

# 1. *The IRAC Method of Analyzing Authorities*

One threshold question for legal writers is exactly *how* to discuss the legal authorities that have been located in the research process. In discussing and analyzing authorities, many writers follow what is referred to as the “IRAC” method. “IRAC” is an acronym for Issue, Rule, Analysis or Application, and Conclusion. First, the issue is presented (*Does the Uniform Partnership Act govern a partnership that has no written agreement?*). Next, the rule or legal authority that governs the issue is discussed. Then the writer analyzes and applies the rule to the writer’s particular case situation. After a thorough analysis, in which authorities are compared and contrasted, a conclusion is presented.

Other writers use a variation of IRAC, one of which is called “CRAC” (for Conclusion, Rule, Application, and Conclusion). In this type of analysis, the conclusion is given first, followed by the rule of law that supports the conclusion. The rule is explained and illustrated through citation to legal authorities. The rule is then applied to the writer’s particular case, and then the conclusion is restated. The CRAC method is often used by authors of court briefs, which are persuasive documents, because stating the conclusion first is a more powerful way to begin an argument than merely identifying the issue the document will examine.

Still another variation of IRAC is “CRuPAC” (for Conclusion, Rule, Proof, Application, and Conclusion). In this analysis, the conclusion is first stated, followed by the pertinent rules that govern the issue. The proof section then analyzes the relevant case precedents. The rules and proof are then applied to the specific facts in the case, and the second conclusion reiterates the introductory conclusion. Some experts dislike the use of IRAC and similar methods, believing they are better suited to exam writing than to other legal documents, especially briefs.

Although methods of analyzing cases vary, some techniques are common to all analysis:

- Analyze rather than merely summarize the legal authorities you rely on. Describe the cases you rely on, giving sufficient facts from those cases so the reader may readily see how and why those cases apply to your situation.
- Give the holding and the reasoning from the cases you rely on. Then, compare and contrast the cases you rely on with your particular issue or problem.
- Convince by applying the holding and reasoning from the cited authorities to your case. Complete the analysis by giving a conclusion for the reader. Don't force the reader to guess at a conclusion.

## 2. *The Legal Memorandum: Its Purpose and Format*

A *legal memorandum* or research memorandum is a document designed to provide information about a case or matter. It is one of the best known documents in legal writing; it calls for you to research a question and then provide your answer in the form of a written memorandum or "memo." The memo is an internal document, meaning it is prepared for use within a law firm or company. It is generally protected by the work product privilege and thus is not discoverable by an adverse party. Because it is not discoverable, its primary characteristic is its objectivity. The most difficult part of writing a memo is remaining neutral and objective. You must point out any weaknesses and flaws in the client's case. Your goal is to explain the law, good and bad, not to argue it.

In addition to research memoranda, many firms use memoranda to report the results of client interviews or investigations. Some law firms use specific formats for their memos. Most memos, however, share the following common features:

- **Introductory Information.** This section identifies the document, the person for whom the memo is prepared, the author's name and position, the subject matter of the memo, and the date it is prepared.
- **Question(s) Presented.** This section sets forth the legal questions or issues the memo addresses. If the memo discusses more than one issue, number each one. Most writers use a true question form, such as *In Florida, are punitive damages recoverable in fraud actions?*
- **Brief Answer(s).** This section of the memo briefly answers the questions you set forth, in the order you presented them. Each answer should be no more than one or two sentences. Do not include formal citations.

- **Statement of Facts.** The statement of facts will be based upon what you know about the case, what the client has said, and your review of the file. Remember to be objective and include all facts, even if they are unfavorable to the client's position. The most common approach in stating the facts is to present them in the past tense and in chronological order. Some writers place the Statement of Facts before the Questions Presented section.

- **Analysis or Discussion.** The heart of the memorandum is the analysis or discussion section. This portion of the memo provides an in-depth analysis of the issues presented. Cases, statutes, and other legal authorities will be discussed. Citations usually appear in the body of the memo rather than as footnotes. Consider using the IRAC approach to analyze the issues. Use headings and subheadings throughout this section to alert the reader to new topics. Write in the third person in your discussion.

- **Conclusion.** The conclusion should be brief (probably no more than one paragraph) and should not include formal citations. The conclusion should summarize your analysis section.

## APPENDIX

### MEMORANDUM

To: Joanne DeRoache, District Attorney  
From: Lane Gammon, Paralegal  
Re: *State v. Davis* Terroristic Threatening  
Date: January 30, 2013

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#### ISSUES

1. In Delaware, does the offense of terroristic threatening require that the threat be communicated to the person threatened?
2. Is a threat to kill protected under the First Amendment?

#### BRIEF ANSWERS

1. No. A threat need not be communicated directly to the person threatened for terroristic threatening to have occurred.
2. No. An unequivocal threat to kill another is not speech that is protectable under the First Amendment.

