Persuasion from A to P: Back to the Basics

Roy T. Stuckey
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I. INTRODUCTION

Advocacy is one of the two primary activities of the American lawyer.¹ The daily work of most lawyers includes trying to persuade somebody about something. It is natural for lawyers to want to become masters of persuasion in order to provide effective services to their clients. Unfortunately, efforts to teach advocacy to lawyers seldom, if ever, include a broad view of advocacy or explain fundamental principles of persuasion.²

The basic principles of advocacy were developed by the Greeks over two thousand years ago,³ but the classical rhetoric of Aristotle is not a familiar subject to the modern lawyer. Today, rhetoric has become a word with negative connotations. "Ordinary usage now defines rhetoric as the specious, bombastic or deceitful use of language; rhetoric, in other words, is the abuse of language . . . ."⁴ However, the ancient

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1. The American Bar Association recognizes the primary roles of the lawyer as advocate and counselor and it uses this division to define the professional obligations of lawyers. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Official Draft 1981), (Preamble), (Adapted 1983).

2. In Why Teach Trial Advocacy? An Essay on "Never Ask Why", Humanistic Education in Law: Monograph III 68 (Columbia University School of Law, 1981), Kenney Hegland criticizes trial advocacy courses and skills courses in general for several reasons, including their overemphasis on technique and their underemphasis on the philosophical and psychological underpinnings of technique. He recommends "the use of theory not to make students more skillful but to encourage them to question and perhaps ultimately change the skills we teach and the world in which those skills appear to work."


Greeks associated rhetoric with the art of oratory, primarily with persuasive discourse. Classical rhetoric was a system for discovering and using all available means to persuade an audience to think or to act in a certain way. Aristotle defined rhetoric as "the faculty of discovering the possible means of persuasion in reference to any subject whatever." Thus, rhetoric should be a topic of genuine interest to lawyers.

Until the late nineteenth century, rhetoric was a subject of study for all lawyers, but it disappeared from basic legal education with the advent of academically-based legal education and the de-emphasis of practice-oriented instruction. These historical events, however, do not diminish the importance of rhetoric for the modern lawyer.

This article was inspired by the contemporary writings of Chaim Perelman, a Belgian philosopher and lawyer, who pursued the development of a "new rhetoric," a discipline founded in Aristotelian rhetoric which would "unite the topics and rhetoric in one single branch of study of reasoning with an audience in view."

Neither Perelman nor the adherents to his theories have

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5. ARISTOTLE, supra note 3, at 15.

6. Cf. Reike, Argumentation in the Legal Process, in ADVANCES IN ARGUMENTATION THEORY AND RESEARCH 363 (1982) [hereinafter ADVANCES]. (The remnants of medievalism left rhetoric with a seedy image of sophistry, and law schools found themselves in tough competition with the apprenticeship system. Although Yale was a holdout, it was Harvard that set the pattern for legal education that has prevailed until this time. "At Harvard, the theory was that legal education should consist of study in philosophy and principles of law. The rhetorical-communicative elements were completely rejected on the grounds that all one needed to be an effective advocate was knowledge of the law." Id. at 366.).


8. Cf. THE NEW RHETORIC, supra note 7, at 118.

The new rhetoric thus owes its specific character to the relation between speaker and listener, between the man who tries to persuade and those whom he seeks to persuade. Its object of study should therefore be wholly general, not restricted to the techniques designed for a particular audience (for example the nonspecialized public), or to a particular medium of communication (oral or written, direct or nondirect) or to any single form of persuasive communication (discourse or treatise, formal or informal discussion, inward deliberation) or to the contents of this communication (political discourse, counsel's speech, philosophical treatise, academic address, report at scientific congress, etc.).
succeeded in fully describing the parameters of this new discipline. However, this article incorporates some features of discipline and some features of the new rhetoric. It disregards the distinctions between dialectic and rhetoric, it draws upon a wide range of concepts about persuasion, it focuses on the audience, and it emphasizes the role of value judgments in human decision-making.

Aristotle and Perelman did not write about modern law practice, and their phraseology and examples are alien to the worlds of lawyers and law students. This article converts their words into language which is more understandable to lawyers, and it adapts their concepts to law practice situations.9

Persuasion is a multi-faceted subject which no short article can fully explain.10 However, this article should serve as a useful guide for the lawyer who is actively engaged in planning persuasion, even in the context of minor everyday problems. The basic structure and the key concepts are relatively simple. They should be easy to remember and apply, once the lawyer has become acquainted with them.

II. PRELIMINARY CONSIDERATIONS

A. Persuasion Defined

A suitable definition of persuasion is elusive. Webster's defines "persuade" as "to move by argument, entreaty, or expostulation to a belief, position, or course of action." Another description is:

"[P]ersuasion" refers to two related but different things:

9. The title of this paper signals its relationship to the works of Aristotle and Perelman. However, "from A to P" also signifies the incompleteness of our understanding about persuasion and our present inability to fully describe the parameters of Perelman's new rhetoric.


Perhaps the most important single characteristic of rhetoric is that it is a matrix of complex and interrelated variables of the kind discussed in this paper. The theorist cannot meaningfully pluck from the system any single variable and hope to understand it apart from the others . . . . Unfortunately for the prognosis of theoretical advances in rhetoric, the combinations and permutations of the alternatives afforded by the various dimensions are so many as to approach infinity.
the process that brings about an eventual result and the result itself. "Persuasion" is a process (persuading) and the product (being persuaded). From the standpoint of the person doing the persuading, the process entails the techniques of persuading; from the standpoint of the person being persuaded, the process embodies the motivations for belief . . . .

The product (persuasion), which results from the process of persuading, consists in the resulting conviction in the soul of the person being persuaded. It is the belief engendered because of the motivations presented in the process.11

This article is concerned with persuasion from the standpoint of the legal advocate who is doing the persuading. For our purposes, persuasion should be understood to involve the manipulation of the decisions of an audience of one or more people that can affect the achievement of a client's objectives. The decisions at which a lawyer's persuasive efforts are directed must involve some degree of uncertainty, that is, the decision-makers must have more than one viable alternative from which to choose.12

1. Decisions Involving Uncertainty

Advocacy is not appropriate, nor can it succeed, where the solution is clear to those people who control the decision in question. Some uncertainty about the proper result of an impending decision must exist in the minds of the decision-makers before persuasion can occur.

Whenever two men come to opposite decisions about the same matter, [says Descartes] one of them at least must certainly be in the wrong, and apparently there is not even one of them who knows; for if the reasoning of one was sound and clear he would be able so to lay it before the other as finally to succeed in convincing his understanding also.13

When a lawyer is involved in a matter in which the legally correct resolution is clear to all parties (or can be made to

13. The New Rhetoric, supra note 7, at 2 (quoting Descartes, Rules for the Direction of the Mind, 31 GBWW 1, 2 (1952)).
be clear), persuasion plays no role in the outcome. No one deliberates where the solution is necessary or argues against what is self-evident. In such situations, the client should be appropriately advised and litigation should either not be initiated or should be quickly settled.

The important consideration in law cases is not so much what the lawyers believe about the matter, but what the people who will decide the outcome believe about it. As, by definition, a lawyer engaged in advocacy is unable to prove a case to any degree of scientific certainty, decision-makers will base their decisions on those propositions which they are satisfied to be the most credible, plausible and probable. The decisions may be based on the actual truth of the matter, but they may not be.

2. Audience

Decision-makers are the audience for a lawyer’s persuasive efforts. The audience of a persuasive effort is best understood as the gathering of those whose decisions the lawyer wants to influence. The people who constitute the audience for a persuasive effort may not be the same people who are being directly addressed by the lawyer. For example, the opposing party may be the target of the advocacy, not the lawyer with whom the advocate is negotiating. Or, it may be both the lawyer and the opposing party.

For a persuasive effort to succeed, there must be some attention paid to it by those to whom it is directed. It is not enough for a lawyer to speak or to write; he or she must also be listened to or read. Knowledge about the audience is a precondition of all effective persuasion, and knowledge of an audience cannot be conceived independently of knowl-

15. There are some people who are bothered by this notion. They would prefer for the legal system and everyone who participates in it to work together to discover the truth in every case. Even if this goal was obtainable, there would always be cases in which the truth could not be discovered, but the dispute would still have to be resolved. Although legal dispute resolution mechanisms do not always produce correct results, they are vastly superior to the alternative... violence between the disputants.
17. The New Rhetoric, supra note 7, at 18.
edge of how to influence it.\textsuperscript{18} In advocacy, the important thing is not knowing what the lawyer regards as true or important, but knowing the views of the people whose decisions the lawyer seeks to manipulate.\textsuperscript{19}

3. Manipulation

The lawyer who intends to become an effective advocate must accept the reality that manipulation is an inevitable part of the game. Unfortunately, manipulation may include an element of unfairness, and so the image of the manipulative lawyer is not one which is favored by the legal profession.

However, there is really no better word for describing what advocates do, and lawyers should not pretend that they do not manipulate. Much of the discomfort of accepting the role of manipulation in advocacy can be avoided by adhering to the following definition of manipulation: to control by artful (but not unfair) means to the advantage of one’s client. Advocates who practice in accordance with this definition should feel no shame about being manipulative.

B. Images of Advocacy

One way to conceptualize advocacy is to think of it as a competition between two lawyers who are trying to peddle competing versions of a story to a person who must decide which one to buy. This is an appropriate image, for a lawyer’s efforts at persuasion are guided by the same principles as a business person’s efforts to sell products. Legal advocates just happen to be in the business of selling ideas, not merchandise.

Another illustration of legal advocacy begins with a triangle. At one corner is the lawyer. At another is the audience (judge, jury, opposing attorney, etc.). At the third corner is the truth, that is, the reality of the subject of the persuasive effort. [The question at issue may involve historical facts (what happened or who did it), culpability (who is responsible for it), damages (what is it worth or how much time should be served), or the law (what do these cases and statutes really mean). It can also involve the consequences of

\textsuperscript{18} \textit{The New Rhetoric}, supra note 7, at 20.
\textsuperscript{19} \textit{The New Rhetoric}, supra note 7, at 23.
deciding one way rather than another (e.g., if I turn down the settlement offer will I fare better at trial).]

Somewhere inside the triangle is the message (central thesis) to which the lawyer wants the audience to adhere. Success occurs if the audience holds the belief when it makes its decision that the central thesis of the lawyer is in fact reality (truth), or is closer to reality than any other alternative from which the audience can choose.20

In legal disputes involving third party decision-makers, there is always more than one alternative being offered to the audience. Thus, the illustration of legal advocacy is incomplete. Return to the image of the triangle and add an identical triangle, forming a diamond with a line through the center. The lawyers are at opposite ends and the dividing line runs between the decision-maker and reality (the center line should be broken to indicate the decision-makers' inability to investigate or discover the truth without relying on the lawyers). The competing versions of the truth float in the enclosed spaces on either side of the center line. This image of legal advocacy will aid one's understanding of the concepts presented in this paper.

![Diagram of legal advocacy with triangles]

C. Strategy and Tactics

Legal persuasion takes many shapes and forms. It includes overall strategy considerations (designing a litigation plan from the initial client meeting to the ultimate conclusion of the case) as well as smaller strategies and tactics which are employed along the way. In planning an overall strategy, a lawyer will usually anticipate numerous points at which decisions could produce results which are satisfactory

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20. The application of the basic communications triangle to classical rhetoric is more fully explained in J. Kinneavy, supra note 3 (Kinneavy includes a representation of the structure of Aristotle's Rhetoric based on the communications triangle on page 226).
to the client. The lawyer may even need to engineer particular events at which key decisions can be made (e.g., motions to dismiss must be filed in order to give a judge a chance to rule on them). Tactical planning will usually relate to a lawyer's attempt to manipulate a particular decision within an overall strategic scheme.

Aristotle and Perelman's approaches to persuasion are broad enough to embrace all forms of persuasion. The same guiding principles apply to persuasive efforts about a narrow point (negotiating the price of a widget) as to more complex efforts at persuasion (litigating a products liability case). Therefore, the steps outlined in this paper for designing a plan for persuasion should have equal application to big events as well as to small opportunities for persuasion.

III. DESIGNING A PLAN FOR PERSUASION

This article describes a method for designing a plan for persuasion which is consistent with fundamental principles of advocacy. An outline is set forth below. The remainder of the article will discuss the components of each step.

