REVISED 4TH EDITION

Writing and Analysis in the Law

Helene S. Shapo • Marilyn R. Walter • Elizabeth Fajans

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Revised Fourth Edition

by

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Dedication

To our families—
Marshall, Benjamin, and Nathaniel Shapo
Ron, Amy, and Alison Walter
Bob, Nicholas, Rachel, and Paul Zimmerman
For the love, support, and advice they have given us
before and during the preparation of this book.

Preface

Many people find writing a difficult and frustrating process. As a result, they put off writing projects in the hope that they will eventually be struck by inspiration. Unfortunately, few professions, especially the legal profession, are willing to postpone business in anticipation of this happening.

This book is devoted, therefore, to taking control over the writing process away from chance and investing it in ourselves. We have tried to break the legal reasoning and writing process into manageable components to enable you to be conscious of that process and to be master of your thoughts and their expression. We hope this awareness of the writing process will also make you less anxious when writing and more satisfied with your work when finished.

Writing and Analysis in the Law is a collaborative effort. Decisions about the scope of the book and the focus of each chapter were made jointly. In addition, the authors edited each other's chapters extensively, making both substantive and stylistic contributions to each chapter. We have learned much from each other and hope the book confirms our belief in the benefits of editing and rewriting.

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Introduction to the Legal System and Legal Writing

I. The Primary Sources of Law

STUDENTS DECIDE TO COME TO LAW SCHOOL for many good and diverse reasons. However, despite our numerous years teaching in law schools, we have never heard new students say they have come to law school because they like to write. Yet lawyers write all the time. They write to colleagues; they write to clients; they write to adversaries in a law suit; they write to third parties requesting favors or information; they write to judges. They write documents for many different purposes: to persuade a court to rule in a client's favor; to answer a client's questions; to analyze a client's case; or to inform an adversary that a client is open to settlement but willing to litigate if pressed too hard. To be a good lawyer, you must be a good writer. And to be a good legal writer, you must have both a good understanding of law and a good grasp of principles of writing.

This book is about good writing. It introduces you to the sources of authority with which a lawyer works and upon which a lawyer's writing revolves. It introduces you to legal analysis and some forms of legal writing. Finally, it tries to integrate those lawyerly enterprises with that which all good writing must demonstrate, namely, a clear sense of audience, purpose, organization, and paragraph and sentence structure.

When you were an undergraduate or graduate student, you probably read a variety of primary and secondary sources to get the information you needed to write papers. You may have relied upon several secondary sources, such as books written by others about the topics of your papers. As a lawyer you will also use many different sources of information to acquire the necessary background information to analyze a legal question. A lawyer's most important sources of information, however, are primary sources.

Primary sources in law include both case law (judicial decisions) and enacted law (statutes, constitutions, and administrative regulations). These are the formal sources of enforceable legal rules in this country. Although you may not study administrative and constitutional law until the second or third year of law school, you will have to learn to use case law and statutory law throughout your first year and for almost all the writing that you do in your legal writing course. That is because in our legal system, analysis of a problem is controlled by enacted law that regulates the subject matter of that problem, and by the decisions of earlier cases that involved issues and facts similar to those in that problem. This year you will be learning how to find those legal authorities, how to use them, and how to write about them.

The first information you need concerns the origins of the primary authorities of the law. Because most of your first-year classes emphasize case law, this introduction will begin with judicial decisions. You should be aware, however, that enacted law forms a significant part of the body of law in our country. You must always consult these sources first when you do research for a problem because constitutional provisions and statutes take precedence over case law. However, even when you find an applicable statute or constitutional provision, you must also determine whether any case law is relevant to the problem. Your legal research will require you to search for cases that have interpreted the particular statute or constitutional provision. When you find these cases, you analyze how they are relevant to your problem or explain why the cases are not relevant. When no statute or constitutional provision applies, however, you must rely solely on earlier cases to provide the law on the subject. Those earlier cases provide a source of enforceable rules called the common law.

The United States is a common law country, in that rules of law come from the written decisions of judges who hear and decide litigation. The common law is judge-made law. Judges are empowered by statute or by constitutional provision in every state and in our federal system to decide controversies between litigants. When a judge decides a case, the decision attains the status of law, and it becomes a precedent for future legal controversies that are similar. Our common law system, like the English system from which it came, is a system of precedent. In the simplest sense, precedents are just the decisions of judges in previous litigation. Those decisions, however,

play a dual role. First, the decision resolves the litigation that is before the court. Second, if that decision is published, it becomes available for use by judges in later litigation. According to the doctrine of precedent, judges should resolve litigation according to the resolutions of similar cases in the past.

Many factors in addition to similarity determine how a case is used as a precedent, and this book will introduce you to some of those factors. For example, the value of a decision is affected by the court that decided the case. The purpose of this introductory section is to explain where our law comes from and how a decision's value as a precedent is affected by the nature of the court that decided the case. This information, in turn, is crucial to the analysis and organization of your written work.

II. Structure of the Court System in the United States

A. The Vertical Structure of Our Court System

CASE LAW IN THE UNITED STATES comes from litigation conducted in many court systems. Each state, as well as the District of Columbia and the federal government, has its own system of courts. Each is a separate jurisdiction. For our purposes, a jurisdiction is the area over which the courts of a particular judicial system are empowered to resolve disputes and thus to enforce their decisions. Jurisdiction is determined by a geographic area, like a state, and it can also be based upon subject matter. Subject matter jurisdiction is the authority of a court to resolve disputes in only a particular subject area of the law, such as criminal law.

The structure of the court system within each jurisdiction is a hierarchical one. Courts are organized along a vertical structure, and the position of a court within that structure has important consequences. Courts in which litigation begins are called courts of original jurisdiction. In many states, the lowest rung of the courts of original jurisdiction is occupied by a so-called court of inferior jurisdiction. This court has the power to hear only limited types of cases, such as misdemeanor cases or cases in which the amount of damages the complaining party (the plaintiff) demands from the party sued (the defendant) does not exceed a specified sum. These courts have various names, such as courts of common pleas or small claims courts. Other courts of inferior jurisdiction are limited to deciding cases

about one particular subject matter, for example, juvenile or family law matters. Courts of inferior jurisdiction may be conducted informally. For example, the parties often represent themselves and the court does not follow the formal rules of evidence used in higher courts. The decisions of these courts are not published and they have no value as precedent to future litigants.

The next rung up from the courts of inferior jurisdiction is occupied by the trial courts. Litigation often begins at this level, and the trial courts are usually the courts in which the parties first litigated the cases that appear as appellate decisions in your case books. Trial courts are usually courts of general jurisdiction, that is, they may hear cases of all subject matters. Thus, a trial court may hear civil litigation, which is litigation between private parties who are designated as the plaintiff and the defendant. It may also hear criminal cases. Criminal litigation is brought by the state, which prosecutes the criminal charges against a defendant or defendants. There is no private party plaintiff in a criminal case.

A trial court is presided over by one judge. It is the particular province of the trial court to determine the facts of the case. The trier of fact, either judge or jury, "finds," that is, determines, the facts from the evidence at trial, the examination of witnesses, and the admissions of the parties. For example, one issue in a case may be the speed at which a vehicle was travelling. This fact may be disputed by the parties. The trial judge or the jury, if the question is put to a jury, will resolve the dispute and "find," for example, that a party traveled at 75 miles per hour. The court then decides the case by applying the applicable law to that fact.

Often the trial court judge will decide a case by procedures that preclude a trial. For example, one of the parties may bring a motion (a request to the court) for the court to take a particular action. Some types of motions, if granted, will result in a decision that eliminates the need for a trial. You will learn about those types of motions in your civil procedure course. If a case is not ended on a pre-trial motion, and the parties do not voluntarily settle their dispute, then the case will go to trial.

The next step up the hierarchy of courts from the trial courts is occupied by the appellate courts. The party that has lost at the trial level, either by motion or by a decision after trial, may ask for review by a higher court. This review is known as an appeal. The party who appeals is usually called the appellant and the other party, the appel-

lee. The appellate court determines whether the lower court committed any error significant enough to require that the decision be reversed or modified, or a new trial be granted.

Most states provide two levels of appellate courts. The first is an intermediate court of appeals. The second is the highest court of appeals and is usually known as the state's supreme court, although some states use other designations. Sometimes a jurisdiction's highest court is described as the court of last resort. Generally, the intermediate appellate court hears appeals from the trial courts, and the supreme court hears appeals from the intermediate courts of appeals. In many states with intermediate courts of appeals, however, the supreme court must hear appeals for certain types of issues directly from the trial courts. There is no further appeal of the decisions of the state court of last resort as to matters of state law.

Some states, although a decreasing number, have no intermediate court of appeals. In those states, trial court decisions will be reviewed directly by the court of last resort. In either system, except for certain types of cases, the court of last resort need not hear every case for which an appeal has been requested. Rather, the court has discretion to choose which cases to hear.

In many states, the intermediate appellate level consists of more than one court. For example, the state may be geographically divided into appellate districts, with each district having its own court of appeals. That district will contain several trial courts, the appeals from which all go to the one court of appeals for that district. Each court of appeals in that state is a co-equal, that is, each occupies the same rung on the court hierarchy as the others. The state will have only one court of last resort, however, and that court is superior to all other state courts.

An appeal is heard by more than one judge, and because the appeal should be heard by an odd number of judges, all appellate courts require three or more judges. The judges decide the case by voting and usually one of the judges from the majority writes the decision. A judge who disagrees with the majority may write his or her own opinion, called a dissenting opinion (or just a dissent). In addition, a judge who has voted with the majority as to the outcome of the case may write a separate opinion to express his or her differing views about certain aspects of the case. This decision is a concurring opinion ("concurring" because the judge concurred in the outcome of the case). The name of the judge who writes an opinion appears at the

beginning of that opinion. Sometimes the opinion of the court does not bear the name of an author, but is designated a "per curiam" decision. This means a decision "by the court" and may be used for a shorter opinion on an issue about which there is general unanimity.

