An ELEMENTary Approach to Legal Reasoning

FIRAC: *An* ELEMENT*ary Approach to Legal Reasoning*

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1.1 An overview of the FIRAC approach.

FIRAC is an acronym for a five step analytical process that can be used to learn any law or to determine whether any law has been violated. Each letter represents one step of the process and the ideal order in which they should be performed.

"F"	—	The first step is to ascertain the **F**acts of the case.
"I"	—	The second step is to identify a law **I**ssue raised by the facts.
"R"	—	The third step is to find an accurate statement of the **R**ule.
"A"	—	The fourth step is to **A**pply the rule to the facts.
		(1) Identify one element issue.
		(2) Use one or more legal reasoning methods to compare the element to the facts and determine whether the element is satisfied.
		(3) Repeat (1) and (2) for each element.
"C"	—	The final step is to determine the **C**onclusion to the issue.

A Primer of the FIRAC Terminology

What follows is an introduction to the FIRAC terminology. The intent is only to convey the essence of each step. Subsequent sections will discuss each of the steps in more depth. >/p>

Facts of the case

"Case" refers to an actual, potential, or hypothetical dispute which raises a question of whether one or more laws were violated. A lawsuit is an example of a case. So is a "case analysis" on an exam.

The **"facts"** of the case describe what happened to cause the dispute. The facts may describe behavior, who or what engaged in that behavior, the reasons for the behavior, when and where the behavior occurred, circumstances at the time the behavior occurred, who or what was affected, how they were affected, and so on.

Sometimes, the facts are presented as a given. The parties to a dispute may have agreed upon (stipulated to) the facts. A trier-of-fact (such as a jury or hearing officer) may have considered the evidence and decided the facts. A professor may have prepared a statement of facts for an exam question. Other times, the facts must be ascertained from scratch.

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Issue (question)

Lawsuits are brought because one person believes another has violated some law. Thus, the primary **"issue"** a court has to answer is whether a named defendant is guilty of or liable for violating a specific law. "Did James Allen Cook violate North Carolina General Statute § 14-34.2?" and "Is Bill Derr liable under the common law of negligence?" are examples of law issues.

CAUTION: In the context of FIRAC, the term "*legal issue*" is frequently used to refer to two related but distinctly different types of questions:

> (1) A question that asks whether a specific law has been violated – what I call a **law** issue (as distinguished from a *legal* issue.) Example:
>
> > Did Len Lorde violate Sec. 554.602 of the Michigan Landlord-Tenant Relationship Act?
>
> (2) A question about the meaning of a particular word or phrase used in a law -- what I call an **element** issue. Example:
>
> > Is a building leased for use as a retail store a "rental unit?" ["Rental unit" is only one of the many words and phrases that, together, make up the entire law known as Sec. 554.602.]

After reading the rest of this section, you will have a better understanding of these two types of legal issues. However, it should be apparent from the examples above that the phrasing and focus of the questions are notably different.

Right now, just keep in mind that *identifying **law** issues is the focus of the "I" step.* Recognizing element issues is part of the application step.

The issue sets up the problem. What happens in the remaining steps depends upon the law issue identified in this step. Change the issue and everything that follows also changes. Among other things, this means that when the facts give rise to multiple law issues it is necessary to do a separate FIRAC analysis for each one.

To identify a law issue, it is necessary to (1) know the facts of the case and (2) understand a law well enough to recognize when it may have been violated. When the conduct described by the facts causes you to believe, suspect, or even question whether a specific law has been violated, you have discovered a law issue.

"Issue spotting" may seem easy but don't be misled. There are so many variables at work that a law issue may remain hidden in plain sight. The facts may be screaming that a law has been violated but you will be oblivious to the outcry if you are ignorant of the law. You may know everything about a law except for the key piece of information needed to make the connection in the particular fact situation before you. You may misread the facts or fail to pick up on a nuance. Time pressure may cause you overlook something that would have been apparent if you had not been in a rush. A haphazard approach may miss things that a systematic approach would find.

Not noticing a law issue, for whatever reason, has consequences. To not ask a question is to forfeit the answer and all the associated benefits. Overlooking a law issue on an exam means giving up all the points allocated to that issue. Missing a law issue in a real case can mean a damage award that might have been, a defense that never was, or an upset client.

The "I" step is only about recognizing the question. Figuring out the answer is the purpose of the remaining steps. Even if you are absolutely, positively certain you know what the answer is, restrain the urge to jump to the "C" step. Your initial reaction could be wrong. You may have overlooked a critical fact. Your understanding of the law may be incorrect. Bias or emotion may have influenced your perception. Doing a complete FIRAC analysis is the only way to catch such errors.

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Rule (law)

The **"rule"** is the *text* of the law that was identified in the "I" step. What is needed is a quotation of the rule, preferably from a primary source. The name of the rule is not sufficient. Neither is a paraphrased statement. In the application step, words of the rule will be compared to the facts. The words of the rule also provide information needed for the conclusion step. If the rule is not expressed accurately here, the rest of the analysis will be flawed.

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Application

An **"application"** is, in essence, a comparison of two sets of words:

> Set 1: the words of the rule that describe the conduct it prohibits/requires /permits
>
> Set 2: the words (facts) that describe the conduct that occurred.

The task is to ascertain whether the two sets of words describe the same conduct.

The words of a rule describe certain conduct. Those words have been chosen with care to create a precise and unique description of that conduct and to distinguish it from conduct not covered by the rule. The result is a list of separate and identifiable things which have been combined together in sentence form. One word or phrase of the rule may describe a *specific behavior*. A different word or phrase may describe *who* must have engaged in that behavior; or a *state of mind* that must have been present while engaging in the behavior; or *circumstances that must have been present* when the behavior occurred; or *who or what must have been affected* by the behavior. Other words may describe other things.

Each of these things is one **element** of the rule. Where do you get a complete and accurate list of a rule's elements? It may be provided by an instructor. Judicial opinions often identify the elements of the law at issue in that case. Do an Internet search. There are lots of sources. And once you truly comprehend what an element is, it is relatively easy to look at the text of a rule and pick out the elements.

The best way to do an application is to compare each element, one at a time, to the facts. Each element describes one part of the conduct covered by the rule. By proceeding methodically through all the elements, each and every part of the conduct is compared to the facts. Nothing essential is overlooked and nothing extraneous is considered.

Begin by converting each element into what I call an **"element issue."** An element issue is a question that asks whether an element is satisfied. It may be stated in general terms, such as "Was there 'state action?'" ["State action" is one of the elements of the Equal Protection Clause of the U.S. Constitution.] It is preferable, however, to phrase an element issue as a question that states the relevant facts and asks whether they come within the meaning of the element. "Was the New York Yankees' policy to exclude female reporters from its locker room in Yankee Stadium 'state action?'" is a better statement of an element issue than "Was there 'state action?'"

An element is **"satisfied"** or "met" if the thing described by the element (the who, what, circumstances, etc.) is also described by the facts. If *all* the elements are satisfied, the rule and the facts describe the same conduct. But it's all or nothing. Close doesn't count. There must be a perfect match. If one or more of the elements are *not* satisfied, the rule and the facts describe different conduct. There may be some other rule that encompasses the conduct – but not the one you are analyzing.

What if there is uncertainty or disagreement about whether an element is satisfied? "Maybe" is not an option. The element is either satisfied or not; those are the only two choices. To figure out which answer is the correct one, lawyers and judges use a variety of reasoning methods. They may look up the definition of the element's words, rely upon precedents for guidance, apply a test or standard, consider the purpose of the rule, or use some other method.

