

Using the Law Class to Teach Problem-Solving and Writing Skills

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Problem solving and writing skills are vital to an understanding of the law and how it applies to situations arising in the construction industry. The law class can be used to teach both skills. This paper presents a process for teaching students how to make a legal argument supported by premises. It also outlines a method to use in preparing a complete stand-alone paper containing the argument. The Appendix contains a set of three assignments with suggested solution. These assignments introduce the students to the problem-solving skills necessary to prepare a legal argument and show them how to make an outline in preparation for writing out a complete legal argument. These assignments can be completed during a class session and immediate feedback given to the students. Also included in the appendix are homework assignments requiring written arguments and samples of actual student work handed in response to the homework assignment.

Key words: writing, analytical thinking, education, construction law

Introduction

Problem solving, also called analytical thinking, is one of the most important aspects of the law class. That is, requiring students to solve legal problems or hypothetical cases is extremely important to gaining an understanding of the law. Most law professors and lawyers will use the term “hypotheticals” rather than the terms “legal problems” or “hypothetical cases”. Another important skill to be learned by college students is writing (Ray, 1998). Both can be effectively combined in law classes, particularly law classes contained in construction science curriculums. By teaching students how to solve a legal problem, and then requiring them to write out the solution, they will gain practice in both problem solving and writing.

Learning how to solve a legal problem will give the student experience in solving any problem based upon a fundamental law or principle. For example assume the problem is overpopulation. The fundamental principle to be applied is: populations grow or decline through a combination of the birth rate, the death rate and migration. Different factual scenarios can then be analyzed, using this rule, to determine how to solve overpopulation.

Taking a management example, assume the problem or issue to be solved is, how to motivate employees. One rule or principle that could be used in developing a solution to the problem is the theory of Maslow’s Hierarchy of Needs. Under that theory a person will strive to reach the next level of need. The problem solver then needs to determine what level the employees are at, and set goals geared toward the next higher level. Just as in the law, other principles could be used instead of this one. For example, Herzberg’s Motivation/Hygiene Theory is used as the principle

from which solutions will be derived and a different solution to the problem will be produced. This is exactly what happens in the law – different solutions are reached depending on the law used.

Argumentation/Analysis

In order to solve a legal problem it is necessary for the student to prepare an argument in support of a conclusion. In law school this process is usually called “analysis”, which has a slightly different meaning than the dictionary definition. The dictionary definition of analysis would be something like, “to separate into parts or basic principles so as to examine the nature of the whole or to examine methodically”. This is not what legal analysis is. Legal analysis is the application of the law to the facts to come to a legally valid conclusion. Because of the confusion between the dictionary definition of “analysis” and the specialized definition used in the legal profession, the word can cause confusion. By using the term “argument”, a term with which most students are familiar, and one that is also used in the legal profession, students can more easily and quickly grasp the concept being presented.

Though familiar with arguments and the concept of arguing, the term “argument” has several meanings and it is necessary to clarify the meaning used in the assignments. For the purposes of the assignments in this article, the definition of the term “argument” is “a passage or discussion composed of premises, used to support a conclusion”. This is the definition given the word by the science of logic. A common definition of argument may be “disagreement”. Another definition is “a highly emotional interaction or emotional exchange between two or more people”. The term argument may be used to describe “a situation where one person tries to dominate another through the use of emotions such as fear or anger”. These are *not* the meanings used in this article.

An argument is a passage or discussion purporting to prove something. Not all passages are arguments. A passage may be only informational or be an opinion. For example, the statement, “I am an honest person” is not an argument. It may be true, but it is not an argument. It is not an argument because it has not premises in support of a conclusion. The statement, “I am an honest person because I have never cheated on a test and I returned a lost wallet to the owner” is an argument. This statement contains premises in support of the conclusion, “I am an honest person”. In order for a passage to qualify as an argument, the passage must contain at least one premise to support the conclusion. The premises in this argument are “I have never cheated on a test” and “I returned a lost wallet to the owner.” A conclusion unsupported by any premises is not an argument.

In most construction law classes the amount of material to be covered prevents a detailed study of logic. However, even a basic understanding is extremely useful and can be used to make the types of legal arguments they are likely to come into contact with on the job.

To prepare an argument students must have a basic understanding of logic, the science that evaluates arguments. A small amount of time can be spent reviewing fallacious arguments such as “appeal to pity”, “begging the question”, and “attacking the person”. Many students find this

very interesting and it has proved effective in preventing students from making fallacious arguments when attempting to support a conclusion.

In addition to the premises and conclusion, every argument contains an issue, though most arguments assume the reader will recognize the issue from the passage. Most arguments do not contain a sentence stating, “The issue here is...” Students often find it difficult to define the issue being raised and to tell the difference between the premises of the argument and the conclusion. Practice is necessary.

It is often best, and even fun, to start with non-legal arguments. Students usually have some familiarity with these. This also has the advantage of being able to relate something new to something already known. Here is an example of a very simple argument to get students started on learning how to dissect arguments:

“Homework stifles the thrill of learning in the mind of the student. It instills an oppressive learn-or-else discipline. It quenches the desire for knowledge and the love of truth. For these reasons homework should never be assigned.” Colman McCarthy, *Homework’s Tyranny Hobbles Promising Minds*).

This argument can be dissected as follows:

ISSUE: Should homework be assigned?

PREMISES:

1. Homework instills an oppressive learn-or-else discipline.
2. Homework quenches the desire for knowledge and the love of truth.

CONCLUSION: No

Here is a sample of a slightly more difficult argument that can be given to a student to dissect.

“...If a work plan falls behind schedule, the standard reaction is to somehow increase the production effort in order to get back on schedule. When the production effort is increased, accidents have an increased chance of occurrence. That effect demonstrates the need for the work to progress smoothly and in an organized fashion so that the scheduled work activities take place as planned. With the many different tasks involved in most construction projects and with the large number of subcontractors that participate in the construction effort, it is clear that a great deal of coordination is required to deliver project in the specified period of time.” Hinze, Jimmie W., *Construction Safety*, Prentice Hall, 1997, p. 283.

This argument can be dissected as follows:

ISSUE: Is coordination of the construction project important to safety on the project?

PREMISES:

1. If a work plan falls behind schedule, the standard reaction is to somehow increase the production effort in order to get back on schedule.

2. When the production effort is increased, accidents have an increased chance of occurrence.

CONCLUSION: Yes. Can also be worded: Coordination and planning of the work are necessary for a safe project.

