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*Third Edition*

*William H. Putman*



# LEGAL ANALYSIS AND WRITING

Third Edition

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Third Edition

WILLIAM H. PUTMAN

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Third Edition  
William H. Putman**

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Library of Congress Control Number: 2008922255

ISBN-13: 978-1-4180-8092-1

ISBN-10: 1-4180-8092-6

**Delmar**

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# Preface

Paralegals are increasingly called upon to perform substantive legal analysis and legal writing tasks. These tasks range from drafting interoffice legal memoranda that summarize the research and analysis of issues involved in a client's case to preparing drafts of appellate court briefs. The goal of this text is to provide the student with in-depth knowledge of the fundamentals of legal analysis and legal writing. The hope is that the student will be better prepared to meet the challenges presented by substantive legal analysis and writing assignments.

The impetus for this book came from student requests for comprehensive information regarding many of the difficult areas of legal analysis and writing, such as the following:

- How to identify the issue
- How to state the issue
- How to determine if a case is on point
- How to identify the key facts in a case
- How to conduct counteranalysis
- How to prepare an interoffice memorandum and court brief

The text is designed to cover the topics of legal analysis and writing in general. It is organized in a manner to provide students with comprehensive information regarding the difficult areas of analysis and writing.

The text is divided into the following three parts.

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

**Part II: The Specifics of Legal Analysis.** Part II consists of seven chapters that provide thorough coverage of the elements and tools used in the analysis and writing process. These chapters cover the difficult areas of legal analysis and writing that are not covered extensively in most texts.

- Statutory analysis
- Case law and case law briefing
- Key facts
- Issue identification
- Stating the issue
- Case law application (whether a case is “on point”)
- Counteranalysis

**Part III: Legal Writing.** The focus of Part III is on the application of the principles presented in the previous chapters to the drafting of legal research memoranda, court briefs, and legal correspondence. This part consists of chapters on the following topics:

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

## CHAPTER FEATURES

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

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

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

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

**In-depth Coverage of Topics.** The greatest advantage of this text for both teachers and students is the comprehensive and in-depth coverage of topics that are not thoroughly covered in most texts. These topics include the following:

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

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

**Assignments.** There are assignments of various levels of difficulty at the end of each chapter. The assignments require students to apply the principles and techniques presented in the text. For example, among other assignments, there are eight case brief assignments in Chapter 4 (the cases are presented in Appendix A) and ten office legal memoranda assignments in Chapter 13 (based on the facts and law presented in the assignment and the court opinions in Appendix A). The answers to all the assignments are presented in the Instructors Manual.

**Appendices.** The text has three appendices and a glossary of terms. Appendix A consists of court opinions that are necessary for the chapter assignments. Appendix B presents the brief of the appellee in a case filed in the Tenth Circuit Court of Appeals. The legal research, legal analysis, and initial drafts of this brief were performed by a paralegal who works in the Criminal Division of the United States Attorney’s office for the District of New Mexico. Appendix C is a brief overview of the basic rules of legal citation. The overview uses the rules set forth in *The Bluebook: A Uniform System of Citation* (17th Edition, 2000) and the *ALWD Citation Manual*.

**Readability.** The text is written in a manner that a layperson can understand. Legalese is avoided, concepts are illustrated with examples, and the subject matter is presented simply and clearly.

## PREFACE

### NEW FEATURES—THIRD EDITION

The first two editions included repeated references to other chapters and definitions of key terms and concepts throughout the text. One of my goals in doing this was to save students from having to refer to other chapters for the definitions of concepts and terms used in other chapters. From the feedback I have received, it is apparent that these repeated references served more to interrupt the flow of the text rather than help the student. Most of these references have been removed from the third edition. In addition, I have added new material and condensed other sections.

A major addition to the third edition is the inclusion of a CD-ROM with each text. The CD-ROM provides additional assignments, a chapter outline, and study questions for each chapter.

### SUPPORT MATERIAL

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



***Student CD-ROM.*** The new accompanying CD-ROM provides additional material to help students master the important concepts in the course. The CD-ROM includes additional assignments, chapter outlines, and study questions for each chapter.



***Instructor's eResource CD-ROM.*** The new eResource component provides instructors with all the tools they need in one convenient CD-ROM. Instructors will find that this resource provides them with a turnkey solution to help them teach by making available PowerPoint® slides for each chapter and an electronic version of the Instructor's Manual. Each chapter of the Instructor's Manual has several exercises ranging in difficulty. The Instructor's Manual provides *complete* answers to each exercise, general guides for the instructors, and suggested additional assignments. Among other things, the manual includes eight examples of briefs of court opinions, nine examples of office legal research memoranda, and two examples of appellate briefs.

**All of these instructor materials are also posted on our website, in the Online Resources section.**



***Online Companion™.*** The Online Companion to accompany this text contains additional chapter assignments, chapter summaries, and weblinks.