Doing an application is like playing a matching game. The following game illustrates the concept.

Consider the following pairs of words. Does the word in the "element" column mean the same thing as, or include, the word directly opposite it in the "fact" column?		
Element	Fact	Answer
spouse	wife	YES or NO
forty percent	two-fifths	YES or NO
statue	Consumer Protection Act	YES or NO
state capitol	Washington, D.C.	YES or NO
pig	greedy	YES or NO
species	Cetacea	YES or NO

And just like a matching game can be tricky, so can an application. Grammar and punctuation can affect how a word or phrase should be interpreted. A word may have multiple meanings. If you think an element means one thing but the legal definition is different, you will be searching the facts for the wrong thing. It is all to easy to misread, overlook, or ignore relevant facts, consider irrelevant ones, or assume the existence of facts that are not stated.

If you haven't already done so, play the "matching game" above. Some of the comparisons are designed to take advantage of mistakes that beginners often make when doing an application. ANSWERS

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Conclusion

Every rule, in addition to describing certain conduct, also states a conclusion to be reached when that conduct occurs. It may help to think of a rule as an "if-then" statement:

> IF the conduct described by the rule occurred,
> THEN the **conclusion** stated in the rule should be reached.

The comparison conducted in the application step provides the information needed to determine whether the "IF" condition has been met. If ALL the elements were SATISFIED, the conduct occurred. If ONE OR MORE of the elements were NOT satisfied, the conduct did not occur.

But you still need one more piece of information before you can complete this step – you need to know the conclusion stated in the rule. You will find it in the words of the rule, which were quoted in the "R" step.

Picking out the conclusion may be easy – or not. Likewise, understanding what the conclusion means may be easy – or not. This is because there are many different

conclusions as well as different ways of stating them. Here are some general guidelines and examples to get you started.

A straightforward example:

"Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, *is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100)*." [Italics mine.]

The first half of the rule describes the conduct it prohibits. Those are the words that were compared to the facts in the application step. If it was determined that the facts and the rule described the same conduct (i.e., all the elements were satisfied), the italicized words state the conclusion to be reached -- guilty.

What if the facts and the rule described different conduct (i.e., one or more elements were not satisfied)? The conclusion stated in the rule is not reached – not guilty.

Another straightforward example:

"If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog *shall be liable for any damages suffered by the person bitten . . . .*" [Italics mine.]

Like the previous example, the first part of the rule describes the conduct it prohibits. If that conduct occurred, the italicized words state the conclusion to be reached -- liable. If the prohibited conduct did not occur -- not liable.

A more difficult example:

"The operator of a vessel involved in a collision . . ., to the extent that he or she can do so without serious danger to his or her own vessel, crew, and passengers, *shall* render reasonable assistance to a person affected by the collision . . . ." [Italics mine.]

This example differs from the previous examples in two significant ways. First, both of the previous rules described conduct that was prohibited. Doing what a rule prohibits results in guilt/liability. The rule in this example, however, describes conduct that is *required*. The italicized word "shall" – a single word buried among all the others – tells you that the conduct described by the other words is required. And that is enough to determine whether the rule has been violated. If the conduct described by the rule occurred (i.e., all the elements were satisfied), the person did what was required so the conclusion is not guilty/no liability. If the conduct did not occur (i.e., one or more elements were not satisfied), the person did not do what was required and the conclusion is guilty/liable. Note that this is the *opposite* of the reasoning used when a rule prohibits conduct.

Second, unlike the first two examples, this rule does not state the consequences if it is violated. This is common. It doesn't mean there are no consequences. It just means the consequences are specified elsewhere.

Another more difficult example:

"Any alien who is not an enemy, *may* own, sell, devise, dispose of, or otherwise deal with property in the same manner as if he had been a citizen of the State by birth." [Italics mine.]

Once again, a single word is the key to determining the conclusion. But unlike the previous example, the italicized word in this rule is “may,” not “shall.” “Shall” means required; “may” means optional. This rule does not prohibit conduct or require conduct. Rather, it *permits* conduct.

All the words of the rule except “may” describe the permitted conduct. If that conduct occurred (i.e., if all the elements were satisfied), the person did what was permitted so the conclusion is “the rule was not violated” – not guilty/no liability/no consequences.

Likewise, a person who never attempted to do what the rule permitted cannot be found guilty of violating it. The conduct is optional. There is no penalty for not doing something that didn’t have to be done.

With rules that permit conduct, a violation occurs when a person attempts to do what is permitted but the attempt is defective in some way. For example, if an alien who was not an enemy attempted to deal with property in a *different* manner than a citizen could, that would violate the rule. (The rule only permits dealing with property in the *same* manner a citizen could.) The rule would also be violated if an alien who *was* an enemy attempted to deal with property in the same manner as a citizen would. (The rule only extends the option to aliens who are *not* enemies.)

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1.2 Don’t believe everything you think.

About 10 years ago, my mother was selected as a prospective juror in a criminal trial. The defendant was a long haired, bearded young man accused of the illegal possession of marijuana. During *voir dire*, the defense attorney challenged my mother for cause. The judge agreed and excused her.

Several weeks later, my mother related her experience to me. She was upset and felt insulted by her dismissal. “I don’t understand why they wouldn’t let me be a juror,” she exclaimed. “You could tell just by looking at him [the defendant] that he was guilty!”

My mother was, no doubt, looking for some sympathy from her attorney son. Instead, I told her “I would have done the same thing.” and launched into an explanation of confirmation bias. Once humans form a belief, they tend to seek only evidence that will verify their belief and ignore or rationalize away any evidence that would refute it.

In their book, *Mistakes Were Made (but not by* me) [Harcourt, Inc. 2007], social psychologists Carol Tavris and Elliot Aronson discuss the existence and effects of confirmation bias in the American criminal justice system. One example:

> Many detectives do just what the rest of us are inclined to do when we first hear about a crime: impulsively decide we know what happened and then fit the evidence to support our conclusion, ignoring or discounting evidence that contradicts it. Social psychologists have studied this phenomenon extensively

> by putting people in the role of jurors and seeing what factors influence their decisions. In one experiment, jurors listened to an audiotaped reenactment of an actual murder trial and then said how they would have voted and why. Instead of considering and weighing possible verdicts in light of the evidence, most people immediately constructed a story about what had happened and then, as evidence was presented during the mock trial, they accepted only the evidence that supported their preconceived version of what had happened. Those who jumped to a conclusion early on were also the most confident in their decision and were most likely to justify it by voting for an extreme verdict. This is normal; it's also alarming. [pp.135-36]

No one is immune from confirmation bias. Not jurors. Not law enforcement officers. Not law students. Not attorneys. Not judges. Not businesspeople, politicians, journalists, scientists, other trained professionals, or anyone else.

And that's one of the reasons I cringe whenever someone justifies an opinion by declaring "It's obvious." or "It's common sense." What the person really means is "I feel certain that I am correct and you should agree with me simply because my belief is so strong." Challenge him with evidence and reasons that discredit his point of view and the probable -- and ironic -- result is that, instead of changing his mind, he will end up being even more convinced that his original opinion is right.

Of course, confirmation bias is not the only cause of thinking errors. In his book, *On Being Certain: Believing You Are Right Even When You're Not* (St. Martin's Press 2008), neurologist Robert A. Burton argues: "Despite how certainty feels, it is neither a conscious choice nor even a thought process. Certainty and similar states of knowing what we know are sensations that feel like thoughts, but arise out of involuntary brain mechanisms that function independently of reason." In other words, feeling absolutely, positively certain that you are correct doesn't mean you are.

