system.

Figure 1-1 shows the hierarchical nature of mandatory authority. A decision handed down by a court is mandatory authority for those courts below it connected by an arrow. For example, a federal district court in the First Circuit is required to follow the decisions of the federal court of appeals for the First Circuit. But the decisions of the Second Circuit court of appeals are only persuasive authority for the First Circuit district courts. Likewise, the decisions of state A's highest appellate court are mandatory authority for state A's intermediate appellate and trial courts, but they are only persuasive authority for state B's courts. This process of looking to **precedent**—prior cases—for guidance is known as following the doctrine of **stare decisis.** Stare decisis literally means the decision stands.

The first section of a court opinion usually starts with a discussion of the facts of the case. These facts can be divided into two groups: substantive facts and procedural facts.

The **substantive facts** deal with what happened to the parties before the litigation began—that is, with why one party is suing the other.

When reading a court opinion, look for answers to the following questions:

- Who were the parties in this legal dispute?
- Who did what to whom that created the conflict being litigated?
- Which party initiated the legal action (either civil suit or criminal prosecution)? What did the various parties want the court to do?

Procedural facts refer to what happened in the lower courts or administrative agencies as well as the action taken by the appellate court issuing the

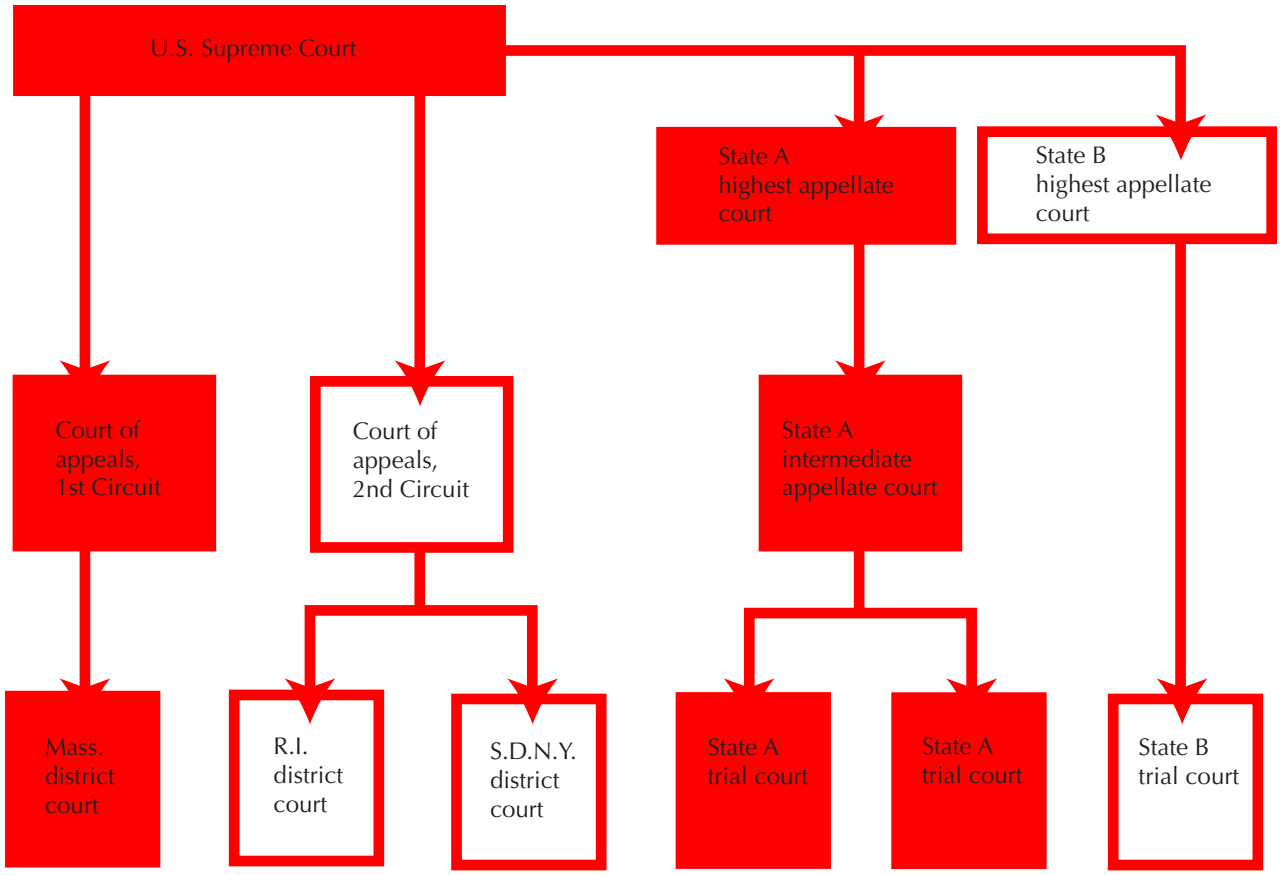

Figure 1-1 Mandatory Authority

opinion. For example, in the trial court did the plaintiff win after a jury verdict, or did the plaintiff lose on a motion to dismiss? These procedural facts are sometimes referred to as the judicial history of the case.

After reviewing the facts, the court will move on to discuss the **legal issues** raised in the case. It is not unusual for a court opinion to address multiple issues in a single opinion. These legal issues usually relate to how the law should be interpreted or applied to the facts of the case being decided. The discussion of the issue will often include references to cases that the court wishes to rely on as precedent. There may also be references to prior cases that the court rejects as precedent either because they are not relevant to the precise issue being decided or because the court disagrees with the prior court's reasoning.

The opinion will conclude with a section that announces the official decision reached by the majority of the judges participating. In addition to declaring how the law is to be interpreted, it will usually include directions as to what is to happen next. These directions constitute what is called the **disposition** of the case. If the court agreed with the actions of a lower court, it will simply **affirm** the lower court's decision. If the court found that an error

Legal issues
Questions about the interpretation and application of the law.

Disposition
The result reached in a particular case.

Affirm
A decision is affirmed when the litigants appeal the trial court decision and the higher court agrees with what the lower court has done.

Reverse
