

MANDATORY V. PERSUASIVE CASES

BY BARBARA BINTLIFF

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Teachable Moments for Students ... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a “teachable moment,” a brief window of opportunity when—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the Teachable Moments for Teachers column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own “teachable moments for students” to the editor of the column: Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

It’s pretty typical for law students, especially first-year law students, to get so involved in a legal research project that they forget what they’re really doing. They find law review articles, statutes, cases, treatises, and encyclopedia entries on their topic, and yet don’t know which to use or why to use it. They lose sight of the fact that, in the end, most legal research is a search for authority, something that will cause a court to decide in your favor or, better yet, that will cause your opponent to settle a case in your favor before it gets to court. Authority comes in several versions: primary and secondary, mandatory and persuasive.

Primary authority is that coming directly from a governmental entity in the discharge of its official duties. Primary authority includes documents like case decisions, statutes,

regulations, administrative agency decisions, executive orders, and treaties. Secondary authority, basically, is everything else: articles, Restatements, treatises, commentary, etc. The most useful authority addresses your legal issue and is close to your factual situation. While decision makers are usually willing to accept guidance from a wide range of sources, only a primary authority can be mandatory in application.

Just because an authority is primary, however, does not automatically make its application in a given situation mandatory. Some primary authority is only persuasive. The proper characterization of a primary authority as mandatory or persuasive is crucial to any proceeding; it can make the difference between success and failure for a client’s cause. This is true of all primary authority, but this column will address case authority only.

Determining when a court’s decision is mandatory or persuasive can be tricky, given the multiple jurisdictions throughout the country and the layers of courts within each jurisdiction. Our court systems are founded on the belief that there should be fairness, consistency, and predictability in judicial decision making. The doctrine that expresses this concept is labeled *stare decisis*. In essence, *stare decisis* considers mandatory, or binding, an existing decision from any court that exercises appellate jurisdiction over another court, unless the lower court can show that the decision is clearly wrong or is distinguishable from the case at hand.

The following is a brief explanation of when the decisions of a particular court should be characterized as mandatory or persuasive. It deals only with the decision of the majority of the court; no matter how appealing in content, dicta, concurrences, and dissents will always remain persuasive.

When Decisions Are Mandatory

Whether a decision of a particular court is mandatory, whether it must be followed by another court, depends on the source of the decision. As a general rule, the decisions of a court will be mandatory authority for any court lower in the hierarchy. Decisions from a court lower than the one in question are never mandatory.

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Federal Courts

United States Supreme Court—The decisions of the United States Supreme Court are mandatory authority in all courts, federal and state, when the decisions cover points of federal law.

United States courts of appeals—Decisions of the U.S. courts of appeals are mandatory on district courts and other lower courts within the circuit. Court of appeals decisions are persuasive authority in the other circuits, both for other courts of appeals and for lower courts. Federal courts of appeals decisions are not binding on state courts.

United States district courts—The decisions of U.S. district courts are mandatory on specialized lower courts if within the appellate jurisdiction of the district court (i.e., bankruptcy, territorial courts, etc.). District court decisions are not binding on state courts.

State Courts

State supreme courts, on decisions of state law—The decisions of a state supreme court on that state’s laws are mandatory authority for all lower courts in that state. State supreme court decisions will also be binding on federal courts that are interpreting the state’s law under diversity jurisdiction.

State appellate courts, on decisions of state law—Decisions of state appellate courts, when adjudicating that state’s laws, are mandatory on all lower courts in the state. (Note: In some states, the appellate courts are divided into circuits or panels. If this is the case, decisions of an individual circuit or panel most likely will be binding within the jurisdiction of that circuit or panel, and will be persuasive authority for other courts in the state. Check the court rules or case law in the state involved to understand how the system works.)

State trial-level courts—State trial-level decisions will be mandatory authority only if the trial-level court exercises review over a lower court’s decisions. For example, in many states, parties can have a review or rehearing of cases originally heard in the county courts, traffic courts, or municipal courts.

