



WHAT DO YOU MEAN “THERE’S MORE THAN ONE WAY TO DO IT”? SELECTING METHODS OF LEGAL ANALYSIS THAT WORK BEST^{*}

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You’ve just gotten an assignment from your professor or supervising attorney. She wants a memo outlining the prospects for a client’s potential defamation claim against a former employer. You ask a trusted, more experienced colleague what your memo should look like, and he tells you “there’s more than one way to do it.” Sure, that may be true for a scholarly paper, you think, but is there really more than one way to write a practical document like a memo or a brief? The analysis in these documents has always seemed the same to you—even formulaic. You state rules of law and use comparisons with precedent case law to show how the rules should be applied in your case. You might analogize to a couple of different cases in the text, but is there really much more than one way to write this memo?

In truth, there are a number of different ways to approach legal writing projects. The challenge is in becoming familiar with the methods of analysis that are accepted in the legal writing community, and then choosing the form for your own legal document that will match your purpose in writing it. Legal writing is all about making smart and strategic choices to communicate with a particular audience. This handout can help familiarize you with some of the most common analytical strategies that most legal writers should have in their repertoire, as well provide a framework for selecting an approach that will meet your purpose in writing.

A. The Tools: Traditional Forms of Reasoning in Law and in Life

Most attorneys use a variety of legal reasoning methods in their professional writing that have roots in movements ranging from classical rhetoric to more modern analytical trends.¹ Their formal labels aside, these techniques are likely to seem familiar. You have probably employed this kind of reasoning in all sorts of everyday settings well before you came to law school.

A hypothetical can probably best illustrate how we use these methods of argument in our daily lives. Imagine yourself back in the shoes of a teenager. You’re the youngest of four siblings in your family. You’ve just turned seventeen and would like to drive the family car to the mall to meet your friends, but your parents would like you to wait until

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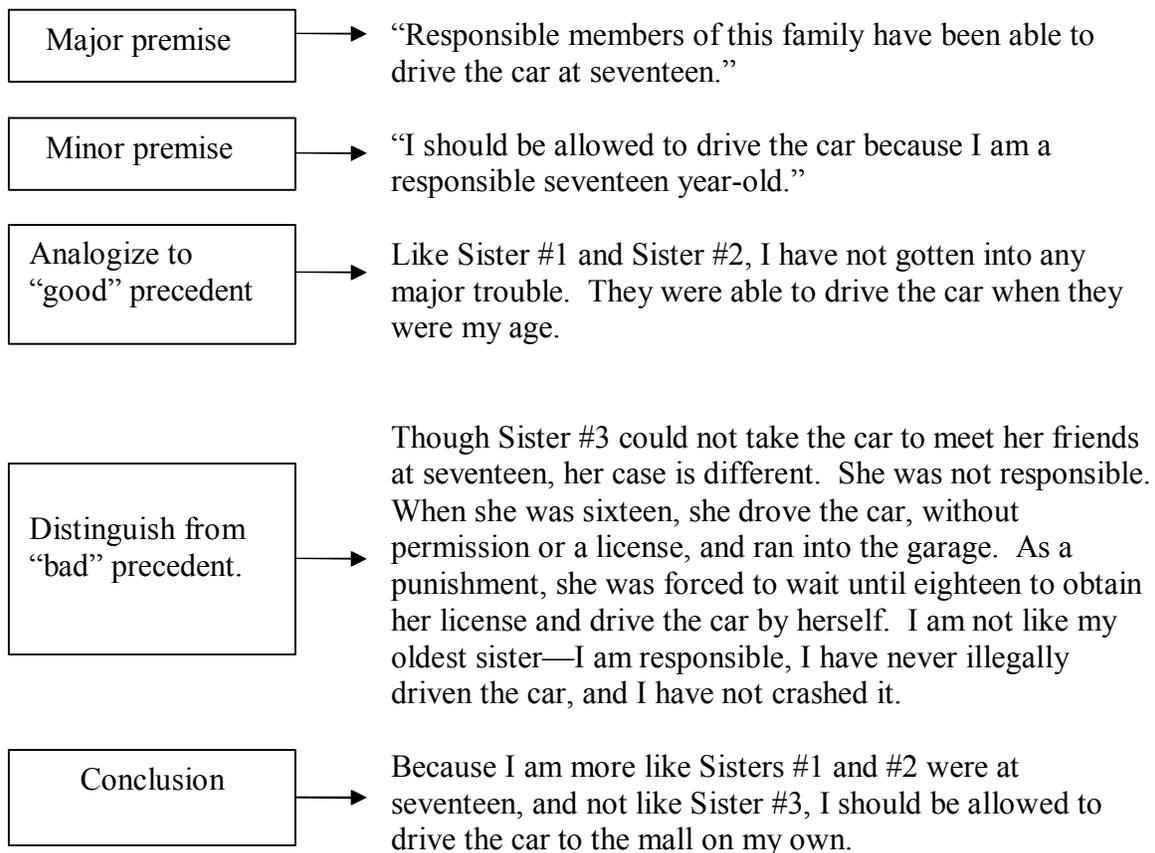
you're eighteen to start driving the car by yourself. How would you go about convincing them that they should let you take the car?

