Introduction to the Legal System and Legal Writing

Students decide to come to law school for many good and diverse reasons. However, despite our numerous years teaching in law schools, we have never heard new students say they have come to law school because they like to write. Yet lawyers write all the time. They write to colleagues; they write to clients; they write to adversaries in a law suit; they write to third parties to request favors or information; they write to judges. They write documents for many different purposes: to persuade a court to rule in a client's favor; to answer a client's questions; to analyze a client's case; or to inform an adversary that a client is open to settlement but willing to litigate if pressed too hard. To be a good lawyer, you must be a good writer. And to be a good legal writer, you must have both a good understanding of law and a good grasp of principles of writing.

This book is about good legal writing. It introduces you to the sources of authority with which a lawyer works and upon which a lawyer's writing revolves. It introduces you to legal analysis and some forms of legal writing. Finally, it tries to integrate those lawyerly enterprises with that which all good writing must demonstrate, namely, a clear sense of audience, purpose, organization, and paragraph and sentence structure.

1. The Primary Sources of Law

When you were an undergraduate or graduate student, you probably read a variety of primary and secondary sources to get the information you needed to write papers. As a lawyer you will also use many different sources of information to acquire the necessary
background information to analyze a legal question. But a lawyer's most important sources of information are primary sources.

Primary sources in law include both case law (judicial decisions) and enacted law (statutes, constitutions, and administrative regulations). Although you may not study administrative and constitutional law until the second or third year of law school, you will need to use case law and statutory law throughout your first year. That is because in our legal system, analysis of a problem is controlled by enacted law that regulates the subject matter of that problem, and by the decisions of earlier cases that involved issues and facts similar to those in that problem. This year you will be learning how to find those legal authorities, how to use them, and how to write about them.

Because most of your first-year classes emphasize case law, we begin with judicial decisions. You should be aware, however, that enacted law forms a significant part of the body of law in our country. You must always consult these sources first when you do research for a problem because constitutional provisions and statutes take precedence over case law. However, even when you find an applicable statute or constitutional provision, your legal research will require you to search for cases that have interpreted the particular statute or constitutional provision. Then, you will need to analyze how they are or are not relevant to your problem. When no statute or constitutional provision applies, however, you must rely solely on earlier cases to provide the law on the subject. Those earlier cases provide a source of enforceable rules called the common law.

The United States is a common law country in that rules of law come from the written decisions of judges who hear and decide litigation. The common law is judge-made law. Judges are empowered by statute or by constitutional provision in every state and in our federal system to decide controversies between litigants. When a judge decides a case, the decision attains the status of law, and it becomes a precedent for future legal controversies that are similar. Our common law system, like the English system from which it came, is a system of precedent. In the simplest sense, precedents are just the decisions of judges in previous litigation. Those decisions, however, play a dual role. First, the decision resolves the litigation that is before the court. Second, if that decision is published, it becomes available for use by judges in later litigation. According to the doctrine of precedent, judges should resolve litigation by taking into account the resolutions of similar cases in the past.

II. Structure of the Court System in the United States

A. The Vertical Structure of Our Court System

Case law in the United States comes from litigation conducted in many court systems. Each state, as well as the District of Columbia and the federal government, has its own system of courts. Each is a separate jurisdiction. For our purposes, a jurisdiction is the area over which the courts of a particular judicial system are empowered to resolve disputes and thus to enforce their decisions. Jurisdiction is determined by a geographic area, like a state, and it can also be based upon subject matter. Subject matter jurisdiction is the authority of a court to resolve disputes in only a particular subject area of the law, such as criminal law.

The structure of the court system within each jurisdiction is a hierarchical one. Courts are organized along a vertical structure, and the position of a court within that structure has important consequences.

1. Courts of Inferior Jurisdiction

Courts in which litigation begins are called courts of original jurisdiction. In many states, the lowest rung of the courts of original jurisdiction is occupied by a so-called court of inferior jurisdiction. This court has the power to hear only limited types of cases, such as misdemeanor cases or cases in which the amount of damages the complaining party (the plaintiff) demands from the party sued (the defendant) does not exceed a specified sum. These courts have various names, such as courts of common pleas or small claims courts. Other courts of inferior jurisdiction are limited in deciding cases about one particular subject matter, for example, juvenile or family law matters. Courts of inferior jurisdiction may be conducted informally. For example, in small claims courts, the parties often represent themselves and the court does not follow the formal rules of evidence used in higher courts. The decisions of
these courts are not published and they have no value as precedent to future litigants.

2. Trial Courts

The next rung up from the courts of inferior jurisdiction is occupied by the trial courts, where litigation often begins. Trial courts are usually courts of general jurisdiction, that is, they may hear cases of all subject matters. Thus, a trial court may hear civil litigation, which is litigation between private parties who are designated as the plaintiff and the defendant. It may also hear criminal cases. Criminal litigation is brought by the state, which prosecutes the criminal charges against a defendant or defendants. There is no private party plaintiff in a criminal case.

A trial court is presided over by one judge. It is the particular province of the trial court to determine the facts of the case. The trier of fact, either judge or jury, "finds," that is, determines, the facts from the evidence at trial, the examination of witnesses, and the admissions of the parties. For example, one issue in a case may be the speed at which a vehicle was travelling. This fact may be disputed by the parties. The trial judge or the jury, if the question is put to a jury, will resolve the dispute and "find," for example, that a party traveled at 75 miles per hour. The court then decides the case by applying the applicable law to that fact.

Often the trial court judge will decide a case by procedures that preclude a trial. For example, one of the parties may bring a motion for the court to take a particular action. Some types of motions, if granted, will result in a decision that eliminates the need for a trial. You will learn about those types of motions in your civil procedure course. Often, the attorneys submit a written document to the court, usually called a trial brief or a memorandum of law. If a case is not ended on a pre-trial motion, and the parties do not voluntarily settle their dispute, then the case will go to trial.

3. Appellate Courts

The next step up the hierarchy of courts from the trial courts is occupied by the appellate courts. The party that lost at the trial level, either by motion or by a decision after trial, may ask for review by a higher court. This review is known as an appeal. The party who appeals is usually called the appellant and the other party, the appellee. The appellate court determines whether the lower court committed any error significant enough to require that the decision be reversed or modified, or a new trial be granted.

