Working with Lawyers: 101

2018 SRAI Annual Meeting
October 27-31

Ross Hickey, JD, CIP, CPIA, Assistant Provost for Research Integrity
Casey Webster, JD, CIP, Research Compliance Administrator
University of Southern Maine, Portland, ME, USA
“I told him it was law logic- an artificial system of reasoning, exclusively used in courts of justice, but good for nothing anywhere else.”

- John Adams
Disclaimer:

Objects may appear closer than they really are. Some assembly required. Any resemblance to real person, living or dead, is purely coincidental. No animals were harmed in the making of this class. Allergy alert: may contain nuts. Prolonged exposure may cause vomiting, dizziness, dry-mouth, flu-like symptoms, gas, headaches, insomnia, inappropriate feelings, elation and/or rapid thoughts, itching, loss of appetite, nausea, nervousness, rash, sinusitis, sleepiness, sore throat, sweating, tremors, upset stomach, abnormal taste, agitation, chills, heat flashes, confusion, ear pain, emotional instability, fever, high blood pressure, increased appetite, loss of memory or palpitations. Return for store credit only. Slippery when moist or wet. You must be present to win. No purchase necessary. Not recommended for persons on sugar restricted diets. Batteries not included. As seen on TV. A restocking fee may apply. Not intended for use by children under 5, or people who act like them. May cause irritability after prolonged use. Sanitized for your protection. Contents may explode if put even under the slightest pressure. PLEASE DO NOT: ANNOY, PESTER, TAUNT, TORMENT, MOLEST, WORRY, BADGER, HARRY, HARASS, CASTIGATE, HECKLE, PERSECUTE, IRK, BULLY, VEX, DISQUIET, GRATE, BESET, TEASE, NETTLE, TANTALIZE OR RUFFLE THE PROFESSORS. This means you. Shake well before using. If condition persists, consult your physician. One size fits most (but not really and you should consider the following: even if we make it in a particular size does this mean you should wear it?) All sales final. Tax, tag & title extra. Check daily for applicable rates. Additional charges may apply in some service areas. Apply only to affected area. Avoid prolonged exposure to sunlight or darkness or mid-level lighting. Not to be combined with other classes without consulting a professor first. Printed on un-recycled paper or a non-green screen. Use only in well-ventilated area. Keep away from open fire or flame. Do not disturb. Some equipment shown is optional. Prices may vary. Not recommended for children of any age. Reproduction strictly prohibited. No solicitors. First pull up, then pull down. Contents may settle during shipping. Call before digging or grooving. This product is meant for entertainment purposes only. This class is meant for educational purposes only. Freshest if used before date on syllabus. Subject to change without notice – especially pennies, nickels and dimes. Drivers do not carry cash. Decisions of judges is final. We do not warranty or make any representation of the fitness of this course for any purposes other than those for which it was designed. In no event shall the professors be liable for any special, indirect or consequential damages or any damage related to the validity, accuracy, or reliability of the course or profits or loss of use derived from the course, whether in action, contract, negligence or other tortious or tortuous action, arising out of or in connection with the use of information from this course or any site connected to this course. DO NOT TAUNT HAPPY FUN BALL!!! Please consult an attorney for legal advice. Expressio unis, exclusio alterius. Pecunum ante plebium. HUH? We thank you for your time and have a nice day.

© Kai-Zen Academic Consulting, LLC
Learning Objectives

• Anticipate the questions lawyers will be likely to ask, decrease potential frustration and improve communicative responses when interacting with an attorney.

• Understand the process in which an attorney is likely to approach a problem and utilize it in your own daily workplace encounters.
Learning Objectives: Notes

• The questions lawyers will ask and how they will respond to your questions will be determined by:
  • Who the lawyer’s client is;
  • The setting and nature of the communication;
  • What the client has asked his/her lawyer to do; and/or
  • What capacity they are acting in.
• Not all “lawyers” are practicing attorneys or act in traditional “legal” capacities.
Learning Objectives: Notes

• How a lawyer is likely to approach a problem will be determined by:
  • The type of lawyer they are or their area of expertise;
  • How they are trained to think;
  • The type of law involved (contract, tort, administrative, etc.); and/or
  • What capacity they are acting in.
Have you ever noticed that…

- A lawyer’s two favorite words are “...it depends”.
- Why is it that a lawyer always answers a question with a question?
- Lawyers speak two languages: Legalese and hypothetical, with Latin sometimes thrown in.
- A lawyer never seems to give a straight answer...but it depends on the question.
- Only lawyers call a 600-page document a “brief.”
- All the above, subject to change, without prior warning or notice...
Who do you think of when someone mentions a lawyer?
Who do you think of when someone mentions a lawyer?
How to Identify Your Lawyer in the Wild

**Attorney** : A lawyer admitted to practice law and provide legal advice. AKA Attorney at Law. Term generally used to denote a practicing lawyer in a legal capacity. Usually identified by *ESQ*.