The following argument comes from the *A Guide to Successful Construction – Effective Contract Administration*, Arthur O’Leary, 1997. BNI Building News, p. 3:

In recent years, informed opinion has reverted once again to favor the architect’s traditional role of monitoring the construction contract. This has several advantages which outweigh the disadvantages. With the architect more intimately involved in the conversion from drawings and specifications to physical reality, there is a greater chance of preventing contractor misconceptions and misinterpretations in a timely manner. It also affords the architect an opportunity to correct errors and anomalies in the documents before the construction progress makes them impossible, impractical or too costly to rectify.

This argument can be dissected as follows:

ISSUE: Should the architect monitor the construction contract?

PREMISES:

1. Though there are disadvantages to the architect monitoring the construction contract, there are more advantages.
2. The architect can prevent contractor misconceptions and misinterpretations in a timely manner.
3. The architect can detect errors in the documents before the construction progress makes them impossible, impractical or too costly to rectify.

CONCLUSION: Yes. Can also be worded: The architect should monitor the construction contract.

Another useful exercise to practice recognizing and dissecting arguments is to have them find actual arguments. The following exercise gives them practice in this skill, plus gives them practice in using the Internet to find information:

1. Using the Internet, find two arguments from books, magazines, newspaper articles, etc. Good sources of arguments are letters to the editor, editorials, and political commentary. These arguments DO NOT have to be related to the construction industry or even law, though you will be making legal arguments in the future. Attach a copy of the argument to your return memo.

For each argument, answer the following questions:

- a. What is the issue being raised by the argument?
- b. What is the argument trying to convince you to believe? In other words, what is the conclusion of the argument?

- c. What are the premises of the argument?

Legal Argumentation

Once the students have reviewed arguments in general, and can dissect them, the concept of the legal argument can be introduced. Legal argumentation, which can also be called legal analysis, is merely a specialized form of argumentation using facts and law in the premises of the argument.

Facts

When confronted with a legal argument it is not uncommon for students to have difficulty determining the difference between facts, rules, issues and conclusions. It takes practice. In general a fact will answer a question such as:

Who are the people involved in this claim?
What happened?
Where did it happen?
Why did it happen?
How much did it cost to fix?
What does the contract say?

Note the contract is a fact, not a rule or law. This is because the law does not uphold every provision of the contract and therefore no legal conclusion can be reached merely by referring to the contract. In order to uphold a provision of a contract in a court of law, a law must be found that will support the contract provision. Of course the basic premise of contract law is: A party must uphold its contract. This premise can be used to support any contractual provision, unless another, more specialized rule contradicts it. A special rule will prevail over the general rule.

Another concept related to facts that causes some confusion is the concept of proof. In a court of law no fact can be used to support a legal conclusion unless it is proved by admissible evidence. For example the contract is 'proved' by admitting it into evidence, or by testimony of the parties, if the contract is oral. For purposes of most classes the students must be told all facts given are assumed to be proved, unless specifically told otherwise.

Enumerating the issue in a legal argument can be difficult. There are always many, many ways to phrase the issue in any legal problem. Simplistically a legal issue can always be worded as, "Who will win this lawsuit?" In the legal profession legal issues are usually more specifically enumerated. For example, "Was the general contractor negligent when he lent a broken ladder to the employee of a subcontractor?" or "Is the ambiguity in this contract patent or latent?" Note that in legal argumentation or analysis, the issue is *always* worded as a question, with the conclusion being a short answer to that question.

Many undergraduate students will need practice in formulating more specific issues. For this reason it is recommended that several problems be given to the students with the issue clearly enunciated. After some practice students should be able to state the issue.

Here is an example of a hypothetical containing the facts and issue. The issue is pulled out of the hypothetical for the student, and the student is given the rule to apply:

FACTS: General contractor submits bid to owner using subcontractor's bid of \$100k for the concrete. General is awarded contract. Subcontractor determines it made a mistake, and the actual cost to do the concrete work will be \$125k. The subcontractor refuses to do the work for \$100K, and the contractor pays the subcontractor \$125K because it cannot get anyone else to do the work cheaper.

ISSUE: Can the subcontractor rescind (revoke) it's bid without incurring any liability to the general contractor?

RULE #1: A party must honor its contract. (Basic premise of contract law)

RULE #2: "Justice demands that the loss resulting from the subcontractor's carelessness should fall upon him who was guilty of the error rather than upon the principal contractor who relied in good faith upon the offer that he received." *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958).

Most students can come to the correct conclusion in the above problem. However, preparing a convincing argument in support of the conclusion is the point of the writing exercise. The method used to enable students to do this is discussed below in the section "How to FIRAC." FIRAC is similar to the process called IRAC (Issue, Rule, Analysis, Conclusion) used in law school. FIRAC stands for Facts, Issue, Rule, Argument and Conclusion. By making sure each of the FIRAC elements is included in the written paper, the student will have a complete, stand-alone document that can be understood by a reader unfamiliar with the situation.

Premises

Developing the premises of the argument will be difficult for students. Several different types of premises exist. Four will be reviewed here: the simple premise, basic premise of contract law, premises based upon opinion and creative thinking, and last, premise based upon lack of evidence.

Almost every legal argument employs what a type of premises herein termed the "simple premise" which consists of the application of a rule to the facts. Only two simple premises exist. The first is: Facts = Rule, therefore the Rule applies. The second is: Facts ? Rule, therefore the Rule does not apply. For example, an extremely simple argument on the issue of whether a drunk driver hitting a pedestrian is negligent would look like this: Driving while drunk (fact) is unreasonable (rule), and therefore the driver was negligent. Only when the law is entering previously uncharted or new legal territory are these types of premises NOT used. In introductory law-related classes the simple premise should always be used.

In all legal arguments discussing contracts one of the rules or laws applied is ALWAYS the Basic Premise of Contract Law: “A party must honor its contract.” All arguments involving contract interpretation start from this basic premise. However, since this basic premise is so fundamental, most legal authors and judges just assume people reading their work or legal opinions realize its existence and may not discuss it at all.

Some of the most difficult premises for students to use are premises based upon opinion and creative thinking. Unless a legal argument is based upon a case containing exactly the same facts as the one under discussion, any argument must contain the author’s opinion that the facts of this case are similar to the applied case and therefore the applied case does apply. An example of such an opinion premise is in the example below dealing with the Wrights home. Creative thinking arises when the author looks at the facts in a slightly different way to support the result. This is extremely challenging for undergraduate students and is not discussed in this paper. Though many can develop extremely creative arguments as to why late assignments should be accepted, this skill is more difficult to employ in abstract classroom situations where the author of the argument has no personal stake in the conclusion.

