

Chapter Summaries



CHAPTER 1

Law and Sources of Law

- ◆ The federal and state governments are each made up of three branches: legislative, judicial, and executive.
- ◆ The judicial branch (the courts) produces what is called common law, case law, or judge-made law.
- ◆ Common law is law developed case-by-case from court decisions.
- ◆ The legislative branch (elected representatives) passes statutes.
- ◆ Administrative agencies (often considered part of the executive branch) promulgate administrative rules and regulations.
- ◆ The chief executive (the president or governor) issues proclamations and executive orders.
- ◆ Federal and state laws are a product of an important interplay among the three branches of government.
 - ✦ The legislature can pass statutes that supersede the common law.
 - ✦ The courts interpret and apply constitutions, statutes, and administrative regulations.
 - ✦ The chief executive may veto legislation, sets priorities in law enforcement, and appoints judges.
- ◆ The Supremacy Clause of the United States Constitution makes the United States Constitution the supreme law of the land. No federal or state statute or state constitution may conflict with it.
- ◆ In the law library primary sources contain the law itself while secondary sources and finding tools are used to locate relevant primary sources.
- ◆ In addition to books from the law library, many legal researchers use computers to assist them in legal research; computer-assisted legal research includes online services, services contained on CD-ROM, and the Internet.

CHAPTER 2**Legal Reasoning and Analysis**

- ◆ The doctrine of stare decisis states that when a court has set forth a legal principle, that court and all lower courts under it will apply that principle in future cases where the facts are substantially the same.
- ◆ *Roe v. Wade* illustrates the doctrine of stare decisis:
 - ◆ In *Roe v. Wade*, the United States Supreme Court held that a Texas statute making abortion a crime was unconstitutional but that the state could regulate the right to an abortion during the second trimester and prohibit it during the third trimester.
 - ◆ Applying the doctrine of stare decisis, *Roe v. Wade* is used as precedent in later cases where the facts are “substantially the same.”
 - ◆ If the facts in a later abortion case in which a state abortion statute is challenged are substantially the same as the facts in *Roe v. Wade*, then the court in the later case should hold the challenged abortion statute unconstitutional.
 - ◆ However, if the challenged abortion statute in the later case is distinguishable from the *Roe* statute, a court may uphold the constitutionality of the challenged statute.
- ◆ The doctrine of stare decisis gives case law predictability while allowing gradual change.
- ◆ There are at least two sides to every problem and the attorney represents the client’s best interest by arguing that authority favorable to the client’s case should be applied and that unfavorable authority is distinguishable.
- ◆ When reading a court decision, note what type of opinion it is: majority, plurality, concurring, dissenting, per curiam, or en banc.
- ◆ A case may be mandatory authority, which must be followed under the doctrine of stare decisis, or a case may be persuasive authority, which may, but is not required, to be followed.
- ◆ In interpreting statutes, the legal researcher may consider legislative intent, the plain meaning of the statutory language, the immediate statutory context, strict construction of the statutory language, and legislative history.
- ◆ The methods of interpreting the United States Constitution include originalism, modernism, literalism, and democratic or representation reinforcement.
- ◆ Legal analysis involves three steps: 1.) reading and synthesizing all relevant authority to extract a rule of law; 2.) applying the rule of law to the facts of the problem; and 3.) reaching a conclusion.

CHAPTER 3**Secondary Sources and Finding Tools**

- ◆ Legal encyclopedias can be used as secondary authority and as finding tools.
- ◆ *Corpus Juris Secundum* and *American Jurisprudence 2d* are the two most widely used national encyclopedias. There may also be a legal encyclopedia for the law of your state.
- ◆ Legal encyclopedias contain a textual explanation of hundreds of legal topics, with the explanation heavily footnoted to give citations to relevant primary authority.

- ◆ Legal encyclopedias are best used to find primary authority and to give the researcher general background information.
- ◆ *American Law Reports* annotations contain selected cases, accompanied by a textual explanation (called an *annotation*) of the law with lengthy footnotes to relevant cases.
- ◆ *American Law Reports* are best used to find primary authority and to give the researcher general background information.
- ◆ *Restatements of the Law*, another secondary source, summarize major common law legal principles.
- ◆ Other secondary sources include treatises, legal dictionaries, legal directories, formbooks, legal periodicals, law review articles, legal thesaurium, continuing education publications, and restatements.
- ◆ Digests are finding tools that contain case summaries and references to other research materials.
- ◆ Digests serve as indexes to cases and allow the researcher to locate relevant cases.
- ◆ When using digests, try to use the digest set that is most specific to the type of cases you are trying to find: a United States Supreme Court digest for cases from that court, a federal digest for cases from any of the federal courts, your state's digest for cases from your state, etc.
- ◆ Legal encyclopedias, digests, and other law books are updated by annual pocket parts and by paperbound supplementary pamphlets.

