South Carolina Bar
Continuing Legal Education Division

2026 SC BAR CONVENTION

Breakfast Ethics

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South Carolina Bar

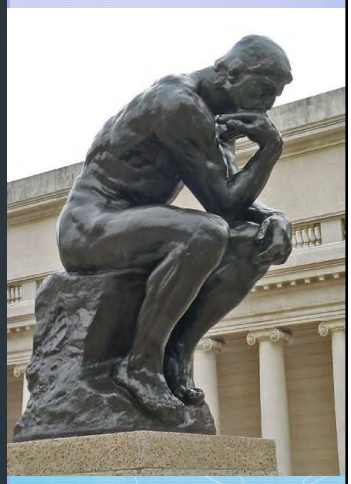
Continuing Legal Education Division

Illogic and Ethics

Lenne Espenchied

Logic, Argumentation, and Persuasion:

Illogic and Ethics



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Logic, *n.* The study of the principles of sound reasoning.

2

Persuasion, *n.* The process by which a person's attitudes are influenced by communications from other people.

3

Why study logic?

Lawyers who understand **logic** are more likely to:

- Reason clearly
- Structure stronger arguments
- Find weaknesses

4

Fallacy, *n.* Unsound or incorrect reasoning.

5

Informal Fallacy, *n.* **a** defect in the **content** of the argument.

Formal Fallacy, *n.* a defect in the **structure** of the argument.

6

1. Red Herring Fallacy

red her·ring

noun

1 a dried smoked herring, which is turned red by the smoke.

2 something, esp. a clue, that is or is intended to be misleading or distracting : *the book is fast-paced, exciting, and full of red herrings.* [ORIGIN: so named from the practice of using the scent of red herring in training hounds.]

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2. Straw Man Fallacy

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Straw man fallacy:

- Misrepresents the argument
- Light and flimsy
- Easier to defeat
- Reveals fear

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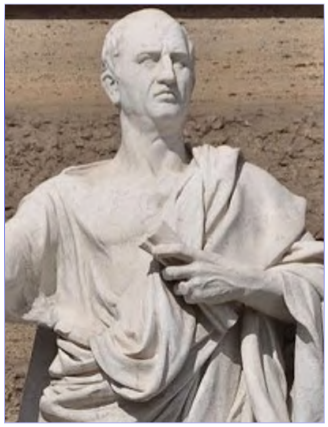
3. Ad Hominem Attack

"When you have no basis for an argument, abuse the plaintiff." ***-- Cicero***



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Ad hominem attack:

- Defaming or discrediting the proponent
- Personal characteristics that are irrelevant
- Not addressing the argument

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4. Cherry picking; nut picking

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Cherry picking:

- Ignores inconvenient, but relevant, evidence
- Misleading
- Confirmation bias

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Nut Picking:

- Ignores inconvenient **POSITIVE** evidence
- Misleading
- Confirmation bias

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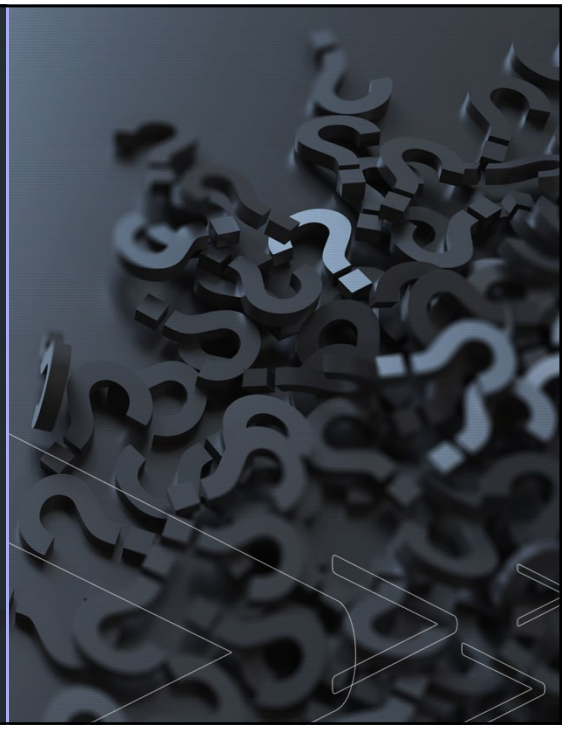
Is it ethical deliberately to apply logical fallacies to legal arguments?



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Restatement (Third) of Law Governing Lawyers §110, Comment b (2000):

Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid over-enforcement.

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ABA Model Rule 3.1:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

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ABA Model Rule 3.1, Comment 2:

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

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Restatement (Third) of Law Governing Lawyers, §110(1) (2000)

A nonfrivolous argument includes a good-faith argument for an extension, modification, or reversal of existing law. Whether good faith exists depends on such factors as whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer's position, or whether, for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.

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First Illustration:

"Notwithstanding the earlier rulings of the state supreme court, intervening events indicate that a candid attempt to obtain reversal of the employment-at-will doctrine is a nonfrivolous legal position in the jurisdiction."

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First Illustration:

"On the other hand, if the state supreme court had unanimously reaffirmed the doctrine in recent months, the action would be frivolous

in the absence of reason to believe that there is a substantial possibility that, notwithstanding the recent adverse precedent, the court would reconsider altering its stance."

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Second Illustration:

"…the law is and continues to be well-settled that absolute judicial immunity under §1983 extends to such errors and precludes an action such as that asserted by claimant. No intervening legal event suggests that any federal court would alter that interpretation. Given the absence of any basis for believing that a substantial possibility exists that an argument against the immunity would be accepted in a federal court, the claim is frivolous."

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Brunswick v. Statewide Grievance Committee

(Connecticut):

The commentary to Rule 1.2(a) of the Rules of Professional Conduct states in relevant part that "a lawyer is not required to pursue objectives or employ means simply because a client may want that the lawyer do so." When an attorney is aware that a good faith basis is lacking, his duty as a minister of justice every time must trump a client's desire to continue an untenable allegation.

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United Stars Industries, Inc. v. Plastech Engineered Products, Inc.
(U.S. D. Ct., Wisconsin)

The Basis of a "Baseless" Counterclaim

Although defendant made many requests directed to the overcharges, when it came to its own disclosures, it identified only one employee, Scott Ryan, as having information about them. It told plaintiff that Ryan had performed an "in-depth audit" and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an "internal audit staff" was. Undaunted, defendant named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim.

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GLT2, LLC v. Jane Doe and John Doe South Carolina, October 2025

- High-profile dispute involving U.S. Rep. Nancy Mace
- Charleston Circuit Judge J. Michael Baxley sanctioned an attorney and his client $48,456.74 under the Frivolous Proceedings Sanctions Act (S.C. Code §15-36-10) and Rule 11, SCRCP.
- According to Court Documents, sanctions were levied to prevent "future litigation abuse" and to ensure accountability for those who "knowingly filed a deficient petition and issued various subpoenas for depositions which had not been sanctioned or ordered by the Court."

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Hamilton v. Boise Cascade Express (Idaho)

*Lawyer sanctioned for deliberately mischaracterizing the other party's position

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Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.,
534 F. Supp. 2d 224 (D. Mass. 2008)

Throughout the trial, the defendants demonstrated a failure to accept the claim construction governing this case. In fact, with the exception of their ensnarement argument, their defense to infringement appears to have been wholly based on an attempt to obscure, evade, or minimize the Federal Circuit's construction of the patent-in-suit (the '678 patent). Even as early as the defendant's opening statements, they essentially urged the jury to adopt an interpretation of the patent claims developed by their experts instead of the construction mandated by the Federal Circuit.

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2. Rule 4.1 -- Truthfulness

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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- "The most my client can offer is $100,000."
- Certain statements in negotiating are not taken as statements of fact
- "bluffing," "puffing"

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Restatement (3d) of Law Governing Lawyers:

Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and **not** misstatements of fact or law….

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Factors:

- circumstances, past relationship of the negotiating parties;
- sophistication of the parties;
- plausibility of the statement;
- phrasing of the statement;
- related communications between the parties;
- known negotiating practices of the community; and
- similar circumstances.

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- Salary is $75,000 when it's $50,000
- Policy limit is $50,000 when it's $500,000

- Bottom line for settlement is $175,000 when it's $250,000
- Objective vs. subjective

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ABA LEO 439 (4.12.06):

"A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statement of material fact."

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ABA LEO 518 (10.15.25):

Lawyers acting as third-party neutrals lack "leeway" under Rule 4.1 for misleading statements (e.g., exaggerating settlement viability) that parties might rely on, even if puffery in bilateral talks.

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Is there a duty to disclose a mistake of law?

35

- Generally, no…but
- Possibly, if the misunderstanding of law was caused by the lawyer's misrepresentation

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Comment to Rule 4.1:

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

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3. Watch that talk!

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ABA Model Rule 1.6(a):

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."

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Elevator Talk

- Stop talking when others get on
- Emergency Call Microphone?

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Uber Talk

- Driver
- Driver's Cellphone
- Audio-Recording for safety

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Airplane Talk

- Conversations
  - Phone
  - In-person
- Visible laptop screens
- Shared Wifi

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Hotel Talk

- Business Center
- Shared Wifi
- Conversations

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Starbucks Talk

- Privilege waiver?
  - *MacFarlane v. Fivespice, LLC*
- Who can hear?
  - Reporters?
- Shared Wifi
- Conversations
- Visible laptop screens

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Social Media Talk

- *People v. Juliet Rene Piccone*
- 8 social media posts – client info
- Harrassing opposing counsel

45

Cop Talk

- *In Re Rhame*
- Acrimonious divorce
- Murder
- Lawyer interviewed by police

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Dinner Party Talk

- Who is Robert Galbraith?
- “Only a tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of prior to Sunday night could have found out something that many of my oldest friends did not know. To say that I am disappointed is an understatement. I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced."

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Tipsy Talk

- Tipsy D.C. lawyer Shulman
- Pfizer’s $3.6 B acquisition
- Tibor Klein, investment adviser who bought it, literally

48

Brother Talk

- Richard Woodward, CSW
- Suspended for 3 years
- Unaware
- $255,000

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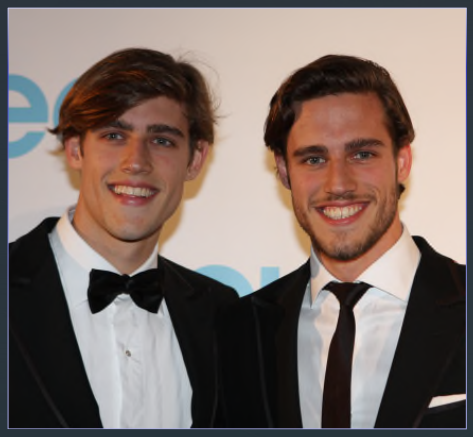
BFF Talk

- CSM Associate met BFF for lunch
- Excited to work on a major M&A deal
- Career advancement!
- BFF shared with stockbrokers



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Pillow Talk

- Tonya Jacobs – BakerHostetler
- Hubby James W. Balchan – insider trading
- National Semiconductor GC skipped a “wine and dine”

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For attending!

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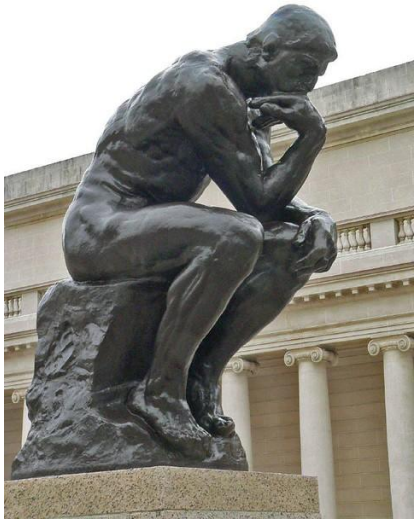
Logic, Argumentation, and Persuasion:

Illogic & Ethics



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Introduction

"Logic" is the study of the principles of sound reasoning; it encompasses the processes of thought and analysis necessary to compose sound arguments, to determine the validity of those arguments, to identify and eliminate fallacious arguments, and to communicate in a manner that can be trusted. "Argumentation" is the process of reasoning systematically to support a proposition; "Persuasion" is the process by which a person's attitudes are influenced by communications from other people. Lawyers who understand the principles of logical thinking are more likely: 1) to reason clearly than lawyers who do not; 2) to structure stronger arguments; and 3) to find weaknesses in their opponents' propositions.

One of the primary goals of law schools is to teach students foundational skills of logic and sound reasoning; the proverbial ability to "think like a lawyer" means to be able to reason logically and soundly. Tenets of legal reasoning like precedent, *stare decisis*, burden of proof, standards of review, and certain presumptions are tested with Socratic Method to help law students learn to think logically. The Socratic Method uses structured questions to explore complex ideas, to uncover issues and assumptions, to analyze concepts, to distinguish what is known from what is not known, and to develop a logical approach.

