HARMONIZING ADJUDICATION RULES WITH ADVOCACY NORMS

Dane S. Ciolino

For millennia, advocates have used extra-evidentiary persuasion techniques to tip the scales in favor of their clients. They appeal to emotion, develop personal credibility, and tell stories to influence tribunals with irrelevancies. But in so doing, lawyers violate more recent adjudication laws that facially prohibit such widely accepted practices. This Article addresses this disconnect between adjudication rules and advocacy norms. It argues that the lack of congruence between the rules as written and as enforced runs afoul of the rule of law. It concludes that the rules of evidence, procedure, and lawyer conduct should be revised to include a flexible reasonableness standard that is compatible with age-old advocacy norms.

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INTRODUCTION

Clarence Darrow famously inserted a straight wire into a cigar and smoked the cigar during trial; the ash grew and grew but never fell, fixating jurors and causing them to pay little attention to his opponent's argument.[1] O.J. Simpson's defense team replaced photographs of white people in Simpson's house with photos and lithographs of African-Americans.[2] Lawyers dress down and adopt an "aw-shucks" demeanor to appeal to jurors. They wear lapel pins and remove wedding rings.[3] They weave narrative stories with villains and heroes and their journeys. They use rhetorical techniques such as *ethos* to gain personal credibility and *pathos* to stir emotions. Lawyers employ these and other techniques for one obvious reason: to persuade decision makers subconsciously with extra-evidentiary information.[4]

This is nothing new. Advocates have studied rhetoric—the art of persuasion—since the 5th century BCE. Two millennia later, we

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[1] *See* RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 147-48 (1999).

[2] Albert W. Alschuler, *How to Win the Trial of The Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 309-310 (1998). Prof. Alschuler notes that at least three different sources corroborate that the "picture swap" at Simpson's home occurred, although Simpson's principal defense lawyer, Johnnie Cochran, later denied playing a role in it. *Id.* at 310 n. 83.

[3] ZITRIN & LANGFORD, *supra* note 1, at 145 ("If Abe Dennison thinks that adopting an aw-shucks demeanor will help him relate to the jury, who's to say he can't?"); *see also* Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 56 (2002).

[4] ZITRIN & LANGFORD, *supra* note 1, at 108 ("Trial lawyers are always looking for an edge, an angle, with the jury. There are almost as many examples as there are lawyers who try cases. Some efforts seem more desperate, or even silly, than useful, but all are consistent with another lesson repeated by those who teach trial techniques: 'Everything that happens in the courtroom counts; you never know what will have an effect on the jury.'").

continue to teach it in our advocacy classes along with newer techniques informed by modern psychology and social science.

But these persuasion techniques run afoul of the plain language of the rules of evidence, procedure, and professional conduct. Those rules prohibit lawyers from persuading decision makers with personal credibility, appeals to emotion, and other allusions to information that is not in evidence. They prohibit courts from admitting such irrelevant information into evidence. And they prohibit juries from deciding cases based on anything other than the law and the facts. The rule of law requires nothing less of the adjudicative process. After all, decision makers must resolve cases deliberately using law and evidence—not subconsciously under the dark spell of the art of persuasion. Or so the theory goes.

This Article addresses the disconnect between unambiguous adjudication rules, which prohibit appeals to extra-evidentiary matters, and longstanding advocacy norms, which routinely employ such appeals and allusions. Part I describes what advocates do to persuade decision makers using principles of rhetoric, storytelling, psychology, and other persuasion techniques. Part II discusses existing adjudication rules and concludes that they flatly prohibit advocates from doing much of what they currently do and have long done. Part III considers what should be done about this disconnect between what advocates do and what the rules prohibit.

The Article concludes that the lack of congruence between adjudication rules as written and as enforced runs afoul of the rule of law. This is particularly troubling considering that these rules exist for one purpose: to further the rule of law. As a result, the Article argues that the rules of evidence, procedure, and lawyer conduct should be revised to accommodate longstanding advocacy norms. Such a revision would replace the current categorical rules prohibiting extra-evidentiary persuasion techniques with a flexible standard prohibiting only those that are objectively "unreasonable."

I. WHAT ADVOCATES DO TO PERSUADE

Advocates want to win. To that end, they marshal relevant facts and the applicable law to persuade decision makers that their clients should prevail. But effective advocates do far more than present law and facts. In addition to making logical arguments from admissible evidence, they use a myriad of overt and covert

persuasion techniques to tip the scales in favor of their clients. This Part surveys these techniques.

A. Advocates Use Classical Rhetoric

Lawyers persuade decision makers using principles of rhetoric[5] developed in Greece during the 5th and 4th Century BCE. Rhetoric is perhaps "the most coherent and experience-based analysis of legal reasoning, legal methodology, and argumentative strategy ever devised . . . ."[6] While historians credit Corax of Syracuse with inventing rhetoric,[7] Aristotle provided many of the fundamental persuasion techniques that modern lawyers continue to study and employ.[8]

Aristotle recognized that people are persuaded by "*logos*"—logical arguments. Such arguments include those that use formal reasoning to deduce uncertain facts from known facts. For example, if we were uncertain about the mortality of Socrates, we could use this classic syllogism to argue that he is mortal: all men are mortal; Socrates is a man; therefore, Socrates is mortal. Logical

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[5] This Article uses the term "rhetoric" to mean the art of persuasion developed and taught in ancient Greece during the 5th and 4th centuries BCE. *See* THOMAS O. SLOANE, ENCYCLOPEDIA OF RHETORIC 92-93 (2001). In Plato's *Gorgias*, Socrates accepted the definition of rhetoric as "'the craft of persuasion in jury-courts and in other mobs . . . and about the things which are just and unjust.'" *See* Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 677-78 (1999) (quoting PLATO, GORGIAS 453d (Terence Irwin trans., Clarendon Press 1979)); Joseph P. Tomain, *The Art of Rhetoric*, 67 U. CIN. L. REV. 669, 671 (1999) (same). Others, of course, use the term differently. *See, e.g.*, GEORGE THOMPSON, JERRY JENKINS, VERBAL JUDO: THE GENTLE ART OF PERSUASION 121 (2013) ("[R]hetoric is the art of finding the right means and the right words to generate voluntary compliance. Rhetoric is Verbal Judo."); Michael Frost, *Introduction to Classical Legal Rhetoric*, 8 S. CAL. INTERDISC. L.J. 613, 614 (1999) ("the term rhetoric is now usually associated with meaningless political exaggeration or mere stylistic embellishment").

[6] Frost, *supra* note 5, at 614; RONALD J. MATLON, COMMUNICATION IN THE LEGAL PROCESS 81-82 (1988) ("A critical stage in pretrial strategy involves delineating the issues in a case. Issue analysis has been theorized and written about for nearly twenty-five centuries in a field of study known as rhetoric.").

[7] Frost, *supra* note 5, at 614 n.1 (citing EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 595 (2d ed. 1971); GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 8 (1980)).

[8] HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN IN ONE VOLUME 3 (2013) (noting that Aristotle "has much to teach us" about persuasion).

arguments also include those that use informal reasoning to inductively draw conclusions about uncertain facts from examples and analogies.[9] We could argue that Socrates is mortal by observing that thousands of Athenians who drank hemlock died; Socrates is no different from those other people who died; therefore, Socrates probably will die if he drinks hemlock. Advocates employ *logos* when they urge fact-finders to use reason to draw inferences from the admitted evidence and applicable law.[10] In so doing, advocates appeal to the brains of decision makers.[11]

But Aristotle knew that people do not make decisions with their brains alone; *logos* only goes so far.[12] He understood that decision makers also decide with their hearts.[13] For that reason, effective advocates use *pathos*—appeals to emotion.[14] Orators stir the emotions of their audiences to make them more favorably disposed to the orator's message.[15] For example, they appeal to positive emotions, such as common group identity, hope, courage, kindness, compassion, trust, self-benefit, and respect. And they channel toward their opponents negative emotions, such as anger, distrust, pity, disgust, guilt, fear, and shame.

Finally, Aristotle recognized that while *logos* and *pathos* were important modes of persuasion, they were not the most important. That distinction, he believed, belonged to *ethos*—appeals to the good character of the advocate.[16] The message matters; but the

[9] WILLIAM M. KEITH & CHRISTIAN O. LUNDBERG, THE ESSENTIAL GUIDE TO RHETORIC 36-38 (2008).

[10] For an approachable treatise on using *logos* effectively, see RUGGERO J. ALDISERT: LOGIC FOR LAWYERS (3d ed. 1997).

[11] JAY HEINRICHS, THANK YOU FOR ARGUING 38 (4th ed. 2020).

[12] Marcel Becker, *Aristotelian Ethics and Aristotelian Rhetoric*, 23 IUS GENTIUM 112, 114 (2013) ("logical arguments alone do not suffice to energize the will of the people . . . appeals to emotions are necessary"). Using *logos* has never been among the techniques for winning friends and influencing people. *See* DALE CARNEGIE, DONNA DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE: UPDATED FOR THE NEXT GENERATION OF LEADERS (2022).

[13] HEINRICHS, *supra* note 11, at 38.

[14] Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 76 (2002) (discussing the importance of using emotion to persuade).

[15] KEITH & LUNDBERG, *supra* note 9, at 39.

[16] *See* ARISTOTLE, THE ART OF RHETORIC 76 (Robert C. Bartlett trans. Univ. Chicago Press 2019) (It is necessary for the speaker to establish "that he himself is a certain sort of person"); HEINRICHS, *supra* note 11, at 44 (noting that Aristotle believed *ethos* was "the most important appeal of all"); David

messenger matters more. To persuade, speakers must adapt their character to the character of their audiences.[17] Audiences like people who are like them. They trust people who are trustworthy. They believe speakers who are virtuous, who have practical wisdom, and who are disinterested.[18]

Although recognized more than two thousand years ago, these fundamental persuasion techniques—"Aristotle's Big Three"[19]—remain core principles of advocacy that are taught to and used by 21st century lawyers.[20] "Logos, ethos, and pathos appeal to the brain, gut and heart of [an] audience," and thus "form the essence of effective persuasion."[21] We teach and encourage contemporary lawyers to employ *logos* by using good organization, rational and logical presentation, and well-sourced law and facts.[22] We teach

McGowan, *(So) What if It's All Just About Rhetoric?*, 21 CONST. COMMENTARY 861 (2004) ("It is not true . . . that the personal goodness revealed by the speaker contributes nothing to his power of persuasion. On the contrary, his character may almost be called the most effective means of persuasion he possesses.") (quoting ARISTOTLE, RHETORIC 1 ii 1355b, in THE RHETORIC AND POETICS OF ARISTOTLE 25 (W. Rhys Roberts & Ingram Bywater trans., 2d ed. 1984)); *see also* Paul Mark Sandler, JoAnne A. Epps, Ronald J. Waicukauski, *Classical Rhetoric and the Modern Trial Lawyer*, LITIGATION, Winter 2010, at 16; Marcel Becker, *supra* note 12, at 112 (2013) (noting that the orator must appear to have trustworthy characteristics); *id.* at 115 ("ethos is the most effective means of persuasion"); Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1365 (2016) ("ethos persuades through the authority of 'character,' not through character itself").

