Textbooks for paralegals usually include court opinions and this textbook is no exception. Court opinions begin with litigation initiated by an aggrieved party who files a complaint or petition in the office of the clerk of the trial court. This court is often named the district court, but not in all cases—for example, in New York the trial court is the Supreme Court. At trial, both questions of fact (i.e., was the light red or green?) and issues of law (i.e., should a minor have the right to disaffirm a contract and, if so, when?) are determined. Questions of fact are resolved by the jury unless the trial is without a jury (bench trial)—in which case questions of fact are resolved by the judge. Issues of law are decided by the judge.

If a party appeals, alleging an error committed by the trial court, an appellate court will review for the alleged error. The review of questions of fact carries a much higher standard of review as compared with the review of issues of law; questions of fact, therefore, are generally not appealed. Since most published state court opinions are from an appellate court, they generally deal exclusively with issues of law.

Court structures differ from state to state. Some states have a two-tier judicial system—a trial court and one appellate court. Some have three tiers—a trial court, an intermediate appellate court, and a higher appellate court. Some have more complicated systems (e.g., some types of cases are appealed to an intermediate appellate court while others are appealed directly to the higher appellate court; or all cases are appealed to the higher appellate court and that court either retains or transfers the case to an intermediate appellate court).

Not all opinions have the same precedential value. An opinion from a state’s highest court has more precedential value than an
opinion from that state’s intermediate appellate court. The justices of the highest court have the final word and intermediate appellate court judges may feel reluctant to forge new precedent, knowing that their decisions may not be upheld by the highest court.

With a few exceptions (e.g., New York), most state trial court opinions are not published. Federal trial court (United States District Court) opinions may be published if the federal district court judge deems publication appropriate.

Textbooks for paralegals often include statutory material. Both judicial opinions and statutes are the primary authority and are used extensively in preparing a client’s case for most forms of dispute resolution—litigation being only one of these. Even when preparing only to negotiate, for example, knowing the law (relevant judicial opinions and statutes) is essential.

HOW TO BRIEF A CASE

Students must dissect assigned cases to be able to participate in and follow the class discussion. One outline form for dissecting judicial opinions is called a “brief.” Some instructors require students to read their written briefs in class. Most assume that students have written a brief prior to class. The information generated in a brief is usually the focal point for classroom discussion.

Many instructors give students guidance on how to brief for their class. Students may find it convenient to use the following briefing format as the starting point, refining it to conform to each instructor’s suggestions. This format uses the headings “Case Name,” “Pre-Trial Facts,” “Action,” “Decision(s),” “Issue,” “Rule,” “Application,” and “Conclusion.”

Case Name

The case name, jurisdiction, court, year, and page in the casebook are written in this order.

Example A–1


Use A Uniform System of Citation as the guide to case names.

Pre-Trial Facts

State the key facts. Omit non-key facts.

“A fact in an opinion is a key fact when the result in the opinion would have been different if that fact had been altered.” W. Statsky & R. Wernet, Case Analysis and Fundamentals of Legal Writing 164 (1977).
For many courses, the key facts are prelitigation facts—those facts that led to the lawsuit. The filing of the lawsuit is discussed under “Action,” and the various judicial decisions for that case are discussed under “Decisions.” The brief, under this format, follows events in chronological order.

At the prelitigation stage, neither a plaintiff nor a defendant exists. Do not, therefore, refer to a plaintiff or to a defendant in the statement of the facts. Refer to the disputants by name. Referring to the disputants as plaintiff and defendant at the prelitigation stage violates **Cardinal Rule #1** (see Exhibit A–1).

The statement of facts should be long enough to trigger an accurate recollection of the case but short enough to represent a substantial condensation of the court’s statement of the facts. The entire brief should be no longer than one page (if at all possible). An excessively long brief violates **Cardinal Rule #2**.

**Action**

The action step covers who is suing whom, the name of the action, and the nature of the relief requested.

**Example A–2**

Laredo Hides sued H&H for breach of contract seeking specific performance and damages.

The “who is suing whom” designates the disputants by name rather than “plaintiff sued defendant.”
The “name of the action” or “cause of action” is separated from the “remedy.” For example, breach of contract is a cause of action; specific performance is a remedy; negligence is a cause of action; damages is a remedy.

Remember, the “Action” step in the brief is the entry into the trial court. The trial court is where the lawsuit is initiated (by complaint or petition) and the trial held. Including extraneous material in “Action” violates Cardinal Rule #3.

**Decision(s)**

The decision step involves highly technical material that flows in chronological order.

Look ahead to what the appellant is alleging as the trial court’s error. The appellant will complain that the trial court erroneously sustained the opposing counsel’s demurrer, motion for summary judgment, motion for judgment not withstanding the verdict (judgment n.o.v.), or motion for a new trial—or erroneously overruled his or her own demurrer or motion. Begin the “Decision(s)” section of the brief with a statement regarding this procedural move (that is, error asserted). Follow with the trial court’s resolution of this procedural move, the outcome of the case, and who appealed.

Next, consider the first appellate court and how the case was resolved on appeal. If the case has been appealed to a still higher court, who appealed and how was the case resolved?

Begin each sentence with the name of the court followed by what that court did. Do this for each court.

**Example A–3**

The District Court (without a jury) sustained Smith’s motion for summary judgment. Jones appealed. The Texas Court of Civil Appeals reversed and remanded the case for trial.

**Issue**

The issue has two components:

(1) The key facts to which the rule will be applied
(2) The applicable rule

An issue that omits either the fact or the rule component violates Cardinal Rule #4.

