A Lawyer Writes

A Practical Guide to Legal Analysis

Third Edition

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Chapter 2

Sources and Systems of the Law

The last chapter showed you the path ahead. Now, we must go back and look more closely at the steps you will take to develop that analysis.

After learning about your client and the problem that brought your client to your office, you will begin to research. To answer your client's legal question, you will need to know the universe of law that might govern and choose from that universe. To choose well, you will need to determine which law is relevant and assess the impact it is likely to have on your client's case. That is, you will need to evaluate the "weight" of each legal authority. As you select relevant authority and assess the weight of each, you will begin to develop an answer to your client's question.

This chapter is about how to select and weigh legal authority. It will introduce the most common sources of law in our legal system and explain some basic principles that will guide you in determining the use and relative importance of those legal authorities.

I. Sources of the Law

A law is any binding custom or practice of a community. In the United States, each branch of government has authority to create and publish law: The legislative branch enacts statutes; the executive branch issues regulations and executive orders; and the judicial branch produces case law.

Law from any branch of government is primary authority. The word "primary" refers to authority that the government creates and publishes. In other words, primary authority *is* the law. "Secondary" authority is commentary about the law and is not binding on anyone. Secondary authority can provide you with an overview of an area of law or a critique of the law. Examples of secondary authority are legal encyclopedias, law review articles, and treatises.

Sidebar

Attorneys use the words "sources" and "authorities" and the phrase "support for an argument" interchangeably. Each is a catch-all reference to the materials used to analyze and predict the outcome of a legal issue.

Secondary authority is helpful when you are researching an unfamiliar area of the law and need to quickly understand its broad contours. Primary authority, however, has more weight because it is the law. Thus, in your memorandum to the senior partner, you will typically rely on primary authorities.

The Federal Constitution, which is primary authority, is the highest law of the land. It establishes the three branches of the federal government, each of which creates law. Each state also has its own state constitution, which likewise establishes the branches of state government.

A. The Legislature

Legislatures create two types of authority frequently relevant to analyzing a client's legal question: statutes and legislative history.

1. Statutes

A statute is simply a law enacted by a legislature. Under the Federal Constitution, Congress has sole authority to enact statutes for the nation. Similarly, the legislature of each state is responsible for enacting statutes that regulate conduct in that state.

Typically, statutory sections are grouped into a statutory scheme. For instance, Washington State prohibits bribery in baseball through a series of statutory sections (Example 2-A). Similarly, the Federal Clean Air Act is a statutory scheme composed of more than 150 sections (Example 2-B). Together, those sections seek to reduce air pollution in the United States.

Example 2-A · A series of statutory sections creates a statutory scheme

67.04.010. Penalty for bribery in relation to baseball game

Any person who shall bribe or offer to bribe, any baseball player with intent to influence his play, action or conduct in any baseball game, or any person who shall bribe or offer to bribe any umpire of a baseball game, with intent to influence him to make a wrong decision or to bias his opinion or judgment in relation to any baseball game or any play occurring therein, or any person who shall bribe or offer to bribe any manager, or other official of a baseball club, league or association, by whatsoever name called, conducting said game of baseball to throw or lose a game of baseball, shall be guilty of a gross misdemeanor.

67.04.020. Penalty for acceptance of bribe

Any baseball player who shall accept or agree to accept, a bribe offered for the purpose of wrongfully influencing his play, action or conduct in any baseball game, or any umpire of a baseball game who shall accept or agree to accept a bribe offered for the purpose of influencing him to make a wrong decision, or biasing his opinions, rulings or judgment with regard to any play, or any manager of a baseball club, or club or league official, who shall accept, or agree to accept, any bribe offered for the purpose of inducing him to lose or cause to be lost any baseball game, as set forth in RCW 67.04.010, shall be guilty of a gross misdemeanor.

67.04.030. Elements of offense outlined

To complete the offenses mention in RCW 67.04.010 and 67.04.020, it shall not be necessary that the baseball player, manager, umpire or official, shall, at the time, have been actually employed, selected or appointed to perform their respective duties; it shall be sufficient if the bribe be offered, accepted or agreed to....

Example 2-B · Statutory sections from the Federal Clean Air Act

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation....

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State....

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section....

2. Legislative history

Legislative history is the record that develops as an idea makes its way through the legislative process and becomes a statute. Attorneys use legislative history to determine the intended purpose of a statute when the language of the statute is unclear.