Most states provide two levels of appellate courts. The first is an intermediate court of appeals. The second is the highest court of appeals and is usually known as the state's Supreme Court, although some states use other designations. Sometimes a jurisdiction's highest court is described as the court of last resort.

Generally, the intermediate appellate court hears appeals from the trial courts, and the Supreme Court hears appeals from the intermediate courts of appeals. In many states with intermediate courts of appeals, however, the Supreme Court must hear appeals for certain types of issues directly from the trial courts. There is no further appeal of the decisions of the state court of last resort as to matters of state law.

Some states, although a decreasing number, have no intermediate court of appeals. In those states, trial court decisions will be reviewed directly by the court of last resort. In either system, except for certain types of cases, the court of last resort need not hear every case for which an appeal has been requested. Rather, the court has discretion to choose which cases to hear.

In many states, the intermediate appellate level consists of more than one court. For example, the state may be geographically divided into appellate districts, with each district having its own court of appeals. That district will contain several trial courts, the appeals from which all go to the one court of appeals for that district. Each court of appeals in that state is a co-equal, that is, each occupies the same rung on the court hierarchy as the others. The state will have only one court of last resort, however, and that court is superior to all other state courts.

An appeal is heard by more than one judge, and because the appeal should be heard by an odd number of judges, all appellate courts require three or more judges. The judges decide the case by voting and usually one of the judges from the majority writes the decision. A judge who disagrees with the majority may write his or her own opinion, called a dissenting opinion (or just a dissent). In addition, a judge who has voted with the majority as to the outcome of the case may write a separate opinion to express his or her differing views about certain aspects of the case. This decision
is a concurring opinion ("concurring" because the judge concurred in the outcome of the case). The name of the judge who writes an opinion appears at the beginning of that opinion. Sometimes the opinion of the court does not bear the name of an author, but is designated a "per curiam" decision. This means a decision "by the court" and may be used for a shorter opinion on an issue about which there is general unanimity.

The procedure of an appeal differs from proceedings before a trial court. An appeal does not involve another trial before the panel of appellate judges. That is, the parties do not submit evidence or examine witnesses, and the court does not empanel a jury to re-examine factual issues. Rather, the parties' lawyers argue to the appellate judges to persuade them that the court below did or did not commit an error or errors. Typically, this argument is made by means of written documents called appellate briefs that the attorneys submit to the court. The attorneys may also argue orally before the judges, although not all appeals involve oral argument. In addition, the appellate court reviews the record of the proceedings below.

Most state trial court decisions do not result in explanatory judicial opinions and so are not published, but the verdicts are recorded in the court files. Many, but not all, of the appellate decisions, however, are published both in volumes called case reporters and online.

### B. The System of Courts: The Federal Courts

The hierarchical nature of the federal court system parallels the vertical structure of state courts. The trial courts within the federal system are called district courts. There is at least one United States District Court within each state. A district court's territorial jurisdiction is limited to the area of its district. A state with a small population and a low volume of litigation may have one district court and the entire state will comprise that district; for example, Rhode Island has one district court called the United States District Court for the District of Rhode Island. The volume of litigation in most states, however, requires more than one court in the state and thus the district is divided geographically. For example, Illinois is divided into three federal district courts: The United States District Court for the Northern District of Illinois, the United States District Court for the Southern District of Illinois, and the United States District Court for the Central District of Illinois.

Each intermediate appellate court in the federal system is called the United States Court of Appeals. For appellate court purposes, the United States is divided into thirteen circuits, so there are thirteen United States Courts of Appeals, eleven of which are identified by a number. Thus, the complete title of one court is The United States Court of Appeals for the First Circuit. The eleven numbered circuits are made up of a designated group of contiguous states (and also may include territories). The United States Court of Appeals for the Seventh Circuit, for example, is made up of the states of Illinois, Wisconsin, and Indiana. The other two courts of appeals, designated without numbers, are the United States Court of Appeals for the District of Columbia Circuit, and the United States Court of Appeals for the Federal Circuit. Appeals from the district courts within the area that makes up a circuit go to the court of appeals for that circuit. A case that was litigated in the United States District Court for the Northern District of Illinois, for example, would be appealed to the United States Court of Appeals for the Seventh Circuit.

The highest court in the federal system is the Supreme Court of the United States. This court hears cases from all the United States Courts of Appeals and, for certain issues, from federal district courts and from the highest courts of the state systems. The Supreme Court must hear certain types of cases and has discretion to hear other requests.

### III. Overview of a Civil Case

The attorney-client relationship typically begins when a client comes to the attorney to discuss a problem. This relationship may involve business matters, such as drafting a contract, or it may involve personal matters, such as drafting a will, or the

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1. The United States Court of Appeals for the Federal Circuit hears certain specialized cases such as international trade, patents, trademarks, and government contracts.

2. The United States also has courts of limited jurisdiction, that is, courts that are competent to hear only specialized subject matters, such as tax courts. You will rarely read cases from these courts in your first year of law school and we will not include them in this discussion.
relationship may begin with a client's legal problem that involves civil litigation. The attorney interviews the client to determine the nature of the client's legal claim, that is, the client's cause of action, and to gather as many facts as possible. At this point, in order to keep a written record of her work and conclusions about the client's case, she may write a short memorandum for her files or for another lawyer in the firm with whom she will be working. She will then research that claim in order to gather the relevant statutes and cases to understand its legal requirements. The attorney may then write a full office memorandum analyzing the law and facts, or a more abbreviated summary of her research. She may also write to her client by letter or email to explain her analysis and recommendations.

A. Pleadings: Complaint and Answer

When the attorney and the client are ready to begin the lawsuit, the attorney will file a complaint with the appropriate trial court, and arrange to serve the defendant with a summons and a copy of the complaint. These documents notify the defendant of the lawsuit against him or her. The complaint must set out enough of the facts that form the basis of the cause of action to give the defendant notice of the plaintiff's claim.

The defendant then, within the time limits required in that jurisdiction, responds either with an answer to the complaint or with a motion. If the defendant answers the complaint, the defendant's answer responds to each of the allegations in the complaint. The answer may also allege facts that would provide an affirmative defense to the plaintiff's cause of action. For example, if the plaintiff alleges a cause of action for trespass, the defendant's answer may allege facts that set up the defense of license, that is, that the plaintiff had authorized the defendant to go on the plaintiff's land. A person whom the plaintiff authorized to enter his land is not liable in trespass for that entry.