Classical Rhetoric

1. Analogical Comparative Reasoning: "I'm just like my two oldest sisters!"

Most law students are familiar with this form of legal reasoning. Analogical comparative reasoning is most useful when there is already precedent in your jurisdiction that deals with similar facts. You usually begin by identifying the "rule," or "major premise." Often, you will draw this rule from an applicable statute, or infer it after synthesizing precedent. After defining any uncertain terms, like an ambiguous element in a statute, you then present your client's situation as the "minor premise." You prove your minor premise by analogizing your facts to cases that reach a similar result, and disprove counterarguments by distinguishing your case from cases that do not. Once you have proven that your minor premise is governed by the major premise, you come to a conclusion.

We can see how this works by returning to our family car hypothetical. Let's say you have three older sisters; two were allowed to drive the car to the mall on their own at age seventeen, and one wasn't. You want to use this precedent to prove that you should be allowed to take the car as well.



2. *Induction to Form the Rule: “I should be able to drive the car by myself at seventeen!”*

This method can be useful when there is no precedent in your jurisdiction clearly relating to your client’s situation. You can use available legal precedent and other secondary materials to devise your own statement of the rule or principle. Perhaps several cases can be used to establish an emerging pattern in your jurisdiction that might be relevant to your client’s situation. Look to other materials that might support this conclusion, like dictionaries, law review articles, and opinions of legal and non-legal experts. You might conclude that there is really no consistent way of analyzing this situation, but several different approaches that a court might take.

Let’s apply the family car example again here. There is presently no family rule about cars, but you are advocating for a new one: you should be able to drive the car by yourself at seventeen. You might start out by pointing that it is perfectly legal to drive the car alone at the age of seventeen. Perhaps you’d cite other “expert” opinions: “My best friend’s mother had five kids, and she let all of them drive the car by themselves at seventeen!” And other trends in precedent might help your case: “All of my classmates, most of whom are seventeen, are allowed to drive the car by themselves.”

3. *Deduction Using Examples; “This is the way Sally’s family made this decision.”*

This method uses precedent as an *example* or *template* for the way in which a legal problem should be analyzed. A case might outline various methods of statutory interpretation and the order in which a court should use those methods (ex: plain meaning first, then purpose and intent only if plain meaning is not clear). Alternately, in a jurisdiction in which there are competing models of analysis, you may use several cases that illustrate that there is a developing pattern that dictates the way in which to analyze your particular legal question.

