

Chapter 1

The Foundations of Legal Analysis

OBJECTIVES

WHEN YOU FINISH THIS CHAPTER AND COMPLETE THE EXERCISES, YOU WILL BE ABLE TO

- UNDERSTAND THE ROLE OF STATUTES
 - UNDERSTAND THE ROLE OF CASE LAW
 - UNDERSTAND THE RELATIONSHIP BETWEEN THE COMMON LAW, PRECEDENT, AND *STARE DECISIS*
 - DESCRIBE THE HIERARCHY OF COURT SYSTEMS
 - UNDERSTAND JURISDICTION
 - IDENTIFY DIFFERENT TYPES OF AUTHORITY
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Lawyers serve as advocates for their clients. They are hired to represent people, partnerships, corporations, property, and estates on a wide variety of issues ranging from the mundane to the complex. Lawyers are required to analyze an ever-increasing body of law that includes cases, statutes, ordinances, rules, and regulations and to apply that law to an infinite variety of fact scenarios. But how do lawyers craft meaningful legal arguments when the body of law and facts are so large and ever-changing? How do lawyers argue before a court with conviction? Can lawyers anticipate how a court would likely rule in a given case? The answers to these questions lie in an understanding of the foundations of legal analysis.

This chapter introduces the foundations of legal analysis. The foundations of legal analysis are the set of principles that lawyers

use to analyze the law, devise legal arguments, and predict legal outcomes. Understanding these rules and principles is a crucial step towards becoming an effective advocate.

The foundations of legal analysis do not require attorneys to know the law by heart. The body of jurisprudence is too large and always changing. The rules and principles of legal analysis, however, allow attorneys to fashion credible and persuasive arguments on almost any legal issue. The key is to understand how the law-makers, typically courts and legislatures, make and change the law.

This chapter introduces two important sources of law—statutes and case law. It also discusses three seminal principles of case-law analysis: (i) common law; (ii) precedent; and (iii) *stare decisis*. In addition, this chapter discusses the structure of court systems, basic principles of jurisdiction, and the weight or significance of legal authority. Together, these concepts form the foundation of American jurisprudence. They serve as some of a lawyer's most powerful tools.

A. Statutes

Statutes are one source of law that lawyers use to analyze problems. Typically, students in their first year of law school spend the majority of their time reading and analyzing judicial opinions. As a result, they often fail to recognize the importance of statutes. A statute is an act of a legislature that, among other things, proscribes and governs conduct. It is a formal written enactment of the legislative body. Statutes are only one kind of enacted law. Other enacted law includes ordinances, or municipal law, and regulations, or law derived from administrative bodies.

Legislatures have the exclusive constitutional authority to enact statutes. The federal legislature, the United States Congress, enacts laws that affect every person or legal entity across the country. In addition, each state has its own legislature with authority to enact laws that regulate conduct within that state's borders. Congress and the various state legislatures are independent, separate lawmaking bodies. Most legislatures are bicameral. They consist of two chambers, a Senate and a House of Representatives or Assembly.

The process of enacting a federal statute involves several stages. First, a legislator introduces a bill in his or her chamber of the legislature. The bill is then referred to a committee consisting of members from that chamber. A committee can be either permanent, called a standing committee, or temporary, called a special or ad hoc committee. The legislature's committee structure is organized so that each committee considers only legislative ideas of the same or similar subject matter. For example, the House of Representatives' Committee on Agriculture considers bills that relate to farm policy and nutrition.

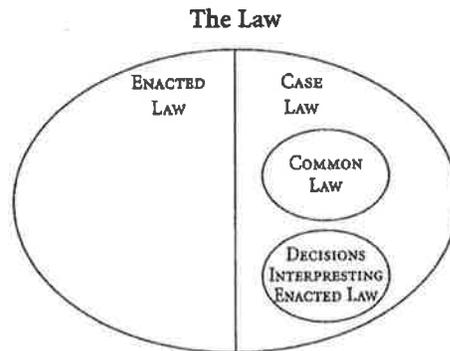
Once a bill is assigned to a committee, the committee reviews the bill and invites experts and other interested parties to testify on the impact of that legislation. More importantly, the committee debates each section of the proposed law and amends, or marks up, the bill. After careful consideration, the committee votes up or down on the bill. If the bill wins support from a majority of committee members, then the bill is reported out of committee to the full chamber. If the bill fails to win a majority, then the bill is deemed "dead in committee." When a bill survives a committee vote, the committee issues a report, including a revised version of the bill. That report recommends whether the full chamber should approve the bill. The full chamber then considers, debates, amends, and finally votes on the bill. If the bill passes in the originating chamber, it goes through a similar process in the opposite chamber. When both chambers pass an identical bill, the bill is then presented to the President. If the President signs the bill, it becomes law. If the President does not sign the bill within ten days, it still becomes law. If the President vetoes the bill, the bill goes back to the legislature. There, the veto may be overridden by a two-thirds vote in each chamber. Barring a congressional override, the bill could be re-drafted to incorporate the President's objections or shelved.