[17] *See* Jamar, *supra* note 14, at 73-74 (discussing Aristotle's concept of character).

[18] HEINRICHS, *supra* note 11, at 44-55.

[19] HEINRICHS, *supra* note 11, at 37.

[20] JOAN M. ROCKLIN, ET AL., AN ADVOCATE PERSUADES 4 (2016) ("To effectively persuade, you will use all three principles [*ethos*, *logos*, *pathos*] in varying degrees . . . ."); Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 WASH. U. JURISPRUDENCE REV. 131 (2014); Frost, *supra* note 5, at 635 ("a growing number of modern lawyers, judges, and legal academics have begun employing classical rhetorical principles in their analyses of legal discourse"); *id.* at 614 ("[W]ith some adaptations for modern stylistic taste and legal procedures, Greco-Roman rhetorical principles can be applied to modern legal discourse as readily as they have been to legal discourse in any other period.").

[21] HEINRICHS, *supra* note 11, at 38.

[22] ROCKLIN, *supra* note 20, at 8-9; STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE § 2.3.1.1 at 19 (6d ed. 2020) ("A winning theory has internal logical force. It is based on a foundation of undisputed or otherwise provable facts, all of which lead in a single direction.").

them to avoid formal and informal fallacies in making legal arguments.[23]

But the modern (and ancient) reality remains that fact-finders do not decide cases on *logos*. As one of the leading trial advocacy casebooks has observed, mid-20th-century behavioral science and jury research have "emphatically rejected" the view that jurors objectively absorb evidence and reach logical decisions based only "on the evidence and the applicable law."[24] Judges and jurors routinely and unwittingly decide cases partly "on the basis of emotion and not reason."[25] Emotion is so powerful because it "'releases the legal imagination to see relevant similarities and therefore permits the final leap to judgment.'"[26] For that reason, we teach and encourage lawyers to use *pathos*.[27]

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[23] ALDISERT, *supra* note 10, at 139-44 ("Introduction to Fallacies").

[24] THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 14 (11th ed. 2017) ("Until perhaps 50 years ago, a common view was that jurors objectively absorbed the evidence presented by both sides during a trial, withheld making premature judgments, dispassionately reviewed that evidence during deliberations, and ultimately reach a logical decision, based on the evidence on the applicable law. Behavioral science research, beginning in the 1940s, and jury research, beginning in the 1960s, have emphatically rejected that view.").

[25] STERN & SALTZBURG, *supra* note 8, at 52.

[26] McCormack, *supra* note 20, at 140-41 (quoting Jonathan Uffelman, *Hamlet Was a Law Student: A "Dramatic" Look at Emotion's Effect on Analogical Reasoning*, 96 GEO. L.J. 1725, 1728-29 (2008)).

[27] Mark Spottswood, *Emotional Fact-Finding*, 63 U. KANSAS L. REV. 41 (2014) ("[W]e teach law students to frame arguments to convince the reader, not just with logic and precedent, but also with moral and emotional weight. Likewise, when lawyers take cases to trial, they consider juror feelings from start to finish, using voir dire to search for sympathetic jurors, and selecting their theories, evidence, and arguments to craft an emotionally compelling case."); *see* ROCKLIN, *supra* note 20, at 11 (noting that emotional appeals have "powerful and sometimes unconscious influences" on decision making); Charles H. ROSE, III & LAURA ANNE ROSE, MASTERING TRIAL ADVOCACY 605 (2d ed. 2020) ("[a]ppeal initially to emotions"); SAM SCHRAGER, THE TRIAL LAWYER'S ART 110 (1999) (lawyers must "connect with their emotions so they can spread a contagion to jurors"); Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip*, 23 U. HAW. L. REV. 1, 14 (2000) ("Oftentimes the only way to sway an audience is to arouse its emotions, to make it care about the outcome of an issue."); John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 3 J. ASS'N LEGAL WRITING DIRECTORS 154, 163 (2006) (discussing role of emotion in appellate advocacy); RONALD H. CLARK, ET AL., CROSS-EXAMINATION HANDBOOK: PERSUASION, STRATEGIES, AND TECHNIQUES 11 (2d ed. 2015) ("Cross-examination must take into account that people make decisions "'by gut

Advocates use *pathos* to call decision makers to action by, for example, making their cases bigger than their facts.[28] They use it by asking jurors to send messages to the community.[29] They tailor their arguments to appeal to the "biases, prejudices, preferences, and leanings of those who decide the case."[30] Advocates tell vivid stories with sensory appeal that give audiences the sensations of an experience. They underplay emotion by speaking simply and holding their own emotions in check—"less evokes more."[31] Further, skilled advocates take their time; *pathos* "tends to work poorly in the beginning of an argument."[32] As a substantive matter, they target appropriate emotions such as anger, patriotism, emulation, nostalgia, and desire.[33]

Finally, we teach and encourage lawyers to use *ethos*.[34] We do so because lawyers ask decision makers to believe in them and in their arguments. Lawyers who appear to be trustworthy experts are more persuasive because decision makers operate from a "heuristic that prescribes that 'experts' can be trusted."[35] As a result, the credibility of lawyers plays "a large part in shaping [a] trial's outcome."[36] Legendary trial advocacy teacher Herbert Stern

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emotions rather than by rational, analytic thought.'") (quoting Sharon Begley, *Adventures in Good and Evil*, NEWSWEEK, April 25, 2009, at 32-33).

[28] STERN & SALTZBURG, *supra* note 8, at 48 (noting that emotion is "potent stuff").

[29] STERN & SALTZBURG, *supra* note 8, at 49.

[30] STERN & SALTZBURG, *supra* note 8, at 58.

[31] HEINRICHS, *supra* note 11, at 85.

[32] *Id.* at 86.

[33] *Id.* at 98-99.

[34] *See* ROCKLIN, *supra* note 20, at 6-7; MAUET, *supra* note 24, at 26 ("An effective advocate is always credible, . . . trustworthy, knowledgeable, and dynamic so that the jurors see you as the teacher, helper, and guide."); ROSE & ROSE, *supra* note 27, at 604 ("[y]our character (ethos) is critical"); Fajans & Falk, *supra* note 27, at 14 ("a convincing argument might prove futile if the audience does not trust and esteem the speaker and believe in his or her benevolence, candor, and intelligence"); H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 980 (2002) (discussing "Honest Abe" Lincoln and concluding that "[s]incerity and authenticity" are "essential to effective advocacy.").

[35] JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 118 (2012).

[36] LUBET, *supra* note 22, § 3.2 at 37. "In a very real sense, a lawyer is 'on trial' from the first moment he steps in front of the fact-finder. Judge and jury will constantly evaluate (and reevaluate) your credibility as they assess your

has argued that *ethos* is the "most important weapon of a trial lawyer"; *ethos* is "bigger than the facts and bigger than the law."[37]

Advocates use *ethos* by appearing sincere, intelligent, knowledgeable, and trustworthy. They use it by appearing to be more prepared than their adversaries.[38] They use it by showing respect to everyone in court, by not appearing partisan,[39] by giving away or embracing what they can't win,[40] and by resisting the urge to contaminate good arguments with bad. Advocates use it by appearing conservative in behavior and by matching the audience members' values[41] and expectations as to "tone, appearance, and manners."[42] They avoid lawyer speak, they do not condescend, and they appear to be fair.[43] And, they exhibit "practical wisdom" by appearing to be knowledgeable, sensible, experienced, and well skilled in their craft.[44]

B. Advocates Use Storytelling, Psychology, and Other Persuasion Techniques

In addition to using rhetoric, advocates persuade decision makers using storytelling principles and techniques informed by

behavior, appearance, bearing, and conduct. They will observe your interactions with your client, with opposing counsel, with witnesses, and with the court." *Id.* § 3.2.

[37] STERN & SALTZBURG, *supra* note 8, at 21. Stern considers *ethos* so important that developing it is "Rule I" for trial lawyers, *see id.*, while *logos* is relegated to "Rule II." *See id.* at 35; *id.* at 18 ("When jurors believe in the lawyer, they are likely to believe in his case.").

[38] *See* ZITRIN & LANGFORD, *supra* note 1, at 148 ("Some lawyers wheel boxes of papers into court each day of trial to send a message to jurors that they have more evidence than can possibly be explained away.")

[39] HEINRICHS, *supra* note 11, at 74. By showing "disinterested goodwill," a persuasive advocate "combines selflessness and likeability." *Id.* Some tools to generate this aspect of *ethos* include exhibiting "the reluctant conclusion," using *dubitation* ("doubt in your own rhetorical skill") and displaying apparent authenticity. *Id.* at 81.

[40] HEINRICHS, *supra* note 11, at 64-65 (noting the benefit of "changing your position" and "pretend[ing] you were for your new stand all along").

[41] HEINRICHS, *supra* note 11, at 56 (this is "virtue," being "*seen* to have the 'right' values—your audience's values, that is"). One lawyer cultivated *ethos* by appearing to read the same newspaper as the jury foreperson. *See* ZITRIN & LANGFORD, *supra* note 1, at 147.

[42] HEINRICHS, *supra* note 11, at 45 (rhetorical "decorum" is the art of "fitting in").

[43] STERN & SALTZBURG, *supra* note 8, at 21-34 ("Establishing Your Rule I").

[44] HEINRICHS, *supra* note 11, at 67-73.

modern social science and psychology. Storytelling influences what jurors think and feel about an advocate's case.[45] This is so because humans are "symbol-using creature[s]" and "story-telling animal[s]"[46] and trials are "shot through with narratives."[47] When jurors interpret and deliberate the evidence in the context of a lawyer's narrative, they are more likely to decide in that lawyer's favor.[48] For these reasons, we teach and encourage lawyers to tell "vivid" stories using "sensory language" and "visceral and visual images."[49]

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[45] DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 101 (2d ed. 1997); Delia B. Conti, *Narrative Theory and the Law*, 39 DUQ. L. REV. 457, 458 (2001) ("The study of law and the practice of law are infused with stories, and, thus, attention must be paid to the inherent power of stories."); *id.* at 457 ("Legal practitioners recognize the importance of storytelling in the courtroom."); ROSE & ROSE, *supra* note 27, at 604 ("Tell stories."); ZITRIN & LANGFORD, *supra* note 1, at 106 ("Those who teach trial techniques—psychologists, sociologists, and yes, acting coaches, as well as lawyers—often emphasize another point: the art of storytelling.").

[46] Conti, *supra* note 45, at 469.

[47] Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 397 (1999).

[48] LISA L. DECARO, THE LAWYER'S WINNING EDGE: EXCEPTIONAL COURTROOM PERFORMANCE 76 (2004); Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 489 (2003) ("A story is simply a tale with a beginning, a middle, and an end. Juror research indicates that the presentation of evidence in story form is more persuasive than merely reciting facts or than organizing a presentation by witness order."); RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 48 (1990) (noting that jurors use stories to organize information to "make sense" of the evidence).

