PART I STUDY OUTLINE

I. INTRODUCTION
Identifying the issue, commonly referred to as “spotting the issue,” is the first step of the legal analysis process. Identifying the legal issue(s) presented by the fact situation is the foundation and key to effective legal analysis.

II. DEFINITION AND TYPES
In the broadest sense, the **issue** is a question—it is the legal question raised by the specific facts of a dispute.

   Issues can be broken into three broad categories:
   1. A question of which law applies
   2. A question of how a law applies
   3. A question of whether a law applies at all

III. ELEMENTS
A. Applicable Law
   **Applicable law** is the specific law that governs the dispute. This may be a constitutional provision, statute, ordinance, regulation, or case law doctrine, principle, rule, test, or guide.

B. Legal Question
   This refers to the **legal question** concerning the law governing the dispute, raised by the facts of the dispute.

C. Key Facts
   **Key facts** are the key or legally significant facts that raise the legal question of how or whether the law governing the dispute applies.
D. Examples

The three elements of the issue—the applicable law, the legal question concerning the law, and the key facts that raise the legal question—are a comprehensive, narrow, or specific statement of the issue. An issue including these elements is comprehensive because it includes the specific law and key facts. It is a narrow statement of the issue because the more facts that are included, the more specific (or narrow) the legal question becomes.

• Under the holographic will statute, Colo. Rev. Stat. § 15-11-503 (Applicable Law), is a holographic will valid (Legal Question) if it is handwritten by a neighbor at the direction of the testator, but not written in the testator’s handwriting (Key Facts)?

• Under Arizona tort law (Applicable Law), does a battery occur (Legal Question) when law enforcement officers, while making a lawful arrest, encounter resistance, use force to overcome that resistance, and continue to use force after resistance ceases (Key Facts)?

Failure to include these elements results in an abstract question, a broad statement of the issue that is missing the legal (applicable law) and factual context.

For Example:

• Was the will valid?
• Did the police commit a battery?

The importance of focusing on the elements of the issue and identifying the issue in terms of the elements is critical. It reduces the chance of misidentifying the question presented by the facts and helps guide the researcher, thereby saving time and effort.

A broadly stated issue is not appropriate in legal research and writing for several reasons:

1. It is not helpful or useful for the reader who is not familiar with the facts of the case.
2. It does not guide the reader to the specific law in question.
3. It is not useful to the individual drafting and researching the issue. It fails to focus the researcher’s inquiry or guide the researcher to the specific area of battery law in dispute.

IV. ISSUE IDENTIFICATION—CLIENT’S CASE

Keep in mind from the outset this question: “What must be decided about which facts?” or phrased another way, “What question concerning which law is raised by these facts?”

A. Step 1: Identify Each Type of Cause of Action

Identify each type of cause of action and area of law possibly involved.

The purpose is twofold:
• To identify in general terms the issues involved
• To provide a starting point for the identification and clarification of each specific issue that must be resolved in the case

B. Step 2: Determine the Elements of Each Cause of Action

Determine the elements of each cause of action identified in step 1. Steps 2, 3, and 4 should be applied separately to each potential issue or cause of action identified in step 1.

• Choose one potential issue identified in step 1.
• Apply steps 2, 3, and 4 to that issue.
• Complete the identification of that issue before addressing the next potential issue.

Step 2 requires researching the area of law to determine the elements necessary to establish a cause of action.

C. Step 3: Determine the Key Facts

Determine which of the facts of the client’s case apply to establish or satisfy the elements of each cause of action—the key facts. If there are no facts that satisfy or establish an element, there probably is no cause of action or issue.

D. Step 4: Assemble the Issue

Gather and assemble the elements of the issue from the law and key facts identified in steps 2 and 3.

E. Multiple Issues

Identify all potential issues and apply the four-step process to each. Note that a single issue may have multiple parts or subissues. Each part or subissue should be separately considered and addressed.