Outline of Persuasion Plan

A. Specify Objectives and Options
B. Anticipate Key Decisions and Decision-Makers
C. Rank and Compare Values/Goals of Decision-Makers
D. Formulate a Thesis
E. Select Supporting Propositions
F. Marshal Proof of the Propositions (Employ all Means of Persuasion)
   1. Plan the Substance of Persuasion
      a. Employ Existing Tools
         i. Familiar Tools (Evidence)
         ii. Procedural Devices
         iii. Presumptions
         iv. Values
         v. Loci of the Preferable
      b. Employing Existing Tools in Klare
      c. Employ Creative Tools
         i. Appeal to Reasoning
         ii. The Personal Appeal of the Lawyer
iii. Appeal to Emotions
d. Employing Creative Tools in Klare
   i. Appeal to Reasoning
   ii. The Personal Appeal of the Lawyer
   iii. Appeal to Emotions

2. Plan the Presentation of Persuasion
   a. Organization
   b. Style
   c. Delivery
   d. Memory

G. Put it all Together
H. Consider Moral Implications of the Plan

This outline may at first seem to involve too many steps to be useful to a practicing lawyer's routine work. To be sure, persuasion is a complex endeavor and an explicit analysis of each component of the planning process in connection with any persuasive effort will be a time-consuming and difficult task. Although it will aid lawyers in conducting such in-depth planning efforts, this article should also assist lawyers who have neither the time nor the need to do so.

An advocate does not need to plan carefully for every persuasive effort. Some decisions are not critical for achieving the ultimate objectives of the client, and the lawyer is often justifiably comfortable relying on instinct and experience to develop and execute an effective plan of persuasion. More often than not, lawyers will easily, even subconsciously, accomplish most of the tasks described in the planning scheme—it tracks the natural development of a persuasion plan. Sometimes lawyers will get hung up on certain aspects, and careful thought about those issues will be worthwhile. The principles of persuasion described in this article can assist lawyers in overcoming those obstacles, and the outline can also be used as a checklist to ensure that all com-

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21. Perhaps lawyers too quickly fool themselves into believing this when time pressures and restricted resources force them to look for short cuts. An improved understanding of persuasion should help lawyers make better judgments about the need for detailed planning and reduce the risks for clients. It should also assist the lawyer in those many situations in which a persuasion plan must be developed and implemented instantaneously on a particular issue when there is no time for thoughtful planning.
ponents of persuasion have been considered.

An understanding of the basic principles of persuasion and a general command of the method described for designing persuasive efforts will help lawyers when they need to plan thoroughly for a persuasive effort or when they simply need to examine one or more components of a persuasion plan, whether it is their own or their opponents'.

A. Specify Objective and Options

Setting objectives is the starting point of planning for persuasion. The lawyer should take care to distinguish between the ultimate objectives of the case and the specific objectives of the lawyer's persuasive efforts.

The ultimate objectives of the case are always dictated by the client: what are the purposes for which the lawyer has been retained (e.g., to be acquitted of the criminal charge; to execute the contract by a certain date for a certain price; to prevent the divorce)? A misunderstanding about a client's objectives could result in a successful persuasive effort with no benefit to the client (the client wants to stop the divorce; the lawyer negotiates a very good settlement of the terms of the divorce). In many law cases, the client will have secondary objectives which are to be pursued if the primary objectives cannot be achieved (e.g., plea bargain for no jail time; obtain an agreement to reconsider in six months if a contract cannot be executed now; get the house as part of the settlement if the divorce cannot be prevented).

These objectives of the case are accomplished by successfully completing a series of persuasive efforts which lead to the ultimate objectives. For example, one way to obtain an acquittal in a criminal case is to convince the prosecutor to drop the charges. This may require first convincing the prosecutor that the client is remorseful, that the client comes from a good family, or that the case against the client is too weak to prosecute. At the beginning of a case, the lawyer should focus on setting the ultimate objectives of the case.

As the case progresses, the focus of the lawyer will shift to defining and accomplishing the precise persuasive tasks which are necessary to reach the ultimate objectives. Specificity is important. Precision in formulating the objectives of persuasion will sometimes produce an immediate understanding of the most effective routes to success. Imprecision may
result in misguided planning and unsatisfactory results.

A natural part of the process of setting objectives is the concurrent identification of potential routes to success, both legal and nonlegal. Priorities among the options should be set in relation to time, costs, and the probability of success of each alternative. Care should be taken to avoid eliminating any option from consideration until the lawyer is fully satisfied that it could not help achieve any objective of the client at any stage of the case.

As the matter proceeds, objectives, options and priorities should be continuously reevaluated. The refinement of objectives, options and priorities must continue throughout the duration of the case.

1. The Klare Case

As it is difficult to understand abstract concepts about persuasion, the following hypothetical situation will be used throughout this article to provide a context for demonstrating how to create a plan for persuasion. Although the dissection of the Klare case provides only a surface analysis, it should make the basic concepts of persuasion more understandable.

Assume that you and I are law partners who have been retained by Kathe Klare. Ms. Klare, age 32, is an untenured assistant professor at Middletown College. Last year was her sixth and final year to obtain tenured status. The College's tenure policy requires a candidate to have published four scholarly articles of appropriate length in acceptable journals. Professor Klare has published three articles which meet the tenure standard.

Based on the acceptance of a fourth article by the Journal of Human Experience (hereinafter Journal), Klare received the enthusiastic support of her colleagues for the award of tenure and the petition had been forwarded to the President of the College, Gilligan, for her review and submission to the Board of Trustees. The Journal had promised to publish the

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22. The Klare facts were created by Dean Joseph Harbaugh, University of Richmond School of Law, and they serve as the basis for one of six negotiation exercises in J. HARBAUGH, LAWYER NEGOTIATION TRAINING MATERIALS (1988). The abbreviated version of the Klare facts included in this paper is used with Dean Harbaugh's permission.
article in an issue which was originally due to be published two months ago.

However, some months ago, Klare received a letter from the new editor-in-chief of the Journal, Justin, notifying her the article would not be published by the Journal. Citing a newly-adopted policy of producing only symposium issues of the Journal, Justin claimed he had been unable to find two other acceptable articles to go with Klare's and her article would not "fit" the topic selected for the issue in which she had expected publication. He couldn't anticipate when they would publish a symposium which would "fit" her article.

Klare submitted the article to three other professional journals which rejected it because of previous publication commitments and the belief that Klare's piece would be "out of date" at the end of the year.

Subsequently, Klare was informed that the department's tenure recommendation was "reluctantly withdrawn." President Gilligan has informed Klare she would not recommend tenure because of the department's action and the College's four publications rule.

Klare now faces a "terminal year" at Middletown College (which means her contract will be renewed for one year only). Her salary during her "terminal year" will be $21,500. If she had been granted tenure, she would have been promoted to associate professor with an $8,000 raise.

President Gilligan is sympathetic to Klare's plight, but unyielding. The College recently adopted the "strict publication standard" for tenure following a "few unfortunate incidents where tenure was awarded on expected publication and the professor never got around to publishing the article or book." She said Klare surpasses the tenure requirements for teaching and service.

She admitted Klare's situation is unique but she and the Board could not change the "inflexible rule without taking the first step along a very slippery and dangerous slope." However, she hinted that the "special circumstances" of the case "might permit some slight deviation from the rule." If Klare gets her article published in an acceptable journal before the meeting of the Board in three months, the College would be "receptive to a petition for reconsideration" by Klare.

Klare has received a job offer from Clarion College in
San Francisco. Clarion offered her a three year untenured assistant professor position at $19,500.00 per year, assuming "an amicable separation from Middletown."

*Journal* is a not-for-profit corporation. *Journal's* insurance policies do not include coverage in this case. The *Journal* is in terrible financial shape, and faces sharply declining revenues. A significant judgment against the *Journal* would cause it to go out of business.

A computer problem at the printer's has caused a postponement of the issue which would have contained Klare's article for two more months, and it has pushed back the following issue to six months from now "at the earliest." The printing contract prohibits insertion of new material within two months of publication, without permission of the printer. Kathe Klare's article would cost an additional $6100.00 to publish, if it is added to the present issue.

a. Objectives and Options in Klare

Ms. Klare has made her objectives clear. Her first priority is to stay at Middletown, preferably with tenure. If she cannot retain her job at Middletown, she will accept the job at Clarion, and seek compensation from the *Journal*. She is not sure whether she would want to sue the University, but she might.

We have identified the following alternatives which might accomplish Klare's goals:

*legal*

1. breach of contract suit against the *Journal*.
2. breach of contract suit against the University.
3. sex discrimination suit against the University.

*nonlegal*

4. convince the University to extend the deadline.
5. convince the *Journal* to publish on time.
6. find another place to publish on time.

We feel that the option of finding another place to publish the article on time is impractical, but we advise Klare to keep looking for an alternate publisher in case the University grants more time, but the *Journal* cannot be made to publish it in time to meet the new deadline. Klare does not want to sue the University for breach of contract at the present time.
due to her personal situation, and because it might jeopardize her job offer from Clarion. Our analysis of the law and the known facts discloses no justification for filing a sex discrimination suit, unless additional facts come to light (given Klare's reluctance to sue the University, there is no immediate need to search for evidence of sex discrimination).

The only two options which would achieve Klare's first goal of keeping her job at Middletown and which also would avoid future trauma and expense are: convince the University to extend the deadline or convince the Journal to publish on time. We are undecided about the utility of filing a suit against the Journal for breach of contract. There is virtually no hope of obtaining an order of specific performance in time to save Klare's job at the University, and we want to more thoroughly assess whether a lawsuit would help or hinder our efforts to convince the Journal to publish on time.

B. Anticipate Key Decisions and Decision-Makers

Every persuasive effort is directed at a decision. There is no purpose of legal advocacy other than to influence a decision which might affect the outcome of a case. People make decisions. In a law case, the decisions which might conclude the matter at each stage of the process and the decision-makers who control them can be fairly easily identified. The possibilities are usually limited to the parties and their lawyers, trial and appellate judges, and jurors. In some cases, but not all, third parties control decisions which can either make settlement possible or prevent the parties from resolving the problem.

The advocate should conscientiously anticipate each of the decisions which must be made to attain the desired results for the client, and the advocate should identify the people who will control those decisions. Repeating this exercise from the perspective of the other side will produce an improved understanding of an opponent's objectives and the probable decisions and decision-makers which the opponent will try to manipulate. The lawyer can then consider how best to keep the opponent from being successful.

1. Key Decisions and Decision-Makers in Klare

At Journal, the key decision-maker will be the
editor-in-chief, Justin. For the article to get published within three months Justin must decide to abandon the symposium format for this issue and ask the printer to accept additional material. Additional controlling decisions are: the printer must decide to allow additional material to be added and someone must decide to pay for the additional pages.

For the University, the key decision-maker will be President Gilligan. For the deadline to be extended she must decide either to waive the four publications requirement altogether (we consider this to be highly unlikely) or to waive the time limit. If she makes the latter decision and sets a new deadline, someone must decide to publish the article in time. (Although it was the faculty of Klare's department who withdrew the petition for tenure, we have learned that it will reinstate its recommendation, if Gilligan indicates a willingness to waive the rule.) President Gilligan alone controls the decision to extend the time within which publication must occur.

Editor Justin and President Gilligan are not presently in a posture of needing to influence a decision-maker other than Klare. To this point, their interests have been the same wanting Klare to accept their decisions and leave them alone. Their initial responses to our inquiries can be expected to be consistent with this goal.

If Klare pursues her alternate objective, to receive compensation for her damages, either someone must decide to pay voluntarily, or compensation must be ordered by a court. For compensation to be paid voluntarily, Editor Justin or President Gilligan, or both, must decide that settling the case is, on the whole, a preferable option to continuing the litigation (a variety of decisions would precede this ultimate conclusion). From their perspective, they would want Klare to decide to drop the suit or to accept a settlement offer at the lowest possible cost to them.

If Klare sues the *Journal* for breach of contract and the case proceeds to trial, any compensation would have to be ordered by a court. First, a judge could be faced with deciding whether her pleadings state a cause of action and whether there are sufficient disputed facts to constitute a question for a jury to decide. A judge would rule on any disputed questions of law and either a judge or a jury would decide the facts of the case (if disputed), which might include:
— the existence of a contract between Klare and the Journal to publish the article by a certain date (if none exists, the case is over);
— whether the contract was breached by the Journal (if a contract exists, the Journal has breached it);
— whether the breach was justified or otherwise excused (a key issue of fact may be whether Klare properly discharged her editorial responsibilities);
— what damages were suffered by Klare as a result of the breach;
— was there a duty to mitigate (issue of law for the judge);
— if so, did she properly discharge this duty;
— how much the Journal should be required to pay Klare to compensate for these damages (and any other relief which might be appropriate: specific performance, costs, attorney's fees).

The Journal's defense would be built around one or more of the following positions: there was no contract; if there was, it was not to publish by a certain date; Klare did not perform her end of the bargain; she suffered no compensable damages; and she failed to mitigate them.

We believe the key issue is whether or not the contract was to publish by a certain date, but we are confident of winning this point. We are even more confident of winning on all the others, and we have decided to focus our attention on proving damages. Since the Journal may not be able to survive any judgment against it, we also want to be sure to obtain an order of specific performance to ensure publication of the article. (Publication would have some value to Klare, especially while she remains in a teaching position without tenure. How to avoid having the Journal go out of business before it publishes the article is an unresolved issue.)