[49] LUBET, *supra* note 22, § 14.5.2 at 506 (discussing importance of "body and hand movement"); MAUET, *supra* note 24, at 25 ("Trials involve much more than merely introducing a set of facts; those facts must be organized and presented as part of a memorable story. Effective storytelling is the basis for much of what occurs during a trial, including the opening statements, direct examinations, and closing arguments."); WEYMAN I. LUNDQUIST, THE ART OF SHAPING THE CASE: SUCCESSFUL ADVOCACY IN AND OUT OF THE COURTROOM 129 (1999) ("A trial needs a storyline."); SCHRAGER, *supra* note 27, at 11 ("In every jury trial the attorneys construct rival stories from testimony and evidence whose meaning is unclear. A trial is a competition over the framing of this ambiguous material"); RICHARD H. LUCAS, THE WINNING EDGE: EFFECTIVE COMMUNICATION AND PERSUASION TECHNIQUES FOR LAWYERS 118-122 (1999) (arguing that lawyers should "examine the techniques used by master storytellers like the Brothers Grimm and Hans Christian Anderson"); CLARK, ET AL., *supra* note 27, at 10 (noting the importance of storytelling during cross-examination); STEFAN H.

In addition, an advocate's movement, demeanor, and body language affect decision making.[50] As a result, a lawyer "must create a sense of credibility and believability" with body language.[51] Moreover, attention to "language, vocabulary, syntax, and dramatization," and the use of pacing, "[r]hythm, rhyming, and repetition," make an advocate's case more memorable.[52] For these reasons, we teach and encourage lawyers to be mindful of posture, to avoid fidgeting, to use gestures, to use their eyes, to consider the importance of hair grooming, clothing, and accessories.[53]

Likewise, social science and psychology inform lawyers on persuasive techniques.[54] Psychology-based methods of persuasion can generate "a distinct kind of automatic, mindless compliance from people, that is, a willingness to say yes without thinking first."[55] For example, decision makers remember best what they hear first ("primacy") and last ("recency").[56] They remember "vivid" descriptions of things and events better than those that are less

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KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION AND PERSUASIVE FACT ANALYSIS 170 (2003) (advising lawyers to be mindful of storytelling "sequencing, perspective, and tone" and to consider "chronological approach," "flashback approach," or "episodic structure").

[50] ROSE & ROSE, *supra* note 27, at 142 ("Persuasion can occur without arguing when movement, language and delivery come together.").

[51] ROSE & ROSE, *supra* note 27, at 140-41.

[52] Laurie C. Kadoch, *Seduced by Narrative: Persuasion in the Courtroom*, 49 DRAKE L. REV. 71, 80 (2000); LUBET, *supra* note 22, § 14.5.3 at 506 (discussing importance of "pacing" speech "to convey perceptions of time, distance, and intensity").

[53] See *generally* BALL, *supra* note 45, at 4-9; BRIAN K. JOHNSON & MARSHA HUNTER, THE ARTICULATE ADVOCATE: NEW TECHNIQUES OF PERSUASION FOR TRIAL LAWYERS 5-55 (2009) (discussing what lawyers should do with their bodies to persuade); *id.* at 27 ("[I]f you want jurors to follow, remember, and be persuaded by what you are saying, you must gesture.").

[54] *See generally* ROBBENNOLT & STERNLIGHT, *supra* note 35; *see also* STERN & SALTZBURG, *supra* note 8, at 64 (noting that social scientists and psychologists have "made a major contribution" to trial advocacy).

[55] ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION xiv (rev. ed. 2007); *id.* at 9-11 (these techniques, which subjects "rarely perceive," allow persuaders to "manipulate without the appearance of manipulation").

[56] JOHNSON & HUNTER, *supra* note 53, at 77-80 (discussing primacy and recency); ROBBENNOLT & STERNLIGHT, *supra* note 35, at 123 (same).

detailed.[57] They have "reptile brains" that are influenced by primitive fear and the biological need for security.[58] They are moved by tribalistic appeals to race,[59] religion, and geography.[60] "Source credibility" and "relational attributes" make advocates who establish "familiarity, similarity, and attraction" with their audiences more persuasive.[61] For these reasons, we teach and encourage lawyers to appeal to the superficial "peripheral route" of

[57] STERN & SALTZBURG, *supra* note 8, at 64; ROBBENNOLT & STERNLIGHT, *supra* note 35, at 122 (noting that because of the "concreteness effect," vivid examples and analogies are more memorable).

[58] KEN BRODA-BAHM, SHELLEY SPIECKER & KEVIN BOULLY, JURY PERSUASION IN AN "ALT-FACT" WORLD 4 (2017) ("The advice boils down to trying plaintiff's cases by portraying the defendant's conduct as a threat to the juror's safety and to community safety. The theory is that, through those threat appeals you awaken the 'reptile brain' within jurors and their motivation to protect themselves and their families. The resulting fear incentivizes the jury to find for the plaintiff."); Ken Broda-Bahm, *Respond to the Reptile*, THE PERSUASIVE LITIGATOR (Dec. 17, 2012) ("By framing arguments in terms of our most biologically basic need for security, the theory goes, plaintiffs are able to successfully tap into jurors' primitive or "reptile" mind. And when the Reptile decides, our conscious mind and reason-giving ability follows."). *See generally* REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).

[59] MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (5th ed. 2016) (noting that the defense team in the O.J. Simpson murder trial "played the race card," by "stressing the virulent racism of Mark Furman."); ZITRIN & LANGFORD, *supra* note 1, at 225 ("'Playing the race card' has become one of the most sensitive and thoroughly discussed issues about the courtroom behavior of lawyers. In the last few years many of the nation's most highly publicized trials have had a major racial component, most often involving the tension between African-Americans and whites or Asians.").

[60] BRODA-BAHM ET AL., *supra* note 58, at 4 ("Families, religious organizations and ethnic groups give individuals a sense of value and community. Before jurors ask themselves, 'What do I think about this attorney's argument,' they implicitly ask, 'How will my agreement or disagreement with this argument impact my identification with my tribe(s)?'"); Corey J Clark, et al., *Tribalism is Human Nature*, 28 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, Issue 6 (Aug. 20, 2019) ("selective pressures have sculpted human minds to be tribal, and group loyalty and concomitant cognitive biases likely exist in all groups"); Caroline Kitchener, *The Trouble with Tribalism*, THE ATLANTIC, Oct. 17, 2018 ("Tribalism, understood as 'groupness' or 'group affiliation,' is rooted in human psychology. Everyone, everywhere, has tribal instincts and the need to belong."); Jared T. Miller, *The Psychology of Tribalism*, NEW YORK MAGAZINE, Sept. 26, 2017.

[61] Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos As Relationship*, 9 LEGAL COMM. & RHETORIC 229, 234 (2012). Some may see this as little more than psychobabble for the rhetorical concept of *ethos*.

human decision making[62] through using primacy, recency, vividness, and other psychology-based techniques such as priming,[63] reciprocation, social proof, liking, authority, and scarcity.[64] We do all of this to help the more learned and better skilled advocate win.

II. WHAT THE RULES PROHIBIT

While classical rhetoric and other persuasion principles are longstanding norms in advocacy, the law and professional conduct rules categorically prohibit lawyers from using them.[65] These prohibitions exist for an important purpose: to further the prescriptive ideal of conducting trials in accordance with the rule of law. Notwithstanding this worthy and unassailable goal, tribunals, lawyers, and regulatory authorities universally ignore the rules that prohibit advocates from appealing to extra-evidentiary information. This Part considers the disconnect between adjudication rules and advocacy norms.

A. Adjudication Rules Prohibit Tribunals from Using Irrelevant Matters in Decision Making

The rule of law is an "ideal that has survived over two millennia" and that has "played a pivotal role in so many contexts."[66] A prominent theme associated with this ideal is that

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[62] ROBBENNOLT & STERNLIGHT, *supra* note 35, at 116. (noting that the "peripheral route" is "more superficial, less effortful" and depends more on "heuristic or peripheral cues that may not be linked to the actual quality of the message.").

[63] Kathyrn M. Stanchi, *The Science of Persuasion*, 2006 MICH. ST. L. REV. 411 (2006) ("Persuasive legal writers may not be familiar with the psychological term 'priming,' but much of the conventional wisdom of legal writing incorporates the concept. Persuasive writers are told to begin their briefs with the strongest arguments, to lead paragraphs with strong thesis sentences, and to precede legal text and rules with strong argumentative statements.").

[64] CIALDINI, *supra* note 55, at xiii.

[65] As one commentator has put it, "legal advocacy is not unbridled rhetoric"; it is located "within a particular rhetorical community with a particular rhetorical culture" and requires compliance with the rules of the lawyering game. *See* Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U.L. REV. 93, 98-99 (1997).

[66] BRIAN Z. TAMANAHA, THE RULE OF LAW: HISTORY, POLITICS, THEORY 114 (2004); Richard H. Fallon, Jr., "*The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) (noting that "The Rule of Law is a much celebrated, historic ideal"); Jeremy Waldron, *The Concept and the Rule of Law*,

we live under "'the rule of law, not man;' a 'government of laws, not men.'"[67] In accordance with this ideal, decisions in our tribunals must be the product of the logical application of law to facts rather than the "unpredictable vagaries" of "judges, governmental officials, or fellow citizens," [68] including those citizens serving on juries. In adjudicative proceedings, decision makers must not succumb to "the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity, or whim."[69] The rule of law requires them to be "truly independent of all influence extraneous to the case to be decided."[70] Thus, the rule of law requires sober decision makers to resolve cases with law, evidence, and reason—not under the influence of *ethos*, *pathos*, or other extra-evidentiary persuasion techniques.[71]

Jury instructions reflect the preeminence of the rule of law in the adjudicative process. Trial judges instruct jurors that they must "determine the facts solely from the evidence admitted in the case"[72] and that any verdict "must be based solely upon the evidence received."[73] Further, judges charge jurors to remain mindful that statements, questions, and arguments by lawyers "are not evidence."[74] Indeed, to give any evidentiary weight to

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43 GA. L. REV. 1, 3 (2008) (describing the rule of law as "one of the most important political ideals of our time"). The ideal of the rule of law—like the principles of rhetoric discussed in Part I—is an important component of the work of Aristotle. *See* TOM BINGHAM, THE RULE OF LAW 3 (2010).

[67] TAMANAHA, *supra* note 66, at 122. The phrase "a government of laws and not of men" is typically attributed to John Adams. *See* 4 THE WORKS OF JOHN ADAMS 106, 230 (Charles Francis Adams ed., 1851). It is a core principle of the rule of law in the United States. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws and not of men.").

[68] TAMANAHA, *supra* note 66, at 122.

[69] *Id.*

[70] BINGHAM, *supra* note 66, at 93.

[71] As one court succinctly put it: "A jury should reach its verdict based upon the evidence presented at trial, not each juror's preferences or feelings in their heart or gut." State v. Craven, 475 P.3d 1038, 1044 (Wash. Ct. App. Div. 1 2020).

[72] 1A KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10:01 (6th ed. 2022); *id.* ("This evidence consists of the testimony of witnesses and exhibits received.").

[73] *Id.* § 20:01; *see, e.g.*, *State v. Craven*, 475 P.3d at 1044 (approving instruction that jury must make "an intellectual, not an emotional, decision").