How to FIRAC

In order to get the argument down on paper a process herein termed FIRAC is used. FIRAC is similar to the process called IRAC (Issue, Rule, Analysis, Conclusion) in law school, but is more effective to quickly teach students how to prepare a well-written stand-alone legal argument. FIRAC stands for Facts, Issue, Rule, Argument and Conclusion. By making sure each of the FIRAC elements is included in the written paper, the student will have a complete, stand-alone document that can be understood by a reader unfamiliar with the situation.

The following hypothetical case will be analyzed using the FIRAC process:

FACTS: Mr. and Mrs. Wright are the owners of a home recently built by Revel Contractors. The Wrights have a performance/payment bond with Slow Pay Insurance Co. guaranteeing Revel Contractor’s indebtedness for all “labor and material furnished “ in connection with the work. Shortly after the work on the house is completed, Best Hardware sends the Wrights a copy of an invoice for hammers, pliers, and screwdrivers which Best claims were purchased by Revel for the Wright job, and in fact Revel did use these items on that job site. Revel did not pay Best. The Wrights turn the claim over to Slow Pay to pay pursuant to the performance/payment bond.

ISSUE: Is Slow Pay required to pay the invoice of Best pursuant to its bond with the Wrights?

RULE: The surety on a performance bond must pay for all materials and equipment actually consumed in performing a construction contract.

Approach the preparation of the argument using this FIRAC model. The words in red would be those expected to be written or hi-lighted by a student in preparing his/her answer.

1. Read through the information given at least twice.
2. Fill in the conclusion to be supported. The LAST paragraph will be built around this word.

Last paragraph: CONCLUSION: No.

Notice this conclusion is a **one-word** answer to the ISSUE: Is Slow Pay required to pay the invoice of Best pursuant to its bond with the Wrights? A “yes” conclusion could also be supported. For learning purposes, it makes no difference which conclusion a student has come to: yes or no. It is only the argument that is important.

3. Determine the legal issues and find the applicable legal rules. (Note to instructor: This is always difficult and takes study and practice. In introductory law-related classes the legal issues and rules are generally given. Toward the end of the class a problem just containing facts could be given to students.)
4. Prepare the premises of the argument. To do this, review the rule. Circle or hi-lite all of the elements or important words in the rule. These words **MUST** be repeated in the argument section. In this example the most important rule words are: *materials/equipment*, and *actually consumed*. (Note to the instructor: Many students find this repetition difficult to do.)
5. Put each unrelated rule word into its own paragraph. For this problem there will be:

Paragraph discussing: *materials/equipment* (Note: each item, pliers, hammers and screwdrivers could be discussed in a separate issue, however, to simplify matters all are included in one issue).

Paragraph discussing: *actually consumed*

Last paragraph: CONCLUSION: No.

Notice an outline of the argument is starting to appear. Presently it has three paragraphs; a paragraph discussing “materials/equipment”, another paragraph discussing “actually consumed” and the final paragraph restating the conclusion.

(Note to the instructor: **The entire** rule must be **completely** discussed. Students have a tendency to only discuss parts of the rules, particularly parts of rules that have more than one element. For example, assume the rule being used is the following: Negligence is the failure to act with reasonable care to others, which failure causes injury. (Note this is only a simplified rule of negligence, not the complete rule). The student must discuss both the failure to act with reasonable care AND injury. It is not uncommon for students to discuss only part of the rule. While it is true not all of the facts must be discussed, ALL of the rule, or more accurately all of the elements of the rule, must be discussed.)

6. Review the facts. Circle or hi-lite all of the facts dealing with the rule words in the argument. Fact words dealing with “material/equipment” in the hypothetical are:

hammers, pliers, and screwdrivers. Fact words dealing with “actually consumed are: “*Humm, I can’t find “consume” the closest word, or most similar word is “use”.*

7. Develop the Simple Premises. Copy or paste the above fact words in the paragraphs discussing the rule words. Put an “equal” sign [=] between the fact words and the rule words or a “not equal” [?] sign between them. The outline now looks like this:

Paragraph: *FACT WORDS* *hammers, pliers, and screwdrivers* ? *RULE WORDS:* *materials/equipment.* What is being said is: “hammers, pliers and screwdrivers do not equal materials/equipment” or more simply “facts do not equal rule”. Note if the writer of the argument is supporting a “yes” conclusion an equal sign is placed between “hammers, pliers and screwdrivers” on one side of the equation and “equal materials/equipment”. The facts then equal the rule.

Repeat the above for each element of the rule. Paragraph: *FACT WORDS:* *use* ? *RULE WORDS:* *actually consumed.* This is stating: “using” something (facts) is not the same as “actually consuming” something, or the facts do not equal the rule.

8. The writer of the argument should then add an introductory paragraph(s) telling the reader of the argument the facts and issue. The writer of the argument may want to include the rule here also so the reader can better follow the subsequent paragraphs where the rule will be applied to the facts. The following outline containing four paragraphs now exists:

Paragraph #1: Introductory paragraph summarizing facts and telling reader what the issue is.

Paragraph #2: *hammers, pliers, and screwdrivers* ? *materials/equipment* (rule)

Paragraph #3: *use* (facts) ? *actually consumed* (rule)

Paragraph #4: *Conclusion: No*

9. Finally, write out a complete argument using complete sentences and paragraphs. (Note to instructor: This example has an added sentence discussing the Basic Premise of Contract Law in the final paragraph. Also, the issue, facts, rule and premises are indicated in bold in parenthesis to help the student recognize how these elements interact in the argument):

The issue in this case is whether or not Slow Pay must pay for the hammers, pliers and screwdrivers purchased by Revel Construction for use on the Wrights’ construction project (**issue**). These hammers etc. were supplied by Best Hardware, and used by Revel on the Wrights project, however, Revel did not pay Best for them. Best has submitted the invoice to the Wrights for payment. The Wrights have turned over the invoice to Slow Pay, the bonding company, to pay because they have a performance/payment bond with Slow Pay (**facts**).

The law requires Slow Pay to pay for all materials and equipment actually consumed in the project (**rule**). However, hammers, pliers and screwdrivers are not materials or

equipment. (**This is a simple premise**). In the construction industry materials are such things as paint and wood that are used in a particular construction job and cannot be reused. (**This is an opinion premise**). Since the hammers etc. are not material or equipment, Slow Pay does not have to pay for them (**conclusion**).

In addition to paying for materials and equipment, the rule requires Slow Pay to pay for them only if they were “consumed” in the construction. (**The rule is repeated**) The facts indicate the hammers etc. were not consumed, but were merely used in the construction. (**This is a simple premise**). There is no evidence the hammers were consumed. (**This is a lack of evidence premise**). Slow Pay is not required to pay for items merely used (**conclusion**).

In this matter Slow Pay is not required to pay Best’s invoice. While it is true a party must generally honor its contract, that rule is not applicable here. (**This is the Basic Premise of Contract Law**). This is because there is no contract between Slow Pay and the Wrights to pay for hammers and similar items used on the site. The rule requires Slow Pay to pay only for materials/equipment actually consumed. However, in this case Best’s invoice is neither for materials nor equipment. Additionally, Best’s invoice is not for items consumed on the Wrights’ project, but only used. (**This is a summary paragraph**).

Teaching Methodology

Attached in Appendix A is a series of three FIRAC assignments, which can be given to students to help them learn this process. These can be completed during a class period and immediate feedback given to the student. Reviewing this process in the classroom is extremely helpful to students. A more difficult written homework assignment can then be given. A copy of such an assignment, together with an actual student answer is also attached in the appendix.

Checklist for Arguments

Once the argument is finished, completing the following checklist is useful to the writer of the argument:

1. Change the conclusion to the opposite of what was discussed. For example, in the above argument change “no” to “yes”. Only a few words should need to be changed to support the opposite conclusion, for example “Hammers and pliers are materials or equipment” and “Use is the same as consume”. Does this argument sound unfair, unethical, illogical or immoral? If yes, the original conclusion is probably correct. If no, look more carefully at the original conclusion. Is it the best one?
2. Is the argument complete? That is, can the reader of the argument understand the situation without having to refer to anything other than this argument? In other words, the reader of this argument should be able to understand it without needing to refer to the homework assignment.

3. What are the premises(s) of the argument? Is there at least one Simple Premise? Will a Premise Based Upon Lack of Evidence help me? If yes, use it.
4. Have the rules been COMPLETELY discussed? Even if a rule, or part of a rule, does not apply, it must be explained to the reader why not.
5. The following words should appear in the writing of a beginning writer: “the issue is..”, “the rule is...” “The rule applies because...” “The rule does not apply because...” While it is not necessary for an argument to contain exactly these words, when learning to write an argument, it is a good idea to have them.

Summary

Problem solving sometimes also called analytical thinking, and writing skills are vital to an understanding of the law and how it applies to situations arising in the construction industry. By teaching the students how to solve a legal problem, and then to write it down, they will learn both. In order to solve a legal problem students must understand the concepts of an argument and a legal argument. FIRAC is a method that can be used by students to write out a legal argument so that a complete, stand-alone argument is produced. This same method can be used to solve any type of problem in which some guiding principle is the source upon which an issue is to be resolved.

By requiring students to write a complete argument they will learn valuable writing and problem solving skills, skills that will help them in their future employment.

References

Ray, Christopher S., *An Action Research Plan for Developing and Implementing Writing Skills in Construction Project Administration*, Proceedings of the 34th Annual Conference of the Associated Schools of Construction, April 1988

Appendix A

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Sample of Student prepared response to Homework Assignment

In-Class Assignment - Worksheet: How to FIRAC #1

Student Number: _____
Graded by Student Number: _____
Grade: (Circle 1) Pass, 65-Redo, 0-Redo

Go through the steps outlined in the section entitled, “How to FIRAC” in your text. YOU DO NOT HAVE TIME TO WRITE OUT A COMPLETE FIRAC IN CLASS. DO AN OUTLINE ONLY. If you follow the steps on “How to FIRAC” you will get an outline.

(Note to instructor: Students could be required to prepare a complete legal argument from the outline as a written homework assignment).

Use reverse side or additional sheets if necessary.

Hypothetical #1

FACTS: Caffey Construction, the prime contractor, utilizes Bon Fire Tile’s, (subcontractor) bid of \$85,000 for acoustical tile in preparing the prime’s bid on a contract dated 2/1/98. Assume this is proved by the evidence and is **not** an issue. **THIS JOB IS TO BE PERFORMED IN KENTUCKY.** Correspondence dated 12/1/97 between the prime and sub defined the exact nature and price of the work required by Bon Fire, and the contractor confirmed this in writing. However, on 2/3/98, after the contract has been awarded to the prime, the prime bid shops and gives the acoustical tile work to Sippers Tile, another subcontractor. Bon Fire’s lost profit on the job is \$15,000, and it had no other job during that time, nor could it get another one.

ISSUE: Can the sub get the \$15,000 in lost profit as damages from the prime?

RULE: In order for a contract between two parties to be formed there must exist an offer, and acceptance of that offer, and valid consideration. A subcontractor’s bid is an offer. [*Finney Co. v. Monarch Constr. Co., Inc.* 670 W.W.2d 857 (Ky. 1984)]

Suggested Solution to In-Class Assignment - Worksheet: How to FIRAC #1

(Note to instructor: There is no “right” or “wrong” answer to this problem. Students could be required to prepare a complete legal argument from the outline as a written homework assignment).

FIRAC Outline supporting “Yes” conclusion should look something like:

FACTS: Caffey Construction, the prime contractor, utilizes Bon Fire Tile’s, (subcontractor) bid for acoustical tile in preparing the prime's bid on a contract dated 2/1/98.

ISSUE: Can the sub get the \$15,000 in lost profit as damages from the prime?

RULE: In order for a contract between two parties to be formed there must exist an offer, and acceptance of that offer, and valid consideration. A subcontractor’s bid is an offer.

ARGUMENT:

Offer (rule), Subcontractor’s bid is offer (**rule**). = Bon Fire Tile gives bid to Caffey for acoustical tile (**fact**). This is an offer.

Acceptance (**rule**) = utilizing subcontractor’s bid in preparing the prime's bid (**fact**).

Valid consideration (**rule**) = \$85,000 (**fact**).

CONCLUSION:

Yes

FIRAC Outline supporting “No” conclusion should look something like:

FACTS: Caffey Construction, the prime contractor, utilizes Bon Fire Tile’s, (subcontractor) bid for acoustical tile in preparing the prime's bid on a contract dated 2/1/98.

ISSUE: Can the sub get the \$15,000 in lost profit as damages from the prime?

RULE: In order for a contract between two parties to be formed there must exist an offer, and acceptance of that offer, and valid consideration. A subcontractor’s bid is an offer.

ARGUMENT:

Offer (rule), Subcontractor’s bid is offer (**rule**). = Bon Fire Tile gives bid to Caffey for acoustical tile (**fact**). This is an offer.

Acceptance (**rule**) ? utilizing subcontractor’s bid in preparing the prime's bid (**fact**).

Valid consideration (**rule**) = \$85,000(**fact**).

CONCLUSION:

No

In-Class Assignment - Worksheet: How to FIRAC #2

Go through the steps outlined in the section entitled, “How to FIRAC” in your text. YOU DO NOT HAVE TIME TO WRITE OUT A COMPLETE FIRAC IN CLASS. DO AN OUTLINE ONLY. If you follow the steps on “How to FIRAC” you will get an outline.

Use reverse side or additional sheets if necessary.

Hypothetical #2

FACTS: Caffey Construction, the prime contractor, utilizes Bon Fire Tile’s, (subcontractor) bid of \$85,000 for acoustical tile in preparing the prime's bid on a contract dated 2/1/98. This is proved by documentary evidence and is not an issue. THIS JOB TO BE PERFORMED IN MASSACHUSETTS. Correspondence dated 12/1/97 between the prime and sub defined the exact nature and price of the work required by Bon Fire, and the contractor confirmed this in writing. However, on 2/3/98, after the contract has been awarded to the prime, the prime bid shops and gives the acoustical tile work to Sippers Tile, another subcontractor. Bon Fire’s lost profit on the job is \$15,000, and it had no other job during that time, nor could it get another one.

ISSUE: Can the sub get the \$15,000 in lost profit as damages from the prime?

RULE: In order for a contract between two parties to be formed there must exist an offer, and acceptance of that offer, and valid consideration. A subcontractor’s bid is an offer.

The subcontractor’s bid is an offer inviting acceptance by an act, and that use of the bid in the proposal for the prime contract was that act. [*Roblin Hope Industries, v. J.A. Sullivan Corp.*, 413 N.E.2d 1134 (Mass.Ct.App. 1980)].

Suggested Solution to In-Class Assignment - Worksheet: How to FIRAC #2

Note: There is only one right answer to this problem. Students could be required to prepare a complete legal argument from the outline as a written homework assignment.

FIRAC Outline supporting “Yes” conclusion should look something like:

FACTS: Caffey Construction, the prime contractor, utilizes Bon Fire Tile’s, (subcontractor) bid for acoustical tile in preparing the prime's bid on a contract dated 2/1/98.

ISSUE: Can the sub get the \$15,000 in lost profit as damages from the prime?

RULE: In order for a contract between two parties to be formed there must exist an offer, and acceptance of that offer, and valid consideration. A subcontractor’s bid is an offer.

The subcontractor’s bid is an offer inviting acceptance by an act, and that use of the bid in the proposal for the prime contract was that act. [*Roblin Hope Industries, v. J.A. Sullivan Corp.*, 413 N.E.2d 1134 (Mass.Ct.App. 1980)].

ARGUMENT:

Offer (rule), Subcontractor’s bid is offer (***rule***). = Bon Fire Tile gives bid to Caffey for acoustical tile (***fact***). This is an offer.

Acceptance (***rule***), utilizing subcontractor’s bid in preparing the prime's bid is acceptance = Caffey utilized Bon Fire Tile’s bid in preparing Caffey’s prime bid (***fact***).

Valid consideration (***rule***) = \$85,000 (***fact***).

CONCLUSION:

Yes

In-Class Assignment - Worksheet: How to FIRAC #3

Go through the steps outlined in the section entitled, “How to FIRAC” in your text. YOU DO NOT HAVE TIME TO WRITE OUT A COMPLETE FIRAC IN CLASS. DO AN OUTLINE ONLY. If you follow the steps on “How to FIRAC” you will get an outline.

(Note to instructor: Students could be required to prepare a complete legal argument from the outline as a written homework assignment).

Use reverse side or additional sheets if necessary.

Notes to instructors using this example and answers to the questions appear in red.

Preliminary Questions:

1. This case is a good example of one in which all of the important issues are issues of law. There ARE a few factual issues. Can you find them? One has been labeled in the text for you. Can you find others.

Answer: Factual issues are labeled in red the text below.

2. What testimony from Chernoff would be necessary to raise any factual issues regarding whether or not he said and did the things Dey complained of? Notice this testimony is NOT here, therefore there is no factual issue concerning whether or not he said and did these things.

Answer: In order to raise the factual issue of whether or not the four incidents or the daily comments occurred, Chernoff would have to testify that they had not. However, he never denies that they occurred, so no factual issue is raised. The reader cannot assume he would have denied that the events took place. In fact in the actual case he did **not** deny that these facts took place – only that these facts amounted to sexual harassment.

PROCEDURAL POSTURE OF THE CASE:

Colt Construction has filed a motion for summary judgement claiming that the following facts do not support a claim for sexual harassment. A summary judgement is a method of avoiding a jury trial and allowing the judge to decide the case. It occurs when there are no major issues of material fact.

The procedural posture of the case tells the reader where in the legal system the case is.

FACTS

Anne Dey began working for Colt Construction Company in April 19, 1982. She was hired as the company's bookkeeper, but she was thereafter given the title of "controller." She was responsible for maintaining Colt's payroll, its payables and receivables, for making disbursements to subcontractors and construction material vendors, for paying office expenses, documenting project costs, and preparing affidavits, waivers of mechanic's liens, union reports, and reports for the Department of Housing and Urban Development. She also prepared payroll tax returns for Colt; although Colt's income tax returns and its year-end financial statements were prepared by an outside accountant based on data and schedules compiled by Dey.

Giving the students the facts with a wide margin allows them to make notes and comments.

The office in which Dey worked primarily housed Colt's management personnel and not its field staff. Other personnel at this office included:

Robert Irsay, Colt's president and owner. Has final decision making authority on all company matters.

James Ferguson, Colts VP. He was Dey's immediate supervisor, though Dey occasionally completed projects for Chernoff

and Irsay.
Michael Chernoff, general counsel (attorney)
Sullivan – salesperson
Other Salespeople and/or estimators (1 or 2)
Other support staff (1 or 2)

Beginning in late 1982 or early 1983 Dey claims that Chernoff began subjecting her *to almost daily comments, gestures, and innuendo that she considered sexually suggestive and harassing.* Although she worked directly with Chernoff only on occasion, she had limited daily contact with him whenever he was in town because of the size of the offices.

Dey is unable to remember the specifics of much of the alleged harassment, but she recounts in some detail the following four incidents:

- (1) In talking with Dey sometime in either 1983 or 1984, Chernoff referred to a female attorney with whom he was then working on a Colt project as a "flat-chested cunt";
- (2) When Dey returned from a Phoenix vacation in January 1983, Chernoff suggested she had not gotten a tan because she had spent the week on her back in bed;
- (3) In March or April 1985, after more than two years of alleged harassment, Dey and Chernoff were riding alone on the elevator from Colt's fourth-floor offices to the basement parking garage when Chernoff asked Dey to hold some papers for him; he then unzipped his slacks, whereupon Dey turned her back until the elevator reached the basement; Chernoff did not say anything and did not touch Dey during this incident; she later indicated that she felt trapped and "very afraid"; and
- (4) In September or October 1985, Chernoff said to someone on the telephone that "there is a girl in my office going down on me" as Dey leaned down to put some documents on Chernoff's floor.

Dey claims that these four incidents stand out in her memory as the most blatant but that Chernoff made similar harassing comments on almost a daily basis. She is unable, however, to remember specifics. There was no physical component to the alleged harassment. She was never touched at any time, nor was it intimated that sex was required of her in order for her to keep or maintain her job position.

Dey reported Chernoff's conduct to Ferguson in early 1985, and indicated that she was uncomfortable and embarrassed by Chernoff's comments and that she intended to start a log, recording those incidents she considered particularly offensive. Ferguson admits that Dey appeared upset during the conversation. Dey and Ferguson had other conversations in connection with Dey's complaint.

Dey also complained directly to Chernoff, indicating that his comments and other conduct made her very uncomfortable, that she intended to keep a log and she hoped her objections would discourage any similar behavior in the future.

Chernoff denies that the above conversation took place. (Note: this is the first factual issue raised by these facts. Be on look out for others).

Students: Hi-lighted fact supports element #3 of rule, the frequency of the discriminatory conduct.

Giving the students one fact which supports one of the legal elements helps them find others. The yellow hi-lighted fact at the left tends to support element #3 – The frequency of the discriminatory conduct (rule) is daily (fact).

Student: You may refer to the four incidents listed as "the four incidents" in your outline. Referring to these four incidents as "the four incidents" tends to lessen the offensive nature of this example and make class discussion easier.

Does Chernoff deny that he subjected Dey to daily comments or that the four incidents took place?

Answer: No

What affect does this have on the litigation?
Answer: There is no factual issue as to whether or not these four events took place.

Students: Here is a factual issue. **Factual issue:**

Did Dey complain to Chernoff that his

Dey admits that she just wanted the comments to stop. She considered everyone in the office, including Chernoff, to be her friends, and she characterized the office environment as professional, with the exception of Chernoff's consistent sexual commentary. Dey stated that the sexual banter did not prevent her from fulfilling her responsibilities in a timely fashion, but merely that the conduct upset and embarrassed her, and made her feel uncomfortable. Chernoff's comments caused her to walk out of his office on more than one occasion.

comments and conduct made her uncomfortable? Giving the student one factual issue makes it easier for them to find others.

Dey occasionally had lunch with Chernoff and attended office luncheons and other office social functions where Chernoff was present.

On two occasions Dey received personal, legal advice from Chernoff during office hours.

Dey once requested Chernoff's assistance when a woman appeared at the office demanding to speak with Dey about Dey's alleged relationship with the woman's husband. When Dey could not get the woman to leave, she called upon Chernoff to help her. Chernoff was able to convince the woman to leave.

Dey received a salary increase at the end of April 1985.

In mid-May 1985 Irsay held a closed-door meeting with Chernoff and Sullivan and they agreed that Dey would be terminated. Irsay maintains that he made the decision to terminate Dey independently, that he merely asked Chernoff and Sullivan for their opinions, and that they concurred in his decision.

Factual issue:
Why did Irsay terminate Dey?
Dey says because of her complaint. Irsay says because of problems with Dey.

Irsay states that the decision was based on Irsay's personal assessment of Dey's performance, as well as on complaints Irsay had received about Dey from Sullivan, Ric McCoy (a Colt field superintendent) and other office personnel. The complaints ranged from comments about Dey's uncooperative attitude to charges that she was unable to complete her required work promptly. It is undisputed that Dey had difficulties with both Sullivan and McCoy.

Factual Issue:
Was Dey uncooperative?

Irsay insists that he knew nothing of Dey's sexual harassment charges when he decided to terminate her employment. Both Ferguson and Chernoff maintain that they never mentioned Dey's complaints to Irsay. Both are still working for Irsay at the time the lawsuit was filed in 1986.

Although Irsay decided to fire Dey in May 1985, she was not notified of this until November, after Irsay had found her replacement.

Dey asked Irsay in September 1985 if her job was secure because she was contemplating the purchase of a new automobile, and Irsay assured her that it was and added that she did not even have to ask.

On November 15, 1985 Chernoff met with Dey and told her of her immediate termination. Chernoff explained to Dey that he, Sullivan

Fact issue:

and Ferguson had found her increasingly difficult to work with in the past six months and that the company's business had slowed. No one ever suggested to Dey that she was fired in response to her sexual harassment complaints.

Why was Dey fired?
Dey: Threat to Chernoff
Colt: Business slowed.

Although he was Dey's immediate supervisor, Ferguson did not participate in the decision to terminate Dey. Chernoff told Dey when firing her that Ferguson found her difficult to work with, but Ferguson maintains that he never complained to Irsay about Dey, and he further attests that Dey was adequately performing her duties at the time of her discharge and that he knew of no problems with Dey and other Colt employees. With regard to specific conflicts between Dey and Sullivan or McCoy, Ferguson corroborated Dey's version of those events and indicated that she acted appropriately, and Sullivan and McCoy were difficult to work with. Ferguson is no longer an employee of Colt. [*Dey v. Colt Construction*, 28 F.3d 1446 (7th Cir.1994)].

Factual Issues:
Did Dey act appropriately?

Were Sullivan and McCoy difficult to work with?

ASSIGNMENT: PREPARE A VALID LEGAL ARGUMENT DISCUSSING THE FOLLOWING ISSUE.

ISSUE: Has Dey been sexually harassed?

RULES: (Note: I suggest you use the numbers indicated below when reviewing the facts, however this numbering is only a tool to make it easier/faster to match up the facts with the law. If it is not easier for you, do not do it.)

Rule #1: Sexual harassment occurs when the (1) *conditions of the victim's employment are altered* and (2) when an *abusive working environment is created*. (*Meritor*, 477 U.S. at 65)

Rule #2: The courts and the juries should look at *all of the circumstances* to determine whether or not a work environment has been rendered hostile or abusive. The court has developed the following non-exhaustive list of factors relevant to the somewhat elusive question of whether or not a work environment has been rendered hostile or abusive:

(3) *The frequency of the discriminatory conduct;*

(4) *Its severity;*

(5) *Whether it is physically threatening or humiliating or Merely an offensive utterance;*

(6) *Whether it unreasonably interferes with an employee's work performance.* (*Harris*, 114 S.Ct. at 371).

Notice you have been given TWO rules, the Meritor Rule and the Harris Rule. You must discuss BOTH, COMPLETELY in your argument. (However, for the FIRAC outline you may abbreviate. For example: "alters employment" for "when the workplace alters the conditions of the victim's employment".

This assignment is designed to help you learn how to prepare a legal argument in the FIRAC format. The first thing to do is to take out a sheet of paper and begin your FIRAC outline. The first words on the paper should be:

FACTS:

What should the next word be? See below for some information you need to complete your FIRAC.

Preparing your premises of your argument is the most challenging part of the argument. The following steps will help you. Remember an argument is a set of premises that support a conclusion. To prepare the premises of your legal argument do the following:

1. **Go through the facts and determine which element of the law that fact supports or disproves.** Determine if a fact supports an element of the law, or supports lack of that element. Example: Fact: Dey was given raise, then fired. This fact supports element #1 of the rule, "alters conditions of employment". Here employment was altered (rule) because she was fired (fact).

You have space in the margins of the fact statement to indicate which element of the law is supported or repudiated by a fact.

2. On a separate sheet of paper prepare simple premises (and others if you are able) to support a "yes" conclusion.

3. Repeat above to support a "no" conclusion.

Suggested Solutions to In-Class Assignment - Worksheet: How to FIRAC #3

FIRAC OUTLINE SUPPORTING A “YES” CONCLUSION TO THE ISSUE OF “HAS DEY BEEN SEXUALLY HARASSED?”

NOTE TO INSTRUCTOR: It is unlikely students will find *all* of the facts that support each element. In addition, there will be disagreement over how the facts can be interpreted. This is common in legal problems and is part of the learning experience. Some students might be able to make creative arguments for how certain facts or combinations of facts tend to support the existence or deny the existence of an element. This list should not be considered complete.

There is no “right” answer to this problem. This case was an appeal from a summary judgment in favor of Colt. Colt lost the appeal and the case went back to the trial court for a trial. However, the case does not again appear in the case law so we do not know whether or not Dey or Colt won. For this reason no student who argues this case can be “wrong”, which is one of the reasons it was chosen for this exercise. It is likely that the case was settled sometime after it was ordered back to the trial court.

FIRAC Outline

FACTS: Dey is fired from employment after complaining of sexual harassment.

ISSUE: Has Dey been sexually harassed?

RULES: (Students will not likely have time to copy here during an assignment completed in class).

ARGUMENT:

1. *Conditions of the victim’s employment are altered* (Rule)

Facts tending to support this element:

Dey was fired for making the complaints. She was doing a good job. (Supported by Ferguson’s testimony also).

Daily comments, gestures and innuendoes of a suggestive nature started some months after employment started.

She was uncomfortable and embarrassed by Chernoff’s actions.

Dey had several conversations with Ferguson concerning Chernoff’s actions.

Dey complained to Chernoff.

Office environment was professional EXCEPT for Chernoff’s behavior.

Dey was forced to walk out of Chernoff’s office on more than one occasion due to his actions.

Chernoff (not in chain of command) helped decide that Dey would be terminated.

2. *Abusive working environment is created.* (Rule)

Facts tending to support this element:

4 incidents.

Almost daily comments, gestures and innuendo.

Ferguson’s testimony that Dey was upset.

Dey complained to Chernoff that the comments and other conduct made her very uncomfortable.

3. *The frequency of the discriminatory conduct;* (Rule)

Facts tending to support this element:

Almost daily

4. *Its severity;* (Rule)

Facts tending to support this element:

4 incidents.

Dey tried to discourage Chernoff’s behavior.

5. *Whether it is physically threatening or humiliating or*(Rule)

Facts tending to support this element:

4 incidents.
Almost daily comments, gestures and innuendo.
Dey tried to discourage Chernoff's behavior.

Or Merely an offensive utterance; (Rule)

Facts tending to refute the existence of this element:

4 incidents are not merely offensive.

6. *Whether it unreasonably interferes with an employee's work performance. (Rule)*

Facts tending to support this element:

Dey was fired for making the complaints. She was doing a good job. (Supported by Ferguson's testimony also).

Dey had several conversations with Ferguson concerning Chernoff's actions.

Dey was forced to walk out of Chernoff's office on more than one occasion due to his actions.

CONCLUSION: Yes

FIRAC OUTLINE SUPPORTING A “NO” CONCLUSION TO THE ISSUE OF “HAS DEY BEEN SEXUALLY HARASSED?”

FIRAC Outline

Facts: Dey is fired from employment after complaining of sexual harassment.

ISSUE: Has Dey been sexually harrassed?

RULES: (Students will not likely have time to copy here during an assignment completed in class).

ARGUMENT:

1. *Conditions of the victim’s employment are altered* (Rule)

Facts tending to refute the existence of this element:

Dey admits the sexual banter did not prevent her from fulfilling her responsibilities.

Really only 4 incidents – the others are so minor as to not be remembered.

It was never intimated that sex was required for her to keep her job.

She never started a log.

Office environment was professional except for Chernoff’s behavior.

Dey was not fired because of her sexual harassment complaints.

2. *Abusive working environment is created.* (Rule)

Facts tending to refute the existence of this element:

Really only 4 incidents – the others are so minor as to not be remembered.

She only complained of being uncomfortable and embarrassed.

It was never intimated that sex was required for her to keep her job.

She admits she just wanted the comments to stop.

She considered everyone to be her friend, including Chernoff.

Dey admits the sexual banter did not prevent her from fulfilling her responsibilities.

She sought legal advice from Chernoff.

3. *The frequency of the discriminatory conduct;* (Rule)

Facts tending to refute the existence of this element:

4 incidents only the other items are not discriminatory, only offensive.

4. *Its severity;* (Rule)

Facts tending to refute the existence of this element:

She cannot remember specifics of most things she complains of.

She never started a log so things could not have been that bad.

She admits she just wanted the comments to stop.

She occasionally had lunch with Chernoff.

She sought legal advice from Chernoff.

5. *Whether it is physically threatening or humiliating or*(Rule)

Facts tending to refute the existence of this element:

She was never touched, there was no physical component.

Dey only tried to discourage Chernoff’s behavior.

She considered everyone to be her friend, including Chernoff.

Or merely an offensive utterance; (Rule)

Facts tending to support this element:

Most of the things complained of are only offensive utterances.

It was never intimated that sex was required for her to keep her job.

She admits she just wanted the comments to stop.

She considered everyone to be her friend, including Chernoff.

6. *Whether it unreasonably interferes with an employee’s work performance.* (Rule)

Facts tending to refute the existence of this element:

She admits she just wanted the comments to stop.

She considered everyone to be her friend, including Chernoff.

Dey admitted the sexual banter did not prevent her from fulfilling her responsibilities.

She occasionally had lunch with Chernoff.

CONCLUSION: No

Memorandum

TO: Students

FROM: Nancy J. White

DATE: Spring 1999

RE: Homework Assignment #7 - FIRAC #1

Your company, American Construction Services, Inc. (ACS) has been awarded a contract by the Navy to demolish and remove all facilities, including "remaining residue or product," at a tank farm in Mechanicsburg, Pennsylvania. The contract said the Navy would remove the contents of the tanks prior to issuance of a notice-to-proceed. The contract also stated: "Title to materials resulting from demolition, and materials and equipment to be removed, is vested in the Contractor." When ACS commenced demolition, it discovered the Navy had neglected to remove 100,000 gallons of fuel oil from one section of the tank farm. ACS claimed title to the fuel oil under the terms of the contract. ACS said the oil was "remaining residue or product." The Navy claims title to the fuel and removes it.

Your boss asks you to prepare a preliminary memorandum that will be used by the boss and the firm's attorney in deciding whether or not the company should file a claim for the value of the fuel. Your boss tells you to make a legal argument in support of your conclusion (you might call this a recommendation) that either yes, the company appears to have a good claim, or no, the company does not appear to have a good claim. Remember neither your boss nor the attorney has any of the facts, issues or rules. You must supply all in the memorandum so that the memorandum is complete.

You determine this is a scope of contract or interpretation issue. Prepare a memo discussing the following three issues. Refer to chapter in text discussing Scope issues. (Note to users of this hypothetical problem: Facts taken from: *Dekalb County v. Rockdale Pipeline*, 189 Ga.App. 121, 375 S.E.2d 61, 1988 Ga.App. LEXIS 1329.)

Issue #1: Is the contract ambiguous?

Issue #2: Is the ambiguity, if any, patent or latent?

Issue #3: In whose favor should the court rule?

Hint: Ordinary meaning, Clear expression of intention, Conduct of the parties.

Your assignment:

1. Prepare a memorandum to your boss as requested above.
2. Discuss EACH issue SEPARATELY. Refer to Chapter on "How to FIRAC".
3. Issue #3 must contain an argument using **at least** three rules from the Scope chapter of the text.
4. Turn in your FIRAC outline(s) for each issue also. The outlines can be hand written.

MEMORANDUM

TO: Nancy J. White

FROM: Matt Hammer, Plano, TX. (Used with permission)

DATE: 4/2/99

RE: FIRAC #1 - American Construction Services, Inc. v. United States Navy

The purpose of this memo is to recommend to the management whether or not American Construction Services (ACS) has a claim against the United States Navy (USN).

ACS contracted with USN to demolish and remove all facilities, including "remaining residue or product," at a tank farm in Mechanicsburg, PA. As per contract, USN was to remove the contents of the tank before a notice-to-proceed would be issued to ACS. The contract contained a provision stating "Title to materials resulting from demolition, and materials and equipment to be removed, is vested in the Contractor." ACS began its demolition only to find one-hundred thousand (100,000) gallons of fuel from a section of the farm. ACS claimed this fuel, as per the "titles" clause in the contract and claiming it was "remaining residue or product." USN in turn claims the fuel and removes it.

The first issue in this case is where or not the contract was ambiguous. The rule states that a contract is ambiguous if it is capable of having two relatively reasonable meanings. The contract terms required ACS to remove all facilities including "remaining residue or product," which are the ambiguous terms in this contract. "Residue" by Webster's definition is "something that remains after a part is disposed of or removed" or "remnant." This definition does not specify quantities, however. One party (USN) assumed that "residue" was only small quantities of product. The other (ACS) assumed Webster's definition as ALL quantities. Given the two relatively reasonable meanings here, the contract is ambiguous.

The second issue is to determine whether or not the ambiguity is patent or latent. A patent ambiguity is an ambiguity obvious to a reasonable person given the circumstances of the situation. A reasonable person may not view the ambiguous terms "remaining residue or product" as obvious. There is no quantifiable way to determine whether or not the meanings of words are obvious. Since the ambiguous terms are not obvious, the ambiguity is latent.

The third issue is, in whose favor should the court rule? Here, we will discuss three different rules: ordinary meaning, clear expression of intention, and conduct of the parties.

The ordinary meaning of "remaining residue or product" in the construction industry is that of small quantities. It is obvious that a demolition job will have remaining residue and wreckage. The drafter of the contract, ACS, was aware of this meaning. In other words, they knew they would be taking materials for their own use. Given the ordinary meaning in quantities of "remaining residue or product," ACS should have been aware that they would only be taking small quantities of materials back, and not 100,000 gallons of fuel oil.

Contract rules state that a contract drafter's expression of intention must be stated with clarity. Given ambiguous terms in the contract, ACS could not have expressed their intentions clearly. United States Navy believed that ACS would only leave the site with small portions of usable wreckage. ACS believed they could take any and all wreckage or items left on site for their own. This ambiguity negates the "clear expression of intention" doctrine.

The conduct of the parties involved show specifically what they believed the contract meant. ACS claimed title to the total amount (100,000 gallons) of fuel oil left on site. United States Navy, realizing they had made a mistake leaving it behind, came back to take it. If the USN had not made a mistake, they would have let ACS claim

the oil. A court must give allowances for some mistakes. Given the extreme quantities of oil left on the farm, a reasonable contractor would recognize this mistake and report it.

American Contracting Services, Inc. did not heed an ordinary meaning of "remaining residue and product." They did not clearly state their intention to remove any and all material left on site by the United States Navy. The USN, by their conduct, recognized the mistake in the contract by returning for the left oil. In conclusion, evidence does not exist to allow ACS to collect the 100,000 gallons of fuel oil that the USN mistakenly left on site.