

# *Introduction*

A theme of this book is captured in Blake's poetry:

*The cosmos is in a grain of sand.*

The cosmos of legal reasoning is in the technique of briefing. It is impossible therefore to learn how to brief without learning about legal reasoning—about learning to read, think, talk and write like a lawyer. Hence, the first chapter in this book is less about the technique of briefing and more about why briefing is important:

- to enable you to understand cases
- to help you understand what happens in class and why
- to introduce you to the basic skills necessary for legal reasoning
- to get you on the right track and to avoid unnecessary confusion

In Chapter 1, I therefore present forty answers to commonly asked questions about law and the first year of law school.

In Chapter 2, I present a six-step approach to briefing cases. Detailed guidelines are explained for accomplishing each step. Application of the six-step approach with the guidelines is demonstrated with a short, relatively simple, appellate case, *McBoyle v. United States*. Applying the six-step approach with the guidelines, an excellent brief of *McBoyle* is detailed. A contrasting, poor brief of *McBoyle* is then set forth. My comments detail the reasons why the first brief is excellent and why the second brief is poor. Basic functions of a court, which are exemplified in *McBoyle*, are explained. To aid you in beginning to learn which issues may be reviewed on appeal and which may not be, I succinctly detail a series of issues which were not considered and decided in *McBoyle* and briefly explain why they were not. In a final segment, I define a number of legal terms applied by the court in *McBoyle*.

The basic pattern of Chapter 2 is then repeated in Chapters 3 through 6. In each chapter, I present a different appellate case (or two) and ask you to apply the six-step approach to briefing with guidelines. Excellent and some poor briefs are set forth. Basic functions of a court illustrated in each case are explained as well as issues not raised and considered. Each chapter concludes with additional definitions of legal terms applied in the case(s) briefed. As you brief these cases, you are also being introduced to legal reasoning, the first professorial priority of the first year of law school. The rationale for adding Chapter 7 is previously detailed in the prior "Preface to the Second Revised Edition."

Too many first-year students misconceive the nature and purpose of law and law school. Many beliefs of beginning students about law school are false or at least misleading. These misconceptions lead to an enormous waste of studying time, blunders in class, exacerbation of beginner's confusion, and a defective preparation for exams. Remember: well started is half done. This short book is designed to get you well started for class (but *not* for exams).

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## HOW TO USE THIS BOOK

How you read and use a book is a personal choice, but I suggest the following:

*First*, before starting law school, or as soon as possible, read the book through for an overview. Skip over, however, the examples of excellent and poor briefs in Chapters 2 through 6.

*Second*, read Chapter 1 several times as carefully as you can. Then study the *McBoyle* case set forth in Chapter 2 and the suggested guideline process for briefing. Brief *McBoyle*. Scrutinize the excellent and poor briefs presented and my comments explaining why these briefs are excellent and poor. Compare your brief of *McBoyle* with the excellent and poor briefs set forth in Chapter 2. Don't worry about the quality of your initial effort. Study also the sections on Functions of the Court Exemplified in *McBoyle* [p. 37], Issues Not Considered and Decided in *McBoyle* [p. 37], and the Definitions [p. 38]. Study also the illustration and explanation at the end of Chapter 2 of the various items typically set forth at the beginning of a case (e.g., caption, citation, headnote, etc. [p. 39.]).

*Third*, apply the case briefing process detailed in Chapter 2 to the *Port Huron* case in Chapter 3. Compare your brief of *Port Huron* with the excellent and poor briefs detailed in Chapter 3. Don't be discouraged; all beginners' briefs are forgettable. The process of writing awkward, mistake-filled briefs is the path from darkness to light. Study the sections on Function of the Court Exemplified in *Port Huron* [p. 50], Issues Not Considered and Decided in *Port Huron* [p. 52], and the additional Definitions [p. 53].

*Fourth*, repeat the process with Chapters 4, 5, and 6.

*Fifth*, at this point examine again all your briefs and contrast them with the excellent and poor briefs. Which features of the excellent briefs are reflected in your briefs? Which features of the poor briefs are reflected in your briefs? Correcting and perfecting presupposes diagnosis. Diagnosis requires careful contrasting.

*Sixth*, in the first weeks and months of law school, your professors will stress many of the points emphasized in this book. Use the explanations in this book (e.g., What is a Principle of Law [p. 6], What is a Legal Policy [p. 7], What is the Principle of a Case [p. 51]) to clarify what is unclear. Finally, you might read the entire book through again after some weeks of classes. Since you'll know much more at that time, you'll see much more in the chapters.

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## HOW TO USE THIS BOOK — FOR TEACHERS

In teaching first-year students at the New York University Law School and at the City University of New York Law School, I have often emphasized that one of my objectives was to bring students from their beginners' level of confusion about cases and legal reasoning to my advanced, sophisticated level of confusion. I intended the remark as only somewhat facetious. I meant to convey the thought that sophistication in the art and craft of legal reasoning is a life-long task. Over forty years of lawyering activity, including a thousand trials, one hundred fifty appeals, extensive law-reform activities, and full-time teaching for years, has convinced me of the truth of this thought—and of the following principles that underlie this book.

1. Law is a process of reasoning for decision-making about particular controversies. True, it's more than this, but this definition orients beginning students to the overriding priority of first year.

2. The professorial priority in the first year of law school is the learning of the skills necessary for legal reasoning.

3. It is not knowledge in itself that is imperative but, rather, knowledge filtered through these skills that is imperative for law school and for lawyering.

4. It is important to begin systematically with the basics of legal reasoning, spelling out the positivist form of legal consciousness.

5. It is important to proceed beyond the basics—to introduce a broader jurisprudential framework that explains what judges actually do in case reasoning, beyond positivist formulation, analysis and decision-making.

6. This broader framework requires introducing students early to the flexibility and resourcefulness of lawyerly argument and of judicial decision-making, including modes of reasoning based on the principle of a case and broad and narrow constructions of a case holding and precedent. It also requires an introduction to the frame-shifting possibilities inspired by varying jurisprudential perspectives. Technical craft must be informed by jurisprudential breadth and insight.

7. Legal reasoning in cases is a gestalt; the parts are only intelligible in light of each other and of the whole. Hence, a holistic perspective is a *sine qua non* for comprehending key facts, the procedural history, the issue(s), the holding(s), the judgment, the types of legal reasoning applied, and what each case adds to prior cases already deciphered.

These principles do not emerge from interpretation of my dreams. They emerge from my experience including my debt of gratitude to these giants of twentieth-century jurisprudence, who are my intellectual mentors for the purpose of this book: Karl Llewellyn, Jerome Frank, Edward Levi, Benjamin Cardozo, and Felix Frankfurter. Finally, it may be helpful to understand what I attempt in this book by appreciating what I do not attempt. The book is not about legal research. Nor is it about legal writing in any systematic way. Nor is it about statutory construction in any exhaustive manner. It is about briefing a case and about an introduction to the verdant terrain of legal reasoning and jurisprudence. Any comments and suggestions concerning this book will be appreciated.