[74] *Id.* § 10:01; *see also* 3A KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 103:30 (6th ed. 2022) ("The

anything said or alluded to by lawyers would violate the jurors' "sworn duty" to base a verdict only on "the evidence received in the case and the instructions of the Court."[75]

Likewise, rules of evidence implement the rule of law by limiting extraneous inputs into the decision-making process. For example, Federal Rule of Evidence 402 provides that "[i]rrelevant evidence is not admissible."[76] Rule 401 defines evidence to be "relevant" only if it has some logical bearing on the issues before the court, namely, if it has a "tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the action."[77] Rule 403 excludes even logically relevant evidence when "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury," and similar concerns.[78] These relevancy rules serve the rule of law by excluding information that "has a tendency to influence by improper means," by "appeals to the jury's sympathies" or by otherwise leading "a jury to base its decision on something other than the established propositions in the case."[79] In discouraging decision making on "a purely emotional basis,"[80] these rules are at the core of "'the very conception of a rational system of evidence.'"[81]

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lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times . . . is not evidence."); *see also, e.g.,* Lovett ex rel. Lovett v. Union Pacific R.R., 201 F.3d 1074, 1083 (8th Cir. 2000) (favorably quoting district court instruction that jurors cannot allow "sympathy, prejudice" or "arguments, statements, or remarks of attorneys" to influence decision).

[75] *Id.* § 12:02.

[76] FED. R. EVID. 402.

[77] *Id.* r. 401.

[78] *Id.* r. 403.

[79] State v. Davidson, 613 N.W.2d 606, 623 (Wis. 2000). *See generally* Cathren Koehlert-Page, *Tell Us a Story But Don't Make it a Good One: Embracing the Tension Regarding Emotional Stories and Federal Rule of Evidence 403*, 84 MISS. L.J. 351, 356-57 (2015); McCormack, *supra* note 20, at 140-41 ("there are those that have argued that emotions are not only present in the courtroom, but dispositive in jury trials to the detriment of justice").

[80] FED. R. EVID. 403 advisory committee's note to 1972 proposed rules.

[81] FED. R. EVID. 402 advisory committee's note to 1972 proposed rules (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE 264 (1898)); *see also* Bruton v. United States, 391 U.S. 123 (1968) (noting that an important element of a fair trial is that the jury consider only relevant and competent evidence); *see also* PAUL THAGARD, HOT THOUGHT: MECHANISMS AND

When juries go astray from rule-of-law jury instructions, courts fix their errors.[82] For example, one district court ordered a new trial when the verdict was "the product of impermissible speculation, sympathy, and emotion."[83] Said the court: "The jury decided the case with its viscera, not its reasoning, and therefore permitting the verdict to stand would constitute the gravest miscarriage of justice."[84] Many other decisions are in accord.[85]

B. Professional Conduct Rules Prohibit Lawyers from Appealing to Extra-Evidentiary Matters

Professional conduct rules conscript lawyers in the cause of furthering the rule of law in adjudicative proceedings. Indeed, "ethics" rules impose limits on advocacy to protect the integrity of

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APPLICATIONS OF EMOTIONAL COGNITION 155-56 (2006) ("if emotional bias helps to prevent the jury from arriving at true answers, then . . . [its] influence . . . would seem to be normatively inappropriate" and that in an ideal system the influence of emotion should be "minor" compared to "the rational assessment" of the evidence); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 51-54 (2006) (criticizing role of a juror's conviction based on subjective feelings because deliberations should be a rational process of "reasoning through the evidence"); *see also* D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force": Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 445 (1998) (noting that "the horror of the crime changes the operational notion of what constitutes a reasonable doubt"); HEINRICHS, *supra* note 11, at 83 (noting that the "tools of *pathos* work "for good" and "as well for evil").

[82] STERN & SALTZBURG, *supra* note 8, at 48 (noting that courts "will nullify jury verdicts if they conclude that the jury has been deflected from a 'rational' determination of the facts under the law applicable to the case"); MAUET, *supra* note 24, at 437 ("In egregious cases, this may cause a mistrial and, if intentionally done, may bar a retrial."); *see also, e.g.*, Moore v. Morton, 255 F.3d 95, 117 (3d Cir. 2001) ("By asking the jury to factor their understandable sympathy for the victim of this horrible crime into deciding . . . guilt or innocence, the prosecutor made an impermissible request to decide guilt on something other than the evidence. Courts applying Supreme Court precedent have found that similar appeals for jurors to decide cases based on passion and emotion were improper."); State v. Papst, 996 P.2d 321, 324-29 (Kan. 2000).

[83] Fineman v. Armstrong World Indus., Inc., 774 F. Supp. 266, 269 (D.N.J. 1991).

[84] *Id.*

[85] *See, e.g.*, Draper v. Airco, Inc., 580 F.2d 91, 96-97 (3d Cir. 1978); Koufakis v. Carvel, 425 F.2d 892, 904 (2d Cir. 1970); Polansky v. CNA Ins. Co., 852 F.2d 626, 630 (1st Cir. 1988).

tribunals and to promote just decision making.[86] Because lawyer "zeal cannot go unchecked," courts enforce these standards "to ensure that advocacy supports instead of erodes justice."[87] Thus, professional conduct rules universally prohibit advocates from appealing to irrelevant matters such as inadmissible evidence, emotion, and their own knowledge or trustworthiness.[88] The most significant of these rules, Model Rule of Professional Conduct 3.4(e), provides as follows:

> A lawyer shall not ... (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.[89]

The principles in this rule are not new. The earliest 19th century lawyer conduct standards published by Hoffman, Sharswood, and others contained similar prohibitions.[90] The 1908

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[86] Ethical limitations on lawyer advocacy exist to maintain "the efficiency and respectability" of tribunals, and to assure that trials "are, and are perceived to be, even-handed and fair." HAZARD ET AL., THE LAW OF LAWYERING § 29.04, at 29-9 (4th ed. 2021).

[87] Mount Hope Church v. Bash Back!, 705 F.3d 418, 426 (9th Cir. 2012).

[88] In furthering the rule of law, these rules limit the ability of lawyers to advocate on behalf of their clients. This is yet another example of tension between, on the one hand, a lawyer's responsibilities "to clients," and, on the other hand, "to the legal system." "Virtually all difficult ethical problems" arise from that tension. *See* MODEL RULES OF PRO. CONDUCT preamble ¶ 9 (AM. BAR ASS'N 1983); *see also* JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 165 (2d. ed. 2007) (noting that a lawyer's "legal or ethical duties" preclude "strategically desirable, or even indispensable, arguments" when ethical responsibilities conflict with "the best possible case on the client's behalf").

[89] MODEL RULES OF PRO. CONDUCT r. 3.4(e) (AM. BAR ASS'N 1983).

[90] *See, e.g.,* DAVID HOFFMAN, FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPORTMENT ¶ 47 (1836) ("[m]y resolution, therefore, is to respect courts, juries, and counsel as assailable only through the medium of logical and just reasoning"); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 43 (1860) (if a lawyer's opinion "has been formed on a statement of facts not in evidence, it ought not to be heard,—it would be illegal and improper in the tribunal to allow any force whatever to it"); AL. CODE OF ETHICS Canon 22 (AL.

ABA Canons of Professional Ethics prohibited a lawyer from asserting as a fact "that which has not been proved" or offering evidence that "he knows the Court should reject" or currying favor with jurors "by fawning, flattery or pretended solicitude for their personal comfort."[91] The 1969 ABA Model Code of Professional Responsibility prohibited a lawyer appearing in a "professional capacity before a tribunal" from alluding to any matter that the lawyer had "no reasonable basis to believe" was relevant or that would "not be supported by admissible evidence," asking irrelevant questions, asserting "personal knowledge of the facts in issue," or asserting a "personal opinion" as to the justness of a cause, the credibility of a witness, or the guilt of the accused.[92]

Other ABA model rules and standards similarly prohibit lawyer advocates from alluding to inadmissible matters or injecting false inputs into the decision making of tribunals. Model Rule 3.3(a) prohibits a lawyer from making a false statement to a tribunal or offering false evidence.[93] Model Rule 3.4(c) prohibits a lawyer from disobeying an obligation to a tribunal.[94] Model Rule 3.7 limits the extent to which a lawyer appearing before a tribunal can serve as both advocate and witness.[95] Model Rule 8.4(d) prohibits a lawyer

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STATE BAR ASS'N 1887) ("Candor and Fairness") (prohibiting a lawyer from asserting a fact "which has not been proved" or offering "evidence which he knows the Court should reject, in order to get the same before the jury by argument"); *id.* Canon 15 ("How Far a Lawyer May Go in Supporting a Client's Cause") (prohibiting a lawyer from asserting "his personal belief in his client's innocence or in the justice of his cause").

[91] CANONS OF PRO. ETHICS Canons 22-23 (AM. BAR ASS'N 1908) (addressing candor, fairness and "attitude toward jury").

[92] MODEL CODE OF PRO. RESP. DR 7-106 (AM. BAR ASS'N 1969) (addressing "trial conduct"). This rule also prohibited a lawyer from failing to "comply with known local customs of courtesy or practice of the bar or a particular tribunal," engaging in "undignified or discourteous conduct" that was "degrading to a tribunal," or "intentionally or habitually" violating any "established rule of procedure or of evidence." *Id.* DR 7-106(5-7).

[93] MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983) ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . (3) offer evidence that the lawyer knows to be false.").

[94] MODEL RULES OF PRO. CONDUCT r. 3.4(c) (AM. BAR ASS'N 1983) ("A lawyer shall not . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.").

[95] MODEL RULES OF PRO. CONDUCT r. 3.7 (AM. BAR ASS'N 1983); *see also* Matter of Est. of Waters, 647 A.2d 1091, 1098 (Del. 1994) ("Rule 3.7 and Rule

from engaging in conduct that is "prejudicial to the administration of justice."[96] Similarly, ABA Criminal Justice Standards prohibit a prosecutor from expressing "personal opinion, vouching for witnesses" making "inappropriate appeals to emotion," implying "special or secret knowledge of the truth or of witness credibility," appealing to "improper prejudices of the trier of fact," or making arguments that "seek to divert the trier of fact" from deciding the case only "on the evidence."[97] Likewise, they prohibit a defense lawyer from expressing "personal opinion, vouching for witnesses," from making "inappropriate appeals to emotion," asking improper questions alluding to facts not in evidence, or making "arguments calculated to appeal to improper prejudices."[98]

Finally, the 2000 American Law Institute *Restatement of the Law Governing Lawyers* prohibits a lawyer from stating a "personal opinion about the justness of a cause" or "the credibility of a witness" while "in the presence of the trier of fact."[99] It prohibits a lawyer from alluding to any matter that "the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."[100] The professional conduct regulations in

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3.4(e) both prohibit the mixing of advocacy and testimony . . . . There are multiple threats to the integrity of the judicial proceedings if a trial advocate also testifies as a trial witness regarding a contested issue . . . .").

[96] MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983) ("It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.").

[97] CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION stds. 3-6.5(c) & 3-6.8(b-c) (4th ed. 2017).

[98] CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION stds. 4-7.5(c), 4-7.7(d) & 4-7.8(c-d) (4th ed. 2017).

