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CICERO

A Three-Part Seminar on Advocacy
Ethos, Logos, Pathos

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LOGOS

The Use of Logic by the Advocate

Logic is supposedly the core of law school. Isn't logic part of what it means to "think like a lawyer"?

Unfortunately, I cannot think of any law school that has a class on formal logic. Perhaps it is assumed incoming students know the rules of logic, even though law school requires no prerequisite classes for admission. And perhaps, even though law school is a professional school, actually teaching logic would be considered veering too close to being a trade school, which professors seem to think is anathema.

The result: generations of graduates who cannot make arguments that are valid (and do not even know what that means).

Here is a short primer on logic.

Terms

Proposition: A statement that is true or false

Premise: A proposition that supports an argument's conclusion

Argument: A set of propositions aimed at persuading

Deductive Argument: An argument; if the premises are true, the conclusion must be true

Inductive Argument: An argument; if the premises are true, the conclusion is probably true

Validity: Where the conclusion follows from the premises

Soundness: Where the premises are true and the argument is valid

Logical Fallacy: An error in reasoning

Types of Legal Arguments (in order of strength)

Statutory Law (Canons of Construction)

1. Plain meaning analysis – It means what it says¹
2. Legislative intent – It means what the legislature says
3. Statutory context (*pari materia*) – It means what the other statutes say it means (read the statutes together)
4. Void for vagueness – It doesn't mean anything!²

¹ But see State v. Courchesne, 262 Conn. 537 (2003)(Holding the court should defer to the legislative intent, even when the meaning is plain).

² Admittedly, this is more a constitutional argument than a canon of construction.

Case Law (the common law)

1. Stare decisis (argument by analogy) – prior decisions require this decision. ‘In that case, the court held X. In this case, which has similar critical facts, this court should also hold X’
2. Rebut – prior decisions do not apply because the facts are different; prior decisions do not apply because the decision should be interpreted narrowly
3. Weight of authority, trend in authority where there is a conflict of authority
4. Controlling v. persuasive cases (and unpersuasive cases)³
5. Precedent must be overruled because it is obsolete or poorly reasoned

Balancing Tests (Deciding which competing interest is more important)

Policy Arguments⁴

1. What is the policy or purpose behind the law? The court’s decision should advance that policy;
2. In cases of first impression, what policy should the court advance? You are asking the court to create law (and perhaps asking the court to act as the legislature); give them a powerful story to encourage them;
3. What will happen in the real world if the court decides this way? What are the social goals? But, is the court the proper branch to decide?

Judicial Economy (If you do this, you’ll have less work)

Logical Structure

³ Attack the reasoning, *not the judge*, of a poorly reasoned decision. Judges belong to the same club, you don’t.

⁴ Policy may be low in the pecking order, but remember the law is born of policy, and the law should do nothing but serve policy.

Legal arguments are based on: 1) applying a rule to a set of facts and stating the necessary outcome, or 2) comparing a prior case to this case and stating the outcome of this case should be the same as the outcome of the prior case. Legal arguments, therefore, often take two forms: 1) a syllogism; 2) an analogy.

In both forms, begin with the point you are making (the bold assertion), then state the argument supporting your point. This is crucial. If you begin with your argument, without stating the point of your argument, your reader – your intelligent, but busy and impatient reader – will feel as though she is going bushwhacking with you, rather than going to the summit.

Argument by Syllogism; BaRAC!:⁵

BaRAC is ‘Bold Assertion, Rule, Application, Conclusion’⁶

BaRAC is just a deductive syllogism:

Do not go on bombing runs, citing case after case, as though you are dropping one bomb after another, hoping to hit your target. Rather, use the structure of a deductive syllogism.

⁵ TRAC (Topic, Rule, Application, Conclusion) and IRAC (Issue, Rule, Application, Conclusion) are for memos, not for argument.

⁶ Legal Writing by Design, Rambo and Pflaum. The “I deserve an A,” examples are inspired by an example from this book.

Example:

Socrates is mortal;⁷
All men are mortal;⁸
Socrates is a man;⁹
Socrates is mortal.¹⁰

Becomes...

- a. State your position (i.e., Bold Assertion);
- b. State the law (Rational);
- c. Explain the law (Explanation) or prove the law (Rule Proof)¹¹;
- d. Apply the law to the facts of this case (Application);¹²
- e. Refute your opponent's position;¹³
- f. State your position (Conclusion).¹⁴

Argument by Analogy

Argument by analogy is an argument the court should decide your case the same way another court (or maybe even this court) decided a similar case (this is argument by use of stare decisis).