Then there is all the research which shows that emotions, such as fear and love, often trump reason. And the popular literature (such as *Blink: The Power of Thinking without Thinking* by Malcolm Gladwell, Little Brown & Company, 2005) which contends that intuition is often as good, and sometimes even better, than conscious, rational decision making. Life would be a whole lot easier, less painful, and more successful if we could rely upon our "gut reactions." That illusion has a seductive appeal. But the reality is that, while our emotions and intuition sometimes steer us in the right direction, they also (more frequently than we're willing to admit – remember confirmation bias?) lead us far astray.

But reasoned decision making has its shortcomings, too. The human brain can only process limited amounts of information at any one time. We deal with the overload by simplifying the complex -- by ignoring information deemed to be (but which may not be) irrelevant, by utilizing generalizations and stereotypes (which may be inaccurate) , and by formulating simplistic decision making rules (which may omit critical considerations) out of whatever information is readily available (which may be incomplete, false, or immaterial.) Logic skills, language, perceptions, and a host of other factors can also affect the outcome. This leaves a lot of room for bias and error. Appearances can still deceive. Words can still mislead. Unwarranted assumptions and inferences can still generate baseless conclusions.

And the list goes on. If you are beginning to wonder whether you can trust your own judgment, congratulations! Recognizing and accepting uncertainty and being able to deal with it constructively is a hallmark of a good lawyer. On the other hand, if you reject what

you have been reading or picture yourself as the exception, [it is absolutely, positively, certain and blatantly obvious that :)] your confidence exceeds your ability to reason.

Mistakes in thinking are a pitfall that legal professionals must do their best to avoid. It's not just a matter of needing to satisfy some abstract notion of justice. There are very real and serious practical consequences at stake. Faulty reasoning can result in an incorrect understanding of a law, bad advice to a client, ineffective representation in court, erroneous acquittals and convictions, and flawed precedents.

One way to minimize bias and error is to allow our reasoning to be guided by an external process that forces us to proceed methodically and logically and to confront our blind spots and consider disconfirming evidence. A good example of such a process is the "scientific method." Among other things, it requires scientists to try and disprove their hypothesis. This necessitates the search for and evaluation of contrary evidence and alternate explanations, thereby countering the natural tendency to "cherry pick" only the information that supports one's belief.

The analogous reasoning process used by the legal community is known by the acronym, "FIRAC." There are significant differences from the scientific method, of course, but the purpose is the same – to provide a standardized, systematic procedure for effectively determining and evaluating answers to questions. Specifically, the FIRAC approach to legal reasoning:

- provides structure, direction, and focus, which substantially decreases the uncertainty, confusion, and wasted time and effort that typically accompany a flail-in-the-dark or scattergun approach.
- breaks the problem into smaller parts which the human brain is better able to handle.
- inhibits the impulse to jump to conclusions and balances reason against intuition and emotion.
- furnishes a framework that facilitates and improves information gathering and processing. It identifies what information is needed, helps organize the bits and pieces gathered from various sources into a comprehensive and useful whole, and reveals critical gaps that need to be filled.
- highlights determinative issues and pinpoints areas of ambiguity and disagreement. This allows attention and resources to be concentrated where they are most needed and will have the greatest potential impact.
- suggests reasoning methods that can be used to analyze the information and resolve the issues. The necessary deliberation usually exposes and forces the consideration of alternative viewpoints, adverse evidence, and counterarguments.
- improves communication among legal professionals (and others familiar with the FIRAC approach.) Speaking the same language and thinking along the same lines heightens mutual understanding. And that improves a lawyer's ability to perform her professional tasks, including learning law, giving advice, drafting documents, negotiating agreements, and advocating a position.

When applied properly, the FIRAC approach will guide you to a reasonable conclusion and provide ammunition for convincing others that the conclusion you reached is more reasonable than other possible conclusions. What FIRAC will NOT do is produce an empirically testable "correct" answer. Legal reasoning is about formulating a supportable opinion. That opinion is "right" if a human decision maker (such as opposing counsel, a juror, a judge, or an IRS agent) agrees with it; it's "wrong" if he or she disagrees.

This is not to suggest that all opinions are equal. Nor does it imply that characterizing an opinion as “right” or “wrong” is no more meaningful than the flip of a coin. An opinion untainted by bias and supported by the application of impeccable logic to a comprehensive and accurate body of evidence is much more likely to be correct than one that is the product of blind faith, unquestioned belief, prejudice, ulterior motives, flawed logic, or incomplete and erroneous data.

“More likely to be correct” is not the same as certainty. But it’s the best that legal professionals can strive for. And that’s what FIRAC can help them accomplish.

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1.3 Words count

One, two, three, four,
a definition you ignore,
five, six, seven, eight,
may decide your client's fate.

I lived in the Law Quad during my first year of law school. Shortly after moving in I met my next door neighbor, John, another freshman. When it turned out that we had been assigned the same classes, we joined with several other classmates to form a study group.

John's and my mid-year and final grades were almost identical. While that may seem reasonable, since we studied together, I found it frustrating. I studied many more hours than John. I felt that I understood the material better and that my reasoning skills were superior. Yet, despite my supposed advantages, our exam scores were about the same.

It took me a while to figure out why. John was a much better wordsmith.

My undergraduate degree was in Business Administration; John's was Journalism. On aptitude tests, such as the SAT and LSAT, my lowest scores were on the verbal sections; that's where he scored the highest. The disparity in our language abilities handicapped me. When writing an exam case analysis, I was not able to communicate my knowledge and thoughts as well as he. John was able to make more efficient use of his study time because his reading comprehension surpassed mine. My reasoning suffered because I overlooked

nuances he was able to detect. Overall, our respective advantages offset each other, resulting in equivalent grades.

Thanks to the unwitting example set by John, I began to truly appreciate how much my success as a law student, and eventually as a lawyer, depended upon my mastery of words. Previously, my verbal abilities had been good enough to learn what I needed to know to identify, solve, and, when necessary, explain my solution to management problems, physics problems, psychology problems, and car problems. But, while words played a role in these problems, the questions and answers were about management, physics, psychology, and cars.

Legal problems are different. They are word problems about *words*. From start to finish – from becoming aware of a law to deciding whether it has been violated, words dominate one's attention and thinking.

Let me show you what I mean. Here is **an example** of a legal problem -- an actual lawsuit brought before a court. Since courts use the FIRAC approach to decide lawsuits, all the FIRAC steps – Facts, Issue, Rule, Application, and Conclusion – are illustrated in this example.

William McBoyle operated a commercial airport in Galena, Illinois. He induced A.J. Lacey, one of his aviators, to steal an airplane from an air field in Ottawa, Illinois and fly it to McBoyle's airport in Galena. After changing the serial number and servicing and fueling the airplane, McBoyle instructed Lacey to fly it to Amarillo, Texas. Lacey had gotten as far as Guymon, Oklahoma when McBoyle directed him to sell or store the airplane and return to Galena. [This paragraph states the ***facts***.]

McBoyle was charged with violating the National Motor Vehicle Theft Act which made it a felony to "transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen . . . ." [This paragraph states the ***law issue*** – Did McBoyle violate the National Motor Vehicle Theft Act? – and the ***rule*** – the words beginning with "it [is] a felony" and ending with "stolen ."]

McBoyle is guilty (i.e., he has committed a felony) **IF** his conduct (described by the facts) and the conduct prohibited by the law (the quoted text in the previous paragraph) are the same. Are they? If you are uncertain whether McBoyle violated the act, what particular words created that doubt?

