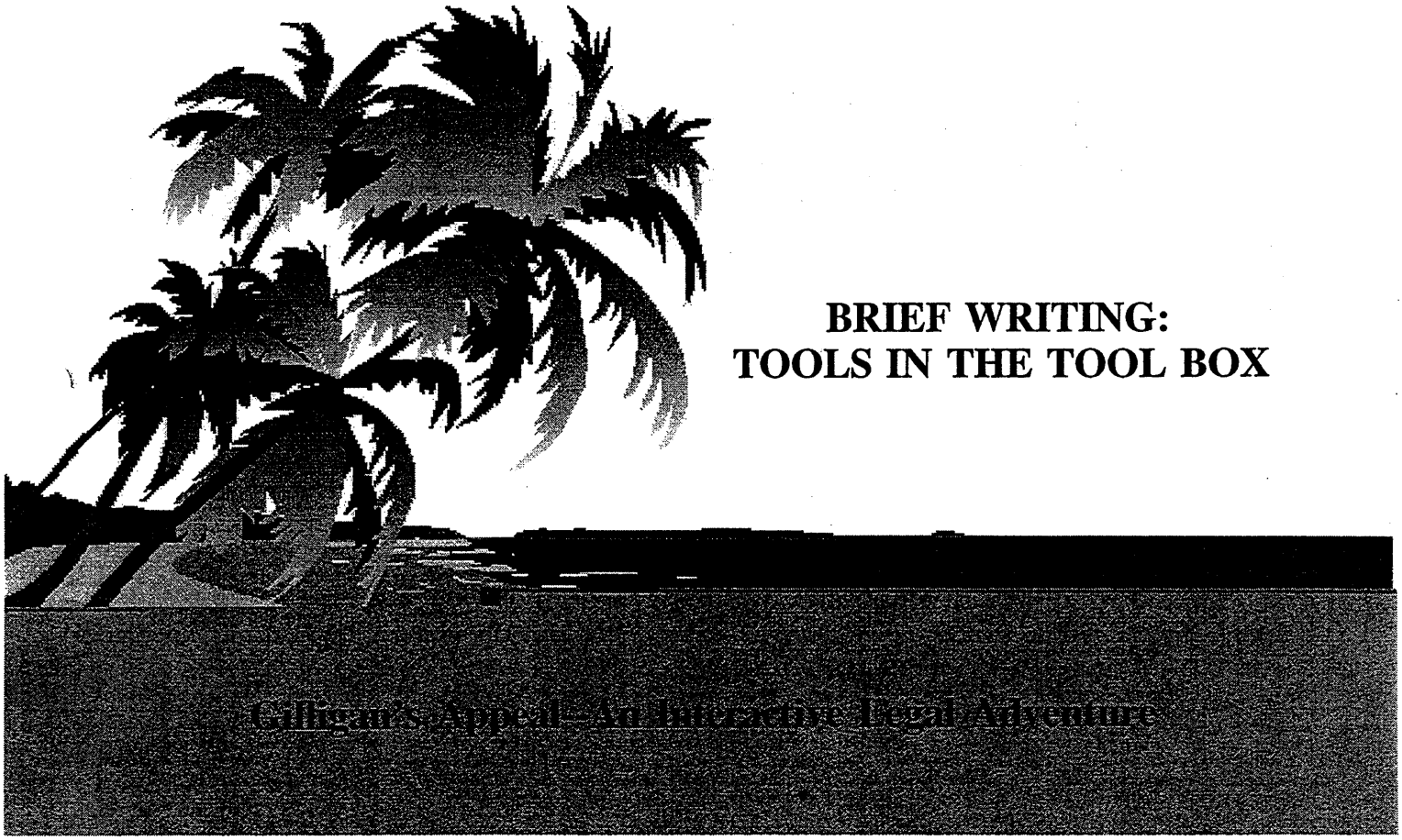

BRIEF WRITING: TOOLS IN THE TOOL BOX

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BRIEF WRITING: TOOLS IN THE TOOL BOX

I. LEGAL PERSUASION: REASONING AND AUTHORITY Abraham Lincoln, both a lawyer and a politician, said that there are two ways to establish a proposition: one is to demonstrate it on reason; the other is to show that great men of former times have thought it, and thus pass it by weight of pure authority. ABRAHAM LINCOLN, WISDOM & WIT 27 (Louise Bachelder ed. 1965). This is true in law, as it is in politics. Legal reasoning, however, involves the use of authority, so that the two methods of persuasion are merged when lawyers try to persuade judges, and when judges go about the business of judging.