The procedure of an appeal differs from proceedings before a trial court. An appeal does not involve another trial before the panel of appellate judges. That is, the parties do not submit evidence or examine witnesses, and the court does not empanel a jury. Rather, the parties' lawyers argue to the appellate judges to persuade them that the court below did or did not commit an error or errors. Typically, this argument is made by means of written documents called appellate briefs that the attorneys submit to the court. The attorneys may also argue orally before the judges, although not all appeals involve oral argument. In addition, the appellate court reviews the record of the proceedings below.

Most state trial court decisions do not result in explanatory judicial opinions and so are not published, but the verdicts are recorded in the court files. Many, but not all, of the appellate decisions, however, are published in volumes called case reporters.

B. The System of Courts: The Federal Courts

We have explained the vertical system of courts and its hierarchy of higher and lower courts in terms of a state court system. In this country, we also have a system of federal courts that parallels the state courts. The systems also intertwine at certain points. Federal courts are empowered by federal statutes and the constitution to hear certain types of cases, and are limited to those cases. There is federal jurisdiction for cases that involve questions of federal law, such as federal statutory or administrative agency matters, for cases in which the United States is a party, and for cases that involve citizens of different states. The latter is known as diversity jurisdiction. These cases involve matters of state law that a party chooses to litigate in federal court. The court, however, must apply the law of the state.

The trial courts within the federal system are called district courts. There is at least one United States District Court within each state. A district court's territorial jurisdiction is limited to the area of its district. A state with a small population and a low volume of litigation may have one district court and the entire state will comprise that district; for example, Rhode Island has one district court called

the United States District Court for the District of Rhode Island. The volume of litigation in most states, however, requires more than one court in the state and thus the district is divided geographically. For example, Illinois is divided into three federal district courts: The United States District Court for the Northern District of Illinois, the United States District Court for the Southern District of Illinois, and the United States District Court for the Central District of Illinois.

Each intermediate appellate court in the federal system is called the United States Court of Appeals. For appellate court purposes, the United States is divided into thirteen circuits, so there are thirteen United States Courts of Appeals, eleven of which are identified by a number. Thus, the complete title of one court is The United States Court of Appeals for the First Circuit. The eleven numbered circuits are made up of a designated group of contiguous states (and also may include territories). The United States Court of Appeals for the Seventh Circuit, for example, is made up of the states of Illinois, Wisconsin, and Indiana. The other two courts of appeals, designated without numbers, are the United States Court of Appeals for the District of Columbia Circuit, and the United States Court of Appeals for the Federal Circuit.[1] Appeals from the district courts within the area that makes up a circuit go to the court of appeals for that circuit. A case that was litigated in the United States District Court for the Northern District of Illinois, for example, would be appealed to the United States Court of Appeals for the Seventh Circuit.

The highest court in the federal system is the Supreme Court of the United States. This court hears cases from all the United States Courts of Appeals and, for certain issues, from federal district courts and from the highest courts of the state systems. The Supreme Court must hear certain types of cases and has discretion to hear other requests.[2]

[1] The United States Court of Appeals for the Federal Circuit hears certain specialized cases such as international trade, patents, trademarks, and government contracts.

[2] The United States also has courts of limited jurisdiction, that is, courts that are competent to hear only specialized subject matters, such as tax courts. You will rarely read cases from these courts in your first year of law school and we will not include them in this discussion.

III. The Development of the Law Through the Common Law Process

A. Precedent and Stare Decisis

THE POSITION OF A COURT within the structure determines how its decisions are treated as precedent. Some precedents have greater authoritative value than others. In order to describe the weight of precedent, we must first discuss some important characteristics of the American system of precedent and its companion doctrine, stare decisis. That term is a shortened form of the phrase stare decisis et non quieta movere, which means "to stand by precedents and not to disturb settled points." In this country, stare decisis means that a court should follow the common law precedents. But the doctrine also means that a court must follow only those precedents that are binding authority.

Precedent becomes "binding authority" on a court if the precedent case was decided by that court or a higher court in the same jurisdiction. If precedents exist that are binding authority on the particular point of law then those precedents constrain a judge to decide a pending case according to the rules laid down by the earlier decisions or to repudiate the decisions. Cases decided by courts that do not bind the court in which a dispute is litigated, such as a court of another state, are persuasive authority only. When an authority is persuasive, the court deciding a dispute may take into account the decision in the precedent case, but it need not follow that decision.

When you search for case authorities to help you answer the issue before you, you will search first for precedents that are binding on the court where the dispute will be decided because these cases provide the constraints within which you must analyze the problem. If the issue has never been litigated in the jurisdiction of the dispute (sometimes called a "case of first impression"), you should familiarize yourself with how courts in other jurisdictions have analyzed the problem. Those precedents, even though not binding on the court, may nevertheless persuade the court to decide your case in a particular way.

Even if there is relevant case law in the jurisdiction in which your dispute will be litigated, you may still want to familiarize yourself with case law in other jurisdictions. This is especially so if those cases

are factually similar, or well-reasoned, or particularly influential decisions.

B. Binding and Persuasive Authority

Because the United States is composed of many jurisdictions, including each of the states and the federal court system, it is important to determine which precedents a court in each jurisdiction must follow besides its own prior decisions.

1. State Courts

A state court must follow precedents from the higher courts in the state in matters of state law. Thus, a trial court must follow the precedents of the state's highest court. If the state court system includes a tier of intermediate appellate courts, as most state systems now do, the trial court must also follow the precedents of the intermediate courts of that state. Depending upon the rules of procedure of the particular state, the trial court may be bound only by the intermediate court that has the authority to review its decisions, or it may be bound by the decisions of any of that state's intermediate courts of appeals that are not in conflict with the court that reviews its decisions.

An intermediate appellate court also must follow the decisions of the state's highest court, but it is not bound by the decisions of the other intermediate courts because those courts are not superior to it, although these decisions usually will be very persuasive.

In addition, a state court is bound by the statutes of that state, as interpreted by its courts. Like case law, the statutes of one state do not bind the decisions of the courts in another state. If another state has a statute that is the same as, or has language similar to, the statute that controls your case, the interpretations given to that statute by the courts of the other state may be persuasive to the court of your state, but they are not binding on it. That is, the court may, but does not have to, follow the other state's interpretation of the statute. If your case is not governed by either a statute or a judicial precedent from your jurisdiction, then look to precedents in other states. Remember those precedents are persuasive only. The courts of a state are not required to follow precedents from other states, but they will take those decisions into account in reaching their own decisions.

2. *Federal Courts*

The decisions of the Supreme Court of the United States are binding on all courts in all jurisdictions for matters of constitutional and other federal law. The decisions of the courts of appeals do not bind each other, even in cases in which the appellate court has interpreted a federal statute. For matters of federal law a court of appeals is bound only by its own decisions and those of the Supreme Court. A federal district court (the trial court) is bound by its own decisions, the decisions of the court of appeals of the circuit in which the district court is located, and the decisions of the Supreme Court. The district court is not bound by the decisions of any other district court, nor by the decisions of other federal courts of appeals. Again, as always, a court will take account of the decisions of other courts.

Questions of state law, either common law or statutory, often come to the federal courts in lawsuits between parties from different states, known as "diversity suits." In diversity suits, the federal court must apply state law and thus follow the state courts' decisions on state substantive law questions. A detailed discussion of problems related to federalism, that is, the relationship between state courts and federal courts and state law and federal law, is beyond the scope of this introductory explanation.

3. *Writing About Legal Authority*

Because the common law and statutes of a jurisdiction are binding on future litigation within that jurisdiction, when you write an analysis of a legal problem you should always first identify and explain the binding law on the issue of the problem. Begin first with relevant statutes, if there are any, and the cases that interpret the statutes. Explain relevant case law first from the highest court of the jurisdiction and then other reported decisions from that jurisdiction's lower courts.

If there is controlling law from the jurisdiction of the problem, you should not begin by writing about the law in other jurisdictions or with explanations from other sources such as legal encyclopedias or a law dictionary.

Read the two examples below, which are introductory sentences to a discussion about a false imprisonment problem in the state of Kent. What is the difference between them? Which is the better way

to begin the discussion? The italicized words are the names of the cases from which the quotes were taken. All are cases from the state of Kent.

1. In most states, the definition of false imprisonment requires that the defendant intend to confine the plaintiff within boundaries set by the defendant. Some other jurisdictions also require that the plaintiff be aware of the confinement.

   The definition of false imprisonment in Kent is "the intentional unlawful restraint of another against that person's will." *Jones v. Smith.*
2. In Kent, false imprisonment is "the intentional unlawful restraint of an individual's personal liberty or freedom of locomotion against that person's will." *Orange v. Brass.* A person need not use force to effect false imprisonment, but may restrain by words alone. *Arnold v. Rocky.* "Against that person's will" requires that the person be aware of the confinement. *Jones v. Smith.*

Example 1 incorrectly begins with the law of other states. Example 2 correctly begins by setting out the law of the jurisdiction of the problem.

C. Stare Decisis and Overruling Decisions

The standard definition of stare decisis implies that following precedent is mandatory and that precedent is binding authority within a particular jurisdiction. Yet the doctrine as applied in the United States does not produce rigid adherence to prior decisions. Instead, a court has freedom to overrule its previous decisions and thus decide a case by a rule different from the one it had previously adopted.[3] A court overrules its earlier decision by explicitly or implicitly deciding in a later case that it will no longer follow that previous decision.

One reason that a court may overrule a case is that the earlier decision has become outdated because of changed conditions. Other

[3] A court will not overrule the decision of a higher court, although cases exist in which a lower court did not follow a rule from a controlling higher court because that rule was very old and out-of-date. If a judge of a lower court were to refuse to follow the decision of a higher court, that judge's decision would no doubt be appealed.

reasons are that the existing rule has produced undesirable results, or that the prior decision was based on what is now recognized as poor reasoning. Sometimes a changed interpretation reflects a difference in the views of the present judges on the court as compared with those of the previous court.