#### FACTS

Robert Davis ("Davis") was recently charged by the State of Delaware with "terroristic threatening," a violation of Del. Code Ann. tit. 11, § 621 (2002). The charge arose out of the following incident. After his girlfriend, Gina Gersten, broke up with him, Davis saw Ms. Gersten with another man. Davis angrily told his friend, Allen Franklin, "I'll kill Gina if I ever see her with another man again. You know I have a gun, and I'll do it." Concerned, Mr. Franklin told Ms. Gersten about Davis's threat. Ms. Gersten reported the threat to the police, who charged Davis with "terroristic threatening," a violation of Del. Code Ann. tit. 11, § 621 (2002).

Davis contends that because the threats were not uttered to the intended victim, Ms. Gersten, they cannot constitute terroristic threatening. Davis has also contended that his statement is protected free speech under the First Amendment.

## DISCUSSION

### Terroristic Threatening

Del. Code Ann. tit. 11, § 621 (2002) provides, in pertinent part, that "a person is guilty of terroristic threatening when he or she . . . threatens to commit any crime likely to result in death or in serious injury to person or property." The language of the statute does not specify that the threat must be made directly to the person to whom the threat is addressed. Moreover, there is no case law in Delaware addressing this issue. Case law from other jurisdictions, however, with statutes similar to those of Delaware supports the conclusion that a threat to a third party, rather than to the threatened person directly, can constitute the offense of terroristic threatening.

In *State v. Alston*, 865 P.2d 157, 162 (Haw. 1944), the defendant, Alston, was seated in a restaurant and threatened a waitress who was scheduled to be a witness against him in court. Two police officers were present and asked Alston to go outside with them. While outside, Alston pointed at the waitress through the window and angrily told the officers that he was "tired of that [expletive]" and that if he were arrested, he would "go home and get his pistol and tie up this end once and for all." Alston immediately told another woman present to go to his home and get his gun so he could "take care of that [expletive] once and for all." *Id.*

Alston was charged with terroristic threatening for the threats to the waitress made in front of the two police officers. He argued that the threats made in front of the officers could not constitute terroristic threatening because the threats were never communicated to the person against whom the threats were made. The Hawaii Supreme Court held that the threat did not need to be communicated to the victim. The court noted that for one to be subject to criminal prosecution for terroristic threatening, "the threat must be conveyed to either the person who is the object of the threat or to a third party." *Id.* at 168. Once the threat is communicated to anyone, terroristic threatening has occurred.

Similarly, in *State v. Chung*, 862 P.2d 1063 (Haw. 1993), a teacher (who was holding a clip of bullets) made a threat against the school principal in front of other teachers, but without the principal present. The court held that this threat constituted terroristic threatening. Moreover, the court noted that actual terrorization is not a material element of the offense of terroristic threatening. To be subject to criminal prosecution for terroristic threatening, one need only make a threat either to the person who is the object of the threat or to a third party. *Id.* at 1071.

In *Richards v. State*, 585 S.W.2d 375, 377 (Ark. Ct. App. 1979), the defendant, Richards, while holding a gun, stated that he intended to shoot a former coworker, Roberts. The threat was made to a third party, and Roberts did not hear it. The third party promptly communicated the threat to Roberts. On appeal, the defendant challenged his conviction on the ground that the threat had not been communicated to the intended victim. The Arkansas statute prohibiting terroristic threatening was nearly identical to the Delaware statute at issue in this case. The court held that because the statute did not include language specifying that the threat must be communicated directly to the person threatened for the offense to have taken place, terroristic threatening can occur even though the intended victim does not hear or know of the threat. Thus, Davis's threat to kill Ms. Gersten constitutes terroristic threatening under the Delaware statute even though the threat was made to a third party and not directly to Ms. Gersten.

### **First Amendment Defense**

Davis has asserted that his statement that he would kill Ms. Gersten if he ever saw her with another man again is protected by the First Amendment right of free speech and expression. See U.S. Const. amend. I.

The U.S. Supreme Court has already addressed the issue whether an unequivocal threat is protected under the First Amendment and has firmly stated, "[A] statement that amounts to a threat to kill . . . would not be protected by the First Amendment." *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987). Although threats made in jest and that when taken in context are not true threats because they are conditional are protected under the First Amendment, *Watts v. United States*, 394 U.S. 705, 708 (1969), if language used in a threat conveys a gravity of purpose and likelihood of execution, it is not protected speech, *United States v. Kelner*, 534 F.2d 1020, 1026-27 (2d Cir. 1976). If a statement on its face and in the circumstances in which it is made is so unequivocal and unconditional as to convey a gravity of purpose and imminent prospect of being carried out, such is not protected speech under the First Amendment. *Id.*

In the present case, Davis's threat was made in anger, not in jest, and stated his clear and unequivocal intention to kill Ms. Gersten. Davis's statement included specific details as to how this killing would occur. Moreover, Franklin understood the threat

to be sufficiently serious that he immediately conveyed the threat to Ms. Gersten. Such an unequivocal and unconditional threat is not protected free speech.

### **CONCLUSION**

Because there is nothing in the Delaware statute requiring an applicable threat to be made directly to the threatened person, a threat made in front of a third party who later communicates it to the victim can constitute terroristic threatening. Thus, Davis has committed the threat of terroristic threatening. Moreover, because Davis's threat was unequivocal and unconditional and not made in jest, it is not protected free speech under the First Amendment.