A. Reasoning Aristotle divided persuasive reasoning into two types: *deductive* and *inductive*. Traditionally it is said that deductive reasoning proceeds from the general to the specific, while inductive reasoning proceeds from the specific to the general. Arguably, inductive reasoning is just a preliminary step you take to get to deductive reasoning.

1. Deductive Reasoning Deductive reasoning begins with a proposition or rule, and the analyst (in the law it is the lawyer or the judge) considers whether the present case fits within that rule. The deductive reasoning process was described by Aristotle as the "syllogism," in which a major premise is assumed, a minor premise is established, leading to the conclusion.

The classic example of a syllogism is as follows:

All men are mortal. [Major Premise]

Socrates is a man. [Minor Premise]

Therefore, Socrates is mortal. [Conclusion]

While syllogism usually involves pure logic rather than extrinsic proof, by viewing the proof portion of a lawsuit as the minor premise, legal proceedings readily lend themselves to syllogistic analysis.

Socrates' criminal trial can be seen syllogistically.

[Major Premise]
A person who challenges popularly held beliefs is a traitor to Athens.

[Minor Premise]
Socrates teaches Athenian youth to question prevailing views.

[Conclusion]
Socrates is a traitor.

In a sense all law is applied in a syllogistic manner, with the law as the major premise, the facts as the minor premise, and the conclusion being the legal ruling. This applies just as much to the court's rulings on individual evidentiary objections as it does to the overall application of the law to the facts of the case which leads to the ultimate result of the litigation.

To take a simple example from the law, a motorist is charged with violating the law by exceeding the speed limit. The major premise is that it is illegal to exceed the speed limit. The minor premise is that the motorist was driving 45 m.p.h. in a 35 m.p.h. speed zone. If the minor premise is proved by the state beyond a reasonable doubt, then the conclusion follows that the motorist is guilty of breaking the law.

All criminal prosecutions are this type of syllogism. In a burglary case, the major premise is that a person commits an offense if he enters a habitation without the effective consent of the owner, and with the intent to commit a felony or theft. The minor premise is the factual issue of whether the defendant engaged in that behavior. If the fact finder concludes, beyond a reasonable doubt, that the defendant engaged in that behavior, then the conclusion is reached that the defendant is guilty of the offense of burglary. If the jury is not so convinced, then the conclusion is not reached and the defendant is acquitted.

The prosecutor may use a syllogism in proving her burglary case. The prosecutor must show that the defendant, who was arrested in possession of the homeowner's T.V., removed the T.V. from the house. The defendant contends that he bought the T.V. from a stranger for $ 100.00 cash. The prosecutor proves that the defendant's fingerprints were found on a vase that was sitting on the T.V. before the crime, and which was found on the floor inside the house after the crime was committed. The homeowner established that the defendant was never in the house on any other occasion. A syllogism applies. The major premise is that only someone who entered the house could touch the vase. The minor premise is that the defendant touched the vase. The conclusion is that the defendant entered the house.

The police used a syllogism in investigating a robbery. The victim says his wallet, containing cash and credit cards, was taken at gunpoint by a caucasian male, 6 ft. tall and weighing 225 lbs. A person is arrested in possession of the victim's wallet, but he is an oriental male youth, 5 ft. 5" tall, weighing 150 lbs., who claims he found the empty wallet on the sidewalk. The suspect is released because of a syllogism. The major premise is that a tall, heavy anglo male committed the crime. The minor premise is that the suspect is not tall, heavy or caucasian. The conclusion is that the suspect cannot have committed the crime.

Another example. Driver A and Driver B are driving side-by-side. Driver A's car suddenly crosses the lane line and collides with Driver B's car. The law prohibits a driver from changing lanes unless he can do so safely. Driver A denies responsibility, saying that his right front tire hit a large chuck hole that pulled his wheel to the right and caused the accident. The case boils down to this syllogism: a motorist is liable for all damages proximately caused by his negligence [the general premise]; the defendant was negligent, and his negligence proximately caused the plaintiff's injuries [the minor premise]; the defendant is liable for the plaintiff's injuries [the conclusion]. In a jury trial, the major premise is set out in the jury charge, the party with the burden of proof must convince the jury to vote "yes" that the minor premise is true, and if the jury does, then the court reaches the conclusion by rendering judgment for the proponent.

Syllogisms abound in the appeal of cases.

Major premise: a summary judgment should be granted only when the summary judgment proof establishes that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion, answer, or other response. Minor premise: in the case before the court, the statute of limitations has expired on the plaintiff's claim. Conclusion: summary judgment

should be granted to the Defendant. Plaintiff argues on appeal that the minor premise was not shown, in that after defendant pled limitations, plaintiff plead the discovery rule and raised a fact issue as to when the plaintiff knew or should have known about her cause of action. Therefore, the conclusion (granting the summary judgment) was not reached, and it was error to grant the summary judgment.