B. Motion Practice and Discovery

1. Motions to Dismiss

Instead of answering a complaint, the defendant may decide to enter a motion, which at this stage is most likely a motion to dismiss for failure to state a claim upon which relief can be granted. In some states, this motion is called a demurrer. This motion asks the court to dismiss the complaint because even if the plaintiff's alleged facts are true, the facts do not establish any cause of action, and do not provide any relief recognized by the law. The defendant will likely accompany the motion with a memorandum of law to the court that explains the reasons for the motion. This memorandum is an advocacy document written to the court to persuade it to grant the motion. It differs from the office memorandum referred to above, which is an analytical memo usually kept within the law firm. The plaintiff will then file her own memorandum of law, but one in opposition to the defendant's motion.

If the defendant argues successfully, the court will grant the motion and dismiss the plaintiff's lawsuit. The plaintiff may then appeal this decision to a higher court. If the defendant loses at this stage, however, he must file an answer to the complaint, and the litigation continues.

2. Discovery

The next step in the litigation process requires the parties to gather information for the lawsuit by a process called discovery. They will often use procedures formalized in the jurisdiction's rules of civil procedure. These procedures commonly involve, first, depositions, which are an attorney's oral examination under oath of the opposing party and of witnesses who are under oath. The deposition is
transcribed by a court reporter. Second, attorneys submit interroga­
tories, which are written questions to the other party. Attorneys
may also take affidavits from the parties and others and request
relevant documents. An affidavit is a written declaration of facts
that the person (the affiant) swears to under oath.

3. Summary Judgment Motions

After the parties have gathered what they consider enough evidence
to go forward, one or both may move the court for summary judg-
ment. A motion for summary judgment asks the court to decide
the case without a trial by applying the controlling law to the
facts gathered through discovery. The parties again will submit
memoranda of law in support of or in opposition to the summary
judgment motion. A court cannot grant this motion if there is any
conflict over material facts; if there are disputed facts, there must be
a trial where a jury or judge “finds,” that is, determines, the facts.
If the court grants either party’s summary judgment motion, the
losing party may appeal that decision. If neither motion is granted,
the case moves on to trial.

C. The Trial

At any point the parties may negotiate and settle the case between
themselves, thus avoiding the time, stress, and expense of litiga-
tion. The parties may even settle the case during the trial and avoid
the case going to judgment. If the parties do go to trial, however,
they may submit a variety of motions during and after the trial.
If the case goes to judgment, the losing party may appeal, first to
an intermediate court of appeals, and then to the jurisdiction’s
highest court.

D. The Appeal

At the appellate stage of these proceedings, the attorneys produce
formal written documents for the court, known as appellate briefs.
These briefs explain the facts and the law as the party analyzes
them. The party that appeals the lower court’s decision (the appel-
ellant) also explains that the lower court made errors that require
that the appellate court reverse that decision. The other party (the
appellee) explains that the decision in the lower court was correct
and should be affirmed (upheld).9 The appellate court may make
a final decision in the case or send it back (remand) to the lower
court for further proceedings in accord with its legal ruling and
the reasons for that ruling. Besides the formal briefs to the court,
the attorneys may also have written less formal documents for
their files, and letters to their clients explaining the status of the
litigation and its outcome.10

Thus, at every stage of the process, the attorneys will write for
different audiences and for different purposes. The quality of those
documents will be crucial for the attorneys’ success in negotiations
and in court, and important to their professional relationship with
their clients.

IV. The Development of the Law Through the
Common Law Process

A. Precedent and Stare Decisis

The position of a court within the structure determines how its
decisions are treated as precedent. Some precedents have greater
authoritative value than others because of the American system of
precedent and its companion doctrine, stare decisis. That term is
a shortened form of the phrase stare decisis et non quieta movere,
which means “to stand by precedents and not to disturb settled
points.” In this country, stare decisis means that a court should
follow the common law precedents. But the doctrine also means
that a court must follow only those precedents that are binding
authority.

Precedent becomes “binding authority” on a court if the prece-
dent case was decided by that court or a higher court in the same
jurisdiction. If precedents on a particular point of law exist, those
precedents constrain a judge to decide a pending case according
to the rules laid down by the earlier decisions or to repudiate the
decisions. Cases decided by courts that do not bind the court in
which a dispute is litigated, such as a court of another state, are

9 We discuss advocacy writing and writing to the court in Chapters 15 and 16.
10 We discuss status letters to clients and other types of letters in Chapter 14.
persuasive authority only. When an authority is persuasive, the court deciding a dispute may take into account the decision in the precedent case, but it need not follow that decision.

When you search for case authorities to help you answer the issue before you, you will search first for precedents that are binding on the court where the dispute will be decided because these cases provide the constraints within which you must analyze the problem. If the issue has never been litigated in the jurisdiction of the dispute (sometimes called a “case of first impression”), you should familiarize yourself with how courts in other jurisdictions have analyzed the problem. Those precedents, even though not binding on the court, may nevertheless persuade the court to decide your case in a particular way.

Even if there is relevant case law in the jurisdiction in which your dispute will be litigated, you may still want to familiarize yourself with case law in other jurisdictions. This is especially so if those cases are factually similar, or well-reasoned, or particularly influential decisions.

B. Binding and Persuasive Authority

Because the United States is composed of many jurisdictions, including each of the states and the federal court system, it is important to determine which precedents a court in each jurisdiction must follow besides its own prior decisions.

1. State Courts

A state court must follow precedents from the higher courts in the state in matters of state law. For example, states have their own law on gun control, torts, and marriage and divorce. Thus, a trial court must follow those precedents of the state’s highest court. If the state court system includes a tier of intermediate appellate courts, as most state systems now do, the trial court must also follow the precedents of the intermediate courts of that state. Depending upon the rules of procedure of the particular state, the trial court may be bound only by the intermediate court that has the authority to review its decisions, or it may be bound by the decisions of any of that state’s intermediate courts of appeals that are not in conflict with the court that reviews its decisions.

An intermediate appellate court also must follow the decisions of the state’s highest court, but it is not bound by the decisions of the other intermediate courts because those courts are not superior to it, although these decisions usually will be very persuasive.

