

ANALYSIS, RESEARCH & WRITING

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Legal Services Practice Manual: Skills

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LEGAL ANALYSIS: THE HEART OF THE LEGAL PROBLEM

HOLVING PROCESS
Helping people solve problems is the essence of what we as advocates do. Expertise in how the law affects these problems — particularly those of low-income people — is our specialty.

Here we present a model of the tasks involved in legal problem solving, showing how legal analysis is a critical part of each task. In your busy practice, you don't have time to reflect on process — how you do things — you just do them. These materials present opportunities to reflect on these tasks to help you perform them more skillfully. Awareness of how legal analysis is involved in problem solving tasks is key to understanding how to do it better.

Study Questions

These study questions highlight the key concepts in this section and serve as an organizer for your notes as you read it.

1. Describe the key steps in the legal solving process.
2. Describe how legal analysis is part of each step.
3. Describe the role of legal memoranda in legal problem solving.

Legal Problem Solving and Analysis

Legal problem solving — identifying and diagnosing problems and generating strategies and tactics to achieve client objectives — is a legally trained person's most basic function. Most legal problem solving activity involves some legal analysis — combining law and facts to generate, justify, and assess a legal problem's merits.

Awareness of the process helps you analyze your own approach to solving problems, making it easier to develop your ability to do legal analysis.

Your Approach to Solving and Analyzing Legal Problems

Recall a case that you handled from beginning to end. Visualize in your mind in as much detail as you can what happened from your initial contact with the case to its final resolution. Focus on the process — what you did — rather than the content — type of case, kind of law involved — paying close attention to how you analyzed the case. Describe the tasks and the order in which you did them

Legal Problem Solving Process: A Model

Compare your process to the model diagramed in Illustration 5 - 1. The model is designed to help you identify different components of legal problem solving and the role that legal analysis plays in that process. In practice, these activities don't occur in neat little compartments that are perfectly distinct from one another; the boundaries between components are usually fuzzy. Moreover, people frequently move through the activities several times before any type of "solution" is reached.

The first box is labeled **GATHER FACTS**. The first step in analyzing a legal problem is to gather the facts,

usually from a client interview. The more familiar you are with the law that governs the client's problem, the more valuable the information you will obtain at first. If you know nothing about the law that affects the problem, you always can use the five "W's" — who, what, when, where, why — as a fact gathering guide. You always must identify the client objectives and priorities as part of initial fact gathering.

ANALYZE THE FACTS involves determining which facts may be legally significant. Legally significant facts might be, for example, that a *tenant* with an *eviction notice* has never been supplied with *hot water*; or a *parent* who is seeking *custody* of her *children* has been *convicted* of a *crime*; or a *SSI recipient's benefits* have been *terminated* because the recipient allegedly didn't *report* certain *income*.

At this stage, fact analysis can lead to formulating the tentative, overall issues in the case. If you are unfamiliar with the law that governs a case, then your issue statement tends to be broad, *e.g.*, Can the client be evicted? Can the client retain custody of her children? Was the client's termination from SSI proper?

The more you know about the law that affects the problem, the more precise your issue statement tends to be, *e.g.*, Did the landlord's failure to provide hot water to the premises constitute a breach of the implied warranty of habitability which the tenant can raise successfully as a defense to the eviction action? dispute at this stage. This analysis also may change as you research the law and gather more facts. No matter how tentative, however, such an analysis serves to focus your research and fact discovery.

Using various research strategies, you **SEARCH and ANALYZE THE LAW**. You must always check the law if only to confirm that your memory of it is correct. Given the uniqueness of each fact situation and how quickly the law changes, every problem merits a fresh look at the governing law's language.

Since legislation — statutes and regulations — governs the majority of disputes, you should check it first. Once you find pertinent legislation, you should identify its elements, identify and frame the issues and define the elements in contention. Following these steps is critical to formulating legal rules and is discussed in "Introduction to Legal Analysis." To define the elements in contention, you should search for court opinions, legislative history and definitional legislation. Each pertinent court opinion should be briefed — its key elements identified — and compared to the client's case.

If legislation does not govern your problem, then using appropriate research strategies, you should read and brief all pertinent cases, comparing them to your client's case. Analysis of court opinions is discussed in "Introduction to Legal Analysis," *infra*.

In some cases you must go beyond merely identifying relevant law and formulating legal rules through identifying and defining the key elements of legislation and case law. You also must identify trends in the law's interpretation and application; *e.g.*, by tracing and discussing the legislative history or prior versions of legislation or by identifying and synthesizing a rule's development in a line of cases. We briefly discuss these skills in the next section, but do not deal with them in depth.

Research often reveals fact gaps — information you need to analyze the

problem completely. To close fact gaps, you need to **GATHER FACTS** or do further discovery, which sometimes simply means asking your client for information. Other situations require initiating formal discovery, which usually is available if a lawsuit has been filed and in some administrative agency hearing processes. Additional facts may change or modify an initial analysis. The facts and the dispute must be re-analyzed in light of new information.

Once you have analyzed a problem's facts and law, identified the legal issues, and closed as many fact gaps as possible, you must **FORMULATE, EVALUATE and SELECT LEGAL THEORIES** of the case. A *legal theory* may be defined as how you conceptualize the relationship between law and facts that entitle the client to relief.

For example:

- The theory of a tenant seeking to defend against an eviction action may be that the landlord has failed to supply hot water to the tenant's home for the past six months;
- The theory of a mother asking for custody of her children may be that she has been their primary caretaker for the past five years and the father has never visited the children;
- A TANF recipient's theory for remaining eligible for benefits is that the children's father suffers from a severe disability.

Legal arguments support and justify legal theories. Formulating legal theories means identifying and organizing arguments and counter-arguments in terms of claims, defenses and other legal results. It means including the theories and arguments

that the opposing party will make.

Once you've identified your legal theories and those of the other side, you must evaluate them. Evaluating legal theories involves predicting how the decisionmaker will decide the case. The evaluation must consider the decisionmaker's predisposition toward your legal theories and supporting arguments and those of your opponent.

This predisposition may be indicated, for example, by patterns of previous decisions, reasons given for previous decisions, or the decisionmaker's particular characteristics. The evaluation should also examine any legal or factual equities that compel a particular result in a case. The law, for example, may be so clear that any other legal theory is unacceptable or the facts may be so strong that any other result would be blatantly unfair.

Theory evaluation ends the diagnostic phase of legal problem solving. Legal theories, supporting legal arguments and counter arguments, and their evaluation are sometimes expressed formally in an internal or inter-office memorandum.

Most public interest advocates do not have the luxury of writing formal memos. *Minimum standards of competence dictate that you include a written diagnosis of the client's problem in the case file in some form of an opening memorandum.* At minimum the opening case memo should include all possible legal theories, supporting legal arguments and counter arguments and their evaluation. Although the writing need not be the quality of a memoranda submitted to a court or administrative body, it should be writ-



ten so that someone else can understand it.

FORMULATE, EVALUATE, SELECT and IMPLEMENT STRATEGIES means that once a problem has been diagnosed, you must develop and evaluate alternative solutions and strategies, selecting and implementing those that best advance some or all of the client's objectives. Strategies include adjudicating the matter before a court or administrative law judge, negotiating a settlement or using other forms of dispute resolution. Strategy implementation may involve writing, drafting, negotiation, and other advocacy skills. Advocacy memoranda—hearing, trial, or other appellate briefs, memoranda of law that accompany motions or orders to show cause—contain the legal theories and arguments that support the client's position, omitting the objective evaluation found in internal memoranda.

USING THE MODEL

As you begin to master the legal analysis process, you'll understand that this linear model cannot represent the exact way that legal problems are solved. Legal problems are not solved by mechanically following a rote process, completing one step in its entirety before starting another. At all of its stages, legal problem solving incorporates the results of continuous unfolding; like standing on a hilltop before dawn and watching the scene below become clearer and clearer as the sun rises.

This model is meant to guide you in your first efforts at legal analysis by making you conscious of the tasks and skills involved in legal analysis in the context of solving a client's problems. Refer to it whenever the trees become so dense that you need a sense of the "forest" of legal analysis.



LEGAL PROBLEM SOLVING PROCESS

GATHER FACTS

Five Ws
Client objectives and priorities

ANALYZE FACTS

Legally significant facts
Identify issues/key words to enter research materials

ANALYZE DISPUTE

Factual? Definitional? Consistent?

Using research strategies

SEARCH/ANALYZE LAW

Go first to

If no legislation, go to

Legislation

Case Law

Identify elements
Identify issues
Frame issues
Define elements

Brief
Compare to client's case
Identify trends in application/
interpretation

To close fact gaps

To close fact gaps

GATHER FACTS

Interviews
Documents
Site Investigation
Formal Discovery

Once fact gaps closed

FORMULATE/EVALUATE/SELECT LEGAL THEORIES

Relationship between facts and law
Supporting legal arguments
Assess re decisionmaker's predisposition/equities

WRITE

Internal/Opening Memo

FORMULATE/EVALUATE/SELECT/IMPLEMENT STRATEGIES

WRITE
Pleadings/Motions/Trial/Hearing Briefs
Business Plan/Business Documents

Illustration 5 - 1

LEGAL ANALYSIS: COMBINING LAW AND FACTS

Mastering legal analysis is like riding a bicycle — once you’ve mastered the basics, you never forget how. And the more conscious you are of the processes involved, the quicker you’ll become better at doing it.

This section describes legal analysis as you do it in your work, for example when you use your knowledge of the law to get the relevant facts. We also look at it from a decision-maker’s perspective.

Judges do legal analysis when they decide cases — they determine the law that governs a case, decide what the law means and apply the law to the facts as they find them to be. Finally, we describe the difference between factual, definitional and consistency disputes. Deciding whether a dispute is factual, definitional or one of consistency helps focus your legal analysis. Should you focus on arguing what the law means or whether it’s inconsistent with other laws? Or should you concentrate on gathering persuasive proof to prove your client’s version of the facts?

Study Questions

These study questions highlight the key concepts in this section and serve as an organizer for your notes as you read it.

1. Define legal analysis.
2. Describe the relationship between the law of a case and the facts of a case.
3. Define findings of fact and conclusions of law.

4. Describe what decision-makers do when they decide a case.

5. Define and distinguish factual, definitional and consistency disputes.

LEGAL ANALYSIS AT WORK

Legal analysis involves selecting legal rules and applying them to facts. Facts are information describing persons, things or events. Legal rules, enforceable governmental standards of conduct, consist of *legislation* — constitutions, treaties, statutes, executive orders, administrative agency regulations, charters, ordinances and court rules — and *case law* — judicial and administrative agency opinions.

Legal analysis concerns what legal rules govern a specific factual situation and how the rules apply to these facts. “Determining what law governs the facts” means sifting through the law and selecting the rules that apply to the facts. “Applying the law to the facts” means taking the rules that govern a particular fact situation and determining how they operate on the facts. The application process is somewhat like placing a stencil — legal rules — over a pattern — facts — to determine if the pattern fits the stencil. If the pattern fits, then the rule applies and the consequences of the rule pertain.

We don’t believe — as some schools of thought hold — that legal analysis is a neutral, objective or scientific process that always leads to identical results when applied to identical key facts. Social, economic, and political considerations do influence courts in how they apply legal rules to facts. We’re using the stencil analogy here to help make an abstract process concrete.

For example, suppose that your client, Florence, says she wants to stop her next door neighbor, Pat, from

spitting on her pet rabbit, Bonzo, which is confined in Florence’s backyard. You look up “spit” in the index of your state annotated code and find two statutes. One “prohibits any person from spitting in a public place” and the other provides that “any person who spits on the chattel of another is liable to the owner for \$100.”

To determine what legal rules govern a situation, you break down legislation into *elements* — conditions that must be met if the rule is to apply. You then compare the elements with your fact situation to see if the rule might apply.

You identify the elements in the first statute as “person,” “spit,” and “public place.” You decide it does not apply because neither the rabbit nor Pat was in a public place when the spitting occurred. You identify the elements in the second situation as “person,” “spit,” and “chattel of another”. You locate a statute that defines a chattel as “any personal property” and a court opinion that holds that a rabbit is considered personal property. You decide that this statute governs your case.

