ASPEN COURSEBOOK SERIES

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

A Practical Guide to Legal Writing and Legal Method

SEVENTH EDITION

ASPEN PUBLISHING

A Practical Guide to Legal Writing and Legal Method

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Cover image: Image by Shutterstock/s_maria.

To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
PO Box 990
Frederick, MD 21705

eisbn: 978-1-5438-2524-4

Library of Congress Cataloging-in-Publication Data

Names: Dernbach, John C., 1953- author. | Singleton, Richard V., 1949- author. | Wharton, Cathleen S., author. | Wasson, Catherine J., author.
Title: A practical guide to legal writing and legal method / John C. Dernbach, Widener University School of Law; Richard V. Singleton II, Blank Rome LLP; Cathleen S. Wharton, University of Georgia School of Law, Retired; Catherine J. Wasson, Elon University School of Law.
Description: Seventh edition. | Frederick, MD: Aspen Publishing, [2021] | Series: Aspen coursebook series | Includes index. | Summary: “A law school textbook for courses on legal writing and legal analysis” — Provided by publisher.

Identifiers: LCCN 2020054285 (print) | LCCN 2020054286 (ebook) | ISBN 9781543825237 (hardcover) | ISBN 9781543825244 (epub)
Subjects: LCSH: Legal composition. | Law—United States — Methodology. | Law — United States — Language.
Classification: LCC KF250 .P72 2021 (print) | LCC KF250 (ebook) | DDC 808.06/634 — dc23
LC record available at https://lccn.loc.gov/2020054285
LC ebook record available at https://lccn.loc.gov/2020054286

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

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Acknowledgments

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

This edition is informed by the teaching and law practice experience of its authors. John Dernbach (government law practice and teaching) and Richard Singleton (private law practice) are again joined by two legal writing directors — Cathleen Wharton (retired) and Catherine Wasson.

At Widener University Commonwealth Law School, the administration and faculty have been consistently supportive of this book. Dean Christian Johnson encouraged and supported this project. We are especially grateful to the legal methods and academic success faculty — Anna Hemingway, David Raeker-Jordan, and Amanda Sholtis — for their suggestions and feedback.

At the University of Georgia, the writing faculty contributed valuable insight over the years into both the writing process and the teaching of writing. The students at Georgia Law also provided significant and important feedback regarding the process of learning the skills critical to effective legal writing and the challenges facing law students today. Laura Ivey wrote the first draft of the memoranda in Appendix A, that was the basis for the hypothetical around which the appendices were developed.

The students at Elon University School of Law continue to provide useful feedback on the effectiveness of the book in the classroom. Research

Assistant Amber Cain, M.L.I.S. (J.D. 2020) checked references to the legal authorities cited in the book to ensure that they remain accurate.

A special acknowledgment and our deepest thanks go to our co-author, Joan Ruhtenberg, Clinical Professor of Law Emerita, Indiana University Robert H. McKinney School of Law, who retired after the Fifth Edition. Her work on four prior editions of this book, over a span of twenty years, was informed by her deep knowledge of how students learn — and how teachers need to teach — the essential skills of legal analysis and writing. Her thoughtful ideas and sharp eye for detail have made this a better book.

We are deeply grateful to the late David W. Craig, former president judge, Commonwealth Court of Pennsylvania; the Honorable Lynn N. Hughes, United States District Judge, Southern District of Texas; the Honorable Sylvia Rambo, United States District Judge, Middle District of Pennsylvania; Bridget Montgomery, then law clerk to Judge Rambo, who reviewed and

commented on many of the chapters in Part E; and Karen Kramer, who reviewed the appendices.

Carol McGeehan and George Serafin helped convince us to publish the third edition with Aspen. As a result, subsequent editions, including this one, are also published with Aspen. For this edition, we are grateful to Stacie Goosman and Justin Billing, managing editors; Jessica Barmack, developmental editor; Patrick Cline, production editor, The Froebe Group; Lauren Arnest, copy editor; and Marla Cook, proofreader, who provided editorial support.

Fred B. Rothman, who passed away in 1988, believed in this book from the beginning. His decision to publish the first edition made all the rest possible.

Our greatest debt is to our students, both past and present, at six different schools over more than forty years. We hope they have learned as much from us as we have learned from them.

Introduction

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

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

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

Effective legal writing is hard work. Nothing is included without good reason, and nothing of significance is omitted. Each word, each sentence is

chosen or structured with care. If a document reads smoothly and intelligently, it is not usually because it was easy to write. The reverse is more often true: a document that was easy to write is often muddled. The beauty of well-crafted writing is that the final product masks the painstaking and difficult process by which it was created. The good writer — the craftsperson — makes it *look* easy.

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

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

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

The book is based on two classroom-tested premises. First, the fundamental principles of legal writing and legal method can be reduced to a series of fairly simple guidelines. Second, these guidelines can best be learned by practice, particularly by working through highly focused

exercises. More than forty years with the first six editions of this book have confirmed these premises.

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

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

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

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

In addition, Appendices at the end of the book show several examples of emails, legal memoranda, and a client letter, as well as a trial court opinion,

trial court briefs, and appellate briefs. These appendices are intended to be helpful models of the kind of writing taught in this text — not only for class but afterwards in the practice of law.

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

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

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

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

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PART A Introduction to Law

CHAPTER 1 Rules and Policies

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

A. Legal Rules

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

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

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

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

B. Law and Policy

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

Because legal rules are based on social judgments, they tend to act as a shorthand way of deciding what is just in a specific factual situation. Instead of

simply asking what is right, for example, a court will first apply the relevant legal rule. The Twenty-Sixth Amendment to the United States Constitution provides that a United States citizen

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

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

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

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

Although the Court's sex discrimination decisions over the last 150 years leave open some important questions about equality, there is no doubt that its

outlook has changed significantly. It is difficult to imagine the Court drawing the same conclusion today as it did in 1872. As Justice Brennan, referring to the *Bradwell* case, wrote in a 1974 opinion:

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

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

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

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

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

The old legal adage "hard cases make bad law" is rooted partly in the tremendous difficulty that lawyers and judges have when a rule is clearly applicable to a factual situation in which it would work a manifestly unjust result. Sometimes the rule is flexible enough that the problem can be solved by interpretation. Sometimes the rule provides for exceptions. Sometimes it is

more important to maintain the integrity of the category than it is to work justice in all cases. And sometimes it is necessary to change the law.

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

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

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

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

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

Lawyers have obligations to their clients, but they also have obligations to society. When these obligations are in tension with one another, the tension is not always easy to resolve. If you successfully help a company develop a shopping mall near a city, for instance, you will have a significant effect on local land use, transportation, and housing patterns. If you successfully

represent a landowners' group seeking to block that development, you prevent those effects but cause others. Whichever side you represent, you will be arguing for the social good your clients ostensibly seek. "Justice" and "the social good" have many meanings, and you will develop and refine your own understanding of these concepts as you study law.

EXERCISES

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

Exercise 1-A

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

3. Do you think it is important that your decisions be consistent? Is it more important that judicial decisions be consistent? Explain.

Exercise 1-B

1. Assume you are a trial judge. Decide each of the following cases according to your idea of a just result and explain the reasons for your decision. Do not refer to any of the other cases in making your decision and do not invent additional facts.

   a. Dale Price was arrested and charged with armed robbery shortly after three men stole $20,000 from Crabtree National Bank. Two of the men escaped. Price objected to his prosecution on the ground that he should not be tried unless the other two were tried with him. Does Price have a valid defense?

   b. Jennifer Fong was arrested for driving sixty-four miles per hour in a fifty-five mile-per-hour zone. She objected to her prosecution because

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

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

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

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

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

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

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

CHAPTER 2 Sources of Law

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

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

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

A. The Hierarchy of Laws

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

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

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

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

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

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

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

California

California Constitution

California Environmental Quality Act, passed by the California legislature to protect and enhance the quality of the environment in the State of California

Administrative regulations promulgated to effectuate the Act, such as the rule that an environmental impact report must be filed before a construction project is approved

Judicial decisions construing the Act or the regulations

B. The Hierarchy of Jurisdictions

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

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

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

C. The Hierarchy and Jurisdiction of Courts

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

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

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

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

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

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

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

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

The jurisdiction of state courts is similarly defined by the state's constitution and legislature. A trial court's jurisdiction ordinarily is limited by geography (usually all or part of a county or municipality), subject

matter, and the amount in controversy. The court system in a municipality or county may include criminal courts and civil courts of limited or general jurisdiction. The latter are often called *circuit courts, superior courts, district courts,* or *county courts*.