When a court overrules a previous case, that change in the law has no effect on the parties to the litigation that produced the prior decision, or on other parties whose rights have been determined under that precedent. The results between those parties became final at the time of the last decision in those cases. Indeed, sometimes the change in the law will not affect the parties in the very case in which the court overrules the earlier decision and announces its changed rule. This result occurs when the court makes the new rule prospective, that is, applicable in future cases only.

Another means of overruling a judicial decision is by legislation. The legislature may change by statute a rule that came from a particular decision or a common law rule of long standing. This change in the law binds the courts within that jurisdiction.

A more literal interpretation of stare decisis would lead to a more rigid system of law than now exists in this country, or would require frequent appeal to legislative bodies to correct by statute undesirable or outdated judicial decisions.

D. Holding and Dicta

A judge may decide to be bound by a precedent and to reach the same outcome in a case before the court when the causes of action are the same, the issues presented to the court for decision are the same, and the material facts are similar enough so that the reasoning of the earlier case applies. Even if there is such a similar case from a court that is binding on the judge's decision, that judge is bound only by the holding of the previous decision. This is another limitation on the binding force of precedents in addition to the limitation that arises from a judge's ability to overrule an earlier decision.

The holding of a case is the court's decision on the issue or issues litigated. The holding has been defined as the judgment plus the material facts of the case.[4] Several other definitions of the holding

[4] *See* Glanville Williams, *Learning the Law* 72 (8th ed. 1969).

exist.[5] But whichever definition is used, the holding of a case must include the court's decision as to the question that was actually before the court. That decision is a function of the important facts of the litigated case and the reasons that the court gave for deciding the issue as it did based on those facts.

Thus, the holding is different from general rules of law and from definitions. If a court in a contracts case says "a contract requires an offer and an acceptance," that is a rule that has come from many years of contract litigation, but it is not necessarily a statement of the decision in the particular contract case before the court. In deciding a case, a court identifies the particular rule that controls the issue being litigated.[6] Then it analyzes whether the facts of the case satisfy the requirements of the rule.

Rules come from many places. In addition to rules like the contracts rule just mentioned that comes from common law adjudication, rules may come from enacted law like statutes and administrative agency regulations. Rules also come from private documents like contracts, deeds, and leases.

For example, a particular contracts case may require the court to decide the issue of whether the defendant offered to sell goods to the other party. If the defendant did, and the other party accepted, then the general contracts rule of offer and acceptance requires the court to decide that the parties had entered into a contract. The court may also define some of its terms. If the court says, "an offer must manifest definite terms," the court is defining an offer, one in keeping with a long line of litigation, but is not giving its holding. The holding might be "the defendant's letter describing his goods and saying, 'I am considering asking 23¢ a pound,' was not an offer." This statement decides the question before the court in terms of the facts of the case. A holding that includes reasons would add, "because the defendant did not convey a fixed purpose and definite terms." The court is deciding that those facts did not fulfill the definition of an offer.

[5] *See* those in Edgar Bodenheimer et al., *An Introduction to the Anglo-American Legal System* 85–88 (1980).

[6] Sometimes the court first will have to decide what rule is the appropriate one to apply to the case.

Not everyone will agree to any one formulation of a holding of a case. Indeed, there is no one correct way to formulate a holding. Formulating the holding can be a difficult task, and one that you will refine throughout your legal career. One source of difficulty is to determine which facts are essential to the decision. For example, in a false imprisonment case, the plaintiff may have been kept in a corner of a room by a black and white bulldog that growled and showed its teeth. Your statement of the holding would not include the dog's color because these facts would not have been necessary to the decision that the plaintiff was imprisoned. The breed of the dog may have been important, however, if its ferocity led the plaintiff to believe that the dog would bite if he moved out of the corner.

Another source of difficulty is how to describe the facts, that is, whether to describe them specifically as they were in the case or to describe them more generally. For example, a more general descriptive category for the growling bulldog is as a dog, or more generally as a household pet that made noises at the plaintiff. These terms are broader because they include more types of animals and behavior than do the more narrow categories "dog" and "growled." When you describe the facts too broadly, however, your description will include facts that may raise considerations that are different from those that the court took into account when it made its decision. For example, the description "household pet" includes a white rabbit. And although a rabbit may cause fear in a person who hates rodents, the issue of whether that person's fear is reasonable raises questions about phobia that are different from considerations about a dog's ferocity.

Frequently, common sense will take you a long way in deciding how to determine a holding. Common sense will tell you that the fact that the defendant's dog was black and white should not be important to the decision in the false imprisonment example, but that the breed of dog could be important because of its size or ferocity. Common sense will also tell you that "household pet" is probably too broad a description for false imprisonment purposes because the term includes white rabbits and goldfish. Beyond that, you will acquire the added experience and judgment that will come with being a law student and lawyer.

If you are recording the holding for objective purposes, such as in a case brief for class (see Chapter 2) or just to describe a case, then you may want to use more specific facts rather than broad categories. You may say, for example, that the defendant's letter said "I am

considering asking 23¢ a pound." Often, however, you will describe a holding more generally. When you use cases as precedents for evaluating legal problems, or when you want to persuade a court that it is bound in a particular way by a precedent's holding, you may need to describe the facts more generally in order for them to encompass your client's situation. Courts have a good deal of freedom to decide what a precedent stands for, that is, what its holding was, and an important skill of the attorneys appearing before those courts is to formulate a holding in a way that is favorable to the attorney's case. As you will see, this is an important skill for your writing assignments, and one we will emphasize through the book.

Sometimes the court itself will announce its holding. You should not always accept that court's formulation, however. Make sure that the judge has not stated the holding too broadly or too narrowly and that the principle the judge has articulated was actually required for the resolution of that case. For example, if the court deciding the hypothetical false imprisonment problem had written, "We therefore hold that the defendant's dog's growling at the plaintiff was sufficient to constitute false imprisonment," that court would have stated its holding too broadly. A literal application of this statement of the holding would permit liability if a person's dog growled at someone on the street. The statement must be read in conjunction with the facts of the case that the plaintiff was kept immobilized in the corner of a room.

The binding nature of a statute is somewhat different from that of a case because the entire statute is binding authority, and all the statutory requirements must be satisfied. This is not always as simple as it sounds, however. As indicated earlier, there may be case law interpreting the statute that tells you how to interpret the statutory language. The statute may contain internal contradictions that a court may have reconciled, for example, or a court may have decided that the legislature meant an "or" instead of an "and" in part of the statute. These interpretations affect the manner in which the statutory language is binding. In this situation, the statute and the case law interpreting its language are binding.

There are many statements in a judicial decision that are not part of the holding and are not binding on later courts. These statements are called dicta. For example, the statement "but if the defendant's cat had trapped the plaintiff in the corner of the room, the defendant would not be liable," would not be part of the holding of the

false imprisonment case we have hypothesized. This is so because the plaintiff was not trapped by a cat, and so that is not a material fact of the case. The court was illustrating the extent of its decision. Therefore, dicta about a cat in an earlier case concerning a dog would not bind a judge who had to decide a later case in which a defendant's hissing cat had kept a plaintiff in a corner of a room.

Statements that are dicta are not always unimportant, however. Sometimes the dicta in a case become more important in later years than the holding of the case. Dicta is analogous to persuasive authority in that the statements may be persuasive to a later judge, but the judge is not bound to follow them. If the court later had to decide a false imprisonment case involving a cat, the court's dictum in the earlier case would be very important to the later court's decision.

When you write about judicial decisions, you will have to describe the action that the court took by using a verb. For example, you will be saying that the court said something, or held something, or found something. You must be careful to use the correct verb. It would be incorrect to say "the trial court held that the defendant's car was traveling at ninety miles per hour" if this sentence states a finding of fact by a court. In that case, the sentence should be written, "the trial court found that the defendant's car was traveling at ninety miles per hour."

A sentence correctly describing the holding of this case might be written, "the court held that the defendant was guilty of reckless driving for driving ninety miles per hour in a forty-mile-per-hour zone."

To describe a court's dicta, you could use a verb such as "said," or "stated," or "explained." For example, the hypothetical dicta used in the false imprisonment example, "but if the defendant's cat had trapped the plaintiff in the corner of the room, the defendant would not be liable," should not be preceded by the inaccurate statement "the court held," but by a statement such as "the court said," or "the court hypothesized," or "the court limited its decision."

Read the case decision below. Then choose the best statement of the holding from the five choices.

In Re Gaunt
Terse, J.

John Gaunt was having coffee with his nephew Felix. John told Felix that he was giving him a gift of his gold watch, which he kept in a safe deposit box in his bank. He said he would get the watch for

Felix the next time he went to the bank. John died that night, without going to the bank. Felix has demanded the watch be delivered over to him as his gift. The administrator of John's estate is keeping the watch as part of the estate.

Felix's demand must be refused. A completed gift requires first that the donor intend to give the gift, second, delivery of the item of gift, and third, acceptance by the donee. Only then does the intended donee have title to the item. John probably did intend that Felix have the watch. The watch had been John's grandfather's and Felix is the next male heir in that family. We can assume that Felix would have accepted the watch. Sentiment aside, it is a valuable piece of jewelry. John, however, never sent the watch to Felix, and Felix never had possession of the watch. If he had given him the key to the safe deposit box, that may have been a constructive delivery, effective to create a gift. As it is, without delivery, John made only an unenforceable promise. A court will not enforce an uncompleted gift.

Which is the best statement of the holding in *In re Gaunt?*

1. The court held that delivery of a key to a safe deposit box is a delivery of the item kept in the box because it is a constructive delivery.
2. The court held that there are three requirements for a valid gift: intent to give, delivery, and acceptance.
3. The court held that a decedent's jewelry remains part of his estate at death if he has not given it away during his life.
4. The court held that a decedent had not made an effective gift of personal property during his life where he made an oral promise of the gift but had not delivered possession of the item to the intended donee (the person receiving the gift).
5. A court will not enforce an incomplete promise of a gift.

Sentence four is the best statement of the holding.

1. Sentence 1 is a statement of dicta in *In re Gaunt.* John did not give the safe deposit key to Felix. The court used that fact as a hypothetical of what may have been a delivery for purposes of satisfying the requirements of a gift.