State the issue in one sentence in question form. An issue not stated in one sentence violates Cardinal Rule #5.
Work enough facts into the issue so that the brief still means something two weeks after the case is briefed.

If the case involves several issues, state the issue, rule, application, and conclusion for the first issue. Repeat these steps for subsequent issues.

**Rule**

The rule is the legal statement that governs the resolution of the issue. The rule may emanate from the United States Constitution, a state constitution, or the Bill of Rights—or from a statute, an ordinance, an administrative regulation, or a prior case (case law). Because the rules form the structure for the substantive or procedural area being studied, students must think about how these rules relate to one another.

**Application**

Apply the rule to the facts. By the time the application step is reached (because this is an appellate case, it will emphasize the law rather than the facts), the application in most cases is straightforward.

**Conclusion**

The conclusion returns to the issue and states how the issue is resolved based on this set of facts. A brief that states only a conclusion and omits the rule and application violates **Cardinal Rule #6**.

In briefing, do not merely rewrite the court's opinion. Think about what is said and put it into the briefing format in your own words. Some judicial opinions have shortcomings. Astute briefing identifies these shortcomings. A brief that merely restates the court's opinion violates **Cardinal Rule #7**.

Do not rewrite the court's opinion to the extent that the brief no longer follows the court's rationale. (If the opinion is resolved by common law, for example, do not use the Uniform Commercial Code in the brief.) A brief that disregards the court's rationale and goes its own merry way violates **Cardinal Rule #8**.

Once the brief is completed, consider what you would have done if you had been the court. Specifically:

1. Is the court deciding the appropriate issue?
2. Is the court using the appropriate rule?
3. Is the application of rule to facts correct?
4. Based on social and economic needs of the community, is the rule sound? Should a different rule be promoted? If so, what would it be and why?
Postscript

A memorandum of law is organized around the “Issue,” “Rule,” “Application,” and “Conclusion” format of briefs. Begin with the issue. The issue would be followed by the rule, the application of rule to facts, and the conclusion for that issue.

If the memorandum has more than one issue, begin the next section with the next issue, continuing in this manner until all issues are covered. As students develop their briefing technique, they are also developing their writing technique.

HOW TO ANALYZE CONSTITUTIONS, STATUTES, REGULATIONS, AND OTHER RULES

Law in the form of constitutions, statutes, regulations, executive orders, and ordinances comes into existence focusing not on one dispute but on a number of pending and hypothetical disputes or concerns. It is created in a deliberate process. Hearings are often held to gain information to enable the drafter or drafters to fully comprehend the problem and write a law that will apply to a range of situations. As a result, the law often appears cumbersome because it aims not at one target but at multiple targets.

As you research constitutional provisions, statutes, and other rules, you must dissect them in order to understand them thoroughly. The following outline uses a decision tree approach. This approach is helpful in identifying the various components of the law and how they relate to one another. Does all the language of a statute apply to each problem governed by the statute? If not, which phrases apply and which do not?

Your initial task is to find the elements of the law that apply to the problem. The simplest form of law will have all the elements arranged linearly with no choice between elements.

Example A–4

The Uniform Commercial Code § 2–201(2) provides:

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

A writing satisfies the requirements of section (1) of 2–201 against the party receiving it if the following conditions are met:

1. The writing was sent between merchants.
2. The writing was received within a reasonable time.
3. The writing is sufficient against the sender.
4. The party receiving the writing had reason to know its content.
5. The party receiving the writing has not given written notice of objection to the writing's contents within 10 days after receiving it.

A decision tree of 2–201(2) would be a straight line because there are no choices within the statute (see Exhibit A–2). All elements of the statute must be satisfied for it to be applicable.

To develop a decision tree that has a number of choices, divide the statute by using the word “or.” Each “or” indicates a branching of the tree. Choose one branch or the other. Since “or” is disjunctive, only one branch is used when resolving a dispute. By applying the facts to each decision as the tree branches, the appropriate path through the statute is found.

### Example A–5

The Uniform Commercial Code § 2–104(1) defines the term “merchant” when used in transactions that involve a sale of goods.

“Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

This definition uses “or” eight times. Since “or” is disjunctive, some phrases in this statute will be applicable to some problems and some to others. The trick is to identify which phrases apply to which problems. Tracing the various branches in section 2–104(1) shows that a person could be a merchant if he or she fits into one of eleven different scenarios (see Exhibit A–3):
1. He or she is a person who deals in goods of the kind involved in the transaction;
2. He or she is a person who by his or her occupation holds himself or herself out as having knowledge peculiar to the practices involved in the transaction;
3. He or she is a person who by his or her occupation holds himself or herself out as having knowledge peculiar to the goods involved in the transaction;
4. He or she is a person who by his or her occupation holds himself or herself out as having skill peculiar to the practices involved in the transaction;
5. He or she is a person who by his or her occupation holds himself or herself out as having skill peculiar to the goods involved in the transaction;
6. He or she is a person to whom such knowledge may be attributed by his or her employment of an agent who by his or her occupation holds himself or herself out as having such knowledge;
7. He or she is a person to whom such knowledge may be attributed by his or her employment of a broker who by his or her occupation holds himself or herself out as having such knowledge;

8. He or she is a person to whom such knowledge may be attributed by his or her employment of another intermediary who by his or her occupation holds himself or herself out as having such knowledge;

9. He or she is a person to whom such skill may be attributed by his or her employment of an agent who by his or her occupation holds himself or herself out as having such skill;

10. He or she is a person to whom such skill may be attributed by his or her employment of a broker who by his or her occupation holds himself or herself out as having such skill; or

11. He or she is a person to whom such skill may be attributed by his or her employment of another intermediary who by his or her occupation holds himself or herself out as having such skill.