ASPEN COURSEBOOK SERIES

John C. Dernbach • Richard V. Singleton II
Cathleen S. Wharton • Catherine J. Wasson

A Practical Guide to Legal Writing and Legal Method

SEVENTH EDITION

ASPEN PUBLISHING

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John C. Dernbach, Widener University
Richard V. Singleton II, Blank Rome LLP
Cathleen S. Wharton, University of Georgia, retired
Catherine J. Wasson, Elon University

A Practical Guide to Legal Writing and Legal Method, Seventh Edition, explains essential writing and analytical skills with the clarity and precision that have made it a classic in the field. Every concept and principle is illustrated by examples of both effective and ineffective legal writing. Focused exercises in every chapter allow students to apply the lessons taught in a written document or oral argument. This practical, building-block approach supports a variety of teaching and learning styles, making ***A Practical Guide to Legal Writing and Legal Method*** the ideal choice for the classroom and the ideal resource for graduates as they begin their professional careers.

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To our families and friends—
for their love, support, and patience.

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Acknowledgments

We have now published seven editions of this book since 1981. That this book is still being used, forty years after it was first published, is a reflection of the support of thousands of teachers and students.

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Introduction

A good lawyer is much more than a professional. A good lawyer is a craftsperson, applying his or her talents with imagination, diligence, and skill. Although the practice of law requires a combination of negotiation, counseling, research, and advocacy skills, there is one skill upon which all others depend: The good lawyer, the craftsperson, must be able to write effectively.

Effective legal writing combines two elements—legal method and writing. Legal method is the process of understanding legal rules, applying them to specific factual situations, and drawing justifiable and well-organized conclusions. Law school, it is often said, is designed to teach you to "think like a lawyer." The myriad legal rules presented in torts, civil procedure, property, and other courses are important, but law school courses should also instill the logic or method of law. A good lawyer knows how to resolve a particular problem, even though he or she may not yet know the relevant legal rules.

A thorough understanding of the legal problem-solving process is of little value, however, unless the analysis can be communicated on paper. Good legal writing is in many ways the same as good writing in general. Legal writing should be clear, precise, and complete, yet fully understandable to a layperson. Contrary to what many people think, good legal writing is not a legalistic style of Latin phrases and archaic words.

Effective legal writing is hard work. Nothing is included without good reason, and nothing of significance is omitted. Each word, each sentence is chosen or structured with care. If a document reads smoothly and intelligently, it is not usually because it was easy to write. The reverse is more often true: a document that was easy to write is often muddled. The beauty of well-crafted writing is that the final product masks the painstaking and difficult process by which it was created. The good writer—the craftsperson—makes it *look* easy.

The good writer also understands his or her audience. Not surprisingly, the audience for most legal writing is most often lawyers. They may be friendly or supportive lawyers, lawyers for the opposing side, lawyers who are judges, and lawyers who are clerks. They have different experiences and legal skills, but you should assume that they understand legal method and legal writing and that they bring certain expectations to what they read. They don't necessarily know the law relevant to a particular problem, so they expect that a memorandum or brief will explain it. They have good noses for the strengths and weaknesses of legal conclusions, so they expect

conclusions to be explained and counterarguments answered. They are sensitive to the real-world consequences of decisions based on legal documents, so they take these documents seriously. And they are busy—often extremely busy and working under a deadline—so they expect memos and briefs to be as direct, easy to read, and understandable as the material will allow.

This book is designed as a legal writing text that provides practical guidance in the basic skills of legal writing and legal method.[1] Although intended primarily for first-year law students, it integrates and synthesizes many of the fundamental lessons of other law courses. It explicitly states the basic principles of legal method and provides a way of learning this method by explicating the thinking and writing necessary to analyze specific legal problems.

The book is based on two classroom-tested premises. First, the fundamental principles of legal writing and legal method can be reduced to a series of fairly simple guidelines. Second, these guidelines can best be learned by practice, particularly by working through highly focused exercises. More than forty years with the first six editions of this book have confirmed these premises.

Each chapter covers a specific topic, such as organization or precedent. Most chapters set out a short series of principles or guidelines that are explained and illustrated with hypothetical legal problems. The book shows good and bad ways of applying these guidelines and explains why one example is better than the others. Exercises of varying complexity at the end of each chapter afford an opportunity to learn and apply the rules. Most of the illustrations and exercises are based on altered or abridged versions of real cases and statutes, citations to which are set out in the Bibliography.

Although the book offers a step-by-step approach to legal writing and legal method, you need to be aware that legal writing is a recursive process. You may outline a memorandum or brief, begin writing, and then find you need to change your outline. You may find, as you revise your explanation of how a particular statute is applicable to your case, that the statute actually is *not* applicable. The steps in this book, in other words, do not move inevitably from "earlier" to "later." You will often find yourself going back to "earlier" steps as your understanding of the law and how it applies deepens.

The book is divided into five parts. The first three parts focus on analytical and writing lessons common to most legal documents. These three parts introduce the law (Part A), and explain basic concepts of legal method (Part B) and legal writing (Part C). Although many of the examples used in these parts are based on legal memoranda, these guidelines also apply to briefs and other legal documents. The fourth part (Part D) shows more

1. Legal research, basic grammar, and citation form are not discussed. These subjects are covered in detail elsewhere, and there is little value in summarizing them here.

specifically how these guidelines apply to objective memoranda written for a supervisor or judge and opinion letters written to a client. The fifth and final part (Part E), provides additional guidelines for writing persuasive briefs to a trial or appellate court.