McBoyle's attorney picked up on the words "motor vehicle." He contended the stolen airplane was NOT a "motor vehicle." The prosecutor argued it was. ["Motor vehicle" is one of the ***elements*** of the law.]

What do you think? Was the airplane a "motor vehicle?" [This is an ***element issue***.]

Do you feel the answer is obvious or clear-cut? If so, you are missing something. The answer was so debatable the dispute went all the way to the U.S. Supreme Court. The first two courts to hear this case – the U.S. District Court for the Western District of Oklahoma and the 10th Circuit Court of Appeals – reached one conclusion. The Supreme Court reached the opposite conclusion. Why the different conclusions? Because the courts defined "motor vehicle" differently.

The 10th Circuit Court of Appeals' ***application*** and ***conclusions*** are *quoted* below. [See

McBoyle v. United States, 1930 10Cir 118, 43 F. 2d 273] Note how the court uses multiple sources of definitions and a rule of statutory construction called *ejusdem generis* to determine what "motor vehicle" means and to decide whether an airplane comes within that meaning.

> The primary question is whether an airplane comes within the purview of the National Motor Vehicle Theft Act. This act defines the term "motor vehicle," as follows:
>
> > "The term 'motor vehicle" when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."
>
> The Century Dictionary gives the derivation of the word "vehicle" as follows: "F. Vehicule, L. Vehiculum," meaning a "conveyance, carriage, ship." * * *
>
> It will be noted that the Latin word "vehiculum" means a ship as well as a carriage.
>
> Webster defines the word "vehicle" as follows:
>
> > "(1) That in or on which any person or thing is or may be carried, esp. on land, as a coach, wagon, car, bicycle, etc.; a means of conveyance.
> > "(2) That which is used as the instrument of conveyance or communication."
>
> Corpus Juris, vol 42, p. 609, §1, defines a motor vehicle, as follows:
>
> > "A 'motor vehicle' is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials; and as the term is used in the different statutes regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracks."
>
> Both the derivation and the definition of the word "vehicle" indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land, although the latter may be the limited or special meaning of the word. We do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce.
>
> An airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means of transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to some within

> the general term, “any other self propelled vehicle,” does not offend against the maxim of *ejusdem generis*. [In other words, the Court of Appeals’ ***conclusion to the element issue*** is that an airplane comes within the meaning of “motor vehicle.”]
>
> The judgment is therefore affirmed. [This is the Court of Appeals’ ***conclusion to the law issue***. The District Court concluded that McBoyle had violated the National Motor Vehicle Theft Act. The Court of Appeals agreed.]

The U.S. Supreme Court’s ***application*** and ***conclusions*** are *quoted* below. [See McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816 (1931)] Note that the Supreme Court also determines whether the meaning of “motor vehicle” includes an airplane. But the court uses different reasoning techniques which result in a different conclusion.

> The question is the meaning of the word "vehicle" in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction . . . . But in everyday speech, "vehicle" calls up the picture of a thing moving on land. * * * [H]ere, the phrase under discussion calls up the popular picture. For, after including automobile truck, automobile wagon, and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense -- that is, a vehicle running on land -- is the theme. It is a vehicle that runs, not something . . . that flies. Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress.
>
> It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage . . . more precisely confines to a different class. The counsel for . . . [McBoyle] have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan, and Missouri, not to mention the late Regulations of Traffic for the District of Columbia, Title 6, c. 9,§ 242, none of which can be supposed to leave the earth.
>
> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. United States v. Thind, 261 U. S. 204, 261 U. S. 209. [In other words, the Supreme Court’s ***conclusion to the element issue*** is that an airplane does NOT come within the meaning of “motor vehicle.”]
>
> Judgment reversed. [This is the Supreme Court’s ***conclusion to the law issue***. The Court of Appeals concluded that McBoyle had violated the National Motor Vehicle Theft Act. The Supreme Court disagreed.]

The McBoyle case is neither unusual nor an exception. On the contrary, it is a representative example of what attorneys and judges do – they ponder, debate, and decide issues about words. What are the words of a law? What do those words mean? Do the facts (one set of words) come within the meaning of the law's words (another set of words)?

The average person is not particularly fussy about his or her choice of words. Who cares if murder is not the same as homicide? If a stockholder is not the same as a partner? If a credit union is not the same as a bank? If a human being is not the same as a person? If a statue is not the same as a statute? "You know what I mean." "Don't be so picky."

Really? I bet you would be picky if you were charged with murder after killing an assailant in self-defense (which is homicide.) Or if creditors tried to hold you personally liable for debts incurred by a business that you co-own. (The answer depends upon whether you are a stockholder or a partner.)

Legal professionals don't have the luxury of sloppy language. They are "picky" because they appreciate that how a word is defined can make a huge difference – like the difference between guilty or innocent, which is sometimes the difference between life and death. The words of a law specify the conduct it prohibits or permits. Being able to determine whether a person has violated the law depends upon knowing *exactly* what its words mean.

The problem is that language is intrinsically imprecise. The *same* word may mean different things. *Different* words may mean the same thing. Uncertainty may exist even when the meaning of a word seems clear-cut. Thus, no matter how carefully a law is drafted, disagreements about its meaning may arise.

Take the term "human being." In the abstract, its definition may appear unequivocal. But add details and context and questions emerge. Does a law that prohibits the killing of a "human being" prohibit the killing of a dog which the owner considers to be "my child"? Of a lawyer? Of a man who is brain dead but whose bodily functions are maintained by artificial life support? Of a nine week old fetus in its mother's womb? Of a woman's egg that has been fertilized in a laboratory but not yet implanted into her uterus?

In casual conversation it may be good enough to assert "I believe life begins at conception so, yes, I think a woman's egg becomes a human being at the moment it is fertilized in a lab" and blithely dismiss contrary viewpoints as ridiculous, immoral, or sacrilegious. For a lawyer involved in a wrongful death lawsuit against a fertility clinic that accidently destroyed a frozen "pre-embryo," such a simplistic argument is not going to be even close to adequate. Whether a pre-embryo is a "human being" is an extremely difficult and complex question that raises important emotional, practical, moral, religious, ethical, social, economic, political, scientific, and legal issues that need to be addressed and thoughtfully considered.

Words matter. People who possess the attitude that they don't are, in my experience, at a significant disadvantage when it comes to learning and practicing law. It's not, as you might think, because they have inferior verbal abilities. When it comes to language or any other skill, there is always going to be someone who, at the moment, is better. But that only means everyone is starting at a different point. By studying and practicing, it is possible to move up the scale and even pass those who began ahead.

Rather, the biggest disadvantage of a “words don’t count” mindset is the mindset itself. People who don’t believe words are important pay little attention to specific words and their accurate use. As a result, they have not developed an eye for detail and subtlety and are therefore less likely to recognize ambiguities and distinctions. They are less inclined to learn the technical vocabulary and master the techniques used by members of the profession to determine the meaning of a word. And they are less able to express themselves clearly and persuasively. When presented with a task beyond their current abilities, their reaction is self-defeating – instead of accepting what must be done and figuring out how to do it (which may necessitate admitting deficiencies and adopting a different approach or developing new skills), they reject the task or the means of accomplishing it and come up with rationalizations to justify their response. The not surprising consequence is that, while others progressively improve, they keep falling farther behind.

Words cut across all aspects of the study and practice of law – from doing homework and research; to communicating with clients and colleagues; to taking classroom and bar exams; to drafting memoranda and briefs; and to presenting oral arguments to juries and judges. It follows that your success as a law student or legal professional depends upon your attitude about and skills with words. The following sections will help you acquire the frame of mind, perspectives, vocabulary, and techniques required to do your job.