In addition, a state court is bound by the statutes of that state, as interpreted by its courts. Like case law, the statutes of one state do not bind the decisions of the courts in another state. If another state has a statute that is the same as, or has language similar to, the statute that controls your case, the interpretations given to that statute by the courts of the other state may be persuasive to the court of your state, but they are not binding on it. That is, the court may, but does not have to, follow the other state’s interpretation of the statute. If your case is not governed by either a statute or a judicial precedent from your jurisdiction, then look to precedents in other states, even though those precedents are persuasive only.

2. Federal Courts

The decisions of the Supreme Court of the United States are binding on all courts in all jurisdictions for matters of constitutional and other federal law. The decisions of the courts of appeals do not bind each other, even in cases in which the appellate court has interpreted a federal statute. For matters of federal law a court of appeals is bound only by its own decisions and those of the Supreme Court. A federal district court (the trial court) is bound by its own decisions, the decisions of the court of appeals of the circuit in which the district court is located, and the decisions of the Supreme Court. The district court is not bound by the decisions of any other district court, nor by the decisions of other federal courts of appeals. Again, as always, a court will take account of the decisions of other courts.

The federal and state systems intertwine at certain points. Questions of state law, either common law or statutory, often come to the federal courts in lawsuits between parties from different states, known as “diversity suits.” In diversity suits, the federal court must apply state law and thus follow the state courts’ decisions on state substantive law questions. A detailed discussion of problems related to federalism, that is, the relationship between state courts and federal courts and state law and federal law, is beyond the scope of this introductory explanation.
3. The Binding Nature of a Statute

The binding nature of a statute is somewhat different from that of a case because the entire statute is binding authority, and all the statutory requirements must be satisfied. This is not always as simple as it sounds, however. As indicated earlier, there may be case law interpreting the statute that tells you how to interpret the statutory language. The statute may contain internal contradictions that a court may have reconciled, for example, or a court may have decided that the legislature meant an “or” instead of an “and” in part of the statute. These interpretations affect the manner in which the statutory language is binding. In this situation, the statute and the case law interpreting its language are binding.

4. Holding and Dicta

A judge may decide to be bound by a precedent and to reach the same outcome in a case before the court when the causes of action are the same, the issues presented to the court for decision are the same, and the material facts are similar enough so that the reasoning of the earlier case applies. Even if there is such a similar case from a court that is binding on the judge’s decision, that judge is bound only by the holding of the previous decision. This is another limitation on the binding force of precedents in addition to the limitation that arises from a judge’s ability to overrule an earlier decision.

a. The Holding of a Case

The holding of a case is the court’s decision on the issue or issues litigated. The holding has been defined as the judgment plus the material facts of the case. Several other definitions of the holding exist. But whichever definition is used, the holding of a case must include the court’s decision as to the question that was actually before the court. That decision is a function of the important facts of the litigated case and the reasons that the court gave for deciding the issue as it did based on those facts.

Thus, the holding is different from general rules of law and from definitions. If a court in a contracts case says “a contract requires an offer and an acceptance,” that is a rule that has come from many years of contract litigation, but it is not necessarily a statement of the decision in the particular contract case before the court. In deciding a case, a court identifies the particular rule that controls the issue being litigated. Then it analyzes whether the facts of the case satisfy the requirements of the rule.

Rules come from many places. In addition to rules like the contracts rule just mentioned that comes from common law adjudication, rules may come from enacted law like statutes and administrative agency regulations. Rules also come from private documents like contracts, deeds, and leases.

For example, a particular contracts case may require the court to decide the issue of whether the defendant offered to sell goods to the other party. If the defendant did, and the other party accepted, then the general contracts rule of offer and acceptance requires the court to decide that the parties had entered into a contract. The court may also define some of its terms. If the court says, “an offer must manifest definite terms,” the court is defining an offer, one in keeping with a long line of litigation, but is not giving its holding. The holding might be “the defendant’s letter describing his goods and saying, ‘I am considering asking 23¢ a pound,’ was not an offer.” This statement decides the question before the court in terms of the facts of the case. A holding that includes reasons would add, “because the defendant did not convey a fixed purpose and definite terms.” The court is deciding that those facts did not fulfill the definition of an offer.

Parties rarely agree to any one formulation of a holding of a case. Indeed, there is no one correct way to formulate a holding. One source of difficulty is to determine which facts are essential to the decision. For example, in a false imprisonment case, the plaintiff may have been kept in a corner of a room by a black and white bulldog that growled. Your statement of the holding would not include the dog’s color because these facts would not have been necessary to the decision that the plaintiff was imprisoned. The breed of the dog may have been important, however, if its ferocity

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12 Sometimes the court first will have to decide what rule is the appropriate one to apply to the case.
led the plaintiff to believe that the dog would bite if he moved out of the corner.

Another source of difficulty is how to describe the facts, that is, whether to describe them specifically as they were in the case or to describe them more generally. For example, a more general descriptive category for the growling bulldog is as a dog, or more generally as a noisy household pet. These terms are broader because they include more types of animals and behavior than do the more narrow categories “dog” and “growled.” When you describe the facts too broadly, however, your description will include facts that may raise considerations that are different from those that the court took into account when it made its decision. For example, the description “household pet” includes a rabbit. And although a rabbit may cause fear in a person who hates rodents, the issue of whether that person’s fear is reasonable raises questions about phobia that are different from considerations about a dog’s ferocity.

Frequently, common sense will take you a long way in deciding how to determine a holding. Common sense will tell you that the fact that the defendant’s dog was black and white should not be important to the decision in the false imprisonment example, but that the breed of dog could be important because of its size or ferocity. Common sense will also tell you that “household pet” is probably too broad a description for false imprisonment purposes because the term includes white rabbits and goldfish. Beyond that, you will acquire the added experience and judgment that comes with being a law student and lawyer.

If you are recording the holding for objective purposes, such as in a case brief for class (see Chapter 2) or just to describe a case, then you may want to use more specific facts rather than broad categories. Often, however, you will describe a holding more generally. When you want to persuade a court that it is bound in a particular way by a precedent’s holding, you may need to describe the facts more generally in order for them to encompass your client’s situation. Courts have a good deal of freedom to decide what a precedent stands for, that is, what its holding was, and an important skill of the attorneys appearing before those courts is to formulate a holding in a way that is favorable to the client’s case. As you will see, this is an important skill for your writing assignments, and one we will emphasize throughout the book.