V. ISSUE IDENTIFICATION—CASE LAW

• Issue not stated—In some opinions, the court never clearly states what the issue is in the case.
• Broad statement of the issue—“The issue in this case is whether the defendant breached the contract.”
• Issue stated in the procedural context—“The issue in this case is whether the trial court erred when it granted the motion to suppress the evidence.”
• The court stated the issue in the context of how the case came before the court procedurally—an appeal of a trial court order granting a motion to suppress. To answer this question, the court actually addressed a substantive question raised by the facts of the case, and the substantive issue is what the case is actually about.
A. Step 1: General Question

Read the entire court opinion before attempting to identify the issue.

When reading the case, ask yourself, “What was decided about which facts in this case?” or “What question concerning which law and key facts was decided by the court?”

- “What was decided ...” keeps the mind focused on searching for the legal issue that was resolved and the law necessary for its resolution.
- “About which facts ...” keeps the mind focused on looking for the facts essential to the resolution of the legal question.

B. Step 2: Look to the Holding

1. “What was decided in the holding?” “What issue was addressed and answered by the holding?” This identifies the second element of the issue, the legal question addressed by the court.

2. “What statute, rule of law, principle, and so on, did the court apply to reach this holding?” This question helps identify the relevant rule of law, the first element of the issue.

3. “Which of the facts presented in this case are related and necessary to the determination of the question identified as addressed in the holding?” or “Which of the facts, if changed, would change the outcome of the holding?” These questions help identify the third element of the issue, the key facts.

C. Step 3: Assemble the Issue

Assemble the identified elements in the Law + Legal Question + Key Facts format.

D. Other Aides—Case Law Issue Identification

1. Concurring or Dissenting Opinion

Be aware, however, that the concurring or dissenting judge may have a different view of what the issue is, especially in the case of a dissent.

2. Other Opinions

Reading other opinions cited in the case may provide guidance concerning the issue in the case you are researching.

E. Multiple Issues

Where there is more than one issue, apply the steps discussed previously to all the issues in the case. Make sure that the court’s resolution of the other issues does not in some way impact the issue on which you are focused. Read the entire opinion and check for any overlap of the issues or interconnectedness of the reasoning.
PART II  STUDY QUESTIONS

1. What is the definition of an issue?
2. What are the three broad categories of issues?
3. What does a narrow/specific statement of the issue include?
4. What does a broad statement of the issue fail to provide a researcher?
5. What questions should be kept in mind at the outset of the client’s case?
6. What are the steps to help identify the issue in a client’s case?
7. What should you do when there are multiple issues in a client’s case?
8. What questions should you ask yourself when reading a case?
9. What are the steps to help identify the issue in a court opinion?
10. When identifying the issue in a case, what are the three questions to ask when you look to the holding?
11. What should you be aware of when reading a concurring or dissenting opinion in a court opinion?

PART III  ASSIGNMENTS

NOTE: The facts and rule of law in Assignments 1 and 2 are the same as Chapter 2 Student Companion Site Assignments 1 and 2. They are presented again here so that you do not have to refer to them to perform the assignment.

ASSIGNMENT 1

Facts: The client is charged in state court with theft in violation of Criminal Code Section 18-16-401 Theft. The client manages a store for his employer. His duties include running a cash register, ordering and signing for inventory, stocking shelves, and making the daily cash and check deposit with the bank. One day an order of legal pads arrived. The invoice listed 100 pads. In the shipping box were 110 pads. The client opened the container, took the extra 10 pads, put them in his backpack, and took them home. He stocked the rest of the pads. Another employee saw the client take the pads and reported him to the employer. The employer called the police.

Rule of Law: Criminal Code Section 18-16-401 Theft. A person commits theft when he or she knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception.

Assignment

Identify the theft issue.
ASSIGNMENT 2

Facts: The client, Jason, is charged with murder in the first degree. Jason hated Kim for ruining Jason’s business. Jason decided to kill Kim. Jason followed Kim for several weeks and discovered that Kim jogged once a week next to a country road. Jason hid on a hill near where Kim jogged and planned to shoot him. As Kim ran by, Jason fired and missed. When Kim heard the report from the rifle, felt the bullet fly by, and jumped. He jumped onto the road and was hit and killed by a passing car. A witness saw Jason. He was caught and charged with a first-degree murder.