A decision is reversed when the litigants appeal the trial court decision and the higher court disagrees with the decision of the lower court.

Remand
When an appellate court sends a case back to the trial court for a new trial or other action.

Majority opinion
An opinion in which the majority of the court joins.

Concurring opinion
An opinion that agrees with the majority's result but disagrees with its reasoning.

Dissenting opinion
An opinion that disagrees with the majority's decision and reasoning.

was committed, it will **reverse** the actions of the lower court and **remand** the case back for further actions consistent with the way the court interpreted the law.

In cases where there is more than one judge, a decision can be unanimous, but often not all of the judges agree on the result or the reason for reaching that result. When this occurs, a majority opinion represents the final opinion of the court and is binding. In addition, those not fully agreeing with the majority may choose to file either a **concurring** or a **dissenting** opinion. While these concurring and dissenting opinions have no legal effect on the outcome of the case, concurring opinions can affect the way the law is interpreted in the future, and dissenting opinions can provide arguments that may sway other judges in future cases.

The following is a court opinion dealing with facts similar to those Mr. Drake experienced. As you read the case, pay careful attention to the facts, the rule the court applied to those facts, how the court resolved the case, and finally its reasoning for finding as it did. Keep in mind that court decisions can be quite complex, and judges often use a writing style that is different from the sorts of writing with which you are likely accustomed. Therefore, always plan on reading the case at least twice. The first time, focus on getting the "big picture." On the second reading you can pay more attention to the details and take notes. We will be discussing one method of note taking, called briefing a case, in the next section, after you have read *Dillon v. Legg*.

(2) Sample case: *Dillon v. Legg*

Dillon v. Legg
68 Cal. 2d 728, 441 P.2d 912 (1968)

TOBRINER, Justice.

[O]n . . . September 27, 1964, defendant drove his automobile in a southerly direction on Bluegrass Road near its intersection with Clover Lane in the County of Sacramento, and at that time plaintiff's infant daughter, Erin Lee Dillon, lawfully crossed Bluegrass Road. [D]efendant's negligent operation of his vehicle caused it to "collide with the deceased Erin Lee Dillon resulting in injuries to decedent which proximately resulted in her death."

Plaintiff's [complaint] alleged that [the mother] "was in close proximity to the . . . collision and personally witnessed said collision." She further alleged that "because of the negligence of defendants [she] sustained great emotional disturbance and shock and injury to her nervous system" which caused her great physical and mental pain and suffering.

[D]efendant . . . moved for judgment on the pleadings, contending that "No cause of action is stated in that allegation that plaintiff sustained emotional distress, fright or shock induced by . . . witnessing of negligently caused injury to a third person." The court granted a judgment on the pleadings against the mother [and she] appealed from the judgment.