State legislatures largely echo the federal model. In every state the governor must sign a bill into law and reserves the right to veto an objectionable bill. Once enacted, each statute becomes an independent source of law. Federal statutes govern persons and entities throughout the United States, while the reach of state statutes usually ends at the state's borders. Once enacted, a statute remains

fixed unless changed or abolished by the legislature or declared unconstitutional by a court of competent jurisdiction. While courts can and do interpret the meaning and application of a statute's terms, they cannot amend its language.

B. Case Law

Another source of law is case law. Case law is law derived from the opinions of courts. Case law consists of both the common law and judicial decisions that interpret statutes and other enacted law.



Courts make law in at least three ways.

First, a court may fashion a general legal doctrine or principle if it is required to resolve a case but no binding law exists to determine the matter. That new legal doctrine or principle is enforceable only within that court's geographic reach. By adopting or creating a new legal doctrine, a court creates binding law absent any legislative debate or vote. But, a court can create new law only in the absence of enacted law because enacted law trumps case law. For example, if neither the United States Congress nor a state legislature has enacted a law to protect victims of negligent infliction of emotional distress, a court may create a legal doctrine that recognizes the harm and provides a remedy to victims.

Second, a court also makes law by deciding cases that interpret existing legal doctrines. A court makes new law with each case it decides because each case comes before the court with a unique set of facts. When the court applies the law to a new set of facts, a new precedent is born that adds to the growing body of case law. An opinion that incorporates a new fact to an existing legal doctrine creates new law for the purpose of deciding future cases that include the same or materially similar facts.

Suppose a court decided that a plaintiff could recover for a defendant's negligent infliction of emotional distress. In that case, a defendant was liable to a mother when he accidentally shot and killed her young child in plain view of her mother. The court in that case limited its holding to allow only parents to recover, reasoning that the defendant knew or should have known that his negligent acts would harm a parent witnessing the shooting of her child. In a later decision, the court allowed a foster parent to recover under a similar set of facts. From that point forward, potential plaintiffs included all parents and foster parents. In a subsequent case, the court held that siblings were also included in the pool of potential plaintiffs. Each case added to or modified that state's case law by expanding the class of plaintiffs who could sue under a negligent infliction of emotional distress theory.

Third, courts make law by interpreting ambiguous or vague language in enacted law, such as statutes, ordinances, or administrative regulations. Sometimes, a legislature or other rule-making body will enact a law with terms that have more than one meaning or with terms whose meaning depends on context. Before a court can apply that law to the facts before it, it must construe the indefinite terms. The court's interpretation of ambiguous terms in enacted law determines how a later court should apply that law to similar cases in future disputes. Suppose a court interpreted a state statute regarding recycling. The relevant statute states that "all newsprint shall be collected and recycled." The issue before the court was whether magazines are considered newsprint. The court concluded that magazines were not newsprint for the purposes of the statute. In that case, the court added to the body of case law

by construing an ambiguous term in a legislative enactment. That opinion now has the force of law on all similar cases.

Courts do not render decisions in a vacuum. Instead, courts abide by an important set of concepts to aid in their resolution of cases. Among these concepts are the common law, precedent, and *stare decisis*. In contrast to legislatively enacted statutory law, the common law consists of the rules and legal principles derived from judicial decisions rendered in the absence of enacted law. A precedent is any judicial decision or opinion that serves as an example of how a subsequent court can resolve a similar question of law under a similar set of facts. Finally, *stare decisis* is a time-honored maxim that requires courts to follow precedent when deciding similar cases.

1. Common Law and Precedent

Generally, the common law is case law rendered in the absence of enacted law. Under federal and state constitutions, only the legislature is empowered to make law. As such, courts can make law only to fill a void left by the legislature. The common law is derived from the body of judicial opinions.