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

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

D. Source Material for Researching the Law

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

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

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

1. Primary Authority

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

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

statutes, references to secondary authority and finding aids, and brief annotations or descriptions of cases construing a particular section.

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

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

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

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

West Regions	States Included
Atlantic (A., A.2d, and A.3d)	Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, the District of Columbia

Northeastern (N.E. and N.E.2d)	Illinois, Indiana, Massachusetts, New York, Ohio
Northwestern (N.W. and N.W.2d)	Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin
Pacific (P., P.2d, and P.3d)	Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, Wyoming
Southeastern (S.E. and S.E.2d)	Georgia, North Carolina, South Carolina, Virginia, West Virginia
Southwestern (S.W., S.W.2d, and S.W.3d)	Arkansas, Kentucky, Missouri, Tennessee, Texas
Southern (So., So.2d, and So.3d)	Alabama, Florida, Louisiana, Mississippi

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

2. Secondary Authority

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

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

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

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

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

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

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

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

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

restatement provision, thereby making the restatement provision the law of that jurisdiction.

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

EXERCISES

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

Exercise 2-A

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

1. A section of the code of your state that says evidence of prior wrongs is usually inadmissible, but may be admissible to show the accused person's criminal intent.
2. A law review article on the difficulty of proving criminal intent in date-rape cases.
3. A decision by a middle-level appeals court in another state holding that if the accused rapist admits the act, his intent is irrelevant, the only issue being the consent of the victim.
4. A decision by a federal court of appeals, applying the law of another state, holding that prior rapes are irrelevant to both the defendant's

intent and the victim's consent, and are therefore inadmissible.

5. A section of the code of your state that defines rape as compelling another person to engage in a sexual act by force or threat of force.
6. A decision by the highest court of another state holding that evidence of prior rapes is relevant to show the defendant's awareness that the victim had not consented and therefore his intent to rape.
7. A decision by the highest court of another state holding that prior acts of rape are not admissible because they are unfairly prejudicial and have no bearing on the defendant's intent at the time of the rape for which he is on trial.
8. A dissent by a judge in the case described in item 7. The judge believed that the prior acts were similar enough to show the defendant's characteristic behavior and thus to rebut the defense that the victim consented.

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

Exercise 2-B

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

releases of pollutants. In researching this issue, you have found the following:

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

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

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

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

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

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

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

CHAPTER 3 Case Analysis and Case Briefs

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

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

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

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

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

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

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

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

The chart below illustrates these components.

State v. Jones **(1994)**	Procedural fact

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

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

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

This chapter will help you develop a method for analyzing cases. Each component of a case will be discussed separately to help you learn to identify and understand that component. Because of the web-like nature of a judicial opinion, no method will result in instant identification or understanding of all the

components. As you gain experience at briefing cases, you will develop a format that suits your particular abilities and needs. The following method is helpful as a starting point and framework for your analysis.

A. Read the opinion carefully.

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

1. Identify the holding.

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

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

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

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

> The trial court found the defendant guilty of reckless driving without any testimony that the defendant was, in fact, operating his car in a reckless manner. Anyone who drives at ninety miles per hour is forced

to dodge and weave through traffic at a high rate of speed. This conduct is inherently reckless and endangers the well-being of others. Affirmed.

The court's holding is the same as in the first example, but here the judge did not expressly state it.

Do not confuse implied holdings with the reasons for the decision. Sometimes these two components are hard to distinguish and lawyers and judges sometimes disagree as to what the court actually held. Remember that the holding is the actual decision and the reasons or policies are the justifications given for the decision. The two concepts can generally be distinguished if you remember this: Each issue has only one holding, but each holding may be supported by several reasons.

Study the following judicial opinion and the three proposed holdings for the case:

***State v. Klein* (1979)**

Casey Klein appeals his conviction for burglary. Klein was apprehended reaching into a house with ten-foot-long tree snips he had modified into a long pair of tweezers. He admitted to the police that he intended to steal a mink coat lying on a chair near an open window.

Appellant Klein denies that he could properly have been convicted of burglary. The maximum offense, he argues, is attempted larceny, because that crime requires only an attempt to steal the property of another. The prosecutor, however, correctly sought and won a conviction for burglary.

Generally, burglary occurs only if the defendant is physically present in the house; he must actually penetrate the enclosure of the dwelling. Although the defendant in this case never entered the house, he did extend his tree snips through the window. There is no meaningful difference between the snips and his arm because the penetration by the snips was merely an extension of Klein's person. Crime has run rampant in recent decades and this type of activity must be discouraged. Burglary carries a greater penalty than attempted larceny and this penalty will more effectively deter such crimes. We therefore hold that the need to deter such activities renders the defendant's actions burglary. Affirmed.

ANSWER A: A defendant may properly be convicted of burglary during a high-crime period when his conviction will deter similar actions, even if he was not physically present in the building.

ANSWER B: For the purposes of burglary, tree snips are the same as a human arm.

ANSWER C: The protrusion of tree snips held by defendant into a dwelling satisfies the penetration element of burglary even if the defendant's body does not enter the dwelling.

The actual holding of the case is contained in Answer C. It shows how the relevant legal rule was applied to the facts of this case. Answer C does not justify the holding; it is simply a statement of what the court decided. This is the rule that subsequent courts will apply or distinguish.

Answer A is what the court said it was holding, but not what it actually held. Deterring crime is a reason the court gave for deciding the case the way it did, but reasons and holdings are different things. Answer A reflects the court's confusing way of stating a policy justification for the decision, but it is not the court's holding.

Answer B sounds more like a holding and less like a reason than Answer A. It does not, however, offer a very useful holding. Tree snips may be the same as a human arm, but that statement fails to explain what legal rule is involved. In addition, the court ***reasoned*** that there was no meaningful difference between tree snips and a human arm for purposes of satisfying the penetration requirement. Thus, Answer B is also more like a reason.

2. Identify the issue.

Cases usually develop because the parties disagree over the application of one or more rules to a particular set of facts. The *issue* is the legal question that must be resolved before a case can be decided. Notice the interplay between holdings and issues: Holdings are the answers to the legal issues.

The issue in a case, like the holding, can be express or implied. Often the court will tell you the issue. For example: "The question presented in this case is whether a snowmobile is a motor vehicle within the meaning of the Michigan Motor Vehicle Code." This is an *express issue.* Sometimes a court will tell you the issue is one thing when a close reading of the case will demonstrate that it is something else. Sometimes the court will not tell you the issue, resulting in an *implied issue.* When this happens, you must read the case carefully and identify the issue based on the holding and the reasons that support the holding. Because the holding is the answer to the issue, once you have identified the holding in a case you should have little trouble spotting the issue.

Study the following opinion and three suggested issues:

***Johnson v. Silk* (1983)**

Alice Silk and Fran Johnson, university students who had recently met, decided to use Silk's small sports car to drive to their hometown for the weekend. Silk told Johnson she would pay all their traveling expenses to repay Johnson for tutoring Silk before the midterm examination in Silk's Chinese philosophy class. Shortly after they started out, Silk lost control of her car and it struck a construction barrel on the side of the road. Johnson suffered severe injuries and brought suit against Silk to recover damages. The trial court granted Silk's motion to dismiss, and Johnson appealed.

The state Automobile Guest Statute bars guest passengers from suing drivers for injuries they sustain in automobile accidents. The statute applies only if the passenger did not confer a substantial

benefit on the driver that motivated the driver to provide the ride.

The trial court found that Johnson was barred from recovery because she "paid nothing for the ride." The issue in this case is whether Johnson assumed the risk of her own injury by riding on a busy highway in a small sports car. Johnson tutored Silk, and she did so before the ride with every expectation of repayment. It is not necessary that the substantial benefit motivating the ride be cash. Silk owed a favor to Johnson that she felt obligated to repay, and under general principles of fairness actually was bound to repay. The Guest Statute therefore is inapplicable. Reversed.

ANSWER A: Whether a passenger injured in an accident while riding in a small sports car on a busy highway is barred by assumption of risk from suing the driver of that car for damages.

ANSWER B: Whether a court can disregard the Automobile Guest Statute to reach a just and fair result.

ANSWER C: Whether a passenger's tutoring of a driver before a midterm examination constitutes a substantial benefit that bars application of the Automobile Guest Statute.

The correct statement of the issue is Answer C. The court had to decide whether the Automobile Guest Statute applied to this situation. Application of the statute turned on whether the passenger conferred a substantial benefit on the driver. This is the real issue. The court determined that Johnson's tutoring of Silk constituted a substantial benefit because Silk had an obligation to repay Johnson by providing the ride. The court therefore held the statute inapplicable, and this holding provides further evidence of the issue.

