PLG-120 Week 5 Lecture Notes

This is a discussion of how to read and analyze multiple authorities, including statutes, rules and regulations, court orders and opinions, to determine the rule of the law that applies to your issue in your jurisdiction. To do this, you must build on the following, which have already been covered:

- You must know which of your sources are primary authorities and which are secondary.
- You must understand the holdings of the cases you have found and their applied rules to determine their place in the body of controlling or potentially controlling law you are constructing on the issue.
- You must understand what was dicta in these cases, so that you can start building up a store of persuasive authority on the issue.
- You must understand the hierarchy of judicial authority in your jurisdiction so that you can properly rank the cases you have found.
- You must understand the priority of statutes and regulations and how to deal with subsequent interpretations of these sources by cases and legal commentators.

A collection of sources must be ordered in terms of priority between primary authorities and secondary authorities and potentially controlling authorities and non-controlling or persuasive authorities. Then you can determine which authorities, if any, are actually controlling, and which are relegated to the persuasive pile. Finally, you must analyze the precedents from each of the authorities and attempt to reconcile them so that you can make one coherent presentation of the rule.

Primary authorities are legislation (including statutes, ordinances, laws, codes, treaties, charters, and constitutions); administrative rules and regulations (including court rules and the regulations, decrees, orders, licenses, and interpretations promulgated by administrative agencies, non-legislative governmental entities, and other regulatory boards and commissions); and judicial orders and opinions.

Secondary authorities are everything else: commentary and interpretations of the law written by legal scholars, judges, legislators, and legal practitioners in treatises, restatements of the law, horn-books, law review articles, annotations, encyclopedias, legislative history documents, and other publications.

Controlling authority (also known as binding or mandatory authority) is authority that *must* be followed by courts and legal practitioners. It controls the rule that determines the issue you are researching. Persuasive authority is everything else that is not controlling authority. A court might follow persuasive authority if the court finds it to be useful for the resolution of the issue at hand, but the court does not have to follow it.

Only primary authorities have the potential to be controlling authority, but not every primary authority is even controlling. If they are not controlling, they will be relegated to the "persuasive authority" pile. Persuasive authorities will be ranked by order of their "persuasiveness."

Every issue is governed by a certain set of laws – one state's law or federal law or another country's law. An issue will not be governed by both state and federal law, and a single issue cannot be governed by two different states' laws or by one state's law and by federal law. If a constitution, statute, or administrative rule or regulation from your jurisdiction is on point – that is, it deals with the subject matter of your issue – then it is controlling.

Although constitutions, statutes, and regulations are given priority in the discussion of a rule, cases decided subsequent to enactment of the provision in question necessarily interpret and often change the effect of the language standing alone. The courts cannot repeal a statute, but they can take the guts out of it by construing it in such a way that it no longer has any practical application. In addition, courts can nullify (strike down or abrogate) a statute on state or federal constitutional grounds. If the legislature does not like what the courts are doing when the courts interpret and apply a statute, it can amend the statute to make it clear how they want it to work.

Cases are potentially controlling authority if they are:

- issued by a higher court
- in the direct hierarchy of judicial authority in the applicable jurisdiction

Potentially controlling cases are actually controlling if:

- the holding of the case discusses and resolves the issue at hand (that is, the case is "on point")
- the case still is good law
- the case has not been replaced or superseded by more recent controlling authority

The hierarchy of judicial authority for the jurisdiction whose law applies determines what cases are potentially controlling no matter what the actual forum of the case is. A federal court sitting in *diversity* and applying state law to the matter before it will look to the applicable state's legislature and the state's court of last resort as controlling authority on the state's law. The applicable law and its associated hierarchy of judicial authority determines what cases are potentially controlling, but not all of them necessarily are controlling. In order to determine if a given case is actually controlling, you must consider the following:

- Are the facts and issues of the case legally significant? The only issues that really matter are the ones governed by the applied rule that you have determined applies in your client's case.
- Is the case still good law? If the case whose opinion you are reading goes up on appeal and gets reversed or vacated, the opinion below is no longer reliable law. Unless another court finds the dead case and resurrects it by adopting its holding and reasoning in a new case, the case is dead letter, and you should give it no further attention. Also, a more recent opinion supersedes and replaces an earlier one.
- Has the case been superseded by more recent, equally authoritative cases, statutes, or rules? Later cases can replace the authority you are looking at by restating the same rule or advancing it further through modification and adaptation, not necessarily by stating a new rule on the same legal topic which would overrule the earlier authority. The more recent cases are better authority, and you should rely on them and use them to formulate the rule in the jurisdiction.

Once you know which of your authorities, if any, are actually controlling, you still need to evaluate the weight of each controlling authority because all controlling authorities are not created equal.

- Recent controlling authorities are better than older controlling authorities.
- The best persuasive authority is dicta from a controlling authority. Only the **holding** of a case is binding on courts lower down in the same hierarchy of judicial authority. Dicta is not binding.
- Unpublished opinions have not been published in an official reporter of the court's cases. However, these cases are widely available through computer-assisted legal research and other means.