Although much of a lawyer's success relies on his or her ability to think logically, "the idea of teaching traditional logic to law students does not seem to be very popular."[1] Classic Aristotelian syllogistic logic is rarely taught, and logical fallacies are taught even less often, which means most lawyers have only a vague idea how to frame arguments, and how to recognize informal logical fallacies. In logic, a "fallacy" is reasoning that is unsound or incorrect. Fallacies are defects that weaken arguments, although they are quite common and can seem persuasive at first blush. A "formal fallacy" is a defect in the ***form*** of the argument. An "informal fallacy" is a defect in the ***content*** of the argument. Some examples of informal logical fallacies are:

1. **Red Herring Fallacy** – a different argument, usually introduced deliberately to shift the discussion to other issues where presumably the party has better arguments. A red herring changes the subject by drawing attention away from the original issue; however, a red herring fallacy can also occur accidentally when one of the parties either does not understand the original issue or does not know much about it.

   Historically, "red herrings" were used by dog trainers to train tracking dogs. The trainer would drag the red herring, a dead fish that had become quite smelly, across the trail of the creature he or she wanted the dog to track to teach the dog not to become distracted.

[1] BURTON, STEVEN I., *An Introduction to Law and Legal Reasoning* 1 (1985).

Red herrings are often used in mystery novels (clues that do not lead to the culprit) and in rhetorical political arguments (no explanation required). For example, in *The DaVinci Code*, Dan Brown cleverly created the character "Bishop Aringarosa," whose Italian name loosely translates "aringa" – herring and "rosa" pink or red. In the novel, Bishop Aringarosa appears to be at the center of several sinister conspiracies but is ultimately revealed to have been duped.

2. **Straw Man Fallacy** – A straw man fallacy occurs when an opponent misrepresents, distorts, or exaggerates the proponent's argument in some extreme way that makes it easier to attack, and then attacks the extreme distortion as if that were really the claim the proponent is making. Presumably, the name is associated with the fact that a straw man, like the hapless fellow in *The Wizard of Oz*, is light and flimsy, and therefore much easier to defeat than a real person; however, the first known use of the "straw man" image is several hundred years older. In his book *The Babylonia Captivity of the Church* (1520), Marin Luther responds to arguments of the Roman Catholic Church regarding the *correct way* to serve the Eucharist. While the church claimed that he was arguing *against* serving the Eucharist, Luther stated that he did not take the position, and in fact the Church was making this argument: "they assert the very things they assail, or they set up a man of straw whom they may attack." The *Online Etymology Dictionary* states that the term "man of straw" can be traced back to 1620 as "an easily refuted imaginary opponent in an argument."

   Consider the following example:

   Party A: This bank teller can't be trusted.

   Party B: Oh, so now bank tellers can't be trusted?

   The typical straw man argument is a disingenuous form of cheating that creates an illusion of refuting the proponent's argument by replacing it with a different argument that is easier to knock down; however, resorting to a straw man argument usually reveals that the opponent is either unable to address the legitimate argument or has misunderstood the true issue. It is poor reasoning because it responds to the wrong argument and leaves the real argument unanswered.

   A straw man argument can take several forms:

   - Quoting an opponent's words out of context—i.e., choosing quotations that misrepresent the opponent's intentions.
   - Presenting someone who defends a position poorly as *the* defender, then denying that person's arguments—thus giving the appearance that *every* upholder of that position (and thus the position itself) has been defeated.

- Oversimplifying an opponent's argument, then attacking this oversimplified version.
- Exaggerating (sometimes grossly exaggerating) an opponent's argument, then attacking this exaggerated version.

3. ***Ad Hominem* Attack** – As Cicero advised long ago, "When you have no basis for an argument, abuse the plaintiff." Rather than addressing the issue presented by the proponent, a*d hominem* seeks to make the proponent the issue. *Ad hominem* shifts attention by defaming or discrediting the proponent based on personal characteristics that are irrelevant to the argument, without addressing the argument itself. *Ad hominem* attacks are unfortunately common in political debates, where instead of addressing the proponent's arguments, the opponent attacks his or her character or motives. We will ignore the obvious lack of civility and manners to focus instead on the logical flaw: an *ad hominem* attack is illogical because even though a person's character is flawed, his or her argument can still be valid, so the criticism is not germane to the truth of the argument.

4. **Cherry picking; nut picking** – "Cherry picking" is a type of "fallacy of incomplete evidence," that points to specific cases that seem to support the proposition while ignoring the significant majority of cases or instances that refute it. The problem with cherry picking is that it ignores or represses inconvenient evidence that should be considered relevant in order to strengthen the proponent's position. The stronger the inconvenient evidence, the more fallacious becomes the argument. Similarly, "nut picking" is using individual cases to contradict a particular argument while ignoring more significant data that actually supports it.

   The problem with cherry picking is not that it advocates a particular client's position; rather, that it presents the evidence in a misleading manner by ignoring the stronger evidence. Like other humans, lawyers sometimes cherry pick subconsciously because of "**confirmation bias**," which causes people to process information to confirm their preexisting beliefs.

1. Is it "ethical" to deliberately apply logical fallacies to legal arguments?

Are lawyers prohibited from deliberately applying flawed logic in representing clients? According to the Model Rules lawyers cannot file a suit or assert a position when it is obvious that the action serves merely to harass or maliciously injure another. The gray area lies somewhere between a baseless claim and a meritorious, good faith claim that is nevertheless unlikely to prevail. Most sanctions against lawyers for frivolous claims come in the form of

court fines for contempt; bar discipline for frivolous claims is less common, as the Restatement notes:

> Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid over-enforcement. **Restatement (Third) of Law Governing Lawyers §110, Comment b (2000).**

A lawyer may be disciplined in federal courts for misbehavior that is "unreasonable and vexatious," a seldom applied standard established in Section 1927 of Title 28 that specifically relates to repeated filings. Even though bar discipline is uncommon, the ABA Model Rules prohibit frivolous claims unless some non-frivolous basis exists in law and in fact:

ABA Model Rule 3.1

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Comment 2 explains what is *not* considered frivolous:

ABA Model Rule 3.1, Comment 2:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

The Restatement echoes the same principles:

Restatement (Third) of Law Governing Lawyers, §110(1) (2000)

> A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

The Restatement discusses factors to be considered in determining whether a lawyer can ethically argue a position:

> A nonfrivolous argument includes a good-faith argument for an extension, modification, or reversal of existing law. Whether good faith exists depends on such factors as whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer's position, or whether, for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.

The Restatement also includes two illustrations regarding the ethical implications of challenging well-settled laws:

First illustration:

> The supreme court of a jurisdiction held 10 years ago that only the state legislature could set aside the employment-at-will rule of the state's common law. In a subsequent decision, the same court again referred to the employment-at-will doctrine, stating that "whatever the justice or defects of that rule, we feel presently bound to continue to follow it." In the time since the subsequent decision, the employment-at-will doctrine has been extensively discussed, often critically, in the legal literature, and courts in some jurisdictions have overturned or limited the older decisions. Lawyer now represents an employee at will. Notwithstanding the earlier rulings of the state supreme court, intervening events indicate that a candid attempt to obtain reversal of the employment-at-will doctrine is a nonfrivolous legal position in the jurisdiction. On the other hand, if the state supreme court had unanimously reaffirmed the doctrine in recent months, the action would be frivolous in the absence of reason to believe that there is a substantial possibility that, notwithstanding the recent adverse precedent, the court would reconsider altering its stance. **Restatement §110, Comment d (2000).**

Second illustration:

> Following unsuccessful litigation in a state court, lawyer representing the unsuccessful claimant in the state court litigation filed an action in federal court seeking damages under a federal civil rights statute, 42 U.S.C. §1983, against the state-court trial judge, alleging that the judge had denied due process to claimant in rulings made in the state

court action. The complaint was evidently based on the legal position that the doctrine of absolute judicial immunity should not apply to a case in which a judge has made an egregious error. Although some scholars have criticized the rule, the law is and continues to be well-settled that absolute judicial immunity under §1983 extends to such errors and precludes an action such as that asserted by claimant. No intervening legal event suggests that any federal court would alter that interpretation. Given the absence of any basis for believing that a substantial possibility exists that an argument against the immunity would be accepted in a federal court, the claim is frivolous. **Restatement §110, Comment d (2000).**

Courts try to strike a fair balance between legitimate but losing claims that merit a day in court and purely frivolous arguments. Lawyers are most often reprimanded for continuing to advance arguments when it has become clear that the arguments have no basis. The key is to be able to make a good faith argument in support of the client's position, even if the facts and law are against you.

Brunswick v. Statewide Grievance Committee, 931 A.2d 319 (Conn. App. Ct. 2007)

It is not that the plaintiff alleged partiality or corruption consistent with §52-418 in the motion to vacate, but rather that he persisted in that allegation despite not having a scintilla of evidence to support it. For that reason, we agree that the plaintiff lacked a good faith basis to maintain his allegation of evident partiality or corruption on the part of the arbitrators. The plaintiff further testified that his client refused to authorize him to withdraw the allegation. That is not excuse for his continued pursuit of the allegation. The commentary to Rule 1.2(a) of the Rules of Professional Conduct states in relevant part that "a lawyer is not required to pursue objectives or employ means simply because a client may want that the lawyer do so. When an attorney is aware that a good faith basis is lacking, his duty as a minister of justice every time must trump a client's desire to continue an untenable allegation.

United Stars Industries, Inc. v. Plastech Engineered Products, Inc., 525 F. 3d 605 (7th Cir. 2008)

The court upheld $30,000 in sanctions against Jones Day because of a "baseless" counterclaim:

Although defendant made many requests directed to the overcharges, when it came to its own disclosures, it identified only one employee, Scott Ryan, as having information about them. It told plaintiff that Ryan had performed an "in-depth audit" and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an "internal audit staff" was. Undaunted, defendant named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim.

Hamilton v. Boise Cascade Express, 519 F. 3d 1197 (10th Cir. 2008)

In *Hamilton*, the court sanctioned a lawyer for deliberately mischaracterizing the other party's position in litigation.

While challenging the way the opponent constructs the claim is usually an acceptable strategy, the law firm of Dewey & LeBoeuf learned the hard way to be wary of refusing to accept the construction once the court has defined the parameters of the argument, and its client suffered a $10 Million verdict as a result of its antics described in this case:

Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc., 534 F. Supp. 2d 224 (D. Mass. 2008)

> Throughout the trial, the defendants demonstrated a failure to accept the claim construction governing this case. In fact, with the exception of their ensnarement argument, their defense to infringement appears to have been wholly based on an attempt to obscure, evade, or minimize the Federal Circuit's construction of the patent-in-suit (the '678 patent). Even as early as the defendant's opening statements, they essentially urged the jury to adopt an interpretation of the patent claims developed by their experts instead of the construction mandated by the Federal Circuit.

2. Rule 4.1 – Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

a) What is a false statement?

An ethical dilemma arises for lawyers who negotiate on behalf of their clients: given that lawyers are forbidden from making a false statement of material fact or law to a third party, can a lawyer state that "the most my client can offer is $100,000" when the lawyer knows the client's limit is $150,000? Isn't this an example of a false statement of material fact? The answer is unequivocally, YES, this is a false statement of a material fact; however, it usually doesn't run afoul of the ethical rules because this sort of "horse-trading" talk is considered to be permissible "puffing."

Comment 2 clarifies that Rule 4.1 only refers to statements of fact, and certain types of statements made in the course of negotiating, like estimates of price or value placed on the subject of a transaction, are not taken as statements of material fact.

Comment

[2] **This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category**, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The Restatement offers a number of factors to consider, but is not always definitive in figuring out where the line is that puffing crosses into a material misrepresentation:

> "A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law…. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the parties involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by non-clients to be making nonimpartial statements, in the same manner as would the lawyer's client."

Clearly, lawyers do not have *carte blanche* to make any statement regarding any matter as "puffery," so caution is warranted. Some statements made in zealous negotiation clearly go beyond the puffery line and violate the ethics rule. For example, in 2015, a California legal ethics opinion posed the following example of a statement made by a lawyer in settlement discussions regarding a wage loss claim. The lawyer claimed his client was making $75,000 per year when, in fact, the client was earning $50,000. The ethics board considered this an improper false statement that is not permissible.

Similarly, the ethics board concluded that a statement that a client's insurance policy limit is $50,000 when it is actually $500,000 is an intentional misrepresentation of fact that misleads the other party and its lawyer.

Nevertheless, the California ethics board concluded that if a lawyer tells the other party that the bottom line for settlement is $175,000 when it is actually $375,000, this is puffery:

> "Statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or 'puffery,' are among those that are not considered verifiable statements of fact. A party negotiating at arms' length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise."

The ABA concurs:

> "A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, or its factual or legal position. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statement of material fact."