2. Sentence 2 is the general rule of the three requirements for a gift which had been formulated before this case was litigated. Not all three were disputed in this case.
3. Sentence 3 sounds as if it could be the holding, but it is really a general rule of property law that tells the result of the decision in this case.
4. Sentence 4 is the holding that decides the question in this case of whether John Gaunt had given away the property during his lifetime if he had not delivered the watch to his nephew. If he had not, then John still owned the watch and the result described in Sentence Three occurs.
5. Sentence 5 is a reason for the decision in the case.

The holding could be made broader or narrower by describing the intended item of gift differently. The gift could be described as

1. property (which includes real and personal property)
2. jewelry
3. a gold watch
4. a family heirloom

Which of these items is the broadest? Which is the most specific? Could you describe the parties involved as an uncle and nephew instead of a decedent and a donee?

Exercise 1–A

Read the following decision in the case *Sosa v. Lowery.*
Terse, J.

The plaintiff John Sosa rented an apartment from Tim Lowery. Lowery required a security deposit of one month's rent. The lease provides that Lowery must return the security deposit within 30 days of the expiration of the lease, but could deduct for damage to the property beyond reasonable wear. Lowery deducted $400 from Sosa's deposit to replace the living room carpet, which, during Sosa's tenancy, suffered several cigarette burns. Sosa claims that the burns are the result of reasonable wear. We disagree. Cigarette burns result from a careless act rather than from accumulated use. Frayed spots from walking on the rug would be reasonable wear. Lowery properly deducted the $400.

1. What is the rule for when a landlord may deduct from the tenant's security deposit? Where does this rule come from?
2. The court used this rule to decide the question before it, that is, to reach its holding. What is the court's holding regarding Sosa's deposit?
3. What is the court's dicta about what type of use might be reasonable wear of the carpet?

Exercise 1–B

Beta v. Adam
Terse, J.

Beta has sued Adam, the owner of a restaurant, for false imprisonment. Adam believed that Beta was leaving without paying her bill. Beta in fact had left the money on her table. Adam told Beta that she could not leave until someone verified that she had paid. Adam took Beta's pocketbook in which Beta had her keys, money, credit cards, and her checkbook. The restaurant was very busy and understaffed. Beta stayed with Adam for twenty minutes until Adam found an employee to see if Beta had left the money on the table.

Although Adam never physically prevented Beta from leaving, and Beta could have walked out of the restaurant at any time, Adam is liable to Beta for falsely imprisoning her. A person falsely imprisons another by unlawfully confining her within fixed boundaries, if he acts intending to do so. Adam confined Beta in the restaurant by telling her she could not leave and by taking her purse. Confinement may be effected by duress, even duress that is not the product of threatening behavior. Beta could not leave the restaurant because she believed that she could have lost her pocketbook with its valuable contents if she did so. Thus, she was unlawfully confined. She acted reasonably by remaining in the restaurant until she recovered her possessions.

Which is the broadest formulation of the holding? The most narrow?

1. The defendant falsely imprisoned the plaintiff by duress when he took an item from the plaintiff in order to have her remain on the premises.

2. The owner of a restaurant unlawfully confined his customer when he told her she could not leave and took her pocketbook and its valuable contents away for twenty minutes until he could verify her payment of her bill.

3. The defendant falsely imprisoned the plaintiff by means of duress although he did not use physical force when he took an item of value belonging to plaintiff in order to have her remain on the premises.

E. The Weight of Authority

Besides the judgments involved in determining the holding and the dicta of a case, and therefore which part of that case is binding, you must make other judgments in using precedents. For example, where there are many relevant cases, you will have to decide which are most important to your problem and will have the most weight with the court deciding your own case. Several factors can determine the weight of an authority.

The precedents that are binding authority are of course the most important. Always begin your analysis with the cases on the same issue from the jurisdiction of your problem. Start with the cases from the highest court. In addition, the decisions of the courts within the jurisdiction, even if not binding (such as decisions of another court of appeals) generally will be the most persuasive authority to a court. As to the weight of authority of cases from all jurisdictions, the similarity of the facts between the precedent and your problem is important. The more similar the specific facts between the cases, the greater weight the precedent will have for your own problem.

Another important factor is the level of the court that decided the previous case. A case decided by a state's supreme court will be more authoritative than one decided by a lower state court.

An opinion written by a particular judge may be important because of the excellent reputation of the judge. In addition, decisions from a particular court in a particular era may carry extra weight because of the membership of the court during those years. Exemplary are the New York Court of Appeals (the highest court in New York) during the time when Benjamin Cardozo was a member of the court, and the California Supreme Court during the service of Justice Roger Traynor.

A case decided by a unanimous court or a nearly unanimous court may be more persuasive as a precedent than one in which the court

was closely divided. And statements from concurring or dissenting opinions will usually not carry as much weight as statements from majority decisions, although exceptions exist.

Another factor to consider in evaluating the weight of a precedent is the year of the decision. If a case is old and the decision reflects policies or social conditions that are no longer as important as they once were, then the precedent will have little weight even if the facts of the case are very similar to your problem. If, however, the decision is based on reasoning that is still valid, the age of the case may not be important.

The courts in some states may favor decisions from states that are geographically close or have similar social or economic conditions that relate to the litigation. In addition, a decision that interprets a statute may be persuasive to another court in a case that involves a similar statute.

Very important is the depth and quality of the prior treatment of the relevant issue. A case in which the issue received the full attention of the previous court and was fully and articulately discussed will be more important than one in which the question received cursory attention. And well reasoned decisions with careful explanations will probably already have achieved deserved respect in the field.

No matter how many of these factors are present, however, a case from another jurisdiction is not binding on a court, and does not foreclose the decision of that issue.

IV. Statutes and the Relationship Between Case Law and Statutes

THE PRECEDING MATERIAL IN THIS INTRODUCTION reflects the historic importance of case law to our legal system. You should be aware, however, that enacted law, especially statutory law, forms a greater part of the body of legal authority in our country than ever before. In fact, enacted law should be the first source in which you research a legal problem. In this section we will discuss enacted law in the form of statutory law and its characteristics and relationship with case law.

Statutes are enacted by legislative bodies that are constitutionally empowered to exercise the legislative function within a jurisdiction. The federal legislative body is the United States Congress. Each state has its own legislature and also has municipal and, perhaps, county forms of legislatures. In addition, state and federal administrative bodies may have limited legislative functions in that they are empowered

to enact regulations concerning the subject matter of their administration. These regulations provide another form of enforceable law.

Enacted law, like case law, falls along a vertical hierarchy.[7] At the top of that hierarchy is the Constitution of the United States. Next are both federal statutes and treaties. Federal statutes, when enacted within the powers conferred by the Constitution, take precedence over statutes of other jurisdictions. Then come federal executive orders and administrative regulations, state constitutions (a constitution, however, is the highest authority within a state as long as it does not conflict with federal law), state statutes, state administrative regulations, and municipal enactments.

A jurisdiction's constitution and its statutes are the highest authority within that jurisdiction, and the courts are bound by them. A legislature may change the common law by passing legislation that changes the common law rule. That change then supersedes the old rule. A court cannot in turn overrule that legislative enactment and say it will not follow it (although it can invalidate it on the ground of unconstitutionality). The legislature may also create new causes of action that were not available in the common law but which result from the legislation, such as worker's compensation laws and employment discrimination laws. A legislature may also enact a common law rule into statute; for example, many criminal statutes have codified what were previously common law crimes. Then the case law interpreting that common law rule may still be valid.

Because a jurisdiction's constitution is more authoritative than its statutes, the legislature may act only within its constitutional powers. Although a court cannot overrule legislation, that is, it cannot decide it will not follow the law imposed by the particular statute, a court may review a statute's validity. Legislation may be challenged in court on the ground that the legislature exceeded its constitutional powers. A reviewing court may then decide a statute is unconstitutional and is invalid.

Courts are constantly deciding statutory issues because statutes must be enforced and frequently must be enforced by litigation. A person's challenge to the constitutionality of a statute, for example, will usually arise during litigation in which the government attempts to enforce the statute against that person.

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[7] This hierarchy is taken from E. Allan Farnsworth, *An Introduction to the Legal System of the United States* 55–57 (1983).

More often, however, a court must decide not the validity of the statute, but how to apply the statute. As a necessary step in this litigation, the court may have to interpret the meaning of the statutory language in order to apply and enforce it in a specific situation. Cases that interpret and apply statutes are case law and become precedents in that jurisdiction. But they are not common law because the legal rule that is being enforced originates with the legislature. Common law rules originate with courts.

By its nature, legislation is cast in general terms, that is, in broad categories, because it is law written to affect future conduct, rather than law written to decide a specific case. General legislative language must then be applied to individuals and to the particular controversy being litigated. Statutory language may also be vague; for example, businesses cannot act in "unreasonable restraint of trade." Thus, a good portion of a court's work is deciding questions that involve the interpretation of statutes. The legislature could still have the last word, however. If it does not agree with the court's statutory interpretation, it can amend the statute. In reality, however, a legislature rarely gives attention to the course of judicial interpretation of a statute, and even more rarely reacts to judicial interpretation by amending the statute.

When you are writing about a problem that is controlled by a statute of that jurisdiction, you should always include the exact statutory terms at issue and an explanation of those terms. The explanation usually should be at the beginning of your written analysis. Do not start writing about the problem as if the reader knows the statute's terms unless you have been instructed to do so.

Exercise 1–C

What is the difference between the two examples below? Which is the better introduction to a discussion of a statute?

1. Under the Wills Act of Kent, a person's will must be "in writing, signed at the end by the person, and attested by two competent witnesses". Smith fulfilled all these requirements when he executed his will, even though he signed the will with his initials only.

2. Smith's will is valid because he fulfilled the three requirements under Kent law. He fulfilled the second requirement even though he used only his initials to sign the will.

V. Citation

ONE CONSEQUENCE OF RELYING ON legal authorities in your written work is that you will have to provide citations to those authorities. In legal writing, you use citations for many purposes: You demonstrate that your assertions are supported by other authority; you supply the bibliographic information a reader needs if she wants to look up that source herself; and you attribute borrowed words or ideas to their sources, thus avoiding plagiarism.