C. Rank and Compare Values/Goals of Decision-Makers

An examination of the role of values in decision-making is critical to understanding persuasion, because the personal values of the decision-makers will determine the outcomes of their decisions.

A value is a prescriptive belief that judges whether or
not a means or an end is desirable or undesirable.\textsuperscript{23} Values are derived from culture and they have been transmitted in successive generations through society's institutions. According to Chaim Perelman, values which are accepted by all people include justice, freedom, humanity, truth and duty.\textsuperscript{24}

Most people in American society share common values which reflect its Judeo-Christian heritage.\textsuperscript{25} Milton Rokeach has identified thirty six values which are shared by most Americans, eighteen "terminal" values (ideal end states of existence) and eighteen "instrumental" values (ideal modes of behavior).\textsuperscript{26} He studied the value hierarchies of Americans during the period 1968-1971 and discovered the following rankings (men/women):

<table>
<thead>
<tr>
<th>Terminal Values</th>
<th>Instrumental Values</th>
</tr>
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<tbody>
<tr>
<td>1/1 A world at peace.</td>
<td>1/1 Honest.</td>
</tr>
<tr>
<td>62/2 Family security.</td>
<td>2/4 Ambitious.</td>
</tr>
<tr>
<td>3/3 Freedom.</td>
<td>3/3 Responsible.</td>
</tr>
<tr>
<td>4/13 A comfortable life.</td>
<td>4/5 Broadminded.</td>
</tr>
<tr>
<td>5/5 Happiness.</td>
<td>5/6 Courageous.</td>
</tr>
<tr>
<td>6/6 Self-respect.</td>
<td>6/2 Forgiving.</td>
</tr>
<tr>
<td>7/10 A sense of accomplishment.</td>
<td>7/7 Helpful.</td>
</tr>
<tr>
<td>8/7 Wisdom.</td>
<td>8/12 Capable.</td>
</tr>
<tr>
<td>9/8 Equality.</td>
<td>9/8 Clean.</td>
</tr>
</tbody>
</table>

\textsuperscript{23} See V. O'Donnell & J. Kable, \textit{Persuasion: An Interactive Dependency Approach} 23-24 (1982) [hereinafter \textit{Persuasion}]. (The smallest value in a social-value system is a belief (a value being one type of belief), but values are more manageable than beliefs when one is conducting an analysis of motivations in decision-making because an adult may have tens or hundreds of thousands of beliefs, but only dozens of values.) See also Sillars & Ganer, \textit{Values and Beliefs: A Systematic Basis for Argumentation}, ADVANCES, supra, note 6, at 184, 186-87. (Values are also generally more important to argumentative analysis than beliefs because they are better indicators of the shared convictions of a community.).

\textsuperscript{24} C. Perelman, \textit{Practical Reasoning In Human Affairs} 16 (1986) [hereinafter \textit{Practical Reasoning}].

\textsuperscript{25} Rex Lee describes the shared values of lawyers in \textit{The Role of the Religious Law School}, 30 VILL. L. REV. 1175, 1183 (1985).

Most of what is good and moral in our profession and in our broader society has religious roots that are both ancient and deep. This includes the higher moral aspirations of our profession: love of truth, love of justice, love of teaching and public service, and concern for the welfare of others.

\textsuperscript{26} Rokeach, \textit{Change and Stability in American Value Systems} 1968-1971, 38 PUB. OPINION Q. 222 (1974). (\textit{Persuasion}, supra note 23, at 25 reports that one study has concluded that the prime American values are power, money and sex.).
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In sum, a person's values include whatever will produce personal satisfaction at a given moment in one's life. Aristotle advanced the philosophy that people make decisions which they believe will be conducive to their greatest personal happiness.

Men, individually and in common, nearly all have some aim, in the attainment of which they choose or avoid certain things. This aim, briefly stated is happiness and its component parts. Therefore, for the sake of illustration, let us ascertain what happiness is, generally speaking, and what its component parts consist in; for all who exhort or dissuade discuss happiness and the things which conduce or are detrimental to it. For one should do the things which procure happiness or one of its parts, or increase instead of diminishing it, and avoid doing those things which destroy or hinder it or bring about what is contrary to it. \(^27\)

Pascal said, “All men whatsoever are almost always led into belief not because a thing is proved but because it is pleasing.” \(^29\)

\(^27\) Id. Rokeach also discovered differences in the ranking of values based on race, age, income and education, as well as sex. See also Sillars & Ganer, supra note 23, at 190. (Although “a world at peace” was ranked at the top during Rokeach’s survey during the Vietnam war, it was ranked no higher than eight by college students in 1978-1982.).

\(^28\) ARISTOTLE, supra note 3, at 47.

\(^29\) THE NEW RHETORIC, supra note 7, at 61 (quoting Pascal, On Geometrical Demonstration, Section II: Concerning the Art of Persuasion, 33 GBWW 430, 440 (1952)). When counseling some clients, a difficult question for lawyers may be whether a client’s decision is consistent with short term happiness, but not necessarily long term happiness. For example, the desire to avoid the tension of a trial is consistent with short term satisfaction, not necessarily long term. Also, the divorce client who wants to be more generous than necessary during the divorce may regret the decision later when material possessions become more important.
Rokeach and others have learned that different people rank their values in different orders and that these rankings will change regularly during a person's lifetime. This is of the utmost importance to lawyers, because the values of an audience are not, in and of themselves, as important as the manner in which the values are interrelated, that is, their hierarchies.

Value hierarchies are, no doubt, more important to the structure of an argument than the actual values. Most values are indeed shared by a great number of audiences, and a particular audience is characterized less by what values it accepts than by the way it grades them.

"When values converge, it is the hierarchy which resolves the conflicts between them."

In all cases involving persuasion, one assumes the existence of values which are accepted, though incompatible in a certain situation; the hierarchic structure, whether it be the result of an argumentation or has been established from the start, will indicate which value will be sacrificed.

Thus, people who face similar situations will make different choices, not because their basic values are different, but because the ranking of values (hierarchies) varies from person to person as it varies from time to time in each individual's life. Decisions become difficult when the choice to be made causes a conflict between two or more values of approximately equal rank.

than maintaining cordial relations with the former spouse. Although it is not clear how lawyers should proceed when faced with alternatives that produce a conflict between long term and short term satisfaction, Menkel-Meadow, Toward Another View of Legal Negotiation, 31 UCLA L. REV. 754, 760, 803 (1984), does advise lawyers to consider explicitly the short run and long run needs of the client (and other parties) when fashioning negotiation plans.

31. PERSUASION, supra note 23, at 81.
32. PERSUASION, supra note 23, at 82.
33. PERSUASION, supra note 23, at 83.
34. Some decisions are justified by lawyers on the basis of role values, not personal values. For example, the lawyer who helps a client evict an elderly tenant on Christmas Eve justifies the action in terms of professional norms, not personal values. Such lawyers are only avoiding an admission that their personal values had led them to decide to comply with the professional norms which supported the Christmas eve eviction rather than to follow professional norms which would have
Close attention should be paid by lawyers to the personal values of the decision-makers they wish to influence. Remember, knowledge of an audience cannot be conceived independently of the knowledge of how to influence it. Of course, it is difficult to learn enough about jurors, judges, opposing parties, or even one's own clients to analyze their value hierarchies accurately.

At least in the early stages of law practice, one must rely on indirect evidence about the values of the participants, except for one's own client. To the extent that one can discover them or guess at them, the goals of the parties are probably the best source of information about their values. Therefore, advocates should articulate and rank the goals of the decision-makers at an early stage of a dispute and should continuously update the list as more information is obtained.

As explained earlier, the first step in the planning process is to specify the objectives of persuasion. These objectives should reflect the principal value hierarchies of the client as they relate to the case. They provide a starting point for creating a complete list of what the client wants to accomplish and avoid throughout the duration of the case.

If client satisfaction and positive results are the two goals of all client representation, a lawyer needs to understand as fully as possible the legal, economic, psychological and social goals of the client. Every goal of the client should be included on the list, whether or not the lawyer believes it is realistic.

35. **Perelman, supra** note 7, at 20.

36. This underscores the need for lawyers to utilize client-centered techniques when helping clients reach decisions. See D. Binder & S. Price, Legal Interviewing and Counseling: A Client Centered Approach (1977). Menkel-Meadow, supra note 29, at 802-03, points out the importance of trying to learn about one's clients' latent (unstated) needs as well as their manifest (articulated) needs. Whereas this is difficult enough to accomplish with one's own clients, it is considerably more difficult to do with respect to other decision-makers in the case. However, it is essential for effective advocacy.
Of equal, if not greater importance is the creation of similar lists for the decision-makers who will be the objects of the lawyer's persuasive efforts. Knowledge of one's audience is central to effective persuasion. It is important to understand not just the client's values and needs, but also those of other people who control or affect key decisions, including the lawyers.

Once the goals of the client and other decision-makers have been predicted and tentatively ranked, the lists should be compared. This can be a surprisingly fruitful exercise. A comparison of the goals of all parties may reveal common ground on which an agreement can be based, or it may identify particularly difficult or insurmountable obstacles which make it clear that settlement or ultimate success is unlikely.37

One should not feel completely confident with the results of this segment of the planning process. Those things about which confidence is lacking should be noted. This will help focus subsequent information gathering, formal as well as informal.

If goals are identified which appear to block successful achievement of the client's objectives, the lawyer should search for lower ranked goals of the decision-maker which would be consistent with success for the client. If these exist, planning for the persuasive effort should focus on how the lawyer can cause the decision-maker's value hierarchies to be rearranged so that at least one of these lower ranked goals becomes ranked higher than any goal which would block achievement of the client's objectives.

1. Values/Goals of Decision-Makers in Klare

We have made the following lists of the key decision-makers' goals, ranked in priority from top to bottom.38

37. In INTERVIEWING, COUNSELING AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION 479-84 (1990), Joe Harbaugh and Bob Bastress describe a similar process for "planning for exchange as a problem-solving negotiator." They also suggest that each need be classified as absolutely essential, important or desirable and that the needs of the parties be compared and labeled as shared, conflicting or independent. Menkel-Meadow, supra note 29, describes the following process: identify needs, search for solutions which meet needs, try to expand the resources which are available to meet needs, and consider the justness and fairness of the solutions.

38. Recognize that the paper attempts only a surface analysis of the parties'
Klare wants:
1. to get tenure at Middletown
2. to get tenure at next school
3. to avoid having to leave Middletown
4. to get tenured salary
5. to avoid taking a pay cut to move
6. to get as much money as possible
7. to get the article published (as is; as modified; asap)
8. to avoid further publicity about the situation
9. to avoid uncertainty/stress of trial
10. to avoid expenses of further litigation
11. to avoid unnecessary harm to the Journal (do the right thing)

Justin wants:
1. to keep the Journal operating
2. to avoid harm to his or the Journal's reputation
3. to maintain his authority as editor-in-chief
4. to avoid further publicity about the Klare situation
5. to pay as little as possible to Klare
6. to avoid uncertainty/stress of trial
7. to avoid expenses of further litigation
8. to avoid unnecessary harm to Klare (do the right thing)
9. to retain symposium format

Gilligan wants:
1. to have the College's rules followed
2. to avoid being sued for changing the terms of Klare's employment after hiring Klare
3. to avoid involvement in litigation
4. to be fair to Klare
5. to retain Klare
6. to avoid adverse publicity
7. to see Klare's article published

goals for illustrative purposes. In a law suit involving real people, not hypothetical caricatures, a lawyer can and should inquire more deeply into the values/goals which will affect each player's decision-making. For example, some people will have a much greater reluctance to proceed to trial than others simply because they have a personal aversion to taking the witness stand while others will relish the opportunity to "tell their stories" and will turn down very good settlement offers to have that opportunity. The more a lawyer can understand the motivations of the players, the greater the likelihood of successful advocacy.
Our next step was to compare the lists. We concluded that the only goal of Justin which conflicts with a goal of Klare's is the desire to pay Klare as little money as possible. In our opinion, the only options which would avoid paying any money to Klare are: to win at trial; to print the article within three months; or for the University to grant more time. The last option would satisfy all of Justin's goals, therefore, he should be willing to help us persuade the College to change its rules.

The option of printing the article in a timely fashion would achieve more of Justin's goals than going to trial, therefore, he should be willing to explore this option, especially if the University refuses to allow more time. The only goal which would be negatively affected by printing early is Justin's desire to retain the symposium format, and, perhaps, his retention of authority. We cannot be sure how strongly Justin feels about retention of the symposium format, but we think it is more logical to place a higher priority on staying in business than on standing pat on the symposium issue.

Justin's primary objective is the survival of the Journal. Its survival would be threatened by a lawsuit, for even an unsuccessful lawsuit could cost more to defend than the Journal can afford. He wants Klare to decide not to sue the Journal. If she does sue, he will want a quick, inexpensive settlement of it, or he will want litigation to be as inexpensive as possible.