ABA LEO 439 (April 12, 2006). Bluffing, overstating or understating bargaining position, overstating the strengths or weaknesses of a client's position, and opinions regarding value or worth are not considered material facts subject to Rule 4.1. Ironically, the difference seems to be that statements of verifiable facts, like a person's salary, which can be confirmed by an employer, or the policy limits, which can be confirmed by the insurer, are not considered posturing or puffing. This seems ironic because if opposing counsel could verify but chose instead to rely on the other lawyer, it seems that opposing counsel should at least bear some responsibility for failure of diligence. Also see ABA LEO 518 (October 15, 2025) regarding a lawyer's responsibilities when acting as a third-party neutral.

b) Is there a duty to disclose a mistake of law?

In the course of negotiating a transaction, when a lawyer becomes aware that opposing counsel misunderstands the law, what is the lawyer's responsibility? For example, suppose opposing counsel has drafted a promissory note that does not meet the required elements for negotiability. Are you required to point this out? Generally, unless the misunderstanding of law was caused by the lawyer's misrepresentation, the lawyer does not have a duty to correct opposing counsel; in fact, most authorities even prohibit such a disclosure that benefits the adversary but harms the client.

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

3. Watch that talk!

The ABA Model Rules are clear regarding client confidentiality. ABA Model Rule 1.6(a) admonishes that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." Under Model Rule

1.6(c), a lawyer is required to act competently to safeguard confidential information, and make reasonable efforts to prevent the inadvertent disclosure of client information.

Unless an exception to the general rule applies, a lawyer cannot comment publicly about any information related to a representation; even the client's identity is protected by Rule 1.6. It does not matter whether others are aware of or have access to the information. The Rule encompasses not only the lawyers, but also other persons who participate in representing the client who are subject to the lawyer's supervision. Violations of Rule 1.6 can result in bar sanctions including formal reprimand, suspension from practice, and disbarment, and may also lead to civil malpractice claims.

Conversations about client matters carried on in many places and scenarios pose traps for unwary or careless lawyers. The following 12 kinds of talk can get you in trouble:

Elevator Talk

Lawyers are required to protect confidential client information wherever they are, so don't discuss client matters when any third party is present, and be sure you know whether the emergency call microphones are on even when no third party is physically there.

Uber Talk

Lawyers frequently rely on rideshare drivers to get them to and from the airport and meetings. Often, client conversations are necessary while traveling, but confidentiality rules still apply. That driver who seems disinterested is only half the problem. Uber recently announced that its drivers may audio-record passengers, ostensibly for safety reasons.

Airplane Talk

Protecting confidential client information can be challenging while sitting elbow to elbow with other passengers. I've often seen laptop screens fully exposed while harried lawyers with looming deadlines try to slip in a few more billable hours in flight. Frankly, this is a bad idea unless you've got the whole row to yourself, and even then, be sure no one behind you can see your screen. Screen protectors sometimes help. Be aware of the surroundings and don't work on sensitive matters on airplanes.

Hotel Talk

Lawyers often meet clients, take phone calls, and use wifi and business services in hotels. Some jurisdictions require lawyers to investigate the degree of security and weigh this with assessment of whether the communication is urgent, whether the information is sensitive. A lawyer has a long-standing duty to prevent being overheard when talking to a client on the phone. The technology amendments to the Model Rules (discussed below) require lawyers to be savvy and competent regarding other potential weak spots, like shared wifi and shared

business center computers. Placing client confidential information on an insecure data system is likely to be determined inadequate.

Starbucks Talk

Lawyer-client conversations should occur in a confidential setting. In a recent Oregon case, a lawyer narrowly escaped a privilege waiver argument for having a meeting in a booth at a café that was not in a private meeting room. Opposing counsel tried to require disclosure of the conversation, arguing that privilege did not apply because the meeting was conducted in a non-confidential, public setting. The lawyer was able to prove that the tables around them were empty and no one overheard the conversation. *MacFarlane v. Fivespice, LLC*, 2017 WL 1758052 (May 2017). Starbucks and other restaurants also have potential wifi issues. Reporters have overheard lawyers at lunch discussing client matters as if they were in a confidential setting. Avoid talking about client matters unless and until you have a private space.

Social Media Talk

In *People v. Juliet Rene Piccone*. 19PDJ041, January 13, 2020, lawyer Piccone was suspended for six months for making eight posts on social media that revealed client information; some of those posts also disclosed confidential attorney-client communications and disparaged her clients. In connection with one of those cases, Respondent posted on social media embarrassing information that had no substantial purpose other than to humiliate opposing counsel.

Cop Talk

In *In Re Rhame III,* 416 N.E. 2nd 823 (1981), Rhame had represented a husband and wife in various matters until their acrimonious divorce, in which he represented the wife. Shortly thereafter, the wife was arrested for murdering her husband, and Rhame was interviewed by the police, during which interview, he revealed details regarding their divorce and financial difficulties. After realizing he had revealed confidential information, Rhame reported himself to the bar and cooperated fully. Despite his cooperation, the Supreme Court of Indiana publicly reprimanded him for revealing confidential client information.

Dinner Party Talk

British lawyer Chris Gossage wishes he had eaten his words instead of his haggis. At a dinner party with his wife's BFF, Judith Callegari, Gossage revealed that Robert Galbraith is a nom de plume under which J.K. Rowling penned *The Cuckoo's Calling.* Callegari, not being selfish enough to savor such a juicy secret privately, immediately published this nugget on Twitter. Although Gossage's law firm apologized profusely, Rowling was howling mad: "only a tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of prior to Sunday night could have found out something that

many of my oldest friends did not know. To say that I am disappointed is an understatement. I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced." Gossage was fined $1,600 by the Solicitor's Regulation Authority for failing to act in the best interests of a client. He and Callegari were also sued by Rowling.

Tipsy Talk

According to the Securities and Exchange Commission, in 2010, a tipsy D.C. lawyer passed confidential information to a friend about Pfizer Inc.'s planned $3.6 billion acquisition of a pharmaceutical industry client. Unfortunately, the friend, Tibor Klein, an investment adviser, allegedly bought shares of King Pharmaceuticals Inc. shortly before the firm was acquired by Pfizer Inc. for $3.6 billion. Klein was charged with insider trading and ultimately barred from the securities industry. Schulman, who was not named as a defendant in the suit, learned about the deal because he represented King Pharmaceuticals in separate litigation. SEC vs. Tibor Klein (May, 2018).

Brother Talk

A Cravath, Swaine & Moore associate, Richard Woodward, was suspended from the practice of law for three years after improperly disclosing client confidences to his brother and a friend, who traded on the information. *In re Woodward*, 661 N.Y.S.2d 614, 615, 616, 615-616, 616, 615 (N.Y. App. Div. 1997). Richard Woodward stated that he was initially unaware that the men were using the information for illegal trades and, on one occasion, asked them both to rescind the trades. The Federal investigation into the matter revealed that John Woodward earned about $255,000 while Warren Eizman earned about $132,000 and passed the information on to 11 of his friends and relatives, who earned another $165,000 collectively. There was no finding that Richard Woodward ever personally traded with the information or profited from the illegal trading.

BFF Talk

According to the complaints filed by the Justice Department and the SEC, a Cravath, Swaine & Moore associate assigned to work on the 2009 IBM-SPSS merger deal met his BFF for lunch. The associate discussed with his BFF how working on such a major M&A deal might advance his career at the firm. The conversation was typical between the friends and the lawyer had no reason to think it might lead to wrongdoing; however, the BFF passed the information along to two stockbrokers. Federal prosecutors in Manhattan subsequently charged Thomas Conradt of Denver and David Weishaus of Baltimore with running an insider trading scheme that yielded more than $1 million in illicit profits based on the confidential information about IBM's $1.2 billion acquisition of analytics software maker SPSS. The associate's name was not included in the complaints, so there is no indication that anyone has been sanctioned by the bar in

connection with this matter. See Brian Baxter, Associate's Failure to Keep Secrets a Cautionary Tale for Young Lawyers, AmLaw Daily, Nov. 30, 2012.

Pillow Talk

The U.S. Securities and Exchange Commission sued James W. Balchan for insider trading after his wife, Tonya Jacobs, who was apparently a partner at BakerHostetler, tipped him that Texas Instruments planned to acquire National Semiconductor Corporation. Jacobs knew that National's general counsel, Todd Duchene, had cancelled an appearance at a "wine and dine" social function to work on the deal. According to the SEC the very next morning, Balchan misappropriated the confidential information he learned about the acquisition and purchased 2,000 National Semiconductor shares, profiting $30,000. Balchan ultimately agreed to pay a fine of $60,000 to settle with the SEC. There is no record that Jacobs was sanctioned.

South Carolina Bar

Continuing Legal Education Division

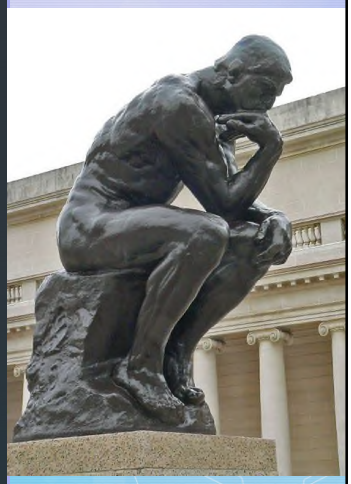
Is That a Fact?

Lenne Espenchied

LOGIC, ARGUMENTATION, and PERSUASION:

Is That a Fact?

lenne@nextlevelcontracts.com



1

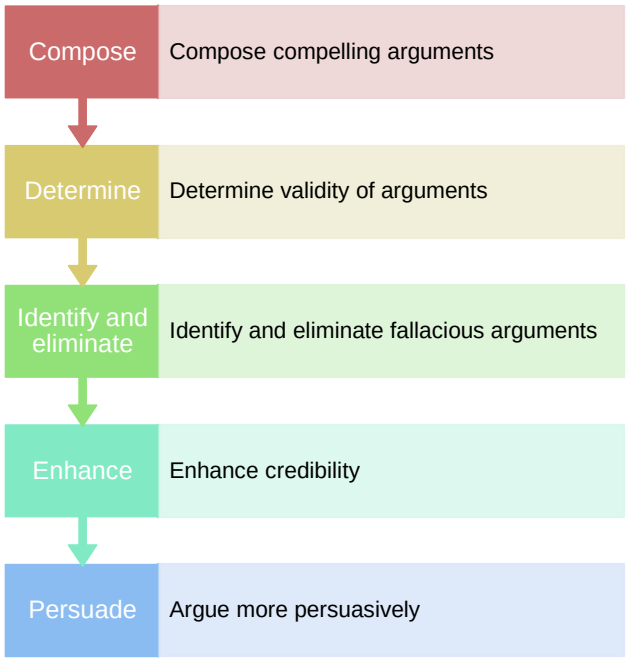
Why study logic?

Lawyers who understand **logic** are more likely to:

- Reason clearly
- Structure stronger arguments
- Find weaknesses

2

Learning about Logic helps you:



3

Logic, *n.* The study of the principles of sound reasoning; the analysis and appraisal of arguments based upon established principles of sound reasoning.

4

Sound Reasoning = Clear, cogent thinking accomplished by structuring propositions in a rational, analytical way.

5

Fallacy = Defect in thinking that weakens or corrupts the proposition.

6

Aristotle:

Syllogism =

- Major premise
- Minor premise
- Conclusion

7

Syllogisms

- Based on premises presumed to be true
- What is “true”?
- Does “true” equal “fact”?