This method will also work in the family car hypothetical. This time, instead of proving that you are like your sisters, or that there is a particular trend regarding the age at which a child should be able to drive the car alone, you would use another family’s template to guide your parent’s decision-making. “When Sally’s parents made a decision about this, they first reviewed how responsible Sally was. They then reflected on how safe a driver she was when they were in the car with her. Next they thought about her behavior over the preceding year. They then inquired as to who else might be in the car with her, where she was going, and what time she would be home. You should also use the same factors when determining whether I can drive the car by myself.”

4. *Deduction Using Elements: “I fit the definition of a legal driver!”*

Deduction Using Elements is yet another way of proving a legal conclusion. Sometimes referred to as plain meaning interpretation, this method usually begins by presenting the elements of a legal concept, claim, or statute. You can show how your facts fit into the plain meaning of each element. Given the prominent role that *stare decisis* plays in the American legal system, this method is not likely to be the most persuasive. It is often useful as a supplement to other forms of legal analysis.

The family car example illustrates how this method can be effective when the facts fit the plain meaning of the law well. “The law says that I can drive alone,” you might argue, “if I have passed my driving test, am insured, and do not drive drunk. I have passed my driving test. I am covered under your car insurance. I have no intentions of drinking alcohol tonight. Therefore, I should be able to drive the car.” (Of course, you’ll have to convince your parents that the state law on driving is a good proxy for your parents’ decision-making process!)

5. *Neoclassical Fallacy, Straw Man: “You may think that, BUT...”*

Neo-classical Fallacy consists of invalidating counterarguments instead of creating original arguments for your client. This type of reasoning often appears in respondents’ briefs; one might present each of her opponent’s arguments, only to prove why they are untenable. Remember, however, that a legal memo or brief dedicated entirely to invalidating counterarguments is left with no law, reasoning, or basis for coming to a conclusion about your own client’s case. As such, neo-classical fallacy is probably best used as one of a *combination* of analytical tools.

This tool can be especially appealing to the teenager who may feel on the defensive: “Mom, you might say that you don’t want me driving to the mall because it’s dangerous. But that’s not actually true. The mall is only one town over. I’ve driven to the mall with you over twenty times and am very familiar with the roads. What’s more, I’ll be driving during the daytime, and am not likely to get lost. And I’ll have my cell phone with me so that I can call you if any problems arise. You’ll be able to come find me immediately.”

Modern Legal Analysis

Before you came to law school, you learned how to analyze problems in ways that did not depend on case law and legal precedent. These approaches can be used as alternate forms of legal analysis, either as supplements to the more traditional forms, or as the entire basis for your approach.

6. *Legal Realism: “Consider the effect that denying me car privileges will have.”*

The basis tenet of Legal Realism is that the law is only meaningful if put in the context of social conditions. Accordingly, the *purposes* and *policies* behind the law should be examined in its application. In addition, the practical effect that the law will

have upon application should also be examined. These policy arguments can be effective when coupled with more traditional methods of case analysis, particularly when you are trying to convince your audience to adopt a stance, rule, or perspective that is not yet widely adopted.

As a teenager arguing for the family car, you no doubt could muster several compelling arguments. “It makes sense for you to let me drive the car alone. I’ve been well behaved all year, and deserve this privilege as a reward for my good behavior. If you don’t let me drive the car alone, you’ll be implicitly conveying to me that my good behavior is not valuable to you, and that you don’t trust me. These messages will have an adverse effect on our relationship. At this age, it’s important for me to start being independent, and driving the car on my own is a first step in that process.”

7. Legal Process, Threshold Questions First: “You didn’t follow the rules.”

Those who believe in the Legal Process approach believe that even parties that cannot agree on the interpretation or application of the law can agree on the process or procedure by which the legal dispute will be resolved. As such, the law has its own “internal, process morality, rather than an external reasoning morality.”² Within the legal process, the sequence in which a legal problem is analyzed is important. Merits of the case notwithstanding, a case can be lost simply because proper procedure was not followed.