Applying the law to the facts, you decide that Pat is liable to Florence for \$100. If Pat can defeat *any* of these elements, *i.e.*, she’s not a person (she’s a robot), she didn’t spit (she sneezed), Bonzo is not a rabbit (he’s a high public official), Bonzo does not belong to Florence (he’s government property), then the law would not apply. And Pat would not suffer the consequences of the rule’s applicability; *i.e.*, she would not be liable to Florence for \$100.

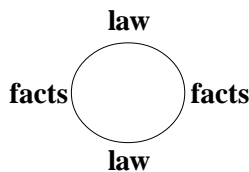
The Interdependent Relationship of the Law and the Facts

To analyze a legal problem, you must know the legally significant facts and the law that governs the problem. A case’s facts and law are inextric-

cably intertwined; you need the facts to find the applicable law; you need the law to determine which facts are legally significant.

Analyzing a legal problem usually begins by gathering some facts, most likely in a client interview. Knowledge of the law that governs the problem makes this process more efficient and effective; the more law you know, the more legally significant facts you'll get. Researching the law usually reveals the need to gather more facts, because certain facts do not become significant until the law that governs the problem is analyzed. Armed with additional information, you return to the law that sometimes reveals even more facts that must be investigated.

The interdependent and circular relationship between the law and facts involves continual sifting and comparing until the relevant law and the significant facts emerge. This relationship can be illustrated as a continuous circle:



Another example: Suppose your client, Jerry, wants to know if he is entitled to "NRFA" benefits. He says that he's heard that all retired farmers are entitled to these benefits. You go to the index in your state annotated code and look under "farmers" and "retirement benefits." Luckily, you find a statute entitled "National Retired Farmer's Act" that says, "All farmers who are retired from full-time farming and are over the age of 65 are entitled to benefits if their lifetime income is under \$1,000,000." You find a court opinion that holds that "full time farming" means that a person must work at least thirty years as a

farmer.

You return to Jerry with questions about his age, income and amount of time as a *farmer. He says he's worked 29 years as a farmer, although Selma, his 65-year-old wife, has farmed for 37 years, earning \$800,000 in her lifetime. Returning to the law, you find a court opinion that says "farmer" means male head of household or female who has worked at least 20 years growing peas, tomatoes, and corn. You find another court opinion that holds that "lifetime earnings" means earnings from farming only.

Note how in this example, knowledge of the law directs and focuses fact investigation. Whether you are responsible for conducting an entire case or only for its fact investigation, you must be familiar with the law that governs it. If you were familiar with NRFA benefits in Jerry's case, you would have gotten more pertinent information at Jerry's initial interview, whether the case was yours or you were gathering facts for someone else.

FACTS, FACTS, FACTS: IT'S THE FACTS

In our legal system facts are supreme. Our job as advocates is to determine how the legal system will deal with the facts our clients bring us.

Knowing the facts directs and focuses legal research. To find the law, you must know the facts. *Rules of law are meaningless outside the factual context to which they are applied.* To solve a legal problem, you must know the facts that give rise to it. To resolve disputes, decision-makers require complete factual presentations. An ALJ deciding Jerry's and Selma's case for example, would want to know how the law affects their unique facts; the judge would not be interested in a comprehensive essay on all NRFA

benefit law.

Inexperienced advocates, especially lawyers, tend to place more importance on finding the law than investigating the facts, in large part because fact investigation is given short shrift in law school. Law students read appellate court opinions that focus on interpreting and applying the law where the facts are "settled," *i.e.*, not subject to dispute. In research projects and examinations, facts are given and not subject to controversy and investigation as in real life.

On the other hand, most inexperienced paralegals tend to ignore the law, particularly court opinions applicable to the case. This tendency is probably due to lack of training in finding and analyzing the law and the myth that analyzing the law is solely within the province of lawyers.

Experienced advocates have complete command of the facts and law of a case. They understand that this mastery is critical to identifying facts that must be proved and predicting how the law will be applied to a case's factual findings — essential legal problem solving skills.

THE DECISIONMAKER'S ROLE: DECIDING FACTS AND LAW

A legal dispute is a controversy over the *facts* — what happened, who said or did what — and the *law* that applies to the facts — what law applies, its meaning and how it applies. A legal dispute occurs between two or more parties that may or may not be brought for resolution to an adjudicatory body such as a court or administrative hearing. The role of the official decisionmaker is to resolve disputes; their resolution ends in a decision or judgment.

In most disputes, parties do not disagree on all of the facts and law of the dispute; commonly, they find

several areas of agreement. Most adjudication systems focus on the facts and law “at issue;” *i.e.*, over which the parties disagree. Judges reach decisions by determining the facts at issue and deciding what law governs and how the law applies to those facts. Decisions about the facts are called *findings of fact*; decisions about the law are called *conclusions of law*.

As triers of fact, a role played by a jury when one is impaneled, judges make findings of fact based on the evidence presented to them. If no evidence such as testimony, documents, or objects is presented to prove the facts in question, then the trier of fact can make no finding that the fact exists.

In determining questions of law, judges consider and often rely on parties’ legal arguments, presented orally—closing or oral argument—or in writing—advocacy memos. Each party’s legal argument describes its best legal theories supported by authority, *i.e.*, what law governs the case, the law’s meaning and how it applies to the dispute’s facts. Theoretically, judges are not confined to the legal arguments that parties present, but must decide the law “correctly” regardless of any argument presented to them. In practice, many judges do not look beyond the parties’ arguments. Therefore, in all cases each party always must present its best possible legal arguments to persuade the decisionmaker to decide the case in the client’s favor.

Basically, decisionmakers resolve disputes by finding the facts, deciding what law applies to the dispute, interpreting that law, and applying the law as interpreted to their factual finding to reach conclusions of law. These conclusions form the

basis for the decision in the case. *This process is diagramed in Decisionmakers’ Tasks in Resolving Disputes in Illustration 5 - 2.*

As an example: suppose Wendy and Henry seek a divorce. The only issue is the child support amount Henry must pay for the support of his daughter, Debbie. The pertinent law is Rev. Stat. Section 222 that provides:

“To determine the amount of child support, the court must consider each party’s earning capacity, needs, obligations and assets and then apply the payment schedule which appears in its local court rules.”

The parties agree on Henry’s earning capacity and obligations. They disagree over the amount of his assets—whether he owns Purpleacre, a parcel of land valued at \$30,000, and his needs—whether psychological therapy is a need.

The parties agree that Henry’s monthly income is \$1,200, and that he spends \$500 per month for food and housing. They disagree over whether Henry owns Purpleacre.

Wendy introduces a document that shows that a Jake Moran owns Purpleacre. She also offers a handwriting expert who testifies that Henry signed the deed as Jake Moran. Wendy also introduces Henry’s recent conviction for perjury.

Henry testifies that he did not sign the document as Jake Moran. His handwriting expert says the same thing.

The factual question to be resolved is: does Henry own Purpleacre? The judge considers and weighs the evidence and decides that Wendy’s evidence is more persuasive than

Henry’s. The Judge makes the finding of fact that Henry owns Purpleacre.

The Judge now must apply the law to the facts. Wendy and Henry agree that Section 222 is the law that governs the case and that “asset” means “thing of value”. Agreeing with their interpretation of the law, the judge applies the law to the facts and concludes that Henry’s assets include a parcel of real property worth \$30,000.

Wendy and Henry agree on the facts that Henry suffers from depression and requires therapy. They disagree over the meaning of “needs.” Henry argues that “needs” include psychological needs, while Wendy argues that “needs” are confined to physical needs such as food, shelter and clothing. Both parties support their legal theories with authority. The legal question is whether Henry’s therapy is a “need” which the court must consider under Section 222.

After considering the arguments, the judge decides that Section 222 governs the case and that “needs” includes psychological needs. Applying this interpretation of the law to the undisputed facts—that Henry suffers from depression and requires therapy—the court concludes that Henry’s therapy is a “need” under Section 222. Taking its conclusion of law—that Purpleacre is Henry’s asset and Henry’s therapy is a need—the court applies the payment schedule and decides that amount of child support Henry must pay.

Note that the parties are not arguing over the facts in the needs issue; they agree that Henry suffers from depression and requires therapy. They disagree over the interpretation of the law; *i.e.*, the meaning of “needs” in Section 222. Contrast this issue with the question about Henry’s ownership of the real

DECISIONMAKERS' TASKS IN RESOLVING DISPUTES

To Resolve Issues
(Areas where parties disagree)

Decide Facts

↓
Consider the evidence
offered to prove facts
at issue

↓
Weigh the evidence

↓
Make findings of fact

Determine Law

↓
Decide what laws
govern the dispute

↓
Interpret the
governing laws

↘ ↙
**APPLY LAWS AS INTERPRETED
TO
FACTUAL FINDINGS**

To reach

↓
CONCLUSIONS OF LAW

To reach

↓
DECISION

Illustration 5 - 2

property. In that issue, the parties disagreed over the facts — whether Henry owned the property; they did not disagree over the meaning of “asset” or whether real property was an asset.

In summary, decisionmakers in legal disputes decide questions of fact and law. Triers of fact make factual findings based on the evidence presented. Based on the parties’ legal arguments and sometimes their own independent research and analysis, judges formulate conclusions of law by deciding what law governs a case, interpreting the law’s meaning, and then applying it to the factual findings.

As an advocate, your job is to

present decisionmakers with the legal analysis that they will adopt. You present the law that should govern the case and demonstrate how it should be interpreted and applied to the facts as you prove them to be.

ANALYZING THE DISPUTE: FACTUAL DEFINITIONAL CONSISTENT

Deciding whether issues in a case are factual, definitional or ones of consistency helps focus legal research and fact investigation.

Factual Disputes

In a factual dispute, the parties agree on the definition of the rule of law or the test used to determine whether the legal rule applies. The dispute is over whether the facts of

the case fit within the definition or test. The Wendy-Henry dispute over Henry’s assets was factual; they disagreed over whether Henry owned the property, not over the definition of “asset.”

For example, Ron and Bill disagree over whether Ron’s pet, Edwin, is a turkey. Both agree that a turkey is a large bird that says “gobble, gobble.” Ron claims that Edwin doesn’t gobble, Bill says he does. The dispute here is not over the definition of turkey, but over whether Edwin fits the definition, *i.e.*, does he gobble?

The welfare department terminates Hilary’s benefits, alleging that she failed to notify it of a change in income. Both agree on the meaning of Reg. Section 111 that provides: “All notices regarding change of income must be written and hand-delivered to a recipient’s eligibility worker.” Hilary says she handed a written notice to Barbara, her eligibility worker. Barbara denies it. The parties agree about what constitutes notice — its definition; they disagree over whether that definition was met in this case; *i.e.*, did Hilary hand a written notice to Barbara?

Definitional Disputes

In definitional disputes, the parties do disagree over the definition of a rule of law or a portion of it. The Wendy-Henry dispute over needs was definitional — Wendy argued that “needs” in Section 222 — the relevant legal rule — meant basic physical needs, while Henry argued that “needs” including psychological needs.

For example, on the issue of whether Edwin is a turkey, assume that Ron and Bill agree on the facts that Edwin is large, gobbles, and has two legs. Ron claims that a turkey is a bird with four legs; therefore,

Edwin is not a turkey. Bill argues that a turkey is a bird with two legs; therefore, Edwin is a turkey. The parties agree on the facts; they disagree on the definition of turkey.

For example, on the issue of whether Hilary notified the welfare department about her change in income, assume that the parties agree that Hilary hand-delivered a typewritten letter to Barbara which described her income change. The welfare department argues Section 111 requires written notice to be hand-written in the recipient's blood. Hilary argues that a typewritten notice constitutes valid notice. This dispute is definitional; the debate centers on the meaning of written notice in Section 111.

Disputes over Consistency

The question in a consistency dispute is whether one rule violates or contradicts another. Two laws of equal with such as two statutes or two regulations may contradict one another. A statute or regulation may be inconsistent with a state or the federal constitution. A regulation may be inconsistent with its enabling legislation. The most common consistency problems involve these latter two situations — laws that conflict with higher laws.

