LEGAL COMMUNICATION

Oral and Written Communication
to Achieve Legal Objectives

Legal communication builds on all of the other tools of legal literacy discussed in this book. Effective communication in a legal context allows students of legal studies and litigants to describe (frame) people’s needs and concerns using the concepts and terminology of the law; locate the legal institution (court or administrative body) with jurisdiction to respond to them; identify and plan the steps to be taken in legal processes (court or administrative procedures); prepare for those steps and take them (using documents and communications) when required; find, present, and explain the legal materials (legislation and cases) that operate as authorities; make well-organized and persuasive arguments (about facts and law) to decision-makers, and advocate coherent ideas and proposals for improving law and the legal system.

Legal communication also occurs both in adversarial and transactional contexts, required to achieve the legal goals of making a will, negotiating a contract, or offering to buy property. However, if challenged, these and other transactions will require legal proceedings either to implement or undo them. This chapter focuses on communication for the purpose of assisting judges and
tribunals to resolve legal disputes of all kinds, whether arising from contracts, accidents, or other causes.

**Proof of Facts in Law**

Legal decision-makers refuse to decide hypothetical questions. The judicial (and quasi-judicial) role is to apply the law to real situations that have given rise to specific disputes. Legal decisions are therefore based on the facts of particular circumstances, actions, or events. In litigation therefore, judges must first gain knowledge of these factual matters, then proceed to consider which law should be applied and what it requires. Thus communication between disputing parties and decision-makers is required to reveal the facts of the matter; discover the relevant law; decide how the law applies to the facts; and determine the consequences of that application.

The resulting judgment or order will state the decisions that have been made on all of these matters, including findings of fact. It is therefore inaccurate to talk about communicating facts to courts or tribunals. Legally speaking, there are no facts in a case until a decision about them has been made. Another way of putting this is to say that only proven facts are considered for the purpose of deciding the current case.

Evidence is the information communicated by the parties to the decision-maker in order to prove facts. Here’s an example: when applying for a passport, it is necessary to prove a place of birth in order to establish citizenship. An oral statement based on family history and tradition will not be enough for the passport office—this evidence is not sufficient proof of the fact of citizenship. Instead, documentary evidence such as birth certificate will probably be required to support a finding of citizenship and therefore of entitlement to a passport.

Before the facts are found (concluded to be proved) by a decision-maker, they are only allegations, or suggestions of what the facts are. When information is presented by the parties, it must first be admitted as evidence by the decision-maker, which means it will be taken into consideration when deciding the facts. The admissibility of certain evidence may be opposed by the other side in an adversarial matter, when they do not wish it to be used. Witnesses who can prove they are experts are allowed to give opinions on technical matters, but ordinary witnesses must stick to reporting only what they have
experienced through any of their senses (sight, hearing, etc.). If evidence is decided to be inadmissible, then it will not be considered further when finding the facts. When considering which alleged facts have been proved, a decision-maker may accept some or all of the admitted evidence. Evidence that is accepted is taken to be truthful and valuable. A judge or tribunal then weighs all of the accepted evidence to evaluate its contribution in convincing the decision-maker(s) which facts have been sufficiently proved. Note that information is not evidence until it is admitted, admitted evidence may not ultimately be accepted, and only evidence that has been admitted and accepted will be weighed (evaluated) when determining the facts.

The facts stated in the decision of a legal dispute are not necessarily the same as the truth of what happened. They are only that portion of the truth which can be proved by evidence. And there is yet another restriction on the facts in legal proceedings: only some facts are relevant, or legally worth considering, when making a decision. The relevancy of a fact is determined by the legal issue to be decided and the applicable law. If a fact is not related by logic or in any other way to the legal question, then it will be disregarded in making that decision. For example, the fact that an applicant is a doctor is not relevant when making the decision whether he or she should be given a passport.

The world of legally proven facts is therefore a virtual one, and the people in it are like avatars—they do not have all the depth and detail of living persons. This is why people may not recognize themselves or the truth of their circumstances in the facts recited in a legal judgment. The law adopts a model of how people are expected to act, and the legal system ensures conformity to it. In the “game-world” of law, a pre-programmed fact scenario recognized as familiar by the legal system may determine the legal outcome even though the truth may be more complex.