A precedent is a judicial opinion that illustrates the application of legal rules and doctrines to the facts of a specific case. A precedent, if it examines a common-law rule, becomes part of the common law. Thus, a case can be both a precedent and part of the common law. Some precedents, however, interpret enacted law and not common-law principles. While these cases are not part of the common law, they are still precedents because they illustrate the application of a statute to a set of facts.

Generally, a judicial opinion resolves only the facts and issues raised in the action. That same opinion, however, becomes an authoritative source of law for future cases. Courts, when deciding issues, will look to those opinions for guidance. Each new decision, then, follows logically from the existing body of precedents. Each new decision becomes part of the larger body of case law and takes on precedential weight.

2. The Power of Precedent and *Stare Decisis*

The famous Latin maxim, *stare decisis et quieta non movere*, translates into “those things which have been so often adjudged ought to rest in peace.” *Stare decisis* is the controlling doctrine governing the ability of judges to make law. *Stare decisis* is a principle that requires courts to follow precedent when deciding similar cases. It gives prior judicial decisions the force of law. These decisions are binding on some courts hearing later analogous cases. Courts ordinarily adhere to this doctrine and will only depart from *stare decisis* when absolutely necessary to avoid an injustice, to protect the general welfare, or to change the law to reflect contemporary values.

Stare decisis is a key maxim in American jurisprudence because it promotes stability, predictability, and fairness in the application of law. It promotes fairness because a court will treat parties with similar claims and facts in the same way. It also allows a lawyer to predict legal outcomes by analyzing prior decisions that resolve the same legal issue on the same or similar facts. If a lawyer can find controlling authority, or precedent, that speaks to her client’s case, then she can anticipate how a court will likely rule in the matter. *Stare decisis* ensures stability in the law because courts are required to follow prior decisions instead of rendering decisions in a vacuum.

The power of *stare decisis* is directly related to the notion of judicial error. Generally, a party who was aggrieved by a court’s mistake on a matter of law, fact, or procedure has a right to appeal that legal, factual, or procedural ruling to a higher court. If the higher court agrees with the complaining party, then the higher court may correct the error and reverse the original court’s determination. A court that violates *stare decisis* by failing to apply a controlling precedent may be reversed on appeal. Hence, a court typically will honor *stare decisis* or risk a higher court reversing its holding or ruling on appeal.

Stare decisis and precedent are related, but different, concepts. *Stare decisis* requires courts to follow prior decisions when determining the outcome of like cases. Precedent is the prior decision itself.

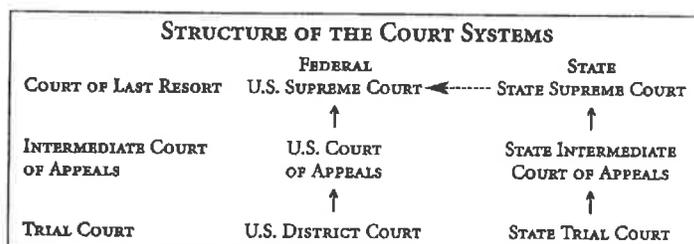
For example, in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), a railway company's conductor pushed a passenger carrying a package of fireworks. The conductor did not know the package contained fireworks. The package fell. As a result, the fireworks exploded, causing a shockwave, which knocked down heavy scales located at the other end of the train platform. The scales struck the plaintiff, causing injury. The plaintiff sued to recover for her damages. The New York Court of Appeals, the court of last resort in New York, held that there is no duty, hence no liability, to an unforeseen victim of negligence. The court held that the defendant could not have foreseen injuring the plaintiff, and was, therefore, not liable.

By itself, the *Palsgraf* opinion decided the outcome of one case. The holding is legally binding only on the parties in the lawsuit. The court's reasoning, however, and the legal rules employed to determine the outcome of that case, are binding on everyone within that court's jurisdiction. Under the doctrine of *stare decisis*, *Palsgraf* became a precedent. After *Palsgraf*, New York courts were required to look to that case to decide any lawsuit that raised the same legal issue with the same or similar facts. Why? *Stare decisis et quieta non movere*—once properly decided, a legal issue should not be decided again. If a later trial court chooses to ignore *Palsgraf* and hold that a defendant is liable to an unforeseen plaintiff, then a higher court could reverse the trial court to correct the mistake. As such, the *Palsgraf* opinion became a predictable and reliable basis to assess liability in future like cases.