Rule of Law: Criminal Code Section 18-8-101 Murder in the first degree. A person commits murder in the first degree if:

a. After deliberation and with the intent to cause the death of a person other than himself he causes the death of that person or another person; or

b. Acting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault, and in the course of the crime the death of a person is caused by anyone.

Assignment

Identify the murder issue.

ASSIGNMENT 3

Read Baumgardner v. Stuckey presented later. What is the issue?

ASSIGNMENT 4

Read United States v. Kutas presented in the Student Companion Site Chapter 5, Assignment 3. What is the issue?


Superior Court of Pennsylvania.
Richard L. BAUMGARDNER and Marcia H. Baumgardner, Appellants,
v.
Gordon D. STUCKEY, Appellee.
Argued June 16, 1999.
Filed July 26, 1999.

*1272 James J. Kutz, Harrisburg, for appellants.
D. Lloyd Reichard, II, Waynesboro, for appellee.

Before DEL SOLE and STEVENS, J. J., and CIRILLO, President Judge Emeritus.

¶ 1 Richard L. and Marcia H. Baumgardner (the Baumgardners) appeal from a final decree entered in the Court of Common Pleas of Franklin County denying their motion for post-trial relief. We reverse and remand.
2 On June 17, 1988, Gordon D. Stuckey, a truck driver, purchased a home in the Sheffield Manor property development located in Waynesboro, Pennsylvania. From 1989 to present, Stuckey has intermittently parked his truck-tractor on his property within Sheffield Manor, and since 1991, he has also parked one or more trailers at that residential site. Moreover, the record reveals not only that Stuckey has used the site to store truck-tractors and trailers, but also that he has performed repairs on truck-tractors at that same location.

3 The development in which Stuckey’s property is located is governed by a restrictive covenant, recorded on December 2, 1983, which provides in pertinent part:

1. LAND USE AND BUILDING TYPE: No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than for residential purposes and private garages or carports.

5. TEMPORARY STRUCTURES, CONSTRUCTION AND STORAGE: No structure of temporary character, trailer, basement, tent, shack, garage or other building shall be used on any lot at any time as a residence either temporarily or permanently. No lumber or building materials shall be stored on lots over ninety (90) days prior to actual beginning of construction, and no machinery, tractors, trailers, or equipment shall be stored or maintained beyond a reasonable time of its use in connection with actual residential construction. If construction of a home is started, such construction shall be completed within two (2) years. No junked car or cars for sale may be stored at any time. No unsightly matter or material of any kind shall be stored on any lot. Cars and other motor vehicles shall have current motor vehicle inspection stickers and registration tags.

4 On July 1, 1997, the Baumgardners, acting in their capacity as members of the Architectural Control Committee of Sheffield Manor Development, filed a complaint in equity against Stuckey, alleging that he had violated the foregoing restrictive covenant by parking a tractor-trailer on his own property. The Baumgardners requested injunctive relief and attorney’s fees and costs. A non-jury trial was held on this matter; the trial court issued an opinion and decree nisi, holding that the foregoing restrictive covenant did not prohibit Stuckey from parking his tractor-trailer on his property. A post-trial motion was filed and denied, and a final decree was entered against the Baumgardners. This appeal followed.

5 On appeal, the Baumgardners raise the following issues for this court’s consideration:

(1) Whether the Court erred in unnecessarily interpreting otherwise self-explanatory and sufficiently clear language in the covenants at issue?

(2) Whether the Court erred in its factual construction and interpretation of the terms of the covenant?

(3) Whether the Court erred in finding that the storage of an admittedly commercial vehicle did not violate the residential restriction terms of Paragraph One of the covenants?
¶ 6 In short, the Baumgardners contend that the trial court erred in its construction of the aforesaid restrictive covenant. Specifically, they argue that the covenant is clear and unambiguous and that it prohibited Stuckey from parking a truck-tractor and/or trailer on his property located in Sheffield Manor. We agree.


