

# DETAILED TABLE OF CONTENTS

## INTRODUCTION

HOW TO USE THIS BOOK.....	xvi
HOW TO USE THIS BOOK — FOR TEACHERS .....	xvi

## CHAPTER ONE

INTRODUCTION .....	1
LAW: WHAT IT IS AND IS NOT .....	1
What is law? .....	1
What the first year of law school is not .....	1
What are the authoritative sources and types of law?.....	2
What is a statute?.....	2
What is a case? .....	2
What is a constitution?.....	3
What is a regulation?.....	3
BRIEFING AND THE CASE METHOD .....	3
What is a brief of a case?.....	3
What is the case method?.....	3
THE COMMON LAW SYSTEM .....	3
What is the common law system?.....	3
COURT SYSTEM.....	4
What is a trial court? .....	4
What is an appellate court?.....	4
TWO BASIC COMMON LAW DOCTRINES.....	5
What is <i>res judicata</i> ? .....	5
What is <i>stare decisis</i> ?.....	5
Binding precedent.....	5
Persuasive precedent.....	6
SUBSTANTIVE LAW.....	6
What is a rule of law?.....	6
What is a principle of law? .....	6
What is a legal policy?.....	7
Is there consistency in the use of rule, principle and policy?.....	7
SKILLS FOR LEGAL REASONING .....	8
What are the basic skills required for legal reasoning? .....	8
What is extricating key facts?.....	8
What is issue spotting? .....	8
What is selection of a rule? .....	8
What is rule-application, especially interweaving of facts with elements of rules .....	9
What is adroit use of policy?.....	9
What is lawyerly writing?.....	9

THE FIRST YEAR .....	10
Why is the first year of law school formidable?.....	10
In developing these basic skills of legal reasoning, am I learning to read, think, talk and write like a lawyer?.....	10
ROLE OF KNOWLEDGE.....	11
You don't emphasize knowledge—I thought law school meant learning the law .....	11
BRIEFING AND BASIC LEGAL SKILLS.....	11
How does briefing help me to learn and practice the basic legal skills necessary for legal reasoning?.....	11
Am I supposed to learn all about legal reasoning from briefing cases? .....	11
Do these basic skills of legal reasoning apply in doing other legal tasks?.....	11
How does briefing cases help me prepare for class? .....	12
What is reconciling and synthesizing of cases?.....	12
THE LAW SCHOOL CLASSROOM.....	12
What is the Socratic method?.....	12
In addition to briefing cases, what else should I do to prepare for class? .....	12
What is the value of class participation?.....	13
What are the disadvantages of learning by the case method?.....	13
STATUTES .....	14
What is the role of statutes and when do I learn them?.....	14
THE BAR EXAM.....	14
How will briefing help me pass the bar exam?.....	14
WHAT ELSE?.....	14
In addition to learning how to brief cases as a means of learning the basic skills, what else must I learn as a beginning law student? .....	14
A warning.....	14

## CHAPTER TWO

INTRODUCTION .....	15
SIX STEPS FOR BRIEFING .....	15
1. Facts.....	15
2. Procedural history.....	15
3. Issue .....	16
4. Holding.....	16
5. Judgment .....	16
6. Reasoning .....	16
BRIEFING CASES IS LIKE PLAYING CHECKERS.....	16
GUIDELINES FOR PERFORMING EACH STEP .....	16
Facts — Six guidelines for extricating key facts .....	16
1. The parties and their roles .....	16
2. The plaintiff's cause-of-action.....	17
3/4. The element(s) at issue and relevant facts.....	17
5/6. Any asserted defense, element(s) at issue, and relevant facts.....	17