Imagine a system without *stare decisis* or precedent. If judges decided each case without regard to prior cases, litigants would indeed be at the mercy of the court. Judges would have the power to reach conclusions without the aid of a sustainable, predictable body of law. Litigants would have no reliable basis to determine whether a particular act had any culpable consequence. Without *stare decisis* and precedent, the ability of lawyers to predict a legal result would be nearly impossible. And without *stare decisis* and precedent, a lawyer's ability to argue cases before a tribunal would be difficult, if not impossible. The stabilizing impact of precedent and *stare decisis* is integral to the foundations of legal analysis.

C. Hierarchy of Courts

The authoritative weight, or value, of a particular precedent depends on which court within the *hierarchy* of courts rendered the opinion. A hierarchy represents the different levels of courts within a jurisdiction. The federal court system and the court systems of most states consist of three levels: a trial court, an intermediate court of appeals, and a court of last resort. A court is bound by a decision of a higher court within its line of appeal. A decision rendered by a court of last resort, the highest court of appeals within a jurisdiction, is binding on all other courts within that same jurisdiction. A decision by an intermediate appellate court is binding on a trial court when the highest court of appeals is silent or has not conclusively decided an issue.



Under our system of federalism, each state and the federal system is an independent, autonomous, and sovereign judicial system with one important exception—the United States Supreme Court. An opinion of the United States Supreme Court interpreting federal law is binding on every court in the United States, both federal and state, because it is the highest court in the land deciding a question of federal law. A decision rendered by a state's highest court of appeals, however, is usually the last word on most state issues.

Consider the following scenarios:

An Arizona trial court is bound by decisions of Arizona's highest court of appeals; Arizona's intermediate court of appeals,

when the state's highest court of appeals is silent on an issue; and the United States Supreme Court interpreting federal law.

The Connecticut trial court is bound by Connecticut's highest court of appeals; the Connecticut intermediate court of appeals, when the state's highest court of appeals is silent; and the United States Supreme Court interpreting federal law.

A federal trial court considering a federal issue is bound by the United States Circuit Court of Appeals for the circuit in which the federal trial court is located and the United States Supreme Court.

D. Jurisdiction

Stare decisis requires courts to look to previous decisions, or precedent, for authoritative guidance in resolving legal disputes. Not all courts, however, are bound by every authoritative precedent. Jurisdiction is an important limit on the precedential impact of a particular decision.

Jurisdiction limits the ability of a court to exercise its authority. Jurisdiction restricts the power of a court to resolve legal issues in two ways. First, jurisdiction limits courts geographically. Second, jurisdiction limits courts by the subject matter they are allowed to consider. Geographic jurisdiction limits the power of a court to a particular territory. These limitations are drawn, for example, along municipal boundaries, county lines, or state borders. Subject matter jurisdiction limits the types of actions a court is authorized to hear. For example, a federal bankruptcy trial court does not have jurisdiction, and, therefore, cannot consider a state criminal action.

Jurisdiction limits the reach of precedent because it controls which judicial decisions, or precedents, a particular court is obliged to follow. Generally, state courts are bound only by controlling opinions derived from courts that are located within the same jurisdiction, as well as opinions derived from the United States Supreme Court when it renders a decision on federal law. For example, a trial court in Massachusetts is not bound by the

opinions of the Supreme Court of Tennessee. A trial court in Massachusetts is bound by the Supreme Judicial Court of Massachusetts because that trial court is within the geographical jurisdiction of Massachusetts' court of last resort. The courts in both Massachusetts and Tennessee, however, are bound by opinions of the United States Supreme Court when it opines on federal law.

Courts may, but are not required to, follow precedent of other jurisdictions. Suppose the court of last resort in Alaska rendered a decision holding bar owners liable for injuries caused by their inebriated patrons. Subsequently, a case with similar facts alleging the same legal issue is heard by a trial court in Tennessee. The court of last resort in Tennessee has not decided the issue. The Tennessee trial court considering the issue must decide the matter and render a decision that will have precedential value for that jurisdiction. Under *stare decisis*, that decision would be binding in Tennessee until the Tennessee Supreme Court changes, reverses, or overrules the decision. The court in Tennessee could look to the Alaska court's decision for guidance, but Tennessee's court is not bound to follow that court's holding. The court, however, may be persuaded by the logic and reasoning of the Alaska court's decision and adopt all or part of that court's opinion. Alaska's decision, while not binding on Tennessee, may be persuasive.