[4][5][6] ¶ 8 In interpreting the foregoing restrictive covenant, we are guided by the well-reasoned principles announced by our supreme court in *Great A. & P. Tea Co. v. Bailey*, 421 Pa. 540, 220 A.2d 1 (1966):

> It is a general rule of contract interpretation that the intention of the parties at the time of the contract is entered into governs: *Heidt v. Aughenbaugh Coal Co.*, 406 Pa. 188, 176 A.2d 400 (1962). This same rule also holds true in the interpretation of restrictive covenants: *Baederwood, Inc. v. Moyer*, 370 Pa. 35, 87 A.2d 246 (1952), and *McCandless v. Burn*, 377 Pa. 18, 104 A.2d 123 (1954). However, in Pennsylvania, there is an important difference in the rule of interpretation as applied to restrictive covenants on the use of land. It is this. Land use restrictions are not favored in the law, are strictly construed, and nothing will be deemed a violation of such a restriction that is not in plain disregard of its express words: *Jones v. Park Lane For Convalescents*, 384 Pa. 268, 120 A.2d 535 (1956); *Sandyford Pk. C. Assn. v. Lunnemann*, 396 Pa. 537, 152 A.2d 898 (1959); *Siciliano v. Misler*, 399 Pa. 406, 160 A.2d 422 (1960); and, *Witt v. Steinwehr Dev. Corp.*, 400 Pa. 609, 162 A.2d 191 (1960).

> *Id.* at 544, 220 A.2d at 2-3. *See Hoffman v. Gould*, 714 A.2d 1071, 1073 (Pa.Super.1998) (holding that restrictive covenants are not favored by the law and should be strictly construed, as “they are an interference with an owner’s free and full enjoyment of his property.”) (citation omitted). Additionally, we note that “this court cannot enlarge a restriction by implication for the restriction must be strictly construed against the one asserting it.” *Berger v. Ackerman*, 293 Pa.Super. 457, 439 A.2d 200, 203 (1981).

[7] ¶ 9 Instantly, the trial court found ambiguous the restrictive covenant at issue herein. In so finding, the chancellor rested solely upon the fact that the parties were before the court disputing whether the covenant prohibited Stuckey from parking a tractor-trailer on his property. Specifically, the trial court stated in its opinion that “[h]ad the language
been clear and unambiguous, this case would not have been before this court.” We disagree with the trial court’s rationale and we will, therefore, look to the express words of the instant covenant to discern its applicability to the facts of the present case. See Gey v. Beck, 390 Pa.Super. 317, 568 A.2d 672, 675 (1990) (“[i]n construing a restrictive covenant, we must ascertain the intention of the parties by examining the language of the covenant in light of the subject matter thereof, the apparent purpose of the parties and the conditions surrounding execution of the covenant.”) (citation omitted).

¶ 10 Paragraph 1 of the restrictive covenant expressly provides that the lot is to be used solely for “residential purposes.” The term “ ‘[r]esidence,’ in its popular as well as its dictionary sense, means place of abode; it is where one lives, either alone, or with one’s family; the family is the generally recognized unit.” Gerstell v. Knight, 345 Pa. 83, 85, 26 A.2d 329, 330 (1942) (citation omitted); Morean v. Duca, 287 Pa.Super. 472, 430 A.2d 988, 990 (1981). From its plain meaning, we find that the residential restriction contained in Paragraph 1 was intended to restrict the use of Sheffield Manor to those being residential. Paragraph 5 expressly prohibits the storage of tractors, trailers and equipment beyond the time of its use in connection with construction of the residence. In Galliford v. Commonwealth, 60 Pa.Cmwlth. 175, 430 A.2d 1222 (1981), our commonwealth court was called upon to determine whether a truck-tractor was a commercial vehicle for purposes of a zoning ordinance that prohibited the parking of a commercial vehicle on a residential lot. Id. The Galliford court found that a truck-tractor is commercial in nature; in its analysis it quoted the following text from its decision in Taddeo v. Commonwealth, 49 Pa.Cmwlth. 485, 412 A.2d 212 (1980):

The use of the equipment parked at Appellant’s home . . . is such an integral part of Appellant’s business, which is certainly commercial in nature, as to be inseparable from that business. . . . Storage of heavy equipment is neither incidental to, nor customary in, a residential area.

Galliford, 430 A.2d at 1224 (quoting Taddeo, 412 A.2d at 213). We find the commonwealth court’s analysis in Galliford and Taddeo instructive and adopt it for purposes of this appeal.