⁷ Bold assertion

⁸ Rule (First Premise).

⁹ Application (Second Premise).

¹⁰ Conclusion (That follows from premises).

¹¹ Prove this is the law by citing the cases. Explain the law if it is complex, prove the law if the law is not well established

¹² Prove these are the facts by citing the record.

¹³ A mini-BaRAC may be applied in this section

¹⁴ As opposed to a the predictive writing of a memo, which would state:

1. Is Socrates is mortal?
2. All men are mortal
3. Socrates is probably a man
4. Therefore, Socrates is probably mortal

The best case to use in an argument by analogy is a case that: 1) Has the same issue; 2) Has the same (or similar) *material facts*;¹⁵ 3) Has good reasoning; and 4) Has a holding favorable to your position.

To make an argument by analogy:

1. State your Bold Assertion
2. State the rule
3. Introduce the analogous case and state the point of the analogy
4. Discuss the analogous case (holding, facts, issue, holding, rule, reasoning)
5. Return to this case
6. State the *material fact to material fact* comparison
7. Apply the court's reasoning to your case
8. State your conclusion.

Example:

Socrates is mortal.¹⁶

All men are mortal.¹⁷

Plato is a *man*.¹⁸

Therefore, Plato is a mortal.¹⁹

Like Plato, who is a *man*, Socrates is a *man*;²⁰

Therefore, like Plato, who is mortal, Socrates is mortal.²¹

¹⁵ Material facts are facts that are relevant to the rule. For example, given the rule of what it takes to earn an A, one of the material facts is the fact that the student earned an A on the Final Brief.

¹⁶ Bold assertion.

¹⁷ Rule.

¹⁸ Analogous case, with material fact in italics.

¹⁹ Holding, reasoning.

²⁰ Material fact to material fact comparison.

²¹ Conclusion.

Rebutting Your Opponent's Argument

1. After you have asserted your argument, rebut you opponent's argument, then conclude. Use BaRAC;
2. Do not set forth your opponent's argument, then try to prove it incorrect. If you do so, you are turning part of your brief over to your opponent, and letting him argue in your brief.
3. Rather than argue, "My opponent argues I should get a D because ...," Argue, "I should get an A, not a D as my opponent argues, because ..."
4. If your opponent's argument uses a rule (from a case or statute), rebut the argument by arguing: 1) The rule does not apply to these facts;²² 2) There is an exception to the rule; 3) The rule is void for vagueness; or 4) The rule is unjust.
5. If your opponent's argument uses an analogy, rebut the argument by arguing the 'analogous case': 1) Does not have the same issue; 2) Does not have the same (or similar) material facts; 3) Does not have good reasoning; or 4) Does not have the same holding.

Common Logical Fallacies

²² This is the 'beautiful legal theory beat up by a brutal gang of facts' tactic.

1. *Argument from Consequences* (I don't care if my opponent is right, if he gets his way, other bad things will happen, therefore he is wrong)
2. *Straw Man* (Even though I know my opponent is arguing that, I'm going to subtly mischaracterize his argument so it seems ridiculous and you will think he is wrong)
3. *Appeal to Irrelevant Authority* (My opponent is wrong because my expert – who I secretly admit knows nothing about this subject – says he is wrong)
4. *Equivocation*
5. *False Dilemma* (Even though we have five choices, I'm going to pretend we have only two choices and say you have to choose one of the two)
6. *Not a Cause for a Cause* | Post Hoc Ergo Propter Hoc (Because this event happened right before that result, this event caused that result)
7. *Appeal to Fear* (If my opponent gets his way, the thing that you cherish the most will be destroyed, so don't let him have his way)
8. *Hasty Generalization* (Because it is raining this morning, it will rain every morning)
9. *Appeal to Ignorance* (This must be true because there is no proof it is not true)
10. *Guilt by Association* (My opponent is making an argument that is also made by the most evil person in the world, so my opponent's argument is wrong)

11. *Appeal to Hypocrisy* (Even though we're arguing about Issue A, my opponent wants you to know my car is dirty. I reply, I want you to know that my opponent's lawn is overgrown)
12. *Slippery Slope* (If my opponent gets his way, a series of increasingly bad things will happen until the world ends)
13. *Appeal to the Bandwagon* (Everyone else thinks this is right, therefore this is right)
14. *Ad Hominem* (My opponent is wrong because he's a jerk)
15. *Composition and Division* (I won my last ten arguments, so I must win this one)

Rhetorical Devices

1. Primacy/Recency
2. Rule of Threes
3. Repetition
4. Anchoring
5. Juxtaposition



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