

H. Viner Samborn • A. Yelin

BASIC LEGAL WRITING FOR PARALEGALS

SIXTH EDITION

Hope Viner Samborn • Andrea B. Yelin

Basic Legal Writing for Paralegals, Sixth Edition, teaches students the skills they need to effectively work with cases, legal authorities, documents, and professional correspondence. Samborn and Yelin guide students through the writing process, using the objective memo as a teaching tool. At every stage of a well-defined writing process, the authors provide lucid explanations, visual aids, and plenty of examples. With practice exercises throughout the book, students will develop the skills they need and that are indispensable to their careers as paralegals.

Both accessible and highly effective, *Basic Legal Writing for Paralegals* features:

- Thorough and readable coverage of case briefs, legal memoranda, correspondence, and persuasive writing
- A practical approach that emphasizes the role of the paralegal and how different types of legal writing are used in practice
- Step-by-step instruction that guides students through every stage of the writing process, from pre-writing planning to drafting and revising

- An overview of the legal system that shows how different forms of legal writing are used in different contexts
- Synthesizing and presenting legal authorities
- How to use the IRAC method of legal analysis
- Examples, writing tips, exercises, ethics alerts, and web resources
- Additional student resources in its appendices on citation rules and writing strategies

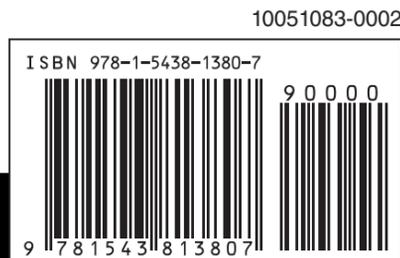
Updates and highlights of the revised Sixth Edition:

- New and updated exercises
- Streamlined presentation, making the material even more accessible and teachable
- Updated web resources
- Revamped Case Briefing and Analysis chapter
- Expanded coverage of email and e-memos
- Additional practice pointers and ethics alerts help students understand real-life issues they will face as paralegals

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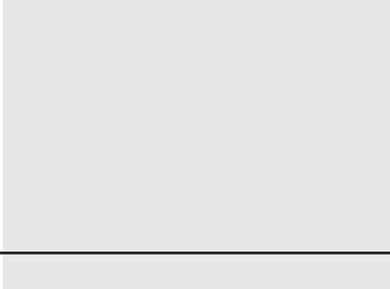
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Wolters Kluwer



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HOPE VINER SAMBORN

ANDREA B. YELIN



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FOR EVE, SARAH, BENJAMIN, BRANDT AND
RANDY WITH ALL OF MY LOVE
—HVS

FOR DAVID, RACHEL, AND HENRY
WITH ALL MY LOVE AND WHO
BRING SO MUCH JOY!
—ANDREA B. YELIN

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PREFACE

The Role of the Paralegal in Legal Writing

Legal writing is one of the tasks paralegals must learn to perform efficiently and cost effectively for law firms and their clients. But to do so, paralegals must understand the legal system, research materials, and legal writing techniques. Objective memos often must be drafted by paralegals to inform an attorney of the relevant law, both for and against a client's position, so that the attorney can best handle the matter. Paralegals also brief cases to expedite the research process, as well as write documents such as motions, briefs, complaints, and answers in litigation matters. Delegating the task of writing an objective memo to a paralegal is cost effective for an attorney and often saves a client money.

The Purpose and Structure of This Text

Basic Legal Writing for Paralegals guides the student and the practicing paralegal through the writing process in a step-by-step manner using the objective memo as a teaching tool. The text also introduces persuasive writing and instruments and documents drafted by legal assistants. In addition, the book contains information about grammar, editing, and writing processes as well as how to properly organize each portion of a document. The book is a valuable reference manual for any legal assistant who has to craft a document, especially an objective memo. Examples, exercises, and checklists help guide you.

Objective writing is explored in great detail. To master the art of objective writing, a paralegal must develop the ability to articulate legal

concepts clearly, and to draft documents in a manner reflecting legal analysis. Learning to perform legal analysis and to organize a legal discussion is the basis of objective writing. Much time must be spent to refine and to master these skills. Once a paralegal hones objective writing skills, he or she will be able to master other legal writing skills. The book begins with an overview of the legal system, writing basics, and then discusses case briefing. Understanding how our legal system operates and knowing how to read, brief, and analyze legal opinions are prerequisites to effective legal writing. You are provided with information about grammar and effective writing and editing techniques. Then, you are guided through the concept of the objective memo and its purpose. The next chapter discusses the question presented and the conclusion or brief answer. The facts and drafting the statement of the facts are explored in a separate chapter where you will learn to identify legally significant facts. The IRAC method is then introduced. IRAC, an acronym for Issue, Rule, Application, and Conclusion, is the format for the discussion portion of the memo. Building on the skills that you have acquired, you are then introduced to the task of synthesizing cases and authorities. Synthesis is essential to writing most case-related documents. Synthesis requires you to distill a general legal concept and then to create a statement of the law using more than one case or statute. Using the IRAC method, you will learn to synthesize authorities effectively and consistently. These chapters are very detailed because you are also being taught legal reasoning and legal analysis. After you master these skills, other forms of legal writing are easier to master. The rest of the text discusses writing documents such as deposition and meeting summaries used in law offices daily, persuasive writing, and letter writing, as well as citation.

The book includes hands-on exercises that reinforce the concepts presented in the book and provide you with practical applications for future work experiences. The book also includes email drafting tips and etiquette as we increasingly write in the digital format. Practice Pointers, Net Notes, and Ethics Alerts included in this text are designed to guide you in your day-to-day work as a paralegal.

Basic Legal Writing for Paralegals is designed to be both a handbook and a textbook, and therefore helps you to develop your writing skills now and in the future. You will learn to convey the results of your research in written documents. You also will be shown how to articulate legal concepts, to convey information, to answer a question, or to craft a persuasive argument. These skills require attention to detail, keen analysis, and precision with language. Legal writing skills are developed through practice; often the best writing is done in revision.

You should view this book as a launching point in developing your legal writing skills. Refer to the guidelines and concepts in this book throughout your career as you hone your writing skills.