Say your family has a set of rules that must be followed before a family member may take the car. You failed to follow the rules, and this time your parents are using the legal process analysis against you: “You know that in our family, if you’d like to take the car out, you have to request the car a week in advance so that we can arrange our schedules. You also know that all of your chores and your homework must be done before taking the car. You did put in the request a week ago, but did not do the dishes. You also have not finished your science report. So, even though no one else is using the car tonight, you are still not allowed to use it.”

8. Law and Society: “I think I have a way to make everyone happy.”

The Law and Society approach views the law as the “external product of values, culture, history and religion,” as opposed to the “internal product of reasoning.”³ Accordingly, proponents believe that the law often responds to situations, rather than creates rules that can appropriately govern situation. As such, the role of a lawyer is to guide parties through a legal problem, helping to formulate responses and solutions that will consider all aspects of the problem.

One of your older sisters becomes involved as we apply this analytical technique to the family car situation. You’d like to drive the car by yourself. Your parents are adverse to that idea—they didn’t have a privilege like this one as your age, and they are still complaining about the time that another one of your siblings drove the car into the garage. Your older sister can see both viewpoints. She understands your parents

concerns, as well as your desire to be independent like your friends. Accordingly, she steps in to try and mediate a compromise between you and your parents.

9. *Law and Economics*: “You can have the car, but there’s a price to pay.”

The Law and Economics framework holds that the law can be seen as a “series of transactions in which cost and benefit are measured and certain outcomes become predictable from those measurements.”⁴ Because economic theory suggests that certain costs will deter certain behaviors, legal rules can be created to foresee those costs and regulate behavior accordingly.

This time, your parents are using the law and economics theory of analysis against you. Your parents know that you want to drive the car, but are not yet ready to begin letting you drive the car by yourself. They also know that you are very reluctant to spend your money, which you’ve earned by working at a part-time job. To deter your requests to drive the car, your parents have created a rule: you may only drive the car if you promise to both fill up the gas tank and vacuum the insides after each drive.

B. Defining the Rhetorical Setting: How to Pick the Best Tools

Now that you’re familiar with some of the most common analytical strategies, it’s time to think about how best to apply them. How do you decide which ones to use? This is where legal writers often find the best opportunities for creativity. A substantial part of the legal writing process should be devoted to making careful and strategic decisions about the paper’s analytical approach and design.

Think back one last time to the family car example. As a teenager, you know that your approach is almost as important as what you’re about to say. ***And the approach you use depends on your circumstances!*** Which parent will you be speaking with? When is the best time to approach Dad? What kinds of arguments have been successful with Mom before? Are they still angry about your older sister’s car accident?

Similarly, some of the best legal writers think of writing as problem-solving. Before deciding how they will design their writing, they first consider the *rhetorical problem*. The rhetorical problem requires the writer to consider her audience and the context in which she is communicating: Who is my reader? How do I want my reader to feel when she is finished reading my writing? What obstacles might prevent me from conveying this meaning to my reader? Consider the rhetorical problem every time you complete a legal writing task by thinking about four elements: **purpose, audience, scope, and stance**. Remember that the rhetorical situation can be complex, and there often can be one or more of each rhetorical element.

Examples of the Rhetorical Elements in Legal Writing⁵

Purposes	Audiences	Scopes	Stances
<ul style="list-style-type: none"> • Convince a client not to take an unwise action • Prepare for worst scenarios • Refute opposing attorney's claim • Identify policy implications • Satisfy reporting requirements • Impress a supervising attorney • Predict how a court will rule • Show statute's application 	<ul style="list-style-type: none"> • Supervising attorney • Agency head • Client • Judge • Law clerk • Opposing counsel • Students • Congressional staff 	<ul style="list-style-type: none"> • Page limit imposed by court • Section assigned by supervisor • Summary of most likely outcomes • Bullet list of cases • Survey of a particular jurisdiction • Decisions by a particular judge • Illustration of typical application of statute 	<ul style="list-style-type: none"> • Confident • Aggressive • Respectful • Methodical • Passionate • Apologetic • Emotionless • Concerned • Indignant