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Answer A is what the court said the issue was, but it is not what the court decided. Assumption of risk, as you may know, is a defense to negligence. Most of this opinion, however, deals with the Automobile Guest Statute, and this is a good clue that the issue concerns the statute and not assumption of risk. Although few courts will err as obviously as this one did, you must remember that word and deed are not necessarily the same thing in judicial opinion writing.

Answer B may be your first reaction to what happened in this case, but issues must be stated in terms of a legal rule, not policy. Fairness is mentioned in the opinion, but it was a reason for the decision, even though the court mistakenly said it was the holding. This mistake points to an important lesson: You must be very sure you have identified the correct holding before you use it to infer the issue. Answer B does not define the legal issue.

3. Identify the rule.

Once you have determined the issue and holding, you should identify the rule. The *rule* is the general legal principle relevant to the particular factual situation presented. It can be a rule fashioned by a court in a previous case, a synthesis of prior holdings in cases with similar facts, or a provision in a constitution, statute, or regulation.

Identifying the rule involved in a particular case is relatively easy. The court will usually state what rule it is applying or why it is refusing to apply a certain rule. When the court does not state the rule, and you are unfamiliar with the area

of law, you will have to infer the rule from the issues, holdings, and facts of the case.

Rules, issues, and holdings are closely related. The issue is generally how the relevant rule will be applied to the specific facts of the case. The holding is the resolution of the issue — the determination of how the rule should be applied to the case. For example, in *State v. Klein*, the rule is that "burglary occurs only if the defendant is physically present in the house; he must actually penetrate the enclosure of the dwelling." The issue is whether a defendant was "physically present" or "penetrated" the building when he held an object that entered the building rather than entering it himself. The holding is the application of the rule to these particular facts — the defendant satisfied this requirement by penetrating a dwelling with tree snips.

The following examples are illustrative:

***Whitman v. Whitman* (1997)**

James Whitman's will left all of his property to his brother, George. James's wife challenged the validity of the will after James died, claiming that it did not express James's clear intent. She sought to present evidence, including her own testimony, that James actually wanted to give a substantial portion of his estate to her. The trial court excluded the evidence and we affirm. The rule in this state is that an unambiguous will is conclusive as to the testator's intent unless it would contravene law or public policy. All other evidence must be excluded. Because James's wife sought to present precisely such evidence, and the will was not ambiguous, the trial court properly ruled the evidence inadmissible. We find no legal or public policy reason to depart from the intent expressed in the will.

Identifying the rule in this case is simple because the court explained that "the rule in this state" is that an unambiguous will is conclusive as to the testator's intent. But consider this opinion:

***Central Credit Co. v. Smith* (1989)**

Olan Computer Company began to operate as a business before it was properly incorporated. Prior to proper incorporation, the company made sales and incurred debts. Olan's creditors are seeking to hold Smith and Jones, the incorporators and sole shareholders, personally liable for these debts. A corporation does not legally exist until it has been properly incorporated. Once a business is properly incorporated, a creditor must look to the corporate entity to satisfy its claim. The trial court properly found Smith and Jones personally liable for the debts. Affirmed

Because the precise rule used by the court is not stated here, you must identify it by inference. The legal rules stated by the court and its holding in this case help

the inquiry. A corporation's legal existence begins with proper incorporation, the court said. After that time, the corporation's shareholders are not personally liable for its debts. The court also held these shareholders personally liable for debts they incurred before incorporation. The court thus applied a corollary of the rules, stating: A shareholder of a corporation can be held personally liable for debts incurred when the company is not properly incorporated.

Sometimes, however, there is no rule in the jurisdiction, and the court must create a rule. These cases are referred to as *cases of first impression*. The case below is an example.

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***Morgan v. Davis* (2002)**

Kevin Morgan hired Sam Davis to construct a gazebo in his backyard. While excavating soil for the foundation, Davis discovered a metal box filled with gold coins dating from 1848 to 1893. Davis kept the box and its contents, and Morgan filed suit against Davis for recovery of the property. The trial court held that the right to possession of the coins belongs to the landowner. Davis appealed, claiming that the coins are treasure trove and possession belongs to the finder.

This is a case of first impression in this state; we have not had occasion to decide who has the right to possess treasure trove that has been found. Treasure trove includes gold or silver coins or bullion concealed in the earth or in a structure. The common law in many other states is that the finder of treasure trove has a right to possess it against everyone but the true owner. Our cases recognize another class of property that is somewhat similar, however. The owner of land on which embedded property (personal property that has become part of the earth) is found has a right to possession of that property as against all but the true owner, even if it was found by someone else.

We agree with Davis that the coins are properly classified as treasure trove, but we find archaic the common law rule that the right to possession of treasure trove belongs to the finder. Giving the right of possession to a trespasser or a hired workman rather than to the landowner does not conform to present day notions of fairness. We also see no reason to distinguish between treasure trove and other personal property embedded in the soil. We hold that, as a matter of law, the right to possession of property classified as treasure trove belongs to the owner of the land upon which it was found. Affirmed.

This case required the court to decide what the rule is. After considering the traditional common law rules regarding found property, the court decided to fashion its own rule because it found the distinctions between certain categories of property artificial and outdated. When you identify the rule for such cases, you will describe the state of the law prior to the court's decision.

4. Identify the facts.

After the initial reading of the case, you have a general knowledge of the facts. Once you understand the rule, holding, and issue, however, you will be able to reread the facts and determine *which* were important to the decision.

Judicial opinions usually contain a lengthy description of the facts because the court wants the reader to understand the situation completely. Your case brief should identify only two kinds of facts: legally relevant facts and procedurally significant facts.

Legally relevant facts are those the court considered important in deciding the case. These facts are outcome-determinative; they

affected the court's decision. Because facts are inextricably tied to legal issues and rules, it is impossible to know which facts are relevant without first knowing what the court decided. Sometimes a court will state precisely those facts it thought significant in deciding the case. At other times, you will have to infer those facts from the court's holding and reasons. There is no single approach that will always tell you which facts are outcome-determinative. Determining which are the legally significant facts requires a careful reading of the opinion.

Procedurally significant facts describe at what stage in the case an error may have occurred in the lower court. These facts, which are routinely stated in appellate opinions, include the ruling of the trial court on the matter that is the subject of the appeal. They are important because they describe the specific question that the appellate court will address and determine the scope of the court's review. The alleged error might be as narrow as whether the court erred in denying a motion to exclude a certain piece of evidence or as broad as whether the court erred in refusing to grant a motion for a directed verdict at the end of the trial.

Procedural facts are also important because the procedural posture of the case affects what legally relevant facts are available to the appellate court. When the parties agree on the facts, the trial court simply determines and applies the relevant law. If the parties disagree on the facts, a trial is held during which each side presents witnesses and other evidence to support its story. Appellate courts are then confronted with more numerous and less consistent facts than if a case is resolved before trial. The procedural posture of the case also affects what the appellate court can do if it disagrees with the trial court. If the factual record is complete, the appellate court's decision should end the controversy; if the record is not complete, the appellate court will remand the case for more fact finding. In *State v. Klein,* for example, the defendant appealed his conviction for burglary, and the court affirmed his conviction. Because he was convicted, you know that there was a trial and that the evidence concerning the tree snips came out of that trial.

Because his conviction was affirmed, you also know that this case (barring a further appeal) is over.

Consider the following opinion and factual statements:

Lost River Ditch Co. v. Brody **(1923)**

The defendant owns a small riparian tract on Apple Blossom Creek. In the fall of 1922, he began diverting 45,000 gallons of water a day from a pump house on that tract to a nonriparian parcel one-half mile from the stream.

The defendant claimed he needed the water because he had just doubled the size of his herd. The plaintiff, who owned another riparian tract downstream on the creek, sued the defendant for damages, claiming that any diversion of water from the watershed was impermissible. Although the plaintiff was unable to prove any actual damages, the jury awarded him one dollar in nominal damages. We reverse. Diversion of water from the creek to a nonriparian tract without some evidence of damage does not provide a basis for recovery of nominal or any other damages.

ANSWER A: The defendant, who owned a small riparian tract on Apple Blossom Creek, diverted 45,000 gallons of water per day in the fall of 1922 to supply water for his recently doubled cattle herd. The plaintiff, a downstream riparian owner on the same creek, sued the defendant for damages, claiming that any diversion of water from the riparian tract was prohibited. A jury awarded the plaintiff one dollar in nominal damages even though he was unable to prove actual damages. The defendant appealed.

ANSWER B: The defendant, who owned a riparian tract on a creek, diverted water from the creek to a nonriparian tract. The plaintiff, a downstream riparian owner on the same creek, sued the defendant for diverting the water. The plaintiff could not show actual damages, but a jury awarded him nominal damages. The defendant appealed.

