PLG-120 Week 4 Lecture Notes

To begin your analysis of the legal issue you have been asked to address, you must identify the governing rule of law. Articulating the legal rule is, of course, the point of the "Rule" section of your discussion.

With constitutions, statutes, and regulations, determining the rule typically is not the difficult part because constitutions, statutes, and regulations *are* rules. If a constitutional, statutory, or regulatory provision is on point, the terms of the provision state the rule – or at least provide the starting point for the rule section. Determining the *meaning* of the terms of the provision (through the process of statutory interpretation) can be much trickier.

In contrast, determining the rule or rules that were applied by a court in its decision is not always as simple as it may seem. This week we discuss how to read and analyze a court order or opinion to determine the rule of the law that the court applied to produce the outcome in the case. This rule, which is part of the **holding** of the case, represents the precedent for which the case stands, and in conjunction with the rule(s) from the other sources you are relying on, makes up the rule in your jurisdiction that answers the legal question you are researching.

Judges are not charged with the official task of *making* law. Rather, their primary task is to find, interpret, and apply the law to adjudicate disputes that come before them. Still, judicial opinions are a *primary* source of the law, and it is true that judges can create, modify, or abandon rules of law. Judges (and the lawyers who work for them, who typically are called law clerks or staff attorneys) receive a set of "problems" in the form of a lawsuit, and when they have to make a decision concerning one of these problems, they turn to the same sources of law as the attorneys who appear before them. Judges and their legal staff must find the sources and analyze what they say to determine what the law is on each issue that arises in the case before them.

Because judges follow the same methodology as practitioners in researching and determining what the law is on a given issue, they often include in their writing a statement of the applicable rule of law on the issue that was found in earlier authorities. Thus, the court borrows or adopts this statement of the rule for its own opinion, which is referred to here as the **borrowed rule**. The borrowed rule may be the rule of law that was applied by the court to make its decision, thus becoming part of the **holding**, and the case becomes one more precedent on the meaning and application of the borrowed rule. It is, however, important to remember that the borrowed rule *is not necessarily the rule of law that is applied by the court* and it is not necessarily part of the holding and the precedent set by the case. The borrowed rule is considered part of the holding *only* when the court did nothing in its discussion of the rule to alter, interpret, add to, or abandon all or part of the borrowed rule.

The court, in analyzing the case and applying the borrowed rule(s) to the case, may:

- interpret a borrowed rule,
- modify a borrowed rule, or
- strike (or **abrogate** or **overturn**) the entire borrowed rule or part of the rule.

You have two choices for how to phrase the applied rule from a case: you can write the borrowed rule followed by the modifications that this case has rendered to the borrowed rule, thus revealing the applied rule in a paragraph, or you can try to **synthesize** what the case has done to the borrowed rule into a single, revised version of the rule – thus, revealing the applied rule in a single sentence.

- Never change the wording of rules from constitutions, statutes, and administrative regulations.
- Do not change the wording of a much-cited historical rule. Write any modification second.
- Synthesize the applied rule if it makes a clear, succinct, and coherent statement of the applied rule. Do not synthesize if it forces you to write a long, overly complicated, run-on sentence for the rule.

Holding is a sentence or short discussion (no more than a paragraph), which explains in legal terms the applied rule(s) of law that were used to resolve the legal issues in the case, and how they were applied, so as to explain why the prevailing party won. **Dicta** is a legal discussion in the case that is not part of the holding. Dicta can be important as lawyers and judges often will be curious to find out what other courts have said in previous cases, especially cases from a higher court in the appropriate hierarchy of judicial authority, no matter if the statements are holding or dicta. Dicta can be a useful predictor of what the court that uttered the dicta will do in a future case where the issue discussed in the dicta is finally reached and resolved by the court. The important distinction is that a lower court is not bound by dicta, while it is bound by the holding.