After controlling authorities (if any) are ranked, and some potentially controlling authorities have been discarded, you will have enough to formulate the rule of law that governs the issue at hand based n your controlling authorities. Assuming there are gaps and incomplete coverage of the issue, you may have to resort to using some persuasive authority to flesh out the rule.

To reiterate: if a statute, rule, or administrative regulation is from the applicable jurisdiction and it is on point, it is always controlling. Here, we are talking only about statutes or regulations from *other* jurisdictions. As with controlling authority, some persuasive authorities are better than others.

Regardless of whether the case is actually controlling, a trial court is very interested in following the opinions and recommendations of courts in the same court system. Therefore, the opinions of these courts should be given great persuasive weight.

Once you have exhausted cases from your jurisdiction and its hierarchy of judicial authority and cases from the same jurisdiction but a parallel hierarchy of judicial authority, you may look to other jurisdictions to see what their courts have said about the law in the area you are examining. The courts, however, are completely free to disregard the out-of-jurisdiction authority for any reason or no reason at all.

Another use of out-of-state authority is to find cases that are closer to your client's facts than any cases from the applicable jurisdiction, and to show that under the law of the other jurisdiction, the outcome of these cases supports your formulation of the rule that governs the issue and your thesis on the most likely result from the application of the rule to the facts of your case. An out-of-jurisdiction case that is on all fours with your client's case still cannot trump a case from the jurisdiction whose law governs the action at hand, but it can give support for your formulation of the law, and eventually, when you report your findings, for your thesis. These cases will almost always be discussed in the explanation section of your work, but if there is little or no controlling authority on point, they may be used in the rule section. Dicta from an out-of-jurisdiction persuasive authority is weaker than the case's holding.

Persuasive authority is affected by the same factors as controlling authority. You probably should not think about citing a persuasive authority unless the facts are directly

analogous to your own. Additional factors that affect the value of primary persuasive authority include:

- Relative prestige of the issuing court, and the court's perceived level of experience with a particular kind of case
- The subject matter of the opinion may affect whether the opinion should be valued more highly or not
- The relative prestige of the judge who wrote an opinion
- With appellate cases, the number of judges who signed off on the opinion

Secondary authority should *rarely* be used in the actual formulation of the rule on an issue. If there is absolutely is **no** controlling authority, the persuasive authority from the applicable jurisdiction is sparse or weak, you might turn to secondary authorities for rule formulation.

Once you have compiled your authorities, you must analyze them together in order to determine the applicable rule in your jurisdiction. The process has several steps as depicted in the following chart, each of which will be explained more completely below.

- Start with the highest and most recent controlling authority
    - If you have a constitution, statute, or regulation, start with these authorities in the order listed
    - If you have a watershed case that is controlling, start with that
    - If your best authority is a case from the court of last resort, take the most recent opinion from that court, and start with that
    - If the above criteria do not apply, start with the most recent actual controlling authority that is on point
    - Only if none of the above applies would you consider turning to non-controlling authority – primary or secondary
    - Don't expect to use all of your authorities

- Reconcile differing statements or phrasings of the rule from controlling authorities, and attempt to synthesize the rule into one coherent statement of the legal principles that govern the issue
    - DON'T change the wording of or paraphrase rules from constitutions, statutes, administrative regulations, and watershed cases
    - Unless an applied rule can be written smoothly and effectively in one sentence or phrase, write the rule first with modifications second

- Write the rule first, interpretative rules second, and exceptions to the rule third
    - Write interpretive sub-rules on elements of the rule in the second or sub-TREAT discussion that discusses that element of the rule. Write exceptions to the sub-rules after you lay out the sub-rules themselves
- Do not write a rule with inherent contradictions
    - Do accept the *remote* possibility that two competing rules on the same issue might exist in the same jurisdiction.

An interpretive rule provides criteria aid in the interpretation and application of the rule itself. An exception to rule is just that: the opinion carves out a set of facts or circumstances and states that rule will not cover these facts or circumstances or it will work a different way in these facts or circumstances.

On occasion, two rules coexist and compete at the same time in the same jurisdiction. A line of controlling cases will follow the other rule. This situation is unusual enough that you should reexamine your authorities to determine if you have found the secret entrance to your destination or simply stumbled into a blind alley. If the rules appear to be inconsistent, reexamine the facts of each case in the competing lines of authority. Consider whether there are different public policies at work in the competing lines of authority.

Before proceeding, please understand two things:

- Rule Synthesis is one of the most important skills you can acquire and is the centerpiece of the TREAT paradigm.
- Weeks 6 and 7 will address Rule Synthesis within the context of that paradigm.

Remember that your task is not only to spit back the law to the reader, but to explain it in plain English and present it to the reader in the most concise and understandable way. You do not want your reader to have to do the work of rule synthesis; rather, you are tasked with doing it when you are assigned the case or issue.

Furthermore, the following is critical: You should always ask yourself whether you are synthesizing the authorities or just listing them and thereby asking your reader to synthesize them for you.