Examples

Section 333 provides that a divorce petition must be filed 25 days after service of the petition. Section 444 provides that a response must be filed 30 days after service of the petition. The consistency question is whether Sections 333 and 444 contradict one another.

Section 666 requires female teachers to take a six-month leave during pregnancy. The Fourteenth Amendment to the United States Constitution and a state constitution guarantee equal protection of the laws. The

question of consistency is whether Section 666 violates or is inconsistent with the Federal or state constitution.

Section 777 of a state legislative code requires county agencies to investigate all allegations of paternity to force fathers to fulfill support obligations. Regulation Section 45.68 of its administrative code provides that mothers who do not cooperate in establishing paternity of their children shall be denied aid. The Fourteenth Amendment of the United States Constitution guarantees due process of law.

The consistency questions are: does Section 777 authorize the agency to condition aid on cooperation in establishing paternity as required by Reg. Section 45.68? Is the regulation consistent with the statute?

If Reg. 45.68 is validly based on Section 777, does the condition violate the constitutional right to due process? Are these laws consistent with the Constitution?

Consistency disputes almost always involve a definitional dispute. Whether a statute violates the constitution, or a regulation goes beyond what its enabling statute authorizes, depends on its meaning. Consistency disputes, therefore, are treated as definitional disputes as discussed above.

A case may involve all three types of disputes, although usually a dispute is primarily of one kind or the other. The parties might disagree about the facts in one issue, over the definition of the law in another, and whether rules are consistent in still another.

The Wendy-Henry dispute involved a factual dispute over assets and a definitional dispute over the meaning of needs. Hilary's dispute with the welfare department easily could

involve a consistency dispute. She could argue that the regulation, interpreted to require a notice written in the recipient's blood, violates both its enabling statute and constitutional due process guarantees.

Analyzing a case in terms of the types of disputes involved helps direct case strategy. If a dispute is primarily factual — a “fact” case, efforts should be focused on gathering the most persuasive evidence available to prove the facts at issue. Case strategy might entail doing everything possible to win at the hearing or trial level, since winning a “fact” case on appeal is difficult. If a dispute is primarily definitional or over consistency — a “law” case, efforts should be focused on developing legal arguments. Case strategy might constitute making a record for appeal, if the chances for winning at the lower level are remote. Similarly, the nature of a dispute can affect a negotiation strategy.

Emphasizing the facts or law aspect of a case, does not mean ignoring the law in a fact case or the facts in a law case. Remember the interdependent relationship between the two as discussed earlier in this chapter. Presenting the facts persuasively in a law case makes explicit the relevance of the facts.

Finally, analyzing a dispute in this fashion might lead to developing an effective legal theory that otherwise might have been missed. Some people, for example, view the law as unchallengeable; *i.e.*, the law is as written and ever shall be. As a result, regulations that may be inconsistent with their enabling statutes or laws that may be unconstitutional, are not challenged in appropriate cases. If each case is analyzed as to whether it involves factual, definitional or consistency disputes, the possibility of missing a good legal

theory is minimized.

In summary, every legal dispute should be analyzed to determine if it is primarily factual, definitional, or one of consistency. This analysis focuses legal research and issue formulation at the diagnostic stage of legal problem solving and provides helpful information in planning and implementing problem-solving strategies.

Summary

This chapter presented a broad overview of legal analysis and how it operates in resolving disputes. Basically, legal analysis is combining the law that governs a legal problem with its facts; it involves selecting legal rules and applying them to facts. We emphasized the interdependence of the law and facts, showing that mastery of both is critical in analyzing a case. We outlined how decisionmakers, by deciding factual and legal questions, resolve disputes. We discussed how to analyze whether a dispute primarily involves factual or legal issues and the benefits of such an analysis.



ASSIGNMENT

1. True/False

Since judges must determine what law governs a case and how it applies to a dispute's facts, advocates need not present arguments on the law.

2. True/False

In administrative hearings, judges make findings of fact based on testimony, documents and objects presented on the hearing record.

3. State whether the statements below are findings of fact or conclusions of law.

a. The claimant left employment for good cause.

b. The claimant moved her residence 250 miles.

c. The claimant hit another worker with a bottle.

d. The claimant did not read the notice.

e. The claimant is disabled.

f. When the claimant moves his right foot, he experiences pain.

4. State whether the disputes described below are factual, definitional or ones over consistency.

a. Mary, a recipient of public benefits, receives \$1,000. She argues that according to the agency's regulations, Section 100, is a resource.

The welfare department says that per Section 100, the sum is income.

b. Mary argues that she received \$1,000. The welfare department alleges that she received \$1,500.

c. Mary argues that section 100 contravenes Section 560.9 of the state welfare code which states that her sum is a resource. The welfare department says that Section 560.9 has nothing to do with recipients.

d. Mary owns a bicycle with a motor attached to it. The welfare department argues that per Section 209, the bike is a vehicle. Mary argues that it is not a vehicle within the meaning of that section.

e. Mary owns an automobile. She says it is worth \$200. The welfare department says that it is worth \$1,000.



LEGAL RESEARCH: FINDING THE LAW THAT GOVERNS THE PROBLEM

Analyzing the law requires research skills. To analyze a problem, you must know the law that governs it. Except in the simplest cases, no one is familiar with all the law. Therefore, knowing the law is tantamount to an ability to find it.

This section is designed to help you research and analyze the law by making explicit the relationship between legal research and legal analysis skills and by providing information about the law and the institutions that create it.

This section also describes the relationship between enacted law or legislation and court opinions. Understanding this relationship and how courts deal with enacted law in their opinions is critical to being able to analyze a client's problems and write objective and persuasive memoranda.

Study Questions

1. Define and give examples of legislation and case law.
2. Define constitutions, statutes, regulations, court opinions and administrative agency opinions.
3. Describe the information reported in a court opinion.
4. Define legislative history and describe why it is important in interpreting statutes.
5. In what books are federal statutes found?
6. Define subject matter jurisdiction, original and appellate jurisdiction.

7. How many federal district courts are in your state? What federal circuit is your state in?

8. In what reporters are these federal courts opinions found:

- District Courts
- Court of Appeals
- Supreme Court

9. What is a *petition for a writ of certiorari*?

10. What West regional reporter governs your state?

11. Does your state have an intermediate court of appeal?

12. Define the following:

Precedent

Stare decisis

Case of first impression

On point decision

13. Under what circumstances do courts create law.

14. Describe how courts interpret enacted law.

15. Describe two rules of statutory construction that courts use in interpreting enacted law.

16. Define judicial review.

17. Describe these administrative agency functions:

Executive

Legislative

Adjudicative

18. Where do you find federal regulations and where are they updated?

19. Define primary and secondary authority.

20. Describe the relationship between case law and legislation.

Discovering Ambiguities Legal research is searching for the law to solve legal problems. Legal research is not about finding answers; the “correct” law that governs a client’s problem does not pop up like toast from a toaster. *Legal research concerns discovering ambiguities that can be clarified and manipulated to formulate legal theories and arguments that further client objectives.*

Legal research skills come into play repeatedly during the course of legal problem solving. During the diagnostic stage, for example, you do legal research to find the law to formulate legal theories and arguments. You might also research points of procedure — how to subpoena witnesses to a hearing, what evidence is admissible — while formulating or implementing your case strategy.

Researching the law requires analytical skills. Finding the law that governs a problem’s facts requires selecting the applicable law from laws that do not apply. Making this selection requires the analytical skills of identifying and defining the elements of each law examined and applying the elements the facts. If the elements of the law might possibly govern the problem, the law is subjected to further analysis.

For example, in our earlier hypothetical involving Pat spitting on Florence’s pet rabbit, Bonzo, we found two statutes that might have applied to the problem. To determine whether one or both laws governed the problem, we identified and defined their elements. We then eliminated the statute that prohibited any person from spitting in a “public

place” because we were reasonably sure that neither Pat nor Florence would claim that the spitting occurred there. However, if the spitting *might* have occurred in a public place, we would have analyzed that statute in more depth.

Researching a legal problem requires more than the ability to use the resource materials that contain, collate, describe, explain and update the law, the emphasis of traditional legal research courses. Besides analytical skills, researchers must understand some essential characteristics of law — the object of their research. Researchers must also develop research strategies to find the appropriate law efficiently and effectively.

This section generally discusses the creation of law, its forms and their relationship, its operation as authority, and various strategies for researching the law. It does not explore the resource materials that contain, collate, describe, explain and update the law except in passing. Many books do describe these materials and their use.

Forms Of American Law

The two forms of American law are *legislation* — constitutions, treaties, executive orders, statutes, regulations, charters, ordinances and court rules — and *case law* — opinions or decisions of courts or administrative agencies.

Like most English-speaking countries, the United States is considered a “common law” jurisdiction, because American law is based on the common law system of England. Except Louisiana, whose laws are based on the Civil Law System, each state has incorporated English common law into its own body of law by statute. As a result, old English cases still are good law, unless their rules have been changed or abrogated by legislation.

AMERICAN LAW

Constitutions	The fundamental law which creates the government framework, <i>e.g.</i> , three branches — Executive, Legislative, Judicial — and identifies basic governmental obligations and citizens’ rights and liberties. Provides the standards against which all laws are measured.
Treaties	Agreements between two or more sovereign countries, including Indian treaties. The exclusive prerogative of the federal government, the President has the sole power to initiate and make treaties that the Senate must approve.
Executive Orders	Laws issued by the Chief Executive to direct and govern the activities of government officials and agencies.
Statutes	Laws or acts passed by a legislature which prescribe conduct, define crimes, create inferior governmental bodies and appropriate public monies.
Regulations/ Rules	Laws promulgated by administrative agencies which implement or explain the statutes or executive orders that govern the agency.
Charters	The fundamental law of a local governmental unit which authorizes it to perform governmental functions, a local government’s “constitution.”
Ordinances	Laws passed by the legislative branch of a local government, ordinances regulate matters of local concern, <i>e.g.</i> , zoning, parking, refuse disposal and crimes such as loitering.
Court Rules	Laws governing court operations and practice before a particular court, <i>e.g.</i> , timing, filing and form of court papers and pre-trial procedures. Promulgated by courts, court rules are usually subservient to statutes governing procedure.
Opinions/Cases	A court’s explanation of why it reached its decision.
Administrative Decisions	Agency’s resolution of specific controversies by applying regulations, statutes, or executive orders.

Illustration 5-3

As first developed, case law was the common law system's only form of law. Statutes were enacted later, but played an insignificant role in the English and early American legal systems. In the process of settling disputes at common law, the courts made rules that were followed by courts deciding later disputes with similar facts. As is done to this day, Judges wrote opinions, official case statements, which reported:

1. *facts* necessary to understand the dispute and which influenced the court's decision;
2. *issues* or questions that were resolved;
3. *past cases or precedents* that the court examined and found to control the dispute;
4. court's *reasoning* or explanation of how it reached its decision; and
5. *disposition* or result reached in the case. In order to find the law that governed a dispute, lawyers and judges had to extract the rules of law from those cases with similar facts.

Codification of Laws

In mid-nineteenth century, American statutory law began to grow. This legislative explosion reflected the need for a comprehensive set of laws, responsive to a changing, industrial society. The proliferation of statutes resulted in the "*codification*" of the laws, which involved organizing and enacting statutes and common law into codes. Codification of statutes involved organizing existing statutes into codes by subject matter, e.g., all laws dealing with crimes were put into a Criminal Code.

Codification of the common law involved enacting large bodies of the common law —rules extracted from cases — into statutes. This

process eventually resulted in a set of codes, arranged by subject matter, which contained acts passed by the legislature and common law rules first developed in case law by the courts.

All common law has not been codified. Rules developed at common law that have not been enacted into or abrogated by legislation still are good law. In areas where no legislation exists, courts continue to make law in the process of deciding disputes. Courts are also responsible for interpreting legislation and determining whether it conforms to the Federal and state constitutions.