Sometimes the court itself will announce its holding. You should not always accept that court’s formulation, however. Make sure that the judge has not stated the holding too broadly or too narrowly and that the principle the judge has articulated was actually required for the resolution of that case. For example, if the court deciding the hypothetical false imprisonment problem had written, “We therefore hold that the defendant’s dog’s growling at the plaintiff was sufficient to constitute false imprisonment,” that court would have stated its holding too broadly. A literal application of this statement of the holding would permit liability if a person’s dog growled at someone on the street. The statement must be read in conjunction with the facts of the case that the plaintiff was kept immobilized in the corner of a room.

b. Dicta

There are many statements in a judicial decision that are not part of the holding and are not binding on later courts. These statements are called dicta. For example, the statement “but if the defendant’s cat had trapped the plaintiff in the corner of the room, the defendant would not be liable,” would not be part of the holding of the false imprisonment case we have hypothesized. This is so because the plaintiff was not trapped by a cat, and so that is not a material fact of the case. The court was illustrating the extent of its decision. Therefore, dicta about a cat in an earlier case concerning a dog would not bind a judge who had to decide a later case in which a defendant’s hissing cat had kept a plaintiff in a corner of a room.

Statements that are dicta are not always unimportant, however. Sometimes the dicta in a case become more important in later years than the holding of the case. Dicta is analogous to persuasive authority in that the statements may be persuasive to a later judge, but the judge is not bound to follow them. If the court later had to decide a false imprisonment case involving a cat, the court’s dictum in the earlier case would be very important to the later court’s decision.

When you write about judicial decisions, you will have to describe the action that the court took by saying that the court said something, or held something, or found something. You must be careful to use the correct verb. It would be incorrect to say “the
trial court held that the defendant’s car was traveling at ninety miles per hour” if this sentence states a finding of fact by a court. In that case, the sentence should be written, “the trial court found that the defendant’s car was traveling at ninety miles per hour.”

A sentence correctly describing the holding of this case might be written, “the court held that the defendant was guilty of reckless driving for driving ninety miles per hour in a forty-mile-per-hour zone.”

To describe a court’s dicta, you could use a verb such as “said,” or “stated,” or “explained.” For example, the hypothetical dicta used in the false imprisonment example, “but if the defendant’s cat had trapped the plaintiff in the corner of the room, the defendant would not be liable,” should not be preceded by the inaccurate statement “the court held,” but by a statement such as “the court said,” or “the court hypothesized,” or “the court limited its decision.”

Read the case decision below. Then choose the best statement of the holding from the five choices.

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C. Stare Decisis and Overruling Decisions

Although stare decisis implies that following precedent within a particular jurisdiction is mandatory, the doctrine as applied in the United States does not produce rigid adherence to prior decisions. Instead, a court has freedom to overrule its previous decisions and thus decide a case by a rule different from the one it had previously adopted.\(^\text{13}\)

One reason that a court may overrule a case is that the earlier decision has become outdated because of changed conditions. Other reasons are that the existing rule has produced undesirable results, or that the prior decision was based on what is now recognized as poor reasoning. Sometimes a changed interpretation reflects a difference in the views of the present judges on the court as compared with those of the previous court.

When a court overrules a previous case, that change in the law has no effect on the parties to the litigation that produced the prior decision, or on other parties whose rights have been determined under that precedent. Those results became final at the time of the last decision in those cases. Indeed, sometimes the change in the law will not affect the parties in the very case in which the court overrules the earlier decision. This result occurs when the court makes the new rule prospective, that is, applicable in future cases only.

Another means of overruling a judicial decision is by legislation. The legislature may change by statute a rule that came from a particular decision or a common law rule of long standing. This change in the law binds the courts within that jurisdiction.

A more literal interpretation of stare decisis would lead to a more rigid system of law than now exists in this country, or would require frequent appeal to legislative bodies to correct by statute undesirable or outdated judicial decisions.

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\(^{13}\) A court will not overrule the decision of a higher court, although cases exist in which a lower court did not follow a rule from a controlling higher court because that rule was very old and out-of-date. If a judge of a lower court were to refuse to follow the decision of a higher court, that judge's decision would no doubt be appealed.
V. Statutes and the Relationship Between Case Law and Statutes

Although this introduction has focused on case law, you should be aware that enacted law, especially statutory law, forms an ever greater part of the body of legal authority in our country. In fact, enacted law should be the first source in which you research a legal problem, as we discuss in this section.

Statutes are enacted by legislative bodies that are constitutionally empowered to exercise the legislative function within a jurisdiction. The federal legislative body is the United States Congress. Each state has its own legislature and also has municipal and, perhaps, county forms of legislatures. In addition, state and federal administrative bodies may have limited legislative functions in that they are empowered to enact regulations concerning the subject matter of their administration. These regulations provide another form of enforceable law.

Enacted law, like case law, falls along a vertical hierarchy. At the top of that hierarchy is the Constitution of the United States.
Next are both federal statutes and treaties. Federal statutes, when enacted within the powers conferred by the Constitution, take precedence over statutes of other jurisdictions. Then come federal executive orders and administrative regulations, state constitutions (a constitution, however, is the highest authority within a state as long as it does not conflict with federal law), state statutes, state administrative regulations, and municipal enactments.

A jurisdiction’s constitution and its statutes are the highest authority within that jurisdiction, and the courts are bound by them. A legislature may change the common law by passing legislation that changes the common law rule. That change then supersedes the old rule. A court cannot in turn overrule that legislative enactment and say it will not follow it (although it can invalidate it on the ground of unconstitutionality). The legislature may also create new causes of action that were not available in the common law but which result from the legislation, such as worker’s compensation laws and employment discrimination laws. A legislature may also enact a common law rule into statute; for example, many criminal statutes have codified what were previously common law crimes. Then the case law interpreting that common law rule may still be valid.

Because a jurisdiction’s constitution is more authoritative than its statutes, the legislature may act only within its constitutional powers. Although a court cannot overrule legislation, that is, it cannot decide it will not follow the law imposed by the particular statute, a court may review a statute’s validity. Legislation may be challenged in court on the ground that the legislature exceeded its constitutional powers. A reviewing court may then decide a statute is unconstitutional and is invalid.

Courts are constantly deciding statutory issues because statutes must be enforced and frequently must be enforced by litigation. A person’s challenge to the constitutionality of a statute, for example, will usually arise during litigation in which the government attempts to enforce the statute against that person.