When a legislator has an idea for a new law, the legislator drafts what is called a bill. The legislator then introduces the bill to the legislature. Typically, the bill will be considered by a committee in each house[1] and, if each committee approves the bill, the bill will be considered by the full legislative body of each house. Along the way, the bill is debated and amended. If the bill is approved by both houses and signed into law by the President (in the case of a federal bill) or by a governor (in the case of a state bill), the bill becomes a statute.

If the language of the statute is unclear and a court is asked to interpret the meaning of the statute, the court may look to the debate that surrounded the statute's enactment and the history of amendments to the statute to interpret the statute's meaning. Because legislatures enact so many statutes, not every statute is subject to formalized, recorded debates.

As an attorney, if your client's legal question involves an ambiguous statute, you will have to determine the extent to which a legislative history exists and assess how that history would affect a court's interpretation of the statute. Example 2-C shows an excerpt of the legislative history to the Federal Clean Air Act.

Example 2-C · Clean Air Act legislative history

CLEAN AIR ACT

Senate Report No. 638, Nov. 7 1963 [To accompany S. 432]
House Report No. 508, July 9, 1963 [To accompany H.R. 6518]
Conference Report No. 1003, Dec. 5, 1963 [To accompany H.R. 6518]
The House bill was passed in lieu of the Senate bill. The House Report and the Conference Report are set out.

1. Except in Nebraska, which does not have a bicameral legislature.

House Report No. 508

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 6518) to improve, strengthen, and accelerate programs for the prevention and abatement of air pollution, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

HISTORY OF LEGISLATION

Air pollution is a serious national problem. It is probable that it will increase greatly, unless appropriate action is taken, owing to further industrial growth and the concentration of population in urban areas. The Nation's rapid progress in technological development has made possible a high level of material benefits for the people, but has also generated, as byproducts of such development, a high level of existing and potential problems of contamination of our environment....

B. The Executive Branch

The executive branch also creates law. For example, agencies within the executive branch can create regulations, and the President can issue executive orders.

1. Regulations

Although Congress has sole authority to enact statutes, once it has enacted a statute it often delegates to the executive branch the responsibility for creating regulations that will implement the statute. For example, although Congress passed the Clean Air Act, it delegated to the Environmental Protection Agency, an agency within the executive branch, the responsibility for promulgating regulations to implement the Act (Example 2-D).

If the legal question you are researching involves a statute, you will need to determine if that statute also has accompanying regulations. Some statutes do. Some do not. If the statute is implemented through regulations, you will have to research those regulations to determine how the statute will be applied to your client's case.

Example 2-D · Excerpt from the Code of Federal Regulations showing regulations implementing the Federal Clean Air Act

§ 50.2 Scope.

(a) National primary and secondary ambient air quality standards under section 109 of the [Clean Air] Act are set forth in this part.

(b) National primary ambient air quality standards define levels of air quality which the Administrator judges are necessary, with an adequate margin of safety, to protect the public health. National secondary ambient air quality standards define levels of air quality which the Administrator judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant....

§ 50.4 National primary ambient air quality standards for sulfur oxides (sulfur dioxide).

(a) The level of the annual standard is 0.030 parts per million (ppm), not to be exceeded in a calendar year....

(b) The level of the 24-hour standard is 0.14 parts per million (ppm), not to be exceeded more than once per calendar year....

§ 51.40 In what form should my state report the data to EPA?

You must report your emissions inventory data to us in electronic form. We support specific electronic data reporting formats and you are required to report your data in a format consistent with these. Because electronic reporting technology continually changes, contact the Emission Factor and Inventory Group (EFIG) for the latest specific formats. You can find information on the current formats at the following Internet address: *http://www.epa.gov/ttn/chief*. You may also call our Info CHIEF help desk at (919)541-1000 or e-mail to *info.chief@epa.gov*.

§ 51.45 Where should my State report the data?

(a) Your state submits or reports data by providing it directly to EPA.

(b) The latest information on data reporting procedures is available at the following Internet address: *http://www.epa.gov/ttn chief*....

