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Classical Rhetoric, Explanatory Synthesis, and
the TREAT Paradigm

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Abstract

The TREAT paradigm and the doctrine of explanatory synthesis are both organizational methodologies and substantive theories designed to improve the substance of legal writing. The TREAT paradigm doctrine holds that the presentation of legal discourse in a carefully constructed order not only promotes clarity and satisfies audience expectations but also maximizes the communicative potential and persuasiveness of the material. The explanatory synthesis doctrine casts aside the prior methodology of “explanation” of governing legal standards in legal writing. Explanatory synthesis doctrine combines the substantive doctrine of precedent and stare decisis that underlies the Anglo-American common law tradition and the doctrine of analogical reasoning that supports the presentation of common law and positive rules by illustrating the effect of the precedent where the rules were applied. Explanatory synthesis improves the substance of legal writing by combining precedents in a process of inductive reasoning within a deductive reasoning structural paradigm and reveals the factors and policies that determine the outcome of precedent. Classical rhetoric in general, and the writings of Aristotle, Cicero, and Quintilian in particular, provide substantive support for the TREAT paradigm and the doctrine of explanatory synthesis. Part I of this article will describe the essentials of classical rhetoric and theories of persuasion that are relevant to the discussion. Part II will describe the TREAT paradigm and the doctrine of explanatory synthesis. Part III will describe how the TREAT format and explanatory synthesis support the tenets of classical rhetoric and its theories of persuasion.

Classical Rhetoric, Explanatory Synthesis, and the TREAT Paradigm

by Michael D. Murray¹

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The TREAT paradigm² and the doctrine of explanatory synthesis³ are both organizational methodologies and substantive theories designed to improve the substance of legal writing. The TREAT paradigm doctrine holds that the presentation of legal discourse in a carefully constructed order not only promotes clarity and satisfies audience expectations but also maximizes the communicative potential and persuasiveness of the material. The explanatory synthesis doctrine casts aside the prior methodology of “explanation” of governing legal standards in legal writing. Explanatory synthesis doctrine combines the substantive doctrine of precedent and *stare decisis* that underlies the Anglo-American common law tradition and the doctrine of analogical reasoning that

¹ Professor Murray teaches at the University of Illinois College of Law, Urbana-Champaign. He gratefully acknowledges the comments and input he has received on the TREAT paradigm and the doctrine of explanatory synthesis from Professors Christy H. DeSanctis (George Washington), Terri LeClercq (Texas), Suzanne Rowe (Oregon), Ann Shields (Washington University), Mark Wojcik (John Marshall), and Cliff Zimmerman (Northwestern). Professor Murray is doubly indebted to Professors Christy DeSanctis, Michael Frost, James Levy, and Mark Wojcik for their agreement to review and comment on this article.

² See Michael D. Murray & Christy H. DeSanctis, *LEGAL RESEARCH AND WRITING*, chapters 6 and 7 (2005). TREAT refers to Thesis Heading on the issue—Rule that governs the issue—Explanation of the rule—Application of the rule—Thesis restated as a conclusion. *Id.*, chapter 6.

³ See *id.*, chapter 6.

supports the presentation of common law and positive rules by illustrating the effect of the precedent where the rules were applied. Explanatory synthesis improves the substance of legal writing by combining precedents in a process of inductive reasoning within a deductive reasoning structural paradigm and reveals the factors and policies that determine the outcome of precedent.

Classical rhetoric⁴ in general, and the writings of Aristotle,⁵ Cicero,⁶ and Quintilian⁷ in particular, provide substantive support for the TREAT paradigm and the doctrine of explanatory synthesis. The TREAT paradigm is true to the *sullogismos* (syllogisms) and *enthumema* (enthymemes) of deductive reasoning espoused by Aristotle.⁸ Explanatory synthesis follows the path of inductive reasoning through

⁴ I am referring to the body of teaching known as “classical rhetoric” that was begun in the fifth century B.C.E. and continued on and perfected over the course of the next 1,000 years of Greco-Roman history by Aristotle, Cicero, and Quintilian. See Edward P.J. Corbett & Robert J. Connors, CLASSICAL RHETORIC FOR THE MODERN STUDENT 15-16, 18-19 (4th ed. 1999). Some scholars would start the list of the fathers of classical rhetoric with Socrates followed by Plato followed by Aristotle. John H. Mackin, CLASSICAL RHETORIC FOR MODERN DISCOURSE vii, 6-7, 17-18, 26 (1969). It also is popular to trace the study of rhetoric and argumentation to Corax of Syracuse. See, e.g., Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 615 (1999) (Frost, Lost Heritage).

⁵ Aristotle, THE RHETORIC (W. Rhys Roberts transl. 1965) [“Rhetoric”], available at <http://www.public.iastate.edu/~honeyl/Rhetoric/> (accessed Sept. 15, 2005) (Lee Honeycutt ed.).

⁶ Marcus Tullius Cicero, DE INVENTIONE 93, 104 (H.M. Hubbell transl., 1949); Marcus Tullius Cicero, DE ORATORE (E.W. Sutton transl., 1942).

⁷ 1 Marius Fabius Quintilian, INSTITUTIO ORATORIA 273 (H.E. Butler transl., 1954).

⁸ Corbett & Connors, *supra* note 4 at 38-60; George A. Kennedy, CLASSICAL RHETORIC AND ITS

exploration of the genus of situations (a form of *topoi* or topic⁹) where a given legal rule has been applied to produce a concrete outcome, and explains the species of cases (precedents¹⁰) that illustrate the genus principles of interpretation and application of the rule that can be presented in legal writing. Together, the TREAT paradigm and explanatory synthesis persuade through *logos*,¹¹ a logical exposition of the argument, as well as by revealing the competence of the author to handle the exposition itself (*ethos*).¹² The TREAT paradigm rewards the audience with the presentation of the author's thesis on the issue up front in a heading, and explanatory synthesis breaks down and synthesizes the relevant authorities so that the audience does not have to, aiding the *ethos* of the author's reception with the audience. Explanatory synthesis and the application section of the TREAT paradigm are useful for revealing the client's facts and circumstances that may inspire emotions that put the audience in a frame of mind to be persuaded by the

CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 83-84 (1999) ("Kennedy, Classical Rhetoric"); Christof Rapp, *Aristotle's Rhetoric*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2002 ed.), Edward N. Zalta (ed.), available at <<http://plato.stanford.edu/archives/sum2002/entries/aristotle-rhetoric/>> (accessed Sept. 15, 2005) (last substantive edit May 2, 2002).

⁹ Corbett & Connors, *supra* note 4 at 89-91.

¹⁰ Corbett & Connors, *supra* note 4 at 119-120.

¹¹ See Smith, Robin, *Aristotle's Logic*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2004 ed.), Edward N. Zalta (ed.), available at <<http://plato.stanford.edu/archives/fall2004/entries/aristotle-logic/>> (accessed Sept. 15, 2005) (last substantive edit Aug. 23, 2004).

argument (*pathos*).¹³

Part I of this article will describe the essentials of classical rhetoric and theories of persuasion that are relevant to the discussion. Part II will describe the TREAT paradigm and the doctrine of explanatory synthesis. Part III will describe how the TREAT format and explanatory synthesis support the tenets of classical rhetoric and its theories of persuasion.

I. INTRODUCTION TO THE CONCEPTS OF LOGOS, ETHOS AND PATHOS IN CLASSICAL RHETORIC

Aristotle's *The Rhetoric* is an extended essay on discerning the forms of proof that may persuade an audience engaged in evaluating a particular argument.¹⁴ Rhetoric, in Aristotle's terms, is an off-shoot of the dialectic,¹⁵ which is in turn a companion of demonstration, dialectic and demonstration being the two principle forms of reasoning

¹² William A. Covino & David A. Jolliffe ed., *RHETORIC: CONCEPTS, DEFINITIONS, BOUNDARIES* 52 (1995); Corbett & Connors, *supra* note 4 at 71-77; Kennedy, *Classical Rhetoric*, *supra* note 6 at 68, 75.

¹³ Covino & Jolliffe *supra* note 8 at 17; Corbett & Connors, *supra* note 4 at 77-84; Kennedy, *Classical Rhetoric*, *supra* note 6 at 82, 89.

¹⁴ Michael R. Smith, *ADVANCED LEGAL WRITING* 77 (2002); Rapp, *supra* note 6; see *Rhetoric*, Book I, ch. 1 at 1355a; Book I, ch. 2 at 1355b. Page numbers for *Rhetoric* (such as 1355a) refer to the Bekker edition of the Greek text of Aristotle's works and traditionally are used as the internal reference for Aristotle's works.

¹⁵ *Rhetoric*, Book I, ch. 1 at 1354a.

recognized by Aristotle.¹⁶ Rhetoric is the form of reasoning used in argument or “continuous discourse,” whereas dialectic is more appropriate to debate.¹⁷

Rhetoric follows three paths simultaneously toward the goal of persuasion: *ethos* (persuasion accomplished through the perceived character or reputation of the speaker),¹⁸ *pathos* (persuasion accomplished through the emotional response of the audience to the communication),¹⁹ and *logos* (persuasion accomplished through logical reasoning embodied in the content of the communication).²⁰ The interaction of the three means of persuasion may be depicted as a “rhetorical triangle” similar to the “communication triangle” discussed in modern rhetorical theory²¹ (see diagram below):

¹⁶ Kennedy, *Classical Rhetoric*, *supra* note 6 at 80.

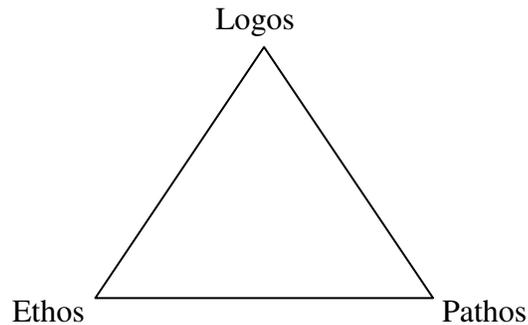
¹⁷ *Id.* at 66.

¹⁸ Rhetoric, Book I, ch. 2 at 1356.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Brett Hansen, *Ethos, Pathos and the NTSB* 3 (2003), at http://www.ctre.iastate.edu/mtc/papers/2003/Brett_Hansen.pdf (last visited Dec. 1, 2005); Univ. of Iowa Rhetoric Dep’t, *The Rhetorical Triangle: Logos, Ethos and Pathos*, MORPHING TEXTBOOK~RHETORIC TOOLS at http://www.uiowa.edu/~rhetoric/morphing_textbook/general/triangle.html (last visited Dec. 1, 2005); *see also* Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL ED. 108, 114-15 (1993); A THEORY OF DISCOURSE: THE AIMS OF DISCOURSE 19 (1971); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1091-93 (1986).



