



## WHAT DO YOU MEAN “THERE’S MORE THAN ONE WAY TO DO IT”? LEGAL ANALYSIS AND THE RHETORICAL SETTING \*

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Imagine you’ve just gotten an assignment from your supervising attorney. She wants a memo describing 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 short, yes! Legal writing is all about making smart and strategic choices to communicate with audience. The analytical formulas from 1L legal writing are a great start, but for some assignments, you will need to discuss the law from another angle. In Section I, this handout will familiarize you with some of the most common analytical approaches that most legal writers should have in their repertoire. Section II will help you choose between those approaches based on the rhetorical setting of your document.

### **I. The Tools: Traditional Forms of Reasoning in Law and in Life**

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

#### *Family Car Hypothetical:*

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 want to drive the family car to the mall to meet your friends, but your parents would like you to wait until you’re eighteen to drive the car by yourself. How would you tackle convincing them that they should let you take the car?

\* By Maureen Aidasani and Osamudia Guobadia (2004). Edited by Alison G. Smith.

## A. Classical and Neoclassical Rhetoric

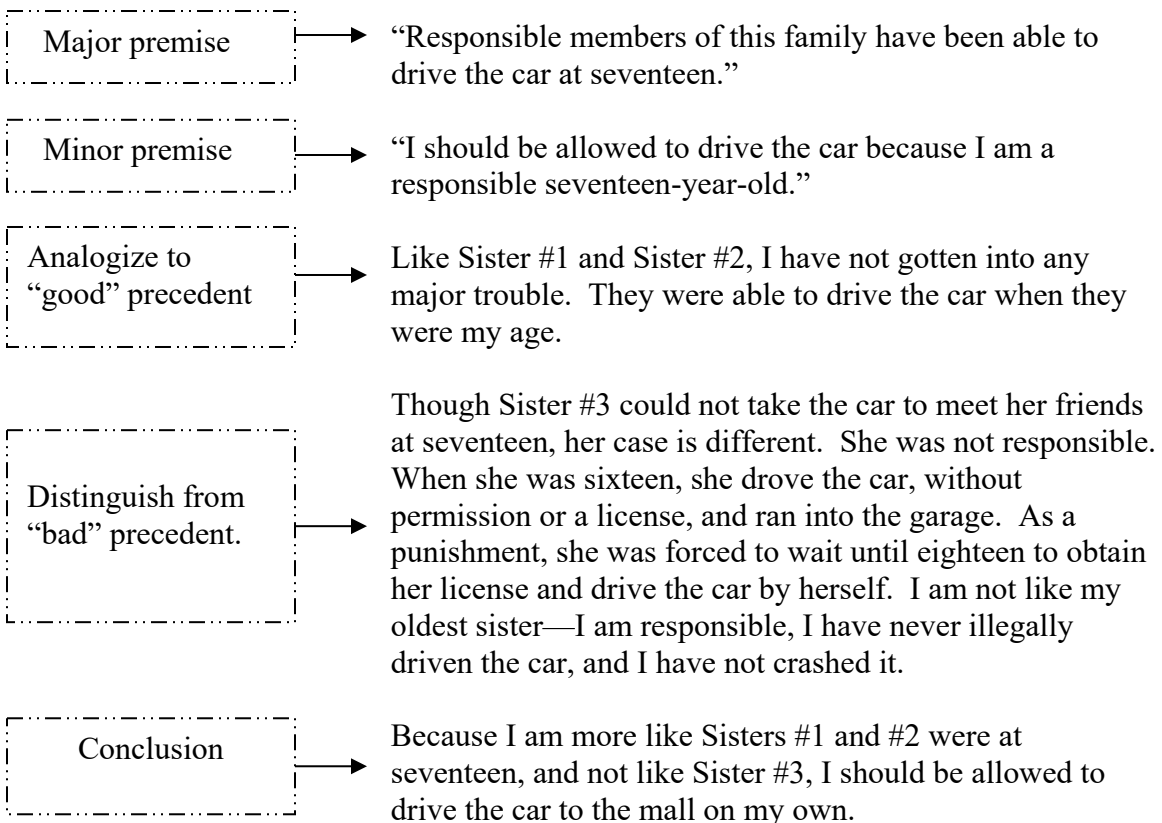
At the core of most formal legal analysis is logical reasoning. These analytical frameworks use inferences to derive conclusions.

### 1. Analogical Comparative Reasoning: *“I’m just like my two oldest sisters!”*

Most law students are familiar with this form of legal reasoning. 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. Analogical comparative reasoning is most useful when there is already precedent in your jurisdiction that deals with similar facts.

#### *Family Car Hypothetical 1:*

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 at seventeen!”*

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. If there is little or no case law, 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. This method can be useful when there is no precedent in your jurisdiction clearly relating to your client’s situation.

