

## *How to Brief a Case and Prepare for Class*

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### *Sources of Law*

Legal rules are promulgated by a wide variety of government bodies in a hierarchical scheme. The major sources of law in that system include the following:

1. *United States Constitution.* The federal Constitution is the fundamental law of the land. It was adopted by state constitutional conventions, whose members were elected by (a small subset of) the people.<sup>1</sup> Constitutional amendments are generally passed by Congress and ratified by state legislatures. The Constitution determines the structure of the federal government, including the relations among the executive, legislative and judicial branches of the federal government, and the relations between the federal government and the state governments. It also defines the powers of the federal government and limits the powers of both the federal government and the states to protect individual rights, including property rights and other rights such as freedom of speech, freedom from unreasonable searches and seizures, equal protection of the laws, and due process.

2. *Federal statutes.* Legislation is passed by the Congress of the United States and ratified by the president, or passed over the president's veto. Federal statutes address a wide variety of matters relating to property law; examples include the *Fair Housing Act of 1968*, the *Civil Rights Act of 1964*, the Internal Revenue Code, the *Sherman Antitrust Act*, and the *Worker Adjustment and Retraining Notification Act of 1988*.

3. *Administrative regulations.* Congress may pass legislation creating administrative agencies, such as the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Federal Trade Commission, or the Internal Revenue Service; these agencies may have the power to promulgate regulations in a particular field (environmental protection, employment discrimination, or tax law).

4. *State constitutions.* Each state has its own constitution defining the structure of state government and defining certain fundamental individual rights against the state. In some instances, state constitutions grant greater protection to individual rights than does the federal Constitution. For example, a search by the police that is allowed under the fourth amendment to the U.S. Constitution may be prohibited under the New Jersey constitution. Although state constitutions may not grant citizens less protection than provided by the federal Constitution, they may grant their citizens more protection by going further than the U.S. Constitution in limiting the power of state officials.

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<sup>1</sup> It is important to note that when the United States Constitution was adopted in 1789, the voting population in the 13 states excluded women, African American men, American Indians, and white men who owned less than a certain amount of property.

5. *State statutes.* State statutes are passed by state legislatures with the consent of the governor (or by a supermajority vote over the governor's veto). Many state statutes deal with property law matters such as landlord-tenant legislation, recording acts, civil rights statutes, and regulation of family property on divorce.

6. *State administrative regulations.* State legislatures, like the federal Congress, may create administrative agencies that have the power to promulgate regulations in limited fields of law. The Massachusetts legislature, for example, has created a Building Code Commission endowed with the power to promulgate and enforce regulations on building construction and materials to protect the public from unsafe structures.

7. *Common law.* In the absence of any controlling statute or regulation, state courts adjudicate civil disputes by promulgating rules of law. Judicial opinions explain and justify the rules adopted by judges to adjudicate civil disputes. During the first year of law school, most courses focus on common law rules and the process of common law decision making by judges.

8. *City ordinances and town by-laws.* State legislatures delegate to cities and towns the power to promulgate ordinances or by-laws in limited areas of law, including zoning, rent control, schools, traffic, and parking.

### ***Lawyers' Skills***

In reading case materials and in preparing for class, you should keep in mind three basic tasks that lawyers perform.

1. *Counseling.* In advising clients, lawyers perform a variety of roles. First, they answer clients' questions about their legal rights. They do so by looking up the law in statutes, regulations and judicial opinions. In so doing, they may or may not find legal rules that specifically address the question they need to answer. In either case, lawyers must predict how the courts would rule on the question if they had the opportunity to do so. This requires lawyers to make educated judgments about how prior case law will be applied to new fact situations. Second, lawyers counsel clients on how to conform their conduct to the dictates of the law and how to achieve their goals in a lawful manner. Third, lawyers draft legal documents for clients, including leases, deeds, purchase and sale agreements, bond documents, and employment contracts. They may also draft statutes for clients that intend to submit them to legislatures for possible consideration. Fourth, lawyers negotiate with other parties or their attorneys to settle disputes or to make deals.