CHAPTER 4

The Judicial Branch and Cases

- ◆ A court's jurisdiction is the power of the court to decide cases. To decide a case, a court must have geographical jurisdiction, subject matter jurisdiction, and hierarchical jurisdiction.
- ◆ The Supreme Court of the United States is the highest federal court. The thirteen United States Courts of Appeals are federal intermediate appellate courts. The United States District Courts are federal trial-level courts.
- ◆ The state court system varies from state to state. Some states have a simplified court structure (also called a unified court structure) with three or four tiers; the court structure of other states is more complex.
- ◆ Cases are easier to read and understand once you are familiar with typical case style and format.
- ◆ The syllabus (case summary) and the headnotes (summaries of important legal principles contained in the case) that precede the opinion were prepared by the publisher and have no official authority.
- ◆ The main parts of a typical opinion are the facts, the procedural history of the case before it reached the court writing the opinion, the issue(s) (legal questions considered by the court), the holding(s) (the rules of the case), and the court's explanation of why it reached the particular holding(s).
- ◆ "Briefing a case" means taking notes of the most important parts of a case so that you can later refer to your "case brief" to quickly refresh your memory.

- ◆ A standard format for briefing a case contains:
 - ✦ correct case citation
 - ✦ facts
 - ✦ history
 - ✦ issue(s)
 - ✦ holding(s)
 - ✦ reasoning
 - ✦ disposition

CHAPTER 5

Primary Sources: Constitutions, Statutes, Court Rules, and Administrative Law

- ◆ Constitutions, statutes, court rules, and administrative law, like cases, are primary authority.
- ◆ The United States Constitution sets forth the fundamental principles of governance for the country; state constitutions set forth the fundamental principles of governance for the states.
- ◆ To find how a provision of a constitution has been interpreted by the courts, you would consult an “annotated” version of the constitution.
- ◆ Federal and state statutes first appear as slip law, then as “session laws” (arranged chronologically), and later are “codified” (grouped by subject matter).
- ◆ To understand a statute, you must read the text of the statute and any annotations summarizing how the statute has been interpreted by the courts.
- ◆ The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence govern litigation procedure in federal trial courts.
- ◆ Similar sets of rules govern litigation procedure in state trial courts.
- ◆ Separate sets of rules govern litigation procedure in federal and state appellate courts.
- ◆ Administrative agencies promulgate administrative regulations that have the force of law.
- ◆ Federal administrative regulations are published chronologically in the *Federal Register* and are later codified in the *Code of Federal Regulations*.
- ◆ State administrative regulations are generally published in similar fashion.

CHAPTER 6

Citators

- ◆ Citators allow the legal researcher to determine whether and where the authority found has been cited in any source.
- ◆ “Shepardizing” involves consulting *Shepard’s* citators.
- ◆ The two reasons for consulting citators are to discover whether your authority is still good law and to locate more recent authority dealing with the same legal principle found in your authority.
- ◆ To Shepardize an authority, consult each volume of the appropriate *Shepard’s* set to see whether your authority has been cited in any other source.
- ◆ Shepardizing needs to be done systematically or you may miss something.

- ◆ Check to determine that you are Shepardizing under the correct volume and series of the correct reporter and that you have consulted every applicable *Shepard's* volume.
- ◆ Consult the abbreviation tables at the beginning of each *Shepard's* volume to determine what the abbreviation stands for.
- ◆ Abbreviations in the left-hand margin of a column of *Shepard's* citations indicate whether an authority has been affirmed, reversed, or vacated.
- ◆ Other abbreviations indicate the treatment of the authority you are Shepardizing in other sources.
- ◆ *Shepard's* case citations are grouped by court: federal courts in descending order and then state court decisions arranged alphabetically.
- ◆ Shepardizing may also be done on LexisNexis, or a CD-ROM edition of *Shepard's*.
- ◆ WESTLAW uses KeyCite to perform the same function as performed by *Shepard's* on LexisNexis.