In addition, Appendices at the end of the book show several examples of emails, legal memoranda, and a client letter, as well as a trial court opinion, trial court briefs, and appellate briefs. These appendices are intended to be helpful models of the kind of writing taught in this text—not only for class but afterwards in the practice of law.

Because legal writing and legal method are skills, they are best learned and improved through the type of practice provided here. Many different skills are involved, but you need to master each of them and you must be able to use many of them in a single document. While mastery of basic knowledge about writing and legal method is also essential, simply memorizing that information will not do. If you cannot apply that information in a particular problem, you do not know it.

Learning new skills is often difficult, particularly at first. This is true of all skills, such as riding a bicycle, keyboarding (or typing), driving, playing a musical instrument, or participating in a sport. But as with these skills, the more you practice legal writing and legal method skills, the better you will get and the more you will enjoy using them. With time and practice, the finer points of legal writing and legal method can be mastered.

The materials in this book are intended to be straightforward, manageable, and easy to understand. The guidelines provided can be applied to legal writing assignments, as well as to more complex situations you will encounter as your experience with the law grows. Ultimately, this book provides tools that will help you develop the skills required by the good lawyer, the skilled craftsperson, and will serve you well wherever you go in the practice of law.

A Practical Guide to Legal Writing and Legal Method

PART A

Introduction to Law

CHAPTER 1

Rules and Policies

The law can generally be understood as the rules and underlying policies for guiding or regulating behavior in society. Rules describe what behavior is permissible or impermissible, what procedures must be followed to achieve certain ends, and what happens to those who do not follow them. Legal rules are intended to provide a means of resolving disputes peaceably, predictably, and, more or less, efficiently. They define relationships among individuals and groups, and help people arrange or conduct their business with greater security.

A. Legal Rules

Legal rules come about when the legislature enacts a statute, when a court resolves a dispute, when the president ratifies a treaty with another nation after the Senate has given its advice and consent, or when a government agency promulgates administrative regulations. Legal rules differ from other rules because their creation and enforcement require the participation of government. The police, courts, and other governmental bodies are responsible for ensuring compliance with these rules.

Rules vary considerably in their scope, clarity, and precision. Common law rules are created one case at a time. Although they may apply to more situations than just the case at hand, they may be so narrowly tailored that they have little application beyond the particular case from which they arose. Some rules are phrased in broad or general language. Many federal constitutional rules, for example, prohibit persons from being denied "freedom of speech" or "equal protection of the laws."

Much tort law turns on what is "reasonable" in particular cases. Rules with such broad terms offer attorneys and judges considerable freedom for interpretation. Other rules are much more specific. Statutes tend to be more detailed than constitutions, and administrative regulations tend to be even more detailed. An administrative regulation, for example, may require a person who uses explosives to be certified by the state after paying a $300 fee and passing a competency test. Such regulations offer less room for interpretation than rules defined by concepts like "freedom of speech." Common law rules, such as those involving estates in land, can also be quite specific.

This range reflects contrasting approaches to the creation and application of law. Since common law is made on a case-by-case basis, it develops cautiously and is premised on the view that problems are best understood and analyzed in light of the facts of each particular case. Other laws, such as statutes and administrative rules, confront problems in groups. This approach is bolder, relies on the premise that problems can be understood in categorical terms, and makes law about particular situations in advance. Each approach works to solve certain problems, but neither works for all problems.

B. Law and Policy

Policies are the specific underlying values or purposes for legal rules. Policies reflect varying and sometimes inconsistent views about what is socially good. Much property law survives from feudal times primarily because of the convenience of adhering to custom. More recent lawmaking, on the other hand, is often directed toward the achievement of specific political goals. Policies also vary greatly in abstractness, even for the same rules. A building code provision requiring a certain kind of fire extinguisher for apartment buildings will probably be premised on technical judgments concerning the safety or efficiency of certain products or materials. These technical judgments, in turn, will be premised on certain moral or value judgments about the degree of protection that ought to be afforded tenants of apartment buildings. Sometimes policies are articulated clearly, but frequently they are stated unclearly or not at all. Often, a single rule is buttressed by several policy considerations.

Because legal rules are based on social judgments, they tend to act as a shorthand way of deciding what is just in a specific factual situation. Instead of simply asking what is right, for example, a court will first apply the relevant legal rule. The Twenty-Sixth Amendment to the United States Constitution provides that a United States citi-

zen who is 18 years of age or older cannot be denied the right to vote simply because of the person's age. The answer to the question, "Can Isaac vote in the national presidential election?" depends on whether Isaac is a United States citizen and is 18 years of age or older. There are good reasons for restricting the national voting privilege to United States citizens, but we all know of 10- and 12-year-olds who could vote more intelligently than some adults. Could we fairly select and include these children while excluding certain adults? Probably not. The age of 18 is simply a reasonable place to draw a line. Line-drawing is one of the most important policy considerations in creating and applying legal rules.

Because legal rules are often created to achieve socially desirable goals, they are not etched in stone for eternity and do not necessarily reflect the "natural" order of things. Change in underlying values or policies will often be followed by change in legal rules.

