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## CHAPTER I: BASIC CONCEPTS OF AMERICAN JURISPRUDENCE

### A. Summary of Basic American Legal Principles

What follows are some of the fundamental principles that comprise the American legal system. Each of these is discussed in greater detail in this and other chapters of this book. They are summarized below in order to give the reader an overview of some of the basics of American common law.

#### 1. Impact of Precedent—The Principle of *Stare Decisis*

The defining principle of common law is the requirement that courts follow decisions of higher level courts within the same jurisdiction. It is from this legacy of *stare decisis* that a somewhat predictable, consistent body of law has emerged.

#### 2. Court Hierarchy

Court level or hierarchy defines to a great degree the extent to which a decision by one court will have a binding effect on another court. The federal court system, for instance, is based on a three-tiered structure, in which the United States District Courts are the trial-level courts; the United States Court of Appeals is the first level court of appeal; and the United States Supreme Court is the final arbiter of the law.

#### 3. Jurisdiction

The term “jurisdiction” has two important meanings in American law. One meaning of “jurisdiction” refers to the formal power of a court to exercise judicial authority over a particular matter. Although the term most often is used in connection with the jurisdiction of a court over particular matters, one may also speak of matters being within or beyond the jurisdiction of any other governmental entity.

Second, the federal court system is based on a system of “jurisdictions,” the geographic distribution of courts of particular levels. For instance, while there is only one Supreme Court, the court of appeals is divided into 13 circuits, and there are 94 district courts. In addition, each state court system comprises its own “jurisdiction.” As indicated above, the jurisdiction in which a case arose will determine which courts’ decisions will be binding precedents.

#### 4. Mandatory / Binding versus Persuasive Authority

Some of the various sources of law that will be examined are considered to be “mandatory” or “binding,” while other sources are considered to be merely “persuasive.” Indeed, a court may completely disregard precedent that is not binding (*i.e.*, not even consider it to be persuasive). The issue of whether authority is mandatory or persuasive relates directly to the application of *stare decisis* principles.

#### 5. Primary versus Secondary Authority

The various sources of law may also be broken down into primary and secondary sources of law. Primary sources of law may be mandatory on a particular court, or they may be merely persuasive. Whether they are binding or persuasive will depend on various factors. Secondary authority is not itself law, and is *never* mandatory authority. A court may, however, look towards secondary sources of law for guidance as to how to resolve a particular issue. Secondary authority is also useful as a case finding tool and for general information about a particular issue.

## **6. Dual Court Systems**

The American legal system is based on a system of federalism, or decentralization. While the national or “federal” government itself possesses significant powers, the individual states retain powers not specifically enumerated as exclusively federal. Most states have court systems which mirror that of the federal court system.

## **7. Interrelationship Among Various Sources of Law**

One of the more complex notions of American jurisprudence is the extent to which the various sources of law, from both the state and federal systems, interrelate with one another. There is a complex set of rules that defines the relative priority among various sources of law and between the state and federal systems.

## **B. What Is Common Law?**

The term “common law” evokes confusion and uncertainty—which is no surprise given its duality of meaning. The term “common law” may refer to any of the following:

### **1. Common Law as Differentiated from Civil Law**

The American system is a “common law” system, which relies heavily on court precedent in formal adjudications. In our common law system, even when a statute is at issue, judicial determinations in earlier court cases are extremely critical to the court’s resolution of the matter before it.

Civil law systems rely less on court precedent and more on codes, which explicitly provide rules of decision for many specific disputes. When a judge needs to go beyond the letter of a code in disposing of a dispute, the judge’s resolution will not become binding or perhaps even relevant in subsequent determinations involving other parties.

### **2. Case Law**

Common law may refer to “judge-made” law, otherwise known as case law. Cases are legal determinations based on a set of particular facts involving parties with a genuine interest in the controversy.

#### **a. Case Law May Be of Several General Types:**

(1) *Pure decisional case law*—Court called upon to decide cases on the basis of prior court decisions (precedent) and / or policy and a sense of inherent fairness. In cases of pure decisional law, there is no applicable statute or constitutional provision that applies. This type of decisional law is what is referred to as “judicially-created doctrine.” Historically, the term “case law” referred to certain

areas of law (*e.g.*, torts, property) that began as judge-made, or pure decisional law.

(2) *Case law based on constitutional provisions*—Court called upon to consider whether a particular statute or governmental action is consistent with the United States Constitution or a particular state constitution. Court interpretation may rely upon prior decisional law interpreting same or some other constitutional provision.

(3) *Case law based on statutory provisions*—Court called upon to interpret a statute. Court interpretation may rely upon prior decisional law interpreting the same or similar statute.

**b. Subsequent Case History:**

(1) Subsequent Case History defined—What a higher level court has done with respect to a lower-level court decision on appeal.

(2) Importance of Subsequent Case History—If a higher level court has taken action on a lower level case, it is the opinion and holding of the *higher* level court that will constitute the precedent in the case. A higher level court opinion will in effect abrogate the lower level court opinion in the same case.

**c. Subsequent Case Treatment:**

(1) Subsequent Case Treatment defined—What other cases have said about the initial case. Has it been followed? Reversed? Distinguished? Applied in a specific way?