The biggest conflict between Klare's goals and Gilligan's goals is the desire to have the College's rules followed. The only solution which would allow this goal to be satisfied and allow Klare to get tenure is to have the Journal publish it on time. Before we could persuade Gilligan to recommend allowing more time, we would have to find a way to rearrange Gilligan's values hierarchy so that a goal which is consistent with allowing more time would become ranked higher than the goal of following the rules. Klare's feelings about Middletown College and our need to maintain amicable relations due to the job offer from Clarion eliminate using litigation or bad publicity as a club. This leaves three goals we can promote: be fair to Klare; retain Klare; and see Klare's article published. We will simultaneously explore ways to lower the ranking of her goal of adherence to the rule.
D. Formulate a Thesis

The first step in developing the tactics of a particular persuasive effort is to formulate a central thesis, that is, a proposition, a premise, a theory of the case. This thesis is the conclusion which the lawyer wants the audience to have reached at the time it makes its decision. It is at this stage where the distinction becomes clear between the ultimate objectives of the case and the particular objectives of the advocate. The thesis will be used to advance the lawyer's specific persuasive objective. Accomplishing that objective will be one step toward achieving the ultimate objectives of the case.

The thesis should be envisioned as a single declarative sentence. It should represent what the lawyer wants the decision-maker to believe about the matter when the persuasive effort is completed, that is, the thesis is the conclusion. It should be conceptualized in terms of what the lawyer is trying to convince the decision-maker to do or to refrain from doing. Sometimes the thesis will be stated to the audience; sometimes the lawyer will want the audience to figure it out for themselves.

At the beginning of the planning process, a lawyer may not be able to form a firm idea of what the thesis should be. In such cases, a tentative thesis or a series of alternative theses should be developed. However, before the actual presentation of persuasion, a single thesis should be selected. It will lay the foundation for the persuasive effort, and it should be clear and cogent. If the central message is fuzzy and disunified in the lawyer's mind when advocacy begins, then it will be fuzzy and disunified in the decision-maker's mind when advocacy is over. More than one thesis can be advanced simultaneously, if they are consistent with each other.

In formulating a thesis, a lawyer should keep in mind that the ultimate thesis in every case is “you will be happier making the decision I want than any other choice available
to you." Stated another way, this becomes "compared with any other alternative, the decision I want you to make is consistent with personal values that are more important to you than those values which would point toward another decision."

1. Potential Theses in Klare

If we are negotiating with the College to get more time for Klare to publish, some potential theses include:

1. The rule was not intended to result in the dismissal of someone in Klare's situation.
2. Klare has not had a fair chance to comply with the new rule.
3. Klare's dismissal would needlessly harm her and cost the University a valued and loyal employee.

Potential theses for convincing the Journal to publish Klare's article in the upcoming issue include:

1. The Journal cannot survive this litigation.
2. Publicity surrounding the litigation will not be favorable to the Journal or to Justin.

If the suit against the Journal goes to trial, some potential theses for the jury include:

1. Kathe Klare deserves the fruits of her years of dedication and achievement.
2. The Journal could have achieved its goals without harming Klare.

E. Select Supporting Propositions

Reflect for a moment on the image of advocacy described earlier in the paper (the diamond with the line down the center, in which the decision-maker chooses between competing versions of the truth). What the decision-maker is doing is judging which of the theses represents the truth, or is closer to it. A wide range of factors will affect the ultimate decision, and the final judgment will be based on particular factors which are selected by the audience. These will serve as the justifications for the audience's decision.

Once selected, these justifications will be held, or adhered to, in varying degrees of intensity. This adherence will occur on "a continuum of infinite gradations and no fixed
point of logical acceptability can be identified. The audience alone will decide when, and to what degree, a proposed thesis is 'justified' by the arguments being advanced in its behalf. Thus, the soundness of one's arguments and the strength of one's persuasive efforts are entirely dependent on the quality of the audience being addressed. Some audiences will choose to justify their decisions on certain factors while others will select different reasons.

According to Perelman, what keeps the behavior of audiences from being haphazard and capricious is the notion that such judgments are made "according to the Rule of Justice, which requires that essentially similar situations be treated in the same manner." Perelman's concept of normative justice is one of the guiding principles of the new rhetoric. The advocate's task, therefore, is not to find proofs which demonstrate the truth of propositions. Rather, the advocate must strive to fashion arguments which serve to justify one's treatment of Perelman's "essentially similar situations," or, in other words, to provide pragmatic justification for the adoption of a belief by the audience. The lawyer's goal is to give the decision-maker a good reason to accept the lawyer's thesis and to make the decision desired by the lawyer.

It is most important to keep in mind that it is not the thesis which must be justified, but, rather, it is the behavior of the decision-maker in accepting the thesis and acting on it which must be justified. Therefore, it is not necessary that the thesis be shown to be true before adherence to it is deemed justifiable by the audience.

One need not justify those things which conform incontrovertibly to accepted norms or criteria of the audience. "Justification deals only with what can be and is being debated." There are many criteria on which decisions are based

41. Dearin, Justice and Justification in the New Rhetoric, PRACTICAL REASONING, supra note 24, at 176.
42. Dearin, Justice and Justification in the New Rhetoric, PRACTICAL REASONING, supra note 24, at 177.
43. Perelman, Value Judgments, Justifications, and Argumentation, 6 PHIL. TODAY 45-51, 46 (1962).
which do not have to be justified and from which new justifications can be built. In fact, it is through the use of the accepted norms and criteria of the audience that the advocate can persuade an audience to adhere to the central thesis which will control the targeted decision.

The way in which an advocate causes a decision-maker to come to the desired conclusion is by choosing as supporting propositions of a persuasive effort theses with which the audience already agrees. The aim is not to prove the truth of the conclusion from these propositions, but to transfer to the conclusion (the ultimate thesis), the adherence accorded to the supporting propositions by the audience. This transfer of adherence is accomplished only through the establishment of a bond between the supporting propositions already accepted by the audience and the central thesis whose acceptance the lawyer wants to achieve.

Some decision-makers already believe what the lawyer wants them to believe before advocacy begins, that is, they already accept the central thesis. The lawyer's challenge in these cases is to strengthen their adherence to those beliefs which support the central thesis and to prevent the opposing lawyer from changing their minds. Other decision-makers have formed no beliefs relevant to the matter at hand. They await proof with no preconceptions about the outcome of their decisions. The final category of decision-makers are those people who have formed opinions contrary to the beliefs the lawyer wants them to hold. The advocate must change the minds of these people. As Perelman sums it up, the advocate's purpose is "to induce or to increase the mind's adherence to the theses presented for its assent."

There are no right or wrong propositions in any objective sense in a persuasive effort. Arguments are "as worthy as the audience that would adhere to them," that is, if the audience accepts a proposition which will support the lawyer's cause, it is a good proposition. In short, the ideal persuasive effort is one that persuades the person to whom

44. C. PERELMAN, supra note 7, at 23.
45. C. PERELMAN, supra note 7, at 21.
46. C. PERELMAN, supra note 7, at 21.
47. THE NEW RHETORIC, supra note 7, at 4.
48. Fisher, Judging the Quality of Audiences and Narrative Rationality, PRACTICAL REASONING, supra note 24, at 85.
it is addressed.49

Of course, if the question is not one which can be proved to a scientific certainty (all persuasive efforts by definition), there is always something to be said in favor of the opposing thesis and the audience may well agree more with the propositions which support it. Thus, all arguments must be adapted to the audience.

It is not sufficient that the starting point be considered as true by the speakers, for, if the listeners do not admit that it is true, they might judge that the whole argument is built upon a petitio principii, a begging of the question . . . . On the other hand, the adherence of minds, which is the starting point and the end of every argument, occurs with variable intensity. To increase the intensity of adherence is most important, because the theses to which we adhere may be in conflict, in concrete situations; it is for the most part in order to solve such conflicts, to orient our choices, to justify our preferences, that recourse to deliberation and to argument will take place.50

As a persuasive effort develops, the audience is led by the advocate toward the desired result agreeing with the central thesis (conclusion) of the lawyer at the time the decision is made. This progression occurs as the lawyer presents a series of supporting propositions with which the audience agrees, the cumulative result of which is acceptance of the central thesis. The agreement of the audience "is sometimes on explicit premises, sometimes on the particular connecting links used in the argument or on the manner of using these links: from start to finish, analysis of arguments is concerned with what is supposed to be accepted by the hearers."

1. Supporting Propositions in Klare

We have tentatively identified the following propositions in support of the thesis that "Klare should be given more

49. Cf. ARISTOTLE, RHETORIC, 9 GBWW 593, 596 (1952). ("A statement is persuasive and credible either because it is directly self-evident or because it appears to be proved from other statements that are so. In either case it is persuasive because there is somebody whom it persuades.").

50. Perelman, How Do We Apply Reason to Values?, 52 J. PHIL. 797, 799 (1955).

51. THE NEW RHETORIC, supra note 7, at 65.
time because the rule was not intended to result in the dismissal of someone in Klare's situation:

a. A rule should not be applied in a particular case if its purpose would not be achieved. (This is the key proposition. If President Gilligan does not agree with this statement and cannot be convinced to agree with it, the thesis is worthless.)

b. the purpose of the rule was to prevent people from getting tenure who had written articles which had not been accepted for publication and which were never published.

c. Klare's article was accepted for publication and it will be published at some point.

d. Klare completed her article in time to comply with the letter of the rule.

e. Late publication was caused by unique circumstances which were beyond Klare's control and could not be foreseen by her in time for the article to be published elsewhere.

Our tentative propositions in support of the thesis that, "the Journal should publish the article in the upcoming issue because the Journal cannot survive this litigation" include:

a. Retention of the symposium format is not as important as survival of the Journal (this is the key proposition).

b. Klare's damages will be very high if the article is not published in time to achieve tenure at Middletown.

c. The Journal cannot afford the costs of litigation, even if it prevails on the merits (this would be enhanced by a bluff that Klare is prepared to make the litigation as complicated and expensive as possible).

d. Publishing the article is a less expensive option than continuing the litigation.

e. It will cost no more to include the article, because Klare will pay for it to be published (if necessary).

In support of the thesis, "the jury should award damages against the Journal because Kathe Klare deserves the fruits of her years of dedication and achievement," we came up with:

a. People should reap the benefits of their labor.

b. Kathe Klare worked diligently for years to meet the University's criteria for tenure.

c. She would have been awarded tenure if she had published a fourth article before the deadline.
d. The *journal* promised to publish the fourth article before the deadline.

e. The *journal* broke its promise without sufficient justification.

f. The *journal* should pay Kathe Klare an amount of money which fairly compensates her for the lost benefits of her labor.

F. *Marshal Proof of the Propositions (Employ all Means of Persuasion)*

Once the theses and supporting propositions have been at least tentatively identified, the lawyer needs to consider how to promote the audience's agreement and adherence to them, that is, how to prove the propositions. Persuasive proof is not the same as legal proof. Legal proof concerns itself with a limited type of information which is presented to a judge or jury through prescribed procedures. Persuasive proof can involve all types of information and all methods of presentation. There are no rules, except those chosen by the advocate after considering the occasion, the subject, the audience, and the advocate's personal characteristics.

The reasons for success or failure as an advocate are seldom obvious. There are many ways to influence decisions, and the lawyer should not overlook any angle during the preparation of a persuasive effort. Consistent success can only be achieved by employing all available means of persuasion.

Lawyers should avoid habitual reliance on one component of persuasion and should strive, instead, to use the full range of devices which are available to aid the advocate. This will help the lawyer master a range of approaches to advocacy and avoid the tendency of some lawyers to develop inflexible methods which characterize their persuasive efforts.

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52. Lawyers do usually understand why cases are won or lost. Few cases are equally balanced and lawyers and clients may be disappointed, but they should not be surprised, to lose when the facts and the law favor the other side. However, when the lawyer makes a serious attempt to be persuasive on a particular point, but fails, there is no reliable way to learn why that effort did not succeed. As there is usually no one who can provide adequate feedback, the ability to reflect on experience may be one of the most important lawyering skills. Lawyers interested in improving this skill should read C. ARGYRIS & D. SCHON, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* (1974) and D. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).
throughout their careers. If there is one lesson to be learned from classical rhetoric, it is the importance of fashioning one's presentations to suit the particular audience and circumstances at hand. The lawyer who fails to heed this lesson is practicing law at a disadvantage to those who do.\textsuperscript{55}

There are two basic segments in a persuasion plan: the content of the lawyer's message (substance) and the manner in which the message is communicated to the decision-maker (presentation).\textsuperscript{54} The lawyer who devises brilliant arguments but gives no attention to presenting those arguments effectively is just as incomplete an advocate as the lawyer who is a highly skilled communicator with no persuasive message to convey.

1. \textit{Plan the Substance of Persuasion}

There is no magical formula for discovering the best arguments in a given situation. There is no substitute for the insights and genius of the human mind. In some law cases, sound propositions are fairly obvious. On other occasions, good theses and supporting propositions never surface (sometimes for good reason). A careful preliminary analysis of the case will usually produce several potentially successful theses. Careful planning of the content and presentation of the effort will refine those theses and produce more ideas.