In this conceptualization, the three paths of persuasion flow into one another: the logos of the argument affects the pathos in the audience and simultaneously affects the perception of the ethos of the author; the pathos of the audience members affects how they perceive the ethos of the author and how they receive the logos of the argument.

Jakob Wisse presents the concept as a linear flow-chart²²:



The author projects his ethos along with or, in optimal circumstance, as part of the logos of the message so as to influence the pathos of the audience.²³

²² Jakob Wisse, *ETHOS AND PATHOS FROM ARISTOTLE TO CICERO* 6 (1989).

²³ *Id.* at 7-8.

The rhetorical pathways are fundamentally pragmatic.²⁴ Aristotle sought to remind advocates that an argument is not one-dimensional. The most logically constructed argument still will not persuade an audience if the audience perceives the author as a buffoon. Similarly, the most respected author whose reputation is beyond question still will not win the day if her argument is riddled with logical fallacies and comes apart at the seams with a single, gentle tug at one of its logical flaws. An ironclad argument may be delivered in such a way as to antagonize the audience, or the effect of the argument may be squandered if the audience begins to question the integrity and credibility of the author.²⁵

Logos, ethos, and pathos will be the starting points of the analysis of the TREAT paradigm and the doctrine of explanatory synthesis, so they will be explained individually below.

A. Logos

1. The Enthymeme: A Rhetorical Syllogism

There are two permitted logical structures for an argument, the deductive and the

²⁴ See Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1728-29 (1995); Frost, *Lost Heritage*, *supra* note 4 at 614, 624, 625, 627.

²⁵ See generally Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994) (Frost,

inductive,²⁶ but Aristotle obviously preferred the deductive structure of syllogisms and enthymemes.²⁷ Both syllogisms and enthymemes begin with a major premise and follow with a minor premise so as to produce a conclusion. The difference between the two forms is that in a true syllogism each major premise must be a true statement of absolute certainty, and the minor premise also must be a true statement of absolute certainty, so that the conclusion is absolutely, unrefutably true.²⁸ This is referred to by Aristotle as a “complete proof.”²⁹

In an enthymeme, the major premise, whether it be explicitly stated or implied in the enthymeme, must be most probably true.³⁰ In other words, truth with absolute certainty is not required, only probability of truth.³¹ Similarly, the minor premise must be

Ethos, Pathos & Legal Audience); Corbett & Connors, *supra* note 4 at 72-73.

²⁶ Rhetoric, Book I, ch. 1 at 1355a; Cicero, *supra* note 6 at 93; Quintilian, *supra* note 7 at 273.

²⁷ See Rhetoric, Book I, ch. 1 at 1355a; Book I, ch. 2 at 1356b.

²⁸ Corbett & Connors, *supra* note 4 at 38-48.

²⁹ Rhetoric, Book I, ch. 2 at 1357.

³⁰ Corbett & Connors, *supra* note 4 at 53 (quoting Aristotle, THE LOGIC: PRIOR ANALYTICS, Book II, ch. 27); Frost, Lost Heritage, *supra* note 4 at 635-36; Michael Frost, *Justice Scalia's Rhetoric of Dissent: a Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L. J. 167, 168 n. 6 (2002) (Frost, Scalia's Rhetoric); Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. L. WRITING 61, 77, 80, 81-84 (2001-2002).

³¹ Corbett & Connors, *supra* note 4 at 53-54. Corbett and Connor's definition of enthymeme in the Aristotelean sense is more appropriate for the evaluation of legal discourse than the more limited definition of an enthymeme as a truncated syllogism where one of the premises, usually the major

most probably true, not absolutely, necessarily true.³² This produces a conclusion that also is most probably true; but this is acceptable because the enthymeme's purpose is to persuade, not to establish or define a proposition as a matter of scientific proof.³³

Given the uncertainties of the law, where legal rules are constructed from multiple controlling authorities and, in certain instances, colored by persuasive authorities, and where facts might be uncertain or subject to multiple credible interpretations, the model of the enthymeme with its anticipation of uncertainty, is the better model. Aristotle recognized that in legal discourse (continuous discourse), the enthymeme is preferred,³⁴ or more accurately, might be the only proper logical structure for a legal argument.³⁵

premise, is implicit and unstated. *Accord*, Eugene E. Ryan, ARISTOTLE'S THEORY OF RHETORICAL ARGUMENTATION 29-34, 36, 38-41 (1984); James A. Gardner, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 4-5, 8, 37-38 (1993). As these authors point out, the implicit major premise is one potential aspect of an enthymeme that would differentiate it from a true syllogism, but it is not a requirement of every enthymeme.

³² Corbett & Connors, *supra* note 4 at 53-54.

³³ *Id.* at 53. See Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN'S L. REV. 107, 110 (1992) (Frost, Greco-Roman Legal Analysis).

³⁴ See Rhetoric, Book I, ch. 1 at 1355; Book I, ch. 2 at 1356.

³⁵ Indeed, the rhetorical methodology pioneered by Corax of Syracuse was created to allow private citizens to make arguments regarding the probabilities of their ownership of land and property seized by a despot. In these circumstances physical or documentary proof or testimony of witnesses was unavailable to establish these property title claims. So, an argument based on probabilities was the only available argument. The art of rhetoric was developed as a means to structure arguments so as to analyze which claims were the most persuasive and thus worthy of recovery. Frost, *Lost Heritage*, *supra* note 4 at 616 & n.15 (citing Edward P.J. Corbett, CLASSICAL RHETORIC FOR THE MODERN STUDENT 595 (2d ed. 1971)).

2. Deductive and Inductive Reasoning

The process of formation of a major premise or general proposition and moving to the analysis of a minor premise or specific proposition so as to draw a conclusion is defined as deductive reasoning.³⁶ Aristotle characterized all forms of deductive reasoning as belonging to the topic of syllogisms.³⁷ The conclusion that is deduced explains how the specific proposition is controlled or affected by the general proposition.

If all As are X
and if B is an A
then B is X

In a legal argument, a legal rule—a statement of the legal principles that govern a general set of circumstances—is applied to a new situation—a specific set of facts—to produce a conclusion about the outcome of this application.³⁸

If the material facts of a case are undisputed and the movant is entitled to

³⁶ Frost, *Greco-Roman Legal Analysis*, *supra* note 32 at 118; Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 492-93 (2003); John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 88-89 (1993).

³⁷ See *Rhetoric*, Book I, ch. 1 at 1356.

³⁸ Murray & DeSanctis, *supra* note 2 at 8-9.

judgment as a matter of law, then summary judgment is appropriate.³⁹

The material facts of the instant case are undisputed and the movant here is entitled to judgment as a matter of law.

Therefore, summary judgment is appropriate.

In an enthymeme, a highly probable construction of the applicable legal principles is applied to a highly probable construction of the specific circumstances of the case at hand, so as to describe a highly probable conclusion or prediction about the application.⁴⁰ Given the uncertainty of an enthymatic deductive legal argument (high probability is not absolute certainty), the advocate may turn to inductive reasoning to buttress the argument.⁴¹

Aristotle called a rhetorical syllogism an enthymeme and a rhetorical induction an “example.”⁴² The process of induction finds a general proposition to be true because of

³⁹ See Fed. R. Civ. P. 56.

⁴⁰ Rhetoric, Book I, ch. 1 at 1355a. See also sources cited in notes 29-32, *supra*.

⁴¹ Aristotle recognized that there are two forms for effective rhetoric: the deductive, syllogistic rhetorical form known as an enthymeme, and the inductive rhetorical form known as an example or paradigm argument. Rhetoric, Book I, ch. 2 at 1356b. See also George A. Kennedy, ARISTOTLE ON RHETORIC: A THEORY OF CIVIC DISCOURSE 40 & n. 49 (1991) (“Kennedy, On Rhetoric”). Aristotle believed the enthymeme to be the superior of the two forms. Rhetoric, Book I, ch. 2 at 1356b.

⁴² Rhetoric, Book I, ch. 2 at 1356b; Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 752 & n.58 (2004); Robert H. Schmidt, *The Influence of the Legal Paradigm on the Development of Logic*, 40 S. TEX. L. REV. 367, 372-73 (1999).

its relationship to a number of other specific propositions that are known to be true. A certain genus of situations with identifiable characteristics can be defined from a synthesis of known situations (“species” of situations, or “precedents”) that all share these characteristics.⁴³ For example:

If every known situation of a successful parody borrowed material from another source in order to criticize the original source,

Then the genus of successful parodies consists of new works that incorporate material from an original work in order to criticize the original work.

In daily life, and particularly in the law, a rhetorician infrequently can state an induction with as much certainty as the above example. Aristotle anticipates this when he differentiates a rhetorical induction (an “example”) from a true induction.⁴⁴ In an example, as in an enthymeme, the propositions induced by a representative sampling of species of situations (cases or precedents) are asserted to be true to a high degree of probability, not certainty.⁴⁵

The clearest explanation of the related nature of enthymemes and examples is

⁴³ See Rapp, *supra* note 6 at §§ 5(C), 7.4.

⁴⁴ See Scharffs, *supra* note 42 at 752 & n. 58.

⁴⁵ See Rhetoric, Book I, ch. 2 at 1356b, Book II, ch. 19 at 1392a-1392b.

found not in *The Rhetoric* but in Aristotle's *Posterior Analytics*⁴⁶:

All instruction and all learning through discussion proceed from what is known already The same things hold with regard to dialectical arguments, both those that work by syllogisms and those that use induction. Both achieve their task of instruction by working from things known already. Syllogism takes a point to be known by the audience, and induction is able to point out the universal because the particular is already clear.

Orators persuade in the same way. They use either examples (induction) or enthymemes (syllogisms) . . .⁴⁷

The rhetorician's job is to synthesize the most representative cases so as to induce a general proposition that is true to the highest possible degree of probability, although not absolute certainty. For example:

In multiple cases, the requirement of exclusive possession of the land in an adverse possession case has been satisfied by exclusive use of the land rather than by actions taken to exclude others from the land.

Therefore, the genus of cases that will satisfy the requirement of exclusive possession of the land should be cases where the claimant is the exclusive user of the land.

The power of the genus principle induced through a synthesis of cases depends on the quality of cases relied on and the correctness of the rhetorician's observation of the

⁴⁶ Aristotle, *THE LOGIC: POSTERIOR ANALYTICS*, Book 1, sec. 1, *reprinted in* *THE PHILOSOPHY OF ARISTOTLE* 160-61 (Renford Bambrough ed. & A.E. Wardman trans., Mentor Books 1963).

common features that may be induced from the cases. Thus, the more skilled the rhetorician, the more persuasive the genus principle that is induced from a given set of precedents.

