

Aristotle’s Tried and True Recipe for Argument Casserole

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I thoroughly enjoyed John Schunk’s article—“What Can Legal Writing Students Learn from Watching *Emeril Live*?”—in the Winter 2006 issue.¹ We are big Emeril fans in our family, and we too have heard him distinguish the art of baking casseroles from the art of baking cakes. Baking a casserole is more art than science, because although there are basic ingredients, a creative cook can vary the recipe to please a variety of palettes. Baking a cake, on the other hand, is more science than art, because if the cook eliminates a necessary egg or adds too much baking powder, the cake could fail. That legal writing is a casserole and not cake is an apt metaphor. In his article, Professor Schunk has captured the palpable tension our first-year students feel between wanting to be creative, and at the same time, wanting to do it the “right” way. As Schunk notes, in their quest for concrete knowledge, first-year law students often latch onto the idea that legal writing is a cake, and all they need to do is memorize and follow the recipe.²

What makes the metaphor particularly delicious is that it turns Plato’s criticism of rhetoric on its head. Plato, who despised rhetoric for its ability to manipulate audiences and its inability to yield absolute truth, described rhetoric as the counterpart to cookery, the false art of medicine.³

¹ John D. Schunk, *What Can Legal Writing Students Learn from Watching Emeril Live?*, 14 *Perspectives: Teaching Legal Res. & Writing* 81 (Winter 2006).

² As first-year students at Georgetown become increasingly more accomplished in terms of undergraduate performance and Law School Admission Test (LSAT) scores, their level of anxiety in trying to “get it right” seems to increase as well.

³ Plato, *Complete Works, Gorgias*, 462b–466a (John M. Cooper ed., 1997).

Just as cookery appeals to earthly desire, rhetoric appeals to audience appetites. According to Plato, cookery was the false art of medicine, and rhetoric was the false art of dialectic (i.e., reason or logic).⁴ However, instead of rejecting Plato’s idea that rhetoric is akin to cookery, Schunk embraces it. Just as people judge a cook’s skill by the taste of her cooking, an audience judges the persuasiveness of an argument by its ability to satisfy.

The idea that legal writing is a process of combining ingredients to achieve optimal taste can be traced back to Aristotle’s *Rhetoric* (c. 333 B.C.).⁵ Aristotle defined rhetoric as the process of “discovering the means of persuasion for every case . . . that is offered.”⁶ Much as a cook shops for the freshest and finest ingredients, the legal writer must discover the best and most persuasive arguments and combine them in order to please her reader. There are basic recipes with which the legal writer is familiar, having used them time and time again. If internal memoranda are lasagna, briefs might be moussaka. Like lasagna, moussaka calls for ground beef and tomatoes, but adding eggplant and cinnamon makes it taste nothing like lasagna. As legal writers gain confidence, they become more adventurous in varying these recipes. Lasagna often contains ground beef, but an experienced cook might substitute lamb and add olives in order to accommodate a special taste.

The process that a cook engages in—shopping for and preparing the ingredients, assembling and baking the casserole, and then presenting it to a discriminating audience—is like the legal writing process. Aristotle first articulated the process of formulating arguments in *Rhetoric*, much of which

⁴ *See id.*

⁵ *See, e.g.,* Lane Cooper, *The Rhetoric of Aristotle* (1932).

⁶ *Id.* at 1355b.

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is devoted exclusively to forensic rhetoric, Aristotle’s term for legal argument.⁷ By the first century B.C., teachers of rhetoric had divided the process into five canons: invention, arrangement, style, memory, and delivery.⁸ Greek and Roman society revolved around the spoken word, but most of the process Aristotle envisioned then is still relevant. Because the vast majority of legal argument today is written, the canons of memory and delivery do not apply.

Invention

Aristotle’s term for invention, the process of gathering and preparing arguments, was *heuresis*, meaning to invent or to discover.⁹ Aristotle believed there were two types of arguments: artistic and non-artistic. Only artistic arguments are actually invented. Non-artistic arguments exist outside the creative process and are simply used.¹⁰ A cook’s non-artistic arguments come from the utensils she uses. In order to prepare lasagna, for example, she must first select the items she needs, such as mixing bowls and wooden spoons, but she does not create them; they are already in her kitchen. So too, the legal writer must gather her utensils. The legal writer’s non-artistic arguments come from the law itself—constitutions, statutes, regulations, and case law. Like a cook who determines for each casserole which utensils she needs, a legal writer determines what law applies to a given dispute.