***Web page.*** Come visit our website at [www.paralegal.delmar.cengage.com](http://www.paralegal.delmar.cengage.com) where you will find valuable information such as hot links and sample materials to download, as well as other Delmar Cengage Learning products.



## ACKNOWLEDGMENTS

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

Pamela A. Lambert, JD, who reviewed the text for intellectual and legal content and consistency. Her legal expertise, analytical skills, and input were invaluable. Pam's encouragement and positive attitude helped me through the rough spots.

Judith A. Putman, who reviewed this text for grammar and general compliance with the rules of English. Her efforts enhanced the quality of the writing. Her support helped keep me going.

Kate Arsenaault, who reviewed the text for general readability. Kate's patient support and encouragement helped ensure the text would be completed.

Jana Sorroche, my niece, who kept my computer in line and alive. Her computer expertise saved me many times when I thought the computer had eaten portions of the text.

Sheila McGlothlin, paralegal, who came up with the idea to write this book. Sheila's initial push, support, and comments on the text were essential.

Leigh Anne Chavez, JD, for assistance with several hypotheticals and ideas in general.

Robert T. Reeback, JD, for the ski resort hypothetical.

Dai Nguyen, JD, for her encouragement and assistance with hypotheticals.

Mary Kubicheck, JD, for her assistance with the chapter assignments.

Kathy Campbell, paralegal, for her assistance with office memos.

Shelley Esposito, Melissa Riveglia, Melissa Zaza, and all the individuals at Delmar who helped with the development of this text. Their encouragement, suggestions, patience, and support were essential to completion of the third edition.

Finally, I would like to thank the reviewers who provided very valuable comments and suggestions for the text:

Regina Dowling  
Bradford Hall Career Institute  
Windsor, CT

Donna Palmer  
Stautzenberger College  
Toledo, OH

Brian J. Halsey  
Peirce College  
Philadelphia, PA

Judith Streich  
Minnesota State University—Moorhead  
Moorhead, MI

Janice Kazmier  
Tulane University  
Jefferson, LA

Debbie Vinecour  
SUNY Rockland Community College  
Suffern, NY

Deborah Keene  
Lansing Community College  
Lansing, MI

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

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## DEDICATION

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

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# PART I

# INTRODUCTION TO ANALYTICAL PRINCIPLES AND THE LEGAL PROCESS

## Overview

Part I consists of two introductory chapters designed to review the information fundamental to legal analysis and writing that is usually covered in introductory paralegal courses. Chapter 1 is an overview of the legal system and the legal process, including a summary of basic legal principles involved in the process. Chapter 2 introduces legal analysis and the analytical process.

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# CHAPTER 1

## Introduction to Legal Principles and Authorities

### Outline

- I. Introduction
- II. Sources of Law
- III. Hierarchy of the Law
- IV. Authority
- V. Key Points Checklist: *Analyzing the Law*
- VI. Application

### Learning Objectives

After completing this chapter, you should understand

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



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

Two weeks ago Renee started working on a gender discrimination case. In the case, the client, Mary Stone, worked for a company for eleven years. She always received excellent job performance evaluations. Her coworker, Tom, asked her on several occasions to go out with him. Ms. Stone always refused

his invitations. The last time he asked her out was about one year ago. After she refused, he told her, “I’ll get even with you.” Nine months ago, Tom was promoted to the position of department supervisor. After his promotion, he did not ask Ms. Stone out again. On her evaluation three months ago, he rated her job performance as “poor” and stated that she was uncooperative and abrasive. He recommended that she be demoted or fired. Ms. Stone feels that she has been discriminated against and she wants the “poor” evaluation removed from her file.

Renee’s assignment is to locate the pertinent state and federal law governing gender discrimination and any other relevant information on the subject and prepare a memo summarizing her research and how it applies to the case. Renee located a federal



and a state statute prohibiting discrimination in employment on the basis of gender, a federal and a state court case with facts similar to those in Ms. Stone's case, and two law review articles discussing the type of gender discrimination encountered by Ms. Stone.

When analyzing the law and preparing her memo, Renee realizes that she must determine which elements of her research apply, and how. She asks

herself, "Which court should the claim be filed in, federal or state? If a complaint is filed in state court, which of these statutes and cases must the state court follow? Why?" This chapter presents general guidelines that assist you in determining when and how legal authorities apply; the Application section of the chapter presents the application of the guidelines to Renee's questions.

## I. INTRODUCTION

As attorneys become more aware of the capabilities of paralegals, an increasing number of paralegals are being assigned substantive legal analysis and writing tasks. This text is designed for the student who has completed introductory paralegal courses and who is familiar with the basics of legal research. The goal of the text is to provide comprehensive coverage of the legal analysis and writing process. Emphasis is placed on in-depth coverage of many of the difficult areas of legal analysis and writing such as

- issue and key fact identification.
- issue stating (how to write the issue).
- statutory and case law analysis.
- counteranalysis.

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

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

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

## II. SOURCES OF LAW

The legal system of the United States, like the legal systems of most countries, is based upon history and has evolved with the passage of time. When America was settled, most of the colonies were governed by English law. As a result, the founda-

### law

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The enforceable rules that govern individual and group conduct in a society.

The law establishes standards of conduct, the procedures governing standards of conduct, and the remedies available when the standards are not adhered to.

tion of the American legal system is the English model, with influences from other European countries.

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

Since the Revolution, the legal system of the colonies has remained largely intact. It consists of two main categories of law:

1. enacted law.
2. common law/case law.

### A. Enacted Law

As used in this text, the term **enacted law** encompasses all law adopted by a legislative body or the people. It includes

- constitutions—adopted by the people.
- statutes, ordinances—laws passed by legislative bodies.
- regulations—actions of administrative bodies that have the force of law.

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

#### 1. Constitutions

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

**United States Constitution.** The United States Constitution

1. establishes and defines the powers of the three branches of federal government: executive (president), legislative (Congress), and judicial (courts).
2. establishes the broad powers of the federal and state governments and defines the relationship between the federal and state governments.
3. defines in broad terms the rights of the members of society.

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

#### 2. Statutes

Laws passed by legislative bodies are called **statutes**. Statutes declare rights and duties or command or prohibit certain conduct. As used here, *statute* includes any law passed by any legislative body: federal, state, or local. Such laws are referred to by

#### **enacted law**

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The body of law adopted by the people or legislative bodies, including constitutions, statutes, ordinances, and administrative rules and regulations.

#### **constitution**

---

A governing document adopted by the people that establishes the framework for the operation of the government, defines the powers of the government, and guarantees the fundamental rights of the people.

#### **statutes**

---

Laws passed by legislative bodies that declare rights and duties, or command or prohibit certain conduct.

various terms, such as *acts*, *codes*, *statutes*, or *ordinances*. The term *ordinance* usually refers to a law passed by a local government. Statutory law has assumed an increasing role in the United States, as many matters once governed by the case law are now governed by statutory law.

**For Example** Criminal law was once governed almost exclusively by case law. Now statutory law governs a large part of criminal law, such as the definition of crimes.

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

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

### 3. Administrative Law

#### **administrative law**

Rules, regulations, orders, and decisions adopted by administrative agencies that have the authority of law.

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

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

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

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

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

### ***B. Common Law/Case Law***

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

#### **For Example**

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

#### **common law/case law**

The body of law created by courts. It is composed of the general legal rules, doctrines, and principles adopted by courts when interpreting existing law or when creating law in the absence of controlling enacted law.

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

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

As mentioned earlier, the case law system in the United States is based on the English case law, and the states have adopted much of the English case law. William the Conqueror established a king's court (Curia Regia) to unify the country through the establishment of a uniform set of rules and principles to govern social conduct. The courts, in dealing with specific disputes, developed legal principles that could apply to all similar disputes. With the passage of time, these legal principles came to embody the case law. The case law process continues to the present day in both England and the United States, with new rules, principles, and doctrines continually being developed by the courts.

#### **For Example**

One hundred and fifty years ago, there was no remedy in tort law for strict products liability (liability of manufacturers and sellers for harmful or dangerous defective products). In the twentieth century, the courts developed the tort to address the needs of a modern industrial society.

## **1. Role of the Courts**

Disputes in our society arise from specific fact situations. The courts are designed to resolve these disputes. When a dispute is before a court, it is called a case. The role of the court is to resolve the dispute in a peaceful manner through the application of

the law to the facts of the case. To accomplish this resolution, the court must identify the law that controls the resolution of the dispute and apply that law to the facts of the case.

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

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

### **opinion**

The written statement by the court expressing how it ruled in a case and the reasons for its ruling.

## 2. Court Systems

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

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

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

1. over persons by geographic area—personal jurisdiction
2. over subject matter by types of cases the court may hear and decide—subject matter jurisdiction

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

### **jurisdiction**

The court's authority to hear and resolve specific disputes.

### **personal jurisdiction**

The authority of the court over the parties to resolve a legal dispute involving the parties.

**For Example** New York state courts do not have authority to decide matters in the state of Ohio. Their authority is limited to the geographic boundaries of the state of New York. A New York state court does have jurisdiction over an Ohio resident if the resident is involved in an automobile accident in the state of New York.

Personal jurisdiction requires that the plaintiff and defendant be properly before the court. Assuming the correct court is chosen, a plaintiff is properly before the court by filing the pleading that starts the lawsuit (the complaint in a civil case or the indictment, information, or complaint in a criminal case). A defendant is properly before the court when the defendant has been notified of the lawsuit (i.e., correctly served with a copy of the complaint, called service of process).

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

1. courts of general jurisdiction
2. courts of limited jurisdiction

Courts of general jurisdiction have the authority to hear and decide any matter brought before them. There are some limitations, however. The authority of a state court of general jurisdiction is limited to matters involving state matters. The authority of a federal court of general jurisdiction is limited to questions involving federal matters or questions involving disputes between citizens of different states where the amount in controversy exceeds \$75,000. The United States District Courts are the courts of general jurisdiction in the federal system. The courts of general jurisdiction are the main trial courts in both systems.

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

**For Example** The United States Tax Court's authority is limited to matters involving disputes over federal taxes.

**For Example** Most state courts have courts whose authority is limited by dollar amount. Such courts are limited to hearing and deciding matters where the amount in controversy does not exceed a certain amount, such as \$5,000. These courts are called by various names: small claims, magistrate, and so on. Some state courts are limited to hearing specific types of cases, such as matters involving domestic relations or probate.

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

**For Example** In diversity of citizenship cases (disputes between citizens of different states) where the amount in controversy exceeds \$75,000, the matter may be tried in either federal court or the state court of general jurisdiction. Both the federal and state courts have authority to try the case; they have concurrent jurisdiction.

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

### **subject matter jurisdiction**

The types or kinds of cases the court has the authority to hear and decide.

### **concurrent jurisdiction**

When more than one court authority over the subject matter of a case.

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

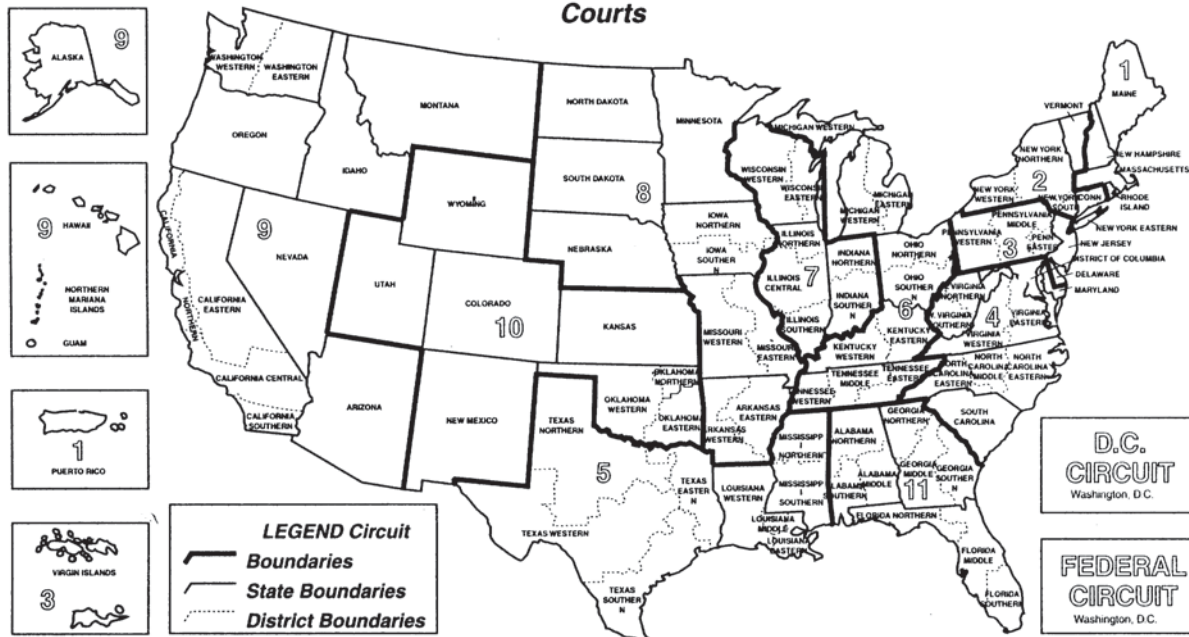
**Federal Court System.** The federal court system is composed of three basic levels of courts:

**trial court**

The court where the matter is heard and decided. Testimony is taken, the evidence is presented, and the decision is reached in the trial court.

1. *Trial Courts.* The **trial court** is the court where the matter is heard and decided. The testimony is taken, the evidence presented, and the decision reached. The role of the trial court is to determine what the facts are and how the law applies to those facts. A trial is presided over by a judge and may include a jury. If the trial is conducted by a judge and a jury, the judge decides **questions of law** such as what the law is or how it applies. The jury decides **questions of fact** such as whether a person performed a certain act. If the trial is conducted without a jury, the judge decides questions of both law and fact. Examples of trial courts in the federal court system are the United States District Court and the United States Tax Court. Each state has at least one United States District Court (see Exhibit 1-1).

**Geographical Boundaries of United States Courts of Appeals and United States District Courts**



ADMINISTRATIVE OFFICE OF THE UNITED STATES SUPREME COURTS  
APRIL 1988

**Exhibit 1-1**

*United States Circuit Courts of Appeals and United States District Court*

**court of appeals**

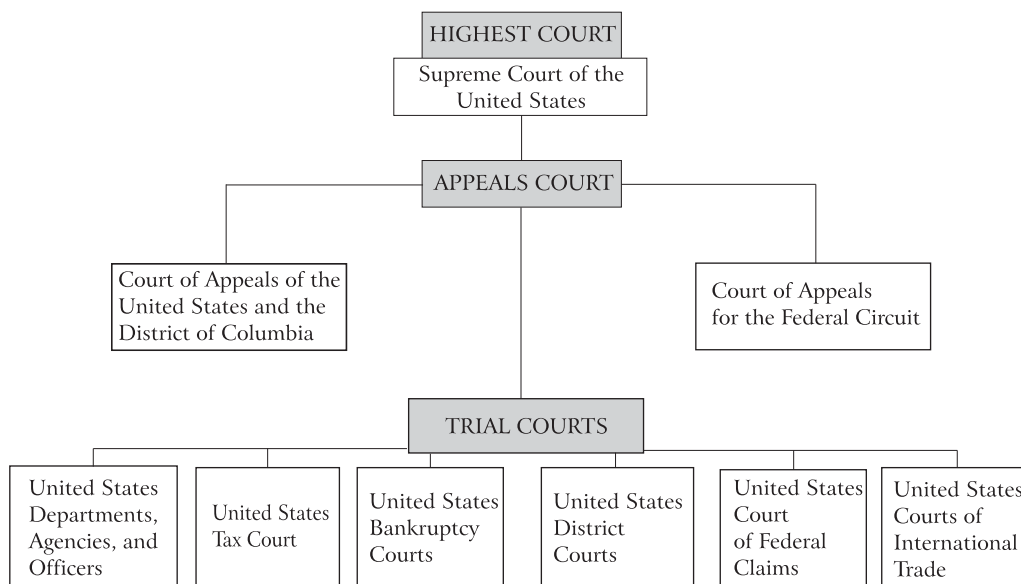
A court that reviews the decision of a trial court or other lower court to determine and correct any error that may have been made.

2. *Court of Appeals.* A party aggrieved by the decision of a trial court has a right to appeal the decision to a **court of appeals**. The primary function of a court of appeals is to review the decision of a trial court to determine and

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

3. *United States Supreme Court*. The United States Supreme Court is the final court of appeals in the federal system. It is the highest court in the land. With few exceptions, an individual does not have an absolute right to have a matter reviewed by the Supreme Court. A party who disagrees with the decision of a court of appeals must ask (petition) the Supreme Court to review it. The request is called a petition for writ of certiorari. The Supreme Court has discretion to review or not review a decision of a court of appeals. If the Court denies the petition, the decision of the court of appeals stands. If the Court decides the matter involves important constitutional issues, if the challenged decision conflicts with federal court decisions, or if there is a conflict between the opinions of the court of appeals, the Supreme Court may grant the petition and review the decision of the lower court.

Exhibit 1-2 presents the organization of the federal court system and the various federal courts.



### **Exhibit 1-2**

*Organization of the Federal Court System*

**State Court System.** Each state has its own court system, each of which has unique features and variations. The names of the courts vary from state to state.



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

Because of the unique features of each state system, it is essential that you become familiar with the court system in your state.

Like the federal court system, most state court systems are composed of three basic levels of courts:

1. *Trial Courts.* All states have trial courts, where evidence is presented, testimony taken, and a decision reached. Usually there are trial courts of general jurisdiction and trial courts of limited jurisdiction. The court of general jurisdiction is often called a **district court**. There are various courts of limited jurisdiction, such as probate courts, small claims courts, county courts, domestic relations courts, and magistrate courts.
2. *Court of Appeals.* Many states have intermediary courts of appeals that function in the same manner and play the same role in the state court system as the federal court of appeals does in the federal system.
3. *State Supreme Court.* Every state has a highest appellate court, usually called the supreme court. This court is the highest court in the state, and its decisions are final on all questions involving state law. In states that have intermediary courts of appeals, the state supreme court often operates like the United States Supreme Court in that there is no automatic right of appeal. Like the federal Supreme Court, the state supreme court grants leave to appeal only in cases involving important questions of state law. In those states where there is no intermediary court of appeals, a party who disagrees with a trial court's decision has a right to appeal to the highest court. In either system, state or federal, all individuals have at least one opportunity to appeal the decision of a trial court to a higher court.

#### **district court**

In many states, the district court is the trial court of general jurisdiction. *See also* United States District Court.

### 3. Precedent and Stare Decisis

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

Reliance on doctrines, principles, or rules to guide the resolution of similar disputes in the future also makes the legal system more stable, predictable, and consistent. If an earlier case establishes the law governing a specific subject or legal question, individuals can rely on a court addressing the same or a similar question

to base its decision on the principles established in the earlier case. Outcomes can be predicted to some extent, and stability and consistency become part of the court system.

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

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

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

A case that is precedent is often called "on point." Chapter 8 discusses the process and steps to follow when determining whether a court opinion may apply or be relied on as precedent.

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

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

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

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

#### precedent

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

#### stare decisis

A basic principle of the common law system that requires a court to follow a previous decision of that court or a higher court when the current decision involves issues and facts similar to those involved in the previous decision. The doctrine that provides that precedent should be followed.

**For Example** In *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), the United States Supreme Court adopted the “separate but equal doctrine” that allowed segregation on the basis of race. In *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Supreme Court refused to follow *Plessy* and overruled it, holding that separate educational facilities were inherently unequal and denied equal protection of the law.

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

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

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

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

When a court follows the doctrines of precedent and stare decisis, the court can be relied on to reach the same decision on an issue as an earlier court when the cases are sufficiently similar. Without these doctrines, a similar case could be decided in an entirely different manner based on the beliefs of the individual judge and jury. The result would be little or no consistency in the case law, and chaos would reign. When a decision of an earlier court may or must be relied on by a subsequent court is discussed later in this chapter in the sections addressing authority.

### III. HIERARCHY OF THE LAW

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

In general, within each jurisdiction, the constitution is the highest authority, followed by the other enacted law (legislative and administrative law), then the case law. This means that legislative acts and court decisions must not conflict with the

provisions of the constitution. A court decision may interpret a legislative act, but it cannot overrule an act unless it is determined that the act violates the constitution.

The United States Constitution separates the powers to govern between the federal and state governments. This separation of powers is called **federalism**. The “supremacy clause” of the Constitution (article VI) provides that between federal and state law, federal law is supreme. If an enacted law or court decision of a state conflicts with a federal law or court decision, the state law or decision is invalid to the extent it conflicts with the federal law or decision.

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

## IV. AUTHORITY

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

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

1. *primary authority*—the law itself.
2. *secondary authority*—nonlaw sources a court may rely on.

Authority may play two possible roles:

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

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

### A. Types of Authority

#### 1. Primary Authority

**Primary authority** is the law itself. It is composed of the two main categories of law: enacted law and case law.

**For Example** Primary authority includes constitutions, statutes, ordinances, regulations, and court opinions.

#### **authority**

Anything a court may rely on when deciding an issue. It includes the law, such as constitutions and statutes, and nonlaw sources, such as legal encyclopedias and treatises.

#### **primary authority**

Authority that is composed of the law (e.g., constitutions, statutes, and court opinions).

**Types of Authority**

**Primary Authority** The law itself, such as constitutions, statutes, ordinances, administrative agency rules and regulations, and court opinions

**Secondary Authority** A source a court may rely on that is not the law, such as legal encyclopedias, ALR, *Restatements of the Law*, treatises, and law review articles

**Role of Authority**

**Mandatory Authority** A source of law a court must rely on when reaching a decision, such as an enacted law (statute, ordinance, etc.) that governs the legal question being addressed or an opinion of a higher court in the jurisdiction that addressed the same or a similar legal question and facts

**Persuasive Authority** Any authority a court is not bound to consider or follow but may consider or follow when reaching a decision, such as an opinion of a court in another state on the same or a similar issue, or a secondary authority source (encyclopedia article, legal dictionary definition, etc.)

**Exhibit 1–3***Types and Role of Authority*

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

**2. Secondary Authority**

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

Secondary authority can be used in several ways:

- to obtain a background or overall understanding of a specific area of the law. Legal encyclopedias are useful for this purpose
- to locate primary authority (the law) on a question being researched. *American Law Reports* (ALR), treatises, digests, and *Shepard's* can be used for this purpose
- to be relied on by the court when reaching a decision, which usually occurs only when there is no primary authority governing a legal question or it is unclear how the primary authority applies to the question. Treatises, law reviews, and restatements of the law are relied on for this purpose.

**secondary authority**

Any source of law a court may rely on that is not the law (e.g., legal treatises, restatements of the law, and legal encyclopedias).

**For Example**

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

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

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

**Law Dictionaries.** Legal dictionaries include definitions of legal terms (and usually a citation to the authority for the definition) and guides to pronunciation. The two major legal dictionaries are *Black's Law Dictionary*, published by West, and *Ballentine's Legal Dictionary*, published by Cengage.

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

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

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

**Treatises.** A treatise is a single- or multivolume work written by an expert in an area that covers that entire area of law. A treatise is often referred to as a horn book. It is a valuable resource because it provides a comprehensive treatment of a specific area of law, references to statutes and key cases in the area, and commentaries on the law.

### ***B. Role of Authority***

After the types of authority have been identified, it is important to understand the role these sources play in the decision-making process. Not all authority referred to

or relied on by a court when deciding an issue is given equal weight. Authority is divided into two categories for the purpose of determining its authoritative value, or the extent to which it must be relied on or followed by a court: mandatory authority and persuasive authority (see Exhibit 1 –3).

### **mandatory authority**

Any authority or source of law that a court must rely on or follow when reaching a decision (e.g., a decision of a higher court in the jurisdiction on the same or a similar issue).

## **I. Mandatory Authority**

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

Not all primary authority, however, is mandatory authority. Primary authority becomes mandatory authority only when it governs the legal question or issue being decided by the court. The factors involved in deciding when enacted law and case law may be mandatory authority are briefly discussed here.

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

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

**For Example** Some legal questions and fact situations such as gender discrimination are governed by both state and federal law, and on occasion by more than one state or federal law.

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

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

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

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

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

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

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

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

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

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

**Case Law.** For a court opinion to be mandatory authority, binding another court to follow the rule or principle of law established in the opinion, two conditions must be met:

1. The court opinion must be on point.
2. The court opinion must be written by a higher court in that jurisdiction.

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



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

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

Chapter 8 presents an in-depth discussion of case law analysis and the process involved in determining whether a case is on point.

## 2. Persuasive Authority

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

**Primary Authority as Persuasive Authority.** On occasion, courts look to enacted law as persuasive authority.

### **persuasive authority**

Any authority a court is not bound to consider or follow but may consider or follow when reaching a decision (e.g., a decision of a court in another state on the same or a similar issue, secondary authority, etc.).

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

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

**For Example** The courts in state *A* have not addressed a legal issue. Therefore, there is no mandatory authority in state *A* that state *A* courts must follow. State *A* courts may consider and adopt the rules and reasoning of federal courts or other state courts that have addressed the issue. It is not mandatory that state *A* follow the primary authority of the federal courts or other state courts, but state *A* may be persuaded to adopt the primary authority of these courts.

**For Example** Neither the legislature nor courts of state *A* have adopted strict liability as a cause of action in tort. State *A*'s highest court can look to and adopt the case law of another state that has adopted the tort.

**For Example** A trial court in state *A* has written an opinion on a legal issue. A higher court in state *A* is not bound by the lower court opinion (the opinion is not mandatory authority), but it may consider and adopt the rule and reasoning of the lower court.

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

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

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

Secondary authority is most valuable in situations where there is no primary authority, either mandatory or persuasive. This situation is rare, however. Few matters have never been addressed by either some legislature or court. As noted earlier, secondary authority is also valuable because it is helpful in locating primary authority when you are having difficulty finding primary authority.

Some secondary authority is given greater weight or considered to have greater authoritative value than other secondary authority.

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

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

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

**For Example** A court opinion addressing an issue may include references to key secondary sources, such as ALR citations.

**For Example** State statutes are often annotated, and the annotations include references to ALR and legal encyclopedia citations that address the area of law covered in the statute. The annotations also include references to law review articles that address specific issues related to the statute.

## V. Key Points Checklist: *Analyzing the Law*

- When analyzing a legal question or issue, always identify the primary authority (the law) that governs the question. First, consider primary authority; then look to secondary authority. As a general rule, courts will rely on primary authority before considering secondary authority.
- When you are searching for the law that governs a topic, always consider all the possible sources of law:
  1. enacted law—constitutions, statutes, ordinances, regulations, and so on
  2. case law
- Remember that there are two court systems operating in every jurisdiction: state and federal. A legal problem may be governed by either federal law or state law or both. Both sources of law and both court systems must be considered when analyzing a problem.
- Keep in mind the hierarchy of primary authority. Constitutions are the highest authority, followed by other enacted law, then by case law. When there is a conflict between federal and state law, federal law governs.
- The doctrines of stare decisis and precedent provide that doctrines, rules, or principles established in earlier court decisions should be followed by later courts in the same court system when addressing similar issues and facts. Therefore, when researching a question, always look for and consider earlier cases that are on point.
- Courts are required to follow mandatory authority; therefore always attempt to locate mandatory authority before searching for persuasive authority.
- Do not rely on persuasive authority if there is mandatory authority. No matter how strong the persuasive authority, the court will apply mandatory authority before persuasive authority. Secondary authority is never mandatory authority.

## VI. Application

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

### A. Chapter Hypothetical

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

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

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

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

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

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

1. *Enacted Law.* In regard to the enacted law, Renee determines which law applies to govern the situation. It is possible that both the state and federal laws apply and that a potential cause of action exists in both federal and state court. It is also possible that the federal law requires that the state remedies be exhausted before a claim in federal court can be pursued. This means that the federal law requires that any remedy available under state law must be completely pursued before a claim can be brought under federal

law. It is possible that the federal act does not apply to the specific legal question raised by the facts of the dispute, or the federal act may apply exclusively and there may be no possible cause of action under the state law. She must consider all of these possibilities when she analyzes the enacted law.

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

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

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

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

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

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

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

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

Renee's understanding of the primary and secondary sources of law, and the hierarchy of the sources, serves as an essential aid in her organization of the research, analysis of the issues, and preparation of the memo.