¶ 13 In the case at bar, Stuckey has been in the business of using a tractor-trailer to transport goods over the past ten years; this activity is clearly commercial in nature. During that same time he has intermittently stored a truck-tractor and/or trailers on his residential property while the said equipment was not in use. We find that the storage of such equipment must be deemed commercial in nature, as the tractor and trailers are an integral part of Stuckey’s commercial business and are “neither incidental to, nor customary in, a residential area.” Galliford, supra. Accordingly, we hold that Stuckey’s storing of his truck-tractor and/or trailers was a clear violation of the restrictive covenant requiring Stuckey use his property for solely residential purposes.

¶ 14 Order reversed. We remand for the sole purpose of determining whether the Baumgardners are entitled to attorney’s fees and costs. Jurisdiction relinquished.

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PART IV WEB ASSIGNMENTS

ASSIGNMENT 1
Refer to the Student Companion Site Chapter 2, Web Assignment 3. Identify the issue(s) in regard to what Tom Roberts is entitled to from Mrs. Roberts’s estate.

ASSIGNMENT 2

Statute
Colorado Revised Statutes § 15-11-502 provides: (1) Except as provided in subsection (2) of this section … a will shall be:

(a) In writing;

(b) Signed by the testator, or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

(c) Signed by at least two individuals either prior to or after the testator’s death, each of whom signed within a reasonable time after he or she witnessed, in the conscious presence of the testator, either the signing of the will as described in paragraph (b) of this subsection (1) or the testator’s acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

Facts
Lisa decided to change her will. Her attorney drafted a new will and brought it to her home. Lisa was extremely ill and confined to her bed. She was too ill to sign the will, but she directed her neighbor, Beth, to sign for her. Before Beth signed, Lisa passed out. Beth signed the will for Lisa. Two witnesses were present and saw Beth sign. After Lisa regained consciousness, the witnesses witnessed the will.

Question
Identify the issue regarding the validity of the will.

ASSIGNMENT 3
Perform Assignment 2 using your state’s statute regarding the signing and witnessing of wills.

ASSIGNMENT 4
Identify the first-degree robbery issue in the following case.
Court of Appeals of Washington,  
Division 2.

_In re the Personal Restraint Petition of Douglas BRATZ, Petitioner._  


HOUGHTON, J.

Douglas Bratz seeks relief from personal restraint imposed following his 1987 acquittal by reason of insanity of one count of first degree robbery, contending that the facts supported only a charge of second degree robbery. Since his acquittal, Bratz has been committed by court order to Western State Hospital, where he may remain for a term no longer than the maximum penal sentence allowed if he had been convicted. RCW 10.77.020(3). First degree robbery carries a maximum life sentence; second degree robbery carries a 10-year maximum sentence. Thus, he concludes, a reversal of the original judgment and entry of an order as to second degree robbery mandates his release from commitment pursuant to the 1987 charge. We agree and grant the petition.

FACTS

In June 1987, Douglas Bratz was found not guilty of first degree robbery by reason of insanity (NGI). The trial court that accepted Bratz’s plea found:

I.  
On January 21, 1987, Douglas Edward Bratz entered the Old National Bank Branch at 1145 Broadway, Tacoma, Pierce County, went up to a teller, stated, “I have nitroglycerin in my coat and I need you to give me money or I’ll blow up the bank.”

II.  
The teller, who had observed that the defendant seemed kind of high or partially drunk, gave the defendant about $80.00, and the defendant said he didn’t need that much. The defendant walked away, then returned to the teller and handed her back about half the money. The defendant left the bank and was arrested within one block of the bank, without incident.

Findings and Judgment of Acquittal of Commitment at 1-2.