B. Ethos

One factor that distinguishes the Greek and Roman analyses of legal discourse from modern analyses is their consistent focus on audience and their candid discussions of how to manipulate judges and juries.⁴⁸ Greco-Roman rhetoricians closely observed human behavior in the light of their own considerable experience in arguing cases, and composed comprehensive treatises which analyzed persuasive discourse in great detail.⁴⁹ “Because they thought emotional arguments and lawyer credibility were critically important to persuading legal audiences, they devoted fully as much attention to those aspects of persuasive discourse as they did to logical, definitional, or organizational aspects.”⁵⁰

Greek and Roman rhetoricians especially were interested in the interplay between

⁴⁷ *Id.*

⁴⁸ Frost, Ethos, Pathos & Legal Audience, *supra* note 25 at 87.

⁴⁹ *Id.*

the types of argument that could be made in various situations (the *topoi* [Greek] or *loci* [Latin] which are translated as the “topics” or “subjects” of argument developed in the process of *inventio* [Latin] or *heuresis* [Greek] which may be translated as “invention” or “discovery”⁵¹) and the *dispositio* [Latin] or *taxis* [Greek] of the argument, which translates as the “arrangement” or “organization” or “disposition” of the contents of the argument.⁵² Greek and Roman rhetoricians also analyzed the *elocutio* of the argument, which is to say its “style” or “composition” rather than the manner in which it is delivered.⁵³ The classical rhetoricians were acutely conscious that good legal arguments (logos) can fail because advocates disregard the non-rational factors of ethos and pathos which affect the persuasiveness of the discourse.⁵⁴

A speaker pays regard to ethos whenever the speech is spoken in such a way as to make the speaker worthy of credence.⁵⁵ Aristotle stated:

There are three reasons why speakers themselves are persuasive; for there

⁵⁰ *Id.*

⁵¹ Corbett & Connors, *supra* note 4 at 17.

⁵² *Id.* at 20.

⁵³ *Id.* at 21.

⁵⁴ Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 87.

⁵⁵ *See Rhetoric*, Book I, ch. 2 at 1356a; Book II, ch. 1 at 1377b.

are three things we trust other than logical demonstration. These are practical wisdom [*phronesis*] and virtue [*arete*] and good will [*eunoia*]; for speakers make mistakes in what they say or advise through [failure to exhibit] either all or one of these; . . . for either through lack of practical sense they do not form opinions rightly; or though forming opinions rightly they do not say what they think because of a bad character; or they are prudent and fair-minded but lack good will, so that it is possible for people not to give the best advice although they know [what] it [is]. These are the only possibilities. Therefore, a person seeming to have all these qualities is necessarily persuasive to the hearers.⁵⁶

This passage indicates that ethos embodies both moral and intellectual qualities.⁵⁷

While virtue and high moral character obviously are concepts relating to the advocate's ethics and morality, the concept of practical wisdom suggests that the audience must perceive the advocate's reasoning as sound, not simply from a formal logical standpoint but in a broader sense of perceiving that the advocate possesses credibility and common sense.⁵⁸ The concept of good will indicates that the advocate should evince good will and benevolence toward the audience as opposed to a spirit of malice revealed through attempted deception, obfuscation, or self-aggrandizement.⁵⁹

⁵⁶ *Id.*, Book II, ch. 1 at 1378a; *see also* Wisse, *supra* note 22 at 29.

⁵⁷ Wisse, *supra* note 22 at 30.

⁵⁸ Rhetoric, Book II, ch. 1 at 1378a; Wisse, *supra* note 22 at 30.

⁵⁹ Rhetoric, Book II, ch. 1 at 1378a; Wisse, *supra* note 22 at 30-33; Corbett & Connors, *supra* note 4 at 72-73.

The lessons of the classical rhetoricians focused as much on projecting the right moral character as in possessing it.⁶⁰ The passage from Aristotle's *The Rhetoric* excerpted above states, "a person *seeming* to have all these qualities is necessarily persuasive to the hearers."⁶¹ Aristotle, Cicero, and Quintilian each recognized that a good moral character could be projected through the discourse itself; it was not necessary that the advocate possess a widely-known reputation for uprightness and good moral character when entering into the proceedings or that the advocate self-consciously point out aspects and examples of his own good character in the discourse (although those means were recognized as being available to the advocate in proper circumstances if handled with appropriate delicacy).⁶²

The ethical appeal has particular importance in legal discourse because the modes of persuasion through enthymemes and examples present arguments based on probability not certainty of proof.⁶³ Thus, it matters dearly when the audience weighs the persuasiveness of arguments and counter-arguments based on probability that the

⁶⁰ Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 100-101; Corbett & Connors, *supra* note 4 at 72; Wisse, *supra* note 22 at 31.

⁶¹ *Rhetoric*, Book II, ch. 1 at 1378a (emphasis added).

⁶² *See* Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 100-101; Corbett & Connors, *supra* note 4 at 72-73.

audience perceive the advocate as credible and believable, “possessing genuine wisdom and excellence of character.”⁶⁴ The slightest lapse in good sense, good will, or moral integrity might turn the audience away from acceptance of the arguments.⁶⁵

The method of affecting the audience’s perception of the ethos of the advocate is not simple to state; Aristotle, Cicero, and Quintilian each devoted significant attention to successful and unsuccessful practices in each of their treatises on Rhetoric.⁶⁶ Corbett & Connors summarize this discussion as follows:

If a discourse is to exhibit a person’s good sense, it must show that the speaker or writer has an adequate, if not a professionally erudite, grasp of the subject being talked about, that the speaker or writer knows and observes the principles of valid reasoning, is capable of viewing a situation in the proper perspective, has read widely, and has good taste and discriminating judgment. If a discourse is to reflect a person’s moral character, it must display an abhorrence of unscrupulous tactics and specious reasoning, a respect for the commonly acknowledged virtues, and an adamant integrity. If the discourse is to manifest a person’s good will, it must display a person’s sincere interest in the welfare of the audience and a readiness to sacrifice any self-aggrandizement that conflicts with the benefit of others.⁶⁷

⁶³ Corbett & Connors, *supra* note 4 at 72.

⁶⁴ *Id.* (quoting 3 Quintilian, *INSTITUTIO ORATORIA*, *supra* note 7, sec. viii at 13).

⁶⁵ *Id.* at 73.

⁶⁶ *See* sources cited in notes 5, 6, and 7, *supra*.

The ethical appeal is in many ways the “hidden persuader.”⁶⁸ “If persuasion depends greatly, even pre-eminently, on ethical appeal, the persuader cannot afford to create the impression by the discourse that he or she is superficial, immoral, or malicious.”⁶⁹

C. Pathos

Far from being sheepish about the discussion of emotional reactions to advocacy, the three principle authors of classical rhetoric, Aristotle, Cicero, and Quintilian, each recognized the importance of the audience’s emotional reaction to the discourse when they discussed theories of persuasion in rhetoric.⁷⁰ Given the amateur status of both judges and juries who decided legal disputes in their day, these rhetoricians found it to be inevitable that advocates should assess the emotional response of audience members to the legal discourse they were receiving.⁷¹ Their analyses of what would persuade judges

⁶⁷ Corbett & Connors, *supra* note 4 at 72-73.

⁶⁸ *Id.* at 77.

⁶⁹ *Id.*

⁷⁰ *See* Jamar, *supra* note 29 at 73.

⁷¹ Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 113, 119 (1996) (Frost, *Metaphoric Reasoning*).

and juries was grounded in basic human psychology rather than jurisprudential philosophy or statutory law.⁷² They concluded that the emotional reaction of the audience matters greatly “for we do not give the same judgment when grieved and rejoicing or when being friendly and hostile.”⁷³ Logic may be the preferred and most effective pathway of persuasion, but Aristotle recognized “that among human beings judgment is not entirely a rational act.”⁷⁴

Aristotle recognized the emotional component in legal arguments but he did not endorse persuasive discourse based solely on the emotions: “One might just as well make a carpenter’s rule crooked before using it as a measure.”⁷⁵ Even though Aristotle recognized the dangers of misuse of emotion-based arguments, he nevertheless provided an extensive account of his observations of human behavior and emotional reactions, and described in detail how and when an advocate might successfully play on the emotions in legal discourse.⁷⁶ Aristotle encouraged rhetoricians to take a sober look at human

⁷² Frost, Ethos, Pathos & Legal Audience, *supra* note 25 at 89.

⁷³ Rhetoric, Book I, Ch. 2 at 1356a.

⁷⁴ *Id.*, Book I, Ch. 2 at 1356a.

⁷⁵ *Id.*, Book I, ch. 1 at 1354a.

⁷⁶ Most of Aristotle’s observations on emotions and emotional responses are recorded in Rhetoric, Book II, chapters 2-11. *See also* Frost, Metaphoric Reasoning, *supra* note 73 at 119-20.

emotions to help them understand how to better address an audience that may already be feeling one or more of these emotions and how to generate or defuse such emotions.⁷⁷

Cicero emphasized the importance of the emotions when he observed that one “potential factor” in the successful argument of a case is “the feelings of the tribunal . . . [which must] be won over, as far as possible, to good will towards the advocate and the advocate’s client as well.”⁷⁸ He, like Aristotle, suggested that advocates speak in a way which “excites and urges the feelings of the tribunal towards hatred or love, ill-will, or well-wishing, fear or hope.”⁷⁹

Quintilian closely followed Cicero’s prescriptions and made similar recommendations.⁸⁰ In fact, Quintilian may have put the most stock in emotional appeals.⁸¹ He claimed that, “this emotional power . . . dominates the court [;] it is this

⁷⁷ See Jamar, *supra* note 27 at 75-76; Stephen R. Leighton, *Aristotle and the Emotions*, in *Essays on Aristotle's Rhetoric* 206 (Amélie Oksenberg Rorty ed., 1996).

⁷⁸ Cicero, *DE ORATORE*, *supra* note 6 at 327; see Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 91.

⁷⁹ Cicero, *DE ORATORE*, *supra* note 6 at 331; see Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 91.

⁸⁰ 2 Quintilian, *INSTITUTIO ORATORIA*, *supra* note 7 at 139, 419; see Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 91.