[99] RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS § 107(1) (AM. L. INST. 2000) ("Prohibited Forensic Tactics"). This section "is designed to prevent interjection of the lawyer's own credibility into the issues to be decided." *Id.* § 107 cmt. b.

[100] *Id.* § 107(2). The remedies for a violation of these principles include discipline, order of retraction, curative instructions, mistrial, dismissal or default, contempt sanctions, or permitting the opponent "to resort to retaliatory advocacy." *Id.* § 107 cmt. d. However, appellate courts are loathe to reverse trial court judgments for such lawyer conduct. *See* RONALD L. CARLSON ARGUMENT TO THE JURY AND THE CONSTITUTIONAL RIGHT OF CONFRONTATION 296-97 (1973) ("Typically, courts have treated digression from the record as opprobrious conduct, but not reversible error.").

every state are in accord with this restatement and with the ABA's model standards in forbidding such lawyer conduct.[101]

These "ethics" rules and standards prevent "[t]rial maneuvers" that are "calculated to suggest to the factfinder (especially a jury) legally irrelevant and otherwise inadmissible evidence or considerations."[102] They are "not based on etiquette, but on justice" and serve to channel fact-finders into determining the issues on "the evidence."[103] Further, they strive to assure "[f]air competition in the adversary system."[104] After all, to allow a lawyer to go "outside the record" leaves the lawyer's adversary without an opportunity to "meet or cross-examine" the facts.[105] To this end, the rules ban "common 'tricks of the trade,'" such as asking improper questions or alluding to matters not in evidence in the hope "that the trier of fact will not be able to 'unring the bell,' even after the court gives a cautionary instruction."[106]

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[101] The supporting authorities from across the United States are numerous. For a representative sample, see CA. RULES OF PRO. CONDUCT r. 3.4(g) (2018); D.C. RULES OF PRO. CONDUCT r. 3.4(e) (1991); FL. RULES OF PRO. CONDUCT r. 3.4(e) (2021); IL. RULES OF PRO. CONDUCT r. 3.4(e) (2009); LA. RULES OF PRO. CONDUCT r. 3.4(e) (2004); N.Y. RULES OF PRO. CONDUCT r. 3.4(d) (2009); PA. RULES OF PRO. CONDUCT r. 3.4(c) (1988); Tx. DISCIPLINARY RULES OF PRO. CONDUCT r. 3.04(c) (1989). Outside of the United States, lawyer conduct codes generally prohibit lawyers from providing "false or misleading information" to tribunals and from disregarding the "fair conduct of proceedings." *See generally* CODE OF CONDUCT FOR EUROPEAN LAWYERS § 4.2-4.4 (COUNCIL OF BARS & LAW SOCIETIES OF EUROPE 2019). However, they do not appear to prohibit allusions to extra-evidentiary information or assertions of personal opinions in provisions similar to Model Rule 3.4(e).

[102] RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS § 107 cmt c (AM. L. INST. 2000); Ronald L. Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, 33 ST. LOUIS U. L.J. 787, 803 (1989) ("A network of modern rules was established to eliminate from jury speeches matters not in the record, emotional arguments designed solely to appeal to jurors' prejudices and other improprieties.").

[103] Cherry Creek Nat'l Bank v. Fidelity & Cas. Co., 202 N.Y S. 611, 614 (1924) (A "violation is not merely an overstepping of the bounds of propriety, but a violation of a party's rights. The jurors must determine the issues upon the evidence. Counsel's address should help them do this, not tend to lead them astray.").

[104] MODEL RULES OF PRO. CONDUCT r. 3.4 cmt. 1 (AM. BAR ASS'N 1983).

[105] STERN & SALTZBURG, *supra* note 8, at 14.

[106] HAZARD ET AL., *supra* note 86, § 33.14, at 33-35; *see also* Carlson, *supra* note 102, at 805 ("[T]he rule is clear: an attorney cannot in argument allude to information that is unsubstantiated by the evidence—in particular to non-record

C. These Rules Prohibit Widely Accepted Persuasion Methods

The law governing trials clearly prohibits the admission of irrelevant evidence. It excludes relevant evidence that would unduly influence the emotions of decision makers. And it restricts the deliberations of fact finders to the law and admitted evidence only.[107] Complementary rules regulating lawyer conduct likewise prohibit advocates from alluding to irrelevant matters, appealing to emotion, and asserting personal knowledge and opinions about disputed facts.[108] Taken together, these laws and rules governing trial practice, evidence, and lawyer conduct categorically prohibit the use of ancient principles of rhetoric and a host of other widely accepted persuasion techniques.[109] After all, these techniques—old and new—overtly or covertly encourage decision makers to decide cases illogically[110] using irrelevant and inappropriate extra-evidentiary factors. So, the law and rules prohibit advocates from

facts which go to the merits of the case. Arguments where the attorney intentionally argues on the basis of facts outside the record not only violate fundamental trial precepts but also constitute unprofessional conduct."); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 161 (2009) ("[I]f you intentionally argue to see if you can get away with it, you are acting unethically whether or not the opponent objects").

[107] *See* Part II.A at 13.

[108] *See* Part II.B at 16. Some commentators have contended that the ethics rules are gray in this context. *See* GARDNER, *supra* note 88, at 165 ("Lawyers and courts have long struggled to identify the precise circumstances in which lawyers' ethical duties require them to refrain from making arguments that their syllogistic methodology tells them they should or must make to win their cases."). However, there is nothing gray about the black letter law in Model Rule 3.4(e). *See* MODEL RULES OF PRO. CONDUCT r. 3.4(e) (AM. BAR ASS'N 1983) ("A lawyer shall not . . . allude . . . .").

[109] They do so by the plain language of their text—irrespective of whether the drafters intended to sweep persuasion techniques within the scope of these rules. The drafters certainly did not say they were excluding persuasion techniques. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 21 (2012) ("One thinks of A.P. Herbert's fictional Lord Mildew, who was probably exasperated with purposivist arguments when he proclaimed: 'If Parliament does not mean what it says it must say so.'") (quoting A.P. HERBERT, UNCOMMON LAW 313 (1935)).

[110] ALDISERT, *supra* note 10, at 144 (noting that "Fallacies of Irrelevant Evidence are arguments that miss the central point at issue and rely principally upon emotions, feelings and ignorance"). Said Judge Aldisert about illogical arguments containing logical fallacies: "They shift attention from reasoned argument to other things that are always irrelevant, always irrational and often emotional." ALDISERT, *supra* note 10, at 174-75.

using *pathos*.[111] They prohibit *ethos*.[112] They prohibit storytelling[113] and body language and grooming and primacy and reptile-brain appeals and tribalistic[114] arguments and lapel pins. All of it.

But lawyers use these persuasion techniques every day.[115] Law students learn them in law schools. Instructors teach them in continuing legal education classes.[116] Judges permit them in their courtrooms. And lawyer regulators don't care.[117] Rather than being subjected to discipline,[118] sanctions, or even the opprobrium of

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[111] Spottswood, *supra* note 27, at 42 ("[J]urors find themselves positioned awkwardly in the middle, caught between advocates who strive to engage their feelings and judges who demand that they perform heroic feats of emotional control.").

[112] Stern and Saltzburg have observed that it is "a violation of ethical rules for a lawyer to express his personal opinion in the courtroom." STERN & SALTZBURG, *supra* note 8, at 13. "Yet that is what every good trial lawyer has striven to do." *Id.* at 14.

[113] *See* CLARK ET AL., *supra* note 27, at 11 (noting that "ABA Rule of Professional Conduct 3.4 and case law impose limitations on this good-versus-evil storytelling approach" in cross-examination). After all, skilled trial lawyers understand "the persuasive benefits inherent in the medium of narrative"; the "use of narrative taps into old story scripts that linger in the minds of jurors and undermines the goal of rational decision-making." Kadoch, *supra* note 52, at 76; *id.* at 72 ("Our system of law and the legal reporting of law, however, sanitizes each story by reducing it to 'legal issues' and 'relevant facts' to promote rational decision-making.").

[114] MAUET, *supra* note 24, at 438 ("[a]sking the jury to base its verdict on some personal characteristic of a party, such as race, sex, or citizenship, is obviously improper").

[115] Said Judge Aldisert, these techniques "are ploys, but ploys that are used every day, everywhere." ALDISERT, *supra* note 10, at 174-75. One commentator noted that lawyers who "get squeamish" and have "ethical doubts" about using irrelevances to persuade will perform less well "in the heat of battle." SCHRAGER, *supra* note 27, at 213.

[116] The advice of many trial advocacy experts "seems to fly in the face of the ethics rules." STERN & SALTZBURG, *supra* note 8, at 16.

[117] Indeed, *none* of the means of engendering compliance with professional conduct rules has discouraged the use of these advocacy techniques—neither "understanding and voluntary compliance" nor "peer and public opinion" nor "enforcement through disciplinary proceedings" has curbed the use of those techniques. *See* MODEL RULES OF PRO. CONDUCT scope ¶ 16 (AM. BAR ASS'N 1983).

[118] There are no reported decisions from any jurisdiction in the United States in which a court imposed discipline on a lawyer for using any of the rhetoric principles or other persuasion techniques described in Part I. Decisions imposing

peers,[119] lawyers who use these extra-evidentiary persuasion techniques are revered. The proverbial bell atop the courthouse rings to summon other lawyers when such masters are at work.

Therein lies the disconnect. On the one hand, long-standing laws and rules governing evidence, procedure, and lawyer conduct categorically prohibit these extra-evidentiary persuasion techniques. On the other hand, longer-standing advocacy norms—many dating back more than two millennia—permit and encourage them because they work.[120] Thus, although there are strict rules regulating lawyers' use of these techniques in their "rhetorical community,"[121] no one in that community follows or enforces them. To paraphrase the title of Roscoe Pound's famous article, there is a divergence between the law in the books and the law in action.[122]

How did this come to be? Maybe it never occurred to the drafters of evidence and professional conduct rules that the broad, prohibitory language that they chose forbids even widely accepted advocacy norms.[123] Maybe the drafters were thinking about only

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discipline on lawyers for appealing *overtly* to emotion or asserting personal opinions are few in number and limited to only the most egregious and prejudicial misconduct. *See, e.g.*, Matter of Vincenti, 704 A.2d 927, 940 (N.J. 1998); Matter of Ungar, 89 A.2d 995 (N.J. App. Div. 1978); In re Alexander, 10 N.E.3d 1241, 1242 (Ind. 2014); In re Swarts, 30 P.3d 1011 (Kan. 2001); In re Brittain, 827 N.W.2d 887 (Wis. 2013); In re Favata, 119 A.3d 1283, 1289 (Del. 2015); In re Hall, 789 A.2d 645 (N.J. 2002). *Cf.* In re Rudie, 622 P.2d 1098, 1105 (Or. 1981) (noting that courts often overlook expressions of personal opinion by counsel during oral argument and finding breach of rule to be "de minimis").

[119] Typically, lawyers whom the profession views as "unprofessional" are subject to such opprobrium. *See* RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 105 cmt. e (2000) (noting that violations of professionalism guidelines and civility codes "are meant to carry the professional sanction of peer opprobrium").