Answer B is better because it contains only those facts the court used to decide the case and those needed to explain what happened in the trial court. Answer B contains nothing else; it is simple and succinct. Answer A is a slightly rewritten version of the facts stated in the case. It includes interesting details, but the name of the creek, the quantity of water diverted, the actual amount of the nominal damages, and some other details are irrelevant to the issue on appeal. Answer A also omits a legally significant fact. Because the rule applies only to water diverted to a nonriparian tract, Answer A should have stated that the water was diverted from the creek to a nonriparian tract.

5. Identify the disposition of the case.

The *disposition* is simply a statement of what the appellate court did with the decision of the court below. When only two courts are involved — the appellate

court and the trial court — stating the disposition is straightforward. If the court agrees with the lower court's

decision, as was the case in *Whitman v. Whitman,* the judgment is "affirmed." If the court believes the decision was erroneous, as was the case in *Lost River Ditch Co. v. Brody,* the judgment is "reversed." As stated above, if additional facts are necessary for a disposition of the case, the court may also *remand* the case for further proceedings.

Sometimes, more than one lower court is involved. A trial court decision, for instance, might be reversed by an intermediate court of appeals. The supreme court of the jurisdiction might then reverse the court of appeals decision and reinstate the trial court's decision. When that occurs, your brief of the supreme court's decision should describe its disposition of the decisions of both the trial court and the intermediate appellate court.

6. Identify the reasons and policies.

Reasons are the logical steps a court uses to reach its holding. Reasons can be simple explanations of how a legal rule or policy is applicable or inapplicable to the case, or more involved explanations of why the analysis from one area of the law is applicable to a different area of the law. Understanding cases requires you to determine the reasoning process the court employed to arrive at its holding on an issue. Determining the reasons behind a court's decision will help you understand what the decision actually means or how broadly or narrowly the case might be interpreted.

Chapter 1 (Rules and Policies) defines policies as the underlying purposes of legal rules. They are similar to but broader than reasons. Whether a court is modifying the law in bold strokes to reach certain goals or carefully limiting the scope of earlier decisions, it will usually advance some policy justification for its decision. Even when a court admits it reached a harsh or unfair result for the parties, it will still try to show how the decision is in the best interest of the public. In other cases, when the law dictates an outcome the court dislikes, the court may complain about the law and even suggest the desirability of legislative change, but it will still explain the policies underlying the law and the outcome. Policies are important because they define the future direction of the law.

To identify policies, first identify the holding. Then look for the social justifications for the court's decision. The court in *State v. Klein* held that use of

tree snips satisfied the penetration element of burglary even though no part of the defendant's body entered the building. The court stated a broad policy to support its conclusion by emphasizing the high crime rate and the deterrent value of the more severe penalty for burglary.

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Some opinions contain no policy justification at all. In *Lost River Ditch Co. v. Brody*, for example, the court stated the rule regarding riparian water rights and reversed the trial court without explaining the basis for the rule or its holding. A court is less likely to provide an explanation in cases like this, when the rule and its application are fairly well settled. If relevant to your analysis, earlier decisions can help explain the policies underlying the rule.

The close relationship between reasons and policies sometimes makes it difficult to tell the two apart, but the following test is useful: Reasons indicate *how* the court arrived at its holding; policies tell you *why* this holding is socially desirable. An opinion may be written without any policy justifications, but a court will generally explain how it arrived at its conclusion.

Sometimes you will find that the court's explanation is incomplete or ambiguous. When that occurs, say so. If only one interpretation is logical, explain it. If several interpretations are possible, you may want to explain them in your case brief.

In *State v. Klein*, for example, the court stated that tree snips were an extension of Klein's arm. The court's reasoning is not explained beyond the statement that there is "no meaningful difference" between the snips and Klein's arm. You might reconstruct the court's reasoning as follows:

> The requirement that the burglar must penetrate the enclosure would mean nothing if a burglar could circumvent the requirement by devices that extend the reach of the burglar's arm. Therefore, we will enlarge this requirement by redefining penetration to include a mechanical extension of a burglar's person.

This reconstruction explains how the court arrived at its holding. The announced policy to deter crime, in addition, helps to justify the court's extension of one of the burglary requirements.

B. Check for congruency.

Once you have preliminarily identified the important facts, the issue, the rule of law, the holding, the disposition, and the reasons and policies in a case, check these components against one another to make sure they are congruent. There is an interplay among them that should be obvious by now. Such interaction makes the case an interlocking whole and underscores why you cannot understand any one component without reference to the others. Always pause when you have gone this far to make sure the components are congruent.

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You might test for congruency by using the following model:

Facts	What happened?
Rule	The law
Issue	How does the law apply to these facts?
Holding	The result when the law is applied to the facts
Disposition	Did the court agree or disagree with the decision below?
Reasons & Policies	Justification for the result in light of the law and facts

If you are using the same law and the same facts in each component, and they accurately reflect the court's decision, you have a good case brief. When the court's holding changes the law, however, you will find that the law described in the holding differs from the law described in the rule. In *State v. Klein*, the court modified the rule that a person must penetrate the dwelling to include penetration by an extension of the person's body. Your case brief should reflect any modifications to the rule.

C. In multiple-issue cases, analyze each issue separately.

A case can contain more than one issue because there may have been several disagreements that the appellate court was asked to resolve. Although an appellate court will frequently dispose of an entire case after resolving only one of these disagreements, an opinion may contain a discussion of several issues with a corresponding holding for each issue. If there are several issues, analyze each issue separately. For each issue, you must identify the rule, relevant facts, holding, and reasons and policies supporting the court's decision. Although the issues may be closely related, your analysis of each should be distinct. Once you have

identified each issue presented in an opinion, follow the steps outlined in this chapter to dissect each one. When researching or analyzing a specific issue, you may determine that only one of several issues is relevant. In this situation, while you may ultimately focus on and fully brief only the relevant issue, you should carefully read the entire case to be sure that the other issues did not have any effect on your specific issue.

As indicated at the outset of this chapter, the six components discussed above may be written out in a short summary of a case often referred to as a case brief. Case briefs may be useful when preparing for class or researching a problem as a ready reference so you do not have to reread a case to remember what it was about.

Below is an opinion and a sample case brief.

***Roberts v. Zoning Commission* (1998)**

Appellant Edwin Roberts owns a parcel of land. He applied to the city Zoning Commission to rezone the parcel from R-3 (single-family residential) to O-I (office-institutional). The Commission denied his application, finding that all surrounding parcels are zoned for and contain single-family homes. Roberts produced evidence that the parcel was appraised at between $50,000 and $90,000 under the current zoning, but would be worth $200,000 to $250,000 if rezoned.

Following the denial of his rezoning request, Roberts filed this action, alleging that the Zoning Commission had taken his property without compensation, in violation of the state and federal constitutions. To demonstrate a taking, the challenger to a zoning classification has the burden of presenting clear and convincing evidence that he has suffered a significant detriment.

The trial court properly dismissed the landowner's complaint because Roberts failed to meet his burden. Merely showing a disparity in the market value of property as currently zoned versus its value if rezoned is not, by itself, sufficient to establish a significant detriment. Offers for real estate depend on the method of marketing and the asking price. Because the landowner did not attempt to market the property at an asking price consistent with its value under current zoning, no significant detriment has been shown. We must bear in mind that zoning ordinances exist to ensure the greater good of the community even though specific zoning may not always be in the best interest of an individual. Affirmed.

In the sample brief of this case, the order of the six parts of the case brief is different from the order in which they were described earlier in this chapter. Looking for the holding first, and then the issue, rule, facts, disposition, and reasons and policies, is a good way to study a case. But some writers find it helpful to organize the six components in the case brief in the order shown below. Case briefs are for your use, so adopt a format that works best for you.

***Roberts v. Zoning Commission* (1998)**

Facts: A landowner applied for a rezoning of his property. His request was denied even though his property would have been worth substantially more if it were rezoned. He did not try to market the parcel under the existing zoning classification. The landowner then sued, alleging an unconstitutional taking. The trial court dismissed the complaint.

Rule: The government may not take property without compensation. To show a taking from a rezoning denial, a landowner must demonstrate by clear and convincing evidence that he has suffered a significant detriment.

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Issue: Has the landowner suffered a significant detriment because of the denial of his rezoning request?

Holding: No. A landowner cannot show a significant detriment unless he attempts to market the property at an asking price consistent with its value under current zoning.

Disposition: Affirmed

Reasons and policies: A significant detriment does not occur when the landowner is deprived of a potential increase in property value that would result if the property were rezoned. A difference in market value depends on such variables as how the land is marketed. Zoning may not always serve the best interest of the individual, but it serves the greater good of the community.