⁸¹ Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 91.

form of eloquence that is queen of all.”⁸² And, like Aristotle, he thought that “the duty of the [advocate] is not merely to instruct: the power of eloquence is greatest in emotional appeals.”⁸³

Over-reliance on the logos, the logical presentation, of an argument may be a myopic tendency of lawyers, but it is likewise clear that pathos cannot be controlled directly by legal argument.⁸⁴ The classical rhetoricians recognized that our emotions are not entirely under the control of our will and our intellect.⁸⁵ We cannot use logic to argue an audience into a emotional state any more than we can will ourselves into an emotional reaction based on an intellectual conviction that we should have a certain emotional reaction to a certain set of facts or a particular logical appeal.⁸⁶ An advocate that explicitly announces that he or she will play on the audience’s emotions in the presentation of the discourse will inevitably achieve the opposite result; the audience, made wary of emotional manipulation, will at best steel themselves not to be manipulated

⁸² 2 Quintilian, *INSTITUTIO ORATORIA*, *supra* note 7 at 419.

⁸³ 2 Quintilian, *INSTITUTIO ORATORIA*, *supra* note 7 at 139; *see* Frost, *Ethos, Pathos & Legal Audience*, *supra* note 25 at 91.

⁸⁴ Corbett & Connors, *supra* note 4 at 78.

⁸⁵ *Id.*

⁸⁶ *See id.*

and at worst will discount the advocate's presentation on the grounds that the advocate has engaged in trickery and subterfuge.⁸⁷ Thus, the advocate must not openly play upon the audience's heart strings, but instead must carefully and subtly arrange the facts and narrative reasoning of the case in conjunction with the logic and legal reasoning of the argument.⁸⁸

When the classical rhetoricians described the function of each part of the discourse they also discussed the emotional effects appropriate to each part.⁸⁹ Because the facts and narrative reasoning of the case is so important to the pathos of the message, an advocate does not have to and in fact should not depend solely on the argument (*confirmatio*) section of legal documents to target the audience's emotional reaction. The introduction (*exordium*) section, the statement of facts or statement of the case (*narratio*) sections, and the conclusion (*peroratio*) section also present opportunities to stress the facts of the case in such a way as to fully engage the emotions of the audience.⁹⁰ But within the argument, the advocate should be wary of the tendency of judges and juries to

⁸⁷ *See id.* at 78-79.

⁸⁸ *See id.*; Frost, Ethos, Pathos & Legal Audience, *supra* note 25 at 94.

⁸⁹ *See id.*

⁹⁰ *See generally* Corbett & Connors, *supra* note 4 at 20; Frost, Ethos, Pathos & Legal Audience, *supra* note 25 at 94-100.

become impatient, bored, inattentive, or distracted unless they also are emotionally engaged in the case.⁹¹ Aristotle and Quintilian each stressed the need to be circumspect in choosing which and how many arguments to raise in a given matter, and the level of detail on which a given argument should be constructed.⁹² The argument section contains “application” sections where the law is applied to the facts to predict the legal outcome of the issue, and these sections can make use of pathos devices and strategies in the arrangement of facts and narratives to create a favorable emotional response.

In this manner, the three modes of persuasion—logos, ethos, and pathos—work together, one supporting the other, in a persuasive, audience-directed work of writing. The next section discusses how an organizational paradigm and a doctrine of inductive reasoning coupled with analogical reasoning that are designed pursuant to the recommendations of classical rhetoricians can improve the substance of legal writing and make the discourse even more persuasive.

⁹¹ Frost, Ethos, Pathos & Legal Audience, *supra* note 25 at 94.

⁹² Rhetoric, Book I, ch. 1 at 1354a-1354b; 2 Quintilian, INSTITUTIO ORATORIA, *supra* note 7 at 303,

II. THE TREAT PARADIGM AND THE DOCTRINE OF EXPLANATORY SYNTHESIS

The TREAT paradigm that I developed in the book, *LEGAL RESEARCH AND WRITING*,⁹³ addresses the analysis and discussion of a single issue.⁹⁴ The format is derived from the rule-based reasoning syllogism⁹⁵ and it instructs legal authors to introduce their **T**hesis on the issue in the form of a heading, provide the **R**ule or rules that govern the issue, **E**xplain each rule and instruct the reader about how the rules are to be interpreted and applied, **A**pply the rules to their client’s situation, and restate their **T**hesis as a conclusion.⁹⁶ TREAT is a structural paradigm that fulfils substantive requirements of rhetoric and advocacy.

383; see Corbett & Connors, *supra* note 4 at 61; Frost, Ethos, Pathos & Legal Argument, *supra* note 25 at 93-94.

⁹³ *Supra* note 2. The material in *LEGAL RESEARCH AND WRITING* that discusses the TREAT paradigm and the doctrine of explanatory synthesis is my own.

⁹⁴ In this context, an “issue” is defined as: “An individual legal question implicated by a problem (a set of facts) that needs to be answered in order to render advice concerning the problem.” Murray & DeSanctis, *supra* note 2 at 5.

⁹⁵ *Id.* at 8-9.

⁹⁶ *Id.* at 95.

A. Thesis Heading⁹⁷

The TREAT format comes into play when authors have done all of the research and analysis of an issue and are ready to report their conclusions. The discussion of an issue will begin with the authors' position on the issue, namely their thesis. The thesis almost always is written in one sentence, and it states what the issue is and how the issue should come out based on the analysis of the issue. In the TREAT format, authors will start off their discussion of the issue by putting their thesis in a heading.

Presenting the thesis on the issue first brings to the front the most important part of the discussion: the answer to the legal question posed by the issue. Readers of all types—judges and law clerks, partners and associates, supervisors and colleagues, and clients—will appreciate not having to wait for the answer.⁹⁸ Putting the thesis on the issue in a heading that precedes the analysis and discussion of the issue further highlights this critical information for the benefit of the reader. When authors consider that most of the writing they will do will discuss a number of issues in the same document, authors can begin to understand that separating and highlighting their conclusions by use of thesis

⁹⁷ The material in section II(A) is derived from Murray & DeSanctis, *supra* note 2 at 95-97.

⁹⁸ This further indicates that the TREAT paradigm is adaptable to any form of legal writing: objective-

headings will help even the busiest reader to pick up the most important parts of their discussion quickly and efficiently.

B. The Rule Section⁹⁹

1. Statement of legal principles and requirements that govern the issue

The rule section follows the thesis, and states the rule or rules that govern the legal issue. In this context, a rule of law is a statement of the legal principles and requirements that govern the analysis of the legal issue at hand.¹⁰⁰ Authors must synthesize the various authorities discussing the rule into one coherent presentation of the rule. The following chart¹⁰¹ breaks down the process of constructing a rule from multiple authorities and performing a “rule synthesis.”

predictive legal writing, such as an internal office memorandum, and argumentative-adversarial legal writing, such as a memorandum in support of a motion or an appellate brief.

⁹⁹ The material in section II(B) is derived from Murray & DeSanctis, *supra* note 2 at 97-99.

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.* at 97.

FORMULATING THE RULE (RULE SYNTHESIS)

<p>❶ Authors should start with the highest and most recent controlling authority.</p>	<ul style="list-style-type: none">◆ If authors have a statute (or constitutional provision or administrative regulation), they should start the rule section with this authority.◆ If the statement above does not apply, but authors have found a watershed case that is controlling, they should start with that.◆ If neither of the above statements apply, and the authors' best authority is from the court of last resort, authors should take the most recent opinion from that court and start with that.◆ If these first three criteria do not apply, authors should start with the most recent actual controlling authority that is on point.◆ Only if none of the above applies would authors consider turning to non-controlling authority—primary or secondary.◆ Authors should not expect to use all of the authorities uncovered in their research in formulating the legal rule that governs the
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	issue at hand.
<p>② Authors should reconcile differing statements or phrasings of the rule from controlling authorities, and attempt to synthesize the material into one coherent statement of the legal principles that govern the issue.</p>	<p>◆ Authors should not change the wording of or paraphrase rules from statutes, administrative rules and regulations, and watershed cases.</p> <p>◆ Unless a processed applied rule¹⁰² can be written smoothly and effectively in one sentence or phrase, an author should write the rule first with modifications second.</p>
<p>③ Authors should write the rule first, interpretive rules¹⁰³ second, and exceptions to the rule third.</p>	<p>◆ Authors should write interpretive sub-rules on elements of the rule in the sub-section of the discussion that discusses that element of the rule.¹⁰⁴ Authors should write exceptions to the sub-rules after they lay out the sub-rules themselves.</p>
<p>④ Authors should not write a rule with inherent contradictions.</p>	<p>◆ Authors should check for ambiguity in the terms they have used to formulate the rule (even if some of these terms came from the authorities).</p>

¹⁰² *Id.* at 42, 43-49.

¹⁰³ *See infra* section II(B)(2).

¹⁰⁴ The TREAT paradigm anticipates that many legal rules governing an issue will themselves raise legal issues that must be addressed. The elements of a legal rule each may present a separate issue that must be answered before the author can answer the initial question for which the rule was the governing authority. Each of the separate legal questions raised by the rule will be addressed in a sub-section of the discussion that also follows the format of the TREAT paradigm. Thus, these sections are referred to as sub-TREAT sections.

<p>⑤ Authors should accept the <u>remote</u> possibility that two competing rules on the same issue might exist in the same jurisdiction.</p>	<p>◆ When this happens, authors may have to analyze the facts under both competing sets of rules.</p>
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The legal standards that govern the issue must be reported in the rule section. Occasionally, the rule section might be as small as one paragraph, but frequently authors will wind up with two or more paragraphs if there are several accounts of the rule that must be synthesized or more than one rule to present on the issue. The format of the rule section does not change whether authors are talking about an elemental rule (a rule with required elements that each must be satisfied to trigger the rule) or a rule with factors that must be evaluated or balanced.

2. Interpretive rules

The rule section also will present interpretive rules from primary and secondary authorities. Interpretive rules are actual statements from legal authorities that instruct lawyers and judges how to interpret or apply the rule on the issue at hand. They are not elements or factors of the rule, and they are not the same as the principles of interpretation and application that authors will derive from an inductive synthesis of the

authorities presented in the explanation section, which are discussed in section II(C) below. Instead, these are individual statements phrased in rule language that authors will lift from the authorities that have discussed and applied the rule.

For example, a case from the applicable jurisdiction might characterize the rule on a claim for dog bite liability as a “disfavored cause of action,” and state that “in order to prove liability for an animal bite, the plaintiff must prove each element of the claim with clear and convincing evidence.” A secondary authority, such as a treatise on tort law, might explain that dog bite liability has moved from a point where “every dog was entitled to one unprovoked bite,” to a point where “each attack by a dog, even the first, may give rise to a valid claim against the dog owner.” These interpretive rules belong in the same section as the actual statement of the rule and its elements or factors, but authors should state explanatory and interpretive rules in one or more paragraphs after authors have laid out the elements or factors of the actual rule.