Continue to Section 2.1

An ELEMENTary Approach to Legal Reasoning

FIRAC: *An* ELEMENT*ary Approach to Legal Reasoning*

by David Guenther, Professor Emeritus, Central Michigan University

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2.1 An introduction to reading and understanding judicial opinions.

After making a decision, a court may write a **judicial opinion** explaining why it reached the conclusion it did. Reading these judicial opinions (commonly called **"cases"**) is an integral part of learning and practicing law. Law textbooks include cases which students are assigned to read and expected to discuss in class. Lawyers, judges, and scholars research cases to improve their understanding of a law and formulate a position. Within the field of law, the standard practice is to support legal arguments with citations to relevant cases.

Acquiring the perspective, background knowledge, and skills necessary to comprehend judicial opinions takes time and effort. Unless you are an exception, you will struggle and get frustrated in the beginning. That's the bad news. The good news is that understanding judicial opinions becomes easier with practice and experience. The better news is that the materials in this section will accelerate your progress up the learning curve by introducing fundamental terminology, concepts, and techniques and offering opportunities to practice.

The starting point – *View a judicial opinion as a FIRAC analysis.*

Judicial opinions contain many different types of information which can be organized and expressed in many different ways. Yet every case is, at its core, a FIRAC analysis. If you are fortunate, the court will clearly perform each step in order. It will begin by stating the facts of the case. Then it will declare the law issue and quote the rule. The application will follow. An element of the rule will be highlighted, relevant facts will be referred to, and one

or more legal reasoning techniques will be used to determine whether the element is satisfied. (If more than one element is in dispute, each will be addressed sequentially.) Finally, the court will announce its conclusion.

But don't be surprised if the format and phrasing of an opinion does not match the model. The steps may be presented in a different order. Or more than once. Or split up, with part of one step performed in one place and part in another. (For example, the issue may be given before the facts. The conclusion may be stated at the beginning and the end. Facts may appear early in the opinion and then be repeated or supplemented in the application.) A court may use labels or terminology different from mine – or none at all. (For example, if a court writes "The issue before us is ....", is the court referring to the *law* issue or an *element* issue? "Requirement" is a common synonym for "element;" "question" is a common synonym for "issue." An issue may be expressed as a statement or a contention instead of a question. A court may not announce what FIRAC step it is performing – it will just do it and assume the reader can recognize what it is doing.)

To add to the difficulty and potential confusion, a judicial opinion will almost certainly contain some non-FIRAC information. This information can be helpful and is sometimes essential to understanding the court's FIRAC analysis. But it is not part of the analysis. For example, an appellate court opinion will typically include some procedural history, such as the identity of the court that previously heard the case and its decision. This procedural history is not part of the facts (although beginners frequently treat it so), nor is it part of any other FIRAC step. However, it can help the reader understand the conclusion (among other things). If the appellate court's conclusion is "AFFIRMED," you know it agreed with the lower court's decision. But what was that decision? The procedural history provides the answer.

Because judicial opinions are FIRAC analyses, the better you understand FIRAC, the easier it will be to follow what a court has written and grasp its significance. You will be better able to recognize each step being performed regardless of the order in which it appears, its location in the opinion, or the phrasing that is used. The vocabulary (especially the legal terminology) and reasoning will make more sense. Your capacity to aggregate, reorganize, and rephrase the content in a way that increases clarity and boosts recall will improve. You are less likely to be sidetracked or confused by extraneous information that can be safely discounted or ignored.

Furthermore, since every judicial opinion is an example of a FIRAC analysis, each one you read provides an opportunity to enhance your understanding of FIRAC and become more proficient at doing a FIRAC analysis (which further improves your ability to understand the next case you read). Like aging, the incremental change may not be obvious from one day to next. But with the passage of enough time, the transformation will be apparent.

An Example of a Judicial Opinion

Don't immediately start reading the opinion. First, take a moment to note its general appearance and format, remembering to view it as a FIRAC analysis. To help you see what is there, I have added labels in the left hand margin to identify the parts of the opinion. In addition, I have used different colors to highlight the text of the various FIRAC steps.

As you read the opinion, make a conscious effort to associate the different types of content with their labels. For example, when reading the facts, think to yourself "This is what a statement of facts looks like." and relate the actual wording used to state the facts in this

case to the abstract definition of “facts.” (The definition of facts from the previous section: “The facts of the case describe what happened to cause the dispute. The facts may describe behavior, who or what engaged in that behavior, the reasons for the behavior, when and where the behavior occurred, circumstances at the time the behavior occurred, who or what was affected, how they were affected, and so on.”) Do you see how the facts in the following case describe “when the behavior occurred” (October 30, 1981), “where the behavior occurred" (the parking lot of Elmer’s Super Value grocery store in Escanaba, Michigan), and other aspects of what happened?

Besides understanding what facts look like, it is also helpful to know what they *don’t* look like. Facts are *not* procedural history. They are *not* issues or laws or applications (although facts may be stated within applications) or conclusions. Appreciating and paying attention to the differences means you will be less likely to mistake one thing for another. Your goal is to understand “facts” (and “issue” and “rule” and “application” and “conclusion” and more) well enough that you will know them when you see them in an opinion, regardless of the organization, phrasing, location, or context.

Heading	**PEOPLE v. KAY** Court of Appeals of Michigan (1982) 121 Mich. App. 438; 328 N.W.2d 424
Facts	On October 30, 1981, defendant stopped at Elmer's Super Value grocery store in Escanaba. Store employees suspected defendant of placing one or two steaks under his jacket. Defendant left the store without going through the cash register and upon reaching the front entrance began to run toward the parking lot where his van was parked. Inside the van was defendant's German shepherd dog. Two store employees followed defendant to the parking lot where they accused defendant of committing larceny. When defendant denied taking any merchandise, the two employees grabbed defendant. Defendant then opened the van door and either called his dog by name or said "get 'em". The dog lunged at the face of store employee Randy Berhow, striking his glasses. Berhow and the second employee, Terry Denessen, released their grip on defendant who grabbed the dog putting him back in the van. Defendant then got in the van and drove off.
Procedural history	Defendant was charged with . . . two counts of assault with a dangerous weapon. On February 22, 1982, the jury found defendant . . . guilty of assault with a dangerous weapon as to store employee Randy Berhow.
Law Issue	The statute in question [MCL 750.82; MSA 28.277] reads:
Rule	> Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles *or other dangerous weapon*, but without intending to commit the

	> crime of murder, and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a felony. (Emphasis added.)

Applicationa) Element issue b) Reasoning technique: using precedents c) Element satisfied	Defendant argues that because only inanimate objects have been found to be dangerous weapons in Michigan, a dog cannot be held to be a dangerous weapon under the Michigan statute. Although no Michigan case has spoken to the issue, a few other jurisdictions have addressed the question of whether a criminal defendant's use of a dog may be regarded as use of a dangerous weapon, as that term is defined in the various state statutes involved. In *State in the Interest of J R*, 165 NJ Super 346; 398 A2d 150 (1979), the New Jersey court affirmed defendant's conviction for "assault with an offensive weapon (his dog)". The dog, a German shepherd, responded to defendant's command "sic 'er" by growling and stalking the victim. The statute claimed to have been violated, like the Michigan statute in the instant case, referred only to inanimate objects. It read: > Any person who willfully or maliciously assaults another with an offensive weapon or instrument * * * is guilty of a high misdemeanor. Finally, in *People v Torrez*, 86 Misc 2d 369; 382 NYS2d 233 (1976), defendant sought a dismissal of an indictment charging him with use of a dangerous instrument, a German shepherd dog. The New York statute defined dangerous instrument in inanimate terms: > 13. "Dangerous instrument" means any instrument, article or substance, including a "vehicle" as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury. The court held that the statutory definition of dangerous instrument, which broadly included any article or instrument which could cause serious injury, did not exclude large dogs trained to attack. In view of the authorities cited from other jurisdictions and the fact that the Michigan statute, like the statutes cited in the New Jersey and New York decisions, broadly defines "dangerous weapon" to include any object which, when used, may be considered dangerous, we hold that a dog may be a dangerous weapon within the meaning of MCL 750.82; MSA 28.277. We reject defendant's claim that MCL 750.82; MSA 28.277 *per se* excludes animate objects. The fact that one is inanimate and the other animate is not controlling. It is the manner in which the instrumentality is used and the nature of the act which determines whether the instrumentality is dangerous.
Conclusion	Affirmed.

Continue to Section 2.2

How to Brief a Case

FIRAC: *An* ELEMENT*ary Approach to Legal Reasoning*

by David Guenther, Professor Emeritus, Central Michigan University

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2.2 How to brief a case (Part 1)

“Case” in this context means a judicial opinion. To “brief” a case means to write a condensed (brief) version of that opinion. The object is to strip away the flesh of the opinion and expose the bones, which are then arranged to display a complete, properly organized, skeleton.

Distinguish (1) a “brief” of a judicial opinion from (2) a “brief” filed with a court to advocate a particular position. The former is a synopsis of a document a court wrote to explain its decision. The latter is a document written by or in support of a party to a lawsuit and submitted to a court for the purpose of persuading the judge(s) to decide in the party’s favor.

Obviously, it is only possible to brief a case after the judicial opinion has been read and understood. Acquiring the necessary understanding may take more than one reading. It also requires a certain level of knowledge and skill. The better you comprehend what you are looking for (facts, rule, etc.) and the more adept you are at spotting those things, the easier it will be to recognize them in an opinion no matter where they appear or how they are expressed.

The primary purpose of this section is to introduce you to the format and content of a case brief. If you want or are required to prepare one, you will have a better idea of how to do so.

But the benefits go far beyond that. The information you need to find and understand in

order to prepare a brief is the same information you need to find and understand to comprehend any judicial opinion. It is also the same information needed to perform a FIRAC analysis. Thus, as your ability to brief cases improves, your ability to comprehend judicial opinions and do FIRAC analyses will also improve. And vice versa. All these tasks are interrelated. They share a common knowledge-base and skill-set. As a result, increasing mastery of one also increases mastery of the others.

Initially, you may find briefing a case to be difficult, time consuming, and frustrating. As you acquire more knowledge and skill, it will get easier, faster, and perhaps even become enjoyable. (Okay, enjoyable may be too much. How about satisfying? Will you settle for tolerable?) The previous sections of these materials have introduced most of what you need to know to brief a case. This section adds a bit more information. Future sections will provide additional depth. There are also many other helpful resources available on the Internet and elsewhere. Still, for most people, there is no escaping the reality that learning how to write a good brief takes time, effort, and plenty of deliberate practice.

A generic briefing format.

Every case is, at its core, a FIRAC analysis and will therefore contain facts, issue(s), rule(s), application(s), and conclusion(s). However, every judicial opinion also includes procedural information that helps, and is sometimes necessary, to understand the case. Concurring or dissenting opinions or both may follow the majority opinion. And some brief writers like to finish with a critique of the opinion.

Here is a 10-step briefing format that allows for the inclusion of all this information, as needed or desired.

(1) Heading
(2) Procedural information
(3) Facts
(4) Issue (law issue)
(5) Rule
(6) Application
    (a) Element issue
    (b) Reasoning
    (c) Conclusion to the element issue
    Repeat (a) - (c) for each element the court addressed.
(7) Conclusion (to law issue)
    Repeat (4) - (7) for each law issue the court resolved.
(8) Concurring opinion(s)
(9) Dissenting opinion(s)
(10) Critique

Variations of this format abound. If directed to use a particular format (by a teacher or employer, for example), you should, of course, do so. Normally, this is no big deal. All variations of briefing formats are substantially similar in purpose, organization, and content.

The steps of a "bare bones" brief

At a minimum, a brief should include Steps 1, 3, 4, 5, 6, and 7 of the generic format

provided above. Below, each of those steps is described and illustrated with an example. The example is taken from the *People v Kay* case (which appeared in the previous section of these materials). The descriptions and examples will probably make more sense if you have a hard copy of *People v Kay* to refer to. For a clean printable copy of the opinion, click here.

Heading

Names of the parties (*Example:* People v Kay)
Name of the court that wrote the opinion (*Example:* Court of Appeals of Michigan)
The date (generally just the year) the case was decided (*Example:* 1982)
The citation (*Example:* 121 Mich. App. 438: 328 N.W.2d 424)

Facts

The facts describe who did what to whom under what circumstances, etc. Usually, facts recount something that happened BEFORE any court got involved. Anything that occurred after the lawsuit was filed in the trial court is, with rare exception, NOT a fact.

Tell the story of what led up to the lawsuit in a way that includes all the determinative facts and keeps extraneous ones to a minimum. (Some extraneous facts are necessary to provide background and a lucid narrative.) Determinative facts are those that make a difference; facts which, if changed, could affect the court's decision. Recognizing whether a fact is determinative requires an understanding of the issue(s) and the court's reasoning.

Quote, do not paraphrase, determinative facts. When paraphrasing, there is a danger of changing the meaning of the original words without realizing you have done so. The effect is to change critical facts.

Example: After Kay left a grocery store, two store employees (Berhow and Denessen) followed him to his van in the parking lot and accused him of taking steaks without paying for them. Kay opened the van door. His German shepherd dog was inside. Kay either called his dog by name or said "get 'em." The dog lunged at Berhow's face, striking his glasses.

Issue (law issue)

Identify the accused and the name or citation of the law he/she/it allegedly violated. State that information as a question which can be answered "yes" or "no", such as "Did _____ violate _____?"

Example: Did Kay/dog owner violate MCL 750.82; MSA 28.277?

Rule

Quote the relevant words of the law identified in the previous step. In all likelihood, the court will be focusing on a single word or phrase in the law. Pinpoint that word or phrase. Then copy it (I highlight it so it stands out) plus any additional words of the law that are necessary to provide an accurate context.

The cautious approach is to quote all the words of the law that appear in the opinion. However, it is usually safe to omit words that do not relate to any of the element issues or reasoning in the case. But be sure to use ellipses (three spaced periods . . .) to indicate where words have been omitted.

Example: Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other *dangerous weapon* . . . shall be guilty of a felony.

[Note: The court focused solely on the "dangerous weapon" element. Since it never mentioned either of the intent elements, it is safe to omit them from the quote.]

Application

(a) State the element issue. Almost always, the dispute in an appellate court is about the meaning of a word or phrase (i.e., an element) of a law. Identify that element and the facts that gave rise to the controversy about its meaning. Incorporate them into a question that can be answered "yes" or "no." Standard practice is to use quotation marks to highlight the element.

Example: Is a German shepherd dog that lunged at a person's face after its owner said "get 'em" a "dangerous weapon?"

(c) State the conclusion to the element issue. This is the "yes" or "no" answer to the question asked in (a) above.

I know this sub-step is out of order. When doing a FIRAC analysis, I wait to reach a conclusion to the element issue until after I have completed my reasoning. However, when briefing a court's analysis, I find that stating the conclusion here helps me follow its reasoning.

(b) Summarize the court's reasoning. Courts use legal reasoning methods to clarify the meaning of an element and determine whether that meaning encompasses the facts of the case. Here are four commonly used reasoning methods:

(1) **Precedents** – previously decided cases that addressed the same or a substantially similar element issue and involved substantially similar facts. The court may compare the facts of the current case to the determinative facts of a precedent to ascertain whether they are enough alike that the conclusions in both cases should be the same. Or the court may extract a generalized "rule of the case" from a group of precedents and apply it to the facts of the current case.

(2) **A test, standard, or list of factors** – set forth specific criteria against which the facts are evaluated. Whether the criteria are or are not met establishes whether the element is satisfied. For example, the "Miller test" is a three prong test used to determine whether expression alleged to be obscene is "speech" protected by the First Amendment of the U.S. Constitution. The "reasonable prudent person standard" is used to determine whether a person accused of negligence "breached a duty of care." "Whether a hired party is engaged in a distinct occupation or business" is one of a list of factors used to determine whether a person is an "employee" or an "independent contractor."

(3) **Canons of statutory construction** (also known as rules of statutory interpretation) – guidelines and presumptions used to infer the meaning of words and phrases in *written laws* (as distinguished from *common law*). The inferred meaning is then applied to the facts of the case. There are many such canons and they can be contradictory. One canon is "Words in a statute should be construed according to the rules of grammar." Another canon (known as the "bad grammar rule") is "Bad grammar does not vitiate a statute if the legislative intent is clear."

(4) **Policy** – the broad societal goal(s) the law is trying to accomplish. The court predicts the future consequences that will flow from alternative interpretations of the element and evaluates those consequences against the goal of the law. The interpretation that produces consequences most consistent with the law's goal is the better one.

A court may use one or more of these reasoning methods to resolve a single element issue. For example, when analyzing an element of a statute, a court might use a canon of construction, a precedent, and policy to justify its conclusion.

For each legal reasoning method used, summarize the court's logic. Typically, the logical progression when using a precedent begins with the court naming the precedent. Next, it states the "rule of the case" established by the precedent (which is a declarative sentence that incorporates the determinative facts, the element in question, and the conclusion to the element issue). Then the court compares the facts of the two cases, explaining why it thinks they are substantially similar or significantly different. This comparison may take the precedent court's reasoning into account. Your summation should mention and convey the essence of each of these links in the court's chain of logic.

Example: The court followed New Jersey and New York precedents. In *State in the Interest of J.R.*, the New Jersey court held that a German shepherd that growled at and stalked the victim after being commanded to "sic 'er" was an "offensive weapon." In *People v Torrez*, the New York court found that the a German shepherd dog trained to attack could be a "dangerous instrument."

As in those cases, Kay urged a German shepherd dog to attack another person. The New Jersey and New York statutes, like the Michigan statute, refer only to inanimate objects and broadly define "dangerous weapon" ("offensive weapon"/"dangerous instrument") to include any object which, when used, may be considered dangerous.

Both the NJ and NY courts held the German shepherds were "dangerous weapons" even though their state statutes only referred to inanimate objects. The fact that a dog is an animate object did not matter. It is the manner in which an object is used and the nature of the act that determines whether an object is a "dangerous weapon." If a dog could be an "offensive weapon"/"dangerous instrument" under the NJ and NY statutes, it could also be a "dangerous weapon" under the Michigan statute.

(d) If the court had to resolve more than one element issue to determine whether the rule (in Step 2) had been violated, repeat sub-steps (a) - (c) for each element it addressed.

Conclusion (to the law issue.)

This is the answer to the question asked in Step (2).

[Note: This court affirmed the trial court's decision that Kay was guilty of violating MCL 750.82; MSA 28.277.]

****

A bare bones brief of *People v Kay*

Here is what a complete brief made up of the examples provided above would look like.

PEOPLE v KAY
Court of Appeals of Michigan (1982)
121 Mich. App. 438; 328 N.W.2d 424

FACTS

After Kay left a grocery store, two store employees (Berhow and Denessen) followed him to his van in the parking lot and accused him of taking steaks without paying for them. Kay opened the van door. His German shepherd dog was inside. Kay either called his dog by name or said “get ‘em.” The dog lunged at Berhow’s face, striking his glasses.

ISSUE

Did Kay/dog owner violate MCL 750.82; MSA 28.277?

RULE

Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other *dangerous weapon* . . . shall be guilty of a felony.

APPLICATION

Is a German shepherd dog that lunged at a person’s face after its owner said “get ‘em” a “dangerous weapon?” Yes

The court followed New Jersey and New York precedents. In *State in the Interest of J.R.*, the New Jersey court held that a German shepherd that growled at and stalked the victim after being commanded to “sic ‘er” was an “offensive weapon.” In *People v Torrez*, the New York court found that the a German shepherd dog trained to attack could be a “dangerous instrument.”

As in those cases, Kay urged a German shepherd dog to attack another person. The New Jersey and New York statutes, like the Michigan statute, refer only to inanimate objects and broadly define “dangerous weapon” (“offensive weapon”/“dangerous instrument”) to include any object which, when used, may be considered dangerous.

Both the NJ and NY courts held the German shepherds were “dangerous weapons” even though their state statutes only referred to inanimate objects. The fact that a dog is an animate object did not matter. It is the manner in which an object is used and the nature of the act that determines whether an object is a “dangerous weapon.” If a dog could be an “offensive weapon”/"dangerous instrument" under the NJ and NY statutes, it could also be a “dangerous weapon” under the Michigan statute.

CONCLUSION

Yes

Continue to Section 2.3 -- Briefing a case Part 2

David Guenther

How to Brief a Case

FIRAC: *An* ELEMENT*ary Approach to Legal Reasoning*

by David Guenther, Professor Emeritus, Central Michigan University

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2.3 How to brief a case (Part 2)

IRAC brief = FIRAC brief.

Do an Internet search of “briefing a case” (or similar terms) and you will notice that some of the webpage titles that turn up refer to an **IRAC** briefing format (such as How to Brief a Case Using the “IRAC” Method). The absence of the “F” may create the impression that an IRAC brief does not include the facts of the case. That is not so. In terms of briefing a case, IRAC and FIRAC are synonyms. Both formats begin with a statement of facts.

(Note: There is a difference between IRAC and FIRAC when solving a legal problem. If you are given the facts of the case, such as during an exam, you only have to perform the remaining steps, i.e., you do an IRAC analysis. A FIRAC analysis is required, however, on those occasions when it is necessary to determine the facts of a case, such as when a client seeks legal advice.)

Everyone agrees on what “facts” are. But what is meant by “issue,” “rule,” “application,” and “conclusion” varies.

Take a moment to click on a sampling of the webpages your Internet search turned up and skim the contents. What you will find is that all use the same (or substantially similar) labels to describe the content of a brief – facts, issue, rule, application (or analysis or reasoning), and conclusion (or holding or decision). But look closer and you will see that,

except for “facts,” the descriptions attached to those labels vary, sometimes considerably.

So, what is going on?

The terms “issue,” “rule,” “application,” and “conclusion” have more than one meaning. For example, I used “issue” in my bare bones briefing format to mean “law issue.” But someone else, describing his or her briefing format, may use “issue” to mean “element issue.” To complicate matters, some descriptions of “issue” do not distinguish between “law issue” and “element issues” and lump them together under the same heading. Likewise, different people may use “rule,” “application,” or “conclusion” to mean different things.