*Family Car Hypothetical 2:*

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 in your jurisdiction might outline 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). 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.

*Family Car Hypothetical 3:*

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 unless there is no case law on the elements in question. It is often useful in combination with other forms of legal analysis, like Induction to form the Rule.

*Family Car Hypothetical 4:*

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 proceeds by *invalidating counterarguments* instead of creating original arguments for your client. This type of reasoning often appears in respondents’ briefs; you might present each of your 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.

*Family Car Hypothetical 5:*

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.”

## B. 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. Modern legal thinking involves modes of analysis driven by considerations beyond logical reasoning. The approaches in this section can be used as supplements to the more traditional forms of legal analysis, or as the basis for your analytical approach.

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

The basic 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.

#### *Family Car Hypothetical 6:*

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 have to follow the rules.*”

The Legal Process approach focuses on the relationship between *procedure and outcome*. This framework assumes an “internal, process morality” to the law,<sup>2</sup> wherein parties that cannot agree on the interpretation or application of the law can and should agree on a fair process or procedure by which to resolve their dispute. Merits of the case notwithstanding, a case can be lost simply because proper procedure was not followed.

#### *Family Car Hypothetical 7:*

Instead of directly approaching your parents about borrowing the car, you decide to try a process-oriented approach. You sit down with your parents to create a new, fair process that controls when you can exercise privileges like taking the car. Together, you decide that from now on, you have to request the car a week in advance so everyone can arrange their schedules. Further, all your chores and homework must be done before taking the car. You immediately submit a request for next week and start getting ahead on your work.

8. Law and Society: *“This rule does not make sense in our community.”*

This approach frames the law as the “external product of values, culture, history and religion,” as opposed to the “internal product of reasoning.”<sup>3</sup> Accordingly, a Law and Society framework recognizes the *social context* in which laws are created and applied. It acknowledges the unintended consequences of the legal system for marginalized groups of people and for how institutions are structured. It also imagines lawyers as guides through the legal system. This is typically a multidisciplinary approach, as analysis might draw on history, sociology, or political science, among other fields.<sup>4</sup>

*Family Car Hypothetical 8:*

One of your older sisters has more experience with your parents and steps in to advocate on your behalf. You’d like to drive the car by yourself. Your parents are against that idea—they didn’t have a privilege like this one as your age. Your sister explains to your parents that it is unfair to apply rules from their childhoods in the city to your modern life in the suburbs. She pulls out a folder of research showing that youth in the suburbs need cars more than youth in the city.

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.”<sup>5</sup> Because economic theory suggests that certain costs will deter certain behaviors, legal rules can be designed to anticipate and tailor those costs and regulate behavior accordingly. You might use economic theories and methods (like price theory and statistics) to predict compliance with a new criminal law or, in a similar vein to Legal Realism, to argue that a victory for your client would incentivize similar actors to behave most efficiently moving forward.<sup>6</sup>

*Family Car Hypothetical 9:*

This time, you are using the law and economics theory of efficiency. You remind your parents that their lives would be much easier if you could drive by yourself: You could take the car while they are otherwise occupied, refill the tank as needed, and even pick up groceries on the way home from the mall. Even better, they will not have to drive you around. If they make you wait until you turn eighteen, they will miss out on a whole year of this saved time!

## II. Defining the Rhetorical Setting: How to Pick the Best Tools

Now that you're familiar with some of the most common analytical approaches, 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 document's analytical approach and its organization.

*Family Car Hypothetical:*

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?

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.

Consider the rhetorical problem every time you complete a legal writing task by thinking about four elements:

**Purpose** – Why am I writing this document? What do I want to communicate?  
What form of analysis best presents my information and arguments?

**Audience** – Who is my reader? What knowledge or experience does my reader have?  
Which analytical frameworks are my readers likely to respond well to?

**Scope** – What obstacles might prevent me from conveying meaning to my reader?  
What methods of argument are possible, from the authorities I found?

**Stance** – From what point of view should I present my information?  
How do I want my reader to feel after reading my writing?

Examples of these rhetorical elements are listed on the next page. Remember that the rhetorical setting can be complex, and there often can be more than one of each rhetorical element for a given document. You may want to decide which purpose, audience, scope, and stance is top priority.

## Examples of the Rhetorical Elements in Legal Writing<sup>7</sup>

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

<sup>1</sup> 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.

<sup>2</sup> *Id.* at 342.

<sup>3</sup> *Id.* at 314-49.

<sup>4</sup> For a more extensive discussion of Law and Society, see Lynn Mather, *Law and Society*, in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* (Robert E. Goodin, ed., 2013).

<sup>5</sup> *Id.* at 347.

<sup>6</sup> For a more extensive discussion of Law and Economics, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (3D ED. 2000).

<sup>7</sup> See *id.* at 287-93 (discussing many of these examples and others).