LEGISLATIVE SYSTEMS

Legislatures are branches of the federal, state and local governments which are responsible for enacting legislation. Congress and all state legislatures but Nebraska, have two chambers, called the Senate and House of Representatives in Congress and in most states. Locally, legislative bodies consist of one chamber and have various titles, e.g., boards of supervisors, aldermen/women or city councils.

Legislative Process

Making legislation is similar at all levels of government. Most laws begin as bills which members of a legislature introduce into a chamber. The few bills that become law must survive a torturous process through various committees and subcommittees where they are amended several times. Consequently, the law as enacted is rarely a replica of the bill as introduced. *See "How Bills Become Law" Illustration 5-4 for an example of the legislative process.*

Each law has a *legislative history*, a record of all the events that take place before the bill became law. In the federal system, the legislative history of "important laws" —laws

that are new or controversial, would be costly to implement, or affect great numbers of people — usually have an exhaustive legislative history, because these bills are subjected to extensive hearings, committee reports and debate on the congressional floor. Legislative histories of state laws are far less complete and in many instances are not recorded at all. Legislative histories of local legislation are almost non-existent.

Legislative history may become important when a law's meaning is at issue. The key to a law's meaning depends on *legislative intent*, i.e., what the legislature intended to accomplish by enacting the law. Courts sometimes examine legislative history to determine a law's legislative intent. For example, a court might examine the changes made in the bill's language before it became law or any testimony given in committees that discussed the bill as evidence of what the legislature intended the law to mean.

In a definitional or consistency dispute, advocates should analyze a law's legislative history, especially when no cases exist which interpret the law in a manner favorable to the client. Where possible, advocates should include statements in the legislative history of laws that affect clients, to facilitate later favorable court interpretations of these laws.



Primary Sources of Legislation

Most federal and state statutes are collected in books called codes, laws or revised statutes. Each set is generally organized according to subject matter, *e.g.*, crimes, education, public health and welfare. Researchers almost always use annotated codes that contain the law and information pertaining to each statute in the form of “annotations.” The annotations include notes about the statute’s research guides, and summaries of case decisions that have interpreted the statute. Each annotated set of statutes also includes the applicable constitution.

Federal statutes are contained in the *United States Code Annotated* (U.S.C.A.) and the *United States Code Service Lawyer’s Edition* (U.S.C.S.). Each State has its own set of annotated statutes, *e.g.*, *California Annotated Codes*, *Michigan Compiled Laws Annotated*, *Oklahoma Statutes Annotated*, and *Revised Code Washington Annotated*.

Local government laws are called ordinances. Since local government takes many different forms, researching ordinances may be difficult. Generally speaking, ordinances are often divided into local codes, *i.e.*, building code or traffic code and can be found in the offices of the agency to which they pertain. Particularly in larger cities or counties, ordinances are sometimes collated, indexed and found in law libraries and the county or city clerks office.



JUDICIAL SYSTEMS

The judiciary is the governmental branch that decides disputes. In the process of deciding disputes, courts create, interpret, and apply the law.

Fifty-one court systems exist in the United States: one system for each state and federal court system. Each system is self-contained, except when highest state decisions are reviewed by the United States Supreme Court. Laws within each system define their courts’ subject matter jurisdiction and their structure.

Subject Matter Jurisdiction

The power of each court to hear and decide cases is called a court’s subject matter jurisdiction. Legislatures enact laws that define the types of cases that its courts may decide. “Type” of case usually refers to the dispute’s subject, *e.g.*, civil, criminal or family, monetary amount involved, or stage of the dispute, *e.g.*, appeal or trial.

The first question a court must decide is whether it has subject matter jurisdiction over a case, *i.e.*, is the dispute the type of case that it may decide? If a court lacks subject matter jurisdiction over a dispute, then it must dismiss the case without deciding on its merits. A judgment rendered by a court which lacks subject matter jurisdiction is void, *i.e.*, has no effect.

Subject matter jurisdiction is classified as exclusive, limited, general, original, appellate and concurrent.

Exclusive jurisdiction: A court with exclusive jurisdiction is the only court that may decide the matter, *e.g.*, federal courts have exclusive jurisdiction over appeals from SSI disability cases. Such an appeal filed in a state court would be dismissed for lack of subject matter jurisdiction.

Limited or special jurisdiction:

A court of limited jurisdiction may only decide cases that deal with subject matter specifically defined by law, *e.g.*, some state courts are limited to hearing only family cases. All federal courts are courts of limited jurisdiction; if federal law does not specify that a federal court may decide a type of case, then it has no subject matter jurisdiction over the case.

General jurisdiction: A court of general jurisdiction may decide all cases that are not within the exclusive jurisdiction of another court; *i.e.*, if no law gives jurisdiction to another court, then a court of general jurisdiction has the power to hear the dispute. State courts of general jurisdiction may decide all cases that arise in the state, except those cases within the exclusive jurisdiction of another court.

Concurrent jurisdiction: When two courts both may hear the same type of case, their jurisdiction is concurrent, *e.g.*, the federal and state courts have concurrent jurisdiction over cases involving interpretation of the federal constitution.

Original jurisdiction: The court of original jurisdiction is the first court where a legal dispute is taken. It hears the evidence and legal arguments, makes findings of fact and conclusions of law upon which it bases its decision. A court of original jurisdiction is usually called the *trial court* or *court of first instance*.

Appellate jurisdiction: Courts with appellate jurisdiction hear appeals of disputes from lower tribunals. Usually these courts do not take evidence, but decide on the “record” — the evidence introduced in the court of original jurisdiction—whether any errors of law were made below.

Courts may have several types of subject matter jurisdiction. Courts of general and limited jurisdiction may have *original jurisdiction* — be the first place a case is heard— *appellate jurisdiction* —hear appeals from disputes, exclusive jurisdiction — be the only place a case may be heard — and concurrent jurisdiction — share power to hear disputes with other courts. Only courts of limited and general subject matter jurisdiction are mutually exclusive, because they are opposites. A court of *general jurisdiction* — a court which may hear all cases unless power is granted to another court — cannot be a court of *limited jurisdiction* —a court that may hear only what the law specifically says it may hear.

Court Structure

The federal and state systems contain two basic types of courts: trial courts and appellate courts. Trial courts have original jurisdiction in most disputes, *i.e.*, they are the first place disputes are taken. Trial courts hear evidence to determine a dispute's facts and interpret and apply the law to its findings of fact to reach a decision.

The party who loses in a trial court usually has the right of appeal to an appellate court. Appellate courts determine whether the trial court committed errors of law, *i.e.*, applied the wrong law or incorrectly applied the law to the facts. These courts do not receive evidence to make factual determinations, but rely on the facts as determined by the trial court.

Some systems have two types of appellate courts: intermediate appellate courts and final courts of appeal or courts of last resort. In a system with an intermediate appellate court, a party who loses in the trial court has a right to appeal the case to an intermediate appellate

court. This appeal is called an “*appeal of right*,” which means that the court must hear the appeal. If a party loses in the intermediate appellate court, it may seek review in the court of last resort. In a system with no intermediate appellate court, a losing party must appeal to the court of last resort.

In most cases, courts of last resort's review of lower courts' decisions is discretionary. The court chooses to hear only cases with important legal issues or where lower courts' rulings conflict with one another. A party who appeals a case to a court of last resort must convince the court that the case falls within these categories. In a system with no intermediate appellate court, parties have no appeal of right; they must petition the appellate court to exercise its discretion to hear the case.

Federal Courts

As the trial court, the federal district court is the court of original jurisdiction of most cases filed in the federal system. The United States is divided into about 98 districts with at least one in each state, the District of Columbia, the Virgin Islands, Puerto Rico and Guam. Some states have more than one district, *e.g.*, California and Texas have four districts. No district court has jurisdiction over an area that covers more than one state.

Federal law defines the cases that a federal district court may hear; if no statute directs that the court may hear a matter, the court has no subject matter jurisdiction to decide the dispute. Because the district court is a court of limited jurisdiction, all initial pleadings filed in federal court must specify the law that confers subject matter jurisdiction on the court.

Generally, federal district courts have original subject matter jurisdic-

tion over cases that involve the interpretation and application of federal law and where the constitutionality of state or federal laws is questioned. Several specialized federal courts exercise original jurisdiction over particular types of cases: the Tax Court, Claims Court, and the Court of International Trade. The trial court exercises appellate jurisdiction over appeals of federal administrative agency decisions like the Social Security Administration's decisions on SSI eligibility.

Federal district court opinions are reported in the *Federal Supplement* (F. Supp.) or *Federal Rules Decisions* (F.R.D.). Most district court opinions are not reported; opinions are issued when a court decides significant issues of law as designated by federal court rules. Unreported opinions usually may be obtained from the court which issued the opinion.

The federal intermediate court of appeals is the United States Court of Appeals, sometimes called “Circuit Courts”. There are thirteen circuits, eleven of which consist of states and territories grouped geographically, the twelfth for the District of Columbia — “the D.C. Circuit” and the Federal Circuit for patent and customs cases. Each Court of Appeals hears appeals from the district courts within its circuit.

The Court of Appeals only reviews errors of law; it does not hear evidence, but limits its review to the district court record. Certain federal agencies may appeal to the Court of Appeals directly without going to district court. The Court of Appeals for the Federal Circuit was established in 1982 to review decisions of the Claims Court and the Court of International Trade.

The opinions of the courts of appeals are found in the *Federal Reporter* (F) *Federal Reporter, Second Series* (F.2d). The Federal Reporter also reports opinions of the Court of Claims and the Court of Customs and Patent Appeals.

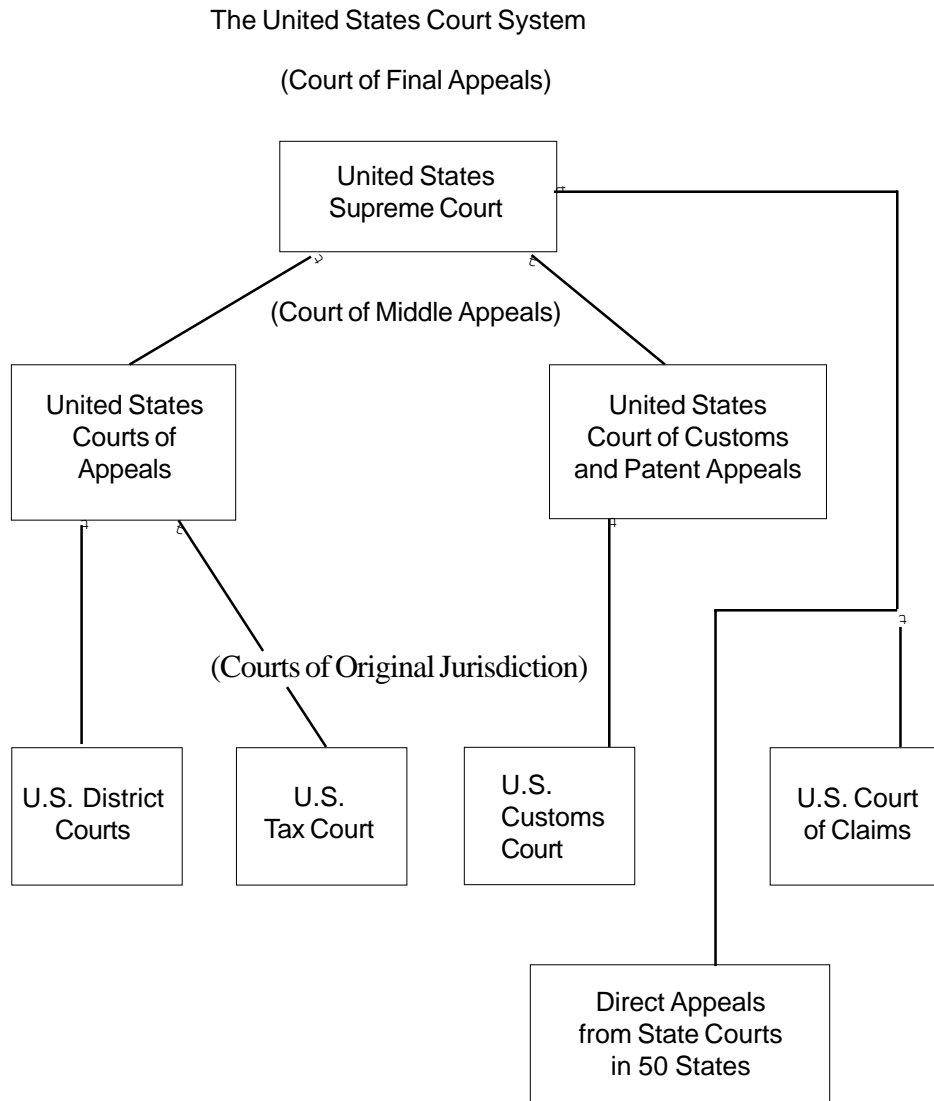
The Court of last resort which is the final review of all federal courts and agencies is the U.S. Supreme Court. The Court may review state court decisions only when these cases raise questions involving the U.S. Constitution or other federal law. Court review is discretionary and is granted only on rare occasions. Parties must file a *petition for a writ of certiorari* (*cert.*) which contains their arguments about why the Court should hear their case. Only if the Court grants the petition for certiorari, will the case be heard on its merits.