Hints for extricating key facts .....	17
PROCEDURAL HISTORY .....	17
Five guidelines for determining procedural history .....	17
1. The parties and their roles at trial and on appeal .....	18
2. The plaintiff's cause-of-action at trial.....	18
3. The disposition of plaintiff's cause of action in the trial court.....	18
4. Determine who is appealing and for what relief.....	18
5. Any prior action or disposition by an intermediate appellate court .....	18
ISSUE SPOTTING.....	18
Five guidelines for issue-spotting .....	18
1. The plaintiff's cause-of-action at trial and its elements .....	19
2/3. The particular element(s) of that cause-of-action which poses the conflict on appeal and the court's marshalling of facts on this element.....	19
4. Any defense, its particular element, and marshalling of facts.....	19
5. Formulate the issue in controversy.....	19
Correct statements of the issue .....	19
Incorrect statements of the issue .....	20
Hints for formulating issues .....	20
HOLDING .....	21
Two guidelines for determining holdings.....	21
1. Identify issue in controversy in the appellate court opinion.....	21
2. Identify holding by extricating the answer to this issue .....	21
Correct statements of holdings .....	21
Incorrect statements of holdings .....	21
Hints for determining holdings.....	22
JUDGMENT .....	22
Three guidelines for determining judgments .....	22
1. Identify judgment of trial court.....	22
2. Identify judgment of intermediate appellate court.....	22
3. Identify judgment of appellate case that you are briefing .....	22
REASONING .....	22
Three guidelines for understanding the reasoning.....	23
1. Identify the separate arguments .....	23
2. Identify the types of argument applied by the court.....	23
Interpreting a statutory rule.....	24
Applying—Interpreting a judge-made rule .....	24
3. Appreciate the varying weight of different arguments .....	25
<i>DICTA</i> .....	25
A CAVEAT ON THE GUIDELINES .....	25
APPLICATION OF GUIDELINES.....	25
<i>MCBOYLE v. UNITED STATES</i> .....	26
BRIEFING <i>MCBOYLE BY APPLYING THE GUIDELINES</i> .....	27
Facts .....	27
Procedural history .....	28

Issue .....	29
Overbroad statements of issues .....	30
Holding.....	30
Overbroad statements of holding.....	30
Judgment.....	31
Reasoning.....	31
Discerning Congressional Intent in <i>McBoyle</i> .....	32
Policy arguments in <i>McBoyle</i> .....	32
AN EXCELLENT BEGINNER’S BRIEF OF <i>MCBOYLE</i> .....	33
A POOR BRIEF OF <i>MCBOYLE</i> .....	34
FUNCTIONS OF THE COURT EXEMPLIFIED IN <i>MCBOYLE</i> .....	36
Interpreting federal statutes.....	36
Principled decision-making.....	36
ISSUES NOT CONSIDERED AND DECIDED IN <i>MCBOYLE IN THE U.S. SUPREME COURT</i> .....	37
DEFINITIONS .....	38
Petitioner .....	38
Writ of Certiorari.....	38
Judgment .....	38
Decision.....	38
Intermediate Appellate Court.....	38
THE MEANING OF ALL THE ITEMS AT THE BEGINNING OF THE CASE.....	39

### CHAPTER THREE

INTRODUCTION .....	41
<i>PORT HURON MACHINERY v. WOHLERS</i> .....	41
AN EXCELLENT BEGINNER’S BRIEF OF <i>PORT HURON</i> .....	45
A POOR BRIEF OF <i>PORT HURON</i> .....	48
FUNCTION OF THE COURT EXEMPLIFIED IN <i>PORT HURON</i> .....	50
COMMENTS .....	50
Relevance for lawyering.....	51
Principle of <i>Port Huron</i> .....	51
The <i>Ratio Decidendi</i> .....	51
Dicta.....	52
Holdings .....	52
ISSUES NOT CONSIDERED AND DECIDED IN <i>PORT HURON</i> .....	52
MORE DEFINITIONS.....	53
Prima Facie Case .....	53
Burden of Proof.....	53
Directed Verdict.....	53
Complaint.....	54
Answer.....	54
Contract.....	54

Promisor.....	54
Promisee.....	54
Promise.....	54
American Law Institute.....	54
Public and Private Law.....	54

## CHAPTER FOUR

INTRODUCTION .....	57
<i>SAUER, ET AL. v. HEBREW INSTITUTE OF LONG ISLAND</i> .....	57
AN EXCELLENT BEGINNER'S BRIEF OF <i>SAUER</i> .....	59
A POOR BRIEF OF <i>SAUER</i> .....	60
<i>GREAVES, ET AL. v. BRONX YMCA</i> .....	62
AN EXCELLENT BEGINNER'S BRIEF OF <i>GREAVES</i> .....	64
DISSENTING OPINION IN <i>GREAVES</i> .....	66
AN EXCELLENT BEGINNER'S BRIEF OF THE <i>GREAVES</i> DISSENT .....	67
FUNCTIONS OF THE COURT EXEMPLIFIED IN <i>SAUER</i> AND <i>GREAVES</i> .....	68
Reviewing application of judge-made rules at trial.....	68
Fact-finding.....	68
<i>Stare decisis</i> .....	69
No ad hoc decision-making.....	69
ISSUES NOT CONSIDERED AND DECIDED IN <i>SAUER</i> AND <i>GREAVES</i> .....	69
Comment on lawyer qua counselor.....	70
ADDITIONAL DEFINITIONS .....	71
Torts.....	71
Duty.....	71
Liability .....	71
Infant and Guardian Ad Litem .....	72
POSTSCRIPT: NARROW vs. BROAD STATEMENTS OF HOLDING AND PRECEDENT .....	72
Trial judge's discretion.....	74
<i>Stare Decisis</i> .....	74
Extending and limiting precedent.....	74
Choosing between two or more applicable rules.....	74
Applying statutory rules.....	74
Determining meanings of ambiguous words.....	75
Appellate judge's discretion.....	75
Slot machines and digestion .....	75
Discretion and change.....	76
CONTRASTING POWER OF THE COURTS IN <i>MCBOYLE VS. PORT HURON,</i> <i>SAUER, GREAVES AND WOODS</i> .....	76

## CHAPTER FIVE

INTRODUCTION .....	77
<i>WOODS v. LANCET</i> .....	77
AN EXCELLENT BEGINNER’S BRIEF OF <i>WOODS</i> .....	83
FUNCTIONS OF THE COURT EXEMPLIFIED IN <i>WOODS</i> .....	85
<i>Stare Decisis</i> and justice.....	85
Distinguishing two different kinds of appeals .....	86
Interacting of substantive and procedural law.....	87
The Court in <i>Woods</i> need not defer to the legislature .....	87
<i>Stare Decisis</i> and <i>Res Judicata</i> .....	87
ISSUES NOT CONSIDERED AND DECIDED IN <i>WOODS</i> .....	87
A FEW FINAL DEFINITIONS .....	88
Decisional law.....	88
Cause of action .....	88
Sufficiency of the complaint .....	88
VALUE OF PRECEDENTS.....	89
OPINIONS CAN BE FUN.....	90

## CHAPTER SIX

INTRODUCTION .....	91
<i>STATE v. SHACK</i> .....	92
AN EXCELLENT BEGINNER’S BRIEF OF <i>SHACK</i> .....	100
FUNCTIONS OF THE COURT EXEMPLIFIED IN <i>SHACK</i> .....	101
Reconciling conflicts in rights.....	101
Constitutional claims.....	102
A jurisprudential claim.....	103
A factual and sociological claim .....	103
A congressional-intent claim.....	103
Narrow and broad views of a holding .....	103
The principle of a case.....	104
The interacting of historical context, politics and law .....	104
Historical context and politics.....	104
Politics becomes law .....	105
Policy as a bridge .....	105
Law is more than politics .....	105
Conclusion.....	106
ISSUES NOT CONSIDERED AND DECIDED IN <i>SHACK</i> .....	106
A FEW FINAL SUGGESTIONS ON BRIEFING .....	106
A second warning.....	108
A parting word .....	108

## CHAPTER SEVEN

INTRODUCTION .....	109
JUDGE VIGOROUS .....	110
Positivism serves democratic decision-making.....	112
JUDGE FREEDOM.....	113
Strict construction and principles .....	113
The centrality of purpose .....	114
<i>Shack</i> and the use of policy .....	115
JUDGE VIGOROUS' REBUTTAL .....	115
Policy undermines democratic decision-making .....	116
JUDGE PRAGMATIC .....	117
The triumphant fallacy .....	117
Discretion is decisive .....	117
A veil of self-deception .....	118
Differences.....	118
Cooperation for the common good .....	118
Application to the cases .....	119
JUDGES VIGOROUS' AND FREEDOM'S REBUTTAL .....	120
JUDGE JUST .....	120
Moral beings — moral conceptions.....	121
A rootless, atomistic activism.....	122
A claim of justice.....	122
REBUTTAL BY JUDGES VIGOROUS, FREEDOM AND PRAGMATIC.....	123
JUDGE EXISTENTIAL.....	123
JUDGE CRIT.....	125
COMMENTS BY PROFESSOR DELANEY.....	126
The manufacture of legal meaning .....	126
A bit of semiology.....	127
Institutional constraints on the judge as Lone Ranger .....	127
Common shared understandings in the legal culture.....	128
Role in the judicial system.....	128
Current traditions of the Court.....	128
Law as fact versus law as hope.....	129
CONCLUSION .....	129
APPENDIX A — Abbreviations for briefing cases .....	131
APPENDIX B — Other Books.....	133