**Counselor** : An attorney or lawyer who gives legal advice and handles legal affairs on the behalf of their client. In some states counselor and attorney are used interchangeably.

**Juris Doctor or “J.D.”** : A person trained and schooled in the legal arts. May or may not be licensed to practice law or provide legal advice. JD is typically used in academic settings.

**The fine print**: This is a presentation about working with lawyers, so of course there is fine print! In general, these terms tend to be interchanged in everyday parlance even though they tend to be applied in specific circumstances.
“You come here with your skull full of mush and our job is to make you think like a lawyer.”

-Professor Kingfield, The Paper Chase
"... I drank what?"
-Socrates
Law School Socratic Method

1. Prepare an abstract or outline (brief) for a particular case in your casebook for class.

2. In class the professor may call on you to answer a question followed-up with additional questions often including hypothetical situations that differ from those in the case.

3. The idea is for the student to develop the principles of:
   - Deductive and Inductive reasoning
   - Identify the truth or falsity of the case’s premises (fallacies)
Legal Reasoning

- Legal Reasoning is really a method of logic
  - The Basic pattern is reasoning by example.
  - It is reasoning case to case.
- The process involves the doctrine of precedent in which:
  1. Similarity is seen between cases.
  2. A rule of law is announced in the first case.
  3. This rule of law is then made applicable to the second case.

Professor Edward Levi
Legal Reasoning

1. Deductive Reasoning: Moves by inference from the more general to the less general.

2. Inductive Reasoning: The process used to fashion premises in deductive reasoning. Moves from the particular to the more general. A conclusion that is more probably true than not:
   - Inductive Generalization: Using multiple particular examples to create a general statement.
   - Reasoning by Analogy: Using relevant examples that has facts that resemble or differ from one another.
Legal Reasoning

Deductive Reasoning:

1. Major Premise: All men are mortal.
2. Minor Premise: Socrates is a man.
3. Conclusion: Therefore, Socrates is mortal.

Reasoning: The process of reaching a conclusion through argument.

Conclusion: “Therefore” statement of the argument.

Premises: Provide evidence for accepting conclusion.

Syllogism: Two statements (propositions) which together imply a separate third statement.
Introduction to Fallacies

I love you
Therefore, I am a lover:
All the world loves a lover
You are all the world to me-
Consequently
You love me.

-J.G. Vivian
Introduction to Fallacies

Formal Fallacies: Error in the logic of the argument. There is an error in the rules of logic in the argument.

Informal Fallacies: An error in the subject matter of the argument.

- Fallacy of the Straw-man
- Fallacies of Distraction: Appeal to Pity, Prestige, Ridicule, Masses, Ages, Terror...
- Other Fallacies: Hasty Generalization, Fallacy of Accident, Begging the Question, etc...
The Three Main Types of Law

1. Case Law
2. Statutory Law
3. Administrative Law
The “Common Law” Tradition

“Adjudication”

1. A rule of law is viewed in combination with other rules by a process of inductive reasoning.

2. To form a broader legal precept, a principle, which constitutes the major premise for a process of deductive reasoning in the next case.

3. Leading to a conclusion of the deductive syllogism, form the basis in the next case.

4. Which in turn takes the form of a new legal rule.

Logic for Lawyers (1989)
The “Common Law” Tradition

• Legal system of principles gradually emerging from individual decisions through a process similar to experimentation.
  • “Working hypothesis, continually retested in those great laboratories of the law, the courts of justice.”
    - M. Smith
  • Decisions or rulings develop over time into a broader legal principle.
• Contrast with **statutory law** which is enacted for future events, not to settle an actual dispute before a court.
Administrative Law

- The Administrative Procedure Act (APA) requires any adjudication process through an administrative law judge (ALJ) to follow legal procedures such as testimony under oath and subpoenas.

- These proceedings are covered by the Due Process Amendments of the U.S. Constitution.
  - Then parties may appeal for judicial review at the end of the process.
Priorities of “Laws”

1. U.S. Constitution
2. Federal Statutes (laws)
3. Federal Case Law
4. State Statutes (laws)
5. State Case Law
6. Regulations
   1. Usually based on a law
   2. Federal regulations trump state regulations when they conflict or overlap
7. Agency Guidance?
Attorney Client Privilege

• A dynamic relationship between the lawyer and a client where information is shared in a protected setting
  • This also why there is a possible problem with lawyers serving on research review boards, like the IRB, IACUC, IBC, etc.
  • If the lawyer works for the institution (ex. in-house counsel), then their “client” is the institution and not the research participants.
  • Tend to focus on liability issues to the institution (that is their job after all)
• Partially why lawyers speak in hypotheticals
• A third party, that is not the client, can break privilege
Attorney Client Privilege, cont.

• This is an obligation of the lawyer; the client can breach this if they want (intentionally or accidentally)

• There are some limitations
  • Ex. perpetration of a known fraud/crime; threat of imminent harm to oneself or an other; when required by law; etc.