More often, however, a court must decide not the validity of the statute, but how to apply the statute. As a necessary step in this litigation, the court may have to interpret the meaning of the statutory language in order to apply and enforce it in a specific situation. Cases that interpret and apply statutes are case law and become precedents in that jurisdiction. But they are not common law because the legal rule that is being enforced originates with the legislature. Common law rules originate with courts.

By its nature, legislation is cast in general terms, that is, in broad categories, because it is law written to affect future conduct, rather than law written to decide a specific case. General legislative language must then be applied to individuals and to the particular controversy being litigated. Statutory language may also be vague; for example, businesses cannot act in “unreasonable restraint of trade.” Thus, a good portion of a court’s work is deciding questions that involve the interpretation of statutes. The legislature could still have the last word, however. If it does not agree with the court’s statutory interpretation, it can amend the statute. In reality, however, a legislature rarely gives attention to the course of judicial interpretation of a statute, and even more rarely reacts to judicial interpretation by amending the statute.

When you are writing about a problem that is controlled by a statute of that jurisdiction, you should always include the exact statutory terms at issue and an explanation of those terms. The explanation usually should be at the beginning of your written analysis. Do not start writing about the problem as if the reader knows the statute’s terms unless you have been instructed to do so.

* * *
I. Introduction to Reading Cases

In your first year of law school, you will be analyzing cases in two contexts. First, you will be reading judicial opinions in casebooks for your doctrinal classes, and second, you will be reading cases in reporters\(^1\) for your legal writing classes. Decisions in casebooks and decisions in reporters look different. Opinions in casebooks are edited and omit both research tools that publishers insert and arguments irrelevant to the author’s purpose for including the case. In addition, the purpose of reading cases in a doctrinal class differs from the purpose of reading cases in legal writing classes—and indeed in legal practice.

A. Case Reading for Doctrinal Courses

One purpose in reading an opinion in a casebook is to understand that particular case in the event your teacher asks you about it in class. There are other equally important purposes:

- to understand the prevailing principles and exceptions in that area of law,
- to see how those principles evolved over time,
- to identify the conflicts in that area of law and the reasons and policies important to the courts’ resolutions, and
- to apply the decision in that case to hypothetical facts.

\(^1\) Judicial opinions are collected and published in volumes called reporters. They are also found online. We refer to both as reporters.
Thus reading in a doctrinal class requires you to put the case in context. You can begin to do this by examining the casebook’s table of contents to determine the topic and subtopic under which the case falls and the relation of that case to others in the section. It is useful to read the background information at the beginning of the section since it may provide an overview of the legal, historical, social, and political context of the cases. Equally helpful are the ‘Notes and Questions’ at the end of each section. These alert readers to some of the issues and conflicts in that area that have led to different resolutions or evolving trends. They also supply suggestions for added reading that may flesh out that area of law.

B. Case Reading for Legal Writing Classes and Legal Practice

Your purpose in reading cases in practice and in legal writing classes is somewhat different from reading cases in your other classes. Here, you read to see what impact a case will have on your client or a hypothetical fact pattern in legal writing classes. As in a doctrinal class, you need to understand the case, but your primary interest is in predicting what effect that case might have on your client. Reading with this specific goal is both easier and harder than casebook reading. It is easier because you focus on cases within a particular jurisdiction. There is a good chance that there is more consistency in the rules and standards within that jurisdiction than in opinions in a casebook, which span jurisdictions. On the other hand, it is harder because the cases in reporters are unedited and may include several issues, some of which may be irrelevant to your problem. Thus you must learn to read selectively, focusing only on the issues in a case that bear on your problem.

II. Reading Strategies

For a beginner, reading law is hard. The cases may contain legal terms that are foreign to you and they may have an unfathomable structure. Moreover, because you are not familiar with the subject matter, you may have difficulty in recognizing and separating complicated procedural issues from compounded substantive law issues, or main points from minor arguments, or holding from dicta. Thus try to develop reading strategies that will help you navigate the text.

A. The Structure of a Case in a Reporter

You will be able to understand a case more readily if you understand its structure and organization.

- The first thing you read is the caption. The caption gives you the name of the case (meaning the parties), the court, and the date of the decision.
- After this comes a synopsis of the case. The synopsis is written by the publisher, and because it is not part of the opinion proper, it should never be quoted or cited as authority. Use it instead as a research tool that may help you decide if the case is relevant to the issue you are researching.
- Following the synopsis comes another research tool publishers like West insert, namely, the headnotes. Each West headnote is categorized by topic indicated by a name and number (e.g., negligence 272) and subtopic indicated by a key number (e.g., 1024 preceded by a key sign). The headnote then summarizes a legal issue in a few sentences. Experienced lawyers skim the headnotes to decide if the case is on point and then may use the Westlaw key numbers digest system to find more cases on point. In the West research system, each topic and key number will lead you to other cases on that particular topic of law.
- Below the headnotes are the names of the attorneys of record.
- This is followed by the name of the judge who wrote the decision.
- The opinion itself begins after the judge’s name.

Although the structure of opinions differs, most decisions have a basic pattern.
They begin with an introductory paragraph that articulates the issues and the court's disposition of the case. This paragraph is usually followed by the fact statement, which includes the facts that created the dispute, as well as the procedural history of the case and the decisions below. Only after the facts does the court begin its analysis.

The analysis often begins with a summary of each party's arguments, although sometimes only the losing party's arguments are given, as well as the court's reasons for rejecting them. At other times, however, the analysis begins with an introduction to the issues and then proceeds to analyze the issues one by one. The court usually begins with the relevant legal standard and follows with its rationale. The rationale may include discussion and application of relevant legal authority as well as policy arguments. Among the policy arguments that a court might raise to bolster its decision are the following:

- Social good arguments, which ask whether a rule advances or undermines moral principles, social goals, or justice.
- Economic arguments, which are concerned with the efficient allocation of resources.
- Institutional competence arguments, which examine the proper role of government branches.
- Judicial administration arguments, which assess the practicality or impracticality of a rule.

(For more on policy arguments, see Chapter 11, Part IV.)

You should also attempt to discern those parts of the analysis that are dicta, that is, statements about issues tangential to the case before the court and unnecessary to its decision. Although dicta is not binding, you may want to use it as persuasive authority. It provides guidance as to what future courts may hold.

What follows is an annotated, abridged opinion, reproduced from its online publication. The material in the right margin outlines its parts, structure, and types of arguments. The issue is whether a bystander may recover for negligent infliction of emotional distress when the bystander is outside the zone of danger of being struck by the negligent force.

