

It's Not That We Don't Know How to Think, it's That We Lack Dialectical Skills

By: Brett A. Sokolow, JD
President, The National Center for Higher Education Risk Management
--a not-for-profit corporation—
www.ncherm.org

© 2002-2003 NCHERM. All Rights Reserved.

Twelve Angry Men Visit the Campus

In my favourite courtroom drama, *Twelve Angry Men* (1957—*Academy Award Nominee, Best Picture*), Henry Fonda proves the title of this article. This classic movie is a must for any campus judicial officer. Fonda plays juror #8 in a murder trial. After the trial, the jury takes a straw vote, and the vote is 11-to-1 in favor of convicting the defendant. Fonda is the sole holdout. The crux of the movie is the story of how Fonda convinces the eleven other jurors to heed their gut instincts, but also to parse the facts and issues in the case to come to a reasoned, deliberate conclusion. At the end, Fonda has convinced the jury to re-vote, and based upon his patient dialectic, the jury votes 12-0 for the acquittal of an innocent man.

HerdinG Cats or Skill-Building?

I've been training judicial boards for six years now. I've used clips from this movie (and a modern Paulie Shore take-off, *Jury Duty*, that is surprisingly the sum of more than its parts) in my judicial trainings. The more I train, the less time I spend on procedural issues, and the more time I spend on dialectical skill-building. Deliberation is the act of analyzing the evidence to determine if a policy, rule or law has been violated. Deliberation occurs by means of dialectical analysis. Dialectic is the art of reasoning or disputing, or that branch of logic which teaches the

rules and modes of reasoning, or of distinguishing truth from error; the method of investigating the truth by analysis. And, my experience is showing me that it's not that people don't know how to think, it's that they lack dialectical skills.

Left to their own devices, the deliberative process post-hearing is (in my experience at least 85% of the time) a disorderly discussion by hearing board members of random facts, assertions and conclusions somewhat reminiscent of a herd of cats in its orderliness. Mostly, what emerges is a right-brained gut or instinctual decision, usually based on the decision-maker's belief that the respondent acted in way that was wrong. I rarely see much heed of whether the actions in fact violated the specific and precise standards of the campus policy. It is often the case that such undisciplined responses come not from students (who seem to have their own anti-developmental bent), but from seasoned faculty and staff members, who should be well-schooled in dialectical analysis.

Follow Your Gut Instincts?

It's not that there isn't a place for right-brained reactions. But, we owe the parties to the complaint more than that. We owe them a duty to test our gut reactions against Henry Fonda's patient parsing of the facts to reach a reasoned, deliberate conclusion. If that conclusion winds up matching our gut, that only makes our conclusion stronger. But, I'll wager strongly that if you pay close attention, you'll notice that at least 50% of the time, your reasoned conclusion is 180 degrees from what your gut tells you.

Just like the Twelve Angry Men on that jury.

You may delude yourself into believing that reason matches your gut all the time, but it does not. For any of us. Gut reactions are emotional. Emotions are subjective, and the decisions we make on the basis of right and wrong are misleading. The campus conduct process is not about determining right from wrong. It is about determining whether a policy was violated. If you ask the wrong question, you can't get the right answer. And too often, our gut causes us to ask the wrong question, and we don't even consciously realize that we're doing it.

Doing Dialectic Right

Dialectical analysis should be an ordered process. It begins with parsing the policy, to identify the elements of each offense alleged. Some people prefer to flowchart a policy, to help them understand its requirements. Others don't need a visual depiction, but still need to break down the constituent elements. For example, look at this policy definition of vandalism:

VANDALISM is committed when there is...

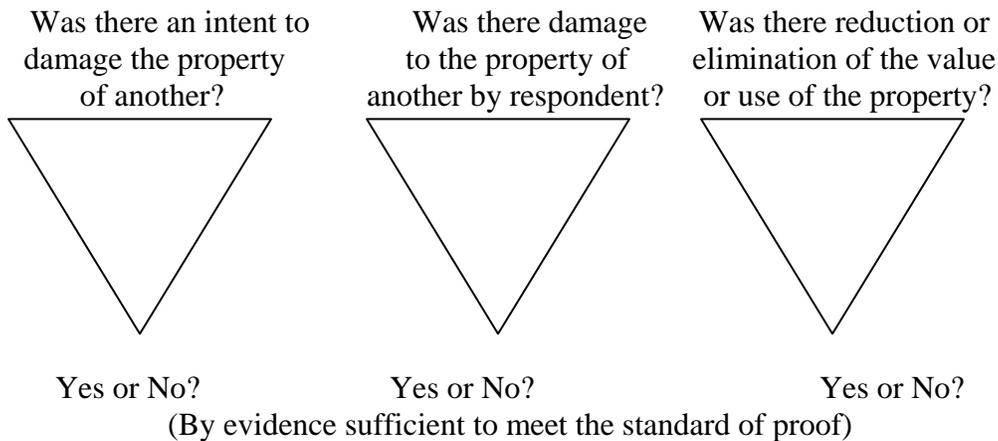
“an intent to damage the property of another so as to render it reduced in value or valueless, or reduced in use or useless”

Identifying the elements means that vandalism does not take place unless there is:

1. An intent to damage, AND
2. Damage to property of another, AND
3. Reduction or elimination of the value or use of the property.

Issue Spotting

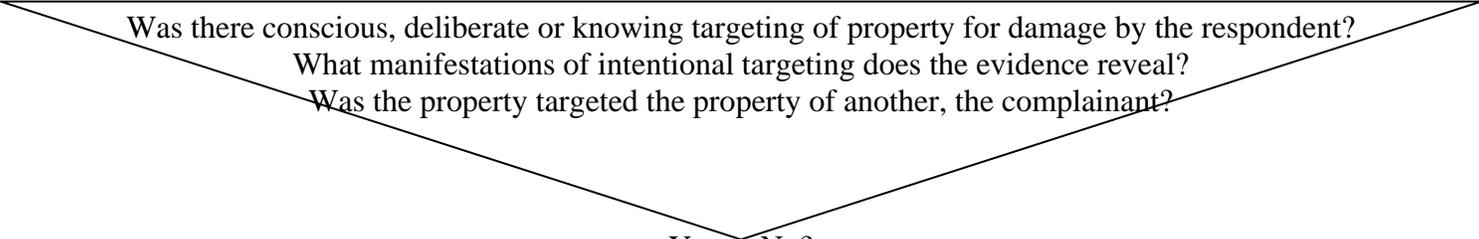
Each of these policy elements is then put into play in a process of issue-spotting. Perhaps the process can be best captured with an image. Imagine an inverted triangle. At the top is the charge, or subject of the complaint, broken into the constituent policy elements. At the bottom, at the point of the triangle, is the responsible or not-responsible finding. Issue spotting is then a process of taking the complaint, from start to finish, through a process of narrowing questions and issues that need to be addressed in order to determine a finding. There may be multiple sub-triangles for each offense. At the top of each triangle is the broadest question or issue. Then, as the triangle narrows, so do the questions, resulting ultimately in the key question apropos the issue. For this vandalism complaint, the policy dictates that there are THREE issue triangles:



While vandalism may be a simplistic example, it's easiest to understand dialectic through a simple example, though it will be most useful in complex, multi-issue, multi-offense cases.

For the first triangle, on the left above, the key questions that could flow down the triangle might be, from broadest to narrowest:

Was there an intent to damage the property of another?

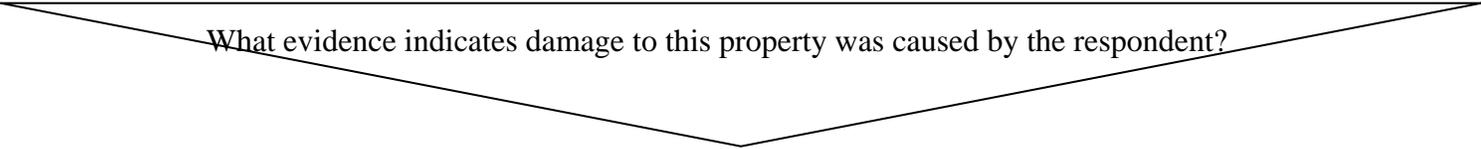


Was there conscious, deliberate or knowing targeting of property for damage by the respondent?
What manifestations of intentional targeting does the evidence reveal?
Was the property targeted the property of another, the complainant?

Yes or No?

For the middle triangle, the key questions that flow down the triangle, from broad to narrow:

Was there damage to the property of another by respondent?

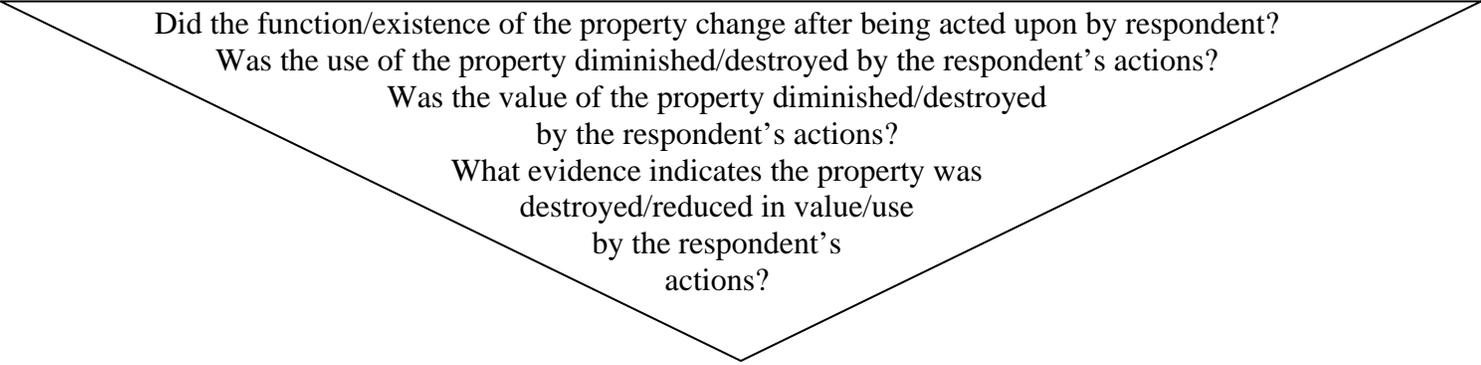


What evidence indicates damage to this property was caused by the respondent?

Yes or No?

For the third triangle, on the right, the key questions that could flow down the triangle, from broad to narrow:

Was there reduction or elimination of the use or value of the property?



Did the function/existence of the property change after being acted upon by respondent?
Was the use of the property diminished/destroyed by the respondent's actions?
Was the value of the property diminished/destroyed by the respondent's actions?
What evidence indicates the property was destroyed/reduced in value/use by the respondent's actions?

Yes or No?

The Dialectic Requires a Matching Process

The final step is to answer each of the questions/issues within each triangle. For each question, the dialectic requires engaging in a matching process. For each question, ask what evidence/information you gained from the hearing that indicates an answer to the question.

Then, for each piece of evidence or information, assess its evidentiary value (deliberation, of which dialectical analysis is a component, can then involve a group process of evaluating and assessing the value of evidence). Is the question answered with a fact(s)? Is it answered with opinion(s)? Is it answered with circumstantial evidence? If it is a fact, it deserves the greatest weight. Opinions are worth less. Circumstances are worth even less. (Try distinguishing between the three—it's not always as easy as you think, and sometimes there are strong and weak facts, opinions and circumstances, that have to be weighed accordingly).

Summing Up?

Some people will assign a numerical weight to each piece of evidence. Not everyone thinks of this in mathematical terms, though. Such an approach is most helpful in borderline cases. If you use a "more likely than not" standard of proof, do you have 51% of the evidence indicating a violation? Some people prefer to add it up and see. Others prefer a less scientific weighing. One approach is not better than another. People just process differently. In the above three triangles, let's say that facts, opinions and circumstances give you a "Yes" answer to all three issues. That would indicate a policy violation. If you get a "Yes" for the first two triangles, but a "No" to the third, then no violation is indicated.

Whether you process by weighing mathematically, or on a more visceral balancing, processing is the goal. And the foregoing is a basic explication of the process of dialectical reasoning, laid out for you methodically, step-by-step. Give it a try. You too can give a performance like juror #8.