8

American Heritage Dictionary:

- **True *adj*. – Consistent with facts or reality; not false or erroneous**
- **Truth *n.* – Conformity to reality or actuality; a comprehensive term that implies accuracy and honesty**
- **Fact – Knowledge or information based on real occurrences, something that is believed to be true or real**

9

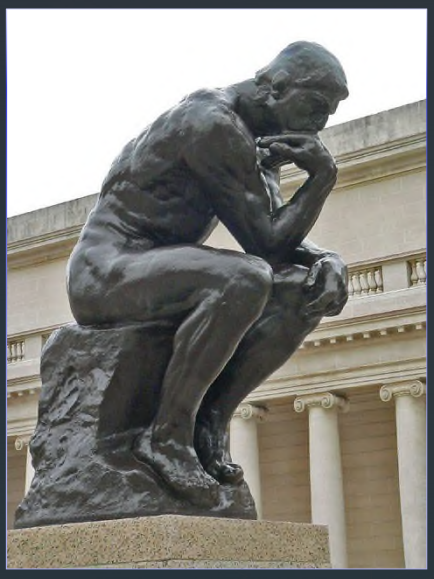
Journalism:

- A fact = information used as evidence in a news story
- *"Some experts stated that the only way to slow COVID is to wear face masks."*

10

Philosophy:

- A fact = an occurrence that exists regardless of what anyone thinks
- Perry Weddle → the Whose? test



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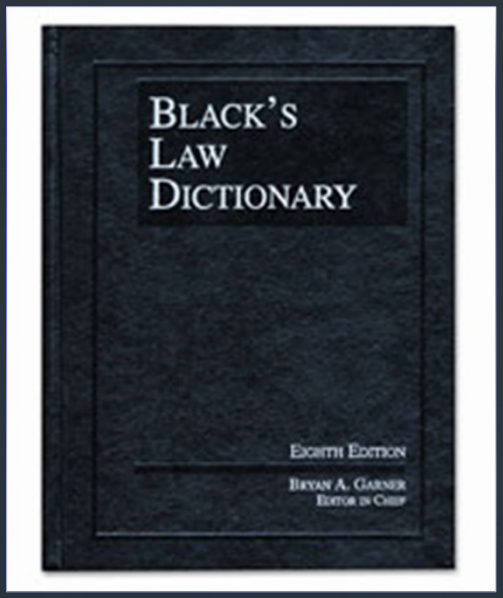
Law:

- A fact = something that actually exists; an aspect of reality
- *"Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and **opinions**."*



12

For this program:

Fact = something known or proven to be true

True = in accordance with actual reality

Opinion = an expression of a person's feelings about a fact

13

Study:

Differentiating Factual from Opinion Statements

PEW RESEARCH CENTER

14

Pew Study:

- 5,035 Americans
- 5 factual statements; 5 opinion statements
- Not a survey of lawyers, per se
- 36% → 64%
- 25%

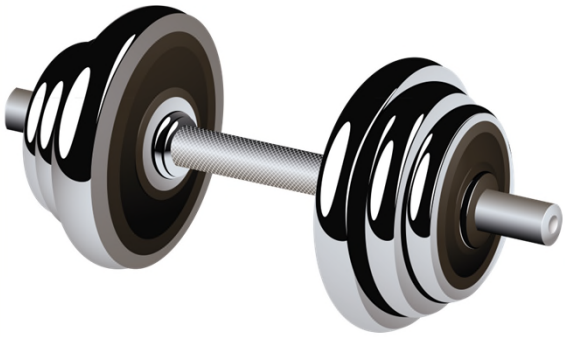
15

Extrapolating:

- Don't overestimate ability to distinguish facts from opinions
- More likely to believe that statements are facts if they support my argument
- More likely to believe that statements are opinions if they support the opposing argument
- More likely to believe that the statements we think are factual are *accurate,* even when they're opinions
- More likely to disagree with factual statements if we believe they are opinions

16

The strength of an argument is determined by the quality of its components.



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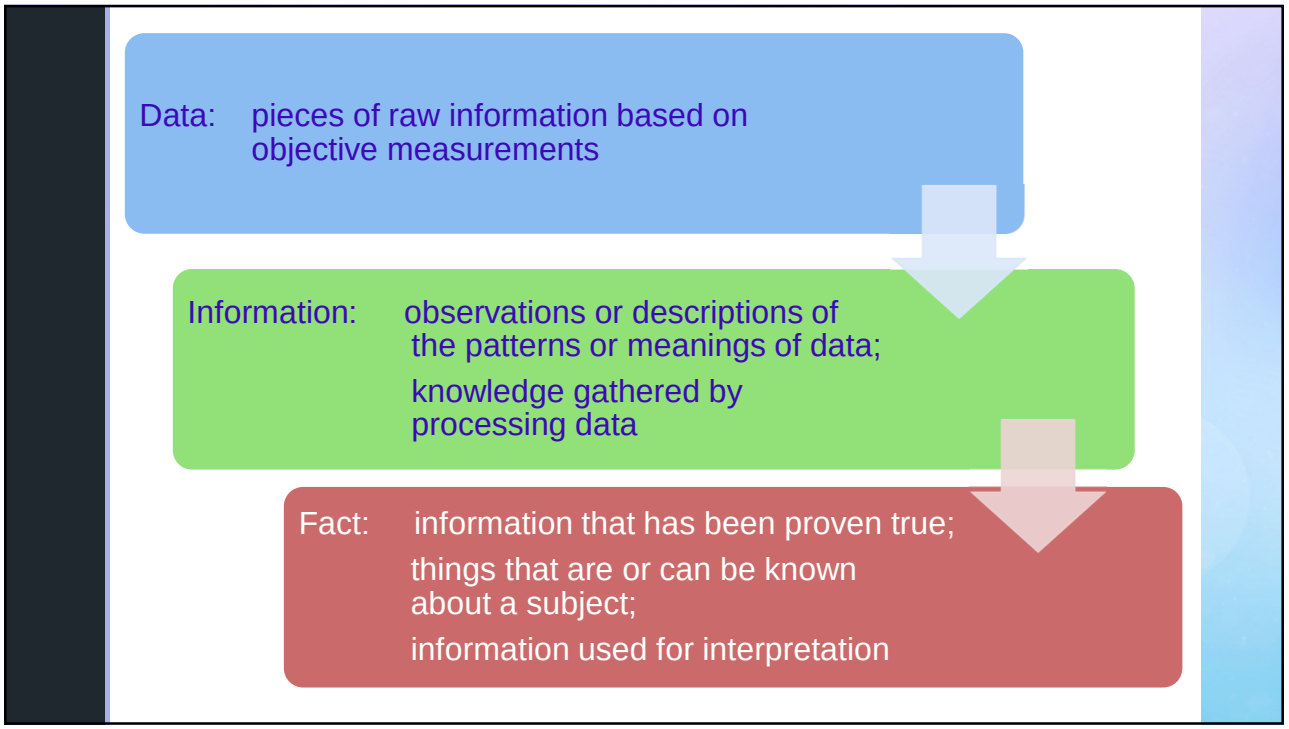
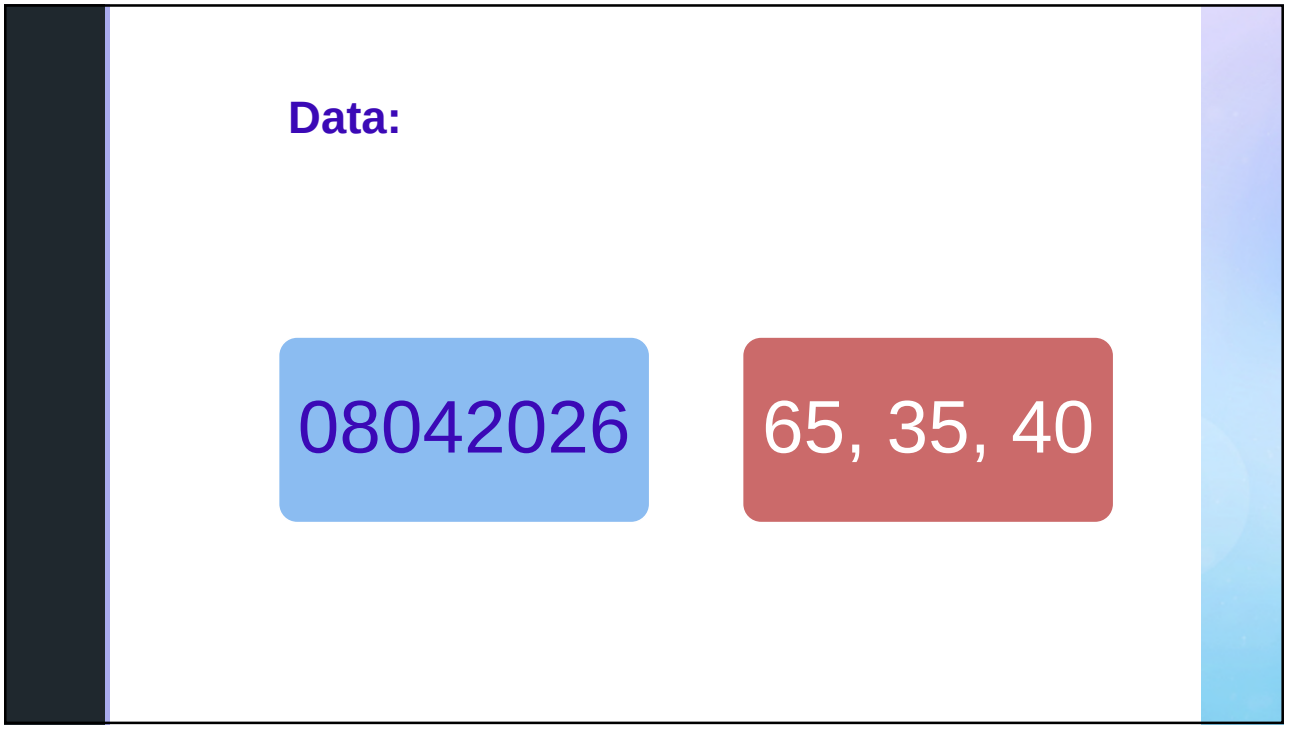
FACTS BELIEFS OPINIONS NORMS VALUES

18


Data: pieces of raw information based on objective measurements
Information: observations or descriptions of the patterns or meanings of data;
knowledge gathered by processing data
Fact: information that has been proven true;
things that are or can be known about a subject;
information used for interpretation

19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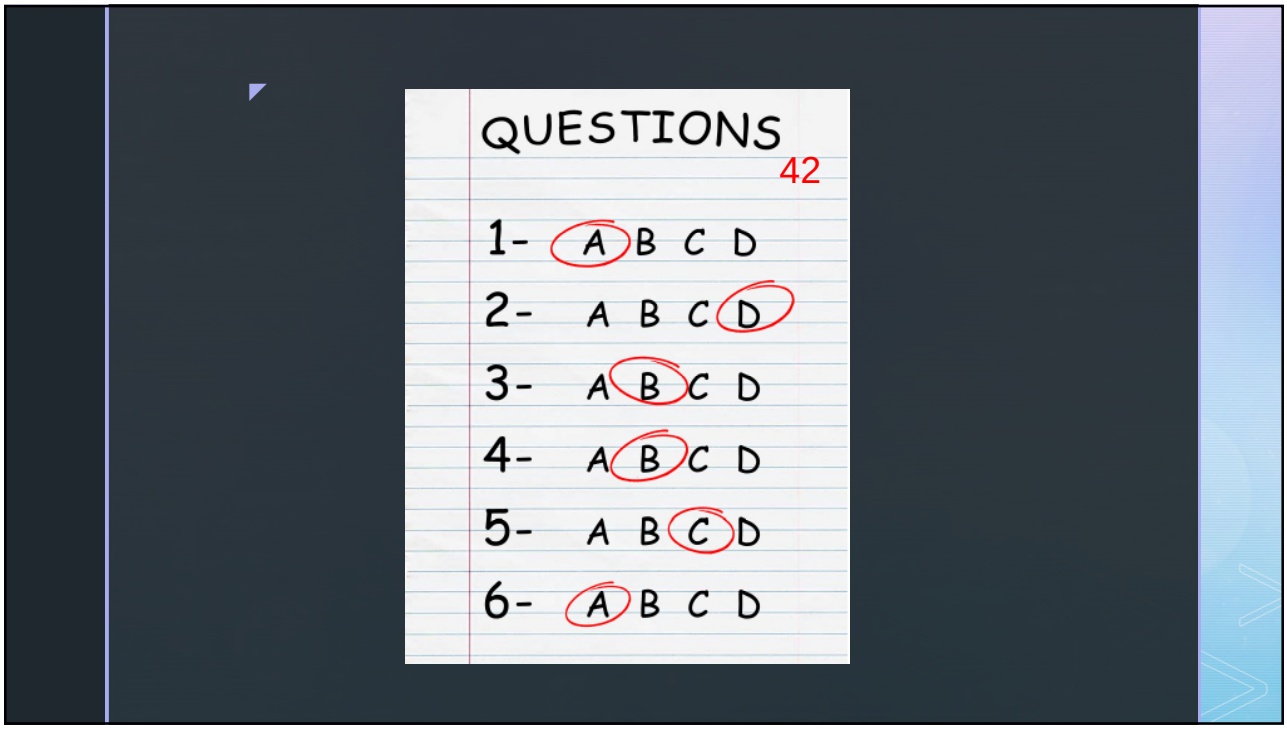

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Belief: a conviction held as unquestionable truth by a person or group that does not depend upon empirical evidence; often related to religion, morals, or values

Claim: something a person or group says is true, which that person or group may or may not believe is true, and which is not anchored by facts and has not been verified

Opinion: a personal view derived by considering relevant information

22

Beliefs, claims, opinions

- Claims are often based on beliefs; no facts required
- Opinions are based on information
- Burden of proof
- It's a claim until proven otherwise

23

Values: a collection of guiding principles by which a person or group determines right/wrong and priorities

Norms: behaviors and attitudes that are considered "normal" by a society; accepted standards of behavior typical of most people within a group

Truth: consistent with facts, reality, and actuality

24

Beliefs, values, norms

- Beliefs are often based on values
- "we hold these truths to be self-evident"
- Life, liberty, and the pursuit of happiness
- Values commonly shared by a group = norms
- Values are guiding principles; norms are practical standards

25

Judge Ruggero J. Aldisert (3rd Cir.)