The Court is a court of original jurisdiction in a few matters such as cases involving disputes between two states. Moreover, the Court will review a decision directly from a District Court in certain instances, *e.g.*, when a District Court rules a federal law unconstitutional.

United States Supreme Court opinions appear in three separate reporters: *United States Reports* (U.S.), *Supreme Court Reporter* (S.Ct.), and *United States Supreme Court Reports, Lawyer's Edition* (L.Ed). Like most court opinions, they are arranged roughly in chronological order.



LINES OF APPEAL IN THE FEDERAL COURT SYSTEM



The chart on the following page illustrates the division of the federal court system into eleven geographic circuits (each with its own United States Court of Appeals), and its further subdivision into ninety-four geographic districts (each with its own United States District Court). Note that each district falls within one of the eleven circuits. (In addition to these eleven circuits, the District of Columbia has its own circuit.) Appeals from a District Court go to the Court of Appeals for the geographic circuit in which that District Court is located.

Circuits of the U.S. Court of Appeals

1st Circuit

Maine New Hampshire Rhode Island
Massachusetts Puerto Rico

2nd Circuit

Connecticut New York Vermont

3rd Circuit

Delaware Pennsylvania Virgin Islands
New Jersey

4th Circuit

Maryland South Carolina West Virginia
North Carolina Virginia

5th Circuit

Canal Zone Mississippi Texas Louisiana

6th Circuit

Kentucky Ohio Tennessee
Michigan

7th Circuit

Illinois Indiana Wisconsin

8th Circuit

Arkansas Missouri North Dakota Iowa
Nebraska South Dakota Minnesota

9th Circuit

Alaska Hawaii Nevada
Arizona Idaho Oregon
California Montana Washington
Guam

10th Circuit

Colorado New Mexico Utah
Kansas Oklahoma Wyoming

11th Circuit

Alabama Florida Georgia

District of Columbia Circuit

Federal Circuit

Illustration 5 - 6

State Courts

Although state trial court structures vary, a common arrangement is a two-tier system of trial courts. At the first level are courts with limited subject matter jurisdiction. These courts usually hear cases involving small claims, divorce or small sums of money. Local courts such as Justice of the Peace and Police Courts often fall into this category.

At the second level are courts of general jurisdiction which handle cases involving large sums of money or serious violations of state law. These courts may be called Superior Courts, Courts of Common Pleas, District Courts or Circuit Courts. In some instances, the two levels may be divided into departments or divisions, *e.g.*, a common arrangement in a large court is to have separate departments or divisions for civil and criminal matters. Many state courts of general jurisdiction exercise appellate jurisdiction over appeals from their courts of limited jurisdiction and state administrative agency decisions.

Each state has a final court of appeal usually called the Supreme Court. About half the states have intermediate courts of appeal called Courts of Appeal or Circuit Courts of Appeal. Some states have separate appeal courts for criminal and civil matters. Other states are divided into appellate districts with each court of appeals hearing appeals from the courts of general jurisdiction in its district. Like federal appellate courts, state appellate courts only review errors of law. An appeal to an intermediate court of appeal is an appeal of right, while an appeal to a final court of appeal is within the discretion of the court to grant or deny.

State trial courts rarely write opinions. Occasionally, a trial court exercising appellate jurisdiction will write an opinion; these opinions are seldom published. Some states do

not publish every intermediate appellate opinion. Cases are designated for publication according to criteria usually found in their court rules, e.g., the opinion establishes a new rule, alters or modifies an existing rule, involves an issue of continuing public interest, or criticizes an existing law. Unpublished opinions have no value as precedent.

The published opinions of the highest state court and any intermediate appellate court are collected in one of the seven regional reporters (Atlantic, Northeastern, Northwestern, Southeastern, Southwestern, Southern, and Pacific) of West's National Reporter System. Each regional reporter contains all the published state court decisions arising from the states in its region, e.g., the Northeast Regional Reporter contains published opinions from Illinois, Indiana, Ohio, New York (highest court only), and Massachusetts. West also publishes the California Reporter and the New York Supplement that contain all the published appellate decisions of their respective states.

In addition to the National Reporter System, many states have a separate system of "official" reports, published in accordance with state law, for their appellate cases. In states with intermediate appellate courts, the opinions from those courts and the highest court's decisions are published in separate reporters. For example, Illinois Supreme Court opinions are found in Illinois Reports (Ill.), while Illinois Court of Appeal Opinions are contained in Illinois Appellate Reports (Ill. App.).

In the states that no longer publish their own official reports, the regional reporter is the only place the opinion is reported. West publishes special state editions for most states, which only contain the opinions of all individual state that are reported in the regional reporter, e.g., Pacific Reporter, Kansas cases only contains Kansas decisions.

STATE ORGANIZATION AND LINE OF APPEAL

State Supreme Court

(Court of final resort. Some states call it Court of Appeals, Supreme Judicial Court or Supreme Court of Appeals.)

Intermediate Appellate Courts

(Only 23 states have intermediate appellate courts, which are an intermediate appellate tribunal between the trial court and the court of final resort. A majority of cases are decided finally by these appellate courts.)

Superior Court

(Highest trial court with general jurisdiction. some states call it Circuit Court, District Court, Court of Common Pleas, and in New York, Supreme Court.)

Probate Court*

Some states call it Surrogate Court or Orphans' Court (PA). It is a special court which handles wills, administration of estates, guardianship of minors and incompetents.)

County Court*

(These courts, sometimes called Common Pleas or District Courts, have limited jurisdiction in both civil and criminal cases.)

Municipal Court*

(In some cities, it is customary to have less important cases tried by municipal justices or municipal magistrates.)

Domestic Relations Court

(Also called Family Court or Juvenile Court.)

Justice of the Peace**
and
Police Magistrate

(Lowest courts in judicial hierarchy. Limited in jurisdiction in both civil and criminal cases.)

*Courts of special jurisdiction, such as Probate, Family or Juvenile and the so-called inferior courts, such as Common Pleas or Municipal courts, may be separate courts or may be part of the trial court of general jurisdiction.

**Justices of the Peace do not exist in all states. Their jurisdictions vary greatly from state to state where they do exist.

State and Local Judicial System-SOURCE: American Bar Association, *Law and the Courts*, 20 (1974)

The National Reporter System

Reporter	Abbreviation	State Courts Included
Atlantic Reporter	A. and A.2d	Supreme and intermediate appellate courts in D.C., Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Vermont
Northeastern Reporter	N.E. and N.E.2d	Court of Appeals in New York and supreme and intermediate (First and Second Series) appellate courts in Illinois, Indiana, Massachusetts and Ohio
Northwestern Reporter	N.W. and N.W.2d	Supreme and intermediate appellate courts in Iowa, Michigan, (First and Second Series) Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin
Pacific Reporter	P. and P.2d	Supreme and intermediate appellate courts in Alaska, Arizona, (First and Second Series) California (Sup. Ct. only since 1960), Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming
Southeastern Reporter	S.E. and S.E.2d	Supreme and intermediate appellate courts in Georgia, North (First and Second Series) Carolina, South Carolina, Virginia and West Virginia
Southern Reporter	So. and So.2d	Supreme and intermediate appellate courts in Alabama, Florida, (First and Second Series) Louisiana and Mississippi
Southwestern Reporter	S.W. and S.W.2d	Supreme and intermediate appellate courts in Arkansas, Kentucky, Missouri, Tennessee and Texas
New York Supplement	N.Y.S.	All New York supreme and intermediate appellate
California Reporter	Cal. Rptr.	All California supreme and intermediate appellate

Illustration 5 - 8

How Courts Create Law

Under a common law system, courts create law in the process of deciding disputes before them. Each judicial decision not only resolves a dispute, but becomes a precedent for the guidance of other courts in deciding future cases. Precedents are decisions in individual cases that may serve as authority for decisions in future cases.

Decisions are converted into binding authority by the doctrine of *stare decisis*, literally “let the decision stand.” *Stare decisis* is the doctrine that once a court has set down a principle of law as applied to a particular set of facts, it will adhere to that principle and apply it in all cases where the facts are substantially the same.

Simply, a court has two¹ choices each time it is required to decide a case which is not governed by legislation: it can apply an existing rule—follow precedent) or it can develop a new or variant rule (refuse to follow precedent or conclude no precedent exists).

Cases of “first impression”, cases which are not governed by any existing precedent, make obvious how courts create law when no precedent exists. For example, suppose Mary and Jack, an unmarried couple, have lived together for ten years in the state of Independence. Jack alleges that he gave up his career as a paralegal to manage the household in return for Mary’s promise to support him. Mary and Jack separate and Mary refuses to support him in the style to which he has been accustomed. Jack sues Mary for support in an Independence trial court.

Mary alleges that Jack did not give up his career to manage the household; she alleges that he quit his paralegal job because he didn’t want

to work hard and has sat around the house eating chocolate bon-bons ever since he quit. She also alleges that she never promised to support him. After considering the evidence, the court makes the factual findings that Jack and Mary lived together for ten years, Jack gave up his career to manage their household, and Mary promised to support Jack.

No Independence legislation governs this dispute and no court decisions have ever considered such a case. The court therefore, must create a new rule of law without the guidance of precedent. To create such a rule, the court will consider “public policy” questions, relying on social utility, ethics, general standards of justice, custom, business practice or expediency. It may consider the undesirable consequences if other available choices were adopted. In this case, the court might ask: should an unmarried person be allowed to get support from a partner? Under what circumstances? How would such a rule affect society and the institution of marriage? What result if the court refused to adopt such a rule? Jack urges the court to adopt a rule that enforces an unmarried partner’s promise of support, while Mary argues against such a rule.

After examining public policy questions, the court agrees with Jack and decides that unmarried partners should be awarded support when their partner promises to support them. Applying this rule to its factual findings, the court awards Jack \$200 a month for support. By this decision, the court has accomplished two tasks: it has decided the dispute between Mary and Jack and created a precedent to be followed in future cases.²

Cases of first impression are rare; as the body of case law increases, the possibility of a case of first impression decreases. More com-

monly, courts are presented with cases governed by precedent or legislation. When no legislation controls the dispute, the court examines prior cases that have resolved disputes similar to the case before it. Examining these cases, the court compares the key facts in the precedent case with the case before it. If the key facts are substantially similar, the court determines the rule established by the precedent case. The court then applies the rule to the dispute before it to reach a decision.

For example, suppose Donnie and Marie, an unmarried couple, have lived together for five years in Independence. The parties agree that Marie gave up her job as a waitress to manage their household and, in return, Donnie promised to support her. After they separate, Donnie refuses to support Marie and she sues him. Assume that *Jack v. Mary* is the only relevant precedent and no factual dispute exists.

Marie argues that *Jack v. Mary* is a “directly on point” or an “on point” decision, since the facts of her case are substantially similar to the facts in *Jack v. Mary*. She argues that therefore, the court should bow to the authority of *Jack v. Mary* and award her support. Donnie argues that *Jack v. Mary* is not *dispositive* of — applicable to — his case and therefore should not be followed. Donnie tries to *distinguish* — show the differences in — *Jack v. Mary* from his case. He argues that his sex — he is a male, Marie is a female — Marie’s former occupation — she was a waitress, Jack was a paralegal — and the relationship’s length — five years for Marie and him and ten years for Mary and Jack should mean that *Jack v. Mary* should not control his case.