Hope Viner Samborn
Andrea B. Yelin

November 2019

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Illustration 6-1. Sample case, *Seymour v. Armstrong*. Reprinted with the permission of Thomson Reuters.

Illustration 6-4. *Lefkowitz v. Great Minn. Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689, 1957 Minn. LEXIS 684 (Minn. 1957). Reprinted with the permission of LexisNexis.

Illustration 6-6. *Morganroth v. Whitall*, 161 Mich. App. 785, 411 N.W.2d 859, 1987 Mich. App. LEXIS 2608, 14 Media L. Rep. 1411 (Mich. Ct. App. 1987). (Abridged document — see online document for complete decision.) Reprinted with the permission of LexisNexis.

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CHAPTER OVERVIEW

Before you begin to research and to write about a legal problem, you must understand your role as a paralegal. You are an important member of a team. To function effectively, you must know which legal system governs and how that system operates. This chapter first considers your role in researching a legal problem and communicating it to your supervising attorney. Next, it discusses the legal system. It focuses on the organization of the U.S. federal government, which is divided into three separate branches: the legislative, the executive, and the judicial. It also provides a general explanation of how state governments are structured. Finally, the role of major governmental bodies is explored.

A. INTRODUCTION TO LEGAL RESEARCH AND WRITING

1. The Role of the Paralegal in Legal Research and Writing

Legal research and legal writing are among the tasks paralegals can perform efficiently and cost-effectively for law firms and their clients. But to do so effectively, you must understand the legal system and a variety of legal concepts. You must be able to use all the research tools available to lawyers and their staffs. Paralegals retrieve information regarding the law as well as nonlegal information, such as financial information and test results.

▼ Why Do Paralegals Perform Research?

Often research is done to determine whether a client has a case. We write an office memo to predict an outcome for the client. This requires that we evaluate all relevant law for and against the client's position. Other times, paralegals must research a particular issue raised after a case has been filed. Some research is done to support motions to be filed with courts. Research also may be done when a client is involved in a transaction and the attorney must determine the law and the steps to take in the transaction.

▼ What Tasks Do Paralegals Handle in the Research and Writing Process?

In practice, paralegals act as an arm of an attorney. The amount of research and the type of assignments paralegals perform vary throughout the country.

In some law offices, paralegals undertake all of the research in preparation for the filing of motions but attorneys draft the motions. In others, paralegals research and prepare rough drafts of motions. Once a research project is completed, you must communicate your research results effectively. To do this, you must understand the fundamentals of legal writing and be able to write detailed, clear, and thoughtful memoranda. Paralegals often are asked to prepare memoranda that summarize their research results. Some paralegals who work with judges prepare rough drafts of court decisions. This book is designed to help you complete each of these tasks.

When you are assigned a research problem, you are expected to work as a professional. You should complete the assignment in a timely fashion. More important, however, the written research results must be accurate, complete, and current. To make sure that your research skills are current and your search results are accurate, we will include references to online resources and search strategies throughout the

text. Chapter 10 introduces you to commercial databases, walks you through forming your queries and finding the content. This book teaches you how to analyze, organize, and communicate the results of a research project in a well thought out, well supported document.

ETHICS ALERT

Paralegals work under the supervision of attorneys, except in very limited, statutorily sanctioned situations. As a result, all research results and client memoranda should be submitted to an attorney before they are provided to a client. Work submitted to clients containing legal opinions should never be signed by a paralegal.

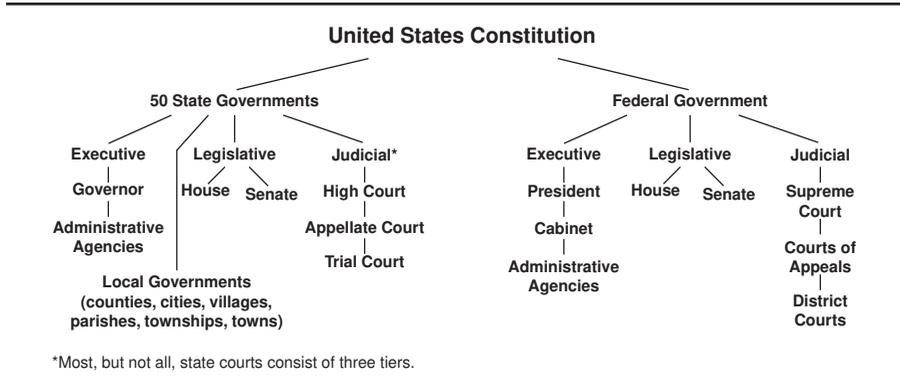
B. INTRODUCTION TO THE U.S. LEGAL SYSTEM

1. The Organization of the Legal System

The United States consists of a multi-tiered system of government. The **federal government** and the **state governments** are the top two tiers. See Illustration 1-1.

Several lower-tier governmental bodies, including **city, village, township,** and **county governments,** exercise authority over the citizens of the United States. For the most part, your research will concern either federal or state law. It is important to know about the federal and state systems and how to find the law they generate. The knowledge of these systems, the types of laws they adopt, and how to find legal standards for these systems later can be applied to any research you undertake concerning other government bodies and their laws. You will use the information you find as authorities in a writing project.

ILLUSTRATION 1-1. U.S. and State Government Systems



▼ How Did the Federal and State Systems Originate?

Representatives of the states adopted a **constitution** for the United States that is the framework for the operation of this federal/state system of government. To that end, the U.S. Constitution creates three branches of government and defines their powers. You can think of the Constitution as an umbrella over all of the United States' governing bodies as it covers questions of not only federal government powers, but some state powers as well. The Constitution reserves for the states all the remaining powers not specifically designated to the federal government bodies. In addition, the Constitution establishes the rules for the relationship between the federal and state governments. The U.S. Constitution is the supreme law of the United States. For example, Congress, the legislative body of the federal government, cannot enact a law that is contrary to the U.S. Constitution. The state legislatures similarly are prevented from adopting laws that violate provisions of the U.S. Constitution.

2. Components of the Federal System and Governing Law

The federal government consists of three branches of government: the legislative, the executive, and the judicial. The U.S. Constitution created each branch and defines the relationship between them. The Constitution establishes a system in which each branch of government can monitor the activities of the other branches to prevent abuses. Each branch has the ability to alter actions of another branch. In this way, the Constitution provides **checks** and **balances** concerning the actions of each branch of government.