CHAPTER 7

Overview of the Research Process and Ethical Considerations

- ◆ Before you start researching in the law library, gather and organize information and read all pertinent documents.
- ◆ Throughout the research process, take notes of what you have found, citations to relevant authority, and ideas for other avenues of research.
- ◆ Review all the information you have gathered and use it to identify key terms and issues.
- ◆ You may want to learn more about the area of law you are researching by consulting secondary sources such as legal encyclopedias, *American Law Reports* annotations, looseleaf services, and law review articles.
- ◆ Locate primary authority by using citations found in secondary authority, indexes, and digests.
- ◆ Use primary authority to locate other primary authority through reading cited primary authority, case summaries in annotated codes and constitutions, and Shepardizing or KeyCiting.
- ◆ You are probably finished with your research when you have checked each of the main primary and secondary sources and keep finding the same authorities.
- ◆ Consult the Research Flowchart printed in this chapter to develop a research strategy or explore other avenues of research.
- ◆ Inadequate legal research may result in an ethics violation.

CHAPTER 8

Computer-Assisted Legal Research

- ◆ Attorneys and paralegals must embrace technology to keep abreast of the ever-expanding amount of legal information disseminated electronically worldwide.
- ◆ The Internet is fundamentally changing the way law firms are organized, how they relate to clients, the courts, information suppliers, and employees, and how attorneys and paralegals conduct legal research.

- ◆ Technology and the Internet are integral parts of today's law practice. Appendix F discusses Internet technology, including protocols, domain name registration, Web browsers and plug-ins, intranets and extranets, blogs, and RSS news feeds. Figure F-1 covers the various parts of a Web address and current Internet domain name extensions.
- ◆ Computer-assisted legal research (CALR) borrowed Boolean searching techniques from the field of computer programming. A Boolean search looks for a particular term or group of terms in a specific relationship to one another.
- ◆ Computer-assisted or "electronic" information resources include three broad formats: commercial online subscription databases, computer disks, and the Internet.
- ◆ Attorneys and paralegals need to be proficient in both print and computerized legal research tools.
- ◆ Computer-assisted legal research is not intended to replace manual research, and is often best used in conjunction with print resources.
- ◆ The Internet is not always the best resource tool. Unless you know exactly where to go, the Internet may not be the fastest or most economical way to find what you need.
- ◆ Set a realistic time limit—Web searching can be daunting, and it is easy to lose track of time.
- ◆ LexisNexis went online in 1973 and is the oldest full-text, computer-assisted legal research information provider. The earliest version of WESTLAW was launched in 1975. LexisNexis and WESTLAW remain the most popular online legal subscription databases, with extensive coverage of legal, news, and business information.
- ◆ Online research is recommended when currency is critical, the online version is easier to use than its print counterpart, or when a comparable print source is unavailable
- ◆ Unlike print products that go through a lengthy editorial and filtering process, information posted on the Internet is mostly unfiltered. This places the burden of evaluating the authority of Web-based resources on the researcher.
- ◆ An important goal when evaluating any information resource is to determine whether the information presented is accurate and timely. This is especially true with legal and government information, regardless of the format. Exhibit 8-1 is a list of recommended criteria for evaluating Web resources.
- ◆ News and up-to-the-minute information on a variety of topics, customized to meet specific research needs, can be automatically delivered via e-mail alerts and RSS feeds. LexisNexis Alerts and WESTLAW WestClips are examples of e-mail alerts.
- ◆ Publishers of original information on the Internet and the Web are provided the same copyright protection as those who publish in other mediums—print and electronic.
- ◆ Unless stated otherwise, all third-party online information vendors obtain public records information directly from the original sources of the data (e.g., courts, federal and state agencies, law enforcement, and credit reporting companies). Popular commercial electronic public records databases include Accurint and AutoTrackXP.