A typical thesis heading and rule section (using fictional cases) might appear as follows:

THESIS HEADING AND RULE SECTION:

I. THE DOG OWNER WILL BE LIABLE FOR THE PLAINTIFF'S DOG BITE INJURIES BECAUSE THE OWNER'S DOG INJURED THE PLAINTIFF AND THE PLAINTIFF DID NOT PROVOKE THE DOG.

In Texas, a dog owner is liable for all injuries caused by his dog unless the dog is provoked by the victim. Smithy v. Jonesy, 123 S.W.2d 345, 347 (Tex. 1965); Johnson v. Anderson, 789 S.W.2d 234, 237 (Tex. App. 1989). The elements of a cause of action for dog-bite liability are therefore: (1) defendant's ownership of the dog, (2) injuries caused by the dog, and (3) lack of provocation of the dog by the plaintiff. See Smithy, 123 S.W.2d at 347.

The rule on dog bite liability has moved from a point where "every dog was entitled to one unprovoked bite," to a point where "each attack by a dog, even the first, may give rise to a valid claim against the dog owner." Id. A claim seeking to impose liability for a dog bite is a "disfavored cause of action," and "in order to prove liability, the plaintiff must prove each element of the claim with clear and convincing evidence." Roberts v. Thomas, 676 S.W.2d 34, 37 (Tex. 1979).

C. The Explanation Section and the Doctrine of Explanatory Synthesis¹⁰⁵

1. Purpose of the explanation section

In the explanation section, authors will use some or all of the legal authorities they have found in their research to explain the rule and to show how the rule operates in

¹⁰⁵ The material in section II(C) is derived from Murray & DeSanctis, *supra* note 2 at 99-110.

various situations. This is the section that employs inductive and analogical reasoning. The goal of this section is to teach the reader the principles learned from earlier authorities where the rule was interpreted and applied to produce a concrete outcome. A synthesis of these authorities can instruct lawyers how to interpret and apply the rule in future cases, such as the case at hand. These prior authorities are the species of situations where the rule was interpreted and applied from which the genus or genera of principles of interpretation and application can be derived through inductive reasoning. They also provide the stock of cases from which an author might select a few truly analogous cases to use in the process of analogical reasoning to make substantive comparisons between these earlier authorities and the case at hand.

The sequence of the discourse works in this way: Authors will spell out the legal standards that govern the issue in the rule section. A law-trained reader can review the rules authors lay out in the rule section and make an educated guess as to how these rules should work in actual situations, but this only will be a guess. The author of a piece of legal writing must confirm or rebut that guess by explaining how the rules have worked in actual situations, which in most instances will require authors to refer to the cases that have applied those rules to produce a concrete outcome. Consider the following chart¹⁰⁶

¹⁰⁶ *Id.* at 100.

that explains the goals of the explanation section:

THE GOAL OF THE EXPLANATION SECTION	
<p>The goal is to illustrate how the rule is to be interpreted and applied based on how the authorities have applied it in actual concrete factual settings, and on how commentators have interpreted the rule.</p>	<ul style="list-style-type: none"> ◆ Authors are going beyond what the courts already have said about the rule in interpretive rules found in authorities. ◆ Authors are presenting principles of interpretation that are supported by a careful reading of the cases and other authorities. ◆ Authors are doing the work of digesting and synthesizing the cases so the reader does not have to.
<p>Case-by-case presentations make the reader do most of the work and they are wasteful of space and time (i.e., the reader's attention span).</p> <p>The proper time to resort to a case-by-case presentation is when authors have one or more cases that are so close to the facts of the instant case that authors want to analogize to them or distinguish them in great detail. This analogical discussion should accompany the inductive synthesis of the authorities described above, not replace it.</p>	<ul style="list-style-type: none"> ◆ Although judges and lawyers constantly follow the process of writing case-by-case presentations, in most cases they are ignoring the purpose of analogical reasoning which is to make substantive comparisons of the policies and factors at work in a precedent case as compared to the case at hand. ◆ Most judges and lawyers make superficial, surface-level mapping of common or dissimilar features of the two cases, and provide little in the way of explanation of how the rule works in the body of precedents applying the rule. This fails to satisfy the common law doctrine of <i>stare decisis</i> and the tenets of analogical reasoning.

The explanation section does not exist simply to provide titillating details from a

number of cases to entertain the reader, and it does not exist to fill up the space from the end of the rule or sub-rule section to the beginning of the application section. Details from cases can be exciting, but the facts and details themselves do not teach the reader how the rule actually works. Surface-level mapping¹⁰⁷ of common or dissimilar features of two cases tells the reader little about the policies and factors that determine how the rule is supposed to be applied in future cases.

The explanation section exists to present principles of interpretation derived from cases and secondary authorities that will show the reader how a rule or sub-rule works in actual situations. Lawyers and judges have a number of ways to go about this task. The common unsynthesized, superficial way used by many if not most lawyers and judges is to write a series of sentences and paragraphs describing the facts and holding of several cases. Typically, the author discusses one case at a time, devoting an entire paragraph to each case, but in most instances each paragraph maps surface-level similarities or differences between the precedent and the case at hand. At the end of it, the author hopes the reader has learned something from this list of factual details and holdings. What is

¹⁰⁷ See Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1215-1220 (2001) (Hunter, *Reason Too Large*). The topic of the theory and practice of analogical reasoning per se is not the subject of this article. The scope of this topic is broad and deep. Indicative sources that explore this topic in proper detail, in addition to the source cited here, are: Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); Dan Hunter, *Teaching and Using Analogy in Law*,

learned often is up to the reader, because the typical author fails to continue on and write a paragraph or two summarizing what the cases teach lawyers about how the rule works and drawing connections between cases that otherwise are factually different. In effect, the typical author simply is saying to the reader: “Here are a number of cases where the rule was applied and here is the outcome of those cases. You make sense out of it.”

A case-by-case presentation is effective when authors want to fully illustrate one or more cases that are exactly on point—they present the same facts and issues as the case at hand—to show how completely they should control their client’s situation. American courts follow the common law system of precedent and *stare decisis*, so a prior case from a proper court that presents the exact same facts and issues as the case at hand ought to control the outcome of the case at hand. A detailed discussion of the facts and holdings, and more importantly the factors and policies that worked on those facts to produce the holdings of these key cases would be useful. This would exhibit a proper use of analogical reasoning.¹⁰⁸

The second instance where a case-by-case presentation may be necessary is when

2 J. ASS'N LEGAL WRITING DIRECTORS 151 (2004).

¹⁰⁸ Hunter, Reason Too Large, *supra* note 107 at 1215-1220. *See also* sources cited in note 107 *supra*.

authors need to fully distinguish a potentially controlling authority¹⁰⁹ that goes against their thesis. The process of distinguishing certain authorities might require a detailed discussion of the facts, issues, and policies that produced the holdings of the cases in order to separate them from the case at hand.¹¹⁰ Once again, this goes beyond the typical surface-level mapping of authorities employed by the typical legal author.

In most instances, however, authors will not have any positive or negative case that is on all fours with their case. Authors will have a number of helpful cases to which authors can analogize their client's situation, and some that are not helpful, but none that is completely on all points with their case. In these situations, a synthesis of the authorities will aid the reader more than a recitation of one case after another. In these situations, the case-by-case presentation method will fail authors because their research does not uncover more than one or two cases on an element or factor of a rule. If authors write an unsynthesized explanation section that only discusses one or two cases, the reader will have very little chance of figuring out how the rule works in real life situations. For example, if an author must instruct a reader as to what "breaking" (an

¹⁰⁹ A potentially controlling authority is an authority from the applicable jurisdiction that has an appropriate position in the hierarchy of judicial authority of that jurisdiction. *See* Murray & DeSanctis, *supra* note 2 at 65-75. The authority is referred to as *potentially* controlling because if the author successfully distinguishes it, it will not control the outcome of the issue at hand.

¹¹⁰ Sunstein, *supra* note 107 at 782-87.

element of burglary) means, but the cases from the applicable jurisdiction all involved defendants who broke a window and each of the courts found that this act was a breaking, the author's explanation of this element might lead the reader to believe that breaking means breaking a window. This conclusion is logical, but absolutely inaccurate.

2. The doctrine of explanatory synthesis

The doctrine of explanatory synthesis uses inductive reasoning to derive genus principles of how a rule is supposed to be interpreted and properly applied in future situations based on the species of situations (cases) where the rule has been applied to produce a concrete outcome. Explanatory synthesis takes the relevant authorities—those that have applied the rule in actual situations—and derives from them one or more principles of interpretation and application of the rule. These principles are derived from common factual elements, policies, or themes found in the cases and other authorities that are relevant to the interpretation of the rule.

Explanatory synthesis requires authors to search for and induce a common element of earlier cases that may be compared to the facts of the case at hand to make the point that the case should enjoy the same outcome because the case at hand shares this common element with the others, or that the case should have a different outcome because it does not share this common element and thus is distinguishable. For example:

If all the prior dog bite cases in the jurisdiction in which the plaintiffs failed to recover involved adult victims who provoked the dog by striking it, and authors have a client who is a dog injury victim but is a small child who accidentally fell against a dog, authors could synthesize the earlier cases where plaintiffs did not prevail as “adult provoker” cases, and distinguish their own case because it involves a child who accidentally made contact with the dog, and a child should not be held to the same standard of care as an adult. This principle must be supported by the holdings of the cases, or by appropriate use of dicta from the cases. If the cases themselves anticipate the possibility that the provoker might be a small child who acts inadvertently and unintentionally, and the cases state that this would not have any bearing on the outcome, then the synthesis is unsupported by the authorities and authors cannot assert it.

Optimally, however, authors will identify a policy or theme that underlies the earlier authorities and that resonates with and defines the applicable rule and the particular area of law in which the rule is found. A principle of interpretation that is induced from the central meaning, common ground, public policy, or theme behind a group of earlier cases where the rule was applied is probative of how the rule properly is to be interpreted and applied in cases in the present and future, such as the author’s client’s own case. Furthermore, when an author applies this principle to the facts of her client’s case in the application section, the results will be more reliable than if the author simply compared one earlier case at a time to the facts of her client’s case. For example:

If all the dog injury cases in the jurisdiction can be tied together with the theme that “the law provides a remedy for injuries suffered when the victim is acting peaceably and the dog is not,” then an author should use this as the explanation of the rule, followed by indicative reference to examples of how this theme is played out in the earlier authorities. This

technique tells the reader how the rule has worked in the jurisdiction in the past, and how it should work again in the future. This is much more useful to the reader than simply writing a paragraph on each case, and concluding each paragraph with, “Once again, plaintiff recovered because the victim was acting peaceably, and the dog was not.”