• Non-licensed, non-practicing lawyers are not bound by this, though many try to uphold this principle
Attorney Client Privilege: Part 2

• Privilege applies to corporations/organizations
  • May not cover each individual!
  • Different standards for outside counsel and in-house counsel
Attorney Client Privilege: Part 2, cont.

- Work-Product Doctrine
  - Generally covers items that are prepared in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3)
  - Generally does not cover items that are created “in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes.” *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993)
  - The work-product doctrine does not apply to certain corporate communications relating to a company’s internal investigations if the communications are not made in anticipation of litigation. *United States ex rel. Barko v. Halliburton Co.*, 2014 LEXIS 36490 (D.D.C. Mar. 6, 2014) (No. 1:05-CV-1276),
“Legalese”

“We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane language to express common place ideas. Seeking to be precise, we become redundant. Seeking to become cautious we become verbose.”

Richard Wydick, Plain English for Lawyers
“Legalese”

Legal writing is often characterized as

- Verbose or “wordy”
- Using archaic language and phrases
- Unclear with run-on sentences and clauses within clauses
- Pompous
- Dull
"Legalese"

Why do Lawyers do this?

- Fear of having the document misconstrued
- Fear of malpractice or disbarment
- Job security
- Tradition
- It is more work to write in plain English (from a lawyer’s point of view that is...)
**Definitions and Concepts**

**Legal advice**: Unfortunately for purposes of this presentation, I cannot provide you with a definition of legal advice as that would constitute the provision of legal advice and since the presenter is not authorized to act in a legal capacity for said hosting client, it would be illegal and unethical to act in said capacity.

Hypothetically speaking, however, this term might refer to the type of advice an attorney/lawyer may provide to a possible client by which that client may make a possible legal decision or rely on.
Some “Legal” Realities

• In general, if it is not written down, it does not exist.
• If it is written down, it is potentially discoverable and evidence.
• If a term, item, clause, etc. can be misconstrued, it will be.
• Contracts are your best friend...and worst enemy.
• The more detailed you are, the better, but the more confining it is.
• The more ambiguous X is, the more flexibility you have, but so does the other side.
Communicating with Lawyers

• **Why is the lawyer reluctant to e-mail me a response to my questions?**
  • When you are **not** their client, a lawyer is likely to see e-mail as discoverable communications in any litigation and so you may get better results in discussions if you talk to them face to face or via phone.
  • If you are a client, this may also be viewed as providing legal advice...
  • If they do respond, do not be surprised if there are a **LOT** of caveats, disclaimers and “hypothetical” comments and/or the response will be vague.
Communicating with Lawyers

• When asking a lawyer what could happen if you do X, lawyers have an ethical obligation to tell you the possible outcomes they can foresee. The response can be overwhelming.

• A more helpful follow-up question to ask the lawyer is what is the LIKELIHOOD of these outcomes occurring.

• One of the big reasons why lawyers speak in “hypothetical”; We can talk about legal matters and “possibilities” without committing to them.
Communicating with Lawyers

Rule 1.4 Communication Model Rules of Professional Conduct

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Communicating with Lawyers

Rule 1.0 Terminology Model Rules of Professional Conduct

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
Communicating with Lawyers

- Always remember who the lawyer works for and who their client is.
- Any time you make a statement, accusation, etc. be prepared to back it up with facts- actual evidence and not hearsay will carry more weight.
- If you reference a previous situation that you believe analogous to the current situation, explain the similarities and how they are relevant or germane.
Have you ever noticed that…

• A lawyer’s two favorite words are “...it depends.” (Legal Reasoning)
• A lawyer always answers a question with a question. (Socratic Method)
• Lawyers speak two languages: Legalese and hypothetical (Attorney Client Privilege; Providing legal advice; Tradition/training)
• A lawyer never seems to give a straight answer...(Reasoning by Analogy)
• Only lawyers call a 600-page document a “brief.” (Traditional Legal Writing)
Non-Lawyer Survival Tips

- Consider who the client is when talking with a lawyer.
- When dealing with lawyers, provide accurate and verifiable information/facts.
- Be ready to explain/defend your position (on whatever) and provide justification for it.
- Do not assume we know what you mean. Terms, definitions, etc. all have specific meanings, but the meaning can change depending on context, law, regulation...
- If your XYZ involves a specific law, regulation, policy, etc. involved, make sure to provide a citation to it so we can look it up (ex. 45 CFR 46).
- Give the lawyer some time to think through the issue and try to avoid pushing for an answer “right then and there”.
- Cookies work for us (the baked version, not the computer ones, but it depends...)
Thank you!

Questions?

Ross Hickey
Assistant Provost for Research Integrity
University of Southern Maine
Ross.hickey@maine.edu

Casey Webster
Research Compliance Administrator
University of Southern Maine
Casey.webster@maine.edu