As for artistic arguments, Aristotle would say the legal writer must discover them. Much as a cook searches for the best ingredients, the legal writer must seek out the best arguments. Aristotle believed most speakers needed a storehouse of arguments—

he called them *topos* or topics—where they could go to get ideas. Although today we think of topics as subjects, to Aristotle, a topic was a place:

a place in which the hunter will hunt for game. If you wish to hunt rabbits, you go to a place where rabbits are; and so with deer or pheasants. . . . And similarly with arguments. They are of different kinds, and the different kinds are found in different places, from which they may be drawn.¹¹

For ideas applicable to all kinds of argument, a speaker could go to the common topics.¹² For ideas relating to political, legal, and ceremonial argument, one went to the special topics. For lawyers, the special topics included motive, state of mind, the nature of wrongdoers as well as victims, and the magnitude of the alleged wrong.¹³

Like a cook, who shops for the tomatoes she thinks are best for her lasagna, the legal writer must choose the arguments she uses with care. Although she is bound by controlling authority and *stare decisis*, she often has great leeway in defining the issues, articulating the “rule” of law, and selecting the most persuasive interpretation of a statute or application of a rule of law. Both primary and secondary sources serve as the special topics for her ideas. The “topics” of the West Key Number System®, legal encyclopedias, and *American Law Reports*, for example, categorize areas of the law in much the same way Aristotle’s *Rhetoric* categorizes human behavior. The task then falls to the legal writer to select the best cases—in her opinion—to use for analogy and to anticipate those cases her opponent is

⁷ See Cooper, *supra* note 5, at Book I, Chapters 10, 12–15.

⁸ Edward P.J. Corbett, *Classical Rhetoric for the Modern Student* 22 (3d ed. 1990). See, e.g., Cicero in *Twenty-Eight Volumes*, Vol. 4 *De Oratore, Book I*, §§ 137–147 (E.W. Sutton trans., 1967) and Quintilian, *Institutio Oratoria Books 3–8* (Donald A. Russell trans. & ed., 2001).

⁹ The past perfect form of *heuresis* is *eureka*, meaning “to have found it.” *The Oxford Dictionary and Thesaurus* 496 (Am. ed. 1996).

¹⁰ See Corbett, *supra* note 8, at 22. Aristotle’s examples of non-artistic arguments were those derived from laws, witnesses, contracts, tortures, and oaths. See Cooper *supra* note 5, at 1375a.

¹¹ See *id.* at Introduction, xxiv.

¹² Aristotle articulated four types of argument applicable to all situations: (1) the possible and impossible (e.g., “if two things are alike, and one is possible, then so is the other”), *id.* at 1392a, (2) past facts (e.g., “If one thing (B) that naturally follows another (A) has occurred, then the antecedent (A) has occurred.”), *id.* at 1392b, (3) future fact (e.g., “If the clouds are gathering, it is likely to rain”), *id.* at 1393a, and (4) size or degree (e.g., in the context of legal argument, the lawyer tried to prove that the justice or injustice of the case is “great or small, whether absolutely or in comparison with other cases.”), *id.* at 1359a, 1393a.

¹³ See *id.* at Book I, Chapters 10–14.

likely to rely on. In this way, the skilled legal writer prepares to predict or argue for a certain outcome. The first milestone for a beginning legal writer comes with the recognition that even at this stage in the process, she has a great deal of discretion.

Once a cook selects and buys her ingredients, she must prepare them: chop vegetables, sauté beef, make the tomato sauce, and pre-boil the pasta. Similarly, once the legal writer collects her ideas, she must begin to prepare her arguments. According to Aristotle, artistic arguments can be subdivided into three types: appeals to reason (*logos*), appeals to the character of the speaker (*ethos*), and appeals to emotion (*pathos*).¹⁴ “[T]o master all three obviously calls for a man who can reason logically, can analyze the types of human character, along with the virtues, and, thirdly, can analyze the emotions—the nature and quality of each several emotion, with the means by which, and the manner in which, it is excited.”¹⁵ The end of all types of argument is persuasion. Aristotle said that when appealing to reason, deduction and induction are the appropriate means to that end.¹⁶ As in classical rhetoric, the basic model for legal reasoning is deduction: rule, application, and conclusion. Legal audiences expect this mode of reasoning regardless of the content of the arguments. It mirrors the syllogism in its attempt to prove the existence of a fact or the rectitude of a given position, but it differs in that it cannot prove these things with certainty.¹⁷ The premises on which legal writers rely are rarely, if ever, absolutely true, and therefore, a legal writer’s conclusions are never more than probable.