It is this kind of synthesized analysis of the cases that is missing from the average lawyer’s explanation section; yet this is what is important to an understanding of how the rule works. Secondary authorities may state principles of interpretation and application directly—the authors of treatises, hornbooks, restatements, and law reviews go to great lengths to synthesize and make sense of the law for the reader—but judicial opinions often do not. The factual details and holdings from a group of individual cases do not in and of themselves define the category of situations that will satisfy the standards of the rule or a particular element or factor of the rule and what categories of situations will not. The factual details of cases often are exciting to write about, but readers would just as soon have authors cut to the chase and tell them the reasons why certain kinds of cases have satisfied the rule in the past and will again in the future, while others did not and will not.

3. The process of explanatory synthesis

The doctrine of explanatory synthesis contemplates the use of a systematic methodology for the inductive processing of authorities:

THE PROCESS OF EXPLANATORY SYNTHESIS		
①	<p>Read cases and look for common facts and common outcomes</p>	<ul style="list-style-type: none"> ◆ Group cases by facts ◆ Divide groups of cases by outcome
②	<p>Review the groups to find the factors or public policies that make the difference in the outcome</p>	<ul style="list-style-type: none"> ◆ Reconcile cases that have different outcomes; what policy or theme or factor determined the outcome in these cases ◆ Reconcile cases that have the same outcome on different facts; what common policy or theme or factors brought about the same outcome on different facts
③	<p>Write principles of interpretation that explain the policies, themes, or factors induced from a synthesis of the authorities</p>	<ul style="list-style-type: none"> ◆ Phrase the principles of interpretation in language that mimics interpretive rules ◆ Often authors can use interpretive rules as principles that tie together multiple authorities; there is no requirement that authors always have to come up with brand new principles
④	<p>Cite the cases that support the principles of interpretation with parentheticals that provide facts or other information about each case</p>	<ul style="list-style-type: none"> ◆ Parentheticals should contain enough information to illustrate how the individual case supports the general principle authors have laid out ◆ Use shorthands and abbreviated phrases to save space
⑤	<p>When authors draft the Application section, apply the principles of</p>	<ul style="list-style-type: none"> ◆ Applying principles to facts will make the analysis more convincing; authors have spelled out the connections to be made

<p>interpretation to the facts of the case at hand; as a general rule, do not apply individual cases to these facts</p>	<p>between the authorities and then followed through and showed how the principles learned from a study of the authorities determines the outcome of the case at hand</p> <p>◆ The exception to this rule is when authors have one or two extremely similar cases that are worthy of individual attention in the Explanation section; these should be discussed individually in the Application section, whether as support or to distinguish them</p>
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Where the individual facts of the authorities authors are using are important—and most often they will be important—parentheticals can be used to guide the reader through some of the particulars of the facts. When authors explain how the rule works in the various situations represented by their cases, authors should bring out the facts and circumstances that make the positive cases (the cases where the result is the same as what authors predict their client’s result will be in the thesis) sound more like their client’s case than the negative cases (the cases where the result goes the other way from what the authors predict in the thesis). This technique is called analogizing to the good cases and distinguishing the bad cases. Synthesis aids this process because authors can link together a number of positive authorities that stand for a proposition that supports their thesis, and authors also can link together a number of negative authorities that do not support their thesis and show a common reason (facts, law, or policy) why each of them

should not control the outcome of the instant case.

4. Comparing unsynthesized and synthesized explanation sections

Most authors already know what unsynthesized explanation sections look like because this method is used by legal writers everywhere in the legal profession, in judicial opinions, in briefs filed with courts, and in internal office memoranda. An unsynthesized explanation section takes the reader on a historical walking tour of the cases that have interpreted the rule. The rhetorical strategy embodied in such a section is to attempt to engage in analogical reasoning, but the number of analogies an author may make necessarily is limited by the space requirements and by an appreciation of the attention span of the audience. The following examples show the differences between an unsynthesized and a synthesized explanation section.

Example 1:

An element of adverse possession is “exclusive possession” of the disputed land. The following fictional cases explain how this element has been interpreted in the jurisdiction:

UNSYNTHESIZED EXPLANATION

In Flowers, the claimant cleared a road and cut down trees and used the land for his own purposes for ten years. He even built a fence, but the neighbors who owned the land pulled down the fence. In spite of this fact, the court held that the possession

was exclusive because the neighbors did not move back onto the land to use it after taking down the fence. Flowers, 979 S.W.2d at 470.

In Conaway, the claimant had no fence. He used the disputed land to build a shed and a horseshoe pit, and he put a little fountain on the land. He cut the grass and maintained the land and the improvement he had put on the land. His neighbor, who actually owned the land, came over and pitched horseshoes from time to time, and may have cut the grass once or twice in ten years, but these visits were sporadic. The claimant was the only one to make use of the land for ten years. The court held this to be exclusive. Conaway, 972 S.W.2d at 445.

In Witt, the claimant had a fence around the disputed land. Although the true owner of the land testified that he thought he could use the disputed land any time he wanted, the evidence revealed that the claimant was the only person who used the land. Witt, 845 S.W.2d at 667. Therefore, the claimant proved that his possession was “exclusive.” Id.

This is how authors could explain how this element has been interpreted and applied using a synthesized explanation section:

SYNTHESIZED EXPLANATION

Exclusive possession refers to the claimant being the exclusive user of the land rather than to the actions of the claimant in excluding people from coming on the land. See Flowers, 979 S.W.2d at 470 (claimants were the only ones to use the land for the ten year period); Witt, 845 S.W.2d at 667 (same); Conaway, 972 S.W.2d at 445 (claimants were the principal users of the land, because the true owner only made sporadic visits). “Exclusive” is used as an adjective to mean that the claimant is the only user, rather than as a verb meaning to exclude. See generally Flowers, 979 S.W.2d at 470; Witt, 845 S.W.2d at 667; Conaway, 972 S.W.2d at 445. Actions that might exclude others, such as fence building, do not determine whether a possession is exclusive. Compare Witt, 845 S.W.2d at 667 (claimant had a fence and established exclusive possession), with Conaway, 972 S.W.2d at 445 (claimant had no fence and still established exclusive possession), and Flowers, 979 S.W.2d at 470 (claimant built

a fence, but the owners tore it down, and claimant still established exclusive possession). Total exclusion is not necessary, because the true owner can make sporadic visits to the land and still not defeat claimant's adverse possession claim. See Conaway, 972 S.W.2d at 445 (sporadic visits by the true owner to play horseshoes and cut the grass did not defeat the exclusive possession of claimant); Flowers, 979 S.W.2d at 470 (the owners' tearing down of claimant's fence did not defeat exclusive possession because the true owners still did not take over the parcel for their own use).

The difference between the two methods is that in the unsynthesized explanation section, the reader learns a lot of interesting details from the cases, but never hears about the underlying principles of interpretation of this element of the adverse possession rule that would help the law-trained reader apply this element to all future situations. The focus of the unsynthesized explanation section is on the cases, not on the principles or themes of interpretation that the cases support. A devoted law-trained reader may be able to ponder the history of the cases, and draw her own conclusions about the categories of situations that will satisfy the rule, and those that will not, but most readers would prefer authors to take the time to think this through and present a complete analysis of how this element of the rule works.

The synthesized explanation section focuses on the genus principles of interpretation and application that can be induced from the species cases. The synthesized explanation section resembles a small scale treatise on this particular element of the adverse possession rule. Factual details are presented when they are necessary to

draw connections between cases and to distinguish positive cases from negative cases. A law-trained reader that reads this section will not have to wonder about the categories of situations that satisfy this element of the rule.

Example 2:

In the applicable jurisdiction, the elements of money had and received are: (1) receipt of money; (2) by mistake; (3) under circumstances that render the retention of the money unjust. The following fictional cases explain the third element—whether retention of the money was unjust:

UNSYNTHESIZED EXPLANATION

In First Federal Bank, 678 N.E.2d at 237, defendant Stevens received an unexpected wire transfer from the plaintiff Bank. The court granted summary judgment to defendant Stevens allowing him to retain the funds because Stevens was entitled to the mistakenly transferred sum as an offset of a judgment Stevens had obtained against the Bank in an earlier lawsuit. The court held that the prior debt gave just cause for defendant to retain the funds. Id.

In ATI, 778 N.E.2d at 44-45, defendant Adam's had a potential claim against ATI, but no action had been filed and no judgment entered. Through a fortuitous mistake, Adam's received a wire transfer from ATI that was intended for Adam's replacement on a construction project. ATI immediately informed Adam's of the mistake, but Adam's refused to relinquish the funds. The court held that there was no justification for Adam's retention of the funds. Id.

Blue Cross, 688 N.E.2d at 566-68, shows the effect of time and laches on the unjust enrichment evaluation. Defendant Carson was a regular beneficiary of payments from Blue Cross for medical expenses. The case arose from a mistaken

quarterly payment by Blue Cross of three *years* of benefits to Carson instead of three months. Blue Cross did not notice the mistake until a year later; by then, Carson had spent the money on his medical care and nursing home expenses. The court refused to order Carson to reimburse Blue Cross, because Carson had a valid expectation of indefinite quarterly payments from Blue Cross, and had changed his position drastically in reliance on his good faith belief that he was entitled to whatever payments he received from Blue Cross, no matter if they may have been larger or smaller than the average quarterly payment.

A synthesized approach to this explanation section would look like the following:

SYNTHESIZED EXPLANATION

The courts have demonstrated the importance of a present obligation from the transferor to the transferee in determining whether the transferee's retention of the funds is unjust. See First Federal Bank, 678 N.E.2d at 237 (the transferor owed a present obligation to the transferee; transferee's retention of the funds was not unjust enrichment); Blue Cross, 688 N.E.2d at 566-68 (same); ATI, 778 N.E.2d at 44-45 (the transferor had no present obligation to the transferee; transferee's retention of the funds was an unjust enrichment). If there is an outstanding debt that is due between the transferor and the transferee, the fact that the transferor did not intend to pay the debt at the time of the transfer does not prevent the transferee from justly retaining the funds it fortuitously received. See First Federal Bank, 678 N.E.2d at 237 (present obligation from transferor to transferee sufficient to allow retention); ATI, 778 N.E.2d at 44-45 (no present obligation from transferor to transferee; transferee's retention was unjust). Even if the funds were not all due at the time of transfer, the expectation of receipt of funds through an existing account or payment scheme can render the retention just. See Blue Cross, 688 N.E.2d at 566-67 (finding was buttressed through transferor's laches that caused a change in transferee's circumstances).