In general, the legislative branch creates the laws, the executive branch enforces the laws, and the judicial branch interprets the laws.

a. The Legislative Branch

The **legislative branch** of the federal government is called the **Congress**. It is comprised of two houses or chambers called the **Senate** and the **House of Representatives**. Both houses are comprised of individuals who are elected. The Congress creates laws called **statutes**. Some statutes are new rules of law. Other statutes either supersede or amend existing statutes or adopt court-made law. Court-made law is referred to as **case law** or the **common law**. One pervasive example of this is patent law. Many laws were adopted based on court decisions concerning this area of the law. The statutes and the U.S. Constitution comprise one body of law called **enacted law**. The laws enacted by the federal government apply to all U.S. citizens and residents.

NET NOTE

Congress.gov provides access to federal legislative information including House and Senate bills.

▼ How Is Legislation Enacted?

Anyone can propose that Congress adopt a new law, and either chamber can introduce a law for consideration. When a proposed law is introduced, it is called a **bill**. Before the bill can become a law, both chambers must approve it. If both houses approve the same version of the bill, it is sent to the chief of the executive branch, our **president**. The president can sign or veto the bill or withhold action on it. If the president signs the bill, it becomes law. If the president does not act within ten days and the legislative session is still in progress, the bill becomes law. If the president vetoes the bill, Congress may override the veto by a two-thirds majority vote of each house.

If the president fails to act on the bill within the ten days and the legislature is out of session, the bill does not become law. This action is called a **pocket veto**.

Once a piece of legislation becomes law, its first form is a slip law. The slip law on the federal level is called a Public Law. At the end of the legislative session, all the laws passed in the session are published in a set called the Statutes at Large. The Statutes at Large are the federal session laws. The process of codification is when the individual laws are inserted, according to subject, into the United States Code. The official United States Code is updated every six years. In the interim, we rely on the unofficial codes—the United States Code Annotated (Thomson Reuters West) and the United States Code Service (Lexis). The United States Code has 54 titles, with each title covering a separate subject.

b. The Executive Branch

The **executive branch** of the government, headed by the president, is the primary enforcer of the law. The president appoints the cabinet and oversees many federal agencies. The executive branch is responsible for the day-to-day management of the federal government. With the assistance of the vice president, the cabinet members, and the heads of federal agencies, the president helps to guide the day-to-day operations of the government. The president can issue executive orders to direct the operations of various agencies and the actions of the citizens of the United States. In addition, the president is the commander-in-chief of the armed forces and with the advice and consent of the Senate, he can enter into treaties. Most federal

administrative agencies are under direct control of the executive branch. See Illustration 1-2.

As the country's top executive, the president has the authority to control many administrative agencies. However, some administrative agencies are independent. For example, the Department of Justice that includes the Office of the Attorney General is part of the executive branch. However, the Federal Trade Commission is an independent agency.

Administrative agencies enforce many of the laws of the United States. These agencies are responsible for the daily regulation of activities controlled by federal law. For a listing of some of the many administrative agencies, see Illustration 1-2.

NET NOTE

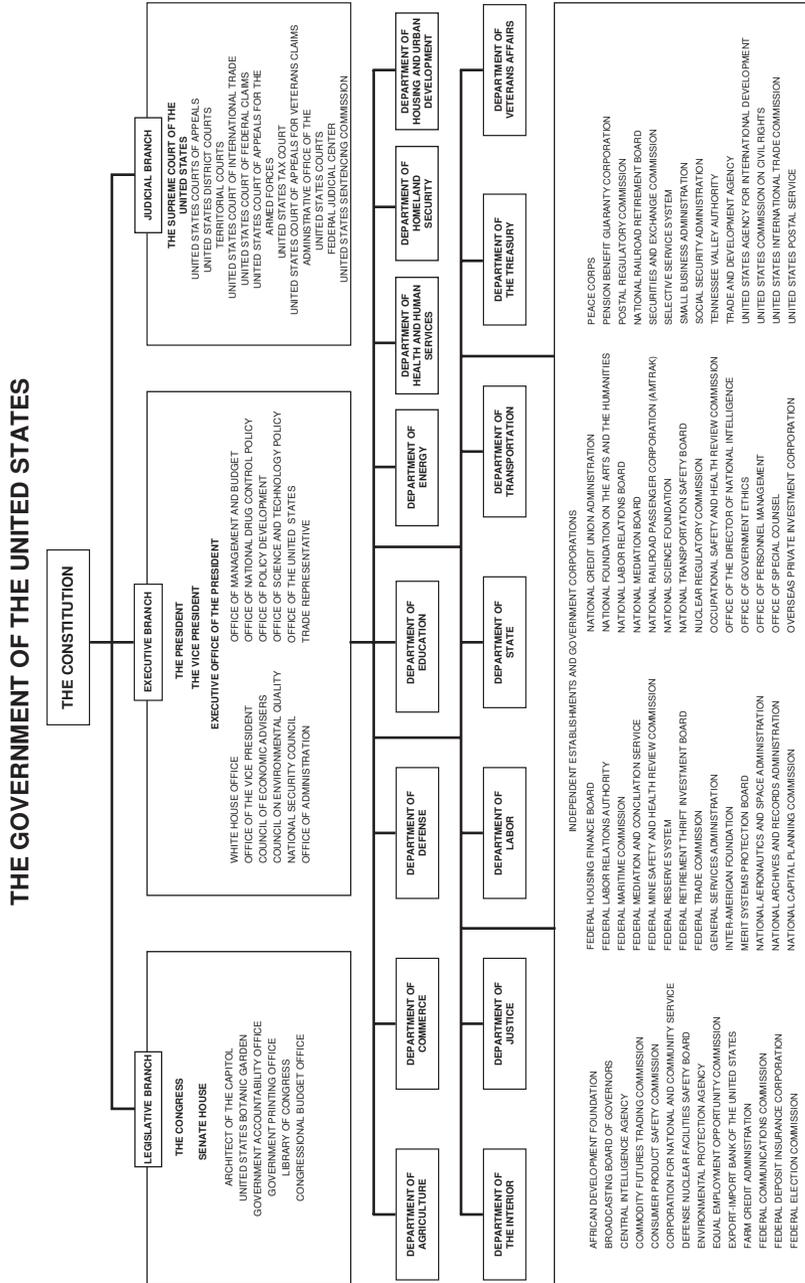
Check govinfo.gov for the Code of Federal Regulations, where you will find the final federal regulations. Proposed regulations and final regulations before they are published in the C.F.R. are located in the Federal Register—federalregister.gov. You can also find executive orders in the Federal Register at federalregister.gov.