The evolution of the law regarding sex-based discrimination is illustrative. The Fourteenth Amendment to the United States Constitution, which went into effect in 1868, provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." In 1872, the United States Supreme Court decided in *Bradwell v. Illinois* that this provision of the Constitution did not prevent Illinois from refusing to license an otherwise qualified woman to practice law in that state. The legislature had said, in effect, that only men could be lawyers. Justice Bradley, writing for himself and two other justices, commented:

> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. . . . I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities.[1]

Although the Court's sex discrimination decisions over the last 150 years leave open some important questions about equality, there is no doubt that its outlook has changed significantly. It is difficult to imagine the Court drawing the same conclusion today as it did in 1872. As Justice Brennan, referring to the *Bradwell* case, wrote in a 1974 opinion:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was

1. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).

> rationalized by an attitude of "romantic Paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.[2]

This change in the Court's attitude, and ultimately in the law, came as a direct result of changing public views about the role of women. This is not to suggest that judicial (or even legislative) decisions are made only after a poll is taken; the point is rather that public attitudes and values influence the environment in which these decisions are made.

The law, in turn, is a source of social norms and expectations. What the law requires, permits, or prohibits often comes to be associated with what is good or right. Just as the Supreme Court's early decisions helped maintain or create patterns of sex discrimination, so its more recent opinions can be credited with helping to lessen it.

The conclusion that rules are created to carry out socially desirable goals has an important corollary: Rules should never be applied to a factual situation without consideration of the consequences. This may seem like a paradox. If the rule is thoughtfully designed to achieve a particular goal, then every application of that rule to a factual situation ought to further that goal; there should be no need to examine its fairness in each case. The practical difficulty with this proposition, however, is the impossibility of knowing in advance the full range of situations to which the rule might ultimately apply. As a result, the rule may not achieve the desired result in all cases and may even achieve exactly the opposite of what was intended.

The old legal adage "hard cases make bad law" is rooted partly in the tremendous difficulty that lawyers and judges have when a rule is clearly applicable to a factual situation in which it would work a manifestly unjust result. Sometimes the rule is flexible enough that the problem can be solved by interpretation. Sometimes the rule provides for exceptions. Sometimes it is more important to maintain the integrity of the category than it is to work justice in all cases. And sometimes it is necessary to change the law.

Suppose, for example, a rule states that the named beneficiary in a will inherits the property of the deceased. The rule respects the wishes of the deceased and provides for the orderly distribution of the dead person's property. But what if the beneficiary murders the person who wrote the will to collect the inheritance? The rule contains no exceptions or room for interpretation. If it is applied as written, the beneficiary will collect the inheritance. Although the basic purposes of the rule would be served, applying the rule seems terribly wrong. A court's

2. Frontier v. Richardson, 411 U.S. 677, 684 (1974) (footnote omitted).

best alternative in this situation is to modify the rule: A beneficiary may not inherit property from a person he has murdered.[3]

Other hard cases require a judge to reconcile competing policy considerations. At what point, for example, does a criminal defendant's right to a fair trial limit the public's right to full media reporting of that trial? To what extent can a person's right to run her own business as she sees fit be limited for the protection of her employees? You will constantly be probing the cases you read for the justness of their rules and policies.

Law practice and legal education tend to focus on hard cases. After all, one does not need a law degree to know that a person who drives seventy miles per hour in a residential neighborhood is breaking the law. Lawyers are most necessary when hard cases arise. Their training and experience help them solve problems when the answer is not obvious.

The importance of value choices cannot be overstated in the practice of law. You will need to explain and weigh competing policies in your legal analyses. As an advocate, you will need to explain why certain policies outweigh others, and you will have to understand and be responsive to the values of your audience to do so.

Lawyers have obligations to their clients, but they also have obligations to society. When these obligations are in tension with one another, the tension is not always easy to resolve. If you successfully help a company develop a shopping mall near a city, for instance, you will have a significant effect on local land use, transportation, and housing patterns. If you successfully represent a landowners' group seeking to block that development, you prevent those effects but cause others. Whichever side you represent, you will be arguing for the social good your clients ostensibly seek. "Justice" and "the social good" have many meanings, and you will develop and refine your own understanding of these concepts as you study law.

3. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

EXERCISES

The following exercises are intended to show you some of the difficult problems judges and legislators face. As you answer the questions in the exercises, ask yourself where your policy or value judgments come from, whether other judgments might also be relevant, and what consequences your judgments would have.

Exercise 1-A

1. Assume you are a state legislator voting on the following bills. State whether you would vote for or against these bills and explain your decisions.
   (a) A bill requiring persons who ride motorcycles to wear protective helmets.
   (b) A bill requiring companies that produce food or beverages for public consumption to place warning labels on products known to contain cancer-causing agents.
   (c) A bill requiring couples applying for a marriage license to undergo twelve hours of psychological counseling and testing before the license is granted so they can better determine whether marriage is appropriate for them.
   (d) A bill prohibiting any person from smoking tobacco.
2. Are your decisions consistent with one another? Explain.
3. Do you think it is important that your decisions be consistent? Is it more important that judicial decisions be consistent? Explain.