The lawyer is aided in the search for good arguments by giving close consideration to planning how to use the tools of the advocate's craft: those things which exist or can be produced independent of the lawyer's creativity (existing tools) and those things which are dependent on it (creative tools).\textsuperscript{55}

\textsuperscript{53} This requires a large amount of effort and skill. It may be the lawyer's equivalent of switch hitting in baseball. It is hard enough for a lawyer to find one approach to lawyering which is comfortable and consistently rewarding. Mastery of any approach to lawyering is an elusive goal, and lawyers are understandably reluctant to abandon a method they've practiced to try out a new approach. Although there are risks involved, every lawyer who wants to be the most effective advocate possible should examine each opportunity for persuasion and should consider whether the usual approach is the most appropriate way to handle it.

\textsuperscript{54} Rhetoricians use \textit{res} and \textit{verba} to describe the major divisions of rhetoric. \textit{Res} involves that component in which "invention" of arguments occurs (what is said), and \textit{verba} is concerned with "style" and "delivery" (how it is said).

\textsuperscript{55} This basic division was recognized by the classical rhetoricians. Cf. ARISTOTLE, supra note 3, at 15.

As for proofs, some are inartificial, others artificial. By the former I
a. Employ Existing Tools

i. Familiar Tools (Evidence)

At the advocate's disposal in every case are tools which exist or can be produced independent of the lawyer's creativity.

For the most part, these devices are familiar to every lawyer: witnesses, laws in their myriad forms, documents, and other exhibits. At the trial stage, these constitute the evidence upon which the judge or jury will justify its decision. Legal education focuses on the use of these tools.

Materials which teach lawyers how to construct a theory of the case concentrate almost exclusively on how an advocate can utilize the known (or provable) facts of a case. This emphasis on facts makes some sense, especially in trial and appellate situations where the lawyer's ability to use other tools is somewhat restricted. However, even in those contexts, the lawyer should not overlook the availability of other tools which can help persuade the audience. This becomes even more important in developing overall litigation strategies and in planning negotiation sessions in which the moti-

understand all those which have not been furnished by ourselves but were already in existence, such as witnesses, tortures, contracts, and the like; by the latter, all that can be constructed by system and by our own efforts. Thus, we have only to make use of the former, whereas we must invent the latter.

"Inartistic" and "artistic" are interchangeable with "inartificial" and "artificial."


Successful theories regardless of type share certain features. Six of these features have become bench marks for working up a winning theory for a particular case. First, the theory must have a firm foundation in strong facts and the fair inferences to be drawn from the facts. Second, if possible, the theory should be built around the so-called "high cards" of litigation, incontestable or virtually incontestable facts . . . . Third, and as a corollary of the second bench mark, the theory should not be inconsistent with, or fly in the face of, incontestable facts. Fourth, the theory should explain away in a plausible manner as many unfavorable facts as it can. Fifth, the theory should be down-to-earth and have a common-sense appeal. It must be acceptable to a jury . . . . Sixth, the theory cannot be based on wishful thinking about any phase of the case.

(emphasis added).
vation to settle may have nothing to do with the facts of the case or the probability of winning at trial.

It is also important to keep in mind that many facts are not uncontestable and the lawyer is unable to use a "fact" as stable data to support a central thesis once it has been contested by someone. The most effective way to disqualify a fact is to show its incompatibility with other facts which are more certainly established, preferably with a bundle of facts which the audience is not ready to abandon. To reestablish the status of a challenged fact, the lawyer must show that the person who contests it is mistaken or, at least, show that there is no reason to take the latter's opinion into account—that is, by disqualifying that person by denying that person the status of a competent and reasonable interlocutor.\(^{57}\)

The lawyer should keep in mind the distinction between demonstrative proof and rhetorical proof. If the facts and law in a given case allow the lawyer to demonstrate conclusively the correctness of a given position, the audience will have been convinced by demonstrative proof. This paper is concerned primarily with the use of rhetorical proof which presumes the inability of either side of an issue to rely on demonstrative proof, except insofar as it tends to support the central thesis being advanced by the lawyer.

\section*{ii. Procedural Devices}

Procedure books generally focus on the official purposes of the rules of procedure (to gather information, to allow orderly processing of disputes, to assure equal treatment of disputants), and they do not generally discuss the use of procedural devices to influence decision-makers. However, it is clear that modern law practitioners have not overlooked the value of procedural devices as persuasive tools.\(^{58}\)

It would be naive to suggest that much of discovery practice is not carried out to create leverage and enhance efforts to persuade opponents (and courts). Aristotle includ-

\begin{enumerate}
\item C. Perelman, supra note 7, at 23-24.
\end{enumerate}
ed torture in his list of the tools of persuasion. The modern lawyer is not likely to encounter many occasions on which physical torture can be used to persuade decision-makers. However, lawyers often use the discovery process as a form of psychological torture. Their purpose is not to gather information or simplify their cases. Instead, the goal is to convince opponents to drop cases or to settle on terms favorable to their clients. The effectiveness of this practice is directly related to the oppressiveness and intrusiveness of the discovery methods employed. Until an effective means of controlling discovery abuses can be found, this practice will continue, for it not only enhances persuasive efforts, it also increases billable hours.

The phrase “nuisance value” applies to those situations in which a defendant decides to offer some money to the plaintiff, even though the defendant is confident of the probability of success at trial. The defendant may want to avoid the cost of litigation, negative publicity, or simply the aggravation of leaving the dispute unsettled.

iii. Presumptions

All lawyers rely on presumptions in persuasion, although they are not usually incorporated into persuasion strategies in the same way as other existing tools. Presumptions are important because presumed facts are given the same weight by a decision-maker as observed, incontestable facts, although they are not presented as evidence and may not be explicitly mentioned during a persuasive effort. Presumptions are the bases, or starting points of argument.

The primary role played by precedents in legal reasoning can be accounted for on the basis of the doctrine of presumption, which is a manifestation of the law of inertia. Legal advocates rely on presumptions of man as well as on legal presumptions. Some common presumptions of man are the presumption that the quality of an act reveals the quality of the person responsible for it; the presumption of natural trustfulness by which our first reaction is to accept what

59. See supra note 55.
60. Dearin, supra note 39, at 168.
61. Dearin, supra note 39, at 167.
someone tells us as being true, which is accepted as long and insofar as we have no cause for distrust; the presumption of interest leading us to conclude that any statement brought to our knowledge is supposed to be of interest to us; and the presumption concerning the sensible character of any human action.  

Presumptions are based on the idea that that which happens is normal and likely. Until there is proof to the contrary, it is presumed that the normal will occur, or has occurred, or rather that the normal can safely be taken as a foundation in reasoning. Presumptions create a continuity of thought and action which, if accepted by one's audience, do not have to be justified, or even stated, in order to rely on them in advocacy. "Only change requires justification, presumption playing in favor of what exists, just as the burden of proof falls upon him who wants to change an established state of affairs."  

The adherents of a presumption require of it no justification, but demand proofs of those who would challenge it. The person who wants to oppose the application of a presumption has the burden of proof in challenging its applicability. Disagreements about presumptions focus on whether or not a presumption is applicable to a given set of circumstances, given the facts of the case.  

[I]t is nevertheless useful to clarify the usual concept of "normal" by showing that it always depends on a reference group, that is, on the whole category for whose benefit it was established. It is to be observed that this group—which is often a social group—is hardly ever explicitly described, perhaps because interlocutors rarely think about it; it is clear, however, that all presumptions based on what is normal imply agreement on this reference group.  

Reference groups are unstable and the conduct of members of the group may modify the norms. They can also be viewed in a variety of ways: how they are expected to act,
how they think, how spokespeople for the group act or think, or what opinions they hold in common.

Variations in the reference group enter into all legal argument. The longstanding opposition between argument from the motives of the crime and argument from the conduct of the accused corresponds to two different reference groups. The reference group relating to motives is wider; that relating to conduct is more specific in the sense that the presumptions are derived from what is normal for men who, all their life, have behaved like the accused.\textsuperscript{67}

Lawyers must be sensitive to the current myths and conventions of society, for all persuasion must relate to them just as it must relate to the peculiarities of each decision-maker. Flags, anthems, ceremonials, demonstrations, God, revolution, class struggle, capitalism, communism, all have particular, fluid meanings to each audience which serve as the basis for certain assumptions.

The perception of the acute relevance of the cultural myths to the needs and desires of a particular audience at a precise moment in history is the sign of the genius of the persuader. The geniuses of Madison Avenue are the people who can tell that the large and ornate automobiles of Detroit are no longer appealing to significant segments of the consumer populace—are no longer a part of their "miranda"—and must be replaced with Volkswagens or Fiats or Falcons.\textsuperscript{68}

iv. Values

Values are included in the list of the existing tools, for they exist independent of the imagination of the lawyer and can be used to manipulate decisions. They were discussed in an earlier section to highlight their importance and uniqueness and to illustrate their role in the development of the central thesis of the advocate. Values are also useful in planning the selection and presentation of supporting propositions, particularly if the lawyer has a sufficient understanding of the decision-maker’s value hierarchies to be able to distin-

\begin{footnotes}
\item[67] \textit{The New Rhetoric}, supra note 7, at 72-73.
\item[68] J. Kinneavy, supra note 3, at 280-81.
\end{footnotes}
guish the values of the person as an individual from the values of the person as a member of a group. If so, the lawyer can avoid the mistake of relying on presumptions or stereotypes which do not fit the particular decision-maker.

v. **Loci of the Preferable**

Classical rhetoricians created storehouses of generic arguments which could be drawn upon whenever they ran short of ideas. These storehouses were called "topics" and they were used during the process of discovering the content of arguments, i.e., the process of "invention." Basically, the "topics" were stereotyped arguments which were supposed to seem plausible to the audience. Aristotle's "topics" have not stood the test of time, because "each age and culture must reformulate its own topics; this has not been systematically done by anyone for any culture since the time of Aristotle."69

Although Perelman and Olbrechts-Tyteca do not systematically reformulate the topics in *The New Rhetoric*, they do discuss them, using the term *loci*. Loci "form an indispensable arsenal on which a person wishing to persuade another will have to draw, whether he likes it or not . . . . [A]ll audiences, of all kinds, have to take 'loci' into account."70

*Loci* operate similarly to presumptions, except that they are based on values rather than facts. They presuppose that there are certain acts, beliefs and values which at a given moment are accepted without argument by an audience; hence there is no need to justify them.71 These express the preferences of the community and serve to direct or guide decision-making about matters of practical reasoning.

Perelman distinguishes between general *loci*, which are affirmations about what is presumed to be of higher value in any circumstance whatsoever, and special *loci*, which concern what is preferable in specific situations.72

We state the general *loci* of quantity when we assert that what is good for the greatest number is preferable to

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what profits only a few; that the durable is preferable to the fragile; or that something useful in varied situations is preferable to something that is of use in highly specific ones. If we give as our reason for preferring something that it is unique, rare, irreplaceable, or that it can never happen again (carpe diem), we are stating the general locus of quality. It is a locus that favors the elite over the mass, the exceptional over the normal; that values what is difficult, what must be done at the very moment, what is immediate. The general locus quantity characterizes the classical spirit, that of quality the romantic.\footnote{C. Perelman, supra note 7, at 30.}

The advocate should realize that all persuasion relies to some extent on the utilization of loci of the preferable. The ongoing research in this area will certainly produce improved understandings about their nature and their function in advocacy.\footnote{As an in-depth consideration of loci or “topics” is beyond the scope of this paper, the reader who wishes to learn more about them should refer to The New Rhetoric, supra note 7, at 83-99; E. Corbett, supra note 3, at 107-298; J. Kinneavy, supra note 3, at 245-50.}

b. Employing Existing Tools in Klare

Let's consider the existing tools which will support our thesis that “the Journal cannot survive this litigation.” Assume we are preparing to negotiate with Justin and his attorney. Our planning should examine this from two perspectives. First, what tools exist to help convince Justin and his attorney that the Journal cannot survive litigation, and, second, what tools exist to help convince them that the verdict at trial will ruin the Journal.

First, if our goal is to convince them that the Journal cannot survive this litigation, there are not many existing tools which come into play. Yes, we have decided to sue the Journal for breach of contract, primarily as a procedural device to increase Justin’s fear of the Journal going out of business and to pressure him to forgo the symposium format in the upcoming issue. Filing the suit is inconsistent with one of Klare’s goals (avoid costs), but it is relatively inexpensive just to file the lawsuit. If we have correctly predicted Justin’s values and his lawyer agrees with our analysis that Klare will
win the lawsuit, settlement should occur quickly, if the option is administratively practical (that is, if the printer agrees to accept more material). Klare has authorized us to pay for the cost of printing the article, if we cannot convince the Journal to pay for it.

a. Retention of the symposium format is not as important as survival of the Journal (this is the key proposition).