Analyzing *Jack v. Mary*, the court finds that its key facts were that an unmarried partner gave up a job to

manage the household in return for a promise of support. Comparing *Jack v. Mary*'s facts to this dispute's facts, it finds them to be substantially similar. The court then determines that the rule in *Jack v. Mary* is that an unmarried partner who gives up a job to manage a household in return for support is entitled to support from the promising partner even after the relationship ends. Applying that rule to the facts, the court decides that Marie is entitled to support from Donnie.

When confronted with precedent that a party argues is controlling, a court can also refuse to follow it. If a court concludes that the precedent's and dispute's significant facts are not substantially similar to justify the same result, it may distinguish or limit the precedent case and refuse to follow it. Had the court agreed with Donnie's argument that the key facts in *Marie v. Donnie* were different than the key facts in *Jack v. Mary*, it could have distinguished *Jack v. Mary*, thereby refusing to apply it to *Marie v. Donnie*.

Even if the court concludes that the significant facts are substantially similar, it can still refuse to follow the precedent and overrule it, stating public policy reasons for abandoning the rule, *e.g.*, the rule is no longer just, expedient, or serves society. Courts do not like to overrule precedent directly; when confronted with a precedent they don't wish to follow, they prefer to distinguish or limit it to its facts. Moreover, this option is open only when the rejected precedent is a decision of the same or lower court, *e.g.*, the U.S. Court of Appeal Fifth Circuit may overrule its own decision or a decision of a district court in the Fifth Circuit; the California Supreme Court may overrule itself or a California Court of Appeal decision. A lower court cannot overrule a di-

rectly on point decision of a higher court in the same jurisdiction.

Courts "making law" then, usually refers to situations where courts create precedent when legislation is absent. Courts also create precedent however, when they decide disputes that are governed by legislation. These disputes constitute at least 80% of all reported cases.

How Courts Interpret Enacted Law

Enacted law is superior to common law. In deciding a dispute, courts first determine whether legislation governs the dispute. When it does, the court's duty is to interpret the legislation in light of its legislative intent, *i.e.*, what the legislature intended to accomplish by enacting the law. Although a court may violently disagree with a legislature's wisdom in enacting a law, its duty is not to second-guess legislative judgment, but to interpret the law to carry out the meaning the legislature intended. Such duty is easier said than done.

Rules of statutory interpretation are numerous and difficult to apply. As a general rule, however, the court uses several techniques to determine a law's legislative intent.

First, a court will examine any prior cases that have interpreted and applied the legislation. If the key facts in these cases are similar to the key facts in the pending case, the court may bow to the authority of the precedent case, applying it to the pending case as described in the context of case law in *Marie v. Donnie*. Courts also may refuse to apply the precedent case, distinguishing it from the pending case on its facts or overruling it.

If no prior analogous cases exists, the court will use other techniques to interpret the legislation such as

examining its language, history or the policy behind the legislation.

Courts' construction of enacted law usually begins with the law's language. Some courts use the *plain-meaning* approach, which looks at law's words and gives them their natural and normal meaning. This approach is based on the theory that a legislature's intent is best reflected in the language that it selects. In the early days of statutory construction, courts refused to examine anything outside a law's words, if their meaning was clear and unambiguous.

Words do not have absolute meanings. And legislators do not always know precisely what they intend to say or can imagine all future cases where a law might apply. Recognizing these limitations, courts created the *golden rule exception* to the plain-meaning approach. This exception provides that the literal meaning is followed unless it leads to absurd or unjust results. Although rejected by the U.S. Supreme Court in favor of the purpose approach, a few state courts still follow the plain-meaning approach.

Considered contradictory to the plain-meaning approach, is the *purpose approach*, whereby courts interpret enacted law to accomplish legislative objectives. Through this approach, courts seek to understand the objectives that a law is designed to achieve by examining its language, the circumstances surrounding its enactment and its legislative history. Courts will examine a law to determine if its language and "plain-meaning" is consistent with its purpose.

Courts sometimes invoke rules or *canons of construction* to aid their interpretations of enacted law. Some canons call for "strict" — narrow—or "liberal" — broad —

construction, depending on the type of law involved. For example, penal laws — designed to punish their violators— and laws in derogation of common law are construed strictly; remedial laws — designed to give relief to those harmed by their violation — are construed liberally.

Sometimes courts refer to canons by their Latin names. For example, *ejusdem generis* (a-yus'-dem-jen'er-is), literally, “of the same kind, class, or nature,” means that where general words follow lists of particular classes, persons, or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as those listed. Hence, in a law which prohibits importing oranges, lemons, grapefruit and other such fruits, the term “other such fruit,” may be interpreted to mean only citrus fruits and not all fruit, *e.g.*, apples, bananas or plums

Expressio unius est exclusio alterius (ex-pre'-she-o u-ne'-us est ex-klu' she-o al-ter' -e-us), literally, “expression of one thing is the exclusion of another,” means that mention of one thing within a law implies exclusion of something that is not mentioned. Thus, a law which grants certain rights to “city librarians, lawyers, and police officers” would be interpreted to exclude other city employees not mentioned in the law.

Some canons artificially limit the meaning of words; while others logically guide in assigning a law meaning when other means are absent. Nevertheless, even logical canons can be applied to reach results inconsistent with a law’s purpose. Most courts use canons to support further a result suggested by other approaches or to aid in interpreting laws which have no published legislative history.

American courts have not generally accepted and consistently applied theory of interpreting enacted law. The techniques a court uses can depend on its attitude toward the substance of the law it is interpreting, *i.e.*, whether it approves or disapproves of the law. These attitudes in turn depend on the political, social, and personal values of its judges. In preparing arguments to support a particular interpretation, advocates must consider these attitudes as affecting a court’s choice of techniques and fashion arguments for their clients accordingly.

Judicial Review

One of the most important powers of courts is judicial review— the power to strike down unconstitutional laws. All legislation is subject to judicial scrutiny to determine whether it conforms to constitutional principles. When a court declares a law “unconstitutional,” the law is invalid. Determining a law’s constitutionality involves interpreting both its meaning and the meaning of applicable constitutional provisions.

Federal courts have the power to determine whether a federal or state law contravenes the United States Constitution. State courts can declare state legislation invalid if it conflicts with either the U.S. or their state constitution. The United States Supreme Court has the final authority to decide whether state and federal legislation conflict with the U.S. Constitution; while each state court of last resort is the final authority as to whether its state laws contravene its own state constitution.

As an example, suppose the State of Independence enacts Penal Code Section 33 which provides that no left-handed person may read out loud in a public place. Ms. Marie Sinister, a left-handed person, is ar-

rested while reciting the Declaration of Independence on the state capitol steps. At her trial in the Independence Superior Court, Ms. Sinister raises Section 33’s unconstitutionality as a defense. She argues that Section 33 is an invalid law, because it contradicts the First Amendment (Free Speech) and the Fourteenth Amendment (Equal Protection of the Laws) of both the Independence and U.S. constitutions.

Using various statutory construction techniques, the court interprets Section 33 and the First and Fourteenth Amendments. It then compares them to decide if Section 33 as interpreted conflicts with the constitutional provisions. The court could base a decision that Section 33 is unconstitutional on the grounds that it conflicts with: 1) both the Independence and U.S. constitutions; or 2) the Independence Constitution only; or 3) the U.S. Constitution only. Courts will rule a law unconstitutional only as a last resort. For example, where possible, courts will attribute a constitutional meaning to a law on the theory that legislatures intend laws to have constitutional meanings. Rather than rule a law unconstitutional, a court will also attempt to resolve a dispute on other, non-constitutional grounds.

ADMINISTRATIVE AGENCIES

Federal, state and local administrative agencies are governmental authorities, other than courts or legislatures, which administer and carry out the laws enacted by the legislature. Agencies are considered part of the Executive Branch of government because their function is to carry out and administer the laws.

Most agencies perform legislative and judicial functions. In their quasi-legislative capacity, they promulgate

rules; in their quasi-judicial capacity, they adjudicate disputes. Agencies are authorized to perform these functions only because a legislature has delegated the power to them through specific statutes called enabling legislation. If regulations do not carry out the provisions of enabling legislation, they are invalid.

Rule-Making Power

The United States and many states have enacted *Administrative Procedure Acts* (APA) which govern the manner in which agencies must exercise their rule-making power. For example, like many state APAs, the Federal APA provides that an agency must publish proposed notices of rule-making, allow public participation in rule-making, and procedures for interested parties to request the issuance, amendment or repeal of a rule. The federal APA does not govern all federal agencies. Unfortunately, many state agencies with which legal services clients deal are non-APA agencies. Although non-APA agency rule-making is subject to some procedural requirements, they usually are more lenient than APA requirements.

To be valid, an agency regulation must:

- interpret, implement, make specific or carry out the provisions of enabling legislation,
- be promulgated according to rule-making procedures, and
- be constitutional.

Most administrative rule-making is subject to court review. The federal and most state APAs provide that “any interested party” may challenge a rule on the grounds it does not conform to APA promulgation standards; *e.g.*, a party may file a case in court asking that a rule

be invalidated. However, most often agency rule-making procedures are challenged in the context of an individual case; *e.g.*, a party raises a rule’s invalidity in response to an agency’s attempt to apply the rule to the party’s situation.

¹For a listing of sixty-four techniques courts use in dealing with precedents, see K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 77-91 (1960).

²Many trial courts and intermediate appellate courts would probably not be so bold as to establish a new rule on their own in this fact situation. More likely, the court would dismiss Jack’s action without a trial. Jack would appeal and the highest state court (if it decided to hear the case) would create the new rule of law. The court then would remand the case to the trial court to make findings of fact to which it would apply the new rule of law.