## Quick References

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administrative law	000	opinion	000
authority	000	personal jurisdiction	000
common law/case law	000	persuasive authority	000
concurrent jurisdiction	000	precedent	000
constitutions	000	primary authority	000
court of appeals	000	questions of fact	000
district court	000	questions of law	000
enacted law	000	secondary authority	000
federalism	000	stare decisis	000
jurisdiction	000	statutes	000
law	000	subject matter jurisdiction	000
mandatory authority	000	trial court	000

## Summary

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

There are primarily two sources of law in the United States:

1. enacted law
2. case law

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

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

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

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

1. precedent
2. stare decisis

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

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

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

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

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

## Internet Resources

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<http://www.findlaw.com>

Considered one of the best sites for finding legal resources in general, federal and state statutes, law journals, cases, and so on

<http://www.uscourts.gov>

This site offers information about federal court justices, statutes, and state laws and links to other sites

<http://www.law.indiana.edu>

Indiana University Law School library

<http://www.law.cornell.edu>

Cornell University Law School Library

<http://law.vill.edu>

This site is a state court locator

<http://www.access.gpo.gov>

The official site for the Government Printing Office

<http://www.westpub.com>

Westproducts and services

<http://gsulaw.gsu.edu>

Provides an index to legal sites on the Web, including links

## Exercises

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*Additional assignments are located on the Online Companion and the Student CD-ROM accompanying the text.*

### ASSIGNMENT 1

What is the name of the court of general jurisdiction in your state?

What is the name of a limited jurisdiction court in your state? What is the subject matter jurisdiction of this court?

### ASSIGNMENT 2

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

**ASSIGNMENT 3**

When is a court opinion considered precedent?

**ASSIGNMENT 4**

**Facts:** The paralegal is analyzing a problem involving the sale of goods on credit in state A.

**Authority:** The following authority has been located concerning the problem:

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

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

**Questions:**

- A. Which authority is primary authority, and which is secondary authority?
- B. Which authority can be mandatory authority? Why? What would be required for any of the sources to be mandatory authority?
- C. Which authority can be persuasive authority? Why?
- D. Assuming that all the primary authority applies to the issues raised by the facts of the client's case, list the authority in the hierarchical order of its value as precedent; that is, authority with greatest authoritative value will be listed first, followed by other authority in the order it will be looked to by the court.

**ASSIGNMENT 5**

**Facts:** Your client is the plaintiff in a workers' compensation case. She was injured in 1993 in state A. In 1995, her employer destroyed all the business records relating to the client. The destruction of the records was apparently accidental, not intentional. They were destroyed, however, while the client's workers' compensation claim was pending.

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

1. *Idle v. City Co.*—a 1980 decision by the highest court of state A where the court created a cause of action in tort for the wrongful destruction of business records. The court ruled that a cause of action exists if the records were destroyed in anticipation of or while a workers' compensation claim was pending. The court also held that a cause of action exists if the destruction was intentional or negligent
2. a 1989 state A statute—a law passed by the legislature of state A that created a cause of action in tort for the intentional destruction of business records. The statute provides that a cause of action exists if the destruction occurs in anticipation of or while a workers' compensation claim is pending
3. *Merrick v. Taylor*—a 1990 decision of the court of appeals of state A. The court of appeals is a lower court than the state's highest court. The court held that intentional, within the meaning of the 1989 statute, includes either the intentional destruction of



- records or the destruction of records as a result of gross negligence
4. *Davees v. Contractor*—a decision of the highest court of state *B* interpreting a state *B* statute identical to the 1989 state *A* statute. The court held that *intentional*, as used in the statute, includes gross negligence only when the gross negligence is accompanied by a “reckless and wanton” disregard for the preservation of the business records
  5. a 1991 federal statute—the statute is identical to the 1989 state statute but applies only to contractors with federal contracts
  6. an ALR reference—a reference that addresses specific questions similar to those raised in the client’s case

**Questions:**

- A. Which authority is primary authority, and which is secondary authority? Why?
- B. Which authority can be mandatory authority, and why? What would be required for any of the sources to be mandatory authority?
- C. Which authority can be persuasive authority? Why?
- D. Can *Idle v. City Co.* be authority at all? Why or why not?
- E. If *Idle v. City Co.* is authority, to what extent?
- F. Discuss the impact of *Merrick v. Taylor* in regard to the 1989 state *A* statute.
- G. Discuss the authoritative value of *Davees v. Contractor*.
- H. Assuming that all the primary authority applies to the issues raised by the facts of the client’s case, list the authority in the hierarchical order of its value as precedent; that is, authority with greatest authoritative value will be listed first, followed by other authority in the order it will be looked to and relied on by the court.



For additional resources, visit our Web site at [www.paralegal.delmar.cengage.com](http://www.paralegal.delmar.cengage.com)



Additional assignments are located on the Student CD-ROM accompanying the text.