Exercise 1-B

1. Assume you are a trial judge. Decide each of the following cases according to your idea of a just result and explain the reasons for your decision. Do not refer to any of the other cases in making your decision and do not invent additional facts.
   (a) Dale Price was arrested and charged with armed robbery shortly after three men stole $20,000 from Crabtree National Bank. Two of the men escaped. Price objected to his prosecution on the ground that he should not be tried unless the other two were tried with him. Does Price have a valid defense?
   (b) Jennifer Fong was arrested for driving sixty-four miles per hour in a fifty-five mile-per-hour zone. She objected to her prosecution because

she had just been passed by two trucks and a car, all traveling five to ten miles per hour faster than she. Most of the other vehicles were traveling at the speed limit. Does Fong have a valid defense?

(c) Sally Hyde was arrested and charged with possession of marijuana at a "4/20" demonstration advocating for the legalization of marijuana. She objected to her prosecution because most of the other people there also possessed marijuana. There were no other arrests for drug possession, and the police said she was arrested at random "as an example to others." Does Hyde have a valid defense?

(d) Denise Gilman was arrested for cohabitation with a male friend. She is an outspoken and militant critic of the Motor City Police Department's practice of random traffic stops in poor, primarily African-American neighborhoods. The cohabitation law had not been enforced for years. She objected to her arrest on the ground that she was being unfairly singled out. Does Gilman have a valid defense?

2. Using your decisions and your stated reasons for those decisions in these four cases, frame a rule that will reconcile your conclusions. Remember that your statement of the rule should be clear and precise. Justify your rule.

CHAPTER 2

Sources of Law

The United States has many sources of law because of our federal system. Power is divided between the federal government and the fifty states. The United States Constitution is the nation's charter and the source of authority for federal laws and the federal courts. The Constitution delineates the limits of federal power and reserves considerable authority to the states. Each state has authority over persons and activities within its boundaries. State governments, in turn, delegate some authority to local governments.

The federal government, state governments, and many local governments are divided into three branches. The legislative branch writes laws, the executive branch carries out those laws, and the courts interpret them. Thus, each of these governmental units may, within certain constraints, make law.

Understanding how laws arise and how they affect our activities requires an understanding of two key concepts: (1) the relationships among laws within a single jurisdiction, and (2) the relationships among federal, state, and local governments in the system. This chapter describes these two concepts and briefly describes resources for legal research.

A. The Hierarchy of Laws

Four basic kinds of laws exist: constitutions, statutes or ordinances, administrative regulations, and judge-made law.[1] These sources form

1. This summary is limited to the basic internal laws of the United States. International agreements and laws of other countries are not described here.

a hierarchy with constitutions at the top and judge-made laws at the bottom. Within a jurisdiction, the constitution is the highest authority; statutes, regulations, and common law must not conflict with the constitution.

Statutes create categorical rules to address particular problems. The Food, Drug, and Cosmetic Act, for example, was adopted by Congress to ensure the safety and healthfulness of the nation's food supply. A statute is controlling as to the subject it encompasses, unless the statute is unconstitutional.

The federal government and most states have many agencies with diverse responsibilities (*e.g.,* labor, veterans' affairs, transportation, commerce, environmental protection). Administrative regulations are rules promulgated by such agencies to help implement specific statutes. For example, the "laws" requiring nutritional information on the packages of certain foods are largely administrative regulations promulgated by the Food and Drug Administration under the Food, Drug, and Cosmetic Act. Properly adopted administrative regulations have the same legal effect as statutes, so long as they are consistent with the Constitution and relevant statutes.

Judges often interpret or apply constitutions, statutes, or regulations. At other times, when such law is not applicable, they interpret or apply a body of judge-made law known as the *common law.* In either situation, law is made whenever a court decides a case. Once a constitutional provision, statute, or regulation has been construed by a court, that construction becomes law.

The charts below illustrate the order of authority within the federal government and within a state government:

United States
United States Constitution
Food, Drug, and Cosmetic Act, passed by Congress to ensure the safety and healthfulness of the nation's food supply
Administrative regulations promulgated to effectuate the Act, such as rules relating to the declaration of nutritional information required on the packages of certain foods
Judicial decisions construing the Act or the regulations

California
California Constitution
California Environmental Quality Act, passed by the California legislature to protect and enhance the quality of the environment in the State of California
Administrative regulations promulgated to effectuate the Act, such as the rule that an environmental impact report must be filed before a construction project is approved
Judicial decisions construing the Act or the regulations

B. The Hierarchy of Jurisdictions

The United States has fifty-three sovereign systems of law: federal law and the laws of each of the states and territories. Although these systems are parallel, they sometimes intersect. Federal law controls when they do. Article VI of the United States Constitution provides that the Constitution and federal laws made pursuant to the Constitution "shall be the supreme law of the land."[2]

Therefore, a state may not act, through its legislature or its courts, in a way that is inconsistent with applicable provisions of the United States Constitution or with federal statutes and regulations. For example, the federal Voting Rights Act restricts or bars entirely devices used to discourage voting by racial and ethnic minorities, such as poll taxes, literacy tests, and voting and registration instructions written only in English. A state whose laws conflict with this Act must change its laws to conform to the federal statute.

Subdivisions of the state, including counties, townships, cities, boroughs, villages, or parishes, may also make laws. These laws, usually called "ordinances," must comply with the applicable provisions of the state and federal constitutions as well as state and federal statutes.