[120] RIEKE & STUTMAN, *supra* note 48, at 142 ("Trial lawyers have reported for years that evidence, both admissible and inadmissible, plays the central role in the courtroom drama."); *id.* at 55 ("[T]he vigor with which advocates argue for their clients often interjects bias and supplants credible evidence."); Alschuler, *supra* note 2, at 309 (arguing that one of the reasons O.J. Simpson won the "trial of the century" was that his defense lawyers found "ways to get information and misinformation to the jury outside the courtroom").

[121] Sammons, *supra* note 65, at 99.

[122] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

[123] But, a contemporaneous critic of the drafters' work complained that the rule "totally ignores the dynamics of litigation" and its effect would be "to destroy advocacy and require[e] the lawyer to practice at his or her peril." AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA

the most egregious instances of misconduct in which lawyers *overtly* infect adjudicative proceedings with emotions, personal opinions, and inadmissible information. Maybe judges, lawyers, and regulators operating under these rules have never paused to consider the clear applicability of these rules to persuasion techniques used every day in American courthouses.[124]

However they came to be, these rules have always been "too much at variance with the actual situation to find acceptance" with regard to persuasion techniques.[125] The universal lack of acceptance by judges, lawyers, and lawyer regulators is not due to a coordinated conspiracy to flout the plain language of categorical rules. Rather, it is likely that everyone simply has taken a "cue" of approval from others, namely, from the lawyers, advocates and orators who have followed the "lore of the profession" and used these techniques with impunity for millennia.[126]

III. HARMONIZING ADJUDICATION RULES WITH ADVOCACY NORMS

So, what should be done? This Part considers what, if anything, rule makers and lawyer regulators should do about the disharmony among current adjudication standards, professional conduct rules, and advocacy norms.

A. Do Nothing?

Perhaps nothing should be done. After all, very few commentators have recognized—much less criticized—the disconnect between the imperative rules prohibiting extra-

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MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 486 (Art Garwin ed. 2013) [hereinafter ABA MODEL RULES LEG. HIST.].

[124] Or maybe the ethical issues associated with persuasion techniques were not high on their lists of concerns. *Cf.* Austin Sarat, *Ethics in Litigation: Rhetoric of Crisis, Realities of Practice* in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 145, 159 (Deborah L. Rhode, ed., 2000).

[125] Pound, *supra* note 122, at 27.

[126] *See* Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 FORDHAM L. REV. 1429, 1440 (2006) ("Lawyers and law firms, the most legally sophisticated regulated individuals and entities, took their cue from others. Junior lawyers looked at what senior lawyers did. Senior lawyers looked at what other lawyers in their firms and other firms had previously done, perhaps assuming that someone earlier down the line had closely analyzed the question. Perhaps the law firm's "ethics" lawyer—if it had one—read some cases. But for most lawyers, the lore of the profession was more important than the case law.").

evidentiary allusions and long-standing advocacy norms.[127] Professor Hazard, although mindful of the disconnect, thought it best to leave such issues to the enforcement discretion of disciplinary counsel. He contended that Model Rule 3.4(e) should not "be read to prohibit all such tactics of their own force."[128] Rather it "is generally acceptable as an admonition that there is a distinction between advocacy and testimony, and that advocates must make an effort to stay on the proper side of the line."[129] Thus, the exercise of regulatory discretion allows leeway for lawyers navigating around such "imperative rules," with discipline to be imposed only when a "lawyer has clearly abused his or her discretion."[130]

The problem with Professor Hazard's view of Rule 3.4(e) is that the rule's express language is categorical.[131] It is not "pregnant

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[127] *See* STERN & SALTZBURG, *supra* note 8, at 13-14 (noting that it is a "violation of the ethical rules for a lawyer to express his personal opinion . . . . Yet that is what every trial lawyer has striven to do."); HAZARD ET AL., *supra* note 86, § 33.14, at 33-37 (discussing ethical line between expressing lawyer opinions subtly and improperly); Koehlert-Page, *supra* note 79, at 356-57 (noting that because stories sway emotions there is "inherent and confusing tension between the advice to tell emotionally evocative stories and the proscription against unduly prejudicial evidence"); Lori D. Johnson, *Melissa Love Koenig, Walk the Line: Aristotle and the Ethics of Narrative*, 20 NEV. L.J. 1037, 1055 (2020) (noting tension "between candor and zeal in the use of story" and observing that the "ethical use of storytelling exists in the shadow of . . . legal ethics"); ZITRIN & LANGFORD, *supra* note 1, at 148 (questioning whether extra-evidentiary persuasion tactics should "be prevented if the impressions they leave don't directly relate to the admissible evidence in the case").

[128] HAZARD ET AL., *supra* note 86, § 33.16. Professor Hazard likely would have characterized this rule as a "seemingly 'imperative' rule" that is "pregnant with discretionary nuances." *Id.* § 1.25.

[129] HAZARD ET AL., *supra* note 86, § 33.14. This is a "subtle judgment" call which is "an inescapable element of a lawyer's professional responsibility." *Id.* § 1.26.

[130] HAZARD ET AL., *supra* note 86, § 1.26. Although Professor Green did not address Rule 3.4(e), he has discussed the selective nonenforcement of "overly broad" rules as a "generally legitimate enforcement strategy, especially in the case of regulatory law." *See* Green, *supra* note 126, at 1442 ("a legislature may intentionally draft an overly inclusive law with the expectation that regulatory authorities will not seek to enforce the law at the margins").

[131] The "Scope" section of the Model Rules notes that "[s]ome of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline." MODEL RULES OF PRO. CONDUCT scope ¶ 14 (AM. BAR ASS'N 1983). Model Rule 3.4(e) is one such "imperative" rule.

with discretionary nuances" and it admits no exceptions. In contrast, other rules employ more flexible and discretion-conferring terms, such as the terms "material" (Rule 4.1), "substantial" (Rule 8.3), and "unreasonable" (Rule 1.5). Such terms provide wide leeway for a broad range of acceptable lawyer conduct.[132] Rule 3.4(e) does not.

The bigger problem with doing nothing, however, is that inaction would maintain a procedural and regulatory framework for adjudication that runs afoul of "formal legality"—a universally understood component of the rule of law.[133] Formal legality requires the government to enforce the law as written. In his classic monograph on legality and the rule of law, *The Morality of Law*,[134] Lon Fuller noted that a "distinct rout[e] to disaster" in creating and maintaining a system of legal rules is "a failure of congruence between the rules as announced and their actual administration." Said Fuller:

> Surely the very essence of the Rule of Law is that . . . a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.[135]

Commentators universally agree that congruence is critical in a legal system that adheres to the rule of law.[136] Indeed, congruence

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[132] HAZARD ET AL., *supra* note 86, § 1.25-1.26.

[133] "Formal legality" is the "dominant understanding of the rule of law among legal theorists . . . ." TAMANAHA, *supra* note 66, at 111. *See generally* Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127 (1993); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L.467 (1997).

[134] LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

[135] *Id.* at 210; *see also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 1 (1997) (noting that from a Wittgensteinian perspective a "rule would cease to exist if we (the relevant community) stopped apprehending it as a rule and stopped recognizing ourselves and others as acting under it").

[136] TAMANAHA, *supra* note 66, at 93 (noting that Fuller's "highly influential formation of the rule of law, which he called 'legality,'" required "consistency between the rules and the actual conduct of legal actors"); SCOTT J. SHAPIRO, LEGALITY 394 (2011) (discussing Fuller and noting that legal standards must actually be "applied"); Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1467 (2010) (noting that Fuller's list of rule of law virtues, which includes congruence, is the "most famous . . . in modern jurisprudence"); Timothy Stostad, *An Unobeyable Law is Not a Law: Lon Fuller's "Desiderata"*

is one of the "fundamental normative commitments on which a legal system rests."[137]

Considering the importance of the rule of law in general[138] and congruence in particular, doing nothing is untenable. As written, anti-persuasion evidentiary and ethics rules pay tribute to the worthy prescriptive ideal that our judicial system resolves cases in accordance with the civics book lore: by applying law to facts. As unenforced, however, these rules are effectively ceremonial—more propaganda than law.[139] What a paradox: anti-persuasion rules that exist to further the rule of law run afoul of the rule of law themselves. For that reason, something should be done.

B. Enhance Enforcement of Existing Rules?

Perhaps trial court judges and lawyer disciplinary authorities should actually enforce the existing anti-persuasion rules and

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Reconsidered, 7 DREXEL L. REV. 365 (2015) (noting that Fuller "famously enumerated as law's 'desiderata'" the "formal features" of the rule of law in "his allegory of King Rex and the 'Eight Ways to Fail to Make Law'"); Richard Stacy, *The Magnetism of Moral Reasoning and The Principle of Proportionality in Comparative Constitutional Adjudication*, 67 AM. J. COMPARATIVE LAW 435, 797 (2019) ("Predictable government behavior that is congruent with stable legal rules is a hallmark, and a virtue, of the rule of law."); Kitta Nrimmee & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105, 116 (2002) (noting that the rule of law requires "congruence with existing social norms, practices, and aspirations"): Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1671 (2009) (placing "in the statute books 'legal' commands that will not be enforced . . . is repugnant to the Rule of Law"); Richard Stacey, *Falling Short of Constitutional Norms: Does "Normative (In)Congruence" Explain the Court's Inability to Promote the Right to Water in South Africa*, 43 LAW & SOC. INQUIRY 796, 797 (2018) ("government behavior that is congruent with stable legal rules is a hallmark, and a virtue, of the rule of law").

[137] Stacy, *supra* note 136, at 473.

[138] *See infra* note 66 and accompanying text; *see also* Rodriguez et al., *supra* note 136, at 1456-57 ("Reformers, and many scholars, insist that the rule of law . . . is an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as economic development and social progress. Political and legal theorists identify the rule of law as essential to a justice-seeking polity. This connection is frequently seen as grounded in democracy, human freedom, equality, justice, economic well-being, national identity, or, as with Lon Fuller, in the 'inner morality' of law.").

[139] *See* Michele Cotton, *Taking the Rule of Law Seriously*, 17 U. MASS. L. REV. 2, 10-11 (2022) (discussing problem of lack of congruence "between norms as stated and norms as applied").

prohibit lawyers from alluding to extra-evidentiary information. After all, these rules are on the books and no credible argument can be made that desuetude[140] or some other doctrine should bar judges and regulators from enforcing them.

But how would that work? Would disciplinary enforcers go on the hunt for lawyers appearing trustworthy and presenting emotional narratives? If so, how would those enforcers detect violations and catch violators given that many persuasion methods work only because they are subtle or covert?

Furthermore, although we pay lip service to the prescriptive ideal of the evidence-only decision maker, we send mixed messages about the extent to which emotion does and should play in adjudication.[141] As a descriptive matter, we know that the courthouse doors have long been open to emotion and, once through those doors, emotion moves decision makers.[142] For example, the United States Supreme Court in *Old Chief v. United States*[143] recognized the power and acceptability of trial lawyers appealing to emotion. There, the defendant offered to stipulate to his prior conviction in a felon-with-a-firearm prosecution to prevent the jury

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[140] Desuetude is a "doctrine by which a legislative enactment is judicially abrogated following a long period of intentional nonenforcement and notorious disregard." Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17-22 (1982). For desuetude to apply, however, the enactment must be "basically obsolete." *See* United States v. Elliott, 266 F. Supp. 318, 325 (S.D.N.Y. 1967) (quoted in United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070, 1083 (D. Co. 1999)). Moreover, the public must no longer support "the moral argument that lies behind" the enactment. *See* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 50-51 (2003). The courts, the profession, and the public undoubtedly still support the rule-of-law rationale that underlies Model Rule 3.4(e), Federal Rule of Evidence 401 and 402, and similar rules.