2. *Advocacy.* If a dispute cannot be resolved amicably, one of the parties — called the “plaintiff” — may bring a lawsuit against the other party — called the “defendant” — claiming that the defendant engaged in wrongful conduct that violated the plaintiff's legal rights. To prevail in such a lawsuit, the plaintiff must be able to (a) prove in court by testimony, documentation, or other admissible evidence that the defendant engaged in the wrongful conduct and that the conduct caused the plaintiff's harm, and (b) demonstrate that the defendant's conduct violates a legally protected interest guaranteed to the plaintiff in a way that violates the plaintiff's legal rights. The parties will normally hire attorneys to conduct the lawsuit. Lawyers argue before judges about what the legal rules are governing the dispute. Sometimes the rules in force are clear. Often, however, the rule governing a particular situation is not clear. The rules contain numerous gaps, conflicts and ambiguities, and lawyers are experts in using the open texture of the law to develop plausible competing arguments about alternative possible rules of law to govern the situation. The attorneys for each side engage in advocacy of alternative possible rules of law, both in written arguments called “briefs” and in oral arguments before judges. In

these settings, lawyers attempt to persuade judges to interpret existing rules or to create new legal rules in ways that favor their clients' interests. Lawyers must therefore learn the kinds of arguments judges find persuasive in interpreting and in modernizing the rules in force. Lawyers may also represent clients before legislative committees considering the passage of legislation.

3. *Decision making.* Finally, it is important to remember that the judges who decide cases are also lawyers. Their role is to adjudicate the cases before them by choosing the applicable legal rules to govern the dispute and others like it in the future. Similarly, legislatures promulgate statutes regulating conduct and resolving conflicts among competing interests. It is also important for you as a participant in the legal system to develop your own views about the wisdom and justice of our legal institutions and rules. Legal education teaches us to consider both sides of important contested questions of law before reaching a judgment about the proper outcome of the dispute. This does not mean we should be indifferent to what those outcomes are or that we should not criticize the rules in force. Your ability to argue for and against a position does not mean that you cannot make up your mind or present persuasive arguments to justify the result you reach; it means simply that your judgment about right and wrong should be true to the complexity of your own moral beliefs and that it is important to recognize what is lost, as well as what is gained, by any choice.

### ***Reading Cases***

***Rules of law.*** In researching the law, attorneys might (1) find a rule of law that clearly defines the parties' respective rights; (2) find no rule of law directly on point (a gap in the law); (3) find a rule of law that does not clearly answer the question (an ambiguity in an existing rule); or (4) find two or more rules of law that arguably govern the dispute (a conflict among possibly applicable rules). Moreover, attorneys might find rules of law applying to situations that are arguably analogous to the case at hand. Lawyers find and exploit the gaps, conflicts and ambiguities in the law to attempt to define the law in ways that benefit their clients.

In preparing for class, you should try to identify the rule of law — the general principle — each side in the case would like the court to promulgate. Ask yourself: What rule of law did the plaintiff urge the court to adopt? What rule of law did the defendant urge the court to adopt?

This is harder than it seems. Sometimes the parties' proposed rules of law are described in the judicial opinion, sometimes not. In either event, you must ask whether it would be wise to argue for a broad rule of law or a narrow one. For example, one might argue for a broad, rather vague, rule of law: "Non-owners are privileged to enter property when their activity will further a significant public policy." Or one might argue for a narrow rule of law, tied very closely to the facts of the case: "Lawyers and physicians working for agencies funded by the federal government may enter property to give professional assistance to migrant farmworkers." Similarly, an owner might argue for a broad rule of law granting owners the right to exclude non-owners under all circumstances, or she might argue for a narrower rule granting owners the right to exclude non-owners only if the owner can show just cause. It is up to you to identify the different ways each side might have framed its proposed rules of law.

### ***Arguments***

After identifying possible rules of law for each side, you should ask what arguments the parties might have given to justify adopting their proposed rules, as well as what

arguments they could have given against the rule proposed by the other side. These arguments should include considerations about the fairness of the proposed rules to the parties: Which rule better protects individual rights? You should also consider the social consequences of the competing rules: Which rule better promotes the general welfare?

### ***Briefing Cases***

In preparing for class, at least at the beginning, you should brief your cases. This means writing an outline of the important elements of the decision. These elements include the following.

1. *Facts.* Who did what to whom? What is the relationship between the parties? What is the wrongful conduct the plaintiff claims the defendant engaged in, and how did it harm the plaintiff? What is the dispute between the parties about?