HOW COURTS DECIDE LEGAL ISSUES

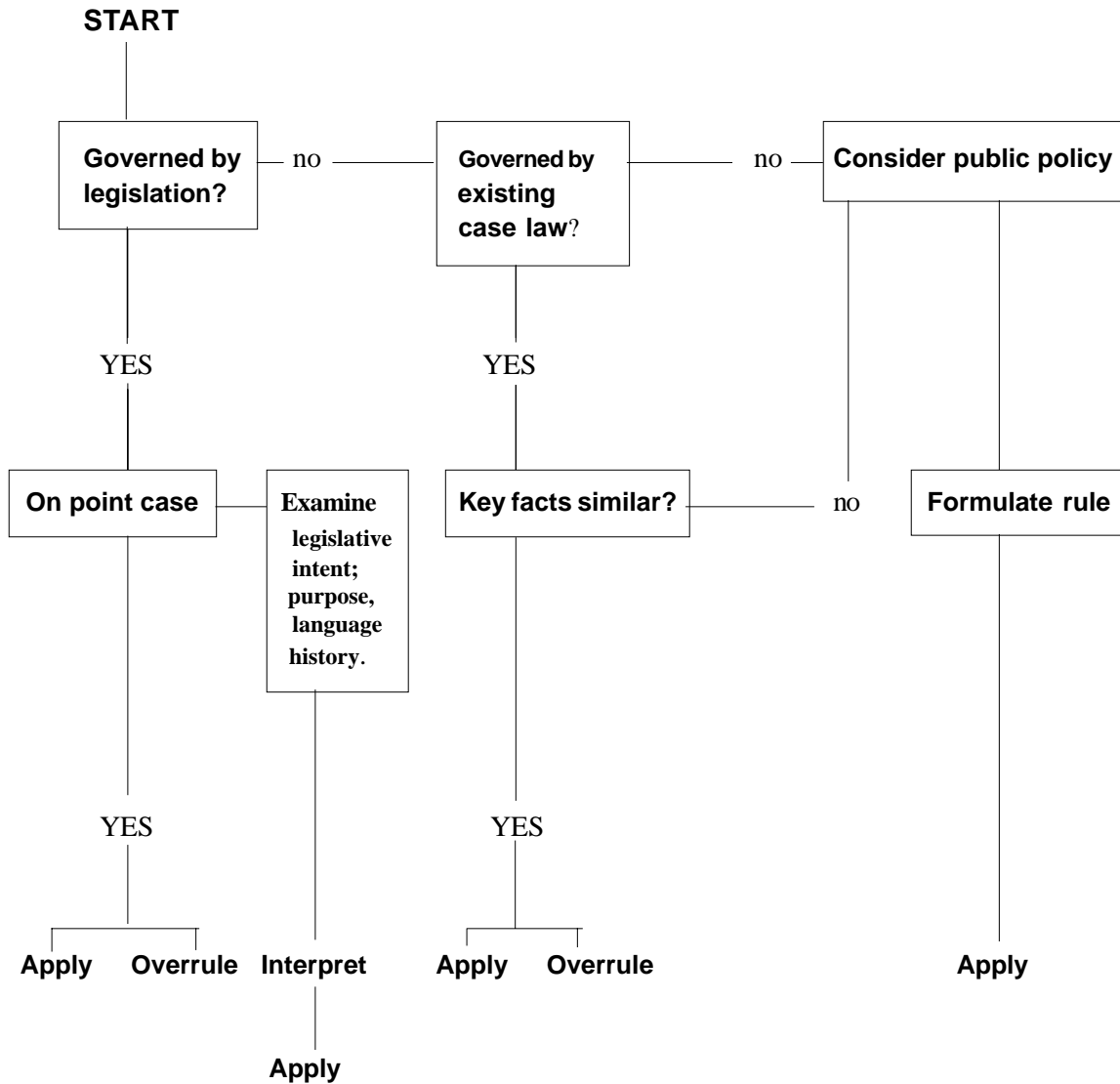


Illustration 5 - 9

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Adjudicative Power

When an agency exercises its adjudicatory power, it acts as courts do in resolving disputes; *it determines facts and interprets and applies the law to those facts in order to render a decision.* The first step in this process is usually a hearing presided over by an official; *e.g.* hearing officer, examiner or ALJ. This officer takes evidence, determines facts, decides what law governs the facts, and makes a decision. Many hearing officers issue written decisions which contain their findings of fact and conclusions of law.

In some agencies, the hearing decision is not final, but a recommendation to higher officials who adopt or

reject the decision. In many other agencies, decisions may be appealed to a body that determines whether the hearing officer made any errors of law. Most agency decisions are subject to judicial review, where the court exercises its appellate jurisdiction to determine whether the agency erred as a matter of law.

Sources of Law

Most federal regulations are published in the *Code of Federal Regulations* (C.F.R.), a multi-volume paperbound set organized by subject matter. The C.F.R. is organized into fifty titles. Each title covers a general subject matter, *e.g.*, Title 20 contains Social Security regulations; Title 42 contains Medicaid regulations. Regulations are initially published in the Federal Register, which is issued every business day.

At least thirty states have a state administrative code which contains some of its agencies’ regulations. Almost all state or local agencies maintain their regulations in loose-leaf manuals that should be available at the agency responsible for promulgating them. Some agencies publish “guidelines” or “interpretive” memos that operate much like regulations. If these agencies will not give you access to these documents, research whether a Freedom of Information Act gives you access or contact your friendly legislator.

Some agencies publish their decisions that may be cited as precedent in future administrative hearings. These decisions usually can be found at agency offices. If you have problems with access, follow the suggested strategy for regulations. Even if agency decisions are not regarded as officially precedent, reading them—especially those decided by your local hearing officers—provides useful information for preparing your cases.

Hierarchy of Authority

Authority is legislation, case law and other statements of the law that parties cite to an adjudicatory body to support their legal position and that an adjudicatory body uses to support its decision. An advocate cannot present an argument, and a decisionmaker cannot justify a decision, without citation to some authority.

Authority is either primary or secondary. *Primary authority is the law — cases and legislation.* Secondary authority consists of statements of the law contained in legal encyclopedias, textbooks, treatises, or law review articles.

In investigating the law, the advocate looks for the best possible authority to support the client's position. Not all authority is of the same weight; therefore, the researcher must be familiar with the hierarchy of authority.

Mandatory authority is law that must be followed, while *persuasive authority* may be disregarded. Secondary authority is never mandatory and at best, is persuasive. Hence a statement from a legal encyclopedia or law review article is never mandatory authority; an adjudicatory body is never bound to follow it, but may if it wishes. Practically, some secondary authority may be more “persuasive” than others. For example, the opinion of an expert in contracts probably will be more persuasive than a statement on contracts from an encyclopedia. Check with other advocates familiar with the courts in your jurisdiction, to discover how your courts rank secondary authority.

Legislation

Legislation is mandatory in the jurisdiction where it was enacted, *e.g.*, federal legislation must be followed in the United States. Outside its

enacting jurisdiction, legislation has no weight, not even as persuasive authority. For example, a West Virginia statute has no weight in any other state; it must be followed only in West Virginia. Case interpreting legislation, however, are persuasive authority outside its enacting jurisdiction. For example, assume that Michigan adopts a statute that is fashioned after a West Virginia courts' interpretation of the statute. The Michigan court need not follow West Virginia decisions, but it may.

Legislation exists in a hierarchy; a “lesser” law that conflicts or is inconsistent with a superior law, is invalid. At the top of the legislation hierarchy is the U.S. Constitution. It contains the fundamental principles by which all laws are measured. To be valid, all federal, state and local laws must conform and be consistent with the U.S. Constitution, *i.e.*, they cannot violate constitutional principles. Next in the hierarchy are statutes, treaties, and executive orders, followed by agency regulations and court rules. Each state has similar hierarchy which also includes local legislation.

A complex situation arises when dealing with a federal-state program such as Medicaid. Because the state receives federal monies, the state laws that govern the program must be consistent with federal law. For example, a state Medicaid regulation must clarify, explain, implement its state enabling statute and be consistent with federal agency regulations and its state and the federal constitutions. If the regulation does comport with its enabling state statute, that statute also must be consistent with federal law.

Case Law

Case law is mandatory and must be followed when the precedent case is *directly on point* — its rules and key facts are identical or substantially similar to the law and facts are

identical or substantially similar to the law and facts of case it is applied to — AND decided by the same court or a higher court.

For example, the U.S. Ninth Circuit Court of Appeals must follow its own on point precedents and those of the United States Supreme Court; all state trial courts must follow all on point decision of its appellate courts.

All case law that is not mandatory is persuasive; it may sway a court because of its cogent reasoning, but a court need not follow it.

Decisions are *persuasive* when they are:

1. From coordinate courts of the same jurisdiction, *e.g.*, a federal district court is not bound by the decision of another federal district court; or
2. From courts of another state, *e.g.*, a decision from any court in Ohio is only persuasive in any other state; or
3. Not on point; *e.g.*, a federal District Court is not bound by a U.S. Supreme Court decision that does not have similar key facts or interpret the identical law.

Practically, some persuasive authority may be more influential in certain courts than authority that is theoretically of the same weight. *For example*, the Third Circuit Court of Appeals may respect Sixth Circuit decisions in employment discrimination matters more than the Ninth Circuit, but hold the Ninth Circuit in more esteem in Social Security cases. Likewise, Oklahoma courts may be more convinced by Texas decisions on housing than California decisions. As with secondary authority, it's important to find out how your courts rank “persuasive” authority.

The hierarchy of authority is diagrammed in Illustration 5 - 10.

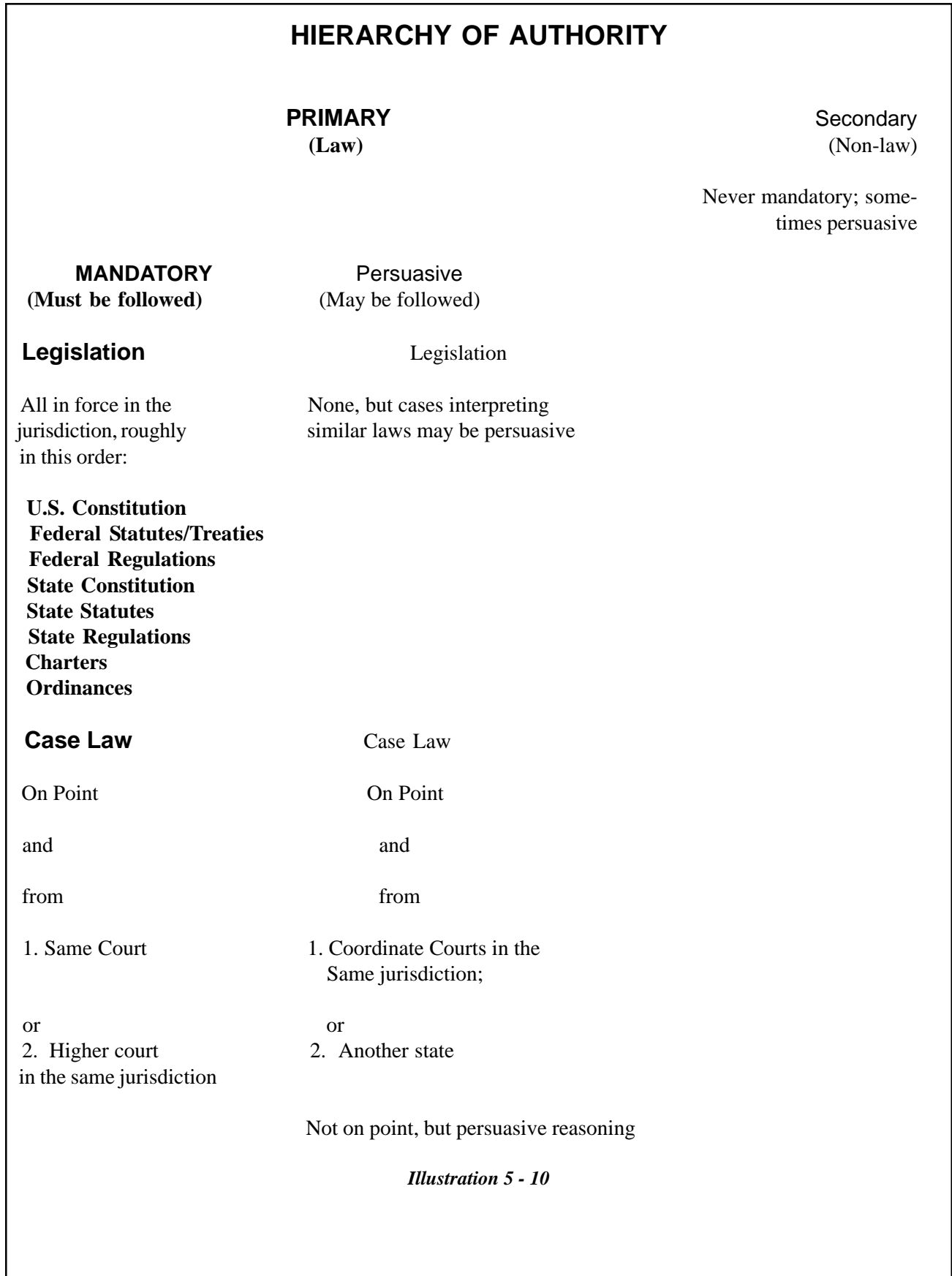


Illustration 5 - 10

Relationship between Case Law and Legislation

Case law and legislation differ in their origin and literary and textual form. Courts make case law in the process of deciding particular disputes, while legislative bodies enact general laws to govern future conduct. Case law is found in case reports; legislation is found in volumes called “Acts,” “Resolves,” or “Statutes.” Case law is textually flexible because the rule of law it establishes may be stated several different ways. Legislation is textually rigid because its precise wording is the exclusive statement of the rule.

Legislation governs most areas regulated by law, although courts continue to make law where legislation is silent, *e.g.*, the law of torts is primarily judge-made. Legislation is superior to common law and if a legislature enacts a law that abrogates a common law rule, the legislation prevails. For example, suppose a court establishes the rule that unmarried partners’ promises to support their partners are enforceable. If the legislature enacts a law that provides that these promises are unenforceable, the common law rule is abrogated and superseded by the legislation.