C. The Hierarchy and Jurisdiction of Courts

The federal court system and most state court systems consist of three tiers: the trial courts, the middle-level court of appeals, and the court of last resort. Within each system, the jurisdiction of the courts—that is, the authority of courts to hear a case — is limited by geography and

2. This is commonly referred to as the "Supremacy Clause."

subject matter. In the federal system, the trial courts are known as *district courts* because the jurisdiction of each is limited to cases brought within its geographic district. A district might be an entire state (such as Maine) or a portion of a state (such as Texas, which currently has four federal judicial districts). The jurisdiction of the middle tier, the *federal appeals courts,* is also generally defined by geographic boundaries. The fifty states and the territories are currently divided into eleven judicial circuits, with the District of Columbia Circuit forming the twelfth and the Federal Circuit forming the thirteenth.

The eleven judicial circuits that are geographically limited include the following states and territories:

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

Each federal court of appeals has jurisdiction to hear appeals from districts within its circuit and may affirm or reverse district court decisions. The final level of appeal is to the United States Supreme Court, which may affirm or reverse federal court of appeals decisions as well as certain decisions by a state's highest court.

The following chart illustrates the hierarchy of courts within three jurisdictions:

Jurisdiction	Federal	Florida	Indiana
Highest Court	United States Supreme Court	Florida Supreme Court	Indiana Supreme Court
Middle-Level Appeals Court	United States Court of Appeals for the First Circuit	Court of Appeals of Florida, Fifth District	Indiana Court of Appeals, Second District
Trial Court	United States District Court for the District of Massachusetts	Circuit Court for Seminole County	Marion County Superior Court

The power of a court to hear certain types of cases is known as *subject-matter jurisdiction.* The subject-matter jurisdiction of the federal courts is limited by the United States Constitution and Congress. Federal courts have no authority to hear cases that fall outside those limitations. The federal courts have subject-matter jurisdiction over (1) civil actions that arise under the Constitution, laws, or treaties of the United States (federal-question jurisdiction); (2) cases involving admiralty or maritime law; (3) civil cases in which the amount in controversy exceeds $75,000 if the plaintiff and defendant are citizens of different states (diversity jurisdiction); and (4) cases involving federal crimes. Congress has also created specialized civil courts, such as federal bankruptcy courts, whose jurisdiction is limited to a particular area of the law.

The jurisdiction of state courts is similarly defined by the state's constitution and legislature. A trial court's jurisdiction ordinarily is limited by geography (usually all or part of a county or municipality), subject matter, and the amount in controversy. The court system in a municipality or county may include criminal courts and civil courts of limited or general jurisdiction. The latter are often called *circuit courts, superior courts, district courts,* or *county courts.*

A state court may hear questions of federal law as well as state law. For example, a defendant who has been charged with violating a local ordinance and who believes the ordinance violates the right to assemble guaranteed by the United States Constitution may raise the constitutional claim in state court. Federal courts may also hear questions of state law, but they must apply the law of the state under whose laws the claim arose. If the law of the state is unclear, the federal court must either make an educated guess about what the highest court of that state would do if confronted with the question before it or, if state law permits, certify the question to the state's highest court.

Within each jurisdiction, the decision of the highest court is binding on the lower courts. A decision of the United States Supreme Court on a federal question would be binding on all courts that entertain the identical federal question. As explained more fully in Chapter 4 (Precedent and *Stare Decisis*), when the question is one of state law, state courts are bound by their court of last resort, but they are free to accept or reject decisions by courts of other states and decisions by federal courts interpreting their state law. Judicial decisions outside the jurisdiction may be persuasive but are never binding.

D. Source Material for Researching the Law

The sources of law described above—constitutions, legislation, regulations, and judicial decisions—are referred to as *primary authority.* They are "law," and the outcome of legal disputes turns on their applicability and interpretation.

Other resources, in which legal experts write about the law or collect and offer general theories about selected rules of law, are known as *secondary authority.* Included in this category are treatises, restatements of the law, articles in law reviews and other legal periodicals, annotations, and legal encyclopedias. These resources may describe the law in a general way or suggest what the law should be, but they are not sources of law and are never binding on any court. Although secondary authority may assist in persuading a court that a given result is correct or preferable, it cannot mandate that result. Nevertheless, some secondary authority has greatly influenced the courts, and many courts have adopted various statements in secondary authority as the law of the jurisdiction. Once a court has adopted a rule proposed or stated in secondary authority, that rule becomes primary authority.

The following is a brief overview of the main sources in which primary and secondary authority are located.[3]

1. Primary Authority

Federal statutes are published chronologically as they are enacted, first in pamphlet form called *slip laws,* and then in a series of books called *session laws*. The set of session laws for federal statutes is called *United States Statutes at Large.* Statutes are then "codified" or published by subject matter in a set of books called a *code*. Federal

3. Primary authority and some secondary authority are also published in electronic databases, such as LexisNexis and Westlaw, in addition to the print sources described in this section.

statutes are published in the *United States Code* (U.S.C.), the official version; in the *United States Code Annotated* (U.S.C.A.), published by Thomson Reuters; and in the *United States Code Service* (U.S.C.S.), published by LexisNexis. The publication of state statutes follows a similar pattern: Recent enactments are first published in pamphlet form and then chronologically in the session laws. They are then codified, or published in a *code*, organized by subject matter. the U.S.C.A., U.S.C.S., and most, if not all, state codes are annotated, which means that the compilations include the history of successive amendments to a code section, references to related statutes, references to secondary authority and finding aids, and brief annotations or descriptions of cases construing a particular section.