Consider these other examples. Is the trial court of West Virginia considering a state issue bound by the court of last resort in Texas? No, because they are different jurisdictions. Is the court of last resort in New Jersey considering a state issue bound by the court of last resort in California? No, they are also in different jurisdictions. Is the court of last resort in New Hampshire considering a state issue bound by the United States Court of Appeals for the First Circuit, the federal circuit court of appeals that has jurisdiction over the federal trial court of New Hampshire? No, a state court is not bound by a federal court of appeals. Does the United States Supreme Court interpreting the United States Constitution trump all other state and federal courts? Yes, because all courts, both state and federal, are bound by the United States Constitution and the United States Supreme Court is the final arbiter of federal constitutional matters.

State courts may hear questions of both state law and federal law. A state court may consider federal law when the litigants raise a federal issue in addition to a state issue. State courts may also decide suits that raise issues of law from other states. These determinations are never binding on the other state's judiciary or the federal court because the deciding court sits in a different jurisdiction.

Federal courts may decide cases that raise federal or state issues. Federal issues arise under federal case law, federal statutes, federal regulations, treaties, or the United States Constitution. A federal district court, the trial court of the federal judiciary, has jurisdiction to hear state issues when the dispute is between citizens of different states and the amount of the claim exceeds \$75,000.

In some situations, a federal court is bound by a state court's ruling. Suppose a federal court is asked to resolve a state issue. The federal court would defer to the state court's determination of the issue and not decide the issue on its own. This deference recognizes that state courts are better positioned to resolve state matters.

In other situations, a case is brought before a federal court that raises a state issue, but no precedent exists from that state's courts to guide the federal court's opinion. Perhaps the case is one of first impression or has not been conclusively decided by the state court. In these situations, the federal court either stands in the shoes of that state's court of last resort and decides the matter by interpreting state law, or *certifies* the issue to the state's highest court of appeals.

Certification, a procedure allowed only by authority of state law, allows a federal court to refer a state issue originally brought in federal court to that state's court of last resort. The state court may then conclusively decide the matter. The federal court is bound by the state court's determination of the state issue. The federal decision ultimately reached is authority for the federal court, but is not binding authority for state cases, even if a subsequent state case involves identical facts under the same law as the prior federal case. Why? The federal court and state court are independent judiciaries. Federal decisions on state law do not

override decisions of a state's court of last resort. Analogous federal decisions may have persuasive impact on the state court, but are not binding.

E. Types of Authority

An *authority* refers to any cited source courts and attorneys use to oppose or support a legal proposition. Several different types of authority exist, such as cases, statutes, regulations, law review articles, legal encyclopedias, and legal newspapers. An authority can refer to either a source that is binding on a court or a source that merely persuades the court to rule in a particular way. Generally, courts and lawyers divide authorities into two groups: primary authority and secondary authority.

Primary authority is any source of law. Examples of primary authority include case law, statutes, or constitutions. Sources other than the law are secondary authority. Secondary authority is any source that comments on or editorializes about the law. Law reviews, legal treatises, newspapers, and legal encyclopedias are all examples of secondary authority.

The type of authority determines whether a source must be followed, or whether it merely serves to guide the court. Secondary authority is never binding on a court; it is only persuasive. Remember, it is not the law.

Primary authority, however, can be either binding or persuasive authority. Primary *binding* authority is any source of law that a court must follow. Primary binding authority includes any statute, regulation, constitution, or ordinance enacted in the jurisdiction, or case law rendered by the court-of-last resort in the jurisdiction. For example, a California trial court considering a state issue is bound by case law rendered by the California Supreme Court, California statutes, and the California Constitution. Primary authority from other jurisdictions is merely persuasive.

Primary *persuasive* authority is law that is not binding on a court. Primary persuasive authority can include statutes and case

law from other jurisdictions. For example, a California court may look to a Nevada case for guidance, but that decision is not binding on the California court, it is only persuasive.

