THE WRITING CENTER
GEORGETOWN UNIVERSITY LAW CENTER

Federal Law, Federal Courts, and Binding and Persuasive Authority[1]

The United States is a common law jurisdiction. Common law countries generally give significant weight to prior judicial opinions. By adhering to the outcomes relating to questions of law of prior decisions, common law judges build a body of jurisprudence that, hopefully, leads to consistent and predictable outcomes. In this way, adherence to binding or persuasive judicial opinions, serves the same purpose as *stare decisis*: "[The] promot[ion of] the evenhanded, predictable, and consistent development of legal principles."[2]

Not all prior opinions are created equal, however. Sometimes prior decisions are binding on courts; courts must follow these binding precedents. In other instances, prior decisions are only persuasive; they provide good rules of thumb, but do not necessarily dictate the result.[3]

Whether a case is binding or persuasive can make all of the difference. As such, this handout will first describe the various relationships of federal courts with other federal courts and how that affects whether law is binding or persuasive. This will teach the legal writer when to recognize whether certain case law is binding or not. Second, this handout will briefly explain different ways to deal with binding precedent. This will teach the legal writer how to work around seemingly binding precedent that undermines the proposition that the legal writer is attempting to establish.

Binding Law and Federal Courts

The System

To understand when an interpretation of law is binding and when it is not in federal court, it is necessary to have a basic understanding of the federal court system. Today, there are ninety-four judicial districts and twelve courts of appeals (the successors to the original circuit courts).[4] Moreover, the Federal Circuit Court of Appeals also hears appeals from trademark and patent cases, but does not oversee its own district courts.[5] Courts of appeals hear cases sitting in panels

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2 Payne v. Tennessee, 501 U.S. 808, 827 (1991).

3 For a detailed discussion of the differences between mandatory and persuasive authority, see the Writing Center's handout, "Can I Cite to Examples and Explanations: How to Use Mandatory and Persuasive Authority."

4 For a discussion of some of the differences between the district courts and courts of appeals, please see the Writing Center's handout, "Identifying and Understanding Standards of Review" https://www.law.georgetown.edu/wp-content/uploads/2018/07/Standards-of-Review.pdf

5 *See Courts of Appeals*, UNITED STATES COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx.

of three judges. Courts of appeals may also sit *en banc*, meaning that the entire court hears an important question of law.

General Rules on Binding and Non-Binding Opinions

Generally, district court opinions are not binding on other district courts or on courts of appeals. The Seventh Circuit Court of Appeals has made it clear, "A single district court decision . . . has little precedential effect[, and i]t is not binding on . . . other district judges in the same district."[6] Other circuits agree.

A Court of Appeals' Relationship with Its District Courts

Courts of appeals are the final arbiters of law in their geographic jurisdictions, absent a determination by the Supreme Court.[7] This means courts of appeals opinions bind district court's in their jurisdictions.

Thus, in a habeas corpus case in the United States District Court for the Central District of California, a plaintiff argued that the district court should adopt an advantageous rule from the Tenth Circuit. This rule was more beneficial to the plaintiff's case and would have allowed him to relitigate a Fourth Amendment issue. The district court, however, declined the invitation: "As petitioner's counsel must realize, however, this court sits in the Ninth Circuit and is bound by Ninth Circuit precedent."[8]

The Supreme Court's Relationship with Lower Federal Courts

Notwithstanding the relationship between courts of appeals and district courts, the Supreme Court has the final say in all matters relating to federal questions of law. As the Supreme Court has explained, "It is [the Supreme] Court's responsibility to say what [the law] means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."[9]

Distinguishing Binding Precedent

Having discussed when a case will be binding, it is necessary to discuss how a legal writer might go about distinguishing what would otherwise be binding authority. Indeed, in legal writing, it is important to effectively distinguish prior case law that may run against your client's interests.

For a useful map of the current jurisdictions for the federal courts of appeals *see United States courts of appeals*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_courts_of_appeals.

[6] United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987).

[7] *See, e.g.*, United States v. AMC Entm't, Inc., 549 F.3d 760, 771 (9th Cir. 2008) ("Similarly, when the Ninth Circuit or any of its coequal circuit courts issue an opinion, the pronouncements become the law of that geographical area.").

[8] Nakai v. Pers. Prob. Officer, No. 11-1139, 2012 WL 395896 (C.D. Cal. Feb. 6, 2012).

[9] Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312 (1994).

In the simplest sense, distinguishing cases "involves showing that the holding of one case" need not necessarily dictate the "holding of another."[10] There are several ways to show why one case need not dictate the result of the other. First, rules of procedure and similar norms may provide a workaround. Second, the adverse language in an opinion may be non-binding *dicta* within an otherwise binding opinion. Third, and most important, your case and a prior binding case may be sufficiently factually distinct to prevent the binding case's application to your case.