"Experienced judges have seen many eager lawyers, young and old, crusading with maximum passion and boundless energy, strident believers in their clients' causes, hopelessly shot down because their propositions were totally bereft of support in law or logic. To passionately feel or believe is one thing; to prevail in the court, quite another."

26

Evidence: the available facts or information that support or reject a proposition

Inference: an assessment made by examining known facts and determining what those facts suggest; an educated guess

Conclusion: a logical assessment that necessarily follows from available evidence

27

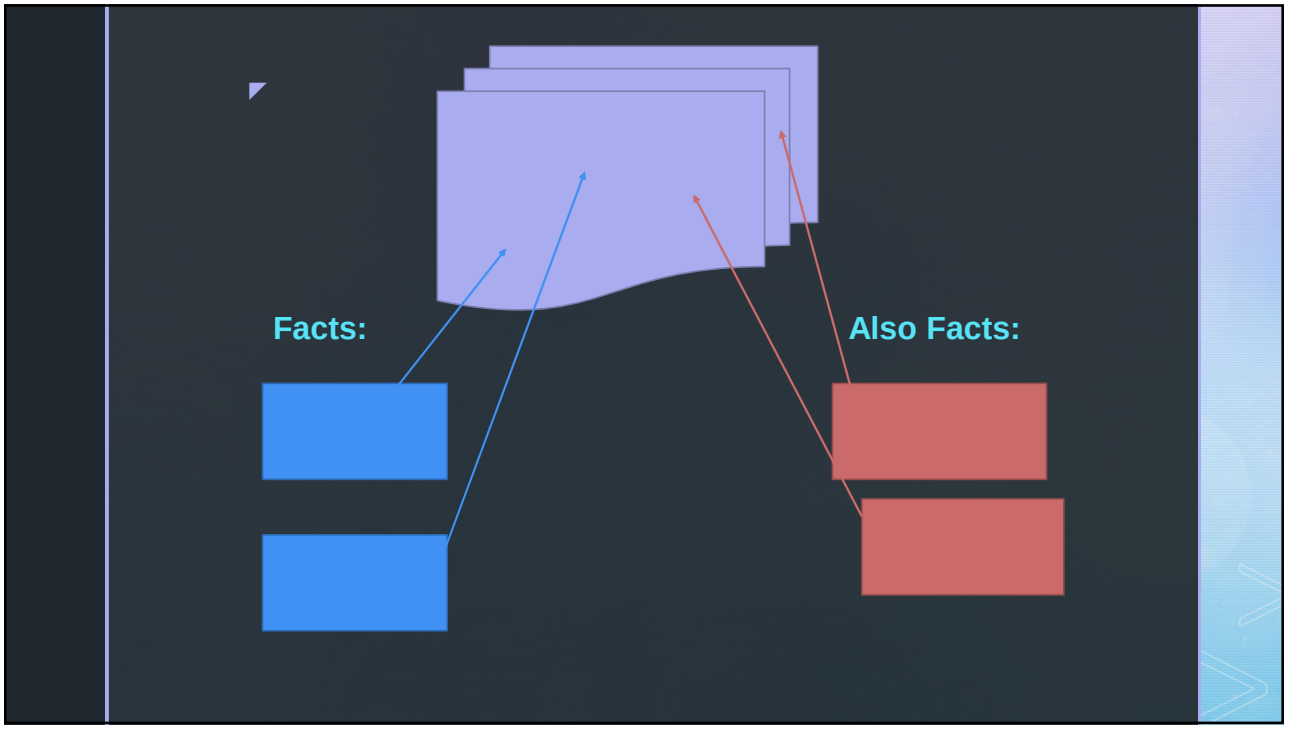
- Inference uses facts to make an educated guess
- Conclusion is the logical end; a decision that necessarily follows

28

Facts vs. truth

- 10 Eyewitnesses
- Cochrane Report

29

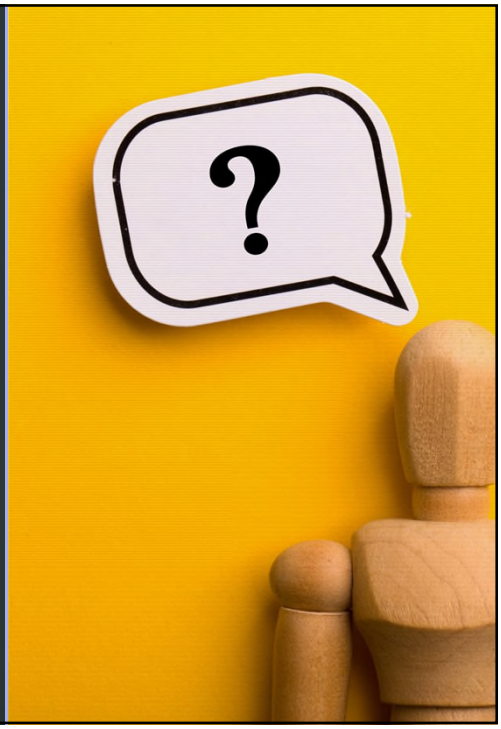


30

Remember this?

31

What do you hear?



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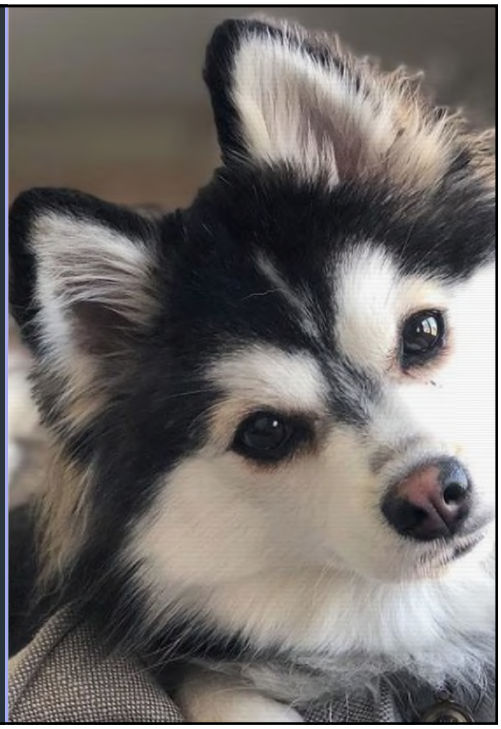
Fact vs. truth

Abe: Bob is going to get a dog.

You: Abe told me Bob is going to get a dog.



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If "the truth" later turns out to have been false, what was it when we believed it?

34

Fact vs. Opinion

This coffee is hot.

35

Hotter vs. prettier

36

Facts are objective and amoral

Neither good nor bad

We interpret through our own filters

Filters = beliefs, values, priorities, past experiences

37

Christopher Wray:

In some cases, it seems like people are coming up with their own sort of customized belief systems – a little bit of this, a little bit of that – and they put it together maybe combined with some personal grievance or something that's happened in their lives. Trying to get your arms around that is a real challenge.

38

What is the difference between facts and opinions?

A reliable rule?

39

How to define the difference?

1. Facts are “true”?

- Bob’s dog
- People believe their opinions are true
- “Facts” are sometimes proven false

40

How to define the difference?

2. Facts are “objective”?

- Resonates with us
- “Reasonable person”
- Independent of personal beliefs
- Weddle’s Whose? test

41

What about the Hostages?

42

How to define the difference?

3. Facts are not controversial?

- Audience; era
- Earth is round
- God exists

43

"*Cogito, ergo sum*."

44

“I think; therefore, I am.”

45

- Expand your thinking
- Avoid the tendency to dismiss
- Keep an open mind
- Consider the opposing view
- Ask for facts
- Assume a modicum of truth
- Professional courtesy

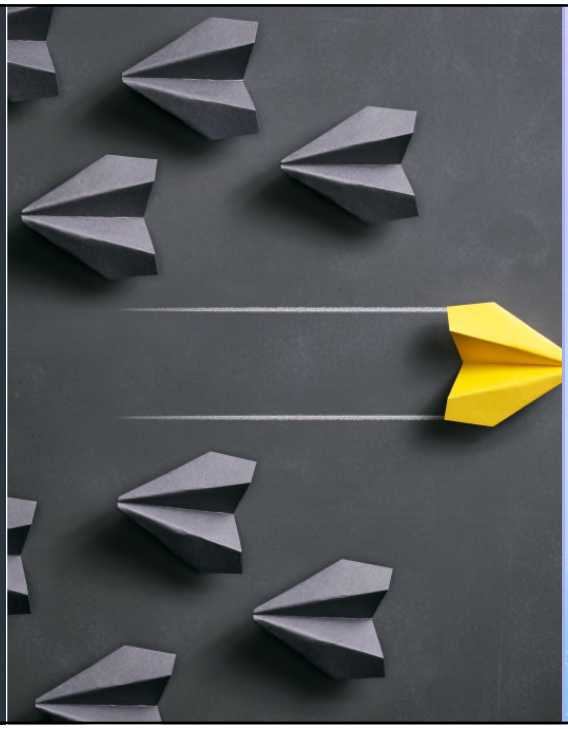
46

Facts vs. Values

- Objective statements that can be proven true
- Shouldn't values automatically align with facts?
- The truth, the whole truth, and nothing but the truth…

47

- Values are not subject to right or wrong
- You can disagree
- We don't eat cats



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Social Facts = values and norms that influence/restrain behavior

Yes, ma'am	What is promiscuous?
Rituals in a wedding	Adultery

49

Arguendo: *Kidnapping innocent civilians*

WSJ, BBC, ABC, Reuters, NPR
Fact; believed to be true
Not morally acceptable in our culture
Apparently morally acceptable to Hamas
Hence, values don't always line up with facts

50

Arguendo: Flat Earthers

Contradict established science

Photos from space

Wrong factually but not morally

Doesn't encompass values

51

Dittrich Study
United Nations University Institute on Globalization

- Value-based measures are easier to dismiss
- norms change among groups and eras
- they become less reliable

52

First, normative reasons are often seen to be relative both with respect to the time in which they are adopted and with respect to the group of individuals [that] adopt them. This simply means that certain individuals may adopt certain values during certain times but others may not, and the same individuals who do may not adopt those values during another time. The problem with this relativity is that it makes it harder to educate individuals to adopt the position in question. For if the normative reasons are not universal but only accepted by some individuals at certain times, it becomes questionable for the individual as to why exactly he or she should accept those values. This is different when it comes to fact-based reasons. Their truth is neither relative to the individuals who adopt them nor to the times at which they are adopted.

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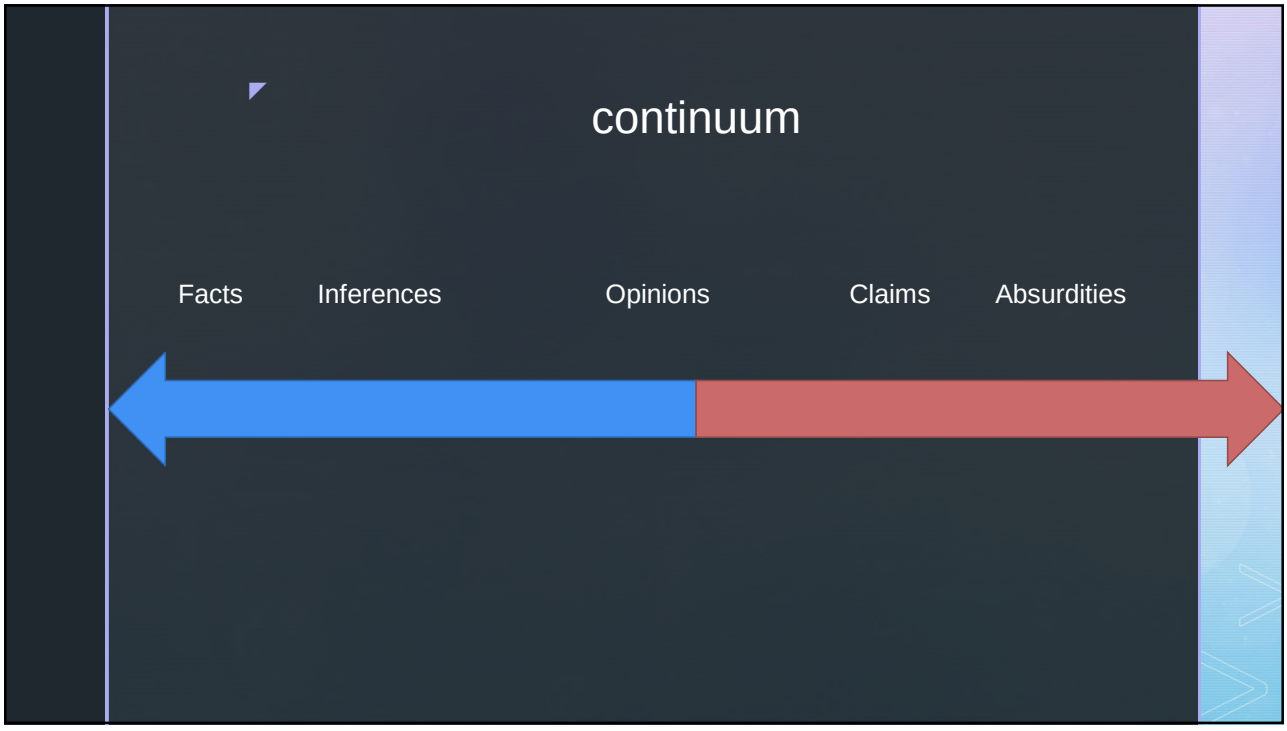