A. Citations to Provide Authority and Bibliography

Citation is important to all types of writing, but you probably will use more citations in your legal writing than you are accustomed to using. Because of the doctrine of precedent, lawyers analyzing a common law action constantly rely on case law to prove that the legal theory offered as the governing rule of law is valid and has been applied in similar situations. In a statutory action, lawyers quote and thus cite the statute that supplies the governing rule of law. They also use cases to help interpret what the statute means. Thus, a legal argument requires identifying the sources of the governing principles of law as well as analyzing what they mean. The writer must cite to those sources each time they are mentioned or relied upon. Lawyers also use secondary authority, such as books and periodical articles, as support for their legal analysis. These sources also must be cited.

Legal citations tell the reader many things. As mentioned above, the presence of a citation tells the reader that the preceding text is based upon information from another source and is not original with the writer. A citation to a case also tells the reader that there is legal authority for the previous statement and where the reader can find that authority. A citation provides information that helps the reader evaluate the weight of the precedent. For example, the citation tells which court decided the case.

Most law schools and lawyers use a specialized citation form found either from a book called *A Uniform System of Citation,* known as the Bluebook, or from the *ALWD Citation Manual.* Some lawyers adhere strictly to the citation rules; others make changes to suit their own practices or to comply with the rules of a particular court or agency. Most law schools require that students use either the Bluebook or the ALWD Manual citation form in their writing.

Besides learning correct citation form, you should also become familiar with certain conventions of legal citation. In legal memoranda and briefs, which are typical law school writing assignments, you will put citations in the text right after the material for which they provide authority, rather than in footnotes. You must use citations to authority for direct quotations, for text that paraphrases the authority, and for text that is based on information in the authority, although not quoting or paraphrasing from it. Notice the citations in the following paragraph. See Appendix B for an explanation of the citation form.

> The law of battery in this state is adopted from the Restatement of Torts. *Lion v. Tiger*, 500 N.W.2d 10 (N.D. 1954). A person may be liable for battery if the person directly or indirectly causes a "harmful contact" with another's person, and the person intends to cause the contact. *Id.* at 12; Restatement (Second) of Torts § 13(b) (1977). Under this definition, Smith will not be liable because she did not act with the required intent.

The first citation, to the case of *Lion v. Tiger*, supplies the authority for the statement about the state's law of battery. It tells you that the court that decided *Lion v. Tiger* is the court that adopted the Restatement definition. The second citation provides the source of the definitions. These sources are the case already cited (*Id.* means that the citation is the same as the previous one) and the Restatement of Torts.

B. Citations to Provide Attribution and Avoid Plagiarism

Citation to sources is essential in legal writing not only to show authority for your reasoning, but to avoid plagiarism. Most of you are familiar with university honor codes prohibiting plagiarism. These concerns are especially important in law school because of the need to document precedents and supporting arguments. As indicated in Part A, citing to authority is essential in legal work. Indeed, although the Rules of Professional Conduct have no specific reference forbidding plagiarism, the Rules forbid dishonest, fraudulent, or deceitful conduct.[8]

[8] Model Rules of Professional Conduct Rule 8.4.

Law schools use different definitions of plagiarism, and it is important that you become familiar with the one used by your school. In general, however, plagiarism occurs when you use another's ideas or words and pass them off as your own, that is, when you do not cite to the source. One important difference among definitions is whether plagiarism includes within its definition the element of intentional conduct. Some schools do not require the writer to have acted intentionally; careless research and notetaking that result in failure to attribute work is enough to sustain a charge. Some schools define the word plagiarism to include the requirement of intentional conduct, although some schools' prohibitions require "intentional plagiarism."

The basic rules of attribution require that you cite (*i.e.*, attribute) the source of direct quotations and paraphrases. If you change some words of the text, you are paraphrasing and must cite. However, if the language remains very close to the original, you should consider quoting directly instead and citing. See Appendix A for the mechanics of quotations. If you use a line of analysis from a source but change all or a lot of words, you are still paraphrasing and must cite the source. To avoid unintentional nonattribution, be careful when you do your research and take notes. Include quotation marks and check the accuracy of the material you copy when you prepare your research notes and write drafts of your paper. See the suggestions in Chapter 12.

In today's electronic, Internet-fueled environment, it is easier than ever to inadvertently plagiarize other people's work. This is because students often "cut and paste" language from electronic documents, rather than manually copy it word-for-word. The relative speed and ease of cutting and pasting can cause students to forget to enclose the copied language in quotation marks and cite the source. This can be a particular problem when students are up late at night, furiously revising their drafts to include quotations and other legal support.

To avoid confusion and inadvertent plagiarism, always remember to put quotation marks around material pasted from another source, and cite the source. To help remind yourself to do this, you can change the font or formatting of the text in the source document, so that it looks different from the other text in your draft. For example, in Microsoft Word, the "Highlight" function works well for this purpose. Or you can change the color of the font in your source document. By doing this, you will remind yourself to quote and attribute language used from other sources.

An important difference from most undergraduate definitions of plagiarism involves information that is "common knowledge," rather than ideas unique to an author. You did not have to attribute common knowledge in your undergraduate work.[9] Law school practice is to require citation for legal "common knowledge" as well as for unique ideas or language. For example, it is commonly known that a contract requires an offer and an acceptance, but were you to write that statement in a legal memorandum, you would cite one or more authorities. This is not really a matter of plagiarism, however, but of providing legal support for your proposition of law. Your writing professor will not likely report you to the school for violation of an honor code for failure to cite. She will probably note that the statement needs a citation to show its acceptability as a general rule of law.

You need not, however, turn your writing into a bibliography. If a book or an article leads you to cases and statutes and you yourself read those materials and discuss their facts or language in your written work, cite to the cases and statutes. You do not also have to cite the source that led you to the cases and statutes, even if that source describes their facts and language. You do cite the source for any of its ideas or theories that you use.[10]

When you become a lawyer in practice, you will find that attitudes toward plagiarism are different from those in an academic setting. In practice, lawyers cite to cases and statutes and to other materials to add precedential value to their arguments and so that their readers can find the sources. Lawyers also provide citations for quotations. However, lawyers typically use others' materials without attribution. One co-defendant's brief may include ideas and even verbatim material from another defendant's work without attribution. Indeed, judges often use material directly from a party's brief without attribution. The attorneys never accuse the judge of plagiarism; instead they feel complimented.

This does not mean that after you graduate from law school you will never be concerned with plagiarism again. Several years ago, a United States Senator's bid for his party's nomination for president

[9] *See, e.g.*, H. Ramsey Fowler, *The Little, Brown Handbook* 482 (1980); Sylvan Barnet and Marcia Stubbs, *Practical Guide to Writing* 231 (1975).

[10] In more advanced writing, you should cite the source that has led you to other sources if the first source uses the other source in an unusual way and you use the other source in the same way. That type of citation is usually not necessary in memoranda and briefs, but may be.

was damaged in large part because he plagiarized a speech. It also became known that he had plagiarized on a law school paper written for a first-year legal writing course. The Senator explained, "I was wrong, but I was not malevolent in any way. I didn't know how to write a legal memorandum."[11] We hope, first, that you will never attempt to pass on others' work as your own, malevolently or not, and that after using this book, you will know how to write a legal memorandum, and other documents as well.

Exercise 1–D

Where do citations belong in the following paragraphs? Why?

1. The test for determining whether a plaintiff is entitled to attorney's fees involves four factors: whether the litigation provided a public benefit, whether the plaintiff gained financially from the litigation, whether the plaintiff had a personal interest in the materials sought, and whether the government unreasonably withheld the materials. The factors usually have equal weight. However, if the government acted particularly unreasonably, the last criterion may be most important.

2. The Kent statute permits an unwitnessed will. This type of will is known as a holographic will. To be valid, a holographic will must be entirely written and dated by the testator. The courts have interpreted "dated" to mean month, day, and year.

Once you become accustomed to using legal citations, you will find that they can contribute to your legal writing style by keeping unnecessary information out of your text. For example, one common writing weakness of lawyers is to explain textually the information that is available in the citation, instead of using the citation to provide that information. Notice the differences in these three sentences.

1. In an old 1922 Massachusetts case, the Supreme Judicial Court held that the plaintiff must prove fraud in order to invalidate an antenuptial contract. *Wellington v. Rugg*, 243 Mass. 30, 136 N.E. 831 (1922).

[11] Jon Margolis, "Biden on quote furor: 'I've done some dumb things'", Chi. Trib., Sept. 18, 1987, at 3.

2. In Massachusetts, a plaintiff must prove fraud in order to invalidate an antenuptial contract. *Wellington v. Rugg*, 243 Mass. 30, 136 N.E. 831 (1922).
3. Massachusetts is the only state that requires a plaintiff to prove fraud in order to invalidate an antenuptial contract, a rule that dates back to 1922. *See Wellington v. Rugg*, 243 Mass. 30, 136 N.E. 831 (1922).

The writer of sentence 1 has supplied two facts in the text that are provided in the citation, that the case was decided in 1922 and that the highest court in Massachusetts decided it. (If the citation does not specifically include the name of the court within the parenthesis and the court is not otherwise identifiable by the citation, the case was decided by the highest court of the state). Unless the writer had a particular reason to include those facts in the text, they are unnecessary, and the sentence is better written as in sentence 2. If the writer wanted to emphasize that the rule is an old one, sentence 3 provides more specific emphasis than sentence 1.

Although the examples may seem strange to you now, citation will become an important and familiar aspect of your writing about legal materials.

Exercise 1–E

1. You are doing research for a state law problem. Your research uncovers some cases similar to the case you are working on, which you are appealing to the intermediate appellate court of your state. These cases are from

2 a. Another intermediate appellate court of the state PERSUASIVE
3 b. A diversity suit in a federal district court in the state, applying the state's law on that issue PERSUASIVE
4 c. The federal court of appeals for the circuit of your state in an appeal from a district court from a diversity suit applying the law of a different state PERSUASIVE
5 d. A state trial court's judgment entered in a decision that was not published but which you know about PERSUASIVE
1 e. The highest court of the state BINDING

What weight would you assign to these authorities? Evaluate how important each is as a precedent.