Congress creates the agencies and delegates some of its own power to them because it alone is unable to handle the day-to-day enforcement of the overwhelming number of federal laws. Agencies, however, have the staff and often the technical expertise to deal with the daily enforcement of Congress's enacted laws. To do this, agencies often make rules that explain in detail how individuals should act to comply with congressional mandates. In some cases, agencies hold hearings to enforce the law. These agencies, therefore, function in quasi-judicial and quasi-legislative roles.

PRACTICE POINTER

Check the table of contents in the daily Federal Register to see agency activity. You can bookmark federalregister.gov and click "Current Issue."

ILLUSTRATION 1-2. The Government of the United States



For example, Congress enacted the Consumer Product Safety Act and delegated its enforcement power to the U.S. Consumer Product Safety Commission. Congress charged the commission with the responsibility for the daily enforcement of that act. As part of the commission's duties, it adopts rules or regulations. It also has administrative hearings, which often result in decisions.

In some cases, agencies use their **police powers** to enforce the law. For example, the U.S. Environmental Protection Agency will assist in prosecuting individuals or corporations that violate the Clean Air Act or other laws designed to protect the environment.

NET NOTE

Search for federal agencies and information about a particular agency at search.usa.gov. Details about cabinet members, proclamations, executive orders, and issues facing the executive branch can be found at www.whitehouse.gov. Another government source of information is www.usa.gov. You can find a complete list of all government agencies at www.usa.gov.

c. The Judicial Branch

The third branch of government is the **judicial branch**. The federal judicial system includes three levels of courts that resolve disputes. See Illustration 1-3.

The entry-level court, in the federal judicial system, is the **trial court**. In that court, disputes are heard and decided by either a judge or a jury. The second level or intermediate level of courts is called **appellate courts**. These courts consider appeals of decisions of the trial court. The final level is the **U.S. Supreme Court**. Its decisions cannot be appealed to any court.

NET NOTE

The website www.uscourts.gov provides links to all the U.S. appellate and district courts and U.S. bankruptcy courts, as well as the U.S. Supreme Court. Information is provided about judges, court personnel, locations, and court rules.

ILLUSTRATION 1-3. Federal Judicial System



▼ Who Can Bring an Action in Federal Court?

A court can only consider a case if it has **jurisdiction** to hear it, that is, if the court is authorized to consider such cases. The federal court can consider all cases involving issues of federal law. In addition, it may hear cases involving disputes between parties of different states. Such cases are called **diversity cases**. Cases in which both the plaintiff, who is the party bringing the lawsuit, and the defendant are citizens of different states are examples of diversity cases. Diversity cases often involve issues of state law.

ETHICS ALERT

If you are assisting an attorney in preparing a claim, be certain that the claim is made in a court that has jurisdiction over such a claim.

PRACTICE POINTER

Federal courts can decide issues of state or federal law.

i. The Trial Courts

The **trial court** is the court that hears the facts concerning a dispute. It is generally the first place in which a party can seek a remedy in federal court. In that way, it is considered a court of **original jurisdiction**. However, this court also hears appeals from some administrative agencies and the federal bankruptcy courts. Some administrative agency decisions, however, are appealed directly to the appellate courts.

In the federal system, the trial courts are known as the **district courts**. These courts decide disputes when a party (which can be a person, corporation, or other entity) brings an action against another party. In such cases, the trial courts often are asked to interpret congressional enactments such as statutes, ordinances, charters, or executive branch-created laws, including agency rules or decisions. When a court interprets a statute or regulation, it is overseeing the actions of other government branches. Courts often consult a body of law called the common law before rendering any decisions. Common law is court-created law found in the judicial opinions or cases; it is not found in the statutes.

ii. The Appellate Courts

The federal trial courts' decisions can be appealed to one of the 13 **federal appellate courts** known as the **U.S. Courts of Appeals**. See Illustration 1-3. This second tier of federal courts is broken into numbered and named **circuits**. Eleven circuits are known as the First through Eleventh. The remaining circuits are the Federal Circuit and the District of Columbia Circuit. The circuits are geographic, except for the Federal Circuit. See Illustration 1-4. An online map is available at www.uscourts.gov. These courts decide issues of law posed in appeals of trial court decisions located within its circuit. These courts do not consider new factual evidence. Witnesses are not brought before these courts. The Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases such as those arising from decisions of the Court of Federal Claims or the Court of International Trade. Decisions of the federal appellate courts can be appealed to the U.S. Supreme Court.

iii. The Supreme Court

The U.S. Supreme Court is the highest court in the United States. See Illustration 1-3. The U.S. Constitution establishes this court. Today

nine justices, appointed by the president and confirmed by the U.S. Senate, sit on this tribunal. The U.S. Supreme Court has discretion to consider many issues. This discretion to consider an issue or to review a lower court's holding is called **certiorari**. If the court decides not to hear an issue, it denies certiorari. The effect is that the decision of the appellate court is final. If the U.S. Supreme Court decides to hear an issue, it grants certiorari. It then will consider whether the appellate court's decision should stand. By law, the U.S. Supreme Court alone has the authority to hear appeals of a state court of last resort decision when a substantial federal constitutional issue is presented. The U.S. Supreme Court also may hear a dispute between two states. The Supreme Court also has original jurisdiction—that is the right—to directly take actions and proceedings in which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties. It also has original jurisdiction in all controversies between the United States and a state. The U.S. Supreme Court site, www.supremecourt.gov, is an excellent resource for recent decisions, and to monitor the status of pending decisions. Many opinions are posted the same day that they are decided. Additionally, the site allows access to the briefs for the U.S. Supreme Court cases. The Supreme Court briefs are terrific resources for the researcher.