2. Executive orders

In addition to regulations, the executive branch can issue executive orders. Executive orders are policy directives that implement or interpret a statute, a constitutional provision, or a treaty.[2] For example, President Kennedy used an executive order to eliminate racial discrimination in federally funded housing,[3] and President George W. Bush used an executive order to permit the federal government to freeze the assets of any person or entity providing financing to a terrorist organization (Example 2-E).[4] Although executive orders can govern a legal question, executive orders play a less active role in governing peoples' day-to-day lives and are, therefore, less likely to be relevant to your legal analyses.

Example 2-E • Executive Order 13224 of September 23, 2001

Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) ... and in view of United Nations Security Council Resolution (UNSCR) 1214 of December 8, 1998, ... and the multilateral sanctions contained therein, and UNSCR 1363 of July 30, 2001, establishing a mechanism to monitor the implementation of UNSCR 1333,

2. 4 West's Ency. of Am. L. *Executive Order* 273 (2005).

3. Exec. Order No. 11,063, 3 C.F.R. 652, *reprinted in* 42 U.S.C. § 1982 app. at 6-8.

4. Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001 ... I also find that because of pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists....

I hereby order:

Section 1.... [A]ll property and interests in property of the following of the following persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons are blocked:

(a) foreign persons listed in the Annex to this order;

(b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of ... the United States.

C. The Judiciary

Finally, courts also create law. When a judge issues an opinion, that opinion becomes a part of the law. A judicial opinion can add to the body of law in several ways.[5]

First, a judicial opinion can announce a new principle of law. When a body of law is wholly developed by judicial decisions, that body of law is called "common law." For example, without any enacted statute, courts have allowed individuals to recover for emotional distress after witnessing injuries to close family members; courts have imposed duties on psychiatrists to warn people about dangerous patients; and courts have created defenses such as "entrapment," which allows a defendant to argue that he would not have committed a crime but for a police officer's encouragement. In each of these situations the courts and not the legislature created rights and duties; thus, these situations are examples of the common law.

Second, a judicial opinion can create law by interpreting a constitution, statute, or regulation. If the language of any of these authorities can be understood in more than one way, a court can clarify how the language should be understood. To do this, a court would consider the language

Sidebar

Attorneys sometimes confuse "common law" with "case law." "Case law" includes *any* judicial decision. "Common law" is a subset of case law and refers to only those areas of case law that developed in the absence of a statute.

5. *See* David S. Romantz & Kathleen Elliott Vinson, *Legal Analysis: The Fundamental Skill* 5-6 (discussing common law, precedent, and stare decisis).

in question and how that language fits within the rest of the constitutional, statutory, or regulatory scheme. The court would then announce how the particular language should be understood.

Finally, a judicial opinion can create law by applying the law to a new set of facts. Each time a court considers how the law applies to a particular set of facts, it creates a precedent to be followed in future, factually similar cases. Thus, even when the court is not announcing a new principle of law or clarifying the language of a law, the court adds to the body of law by providing examples of how the law applies to individual cases.

II. Weave a Tapestry of Law

The many sources of the law will create challenges for you as you research and analyze your client's legal question. You will likely never find a single document with a neatly typed, clearly explained summary of the law relevant to your client's question. Rather, you will have to find all the possibly relevant sources, then *choose* the actually relevant sources, and finally *create* that neatly typed, clearly explained summary of the relevant law.

Creating that summary of the relevant law will require you to synthesize a variety of authorities into a seamless explanation of the law that governs your client's case. If you do your job well, your synthesized explanation of the law will look like a beautiful tapestry that clearly displays the intricate patterns of the law. If you do your job poorly, you'll have a fist full of loose threads, but no cohesive, well-woven explanation of the law.

For example, the memorandum in the previous chapter, Example 1-A, addresses whether a client's statement will be admissible at trial. To write that legal analysis, the attorney had to research all the relevant law and then choose those authorities that were *most* relevant to answering the client's legal question. Ultimately, the discussion focuses on a statute that defines a "stop" and case law that interprets the statute. The explanation of the statute and case law is the synthesized explanation of the law.

To weave that synthesized explanation of the law, attorneys rely on a few fundamental principles of legal analysis. Those principles help an attorney sort through the various materials and carefully select the most appropriate materials for the job. Using those principles, you will also be able to weave together a cohesive, clear explanation of the law.

III. Systems of the Law

Three fundamental principles of our legal system will help you choose the materials that will be most relevant to answering your client's legal question. Those principles are jurisdiction, the hierarchical structure of courts, and stare decisis.