2. *Procedural history.* How did the courts below rule on the case? First, how did the trial court resolve the matter? Who won, and why? Did the party who lost in the trial court appeal an adverse ruling of law to an intermediate appellate court? If so, how did the appellate court rule, and why? Did one of the parties appeal the result in the appellate court to the state supreme court? What court issued the opinion you are reading — the state supreme court or some lower court? (Note that because cases in this and other casebooks have been edited, some portion of the procedural history may be omitted from the text reprinted in the book.)

3. *Relief sought and judgment.* What relief did the plaintiff seek? Did she ask for (a) a declaration of her rights (a declaratory judgment); (b) an injunction ordering the defendant to act or not to act in certain ways; or (c) damages to compensate the plaintiff for the harm? What was the judgment of the court issuing the opinion you are reading? Did it grant a declaratory judgment, issue an injunction, or order the payment of damages? Did it remand the case to a lower court for further proceedings, such as a new trial?

4. *Legal question, or rule choice.* What is the legal question or questions the court resolved? To answer this, you should determine what rule of law the plaintiff favored and what rule of law the defendant favored. What different legal rules did the court consider? What rules should it have considered? What rule of law would you propose if you were the plaintiff's attorney? The defendant's attorney?

5. *Arguments and counterarguments.* Place yourself in the position of the plaintiff's lawyer. What arguments would you give to persuade the court to adopt the rule of law favored by your client, and what arguments can you give against the rule of law favored by the defendant? Next, place yourself in the position of the defendant's lawyer. What arguments would you give to persuade the court to adopt the rule of law favored by your client, and what arguments can you give against the rule of law favored by the plaintiff?

a. *Precedential arguments.* These arguments appeal to existing rules of law. You may argue that an ambiguous rule of law — such as a rule creating a reasonableness standard of conduct — entitles your client to win. You may also argue that one of two conflicting rules of law governs the fact situation in your case or that a rule of law applies by analogy. To do either of these things, you must argue that a prior case establishes a principle of law that governs a situation that is identical — or sufficiently similar — to the case at hand such that the policies or principles that underlie and justify the earlier decision are applicable to the current case. Under these circumstances, you can argue that the prior case establishes a precedent that applies to your case. The lawyer on the other side will argue that the case at hand is different in important ways from the prior case and that

because of those differences, the policies and principles underlying the earlier case do not apply to the case at hand. When the rule of law in the prior case does not apply to the case at hand, we say the lawyer has distinguished the precedent. What rules have you learned that can be applied either directly or by analogy to govern this case?

b. *Statutory interpretation.* The rights of the parties may be governed by a federal or state statute that regulates their conduct. Judges must interpret ambiguities in those statutes by reference to (1) the language of the statute; and (2) the legislative intent behind the statute, which may be elucidated by reference to the policies and purposes the legislation was intended to serve. How can you persuade the judge that your proposed interpretation of the statutory language or purposes best accords with the intent of the legislature? What counterarguments will the attorney on the other side make to answer your claims?

c. *Policy arguments.* These arguments appeal to a variety of considerations, including (1) fairness, individual and group rights, and justice in social relationships; and (2) the social consequences of alternative rules such that the choice of rules promotes social utility, efficiency, or the general welfare. What reasons can you give to persuade the judge that your proposed rule promotes both justice and social welfare? What counterarguments will the attorney on the other side make to answer your claims?

6. *Holding.* What rule of law did the court adopt, and how did it apply to the case? In identifying the holding of the case, it is important to consider several possibilities. Try to describe the rule of law in as broad a fashion as possible by (a) identifying a general category or a broad range of situations to which the rule would apply, and/or (b) appealing to general principles such as foreseeability, reasonableness, or promotion of alienability. Then try to describe the rule of law in as narrow a fashion as possible so as to limit the application of the rule to a narrow range of circumstances by (a) identifying the specific facts of the case as necessary to application of the rule, and/or

(b) appealing to specific, rather than general, principles. For example, a possible broad holding of a case is that owners have an absolute right to exclude non-owners from their property unless the owner's act of exclusion violates public policy. An alternative narrow holding would be that owners of property open to the general public for business purposes have a right to exclude non-owners from their property unless those non-owners are engaging in expressive political activity that does not interfere with the operation of the business.

7. *Reasoning of the court and criticism of that reasoning.* What reasons did the court give for deciding the case the way it did? What problems can you find with the court's reasoning? Do you agree or disagree?