2. Because the domiciles of the parties permit, you have decided to litigate an Illinois property law question in the United States District Court for the Northern District of Illinois. In which sources of primary law would you do your research? Why? Evaluate these in terms of efficient use of your research time.

a. United States Supreme Court cases
b. Cases from the Illinois Supreme Court and intermediate appellate courts
c. Cases from the United States Court of Appeals for the Seventh Circuit
d. Cases from the other two United States district courts in Illinois
e. Property law cases from other states

3. You are doing research for a state law problem about the liability of owners of recreational land to people who use those premises. There are two questions involved, whether the land your client owns is recreational land, and if so, whether your client did not fulfill his legal duties.

How relevant are the following authorities to your analysis of this problem?

a. A newspaper article about accidents in parks
b. A statute of the state that limits the liability of owners of recreational land
c. The regulations of a state agency requiring safety features on recreational land that is open to the public
d. A brochure printed by the owner of the recreational land
e. Case law from the state's intermediate appellate courts interpreting the statutory term "recreational land"
f. Case law from the highest court of another state that has an almost identical statute. These cases interpret the term "recreational land"
g. A case from your state's appellate court that interprets the term "recreational area" in a different statute in that same state about licensing for privately owned recreational areas
h. The notes of the drafters of a uniform act about liability of owners of recreational areas, an act that your state has adopted

2

Analyzing Legal Authority: Case Law

I. Introduction

IN YOUR FIRST YEAR OF LAW SCHOOL, you will be analyzing a case in two contexts. First, your professors may suggest that you "brief" (summarize) each case assigned for class. This type of brief is a written synopsis of the important points of the case. For this purpose, you consider each case in isolation, just trying to understand that particular case. In the second context, however, your concern is the impact that a previous case may have as a precedent for your own problem case, often a hypothetical fact pattern. There, you analyze the relationship between cases. Your success in both of these contexts will depend to some extent on how carefully you identify the significant parts of a judicial decision.

II. Briefing a Case: Finding the Parts of a Judicial Decision

YOU BRIEF A CASE TO HELP YOU UNDERSTAND its significance. There are different methods of briefing a case and the following format is meant to be only an example. Your professors may suggest a format to you, or you may devise your own system by identifying what helps you in your classes. Whatever method you use, read through the case once to get a general idea of what it is about before you start your brief.

The typical components of a case brief are explained below.

A. Facts

The fact section describes the events between the parties that led to the litigation and tells how the case came before the court that is now deciding it. Include those facts that are relevant to the issue the court must decide and to the reasons for its decision. You will not

know which facts are relevant until you know what the issue or issues are. For example, if the issue is whether a minor falsely represented himself as an adult for the purpose of fraudulently inducing a car salesman to contract with him, relevant facts could include the minor's written and oral statements about his age, the minor's height and weight, and his manner of dress. These facts are relevant because they can help prove how the minor represented his age. However, the minor's eye color, the weather on the day the contract was signed, and the payment schedule in the contract would not be relevant to the issue of false representation.

The fact section should also include the relevant background information for the case, for example, who the plaintiff and defendant are, the basis for the plaintiff's suit, and the relief the plaintiff is seeking. Also include the procedural history, although you may put the procedural facts under a separate heading. Procedural facts should include any dispositive motions, such as a motion to dismiss for failure to state a claim. If the case is an appeal, state the lower court's decision, the grounds for that decision, and the party who appealed.

Often you will have to understand the procedural posture of a case in order to understand the court's decision. For example, if the appeal is from a successful motion to dismiss, then the appellate court will decide whether the plaintiff's pleadings stated a claim and whether the plaintiff should be permitted to continue the lawsuit. The appellate court will not decide who should win the lawsuit if it continues.

B. Issue(s)

The issue is the question that the court must decide to resolve the dispute between the parties in the case before it. To find the issue, you have to identify the rule of law that governs the dispute and ask how it should apply to those facts. You usually write the issue for your case brief as a question that combines the rule of law with the material facts of the case, that is, those facts that raise the dispute. Although we use the word "issue" in the singular, there can be and often is more than one issue in a case.

C. Holding(s)

The holding, as was explained in Chapter 1, is the court's decision on the question that was actually before it. The court may make a num-

ber of legal statements, but if they do not relate to the question actually before it, they are dicta. The holding provides the answer to the question asked in the issue statement. If there is more than one issue, there may be more than one holding.

D. Reasoning

The court's reasoning explains and supports the court's decision. The court may explain why it applied the controlling rule as it did. Sometimes the issue in the case may involve the validity of the rule itself, and the court may have looked at two lines of authority and decided the case was more like one group of cases than another. Or the court may have decided that the policy justifying a rule was no longer valid, or may have concluded that the facts of this particular case required an exception to the rule. In any event, it is important to isolate the court's reasoning from the facts and the holding of the case.

E. Policy

Underlying legal decisions are the social policies or goals that the decision-maker wishes to further. When a court explicitly refers to those policies in a case, include that information in your case brief, since it will probably help you understand the court's decision. If the court does not explain the policies on which it based its decision, then try to identify them for yourself.

Read the following case. It is followed by a sample brief.

Paugh v. City of Seattle[1]

The plaintiff is the father of two boys who died at ages six and eight when they drowned in a pond on city-owned land. Mr. Paugh sued the city for the deaths of his sons. The city successfully moved for summary judgment and this appeal followed.

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[1] This example is based on and uses language from *Ochampaugh v. City of Seattle*, 588 P.2d 1351 (Wash. 1979).

The pond is about 100 feet wide at its widest point. It is shallow at the edges, and slopes gently to six feet at its deepest point. Its bottom is muddy and the water is murky. It is located in unimproved bushy terrain about 300 yards from the housing development where the plaintiff lives, and is accessible by a dirt road. The sheriff described it as an ordinary pond, just like the many others in the area. The pond is popular with nearby residents for fishing and swimming and the plaintiff himself had taken his sons there four or five times to fish. He had told them to go only with him and to stay out of the water. There are no witnesses to the drownings.

The city had not taken any measures against trespassers. There are no warning signs around the pond, and the evidence is that a fence all around would be prohibitive in cost and probably not possible without leveling the trees and the uneven ground. The city is now contemplating draining the pond and estimates the cost at $25,000.

The general rule is that a landowner owes no duty to trespassers except to not willfully cause their injury. *Mail v. Smith Lumber Co.*, 287 P.2d 877 (Wash. 1955). There is an exception, however, for child trespassers, the attractive nuisance doctrine, which has been adopted in this state. Id. This doctrine reflects public concern for the welfare and safety of children. The requirements for this doctrine to apply are

(1) The condition must be dangerous in itself, that is, it must be likely to, or probably will, result in injury to those attracted by it;

(2) The condition must be attractive and enticing to young children;

(3) The children, because of their youth, must be incapable of understanding the danger involved;

(4) The condition must have been left unguarded at a place where children go, or where they could reasonably be expected to go; and

(5) It must have been reasonably feasible either to prevent access or to render the condition innocuous without destroying its utility.

Shock v. Ringling, 105 P.2d 838 (Wash. 1940).

In this case, we agree with the court below that the pond is not an attractive nuisance because it is not dangerous in itself. Thus summary judgment for the defendant is appropriate. Admittedly, ponds,

like many bodies of water, are attractive to children, who love to fish and swim. Moreover, when ponds are located near people's homes, children could reasonably be expected to visit them. Nevertheless, although drowning is always a danger, it is a commonly known danger, and six- and eight-year olds are capable of understanding it. In addition, all the evidence is that the number of drownings a year is slight compared to the recreational use made of similar bodies of water. The evidence is that this sad event was the first drowning in this pond.

This state has miles of shoreline and numerous natural creeks, ponds, lakes, and rivers. These bodies of water, standing or flowing, are natural to all states and countries that are not deserts. Compared to the heavy use of these bodies of water, the number of drownings is so small that we must conclude that they are not dangerous. Moreover, it would be an undue burden to require owners to fence them or drain them in order to escape liability for the occasional drowning that occurs, and this duty would shift the responsibility of child care to the landowners from the parents. In addition, the environment, especially wildlife, would suffer and people would not be able to enjoy the recreational facilities. It is a policy of this state to encourage owners of recreational land to allow the public to use the land. Towards this end, the state's Recreational Land Act limits the land owner's liability to the public allowed to use the land for recreational purposes.

If, however, there were conditions that caused particular risk, like a concealed danger, our decision might be different. The trial court here correctly decided that the pond is not an attractive nuisance. Affirmed.

Sample Brief of Paugh v. City of Seattle

A. Facts

The plaintiff sued the city for the deaths of his six- and eight- year-old sons, who drowned in a pond on city-owned land. The trial court granted summary judgment for the city and plaintiff appealed. The pond is described as ordinary, shallow at the edges, gently sloping, and murky. It is about 300 yards from a housing development. The pond is accessible by a dirt road and is used by the community for fishing and swimming. The plaintiff, who lives in the adjacent com-

munity, had taken his sons there to fish 4 or 5 times and warned them not to go alone. The plaintiff's sons were the first drownings in the pond.

The court affirmed the trial court summary judgment for the city.

B. Issue

Is an ordinary pond located near residential property an attractive nuisance so that the property owner is liable for the drowning deaths of trespassing children?

C. Holding

The pond is not an attractive nuisance because it is not dangerous in itself.

D. Reasoning

The general rule in Washington is that a landowner (the city) owes no duty to a trespasser except not to willfully cause injury. There is an exception in favor of child trespassers for injury from an "attractive nuisance." If the landowner maintains an attractive nuisance on its land, it is liable for injuries caused by that condition. The state imposes 5 requirements:

1. The condition must be dangerous in itself, that is must be likely to or probably will, result in injury to those attracted by it;
2. The condition must be attractive and enticing to young children;
3. The children, because of their youth, must be incapable of understanding the danger involved;
4. The condition must have been left unguarded at a place where children go, or where they could reasonably be expected to go; and
5. It must have been reasonably feasible either to prevent access or to render the condition innocuous, without destroying its utility.