Major premise: a directed verdict is proper only when reasonable minds could reach but one conclusion under the available evidence, and the moving party is entitled to judgment as a matter of law. Minor premise: in the present case, the plaintiff failed to present any expert testimony that the defendant doctor was negligent on the occasion in question. Conclusion: directed verdict was proper in this case. Since the major premise is a correct statement of the law, the only matter for the appellate court to determine is whether the minor premise is correct. This determines whether the trial court's ruling (the conclusion of the syllogism) was correct.

Major premise: under *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991), a trial court abuses its discretion if it refers all pending and future discovery matters to a special master, and mandamus will issue to set such an order aside. Minor premise: in this case, the trial court appointed a special master to hear all pending and future discovery matters. Conclusion: mandamus will issue. *See Academy of Model Aeronautics, Inc. v. Packer*, 860 S.W.2d 419 (Tex. 1993).

Major premise: under Tex. Disciplinary Rule of Professional Conduct 3.08(a), a lawyer should not continue employment if he may be a witness necessary to establish an essential fact on behalf of the lawyer's client. Minor premise: plaintiff's lawyer filed an affidavit in opposition to defendant lawyer's motion for summary judgment, stating that defendant lawyer had committed malpractice. Conclusion: plaintiff's lawyer should not have continued as counsel after filing the affidavit. Thus, it was error for the trial court to deny defendant lawyer's motion to disqualify plaintiff's counsel. Mandamus was granted. *See Mauze v. Curry*, 861 S.W.2d 869 (Tex. 1993).

Major premise: a trial court can grant case-determinative sanctions for discovery transgressions only when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with discovery rules. Minor premise: in a particular case, lesser sanctions would not promote compliance with discovery. Conclusion: the sanctions were appropriate and mandamus will be denied. In *GTE Communication Systems Corp. v. Tanner*, 856 S.W.2d 725 (Tex. 1993), the Supreme Court determined that any number of lesser sanctions, from fines to contempt, could have promoted compliance with discovery. The minor premise established that the major premise did not apply. The conclusion of the syllogism is therefore that the sanction is improper, so mandamus was granted.

In some senses all legal proceedings reduce to a fight over: (i) what major premise applies; (ii) whether the party with the burden of persuasion has proven a minor premise that falls within the major premise, and (iii) what conclusion follows. Stated differently, litigants can contest the law, they can contest the facts, and they can contest the way the law is applied to the facts to arrive at a result. And it's critical to precisely identify dispute(s) as to one (or more) of these —

This is obvious and self-evident. However, analyzing the case in a syllogistic fashion can help to clarify the issues. The choice of syllogisms to focus on is somewhat arbitrary. There may be syllogisms and countersyllogisms. The syllogism is nothing more than an analytic tool that can sometimes help to clarify the issues in a case. As an example, assume that the evidence was factually insufficient to support the jury's verdict or the judgment rendered on that verdict. The

appellant's major premise: when the evidence is not factually sufficient to support the jury's verdict, judgment on the verdict must be reversed and the case remanded for a new trial. The minor premise is that the evidence is factually insufficient in the present case. The conclusion is that a new trial must be ordered. The appellee argues that the major premise is incorrect, in that it omitted the requirement that factual insufficiency must be raised by motion for new trial. In this case, appellant did not file a motion for new trial, and so cannot establish the minor premise, and therefore does not reach the conclusion that a new trial is required. In this example, the appellee contested the appellant's statement of the major premise, and thus won the case. If the appellee had accepted the appellant's major premise as correctly stated, then unless the appellate court itself examined the record to see if the complaint was preserved, appellant would have secured a reversal on the basis of his faulty conception of the case (i.e., his syllogism).

Judges routinely analyze cases in a syllogistic fashion: determine what law applies, apply that law to the facts found by the fact-finder, and arrive at the proper judgment. Appellate opinions routinely follow the same three-step pattern: state the law that applies; apply the law to the facts; arrive at the result. Of course, judges and juries sometimes work backwards from the result, modifying the facts or the law to achieve the desired result. However, the syllogistic structure makes it seem that it is the law, and not the judges, that dictate the outcome of the case.

2. Inductive Reasoning Inductive reasoning is required when there is no obvious controlling principle of law that determines the outcome of the case. Inductive reasoning requires the analyst (lawyer, court) to collect together and analyze a group of authorities, to discern a rule of law which is demonstrated by these examples, and then to apply that rule of law to the facts of the present case, so as to arrive at the result. An example of inductive logic is the preparation of a Restatement by the American Law Institute. The drafters assemble and synthesize cases from many jurisdictions and then develop statements of black letter law which are disseminated around America. Appellate courts then frequently adopt sections of the Restatement as law of that jurisdiction. The Restatement section thus becomes the major premise in litigation, and plaintiffs and defendants litigate whether the defendant comes within the scope of that rule. The preparation of the State Bar of Texas' Pattern Jury Charges is another example of the inductive process. The Pattern Jury Charges are then used as the major premise for trying cases.