Constitutions are published in the same manner as statutes. The United States Constitution is published in the U.S.C., U.S.C.A., and U.S.C.S., for example. State constitutions are also usually published as part of the state code.

Federal administrative regulations are printed in the *Federal Register,* which is published five days per week by the United States Government Printing Office. The *Federal Register* also contains proposed regulations and various agency or administrative notices. After they are enacted, and become effective, regulations are published by subject matter in the *Code of Federal Regulations* (C.F.R.), the official source for United States government regulations. In many states, administrative regulations are published in a state version of the *Federal Register (e.g., Pennsylvania Bulletin)* and then codified by subject matter *(e.g., Pennsylvania Code).*

Judicial opinions are published in hardbound volumes, roughly in chronological order, with pamphlet supplements that contain opinions too recent to be published in hardbound. Decisions by the United States Supreme Court are published in the *United States Reports* (U.S.), the official version; the *Supreme Court Reporter* (S. Ct.), published by Thomson Reuters;[4] and the *United States Supreme Court Reports, Lawyers' Edition* (L. Ed.), published by LexisNexis. Thomson Reuters publishes decisions by the federal appeals courts in the *Federal Reporter* (F., F.2d, F.3d) and by the federal district courts in the *Federal Supplement* (F. Supp., F. Supp. 2d, F. Supp. 3d). Not all federal district court and court of appeals decisions are published.

Most states publish their own court decisions. Thomson Reuters also publishes state court decisions by region. It has divided the country into seven regions:

4. The *Supreme Court Reports,* as well as the regional and state-specific reporters referred to later in this chapter, were originally published by West Publishing Company. This series of reporters is thus often referred to as the "West reporter system."

West Regions	States Included
Atlantic (A., A.2d, and A.3d)	Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, the District of Columbia
Northeastern (N.E. and N.E.2d)	Illinois, Indiana, Massachusetts, New York, Ohio
Northwestern (N.W. and N.W.2d)	Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin
Pacific (P., P.2d, and P.3d)	Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, Wyoming
Southeastern (S.E. and S.E.2d)	Georgia, North Carolina, South Carolina, Virginia, West Virginia
Southwestern (S.W., S.W.2d, and S.W.3d)	Arkansas, Kentucky, Missouri, Tennessee, Texas
Southern (So., So.2d, and So.3d)	Alabama, Florida, Louisiana, Mississippi

Because of the efficiency of the national reporter system, some states have discontinued the publication of official versions of their decisions. Their published decisions are available only in the regional reporters.

2. Secondary Authority

This category includes encyclopedias, annotations, scholarly publications, and restatements.

Encyclopedias. Two encyclopedias, found in virtually every law library, cover the scope of Anglo-American jurisprudence—*American Jurisprudence, Second Series* (Am. Jur. 2d), and *Corpus Juris Secundum* (C.J.S.). In addition, many states have encyclopedias devoted to the law of that particular state. Like other encyclopedias, the topics in legal encyclopedias are arranged alphabetically with cross-references in the index.

Annotations. *American Law Reports* (A.L.R.) publishes selected cases along with annotations that survey the law within a discrete area suggested by a particular case. The cases are selected for their interest to the practicing lawyer. A selected case might represent, for example, a new development in the law or one approach to an issue on which the

jurisdictions have split. An annotation on the issue you are researching will give you not only an overview of the law nationwide, but also citations to the most useful cases in each jurisdiction.

Scholarly Publications. Scholars and practitioners publish books within their particular area of expertise. These are called *treatises* (multivolume sets) or *hornbooks* (single volumes). In addition, law reviews, law journals, and other legal periodicals publish numerous scholarly articles each year on current topics of interest to the legal community. These publications cover subjects in more depth than legal encyclopedias or A.L.R. annotations, and the research is usually comprehensive. They frequently provide in-depth analysis or propose solutions to particular legal problems.

Restatements of the Law. At the beginning of the twentieth century, a group of lawyers formed the American Law Institute (ALI). In 1932, the Institute initiated a series of publications that set out black-letter rules generally reflecting the majority view on a given common law issue. The ALI has continued to publish and update these Restatements, issuing Restatements of the law on diverse subjects, including Agency, Conflict of Laws, Contracts, Employment Law, Foreign Relations Law of the United States, The Law Governing Lawyers, Judgments, Property, Torts, and Trusts. Each rule is followed by a Comment that further explains the rule or the reasons for its adoption, and Illustrations that demonstrate how the rule applies in specific situations. In format, a Restatement resembles a code. It is divided into sections, with each section stating a separate rule.

Here is an example from the Restatement (Third) of Agency:

> **§ 1.01 Manifestations of consent.**
>
> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

This code-like structure has led many law students to believe that a Restatement is more authoritative than it actually is. Restatements are only secondary authority. They are written by authors who describe what the law is in some jurisdictions or what it ought to be, but who have no authority to make laws. Courts and legislatures, however, sometimes adopt a particular restatement provision, thereby making the restatement provision the law of that jurisdiction.

This overview of the origin of laws, the hierarchy of authority in our legal system, and the published sources of laws and commentary about the laws should enable you to put the resources you will find in a law library in the proper perspective.

EXERCISES

The following exercises will test your understanding of the information in this chapter.

Exercise 2-A

You represent Chad Hollister, who has been accused of raping his companion while the two were on a date. Hollister admits that he had sexual intercourse with the victim but claims that she consented. The prosecution has brought charges in state court and has sought to introduce evidence that Hollister has been publicly accused of rape several times in the past and prosecuted for rape once. You wish to offer a motion to exclude this evidence. You have found the following:

1. A section of the code of your state that says evidence of prior wrongs is usually inadmissible, but may be admissible to show the accused person's criminal intent.
2. A law review article on the difficulty of proving criminal intent in date-rape cases.
3. A decision by a middle-level appeals court in another state holding that if the accused rapist admits the act, his intent is irrelevant, the only issue being the consent of the victim.
4. A decision by a federal court of appeals, applying the law of another state, holding that prior rapes are irrelevant to both the defendant's intent and the victim's consent, and are therefore inadmissible.
5. A section of the code of your state that defines rape as compelling another person to engage in a sexual act by force or threat of force.
6. A decision by the highest court of another state holding that evidence of prior rapes is relevant to show the defendant's awareness that the victim had not consented and therefore his intent to rape.
7. A decision by the highest court of another state holding that prior acts of rape are not admissible because they are unfairly prejudicial and have no bearing on the defendant's intent at the time of the rape for which he is on trial.
8. A dissent by a judge in the case described in item 7. The judge believed that the prior acts were similar enough to show the defendant's characteristic behavior and thus to rebut the defense that the victim consented.

Divide these sources into three categories: (A) primary authority that is binding, (B) primary authority that is persuasive, and (C) secondary authority. Which source in category (B) is likely to be most persuasive?

Exercise 2-B

Your client is Sarah Berg, who owns an apartment complex. As part of a remodeling project, she hired a paint contractor, Deco, Inc., to strip the paint off the walls of the common areas in the apartment building and repaint them. Several of the tenants became ill after inhaling fumes from the paint remover. They have brought suit against Berg and Deco in state court, alleging that the workers were negligent in using the paint remover without adequate ventilation and without warning the tenants that they should vacate the premises during the paint removal process. Berg has an insurance policy that excludes from coverage damages or injuries resulting from the "dispersal, release, or escape of pollutants." The insurer has denied coverage, asserting that the pollution exclusion clause applies to indoor releases of pollutants. In researching this issue, you have found the following:

1. A law review article discussing whether the standard pollution exclusion clause in an insurance policy applies to indoor releases of contaminants.
2. An A.L.R. annotation on the courts' construction of the pollution exclusion clause.
3. An opinion by the highest court of another state addressing the same issue in a case with similar facts (insecticide sprayed inside an apartment building).
4. An opinion by a federal court of appeals addressing the same issue in a case with similar facts (fumes from house paint) and applying the law of another state when that state's courts had not decided this specific issue.
5. An opinion by a federal district court addressing the same issue in a case with similar facts (fumes from diesel fuel sprayed inside the foundation of an apartment building to eradicate termites) and applying the law of your state. Your state's courts have not addressed this specific issue.
6. An article in a national legal periodical on the history of the pollution exclusion clause.
7. An opinion concerning an automobile liability policy, decided by the highest court of your state, in which the court set out certain principles regarding the construction of insurance policies.
8. An opinion by a federal court of appeals addressing the same issue in a case with similar facts (carbon monoxide released by a faulty furnace) and applying the law of another state, relying on a decision by a middle-level appeals court in that state.

9. An opinion by the same court described in item 8 deciding the same issue but reaching the opposite conclusion based on decisions by the highest court in still another state.

Divide these sources into three categories: (A) primary authority that is binding, (B) primary authority that is persuasive, and (C) secondary authority. Which source in category (B) is likely to be most persuasive?

CHAPTER 3

Case Analysis and Case Briefs

As explained in Chapter 2 (Sources of Law), courts often interpret rules that are codified in statutes, regulations, or constitutions. At other times they make their own rules as they decide cases, forming the common law.

Judicial decisions are the result of a great deal of time and hard work on the part of lawyers, judges, and other participants in the litigation process. Disputes are first heard in trial courts. Whether one party is suing another for breach of contract, or the state is prosecuting someone for manslaughter, the trial court hears the case first. The trial court has two responsibilities. First, it decides what actually occurred in the case. For example, where was the defendant on the night of June 25? Sometimes the parties agree on the facts, but often they do not. Different witnesses may have different stories. The court will hear the testimony of these witnesses and examine other evidence to determine which version of the facts is correct. Sometimes a jury determines the facts; sometimes that job belongs to the judge. Second, the trial court is required to determine what legal rules should be used to decide a particular case. In light of both the law and the facts, the court then decides which party prevails.

The losing party may challenge the decision in a higher or appellate court if that party believes the trial judge made a mistake in stating or applying the relevant legal rules and the mistake affected the outcome. Appellate courts must usually accept the factual record from the trial court; the appellate court only decides legal issues, sometimes upholding the trial court decision and sometimes reversing it. Unlike trial courts, whose responsibilities are limited largely to ascertaining what actually happened and doing justice in individual cases, appellate

courts must think about a range of situations far beyond the facts of the case and about the broader policy implications of what the trial court has done. Because appellate courts review decisions by many trial courts under them, they also ensure that legal rules are understood and applied uniformly.