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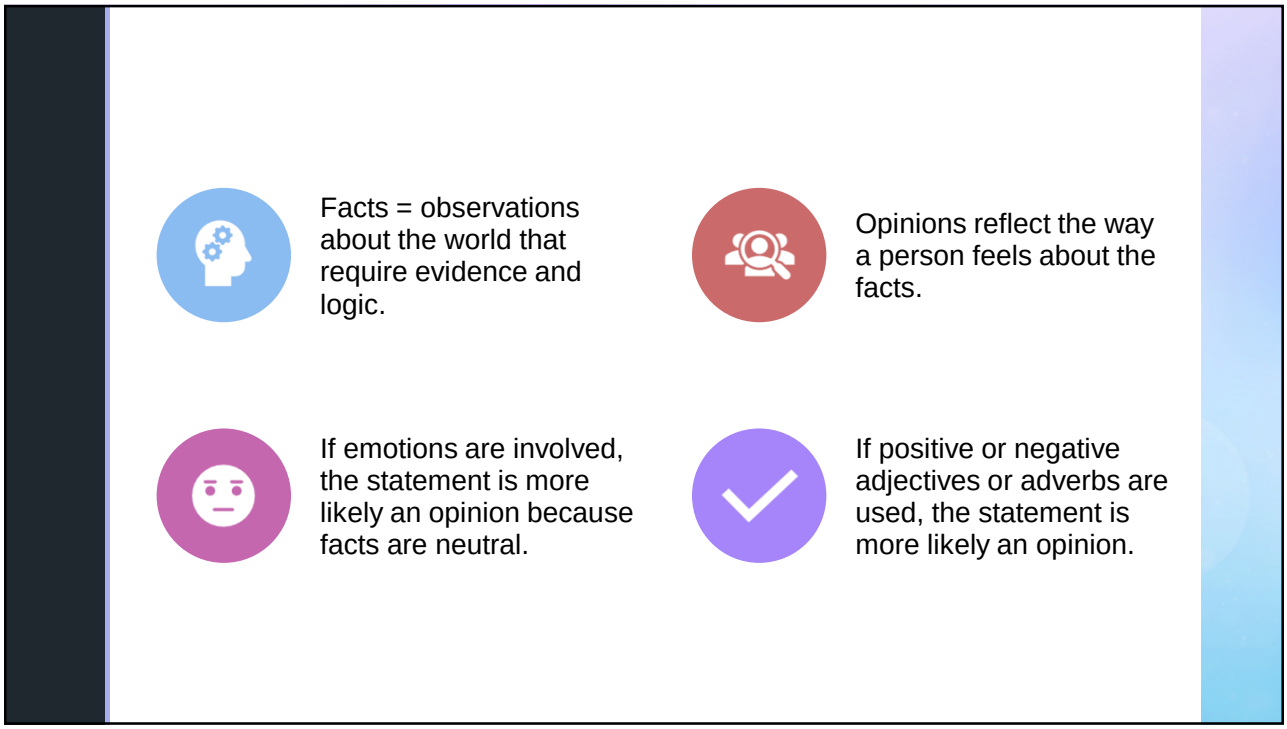
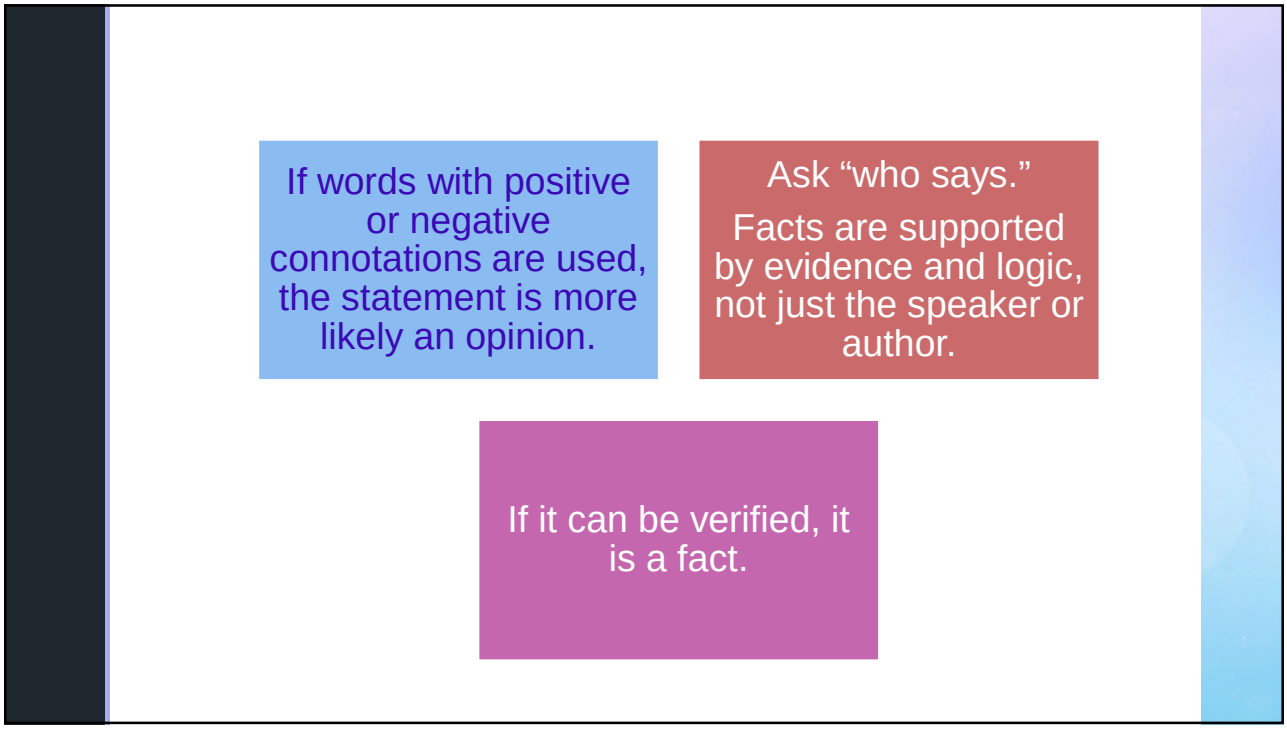

Facts = observations about the world that require evidence and logic.
Opinions reflect the way a person feels about the facts.
If emotions are involved, the statement is more likely an opinion because facts are neutral.
If positive or negative adjectives or adverbs are used, the statement is more likely an opinion.

55


If words with positive or negative connotations are used, the statement is more likely an opinion.
Ask “who says.”
Facts are supported by evidence and logic, not just the speaker or author.
If it can be verified, it is a fact.

56

If it expresses preference, it is an opinion; for example, red wine goes better with red meat.

If it is not subject to assessment as right or wrong, it is an opinion, value, or belief.

If it is subject to assessment as right or wrong, it is a fact.

If it is open to change, it is an opinion.

Beliefs are more dogmatic and less open to change.

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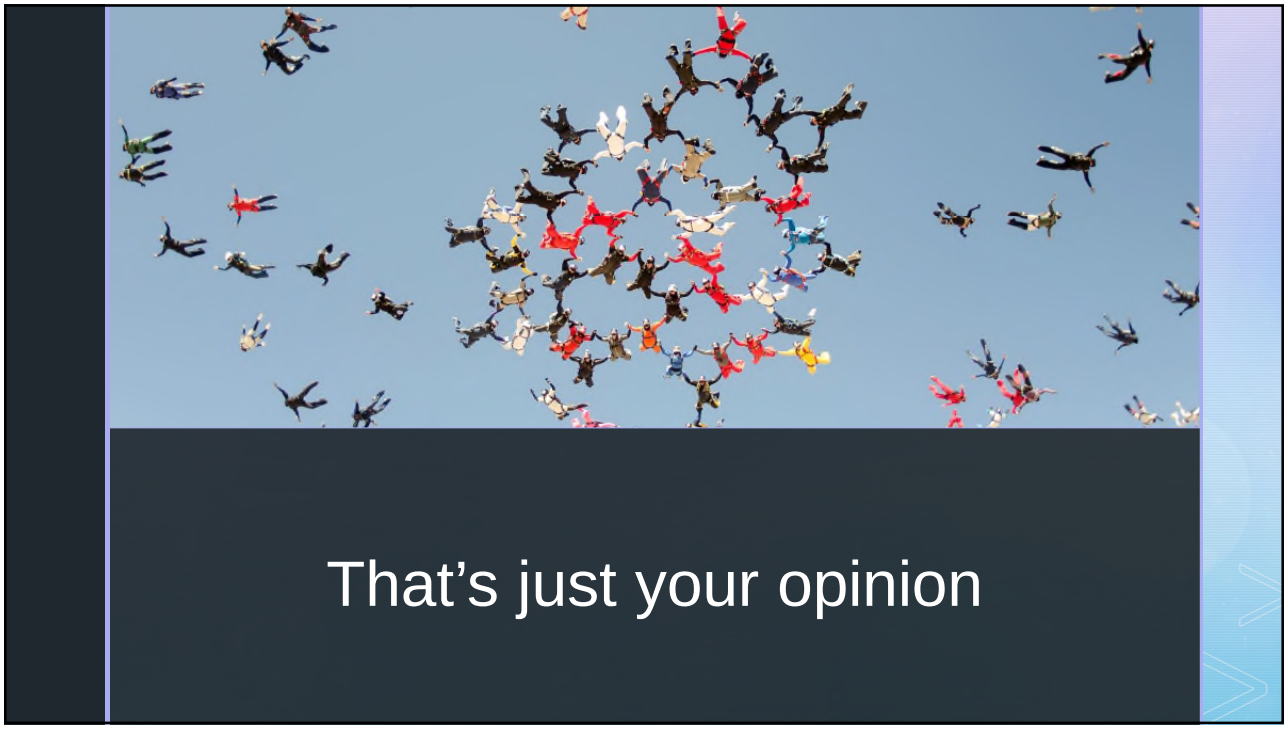

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I’m entitled to my opinion

59

Last thought:

Preserve your personal credibility by citing a source:

The Wall Street Journal reports that electricity usage is increasing at historic rates in the State of Texas.

60

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Logic, Argumentation, and Persuasion:

Is That a Fact?

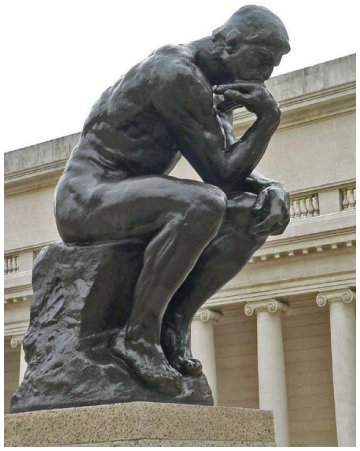

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Table of Contents

Introduction

To "Think Like a Lawyer," a lawyer must first be able to differentiate facts from opinions and the myriad alternate ways a subject can be conceived. Classical logical syllogisms are built upon premises that are presumed to be true, but what exactly is "true" and how does it differ from "fact"? While at first blush this may seem a simple question, the further one digs, the murkier it gets. *The American Heritage Dictionary* defines the word "true" using the word "fact": "Consistent with fact or reality; not false or erroneous." To understand what is true, therefore, one must understand the meaning of "fact"; however, *The American Heritage Dictionary* defines "fact" as "knowledge or information based on real occurrences; something believed to be true or real." These circular definitions fail to differentiate the terms because the definitions use the concepts of truth, fact, and reality to define both words.

For purposes of this program, we will stipulate that a "fact" is something that is known or proven to be true; that "truth" is in accordance with actual reality, and an "opinion" is an expression of a person's feelings about a fact or facts that cannot be proven. Unfortunately, however, people often have opinions about facts and interpret facts based upon their opinions; that is where the distinctions between facts and opinions get murky. With ever-increasing frequency, large numbers of people adamantly assert certain claims to be facts with scant and even contradictory evidence. Most adults in the U.S. have some difficulty in differentiating facts from opinions and very few are able to do so consistently, and with good reason, because our definitions of the respective terms vary even when we try to be precise, and the terms are colloquially used interchangeably without any attempt to be precise.