[141] Justice Robert Jackson opined that "dispassionate judges" who are uninfluenced by emotion are as real as "Santa Claus or Uncle Sam or Easter bunnies." United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

[142] *See generally* DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 91-121 (2012); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 148 (1986); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001); James Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197, 221 (1963).

[143] 519 U.S. 172 (1997).

from learning about it. While the Court ruled in his favor,[144] it famously observed that evidence often "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."[145] Some evidence, though logically unnecessary, is admissible "not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings" and to "satisfy the jurors' expectations about what proper proof should be."[146] Though illogical, emotional evidence is often admissible.

As *Old Chief* suggests, decisions guided in part by hunch and gut and emotion and intuition may not be altogether bad. In his classic book *Thinking, Fast and Slow*, Nobel laureate Daniel Kahneman contended that human "thoughts and actions are routinely guided by System 1"—thinking fast heuristics—and that System 1 decisions "generally are on the mark."[147] For this reason, many have argued as a normative matter that System 1 thinking, including reliance on emotion, should play a greater and more overt role in the process of adjudication.[148] So, maybe we don't hate emotional evidence as much as we constantly say we do.

Finally, enforcing rules that are contrary to two thousand years of advocacy practice is simply unrealistic. As succinctly put by a British politician: "If you have a set of rules which conflict with

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[144] *See id.* at 191-92. The Court ruled that the lower courts should have admitted the defendant's admission and excluded the felony conviction because there was "no cognizable difference" between their "evidentiary significance." *Id.*

[145] *Id.* at 187.

[146] *Id.* at 187-88. The Court memorably concluded that "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." *Id.* at 189.

[147] DANIEL KAHNEMAN, THINKING, FAST AND SLOW 416 (1st ed. 2011).

[148] *See, e.g.*, Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings*, 93 TEX. L. REV. 855 (2015); Richard A. Posner, *Emotions Versus Emotionalism in Law*, in THE PASSIONS OF LAW 309, 310 (Susan A. Bandes ed., 1999); ROBIN WEST, NARRATIVE, AUTHORITY & LAW 247-48, 258-59 (1993); William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988). *See generally* Spottswood, *supra* note 27, at 97-101 (proposing a three-pronged approach to managing emotional evidence at trial: "rule reform, judicial education, and a new procedure for raising evidentiary objections during bench trials").

reality, then reality normally wins."[149] That's why anti-persuasion rules aren't strictly enforced now. And that's why they can't and won't be strictly enforced in the future. In short, although something must be done about unenforced anti-persuasion rules, that something is not enhanced enforcement.

C. Permit Advocates to Appeal to Irrelevant Matters?

Perhaps adjudication and ethics rules should be amended to *expressly* permit lawyers to appeal to irrelevant matters and to assert their personal opinions on contested matters before tribunals. After all, doing so would truthfully reflect the reality of what advocates have been doing for millennia.

But we can't handle that truth.[150] To expressly permit tribunals to receive and weigh irrelevancies would abandon the prescriptive ideal that courts resolve cases using only admissible evidence. By expressly excluding irrelevancies, the current anti-persuasion rules perform more than the traditional functions played by laws and sanctions.[151] They also perform an "expressive function" by pronouncing a "social judgment"[152] about the value we collectively place in the notion that tribunals adjudicate cases in strict accord with the rule of law. Even if tribunals don't really work that way, we can't admit it. If we did, what would be the point of the robes, the law books, and the courthouses?

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[149] Michael J. Glennon, *How International Rules Die*, 93 GEO. L. J. 939 (2005) (quoting British Foreign Secretary Jack Straw as reported in George Parker, *EU Pact Dispute Blights Foreign Minister Meeting*, FIN. TIMES (London), Nov. 29-30, 2003, at 6). *Cf.* Pound, *supra* note 122, at 36 ("In a conflict between the law in books and the national will, there can be but one result"); *id.* at 19-20 (noting that "flesh and blood will not bow" to the theory that decision makers resolve cases in accordance with the "four corners of the pigeon-hole the books have provided" rather than with "extra-legal notions of conformity to the views of the community").

[150] Apologies to Colonel Jessup. *See A Few Good Men*, WIKIPEDIA, https://en.wikipedia.org/wiki/A_Few_Good_Men (last visited July 15, 2022).

[151] Sanctions often serve many traditional objectives simultaneously, such as "general deterrence, special deterrence, compensation, retribution, incapacitation, or rehabilitation." Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 78 (1983). Lawyer sanctions exist to protect "clients, the public, the legal system, and the legal profession." *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS std. 1.1 (AM. BAR ASS'N 1992).

[152] Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 970 (1995) (citing Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 820-24 (1994)).

D. Tailor Adjudication Rules to Fit Advocacy Norms

Something should be done. That something is this: the laws governing adjudication and lawyer conduct should be tailored to fit long-standing advocacy practices. Making advocacy law congruent with advocacy norms would respect the rule of law and confer legitimacy on the rules governing adjudicative proceedings.[153] Here's how to do it.

1. Reconsider Professional Conduct Rules

Lawyer conduct rules should no longer categorically prohibit persuasion techniques that lawyers routinely use. Rather, the rules should prohibit lawyers from using only "unreasonable" persuasion techniques. To this end, Model Rule 3.4(e) should be revised as follows:

> A lawyer shall not . . . (e) ~~in trial~~ as an advocate before a tribunal, unreasonably (1) allude to anything ~~any matter that the lawyer does not reasonably believe is relevant or~~ that will not be supported by admissible evidence, (2) allude to or assert personal knowledge of disputed facts ~~in issue except when testifying as a witness~~, or (3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

In addition to making stylistic changes,[154] this revision would eliminate the current imperative rule that categorically prohibits a lawyer from making *any* allusions to irrelevant and inadmissible

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[153] *See* Kitta Nrimmee & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105, 116 (2002).

[154] Stylistically, the proposal enumerates the subparts. It also substitutes "as an advocate at a tribunal" to make clear that this standard applies (1) not just to "trials," and (2) only when a lawyer is acting as an "advocate" and not as a witness. In this regard, it uses enumerated paragraphs and language similar to that found in ABA Model Code of Professional Responsibility and the New York and Texas rules of professional conduct. *See* MODEL CODE OF PRO. RESPONSIBILITY (AM. BAR Ass'n 1969); N.Y. RULES OF PRO. CONDUCT r. 3.4(d) (2009); TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 3.04(c) (1989).

matters. The revision would replace the current imperative *rule*[155] with a reasonableness *standard*.[156]

A "rule" forces decision makers to "respond in a determinate way" to triggering facts; it captures the underlying policy and then operates independently.[157] Rules "give content to the law" before individuals act rather than requiring decision makers to do so *ex post* after considering the totality of the attendant circumstances.[158] As a classic example,[159] a speed limit of 70 miles per hour is a "rule" designed to make highways safer; it calls for the imposition of a sanction when a driver exceeds the triggering speed. A problem with rules is that they produce "errors of over- or under-inclusiveness."[160] On a sunny day with no traffic, an experienced driver must drive 70 miles per hour; but on a snowy day with heavy congestion, a newly-licensed teenager could lawfully drive the same speed. For this reason, a fixed speed limit rule is both over- and under-inclusive. Current Rule 3.4(e) is a "rule" because it captures the underlying policy—namely, that lawyers must not improperly influence decision makers—and authorizes discipline if a lawyer engages in any triggering conduct,

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[155] Oddly enough, the drafters of Model Rule 3.4(e) expressly declined to include a community standard that would have required lawyers to "comply with known local customs of courtesy or practice." The drafters rejected it because they thought that it was "too vague to be a rule of conduct enforceable as law." ABA MODEL RULES LEG. HIST., *supra* note 123, at 489.

[156] One commentator has suggested that improper lawyer advocacy is and should be restricted by the "informal standard" of "good faith." This approach would be similar to a "reasonable lawyer" standard. *See* GARDNER, *supra* note 108, at 166 (arguing that "good faith is a common-sense notion that can be assessed without time-consuming legal research . . . . [L]awyers can monitor their own good faith by simple reflection; it is a uniquely accessible yardstick.").

[157] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

[158] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992); Sunstein, *supra* note 152, at 961 ("The key characteristic of rules is that they attempt to specify outcomes before particular cases arise. Rules are largely defined by the *ex ante* character of law.").

[159] *See, e.g.*, Sunstein, *supra* note 152, at 963-65; Russell B. Korobkin, *Behavior Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000); THEODORE M. BENDITT, LAW AS RULE AND PRINCIPLE: PROBLEMS OF LEGAL PHILOSOPHY 74 (1978); Green, *supra* note 126, at 1430.

[160] Sullivan, *supra* note 157, at 58; Sunstein, *supra* note 152, at 1022 ("Because of their ex ante character, rules will usually be overinclusive and underinclusive with reference to the arguments that justify them.").

such as by alluding to irrelevant matters. But it is over-inclusive because it prohibits widely accepted advocacy practices.

A "standard," in contrast, requires decision makers to consider the underlying policy and then to apply it to the situation at hand. Standards give the decision maker "more discretion than do rules" by allowing them to consider "all relevant factors or the totality of the circumstances."[161] Standards accommodate "particularistic decision making" and the consideration of "more features of any event than is possible through the application of necessarily acontextual rules"; standards aim to "optimize for each case."[162] A law prohibiting motorists from driving faster than "a reasonable speed" is a "standard" designed to promote highway safety; but it calls for the imposition of a sanction only after considering the motorist's speed in the context of his experience, the weather, the traffic conditions, and other relevant circumstances. In contrast to a speed limit rule, a "reasonable speed" standard permits experienced drivers to go faster in good weather and requires inexperienced ones to slow down in the rain.[163] The proposed revision to Rule 3.4(e) would adopt a standard permitting judges and regulators to consider all the relevant circumstances surrounding a lawyer's use of a particular persuasion technique before responding in a particularized manner.

Standards are familiar to law makers, lawyers, courts, and regulators. Indeed, standards have been part of Anglo-American law for nearly two centuries.[164] For example, courts regularly

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[161] *Id.* at 58-59. Justice Scalia called the use of "standards" a "discretion-conferring approach" to law making. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989). That approach addresses the problem that "general rule[s] of law" are "to some degree invalid" because they have "a few corners that do not quite fit." *Id.*

[162] Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. LAW & PUB. POL. 645, 645-46 (1991).

[163] For other examples of the rules/standards distinction, see Sunstein, *supra* note 152, at 1023 (*Roe* trimester rule versus "undue burden" standard; *Miranda* rule versus voluntariness standard; age-triggered retirement rule versus competence standard); Diver, *supra* note 151, at 70 (contrasting mandatory retirement for pilots at a fixed age versus retirement when continued employment would be "unreasonably dangerous").