Law schools teach budding lawyers to be objective, dispassionate, and professional. These traits may lead lawyers to ignore the social context and personal meaning of events to their clients, and focus solely on the legally relevant (and provable) facts. What is not legally relevant is inconsequential. As a result, lawyers begin to view people solely in terms of their legal roles and legally recognized relationships, and judges may follow suit. The technical requirements of the legal system thus take priority over the needs and concerns of the public. In this process, perspectives are reframed in legal terms such that the original voices of clients are muted and their real “story” is lost in the legal facts.
Litigants without lawyers usually have no hesitation in telling their full stories to legal decision-makers. Courts and tribunals may allow more latitude to such parties when presenting their evidence. Nevertheless, a self-represented party may be stopped at some point if he or she clearly fails to follow the rules for proving facts that form part of the law of evidence. The best known restriction on the admissibility of evidence in this area of law is the rule against admitting hearsay as evidence, which is repeating information stated by someone who is not present (e.g., “John told me he saw the light was yellow when I went through the intersection”). Hearsay is second- or third-hand information. The hearsay rule demonstrates the legal preference for evidence given in person by witnesses who directly observed or participated in the events in question. In many administrative tribunals and agencies, the strict rules of evidence (such as the hearsay rule) are not enforced, and facts may be proved through hearsay and other less formal means such as affidavits (sworn statements in writing).

The results of most legal disputes are determined by the facts found by the decision-maker: a party has either proved all the necessary relevant facts, or has not. Whether the rules of evidence are enforced or not, it is still up to the person who has the burden (responsibility or onus) of proof to offer admissible, believable, and sufficient evidence of all facts he or she must prove. In most cases, the person who alleges a fact must prove it. The burden of proof is the duty to prove everything you allege as a fact. The standard of proof is the degree of certainty the court or tribunal requires before finding a fact to be proved. In civil proceedings, the standard of proof is described as a balance of probabilities: based on all the relevant evidence, it is more likely than not that a particular fact is the truth of the matter. In criminal matters, a higher standard, proof beyond a reasonable doubt (leaving no real doubt in one’s mind) is required.

In summary, legal communications about disputed facts involve a burden to provide sufficient information that will be admitted as evidence and accepted as truthful in order to prove all the relevant facts according to the standard of proof required in the legal proceedings.

LEGAL ARGUMENT

Legal argument consists of ideas presented as the best way to arrive at a rational answer to a question faced by a legal decision-maker. The questions that need
to be answered depend on the legal issue involved. Issues in disputed cases usually involve questions of fact, and sometimes questions of law. Legal questions take various forms, such as:

What facts have been proved, and by whom?
What is the appropriate law to apply to this case?
How is the law to be interpreted and applied?
What should be done according to the law as applied to this case?

There are different forms of argument for each type of question that arises in legal decision-making.

First, let’s consider questions of fact. Arguments about facts are based on the *inferences* (conclusions that fill gaps) that should be drawn from the evidence admitted by the decision-maker. In some situations, there may be an independent eyewitness who observed all of the events in question. If there are no doubts about that person’s memory, eyesight, honesty, or impartiality that may affect his or her *credibility* (believability), then there is little to argue about concerning the information provided in the testimony. What such a witness reports will usually be accepted by the decision-maker as good proof of the facts they speak about.

In cases where there is no such convincing proof, then a *factual argument* may be presented. Argument about facts is based on reasoning about probability. Given the statements of witnesses, available documents, and all other admitted evidence, what is the most probable reconstruction of what actually happened? In considering this question of probability, a decision-maker will rely on his or her common sense, understanding of human nature, experience of similar events, and knowledge of procedures and processes that are usually followed in similar situations. Arguments about facts should therefore appeal to these ways of thinking. Factual arguments may take these forms:

- It makes good sense to conclude that things happened this way.
- Human nature tells us that people usually act in this way in such circumstances.
- We know that people usually follow this approach when in this situation.
An argument of fact invites the decision-maker to infer that things probably happened the way the speaker or writer suggests, and that such a conclusion makes sense, taking into account all of the evidence.

