

# How Case Analysis Works in Civil Litigation

*“WE ARE NOT talking about free speech. We are talking about child protection.”* This came from an advocate of rules to restrain child pornography. Think about that line for a moment. Could the pro-pornography advocate not argue the exact opposite? Move the word “not” from the first sentence to the second. *“We are talking about free speech. We are not talking about child protection.”* Voila! The battle is joined! This line is an example of case analysis at work.

## Analysis

LAWYERS FULFILL TWO essential functions. First, they advise, and second, they speak for their clients. In order to do both of these tasks, lawyers have to analyze. They ask:

- What is the case about?
- What are the choices?
- What is the other side of the story?
- What is the impact of the choices?
- Which one is best?
- What can go wrong?

- What must be proved to succeed?

As lawyers learn from the first class in law school, this is the very stuff of case analysis. Day in and day out, law students read caselaw. They learn both the “black letter” law and the process by which the courts reasoned their way to the conclusions. But consider this: in all the great court cases, there were two or more parties who competed for the court’s ruling. The losers likely thought they had a good shot at winning, but somehow came up short.

This handbook describes the process by which lawyers sift through the myriad inputs, eliminate the distractions, and express the key elements to persuade the audience. This process is case analysis, and the result is the critical path from introduction to successful conclusion.

Much thought goes into framing the issue as “free speech” versus “child protection.” The audience could be a client, the opposition lawyer or party, a regulator, a judge, the attendees at a conference, or pretty well anybody that lawyers encounter in the course of their practices.

Most law schools require completion of the Law School Admission Test (LSAT). At its heart, the LSAT tests for analytical skills. Analysis, however, is only half the battle—the other half consists of implementation; that is, what to do about it.

## Implementation

AS PART OF implementation, lawyers offer opinions, examine witnesses, make submissions, and write briefs. Lawyers must understand the case; they are then able to express

the concept that lies at the core of the case. This core has to permeate throughout their presentation. In the quotation in the opening paragraph of this section, the “case” was “about” either “free speech” or “child protection,” depending on the position being propounded. One could imagine the “about” phrases being used liberally throughout any examination, press release, submission, or brief.