NET NOTE

The Federal Judicial Center provides information about the federal judiciary and its history. See www.fjc.gov.

3. Relationship Between Federal and State Governments

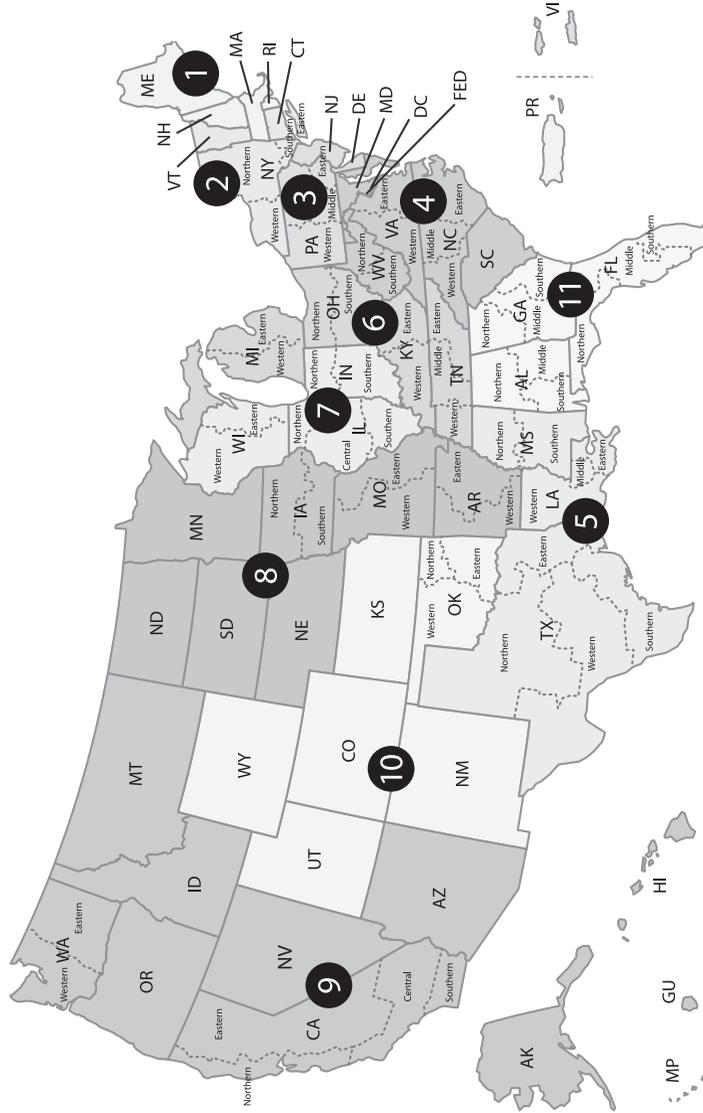
▼ Can a Federal Court Decide an Issue of State Law?

Yes. A federal court can decide an issue of state law if the state issue is presented with a related federal issue or if the state question is raised in a dispute between parties of different states in a case called a diversity action.

▼ What Effect Does a Federal Decision Have on State Law?

A federal court decision generally cannot change state law. It may persuade the state courts to review state law, but its decision usually does not force any change in the law. These decisions, therefore, are advisory for future litigants but must be followed by the parties directly

ILLUSTRATION 1-4. Circuit Map of the U.S. Courts of Appeals



- 1st Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island
- 2nd Circuit: Connecticut, New York, and Vermont
- 3rd Circuit: Delaware, New Jersey, Pennsylvania, and Virgin Islands
- 4th Circuit: Maryland, North Carolina, South Carolina, Virginia, and West Virginia
- 5th Circuit: District of the Canal Zone, Louisiana, Mississippi, and Texas
- 6th Circuit: Kentucky, Michigan, Ohio, and Tennessee
- 7th Circuit: Illinois, Indiana, and Wisconsin
- 8th Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
- 9th Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington
- 10th Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming
- 11th Circuit: Alabama, Florida, and Georgia
- Federal Circuit: Washington
- DC Circuit: Washington

Found at the U.S. Courts website, www.uscourts.gov.

involved in the case in which the decision was rendered. Because states are separate sovereigns, in almost all cases only the state governing bodies can change state law. One exception to this rule does exist. The U.S. Supreme Court can determine whether state law violates the U.S. Constitution. If such a violation is found, the decision of the U.S. Supreme Court could invalidate state law.

▼ Are Federal and State Agencies Part of One Governing Body?

No. The federal government is one sovereign or governing body and the state is a separate governing body or sovereign. That means that the state cannot control the federal government agencies or change federal law. In general, the federal government branches cannot control the state government or change state law. However, the U.S. Constitution, the umbrella, can limit actions of the state government. The Constitution prohibits the states from making any laws that are contrary to its provisions.

PRACTICE POINTER

Often attorneys choose to bring a case in a federal rather than state court or the other way around for tactical reasons. Sometimes an attorney wants to bring an action in federal court because the case will be heard more quickly than in state court where the docket is crowded. More often the reason for bringing an action in a particular court is based solely on the law that serves as the basis for the claim.

4. Organization of State Governments

Most state governments are organized in a manner similar to that of the federal government. State governments are governed by constitutions. That constitution defines the organization of the state's government and the relationship between the branches of government. The states have legislative, executive, and judicial branches.

The legislative branches operate in a manner similar to that of Congress and often feature two chambers. Some legislatures enact enabling laws that create administrative agencies and provide such agencies with the responsibility for the daily enforcement of state laws. The chief executive in each state is a governor.

Each state has a judicial system. However, not all state systems mirror the federal government's three-tier court system. Each state establishes which courts can hear different disputes. Some states have a three-tier system similar to that of the federal judicial branch. In some states, the intermediate appellate court is eliminated. The following systems

do not include an intermediate appellate court: Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

PRACTICE POINTER

The Supreme Court may not be the highest court in a state. This is the case in New York. Check the *Bluebook*, Table 1, for state court information.

NET NOTE

For more information about the state trial courts, see the National Center for State Courts website, www.ncsc.org. Information about court structures and links to the courts are provided.

▼ What Are the Duties of the State Courts?