- ◆ Government (.gov), law schools and universities (.edu), and commercial (.com) Web sites provide free searchable access to primary law materials, including case law, statutes, administrative codes, and constitutions. Appendix G outlines some of the best starting points and Web sites for quickly locating legal and government information on the Internet. Refer to Figure F-1 in Appendix F for an illustration of Internet domain name extensions currently in use.
- ◆ Appendix H includes free Web resources providing access to United States federal government information on the Internet. Appendix I summarizes recommended Web sites with free access to state and municipal government resources.
- ◆ Most federal trial courts—United States district courts (civil and criminal) and bankruptcy courts—provide access to case dockets and scanned images of filed documents for a nominal cost through the subscription service PACER.
- ◆ Availability of case law at the state court level varies by jurisdiction, with the most comprehensive coverage at the highest state court levels. Scope and coverage decreases as you move down the state judicial court structure.
- ◆ Popular commercial subscription services used to retrieve court case dockets and case filings include CourtExpress, CourtLink, and PACER.
- ◆ The Case Management and Electronic Case Files (CM/ECF) system, developed over the past several years by the Federal Judiciary for electronic case management, offers federal courts the ability to maintain court records electronically, and to accept court filings over the Internet.
- ◆ There are currently no government mandated controls on who can post information on the Internet and no federal, state, or international laws or regulations governing Web content. The burden of evaluating information posted on the Internet is solely the responsibility of the researcher. Always verify the source and currency of data published on the Web.
- ◆ LexisNexis and WESTLAW offer free Web sites devoted exclusively to paralegals. Information designed to help paralegals succeed includes online product tutorials, discussion forums, articles, and research tips.

CHAPTER 9

Introduction to Legal Writing

- ◆ Good legal writing is vitally important to attorneys, judges, and paralegals.
- ◆ The trend is to write legal documents in plain English (writing so the document can be easily understood).
- ◆ Your ultimate goal is to have your reader understand what you have written.
- ◆ Legal writing also involves eliminating mechanical errors; this book tells you how to eliminate mechanical errors common to writing in general and how to avoid errors with quotations and citations, as well as to avoid mechanical errors peculiar to legal writing.
- ◆ When writing, one must be cognizant of ethics rules.
- ◆ Poor writing may violate attorney ethics rules and lead to disciplinary action.
- ◆ The purposes of legal documents are to inform, to persuade, to record information, and to set forth the law to be followed.
- ◆ This book devotes a chapter to the transmittal letter (designed to inform), and the client opinion letter (designed to inform and persuade), a chapter to pleadings

(designed to persuade), a chapter to the office memo (designed to inform), a chapter to the memorandum of law (designed to persuade), and a chapter to the appellate brief (designed to persuade).

- ◆ The purpose of a transmittal letter is to communicate information, and the client opinion letter answers a client's legal question.
- ◆ Pleadings are formal statements by the parties to a lawsuit setting forth their claims or defenses.
- ◆ The office memo is used to inform the reader of the results of legal research.
- ◆ A memorandum of law is a written document usually filed with the court which contains the attorney's argument substantiated by relevant authority.
- ◆ An appellate brief is a formal statement by a party submitted to the appellate court.

CHAPTER 10

Fundamentals of Writing

- ◆ The three steps of the writing process are:
 - ✦ prewriting;
 - ✦ writing; and
 - ✦ editing and proofing.
- ◆ Before you start writing you should perform any necessary research and formulate a writing plan.
- ◆ It is a good idea to develop a flowchart and/or outline before you start writing.
- ◆ Good organization is essential for readability.
- ◆ Carefully organize words within sentences, sentences into paragraphs, and paragraphs into an entire document.
- ◆ Overall organization may be dictated by the traditional format of the type of document you are writing.
- ◆ Most paragraphs need topic sentences.
- ◆ Do not challenge your reader too often with unconventional word order.
- ◆ Use transitional language to provide a link between what you have just written and what you are going to write about.
- ◆ Use signposts to point the reader in the right direction and provide a framework for understanding the document.
- ◆ Paragraph and tabulate to enhance readability.
- ◆ Make sure you know how to eliminate the eight mechanical errors discussed at the end of the chapter.

CHAPTER 11

Transmittal Letter, Client Opinion Letter, and E-Mail Correspondence

- ◆ The transmittal letter is the cover letter used when forwarding a document or other information to the client or to a third party.
- ◆ The client judges the competency of the attorney by the way the attorney presents himself or herself. A client letter may either cause the client to lose confidence in the attorney or may strengthen the attorney–client relationship.

- ◆ The client opinion letter answers the client's question and contains a statement of the facts, an explanation of applicable law, and an explanation of how the law applies to the facts.
- ◆ The format of the client opinion letter generally contains a heading, an opening, the facts, an answer, an explanation, and a closing.
- ◆ The client opinion letter should state that it is limited to the facts in the letter, to federal and/or state law of a certain date, and to the benefit of the client.
- ◆ Gear the language in the client opinion letter to the sophistication of the client.
- ◆ You may or may not want to include citations or quotations in the client opinion letter.