B. Authority Courts and lawyers look to legal authority to determine the major premises or rules of law to apply to a case. In the absence of authority, courts fall back on what they think would best serve the citizenry, the so-called "public policy" of the jurisdiction.

The hierarchy of sources for legal authority is: federal constitution, treaties, federal statutes, federal regulations, federal case law (as to federal questions), state constitution, state statutes, state regulations, state case law, reasoning. Interconnected with these authorities is the judge's desire to achieve justice (as he/she conceives of it), in the context of the political situation (especially when the judge must stand for election).

1. Constitution The Constitution is the paramount authority of the jurisdiction, overriding legislation and judicial views. However, American courts have empowered themselves as final arbiters of the meaning of constitutional provisions, thus giving them significant power to control our legal relations.

- *Edgewood Independent Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (Supreme Court held that the Texas system for financing the education of public school children was unconstitutional, under a statutory scheme which had existed for many years).

- *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*, 826 S.W.2d 489 (Tex. 1992) (recently-enacted statute revising state public school finance system held invalid for violating two other provisions of the Texas Constitution).

- Distinguish federal constitutional provisions and interpretation from state constitutional provisions and interpretation. *See In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994) (declaring Family Code provision unconstitutional under Texas Constitution). The U.S. Supreme Court had already declared that the Fourteenth Amendment did not invalidate a similar statute of another state. The Texas Court's majority Opinion states:

> It is wholly under our Texas due course of law guarantee, which has independent vitality, separate and distinct from the due process clause of the Fourteenth Amendment to the U.S. Constitution, that we reach today's decision. [Footnote omitted]

For the past fifty years, public interest litigation has been brought primarily in federal courts whose judges were more willing to overturn state statutes as violating U.S. Constitutional provisions. The Nixon-Reagan-Bush appointees have proven less willing, so there is a "new federalism" afoot to use state constitutional provisions to overturn state legislation.

2. Statutes

- If a statute applies, the statute controls, unless it is unconstitutional. *See Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993) (when Supreme Court created common law duty owed by commercial providers of alcohol to persons later injured by intoxicated patrons, Legislature almost immediately thereafter enacted dram shop statute, which by its own terms became the exclusive basis for civil liability for providing alcohol to an adult). *See* TEX. ALCOH. BEV. CODE ANN. § 2.03 (Vernon Supp. 1993).

- The key issue in applying a statute is legislative intent. *Jensen Assoc., Inc. v. Bullock*, 531 S.W.2d 593, 599 (Tex. 1975). Since statutes are often poorly written, and sometimes are intentionally left unclear so as to facilitate passage through the legislature, courts sometimes have wide latitude, even when a statute controls, in determining what the law is that applies to a particular case. The courts use rules of construction, and often look at the legislative history, to discern legislative intent.

3. Case Law

Stare Decisis. The doctrine of stare decisis provides that when a principle, rule, or proposition of law has been squarely decided by the court of last resort, that decision is binding precedent for that court and inferior courts in deciding the same point of law in later cases. The rule of stare decisis is a "principle of judicial self-restraint." R. POSNER, THE PROBLEMS OF JURISPRUDENCE 134 (1990).

Overturning Precedent. The Supreme Court can overturn precedent, but it must avoid doing this cavalierly or the court will be seen as erratic, or arbitrary, or overtly political, and will draw criticism and perhaps even political reprisals if it occurs in an elective system.

- *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309-10 (Tex. 1987) (establishing that person injured by intoxicated driver can recover from licensee who sold intoxicants in violation of statute). The majority Opinion said:

> "The common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution."

- *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978) (establishing that spouse has independent cause of action for loss of consortium due to physical injuries to other spouse caused by negligence of third party). The majority Opinion said:

> "The law is not static; and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual re-evaluation of common law concepts in light of current conditions."

Courts of Appeal Bound. Courts of appeals are not as free to ignore or overturn stare decisis. *See Lynch v. Port of Houston Authority*, 671 S.W.2d 954, 957 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (refusing to abrogate doctrine of sovereign immunity because such a fundamental and drastic change should come only from the legislature or the supreme court).

Legislature Not Bound. The legislature can overturn precedent by legislative enactment, provided that the legislature is acting within constitutional limits. A common error in legal reasoning is to accept as authoritative decisions that were valid when handed down, but whose validity should be reexamined in light of subsequent legislative action.