The court does not provide a detailed application of these elements, but seems to decide mainly on the ground that the plaintiff could not prove that the pond was dangerous in itself, the first element.

The statistics (not supplied) are that in relation to the many bodies of water in the state, there are few drownings. That is, a pond is not dangerous because its use is not likely to result in injury. These were the first drownings in this pond.

The court also mentions that it was not feasible to prevent access by fencing off the pond because of the terrain. The city may drain it for $25,000, which will destroy its utility for recreation and for the environment.

Finally, the plaintiff had warned his children about the danger of drowning and, at six and eight years, they were old enough to understand that warning. Thus, although ponds are attractive to children (second element) and although this pond was unguarded (fourth element), three of the five elements were not proven.

E. Policy

The purpose of the attractive nuisance doctrine is to protect the welfare and safety of children, who are unprotected under the general rule governing a landowner's liability to trespassers. However, the condition on the landowner's premises must be a dangerous one, that is, likely to cause injury. Ponds and other bodies of water are so common and widely used without injury that they are not dangerous.

Other considerations here are first that ponds are environmentally important; if the water is drained or fenced off, the water is neither available to wildlife, nor available for recreation for others. Moreover, this duty would be unduly burdensome on landowners, and would shift responsibility to protect children to them from the children's parents. The court will do that only if the condition is dangerous. Finally, the state by statute encourages landowners to allow the public to use recreational lands, not to fence them off or make them unusable.

After you identify these important parts of a court's opinion, you should spend some time evaluating what you are reading. This is the best preparation for your classes and for your writing. For example,

think about the legal rule that the jurisdiction has adopted and that the court applies. Does the attractive nuisance rule (now often called the child trespasser rule) properly balance the policy of not unduly burdening the landowner with the policy of protecting minor children? Does it place the burden of protection on the correct party (among the landowner, the child, and the parents)? If the rule is based on the fact that we cannot expect children to be careful, in what circumstances should others be more careful for them? Also evaluate the court's application of the rule to the facts of the case and the logic of the court's opinion. Is an ordinary pond a dangerous agency? Should the city have drained the pond if its agents knew that children fished and swam there?

To prepare for class, think of how changes in the facts might change the court's decision.

III. Using the Parts of a Judicial Decision

A. Reasoning by Analogy

UNDER THE DOCTRINE OF PRECEDENT, judges decide cases according to principles laid down in earlier similar cases, that is, the precedents. Lawyers (and law students) who are working on a legal problem must find those earlier cases and analyze the impact that those cases will have on the decision in their own problem. Thus, lawyers are always comparing cases by drawing analogies and making distinctions between them. By comparing their problem to decided cases, lawyers decide how the decisions of previous cases apply to the new problem. If the cases resemble each other in important ways, such as by their relevant facts, then they are analogous and should also resemble each other in their outcome. Cases are analogous if they are alike in ways that are important to their outcome and if the differences between them are not enough to destroy that analogy.

The first precedents to look for are those that are binding authority on the court in which the case will be litigated. If that court, or a higher court in that jurisdiction, decided a case or cases on the issue before the present court, those cases become the precedents to which the present controversy will be compared, and those are the cases that the court will want to know about first. If there are no cases in that jurisdiction on that exact issue, cases on similar issues will be

important if the court's reasoning and the underlying policies also apply to the facts of the present case.

If you decide, however, that the cases are different and that the decision in the precedent case should not control the outcome of your problem, you are "distinguishing" the cases. If you distinguish a prior case, you avoid its impact on your case. You may distinguish a case by establishing that the differences in the facts require that the court apply a different rule. Or you may decide that the same rule should be applied, but that the facts in your case require a different outcome.

Be careful not to distinguish cases too easily. Each case will have some differences from other cases. The distinguishing facts you select must be significant.

By comparing and contrasting your problem with the precedents, you will be able to show how well the rules of those cases fit your case. This in turn should enable you to predict the probable outcome of your own case. When you reason by analogy, though, you can only offer probable proof for your conclusions, not certainty. Your task is to assess all the possible applications of the relevant rules and to offer the best prediction of the outcome.

Although analogizing and distinguishing may sound like mechanical exercises, legal analysis is rarely analysis by rote. Comparing the similarities and contrasting the differences between cases is often a creative process and the ability to do this is one of the hallmarks of a skillful lawyer. You will become more sophisticated in this process as you gain experience.

B. Applying Precedent

1. Issues

To determine whether a case is controlling as precedent, the issue in the precedent should be essentially the same as the one in the new problem. However, sometimes you can define the issue in the precedent more broadly in order to reveal its significance for your problem case by describing the key facts more broadly. For example, if your attractive nuisance case involved a river, you would describe the dangerous condition in *Paugh* as a body of water, rather than as a pond.

The most relevant cases are those in which the issue is the same. However, sometimes you will not find a case in the jurisdiction with

the same issue, but you will find a case or cases on similar issues. You may use those cases to draw analogies, but it is important that the reasoning and policies supporting those decisions are relevant to the current issue.

For example, a federal district court (a trial court) sitting in Pennsylvania had to determine whether it had diversity jurisdiction[2] in a personal injury suit (personal injury suits are typically litigated in state court under state law). The plaintiff, Ms. Last, sued a residential school for the developmentally disabled located in Pennsylvania. Ms. Last sued on behalf of her legally incompetent adult son who was injured when he was a resident of the school. Ms. Last was a domiciliary of New York. She argued that her son's domicile was also New York and not Pennsylvania, the defendant's domicile. (If Pennsylvania, the parties' domiciles would not be diverse.) A child's domicile is deemed to be that of the parents and an incompetent adult is deemed unable to form the intent to change domicile from that of the parents. The school's burden was to prove that the son had changed his domicile to Pennsylvania as a resident of the school.

The district court relied on an earlier case from its circuit, *Juvelis v. Snider*. *Juvelis* also involved the domicile of an incompetent adult, but the issue was different from that in *Last*. *Juvelis* raised the issue of domicile not to determine jurisdiction, but to determine whether the plaintiff qualified for benefits under a federal statute. Nevertheless, the court in *Last* used the rule developed in *Juvelis* to determine whether an adult incompetent had changed domicile from that of his parents. The court said there were no reasons why the difference in the issue (domicile for benefits under a statute and domicile for purposes of diversity jurisdiction) should change the inquiry into whether an incompetent adult changed domicile.

2. Facts

After you find cases on the same issue, or on issues that are sufficiently analogous, you compare the facts of those cases. When you brief a case, you concentrate on how the facts of that case are relevant to the issue in the case and the reasons for the court's holding. However, when you are considering the relationship between a pre-

[2] See Chapter 1 p. 12.

cedent and your problem case, you view the facts somewhat differently. Now, you also try to determine if the facts in the two cases are basically analogous or distinguishable.

The facts of one case need not be identical to the facts of another case for the cases to be analogous. Indeed, the facts will never be identical. A case can be a precedent for your problem, however, when the facts can be classified similarly. For example, the relative bargaining strength of a party to a contract is one factor the courts will consider in deciding whether a contract is unconscionable (so unfair as to be unenforceable). Thus, an analogy could be drawn between a case in which the owner of a small gas station dealing with EXXON claimed a contract was unconscionable and a previous case in which a consumer dealing with General Motors successfully claimed a contract was unconscionable. Although the station owner is a business person, both the station owner and the consumer are vulnerable buyers in a weak bargaining position relative to the defendant. On the other hand, if these plaintiffs were described at a lower level of abstraction, as a consumer and a commercial enterprise, then the case about the consumer contract might not apply to the gas station. Similarly, a rule for automobiles may apply equally to snowmobiles or even to mopeds if all are classified as motorized vehicles.

Another example involves the element of the tort of intentional infliction of emotional distress requiring that the defendant's conduct be outrageous. Suppose you were asked to analyze whether Olympia Department Store's conduct was outrageous if it made daily phone calls to a customer over a three-month period in attempting to collect payment for a debt. In the jurisdiction of this problem, there may be no cases about the issue of outrageous conduct in which a store made phone calls to a customer. But there may be a case in which a department store sent daily letters to a consumer over a three-month period in attempting to collect a debt. In that case, the court had decided that the conduct was not outrageous on the grounds that a creditor could use reasonable, if annoying, methods to collect a debt, and that the letters fell within reasonable limits.

You may decide that the two cases resemble each other because three months of daily telephone calls are like three months of daily letters. They both fit within a more general category of persistent communications from an outside source. You may, therefore, conclude that the cases are analogous and should resemble each other in result also. Under this reasoning, Olympia's conduct would not be characterized as outrageous.

On the other hand, you might argue that the cases are distinguishable because phone calls are a much more intrusive kind of communication than letters. Or you could distinguish the case if the basic facts were different, if, for example, the customer never actually owed the debt. Under this circumstance, the precedent would be distinguishable since the court's reasoning was premised on the existence of the underlying debt.

In applying precedent, as when briefing a case, you must first determine which facts are relevant to the issue that a court must decide and to the reasons for its decision.

Exercise 2–A

False imprisonment litigation often involves employment situations. The plaintiff's employer wants to question the plaintiff about some aspect of the plaintiff's job performance, and often does so in the employer's office with the door closed. The plaintiff claims that he was involuntarily confined, one of the elements of false imprisonment.

Suppose that Mr. Brown claims he was involuntarily confined in his employer's office for five hours. During this time, he was questioned about his methods of billing his time, and then fired. The door to the room was closed but not locked, and Brown was sometimes left alone in the room, where there was a telephone. He never tried to leave.

The defendant relied on *Towls v. McGann*, in which the court held that the plaintiff was not involuntarily confined when she was called to her employer's office and questioned about money shortages for three hours. Though the door had been locked, she was not prevented from leaving the room when she became upset and wanted to leave. Before that time, she had not been left alone in the room.

Brown points to differences in the facts that may be relevant to change the outcome. Evaluate his success.

a. The previous plaintiff had walked out of the room, but Brown had not.
b. The previous defendant had locked the door.
c. Brown had been left alone in the office where there was a telephone.
d. Brown was in the defendant's office for five hours; the previous plaintiff was in the defendant's office for three hours.