A. Jurisdiction

When selecting material for a legal analysis, jurisdiction is the first cut that separates the relevant from the less relevant. "Jurisdiction" is an area of authority over which a governing body has control.[6] Because a court or enforcement agency is required to follow only the laws of its jurisdiction, your research and analysis should begin with the law of the governing jurisdiction.

Although our legal system depends on many different jurisdictions,[7] for our purposes, the most important kind of jurisdiction is jurisdiction based on the geographical reach of a legislature or court.

With respect to the geographical jurisdiction of courts and legislatures, citizens of this nation are typically governed by two sovereigns.[8] The United States federal government is one sovereign jurisdiction. Its legislature, the United States Congress, has authority to enact laws that affect all the people and businesses within the United States. Its court system has the authority to interpret and apply the laws Congress has created.

Within the United States, more than fifty other jurisdictions exist.[9] Each state is its own sovereign jurisdiction with its own legislature and its own court system. Each state's legislature has authority to enact laws for that state, and courts within that state have authority to impose those laws on those people and businesses within their jurisdiction.

When you begin researching a legal question, you must first determine the jurisdiction that will govern your client's legal question. Sometimes determining the jurisdiction is easy. For example, the jurisdiction is relatively easy to determine when all parties reside in the same state and the dispute arose in that state. In that case, jurisdiction will usually be determined by whether the client's legal question is governed by state or federal law. Sometimes, however, the jurisdiction is more difficult to determine such as when the parties live in different states or the dispute crosses state lines. In those cases, determining the jurisdiction may create an entirely new question that needs to be researched. Once you have determined the governing jurisdiction, you will focus your research and analysis on that jurisdiction.

Law from within the governing jurisdiction is called mandatory authority. Mandatory authority is binding on the parties and their dispute.

Sidebar

Mandatory authority is *always* primary authority. To be mandatory, the authority must emanate from a government body.

Persuasive authority can be primary or secondary authority.

For example, a court opinion from another jurisdiction is persuasive, primary authority. It is not binding outside of its own jurisdiction, but it emanates from a government body.

A law professor's law review article is persuasive, secondary authority because it is not binding and the professor is not a government body.

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6. *Jurisdiction, Black's Law Dictionary* 980 (10th ed. 2014).

7. For example, in Civil Procedure you will learn about subject matter jurisdiction, diversity jurisdiction, and long arm jurisdiction, to name a few.

8. Tribal nations are a third sovereign in the United States, and thus some citizens are governed by three sovereigns.

9. The United States includes "more than fifty other jurisdictions" because it also includes the District of Columbia and five territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), all with their own legislatures, executives, and court systems.

Because it is binding, mandatory authority is given the most weight in a legal analysis.

Law from other jurisdictions is persuasive authority. A court deciding a legal issue may consider authority from another jurisdiction. Although a court is not required to rely on or follow case law from another jurisdiction, a court may do so if it finds the reasoning expressed in that case law to be persuasive and consistent with the law from the court's jurisdiction.

In analyzing a client's legal question, you will likely give more weight to mandatory authority than to persuasive authority. However, persuasive authority may still be helpful, especially if the binding jurisdiction does not have law addressing the issue or if you are advocating for a change in the law. Table 2-F lists some of the authorities that you might rely on when analyzing a client's legal question and describes the weight of each.

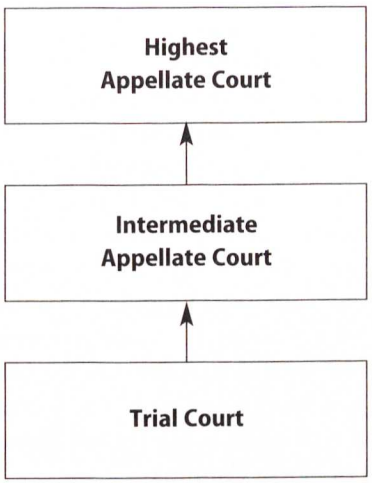
Table 2-F • Authorities and their weight