We are relying on our beliefs about Justin's value hierarchy.

b. Klare's damages will be very high if the article is not published in time to achieve tenure at Middletown.

We can use the terms of the offer from Clarion and documentation from Middletown which explains what her salary will be if she achieves tenure. It would not hurt to have a chart which maps out the differential over the next twenty years or so. Legal research should develop what the legal standard is in this jurisdiction for calculating damages in this kind of case.

c. The Journal cannot afford the costs of litigation, even if it prevails on the merits (this would be enhanced by a bluff that Klare is prepared to make the litigation as complicated and expensive as possible).

At this point, we are relying on information that the Journal is "in terrible financial shape." Formal or informal discovery may enable us to learn more about the details of the Journal's financial plight. However, formal discovery also provides a procedural device which can be used to increase the costs of litigation and hasten the demise of the Journal. Of course, our goal is to force them to settle, not to actually incur the costs, for that would reduce the assets from which they could pay for publication or for Klare's damages. Also, Klare has no intention of paying us for extensive discovery. Therefore, it is only the threat of this device which we can use against the Journal. (Threats are not existing tools, they are creative tools which are discussed in the next section.)

d. Publishing the article is a less expensive option than continuing the litigation.

Here, we might want to prepare some documents which compare the costs of publication to the costs of litigation.

e. (if necessary) It will cost no more to include the article, because Klare will pay for it to be published.

The tool here will be our statements to the Journal. On
the other hand, if our goal is to convince them that the Journal will be destroyed by the size of the trial verdict, we must convince Justin and his attorney of the likelihood of our winning at trial. Let's examine the existing tools which are available to increase adherence to the propositions which support our thesis that a trial verdict will destroy the Journal because Kathe Klare deserves the fruits of her years of dedicated work and achievement.

a. People should receive the benefits of their labor. This represents (we hope) shared values of the jurors. We will try to strengthen their adherence to this proposition through our statements to the jury and by showing its consistency with the laws which are applicable to this case.

b. Kathe Klare worked diligently for years to meet the University's criteria for tenure. Kathe Klare's testimony and that of others who are familiar with her work will be our key tools to prove this proposition.

c. She would have been awarded tenure if she had published a fourth article before the deadline. Kathe Klare's department chairman and President Gilligan will testify to this.

d. The Journal promised to publish the fourth article before the deadline. The correspondence between Kathe and the Journal will be our primary tool. The law will determine whether a contract existed, and this question may be decided by the trial judge, if the facts are not in dispute. If the documents are inconclusive and testimony is allowed about the parties' intentions, the jury will decide disputed issues of fact. (If needed, an expert witness will testify that it is normal practice for journals to publish articles in less time than Kathe had between acceptance and the deadline she faced.)

e. The Journal broke its promise without sufficient justification.

It is uncontested that the Journal did not publish the article. The definition of "sufficient justification" will be a matter of law which the judge will charge to the jury. The burden will be on the Journal to meet the legal standard. An expert witness will testify that the normal practice is to publish articles once they are accepted unless a journal goes out of business or is otherwise incapable of meeting its commit-
ment.

f. The *Journal* should pay Kathe Klare an amount of money which fairly compensates her for the lost benefits of her labor.

Our tool is the *law* as charged by the trial judge. It will define the parameters of the jury's discretion and responsibility in this area. We are relying on a *presumption* that the jury will follow the judge's instructions, including the charges on the law.

c. *Employ Creative Tools*

Once the existing tools have been identified and their potential impact on decision-makers has been analyzed, the lawyer should consider how to use each of the tools of persuasion which would not exist but for the imagination and inventiveness of the lawyer.75

It is the use of the creative tools of lawyering which distinguishes one lawyer from another. The existing tools are unique to each case, but the creative tools are unique to each lawyer. No two lawyers apply precisely the same qualities to any persuasive effort.

The creative tools affect decisions in three ways: by influencing the decision-maker's reasoning, by influencing the decision-maker's personal reaction to the lawyer or the client, and by influencing the decision-maker's emotions.76

i. *Appeal to Reasoning*

Lawyers engaged in a persuasive effort do not have the luxury of using either demonstrative proof or formal logic to prove their points conclusively. However, logic does play a

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75. This is not to be confused with the subject of creative thinking, including how to think creatively about how to use existing tools. Creative thinking has become a subject of growing interest and many materials exist on the topic, including two which include extensive bibliographies: R. W. WEISBERG, CREATIVITY: GENIUS AND OTHER MATTERS (1986) A. B. VANGURNDY, 108 WAYS TO GET A BRIGHT IDEA AND INCREASE YOUR CREATIVE POTENTIAL (1983).

76. Cf. ARISTOTLE, supra note 3, at 17. ("Now the proofs furnished by the speech are of three kinds. The first, depends upon the moral character of the speaker, the second upon putting the hearer into a certain frame of mind, the third upon the speech itself, in so far as it proves or seems to prove."). These constitute the ethical appeal (ethos), the emotional appeal (pathos) and the rational appeal (logos).
role in legal advocacy. “[P]ersuasion has to do with the ‘plausible,’ with apparent proof and seeming logic . . .”77 Rhetoric deals with the “approximately true.”78 The probability of rhetoric has been called a “seeming” probability.79 According to Aristotle, man only thinks he is rational; he is persuaded by the appearance of rationality.80

In advocacy, arguments are not expected to withstand scrutiny by what is called the logic of imperatives or deontic logic. The key is whether the decision-maker believes it to be logical. That is, the argument must appear to be rational to the decision-maker, not to a universal audience. This underscores again the need for the lawyer to understand the audience.

People reason either deductively or inductively, either drawing conclusions from affirmative or negative statements or making generalizations after observing a number of similar facts.81 In logic, the deductive mode of arguing is commonly referred to by the term, syllogism. In rhetoric, the equivalent of the syllogism is the enthymeme. The rhetorical equivalent of full induction in logic is the example. Examples, and especially enthymemes, are particularly effective in helping create an appearance of logical soundness.

The syllogism reasons from statements or propositions that are called “premises.”82 A syllogism has major premise and a minor premise which lead to a necessary and true conclusion. It follows this course: if a is true, and b is true, then c must be true. The classic syllogism is:

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\begin{align*}
\text{All men are mortal beings.} & \quad \text{(major premise)} \\
\text{Socrates is a man.} & \quad \text{(minor premise)} \\
\end{align*}
\]

Therefore, Socrates is a mortal being (true conclusion).

Analytical reasoning deals with truth; dialectical reasoning with justifiable opinion.83 In dialectical reasoning the interaction between the speaker and the respondent vocally

77. J. KINNEAVY, supra note 3, at 220.
78. J. KINNEAVY, supra note 3, at 219.
80. J. KINNEAVY, supra note 3, at 245.
81. E. CORBETT, supra note 3, at 54.
82. E. CORBETT, supra note 3, at 56.
83. C. PERELMAN, supra note 7, at 3.
contribute premises for the construction of dialectical syllogisms. 84

In rhetoric, the speaker uses the enthymeme instead of the question and answer to achieve interaction with the audience. "The speaker draws the premises for his proofs from propositions which members of the his audience would supply if he were to proceed by question and answer, and the syllogisms produced in this way are enthymemes."85 The speaker leaves out one or several of the parts of the strict syllogism (premises or conclusion). By allowing the audience to fill in the missing components of a deduction, the power of suggestion is enlisted in the cause of persuasion. 86

Thus, enthymemes occur only when speaker and audience jointly produce them. This creates an intimate union between speaker and audience and provides the strongest possible proofs. 87

The aim of rhetorical discourse is persuasion; since rhetorical arguments, or enthymemes, are formed out of premises supplied by the audience, they have the virtue of being self-persuasive. Owing to the skill of the speaker, the audience itself helps construct the proofs by which it is persuaded.88

The goal for a lawyer, then, is to omit whatever premises the decision-makers can infer without trouble and give only those parts of arguments that are needed to make it clear.89 The problem, of course, is that it is very difficult to know the audience well enough to predict what premises it will supply, if the lawyer omits them.

ii. The Personal Appeal of the Lawyer

The importance of the decision-maker's personal reaction to the lawyer cannot be underestimated. Perhaps the personal appeal of the lawyer should not be a factor in decision-making which will affect the rights of third parties,

85. Id. at 408.
86. J. Kinneavy, supra note 3, at 251.
87. Bitzer, supra note 84, at 408.
88. Bitzer, supra note 84, at 408.
but it always has been and it will be in the future. So long as human beings are making decisions, they will be affected by the personal characteristics of people who are trying to influence their decisions.

In order to maximize the impact of the personal appeal on the audience, the lawyer must demonstrate three characteristics during a presentation:

First, the lawyer must appear to have a practical knowledge about the topic (good sense). The audience must believe the lawyer has good sense, a manifest ability to make practical decisions. This derives from the self-assurance and knowledgeableness of the lawyer. Snobbery or condescension will have a negative effect.

Second, the advocate must seem to have the good of the audience at heart (good will). The lawyer must identify with the audience somehow: share their aspirations, speak their language in some respects, and share their biases and prejudices, if necessary.

Third, the lawyer must portray himself or herself as a person who would not deceive the decision-maker in the matter at hand (good moral character). The advocate must give evidence of sincerity and trustworthiness in the statements. Assuming frankness and candor will help.

In some cases, it is difficult or impossible for a lawyer to exhibit these characteristics. For example, when a lawyer is negotiating the settlement of a personal injury claim, it is hard to convince an opponent that the lawyer has the good of the opposing attorney or the opposing party at heart. However, lawyers should try to enhance the existence of these characteristics in themselves whenever possible and should always try to avoid becoming viewed by a decision-maker as possessing their opposite traits.90

Some modern research challenges Aristotle's claim that the personal appeal of the advocate is the most important and effective form of argument, but it is unquestionably an

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90. While it is probably true that skilled lawyers can fake having the characteristics of good sense, good moral character, and good will in some cases, it is also probably true that it is more difficult to do than they believe. Meanness and aggressiveness are sometimes effective (emotional appeal), thus, it is possible for lawyers to achieve success even if they sacrifice evidence of good will and good character. However, the cost of this loss should be weighed against the benefits of obnoxiousness.
important aspect of persuasion.

iii. *Appeal to Emotions*

The emotional appeal plays a vital part in the persuasive process. While arguments produce beliefs about the conduciveness of the means to the desired end, it is the emotions which make the ends seem desirable. It is this desire, or will, which moves people to action.

Emotional appeals account for a large portion of modern persuasive techniques. Billboards along the highway, television ad spots, magazines, salesmen and politicians all exploit emotions in modern persuasion. Mother love, sex appeal and chauvinism are among the appeals to our emotions which we encounter practically every day.

Emotions are not under the direct control of conscious thought, but conscious thought and resulting action can certainly be governed by the will. People cannot will themselves to feel an emotion, as they will themselves to think analytically or to recall memories. Emotions are produced when people think about something that stirs them. Thus, emotions must be aroused indirectly.

The lawyer's goal is to cause a decision-maker to feel emotions which will lead to the decision desired by the lawyer. Lawyers who wish to arouse emotions must do so by describing scenes or people or events which will stimulate the desired emotion. It is essential to be specific. General notions and abstract schemes have hardly any effect on the imagination. The more specific the terms, the sharper the image they conjure up, and, conversely, the more general the terms, the weaker the image. To influence the will, the proposed object should appear desirable and the means suggested should be proved to be conducive to the attainment of that object.

Some believe that to stir the emotions of others, it is necessary to feel those emotions oneself. Empathy is essential. A lawyer must feel the feeling he or she wishes to pro-

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94. THE NEW RHETORIC, *supra* note 7, at 147.
duce in the minds of decision-makers.

Knowledge of the audience is once again a critical factor in the success of persuasion. The lawyer must understand the present emotions of the decision-makers, what emotions are most likely to cause them to make the preferred decision, and how to produce the desired emotions in them. To arouse anger, for example, Aristotle said we must always know three things: the state of mind of angry people, the people with whom they get angry, and the grounds on which they get angry.96

Aristotle's analysis of emotions was without benefit of modern psychology, but our understanding of the emotional appeal and its effect on persuasion is still at a common sense stage of development. There has been very little scientific inquiry into the subject, although there has been no dispute about the powerful impact which emotions can have on decisions.

d. Employing Creative Tools in Klare

Assume that we are preparing to negotiate with the Journal, and that our goal is to convince Justin and his attorney to publish Klare's article in the next issue because the litigation will put the Journal out of business.

i. Appeal to Reasoning

Examples are useful. Justin's lawyer should already be aware of the results of similar cases. If not, we can provide them. References to other cases can provide examples of the amounts of jury awards as well as examples of similar facts which resulted in favorable verdicts for Klare's side. Justin's lawyer also shares a common base of information about expenses associated with litigation. If we know the predilections of the trial judge or jurors in cases like this one (and they are helpful to our side), we should use them as examples.