In journalism, a "fact" is information that is used as evidence in a news story, which certainly can be an opinion. Consider this statement, for example: *"Some experts have stated that the only way to slow COVID is to wear face masks."* While it may be a "fact" that at least "some" "experts" did so state, in hindsight, we discovered that these experts made the claim without conclusive evidence proving the underlying statement. In fact, some startling evidence now exists that mask-wearing *did not* provide statistically significantly protection. According to CNN, the well-respected Cochrane Library, which is a collection of databases in medicine and other healthcare specialties, now concludes that "Masks have become political. I can only tell you what the science is….I can't tell you whether they work or don't work. But it's more likely than not that they don't work." [See https://www.cnn.com/videos/health/2023/09/09/smr-author-of-mask-study-on-effectiveness.cnn] Whether that particular Library produced any reliable *facts* is a matter of inference and interpretation. The point here is not to spark debate on whether masks provide statistically significant protection, but rather to illustrate how difficult it can be to tease out the facts from the opinions with respect to this and many other matters upon which lawyers disagree.

In philosophy, a "fact" is an occurrence that exists regardless of what anyone may think about it. Revered philosopher Perry Weddle applied the "Whose?" test, concluding that it always makes sense to ask "whose opinion" but it never makes sense to ask "whose fact?" See https://philotech119334246.wordpress.com/2018/09/24/facts-and-opinions. Most philosophers are also better at identifying statements that are facts and statements that are opinions than they are at coming up with a reliable principle for differentiating them.

In law, according to *Black's Law Dictionary*, a "fact" is something that actually exists; an aspect of reality; however, the *Black's* definition of "fact" effectively obliterates the distinction between facts and opinions with this snippet: "Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and opinions." Ah, that clears it up.

The purpose of this program, *Is That a Fact?*, is to examine the differences between facts, inferences, beliefs, opinions, and norms. We will also consider how "data" differs from "information"; how "norms" differ from "values"; whether "facts" are always reliable evidence; and how "social facts" influence individual behavior. We will use this information to construct more convincing, logical arguments in litigation and transactional practice, and possibly in casual conversations as well, to empower you to argue more effectively and to enhance your credibility.

1. Pew Study – Differentiating Factual from Opinion Statements in the News

A recent Pew Survey revealed that 64% of "knowledgeable" Americans could not distinguish properly between five factual statements and five opinion statements in the news; the unknowledgeable, unsavvy Americans fared far worse. [See https://www.journalism.org/2018/06/18/distinguishing-between-factual-and-opinion-statements-in-the-news] Admittedly, this Pew Study was not about lawyers, and we can assume that with at least some elementary training in logic, lawyers' ability to differentiate "facts" and "opinions" should be at least marginally better than the public at large. An argument can easily be made that the Pew Study has no relevance to our study of logic for lawyers: first, the poll did not assess lawyers *per se*, or at least lawyers' responses were not analyzed as a subgroup within the Pew Study; and second, the Study entailed differentiating fact statements from opinion statements *in the News*, which is different from differentiating fact statements from opinion statements in a contract negotiation, a trial court, or in an appellate brief.

Nevertheless, the findings of the Pew Study are probative for our purposes for several reasons: first, I have not found a similar study that polled only lawyers, so considering a poll of 5,035 Americans is the best available benchmark; second, lawyers probably perform better as a group but it is not likely we all perform perfectly as individuals in differentiating "facts" and "opinions," so the conclusions of the Pew Study may be relevant; and third, the capabilities of our non-lawyer employees, our clients, their business partners, and our juries to distinguish facts from opinions are probably fairly represented by this study. Like news consumers, lawyers often must make rapid assessments of the veracity of statements, so, while acknowledging that the relationship between the Pew Study and lawyers may be relatively weak, the study is worth considering because it is the best measure currently available.

According to the Pew Study, only 36% of Americans who were "knowledgeable" about politics and regularly follow the news were able to correctly differentiate five factual statements and five opinion statements; that means 64% were not [*by the way, that's a conclusion as I'll explain below*]. While more than 50% of people surveyed correctly identified six out of ten of the statements, roughly 25% of them got most or all wrong. Interestingly, the study states that the relationships between being "knowledgeable" and answering correctly or "unknowledgeable" and answering incorrectly persist even after taking an individual's education level into account. [Pew Study Summary, p. 3] Apparently,

education level, generally, does not affect the ability to distinguish facts and opinions as much as staying knowledgeable on a regular basis; again, I continue to assume that lawyers, who all have had at least some training in logic in law school, would perform better than the public at large, but if other kinds of education do not seem to impact this ability, we probably should not be overly confident.

Another interesting tidbit from the Pew Study is that the respondents were more likely to think that news statements are factual when they appeal to their personal point of view, even when those statements were opinions. Further, if the respondents believed a statement was factual, they also tended to believe it was accurate, even though the statement was actually an opinion. Finally, the respondents most often disagreed with factual statements they incorrectly thought were opinions.

To the extent that the findings of the Pew Study can be extrapolated and applied to lawyers, here are some conclusions for us as lawyers:

1. We should not overestimate our own abilities to distinguish facts from opinions, particularly in light of the next section of this program.
2. We may be more likely to believe that statements are facts when they support the argument we are making.
3. We may be more likely to believe that statements are opinions when they support the argument the other side is making.
4. We may be more likely to believe that the statements we think are factual are *accurate,* even when they are actually opinions.
5. We may be more likely to disagree with factual statements if we believe they are actually opinions.

To the extent that the findings of the Pew Study can be extrapolated and applied to our non-lawyer employees, clients, their business partners, and juries, here are some conclusions:

1. Even when "knowledgeable" of the subject matter, they may not be able consistently to distinguish facts from opinions.
2. They may be more likely to believe statements are facts when favorable to their position.
3. They may be more likely to believe the statements are opinions when they favor the other side.
4. They may be more likely to believe the statements they think are factual are accurate.
5. They may be more likely to disagree with factual statements if they believe those statements are actually opinions.

2. Definitions and Gradations

Most authentic arguments are assertions of facts, beliefs, opinions, norms, and values. The strength of an argument is determined by the quality of its components. For example, a fact is more reliable than an opinion; therefore, an argument based on proven facts is generally stronger than one based on opinions. In assessing or designing a logical argument, lawyers must understand slight gradations between different kinds of evidence; yet, at least colloquially, words having critical

distinctions are often bandied about without recognizing those distinctions, which are sometimes hard to decipher. For example, what is the difference between "data" and "facts"? Does a distinction exist between "beliefs," "claims," and "opinions"? How do "inferences" differ from "conclusions"? To construct compelling logical arguments, and to dissect seemingly compelling arguments put forth by your opponent, you must understand the subtle variations among the following concepts.

Data – pieces of raw information, details, or statistics based on objective measurements; data does not convey meaning until it is processed, analyzed, and organized, at which point it becomes information; data is the basic building block for information

Information – observations or descriptions of the patterns or meanings of data; knowledge gathered by processing data; the meaning a person or group assigns to data; things that are or can be known about a subject

Fact – information that has been proven true; information about a particular subject that is used as a basis for further interpretation; a verifiable fact provides crucial support for an argument, but a fact *alone* does not have meaning without context

Belief – a conviction a person or group embraces as an unquestionable truth; usually based upon reasoning, desire, or faith without the necessity of empirical evidence, knowledge, or proof; often related to religion, morals, or values; beliefs guide values

Values – a collection of guiding principles by which a person or group determines what is right or wrong and what is most desirable in life or work

Norms – behaviors and attitudes that are considered "normal" by a society; accepted standards of behaviors; something that is typical or usual of most people within a group of people, or most entities within a group of entities

Claim – something a person or group says is true, which the person or group may or may not actually believe is true but, in any event, which has not been verified

Opinion – a personal judgment derived by considering relevant information about a particular subject; a personal view about a topic that cannot be proven true, right, or wrong

Evidence – the available body of facts or information that support or reject a proposition

Inference – an assessment that is reasoned by examining known facts and determining what those facts suggest about the question at hand; an educated guess based on partial knowledge

Conclusion – a logical assessment that necessarily follows from available evidence

Truth – the status of agreeing with facts, reality, and actuality

Data vs. Facts

These definitions are easy to memorize but sometimes difficult to apply. For example, how do we differentiate between data, facts, and information? Differentiating becomes even more complicated because our society has become lax in speaking about these terms and bandies them carelessly, so the

terms are sometimes used interchangeably, and sometimes used to define each other. Some people define data as facts; some define information as facts; some define facts as information; and in some situations, the distinctions may not even matter. For example, *The American Heritage Dictionary* defines the word "fact" as "knowledge or *information* based on real occurrences" and defines "information" as "knowledge or *facts* learned."

Data usually contain numbers: 08042021, but data are generally useless without information – in this case, the meaning I assign to that data: 08042024 is the date I'll be celebrating my birthday in 2024. The fact, which is verifiable, is that my birthday is August 4. If I record 65, 35, and 40, those are data, but they have no meaning without context: these were the temperatures on a specific date in Saint Simons Island, Washington D.C., and Chattanooga, respectively. The temperature today in Saint Simons is 65 degrees is a fact; however, it may not be 65 degrees tomorrow so this fact has a fuse and limited utility. The three facts – 65 Saint Simons/35 Washington D.C./40 Chattanooga – provide information, but still do not reveal the connection: I live on Saint Simons Island; my daughter lives in D.C., and my son lives in Chattanooga. Moreover, it is *true* that I live on Saint Simons Island; my daughter lives in D.C., and my son lives in Chattanooga, so in this case, the facts and the truth are aligned.

If your favorite student reports that he or she received a 42 on a test, this is a verifiable fact, but further interpretation is required; namely, the number of available points on the test and the average score of the class.

Claims and Opinions

Note that a "claim" is statement that may or may not be true, meaning that verified facts do not comprise a claim; rather, claims are often based on beliefs. An "opinion," on the other hand, is a point of view that is based on information. When you analyze statements to determine the facts and the truth, place the burden of proof upon the person who wants to convince you of something. Start at the bottom and work your way up; assume the statement is a claim until proven otherwise. Ask this: do you have any data [or facts, as the case may be] to back up your claim?

Beliefs, Values, and Norms

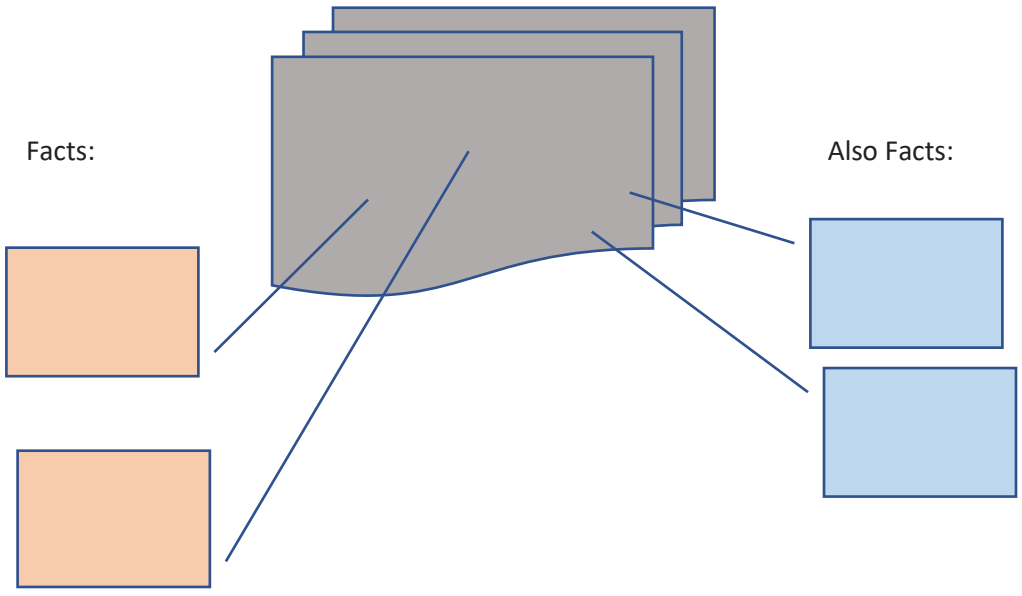
Beliefs are often based on values; values commonly shared by a group are the basis of norms within that group, so it is easy to see how these concepts overlap. For example, "we hold these truths to be self-evident" reflects the Founding Fathers' belief that life, liberty, and the pursuit of happiness are inalienable rights. Beliefs passionately argued may be sufficient to convince the other party in contract negotiations; however, beliefs alone are not convincing jurisprudence, and in litigation, arguments based solely on beliefs are usually doomed, as noted by Federal Judge Ruggero J. Aldisert (3rd Cir): "Experienced judges have seen many eager lawyers, young and old, crusading with maximum passion and boundless energy, strident believers in their client's causes, hopelessly shot down because their propositions were totally bereft of support in law or logic. To passionately feel or believe is one thing; to prevail in the court, quite another."