Courts record their decisions in written opinions, often referred to as "cases," that describe what the dispute was about and explain why the court decided the dispute as it did. These opinions deserve careful study, because courts rely on earlier cases when resolving disputes. Thus, they have enormous value in predicting what a court might do in a specific situation and in persuading a court to reach a particular conclusion. The ability to understand cases is an essential skill in analyzing or writing about any legal problem.

More fundamentally, cases demonstrate the basic methods of legal reasoning that you will use in studying and practicing law. Courts must decide how particular laws apply to factual situations, and they must explain their reasoning. Similarly, the study and practice of law will require you to decide how certain laws apply to certain facts. You, too, must explain your reasoning. You can learn a great deal about legal reasoning by studying the ways in which courts analyze problems. You will discover, however, that judicial decisions (including the cases in this book) contain both good and bad examples of legal reasoning. Over time, you will learn to recognize the difference.

A case brief is a written summary of your analysis of a case that will help you prepare for class or write an assignment. (Case briefs are not to be confused with trial and appellate court briefs discussed in Part E of this book, which are written to persuade a court to adopt your client's position.) Although many formats exist for case briefing, all will include the components described in this chapter.

Judicial opinions can contain many things, but six components are critical: (1) a description of the facts, (2) a statement of the legal issue or issues presented for decision, (3) the relevant rule or rules of law, (4) the holding (the rule of law applied to the particular facts of the case), (5) the disposition by the appellate court, and (6) the policies and reasons that support the holding. The facts of the case can be subdivided into facts about the legal procedure involved in the case and facts that are relevant to the applicability of the relevant law.

The chart below illustrates these components.

***State v. Jones* (1994)**	
Jones appeals his conviction for possession of marijuana. When the police stopped and searched Jones's van, they found an ounce of marijuana in a backpack in the far rear of the vehicle. Although Jones admitted he knew the marijuana was there, he defended against the charge by claiming that the backpack and drugs belonged to a hitchhiker who had been riding with him and who had accidentally left them in the van. In this state, it is presumed that drugs are in the possession of the person who controls them. The issue in this case is whether the marijuana was within Jones's control even though it was in a backpack in the rear of his van. That the backpack and drugs may have been owned by someone else is irrelevant. Public policy dictates that possession should not be synonymous with ownership because the difficulty of proving ownership would permit too many drug offenders to evade prosecution. It is sensible to assume that anything inside a vehicle is within the control of the driver. We hold that Jones possessed marijuana because the backpack was within Jones's van and thus under his control. Affirmed.	Procedural fact Facts relevant to the legal issue Rule Issue Reasoning and policy that support the holding Holding Disposition

Although few cases lend themselves to such ready analysis, each case should contain these components.

You should, however, be aware of three major difficulties. The first is learning how to think in reverse. The opinion is the end product of a lawsuit. You have to start with this end product and work backward to unravel what the dispute was about, what happened in the trial court, and what happened on appeal. This process is akin to discovering the secret of a competitor's product through reverse engineering. The second difficulty is understanding the interplay among the basic components of a judicial opinion. All the components of a case—facts, issues, rules, holdings, disposition, and reasons and policies—are related. One component cannot be understood without understanding the others. Case analysis is thus largely a recursive process. You will revise your understanding of the components as you begin to fit them together. The third difficulty is that not all of the components may be expressed. Because all six components should be present in any opinion, you often must read between the lines to pinpoint a component as precisely as you can if it is not specifically addressed.

This chapter will help you develop a method for analyzing cases. Each component of a case will be discussed separately to help you learn to identify and understand that component. Because of the web-like nature of a judicial opinion, no method will result in instant identification or understanding of all the components. As you gain experience at briefing cases, you will develop a format that suits your particular abilities and needs. The following method is helpful as a starting point and framework for your analysis.

A. Read the opinion carefully.

Several readings are usually required before you can completely understand a case. Your initial reading will give you a general understanding of who the parties were, how the dispute originated, and what effect the court's decision had on the parties. You will also form tentative theories concerning the basic components of the opinion that subsequent readings will test and clarify. After you have acquired a basic understanding of the facts and the "real-world" implications of the court's decision, you can figure out the legal issues the court decided.

1. Identify the holding.

The *holding* is the actual decision in the case—the answer to the legal question presented to the court. Identifying the holding requires you to determine what the court *actually decided* in the case. Holdings can be either express or implied. *Express holdings* are easy to identify because the court announces them. For example:

> We hold that driving a car at ninety miles per hour is prima facie reckless driving.

Although identifying express holdings appears easy from this example, there is a hidden danger. Courts sometimes inadvertently state they are ruling one way when, in fact, they are deciding the case a different way, or they identify as a holding something that is really reasoning or policy. To avoid being misled, concentrate on what the court actually *did*, rather than just on what it said.

Implied holdings are usually harder to identify because you must rely only on the court's actions to discern them. The court gives its ultimate decision and the reasons supporting it, but does not tell you what rule it has formulated or followed. In an implied holding, for example, a court might state: