

Legal Analysis *and* Writing

Third Edition

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Case Law Application: Is a Case on Point

Outline

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Learning Objectives

After completing this chapter, you should understand:

- What “on point” means when discussing case law
- The role and importance of a case being on point in legal analysis
- How to determine whether a case is on point



“That bum has cheated us for the last time,” David Simms said as he walked out the office door. David Simms and his brother, Don, had just finished their initial interview with Ms. Booth, the attorney who would handle their case. Their tale was one of financial abuse by their older brother, Steve.

Their father, Dilbert Simms, died in December 1993 and left his plumbing business, Happy Flush, Inc., to his three sons—Steve, Don, and David. Steve, who had been running the business since 1990, was left 52 percent of the stock. David and Don, who never worked at Happy Flush and were employed in other occupations, were each left 24 percent.

As the majority shareholder, Steve completely controls the business. To date, he refuses to issue stock dividends even though the corporation has

an accumulated cash surplus of \$500,000. He has given himself three very large salary increases and several cash bonuses since his father’s death. When questioned by David and Don about stock dividends, he tells them, “You don’t work in the business. You don’t deserve any money out of it. If you want any money, you’re going to have to get your hands in the poop every day just like I do.”

After this conversation, David and Don consulted the supervising attorney, Ms. Booth. They seek redress for the wrong they feel their brother has committed in refusing to issue dividends.

The paralegal’s task, assigned by Ms. Booth, is to find the applicable statute and the leading case on point in the jurisdiction. The statute, section 96-25-16 of the Business Corporation Act, provides that a court may order the liquidation of a

corporation when a majority shareholder has engaged in oppressive conduct. The statute, however, does not define what constitutes oppressive conduct.

The hard part of the assignment is locating a case on point in the jurisdiction that defines or provides the elements of oppressive conduct. After an extensive search, the paralegal finds only one case dealing with oppressive conduct, *Karl v. Herald*. In this case, a husband and wife owned a small corporation in which the husband owned 75 percent of the stock and the wife owned 25 percent. When they divorced, he fired her from her salaried position of bookkeeper, took away her company car, and refused to issue stock dividends.

The company was very profitable, had a large cash surplus, and was clearly in a financial position to issue dividends. After the divorce, the husband gave himself a hefty salary increase. The court held that he had engaged in oppressive conduct in freezing his wife out of the corporation. It defined oppressive conduct as “any unfair or fraudulent act by a majority shareholder that inures to the benefit of the majority and to the detriment of the minority.”

Upon finding this case, several questions run through the paralegal’s mind. Is this case on point? How do you determine whether a case is on point? Why does it matter?

I. INTRODUCTION

Legal research, analysis, and writing are all related and are often part of a single process. Research locates the law, analysis determines how the law applies, and legal writing assembles and integrates the results into a usable form.

The focus of this chapter is on the application of case law to a legal question. It covers the analytical process you engage in to determine whether the decision reached by the court either governs or affects the outcome of a client’s case. A case that governs or affects the outcome of a client’s case is commonly referred to as being “on point.”

Throughout the chapter, reference is made to single issues and single rules of law or legal principles when discussing court opinions and clients’ cases. The focus is on how to determine whether a single issue, addressed in a court opinion, is on point and, therefore, may affect or govern an issue in a client’s case. Always be aware that there are often multiple issues and legal rules/principles involved in court opinions, some of which may be on point, and therefore govern the outcome of an issue in the client’s case, and some of which may not be on point. When determining whether an opinion is on point, follow the steps discussed in this chapter separately for each issue in a client’s case.

The chapter opens with a definition of the term *on point*, followed by a discussion of the importance of locating a case on point and the process of determining whether a case is on point.

on point

A case is on point if the similarity between the key facts and rule of law or legal principle of the court opinion and those of the client's case is sufficient for the court opinion to govern or provide guidance to a later court in deciding the outcome of the client's case.

II. DEFINITION: ON POINT

Throughout the chapter, the term **on point** is used to describe a court opinion that applies to the client's case. What do "on point" and "applies to the client's case" mean? A case is on point if the similarity between the key facts and rule of law or legal principle of the court opinion and those of the client's case is sufficient for the court opinion to govern or provide guidance to a later court in deciding the outcome of the client's case. In other words, does the court opinion govern or guide the resolution of an issue in the client's case? Is the court opinion precedent? If a case is on point, it is precedent. The terms *on point* and *precedent* are often used interchangeably.

III. ON POINT: IMPORTANCE

Before discussing the process involved in determining whether a case is on point, it is helpful to understand why you must engage in the process of finding past court decisions that affect the client's case. Why is it important?

As discussed in Chapter 1, case law is a major source of law in the legal system. Through case law, courts create law and interpret the language of constitutions, legislative acts, and regulations. The determination of whether a case is on point is important because of two doctrines covered in Chapter 1—Section Precedent and Stare Decisis. The doctrines of precedent and stare decisis govern and guide the application of case law, and thereby provide uniformity and consistency in the case law system. They help make the law more predictable. A brief revisiting of these doctrines is helpful in obtaining an understanding of the process involved in determining whether a case is on point.

A. Precedent

Precedent is an earlier court decision on an issue that governs or guides a subsequent court in its determination of an identical or similar issue based on identical or similar key facts. This chapter identifies the steps involved in determining when a case may be either mandatory or persuasive precedent.

precedent

An earlier court decision on an issue that governs or guides a subsequent court in its determination of an identical or similar issue based on identical or similar key facts.

For Example

The state collections statute provides that efforts to collect payment for a debt must be made in a reasonable manner. The statute does not define "reasonable." In the case of *Mark v. Collections, Inc.*, the supreme court of the state held that it is not reasonable, within the meaning of the collection statute, for a bill collector to make more than one telephone call a day to a debtor's residence, nor is it reasonable to make calls before sunrise or after sunset.

The facts of the case are that the collector was making seven calls a day, some of which were after sunset.

The facts of the client's case are that a bill collector is calling the client six times a day between the hours of 9:00 a.m. and 5:00 p.m. The ruling in *Mark v. Collections, Inc.* applies as precedent to the issue of whether the frequency of the calls by the collector is unreasonable and, therefore, in violation of the act. The *Mark* case is sufficiently similar to the current case to apply as precedent. Both cases involve

- the same law—the collections statute.
- the same question—a determination of when the frequency of the telephone calls constitutes unreasonable conduct within the meaning of the act.
- similar key facts—six telephone calls per day and seven calls per day.