(2) Importance of Subsequent Case Treatment—Will indicate how the same and other courts interpret the initial case.

**C. The American Judicial System: A System Based on Advocacy and the Presence of Actual Controversy**

The American legal system is adversarial and is based on the premise that a real, live dispute involving parties with a genuine interest in its outcome will allow for the most vigorous legal debate of the issues, and that courts should not have the power to issue decisions unless they are in response to a genuine controversy. Hence, federal courts are prohibited from issuing “advisory” opinions, or opinions that do not involve a live case or controversy. (These principles are based on Article III of the U.S. Constitution, which limits federal court jurisdiction to “cases and controversies.” Unlike the federal courts, some states *do* allow for the presentation of cases that are not based on live controversies, and hence do not share the federal court bias against advisory opinions.)

**1. Threshold Issues Designed to Preclude Advisory Opinions**

Given the prohibition against advisory opinions by the federal courts, there are certain threshold prerequisites which must be satisfied before a federal court will hear a case. Issues surrounding the applicability of these prerequisites may also arise in state courts and on petitions for review of agency orders. The principal prerequisites to court review are the following:

*Standing*—The parties must have an actual, cognizable, usually pecuniary or proprietary, interest in the litigation.

*Finality*—In the case of appeals or agency review, the action by the trial court or administrative body must be final and have a real impact on the parties.

- Exhaustion*—The parties must have exhausted any possible avenues for relief available in the trial court or administrative body.
- Ripeness*—The dispute must present a current controversy which has immediate rather than anticipated or hypothetical effects on the parties.
- Mootness*—The dispute must not have been resolved. Nor must the circumstances have changed in any way that renders the dispute no longer subject to controversy.
- No Political Questions*—Courts will not involve themselves in nonjusticiable disputes that are between the other two branches of the federal government and are of a political nature.

While these prerequisites are well-established, the courts tend to apply them in a pragmatic way and allow exceptions to these requirements when warranted by the facts.

## **2. Courts Generally Confine Themselves to the Dispute Presented for Resolution**

As a jurisdictional matter, courts are supposed to restrict their holdings to the narrowest terms possible in resolving a dispute. This limitation relates to the principle of *dictum*, under which portions of the opinion not required for the resolution of the precise issues before the court on the facts presented by the parties are of diminished precedential value.

## **3. Tendency to Avoid Constitutional Issues When Possible**

Federal courts also tend to avoid deciding constitutional issues when they are able to decide a case on a procedural, statutory, or some other ground.

## **D. Institutional Roles in the American Legal System**

### **1. Attorney**

Depending upon the circumstances and the needs of the client, the lawyer may be a counselor, a negotiator, and / or a litigator. In each of these roles, the lawyer will need to engage in factual investigation. With respect to each of these roles, the lawyer will do the following:

**Counselor:** Attorney will help advise the client how to order the client's affairs, how or whether to proceed with a proposed course of action, or how to proceed with respect to pending or potential litigation or settlement. Often, this is when the lawyer will prepare (or ask that someone prepare) an interoffice memorandum of law, which will examine the client's legal position and help the lawyer counsel the client.

**Negotiator:** Lawyer will work with opposing counsel to try to get a favorable resolution for the client with respect to a pending dispute. The parties may already be in litigation when they negotiate, or the parties, through their attorneys, may be negotiating a resolution to a dispute not yet in court. The art of negotiating involves many techniques individual to particular attorneys and the circumstances. The client always retains the right to accept or reject a settlement negotiated or offered by the opposing party.

**Litigator:** In litigating, the attorney will help pick a jury and participate in pre-

trial motions. At trial, the attorney will present evidence through testimony of witnesses, documents and perhaps demonstrative evidence (*e.g.*, charts, diagrams). The lawyer will also present an opening statement and closing argument, and will make and respond to evidentiary objections lodged by the opposing party. The lawyer may also make motions, sometimes supported by a memorandum in support thereof before the court, and propose to the court a set of jury instructions.

***Fact Investigator:*** All of the lawyer's roles require the investigation of relevant facts, including locating and interviewing witnesses.

A lawyer is to be a zealous advocate of his / her client. In this respect, the lawyer must advocate on the client's behalf and avoid conflicts of interest. The lawyer is also an officer of the court and is required to deal fairly and honestly with the court and with its other officers, including the lawyer's opponents.

There are specific ethical rules applicable to these issues, but in most circumstances, when the client's interests and those of the lawyer as officer of the court conflict or otherwise interfere with each other, the lawyer is generally expected to favor his or her role as advocate of the client.

## **2. Judge**

The judge is the final arbiter of the law. The judge is charged with the duty to state, as a positive matter, what the law is. At trial, the judge takes a passive, "umpire" role in connection with the presentation of evidence by counsel. The judge must also make evidentiary rulings, and charge the jury as to the law to be applied. In addition, the judge is to maintain order in the courtroom. Occasionally, when the parties agree, the judge may also act as trier of fact. This is known as a "bench trial." Judges in federal courts are appointed by the President with the "advice and consent" of the Senate. Many state court judges are elected by popular vote.

## **3. Jury**

The jury, a group of local citizens, is the fact-finder in most trials. The jury will receive instructions from the judge as to the law, and its members will assess the facts as they perceive them in light of the law as instructed, to return a verdict.