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EXERCISES

The following exercises will allow you to practice analyzing cases and writing case briefs. Each opinion contains all of the components discussed in this chapter. Write a case brief for each opinion that includes all six components. Identify each component in your case briefs as precisely as possible.

Exercise 3-A

***Toad v. Ulrich* (2002)**

The appellee, Michael Toad, operates a roadside stand where he sells handcarved, three-legged wooden stools to tourists. Toad's business started slowly, but it has increased substantially in recent years. Toad now derives a modest income from his enterprise. From the start, he has advertised and referred to his stools as "Toad Stools." After Toad operated his stand for one year, the appellant, Bruce Ulrich, began operating a similar stand and selling similar stools, which Ulrich also called "Toad Stools." When Ulrich first opened his stand, Toad asked him not to use the name "Toad Stools," but Ulrich did so for two years. Toad made no further effort to prevent the use of the name until he started this suit.

Toad filed suit alleging that the appellant had infringed on his trademark. Toad requested $45,000 in damages for lost sales and an injunction barring Ulrich from using the name "Toad

Stool." The trial court awarded Toad $40,000 in damages and granted his request for an injunction. Appellant Ulrich now contends that the trial court erred in finding a trademark infringement because Toad did not actively defend his use of the name.

Common law trademark principles can protect the name of a business or product, but that protection is not absolute. A person must actively defend that trademark against known infringements. If he or she does not actively defend the name, a competitor is free to use that name after two years. "Actively defend" means making diligent efforts, including lawsuits if necessary, and Toad has not made diligent efforts according to the traditional rule.

We must, however, distinguish between large businesses that have the capacity and the resources to litigate such claims, and small businesses that do not have these resources and should not be held to the same standards. The smaller the business, the easier it should be to satisfy the active defense requirement. When Toad approached Ulrich and asked him not to use the name, he satisfied that requirement. Therefore, Toad is entitled to common law trademark protection. Affirmed.

Exercise 3-B

Bronson v. Road Runner Shoe Co. **(1985)**

The appellee, Road Runner Shoe Co., is a Maryland corporation that manufactures and sells running shoes. Twenty of the company's 100 employees

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work at its Maryland headquarters, while the remainder work at offices throughout the United States. The company, which sells to major retailers, has a fleet of trucks for delivering its shoes. The company employed George Granger as a general helper and driver for one of its delivery trucks.

Johnny Bronson filed suit against the company for injuries he sustained when one of the company's trucks, driven by Granger, jumped the median strip and struck him while he was jogging. It is undisputed that Bronson was using extreme care while jogging and was wearing a bright red jogging outfit. Bronson claimed he would never be able to jog again and that he has had emotional problems since the accident. Granger, who had not received permission to use the truck, had visited his girlfriend during his lunch hour. The company gives Granger one hour to eat lunch, and he was speeding back to work when the incident occurred. Granger was nineteen years old at the time and a "hard worker who comes from a reputable family." He had worked for the company for two years and was saving money to go to college and major in business administration. Granger was arrested once when he was sixteen for drag racing on a public highway, but his case was dismissed.

The trial court granted the company's motion for summary judgment. On appeal, Bronson argues that the company should be liable on the theory of *respondeat superior.* We agree.

The general rule is that an employer is liable for the acts of employees when they are acting within the scope of their authority. In this case, Granger did not have permission to use the truck during lunch and did not usually drive it then. However, Granger normally had exclusive possession of the keys during working hours, and the company had never objected to Granger's private use of the truck. Employers should be held liable for the torts of their employees. It is too easy for an employer to shrug off legal responsibility by saying the employee was not authorized to commit the act. Very few employers expressly authorize employees to commit tortious acts.

Employers, by their position of authority, have control over employees. Employees who do not behave responsibly should be discharged. Reversed.

Exercise 3-C

***State v. Phillips* (1999)**

The appellant set fire to an unoccupied building. The building had been deserted for many years and had been condemned as a "firetrap." The appellant poured several gallons of gasoline throughout the first floor of the building and then ignited it. The building burned to the ground in thirty minutes. The trial court found her guilty of arson, a felony in this state. The appellant does not contest that conviction here.

On the way to put out the fire, a fireman was killed when he fell off the back of the fire truck and was run over by a car that was speeding and following the truck too closely. There was no way the driver of the car could have avoided the fireman. The driver of the car was charged and convicted of speeding and careless driving.

The appellant was also found guilty of murder under the felony murder rule. She appealed this conviction. The felony murder rule provides that if someone is killed during the commission of a felony, the defendant is guilty of murdering that person. The purpose of the rule is to deter people from committing felonies, particularly those which are inherently dangerous to human life. In this case, there is no doubt the fireman was killed during the commission of a felony.

Fires and arson are inherently dangerous to people in buildings, bystanders, the surrounding neighborhood, and firemen summoned to combat the blaze. The appellant should have known that a fire truck would be summoned to put out the fire, but she could not foresee someone would be following the truck too closely. Public policy dictates that there must be a limit to liability. The felony murder rule borders on strict liability in criminal law. Any expansion should be carefully scrutinized. As with any principle of strict liability, there must be a causal connection. Reversed.

CHAPTER 4 Precedent and *Stare Decisis*

Judges have considerable freedom to modify legal rules and principles in accordance with social norms and their views of justice and common sense. The concepts of precedent and *stare decisis* serve as important checks on this judicial freedom and ensure that the law develops in an orderly fashion.

One of the fundamental principles of our legal system is that courts look to previous decisions on similar questions for guidance in deciding present cases. These decisions are known as precedent, and their usefulness is premised on the idea that an issue, once properly decided, should not be decided again. Reliance on precedent ensures that similar cases are decided according to the same basic principles and helps courts to process cases more efficiently. Durable rules also reinforce the social norms they define, encourage confidence in the legal system, and assist people in planning their activities.

The values that surround the notion of precedent are reinforced by the principle of *stare decisis.* Whereas precedent merely requires that courts look to previous decisions for guidance, *stare decisis* requires that a court follow its own decisions and the decisions of higher courts within the same jurisdiction. A state trial court, for example, must follow the decisions of all appellate courts in that state, and a state appellate court must follow its own decisions (unless the issuing court chooses to overrule a prior decision) as well as the decisions of higher appellate courts in that state. Federal courts of appeal must follow decisions of the United States Supreme Court, but decisions of federal district courts or other federal courts of appeal do not bind them.

Precedent, then, can be of two types — binding or persuasive. When the doctrine of *stare decisis* applies, precedent is binding and

a court must reconcile the result in a given case with past decisions. Only after explaining why previous cases are inapplicable may a court fashion new rules or modify or expand existing ones; a court may never simply ignore or contradict binding precedent. When the doctrine of *stare decisis* does not apply, as with decisions from other jurisdictions or lower courts in the same jurisdiction, courts are free to follow, or refuse to follow, previous decisions. Although not binding, such decisions may be *persuasive.* The reasoning of other courts often illuminates the issues and suggests solutions to a problem.

The concept of binding precedent may seem absolute. But in practice, *stare decisis* is a flexible concept. Because a judicial opinion may be interpreted in different ways, judges have significant latitude even when dealing with binding precedent. Differing interpretations result from internal tension — on one hand, between the facts and holding of a case and, on the other hand, its underlying reasons or policies. Viewed most narrowly, a case stands for a particular result regarding that set of facts. Courts often do confine cases to narrow factual categories, but such interpretations give the case relatively little importance. Viewed more broadly, a case stands for the articulated reasons or policies and how they support the relevant rule. Because the court is concerned primarily with the facts of the case before it, legal analysis travels on increasingly risky ground the further it ventures from those facts in trying to predict the outcome of future decisions. The best guides in venturing from those facts are the reasons and policies given in the opinion.

The various ways in which a case can be interpreted highlight the fundamental role that *stare decisis* plays in the process of legal analysis. In his well-known book, *The Bramble Bush,* Professor Karl Llewellyn defined this range of interpretation in terms of "strict" and "loose" views of precedent. The *strict* view, applied to "unwelcome" precedent, limits the reach of prior cases to show that they are not applicable to the case at hand. Strict construction of precedent requires careful distinguishing of the facts and policies of the prior case(s) from those of the present case. The *loose* view, applied to "welcome" precedent, maximizes the reach of these cases to show how they are applicable, or analogous, to the present case. As Llewellyn pointed out, both approaches are "respectable, traditionally sound, [and] dogmatically correct."[1]

Flexibility is necessary to the legal system because it allows the law to adapt to evolving conditions and to accommodate new factual situations. However, the stabilizing effect of *stare decisis* should not be underestimated. When the rules are well-defined and the factual situations are clearly similar or plainly different, *stare decisis* mechanically

dictates the result. Even when the rule is ambiguous or the factual situation complex, *stare decisis* at least defines the starting point for analysis. This tension between restraint and freedom, between stability and change, embodies the essence of our common law system.