In most state court systems, trial courts determine the facts and legal issues of a case. A trial court might include a family, a municipal, or a small claims court. The jurisdiction of these courts is generally limited, sometimes according to the amount of money in dispute.

The next level generally is an appellate level court. However, as noted above, some states do not have this level. As in the federal court system, this court usually does not hear new facts or evidence. Instead, it decides whether the lower court erred in deciding substantive law or procedural issues. Finally, most states have another appellate level court, similar to the U.S. Supreme Court, which is the final arbiter of disputes. In some states, there are two such courts—one for criminal cases and the other for civil cases. Texas and Oklahoma are two states that have such courts.

PRACTICE POINTER

An appellate court may hear facts and evidence if it is the court of original jurisdiction.

▼ Can State Courts Decide Issues of Federal Law?

Yes, state courts can decide issues of federal law. Although a state court decision concerning federal law does not change the federal law, it may persuade federal governing bodies to change federal law. The state court decision's impact is limited to the case in which the federal issue was presented, and therefore only parties involved in that case are bound or required to follow that ruling.

The federal government controls all issues of federal law. The state governments exercise authority over all issues of state law. These areas are not always well defined. In some areas, both the state and federal governments exercise authority. For example, both the state and federal governments control how industries dispose of their wastes. Do not be discouraged if you have difficulty separating state and federal issues in some cases. Many times courts struggle with these issues.

CHAPTER SUMMARY

In this chapter, you learned about the branches of the U.S. government and their functions, as well as the general structure of the state governments. The United States has three branches of government: the legislative, the executive, and the judicial. All of these branches were created by the U.S. Constitution, which guides their activities. In addition, administrative agencies enforce the laws created by the legislature.

The legislature, which consists of the House of Representatives and the Senate, creates laws called statutes.

The executive branch enforces the laws of the United States. The administrative agencies issue proposed and final regulations. The judicial branch resolves disputes and interprets the laws and writes opinions that form the common law. You will find the common law in cases.

The judicial branch is comprised of a three-tier court system. The highest court is the U.S. Supreme Court; the middle courts are the U.S. Courts of Appeals; the trial or lowest courts are the U.S. District Courts. All three branches of government create law.

KEY TERMS

administrative agencies
 appellate courts
 balances
 bill
 case law
 certiorari
 checks
 circuits
 city government
 codification

common law
 Congress
 constitution
 county government
 district courts
 diversity cases
 enacted law
 executive branch
 federal appellate court
 federal government

House of Representatives	Senate
judicial branch	state governments
jurisdiction	statutes
legislative branch	township government
original jurisdiction	trial court
pocket veto	U.S. Courts of Appeals
police powers	U.S. Supreme Court
president	

EXERCISES

SELF-ASSESSMENT

1. What is the role of the President, the courts and the Congress?
2. Can the Rhode Island legislature adopt a law that violates the U.S. Constitution? Why or why not?
3. What type of law do legislatures create?
4. Briefly, how does Congress create a law?
5. What branch of the government handles day-to-day regulatory issues?
6. How are administrative agencies empowered?
7. What are the trial courts of the United States called?
8. What U.S. court is the highest court?
9. Is a decision of the U.S. Supreme Court enacted law or common law?
10. Do appellate courts generally decide issues of fact?
11. How is the legal system organized in the United States?
12. Why does the Constitution establish multiple U.S. government branches?
13. What government bodies are parts of the legislative branch?
14. List at least two entities within the executive branch.
15. What is the federal court system, and what are its duties?
16. What do trial courts do?
17. What is the U.S. Supreme Court, and what does it do?

APPLICATION OF BASIC RESEARCH CONCEPTS

18. Explain the relationships among the state courts in your state.
19. What is the name of the intermediate court in your state, if any?
20. Diagram how a case would go through your state court system.
21. Draw a flowchart of how a case would travel through the federal court system.
22. What is the name (not title) of the top state executive in your state?
23. What are the names of two executive agencies within your state government?
24. Go to the White House website. Note two of the links provided on the site.
25. Go to your state's website. Does it provide links to the legislature? Does it provide links to the courts? If it provides a link to the courts, click on the link for the highest court in your state. Can you obtain opinions?

REVIEW QUESTIONS

26. Draw a diagram of your state government.
27. How many houses does your legislature have? What are the names of each chamber?
28. Diagram your state court system. Is there an intermediate court?
29. Draw a flow chart of the federal bill process.
30. Draw a flow chart of the state bill process for your state.
31. Who is the chief executive?
32. Go to the National Center for State Courts website and review the structure of your state court.
33. What are the monetary requirements for filing an action in the trial court in your state?
34. Go to www.usa.gov and click around the site to find links to the Congressional Budget Office and the Domestic Policy Council.
35. What are the branches of the U.S. government and what are the responsibilities of each branch?
36. What are Congress-created laws called?
37. What is the body of law created by the courts called?
38. Name the judges on your high court. Where did you find this information?
39. Find your state's website. Note it.
40. Find a website for your state courts. Note it.
41. Find a website for your state legislature. Note it.

LEGAL AUTHORITIES AND HOW TO USE THEM

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CHAPTER OVERVIEW

In researching legal issues, you must have goals and understand the value of the legal authorities you find. This chapter explains the concept of legal authority and the determination of governing law. It discusses the value of various authorities and how authorities interrelate

with each other. You will learn which authorities should determine the outcome of a case and which authorities merely provide persuasive support for a case. You will learn how to determine which authorities to use in documents you write.

A. DETERMINATION OF GOVERNING LAW

To determine what law controls your case, you must first determine the jurisdiction. Next, you must identify the current law that applies to your case. To do this, you must examine the hierarchy of authorities. You then consider relevant precedent and dicta.

1. Jurisdiction

Jurisdiction is a complex concept that has several different definitions. In the broadest sense, jurisdiction is the right of a state or of the federal government to apply its laws to a dispute and to exercise control over a conflict. Jurisdiction also is defined as a geographic area such as a state that has the right to interpret and apply its law to a particular case. When a court or a governing body has jurisdiction over a case or situation, it has the authority to adjudicate the case or outcome of the situation.

▼ What Factors Determine Which Jurisdiction Governs Your Case?