Inductive reasoning appears most often in legal writing in the form of case analogies and distinctions. Just as a scientist accumulates evidence sufficient to induce the existence of a fact,¹⁸ a legal

writer accumulates similarities—factual as well as situational—between cases to induce the conclusion that the outcome in both cases should be the same. In order for an analogy to be persuasive, the writer must compare similarities that really matter, and she must not ignore dissimilarities that tend to defeat the comparison.¹⁹ When legal writers distinguish cases, they strive to articulate enough dissimilarities to induce the conclusion that the cases should be treated differently.

Arrangement

Once the ingredients are prepared, the cook is ready to assemble the casserole. For lasagna, she will follow a generally accepted pattern for arranging the ingredients in the pan: first some sauce, then a layer of noodles, and finally, a layer of the cheeses. A creative cook may take some liberties with this traditional pattern, but if she strays too far from it, the dish will no longer be recognizable as lasagna, and she will disappoint the audience’s expectation. Similarly, the legal writer takes the arguments she has crafted and arranges them in a memo or brief. She too can take creative liberties with the traditional arrangement but, once again, not so many that the audience is no longer sure what has been presented.

Aristotle said that the essential parts of political, legal, and ceremonial argument are the statement (of the issue) and the argument itself (which includes counterarguments).²⁰ He said that in legal argument, the statement should also include the facts giving rise to the issue.²¹ Although he thought that introductions and conclusions were not always necessary, he conceded that speakers often include them. Aristotle said that the function of the introduction is “to make clear the end and object of your work” and “to mak[e] your audience receptive” to your position.²² The conclusion has

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¹⁴ See *id.* at 1356a.

¹⁵ See *id.*

¹⁶ See *id.* at 1356b.

¹⁷ See *id.* at 1357a; Corbett, *supra* note 8, at 60.

¹⁸ See Corbett, *supra* note 8, at 68–69.

¹⁹ See *id.* at 105.

²⁰ See Cooper, *supra* note 5, at 1414a–b.

²¹ See *id.*

²² *Id.* at 1415a.

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the equally important function of summarizing the argument and making the audience inclined to decide in the speaker’s favor. As to the conclusion, Aristotle said:

(1) You must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify and depreciate [make whatever favors your case seem more important and whatever favors his case seem less]; (3) you must put the audience into the right state of emotion; and (4) you must refresh their memories.²³

As to refreshing the audience’s memory, Aristotle concluded, “[Y]ou begin by noting that you have done what you undertook to do. So then you must state what you have said, and why you have said it.”²⁴

Roman rhetoricians made additions to this basic arrangement that we recognize today. For example, the *Rhetorica ad Herennium*, a well-known treatise on rhetoric whose Latin author remains unknown, divided argument into six parts: introduction, statement of the issue, outline of the argument, the argument itself, counterarguments, and conclusion.²⁵ The similarity to modern legal writing is striking. A typical memorandum or brief contains five parts: a question presented, summary of analysis or argument, statement of facts, discussion or argument (that includes counterarguments), and conclusion. Although this arrangement often strikes the novice legal writer as inflexible and dull, classical rhetoricians did not view it as a precise formula.²⁶ Cicero, for example,

said that a speaker must “manage and marshal his discoveries, not merely in orderly fashion, but with a discriminating eye for the exact weight of each argument.”²⁷ Thus several considerations can affect a speaker’s decisions in how to arrange an argument, including the type of speech, the nature of the subject, the speaker’s personality, and the nature of the audience.²⁸ So too with experienced legal writers, who deviate from the norm, based on their creativity as well as their knowledge of a particular audience’s tastes.

Style

A cook’s individual style is most apparent in the way she flavors her food. Here she has the most leeway. For lasagna, she must decide, should I add sugar to the tomato sauce to make it less acidic? Should I add nutmeg or cinnamon to give it an exotic taste? Should I add wine to make the sauce richer or water to make it thinner? Just as a cook must decide how to flavor the casserole she is making, the legal writer must decide what words to use to convey the arguments she has invented. Aristotle said “it is not enough to know *what* to say—one must also know *how* to say it.”²⁹ He emphasized the need for a speaker to choose a clear style that is appropriate to the circumstances.³⁰ Because “[n]aturalness is persuasive, [and] artifice is just the reverse,” Aristotle advised speakers to speak naturally and use contemporary language.³¹ Cicero expanded on the notion of style and said there are three types—plain, middle, and grand; the speaker’s choice of style depends on her goal. According to Cicero, a speaker should use a plain style for proof (e.g., to teach), a middle style for pleasure (e.g., to entertain), and a grand style for persuasion (e.g., to make a convincing legal argument).³²

²³ *Id.* at 1419b.