* * *
B. Contextualizing the Case
Once you are familiar with the structure of a published decision, begin your reading by putting the case in context.

- Note the date of the case and the court since, for example, a recent case decided in Massachusetts will have different connotations from an early 20th century case.
- Turn to the end and read the disposition. Knowing the court’s conclusion will help you follow the court’s reasoning.
- Skim the decision, identifying the key issues and thinking about which parts are critical to your purpose in reading the case. Are all the issues relevant? If you are reading a case for its discussion of a question of law, then its facts and the factual discussion may not be critical. If you hope to use the case for factual analogy, however, these parts are crucial.
- Finally, determine what you know about the area of law. Have you read about this topic in a doctrinal class or in a treatise or hornbook? Does the law in your jurisdiction comport with or depart from what you know? Is this the first case you have read for a legal writing assignment or the fifth? If the topic is new, read the case especially carefully because there may be many unfamiliar principles you need to master. If you have already researched and read other cases, you may have a better sense of the big picture, but you still need to think about how the cases fit together, that is, you must synthesize them. Ask yourself the following types of questions.

1. Do all the courts in your jurisdiction apply the same rule or do the courts differ?
   How are the rules different?
2. If the highest court has not resolved the conflict, can you reconcile the holdings?
   Is one rule an extension or exception to the general rule?
   Do later cases seem to adopt one rule rather than another, i.e., is a trend emerging?

C. Reading as a Creative Activity
Reading law is an active rather than a passive activity. The most successful law students are those who acknowledge confusion and attempt to work through it. When they encounter unfamiliar terms and cannot infer the meaning, they use a legal dictionary. When they make inferences, they check whether the inferences were correct when they have finished the case. They reread sections that seem unclear, or read ahead to see if later discussions help to clarify earlier confusion. In short, they read, reread, paraphrase, and question the text to achieve understanding.3

When you read the fact statement in an opinion, pay attention to the facts that caused the underlying dispute as well as the procedural history of the case. Often this requires you to notice how the case came up through the courts, what arguments the parties made below, and what the lower court decided and why.

Once you are clear about this, the truly creative task of reading begins. Reading the analysis section is a multi-dimensional task that requires you to do the following:

- understand the case in and of itself;
- evaluate the soundness of the court’s reasoning; and
- determine how the case applies to your client’s situation.

Your understanding of a case will improve if you annotate the parts, issues, and types of arguments in the same manner as the annotated case in the previous section. But you should engage with the text as well, working at what is confusing, predicting the court’s arguments and conclusions, identifying the rule that the court applies, and hypothesizing about its possible interpretations.4

As you read, consciously monitor your predictions and hypotheses, refining or modifying them as necessary.

4 Ruth Ann McKinney, supra n. 2 at 212.
CHAPTER 2

In addition think about the impact the case will have on your client. Does it support the outcome the client desires because your case is either factually similar or comes within its legal principles? Do you need to minimize the importance of the case, and if so, can you do so because of factual differences, weaknesses in the court's reasoning, or changes in society?

Evaluating cases may require you to evaluate the soundness of the court's reasoning. Ask yourself whether the court overlooked parties who might be affected by its decision, minimized or ignored important policies, or failed to do justice. Look for unfounded assumptions or gaps in reasoning. These weaknesses are important because you may, if necessary, be able to use them to persuade a court that an unfavorable precedent should not control.

D. Case Briefing: Finding the Parts of a Judicial Decision

Once you have read a case using the strategies described in the previous section, it is a good idea to brief it. A case brief gives you a framework for organizing and summarizing the elements of the opinion. Although there is no one format for briefing cases, the typical components of a case brief are explained below.

1. Facts

The fact section describes the events between the parties that led to the litigation and tells how the case came before the court that is now deciding it. Be specific about the facts.

- First, include those facts that are relevant to the issue the court must decide and to the reasons for its decision. You will not know which facts are relevant until you know what the issue or issues are. For example, in the Sinn case, the issue is whether a mother can recover damages for negligent infliction of emotional distress caused when she saw her minor daughter struck and killed by an automobile, though she was not within the zone of danger. Relevant facts include the plaintiff's relation to the victim, the plaintiff's actually viewing the accident at the time it happened, and the plaintiff's acute distress as a result.
- Second, include who the plaintiff and the defendant are, the basis for the plaintiff's suit, and the relief the plaintiff is seeking.
- Third, include relevant background information for the case. This might include significant facts about the parties' employment, economic bracket, recreational activities, or state of mind.
- Fourth, include the procedural history, although you may put the procedural facts under a separate heading. Procedural facts should include any dispositive motions, such as a motion to dismiss for failure to state a claim or a motion for summary judgment. If the case is an appeal, state the lower court's decision, the grounds for that decision, and the party who appealed. Often you have to understand the procedural posture of a case in order to understand the court's decision. For example, if the appeal is from a successful motion to dismiss, then the appellate court will decide whether the plaintiff's pleadings stated a claim and whether the plaintiff should be permitted to continue the lawsuit. The appellate court will not decide who should win the lawsuit if it continues.

2. Issue(s)

The issue is the question that the court must decide to resolve the dispute between the parties in the case before it. To find the issue, you have to identify the rule of law that governs the dispute and ask how it should apply to those facts. You usually write the issue for your case brief as a question that combines the rule of law with the material facts of the case, that is, those facts that raise the dispute.

3. Holding(s)

The holding, as was explained in Chapter 1, is the court's decision on the question that was actually before it. The court may make a number of legal statements, but if they do not relate to the question
actually before it, they are dicta. The holding provides the answer to the question asked in the issue statement. If there is more than one issue, there may be more than one holding.

4. Legal Rule and Reasoning

State the rule and the court’s explanations of it. Also supply the court’s reasoning for its decision, i.e., why it applied the controlling rule as it did. Sometimes the issue in the case may involve the validity of the rule itself, and the court may have looked at two lines of authority and decided the case was more like one group of cases than another. Or the court may have decided that the policy justifying a rule was no longer valid, or may have concluded that the facts of this particular case required an exception to the rule. In any event, isolate the court’s reasoning from the facts and the holding of the case.