Hierarchy of Importance of Cases.

- *Holding*: the holding of an appellate court, the "ratio decidendi" of the case, is what carries precedental weight, not all of the explanation accompanying the holding.

- "*Dictum*" is a general expression of a view that goes beyond the holding of the case. Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a judge on a point not necessarily arising in a case; an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point; not the professed deliberate determination of the judge himself." *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124, 1126 (1913). *See State v. Valmont Plantations*, 346 S.W.2d 853, 878-79 (Tex. Civ. App.--San Antonio 1961), *opinion adopted*, 163 Tex. 381, 355 S.W.2d 502-503 (1962); Quinn, *Authority in the Common Law: Holdings, Dicta, and Miracles--Reflections on Legal Meta-Doctrine and the Realities of Appellate Advocacy* 11-12, Appellate Practice and Advocacy Section Meeting at State Bar of Texas Annual Meeting (June 18, 1993).

- "*Obiter dictum*" is a remark made in passing, unnecessary to the issue upon which the court is writing. *See Ex parte Harrison*, 741 S.W.2d 607, 609 (Tex. App.--Austin 1987, orig. proceeding); Quinn, *supra* at 14. "'Obiter' is correctly defined as that useless chatter of judges, indulged in for reasons known only to them, to be printed at public expense." *United States v. Certain Land*, 29 F. Supp. 92, 95 (D.C. Mo. 1939).

- "*Judicial dictum*" is binding. Judicial dictum is an expression of the court on a point involved in the case, and argued by counsel, which is deliberately passed on by the court, and which is included in the opinion for guidance of the bench and bar. *Ex parte Harrison*, 741 S.W.2d 607, 608-09 (Tex. App.--Austin 1987, orig. proceeding). *See McConnell v. Southside Ind. Sch. Dist.* 858 S.W.2d 337 (Tex. 1993) (plurality opinion by Hightower, J.) (containing judicial dictum regarding the "corollary question" of whether a burden exists to object to a defensive motion for summary judgment or response; one justice concurred only in the holding, and four justices dissented in two separate opinions, pointedly not joining in the obiter dictum in the court's plurality opinion). Surprisingly, the tort of intentional infliction of emotional distress was adopted by the Supreme Court in judicial dictum in *Twyman v. Twyman*, 855 S.W.2d 619, 625-26 (Tex. 1993) for the issue of intentional infliction was not raised by the parties on appeal. *See Twyman*, 855 S.W.2d at 637 (Hecht, J., concurring and dissenting) (criticizing fact that Supreme Court ruled on intentional infliction claim even though plaintiff did not plead it, trial court did not make findings on it, court of appeals did not consider it, and plaintiff did not raise the argument on appeal).

- *Plurality opinions* of the Supreme Court. When a majority of the Supreme Court does not join into one opinion, then the court has plurality opinions, concurring opinions, and dissenting opinions. None of the opinions are stare decisis. *See Langford v. State*, 578 S.W.2d 737, 738 (Tex. Crim. App. 1979). The holding stated in the court's plurality opinion, *and the law necessary to arrive at that holding*, are authoritative, since they were concurred in by enough justices to achieve a majority.

- *Court of appeals opinions*. A decision by one court of appeals is not binding on other courts of appeals. Admittedly, other courts of appeals often follow suit. Examples can be found, however, where courts of appeals have disagreed on a legal point. In some eyes, the weight of a court of appeals decision is affected by subsequent writ history. For example, some might give greater credence to a "writ ref'd n.r.e." than to a "no writ" case. Because the Supreme Court has never, especially since the "writ denied" disposition was implemented, felt compelled to right every wrong brought to its attention, it is questionable how much a "writ ref'd n.r.e." or a "writ denied" adds to the weight of a court of appeals decision. If the Supreme Court denies the writ, with a per curiam opinion stating that the higher court does not necessarily agree with a statement of law made by the court of appeals, that statement of law is very suspect.

- Opinions of *panels* of court of appeals. Although some would argue to the contrary, the decision of a panel of a court of appeals is not binding on another panel of that same court. When two panels hand down conflicting decisions, it is appropriate but not mandatory that the conflict be resolved by en banc review. If en banc review is accomplished, that decision thereafter prevails on that court.

  The author found no case authorities on the question of when a *trial court* is bound by a court of appeals decision made in another case. As a practical matter, trial courts that appeal into that court of appeals should assume that the law will be applied in the same way to the current case, so that deviating from the prior decision will likely result in error. The situation is complicated where the appellate court sits in panels, and it cannot be determined at the trial level who will sit on the panel that reviews the appeal. There appears to be no firm argument to support the view that a trial judge in one appellate district is bound by the rulings of appellate courts in other appellate districts. One trial judge encountered by the author took the position that he was bound by an appellate decision from another district if

it was the only decision on point, but that if a conflict existed between two courts of other appellate districts then this trial judge felt free to choose which court of appeals to follow.