²⁴ *Id.* Some 2,300 years later, Aristotle’s advice survives today in the form of “tell the audience what you are going to tell them, tell them, and then tell them what you have told them.”

²⁵ Corbett, *supra* note 8, at 25. See also Cicero, *supra* note 8, at Vol. 2, *De Inventione, Book I*, §§ 20–109 (H.M. Hubbell trans., 1968) and Vol. 4, *De Oratore, Book II*, §§ 307–33; Quintilian, *supra* note 8, at Book 7.10, §§ 10–13.

²⁶ Classical rhetoricians acknowledged that “on some occasions it was expedient to omit certain parts altogether ... or to re-arrange some of the parts.” Corbett, *supra* note 8, at 25.

²⁷ Cicero, *supra* note 8, at Vol. 4, *De Oratore, Book I*, § 142.

²⁸ Corbett, *supra* note 8, at 279.

²⁹ See Cooper, *supra* note 5, at 1403b.

³⁰ See *id.* at 1404b.

³¹ See *id.*

³² See, e.g., Cicero, *supra* note 8, at Vol. 5, *De Oratore*, § 69. See also Quintilian, *supra* note 8, at Book 12.10, §§ 58–65.

Novice legal writers struggle most with the concept of style. Although an experienced reader's comments may apply to the argument's substance, students often interpret these as a critique of their personal style and resist suggestions for improvement. The undergraduate writer is so accustomed to writing for the professor she knows, she is frustrated having to learn to write for the audience she does not know. It comes as almost a shock to learn that she must provide proof for her ideas in the form of legal citation. The expectations of the legal audience are thus both foreign and demanding. Not surprisingly, these demands initially hamper style and lead first-year students to believe that legal writing does not allow for creativity.

The legal writer quickly comes to learn that the palette of the modern legal reader is uncomplicated. The taste should be pure, strong, and unmistakable, not muddled by a collision of flavors. Judges, lawyers, and clients hunger for legal writing that is clear and to the point. Less is often more.³³ As Aristotle advised, the legal writer should keep the use of stylistic devices—the spice of writing—to a minimum in order to achieve maximum effect. He admonished speakers to use archaic language and poetic phrases “sparingly and seldom” because they “diverge too far from custom toward the extreme of excess.”³⁴ As long as the art of the writing “can escape notice” and “the style is clear,” Aristotle would say the legal writer can create “good . . . prose.”³⁵ In contrast to the grand style of Cicero, the preeminent lawyer and rhetorician of Rome, the plain and unadorned style of Aristotle is the one we teach. We encourage students to use pithy phrases and short sentences to get their point across without being misunderstood. For the most

part, we advise them to avoid elegant variation and passive voice not because it is interesting, but because it leads to confusion. The writer's words, sentence construction, and combinations of sentences can and should be colorful and evocative. Although a writer surely communicates a sense of her style through the selection and arrangement of her arguments, this is where her individual style is most obvious to the reader. These are the spices that add the finishing touch to her creation.

Thus, as Schunk suggests, cookery does resemble the legal writing process. Just as a cook selects the utensils, ingredients, and spices she needs to prepare a casserole, so does the legal writer select the law, arguments, and words she needs to analyze a given issue. Most often, the ingredients a cook uses are hardly unusual; they are readily available on the shelves of her kitchen or grocery store. The casserole she invents, however, can be truly unique and delicious as long as she is willing to treat the process as more art than science. Similarly, legal writers' ideas come from the same readily available sources, but legal writers can distinguish themselves by creating arguments that are not only unique and persuasive but well-suited to their audience's palette. As Chef Lidia Bastianich advises beginning cooks, “Don't become a slave to the recipe. Follow it the first time, yes. But after that, don't worry so much about measuring. Really.”³⁶

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³³ See, e.g., Bryan A. Garner, *Legal Writing in Plain English* (2001); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 *Legal Writing* 257, 278–81 (2002); Joseph M. Williams, *Style: Ten Lessons in Clarity and Grace* (7th ed. 2002); Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005).

³⁴ See Cooper, *supra* note 5, at 1404b.

³⁵ *Id.*

³⁶ Lidia Bastianich, *Let the Recipe Go, but Keep That Spoon*, *Wash. Post*, March 15, 2006, at F1.