This was the extent of the court’s findings as to the circumstances of the crime. Each of the court’s remaining findings pertained to Bratz’s mental condition, which the court concluded justified both an acquittal by reason of insanity and an order of commitment to Western State Hospital. [FN1]

FN1. Specifically, the court found Bratz had a history of mental hospitalizations, suffered from organic brain damage, and was borderline retarded in intelligence.
The police report of the crime states:
[The teller] said she noticed [Bratz] when he first got in line. She said he acted kind of strange. When he got to the window he seemed kind of high or maybe partially drunk. He first said, “I have nitro glycerine [sic] in my coat and I need you to give me money or I’ll have to blow up the bank.” He said he owes a tavern some money and he didn’t need much. [The teller] said, “[a]re you sure you wanted to do this thing?” At this time she pulled the ones, fives and tens out of the drawer and set off the alarm. She figures she handed him only about 80 dollars. He then said, “I don’t need this much.” [Bratz] then walked away from the window.... [The teller] walked out around the counter and [Bratz] approached her again. He reached out and handed her about half the money and said he didn’t need this much. He said he was sorry he had to do this. He reached out to shake [her] hand which [the teller] didn’t acknowledge. He then left the bank.


Bratz then walked across the street and into the Sheraton Hotel where he was arrested minutes later. No nitroglycerin was found on Bratz when searched by police. Upon being apprehended, Bratz confessed to the robbery.

***

Merits of Bratz’s Petition

Contending that the facts in the record support only a charge of second degree robbery, Bratz asks this court to reverse his acquittal of first degree robbery and enter an order of acquittal of second degree robbery by reason of insanity.

Robbery is defined:
A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.
RCW 9A.56.190.

Robbery in the first degree is defined:
(1) A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:
(a) Is armed with a deadly weapon; or
(b) Displays what appears to be a firearm or other deadly weapon; or
(c) Inflicts bodily injury.
Here, Bratz did not inflict bodily injury. Consequently, the only two ways to support the first degree robbery charge would be a finding that Bratz was either armed with a deadly weapon or displayed what appeared to be a deadly weapon.

**Armed with a Deadly Weapon**

Although the charging information alleged that Bratz was armed with nitroglycerin, a deadly weapon, nothing other than Bratz’s statement to the teller supports this charge. There is no evidence in either the police report or the court’s findings that Bratz ever showed nitroglycerin to anyone. Nor was the nitroglycerin ever discovered, although Bratz was apprehended less than a block away from the bank and merely a few minutes after the robbery. While it is theoretically possible that Bratz might have carefully disposed of the nitroglycerin (without exploding the highly volatile compound) in the brief interim between the robbery and his apprehension, such a conclusion stretches the bounds of reason. Bratz never possessed nitroglycerin and thus was not “armed with a deadly weapon.”

**Displayed what Appeared to be a Deadly Weapon**

[16] First degree robbery may also be committed by displaying what appears to be a deadly weapon. Bratz argues that “displays” requires some physical manifestation beyond merely a verbal threat of harm with a deadly weapon. We agree.

The State does not dispute that no Washington case has ever found a verbal threat, unaccompanied by a physical act indicating the existence of a weapon, to constitute first degree robbery. Admittedly, as the State asserts, there is language in *State v. Henderson*, 34 Wash.App. 865, 868-69, 664 P.2d 1291 (1983), suggesting that the displays requirement can be satisfied by a verbal threat of harm with a deadly weapon; however, read in context, the case is not so sweeping. In *Henderson*, the issue was whether “displays what appears” required that the victims actually see the weapon. There, the defendant, while demanding money from two stores, placed his hand in his coat pocket, which contained a large bulky object, and indicated to the victims that he was armed. He challenged his first degree robbery convictions on grounds that no display took place, since the victims never saw a weapon. The court rejected the argument, concluding that the defendant’s “words and actions” together met the statute’s “displays what appears” requirement. *Henderson*, 34 Wash.App. at 869, 664 P.2d 1291 (emphasis added). Even in *Henderson*, the defendant had to commit a menacing physical act beyond his verbal indication that he was armed in order to fall within the first degree robbery statute. [FN6]

FN6. Additionally, we note that the case which *Henderson* relied upon as persuasive authority, *State v. Smallwood*, 346 A.2d 164 (Del.1975), has likewise been so limited. Interpreting identical statutory language as is present here, the Delaware Supreme Court recently concluded:

[T]he court must be more than the victim’s fear of the existence of a deadly weapon. For example, the victim must see a bulge or suggestion that the defendant’s clothing contained a weapon. When the victim’s subjective belief is accompanied
by an objective physical manifestation that the robber appears to be displaying a deadly weapon, it is sufficient evidence to establish that necessary element of Robbery in the First Degree. (Citations omitted). Deshields v. State, 706 A.2d 502, 507 (Del.1998).