As in example 1 above, the unsynthesized explanation section focuses on the

cases themselves while the synthesized explanation section focuses on the principles of interpretation and application that can be induced from the cases. Note well that many of the individual facts from the cases are left out of the synthesized explanation section. Facts such as the horseshoe pit and shed in one adverse possession case and the wire transfers in two of the money had and received cases are only relevant if they tell the reader something about how the rule properly is applied and how the facts affected the outcome produced by the application. Since these facts did not affect the application of the rule and the outcome of this application, these facts were left out of the synthesized account. The facts about fences in the three adverse possession cases and the facts about debts and current obligations in the three money had and received cases were relevant to an understanding of how the rule works, so these facts were included in parentheses in the synthesized version.

A synthesized method is shorter in terms of using up fewer pages out of the page limit than the unsynthesized method. A properly constructed explanation section can use inductive reasoning to potentially synthesize every controlling authority that has interpreted and applied the rule if there are relevant principles to induce from each of the authorities.¹¹¹ If an entire paragraph of text was devoted to each case, the section most

¹¹¹ There is no advantage to synthesizing purely redundant authorities. Only authorities whose facts or

likely would drone on and on in page after page of text. This single advantage is important because authors constantly are pressured to be more concise in their writing by the page limits imposed by courts and by an appreciation of the limited attention span of most legal audiences—judges, law clerks, partners, supervisors, and clients. A case-by-case presentation of every relevant case in which the rule was interpreted and applied may be impossible given the constraints of court-imposed page limits, and it certainly would be inadvisable in most cases to test the audience’s patience with such a presentation.

Explanatory synthesis also has a positive effect on the application section, discussed in section II(D) below. If the facts and policies of the cases are synthesized, it makes it easier to compare the client’s situation to the genera of prior situations that are induced from the authorities. Authors will not write an application section that says, “As in Flowers, our claimant had a partial fence . . . Unlike in Witt, the fence did not go all the way around the disputed parcel . . .,” which make it seem like the cases are the rule, rather than the cases standing as individual examples of situations where the rule was applied to produce a certain outcome. The application section instead might state that, “Claimant and her predecessor in interest were the only persons to use the disputed parcel

relevant factors (policies, themes, holdings) will add additional information useful to the future application of the rule should be synthesized.

for fourteen years. Therefore, they will satisfy the exclusive possession requirement.” Using the above example on money had and received, it would be simple to write an application section that states, “In the instant case, there was no outstanding debt or payment scheme to justify the defendant’s retention of the funds,” and thus to apply the rule to the client’s facts in a short, straightforward manner.

D. The Application Section¹¹²

Application is the section where authors apply the rule to the client’s facts and show how the rule will work in the client’s situation. If authors are writing an informative objective work such as an office memorandum, authors will explain how they think the client will fare based on their analysis of the law. If authors are writing an advocate’s brief, authors will use this section to argue exactly why the client wins when the law is applied to the facts.

In the application section, authors must make the connection between the client’s situation and the situations in the authorities the authors are relying on in support of their thesis. The application section continues the practice of distinguishing bad cases from

¹¹² The material in section II(D) is derived from Murray & DeSanctis, *supra* note 2 at 110-112.

good cases so as to drive home their thesis. Authors must show that the negative authorities the authors discussed in the explanation section are different from the client's situation. If authors relied on policy arguments, authors must show how the client's situation furthers the policies the authors discussed in support of their thesis.

A typical, unsynthesized explanation section will produce an application section that looks like this:

**APPLICATION SECTION FOLLOWING AN
UNSYNTHESIZED EXPLANATION SECTION**

In the instant case, there is no dispute that the defendant's dog attacked and caused injury to plaintiff, his neighbor, when she walked out of her apartment and bumped into the dog with her shopping bag. Thus, the first two elements of this cause of action are established. In reference to the third element, lack of provocation, plaintiff did nothing to present a serious threat to the dog, let alone strike the dog, in contrast to the plaintiff in Smithy. Plaintiff may have swung her shopping bag near the dog in a careless manner, but this is a far cry from the beating that the Smithy dog received before it attacked the victim in that case. Like the plaintiff in Johnson, the Scout was using a public hallway that led to the front door of the apartment building. According to Johnson, walking in a hallway is not a provocative action, and it certainly is no more provocative than mistakenly opening the wrong door of an apartment where the dog is found, as was the case in Russell.

Although the postman in Johnson was acting in the ordinary course of his daily employment duties, and plaintiff here was doing something outside of her ordinary employment activities, this should not be viewed as a legally significant difference precluding plaintiff from recovery. Recovery by plaintiff furthers the policy of allowing recovery where the victim was acting peaceably and the dog was not.

If the author used explanatory synthesis to combine authorities in the explanation section, the application section will apply the principles of interpretation induced from the common facts or common theme of the earlier cases, rather than simply comparing the facts of the instant case first to one earlier case, then the next, then the next, and so on. The author will explain how the common underlying theme is furthered by their interpretation of how the rule will apply in their case, or the author will distinguish the earlier cases because of their common facts or policies that are not present in the instant case. Consider the following modified application section that follows a synthesized explanation section:

**APPLICATION SECTION FOLLOWING A
SYNTHESIZED EXPLANATION SECTION**

In the instant case, there is no dispute that defendant's dog attacked and caused injury to plaintiff, his neighbor, when she walked out of her apartment and bumped into the dog with her shopping bag. Thus, the first two elements of this cause of action are established.

In reference to the third element, lack of provocation, the underlying theme of this state's dog-bite cases is that a plaintiff who is peaceably going about her business and is attacked by an aggressive dog will recover, while a plaintiff who picked a fight with the dog and caused injury to the dog first will not recover. Plaintiff did not pick a fight with defendant's dog. She did nothing to present a serious threat to the dog, let alone intentionally strike the dog. Plaintiff may have been careless in swinging her shopping bag near the dog, but that is a far cry from

beating the dog. Recovery by the plaintiff furthers the policy of allowing recovery where the victim was acting peaceably and the dog was not.

This explanatory synthesis and application of synthesized principles only works if it is fair to link all of the prior cases together under the theme of “a plaintiff recovers when the plaintiff was acting peaceably and the dog was not.” Authors cannot invent a common theme that is not present in the earlier cases, nor can authors assume common facts that are not discussed in the cases. However, if authors can discern a common set of facts and a theme or policy that is important to the understanding of how the rule should work, it is helpful to readers to point this out.

E. The Thesis Restated as a Conclusion¹¹³

Authors should finish their discussion of an issue by restating their thesis as a conclusion. This is not the most critical part of the discussion, but it makes a difference to the reader of legal writing to have one sentence at the end that brings closure to the discussion.

The conclusion authors make can be one sentence, and it can come at the end of

¹¹³ The material in section II(E) is derived from Murray & DeSanctis, *supra* note 2 at 112.

the last paragraph of the application section. As an example, the thesis restated line of the dog-bite example mentioned above might be:

Therefore, defendant will be required to compensate plaintiff for her injuries in this case.

I do not intend to imply that the thesis restated as a conclusion has to be a throwaway. It often is a single sentence, simply there to say this section is completed. But authors can spend more time with a conclusion and use it to advance their argument one more step, or to make a smooth transition to the next topic. Authors only are limited by their own creativity.

III. THE RHETORICAL ADVANTAGES OF THE TREAT PARADIGM AND EXPLANATORY SYNTHESIS

The TREAT paradigm and the doctrine of explanatory synthesis fulfil many of the classical rhetorical principles of persuasive legal rhetoric. The following chart organizes the sections of the TREAT paradigm with reference to the modes of persuasion that each fulfils:

TREAT Section	Modes of Persuasion	Discussion
Thesis Heading	Logos, Ethos	The thesis heading supplies the conclusion of the enthymeme on the issue (logos). The author's use of a thesis heading supplies the reader with the answer to the legal question up front, in a prominent place. The front loading of the information should please impatient readers (ethos).
Rule Section	Logos, Ethos	The rule section's primary function is to provide the legal standards that govern the issue. The author supplies the major premise of the enthymeme in this section (logos). The author also has the opportunity in this section to demonstrate the author's legal skills in researching, analyzing, and synthesizing the authorities that define the rule in the jurisdiction, and thus may bolster the credibility and reputation of the author (ethos).
Explanation section using Explanatory Synthesis	Logos, Ethos, Pathos	In the explanation section, the author seeks to explain how the legal rules are to be interpreted and applied based on an inductive analysis of the species of cases where the rule has been applied in the past (logos). Use of explanatory synthesis reveals the author's prowess in analyzing and synthesizing apposite authorities to induce principles of interpretation and application of rule that are useful to the reader (ethos). The author does the work of synthesizing the relevant cases so that the reader does not have to (ethos). Use of explanatory synthesis allows the author to develop arguments based on factual circumstances and public policies at work in the relevant authorities which afford the author the opportunity to make an emotional appeal (pathos).

Application Section	Logos, Ethos, Pathos	In the application section, the author provides the minor premise of the enthymeme on the issue (logos). The author applies the rules to the facts of the client’s case in accordance with the principles of interpretation and application induced in the explanation section (logos). The application requires proper analysis of the relevance of the client’s facts and circumstances, and may reveal the author’s prowess in matching the client’s circumstances to those of the precedents (ethos). It also is a section dealing with facts and narrative reasoning, and thus provides the opportunity to make emotional appeals (pathos).
Thesis Restated as Conclusion	Logos, Ethos	The thesis restated as a conclusion completes the enthymeme (logos). It also is a useful signal to the reader that the author’s discussion is completed (ethos).

A. The Logos and Ethos of the Thesis Heading

The thesis of a TREAT section is the conclusion of the rhetorical syllogism—the enthymeme—that analyzes the issue.¹¹⁴ It is the final report of the results of deductive reasoning through the syllogistic structure of the TREAT format, and thus is inexorably tied to the logos mode of persuasion. However, the decision to place the thesis in a heading that precedes the discussion of the issue is not accidental and not inevitable.

¹¹⁴ Rhetoric, Book I, ch. 1 at 1355a. *See also* sources cited in notes 29-32, *supra*.

Most legal writing models follow a syllogistic rule-based reasoning structure.¹¹⁵ But these models do not request the author to put the thesis in a heading.

The benefits of putting the thesis—the answer to the ultimate legal question posed by the issue—up front, first and foremost, is to satisfy the desires of the audience for answers. Legal pundits notoriously observe that lawyers and judges are busy people, impatient for answers. Aristotle and Quintilian each admonished advocates not to squander a judge’s or jury’s time and patience and attention span.¹¹⁶ Any device that puts the answer in a law-trained reader’s hands earlier rather than later is going to be appreciated by the reader.