That the courts should allow recovery to a mother who suffers emotional trauma and physical injury from witnessing the infliction of death or injury to her child for which the tort-feasor is liable in negligence would appear to be a compelling proposition.

Nevertheless, past American decisions have barred the mother's recovery. Refusing the mother the right to take her case to the jury, these courts ground their position on an alleged absence of a required "duty" of due care of the tortfeasor to the mother. [They state] the imposition of duty here would work disaster because it would invite fraudulent claims and it would involve the courts in the hopeless task of defining the extent of the tortfeasor's liability. In substance, they say, definition of liability being impossible, denial of liability is the only realistic alternative.

We have concluded that neither of the feared dangers excuses the frustration of the natural justice upon which the mother's claim rests.

1. This court in the past has rejected the argument that we must deny recovery upon a legitimate claim because other fraudulent ones may be urged.

. . .

The possibility that some fraud will escape detection does not justify an abdication of the judicial responsibility to award damages for sound claims: if it is "to be conceded that our procedural system for the ascertainment of truth is inadequate to defeat fraudulent claims . . . , the result is a virtual acknowledgment that the courts are unable to render justice in respect to them."

Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious.

2. The alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases.

In order to limit the otherwise potential infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable.

. . .

Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one.

In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

The evaluation of these factors will indicate the Degree of the defendant's foreseeability: obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree

of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case.

In light of these factors the court will determine whether the accident and harm was reasonably foreseeable. Such reasonable foreseeability does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.

In the instant case, the presence of all the above factors indicates that plaintiff has alleged a sufficient prima facie case. Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma.

We are not now called upon to decide whether, in the absence or reduced weight of some of the above factors, we would conclude that the accident and injury were not reasonably foreseeable and that therefore defendant owed no duty of due care to plaintiff. In future cases the courts will draw lines of demarcation upon facts more subtle than the compelling ones alleged in the complaint before us.

. . .

To deny recovery would be to chain this state to an outmoded rule of the 19th century which can claim no current credence. No good reason compels our captivity to an indefensible orthodoxy.

The judgment is reversed.

BURKE, J., Dissenting

The majority, obviously recognizing that they are . . . embarking upon a first excursion into the "fantastic realm of infinite liability," undertake to provide so-called "guidelines" for the future. But notwithstanding the limitations which these "guidelines" purport to impose, it is only reasonable to expect pressure upon our trial courts to make their future rulings conform to the spirit of the new elasticity proclaimed by the majority.

Upon analysis, [the majority's guidelines] seeming certainty evaporates into arbitrariness. . . . What if the plaintiff was honestly mistaken in believing the third person to be in danger or to be seriously injured? . . . How "close" must the relationship be between the plaintiff and the third person? I.e., what if the third person was the plaintiff's beloved niece or nephew, grandparent, fiancé, or lifelong friend, more dear to the plaintiff than her immediate family? Next, how "near" must the plaintiff have been to the scene of the accident, and how "soon" must shock have been felt? Indeed, what is the magic in the plaintiff's being actually present? Is the shock any less real if the mother does not know of the accident until her injured child is brought into her home? On the other hand, is it any less real if the mother is physically present at the scene but is nevertheless unaware of the danger or injury to her child until after the accident has occurred? No answers to these questions are to be found in today's majority opinion.

It appears to me that in the light of today's majority opinion the matter at issue should be commended to the attention of the Legislature of this state. . . . [I]f all alleged California tortfeasors, including motorists, home and other property owners, and governmental entities, are now to be faced with the concept of potentially infinite liability beyond any rational relationship to their culpability, then surely the point has been reached at which the Legislature should reconsider the entire subject and allow all interests affected to be heard.

I would affirm the judgment.

Now that you have read *Dillon v. Legg*, it is time to turn our attention to stylized legal note taking, called case briefing.

(3) Briefing court opinions

The word *brief* has several meanings in the legal field. In this chapter, we use the phrase *briefing a case* or **case briefing** to refer to the process of summarizing the most important elements of a court decision in a standardized format. This is to be contrasted with an **appellate brief**, which is a formal written argument to an appellate court, in which a lawyer argues why that court should affirm or reverse a lower court's decision.

Case briefing
A method for summarizing court opinions.

Appellate brief
A formal written argument to an appellate court, in which a lawyer argues why that court should affirm or reverse a lower court's decision.