Persuasive authority includes primary persuasive authority, law that is not binding on a court and all secondary authority. Not all persuasive authority, however, has equal weight. Some sources are more compelling than others. Primary persuasive authority is generally more persuasive than secondary authority because primary authority is the law as opposed to a comment or opinion on the law. Even persuasive material derived from the same or similar source can have different persuasive value. For example, an article written by the seminal authority on property law would likely be more convincing to a judge than an article written by a lesser known scholar or a student. Keep in mind this simple rule—the more legally authoritative the source, the more persuasive the authority.

Consider the following sources used to support an argument before a state trial court:

- An article from a legal newspaper;*
- An article from a prestigious law review;*
- An opinion from a federal court of appeals;*
- An opinion from the court of last resort in another state.*

All of the authorities are persuasive authorities and not binding. Of the sources listed above, an opinion from the court of last resort of another state would likely rank as “most persuasive,” followed closely by an opinion from a federal court of appeals. The state court’s opinion was rendered by the court of last resort in that jurisdiction, not an intermediate appellate court. A federal court of appeals opinion and an opinion rendered by the highest court of another jurisdiction are more authoritative than the other sources and more persuasive because they are law. Opinions from any court usually outrank authority derived from articles or books that merely comment on the law. The law review ranks third, followed by the legal newspaper. The law review article, a scholarly commentary on the law, is more authoritative than an article merely reporting on the law.

The persuasive weight of an opinion rendered by another jurisdiction sometimes depends on how that court reached its decision. Was the persuasive opinion a unanimous decision of the court? A split decision? A court sitting *en banc*? Was a dissenting or concurring opinion included? Are you citing to that part of an opinion that bears directly on the relevant issues in dispute, or are you citing to *dicta*, the part of the opinion that was not necessary to the court's holding?

Suppose you are researching a legal issue and find three cases from another state's court of last resort that support your legal position. One decision consists of an opinion that includes a concurring opinion joined by two justices, and the proposition of law you need is found in the concurring opinion. The second decision is a unanimous opinion of the court. The third opinion consists of a majority opinion and a dissenting opinion filed by one judge, but the proposition of law you need is found in the dissenting opinion. How would you rank the persuasive weight of these authorities?

The unanimous opinion would likely rank as "most persuasive" because it represents the agreement of the entire bench on the resolution of the issue. The weight of the other two opinions is less clear. Their persuasive weight depends on the nature of the case decided and the language of the opinions filed. With that said, the concurring opinion would likely rank as "more persuasive" than the dissenting opinion because the concurrence agreed with the majority's holding albeit for different reasons. The dissenting opinion in the third case would likely rank as "least persuasive" because a dissent does not represent the law and is akin to secondary authority.

Some measure of experience is required before an attorney or student is able to accurately identify and weigh the various authorities. Sometimes the difference between authorities is quite subtle. Distinguishing between persuasive and binding sources and the relative weight of persuasive sources, however, is only one part of legal analysis. The challenge lies in crafting a meaningful way to incorporate the authority into cogent, persuasive, and well-reasoned analysis.

Practice Exercises

Complete the following exercises to reinforce your understanding of this chapter.

1. What are two sources of law in the American legal system?
2. Discuss the purposes behind *stare decisis*.
3. Consider the following questions about the court systems:
 - a. What are the three levels of courts that exist in the hierarchy of the federal court system?
 - b. What are the three levels of courts that exist in the hierarchy of most state court systems?
4. Answer the following questions about jurisdiction:
 - a. How do courts determine what law binds them?
 - b. Why must lawyers consider a court's jurisdiction?
5. Can a court amend or change language in a statute? Why or why not?
6. Explain three ways courts make law.
7. A legislator has proposed a bill that prohibits physician-assisted suicide.
 - a. What stages must this bill go through before it can be passed into law?
 - b. If enacted into law, can a court amend its language?
8. You are arguing a state issue before a New Mexico trial court. Which of the following cases are binding on that court?
 - a. Decision from the court of last resort in Texas
 - b. Decision from the court of last resort in New Mexico
 - c. Decision from the federal circuit court of appeals in New Mexico
9. Identify whether the following sources are primary or secondary authority:
 - a. Statute
 - b. Case
 - c. Legal newspaper article
 - d. Legal encyclopedia article
 - e. *Dicta* from a United States Supreme Court opinion

10. You are arguing a case before a North Dakota trial court. Rank the persuasive weight of the following sources:
 - a. Law review article written by a law professor
 - b. Legal newspaper article
 - c. Decision from the court of last resort in New Jersey
 - d. Dissenting opinion from the court of last resort in Indiana