Exercise 2–B

Analogize or distinguish the following facts and those in the Paugh case (page 36) and decide if the factual difference changes the outcome of whether the defendant maintained an attractive nuisance. Explain why.

a. The plaintiff's sons drowned in a river on the city's property that ran near their home (not a pond).
b. They drowned in an artificial body of water, a pond created by filling in a gravel pit dug originally for commercial purposes, but now used by the neighborhood for recreation.
c. They drowned in a lake when they were swept over a small waterfall that was not visible until they were in the lake.
d. They drowned in an old, open, abandoned well located in an undeveloped lot in a subdivision. A path went by the well, over which children chased each other.

Exercise 2–C

Read the following case. Identify the issue in the case and make a list of the facts that are relevant to a court's decision on that issue.

In Re Estate of Winter

The heirs of Robert Winter seek to void a contract for the sale of land Mr. Winter made three weeks before his death. They allege that Winter was mentally incompetent to make a contract at that time. In this state, a contract may be voidable on grounds of mental incompetence if, because of a person's mental illness, he was unable to reasonably understand the nature and consequences of the transaction in question. Since Winter was incompetent under this standard, the contract he made for the sale of land is voidable and will not be enforced.

Mr. Winter had a stroke in 1992. He suffered from a vascular disease which resulted in partial amputation of his foot. As a result of this amputation, he became unable to continue to operate his farm himself. In 1993, Mr. Winter's wife died. Since he was unable to take care of himself, he moved in with one of his daughters, Sandra Bright. Another one of his daughters testified that from that point on, Winter seemed to lose interest in everything. He stopped managing his own affairs. Mrs. Bright handled all of his finances. She balanced his checkbook, deposited his social security checks, and managed the farm.

As time went on, Mr. Winter became easily confused and lethargic, spending much of his time sitting in a chair, staring out of the window. A family friend testified that when Winter described the farm, he sometimes said it was 200 acres and sometimes said it was 2,000 acres. (The farm is 2,000 acres.) Dr. Crabtree, Winter's longtime physician, said that in his opinion, from March 1994 until he died, Winter was totally incompetent to handle any of his own affairs, including taking care of his own body.

In May, 1994, while Mrs. Bright was out for the afternoon, Herbert Spencer paid Winter a visit. Mr. Spencer offered to buy the farm from Winter. Winter agreed and signed a contract for the sale of the farm to Spencer for what a local real estate agent said was far below its actual value. In addition, Winter did not reserve a right of way for himself and his family, creating a problem of access from the road to their other piece of property. Mr. Winter died three weeks after the sale of the farm.

The evidence suggests that at the time of the contract, Winter was unable to understand the nature and consequences of the transaction of the sale of land. He did not appear to have a clear idea of the number of acres in question. The price he received was below the fair market value of the property. He failed to reserve an important right of access for himself. His physician testified that he was incompetent to handle his own affairs. His daughter had, in fact, been taking care of his personal and business affairs before the sale took place, as Winter had lost interest in these matters. Under these circumstances, I hold that Winter was unable to understand the nature and consequences of the transaction, and, therefore, the contract for the sale of land is voidable.

Exercise 2–D

Using *Winter* as the only precedent, identify the issue and make a list of the relevant facts in the following problem case:

Richard Bower wants to void the contract his uncle Joseph Black made for the purchase of a car shortly before Mr. Black's death on the grounds that Black was mentally incompetent at the time he made the contract. Excerpts from the following depositions, taken in the case, will provide the factual background.

DEPOSITION: DR. MARTIN DREW

(By Ms. Jones, attorney for plaintiff, Richard Bower)

Q: Was Joseph Black a patient of yours?
A: Yes, he was my patient for six years until he died on April 10, 1996, of cerebral apoplexy, what you would call a stroke.

Q: What had you been treating Mr. Black for?
A: Mr. Black had cerebral arteriosclerosis. He suffered from a hardening and shrinkage of the arteries, which reduced the amount of blood that gets to the brain.

Q: What are the symptoms of cerebral arteriosclerosis?
A: Well, since this disease develops gradually, the symptoms develop gradually as well, becoming more and more intense. The most common early signs are memory loss, irritability, anger, confusion, and forgetfulness. In Mr. Black's case, the symptoms were becoming more and more severe. You see, as the amount of blood that got to his brain diminished because the arteries continued to shrink, the amount of his confusion and forgetfulness increased. He also became more stubborn as his memory became more uncertain.

Q: When did you last see Mr. Black?
A: I last saw him on January 31, 1996.

Q: How would you describe his condition?
A: I would say that his arteriosclerosis had become quite severe—not enough that he needed to be hospitalized, but enough so that he needed home nursing care. He would talk to me and then he would forget what he said and tell me the same things again and again. And he thought I was my father, who had been his physician 30 years ago. I asked him to tell me his name and where he lived. He remembered his name, but couldn't tell me where he lived.

Q: Doctor, in your opinion, was Mr. Black able to understand ordinary business transactions?
A: At this point in his life, I would say he would not.

DEPOSITION: RICHARD BOWER

(By Ms. Jones)

Q: Mr. Bower, what is your relationship to Joseph Black?

A: He was my uncle, my mother's brother.

Q: Did you accompany your uncle to Miller Motors on February 12, 1996?

A: Yes I did. He came next door, where I live, and asked me to go with him to Miller Motors, which is around the corner. I couldn't understand why, but I humored him and went with him. When we got there, a salesman came out and said, "Your car is ready, Mr. Black." My uncle had bought a Buick the day before and he wanted me to drive him home in it. I couldn't believe it because he hasn't driven in three years. I don't think he even has a valid license anymore. I asked him how he could do such a thing, because he only had $15,000 left to live on, except for Social Security, and the car cost around $14,000. He wouldn't even be able to make his mortgage payments and eat on what he had left. When I reminded him of that he said it was not a problem because he had only borrowed the car and it only cost a few hundred dollars. Then he said that he could give the car back in a few days. When I told him again that he had spent $14,000 on a car, he started yelling at me and making a terrible scene so I drove him home and put it in the garage beside his house. He never went near it. I started it once a week so that the engine wouldn't rot.

Q: What did you do after your uncle died?

A: I called Miller Motors and said I was my uncle's executor and that I wanted to give the car back. I said I would be willing to pay them for the two months' use of the car, even though we never even drove it. But they refused.

DEPOSITION: ROSE BROWN

(By Ms. Jones)

Q: Ms. Brown, were you employed by Joseph Black?

A: I took care of Mr. Black, though Mr. Bower actually paid me out of a joint checking account he had with Mr. Black.

Q: How long did you take care of Mr. Black?

A: I took care of him from February 3, 1996, until he died on April 10.

Q: What did your work consist of?

A: I did the shopping, cooked, cleaned, helped Mr. Black get dressed if he needed help.

Q: How did Mr. Black occupy his time?
A: He sat around, sometimes watched TV. He didn't read the paper anymore. I had to watch him very carefully because he would wander off, like he did the day he bought the car. But you had to be very careful how you talked to him, because he would get angry and use terrible language. He hated to hear that he had forgotten something and would just get more stubborn.

Exercise 2–E

Compare the facts in the *Winter* case and in the problem case to determine whether the cases are analogous or distinguishable. Under what general classifications would you compare the facts?

3. Holding

When you are considering the relationship between a precedent and your problem case, you might formulate a court's holding differently from the way you would if you were simply briefing the case. The holding of a mandatory precedent becomes a rule to apply in the next similar case. Nonetheless, as explained in Chapter 1, you have some flexibility in formulating the holding in that you can choose how many facts to include as essential, and how to characterize those facts. If you describe the facts exactly as they were in the case, then the holding you state will be very narrow. This is sometimes called limiting a case to its facts, because the case cannot be used as a precedent for many other cases. If, however, you describe the facts more broadly, then the holding will apply to a larger number of future cases whose facts come within that broader description. The holding in the *Paugh* case, for example, might be stated in terms of the particular facts of that case, in terms of bodies of water in general, or, most broadly, in terms of any outdoor recreational facility. The holding in the *Last* diversity case could be stated in terms of the plaintiff in particular, in terms of incompetent adults, or more broadly in terms of any category of persons incapable of choosing a domicile.

The way you formulate the holding may depend on the result you want the court to reach in applying that case, the purpose of the document you are writing, and its intended audience. For example, if you are writing to a court and the decision in the precedent case is one that is favorable to your client, then you will try to formulate the

holding broadly enough to encompass the facts of your client's case. Or, if the decision in the precedent is unfavorable, you will try to state the holding more narrowly so that it will not encompass the facts of your client's case. If your client is a parent whose child drowned in an artificial body of water then you might want to limit Paugh's holding to natural bodies of water. Of course, there are limits to formulating the holding broadly or narrowly. If you manipulate the facts to violate the sense of the case, you will be engaging in unethical behavior and faulty analysis.

Exercise 2–F

Reread *Beta v. Adam* in Chapter One, page 21. Suppose you represented the plaintiff in each of the following three false imprisonment cases. How would you formulate the holding of *Beta v. Adam* to be most advantageous to your client?

Case 1:

Same facts as in the *Beta* case in Chapter One, but your client's pocketbook contains only a handkerchief, a comb, and makeup. Your client stays five minutes and leaves.

Which of these two statements would you use as the holding in *Beta v. Adam?*

→ a. In *Beta v. Adam,* the owner of a restaurant confined the plaintiff when he took her pocketbook and told her she could not leave the restaurant until he determined that she had paid her bill.

or

b. In *Beta v. Adam,* the owner of a restaurant confined the plaintiff when he took property of value from her in order to detain the plaintiff and detained her for twenty minutes.

Case 2:

Same facts as above but the restaurant owner tells your client that he does not believe that she left the money to pay her bill, and asks your client to wait while he gets someone to see if she left the money on her table. The owner does not take anything from her, but asks the restaurant hostess to keep an eye on your client. Your client waits for twenty minutes.