In contrast to case law, *identifying* the rule of law in a constitution, statute, or administrative regulation typically is straightforward: the constitution, statute, or regulation itself *is* the rule on the legal issues described in the title and text of the provision. When presenting this type of rule in writing, you should quote the exact terms of the constitution, statute, or regulation that pertain to your legal issue, as these are often referred to as the **operative** or **pertinent** or **applicable terms** of the statute or regulation. It is typically not proper simply to paraphrase (at least not the first time you mention them) the terms of a constitution, statute, or regulation because there should be no guesswork involved in figuring out the terms of the rule from a constitutional, statutory, or regulatory source. The reason one should not paraphrase the operative provisions of a constitution, statute, or regulation is that that language represents the *official* language of a rule of law created by those persons and entities who have been charged with the making of laws and regulations. On the other hand, the courts, who are not charged with making laws, instead create law in the form of legal precedent as a by-product of their primary, adjudicatory function.

As statute or regulation is in itself a rule, and therefore the text of a statute or regulation must be the starting point for the "Rule" section analysis. Typically, however, a lawyer cannot rely on the bare terms of the statute to explain to the reader what the rule means. He or she must engage in the complicated process of statutory interpretation, in a process from textual analysis, to contextual analysis, to secondary sources of interpretation.

Some of the general principles of interpretation of statutory language – the canons of construction – that are applied in the United States are:

I. Principle 1: The text of a statute is the primary, essential source of its meaning.

A. If the statute contains a definition of a word, its meaning is determined by the definition.

B. If the statute does not contain a definition of a word, its meaning is determined by:

1. Common usage of the terms, including:

a. A meaning that is so obvious to the judge that no authority is cited

b. Dictionary definitions

c. Usage of the same word elsewhere in the same statute

d. Usage in other statutes, legislative materials, and other public documents

e. Common law meaning of a term

2. Technical or particular meaning of words that have acquired a technical or particular meaning in a given context

3. Legal meaning as defined in the Dictionary Act, 1 U.S.C. §§ 1-7

4. Legal meaning as defined by state statute or common law

5. The context in which the terms appear

6. The rules of English grammar

II. Principle 2: Prospective and retrospective operation

III. Principle 3: Severability of invalid provisions

IV. Principle 4: Statutes whose terms conflict

V. Principle 5: Comprehensive revisions of the law

VI. Principle 6: Statutes incorporating another statute of the same jurisdiction

VII. Principle 7: Us of headings and titles

VIII. Principle 8: Revisions to statutes

IX. Principle 9: Repeal of a repealing statute

X. Principle 10: Effect of amendment or repeal of civil statutes on civil claims

XI. Principle 11: Effect of amendment of criminal sentencing provisions on pending criminal actions

XII. Principle 12: General avoidance of interpretations that doom a statute to fail

A. Avoid an unconstitutional result

B. Avoid a result that violates international law or an international treaty

C. Avoid extraterritorial effect
D. Avoid an absurd result
E. Avoid an unachievable result
F. Have uniform nationwide or statewide application
G. Give effect, if possible, to its entire text
H. Give effects, if possible, to its objective and purpose
I. Give effect to any carefully crafted compromises embodied in the statute

XIII. Principle 13: "Ejusdem generis" maxim

A. The meaning of a word is limited by the series of words or phrases of which it is a part

B. The meaning of a general word or phrase following two or more specific words or phrases is limited to the category or class established by the specific words or phrases

XIV. Principle 14: Statutes on the same subject

XV. Principle 15: Language excluded from supplanting legislation

XVI. Principle 16: Interpretation of definitions of crimes

XVII. Principle 17: Statutes in derogation of the common law

XVIII. Principle 18: Additional aids to construction

A. A settled judicial construction in another jurisdiction as of the time of the borrowing of a statute borrowed from the other jurisdiction
B. A previous statute, or the common law, on the same subject
C. Related statutes
D. A judicial construction of the same or similar statute
E. An administrative construction of the same or similar statute
F. The circumstances that prompted the enactment or adoption of the statute, the "mischief" that the statute was meant to correct
G. The purpose of a statute as determined from the legislative or administrative history of the statute
H. The historical development of other legislation on the same subject
I. Whether the legislature reenacted a statute or an administrative agency readopted a rule without changing the pertinent language after a court or agency construed the statute
J. Treatises and articles by leading experts on the subject

XIX. Principle 19: Legislative history

A. Proposed or adopted amendments, preambles, statements of intent or purpose, findings of fact, notes indicating source, contemporaneous documents prepared as a part of the legislative or rulemaking process, fiscal notes, and committee reports
B. The record of legislative or administrative agency debates and hearings