Inferences vs. Conclusions

An inference is an educated guess that uses known facts to determine what those facts suggest about the situation; it is an assumption based on existing facts. A conclusion is the end of the point being considered; it is a decision that necessarily follows from available evidence and logical assessment. For example, I put strawberries in the refrigerator yesterday. Is it a fact that strawberries are in the refrigerator today? No, it is an inference that may or may not be reasonable depending upon how hungry my husband has been in the past 24 hours. By comparison, when the Pew Study reports that 36% of knowledgeable Americans can consistently differentiate between fact and opinion statements, we *conclude* that 64% cannot.

3. Facts vs. Truth

How do "facts" differ from "truth"? For example, statements by eyewitnesses to crimes usually contain inconsistencies; the more eyewitnesses, the more inconsistencies and the wider the inconsistencies are. The statements by honest witnesses are facts, but some of those "facts" may not accurately reflect the truth. Similarly, consider the example of the Cochrane Library report regarding face masks: some facts from the study show no significant impact from wearing masks; other facts from the study clearly show it is inconclusive. What is the truth? If what we thought of as "truth" later turns out to have been false, was it "truth" when we believed it, or merely a claim?



Even though some verifiable facts support one conclusion and other verifiable facts support the other conclusion, neither of these conclusions can be said to be "truth," because both conclusions are in opposition to other verifiable facts. Every fact is not necessarily "truth." For example, if your neighbor

Abe tells you Bob is going to get a dog, and you tell Candace that Abe told you Bob is going to get a dog, it is a fact that Abe told you so, but it may not be true that Bob is going to get a dog.

Do you remember the internet sensation nearly a decade ago caused by the gold or blue dress? Some people clearly saw woman wearing a white dress with gold trim; others just as clearly saw the dress as blue with black trim. One woman recently commented that even after more than eight years, she still fully believes "anyone who's ever said white and gold have been saying it just to be different." Well, let me assure you I still see white and gold, and I'm not just saying it to be different. Move over, gold or blue dress, there's a new contest: Yanni or Laurel? You really have to hear this for yourself to decide which side is crazy: https://www.youtube.com/watch?v=7X_WvGAhMlQ.

If nothing else persuades you, these two examples should be adequate to demonstrate that people can see or hear exactly the same thing and perceive it differently. Which is "true"? Even though 49% of respondents see gold and white, the dress is blue. Even though 48% distinctly hear "Yanni," the voice is actually saying "Laurel." This is a shocking revelation: in both cases, nearly half of the people were absolutely certain and absolutely wrong.

4. Facts vs. Opinions

The distinction between facts and opinions, so simple at first blush, becomes murkier the longer one considers it, and it is virtually impossible to devise a rule that works consistently to define the difference. For example, if I say "this coffee is hot," is that a fact? My husband drinks his coffee black and scalding hot; he has usually drunk his cup of coffee before I can safely sip mine without burning my tongue, even with cream, which lowers the temperature. My husband would not agree that my coffee is hot. Similarly, 90 degrees is hot, if that is the temperature of the air in the U.S.; however, if the water in a jacuzzi is 90 degrees, it is cold. Further, 90 degrees in the Sahara may be considered cool. What if I say "this coffee is hotter than that cup of tea"? Is that a fact? Yes, we can measure the temperature empirically and determine by evidence that it is hotter than the cup of tea. So in this sentence, the adjective "hotter" is used as a fact; what about the adjective "prettier" in this sentence: "this painting is prettier than the artist's early work"? No, in that case the adjective is used as an opinion.

Most statements we make in speaking and writing are assertions of fact, opinions, or beliefs. Facts are objective and amoral, which means they are neither good nor bad; however, we often interpret facts through our own filters of beliefs, values, priorities, and past experiences. As we interpret facts based upon our personal filters, they transmute into opinions, which are subjective judgements that are based on how we perceive the facts. As FBI Director Christopher Wray noted and the *Wall Street Journal* quoted on March 3, 2021:

> *In some cases, it seems like people are coming up with their own sort of customized belief systems – a little bit of this, a little bit of that – and they put it together maybe combined with some personal grievance or something that's happened in their lives. Trying to get your arms around that is a real challenge.*

Some have tried to explain the difference between facts and opinions by saying that facts are "true"; however, the example about Bob's dog demonstrates why that distinction is unreliable.

Moreover, people generally believe their own opinions are true, and things we believe to be facts sometimes turn out to be false. Others have tried to explain the difference between facts and opinions by saying that facts are "objective" and opinions are "subjective." This distinction resonates with us as lawyers because much of our jurisprudence, particularly in commercial transactions, is based upon the proverbial "reasonable person," who is notably objective. Following this line of reasoning, facts are objective because they are independent of personal beliefs, and opinions are subjective because they are dependent upon personal beliefs. In this case, Perry Weddle's "Whose?" test makes perfect sense, because it is appropriate to ask "whose opinion?" for subjective matters but it is not generally appropriate to ask "whose facts?" because facts are objective and therefore independent of personal possession. Nevertheless, it is certainly appropriate to ask "whose facts?" when there are verifiable facts on both sides of the argument.

Weddle's "Whose?" test fails us in evaluating statements like "kidnapping and holding innocent civilians as hostages is wrong." By now, we are all familiar with the abductions of citizens in Israel in October, 2023, which has been widely reported by credible sources like *The Wall Street Journal*, BBC, ABC, Reuters, NPR, and many others. Our common value of human life in America demands that this would be wrong regardless of whether an individual *believes* it is wrong; thus, if this is wrong regardless of personal beliefs, the objective/subjective test would render the statement a fact, at least within the realm of American society. Nevertheless, Hamas must believe the exact opposite: Kidnapping and holding innocent civilians as hostages is NOT wrong as a *factual* matter, presumably because in their minds the ends justify the means.

Another explanation philosophers sometimes give for the distinction between facts and opinions is that facts are uncontroversial; however, whether a statement is uncontroversial depends upon the audience and sometimes upon the era. For example, the statement "the Earth is round" was controversial when Pythagoras first "proved" it in 6 B.C. This statement would not be controversial now in a convention of scientists but would be highly controversial in a convention of Flat-Earthers. Similarly, this statement can be highly controversial in some contexts but not controversial in others: God exists. Whether God exists or does not exist is a factual matter that is not determined by my opinions or beliefs; if God exists, He exists independently of whether I believe so. These examples demonstrate why famous French philosopher Rene Descartes spent so much time searching for a statement that could not be doubted before settling on "*Cogito, ergo sum*": I think; therefore I am. Descartes believed that it could not be doubted that he existed, as he was the one doing the doubting.

The important point of this discussion is to expand your thinking about "facts" and "opinions" so you will avoid the tendency to dismiss statements you disagree with or perhaps thought were "just their opinions." When an argument arises, keep an open mind; consider the opposing view; ask for facts that support the claim; and assume at least a modicum of truth exists until proven otherwise, especially as a matter of professional courtesy among other lawyers.

5. Facts vs. Values

If facts are objective statements that have been or can be proven true, should our values not automatically align with facts? Should the pursuit of truth not outweigh everything else: the truth, the whole truth, and nothing but the truth? Our values allow us to prioritize; they also allow us to classify ideas or behaviors as right or wrong, significant, or insignificant, even though, ironically, values themselves are personal and not subject to right or wrong assessment. Values are guiding principles, while norms are practical standards of behavior. According to French sociologist Émile Durkheim, "social facts" are values and cultural norms that are capable of influencing and even restraining individual behavior, like whether and when people should marry, what constitutes promiscuity, and whether adultery is acceptable. For example, Americans value domestic cats as pets; therefore, as a normal standard for behavior, we do not eat them. Yet, the Humane Society reports that citizens in one specific Chinese province, the Guangdong province, eat as many as 10,000 cats per day. [Fortunately, cat eating is not common in most of China.] Nevertheless, you can disagree with someone's values and even with a society's norms.

While fact-based statements accurately describe reality, normative, or value-based, statements evaluate it. For example, if innocent civilian hostages are kidnapped and held against their will, that fact (that it is occurring), though *true*, does not mean that it is morally acceptable. For this reason, values do not always align with facts; whether something is morally justifiable is not based on facts but on values. By comparison, claiming that the Earth is flat is wrong, factually speaking, but it is not a matter of values; rather it is a matter of ignoring vast amounts of empirical scientific data without having vast amounts – or even meager amounts – of empirical scientific data to support the claim. A value-based normative statement says kidnapping and holding hostages is *morally* wrong; while the Flat-Earthers are factually wrong, they are not morally wrong absent extenuating circumstances. For example, if a high school science teacher teaches students that the Earth is flat without explaining that scientific authority universally concludes otherwise, the teacher could be morally wrong; however, just being wrong does not necessarily correlate to morality.

In his United Nations report, Jonathan Georg Dittrich observes that value-based reasons and norms are easier to dismiss than fact-based reasons and explains why:

> First, normative reasons are often seen to be relative both with respect to the time in which they are adopted and with respect to the group of individuals [that] adopt them. This simply means that certain individuals may adopt certain values during certain times but others may not, and the same individuals who do may not adopt those values during another time. The problem with this relativity is that it makes it harder to educate individuals to adopt the position in question. For if the normative reasons are not universal but only accepted by some individuals at certain times, it becomes questionable for the individual as to why exactly he or she should accept those values. This is different when it comes to fact-based reasons. Their truth is neither relative to the individuals who adopt them nor to the times at which they are adopted. [See United Nations University Institute on Globalization, Culture and Mobility policy report "*Addressing Racism through Fact-based Education and Fact-based Policies*" by Jonathan

Georg Dittrich, p.2] [*edited slightly to accommodate for differences between European grammar and American grammar conventions*]

Dittrich also notes the limitations of "tolerance," which he sees as a common value of European societies, because tolerance embraces the belief that every person is entitled to his or her own opinion; however, tolerance can be problematic when one individual is supposed to be tolerant towards the personal values of another. For example, is an individual supposed to be tolerant of the racist values of another? This could lead to the wrong impression that racism is another matter of personal opinion. [See Dittrich report, p.3] Dittrich summarized well the problem with relying on normative reasons to convince a person of something: the norms change among people groups and eras, and because they change they become less reliable. This is the reason to prefer and seek fact-based arguments.

6. Distinguishing between Facts and Opinions on a Continuum

Real life is never simple, and the distinctions between facts and opinions or claims *sometimes* fall along a continuum, where at one end are "facts" that nearly everyone would agree upon based on our shared values as a society and at the other end are "claims" that few would agree upon, or virtually everyone would agree are *not* facts, and along that continuum the facts gradually become opinions, opinions become claims, and statements eventually become absurdities. Moreover, inferences are also based on facts, but an inference should be a logical, reasonable extension of the point the speaker or author is making. Like other humans, lawyers sometimes infer too much, too broadly, or too far beyond the original point, so be wary of inferences that include the words "always," "never," "every," and "all," and even "usually."

Here are a few strategies for sorting out the differences between facts and opinions:

- Facts are observations about the world that require evidence and logic.
- Opinions reflect the way a person feels about the facts.
- If emotions are involved, the statement is more likely an opinion because facts are neutral.
- If positive or negative adjectives or adverbs are used, the statement is more likely an opinion.
- If words with positive or negative connotations are used, the statement is more likely an opinion.
- Ask "who says." Facts should be supported by evidence and logic, not just the speaker or author.
- If it can be verified, it is a fact.
- If it expresses preference, it is an opinion; for example, red wine goes better with red meat.
- If it is not subject to assessment as right or wrong, it is an opinion [or a belief].
- If it is subject to assessment as right or wrong, it is a fact.
- If it is open to change, it is an opinion. [beliefs are more dogmatic and less open to change]

7. Sparring with "Opinions"

When someone says "that's just your opinion," read this as: "I don't have to take your evidence/statement seriously." Rather than becoming defensive and sparring with this accusation, construct a more productive conversation by asking for their opinion on the topic; then ask for evidence that backs up their opinion.

When someone says "I'm entitled to my opinion," read this as: "I'm trying to bootstrap my evidence/statement above criticism." Rather than sparring with entitlements regarding opinions, opt for a more productive conversation by asking "what's your evidence to back that up?" or "what are your reasons?"

Last Thought:

The best way to preserve your credibility is always to cite a source for statements you believe to be factual. State your source, like this: "The *Wall Street Journal* reports that electricity usage is increasing a historic rates in the State of Texas." That the *WSJ* reported it is a verifiable fact; if the report turns out to be false, the damage will be primarily to the *WSJ's* credibility rather than yours. Of course, if you are prone to citing unreliable sources, your credibility will quickly be tarnished as well, so be careful selecting sources.