Next, let’s look at argument concerning questions of law. Law takes different forms, and each calls for a unique method of argument. Rules are perhaps the most common form of law, and certain types of argument are useful when they are disputed. A threshold issue in any legal dispute is jurisdiction—the question of whether the decision-making body has the authority to deal with the case and to give the requested remedy (or relief). Jurisdiction is frequently defined by rules. For example, “A claim for damages under $10,000 shall be made in the small claims court”; or, “An appeal must be filed in writing with the Board within 14 days of receiving notice of a decision.”

These rules prescribe which legal institution has jurisdiction over a certain type of claim, and what must be done before a decision-making body has jurisdiction to hear an appeal. Rules often use the words must or shall, which usually mean something is mandatory (required and not optional).

The most frequent questions to be answered by decision-makers about rules (jurisdictional or otherwise) are: “Which rule governs the situation?” and “How should the rule be interpreted?” The first question is often determined by the way the legal issue is framed. Let’s take as an example unusually damaging contact between players in a professional sports game. The situation may be framed (characterized) as a tort (non-criminal infliction of harm), or as a criminal offence, or both. If the event is framed as a tort, then the civil law of assault and battery would apply, and if as a crime, then criminal law would be applicable.

As I discussed in the previous chapter, Canadian courts look to the purpose of legislation as a guide when questions arise about its proper interpretation. Interpretive arguments therefore may suggest that statutory wording should be given a certain meaning, because the result of doing so would carry out the intention of the lawmakers and fulfill the purpose of the legislation. In addition to the surrounding context, arguments about legal interpretation should also deal with the precise wording of the law in question to respond to concerns of a decision-maker who takes a textual approach to interpretation. The question as to how a legal rule applies to a specific fact often calls for argument based on legal deductive reasoning in the form of a syllogism, which will be discussed in the final section of this chapter.
In addition to rules, law can also take the form of *discretion, standards* (sometimes called tests), and *principles*; there are types of argument appropriate for each. Discretion may be divided into two types: *unfettered discretion* (unconstrained authority to decide), and *discretion according to law*. Someone who has unfettered discretion (such as a government minister in some situations) may make a decision based upon whatever factors he or she considers relevant and important. If one is allowed to make arguments to such a decision-maker, they are not legal arguments in the same sense as those made to a judge, and the courts will not interfere in such decisions. Conversely, some decision-makers (such as administrative boards and tribunals) are given discretion to decide within legal limits. These limits are set by *policy, situational factors, or any relevant considerations*. Discretionary decisions made according to law must respect such limits, and the courts will intervene if the legal guidelines for decision-making are ignored or overstepped. *Predictive reasoning* may be used to foresee the effect of making a decision one way or the other. Arguments about how to exercise discretion according to law may therefore highlight the probable effects of deciding in a particular way:

It would promote (or frustrate) important policy to decide in this way because of the likely consequences, such as . . .

The legislation requires you to take the following matters into account in making your decision, and they support our position in this matter.

Here are some relevant factors you should consider in exercising your discretion, which you will see point to a decision in our favour.

One clue that discretion is involved in decision-making is the use of words such as *may, in its opinion, in its view, or decide having regard to the following matters*. Terminology like this means that a decision-maker has the authority to make a particular decision, but is not required to do so.

Tests or standards are a form of law often found in the common law as it has developed over centuries. These are common law rules or principles that judges have found necessary in areas of law such as torts and contracts to establish legal rights and obligations. Sometimes the requirements of tests or standards are described as the *elements* that must be shown to exist to make a claim. For example, to be successful in a claim involving the tort of *negligence*,

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it must be shown that the defendant had a duty to take care, that there was a breach of that duty, and that damage (harm) resulted. Duty, breach, and damage are considered the basic elements of the tort of negligence, although the law is more complex than this. Because common law tests or standards are drawn from precedents, one appropriate way of arguing about them is to use analogical reasoning (reasoning based on similarity). Arguments by analogy are intended to show that the question to be answered has been decided before by a precedent, or even if the facts are quite different, that the previous case nevertheless provides good guidance although not a precedent. The counter-argument regarding analogy is to distinguish a previous case—to show how it is significantly different from the present one, and therefore shouldn’t be considered a precedent or even useful as a guide. Arguments about common law legal tests or standards may be phrased in the following ways:

The test to be applied in this case is met in the following ways. . . .