5. Policy

Underlying legal decisions are the social policies or goals that the decision-maker wishes to further. When a court explicitly refers to those policies in a case, include that information in your case brief, since it will probably help you understand the court’s decision. If the court does not explain the policies on which it based its decision, then try to identify them for yourself.

6. Reflection

After you identify these important parts of a court’s opinion, spend some time evaluating what you are reading. This is the best preparation for your classes and for your writing. For example, think about the appropriateness of the legal rule that the jurisdiction has adopted and that the court applies. Consider the court’s application of the rule to the facts of the case and the logic of the court’s opinion.

- Are there relevant issues that the court did not address?
- Is there a dissenting opinion that gives a different perspective on the law or the facts?

Finally, to prepare for class, think of how changes in the facts might change the court’s decision. To prepare for your legal writing assignment, think about the impact this case will have on your client and how you can most effectively use it to your client’s advantage.
I. Introduction to Reading Statutes

Just as you should know how to read and analyze a judicial opinion, so should you know how to read and analyze a statute. And just as there are layers of analysis involved in analyzing case law, from briefing a single opinion to synthesizing a group of related cases, there are layers of understanding involved in statutory analysis.

First, you need to understand the structure of the statute, which requires understanding its parts, their relationships, and the elements of individual sections. Second you must understand the language of the statute, such as words of authority—which tell the reader whether the provision is imposing a duty, like “shall” or “must,” prohibiting an action, like “shall not,” or permitting an action, like “may,”—and words that have special meaning because they are defined in the statute itself or by courts interpreting the statute. Lawyers read statutes either online or in a commercial publisher’s unofficial edition of each jurisdiction’s code. These publications arrange statutes by subject matter, organize them in numbered chapters or titles, provide citations to the cases that interpret the statute, and give other information, such as legislative history. Finally, you need to determine whether and how the statute applies to your case and what the precise statutory issues are.

II. The Structure of a Statute

A. The Structure of a Whole Statute

Although many assignments involve only one section of a larger statute, you should look at that section within the context of the statute as a whole.
1. Title and Preamble

Start by reading the title of the statute, which can help you understand its area of application. For the same reason, read the preamble or statement of purpose that follows the title. The statement may tell you, for example, whether the statute was written to codify the existing common law. If so, then the case law decided prior to the enactment of the statute should still be authoritative. If the statute was written to change the common law, then case law prior to it will no longer be controlling, although cases decided after its enactment will be. The statement may also include the underlying purpose of the statute in order to provide guidance to administrators and courts: for example, it may declare the statute is remedial, intended to provide broad relief, and meant therefore to be interpreted broadly.

2. Body

Also skim other sections of the statute to see if any of them affect your problem. Statutes have substantive provisions that set out rights, duties, powers, privileges, and exceptions. You would not want to overlook an exception that might pertain to your client’s situation. They might also have administrative sections that either create or identify an agency responsible for the statute’s enforcement and that outline procedures that entity must follow. If a statute gives an agency the power to draft regulations implementing its provisions, you will need to read those regulations also. It may be that your client has both a substantive and procedural claim under the statute.


Frequently overlooked, but important to know, is the date that the statute took effect. This is called the effective date provision, usually found at the end of the statute. It may be crucial: for example, the statute may not have been in effect at the time of the conduct at issue in your problem. Other provisions at the end of the statute may include sunset provisions, which suspend the operation of a statute on a given date; savings clauses, which ensure the statute applies prospectively only; and severability clauses, which declare that if one part of the statute is held invalid, the rest remains in effect. One of these miscellaneous clauses might also raise an issue in your case.

B. The Structure of a Provision

Statutory provisions are often hard to read. The sentences are frequently so long that is hard to identify the relationship between clauses or the elements that must be proven. Sometimes the drafter helps a reader parse the sentence by using tabulated sentence structure, which shows the relationship between parts of the sentence graphically.

<table>
<thead>
<tr>
<th>‘Severe Physical Injury’ means:</th>
</tr>
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<tbody>
<tr>
<td>1. brain injury or bleeding within the skull;</td>
</tr>
<tr>
<td>2. starvation;</td>
</tr>
<tr>
<td>3. physical injury that creates a substantial risk of death; or</td>
</tr>
<tr>
<td>4. physical injury that causes permanent or protracted serious</td>
</tr>
<tr>
<td>a. disfigurement,</td>
</tr>
<tr>
<td>b. loss of the function of any bodily member or organ, or</td>
</tr>
<tr>
<td>c. impairment of the function of any bodily member or organ.</td>
</tr>
</tbody>
</table>

The tabulation aids in seeing that there are four main ways to establish a severe physical injury, and three ways to establish a serious permanent or protracted physical injury. Tabulated sentences also help to clarify the alternative (‘or’) or cumulative (‘and’) nature of the tabulated items. If the parts are connected by the disjunctive ‘or,’ only one of the parts needs to be proven. If the parts of a provision are connected by the conjunctive ‘and,’ then all parts must proven. The use of the disjunctive above makes it clear that the prosecutor need prove only one type of severe physical injury because the definitions are connected with ‘or.’ For the same reason, the prosecutor must prove only one type of permanent or protracted injury if the case depends on the fourth type of injury. The statutory requirements that must be proven are the elements of the statute.

Sometimes, a statutory provision is written in paragraph form and it is helpful to tabulate the sentence in your head or on paper to see how all the parts fit together.
§ 1. A person is guilty of burglary in the third degree if he knowingly and unlawfully either enters or remains in a building, and does so with the intent to commit a crime.

To determine the elements that the prosecutor must prove for burglary, break the statute into its constitutive parts.

Under the language of § 1, a person needs either to have entered a building or remained in a building in order to be guilty (the disjunctive establishes that only one is required). In addition, the person must have done so knowingly and unlawfully (the conjunction requires proving both). Finally, the person must have intended to commit a crime. The final ‘and’ after item (b) makes it clear that the prosecutor needs to prove all three parts to determine whether a defendant has violated the statute.

Sometimes an exception to the rule is embedded in a provision.

Regulations Concerning Dogs on Private Property: A person who owns or has custody of a dog shall not allow it to go on private property without permission of

3. the occupant, or
4. if the property is vacant, the owner of the property.

Exception:
Permission is not required if the private property is open to the public.

This statute may be redrafted as

1. A person who
   a. owns or
   b. has custody of a dog
shall not allow the dog on private property that is not open to the public without permission of
   c. the occupant or
d. if the property is vacant, the owner

* * *