Sources of Law	Who Makes Them	Type of Authority	Weight of Authority (in governing jurisdiction)
Constitutions	Sovereigns (nations and states)	Primary	Mandatory
Statutes	Legislature	Primary	Mandatory
Regulations	Government agencies	Primary	Mandatory
Case law	Judiciary	Primary	Mandatory (depending on level of court)
Executive orders	Executive branch	Primary	Mandatory
Legislative history	Legislature	Secondary	Persuasive
Law review or journal articles	Professors, experts, students, other writers	Secondary	Persuasive
Legal encyclopedias, dictionaries	Various legal writers	Secondary	Persuasive

B. Hierarchical Court Systems

The structure of our federal and state court systems will affect how much weight you give to a judicial decision. Both the federal courts and the courts in each state are arranged hierarchically. In federal courts and in most state courts, the hierarchy is composed of three levels: a trial court, which is the "lowest court" in the hierarchy; an intermediate appellate court; and a final appellate court, which is sometimes referred to as the "court of last resort" (Figure 2-G).

Figure 2-G • Traditional court hierarchy



Litigation begins in the trial court. After a final decision is reached in the trial court, any party not satisfied with the decision may appeal to the intermediate appellate court and ask the appellate court to review the decisions of the trial court. Usually, a person may appeal to an intermediate appellate court "as of right," which means that any party who is not satisfied can have the intermediate appellate court review the decisions of the trial court.

If a party is not satisfied with the result in the intermediate appellate court, the party may appeal to the final appellate court. Typically, however, a party is not entitled to have the highest court review the intermediate court's decision. Rather, the party must petition the highest court and ask that it hear the appeal. If the highest court believes that reviewing the intermediate court's decision will resolve a novel or important legal issue, it may grant the petition, often known as "granting certiorari," and hear the appeal.

At each level, within a given jurisdiction, courts are bound by the prior decision of the courts above it. That is, the decisions of higher courts are mandatory authority for lower courts within that jurisdiction. Thus, when a trial court is deciding an issue, its decision must follow and be consistent with the decisions of the intermediate and highest appellate courts in its jurisdiction. An intermediate court must follow and be consistent with the decisions of the highest appellate court. By contrast, the decisions of a lower court are merely persuasive authority to the courts above it in the same jurisdiction.

In this hierarchical system, attorneys give greater weight to decisions from higher courts because those decisions control the decision-making in the courts below. As a result, you'll need to become familiar with the court hierarchy of the jurisdiction that governs your client's legal question.

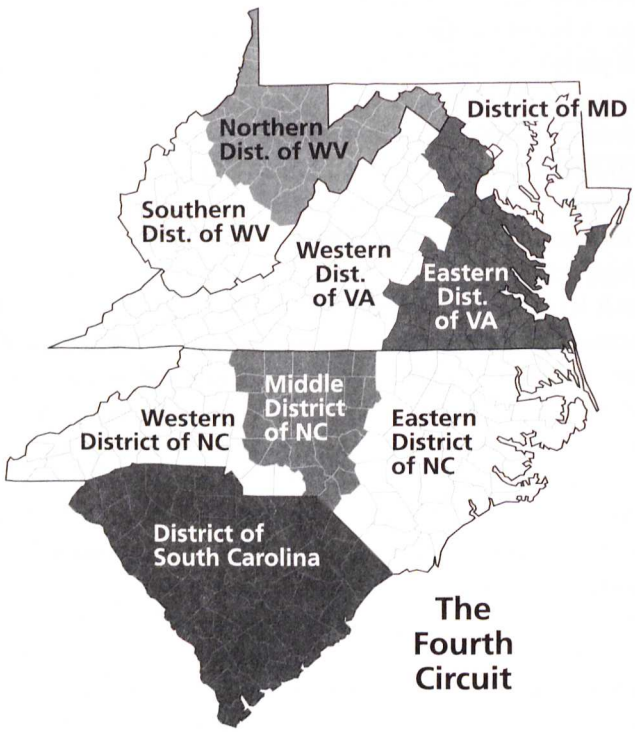
1. Hierarchy in the federal courts

In the federal court system, trial courts are called "United States District Courts." Each state has one or more federal districts. An entire state may be designated as one federal district, or if the state is populous, the state will be divided into two or more federal districts. For example, a less populous state such as South Carolina has only one federal district—the District of South Carolina. The more populous North Carolina is divided into three federal districts: the Western District of North Carolina, the Middle District of North Carolina, and the Eastern District of North Carolina. Figure 2-H shows how South Carolina and North Carolina (along with Maryland, Virginia, and West Virginia) are divided into districts.

