

Chapter 1:

The Foundations

of Authority

Chapter Outline:

- ✓ § 1.1 What is Authority?
- ✓ § 1.2 Primary Authority
- ✓ § 1.3 Using Citations to Locate Authority
- ✓ § 1.4 Locating a Case with a Citation
- ✓ § 1.5 How to Read a Case
- ✓ § 1.6 Locating a Statute with a Citation
- ✓ § 1.7 How to Read a Statute

§ 1.1 WHAT IS AUTHORITY?

Authority is anything the court can or must use in reaching its decision. As we will see, there are different kinds of authority: primary, secondary, mandatory, persuasive, and non-authority.

Knowing how to find cases, statutes, and other legal materials is not enough to make you a competent researcher. The lawyer or paralegal must also anticipate the court's probable response to the material. To make an initial determination about the court's response, the researcher must be able to answer two questions:

- Is the authority law or non-law?
(*primary or secondary*)
- If it is law, what weight will it carry?
(*mandatory or persuasive*)

LEGEND

Dark Blue Headings | Major Sections

Blue Headings | Examples, Diagrams, & Comments

Green Headings | In-Class Exercises & Discussion Points

Pink Headings | Out-of-Class Assignments

Primary/Secondary

If the authority is law, it is primary. If the authority is not law, it is secondary.

Primary Authority

Any form of law is considered primary authority.

Example: A statute, case, or other form of law.

Secondary Authority

Secondary authority is non-law.

Example: A comment from a legal encyclopedia.

Mandatory/Persuasive

Determining what weight an authority carries is important. If the material is from a higher authority than the court in which your client's case is being heard, and within the court's jurisdiction, it is mandatory. In other words, the court must follow the material unless it can be established that the law has been superseded or declared unconstitutional. Material from a court of the same or lower level is persuasive and the court can choose whether to follow it or not.

Mandatory Authority

The researcher is always looking for mandatory authority. In theory, the court must follow such authority.

Example: A case you found in the law library that came from a higher court in the appropriate jurisdiction.

Persuasive Authority

Although the researcher hopes to find mandatory authority, he or she usually has to settle for persuasive authority, which the court is not required to follow.

Example: A case from the same level of court or a case from a different jurisdiction.

Stare Decisis and Persuasive Authority

Stare decisis is a doctrine that holds that a court's previous decision should be followed unless there is a compelling reason not to follow it. Although a court is not *required* to follow a previous ruling by a court of the same level, it will do so, unless a compelling reason is given.

Non-authority

If *authority* is anything the court can or must use in reaching its decision, then *non-authority* is anything the court would never use in reaching its decision, such as a case that has been overturned.

Examples: A case that has been reversed by a higher court. A statute that has been superseded. A research book that is used as an index or that could never be quoted.

In this chapter, we will concentrate on the identification of primary, secondary, and non-authority. We will discuss more advanced applications of authority, including identifying mandatory and persuasive authority, in a later chapter.

§ 1.2 PRIMARY AUTHORITY

The following is an introduction to the ten basic kinds of laws, roughly in order of their supremacy, from the highest down.

constitution

Constitutions are the highest form of law. A constitution is the fundamental law that establishes the basic rights and obligations of citizens and creates the branches of government. The U.S. Constitution is the highest law in the United States. Individual states, of course, have their own constitutions.

statutes

Laws created by the legislative branch of government. The U.S. Congress creates federal statutes which are contained in the *United States Code* (U.S.C.); state legislatures create statutes for their own states. Statutes are *enacted law*. Enacted law supersedes common law.

opinions

An opinion is a decision of a court applying law to specific, factual situations. An opinion is often referred to as a *case* or *case law*. For example, the case of *Roe v. Wade* is an opinion of the court that applied what the court deemed was a constitutional right for a woman to have an abortion. Opinions are *common law*.

treaties

A treaty represents an agreement between two or more governments. The President signs treaties, with the consent of the Senate. For example, the *Strategic Arms Limitation Treaty* (SALT) was negotiated by the United States and the Soviet Union, but had to be confirmed by the U.S. Senate before it became law.

executive order

A law created by the highest entity of the executive branch, such as the President or governor. An example of an executive order is the pardon of someone convicted of a crime.

administrative rules

These are rules and regulations created by state and federal administrative agencies. For instance, the *Federal Aviation Administration* (FAA) creates rules governing air traffic throughout the country.

administrative decisions

Administrative decisions are created by administrative agencies applying administrative rules to factual situations. For example, the FAA can fine a person for making a joke about a bomb in an airport. After a hearing, the agency would issue a report detailing its decision.

rules of court

These are the rules that govern the procedures of the state and federal trial process. Court rules are created by the legislature, the highest court in the state, or both. For instance, the *Federal Rules of Civil Procedure* are the court rules for civil federal trials.

charters

The local equivalent of a constitution, a charter is the basic and fundamental law of local governments; they establish the structure of the local government in that jurisdiction.

ordinances

Ordinances are the local equivalent of statutes. Ordinances are rules that members of the community are expected to follow. If a person fails to cut his lawn, he or she is most likely violating an ordinance.

The researcher's first goal is to locate primary authority. The researcher may utilize secondary or non-authority to get there, but law is almost always the focus of research.

Exercise § 1.2 | Primary Authority

Which of the following are examples of primary authority?

- ☐ *a case*
- ☐ *a statute*
- ☐ *an ordinance*
- ☐ *an index*
- ☐ *a dictionary*
- ☐ *the SALT Treaty*
- ☐ *an encyclopedia*
- ☐ *a presidential pardon*
- ☐ *an administrative rule*
- ☐ *a city charter*
- ☐ *Roe v. Wade*
- ☐ *U.S. Constitution*
- ☐ *Kansas Constitution*
- ☐ *a court opinion*
- ☐ *an executive order*