All of the elements required to answer this question in our favour are found here as follows. . . .

The facts in this case are substantially the same as (different from) those in the case of . . . which should (not) be considered as a precedent; therefore the decision here should (not) be the same.

If legislation is not relevant and cases are used as statements of the law, then the legal issue probably concerns a common law test or standard. However, standards are also sometimes found in laws such as building standards and safety codes. These types of standard are actually rules created by legislation.

Lastly, law may take the form of general legal principles. Because principles are general statements, there are often no situational factors, guidelines, tests, or elements added to them to guide decision-makers. Sometimes different legal principles seem to lead to opposite decisions in a particular case. The scope of application of principles is also sometimes in doubt. One form of argument that is appropriate when dealing with legal principles concerns consistency or compatibility—whether a particular foreseeable result would or would not be in harmony with a principle. Balancing is another form of argument that responds to the problem of competing principles. A legal principle can usually
be paired up against one or more opposing ones (like the rules of legal interpretation), leading to an argument that one is more important in the particular circumstances. Arguments about legal principles can therefore be constructed in these terms:

The principle should (not) be extended to cover a situation like this.

It would be (in)consistent with the principle to decide this way for the following reasons.

When balancing the principles in this situation, the principle of . . . should be given more importance because.

Sometimes legal principles are expressed in the form of rights, such as those found in the Canadian Charter of Rights and Freedoms, and in constitutional documents in other countries. However, not all principles are found in legislation. The principles of natural justice, for instance, were developed by courts through precedent to ensure fair administrative decision-making according to law.

A single legal issue in a relatively simple situation will usually require some factual argument, plus one or two arguments about the law. A complex dispute with many legal issues and extensive, conflicting evidence may call for all the types of argument I have defined. For every argument made, the other side will likely have a counter-argument.

LEGAL WRITING

Lawyers write many things: legislation, contracts, wills, pleadings filed with courts, letters to their clients, and demands for the payment of debts. All of these documents can be considered as legal writing. The focus in this section, however, will be on writing that contains legal arguments. Such documents are usually called written submissions (or written argument) in Canada, and briefs in the United States.

Law is expected to be rational, based on comprehensible ideas and logical thought. Legal arguments accordingly use legal concepts, and deductive, inductive, analogical, and other types of reasoning to provide answers to legal questions. Emotions such as feelings of sympathy or disgust are not legitimate
grounds for answering legal questions because they are considered irrational. The rule of law requires legal decisions to be made according to legal rules and principles, not personal feelings or preferences. But it is not correct to say that emotions must be disregarded in legal writing. Written submissions may contain more than just rational arguments.

Justice Scalia of the United States Supreme Court and his co-author suggest that legal argument should invoke moral approval, perceptions of justice, and reasonableness in addition to providing technical legal answers for the issues to be decided. These experts and others agree that good legal writing may appeal to the emotions of a decision-maker as well as to their intellect. Thus, argumentative legal writing is rhetorical—it is intended to motivate the reader (a judge or tribunal) to take a desired course of action. Chief Justice McLachlin of the Supreme Court of Canada describes it simply as “communication that convinces.”

If persuasive legal writing were solely based on logic and rational thought, it might be possible to construct a computer program to evaluate the arguments presented and reach a decision. Many, however, would probably be uncomfortable allowing a computer to dispense justice. For instance, a legal artificial intelligence software program might logically decide to evict a widow and her children from their apartment on Christmas Eve, but it is difficult to imagine a human(e) judge doing so. We value decision-makers who are not only rational but also sensitive to emotions and perceptions of justice. It would not make sense to try to stimulate positive feelings in a computer, but it is worthwhile when writing for judges and other legal decision-makers.