Each federal district has its own trial court. For example, in the District of South Carolina, the federal trial court is the United States District Court for the District of South Carolina. In the Western District of North Carolina, the federal trial court is the United States District Court for the Western District of North Carolina.

Thus, if you see a federal judicial opinion coming out of a *district* court, you know that the decision is from a trial court, and you can assess its weight accordingly.

Figure 2-H • Federal districts within a federal circuit

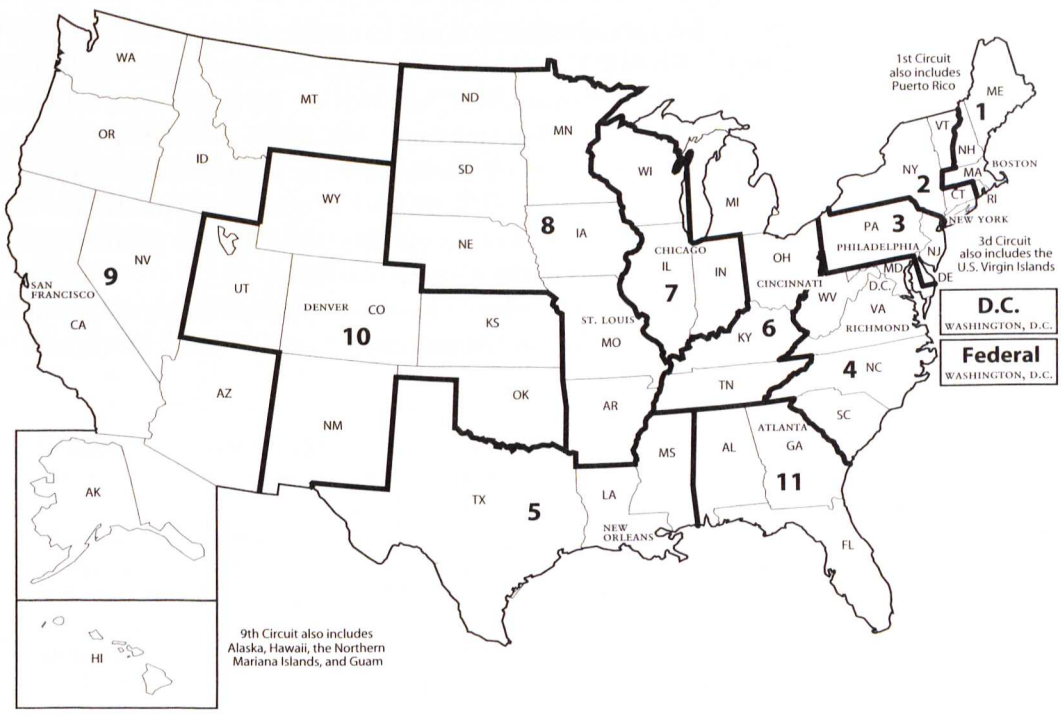


Next in the federal court system are the circuit courts of appeals. These intermediate courts of appeal are arranged into thirteen circuits (*see* Figure 2-I). Eleven of the thirteen circuits are numbered. Each circuit includes federal districts of a number of states. For example, the Fourth Circuit includes the federal districts of five states—West Virginia, Virginia, Maryland, North Carolina, and South Carolina. The United States Court of Appeals for the Fourth Circuit hears appeals from the district courts in each of those five states. Figure 2-H depicts the entire Fourth Circuit Court of Appeals.

Two of the thirteen circuits are special circuits. The District of Columbia has its own circuit court, the United States Court of Appeals for the District of Columbia. That court hears appeals from the United States District Court for the District of Columbia, as well as appeals from some administrative agencies and from the United States Tax Court.

The thirteenth circuit is the Federal Circuit. The Court of Appeals for the Federal Circuit, which sits in Washington D.C., is not defined by a region but instead by the kinds of appeals it hears. The court of appeals for the Federal Circuit hears appeals from specialized courts such as the Court of International Trade, United States Court of Federal Claims, and the United States Court of Appeals for Veterans' Claims. In addition, it will hear any appeal involving patent law.