If put into the form of a syllogism, our primary argument would go something like this:

The Journal wants to stay in business. Continued litigation will put it out of business. Therefore, it should agree to publish the article.

96. See J. Kinneavy, supra note 3, at 242.
Only the second premise is debatable. Our argument in support of it would be: The *Journal* will go out of business if this litigation is expensive. We will make sure that the litigation is expensive. Therefore, continued litigation will put it out of business.

The second premise in this statement is a bluff. If we decide not to use the bluff, or it is called, our fallback primary argument is: The *Journal* wants to stay in business. A trial verdict would put it out of business. Therefore, the *Journal* should agree to publish the article.

The argument in support of the second premise can be stated as follows: The *Journal* will go out of business if it is ordered to pay a judgment over a certain amount. It would be ordered to pay over that certain amount. Therefore, a trial verdict would put it out of business.

As explained in the text, effective advocates would not couch their arguments in the form of syllogisms. *Enthymemes* are more effective. Thus, we would want to produce these syllogisms in the minds of Justin and his attorney through our discussions with them. If we are correct in assuming that the continuation of the *Journal* is their primary interest, the key to our success lies in convincing them either that “we will make sure that the litigation is expensive” or that “the *Journal* would be ordered to pay more than the amount it would take to put it out of business.” If we can convince them of this, the conclusions we want them to reach should form in their minds. Additional syllogisms could be constructed to provide a more in-depth analysis of how to bring the *Journal*’s representatives to these conclusions.

### ii. The Personal Appeal of the Lawyer

We lose some ethical appeal (good intentions . . . I have your best interests at heart) by threatening to put the *Journal* out of business. However, it may be possible to salvage it by offering a settlement opportunity which will avoid this result and which will support as many other values of the *Journal* as possible. The only value which cannot be saved in our plan is Justin’s interest in printing only in a symposium format. We can try to accommodate that objective, too, by pointing out that the planned symposium is not affected by adding Klare’s article, especially if it is separated with a notice that this is a special bonus provided at no extra cost to
purchasers of the *Journal* and by explaining that it had to be printed now or it would have been out of date. Perhaps, it could even be presented as a preview of a forthcoming symposium issue on that topic.

We also lose some ethical appeal (good intentions and good character . . . you can trust us) if we get called on a bluff to run up the expenses of the litigation to force settlement.

### iii. **Appeal to Emotions**

There is a wide range of emotions which would help move Justin, primarily fear of the *Journal* going down the tube and sympathy for Klare (these can be enhanced by a skillful lawyer . . . just think about it). Another tactic would be to induce Justin to feel anger toward the College for putting everyone in this predicament and achieve unity of purpose with Klare. Or, perhaps, we should enhance Justin's apprehension about continued litigation by conducting ourselves or the litigation in such an offensive manner that Justin and his lawyer would do anything to avoid dealing with us.97

### 2. **Plan the Presentation of Persuasion**

The manner in which the message is presented may have as much of an impact on the success of advocacy as the content. A failure to plan the presentation carefully can undermine the most brilliant concepts.

Modern efforts to teach advocacy have focused on matters of technique, of presentation. Current instructional methods are designed to teach lawyers customary rules of lawyer behavior in discrete contexts such as appellate advocacy, trial practice and negotiation as well as to teach the application of rules of procedure and evidence. Most texts about law practice were written by practicing lawyers (or lawyers who are also law professors). By and large, these books represent the composite of the lawyers' experiences. They provide sound advice for the most part, but they do not discuss the theories behind their advice or the relationship between

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97. Yes, this would sacrifice much of the personal appeal of the lawyers and it would present ethical and moral questions.
theory and practice.

It is not the purpose of this paper to critique existing advocacy materials, however, even the cursory coverage of presentation contained in this paper raises questions about the soundness of some of the advice contained in them. An overview of presentation from the perspective of rhetoricians should help lawyers select the modern techniques which best suit the particular needs of each persuasive effort.

Although it is sometimes difficult to separate form from substance in legal advocacy, lawyers should consider four components of form in their planning: organization, style, delivery and memory.98

a. **Organization**

There is persuasive potential in the order in which the content of arguments is presented. Although rhetoricians have tried to codify useful conventions into hard and fast rules, strict adherence to such rules would present a danger to lawyers. Particularly in contexts in which the presentation of a prepared speech is not possible or appropriate (is it ever in law practice?), persuasion cannot be committed to any order. The lawyer must remain free to adapt a persuasive effort based on the lawyer's on-the-scene analysis of the decision-maker's reactions. However, this does not diminish the potential impact of the organization of arguments, even though the actual presentations may more closely resemble chaos.

Traditional rhetoricians believed that rhetorical speech should incorporate the following parts: entrance, narration, proposition, division, confirmation, confutation and conclusion. Entrance is introducing the topic; narration is a recital of the circumstances that are required to understand the points at issue; proposition is specifically stating the speaker's stand on the issue; division is outlining the points the speaker is going to prove; confirmation is the body of the proofs for the speaker's thesis; confutation is the destruction of the opponent's arguments; and conclusion is the review and emotional exhortation.99

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98. This is the *verba* division of rhetoric (*how* it is said).
Without attempting to resolve a debate about the constituent parts of a rhetorical speech which has continued for two thousand years, it is fairly safe to say that advocacy needs a beginning, a middle, and an end.

The beginning (encompassing entrance and narration) should introduce the subject and make the desired result known to the audience (if this is not necessary for a particular decision-maker, omit it). The beginning should also get the attention of the audience. According to Aristotle:

> The things to which the audience is most inclined to listen are things great (momentous, important), things of special interest (to the hearers themselves), things wonderful (surprising), and things pleasant (to hear; either in themselves or their associations); and therefore the speaker should always try to produce the impression (. . . in his hearers' minds) that things of such kind are his subject.100

The middle segment of advocacy is the body of the arguments for and against what it is that the lawyer is trying to prove (the thesis, proposition, premise). An initial decision for the lawyer is when to announce the purpose of the advocacy, that is, what the lawyer is trying to establish (this encompasses proposition and division). If led up to by the presentation of the evidence, it becomes the climax; if the thesis is announced and then established, this would be the anticlimax order.101 There is no clearly correct answer.

Traditional rhetoric would instruct a lawyer to take a stand and explicitly state the thesis at the beginning of the speech. However, modern research and practice suggests that an obvious intent has less chance of persuasion than a hidden intent. "Thus, persuasion is often most successful when it parades under the guise of information or exploration . . . . Persuasion must often not appear to be persuasion; true art hides the art."102

A second decision about the middle segment of an argument is where to place arguments which prove one's own position in relation to arguments that destroy the opponent's position (this encompasses confirmation and confutation).

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100. J. Kinneavy, supra note 3, at 266.
101. Perry Mason is the master of the climax order.
102. J. Kinneavy, supra note 3, at 285.
Three orders have been recommended, based on the strength of the arguments: the order of increasing strength, the order of decreasing strength and the Nestorian order (begin and end with the strongest arguments). Perelman does not believe there is a proper order, except in regard to the particular audience. "[E]ach argument ought to come at the moment at which it can have the greatest impact. But since what persuades one audience does not convince another, the effort of adaptation must always be taken up anew."

Empirical studies have supported this notion. "Instead of a general law of primacy or recency, there exists an assortment of variables, some of which produce primacy, others of which produce recency, and still others of which produce either primacy or recency, depending on their placement and utilization in a two-sided message." The conclusion is that organization does not make or break most arguments. It is how the organization is used to present the material with clarity and interest that counts.

b. Style

Style involves the selection of the words to be used in a persuasive effort. "Style is thinking out into language." Considerations of matters related to style dominate much of the literature about rhetoric. "Yet, despite the abundance of material on something like 'the characteristics of persuasive discourse,' it remains true that much of what is said about rhetorical style is intuitive and speculative."

The so-called virtues of style in classical rhetoric are: clarity, dignity, propriety, and correctness. Clarity stresses the use of ordinary or natural language to ensure that the message is understood by the audience. Dignity or impressiveness, on the other hand, emphasizes the use of unusual or

104. C. Perelman, supra note 7, at 149.
107. This involves that part of rhetoric referred to as elocutio, which to the ancient Greeks meant "style," not the act of speaking with which the word elocution is associated today.
108. E. Corbett, supra note 3, at 414.
extraordinary words to call attention to certain aspects of a presentation; it is embellishment. Propriety or fitness or decorum has to do with the appropriateness of the language for a particular audience. The virtue of purity or correctness has to do with the proper use of grammar and words. In classical rhetoric, it was considered important to use faultless and pure diction.

The need for persuasive language to be clear, yet distinct, presents a paradox. Language must be sufficiently clear in order to establish a linguistic bond between the lawyer and the decision-maker. Yet it must also have a quality that is sufficiently unique to call attention to the message and separate it from the ordinary.

Aristotle said the following about the impressiveness of language:

[D]eparture from the ordinary makes [speech] appear more dignified. In this respect, people feel the same in regard to style as in regard to foreigners and fellow-citizens. Wherefore we should give our language a "foreign air"; for men admire what is remote, and that which excites admiration is pleasant . . . . [T]hose who practise [sic] this artifice must conceal it and avoid the appearance of speaking artificially instead of naturally; for that which is natural persuades, but the artificial does not. For men become suspicious of one whom they think to be laying a trap for them, as they are of mixed wines.

Every lawyer has personal characteristics which will permeate all persuasive efforts and provide some unique qualities, with or without intentional embellishment. However, the style must be designed to fit within the dialect of the audience. If the extraordinary exerts itself too much, the style

110. This article will not discuss the various classifications of style which have been identified by rhetoricians. Cf. E. CORBETT, supra note 3, at 37. ("[T]here was fundamental agreement about three levels of style. There was the low or plain style (atenuta, subtile); the middle or forcible style (mediocris, robusta); and the high or florid style (gravis, florida)." These are also referred to as the Attic, Rhodian and Asian styles, respectively. Also, Cf. J. KINNEAVY, supra note 3, at 277. ("It is, in fact, amazing how many different variations are made on the theme of the three styles. What is considered Attic in one culture is often viewed as Asian by another culture, so that the three levels are continually being given new interpretations by different civilizations.")

111. ARISTOTLE, supra note 3, at 351-53.
itself becomes the message, and persuasion is not achieved.

Persuasive clarity does not necessarily mean clarity in fact. It does mean that the message, as the lawyer wants the decision-maker to perceive it, must be clear. Often this will distort or shield reality from the audience's view. "The clarity of persuasion is then a filtered clarity. It is not the complete objective clarity of science or information, but the hearer must believe he has a clear picture of reality."112 (Keep in mind the image of advocacy involving the equilateral triangles. The goal is to convince the decision-maker that the message of the lawyer is in fact reality, or is closer to reality than any other alternative from which the decision-maker can choose.)

Common devices which are used in persuasion to enhance clarity are figures of speech such as simile, symbol, paradox, metaphor, euphemism, synedoche, metonymy, and hyperbole.113

Advocates also use figures of sound: rhythm, rhyme, alliteration and other sound patterns. These can have persuasive impact. Aldous Huxley had the following to say about the power of rhythm:

No man, however highly civilized, can listen for very long to African drumming, or Indian chanting, or Welsh hymn singing, and retain intact his critical and self-conscious personality. It would be interesting to take a group of the most eminent philosophers from the best universities, shut them up in a hot room with Moroccan dervishes or Haitian Voodooists and measure, with a stop watch, the strength of their psychological resistance to the effects of rhythmic sound . . . all we can safely predict is that if exposed long enough to the tom-toms and the singing, every one of our philosophers would end by capering and howling with the savages.114

More current examples of the power of rhythm are obvious in political and religious slogans and maxims as well as the sounds of most modern advertising slogans.

112. ARISTOTLE, supra note 3, at 351-53.
113. For a discussion of these, see E. CORBETT, supra note 3, at 459-95.
c. Delivery

Delivery is acting. "All the world's a stage. And all the men and women merely players . . . ."\textsuperscript{115} This statement is probably more fitting for lawyers than for any other group, including professional thespians. Unlike professional actors and actresses, most of a lawyer's performances are not conducted in the formality of a courtroom (the lawyer's equivalent of the theatrical stage).\textsuperscript{116} Rather, they occur in offices, homes and even on the steps of courthouses.