Courts are not powerless, however, when faced with legislation, since they are charged with interpreting the meaning of legislation. Given the ambiguous wording of much enacted law, courts have numerous opportunities to shape the meaning of legislation. The power to determine a law’s constitutionality also increases the court influence on the legislative process.

DEVELOPING RESEARCH STRATEGIES

Where to begin research is a common difficulty shared by many advocates. As many different research strategies exist as law books

and researchers. The strategy you select depends primarily on your familiarity with the law that governs the problem and the research materials available. These basic strategies are diagrammed on Illustration 5 - 11.

The first approach directs you to begin research with *Narrative Sources*. This strategy is useful if you are unfamiliar with the area you are researching, because narrative sources give an overview of the law. This overview helps you identify terminology, any agencies involved, some of the issues and any primary authority which governs the problem.

Once you have a general understanding of the area, you should go to legislation, checking the citations found in the narrative sources. Be sure to check all forms of pertinent legislation, *e.g.*, if a problem is governed by regulations, also check the enabling statute.

If narrative sources did not refer to any legislation, check sources of legislation anyway unless you’re sure the problem is governed solely by common law. After reading and identifying the elements in the governing legislation, check the annotations for cases that interpret the elements at issue. If no cases interpret the legislation, you should compile a legislative history. Many texts on legal research will describe how to compile a legislative history. Check the card catalog in a law library to find these sources.

Taking all pertinent case citations, locate and read each case. Never cite a case that you have not read and analyzed. Finding administrative hearing decisions that may be cited as precedent is more difficult. Check with the agency or an expert, experienced advocate in your office or a state or national back-up center, to locate any decisions or inter-

pretative policy memos that the agency relies on.

If you have not located any cases thus far or to find more cases, shepardize the legislation and use case digests. Shepardize all cases to make sure cases are good law and to find other court opinions which have discussed the case.

A second strategy is to begin by examining sources of legislation. This approach is useful when you are familiar with a legal area and you have a citation to pertinent legislation. After you have analyzed the legislation, you then would read all pertinent cases as discussed in the first strategy. Finally, you might check certain narrative sources to collect primary authority, *e.g.*, looseleaf service or identify any recent trends in the law, *e.g.*, legal periodicals or treatises.

When you have a case that is directly on point, you might follow the third strategy which is to begin with that case. You should use this method only if common law governs the problem or you have already analyzed any governing legislation. As in the second strategy, you should check narrative sources, *e.g.*, to identify trends in case law.



SOME RESEARCH STRATEGIES

NARRATIVE SOURCES (Overview and Authority)

START ↵

Legal Services Practice Manuals
Clearinghouse Review
Encyclopedias
Legal Periodicals
Hornbooks
Treatises
Looseleaf Services

Go To
⌘

LEGISLATION (Read and Analyze)

START ↵

Annotated Codes/Pocket Parts
CFR/Federal Register
State Administrative Codes/Manuals
Ordinances and Codes
Court Rules

Go To
⌘

CASES (Read and Analyze)

START ↵

Case Reports
Advance Sheets
Administrative Hearing Decisions

Go To
⌘

Go To
⌘

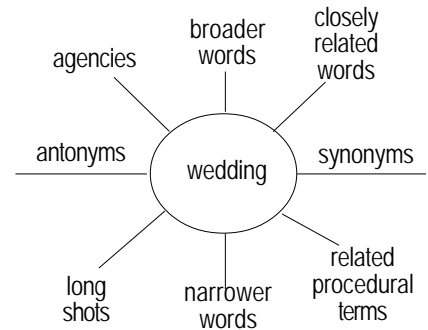
DIGESTS
(To find similar cases)

SHEPARD'S
(To Update Cases)

Illustration 5 - 11

Whatever your research starting point, you will use legal indexes and tables of content to gain access to the information in most legal resource materials. Legal research experts have devised systematic ways for breaking a problem into words and phrases that are looked up in tables and indexes. Perhaps the most thorough is William Stasky's cartwheel approach¹ discussed below.

Suppose your problem involves a wedding. Using the descriptive word index and table of contents in any law book, you look up "wedding". Suppose you don't find "wedding" in either an index or table or its references don't lead to relevant material. Using the CARTWHEEL, you think of as many different phrasings and contexts of the word "wedding" as possible.



1. Identify all the major words from the facts of the client's problem. Most of these facts can be obtained from the intake memorandum written following the initial interview with the client. Place each word or small set of words in the center of the CARTWHEEL.

2. In the index and table of contents, look up all of these words.

3. Identify the broader categories of these major

words.

4. In the index and table of contents, look up all of these broader categories.

5. Identify the narrower categories of these words.

6. In the index and table of contents, look up all of these narrower categories.

7. Identify all of the synonyms of these words.

8. In the index and table of contents, look up all of these synonyms.

9. Identify all of the antonyms of these words.

10. In the index and table of contents, look up all of these antonyms.

11. Identify all closely related words.

12. In the index and table of contents, look up all of these closely related words.

13. Identify all procedural terms related to these words.

14. In the index and table of contents, look up all of these procedural terms.

15. Identify all agencies, if any, which might have some connection to these words.

16. In the index and table of contents, look up all of these agencies.

17. Identify all long shots.

18. In the index and table of contents, look up all of these long shots.

If we were to apply these eighteen

steps of the CARTWHEEL to the word “wedding,” here are some of the words and phrases that would be checked in the index and table of contents of every law book that you examine:

BROADER WORDS: celebration, ceremony, rite, ritual, formality, festivity, etc.

NARROWER WORDS: civil wedding, church wedding, golden wedding, proxy wedding, sham wedding, shot-gun marriage, etc.

SYNONYMS: marriage, nuptial, etc.

ANTONYMS: Alienation, annulment, divorce, separation, etc.

CLOSELY RELATED WORDS: matrimony, marital, domestic, husband, wife, bride, anniversary, custom, children, blood test, pre-marital, spouse, relationship, family, home consummation, cohabitation, sexual relations, betrothal, minister, wedding, oath, contract, name change, domicile, residence, etc.

PROCEDURAL TERMS: action, suit, statute of limitations, liability, court, complaint, discovery, defense, petition, jurisdiction, etc.

AGENCIES: Bureau of Vital Statistics, County Clerk, License Bureau, Secretary of State, Justice of the Peace, etc.

LONG SHOTS: dowry, common law, single, blood relationship, fraud, religion, license, illegitimate, remarriage, antenuptial, alimony, bigamy, pregnancy, gifts, chastity, community property, impotence, incest, virginity, support, custody, consent, paternity, etc.

Developing a research strategy not only involves where to begin, but

when to stop. How do you know whether you’ve found everything you should? Rest assured that no bells will ring. Although experience helps, you’ll never be sure you’ve found everything. To help minimize this anxiety, at the point when you think you should stop:

1. Make sure the law you cite is valid; always Shepardize.

2. Look at the authority you have cited with the critical eye of an opponent, a supervisor or teacher. Are your interpretations of the law supportable? Have you quoted accurately? Did you omit important law that should have been mentioned?

Being reasonably certain about where to start and end research does no good if you don’t have access to proper research materials. A major difficulty that many legal services advocates face in doing research is finding a comprehensive law library. Your office library may be insufficient. Sometimes you’ll have to use investigation and advocacy skills and ingenuity to locate and get access to a decent library. Fellow legal services workers, advocates in private practice, judges, friends, business acquaintances, and legislators are some of the people that might help you in this task.

Some places you might check are: law and paralegal schools, state and county libraries, court libraries, private law firms, bar association libraries, administrative agencies, other public interest law firms and libraries of corporations or associations, e.g., insurance companies, unions. Some of these sources may even allow you access to Lexis and Westlaw.

Finally, here are some guidelines to

keep in mind when you do legal research.

1. Enjoy it. Legal research is exciting and challenging, like hunting for treasure or solving a mystery.

2. Thrive on the law's ambiguity. The library is not a repository of answers, but a storehouse of ambiguities waiting to be clarified and manipulated on behalf of a client.

3. Be patient. Research can be frustrating; the frustration becomes more manageable with practice.

4. Be curious and adventuresome. Figure out how to use law books you've never used before. Not only are there plenty of "how to do legal research" books, but many research tools contain a section entitled "How to Use This Book."

5. Be flexible. Sometimes you don't know what you're looking for until you find it. Be receptive to different perceptions or approaches to a problem that are revealed during research.

6. Ask questions. Almost everyone who does research - colleagues, lawyers, paralegal, librarians—is willing to share research techniques or approaches to a problem in his or her substantive area of expertise. Get to know the people in the national and state support centers.

7. Read and analyze every case and piece of legislation you cite. Always look for case law which interprets the legislation that governs your

problem.

8. Update all law you rely on. Outdated law is bad law, worse than no law at all.

9. Use the authority that will best persuade the decisionmaker to decide in your client's favor.

10. Practice. Practice. Practice. Like other skills, research is only learned and developed through practice. Since knowing the law equals an ability to find it, research skills are among the most important advocacy skills to develop.

Summary

This chapter has presented some basic information that will help you analyze and research the law in the process of solving client problems. We pointed out that in order to analyze the law, you must be able to find it, and to select the pertinent law, you must be able to analyze it.

We discussed how legislation and case law are created, the primary sources where they can be found, and their relationship to one another. We emphasized that analyzing enacted law involves analyzing either case law that interprets it or its legislative history. We also described the hierarchy of authority, emphasizing the importance of supporting your client's position with the authority that is most persuasive to the decisionmaker in a case.

Finally, we described some basic strategies in researching the law and how to overcome such problems as when to stop researching and finding an adequate law library.



ASSIGNMENT

1. True/False Courts make law.

2. True/False Most bills introduced into the legislature become law.

3. True/False Appellate courts usually do not hear evidence.

4. True/False The federal district court exercises appellate jurisdiction over appeals from many federal administrative agencies.

5. True/False Most trial courts write opinions.

6. In arguing to a judge about the meaning of enacted law, it would be important to cite the following:
a) its legislative history
b) its plain meaning
c) court opinions that interpreted it
d) what the advocate thinks
e) all but (d)

7. True/False A state court could declare a person bankrupt.

8. True/False Almost every case can be appealed to the U.S. Supreme Court.

9. In a case of first impression, where there is no governing legislation or court

decisions which have considered the circumstances presented in the case, the court will consider public policy questions and rely on:

- a) social utility
- b) ethics
- c) general standards of justice
- d) customs
- e) business practices
- f) all of the above

10. In deciding a dispute the court will first:

- a) Determine whether legislation governs the dispute
- b) Consider what would be the best public policy
- c) Look for cases that had similar facts
- d) a) and c)
- e) all of the above

11. True/False A court can determine a statute to be invalid.

12. True/False Courts often rule laws unconstitutional.

13. In attacking an administrative agency regulation, advocates can argue that the regulation is:

- a) inconsistent with a state law
- b) inconsistent with a federal law
- c) unconstitutional
- e) a) and c)
- f) all of the above

14. True/False Most administrative agency hearing decisions are subject to judicial review.

15. If you are arguing an unemployment insurance case in California, the best authority to cite would be:

- a) an on point decision from the California Supreme Court
- b) an on point decision from the Alabama Supreme Court

c) an on point decision from a California intermediate appellate court

d) a) and c)

e) all of the above

16. The federal district court sitting in the eastern district of California must follow the on point decisions of the: (check all that apply)

- a) U.S. Supreme Court
- b) the DC Circuit
- c) the southern district of California
- d) the 9th Circuit
- e) none of the above

17. True/False A Florida on point supreme court decision could be persuasive authority to a Oklahoma court.

18. True/False An Ohio court opinion interpreting a statute with identical wording to a Nebraska statute could be persuasive authority to a Nebraska court.

19. True/False Legislation is superior to court decisions.

20. True/False Advocates in an administrative hearing brief should try to find court opinions which support their interpretation of agency regulations.

¹ Statsky, William P., Introduction to Paralegalism, Perspectives, Problems and Skills, West Publishing, Second Edition, pp. 495 - 498.