C. Putting It All Together: Applying the Tools to Solve Your Rhetorical Problem

The example involving the teenager and the car illustrates how rhetorical problem-solving is a part of our everyday living. Now, let's return to the typical legal context. The following examples revisit the situation at the beginning of this handout. Your professor or supervising attorney wants information about the likelihood your client will succeed on a claim of defamation under the law in your jurisdiction. As you read the examples below,⁶ note how the rhetorical situation drives the author's analytical choices. Ask yourself which types of techniques the author employs, and whether they are effective.

Example #1: Inter-office memo

Rhetorical Situation

Purpose: Warn client of potential problems with litigation.

Audience: Supervising attorney will preview, then incorporate in letter to client.

Scope: Short and specific to client's situation, accounting for client's lack of time, or possible distrust of lawyers and legalese.

Stance: Helpful and respectful, but realistic and thorough.

Though the comments made by our client's employer, a university department chair, do appear to fit the plain meaning of each element of the defamation statute on its face, other defendants in our jurisdiction who have made similar remarks have been remarkably successful in defeating defamation claims based on a defense of qualified privilege. See, e.g., Turner v. Jackson, 200 P.2d 1000 (Kan. 2004); Smith v. Tate, 900 P.2d 110 (Kan. 2002); Nelson v. Rider Corp., 500 P.2d 720 (Kan. Ct. App. 2003). Courts seem especially receptive to claims of privilege by employers who must

evaluate candidates likely to be working with students. See Turner, 200 P.2d at 1001 (finding remarks of English professor privileged); Tate, 900 P.2d at 112-13 (Kan. 2002) (finding undergraduate dean's comments privileged); Nelson, 500 P.2d 720, 721 (Kan. Ct. App. 2003) (resting recognition of qualified privilege on faculty chair's responsibilities for enhancing student achievement).

The Turner case provides one illustration of how the district court is most likely to analyze the claims of an educational employer. 200 P.2d at 1001. In Turner, the defendant employer, the head of a university English department, made several disparaging remarks about the plaintiff professor's work habits, punctuality, and esteem among students. Id. The defendant also made unfounded speculations about the professor's possible drug use. Id. Repeatedly emphasizing the need for full and frank exchange of information between employers of teachers, the court found the defendant asserted a valid qualified privilege. Id. at 1005. First, defendant's statements were deemed in good faith because they were based on faculty reports. Id. Further, the court believed that the statements were made in and limited to the interest of protecting students. Id. at 1004. Finally, the defendant's "publication" of the remarks was limited to the inquiring employer. Id. at 1105.

Example #2: Memo informing partner of possible response to appellate brief

Despite defendant's status as a university department chair, her claim of qualified privilege is not well supported by the cited precedent involving other defendant professors because the evidence demonstrates that her derogatory remarks were not in the interests of protecting *students*.

Rhetorical Situation

Purpose: Outline possible responses to brief from opposing agency or firm

Audience: First, your supervising attorney; potentially, the judge, judicial clerk, and opposing attorney; all are familiar with the basic facts of the cited precedent.

Scope: Five pages, specific response to opponent's arguments

Stance: Aggressive, confident

Compare Turner v. Jackson, 200 P.2d 1000 (Kan. 2004); Smith v. Tate, 900 P.2d 110 (Kan. 2002); Nelson v. Rider Corp., 500 P.2d 720 (Kan. Ct. App. 2003). Rather, the defendant's remarks to potential employers that plaintiff was "incompetent," "flighty," and "only hired because of personal connections" were based on unsubstantiated assumptions that implicated personal motives rather than professional concerns. (See Smith Aff. ¶¶5-7; T.4.)