The importance of delivery was not overlooked by the Greeks. When Demosthenes, the greatest of Greek orators, was asked what he considered to be the most important part of rhetoric, he replied, "Delivery, delivery, delivery."\textsuperscript{117} Aristotle wrote little about delivery, but he would consider three qualities about delivery: volume, harmony and rhythm. No treatise had been composed on delivery in his day; but he notes that it is "of the greatest importance" and should be paid attention, not as being right, but as being a necessary part of influencing opinion.\textsuperscript{118}

Lawyers should not begin a persuasive effort without giving some thought to how it will be staged and delivered. Books for lawyers have not ignored the subject. Lawyers can find advice about how to create the right atmosphere in the courtroom,\textsuperscript{119} how to decorate and arrange their offices to create the environment desired for impressing clients or adversaries,\textsuperscript{120} and even how to dress and carry themselves for maximum effect.\textsuperscript{121} Consistent success, however, may

\begin{itemize}
\item \textsuperscript{115} SHAKESPEARE, AS YOU LIKE IT, Act ii, sc. 7, I, 139.
\item \textsuperscript{116} Cf. S. Goldberg, \textit{Trial is Theater, The First Trial in a Nutshell} 4 (1982).
\item \textsuperscript{117} E. Corbett, \textit{supra} note 3, at 38-59.
\item \textsuperscript{118} ARISTOTLE, \textit{supra} note 3, at 345-47. In classical rhetoric the treatment of delivery concerned the management of the voice and gestures. Precepts were laid down about the documentation of the voice for the proper pitch, volume, and emphasis and about pausing and phrasing. In regard to action, orators were trained in gesturing, in the proper stance and posture of the body, and in the management of the eyes and facial expressions.
\item \textsuperscript{119} Cf. J. A. Tanford, \textit{The Trial Process} 367-70 (1983).
\item \textsuperscript{120} Cf. A. S. Watson, \textit{The Lawyer in the Interviewing and Counseling Process} (1976).
\item \textsuperscript{121} Cf. J. Rasicot, \textit{Jury Selection, Body Language and the Visual Trial} (1983).
\end{itemize}
require formal training in theatrical skills, or at least self-instruction.122

d. Memory

Memory was included by Aristotle in his development of classical rhetoric. This suggests that advocacy is more successful when it is undertaken without reference to notes or other materials. If so, the lawyer who uses notes for witness examination, arguments and negotiation would be less persuasive than the lawyer who operates without them. However, there appears to have been no modern research on this question.

This division of rhetoric received the least attention in the rhetoric books. What attention was paid to it focused on the training of the memory from constant practice and various mnemonic devices were suggested to facilitate memorization.123 Today, improved understandings about the human mind have resulted in materials which can aid the lawyer who is interested in memory improvement.124 Still, however, mnemonic devices remain an important tool. An example of a mnemonic device was printed recently in the American Bar Association Journal:

A Speaker’s Mnemonic

Think of the word S.P.E.A.K.E.R when you prepare your talk.
S stands for show business. Audiences like to be entertained.
Prepare. Have an informative, well-organized and interesting talk, and practice your delivery. Be conversational, don’t be an orator.
Energy. Be dynamic; exude enthusiasm.
Anecdotes. Pepper your talk with a generous dose.
Knowledge. Know what you’re talking about.
Examples. Use them to explain and simplify your points.
Rapport. Know your audience. Establish a link with them.

123. E. Corbett, supra note 3, at 38.
early in your talk.\textsuperscript{125}

One wonders if the author is aware of coming so close to describing the components of persuasive argumentation.

\textit{i. Presentation of the Klare Case}

Rather than attempt a description of how the Klare case could be presented in any of the potential forums for advocacy, let's consider how the differences among the three forums might affect our presentations.

Negotiations with President Gilligan would most likely take place in her office. We would be negotiating from a position of weakness, almost begging. We would want to be exceedingly polite and proper.\textsuperscript{126}

Negotiations with Justin and his attorney would probably be at our offices or his attorney's (although we might learn more by trying to have at least one meeting in Justin's office). We think we are negotiating from a very strong posture, and we plan to be fairly aggressive, if not downright obnoxious.

At trial, the setting would be standard and our behavior would be more regulated than in the other settings. As we believe the facts and the law favor our side, our primary goal would be to present Klare in a sympathetic light and to do nothing which would diminish the jurors' admiration of her. We would also want to paint Justin as a scoundrel, but not so much so that the jury would react to our tactics with sympathy for him.

\textit{G. Put it All Together}

The diverse elements of the persuasive process are interdependent. A persuasive effort is more than the sum of the components discussed in this paper. Persuasion involves the

\textsuperscript{125} Teitell, \textit{Fearless Public Speaking}, A.B.A. J., 94 (Sept. 1, 1988).

\textsuperscript{126} Recognize that we have an inadequate description of President Gilligan (or any of the other players in this hypothetical) to really figure out how to most effectively present our case. Imagine that President Gilligan is either Rosalynn Carter or Roseanne Barr. We know we would not present the case to each of them in exactly the same manner, but we still do not know enough about either of them to design the most effective persuasion plan possible. Imagine, instead, that President Gilligan is your mother or your wife. Now we might be able to finish planning the presentation of our case.
construction of liaisons among facts, premises and conclusions; and the process of planning persuasion creates webs of argumentative/persuasive communication.127

There can be no standard rules for how one should assemble the pieces of any particular persuasive effort. The subject, the occasion, the audience and the personal characteristics of the lawyer dictate the means to employ to effect the purposes of advocacy. Effective advocacy requires the lawyer to be flexible and to adapt persuasive efforts to fit each particular situation.

Perhaps the best advice for lawyers who want to influence decisions is to study how people make decisions, for all legal advocacy is aimed at a decision. It is well beyond the scope of this paper to explain decision-making adequately. However, it is important to understand that all decisions follow the same basic pattern. It does not matter if the decision is trivial or important. It does not matter if the decision is hurried or considered. It does not matter if the decision is being made by a judge, a jury or an opposing party. The process is the same.

The study of decision-making is an evolving field and the process is not yet fully understood.128 Consequently, there are a variety of viewpoints as to the precise components of the process. However, even an unrefined understanding of the decision-making process is helpful to the lawyer who wants to influence decisions. One description of the process129 includes the following stages:

1. setting of goal.
2. acquisition of information.
3. analysis of information.
4. identification of alternatives.
5. evaluation of the consequences of each alternative.
6. decision.130

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128. Cf McKean, Decisions, Decisions, DISCOVER, 22 (June, 1985). (McKean describes the recent work of Daniel Kahneman and Amos Tversky, two psychologists who have been studying the mental pitfalls in which rational people find themselves when they try to arrive at logical conclusions.).
130. Richard Neumann describes the stages in the creative process almost iden-
Decisions can be influenced at any stage of the decision-making process. In putting together a final plan for persuasion, the lawyer should identify what stage the decision in question has reached in the decision-making process and should consider carefully at which stage a persuasive effort will have the greatest chance of success.

Effective advocacy requires the lawyer to examine each stage of the decision-making process and to develop strategies for manipulating the process in furtherance of the client's goals. A lawyer might be able to more easily manipulate some decisions by influencing the decision-makers during the goal setting stage, while the key in other cases might involve expanding the number of potential alternatives. No two decisions involve precisely the same considerations, therefore, no two persuasive efforts should be precisely the same.

An example of how lawyers can attempt to manipulate one stage of the decision-making process is the focus in "problem-solving negotiation" on searching for solutions from which both parties can benefit. In problem-solving negotiation, the lawyer influences decisions by introducing alternative solutions which may not otherwise have been consid-


131. Cf. Menkel-Meadow, supra note 29, at 794. ("Problem solving is an orientation to negotiation which focuses on finding solutions to the parties' sets of underlying needs and objectives. The problem-solving conception subordinates strategies and tactics to the process of identifying possible solutions and therefore allows a broader range of outcomes to negotiation problems." [Of course, utilization of this approach to negotiation is a "strategy" which has been chosen to produce results desired by one's client.])
The advocate should keep in mind at all times that, while one lawyer is searching for supporting propositions which are accepted by the decision-makers, another lawyer is also seeking supporting propositions which would lead the decision-makers to a different conclusion. Every persuasive effort "implies a preliminary selection of facts and values, their specific description in a given language, and an emphasis which varies with the importance given them. Choice of elements, of a mode of description and presentation, judgments of value or importance—all these elements are considered all the more justifiably as exhibiting a partiality when one sees more clearly what other choice, what other presentation, what other value judgment could oppose them."\textsuperscript{132}

No systematic approach to advocacy can succeed unless it has the flexibility to adapt itself to human experience, knowledge and aspirations. Although the principles of persuasion outlined in this article provide guidelines which allow this flexibility, in the end, an advocate must rely on personal insights, convictions and beliefs in deciding how to implement each persuasive effort. A comprehensive vision of persuasion will help a lawyer succeed more consistently as an advocate.

H. Consider Moral Implications of the Plan

Once the lawyer is satisfied with the potential effectiveness of a persuasion plan, one question remains: is it the right thing to do?

The principles of advocacy teach methods of persuasion. They have no inherent foundation of moral values; advocacy skills can be used as effectively to do evil as to do good. This should be of concern to all lawyers.

Plato in the Gorgias characterized rhetoric as "ignoble" and "bad." He considered it a deceit of the soul, an appearance of justice which induces belief without knowledge.\textsuperscript{133} Socrates said that a good rhetoric could exist, but no one has ever practiced it.\textsuperscript{134}

\textsuperscript{132} C. PERELMAN, supra note 7, at 34.
\textsuperscript{133} J. KINNEAVY, supra note 3, at 221.
\textsuperscript{134} J. KINNEAVY, supra note 3, at 221.
Aristotle's response to criticism that rhetoric put too much power in the hands of the individual was "it would be absurd if it were considered disgraceful not to be able to defend oneself with the help of the body, but not disgraceful as far as speech is concerned, whose use is more characteristic of man than that of the body. If it is argued that one who makes an unfair use of such faculty of speech may do a great deal of harm, this objection applies equally to all good things except virtue, and above all to those things which are most useful, such as strength, health, wealth, generalship; for as these, rightly used, may be of the greatest benefit, so, wrongly used, they may do an equal amount of harm." 135

The power of American lawyers is not as unfettered as that of individual citizens of ancient Greece. Lawyers are members of a profession. As such, we are governed by a code of ethics and a common aspiration to provide beneficial public services. These regulate the freedom we have to apply skills of persuasion without concern for the impact on an opponent's interests or those of society in general. Unfortunately, the risk of being disciplined for using improper persuasive tactics is very slim.

On the other hand, unwritten professional norms which reflect the realities of law practice in each segment of the profession provide greater protection against abuses of persuasion than the formal rules which govern professional conduct. These represent the collective hierarchy of professional role values as recognized in local customs and practices and as demonstrated by mentors and other lawyers who have reputations as leaders in their fields. Few lawyers will risk their livelihoods by flagrantly departing from modes of practice which have been set by peers who observe their conduct (including opponents and colleagues). However, professional norms do not provide complete protection for the public, especially where particular norms seem to encourage harmful persuasive techniques.

In the final analysis, our conduct is governed by our personal values. Whereas rules of professional conduct and professional norms regulate the freedom we have to apply skills of persuasion without concern for the impact on an

135. ARISTOTLE, supra note 3, at 13.
opponent's interests or those of society in general, only our personal values can regulate any desire we may have to act without concern for the consequences of our actions. Lawyers do what we believe will result in our greatest personal happiness, and there is no other excuse for employing harmful methods of persuasion. If we do something harmful, we do so because we want to do it.

I am not suggesting that lawyers should abdicate their responsibility to provide zealous representation whenever they become convinced that the results of winning a particular case would be unjust or morally wrong. Our system of adversarial justice could not tolerate such conduct. There are times when lawyers must choose to take action on behalf of the client which is personally distasteful to us. Our society demands it, and lawyers whose personal values prevent them from zealously representing their clients' interests are probably in the wrong line of work. One of a lawyer's highest personal values must be to faithfully discharge his or her responsibilities to the client.

This does not excuse those lawyers, however, who do not search for approaches to persuasion which reconcile professional and moral responsibilities. "Professional obligations" should not be used as a shield to justify harmful persuasive efforts unless no other viable course of action exists. When deciding whether to take a particular approach to persuasion, we should remember to ask whether it is the moral thing to do and, if it is not, we should search for a better way to accomplish our clients' objectives.

IV. CONCLUSION

Persuasion is a broad concept. In law practice, it encompasses a range of activities from the evolution of litigation strategies in complex litigation to convincing a clerk of court into helping you resolve a minor procedural problem. The product of the process of planning for persuasion can be mounds of trial notebooks backed by sophisticated computer programs or it can be the scowl (or smile) you decide to use to persuade the clerk to help. The persuasive effort can last years or be over in a flash. In all cases, however, the basic principles or persuasion remain the same, and each step in the planning process is traversed—whether via a methodical plan or a subconscious collage.
Lawyers cannot win every case or every argument. The guidelines for planning persuasive efforts in this paper do not guarantee success. They will help avoid gaps during a lawyer's analysis of opportunities for persuasion. They will also help lawyers select the best possible strategies for advocacy and make it easier to interpret and counter the maneuvers of opponents. They are one more tool for the lawyer who wants to become a master of persuasion.

While this article should prove to be a useful tool for practicing lawyers and for law teachers, its primary purpose is to provide fresh perspectives about legal advocacy and to stimulate further thinking and research which will eventually enable us to describe legal persuasion from A to Z.