Let’s consider some recommendations that have been made for making legal writing persuasive. They can be grouped into three broad topics of concern: those focusing on the audience for legal writing and its context; recommendations directed to the structure and organization of such writing; and lastly, suggestions concerning the contents and mode of expression.

Judges are the most important audience for persuasive legal writing, and they have often been stereotyped as conservative “nit-pickers”—concerned with details, precision, and formalities. Non-lawyers writing legal arguments will probably not be held to the same standards as legal professionals, but they should still keep the character of this audience in mind. Judges need to understand the argument being made, which encourages their use of the proper method to make a decision, and they must also feel that the desired result will be just, which gives them the motivation to decide as requested. As with all
writing, good grammar, correct spelling, and proper citation of legal authorities enhances the credibility of the writer and thus contributes to the persuasiveness of the submission. The context of legal writing is potentially the whole of the legal system, together with all the relevant concepts, rules, and principles. Non-lawyers are at a disadvantage when trying to integrate argument into relevant legal contexts, but basic knowledge of the key laws and principles may be enough to get by. Writers with limited legal knowledge are well advised not to use unfamiliar words or legalese that may have unforeseen (and unfortunate) meanings and legal consequences in the context where they are presented.

There is one simple but important recommendation for structuring a written submission: make sure it has one. This means organizing arguments and other material in sections using headings, points, and other methods to provide a clear and coherent framework for the document. Many courts regulate the form and contents of written submissions. In the Supreme Court of Canada, such documents are called factums, and according to the court’s rules they should be structured in the following order: Title; Table of Contents; Overview of Facts; Issues; Argument; Costs; Orders Sought; Table of Authorities; and, lastly, Statutes, Rule.

Today, factums filed with the Supreme Court of Canada and many other courts are available on the courts’ websites, providing examples of good persuasive legal writing.

Informal decision-makers, such as administrative boards and tribunals, often do not have such strict rules about the form and structure of written argument. In these forums, it will usually be acceptable if a submission includes four sections corresponding to the basic parts of any legal argument:

1. A statement of the legal issue or issues that must be decided (using the technique of framing)
2. Discussion of the facts to be proved and the evidence presented to accomplish that goal (factual argument)
3. Argument concerning the law to be applied (selection, interpretation, and application of the relevant law)
4. Conclusion and request (the desired decision or action to be taken)

Each section of a legal argument should contain cross-references to the others, showing how the law applies to the facts and leads to the requested
result. A written submission in a complex case may deal separately with several legal issues, using the four sections listed for each one. Sometimes one issue will depend on the answer to another so that submissions may contain “nested” sub-arguments, such as “if this argument is accepted, it leads on to a further issue which must then be decided.”

Good written submissions should include counter-arguments to points one side anticipates the other side will make, which can be integrated with the main arguments presented in a separate section. Most legal writing experts recommend presenting the strongest arguments first and the conclusion to be drawn from them, followed by an explanation of why they should be accepted. Overall, the basic points or general context should come before specifics and details. Legal argument should not simply regurgitate the research an individual has conducted, but rather present an orderly arrangement of ideas leading to the desired conclusion. There is no single correct structure for a written submission, but if it contains well-organized sections dealing with the issues, facts, law, and requests, it will likely be a persuasive document that is taken seriously by any legal decision-maker.

A written submission may appeal to a decision-maker’s emotions and perceptions of justice. This type of persuasive writing can be integrated in a legal submission when discussing the facts. Consider two different openings describing the facts of the same case: “The plaintiff is a pensioner residing in subsidized housing,” or “The plaintiff is Esther Peabody. She is 81 years of age and a widow. Her health is not good and she can only afford to live in this studio apartment because her rent is subsidized by the government.” The second description starts to paint a picture that evokes sympathy, while the first is a cold and abstract statement framing the situation using only bare legal concepts. If the case concerns a dispute with the landlord, the second, more humanized version gives the decision-maker some motivation to find a justifiable way to decide in the tenant’s favour.