Figure 2-I • Federal circuits



The United States Supreme Court is the highest court in the federal court system. It reviews decisions from all thirteen circuits and is the "court of last resort." Litigants unhappy with a decision from a federal court of appeals must petition the Supreme Court to hear their appeals. Of the more than 6000 petitions the Court receives each year, it usually grants certiorari to roughly one hundred cases.[10]

2. State court hierarchies

Typically, state courts have the same three-part structure, although some variety exists. For example, some states do not have any intermediate appellate court and in other states the intermediate appellate court functions very differently.[11] In North Dakota, for example, the Court of Appeals hears only those cases that are assigned to it by North Dakota's Supreme Court. And sometimes the names of courts will vary. In New York, for example, the lowest court is named the Supreme Court and the highest court is named the Court of Appeals.

Before reading state court decisions, you should be certain that you understand that state's judicial hierarchy because it affects the weight you will give to a decision. To quickly determine a state's highest and intermediate courts, you can turn to Appendix 1 in the *ALWD Citation Manual*[12] or Table 1 in *The Bluebook* citation manual,[13] which list the highest and intermediate courts in each state.

3. Side-by-side court systems

The federal court system is not hierarchically *above* the state court systems (Figure 2-J). Because a state is its own sovereign jurisdiction, state courts have final say about how to understand and apply state law.

The United States Supreme Court may review a state court decision only to determine whether it misinterprets the United States Constitution or other federal law. If the United States Supreme Court determines that the state court decision misinterprets federal law, then the Supreme Court will reverse that part of the state court decision.

Otherwise, the state court system operates independently of the federal court system, and the two systems simply co-exist in the same regions.

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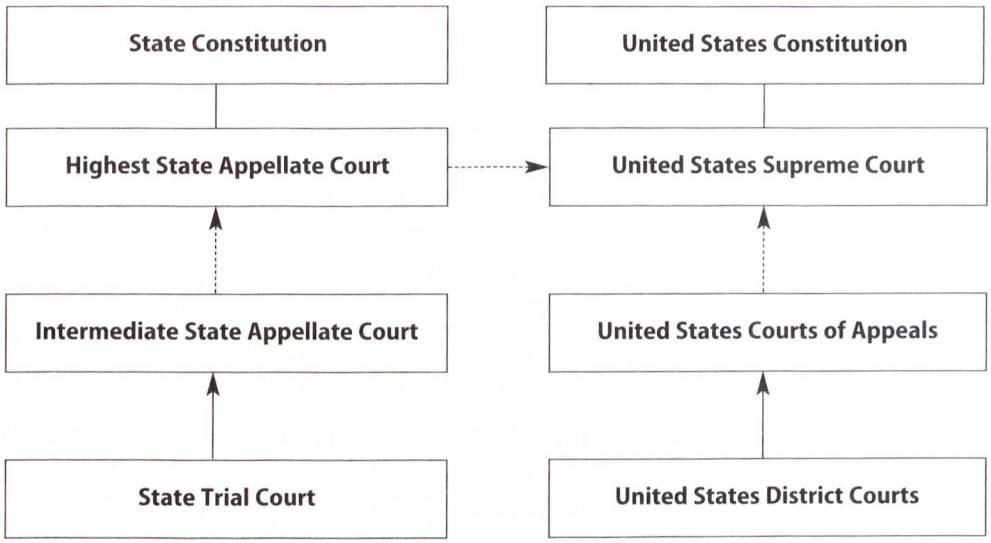
10. James C. Duff, Judicial Business of the United States: 2016 Annual Report of the Director, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables; select Tables A-1 and B-2 (accessed July 27, 2017).

11. Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming are states without typical intermediate courts.

12. ALWD & Coleen M. Barger, *ALWD Guide to Legal Citation* 359–405 (6th ed. 2017).

13. *The Bluebook: A Uniform System of Citation* 233–305 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

Figure 2-J • The hierarchy of federal and state court systems



C. Stare Decisis

Finally, the principle of stare decisis will require you to look for the most factually similar cases in order to predict an outcome in your client's case. The words stare decisis are the first two words in the longer Latin phrase *stare decisis et quieta non movere*, which means "to stand by things decided and not disturb settled points."[14] Stare decisis requires a court to follow its own prior decisions when faced with the same legal issue.

Stare decisis transforms individual court decisions into law. Because a court is required to follow its own prior decisions, a single decision affects more than the parties in that case. Absent some significant change in the law or society, the court will follow that prior decision in all future cases presenting the same legal issue.

