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## A TALE OF TWO ISSUES: “APPLYING LAW TO FACTS” VERSUS “DECIDING WHAT THE RULE SHOULD BE”

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The first objective memo assigned in law school usually involves a fairly straightforward set of facts that correspond with a fairly straightforward set of rules and cases. Students are then set about the task of interpreting the existing law and applying it to the given facts. This kind of assignment introduces important basic concepts like synthesizing a legal rule from existing authority and making rule-based and analogical arguments to achieve a result.

Later assignments may, however, strike out into new territory. Instead of being asked to analyze how existing law applies to a novel set of facts, students may be asked to analyze what the law *should be* in a particular jurisdiction, either because the law is unsettled or because the legal question has never before arisen in that jurisdiction. This type of legal issue requires a slightly different approach. Students should understand the difference between these two types of legal questions before setting out into the library.

### Applying Existing Law to Facts

When the legal issue presented requires an application of existing law to novel facts, a good starting point is to decide what main legal idea the issue involves. You can then focus on that main legal idea, or “phrase that pays,”<sup>1</sup> finding and analyzing authority that either 1) establishes what rules determine when the legal idea is satisfied and when it is not; or 2) provides factual examples of when the legal idea is satisfied and when it is not. For instance, if you are analyzing whether, under a particular fact scenario, a dog has been used as a dangerous instrument for purposes of a first-degree robbery statute, the phrase that pays is “dangerous

<sup>1</sup> See Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 54–55 (Aspen L. & Bus. 2002).

instrument.” Useful case law may contain general principles that define dangerous instrument in this context, like “a dog is used as a dangerous instrument when it is within the control of the defendant and is trained to attack.” Or it may contain a helpful “fact story” like “In the *Smith* case, a defendant ordered a 100-pound Rottweiler that had attended Joe’s Guard Dog Obedience School to ‘sic ’em,’ and the court held the dog was used as a dangerous instrument.”

Once you have determined what rules apply and what fact stories are available for comparison, you develop arguments on the basis of that information. So for the dog example, one rule-based argument might be “Here, the state can argue that the defendant used his dog as a dangerous instrument because the dog was within his control and was trained to attack.” An analogical argument might be “Like the dog in the *Smith* case, here the dog was a trained dog of about 100 pounds. Further, just as the defendant in the *Smith* case told his dog to ‘get ’em,’ here, the defendant told his dog to ‘sic ’em.’ Therefore, like in the *Smith* case, the court in this case will probably conclude that the dog was used as a dangerous instrument.” Thus, through a developed set of criteria and through comparison to existing examples, you can draw a conclusion about whether the particular legal idea at issue is satisfied in this case.

### Deciding What the Rule Should Be

An analysis of and argument about what the law *should be*, however, involve a different kind of strategy and thinking. Consider two different scenarios that may require the legal writer to define the law. First, suppose your legal issue is whether under this jurisdiction’s first-degree robbery statute a dog *can be considered* a dangerous instrument. The courts in this jurisdiction have never decided the issue, so there are two possible rules the court could choose: yes, a dog can be considered a dangerous instrument, and no, a dog cannot be considered a dangerous instrument. Or second, suppose your legal issue is whether under this jurisdiction’s Heart Balm statute, fault should be a factor in deciding who gets to keep the ring after an engagement is terminated.<sup>2</sup> Numerous courts in

<sup>2</sup> Thanks to Debby McGregor for sharing this example through a problem bank.

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this jurisdiction have decided the issue, but some courts have decided yes, fault is a factor, and some have decided no, fault is not a factor. So the current court must choose which rule it will apply. These two scenarios do not require analysis of whether a particular definition is satisfied, such as was the defendant “at fault” or was the dog *actually used* as a “dangerous instrument.” Rather, these issues require analysis about which is the better rule. Only after we decide which rule will apply can we move on to determine whether our facts fit the definitions the rule prescribes, the type of issue discussed earlier.

To analyze which is the better rule, we have to use a different set of analytical tools than we used for the first kind of issue. A primary tool used to determine the better rule is policy analysis. The judge adopting or applying a new rule will be concerned about whether the new rule implements sound policy. The policy driving the rule should be consistent with the policy within that particular area of the law and consistent with policy within that jurisdiction in general. For instance, if the judge must decide whether fault should be considered in determining who gets to keep the ring after an engagement termination, the judge may want to examine current policies in other areas of family law. Since other areas of family law currently reject a fault analysis in favor of a no-fault analysis (e.g., in marital termination proceedings), you could argue that to ensure consistent policy, the court should adopt the no-fault rule.

When researching a question like this, then, the researcher should look for discussion of the policy behind a particular rule and for discussion or clues about the policies implemented in this area of the law in general. Possible sources include cases from other courts that have already decided to adopt or reject a certain rule and cases from the governing jurisdiction involving related areas of law. Legislative history may also provide information about the policy intent behind a statute that must be interpreted.

In deciding which is the better rule, the legal writer may also examine what the majority of other courts have held and what the trend seems to be. For instance, if the issue is whether a dog may be considered a dangerous instrument, you may argue that all other courts that have entertained the issue have decided that a dog can be considered a

dangerous instrument, so this court should too. Further, if earlier courts decided that a dog cannot be considered a dangerous instrument, but all courts in the last 20 years have decided that it can, you can argue that the court should follow the “modern trend.” Also, you may base an argument on the fact that certain well-respected courts or judges or courts from neighboring jurisdictions have decided one way or the other. Research and analysis involving this kind of issue should therefore include good “mapping” of how other courts are deciding the same issue, when those decisions have been made, and what particular courts and judges have made the decision.

Finally, the legal writer deciding a “best rule” question should also be concerned about achieving the most workable and just result for the most people. Thus, the overall effect of the rule, the ease or difficulty of applying the rule, and the practical results in the case presented will all provide bases for argument.

Notice that for the most part, when thinking about what the rule should be, the facts of the particular case in front of you are *not* the main focus. Rather, the main focus is the proposed rule’s shape, effect, and consistency with other rules in that area of the law. This focus differs from the analytical focus for an “apply existing rule to given facts” issue, where the concern is primarily about whether our facts fit under the umbrella of the existing rule. The straight analogical analysis that was so important to us under the “apply rule to facts” issue (“like the dog in the *Smith* case, the dog in our case was barking menacingly; therefore it was a dangerous instrument”) does not work here. Rather, we have to make policy arguments and arguments about the “legal landscape” and how this rule fits into it.

### Conclusion

This discussion is not intended to exhaustively examine all the kinds of analysis helpful to these two types of legal issues. But the student legal writer who sees the difference between the two types of issues and thinks carefully about how to approach each type before starting the research and analysis process will plan and work more efficiently and effectively.

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