Determining the precedential value of rules or ideas in a court's opinion requires a close reading of the case. Statements made by a court that do not bear on the issues before it are known as *dicta* (from the Latin phrase *obiter dictum,* literally, "said in passing"). *Dicta* have little precedential value because a court is supposed to decide only the issues before it and *dicta,* by definition, are not part of the reasoning process that lead to the decision. Courts deciding subsequent cases sometimes rely on *dicta* nonetheless, because *dicta* reflect other judges' concerns and often indicate how a court would rule in the future.

Courts in subsequent cases may also rely on the ideas and reasoning of concurring and dissenting judges. Appellate courts consist of a panel of judges who may not agree on how a dispute should be resolved or why a particular decision should be reached. If the court is divided, one of the judges in the majority will write the opinion of the court. Judges who disagree with the decision reached by the majority and refuse to join the court's opinion are said to *dissent.* Judges who agree with the decision but either disagree with the majority's reasons or would have reached the same decision on other grounds are said to *concur.* These judges frequently write separate opinions.

Unlike *dicta,* which may indicate how a court would rule in the future, a concurring or dissenting opinion indicates only that a judge disagreed strongly enough to write a separate opinion. Nevertheless, these opinions can be a valuable resource. Often, a dissenting or concurring opinion sharpens the focus of the debate. It may offer a different interpretation of precedent, emphasize social policies disregarded by the majority, or frame the legal question in a different way. A court that is considering a change in the law of its jurisdiction or facing an issue of first impression will read concurring and dissenting opinions on the issue in question with great interest. Dissenting opinions in an earlier case are sometimes adopted by a majority of the court in later cases.

The following two cases illustrate how precedent and *stare decisis* function. They concern the question of whether a landlord should be held liable for negligently exposing tenants to foreseeable criminal activities. After deciding the first case, *Brainerd v. Harvey,* in 1982, the same state appellate court was

presented with an opportunity four years later, in *Douglas v. Archer Professional Building, Inc.*, to expand the scope of the rule to cover a different factual situation.

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Brainerd v. Harvey **(1982)**

The plaintiff is an elderly man who lived in a small apartment building in a high-crime area. The building had poor lighting on its front porch and a continuously unlocked outer door. As the plaintiff was about to enter the building one night, the outer door was jerked open by an unknown youth who had been hiding inside. The youth struck and robbed the plaintiff. The plaintiff brought suit against the landlord, but the trial judge granted the defendant's motion for a directed verdict of no cause of action.

We reverse. We have from time to time held that persons are liable for negligently exposing others to foreseeable criminal activities, and this is such a case. The inadequate lighting and locks were physical defects in a common area of the building under the landlord's control; this would be a far different case if the building had not contained such defects. The landlord's negligence in failing to repair them made it more likely than not that the plaintiff would be victimized by a criminal attack.

The trial court also erred in refusing to grant the plaintiff's demand for a jury trial. He did not waive that right by waiting until the pretrial conference to make his demand. Remanded for a jury trial.

Douglas v. Archer Professional Building, Inc. **(1986)**

In 1978, a mental health clinic leased and began occupying an office on the fifth floor of the Archer Professional Building. About two years later, an outpatient at the center stabbed Carol Douglas, a physician with an office in the building, while both of them were riding in the building's elevator. Dr. Douglas brought suit against the owner of the building. At trial, the director of the clinic testified that the stabbing was the first such incident in his ten years of experience with such programs. There was also testimony that before the incident other tenants in the building had voiced concern over use of the elevators and stairwells by the clinic's patients. Dr. Douglas won a jury verdict for $115,000 in damages. We affirm.

We stated in *Brainerd v. Harvey* that landlords are liable for damages caused when they negligently expose others to foreseeable criminal attacks in common areas of buildings they lease. In both this case and *Brainerd,* the attack occurred in an area of the building under the landlord's control and used by all tenants. Just as the landlord in *Brainerd* knew or should have known about the absence of adequate lighting and locks in the apartment building, the defendant here knew or should have known about the potentially dangerous condition in the professional building. When the landlord is informed by his tenants that such a condition exists, he has a duty to investigate and take any possible preventive measures. The jury could properly find that the landlord's failure to do so was negligence.

Fisher, J., dissenting. The court here imposes unwarranted and unreasonable burdens on landlords by vastly extending their potential liability. In *Brainerd v. Harvey,* we expressly limited the landlord's liability to his failure to detect and repair dangerous physical conditions in common areas of leased buildings. Unlike the front door, this professional building had no physical

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defect that enabled the assault to occur. In *Brainerd,* we also limited liability to foreseeable criminal attacks, rather than those based merely on the subjective fears of some tenants in the building. The majority opinion suggests a medieval fear of persons who receive mental health care and will impede the state's goal of returning those patients to the community.

Although the majority and dissenting opinions reached opposite conclusions in the *Douglas* case, they both relied on *Brainerd* for the basic principles of decision. Both opinions acknowledged that landlords are liable when they negligently expose their tenants to foreseeable criminal attacks in common areas of buildings they lease. The principle of *stare decisis* requires that the court start from that position, rather than craft new and different rules.

The division of the court in *Douglas* illustrates the flexibility of *stare decisis.* The majority interpreted *Brainerd* broadly as "welcome" precedent. When the landlord is informed by his tenants of their subjective fears of a potentially dangerous condition in a common area of the building, the majority ruled, he has a duty to investigate the situation and take precautionary measures. The court departed from *Brainerd* by refusing to limit the landlord's liability to situations in which there was tangible evidence suggesting the possibility of a criminal attack. The court responded to the different factual situation presented in *Douglas* by pushing the law in a different direction, even as it reasoned that it was merely following the *Brainerd* decision.

The dissenting judge interpreted *Brainerd* more narrowly as "unwelcome" precedent. *Brainerd*, he concluded, conditions the landlord's liability on the presence of physical defects in the building and objective evidence suggesting the possibility of a criminal attack, neither of which were present in *Douglas*. To support its narrow reading of *Brainerd*, the dissent also raised an objection about the effect of the court's decision on landlords in general and outpatient mental health clinics in particular. The dissenting opinion is buttressed by *dicta* from *Brainerd* that states that the case would be different if the building did not have physical defects. The statement is *dicta* because it was not necessary to the resolution of the *Brainerd* case and was thus disregarded by the majority in *Douglas*.

These two cases illustrate the tension between change and stability that is central to the study and practice of law. Certain factors militate in favor of stability. The *Brainerd* decision altered business expectations and forced landlords to modify their practices to avoid liability. In addition, the corporate owner was found liable in the second case pursuant to a rule that was not articulated until the owner was found to have breached it. After *Douglas,* landlords for other office buildings no doubt made significant changes in their leasing procedures and plans.

Uncertainties would be magnified by any perception that the law was subject to further modification.

Other factors counseled for change. The injury to Carol Douglas underscored the majority's view that landlords should keep their common areas free of foreseeable criminal activity. Even if the risk seemed most apparent after the harm occurred, the court concluded that a subjectively perceived risk of great bodily harm should be sufficient to warrant extra protective measures by the landlord. In addition, liability under the new formulation of the rule is the only realistic incentive for encouraging a plaintiff to seek relief in court. *Douglas* was based on an evolving view of the landlord-tenant relationship. Although the arguments vary somewhat from case to case, the tension between change and stability remains.

Two additional considerations are necessary for a full understanding of the mechanics and policies of precedent and *stare decisis.* First, appellate courts are supposed to decide only as many issues as are necessary for the disposition of a case. As Chapter 3 (Case Analysis and Case Briefs) points out, sometimes this requires courts to decide multiple issues. Each holding on an issue is precedent for later decisions. The court's holding in *Brainerd* concerning the plaintiff's demand for a jury trial, as well as its holding on the negligence issue, are both precedent and will have to be considered by future courts rendering decisions on the same issues.