Legal writing teachers recommend that the discussion of the facts in a written submission should take the form of a narrative rather than simply a list of details. A narrative encourages the reader to see the party about whom it is written as an individual with a unique history and perspective on the events in question. Two strategies writers can use when developing a narrative that may appeal to a legal reader are: to draw an analogy to a classic storyline that evokes sympathy (such as Scrooge and Tiny Tim), or to describe the party as a
typical underdog who deserves to be heard and treated fairly (like David and Goliath). Such a strategy when presenting the facts is sometimes called the theme or theory of the submission. Mrs. Peabody’s case, for instance, might be likened to a contest between David (an isolated individual) and Goliath (a powerful corporation). If Mrs. Peabody was disabled and could not find other accessible accommodation, then she might be considered a member of a minority group whose voice was not sufficiently heard. A legal narrative, however, must not be fiction—it must include all of the relevant facts, and not simply ignore inconvenient ones. One sure way to lose the sympathy of a judge is to lose track of the truth.

Persuasive legal writing is one important nexus of law and society—good written arguments can challenge decision-makers to find ways to mould the law to meet society’s needs. Judges are human, and should always be reminded that the parties who appear before them are human too.

LEGAL SPEECH

The principles of natural justice require that the parties involved in legal proceedings be given an opportunity to state their case and answer any opposing arguments. Sometimes that is done by way of written submissions, sometimes by oral presentations, and in some cases a combination of the two. This section focusses on oral argument (or oral submissions) made to a legal decision-maker.

In a debate between politicians in a Parliament or other legislative body, speeches are addressed to the presiding officer, often called the Speaker. Similarly, in legal matters communications should be directed to the judge or other presiding official, not to other parties. This practice is intended to allow everyone to make their oral submissions in an orderly manner. If there are opposing parties, the party who started the proceedings will usually go first, followed by the other side, with an opportunity at the end for the first party to respond to what they have heard (sometimes called reply or rebuttal).

The degree of a hearing’s formality in a legal matter varies among decision-making bodies (courts being the most formal), but experts recommend that an oral argument should be more like engaging in a discussion rather than making a speech. This advice is a reminder that the judge or tribunal expects assistance from the parties to make a good decision. For that reason, a judge or member of a tribunal may respond to oral submissions by asking questions or
commenting on the points that are made. Such interactions are a good indication as to whether the decision-maker understands the arguments, and where they see problems in the presentation. This discussion with a decision-maker permits clarification and further efforts at persuasion.

A person representing themselves without a lawyer can use oral argument to tell his story in a way that motivates the decision-maker to decide in his favour. He can explain the history and background of the case from a perspective which shows that the requested decision makes good sense and is fair and reasonable. Of course, he must also include legal arguments which will convince the decision-maker that the desired result is legally justifiable. If done effectively, statements made in oral argument will sometimes be repeated by a judge as part of the decision.

Here are some practical recommendations from legal experts on how to act when making an oral presentation: be sure use the correct form of address (respectful description) for the judge or other official to whom you are making your presentation (e.g., “Your Honour,” “My Lord,” “Madam Chair”); if in doubt, ask for guidance; be aware of body language—what posture and movements indicate about yourself and the decision-maker (do not fidget); maintain eye contact with all of the decision-makers to establish your credibility and gain empathy for your arguments.

Robert Barr Smith recommends that someone giving an oral argument should behave in a civilized way by speaking respectfully about all present, including any opposed parties

- be direct and be yourself; don’t pretend to be a lawyer or try to act like you think one would
- write out your argument, or have your written submission in front of you, but don’t read it; use your notes as a prompt while maintaining eye contact
- never interrupt another speaker (especially the decision-maker!); if you are interrupted, stop immediately and wait for direction to continue.