- *U.S. Supreme Court* decisions on federal questions are binding on all Texas courts, but decisions on matter of state law are not binding on state courts. *See Nance Exploration Co. v. Texas Employers' Ins. Ass'n*, 305 S.W.2d 621 (Tex. Civ. App.--El Paso 1957, writ ref'd n.r.e.), *cert. denied*, 358 U.S. 908 1958). Decisions of *federal courts of appeals*, on either state or federal law, are not binding on Texas courts. *First Nat. Bank v. Arrow Oil & Gas, Inc.*, 818 S.W.2d 159, 163 (Tex. App.--Amarillo 1991, no writ).

- *Unpublished and Withdrawn Opinions* have no precedental effect. TEX. R. APP. P. 47.7 (as to unpublished opinions); *Frizzell v. Cook*, 790 S.W.2d 41, 43 (Tex. App.--San Antonio 1990, no writ) (as to withdrawn opinions). In 1993, the Texas Supreme Court determined that it would no longer automatically vacate a court of appeals opinion just because the parties settled. Instead, the Supreme Court would grant writ of error, and without regard to the merits would vacate the judgments of both lower courts, remanding to the trial court for entry of an agreed judgment. The court of appeals' Opinion is not vacated, and if published has a stare decisis effect equivalent to a writ dismissed case. *Houston Cable TC, Inc. v. Inwood West Civic Ass'n*, 860 S.W.2d 72 (Tex. 1993). The vacatur policy in the federal court system was announced in *U.S. BanCorp. Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 130 L. Ed.2d 233 (1994). Vacatur of a lower court decision is required where the case is mooted due to circumstances not attributable to any of the parties, or where mootness arises from the unilateral action of the party who prevailed in the lower court. However, mootness by reason of settlement does not justify vacatur.

4. Public Policy. In the absence of controlling constitutional or statutory provisions, and in the absence of case law precedent, the courts fall back on "public policy."

- *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1993) (Supreme Court held that Mary Carter agreements are void as contrary to public policy). The majority Opinion said:

> As a matter of *public policy*, this Court favors settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment. The bottom line is that our *public policy* favoring fair trials outweighs our *public policy* favoring partial settlements.
>
> This case typifies the kind of procedural and substantive damage Mary Carter agreements can inflict upon our adversarial system. Thus, we declare them void as violative of sound *public policy*. [Italics added.]

- *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993) (Supreme Court declines to impose common law duty on social host who serves alcohol to adult guest whom host knows will be driving). The majority Opinion said:

> Deciding whether to impose a new common-law duty involves complex considerations of *public policy*. We have said that these considerations

include "'social, economic, and political questions,' and their application to the particular facts at hand." [Italics added.]

5. Secondary Authorities. Secondary authorities are authors of treatises, encyclopedias, annotations, law review articles, and continuing legal education articles, who opine on the law. These authorities, being independent from the advocate in a particular case, can lend credence to a litigant's contentions. They are cited by appellate judges to help justify the judge's opinions, to serve as background material for the reader, and sometimes to give credit to the originator or proponent of an idea.

II. ROLE OF TEXAS SUPREME COURT

- to correct errors of law committed by courts of appeals, where the error is of such importance to the jurisprudence of the state that it requires correction. TEX. GOV'T CODE ANN. § 22.0001(a)(6).

- to resolve conflicts between courts of appeals on questions of law. TEX. GOV'T CODE ANN. § 22.0001(a)(2).

- to decide appeals involving the construction or validity of statutes. TEX. GOV'T CODE ANN. § 22.0001(a)(3).

- to decide appeals involving state revenue. TEX. GOV'T CODE ANN. § 22.0001(a)(4).

- to decide appeals where the Texas Railroad Commission is a party. TEX. GOV'T CODE ANN. § 22.0001(a)(5).

- to consider appeals where the justices of the courts of appeals disagree on a question of law material to the decision. TEX. GOV'T CODE ANN. § 22.0001(a)(1).

- to decide appeals from trial courts which grant or deny injunctive relief on the ground of the constitutionality of a state statute, where the case is of sufficient importance to the jurisprudence of the state. TEX. GOV'T CODE ANN. § 22.001(c).

- to issue mandamus to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

- to issue habeas corpus when a person has been improperly held in contempt and incarcerated for violating a court order in a civil case. TEX. GOV'T CODE ANN. § 22.0021(e).

III. ROLE OF INTERMEDIATE APPELLATE COURT

- to consider merits of every appeal where jurisdiction exists

  In *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993), the Supreme Court held that a court of appeals cannot vacate the trial court's judgment and remand the case to the trial court for reconsideration in light of subsequent changes in law; when there is jurisdiction, and error exists, the court of appeals must render its decision on the merits.

- to follow prior Supreme Court precedent

Courts of appeals are obligated to follow Supreme Court precedent. *Lumplin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.--Houston [1st Dist.] 1988, no writ).

- following/disagreeing with other courts of appeals

It is contemplated that courts of appeals will disagree with each other, since resolving disagreements between courts of appeals is one ground for jurisdiction in the Supreme Court. TEX. GOV'T CODE ANN. § 22.0001(a)(2).

- introducing new theories of recovery?

In *Reagan v. Vaughn*, 804 S.W.2d 463, 464 (Tex. 1991), the Court said:

> This court has never addressed the issue of whether a child may recover damages for the loss of parental companionship, love, and society when a parent is injured. (FN2) The courts of appeals of this state that have addressed the issue have refused to allow recovery of such damages *on the grounds that only this court or the legislature have the authority to recognize such a cause of action.* [Emphasis added] See Ramos v. Champlin Petroleum Co., 750 S.W.2d 873, 878 (Tex. App.--Corpus Christi 1988, writ denied); Graham v. Ford Motor Co., 721 S.W.2d 554, 555 (Tex. App.--Tyler 1986, no writ); Hughes Drilling Fluids, Inc. v. Eubanks, 729 S.W.2d 759, 762 (Tex. App.--Houston [14th Dist.] 1986), writ granted, judgment set aside and cause remanded for consideration of parties' settlement agreement, 742 S.W.2d 275 (Tex. 1987); Jannette v. Deprez, 701 S.W.2d 56, 61 (Tex. App.--Dallas 1985, writ ref'd n.r.e.); Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 379-80 (Tex. App.--Austin 1984, writ ref'd n.r.e.). The Fifth Circuit has concluded that no such cause of action exists in Texas. In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985, 856 F.2d 28, 29 (5th Cir. 1988).

In *Vaughn v. Reagan*, 784 S.W.2d 88, 90-92 (Tex. App.--Houston [14th Dist.] 1989), *aff'd in part and rev'd in part*, 804 S.W.2d 463 (Tex. 1990), the court of appeals said:

> Three years ago this court (with one justice dissenting) declined to extend a right of recovery in these cases, stating that *the decision to create a new cause of action was one for the legislature or the supreme court.* [Emphasis added] Hughes Drilling Fluids, Inc. v. Eubanks, 729 S.W.2d 759, 762 (Tex. App.--Houston [14th Dist.] 1986), 742 S.W.2d 275 (Tex. 1987) (writ granted, judgment set aside and cause remanded for consideration of parties' settlement agreement). Since then, however, neither the legislature nor the supreme court has addressed this issue directly, and the appellate courts continue to refuse to recognize such a cause of action. Graham v. Ford Motor Co., 721 S.W.2d 554, 555 (Tex. App.--Tyler 1986, no writ); Ramos v. Champlin Petroleum Co., 750 S.W.2d 873, 878 (Tex. App.--Corpus Christi 1988, writ denied). The Fifth Circuit has considered the issue as well and, "[a]fter wading through the uncertain thicket of present-day Texas tort law," concluded that no such cause of

action exists. In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985, 856 F.2d 28, 29 (5th Cir.1988).

In support of the judgment, appellees argue that Texas law already provides for loss of parental consortium. They point out that at least one appellate court has held that damages to the filial relationship are compensable. Hall v. Birchfield, 718 S.W.2d 313, 338 (Tex. App.--Texarkana 1986), rev'd on other grounds, 747 S.W.2d 361 (Tex.1987). Appellees also cite several supreme court decisions as standing for the principle that the nuclear family is worthy of protection in circumstances of either death or injury. Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630 (Tex. 1986). In addition, appellees refer us to Salinas v. Fort Worth Cab & Baggage Co. and argue that in that case the supreme court appeared to recognize the right to recover for impairment of familial relationships. 725 S.W.2d 701, 704 (Tex. 1987) (minor children allowed to recover for impairment of relationship with father who abandoned them after their mother was raped). Finally, appellees argue that the force of logic in cases from other states supports the trial court's judgment and that it would be unconstitutional under the open courts provision to limit recovery of parent-child consortium to death cases.