[17] In arguing that words alone can bring a defendant within the parameters of the first degree robbery statute, the State seeks an interpretation that would render “displays” tantamount to “threatens.” Yet we are aware that in other instances the Legislature has provided that the mere threat of use of a deadly weapon is sufficient to sustain a first degree charge. See RCW 9A.44.040 (first degree rape). Here, the Legislature did not so provide, instead choosing to require the act of display. We find this significant, as “[i]t is well settled that where the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.” Millay v. Cam, 135 Wash.2d 193, 202, 955 P.2d 791 (1998); see also State v. Coe, 109 Wash.2d 832, 845, 750 P.2d 208 (1988) (recognizing that threatened use is not included in the definition of first degree robbery); State v. Ingham, 26 Wash.App. 45, 52, 612 P.2d 801, review denied, 94 Wash.2d 1008 (1980) (distinguishing between the display and threatened use of a deadly weapon).

[18] Thus, we hold that the mere threatened use of a deadly weapon in the commission of a robbery, unaccompanied by any physical manifestation indicating a weapon, is second degree robbery, not first. To conclude otherwise would negate the presumed distinction the Legislature intended when it enacted the first and second degree robbery statutes. While providing that second degree robbery can be committed by the threatened use of immediate force, the Legislature made no mention of threats as being sufficient to constitute first degree robbery. We consequently conclude that the statutory requirement of displays is not satisfied by the mere verbal allusion to a weapon.

As it is undisputed that Bratz made nothing more than a verbal threat, we conclude that Bratz’s actions did not support a first degree robbery charge. The trial court should have accepted only a NGI plea to second degree robbery.

In summary, there was not sufficient evidence to sustain a finding that Bratz committed first degree robbery. As such, Bratz’s plea and the subsequent judgment are constitutionally infirm. See In re Keene, 95 Wash.2d 203, 622 P.2d 360 (1981) (vacating a forgery conviction obtained by a guilty plea where the evidence did not support a finding that the defendant’s acts constituted the crime); State v. Zumwalt, 79 Wash.App. 124, 901 P.2d 319 (1995) (finding an insufficient factual basis to sustain guilty plea to first degree robbery where the weapon, as a matter of law, was not a “deadly weapon” and the information failed to include any facts underlying the conclusion that defendant was armed with a deadly weapon). The resulting prejudice to Bratz is that he is being detained and confined longer than would be statutorily allowed had the proper judgment been entered.
The petition is granted. The trial court is directed to amend its judgment to provide for a maximum term of 10 years, and Bratz shall not be confined under this cause number after the end of that term. [FN7]

FN7. Civil commitment proceedings may still be instituted against Bratz, if appropriate.

MORGAN, J., and ARMSTRONG, C.J., concur.

PART V  CHAPTER SUMMARY

The most important task in either analyzing a client’s case or reading a court opinion is to identify the issue(s) correctly. You must identify the problem before it can be solved. A misidentified issue can result not only in wasted time, but also in malpractice.

The issue is the precise legal question raised by the facts of the dispute. Therefore, each issue is unique because the facts of each case are different, and each issue must be stated narrowly, within the context of the facts of that case. The issue is composed of the applicable law, the legal question relevant to the law, and the facts that raise the question. These elements must be identified precisely to determine the issue.

There is no magic formula. This chapter includes steps that help in issue identification. When working on a client’s case, there are four recommended steps:

1. Identify each area of law that possibly is involved.
2. Identify the elements necessary for a cause of action under each law identified in the first step.
3. Apply the elements of the law to the client’s facts to determine the key facts.
4. Assemble the issue from the law, elements, and key facts identified in the first three steps.

There are three steps to follow to identify the issue(s) in a court opinion:

1. While reading the case, keep in mind this question: “What was decided about which facts?”
2. Look to the holding to identify the rule of law, legal question, and key facts of the case.
3. Assemble the issue.

These are the recommended steps. They usually work when followed and are always helpful in focusing the practitioner’s attention on that which is essential—the rule of law, the legal question, and facts.