A variety of factors affect which jurisdiction governs a claim in a particular case, including where the dispute arose, the parties involved in the case, and the nature of the dispute. Sometimes making this determination is a complex task. Ask the assigning attorney to assist you in making this determination. Various statutes, procedural rules, and cases also can assist you in understanding which court has jurisdiction. For example, federal court jurisdiction is specified by federal law. One type of federal jurisdiction is diversity jurisdiction. It establishes jurisdiction for disputes involving citizens of different states.

2. Precedent

You already have learned that the courts generate decisions of cases that become law. The basic rule of law decided by the court is the **holding**. If the court is presented with more than one issue, the decision includes more than one holding. The holding also is called the **precedent**. Other courts use past **precedents** to decide cases.

Theoretically, the lower courts must follow decisions or precedents of the higher courts in their jurisdiction. This theory is called **stare decisis**. The idea behind it is that parties should be able to rely on what the courts have done in the past. Doing so allows parties to predict how a court is likely to rule in their cases.

The doctrine of stare decisis makes your job as a researcher important. You must determine what the courts have decided in the past to assist the attorneys in predicting what the court is likely to do, or likely to be persuaded to do, in your case. Sometimes a court will not follow precedent. Even though stare decisis and precedent are the controlling doctrines, courts often decide cases based on the facts before them and the changes in society. This allows the law, through the holdings, to evolve and to meet contemporary needs. Holdings are what you must consider after reviewing the theories of hierarchy of authorities.

3. Hierarchy of Authorities

Once you have determined the jurisdiction, you then must identify the current law that applies to the case. To determine what law applies to your case, you must determine the **hierarchy of authorities**. This is a system in which legal authorities such as court decisions, statutes, administrative rules and decisions, and constitutions are ranked according to the effect they have in controlling the law of a governing body. You can think of this in part as a chain of command. For example, U.S. Supreme Court cases outrank federal appeals and trial courts concerning issues of federal law. Determining the hierarchy of authorities can be simple or complex depending in large part on the system of government and structure of the courts, the law applicable to the dispute, and the underlying claim. The currency of an authority and competing laws within a jurisdiction are other factors that help researchers determine whether one authority outranks another.

a. Currency

You must first determine which authority is most current. Suppose you find that the law governing your case is a federal law and the case involves a question of federal constitutional law. At first glance the highest legal authority would appear to be the U.S. Constitution because it is the supreme law of the United States and because the legal issue in question is constitutional in nature. However, if the U.S. Supreme Court has interpreted the Constitution on the issue presented in your case, then its decision is more current, and the Court would therefore be the highest legal authority.

In another case that does not involve a constitutional issue, a federal statute might be the highest authority. This would depend on whether a court had interpreted the statute. If a federal court had interpreted the statute's language and that language affected the issue

involved in your case, you would need to determine the hierarchy of authority by researching whether the court decision or a statute and any amendment is more recent. The most current authority is the highest authority.

**EXAMPLE OF THE HIERARCHY QUESTION BETWEEN
A STATUTE AND A CASE**

Your case involves a legal issue that was addressed in a statute that was enacted on December 1, 2019. The court cases you have found that may have a bearing on this legal issue involved in this case were decided before December 1, 2019. Therefore, the statute—the most current authority—is the highest authority concerning this issue. For another example, see Illustration 2-1.

ILLUSTRATION 2-1. Example of Ranking Authorities

The problem presented is whether the Fourth Amendment of the U.S. Constitution was violated when the Federal Bureau of Investigation Agents obtained GPS tracking data from a phone app provider.

Applicable law:

U.S. Constitution

The USA Freedom Act (2015) – a statute that ended bulk surveillance of Americans.

A Supreme Court case 2018 in which the Court determined that the Fourth Amendment of the U.S. Constitution protected individuals against the state’s “unrestricted access to a wireless carrier’s database of physical location information.”

Rank of authorities and reason for the ranking:

1. Supreme Court case 2018 interpreting the Constitution would be first. It is the most current authority.
 2. The next authority is likely to be the USA Freedom Act if it directly addresses this point. It is the second most current authority.
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b. Levels of Court

Next, you must consider the level of each authority, that is, where the court or government body ranks in order of its authority. The trial courts, appellate courts, and U.S. Supreme Court do not carry the same weight. For example, a decision of the highest court, the U.S. Supreme Court, would be at the top of the hierarchy of authorities of federal court decisions. Its decisions would trump those of other federal courts.

Except for the U.S. Supreme Court, all the federal courts are within defined groups called **circuits**. Within each circuit are a group of district courts and one circuit court of appeals. The key to the relationship between the federal courts is that the district courts, which are the entry-level courts, must follow decisions of the U.S. Circuit Court of Appeals within its circuit. A district court does not have to follow decisions of appellate courts that are outside of its circuit. A Texas district court is within the Fifth Circuit. Appeals of its decisions generally are made to the U.S. Court of Appeals for the Fifth Circuit. Therefore, the Texas district court must follow the precedents established in the decisions of the U.S. Court of Appeals for the Fifth Circuit. It does not have to follow the precedents set in the decisions of the U.S. Court of Appeals for the Sixth Circuit. For a review of the circuit divisions, review Chapter 1. Decisions of appellate courts outside of a circuit, however, often are used to persuade an appellate court to make a certain decision if it has not addressed that issue earlier. Such a decision is **persuasive authority** discussed later in this chapter.

PRACTICE POINTER

For each jurisdiction in which you often undertake research, create a chart that lists the primary and secondary authorities to consider.

c. Conflicting Decisions Between Circuits

Each circuit is independent of the other circuits. Therefore, decisions from two or more different circuits may conflict. Each appellate court can make its decision independent of any decisions concerning the same issue rendered by other appellate courts. If two appellate courts have conflicting decisions concerning the same issue, how can you, as a researcher, decide what law governs? You must determine what circuit court authority is **mandatory authority** for your case. Mandatory authority is a court decision that a lower court in the same jurisdiction must follow. If the question is a particularly significant federal issue, check if the U.S. Supreme Court has decided the issue or is about to render a decision concerning such an issue. If so, a decision of the Supreme Court—the highest level of court—will be at the top of the hierarchy of authority.

Often, however, one appellate court may be guided in its decision by the decision of another appellate court. Review the example below.