The application of *Mark* as precedent guides the court in its resolution of the question presented in the client's case of whether six calls a day are a violation of the act. The court in *Mark* held that more than one call a day is unreasonable. Therefore, the six calls a day in the client's case are unreasonable in light of the holding in the *Mark* case. This example is referred to as the collections example in this chapter.

B. Mandatory Precedent

Mandatory precedent is precedent from a higher court in a jurisdiction. If a court opinion is on point, that is, if it is precedent, the doctrine of stare decisis mandates that the lower courts in the jurisdiction follow it. In the preceding example, if the decision in *Mark v. Collections, Inc.*, is the ruling of the highest court in the jurisdiction, the lower courts in the jurisdiction must follow it.

mandatory precedent

Precedent from a higher court in a jurisdiction that must be followed by the lower courts in that jurisdiction.

C. Persuasive Precedent

Persuasive precedent is precedent that a court may look to for guidance when reaching a decision but is not bound to follow. In the collections example, courts in other jurisdictions are not bound to follow the *Mark* decision. Also, if the decision was by a lower court in the jurisdiction, such as a trial court, then a higher court, such as a court of appeals, is not bound to follow the decision. A higher court, however, may choose to refer to and use a lower court decision as guidance when deciding a similar case before it.

persuasive precedent

Precedent that a court may look to for guidance when reaching a decision but is not bound to follow.

D. 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 in the jurisdiction when the decision involves issues and key facts similar to those involved in the previous decision. In other words, the doctrine of stare decisis requires that similar cases be decided in the same way—that cases that are precedent should be followed. The doctrine applies unless there is good reason not to follow it.

stare decisis

A basic principle of the case law system that requires a court to follow a previous decision of that court or a higher court in the jurisdiction when the current decision involves issues and key facts similar to those involved in the previous decision.

For Example In regard to the *Mark* case discussed previously, stare decisis is the doctrine that holds that once it is determined that the case is precedent, the lower courts in the jurisdiction must follow it unless good cause is shown. It is mandatory precedent.

Without the doctrines of stare decisis and precedent, judges and attorneys would not have guidance about how matters should be decided. Similar cases could be decided differently based on the whims and diverse beliefs of judges and juries. These doctrines provide stability, predictability, and guidance for courts and attorneys. An individual can rely on a future court to reach the same decision on an issue as an earlier court when the cases are sufficiently similar.

With the above in mind, it becomes clear why determining whether a case is on point is important and why a researcher needs to find a case that is on point.

1. The determination must be made before the case may apply as precedent and be used and relied on by a court in its determination of how an issue will be decided. Note that if the court is unaware of the case, it may be necessary to bring it to the court's attention.
2. Inasmuch as the court will consider precedent in reaching its decision, a researcher needs to find cases that are on point to guide the attorney as to how the issue in the client's case may be decided. Also, cases on point must be analyzed to help the attorney determine what course of action to take. If the case that is on point indicates that the decision will most likely be against the client, it may be appropriate to pursue settlement or other options.

IV. DETERMINING WHETHER A CASE IS ON POINT

The process of deciding whether a court opinion is on point involves determining how similar the opinion is to the client's case. The more similar the court opinion is to the client's case, the more likely it will be considered precedent—that is, the more likely the rule/principle applied in the opinion will govern or apply to the client's case. In order for a case to be on point and apply as precedent, there are *two requirements*.

1. The significant or key facts of the court opinion must be sufficiently similar to the key facts of the client's case; or if the facts are not similar, the rule of law or legal principle applied in the court opinion must be so broad that it applies to many diverse fact situations, *and*
2. The rule of law or legal principle applied in the court opinion must be the same or sufficiently similar to the rule of law or legal principle that applies in the client's case. *Rule of law* and *legal principle*, as used here, include any constitutional, legislative, or case law provision, act, doctrine, principle, or test relied on by the court in reaching its decision.

If these two criteria are not met, the court opinion is not on point and may not be used as precedent for the client's case. The two-step process presented in Exhibit 8–1 is recommended for determining whether the two requirements are met.

For a court opinion to be on point and apply as precedent, the requirements of the following steps must be met.

Step 1. Are the key facts sufficiently similar for the case to apply as precedent?

The key facts of the court opinion must be sufficiently similar to the key facts of the client's case. If the facts are not similar, the opinion will serve as precedent only when the rule of law or legal principle is broad enough to apply to other fact situations, including the client's.

Step 2. Are the rules/principles of law sufficiently similar for the case to apply as precedent?

The rule of law or legal principle applied in the court opinion must be the same as or sufficiently similar to the rule of law or legal principle that applies in the client's case.

Exhibit 8–1

Steps in Determining Whether a Case Is on Point

A. Step 1: Are the Key Facts Sufficiently Similar?

The first step in the analysis process is to determine whether the significant or key facts in the court opinion are sufficiently similar to the key facts in the client's case so that the court opinion may apply as precedent. This is accomplished by comparing the key facts of the court opinion with those of the client's case. A key fact is so essential that it affects the outcome of the case. You must identify the key facts before you can determine whether a case is on point. If there is not a sufficient similarity between the key facts of the client's case and the court opinion, the opinion *usually* cannot be used as precedent—that is, it is not on point.

You may encounter two situations when comparing the key facts of a client's case and a court opinion.

1. The key facts are directly on point—that is, they are identical or nearly identical.
2. The key facts are different.

1. Identical or Nearly Identical Key Facts

When the key facts in the court opinion are identical or nearly identical with those of the client's case, the opinion is on point factually and can be a precedent that applies to the client's case if the requirements of step 2 are met. The phrase **on all fours** is often used to describe such opinions: opinions where the facts of the opinion and those of the client's case and the rule of law that applies are identical or so similar that the court opinion is clearly on point. When such an opinion is the opinion of a higher court in a jurisdiction, it is mandatory precedent that the lower courts in the jurisdiction must follow.

on all fours

A prior court opinion in which the key facts and applicable rule of law are identical or nearly identical with those of the client's case or the case before a court.

For Example

In the case of *Davis v. Davis*, Ms. Davis had sole custody of her two daughters, ages eight and ten. Ms. Davis had a boyfriend who occasionally stayed overnight at her home. The children were aware of the overnight visits. Mr. Davis, her former husband, filed a motion with the court asking for a change of custody. He based his claim solely upon his ex-wife's alleged "immoral conduct." No evidence was presented indicating how the overnight visits impacted the children. The trial court granted a change of custody.

The court of appeals overturned the trial court, ruling that "mere allegations of immoral conduct are not sufficient grounds to award a change of custody." The court required the presentation of evidence showing that the alleged immoral conduct harmed the children.

Assume, in this example, that the client was divorced one year ago and granted sole custody of his two minor daughters, ages eight and eleven. On occasion, his girlfriend stays overnight, and the children are aware of the overnight visits. The client's former spouse has filed a motion for change of custody alleging that his immoral conduct is grounds for a change of custody. She does not have evidence that the children have been harmed or negatively impacted.

Clearly, the requirements of step 1 are met, *Davis v. Davis* is factually "on point" and, therefore, is precedent that applies to the client's case. Note that the requirements of step 2 are also met. The same legal principle is being applied in the court opinion and the client's case: mere allegations of immorality are not sufficient grounds for granting a change of custody. Step 2 addresses the requirement that the legal principles must be sufficiently similar.

Although some of the facts are different—in the client’s case, it is the father who has custody and his girlfriend stays overnight, while in *Davis v. Davis* it is the mother who has custody and her boyfriend who stays overnight—these facts are not key facts. The gender of the custodial parent and the gender of the person staying overnight are not key facts. The key facts are identical: occasional overnight visits, the children are aware of the visits, the children are preteen (the age of the children is always an important consideration), and there is no evidence presented that the children are harmed. This example is referred to as the custody example throughout the remainder of this chapter.

It is rare to find instances where the key facts are identical. Usually there is some difference in the key facts. When you find a case with identical facts that you determine is mandatory precedent, be thankful if the holding supports your client’s position. It is difficult for a lower court not to follow the higher court’s decision when it is so clearly on point.

2. Different Key Facts

When the key facts of the court opinion and the key facts of the client’s case are not identical, the opinion *may* be on point and *may* apply as precedent. *It depends on the degree of the difference.* If some of the key facts are different, you must determine whether the differences are of such a nature or degree that they render the court opinion unusable as precedent. Use the three-part process presented in Exhibit 8–2 when making this determination. Throughout this discussion of **different key facts**, assume that the requirements of step 2 are met—that is, the rule of law applied in the court opinion is the same or sufficiently similar to the rule of law that applies in the client’s case.

Three-part process for determining whether a case is on point when the key facts of the court opinion are different from the key facts of the client’s case.

- Part 1.** Identify the similarities between the key facts.
- Part 2.** Identify the differences between the key facts.
- Part 3.** Determine whether the differences are of such a significant degree that the opinion cannot apply as precedent.

Exhibit 8–2

Three-Part Process for Addressing Different Key Facts

For Example The client’s case is the same as the custody example except that instead of occasional overnight visits by the girlfriend, the girlfriend has moved in with the client. Is the case of *Davis v. Davis* on point?

To answer the question at the end of the example, perform the following steps:

Part 1 Identify the similarities between the key facts. In both the client’s case and the *Davis* case

- the minor children are under the age of twelve.
- someone of the opposite sex is staying overnight with the custodial parent.
- there is no showing that the children have been harmed by the conduct.

Part 2 Identify the differences between the key facts. The difference in the key facts is that in *Davis v. Davis*, the overnight visits are occasional. In the client’s case, there is cohabitation rather than occasional overnight visits.

Part 3 Determine whether the differences are of such a significant degree that the opinion cannot apply as precedent. To determine the significance of the differences, substitute the client's key facts for those of the court opinion. If the substitution of the key facts would result in changing the outcome of the case, the court opinion cannot be used as precedent.

In this example, would the court in *Davis v. Davis* have reached the same conclusion if Ms. Davis's boyfriend had moved in with her? Probably. The same legal principle applies—that is, allegations of immoral conduct alone are not sufficient grounds to award a change of custody; there must be a showing that the conduct harmed the children.

As indicated in *Davis v. Davis*, an essential element necessary before a change of custody is granted is a showing of harm to the children. A key fact in the *Davis* decision was the lack of showing of harm to the children. In both the court opinion and the client's case, there is a lack of showing of harm to the children, and therefore, the principle applied in *Davis* should apply to the client's case even though the *Davis* opinion involved overnight visits and the client's case involves cohabitation.

You must be careful, however. There may be another statute or case law doctrine providing that cohabitation is per se harmful to children—that is, in cohabitation cases such as the client's case, the law presumes that cohabitation is harmful to the children. If this were the situation, the plaintiff would not need to establish harm in cohabitation cases such as the client's, and the *Davis* opinion would not be on point and could not be used as precedent. The difference in the key facts would be so significant that the substitution of the client's cohabitation fact with the court's occasional overnight visits fact would change the decision reached by the court because a different statute would apply.

There are four variations that may be encountered when dealing with different key facts. These variations are presented in Exhibit 8–3.

Variations that may be encountered when dealing with different key facts.

1. Minor Differences in Key Fact—case on point
2. Major Difference in Key Facts—case not on point
3. Major Difference in Key Facts—case on point
4. Major Difference in Key Facts—case on point, broad legal principle

Exhibit 8–3

Different Key Fact Variations

Minor Difference in Key Facts. Some key facts are so insignificantly different that they clearly do not affect the use of a court decision as precedent.

For Example

If, in the custody example, the client's children were nine and eleven years old as opposed to eight and eleven, *Davis v. Davis* would clearly apply as precedent. Although the age of the children is a key fact, a minor difference of one year in the ages of the children is not a significant difference in the key facts. If the client's children were several years older than the children in *Davis v. Davis*, such as ages seventeen and eighteen, the age difference could be a major difference in the key facts because a different standard might apply if the children were in their late teens.

Major Difference in Key Facts: Case Not On Point. The following example presents a situation where the key facts of the court opinion and the key facts of the client's case are different, and the opinion is not on point and does not apply as precedent. This example is referred to in this chapter as the arrest example.

For Example In the court case of *State v. Thomas*, Mr. Thomas was handcuffed and taken to the police station after officers broke up a fistfight. Thomas was not read his rights at the scene of the fight. He was read his rights and formally arrested at the police station thirty minutes later. The court, ruling that he was under arrest when handcuffed at the scene, stated, "An arrest takes place when a reasonable person does not believe he is free to leave."

In the client's case, the client explains that the police handcuffed him and told him to stay in the hallway of the house while they executed a search warrant. He was not allowed to leave. It appears that the key facts regarding whether an arrest has taken place are nearly the same. In both the court opinion and the client's case, the individual was handcuffed and not free to leave. The critical difference in the facts is the context of the seizure of the individual. In *Thomas*, the seizure took place at the scene of a fight. There were no warrants involved. In the client's case, the seizure took place during the execution of a search warrant.

In regard to the question of whether the client was under arrest when handcuffed and detained in the hallway, is *State v. Thomas* on point? The answer is no. Although the facts of the detention are similar, the difference in the context of the seizure is a critical key fact difference. There is other case law that holds that a seizure during the execution of a search warrant is an exception to the rule stated in *Thomas*, and such seizures do not constitute an arrest.

The other case law provides that a search warrant implicitly carries with it the authority to detain an individual for the purposes of the officer's safety and to determine whether there is cause to make an arrest. Therefore, such detentions do not constitute an arrest within the meaning of the law. Because of this authority, the difference between the key facts of *Thomas* and the client's case is critical, and the case is not on point.

Major Difference in Key Facts: Case On Point. A major difference in the key facts does not necessarily result in a determination that the case is not on point. The opinion may still be on point, but the outcome may be different. The legal principle applied by the court may still apply. Its application may just lead to a different result.

For Example In the custody example, if there was an additional key fact in the client's case that the spouse seeking custody had evidence showing that the children were being harmed by exposure to the cohabitation, *Davis v. Davis* could still be on point. This could occur even though there was no evidence of harm to the children presented in the *Davis* case. Although there is now a major difference between the key facts of the court opinion and the client's case, the court opinion may still apply as precedent and govern the outcome of the change of custody question.

The court in the *Davis* case concluded that there were not sufficient grounds to award a change of custody because there was *no evidence* presented showing harm to the children. The same principle governing *Davis* governs the facts here—that is, allegations of immorality, *standing alone*, are not sufficient for an award of a change of custody; there must be a showing of harm to the children.

A corollary of the rule, however, is that if there *is a showing of harm* to the children, there may be sufficient grounds for a change of custody. It can be argued that when the key fact of evidence of harm is present, the corollary of the rule applies. Even though the facts of the court opinion and the client’s case are different, the corollary applies to support a change of custody award—a result different from the result reached in the court opinion.

Major Difference in Key Facts: Case On Point, Broad Legal Principle. Generally, if key facts are significantly different, it is highly probable that a different rule or principle applies and a court case will not apply as precedent. There are, however, instances where the key facts are different, but the court opinion is on point because the rule of law or legal principle is so broad that it applies to many different fact situations. This situation is addressed in greater detail in step 2 in the next section.

For Example

The client was detained with a group of exotic dancers in a bar. The officers who detained the client were not executing a search or arrest warrant. Before informing the dancers they were under arrest or in any way informing them what was taking place, the officers moved them to a separate room where they were detained for more than an hour. They were clearly not free to leave. They were formally arrested two hours later, then taken to jail.

In regard to the question of whether the client was under arrest when detained in the room prior to arrest, *State v. Thomas* (presented in the previous arrest example) is probably on point. The definition of arrest presented in *Thomas* applies to the client’s case even though the factual context of the seizures are different. Applying that definition to the client’s case results in the conclusion that an arrest occurred when the client was moved to a separate room and detained for more than an hour. A reasonable person in the client’s situation would not believe he was free to leave. The definition of arrest presented in *Thomas* is so broad that it applies to a wide range of detention situations.

Note: Be careful. It is always preferable to locate an opinion that is as factually similar to the client’s case as possible. The more dissimilar the key facts, the easier it is for the other side to argue that the differences are critical and that the opinion is not on point, and does not apply as precedent to the case at hand.

A difference in key facts should alert you to be careful and cause you to explore all potential legal avenues that may arise as the result of the fact differences. Focus on the differences. Ask yourself, “Are they important?” Engage in counteranalysis (see Chapter 9). Conduct further research and *shepardize* the case to determine whether there are other cases more on point.

In summary, if the key facts are the same and the same rule of law applies (step 2), the court opinion is usually on point and can be considered as a precedent that

applies to your client's case. If the key facts are different, either in part or totally, you must perform careful analysis to ensure that the factual differences are not so significant that they are fatal to the use of the court opinion as precedent.

B. Step 2: Are the Rules/Principles of Law Sufficiently Similar?

By applying the principles presented in step 1, you determine whether the key facts of the court opinion are sufficiently similar to the key facts of the client's case for the opinion to apply as precedent factually. Once this is accomplished, half of the task is completed. Note that this is a *two-step* process; you *must* complete both steps before you can determine whether a case is on point and apply as precedent.

The second step is to determine whether the rule of law or legal principle applied in the court opinion is the same rule of law or legal principle that applies in the client's case. If it is not the same rule of law, is it sufficiently similar to the rule that applies in the client's case for the opinion to still apply as precedent? You may encounter two situations when performing step 2.

1. *The rule or principle applied in the court opinion is the same rule or principle that applies in the client's case.*
2. *The rule or principle applied in the court opinion is different from the rule or principle that applies in the client's case.*

I. Same Rule or Principle

If you determine that the key facts are sufficiently similar so that the court opinion can apply as precedent and the same rule of law is involved in both the opinion and the client's case, the requirements of step 2 are met, and the case is on point. The rule of law comparison is simple. The rule of law applies in the client's case in the same way as it was applied in the court's opinion.

For Example

In the custody example, if the client's case involves the situation of the client having occasional overnight visits by his girlfriend, the same rule of law governs the court opinion and the client's facts—that is, allegations of immorality without evidence of harm to the children are not sufficient grounds to support a change of custody. The rule applies in the same way in the client's case as in the court opinion—a change of custody will not be granted where there is no showing of harm to the children.

For Example

The client is charged with erecting a sign too close to the street in violation of section 19-b of the Municipal Code, which prohibits the erection of a sign "unreasonably close" to any property line abutting a street. In your research, you come across the case of *City v. Guess*, which interprets "unreasonably close" as within ten feet of the property line. If the key facts of the court opinion are sufficiently similar to the client's key facts, the rule of law analytical process is simple. The same rule of law applied in the opinion applies to the client's case, in the same way: if the client's sign is within ten feet of the property line abutting the street, it is in violation of the statute.

Note that the same rule of law may apply, but its application in the client's case may result in an outcome different from the outcome in the court case. See the example presented in the Major Difference in Key Facts: Case On Point section. In that example, the same legal principle applied in both the client's case and the court opinion, but the result was different.

2. Different Rule or Principle

What if there is no court decision in your jurisdiction applying or interpreting the rule or legal principle that applies to your client's case? What if the rule or principle applied in the closest court opinion you can find is different from the rule or principle that applies in the client's case? Can the court opinion apply as precedent? The general rule is *no*. Usually this is obvious. For example, a child custody opinion rarely can be precedent for a murder case.

Again, there are exceptions. The court's interpretation of a provision of a legislative act or case law rule or principle may be so broad in scope that it applies to the different law or rule that governs the client's case. Keep in mind, though, that since the law or rule applied in the court opinion is different from that which applies to the client's case, the court opinion is *persuasive* precedent. The court hearing the client's case does not have to follow it—it is not *mandatory* precedent. The court has discretion and must be persuaded.

There are two areas to explore when considering these exceptions: legislative acts and case law rules or principles. In regard to these two areas, it is important to remember that the discussion involves *only* those situations where there is *no court opinion* in the jurisdiction that directly interprets the same legislative act or case law rule that applies to the client's case.

Legislative Acts. A court opinion interpreting one legislative act may be used as precedent for a client's case that involves the application of a different legislative act when the two requirements presented in Exhibit 8–4 are met.

1. There is a similarity in language between the legislative acts, and
2. There is a similarity in function between the legislative acts.

Requirements that must be met for a case to be on point when the legislative act applied in the court opinion differs from the legislative act that applies in the client's case.

1. There is a similarity in language between the legislative acts, and
2. There is a similarity in function between the legislative acts.

Exhibit 8–4

*Requirements When
Different Legislative Acts
Apply*

For Example There are three statutes adopted in the jurisdiction.

- Section 56 provides that an individual must be a resident of the county to be eligible to run for the position of county animal control officer.
- Section 3105 provides that an individual must be a resident of the county in order to run for a seat on the county school board.
- Section 4175 provides that an individual must be a resident of the state to be eligible to run for the office of governor.

. The term *resident* is not defined in any of the statutes, and none of the statutes establishes a length of residency requirement. The only case in the jurisdiction that defines the term is *Frank v. Teague*, a case involving section 3105. In this case, the court ruled that to be eligible to run for a seat on the school board, the candidate must be a resident of the county of the school board district for a minimum of three months immediately prior to the election.

Suppose the client, a resident of the county for three and one-half months, wants to run for the office of governor. Does the *Frank* opinion apply as precedent and support the client's claim of eligibility to run for the office of governor? Probably not.

Although there is a similarity in the language of the statutes in that both use the term *resident*, there is not a similarity in function. The considerations involved in determining the length of residence required as a prerequisite for eligibility to run for each office are quite different. The court's decision in *Frank*, imposing a three-month residency requirement for the school board position, may be based on the court's determination that this is the amount of time an individual needs to become sufficiently familiar with the county to perform the duties of a school board member. The position of governor, however, involves different considerations. The office is statewide, and the court could conclude that a longer residency period is necessary for an individual to become sufficiently familiar with the state to adequately perform the duties of governor. This example is referred to in this chapter as the residency example.

For Example

The client wants to run for the position of animal control officer. He has been a resident of the county for four months. In this situation, it is more likely that *Frank* will apply as precedent, that it is on point and supports the position that the client is eligible to run for animal control officer.

Again, both statutes use the same language, *resident*. They are more closely related in function, however, than the school board and governor statutes. Both involve countywide positions wherein the duties are focused on county concerns. It can be argued that no more time is required to become familiar with the county to perform the duties of animal control officer than is required to perform the duties of a school board member.

The court, following this line of reasoning, could conclude that the residency requirement for the position of animal control officer should not exceed the minimum residency set for a seat on the school board. It could, therefore, adopt the three-month standard established in the *Frank* case as the standard for the animal control officer statute.

Because the statutes are different, you are always open to a counterargument pointing out some critical difference in function between the statutes. In this example, it could be argued that the duties of animal control officer are much different than those of a school board member, that the duties of the animal control officer require a great degree of familiarity with the geography of the county, and that a longer period of residency should therefore be required to ensure that a candidate has sufficient time to become familiar with the county.

In every situation where the statutes are different in function, even if they have some similarities, an argument can be made that the difference, no matter how

slight, dictates that a court's interpretation of one statute in one case cannot apply to another statute in a different case.

The above examples involve statutes from the same state. All the statutes were passed by the same state legislature, and the court opinion came from a court in that state. What if, in the residency example, there is no case law in the state interpreting the term *resident*, and the *Frank v. Teague* opinion is a decision from another state interpreting a statute of that state that is identical or very similar to section 3105. Can *Frank* apply as precedent?

The answer is the same as the answer discussed in the above examples. If there is sufficient similarity in language and function of the statutes, the opinion can apply as precedent. If there is not sufficient similarity, it cannot apply as precedent. As long as the court is convinced that the similarity is sufficient, it can apply.

Bear in mind that a decision from another jurisdiction is only persuasive precedent, and a court is more likely to adopt persuasive precedent from a court within the jurisdiction than from a court without. It is best to locate authority within your jurisdiction. Look out of state only if there is no opinion that could apply as persuasive precedent within the jurisdiction.

Realistically, it is always risky to argue that a court's interpretation of a provision of one statute applies as precedent for the interpretation of a provision of a different statute. You are always open to, and will probably have to fend off, counterarguments that the statutes are functionally different and that reliance on a particular court opinion is misplaced. Your position is never solid. Always try to find another opinion or pursue another avenue of research.

Case Law Rule or Principle. "Case Law Analysis" The same principles mentioned in the preceding section apply when attempting to use as precedent a court opinion interpreting a case law rule or principle. Can a court opinion interpreting a case law rule or principle apply as precedent for a client's case that requires the application of a different case law rule or principle? The requirements are similar to those mentioned in the preceding section. Are the case law rules or principles similar in language and function? A court opinion interpreting one case law rule or principle may be used as precedent for a client's case that involves the application of a different case law rule or principle when

1. there is a similarity in language between the case law rules or principles, and
2. there is a similarity in function between the case law rules or principles. (see Exhibit 8–5.)

Requirements that must be met for a case to be on point when the case law rule or principle applied in the court opinion differs from the case law rule or principle that applies in the client's case.

1. There is a similarity in language between the case law rules or principles, and
2. There is a similarity in function between the case law rules or principles.

For Example

The jurisdiction recognizes the torts of intrusion and public disclosure of a private fact. Intrusion protects against the act of prying or probing into the private affairs of an individual. Public disclosure of a private fact protects against the act of publishing information

case law analysis

The analytical process engaged in to determine whether and how a decision in a court opinion either governs or affects the outcome of a client's case.

Exhibit 8–5

Requirements When Different Case Law Rules/Principles Apply

concerning the private affairs of an individual. The highest court in the jurisdiction has established both of these torts. There is no statutory law defining or governing the torts. One of the elements of the tort of *intrusion* is an act of intrusion into the *private affairs* of the plaintiff. One of the elements of the tort of *public disclosure of a private fact* is the public disclosure of a fact concerning the *private affairs* of the plaintiff.

In the client's case, the client was having an affair with the wife of a city council member. A campaign rival of the client disclosed the existence of the relationship at a campaign rally. The campaign rival acquired the information from a campaign aide who obtained the information by peeking through the client's bedroom window. The client wants to sue for public disclosure of a private fact. The question is whether the affair is a private fact.

The only case in the jurisdiction is *Claron v. Clark*, an intrusion case where a private investigator, through the means of a wiretap, discovered that the plaintiff was engaged in an affair. The court ruled that the term *private affairs* includes any sexual activity that takes place within the confines of an individual's residence.

Is the *Clark* opinion, an intrusion case, on point? Can it be precedent in the client's case, which involves a different tort—public disclosure of a private fact? May it be used as precedent in the client's case to guide the court in its interpretation of the meaning of the term *private affairs*? There is a similarity in the elements of the torts; both use the term *private affairs*. Both torts are similar in function. They are designed to protect the private affairs and lives of individuals.

If the court is convinced that the similarities are sufficient, the case can apply as precedent. It can always be argued, however, that because the torts are different, there is a difference in function, no matter how slight, which dictates that a court's interpretation of one tort cannot apply to a different tort. In this case, an argument can be made that prying is different from publication, and therefore, the difference in the interest being protected in the torts is sufficient to prevent an interpretation of a term in intrusion from being used to interpret the same term in public disclosure of a private fact.

Again, be careful. The same pitfalls exist here as when different legislative acts apply. A court opinion within the jurisdiction interpreting a different rule of law is only persuasive precedent. It is not mandatory precedent that must be followed. It is very easy to present a counterargument that the functions of the two doctrines are clearly different, so the court opinion cannot apply as precedent. Also, keep in mind that when the decision is from another jurisdiction, it is still only persuasive precedent, and a court is more likely to adopt persuasive precedent from a court within the jurisdiction than from a court without.

Note: Be careful. It is always preferable to locate an opinion that applies a rule or legal principle that is the same as the rule or principle that applies in the client's case. If different rules or principles are involved, it is easier for the other side to argue that the opinion is not on point and, therefore, does not apply as precedent for the case at hand.

Where different rules or principles are involved, you should conduct further research and *shepardize* the case to determine whether there are other cases more on point.

V. Key Points Checklist: *Determining Whether a Case Is on Point*

- ❑ Focus on the key facts and the rule of law/legal principle of both the court opinion and client's case.
- ❑ Where there are differences between the key facts of the court opinion and the client's case, carefully determine whether the differences are significant. Beware! Different key facts may lead to the application of an entirely different law or principle despite other key fact similarities. The rule of law or legal principle, however, may be so broad that it applies to many different fact situations.
- ❑ Clearly identify the rule of law/legal principle that applies in the court opinion and in the client's case.
- ❑ Where the rule of law applied in the court opinion differs from the rule that applies in the client's case, consider using the court opinion as precedent *only when there is no authority* interpreting or applying the rule/principle that applies in the client's case.
- ❑ Consider authority from another jurisdiction *only* when there is no authority in the jurisdiction.
- ❑ If in doubt about whether a fact is a key fact, continue your analysis until you are certain. Refer to the steps presented in Chapter 5.
- ❑ Follow your instincts. If an opinion does not appear to be on point but your intuition tells you it is on point, continue your analysis until you are certain. If you never reach the point of feeling certain, search elsewhere.

VI. Application

This section presents two examples that illustrate the application of the principles discussed in this chapter for determining whether a case is on point.

A. Chapter Hypothetical

This example is based on the fact pattern presented at the beginning of this chapter. Returning to that problem, is the case of *Karl v. Herald* on point so that it applies as precedent for the client's case?

Step 1 *Are the key facts sufficiently similar?* The first step is to determine whether the key facts of *Karl v. Herald* are sufficiently similar to the client's case for *Herald* to apply as precedent—to be on point. Although the facts in *Herald* are somewhat different, they are sufficiently similar. In both cases, the corporation was in a position to pay dividends. In both cases, while refusing to pay dividends, the majority shareholder allegedly enriched himself through excessive raises and/or bonuses. In both cases, the minority shareholders were effectively frozen out from benefiting in the corporation.

A difference in *Herald* is the plaintiff worked in the business. In the client's case, the brothers did not work in the business. This difference in the cases is not a key fact difference. The fact that the plaintiff in *Herald* worked in the business relates to her status as an employee, but it is not related to her status as a shareholder.

In *Herald*, the court defined oppressive conduct as conduct against shareholders, not employees. The plaintiff's status as an employee may give rise to employee rights, but it is not related to rights as a shareholder and, therefore, is not a key fact.

Step 2 *Are the rules/principles sufficiently similar?* Is there a sufficient similarity between the law that applies in *Karl v. Herald* and that which applies in the client's case for the case to be considered on point and apply as precedent? The same statute, section 96-25-16 of the Business Corporation Act, applies to both the court opinion and the client's case. Both cases involve allegations of oppressive conduct by a minority shareholder against a majority shareholder and are governed by the same section of the statute.

In the *Herald* opinion, oppressive conduct was defined as "any unfair or fraudulent act by a majority shareholder that inures to the benefit of the majority and to the detriment of the minority." The client's case also involves questions of oppressive conduct by the majority shareholder and is governed by the same definition. Just as in *Herald*, there is alleged unfair conduct by the majority shareholder that inures to the benefit of the majority and to the detriment of the minority. There are no major differences between *Herald* and the client's case that restrict the application of *Herald* as precedent.

Note: What if you concluded that *Herald* was not on point, but it was the only case in the jurisdiction that discusses oppressive conduct? You would need to be sure to analyze the case in the memorandum to your supervisor and point out why the case is not on point.

B. Libel Case

The following fact situation and court opinion illustrate another example of the use of the steps discussed in this chapter.

For Example Jerry lives in an apartment building. He often sees couples, and sometimes individuals, entering and leaving Eve's apartment in the late evening and early morning. Convinced that Eve is engaged in immoral behavior, he prepares a petition requesting that Eve be kicked out of the building. He intends to present copies of the petition to the other tenants of the building and submit the signed petitions to the landlord. In the petition, he refers to Eve as a prostitute.

Early one evening he decides to confront Eve. In the ensuing conversation, he discovers that Eve is a marriage counselor employed by a local business. The couples he has seen visiting her apartment are workers at the business who, as a result of their schedule, can come to counseling only during the late evening. She has an agreement with her employer that allows her to counsel couples and individuals in her apartment.

Jerry, realizing he is mistaken about Eve, decides to destroy the petitions. On the way to the incinerator, he unknowingly drops a copy of the petition. It is found by another tenant and ultimately is circulated among the tenants of the building. Eve hears about the petition and decides to sue Jerry for libel.

The state has a libel statute in which libel is defined as "the intentional publication, in writing, of false statements about a person." A leading libel case in the jurisdiction is *Cox v. Redd*. In this case, Redd wrote a letter he intended to mail to Cox wherein he called Cox a crook and a thief. The statements were not true.

Redd intended for Cox, and no one else, to read the letter. The day before he planned to mail the letter, he invited several friends over to spend the evening. He forgot to put the letter away. He left it opened on the dining room table, and some of the guests read it. Redd was not aware that his guests had read the letter. Cox heard about it and sued Redd for libel.

The court, interpreting the libel statute, ruled that “intentional publication” means either the actual intent to publish or, where there is no intent to publish, reckless or grossly negligent conduct that results in publication.” The court held that Redd’s conduct of leaving the letter opened where he knew his guests could see it was grossly negligent conduct, and that, therefore, he had intentionally published the letter and had committed libel. The court commented that Redd knew company was coming to his house, and his failure to exercise care in securing the letter in light of that knowledge was gross negligence.

In this example, is *Cox v. Redd* on point so that it applies as precedent in Jerry’s case?

Step 1 *Are the key facts sufficiently similar?* Both cases involve false written statements that were published. In both cases, there is the question of whether there was intentional publication. In the *Cox* case, even though he may not have intended to publish the letter, Redd’s carelessness in leaving it out resulted in its publication.

Are the facts concerning intentional publication in Eve’s case sufficiently similar? It is questionable. In the *Cox* case, Redd was careless and took no steps to secure the letter. In Eve’s case, Jerry was taking steps to avoid publication and accidentally dropped a copy of the petition. It could be argued that some key facts are clearly different, that his conduct was simple negligence and not gross negligence, and that, therefore, the case is not on point. It could also be argued that because of the extreme sensitivity of the contents of the petition, Jerry should have taken great care to ensure that all the copies of the petition were burned, and the failure to exercise that care constitutes gross negligence. Under this argument, the case can apply as precedent.

It is important to note that there is a difference in the key facts that makes it questionable whether the case is on point. To remove doubt, additional research must be conducted to determine what constitutes gross negligence and whether Jerry’s conduct rises to the level of gross negligence.

Step 2 *Are the rules/principles sufficiently similar?* If it is decided that there is a sufficient similarity in the facts, is there a sufficient similarity between the law that applies in the *Cox* opinion and that which applies in the client’s case for the opinion to be considered on point and apply as precedent? Both cases are libel cases that apply the same libel statute. Both cases involve the element of intent to publish. Both cases are concerned with an aspect of that element—whether there is “intentional publication” when the conduct that results in publication is unintentional.

Therefore, there is little question that *Cox* is on point in regard to step 2. If it is determined that Jerry’s conduct is gross negligence, under the rule of law applied in *Cox*, Jerry’s conduct is intentional publication.

Quick References

case law analysis	000	precedent	000
different key facts	000	on all fours	000
different rule/principle	000	on point	000
identical key facts	000	same rule/principle	000
mandatory precedent	000	stare decisis	000
persuasive precedent	000		

Summary

Court opinions are important because, under the doctrines of precedent and stare decisis, judges reach decisions according to principles laid down in similar cases. Therefore, a researcher should find a case that is precedent (on point) because it guides the attorney as to how the issue in the client's case may be decided. An opinion is on point, and may be considered as precedent, if there is a sufficient similarity between the key facts and the rule of law/legal principle that governs both the court opinion and the client's case.

When considering the key facts, the heart of the process is the identification of the similarities and differences between them. The more pronounced the differences between the facts of the court opinion and those of the client's case, the greater the likelihood that the opinion is not on point. Be very critical in your analysis when there are differences. Always check other avenues of research when the key facts are different.

Where the key facts are sufficiently similar for the opinion to be considered on point, look to the rule of law that governs the court opinion and the client's case. Where the same rule applies, the opinion is usually on point. Where a different rule applies, a court opinion usually cannot apply as precedent. Where the language and function of the applicable rules/principles are sufficiently similar, however, it can be argued that an opinion is on point and can be used as precedent.

Reliance on a court opinion that applies a different rule/principle than that which applies in the client's case is risky and should occur only when there is no case that interprets the rule or principle governing the client's case.

Internet Resources

There are various Web sites that address the subject of cases on point. Most discuss specific cases and topics. These sites may be accessed by using "case law on all fours" or "cases on all fours" as an Internet search topic. Google [<http://www.google.com>] has been mentioned as a search engine in previous chapters; you may also use other search engines such as Yahoo [<http://www.yahoo.com>].

As mentioned in Chapter 5, many sites provide information without charge. Information you obtain for free may not be closely monitored and may not be as accurate or have the same quality of material as that obtained from fee-based services. Therefore, exercise care when using material you do not pay for.

Exercises

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

ASSIGNMENT 1

What does it mean when a case is “on point”? When is a case “on point”?

ASSIGNMENT 2

Describe the two-step process for determining when a case is “on point.”

ASSIGNMENT 3

Describe the three-part process for determining whether a case is on point when there are different key facts.

ASSIGNMENT 4

Describe the two steps to follow when the doctrine/rule applied by the court is different from the doctrine that applies in the client’s case.

ASSIGNMENT 5

Why is it important for a researcher to find a case on point?

ASSIGNMENT 6

In the following example, use the statutory and case law presented in the hypothetical at the beginning of the chapter, that is, section 96-25-16 and *Karl v. Herald*. The client seeks redress for the refusal of the other party to issue dividends. In each example, determine whether *Karl v. Herald* is on point.

Example 1

The client and his sister, Janice, are shareholders in a corporation. Janice is the majority shareholder, the sole member of the board of directors, and the manager of the corporation. For the past five years, she has paid herself a very lucrative salary, twice that paid to managers of similar corporations. The corporation has a \$400,000 cash surplus that Janice claims is necessary for emergencies. No emergency has occurred in the last five years that would require more than \$50,000.

Example 2

The client and Claire own a fabric store. The business is a corporation and Claire holds 80 percent of the stock and makes all the business decisions. The client, an employee of the business, owns 20 percent of the stock. The business has a large cash surplus, but Claire has never issued dividends. Claire’s salary is three times the client’s. When the client asks that dividends be issued, Claire responds, “Your dividend from this corporation is your job.”

Example 3

The client and Don are partners in a business. Don owns 70 percent of the partnership and the client owns 30 percent. The client does not work for the business. Don runs the business and pays himself a large salary that always seems to equal the profits. The client thinks this is fishy and that Don should have a set salary and the profit above Don’s salary should be shared 70/30. There is no partnership case law in the jurisdiction that addresses this question.

ASSIGNMENT 7

In each of the following examples, a brief summary of the court opinion is presented, followed by a client’s fact situation. For each client fact situation, Parts A–G, determine

- A. What are the fact similarities and differences between the court opinion and the client’s situation?
- B. Is the court opinion on point? Why or why not?
- C. If the opinion is on point, what will the probable decision be in regard to the question raised by the client’s facts?

Example 1

Court Opinion: *State v. Jones*. Mr. Jones, a first-time applicant for general relief funds, was denied relief without a hearing. The denial was made on the basis of information in Mr. Jones’s application, which indicated that his income was above the threshold maximum set out in the agency regulations. The regulation provides that when an applicant’s income, or the financial support

provided to an applicant plus income, exceeds \$12,000 a year, the individual may be denied general relief funds. The regulation is silent about the right to a hearing.

Mr. Jones's application reflected that the gross income from his two part-time jobs exceeded by \$2,000 the maximum allowable income for eligibility. He believed there were special circumstances that would allow him to be eligible for general relief.

His demand for an appeal hearing to explain his special circumstances was denied.

The court held that the due process clause of the state constitution entitles a first-time applicant for general relief funds to a hearing when special circumstances are alleged. The question in the following three fact situations is whether the client is entitled to a hearing.

Part A

Client's Facts: Tom lives at home with his parents. He has a part-time job. He does not pay rent and utilities. He uses the money from his job to attend school. He has very little left over. His application for general relief was denied. The written denial stated that the combination of the support provided by his parents and his part-time income exceeded the maximum allowable income. His application for an appeal hearing was denied.

Part B

Client's Facts: In the last session of the state legislature, the legislature passed legislation that provided that when applicants for general relief were denied relief on the basis of information provided in the application, they were not entitled to an appeal hearing. The purpose of the legislation was to cut costs.

Mr. Taylor, a first-time applicant for general relief funds, was denied benefits solely on the basis of his application. He believes that he has special circumstances that entitle him to benefits. His request for an appeal hearing was denied.

Part C

Client's Facts: Client has been receiving

general relief funds for the past year. Last week he received notice that his relief is being terminated as a result of information received from his employer indicating that he had received a raise, and his income is now over the statutory maximum. His request for an appeal hearing on the termination of relief was denied.

Example 2

Court Opinion: *Rex v. Ireland.* Mr. Rex, the landlord, filed an eviction suit against his tenant, Mr. Ireland. Mr. Rex served notice of default upon Mr. Ireland by rolling up the notice of default and placing it in Mr. Ireland's mailbox. The mailbox was situated next to the street. Mr. Ireland retrieved the notice the next day. Mr. Ireland, in his defense to the eviction suit, stated that he was not given proper notice of default under the provisions of section 55-67-9 of the Landlord/Tenant Act; therefore, the case should be dismissed. The statute provides that notice of default may be accomplished by

1. delivery by certified mail
2. hand delivery to the individual to be evicted or
3. posting at the most public part of the residence.

The statute further provides that the court may enter an order of eviction if the notice of default is not responded to within thirty days.

The court, denying the request for dismissal, ruled that the intent of the statute was to ensure that tenants receive notice of default, and although the method of delivery by Mr. Rex did not comply with the statute, the intent of the act was accomplished inasmuch as Mr. Ireland had actual notice of default and was not prejudiced by the improper notice. The question in the following four fact situations is whether the notice of default is effective.

Part D

Client's Facts: The client is a tenant. The landlord told the client's daughter to inform the tenant that he was in default and, under the terms of the lease, would be evicted if he did not pay or otherwise

respond within thirty days. The daughter informed the tenant the next day. Would it make any difference if the daughter informed the tenant after thirty days but before the eviction suit was filed?

Part E

Client's Facts: Client, the tenant, was on vacation when the landlord posted the notice of default on the front door. Client did not return from vacation and learn of the

default until after the thirty-day default period had passed.

Part F

Client's Facts: Landlord sent the notice of default by regular mail, and it was received by the tenant.

Part G

Client's Facts: The landlord sent the notice by certified mail, but the client refused to accept it.



For additional resources, visit our Web site at www.paralegal.delmar.cengage.com



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