CHAPTER 12

Pleadings

- ◆ The *complaint* is the initial pleading in a civil action, in which the plaintiff alleges a cause of action and asks that the court remedy the wrong done to the plaintiff.
- ◆ The *answer* is a pleading in response to the complaint.
- ◆ Pleadings must conform to applicable court rules and statutes.
- ◆ Pleading forms may be used to draft a pleading but must be tailored to the particular situation with which you are dealing.
- ◆ Generally the complaint contains a caption, claims, prayer for relief, and signature block.
- ◆ Generally the answer contains a caption, defenses, affirmative defenses and counterclaims, and a certificate of service.
- ◆ *Evidentiary facts* are facts admissible in evidence.
- ◆ *Ultimate facts* are the facts in a case upon which liability is determined or based.
- ◆ A *legal conclusion* is a statement of the result in a situation that involves applying the law to a set of facts.
- ◆ When drafting the complaint, follow these writing tips:
 1. Separate evidentiary facts, ultimate facts, and conclusions of law.
 2. Write in plain English.
 3. Place only one or two sentences in each numbered paragraph.
 4. Do not include more evidentiary facts than necessary.
 5. Use descriptive words for allegations favorable to plaintiff; use abstract words for allegations adverse to plaintiff.
 6. Use objective rather than subjective language.
 7. State facts precisely.

CHAPTER 13

Law Office Memo

- ◆ The office memo records the results of legal research, explains how the researcher analyzed the law and applied it to the facts, and proposes a solution to the problem.
- ◆ The tone of the office memo is objective rather than persuasive.

- ◆ Generally the office memo contains a heading (to and from, re, and date), facts, issue(s) and answer(s), a thesis paragraph, the rule of law, the application of the law to the facts, and the conclusion.
- ◆ Refer to people by their names or terms such as suspect or officer instead of appellant, appellee, or similar terms.
- ◆ Each issue and each answer should be single sentences.
- ◆ Between the issue and the answer you should give your reader the most information possible.
- ◆ Usually there are the same number of answers as issues.
- ◆ If you refer to a constitutional or statutory provision in an issue or answer by number, also give your reader a short explanation of the provision's subject matter.
- ◆ A "thesis" is the central idea running through the entire memo.
- ◆ Quote only the relevant portion of constitutions or statutes.
- ◆ The first time you refer to a case by name, give the full citation; after that, use a short-form citation.

CHAPTER 14

Memorandum of Law

- ◆ In litigation, an attorney may be required by court rule, may be asked by the judge, or may feel the need to submit a memorandum of law to court.
- ◆ The purposes of the memorandum of law are to explain the client's position in a lawsuit and to convince the judge to rule in the client's favor.
- ◆ The tone of the memorandum of law is persuasive.
- ◆ While the attorney has to represent the client's best interest, this duty is tempered by the attorney's ethical duty as "an officer of the court."
- ◆ Build your credibility by stating the facts and the law accurately.
- ◆ Use a format that makes your memorandum of law reader-friendly.
- ◆ Organize the document to highlight important information and to obscure adverse information that you feel obligated to include.
- ◆ Comply with any court rules and format customarily used for the particular court.
- ◆ The parts of a standard memorandum of law are the caption, the question presented, the facts, the argument, the thesis paragraph, the rule of law, the application of law to the facts, and the conclusion.

CHAPTER 15

Appellate Brief

- ◆ The appellate brief is a written statement submitted to an appellate court to persuade it of the correctness of one's position.
- ◆ When a party appeals, the appellate court's job is to review what the lower court did to determine whether the lower court committed reversible error.
- ◆ The standard of review is different depending on whether the appellate court is reviewing a finding of fact, a ruling of law, or a ruling on a question involving law and fact.
- ◆ The appellate court is bound to follow the trial court's finding of fact unless a jury finding was unreasonable or a trial judge's finding was clearly erroneous.

- ◆ When deciding a question of law or a question involving law and fact, the appellate court is free to reach a ruling different from that of the trial court.
- ◆ The appellate brief is persuasive in tone.
- ◆ Follow any applicable court rules (including local rules) governing the appellate brief.
- ◆ Rule 28 of the Federal Rules of Appellate Procedure requires:
 - ✦ a table of contents;
 - ✦ a table of authorities;
 - ✦ a statement of jurisdiction;
 - ✦ a statement of the issues;
 - ✦ a statement of the case;
 - ✦ a statement of the facts;
 - ✦ a summary of the argument;
 - ✦ an argument; and
 - ✦ a conclusion.