Second, trial courts are responsible for finding facts and applying the law, while appellate courts have the authority to modify and expand the law. Appellate courts therefore have greater freedom in deciding how to apply precedent than trial courts. Appellate courts sometimes find it impossible to reconcile their previous decisions with the application of evolving values or social norms in a subsequent case. When this happens, the court may simply overrule the previous cases and chart a new course rather than show how these cases may be distinguished. Courts usually justify overruling previous decisions by pointing to the outdated principles or poor reasoning that supported them. These decisions are often spectacular, as when the United States Supreme Court, in the 1954 case of *Brown v. Board of Education,*[2] held that a state could not constitutionally require racial segregation in public schools, overruling its 1896 *Plessy v. Ferguson*[3] decision permitting "separate but equal" accommodations. Cases may also be more subtly overruled; a series of decisions, for example, may chip away at the scope of an earlier rule or undercut its policy basis.

EXERCISES

The exercises that follow are intended to show the stability and flexibility inherent in the concepts of precedent and *stare decisis*.

Exercise 4-A

Assume that you are a state appellate court judge. Eric Buckler was charged with reckless endangerment under the Motor Vehicle Code after the car he was driving left the road early one morning and struck a tree, killing a passenger. The trial judge instructed the jury that it could return a guilty verdict only if it was convinced beyond a reasonable doubt that the evidence showed Buckler had operated his motor vehicle in reckless disregard of the lives or safety of others. The judge then read a separate provision of the Motor Vehicle Code that prohibits driving while under the influence of alcohol. Although Buckler was not charged with violating this provision, there was evidence that he had been drinking heavily. The judge told the jury it could use Buckler's violation of this provision to determine his guilt for reckless endangerment. Buckler was convicted. On appeal, he seeks a new trial by challenging the trial judge's instruction that guilt for driving while under the influence of alcohol could be used to establish guilt for reckless endangerment.

There are two relevant cases in the state:

***State v. Waterford* (1909)**

This action began on a criminal complaint charging defendant with reckless endangerment. The complaint charged that defendant recklessly ran his motor vehicle against the decedent and the horse that the decedent was riding, killing both. The defendant filed a demurrer, claiming that the complaint did not indicate the offense with sufficient clarity to notify the defendant specifically for what crime he was to be tried. The trial court overruled the demurrer, and the defendant was convicted. We affirm.

Operators of motor vehicles have a duty to obey the laws regarding the use of motor vehicles. Disregard of or inattention to this duty, as defined in any of the motor vehicle laws, constitutes recklessness. The complaint therefore properly used the words "reckless endangerment" to describe the manner in which the defendant acted, particularly considering his manifest drunkenness. This was not an innocent accident.

***State v. Seperic* (1975)**

A criminal complaint charged the defendant with reckless endangerment in violation of the Motor Vehicle Code. He was convicted after a jury trial. The defendant argues on appeal that the statute violates the state constitution because it does not state with sufficient clarity what it prohibits. We disagree.

Motor vehicles play such an important role in our lives that reckless driving has come to have a commonly understood meaning — driving with wanton disregard for the lives or safety of other persons. The acts prohibited are sufficiently definite to persons of ordinary intelligence. The standard requires not only reckless operation but also operation that endangers the lives or safety of others. Nothing else is needed to establish reckless endangerment. Affirmed.

1. The court in *Seperic* did not mention the *Waterford* decision. Does the holding in the later case nonetheless affect the validity of the earlier case? Explain.
2. How would you decide Buckler's case? Why? How would you use these cases to explain your decision?
3. Could you use *Waterford* to support a decision contrary to the one you reached in response to questions in item 2? Could you use *Seperic* to support a decision contrary to the one you reached in response to questions in item 2? Explain.

Exercise 4-B

Assume you are a trial judge. In the case before you, Marie Elson, an elderly blind woman, defaulted on the land contract for her home. The real estate company wants to repossess the house and keep $57,000 in payments she has made thus far on the $84,000 contract. Elson does not contest her default, and she is willing to let the real estate company repossess the house. She does, however, insist on the return of the $57,000.

The following case is the only relevant precedent in your state:

***Aaron v. Erickson* (1960)**

Susan Aaron defaulted on a $30,000 land contract after making $12,000 in payments. The trial court denied Aaron's request for return of the $12,000. We affirm. There is a fundamental difference in our law between land contracts and mortgages. A land contract is an installment plan under which the purchaser does not get title to the property until the last payment. Those who buy property on a mortgage have it financed through a third party and receive title immediately. It may be a hard result, but those who buy property on a land contract take the risk of losing everything for failure to make payments. If this were a mortgage, we would reach a different result.

The following case is from the highest court of another state:

***Deal v. Novack* (1994)**

In 1980 Samuel Deal entered into a land contract with Larry Novack for $60,000. Deal defaulted in 1990 after making $24,000 in payments. The

court of appeals affirmed the trial court's holding that Novack was entitled to repossess the property and retain Deal's payments. We reverse. Had Deal entered into a typical mortgage arrangement, he would have title to the property and the mortgagee who provided the purchase price would have a lien on the property to secure the loan. Upon his default and the mortgagee's foreclosure, he would lose the property but his $24,000 would be returned. To hold that a land contract is conceptually different from a mortgage is to elevate form over substance. In both cases, the seller gives up possession of the property in exchange for the purchase price. In the case of a land contract, the seller retains legal title to the property as security for the price. In the case of a mortgage, the mortgagee retains a lien on the property as security. It is inequitable to hold that the defaulting buyer under the first arrangement must forfeit 40% of the purchase price while the defaulting buyer under the second arrangement forfeits nothing.

Pearle, J., concurring. A buyer who enters into a land contract must make a clear showing of inequity in order to avoid forfeiture of his payments. Otherwise, the court's opinion can be read as a wholesale repudiation of the land contract as an accepted instrument of commerce.

1. Is Elson entitled to have the money refunded? Justify your decision.
2. Is your answer to question 1 consistent with your sense of a just result? Explain.
3. Could you have used the cases to support a decision contrary to the one you reached in response to question 1? Explain.

Exercise 4-C

Assume you are a judge confronted with the following cases:

1. Jennifer Tubbs and Mark Hoffman negotiated every word of the contract by which Tubbs sold her elaborate stereo system to Hoffman for $4,300. The contract provided that Tubbs would deliver the stereo to Hoffman's house, and that Hoffman would be obligated to accept the stereo and pay the full price even if it was damaged in transit. The stereo was damaged when Tubbs' truck was involved in an accident. Hoffman accepted the stereo, but he insisted on a deduction from the full price. Can Tubbs collect the $4,300 from Hoffman?

   Decide this case according to your idea of a just result, and state a rule that explains your decision.
2. Beth Goldberg insured her house on Louisiana's Gulf Coast for $290,000. The contract was identical in form to all other home insurance policies sold by the company. Goldberg's home was severely damaged by flooding from a

hurricane, and she made a claim on her policy. The company denied the claim, stating that a line in the middle of the seven-page contract specifically

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excluded hurricane flooding from coverage. Beth Goldberg had never read the contract. Can she recover for damage to her home?

Decide this case in a manner that is consistent with your answer to question 1. State a rule that explains your decision in both cases, and describe the basis for your rule.

3. Justin Graff bought a refrigerator from his neighborhood appliance dealer for $700. Because he could not pay the full purchase price, he agreed in a contract to the dealer's financing scheme, which required a $35 payment each month for five years. Graff has a third-grade education and is not good with figures, so he did not know (nor was he told) that the refrigerator would actually cost him $2,100. After he had paid the dealer $840, a friend explained the contract to him. He made no further payments. Can the dealer collect the remaining $1,260?

   Decide this case in a manner that is consistent with your decision in question 2. State a rule that explains your decision and describe the basis for it.

Exercise 4-D

Assume you are a trial judge in a civil action in which Elizabeth Fowler, the defendant, claims the court has no jurisdiction because service was obtained "by trickery and fraud." Fowler, a resident of another state, knew she was the possible subject of two civil actions in your state, one for a $5,000 damage deposit she had not returned to a merchant, and the other for a $200,000 insurance swindle. She wanted to resolve the first potential suit but not the second. To do this, she arranged a vacation in your state so she could pay off the merchant, who said he wanted "to avoid litigation over the deposit." She met the merchant at the airport and paid his deposit. The merchant, who secretly worked for the allegedly defrauded insurance company, then served her with papers for the insurance scheme.

The following case is the only relevant precedent in your state:

***Eckersly v. Ramon* (1981)**

The appellant, Sean Eckersly, a resident of this state, sought to bring an action against Hal Ramon, a nonresident, for breach of contract. To secure service of process on Ramon, Eckersly requested several of Ramon's acquaintances to persuade Ramon that his mother, who also lives in this state, was terminally ill. Ramon agreed to come to this state to visit her. In reality, Ramon's mother was hiking in the Rocky Mountains. Ramon was met at the airport by Eckersly's agent, who served Ramon with papers in the contract action. The trial court rejected Ramon's claim that it lacked jurisdiction because service was fraudulently obtained. We disagree. When plaintiffs resort to such shocking fraud to obtain service of process, the integrity of the entire judicial system

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is undermined. The trial court had no power to render judgment in this case. Reversed.