(a) Reasons for briefing cases Briefing court opinions serves two purposes. First, and most important, it makes you read the case thoroughly. You have to go back and dig out the essentials, organize them, and state them in your own words. This is necessary for an adequate understanding of the court opinion. Second, it is a form of note taking that provides a condensed record of the most important information about the case you briefed. You can use these case briefs to refresh your memory when preparing for class or studying for exams.

(b) Format of a case brief While most case briefs share many common features, there is no single format that is universally accepted within the legal community. Indeed, there are almost as many different briefing styles as there are attorneys writing briefs. What we present here is an approach that we think will help you organize your thoughts and understand the opinion.

The case briefing method we will be using in this chapter breaks the case down into the following elements: (i) case citation, (ii) facts—both procedural and substantive, (iii) rule, (iv) issue, (v) holding, (vi) reasoning, and (vii) criticism. After you read the opinion once, put the case citation on top of the paper, and list the next six items on the left side of the paper, leaving enough room opposite each for the appropriate information. Reread the opinion and fill in the various items.

Although you list the items in a specific order, you may find yourself filling them in out of order. That is fine. Case briefing is a circuitous process. You will often rewrite one part of your brief as your understanding of that part changes based on your work on other parts. As with any type of writing, thinking and writing are intertwined.

A more detailed explanation of the content and purpose of each section of a case brief is provided below. As you finish reading the specific directions for each part of the brief, try your hand at briefing *Dillon v. Legg*. Then look at how that section was worded in the sample case brief on page 17.

(i) Case citation The case citation goes at the top. The citation should contain enough information to let the reader know (1) the name of the case, (2) the court that decided it, (3) where the reader can locate it, and (4) the year of decision. It is important to include the date of the opinion as precedents are sometimes overruled by more recent decisions. You may also want to indicate the page number in your textbook. For example, this case was between Margery M. Dillon and David Luther Legg. It was decided by the Supreme Court of California. The reader could locate it on page 68 of volume 728 of the California Supreme Court Reports, Second Series. You could also find it on page 441 of volume 912 of the Pacific Reporter, Second Series. Therefore, you would cite our example case in the following manner:

Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912 (1968)

(ii) Facts Include a summary of both kinds of facts: substantive and procedural. Recall that substantive facts deal with what happened to the parties before the lawsuit begin, that is, why are they suing each other? The most difficult part of this section is determining how much detail to include. Be sure to state the relevant facts in your own words rather than copying them directly from the opinion. Omit any facts that you think did not form the basis of the court's decision, but be sure to include all facts that the court relied on in reaching its decision.

When giving the facts, it is always best to be as precise as possible. For example, if the case involves an eight-year-old girl, and you think her age and sex matter, do not simply say the case involved a child. However, if an accident occurred at 222 Main Street, but the precise location is not important, there is no need to mention the address.

For the procedural facts, be sure to include what happened in the lower court or courts. For example, in the trial court, did the plaintiff or the defendant win? Also, report the final disposition of the case—for example, did the appellate court affirm or reverse, and if it reversed, did it also remand? You will usually find the court's disposition near the end of the opinion, stated in a few words such as reversed or vacated and remanded.

Some legal writers prefer to put the court's disposition in a separate section rather than including it with the other procedural facts. If you include the disposition with the procedural facts, however, then the reader can see the "whole story" right at the beginning of the brief.

Facts: A mother saw her daughter run over and killed by a negligent driver. She sued for the emotional distress she suffered in witnessing the accident. The trial court dismissed her claim; reversed.

Rule
In a case brief, the general legal principle in existence before the case began.

(iii) Rule The **rule** is a general legal principle in existence before the case began that the court uses to reach the decision in this case. These rules can come from a constitution, statute, regulation, or a previous court decision. Our sample brief would contain the following statement of the rule.

Rule: There can be no recovery for emotional distress from simply observing the death of another.

Issue
In a case brief, the rule of law applied to the case's specific facts.

(iv) Issue(s) A court opinion will include one or more issues. The **issue** has two components: first, the rule of law that the court used to resolve the current dispute and, second, the specific facts of the case to which the rule of law is being applied. You have already given these in the first two sections of the brief. Now you need to create one sentence that tells your reader exactly why the parties are in court. Include the rule and enough of the facts to make it clear why the issue is an issue; that is, let the reader see what the fight is all about. This is the hardest part of briefing a case, so do not get discouraged if this takes some practice.