Procedural Norms

Several courts follow procedural norms that may prevent a case from being binding precedent. In most circuits, for example, unpublished opinions – even from a court of appeals itself – cannot be cited as binding precedent. Instead, these cases are merely persuasive authority.

Additionally, in certain special contexts, other types of decisions are not binding for procedural reasons. For example, decisions of special masters and magistrate judges are not binding on district courts and appellate courts. Certain administrative decisions are also not binding on district courts and appellate courts.

In short, because not all decisions are binding for various procedural reasons, you should always double check to make sure that a decision that appears binding is, in fact, binding. If it falls into one of these special categories, a court will not find it to be binding precedent.

Binding Holdings versus Persuasive Dicta

Not all language in judicial decisions is equally binding on courts. There is, for example, the court's holding, which will be binding on a lower court, and *dicta* (or *obiter dicta*), which is not binding on a lower court. When forming an argument, it is important to recognize the difference between these types of language in a court's opinion.

A court's holding and its rationale (taken together, the *ratio decidendi*) are binding because they were necessary for the court's resolution of the case. As a general rule, a court's *ratio decidendi* "is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them."[11] On the other hand, *dicta* is that superfluous language that was not necessary for the court to arrive at its holding. This language is only considered persuasive, because it was not adjudicated in the court but merely expresses an opinion unnecessary to the outcome.

For example, the Supreme Court once explained in *Gertz v. Robert Welch, Inc.*, a defamation case, that "[u]nder the First Amendment there is no such thing as a false *idea*."[12] This controversy in that case turned on the existence of false *facts* – not ideas – and, therefore,

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[10] Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 772 (1999).

[11] Arthur L. Goodhart, *Determining the Ratio Decidendi of A Case*, 40 YALE L.J. 161, 182 (1930).

[12] 418 U.S. 323, 339 (1974) (emphasis added).

the statement referring to false ideas was not necessary to the resolution of the case. Because of this, this language is mere *dicta*, and the Supreme Court or a lower court could, in fact, disagree with it in a future case. The Supreme Court actually did disagree with this broad principle several years later in *Milkovich v. Lorain Journal Co*., where the court explained "[W]e do not think this [*dicta*] . . . was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'".[13]

The more discriminating an advocate or legal writer is in parsing an opinion's holding and an opinion's *dicta*, the more persuasively he or she can convince a judge or a reader that a language from a higher court's seemingly binding opinion should or should not actually dictate the result in the present case.

Distinguishing Otherwise Binding Precedent

Even if procedural norms and distinctions between holding and *dicta* cannot distinguish an otherwise binding case, a legal writer can also distinguish cases on a factual basis. The Ninth Circuit Court of Appeals may have explained this process the best in the context of how a court distinguishes cases in this way:

> Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.[14]

More succinctly, distinguishing cases on the facts requires a showing "that an authoritative expression of the law in one case does not apply to the facts of another case, that a deliberate statement in one case would be inappropriate when applied to a second case, and so forth."[15]

Say, for example, a state tried to restrict the dissemination of illegally intercepted recordings of private conversations. If a court applied one line of Supreme Court precedent requiring the application of strict scrutiny to content-based laws, the law would likely be found unconstitutional. Alternatively, if a court applied another line of precedent applicable to content neutral laws, the law would likely be upheld under a more lenient test.

It is the job of the legal writer to use factual differences between the present case and the Court's prior cases to distinguish the line of cases that are adverse to his or her argument. A persuasive advocate or legal writer might argue the Court's strict scrutiny test relating to content-based restrictions is inappropriate here, because the law at issue here does not regulate specific types of speech like political speech, but rather regulates *all types* of illegally intercepted speech.

[13] 497 U.S. 1, 18 (1990).

[14] Hart v. Massanari, 266 F.3d 1155, 1172-73 (9th Cir. 2001).

[15] Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 772 (1999).

On the other hand, an advocate might argue that the law is a content-based law insofar as it only prohibits *certain types* of speech – speech resulting from illegal interception. Each of these attempts emphasize certain facts in an attempt to distinguish those cases that would otherwise be binding.[16]

It is hard to predict whether a court will find either attempt to distinguish the cases on the facts persuasive enough to distinguish the Court's prior related cases. If the court sides with the first attempt, the current case would be removed from under the thumb of the prior cases requiring courts to apply a strict scrutiny test. Thereafter, a court would be free to follow the line of cases requiring a more lenient test and vice versa.

Conclusion

It is imperative in legal writing to understand how various federal courts interact and influence other federal courts. By understanding this structure, the scrupulous legal writer will not only be able to present his or her argument in a more persuasive manner, but will also be more aware of when it is important to distinguish certain precedents and when it is not. This awareness and understanding of the effect of case law on current issues will not only make the writer more confident in his or her arguments but will also imbue the writer's credibility in the reader.

[16] For a persuasive example of a judge attempting to distinguish prior precedent *see Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting).