

# Seminar in Constitutional Law: Appellate Advocacy

## Week 2

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Wednesday, April 6th, 2016

# Agenda



- Hour 1:

- Lecture on IRAC (how we read cases) and CrUPAC (how we write briefs).
- (Format for Assignment 2 – due Week 6/May 4)

- Hour 2:

- Review Assignment 1

- Hour 3

- Class assigned to small groups to read summary of *Plessy v. Ferguson*, and the entire *Brown v. Board* case.
- Then groups produce a sample IRAC for *Brown* to go over in class.

# Introduction



- One building block of legal research and writing will be your ability to brief cases into separate, logical, and systemic components.
  
- We learn the law from cases.
  - Reading cases is the main way lawyers/students learn the law.
  
  - Cases form the “common law”:
    - We have (1) cases that interpret the law
    - We have (2) cases that create new law (through precedent).

# Clarity (or lack thereof) in the law



- But the law isn't as clear as you might think...
  - Even when the law is written as a statute, there are questions about the interpretation of laws.
    - I.e. Statute: "No vehicles may be parked in this park."
      - Questions:
        - What about tricycles? What about Jeeps? Etc.
  - Thus, cases apply the law to different contexts and thereby *expand* the law.

# We read and brief cases to learn the law



- Extract general principles embedded in cases.
- Understand and analyze the reasons behind the principles.
  - Help us figure out how these principles apply to a different set of facts.
  - This is what you'll do for clients and what you'll do in law school
- Requires reading the case carefully, thinking about it, pulling it apart, and extrapolating it forward.

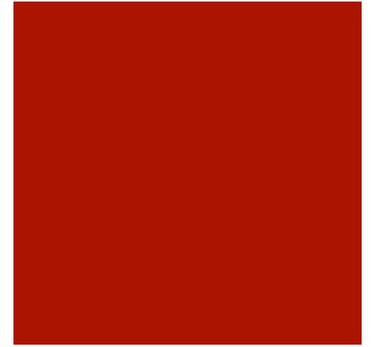
# Case brief v. Legal Briefs



- Case Brief
  - How you read cases
  - The notes you take on cases, similar to an annotated bibliography
  - IRAC
  
- Legal Briefs \*\*
  - What you write for court, for clients, for judges.
  - Structured writing
  - Can be persuasive (subjective) or predictive (objective)
  - CRuPAC

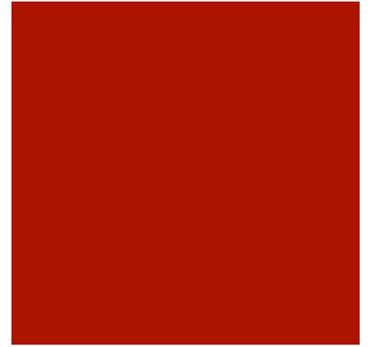
\*\* Note: This is the goal of the class.

# So why “brief” the case?

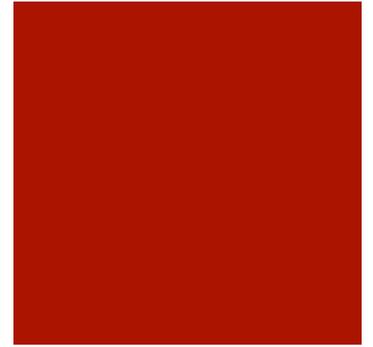


- The act of making the brief really makes you think through the case.
  - The point is the thought process it makes you go through, not owning something that resembles/looks like a brief.
- Puts it in writing so it is handy for classes/clients/reference – AND puts it in your words.
- Will help you synthesize the materials/cases and understand how they relate to each other.

# Contents of a Brief



# Step 1: Read the case



- Reading the case is tedious. We know.
- First, skim the case quickly for a general idea of the facts, issues, who wins, etc.
- Second, read the case carefully.
  - This time, read all the way through and understand the arguments and reasoning the judge(s) relies/rely on to come to to a particular conclusion.
- Third, re-read the case and create a brief.

# Step 2: Creating the Brief

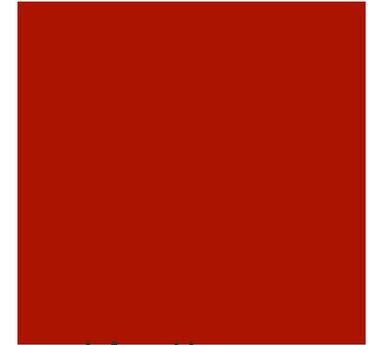
- There is no one “**correct**” type of brief.
  - Everyone does it differently.
  - Different subjects/topics may also emphasize different components – so be flexible with your brief.
  - Goal = reduce the information from the case into a format that will provide you with a helpful reference in class, for review, for your briefs.
- Today, we will discuss 1 form of briefing:
  - (1) IRAC

AND then will cover 1 form of brief writing (this is what the reading talks about):

- (1) CRuPAC

# (F)IRAC

## F = Facts



- **Facts:** What are the important/relevant facts that occurred in the case?
  - Summarize the facts as the trial court found them to be and eliminate those that are not relevant to the court's analysis.
  - For example, a business's street address is probably not relevant to the court's decision of the issue of whether the business that sold a defective product is liable for the resulting injuries to the plaintiff.
  - However, suppose a customer was assaulted as she left a store and is now suing the business. The customer claims that her injuries were due to the business's failure to provide security patrols. If the business is located in an upscale neighborhood, then perhaps the store could argue that its failure to provide security patrols is reasonable. If the business is located in a crime-ridden area, then perhaps the customer is right. Here, you could include the type of neighborhood as a relevant fact in your brief.

# (F)IRAC:

I = Issue



- **Issue:** What issue is the case undertaking and answering? What are the parties fighting about, and what are they asking the court to decide?
  - There may be more than 1 issue.
    - Which may come from statute or case law.
  - For example, in the case of the assaulted customer, the issue for a trial court to decide might be whether the business had a **duty** to the customer to provide security patrols. The answer to the question will help to ultimately determine whether the business owed the customer a duty of care, and what that duty of care was.

# (F)IRAC

## R = Rule



- **Rule:** What is the court's statement of the issue at hand? What is the relevant rule of law that the court (1) relied upon or (2) created and then relied upon? What rule did the court apply to the facts to determine the outcome?
- Determine what the relevant rules of law are that the court uses to make its decision. These rules will be identified and discussed by the court.
- There may be more than one relevant rule of law to a case
- This is also known as the court's holding, which becomes binding.
- I.e. in the assaulted customer case, the relevant rule of law is that a property owner's duty to prevent harm to invitees is determined by balancing the foreseeability of the harm against the burden of preventive measures.

# (F)IRAC

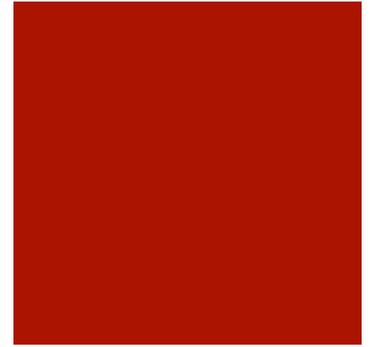
## A = Application/Reasoning



- **Application/Reasoning:** How did the court examine the facts in light of the rule? How did the court analyze the case? What does the court consider to be a relevant fact given the rule of law?
  - This may be the most important portion of the brief.
  - The court will have probably considered all “sides” and arguments presented to it. How courts apply the rule to the facts and analyze the case must be understood in order to properly predict outcomes in future cases involving the same issue.
  - I.e. in the assaulted customer case, did the court consider monetary costs of providing security patrols in weighing the burden of preventive measures? Does the court imply that if a business is in a dangerous area, then it should be willing to bear a higher cost for security?

# (F)IRAC

## C = Conclusion



- **Conclusion:** What was the final outcome of the case?
  - In one or two sentences, state the court's ultimate finding.
  - I.e. in our case it would be: the business did not owe the assaulted customer a duty to provide security patrols.

# Judicial Procedure: One brief component not noted in (F)IRAC



- **Judicial Procedure:** Which court authored the opinion? The United States Supreme Court? The California Court of Appeal? The Ninth Circuit Court of Appeals?
- If an appellate court issued the decision, how did the lower courts decide the case?
- This is important to determining which courts this opinion may be binding on.
- If a trial court issued the decision, it is not binding on an appellate court, etc.

# Jaffee v. Redmond

(from last week)



- What were the facts in this case?

# Jaffee v. Redmond

(from last week)



## ■ What were the facts in this case?

- Petitioner's estate alleged that his constitutional rights were violated when he was killed by respondent Redmond.
- Redmond was an on-duty police officer who responded to a fight at an apartment complex. The Respondent shot the petitioner (Mr. Allen) believing he was about to stab a man he was chasing.
- During discovery, the Petitioner learned that the Respondent participated in 50 counseling sessions with a clinical social worker, Karen Beyer ("Ms. Beyer"). The Petitioner sought access to the notes taken by Ms. Beyer during those sessions and the Respondent resisted their discovery arguing that disclosure should be prevented because of a psychotherapist-patient privilege.
- The district judge allowed the discovery, but neither Ms. Beyer nor the Respondent complied with the request. The judge advised the jury that the refusal to turn over Ms. Beyer's notes could be considered a presumption that the content of the notes would have been unfavorable to the Respondent

# Jaffee v. Redmond

(from last week)



- What was the issue in this case?

# Jaffee v. Redmond

(from last week)



- **What was the issue in this case?**
- Whether statements the officer made to her therapist during the counseling sessions are protected from compelled disclosure in a federal civil action brought by the family of the deceased.
- In other words, the question is whether it is appropriate for federal courts to recognize a “psychotherapist privilege” under Rule 501 of the Federal Rules of Evidence.

# Jaffee v. Redmond

(from last week)



- What was the rule in this case?

# Jaffee v. Redmond

(from last week)



- **What was the rule in this case?**
- (1) Confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.
- (2) The court agreed with the Court of Appeals that “[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.” Thus, this privilege should extend to confidential communications made by licensed social workers in the course of psychotherapy.

# Jaffee v. Redmond

(from last week)



- What was the application/court's reasoning in this case?

# Jaffee v. Redmond

(from last week)

- **What was the application/court's reasoning in this case?**
- (1) Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is “rooted in the imperative need for confidence and trust.”
  - Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.
  - Thus, the purpose of the attorney-client privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”
- (2) Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals.

# Jaffee v. Redmond

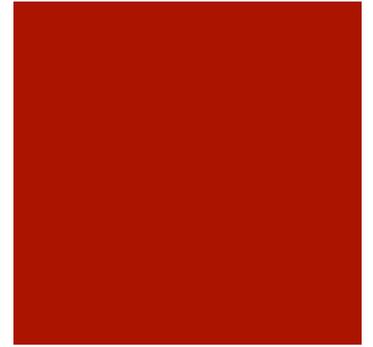
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- What was the conclusion in this case?

# Jaffee v. Redmond

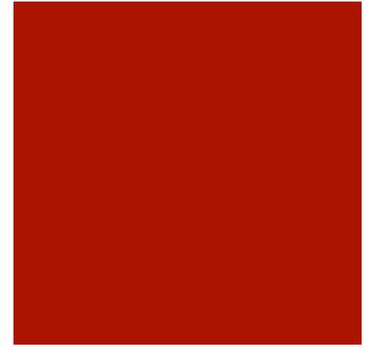
(from last week)



- **What was the conclusion in this case?**
- Court of Appeals decision is affirmed. The conversations between Officer Redmond and Karen Beyer and the notes taken during their counseling sessions are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.

Legal Writing:

CRuPAC



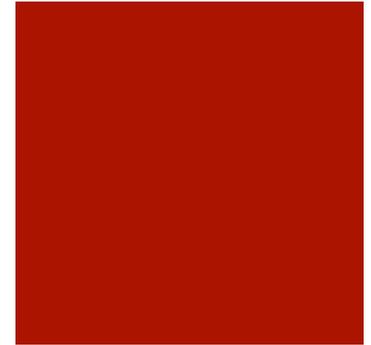
# First a note on the parties in a trial versus appellate case



- Civil Trial Cases
  - **Plaintiff** = party who brings the case/sues.
  - **Defendant** = party who is being sued.
  
- Criminal Trial Cases
  - **Prosecution** = the government bringing the case forward.
  - **Defendant** = party who broke the criminal law.
  
- Civil/Criminal Appellate Cases
  - **Appellant/Petitioner** = party who filed the appeal and wants the lower court's decision overturned.
  - **Appellee/Respondent** = party against whom an appeal is filed. The appellee usually seeks affirmance of the lower court's decision.

# Introduction to Legal Writing

- First, we read cases.
- Next, we brief cases.
  - IRAC
    1. Improve comprehension.
    2. Helpful for analogizing or distinguishing cases
    3. Cheat sheet for Qs in class.
    4. Helps study for exams in common law class.
- Third, we write briefs.
  - Persuasive v. Predictive Writing
    - Predictive: “Sally is not likely to be convicted of robbery”
    - Persuasive: “Sally should not be convicted of robbery”
  - CRuPAC
    1. Goal: Relay information in a structured manner.
    2. Task: Apply the rules and reasoning we learned from the cases to our own arguments.



# CRuPAC Structure



**C:** Conclusion.

**Ru:** Main rule.

**P:** Prove & explain rule by (a) citing authority, (b) describing how authority stands for rule, (c) discussing subsidiary rules, (d) analyzing policy, (e) counter-analyses.

**A:** Apply rule's elements to facts at hand with aid of (a) subsidiary rules, (b) supporting authority, (c) policy, (d) counter-analyses.

\*\*\*\*\* MOST IMPORTANT PART \*\*\*\*\*

**C:** Restate conclusion if discussion complicated.

# CRuPAC:

## C= Conclusion



- **Conclusion of law** = a determination of how the law (and in our situation = case law) treats certain facts.
- When we write appellate\*\*\* briefs, we are writing persuasively.
- Ex: “This Court should find Petitioner’s mark, AFF, is a protectable suggestive mark .“
- \*\*\* appellant = petitioner

# CRuPAC:

## R= Rule



- **Rule** = The main rule on which you rely in reaching your conclusion.
  - Here you want to state the relevant portions of the rule or rules that govern your facts.
  - You may need more than one rule.
  - Move logically through this section by stating general rules first, then more specific rules, and exceptions to the rules.
- Ex: “A mark is suggestive when it “suggests rather than describes a characteristic of the product and requires the consumer to use imagination and perception to determine the product's nature.” *Sally Beauty Co., Inc. v. Beautyco Inc.*, 304 F.3d 964, 976 (10th Cir. 2002).”

# CRuPAC:

## P= Rule Proof

- **Proof of the Rule:** Prove & explain rule by (a) Citation to the applicable authority (simple), (b) Explanation of the rule (more complex, or (c) Could be discussion of legislative record, case law, how the law has been applied to similar situations, etc.
- Your reader needs to know that the rule is truly is the law in your jurisdiction.
- By the time your reader has read this information, he or she feels confident that the law is in fact the correct law, her or she understands it and how it applies
- Ex. “Common words are not protectable unless used in a combination or phrase. *Association of Co-op. Members, Inc. v. Farmland Industries, Inc.*, 684 F.2d 1134, 1140 (5th Cir. 1982). In *Lemme v. NBC, Inc.*, 472 F.Supp.2d 433, 443 (E.D.N.Y. 2007), the court was faced with whether or not the mark, “The American Dream,” as a name for a television show was suggestive. The court reasoned that while the term “American Dream” might conjure up a general idea of what the term means, the consumer did not immediately associate it with a television show. *Id.* A mental leap in the mind of the consumer was required to connect the mark with the television show, therefore the court found the mark to be suggestive rather than descriptive. “

# CRuPAC:

## A= Rule Application

- **Application of Rule to the Facts:** you need to make it obvious to your reader that the application of the rule leads to the conclusion that you mentioned at the beginning (and again at the end).
  - Don't leave out facts that could have an impact on the conclusion.
  - Don't leave out aspects of the rule that might be relevant to your prediction.
  - Here is where you might also hint at information that you do not have and need to know.
- Ex: "Similarly, Appellant's mark, "American Forefathers Foundation," is a combination of three terms which separately may not be protected, but when combined, form a suggestive mark. The organization provides "education services and advocacy programs in the fields of political science, governmental economics, and social theory," which does not connote a direct description of the adopted mark. (R. 6.) "American Forefathers Foundation," like "The American Dream" in *Lemme*, requires the consumer to make a mental leap from the mark to the purpose of the organization."

# CRuPAC:

## C= Restate Conclusion



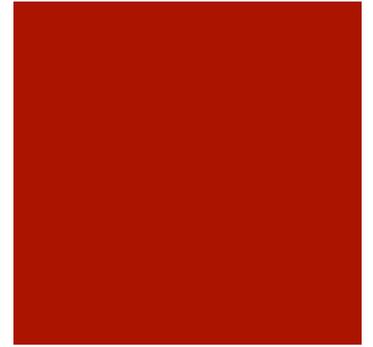
- **Conclusion:** Restate your conclusion and perhaps add something that indicates what you think the result means...
- Such as, “the employer should consider a settlement negotiation with the former employee rather than take a risk of losing at trial...”
- Ex: “The mark suggests that while the organization is related to American politics, it requires imagination and perception to make the connection to the true nature and purpose of AFF.”

# Language and Organization



- The overall piece
  - Section to section...
    - (1) Intro/issue/background;
    - (2) Analysis
    - (3) Conclusion
  
- Subsection to subsection – logical path
  
- Use headings and subheadings to guide the reader
  
- Paragraph to paragraph – logical path - one main idea leading to the next main idea
  
- Sentence to sentence – same

# Transition Words



- Use transitional words and phrases to show the logical flow of ideas:
  - In addition,...
  - Further,...
  - On the other hand, ....
  - However,...
  - Although,.... there is nevertheless....
- These words mean something very specific and demonstrate the logical relationship between the idea that comes before and the one that follows. They give clear signals to your reader.



# IRAC Assignment for May 4

# Introduction to Assignment 2: Due May 4, 2015



- IRAC Assignment
  
- Requires you to read through all the cases that are necessary for your Final Appellate Brief – no matter which side you are on.
  
- You will IRAC each of the cases
  - Facts
  - Issue
  - Rule
  - Application/Reasoning
  - Conclusion
  
- (19 cases)

# Cases for Assignment 2

## US SC Cases

1. *Camara v. Mun. Court*, 387 U.S. 523 (1967)
2. *Terry v. Ohio*, 392 U.S. 1 (1968)
3. *Mich. v. Tyler*, 436 U.S. 499 (1978)
4. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)
5. *Salve Regina College v. Russell*, 499 U.S. 225 (1991)
6. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 225 (1991)
7. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)
8. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)
9. *Safford Unified Sch. Dist. #1 v. Redding.*, 557 U.S. 364 (2009)

## US Appellate Cases

1. *Doe v. Renfrow*, 631 F.3d 91 (7th Cir. 1980)
2. *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986)
3. *Good v. Dauphin Cnty. Social Servs. For Children & Youth*, F.2d 1087 (3rd Cir. 1989)
4. *Edwards For & in Behalf of Edwards v. Rees*, 883 F.2d 881 (10th Cir. 1989)
5. *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993)
6. *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994)
7. *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999)
8. *Roe v. Tex. Dep't of Protective & Regulatory Servs*, 299 F.2d 395 (5th Cir. 2002)
9. *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003)
10. *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009)

# TAKEAWAYS



- **(F)IRAC** formula (Facts, Issue, Rule, Application, Conclusion)
  - How we read cases and take notes on them.
  - This is for your personal use.
  
- **CRuPAC** (Conclusion, Rule, Proof of Rule, Application of Rule, Conclusion)
  - Formula for structured writing when we write briefs to give to court, clients, or judges.
  - This is the work product you create as a lawyer

# Information



- Slides added on TED
- Also added to my personal website under Teaching:  
[nazita.squarespace.com](http://nazita.squarespace.com)