When Decisions Are Persuasive

A court’s decision can be used as persuasive authority in any state or federal courts that do not need to consider it mandatory. It is important to remember, however, that the degree of persuasiveness will vary, dependent on a wide range of considerations. For example, as a practical matter, the interpretations of federal laws by the federal courts of appeals and district courts might as well be mandatory on the state courts within the same jurisdictions, in situations where the state courts are interpreting federal law. That is, if a state court is hearing a case in which a federal claim is a part of a larger state claim, the state court will generally consider itself bound by the decisions of the U.S. district court of that state and the corresponding federal court of appeal on the federal matter.

Factual similarity is key to choosing among persuasive decisions; if the legal issues are the same, the decision based on the most closely matching factual situations will usually be the stronger persuasive authority. Other factors affecting the degree of persuasiveness of a decision include whether the opinion was particularly well reasoned, the stature of the jurist who authored the opinion, and the level of the court from which the decision came.

Courts frequently consider the larger context when choosing among persuasive decisions. A typical situation in which decisions from one state may be highly persuasive on another is where both states share a specific doctrine. For example, Texas courts may find decisions of Wisconsin courts in marital property cases quite persuasive because both states adhere to community property law. Rarely would either state consult its neighboring states on marital property law; both have neighbors that are common-law marital property states. In most other situations, however, Texas courts might find Oklahoma or Arkansas decisions more persuasive than those of Minnesota or Illinois (Wisconsin’s neighbors), because demographic, geographic, or historic similarities may have led to the development of similar legal doctrines among neighboring states. Similarly, whether a state has adopted a particular uniform law can affect the persuasiveness of its decisions. Federal courts, too, look at the larger context when choosing among the range of persuasive decisions to consult.

Of course, a case cannot serve as precedent unless it is identified by the attorney and applied correctly in the case. Every time a case of interest is located, the researcher needs to ascertain whether it is mandatory or persuasive. Obviously, it's preferable to rely on a mandatory case than on a persuasive one. If only persuasive, its degree of persuasiveness must be identified. Reliance on

many marginally persuasive cases will do much less good than reliance on one or two highly relevant ones. Efficient and effective legal research will allow you to locate the most relevant and persuasive cases available.

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CASE AUTHORITY: A TEACHABLE MOMENT AT THE LAW FIRM LIBRARY

BY RACHEL W. JONES

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Every summer, law firm reference librarians work with a group of eager, need-to-know patrons: summer associates. Because these associates are auditioning for permanent, well-paid positions, they are motivated and ready to learn. Astute librarians will recognize that summer associates' research requests present a multitude of teachable moments.

Last summer, a summer associate asked me to compare Shepard's® and KeyCite®—and tell him whether one service was more authoritative than the other. Our reference staff attempts to be unbiased when these inquiries come before us. I replied, "In the ideal world, with unlimited time and resources to get research done, I would advise using both services." The associate and I quickly got into a discussion about case authority, because the two printouts appeared to be quite different. He wanted to know what he should focus on when analyzing these reports. I had escaped the "great debate" about which service is better, but I recognized a significant teachable moment within his question about these reports: Just how authoritative is the information in these lengthy printouts?

Citator services are well suited to online searching. We haven't had print Shepard's in our firm's library for a number of years. Case history

and subsequent treatment is now just one click away from the case being consulted. The process of determining authority should be easier than ever, and yet, I believe that today's citator services create more opportunities for the newly initiated legal researcher to get on the wrong track. All too often new researchers defer to the graphic flags and signals of online citation services and neglect to read cases in their entirety. Today's hypertext environment and term locator features encourage online researchers to browse for "hits" rather than to read documents comprehensively. Reading cases carefully and critically, however, is the key to placing cases in context, determining which law applied and which cases are mandatory versus persuasive. Citator services can only report status; it is the researcher's responsibility to place this information in perspective. The summer associate sees where I am going with this teachable moment.

Citator services lead you to the appropriate authority when your research framework is sound. Before going online, determine what entity has authority in the area being researched. Then focus your attention on the highest level of authority on point, in the required jurisdiction, that has not been overruled or modified, or in the case of statutory authority, amended or repealed. While the flags and signals of online citators provide valuable guidance, you must draw your own conclusions about the significance of the history or subsequent treatment of a given case. The summer associate and I agreed: Searching and researching is not the same thing! This teachable moment concluded with a sense of renewed appreciation that online browsing cannot substitute for sound legal research methodology and careful analysis.

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