Once you are familiar with the FIRAC terminology, the different meanings attached to the labels will not be a problem. Picking up the intended meaning from context and usage will be as instinctive as realizing that “brief” in these materials does not refer to underwear and “case” does not mean a container.

On the other hand, failing to recognize the intended meaning can cause confusion and misunderstandings. It may also affect another’s evaluation of your brief. For example, if you stated the law issue but your teacher expected to see an element issue, your grade might suffer. Therefore, *if your teacher or employer instructs you to use a particular briefing format, make sure you understand what she or he means by “issue,” “rule,” and the other labels.*

The most common briefing format out there – what I call a “facts + application” format.

If your teacher or employer gives you a briefing format, or you find one on the Internet or in a book, whether it’s called an IRAC format or a FIRAC format, the odds are it will be what I call a “facts + application” format. By the way, you won’t see that name used by others. I coined the term because, from my perspective, this version of a brief only includes Steps 1, 3, and 6 (heading, facts, and application) of the generic format provided in the previous section.

A “facts + application” brief (Steps 1, 3, and 6) is a subset of a “bare bones” brief (Steps 1, 3, 4, 5, 6, and 7). Simply put, my “bare bones” format contains more information. It is a more comprehensive version of a brief that includes everything found in a “facts + application” brief plus some.

To state it another way, a “facts + application” brief is a briefer brief. Since it contains less information, it is shorter and takes less time to prepare. Yet it still embodies the “guts” of a judicial opinion – the court’s analysis of the element issue(s) – so is adequate for many purposes.

The problem is that, while the information contained in both formats is mostly the same and the FIRAC terms used to label the parts of the brief are the same, three of those terms – *“issue,” “rule,” and “conclusion – usually refer to very different things.*

GENERIC FORMAT STEP	BARE BONES BRIEF	FACTS + APPLICATION BRIEF

(3) Facts	Same meaning	Same meaning
(4) Issue	Law issue	Element issue (My meaning of Step 6(a).)
(5) Rule	The words of the law that was allegedly violated.	The words of the rule used to determine whether the element was satisfied, e.g., a rule of the case; a test, standard, or list of factors; a canon of statutory construction; or a statement of policy. (Part of what I call a legal reasoning method -- Step 6(b).)
(6) Application	(a) Element issue + (b) Use of legal reasoning method + (c) Conclusion to the element issue	The reasoning part of using a legal reasoning method. (The remaining part of my meaning of Step 6(b).)
(7) Conclusion	Conclusion to the law issue.	Conclusion to the element issue. (My meaning of Step 6(c).)

A “facts + application” brief of *People v Kay* follows. Comparing it to the “bare bones” brief of *People v Kay* in Section 2.2 may help you grasp the differences.

A facts + application brief of *People v Kay*

PEOPLE v KAY
Court of Appeals of Michigan (1982)
121 Mich. App. 438; 328 N.W.2d 424

FACTS

After Kay left a grocery store, two store employees (Berhow and Denessen) followed him to his van in the parking lot and accused him of taking steaks without paying for them. Kay opened the van door. His German shepherd dog was inside. Kay either called his dog by name or said “get ‘em.” The dog lunged at Berhow’s face, striking his glasses.

ISSUE

Is a German shepherd dog that lunged at a person’s face after its owner said “get ‘em” a “dangerous weapon?”

RULE

"Dangerous weapon" is broadly defined to include any object which, when used, may be considered dangerous.

APPLICATION

The court followed New Jersey and New York precedents. In *State in the Interest of J.R.*, the New Jersey court held that a German shepherd that growled at and stalked the victim after being commanded to "sic 'er" was an "offensive weapon." In *People v Torrez*, the New York court found that the a German shepherd dog trained to attack could be a "dangerous instrument."

As in those cases, Kay urged a German shepherd dog to attack another person. The New Jersey and New York statutes, like the Michigan statute, refer only to inanimate objects.

Both the NJ and NY courts held the German shepherds were "dangerous weapons" even though their state statutes only referred to inanimate objects. The fact that a dog is an animate object did not matter. It is the manner in which an object is used and the nature of the act that determines whether an object is a "dangerous weapon." If a dog could be an "offensive weapon"/"dangerous instrument" under the NJ and NY statutes, it could also be a "dangerous weapon" under the Michigan statute.

CONCLUSION

Yes

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The primary shortcoming of a "facts + application" brief is that it sacrifices context. Even though it presents a large part of the picture, it does not display the whole picture. Information about the law that was allegedly violated (Steps 4, 5, and 7 of the generic format) is omitted.

Why does that matter?

When a court writes a judicial opinion, it begins with both a statement of facts and a statement of the law that was allegedly violated. These statements provide context necessary to fully understand the court's reasoning (the application step).

When applying the law to the facts, a court will normally (1) discuss selected words of the law and then (2) relate those words to bits and pieces of the facts. The statement of facts provides context that helps the reader put those bits and pieces of facts into perspective. The statement of the law provides context that helps a reader make sense of the court's discussion of the law's words.

For example, in *People v Kay*, the court noted that "the Michigan statute . . . . referred only to inanimate objects." This is a generalization reflecting the court's characterization of the objects listed in the statute. Would you like more details so you have a better idea of what the court meant by "inanimate objects?" Would you like to evaluate the court's characterization and decide if you agree with it? No problem – as long as you have a statement of the law available.

A quick glance at the statute (which is helpfully quoted in the opinion) reveals the specific objects it refers to: "gun, revolver, pistol, knife, iron bar, club, brass knuckles or other

dangerous weapon." This additional information clarifies the meaning of "inanimate objects." It allows you to form your own opinion about the accuracy of the court's generalization. And it provides insight into Kay's argument, making it easier to see why Kay and the prosecutor disagreed about whether a German shepherd was a "dangerous weapon." On the surface, a dog seems qualitatively different than a gun, knife, or club.

"But I did all that when I read the opinion," you point out. "So why is it necessary to repeat the statement of law in my brief?"

Will someone else (who has not read the opinion) be reading the brief? If so, he or she will need the context provided by the statement of law (and the statement of facts) to make sense of your synopsis of the application.

Do you anticipate using the brief at a later date to refresh your memory of the case? Recollections, especially of details, tend to fade with time. The more important the details of the law are to understanding the court's analysis, the more important it is to include a statement of the law in the brief.

On the other hand, if you know the text of the law so well that you can mentally put references to individual words and phrases in context, the statement of law can probably be left out. But even then, including at least the name of the law in the brief will help trigger the proper association.

The same words may have different meanings in different laws. For example, "dangerous weapon" in MCL 750.82 (the Michigan statute in *People v Kay*) means one thing. "Dangerous weapon" in MCL 380.1313(1) (another Michigan statute which begins "If a dangerous weapon is found in the possession of a pupil while the pupil is in attendance at school . . . ."), means something else. Since the correct meaning of "dangerous weapon" depends upon the law it is a part of, those words cannot be viewed in isolation. Rather, they must be associated with a particular law. The connection is explicit in a "bare bones" brief. It is less apparent in a "facts + application" brief.

There is also a practical benefit to consider. When doing a FIRAC analysis, identifying and quoting the relevant words of the law at issue is an essential step. Including a statement of the law in every brief you prepare gets you in the habit of performing this step and increases your understanding of it.

It doesn't take many words or much time to include Steps 4 (law issue), 5 (relevant words of the law), and 7 (conclusion to the law issue) in a brief. If a court thought it was important to include that information in its opinion, perhaps it is equally important to include it in a brief of the case.