Turner is not on point because, in that case, the defendant professor made speculations about the plaintiff's possible drug use on the basis of comments from student evaluations, e-mails from faculty, and personal observations of the defendant's erratic attendance and punctuality. See 200 P.2d at 1003. Here, however, the defendant admitted that her assertions were based not on documented assertions of defendant's work performance, but her own personal interactions with the defendant at social work functions. Moreover, unlike the defendants in Smith or Nelson, who were well established in their academic fields and held substantial seniority over their plaintiff employees, defendant here had a *personal motive* to defame the plaintiff. Cf. 900 P.2d at 114 (noting that defendant tenured with twenty years teaching experience); 500 P.2d at 724 (recognizing defendant as "preeminent teacher and scholar for more than twenty-five years"). Though defendant is the chair of her department, the plaintiff is arguably more prolific in the academic field in which both compete. Plaintiff has published more articles, is a popular guest speaker, and has been characterized by some students as the "backbone of the department." (T.1, T.3.)

Because the plaintiff's interest in professional reputation overrides the defendant's personal interests underlying her unsubstantiated remarks, the court should deny the claim of qualified privilege. This ruling would be in line with defamation cases within this jurisdiction in which courts have put a premium on the reputations of plaintiffs in other professions, and with courts in other jurisdictions that have held so in educational settings. See Smith v. Jones, 111 P.2d 11 (Kan. 2003) (plaintiff an attorney); Duhe v. Davis, 25 P.2d 650 (Kan. 2003) (architect); Brandon v. Michel, 225 F.2d 104 (2d Cir. 2002) (psychology professor); Dean v. Dean, 45 F.2d 103 (1st Cir. 2000) (art teacher).

Example #3: Trial Brief for a District Court

Rhetorical Situation

Purpose: Convince the court that they do not have jurisdiction to hear opponent's appeal regarding an arbitrator's decision.

Audience: Judge, law clerk, opposing attorney.

Scope: Limited to the tenets of law.

Stance: Confident, aggressive.

The court does not have jurisdiction to hear appellant's challenge to the arbitrator's finding of defamation. Appellee submitted her claim to the arbitrator by the clear terms of her employment contract. (Ex. 1, ¶32.) Also by the clear terms of the contract, the arbitrator's decision is final and binding. (Ex. 1, ¶33.)

Scholars and practitioners alike recognize the many benefits of arbitration as an alternative to formal civil litigation,

including cost savings for the specific parties involved, the decision-maker's increased attention to the specific facts of the dispute, and a reduction in the backlog of the traditional civil docket. See RICHARD A. LORD, WILLISTON ON CONTRACTS §57:73 (4th ed., Westlaw through 2003); Kenneth M. Curtin, Contractual Expansion and Limitation of Judicial Review of Arbitral Awards, 56 Disp. Res. J. 74 (Feb./Apr. 2001). For these same reasons, courts of this jurisdiction have been reluctant to reopen binding arbitration agreements where the terms of a valid employment contract have clearly called for the process. See Carroll v. Smith, 107 P.2d 72 (Kan. 2003); Marsh v. George, 103 P.2d 79 (Kan. 2000); Jas v. Smythe, 103 P.2d 344 (Kan. 2000). “Blindly intervening in private employment agreements only undermines the parties’ incentives to enter into these contracts in the first place.” Carroll, 107 P.2d at 75.

The validity of the employment contract is not in question. The terms of the contract are clear: “All claims arising out of the course of this employment shall be submitted to arbitration for a binding, final decision.” (Ex. 1, ¶32.) Moreover, in the unlikely event that appellant could identify an ambiguity in the terms of the contract, well-established principles of contract law require that the terms of the agreement be interpreted against the author—in this case the appellant. See RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

¹ *See* JILL J. RAMSFIELD, THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS 314-49 (2000). *See* Chapter Five for a more complete discussion of the analytical techniques outlined in this text.

² *Id.* at 342.

³ *Id.* at 314-49.

⁴ *Id.* at 347.

⁵ *See id.* at 287-93 (discussing many of these examples and others).

⁶ Please note that all internal citations are fictitious.