In a long document, a series of thesis headings that not only record the placement of issues but also provide a summary of the author’s conclusions on these issues can be a useful outline for the reader both at the initial reading for finding the areas of the text with which the reader is the most concerned, and later as a tool to allow the reader to jump into sections for reflection and review. The reader will be favorably disposed toward the author for her thoughtfulness in providing meaningful thesis headings at the

¹¹⁵ Indeed, the most common structure of all, IRAC, is a syllogistic, rule-based reasoning structure that presents the Issue, the Rules that govern the issue, the Application of the rules to the facts of the client’s case, and the Conclusion. *See* Robbins, *supra* note 36 at 485.

¹¹⁶ Rhetoric, Book I, ch. 1 at 1354a-1354b; 2 Quintilian, *INSTITUTIO ORATORIA*, *supra* note 7 at 303, 383; *see* Corbett & Connors, *supra* note 4 at 61; Frost, Ethos, Pathos & Legal Argument, *supra* note 25

beginning of each section of discussion of the issues and sub-issues. This may not set the table for a favorable disposition with the strength of an emotional appeal in a pathos sense, but the good will evidenced by the use of the device will benefit the ethos of the author's persuasiveness.

B. The Logos and Ethos of the Rule Section

The rule section is first and foremost a logos section for it provides the major premise of the syllogistic rule-based reasoning structure of the TREAT paradigm. The rule section lays out the principles which, if satisfied, will trigger the operation of the rule in a certain way; if X, Y, and Z are present, A will occur. This is the beginning of the enthymeme that will analyze the issue.

The rule section in most cases is not easy to write. It is an extraordinarily simple issue that is governed by one legal authority defining a simple, one-step rule. Even when the governing legal authority starts with a statutory or constitutional provision, the rule in most cases is tempered by the effects of years of cases and other authorities that have changed the legal effect of the statute or constitutional provision. The author must take into account the precedents that have altered, amended, and modified the requirements of

at 93-94.

the rule over time through the application of rule synthesis. These changes must be recorded in the rule section.

The author's skills (or shortcomings) in research, analysis, and rule synthesis will be revealed first and foremost in the rule section. A section that is drafted crisply and concisely, that evidences careful research and diligent analysis, and that makes sense of a complicated body of law through a skillful synthesis of the standards that the authorities have promulgated to govern the issue will drastically improve the ethos of the author and her message. The opposite effect also is possible for an author whose skills are less adept.

C. The Logos, Ethos, and Pathos of the Explanation Section using Explanatory Synthesis

The explanation section employs inductive reasoning by combining the species of relevant authorities that have interpreted and applied the rule in concrete situations with concrete outcomes so as to induce the genera of principles of interpretation to instruct the reader how the rule properly is to be applied. Its logos effect is to create rhetorical “examples”¹¹⁷ based on precedents that will be used to argue the correct application of the rules in future cases, most particularly in the author’s client’s own case. The argument relies on making the most probable prediction¹¹⁸ based on the most indicative authorities.¹¹⁹

It is a simple fact that predictions based on probable generalizations induced from multiple precedents are more persuasive and more credible in a ethos sense if the author takes into account greater numbers of precedents.¹²⁰ If all other relevant features are the same, a prediction based on five cases is less persuasive on its face than one based on

¹¹⁷ Rhetoric, Book I, ch. 2 at 1356b; Scharffs, *supra* note 42 at 752 & n.58; Schmidt, *supra* note 42 at 372-73.

¹¹⁸ See Scharffs, *supra* note 42 at 752 & n. 58.

¹¹⁹ Corbett & Connors, *supra* note 4 at 119-20.

¹²⁰ *Id.* at 60-61 (“The validity and truth of the generalization will be in direct proportion to the *number*

fifteen cases.¹²¹

The advantages of the doctrine of explanatory synthesis in an ethos and logos sense become evident when explanatory synthesis is compared to analogical reasoning in general and the superficial, surface-level analogical reasoning employed by many if not most legal authors in particular. Explanatory synthesis is logically convincing because it is based on the same principles of induction that support the scientific method. Beyond that, the author who successfully employs explanatory synthesis most often will induce principles of interpretation and application of legal rules from a far greater number of legal authorities than typically can be explored in analogical reasoning. The number and detail of the analogies an author can make are constrained on the one hand by court-imposed page limits and on the other by the temperament and attention span of the audience. The ethos and pathos of the message will be affected if the author drones on overly long and fills up more pages than the audience is pleased to receive on the issue.

Explanatory synthesis is reported in a concise exposition that makes use of the truncated communicative device of parentheticals to convey information beyond the simple citations to the authorities themselves. Furthermore, the very nature of a synthesis is to analyze and combine authorities to induce from them only the most pertinent details

of pertinent particulars studied.”) (emphasis in original).

that are necessary to the analysis of the issue at hand. Many factual details from cases will not bear on the analysis of the issue, and the explanatory synthesis doctrine allows the author to zero in on those details that do make a difference in the application of the rule. Providing more information that is narrowly tailored to the analysis of the issue at hand in less space for the benefit of busy, distracted readers surely will maximize the ethos if not the pathos potential of the message.

Explanatory synthesis also deals with the facts and public policies that drive the proper application of the rule in various circumstances. Through careful arrangement of the facts derived from multiple authorities and development of the public policy principles at work in the precedents and in the client's case, the author can make an emotional appeal in the explanation section much easily than in the rule section. Rules are statements of legal principles; they are not statements of facts, and are not subject to persuasive rendition through the use of narrative reasoning. Thus, the pathos of the message can be shaped in the explanation section.

The inductive reasoning revealed in explanatory synthesis is not intended to replace analogical reasoning altogether. It would be a mistake for any legal author operating in a common law system bound by the doctrine of precedent and *stare decisis*

¹²¹ See *id.* at 61.

to ignore one or more controlling authorities that are so close to the facts and circumstances of the instant case that they ought to control the instant case. By the same token, a legal author must be aware of contrary authorities that have a distinct resemblance to the instant case. In these circumstances, the author must engage in analogical reasoning to map the similarities not just in facts but in the underlying policies and factors that produced the outcome in the precedents, and ultimately to connect the precedents to the factors and policies that drive the area of law in which the precedents are set.¹²² Only in this way can the author analogize to authorities that should control the outcome of the instant case and distinguish those that should not.

The explanation section that employs explanatory synthesis will be a refreshing sight for readers who are used to the commonplace analogical method of case-by-case presentations that map surface-level similarities without exploring the policies and factors that drive the outcome of disparate cases within the context of the area of law of the issue. A synthesized explanation section is like a treatise on the specific body of law that governs the issue; an unsynthesized, superficial analogical explanation section is nothing more than a page out of a digest that lists capsule summaries of cases. The synthesized explanation section instantly confirms or corrects the reader's understanding of how the

¹²² See generally Hunter, Reason Too Large, *supra* note 107 at 1215-31.

legal rules ought to work in various situations based on the principles of interpretation induced from all of the relevant controlling authorities. The superficial analogical explanation section dangles a list of cases in front of the reader, and forces her to do the work of determining how the rule ought to work based solely on a few selected cases. Thus, the synthesized explanation section has the most potential to persuade the reader through the modes of logos, ethos, and pathos of the discourse.

D. The Logos, Ethos, and Pathos of the Application Section

The application section is a fundamental part of the logos of the discourse as it supplies the minor premise of the rhetorical syllogism. The author must marshal the most pertinent facts of the client's situation to make a convincing application of the rules to the client's situation. The author should apply the principles of interpretation derived in the explanation section through inductive reasoning in addition to the legal rules presented as part of the deductive rule-based reasoning syllogism. There is as much opportunity in an ethos sense to impress the reader with the author's insight into the facts and skillful application of the law to the facts in an application section as there is any other section of the TREAT paradigm.

Beyond this, the application section is the only section of the TREAT format that

is devoted to the client's own facts and circumstances. The careful arrangement of facts in light of the sympathetic public policies of the area of law of the issue is the key to a successful pathos appeal. Other sections of legal documents—the introduction (*exordium*) section, the statement of facts or statement of the case (*narratio*) sections, and the conclusion (*peroratio*) section¹²³—also present opportunities to stress the facts of the case in such a way as to fully engage the emotions of the audience, but within the rule-based reasoning syllogism of the TREAT format, the application section stands alone in its ability to use the facts and policies of the case to make a persuasive pathos appeal.

E. The Logos and Ethos of the Thesis Restated

In legal documents, front-loaded information receives the greatest attention. Material that is presented first will grab the readers attention on the first reading, and will be used for orientation in later readings. That is reason that the TREAT paradigm places the thesis first and highlights it by making it a heading that precedes the discussion.

Nevertheless, the thesis restated as a conclusion at the end of the discussion of an issue places the conclusion where it logically belongs in the rhetorical syllogism: at the

¹²³ See generally Corbett & Connors, *supra* note 4 at 20; Frost, Ethos, Pathos & Legal Audience,

end. It also signals to the reader that the discussion of the issue is concluded. These two features of the thesis restated fulfil a logos and ethos function that no other section can accomplish.

IV. CONCLUSION

The TREAT paradigm that incorporates explanatory synthesis maximizes the persuasive potential of the substance of legal writing. The classical rhetoricians remind modern authors not to ignore the importance of the credibility, integrity, and good will of the author that like it or not will be revealed in one way or another in the author's writing. The rhetoricians also remind authors to weigh the likely emotional impact of their writing on the audience, and even to go so far as to carefully arrange their clients' facts in light of the public policies of the areas of law of the issues so that the authors can achieve a favorable pathos appeal in their writing.

TREAT combined with explanatory synthesis brings to bear the two forms of logical persuasive discourse approved by the classical rhetoricians who carried out the Aristotlean tradition: deductive reasoning through the rhetorical syllogism referred to as an enthymeme, and inductive reasoning through the rhetorical induction referred to as an

supra note 25 at 94-100.

example. TREAT allows for analogical reasoning when there are one or more authorities that are so close to the client's own situation that their facts, rationale, and motivating policies must be explained in great detail so as to analogize to them as controlling authorities or to distinguish them. By using the three forms of reasoning in one discussion, the reader maximizes the logos of the discourse.

A summary of classical rhetoric must include the feature most pertinent to this body of teaching: persuasive writing must be audience-directed. The TREAT paradigm and the doctrine of explanatory synthesis fulfil this goal. The TREAT structure respects the time-pressures and attention span of law-trained readers, and explanatory synthesis goes beyond the commonplace superficial analogical reasoning of most lawyers' writing to present a treatise on the specific body of authorities that govern the issue. Together, the TREAT paradigm and the doctrine of explanatory synthesis carry out the traditions established in classical rhetoric.