The principle of stare decisis is triggered by precedent. Precedent is a binding prior court decision. A prior decision is binding on a court only if it raises the same legal issue as the case currently before the court. To raise the same legal issue, two cases must be governed by the same law and have similar facts.

A significant amount of litigation focuses on whether a prior decision is precedent for a current case. Often, attorneys argue about whether the case currently before the court is factually similar to the prior case. If the attorney convinces a court that the current case is factually similar, then the court will be bound by the reasoning and conclusion of the prior de-

14. Bryan Garner, *A Dictionary of Modern Legal Usage* 841 (3d ed. 2011).

cision. If the opposing attorney convinces the court that the prior case is not factually similar, then the prior case is not precedent and the court will not be bound by the outcome of that prior case.

Because the factual similarity of a current case to a prior case generally determines whether a court will be bound by the prior case, in your research and analysis you will look for and give the most weight to those prior cases that are most factually analogous to your client's case. The precedential value of a prior case depends upon whether you can demonstrate that the facts of your case are sufficiently similar to the facts that determined the outcome in the prior case.

Stare decisis alters how we weigh case law. For example, typically, a decision from a higher court within a jurisdiction is given more weight than a decision from a lower court in that same jurisdiction. If, however, the decision of the lower court analyzes facts that are very similar to your client's facts, the factually analogous lower court decision will likely become central to your prediction about how a court in that jurisdiction will view the client's case.

For the same reason, a case that is only persuasive authority may rise in your estimation if it is factually similar to your client's case. If no case in the governing jurisdiction is factually analogous, you may look for factually analogous case law in another jurisdiction, provided that the other jurisdiction has a similar legal framework. Thus, even though the case is from another jurisdiction, and is only persuasive authority, it may be given more weight in your analysis due to its factual similarity.

D. The Effect of These Three Principles

These three principles—jurisdiction, the hierarchical court systems, and stare decisis—exert profound influences on our legal system.

First, these principles create consistency and fairness. Once a higher court reaches a decision in that case, not only will that court be bound by that decision, but so will all the lower courts within that jurisdiction. Thus, these principles ensure that two litigants will be treated the same by the courts within that jurisdiction.

Second, these principles create predictability. Attorneys can look for factually similar decisions within a jurisdiction and then predict how courts will react to future conduct. When lawyers can predict the legal consequences of future conduct, individuals can make informed choices about decisions in business or in their personal lives.

Finally, these principles allow for diversity because each jurisdiction within the United States has the opportunity to create laws appropriate to that jurisdiction, so long as those laws do not conflict with the United States Constitution. Thus, along with consistency and predictability, these principles also allow for great diversity.

The legal system, and the law it generates, is often referred to as a single, monolithic entity—"the law." "The law," however, is a synthesis of laws, often from different sources and arranged according to the weight we give each authority. As an attorney, your job is to explain the law as it will affect your client's case. To do so, you will weigh and then weave together authorities from different sources to create a legal tapestry that is unique to that client's case.

Among the many authorities you will work with, court decisions are the most challenging to weave into the pattern. To determine how a prior court decision fits within the pattern of the law, you will have to consider the prior court's jurisdiction and the court's place within the judicial hierarchy. Most importantly, whether a prior decision is featured or simply part of the pattern's background depends on a seemingly simple conclusion: Is the prior decision like your client's case or not?

Practice Points

- To determine the law that governs your client's legal question, you will have to read a variety of legal sources, assess their weight and relevance, and then synthesize those authorities to create a summary of the law relevant to your client's legal question.
- Authority comes in two forms: primary and secondary. Primary authority must be published by one of the three branches of government. Secondary authority is a legal source that describes the law.
- Case law is any judicial decision. Common law is a subset of case law. It includes only those judicial decisions made by courts in the absence of an enacted statute.
- Jurisdiction is the area of authority over which a court has control.
- Binding or mandatory authority is primary authority that controls the legal issue because it comes from the jurisdiction governing the legal dispute. Authority from other jurisdictions or secondary sources is persuasive authority.
- Federal and state court systems operate side-by-side. Each is typically a three-tiered system. Trials originate in the lowest courts. Intermediate courts generally hear appeals as of right. The highest court hears only selected appeals.
- Stare decisis requires courts to adhere to decisions of a prior court addressing the same legal issue. Whether a prior court decision addresses the same legal issue is often a matter of debate.