Issue: Whether a mother can recover for the emotional distress she suffered upon seeing the negligently caused death of her daughter despite the current rule that denies recovery for an injury caused by observing the death of another.

Notice how the issue contains both the rule and the specific facts involved in the case. Given the rule of law in existence prior to these parties going to court and given the specific facts of the case, what problem must the court resolve? That is the issue. Be sure to state the issue in an unbiased manner. Do not slant the issue by giving conclusions and make sure to include facts that show both sides of the issue.

(v) Holding The **holding** is the court's answer to the issue. The holding is the new version of the rule, a rule that future courts will look to for assistance in deciding similar cases.

If you have given a complete issue statement, technically the holding could be a simple yes or no answer. However, it is always best to give the holding as a complete declarative sentence using the same elements as you did for the issue.

One of the most difficult aspects of developing the holding is determining how narrow or broad it should be. A **narrow holding** contains many of the case's specific facts, thereby limiting its future applicability to a narrow range of cases. A **broad holding** states the facts in very general terms so that the holding will apply to a wider range of cases. See Figure 1-2.

To be useful, a holding should be broad enough to help courts resolve similar cases, but not so broad as to stand for no more than a general legal principle. Learning how to state a holding either very narrowly, by including very specific facts, or very broadly, by stating the facts as generalizations only, is a skill you will acquire over time. For now, state your holdings narrowly. As with the facts portion of the brief, you will find it easier to amend a narrow holding to make it broader than you will to amend a broad holding to make it narrower. However, even with a narrow holding, include only those facts that you think truly affected the court's decision.

Holding
In a case brief, the court's answer to the issue presented to it; the new legal principle established by a court opinion.

Narrow holding
A statement of the court's decision that contains many of the case's specific facts, thereby limiting its future applicability to a narrow range of cases.

Broad holding
A statement of the court's decision in which the facts are either omitted or given in very general terms so that it will apply to a wider range of cases.

Holding: Yes, a mother who witnesses the negligently caused death of her child can recover for emotional distress.

Also be sure to include any possible limitations to the holding. If the court specifically states that its decision covers only a certain set of circumstances, your brief should make that clear. For example, in a case dealing with a social

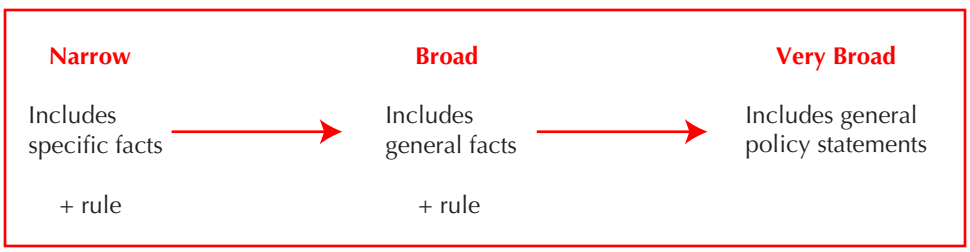

Figure 1-2 Possible Holdings for a Case

host's liability for serving alcohol to a minor, a court might relieve the social host of any responsibility but limit its holding to situations where alcohol is not being served for a profit.

Finally, note that the court's procedural answer (reversed, remanded, affirmed, and so on) can never be the holding. That is the disposition. The holding is always a statement of the new rule that results from the court's decision.

(vi) Reasoning This is an explanation of *why* the court ruled as it did, stated in your own words. The court's reasoning gives you your best clue as to how the court may act in the future in a different but similar situation.

Pinpoint as far as is possible the explicit and implicit reasons that the court gave to justify its holding. But do not quote the court's exact language unless the precise phrasing is critical. It will be easier for the reader to understand your summary if it is primarily in your own words.

Ratio decidendi
The court's reasoning for its decision.

Dictum
A statement in a judicial opinion not necessary for the decision of the case.

In analyzing the reasoning, you need to distinguish between the ratio decidendi and obiter dictum. The **ratio decidendi** is a decision on the legal issues raised in that specific case, whereas **obiter dictum** (sometimes just referred to as dicta) refers to a comment a judge makes that is not necessary to the resolution of the case. For example, it is dictum when a judge talks about what might have been if the facts had been different from the ones presented. Even though courts have power to decide only the precise case with which they are faced, human nature being what it is, judges often cannot resist discussing issues that were not really presented to them. While that part of the opinion will have no effect on the litigants, it could give you a very good clue as to how the court might decide a different case in the future.