Finally, Antonin Scalia and Bryan A. Garner give this advice:

- organize and index all the written materials you will refer to; make copies for everybody, including any other parties
- be sure any visual aids are working and that you know how to use them
• dress appropriately
• be conversational but not familiar
• make your strongest argument first
• welcome questions, listen to them carefully, and answer immediately; don’t put them off until later
• if you don’t know the answer to a question, say so; don’t guess or say something you’re not sure of
• recognize friendly questions intended to help you better present your case
• never question the decision-maker except about procedure
• be prepared to discuss hypothetical situations and how they relate to your case if they are mentioned by the decision-maker
• be prepared to change the order of your argument if the decision-maker’s questions require it
• never become impatient or hostile if the decision-maker disagrees with you; make your best argument and move on
• don’t agree with a suggestion from the decision-maker unless you are sure it could not hurt your argument; don’t concede just to be amiable
• when you have nothing useful left to say, stop talking
• say “thank you for listening” when you finish.\(^9\)

Arguments may be adjusted and rephrased when making oral submissions in response to the needs and concerns expressed by the decision-maker in a way that is not possible in writing. A case may be won or lost because of an oral presenter’s ability, or lack of it, to answer questions and consider hypothetical situations. The core value of oral argument is that it allows the humanity of the parties to shine through. The best preparation for making an oral submission is to observe others presenting their cases to the decision-maker. If the hearings are not open to the public, the court or tribunal staff will usually describe what happens in an oral setting. Some decision-making bodies have placed videos of a typical hearing on their websites to provide guidance for parties appearing before them.

A good oral argument may help to change the law for the benefit of the party making it and for others who may have similar legal problems.
Good communicators take their audience seriously—they keep in mind the needs, assumptions, knowledge, and ways of thinking of their readers and listeners. Accordingly, legal communication should demonstrate understanding of the primary legal audience: judges, lawyers, tribunal members, and administrative officials. Previous chapters have provided an introduction to some of the important concepts, ideas, language, systems, and structures of the law. This section describes some of the ways members of the legal community typically think and communicate, insights that should be taken into account when presenting legal arguments to them.

Lawyers are expert communicators within the legal system. Can non-lawyers be as effective in communicating their own legal needs and interests? Is there something unique, mysterious, and difficult about the way lawyers think that gives them an advantage? Critics have given conflicting answers to these questions which we will explore below.

Law schools have traditionally described their mission as teaching law students “to think like lawyers.” Is “thinking like a lawyer” different from thinking like any other rational person? To help answer this question, we can examine three common thought processes found in law and other disciplines: deductive, inductive, and analogical reasoning.

Deductive reasoning (moving logically from one truth to another) is familiar in mathematics and takes the form of a syllogism (logical train of thought) demonstrated in this classic example:

- Major premise: All humans are mortal.
- Minor premise: All Greeks are humans.
- Conclusion: All Greeks are mortal.

Deductive reasoning thus involves going from generalizations to more specific instances that logically flow from the starting point. In law, it may be used when applying rules like this:

- Major premise: Failing to stop at a red light is an offence.
- Minor premise: You drove your car through a red light.
- Conclusion: You are guilty of an offence.
This example seems to show that deductive reasoning is no different in law than in other areas. Some critics, however, point out that it is more correct to word a legal syllogism as follows:

Failing to stop at a red light is an offence, but in some cases drivers may have a lawful excuse or exemption from the law.

If proved: that the light was red; that it was you who was driving; and you have no legal excuse or exemption.

Then you are guilty of an offence.

Describing the chain of reasoning in this way brings out the difference between statements that are simply assumed to be true, and propositions of law and fact that can be disputed. For instance, what if the vehicle in question was an unmarked police car responding to a 911 call? What might be the legal result if the vehicle had been hijacked by a passenger pointing a gun at the driver? The steps in legal deductive reasoning are always only provisional and subject to proof and exceptions. A legal syllogism therefore lacks some of the logical necessity associated with mathematics, but this form of reasoning is nevertheless well accepted in law. This leaves open the question, however, of whether legal deductive reasoning is a unique way of thinking.