EXAMPLES OF HIERARCHY BETWEEN COURTS

The U.S. District Court for the Northern District of Illinois, which is in Chicago, falls in the Seventh Circuit. See Illustration 1-4. If the federal district court in Illinois was asked to determine whether federal law permitted a union to charge a fee to nonmembers for activities that benefit nonmembers, it would be bound to follow any U.S. Seventh Circuit Court of Appeals decision concerning this issue. This is because this appellate court is a higher court than the district court within the Seventh Circuit. Appeals from the Illinois district court generally are taken to the Seventh Circuit Court of Appeals. If the U.S. Sixth Circuit Court of Appeals in Cincinnati handed down a decision on this issue that conflicted with the Seventh Circuit Court of Appeals, the District Court for the Northern District of Illinois, a trial court, would be bound to follow the decision of the Seventh Circuit Court of Appeals, as it is within the Seventh Circuit and the Seventh Circuit Court of Appeals is above the Illinois district court in rank and status. The Illinois court is not within the Sixth Circuit. Therefore, the Sixth Circuit Court of Appeals is not above the Illinois district court in rank and status. The Illinois court would not be bound to follow the decision of the U.S. Court of Appeals for the Sixth Circuit in Cincinnati. However, the Seventh Circuit decision would be considered **mandatory binding authority** for the Illinois court. The Sixth Circuit opinion would be **primary persuasive authority**. The Sixth Circuit decision would be a very persuasive authority if the Seventh Circuit appellate court had not already ruled on the same issue of law. The Illinois district court facing a decision in a union fee case or even the Seventh Circuit Court of Appeals may be guided by the Sixth Circuit opinion, a persuasive authority rather than mandatory or binding authority.

The U.S. District Court for the Northern District of Ohio, based in Cleveland, falls within the Sixth Circuit. See Illustration 1-4. That district court must follow decisions of the Sixth Circuit appellate court, not those of the Seventh Circuit Court of Appeals in Chicago, because decisions of the Sixth Circuit Court would be mandatory binding authority for the Ohio court. Decisions of the Seventh Circuit would be primary persuasive authorities for the Ohio court.

d. State and Federal Decisions Concerning an Issue

What happens if the issue in your case involves both state and federal decisions? How do you make sense of the hierarchy of authorities in such cases? The key is to determine which court has jurisdiction or the right to hear the case. The court systems of the state and federal governments operate in tandem. As explained above, the federal courts may decide issues of both federal or state law. For example, a federal diversity case may involve a negligence issue—a state law issue.

Next, you must determine whether federal or state law applies. If you find this difficult, ask the assigning attorney. The federal courts

should look to decisions of the highest court of the state to make a determination of state law. The federal court decision, however, does not bind later state court decisions.

State courts also may decide issues of either federal or state law. The state court decisions concerning federal law are merely persuasive authority, however, because federal courts are not required to follow these decisions. State courts will look to federal courts for guidance in deciding issues of federal law. However, they are not bound to follow those decisions. Similarly, a state court may decide a federal age discrimination issue, but the federal courts can disregard that decision when facing the same question.

e. Conflicts in Federal and State Authority

Although the federal and state governments are independent governments, they sometimes regulate some of the same areas, such as environmental pollution. In some cases, the federal government by congressional action will control an area extensively, and a state will attempt to monitor the same area. Who controls varies. Often, a determination of which of the **conflicting authorities** governs is decided by reviewing the Constitution. Other times, federal or state law might specify which law governs.

The federal courts sometimes are asked to decide who controls. The courts may look to the Constitution for guidance or may consider who has pervasively regulated an area. For example, if a case involves a section of the U.S. Constitution, the U.S. Supreme Court is the final authority. In other cases, it depends on the area being regulated. Areas such as trade secrets or environmental law often are regulated by the state and federal government, so conflicts often arise.

f. State Court Decisions

Each group of state courts is a separate court system. State courts of one state are not required to follow decisions courts of other states render. Often, however, state courts consider other states' court decisions for guidance concerning how to decide a case. Decisions of one state's courts are merely advisory or persuasive decisions for another state's courts, not decisions that control the law of the first state.

4. Dicta

Often a court addresses an issue that is not directly presented by the parties. In such cases, a court states what it would do if it was presented directly with the issue. When the court makes such statements, they are called **dicta**. Dicta do not have the same force and effect as holdings. They are not authoritative, and lower courts are not bound to follow such statements.

You might use dicta when no court has ever been asked directly to decide the issue in question. Dicta may explain how a court would decide an issue if it was directly presented to the court. Because of this, the dicta might help you to predict how a court might decide an issue. Dicta also can be used to persuade a court to decide an issue in a certain manner. Although dicta may be helpful, finding dicta is not the goal of your research.

B. TYPES OF LEGAL RESOURCES

Your task is to find primary authority “on point” or “on all fours” with your case. In other words, you are seeking cases that are similar in fact and in legal issue to your case and whose holdings address an issue presented in your case—“on all fours.”

1. Primary Authority

Primary authority is law generated by a government body. Cases decided by any court are primary authority. Legislative enactments such as constitutions, statutes, ordinances, or charters are primary authorities. See Illustration 2-2. Administrative agency rules and decisions also are primary authorities.

These authorities often are published chronologically. However, statutes are arranged by subject. Some sources of primary authorities will be more appropriate for your research than others. In some cases, primary authority is mandatory or binding authority, because a government body, most often a court, must follow that authority when it makes future decisions. Courts are required to follow decisions of higher courts in the same state or the same federal circuit. The words *mandatory* and *binding* are interchangeable.

ILLUSTRATION 2-2. Authorities and Finding Tools

<i>Primary Authorities</i>	<i>Secondary Authorities</i>	<i>Finding Tools</i>
Court decisions	Encyclopedias	Digests
Statutes	<i>American Law Reports</i>	Citators
Agency rules and regulations	Periodicals	Updaters
Constitutions	Law reviews	Case and Statute Annotations
Charters	Dictionaries	
Ordinances	Thesauri	
Adopted pattern jury instructions	Model codes	
Court rules	Unadopted uniform laws	
State-adopted model code provisions	Treatises	
State-adopted uniform laws	Restatements of the Law	