Reasoning: Traditionally, there have been two arguments advanced for precluding such suits: 1) a fear of fraudulent claims; and 2) a fear of indefinable claims. The court discounted both fears. As to the fear of fraudulent claims, the court stated that even if some fraud were to occur, that does not justify denying recovery for valid cases. Besides, in every type of case, it is ultimately the responsibility of the courts to distinguish the valid from the fraudulent claim. As to the second concern, a fear of indefinable claims, the court said that was no reason to deny recovery in this specific case, where no one would deny that a mother seeing her child killed would suffer great harm, and that guidelines could be established to set the extent of liability in future cases. The guidelines the court developed provide that the following factors should be taken into account: 1) how close the plaintiff was to the scene of the accident; 2) whether the plaintiff observed the accident or heard about it later; and 3) how closely related the plaintiff was to the victim.

(vii) Criticism Take a few minutes to think critically about the case. Do you think it was appropriate and well justified? If not, why not? If you agree with the result, do you think the court gave the best or only reasons for reaching that result? If the court included a limitation in the holding, what problems do you think that will cause for future litigants?

If there were **concurring** or **dissenting opinions**, include a discussion of their reasoning. Remember that a concurring decision is one in which the judge agrees with the majority's result but not with the reasoning. A dissenting opinion is one in which the judge disagrees with both the majority's result and its reasoning. While only the majority opinion represents the court's view, what individual concurring and dissenting judges have to say can influence later courts.

Criticism: The dissenting judge thought the guidelines raised more questions than they answered and that such an important change in the law should come from the legislature, not the courts.

I agree that the guidelines are a bit vague and will be difficult to apply in new situations. For example, will "closely related" be determined by familial status or by an actual investigation into how involved the plaintiff was in the victim's life?

Do not be discouraged if you find the criticism section one of the most difficult parts of the brief to write. It is the court's job to convince you that it has reached the right result for the right reasons. Therefore, your first reaction may be to simply agree with everything it says. Resist that inclination. Remember that the case would not have been appealed unless someone thought there were two sides to the issue. Take a look at Figure 1-3 for some additional helpful hints for briefing a case.

(4) Sample brief for *Dillon v. Legg*

Dillon v. Legg
68 Cal. 2d 728, 441 P.2d 912 (1968)

Facts:	**A mother saw her daughter run over and killed by a negligent driver. She sued for the emotional distress she suffered in witnessing the accident. The trial court dismissed her claim; reversed.**
Rule:	**There can be no recovery for emotional distress from simply observing the death of another.**
Issue:	**Whether a mother can recover for the emotional distress she suffered upon seeing the negligently caused death of her daughter despite the current rule that denies recovery for an injury caused by observing the death of another.**
Holding:	**Yes, a mother who witnesses the negligently caused death of her child can recover for emotional distress.**
Reasoning:	**Traditionally, there have been two arguments advanced for precluding such suits: 1) a fear of fraudulent claims; and 2) a fear of indefinable claims. The court discounted both fears. As to the fear of fraudulent claims, the court stated that even if some fraud were to occur, that does not justify denying recovery for valid cases. Besides, in every type of case, it is ultimately the responsibility of the courts to distinguish the valid from the fraudulent claim. As to the second concern, a fear of indefinable claims, the court said that was no reason to deny recovery in this specific case, where no one would deny that a mother seeing her child killed would suffer great harm, and that guidelines could be established to set the extent of liability in future cases. The guidelines the court developed provide that the following factors should be taken into account: 1) how close the plaintiff was to the scene of the accident; 2) whether the plaintiff observed the accident or heard about it later; and 3) how closely related the plaintiff was to the victim.**
Criticism:	**The dissenting judge thought the guidelines raised more questions than they answered and that such an important change in the law should come from the legislature, not the courts.** **I agree that the guidelines are a bit vague and will be difficult to apply in new situations. For example, will "closely related" be determined by familial status or by an actual investigation into how involved the plaintiff was in the victim's life?**

1. Read the Case First, Then Brief

Do not try to brief the case as you read it for the first time. Read it through, underlining if you wish and making notes in the margin, before you start your brief.

2. Develop a Workable Style

Develop a briefing style that works best for you. As mentioned above, there is no right or wrong method. However, if your brief is to serve its intended purpose, you must write it in such a way that you can return to it later and easily find the information for which you are looking.