In Bennight v. Western Auto Supply Co., both the husband and daughter of the injured party sought compensation for loss of consortium. 670 S.W.2d 373 (Tex. App.--Austin 1984, writ ref'd n.r.e.). The Austin Court of Appeals held that a cause of action for loss of parental consortium was not allowed under the laws of this state and that it was not the role of an intermediate appellate court to create a new cause of action. Id. at 379-80. However, the court also stated, "It is difficult 'on the basis of natural justice to reach the conclusion that this type of action will not lie.' Hill v. Sibley Memorial Hospital, 108 F.Supp. 739 (D.D.C. 1952)." Id. at 379. The court noted the "obvious reality" of such injuries to the child when the parent suffers injuries of the kind sustained in Bennight. The court also noted the incongruity of allowing certain family members, but not others, to recover for substantially the same harm suffered by each. Id.

It is difficult to dispute that reasoning. . . .

* * *

However, despite the evidence and the arguments for or against a right of recovery for loss of parental consortium, *the issue remains whether, absent a clear-cut supreme court or legislative mandate, this court can recognize such a cause of action.* [Emphasis added] In that regard, we do not interpret the cases cited by appellees as providing us with a clear-cut mandate. As we have not changed our mind on the role of the appellate court since our decision in the Eubanks case, we continue to

adhere to the present law. Perhaps the dissent in this case will provide the supreme court with an opportunity to review the issue.

Id. at 90-92.

- Declaring public policy in case of first impression?

- *Lubbock Mfg. Co. v. Perez*, 591 S.W.2d 907, 920 (Tex. Civ. App.--Waco 1979, dism. agr.) (whether Mary Carter agreements are against public policy is "matter for determination by our Supreme Court of Texas").

- Reviewing factual sufficiency of the evidence

  - To examine all of the evidence in the record, to determine whether the evidence supporting the determination made by the fact finder is so weak or insufficient that the finding is manifestly unjust, or if the failure of the fact-finder to make an affirmative finding is against the great weight and preponderance of the evidence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (as to factually insufficient evidence); *W.B. Hinton Drilling Co. v. Zuniga*, 784 S.W.2d 442, 447 (Tex. App.--Tyler 1989, no writ) (as to great weight and preponderance). If so, then the case should be remanded for a new trial. The requisite level of proof may be elevated if the burden of persuasion in the trial court was by clear and convincing evidence. *See In re L.R.M.*, 763 S.W.2d 64, 67 (Tex. App.--Fort Worth 1989, no writ).

- *Sage Street Associates v. Northdale Const. Co.*, 36 TEX. SUP. CT. J. 1118, 1125 (June 30, 1993) ("Although courts of appeals act as final arbiters of factual insufficiency issues, that review must be made within the applicable legal constraints. It is well-established that [the Supreme Court] has jurisdiction to determine if a correct standard has been applied by the intermediate court.").

IV. ADDITIONAL MATERIALS Attached are copies of the tables of contents of introductory portions of several books on appellate persuasion. The publisher's address is included.

WINNING APPEALS

Persuasive Argument and the Appellate Process

By Josephine R. Potuto
Richard H. Larson Professor of Constitutional Law
University of Nebraska

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Appellate
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Edward H. Levi

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An Introduction to Legal Reasoning

I

This is an attempt to describe generally the process of legal reasoning in the field of case law and in the interpretation of statutes and of the Constitution. It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack.[1] In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible. The mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity. On serious controversial questions, it makes it possible to take the first step in the direction of what otherwise would be forbidden ends. The mechanism is indispensable to peace in a community.

The basic pattern of legal reasoning is reasoning by example.[2] It is reasoning from case to case. It is a three-step process

[1] The controlling book is Frank, Law and the Modern Mind (1936).

[2] "Clearly then to argue by example is neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term and one of them is known. It differs from induction, because induction starting from all the particular cases proves . . . that the major term belongs to the middle

described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

These characteristics become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts—in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases. If this were the doctrine, it would be disturbing to find that the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.

The determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important.[3] It is not what the

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and does not apply the syllogistic conclusion to the minor term, whereas argument by example does make this application and does not draw its proof from all the particular cases." Aristotle, Analytica Priora 69a (McKeon ed., 1941).

[3] But cf. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161 (1930).

prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference. It is not alone that he could not see the law through the eyes of another, for he could at least try to do so. It is rather that the doctrine of dictum forces him to make his own decision.[4]

Thus it cannot be said that the legal process is the application of known rules to diverse facts. Yet it is a system of rules; the rules are discovered in the process of determining similarity or difference. But if attention is directed toward the finding of similarity or difference, other peculiarities appear. The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. But reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say there is reasoning, but it is imperfect.[5]

Therefore it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are

[4] Cf. Mead, The Philosophy of the Act 81, 92–102 (1938).

[5] The logical fallacy is the fallacy of the undistributed middle or the fallacy of assuming the antecedent is true because the consequent has been affirmed.