*Inductive reasoning* (arriving at generalities based on specifics) is common in science. One famous story tells how Isaac Newton observed apples and other objects drop to the ground, and concluded there must be a general principle at work, thus “discovering” gravity. In law, inductive reasoning is primarily found in the development of rules and principles of the common law. A judge who considers past decisions made over many years may conclude they demonstrate a general principle that can be used to decide the current case. Inductive reasoning of this type can add something new to the common law. This is exactly what happened in the (legally) famous case of *Donoghue v. Stevenson*. In that decision, the British House of Lords reviewed many past decisions about harm inflicted on one person by another, and concluded that the *neighbour principle* is the basis of all claims for compensation arising out of the tort of negligence. According to this principle, a person’s neighbour, legally speaking, is anyone that person should have in mind who may potentially be harmed by his or her actions. This landmark case resulted in a more
generalized statement of the common law of negligence based upon an inductive mode of thought.

Some observers find induction in law to be almost mystical, and have described it as the reflection of changing social views in the minds of individual judges. Others find it less mysterious. Law schools have paid special attention to inductive reasoning, which they call *case synthesis* (forming a general idea based on a variety of decisions), so it has become one of the hallmarks of thinking like a lawyer. Knowing many past cases and having the ability to compare their facts in a detailed and organized way is important for legal inductive thinking. Perhaps there is also an element of insight or intuition in arriving at a new legal idea like the neighbour principle. It remains an open question whether the inductive method in legal reasoning makes legal thought unique.

Finally, legal *analogical reasoning* (drawing useful comparisons) is sometimes described as the most unique aspect of thinking like a lawyer. Analogies are used in legal thinking to fill gaps in the law where it is uncertain which legal rule or principle should be used, or when a law is vague or ambiguous. Finding a good analogy is similar to comparing the details of past decisions in inductive reasoning, but the goal is different. Making an analogy allows a rule used in one case to be borrowed for use in a different (but comparable) one. Analogies do not usually result in new rules or principles, but they extend the range of application of existing law to new situations.

Creative analogical reasoning in law can be described as an art similar to a poet’s choice of evocative metaphors and similes. Scott Brewer, however, describes the legal method of using analogies (*exemplary reasoning* is his term for it) as merely another form of rational thinking that attempts to identify important similarities (for legal purposes) in different fact situations. Perhaps it is right to call legal analogizing an art form. It does require knowledge of rules and cases in areas of law that are ripe to be borrowed, and imagination to make the connection.

Frederick F. Schauer’s view is that the idea of making a decision consistent with established law, although it may seem somewhat unfair or unjust in the specific situation at hand, is one unique aspect of legal thought. He describes this as putting systemic values (such as following precedent) above concern for making the best decision in the immediate circumstances. Michael Scriven, however, points out that all disciplines have rules to safeguard system values (such as statistical thresholds of significance) that arguably
frustrate systemic goals like the search for truth or justice.\textsuperscript{14} Competing values and goals that influence thought processes can be found in all professional realms, not just law.

Perhaps it is the combination of all of these methods of thought, supplemented by insights and intuitions, which make legal reasoning appear special. Or is it just another example of the complex problem-solving found in most professions? James F. Stratman points to the dynamic complexity of the social and argumentative field in which lawyers work—having to anticipate the counter-arguments of opposing lawyers, as well as the synthesizing influence of the court.\textsuperscript{15} From a critical legal studies perspective, we should be wary of professional claims to esoteric knowledge and unique skills that serve to elevate and insulate lawyers and judges from the rest of society.

As in other complex human endeavours, perhaps the greatest mystery is how legal problems are formulated in the first place. That returns us to the practice of framing life in legal terms and the necessary interplay of law and society with which this book started.

\textbf{CHAPTER REVIEW}

After reading this chapter you should be able to:

- describe the role of deductive, inductive, and analogical reasoning in legal thought
- explain the difference between factual and legal issues
- explain the concepts of facts, evidence, burden of proof and standard of proof
- describe the principal types of legal issues and the methods of argument appropriate to them
- describe the basic structure of a written argument or submission
- list some guidelines for making an oral legal argument
- prepare a basic written submission to assist legal decision making including the following parts: issues raised, relevant law, evidence presented, argument of law and fact, and decision requested