3. Write Based on the Needs of Your Reader

If you will be using the brief just as a reference for yourself, abbreviate commonly used terms. For example, use π or P. for plaintiff and Δ or D. for defendant. You may also want to write in phrases rather than complete sentences.

4. Cross-reference

Develop a cross-reference system that will allow you to find the court's full discussion of the points you summarized in your brief. For example, you could place numbers in the margin of the case to correspond to the points you discuss in your brief.

5. Paraphrase

Write the brief in your own words. A brief should not be a long series of quotations, so do not copy large parts of the opinion. A brief is your summary of the case, not merely a listing of quotations from it.

6. Use a Dictionary

Make sure you understand every unfamiliar legal term. Initially, you will find the courts using many unfamiliar terms, some of which will be specialized legal terms. Others, however, will simply be "normal English" you do not know. Do not hesitate to turn to a legal dictionary or an English language dictionary for help.

7. Use but Do Not Be Misled by the Court's Choice of Terminology

While courts will rarely explicitly label the parts of their opinions using the terms issue, holding, reasoning, and so on, they often use language that provides helpful clues. For example, while not saying "The rule is . . . ," they might say something like "The law in this area has long been . . ." Do not be surprised if the court appears to be "mislabeling" various parts of the case. For example, a court might call something its holding when it is really reasoning.

Figure 1-3 Seven Hints for Better Brief Writing

Legal reasoning
The application of legal rules to a specific factual situation; also known as *legal analysis*.

3. Applying the Legal Rules to the Facts

The final stage of legal analysis involves applying the legal rules found in enacted laws and court decisions to a specific set of facts, such as those of Donald Drake or Wanda Smith. This process is known as **legal reasoning.** If

the legal rules appear to be unambiguous and to apply to the client's situation, an attorney can confidently advise clients as to the legal consequences of anticipated acts or recommend steps that they should take to protect themselves.

Frequently, however, the law will be ambiguous, and there will be no prior cases with the exact same set of facts. Then the attorney should alert the client as to this uncertainty and assist the client in deciding on an appropriate course of action. Should the matter end up in court, the attorney will need to use legal reasoning to develop the best available arguments to support the client's position. However, there will be no clear answer as to how an ambiguous rule will be applied until an appellate court resolves the issue. Those are the cases that are often the most interesting to read as the ambiguity in the law's language or its applicability to a new set of facts forces the court to also consider the policy concerns behind the law.

In order to find out how similar situations have been handled in the past, an attorney will examine prior court decisions—precedent—and then apply them to the client's decision. If the facts of the client's situation and a prior court decision are similar, the two situations are **analogous**. If they are analogous, it is likely that the result in the client's case will be similar to the result reached in the prior case. If the facts are significantly different, the two situations are **distinguishable**. Because they are distinguishable, it is likely that the result in the client's case will not be the same as the result reached in the prior case. As you progress through this text, you will learn a lot more about the importance of stare decisis to our legal system. But for now, it is enough to understand that the doctrine of stare decisis is what gives our system its stability and predictability. As we will see, however, stare decisis also gives the courts enough flexibility to allow for change as the needs of our society change.

Analagous
Similar.

Distiguishable
Different.

For example, think about Mr. Drake's situation and the *Dillon v. Legg* court decision. If a court were asked to apply that decision to Mr. Drake's facts, how do you think he would fare? Factually, do you think the court would view a mother and a grandfather as similar? On policy grounds, do you think the court would tend to resolve the issue of recovering for emotional distress the same way in situations involving mothers as in those involving grandfathers?

If you discuss this with your classmates, you may find that you differ as to the "right" answer. But in reality, there are no "right" answers, only better or worse arguments. Any decision about what the law should be is a choice between competing values.

Finally, sometimes there are no rules that govern the situation. For example, while there are both federal and state statutes that protect employees from sexual harassment, under current law Ms. Smith does not appear to have a cause of action against the construction workers.

Prior to the enactment of those state and federal statutes giving protection to workers against sexual discrimination, Ms. Smith would not even have had a cause of action if she had been harassed by her employer. But as societal values change, the law usually changes as well. In recent years, our society has become more sensitive to issues of gender equality, and new laws have been developed to provide new protections. Sometime in the future, someone in Ms. Smith's position may have a cause of action that does not exist today.