1. Decide whether your court has jurisdiction, using the *Eckersly* case as precedent. Justify your decision.
2. Is your answer to question 1 consistent with your sense of a just result? Explain.
3. Could you have used *Eckersly* to support a decision contrary to the one you reached in response to question 1? Explain.

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1. KARL LLEWELLYN, THE BRAMBLE BUSH 66-69 (1930).
2. 347 U.S. 483 (1954).
3. 163 U.S. 537 (1896).

CHAPTER 5 Reading and Understanding Statutes

Chapter 2 (Sources of Law) identified the four basic sources of law in the United States: constitutions, statutes, administrative regulations, and judge-made law. Each of these sources of law is different in its creation, purpose, and structure. To use the law effectively, lawyers must understand how laws develop, recognize the purposes they are intended to accomplish, and identify the structure and distinctive components of each kind of law. Chapter 3 explained how to read and brief a judicial decision. Chapter 4 explained how the principles of precedent and *stare decisis* shape the development of judge-made law. This chapter will help you understand another source of law you will encounter frequently in your legal studies and in your practice: statutes.

Statutes — sometimes referred to as "acts" or "legislation" — are the written laws enacted by state and federal legislative bodies. With one exception, the federal and state legislatures are "bicameral." That is, they have two chambers, an upper house (the Senate) and a lower house (usually called the Assembly or House). The sole exception is the Nebraska Legislature, which is a unicameral body.

Statutes begin to be developed when one or more legislators propose or sponsor a bill. The bill then moves through the appropriate legislative committee or committees in one house, where it is subject to debate and amendment. The final version of the bill is then presented to that house for a vote. The same process is employed in the other house. If there are differences between the House or Assembly bill and the Senate bill, they may be reconciled by a conference committee, and the amended bill is then

put to a vote of each house. If a bill receives a positive vote from both houses of the legislature it is

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sent to the executive — the governor of a state or the president of the United States — who may sign the bill or veto it. If the executive signs a bill, it becomes "law." If the bill is vetoed, it dies unless there are sufficient votes in the legislature to override the veto, in which case the bill becomes law.

After a bill has become law, it is incorporated in the relevant written statutory code. Federal laws are compiled in the United States Code; state laws are compiled in the state's statutory code. All statutory codes are published in multiple volumes arranged by subject, but there is no common structure with regard to the order of subjects within the various state and federal statutory compilations. The criminal laws of North Carolina, for example, are codified in Chapter 14 of the North Carolina General Statutes, while the criminal laws of Colorado are codified in Title 18 of the Colorado Revised Statutes. Similarly, there is no uniform vocabulary for statutes and their parts. For example, some jurisdictions call their statutes a "code," others call them "statutes." Some jurisdictions subdivide their statutes by "chapter," others subdivide them by "title." The United States Code is subdivided by title, each title is subdivided into chapters, and each chapter is further subdivided into sections and subsections. The chart below identifies the first several titles of the United States Code, provides some chapter detail on Title 42, and shows the last title, Title 54:

United States Code

Title 1. General Provisions
Title 2. The Congress
Title 3. The President
. . .
Title 42 The Public Health and Welfare
Ch. 1 The Public Health Service
. . .

Ch. 84 Department of Energy
. . .
Ch. 126 Equal Opportunity for Individuals with Disabilities
§ 12101 Findings and purpose
§ 12102 Definition of Disability
§ 12103 Additional Definitions
Subchapters I-IV (containing more than 50 sections)
. . .
Ch. 157 Quality Affordable Health Care for All Americans
Ch. 158 Support for Pregnant and Parenting Teens and Women
Ch. 159 Space Exploration, Technology, and Science
Title 43 Public Lands
. . .
Title 54 National Park Service and Related Programs

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Below are examples of statutes regarding child custody from two different states.

North Carolina General Statutes	Pennsylvania Consolidated Statutes
Chapter 50 – Divorce & Alimony **Article 1** – Divorce, Alimony, & Custody, Generally **Section 50-13.2** – Who Entitled to Custody	**Title 23** – Domestic Relations **Part VI** – Children & Minors **Chapter 53** – Child Custody **Section 5328** – Factors to Consider when Awarding Custody

As you can see, statutes commonly have headings or labels that identify the subject matter addressed by the statute. Major pieces of legislation may also have popular names by which the legislation is generally known. For example, federal legislation was passed in 1990 to eliminate discrimination against persons with disabilities.[1] The popular name of this legislation is the "Americans with Disabilities Act," often referred to simply as the "ADA." Popular names may be listed in an alphabetical index of popular names found at the end of the published code. A popular name may or may not be mentioned in the legislation itself.

All statutes, even those with popular names, are listed in the code's table of contents under the statute's official name or subject heading. As shown in the text box above, The Americans with Disabilities Act is found in Chapter 126 of Title 42 of the United States Code. Title 42, "The Public Health and Welfare," has more than 150 Chapters, of which Chapter 126, "Equal Opportunity for Americans with Disabilities," is only one. Chapter 126, in turn, contains more than fifty sections, each with a heading — *e.g.,* "§ 12102 Definition of Disability" — and many with multiple subheadings. State statutes are structured in the same way although, as shown above, the names of the various sections may differ from state to state and from the scheme used in the U.S. Code.

Whether you are reading a single subsection or an entire piece of legislation, take the time to identify the name of the statute, the names of its major Subdivisions, and the labels used for each section and subsection. Understanding the organizational scheme of the legislation will place the material that you are reading in context.

Statutes can be complex and difficult to read. With careful reading, however, you will be able to identify the following critical components of a statute: (1) the purpose for which the statute was enacted; (2) the scope of the statute; (3) definitions of key words and phrases; (4) one or more rules of law; and (5) exceptions to the general rule or rules established by the statute.

Although some statutes do not contain all of these components, looking for them will improve your understanding of the statute and reduce the risk that you will miss something. Note also that the process for analyzing statutes described below is not strictly linear or sequential, but iterative: there will be occasions when you return to a prior step as you gain deeper knowledge of the structure and content of the statute.

A. Read the statute carefully.

Every word in a statute matters. Every sentence in a statute is part of "the law." As an attorney, you will often need to do some research to see if there is a statute that affects your client's case. If you read a statute looking primarily for a solution to your client's problem, you may miss something essential. Consider the following hypothetical:

Bruce Wilkins, a sergeant in the Marine Corps, is going to be deployed overseas. He has come to you to discuss his concerns about his sister, Mira. Since their parents' deaths, Mira — who is mildly developmentally delayed — has been under state guardianship. She lives semi-independently, works approximately 30 hours per week, and has been dating a man at her workplace for a few months. Sergeant Wilkins is very protective of his sister and believes that she is "too naïve" to be dating. Now he is increasingly worried that Mira might be prevailed upon to marry while he is away. He would like to know whether she is legally permitted to marry.

The relevant statute provides:

Prohibited civil marriages

Subd. 1. General. The following civil marriages are prohibited:

a. a civil marriage entered into before an earlier civil marriage of one of the parties is dissolved;
b. a civil marriage between an ancestor and a descendant, or between siblings; and
c. a civil marriage between an uncle or aunt and a niece or nephew, or between first cousins.

Subd. 2. Developmentally delayed persons. Developmentally delayed persons committed to the guardianship of the state commissioner of human services may marry with written consent of the commissioner.

When reading this statute, an attorney would likely initially focus on the word "prohibited," which appears in both the title of the statute and the

heading of subdivision 1. The list of prohibited marriages in subdivision 1, followed closely by the phrase "developmentally disabled persons" at the beginning of subdivision 2, however, could lead a careless reader to assume that subdivision 2 continued the list of prohibited marriages started in Subdivision 1. Since this is a result that meets the client's needs, it would be easy to miss the phrase most relevant to Sgt. Wilkins' concerns — "may marry with written consent."

Careful reading of a statute, however, does not require you to examine every section of the statute, no matter how irrelevant it might be. Instead, begin by making sure you know *why* you are reading the statute. Maintaining a clear focus on your goal as a researcher will make you a more efficient reader. Then, with that focus in mind, skim the statute to discern its general scope, meaning, and organization. Statutes are often complex, with many interlocking parts and sub-parts, but a preliminary review of the statute will often help you identify the sections that appear to be most relevant to your question. Take note of these sections and read them carefully before exploring other sections of the statute. By looking for the components discussed below as you read, you will discover how the information you are looking for fits within the statute as a whole, and be more likely to spot potential problems.

B. Identify the purpose of the statute.