[164] English courts developed the reasonable man standard during the early 19th century. *See* Vaughan v. Menlove, 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (Court of Common Pleas 1837) (noting that defendant "was bound to proceed with reasonable caution as a prudent man would have exercised"); Blyth v.

employ reasonableness standards to evaluate the propriety of actors' conduct in constitutional law,[165] criminal law,[166] torts,[167] contracts,[168] property,[169] antitrust,[170] and virtually every other area of the law.[171] In lawyering law, the "reasonable lawyer" standard has long functioned in professional responsibility codes.[172] For example, conduct codes require a lawyer to have the

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Birmingham Waterworks, 11 Exch. 781 (1856) ("[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a . . . reasonable man would not do."). Since then, the objective standard has been a mainstay of tort law. *See generally* Ann McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 23 (2012).

[165] *E.g.*, U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures . . .) (emphasis added); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1484 (1985) (discussing rules/standards debate).

[166] *E.g.*, MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1962) (defining "negligently" to include "deviation from the standard of care that a *reasonable* person would observe") (emphasis added).

[167] *E.g.*, RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a *reasonable* man under like circumstances.") (emphasis added).

[168] *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981) ("A promise which the promisor should *reasonably* expect to induce action or forbearance on the part of the promisee or a third person . . . .") (emphasis added).

[169] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.13 (AM. L. INST. 2000) (requiring association "to act *reasonably* in the exercise of its discretionary powers") (emphasis added). *See generally* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

[170] *See* Sherman Act, 15 U.S.C. § 1; *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) ("This Court's precedents have thus understood § 1 'to outlaw only *unreasonable* restraints.'") (quoting with added emphasis State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)). Interestingly, Section 1 is written in categorical terms, but the Court has interpreted it to include a rule of reason. *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law*, 42 U.C. DAVIS L. REV. 1375 (2009).

[171] Judges are comfortable using general standards like reasonableness "again and again . . . for different purposes depending on the case," the parties, or the area of law. Samuel L. Bray, *On Doctrines That Do Many Things*, 18 GREEN BAG 2D. 141, 149 (2015).

[172] One of the earliest commentators on American legal ethics, Judge George Sharswood, noted that lawyers "guide their own conduct" by "that which is commonly regarded as the standard," namely, the "rule of right . . . which has

knowledge, skill, thoroughness, and preparation "reasonably necessary" for the representation.[173] They require a lawyer to act with "reasonable diligence and promptness."[174] They require a lawyer to keep the client "reasonably informed."[175] They prohibit "unreasonable" charges for fees and expenses.[176] They permit the disclosure of confidential information when the lawyer "reasonably believes" disclosure is necessary to serve a permissible end.[177] And on and on and on. Given that conduct codes already define[178] and employ the standard of the "reasonable lawyer" in many other contexts, it would be easy to apply the same objective standard to lawyer persuasion techniques.[179]

Why would the reasonable-lawyer standard this Article proposes function better than current Rule 3.4(e)? The choice between rule and standard is a pervasive issue in lawmaking.[180]

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been and is approved by their fellows." *Review of Sharswood's Professional Ethics*, AM. L. REGISTER 194 (Feb. 1855).

[173] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983) ("Competence").

[174] *Id.* r. 1.3 ("Diligence").

[175] *Id.* r. 1.4 ("Communications").

[176] *Id.* r. 1.5 ("Fees"); *see also* CANONS OF ETHICS 14 (AM. BAR ASS'N 1908) (a lawyer has a "right to receive reasonable recompense for his services"); MODEL CODE OF PRO. RESP. EC 2-16 (AM. BAR ASS'N 1980) (lawyers entitled to "reasonable fees"); *id.* EC 2-17 (a "lawyer should not charge more than a reasonable fee"); *id.* DR 2-106(B) (a fee is unreasonable when "lawyer of ordinary prudence" would believe the fee is "in excess of a reasonable fee"); AL. CODE OF ETHICS Canon 14 (AL. STATE BAR ASS'N 1887) (lawyer has "right to receive reasonable recompense").

[177] MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 1983) ("Confidentiality of Information"); *see also* MODEL CODE OF PRO. RESP. DR 4-101(D) (AM. BAR ASS'N 1980) (lawyer must exercise "reasonable care" to protect confidences).

[178] The Model Rules define the terms "reasonable" and "reasonably" to denote "the conduct of a reasonably prudent and competent lawyer." MODEL RULES OF PRO. CONDUCT r. 1.0(h) (AM. BAR ASS'N 1983). They define "reasonable belief" and "reasonably believes" to denote that the lawyer "believes the matter in question and that the circumstances are such that the belief is reasonable." *Id.* r. 1.0(i).

[179] Even the earliest set of professional conduct guidelines, Hoffman's *Fifty Resolutions*, permitted lawyers to appeal "to the sympathies of our common nature as are *worthy, legitimate, well-timed, and in good taste*." HOFFMAN, *supra* note 90, ¶ 47 (1836) (emphasis added).

[180] *E.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 15-63 (1987) (discussing age-old tension between rules and standards); Duncan Kennedy,

The rules/standards debate typically considers the merits[181] of each approach using economics,[182] political philosophy,[183] or behavioral psychology.[184] For the following reasons, the proposed standard is preferable to the present rule because it would impose limits on lawyer advocacy[185] in a way that would be realistic, enforceable, and true to the rule of law.[186]

Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1685-87 (1976) (noting that choice of form for legal directives is one between rules and standards). Cass Sunstein has rejected a strict dichotomy between rules and standards, arguing that rules and standards are the ends of a spectrum that includes "factors" in between. *See* Sunstein, *supra* note 152, at 963-64 (noting that there is no "untrammeled discretion" when "factors are pertinent to the decision, but there is no rule, simple or complex, to apply."); Korobkin, *supra* note 159, at 28 ("Multi-factor balancing tests are less pure and more rule-like than requirements of 'reasonableness' because they specify ex ante (to a greater or lesser degree of specificity) what facts are relevant to the legal determination.").

[181] Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 399 (1985) ("Perhaps the most common view of the rules v. standards dialectic ascribes one set of virtues and vices to rules and another set of virtues and vices to standards.").

[182] This approach considers the costs and benefits of making and administering rules and standards from a utilitarian perspective. *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267 (1974); Diver, *supra* note 151; Kaplow, *supra* note 158 (entitled "*Rules Versus Standards: An Economic Analysis*").

[183] Some have argued that rules further "democracy" better than standards. *See, e.g.*, Scalia, *supra* note 161, at 1176 (criticizing statutes that lack "clarity or precision" as "undemocratic"); Sullivan, *supra* note 157, at 64-66 (surveying arguments that rules further democracy better than standards and noting concerns relating to "the judicial role, the separation of powers, and the distinction between law and politics"). Others have suggested that rules further "liberty" better than standards. *Id*. at 63-64 (noting that "the substantive choice of rules over standards is essential to liberty" and noting that rules better steer "between the twin dangers of plunging into Hobbesian anarchy and giving Leviathan unfettered and arbitrary personal discretion") (citing JOHN RAWLS, A THEORY OF JUSTICE 235-43 (1971)).

[184] Korobkin, *supra* note 159, at 56 ("Behavioral analysis, when layered onto a base of economic analysis, leads to a more nuanced analysis of the choice between rules and standards than economic analysis alone can provide.").

[185] Ethical limitations on lawyer advocacy exist to maintain "the efficiency and respectability" of tribunals and to assure that trials "are, and are perceived to be, even-handed and fair." HAZARD ET AL., *supra* note 106, § 29.04 at 29-9.

[186] To address the over- and under-inclusiveness problem, lawmakers could use either a "highly flexible" standard or an "intricate regulatory formula." Diver, *supra* note 151, at 75. This Article proposes a flexible standard because

First, a standard is a better fit than a rule when, as here, the principal concern is "reducing the risk of under- and over-inclusiveness" rather than the "risk of decisionmaker incompetence or bias."[187] The principal problem with current Model Rule 3.4(e) is that it is an over-inclusive and unenforced rule. That is, it over-inclusively prohibits widely accepted persuasion norms, and, perhaps for that reason, it is not enforced by judges and regulators. There is little concern about decision maker incompetence or bias under the present rule.[188] On the contrary, case law reflects that sanctions, reversals, and discipline are reserved for only the most egregious and harmful rule violations. Because over-inclusiveness is the principal problem with Rule 3.4(e), the persuasion techniques it prohibits are more amendable to regulation through a standard.

Second, a standard is a better fit than a rule when, as here, it is difficult to frame "general rules for all contingencies."[189] That difficulty exists when what is acceptable and unacceptable is clear "at the margins" but not in between.[190] Unfortunately, rules sweep together dissimilar people who find themselves in the middle;[191]

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an "intricate" rule enumerating every unacceptable persuasion technique would be virtually impossible to draft.

[187] Sullivan, *supra* note 157, at 58 n.236.

[188] A related concern is that loose standards allow rule enforcers to usurp authority from rule makers by making enforcement decisions inconsistent with rule makers' intentions. *See* Schlag, *supra* note 181, at 386. In the area of lawyer discipline, however, the rule makers (state high courts) are the same as the rule enforcers (state high courts). Thus, there are no "usurpation" concerns in choosing a discretion-conferring standard over a hard-and-fast rule. And, there are no separation of powers issues given that law maker and law enforcer are the same. *See* TAMANAHA, *supra* note 66, at 54-55 (discussing separation of powers as a rule of law principle in America).

[189] Scalia, *supra* note 161, at 1182 ("I stand with Aristotle, then—which is a pretty good place to stand—in the view that 'personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.") (quoting ARISTOTLE, THE POLITICS OF ARISTOTLE, book III, ch. xi, § 19 at 127 (Ernest Barker, transl., 1946)).

[190] Scalia, *supra* note 161, at 1181.

[191] Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189, 200 (1999). On the other hand, "standards create the possibility that similar people will be treated differently." *Id.* at 201.

rules "fail to distinguish between flagrant and technical violations."[192] In legal ethics, it is often "difficult to differentiate between . . . 'hard blows' as opposed to 'foul ones.'"[193] Because of that difficulty, lawyer conduct rules have always recognized that the appropriateness of discipline turns on a standard-like consideration of "all the circumstances."[194] This too should be the approach used to evaluate a lawyer's use of persuasion techniques.

Third, a standard is a better fit than a rule when, as here, there is a need to adapt a regulatory scheme to changing norms.[195] Rules can "often be outrun by changing circumstances."[196] Over time, the acceptability of various persuasion techniques has changed.[197] A reasonableness standard would encourage regulators and courts to ask and to resolve difficult questions about what past and present advocacy techniques are appropriate in contemporary practice. Requiring courts to explain why some techniques are "reasonable" and why others aren't would promote dialogue and encourage the development of advocacy law over time. Rules typically foreclose such dialogue.[198]

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[192] Schlag, *supra* note 181, at 384-85. "Standards authorize application of a deterrent force proportional to the gravity of the evil, thus assuring that the strongest deterrent is reserved for and applied to the greatest social threats." *Id.* at 385.

[193] HAZARD ET AL., *supra* note 86, §1.06 at 1-16 to 1-17 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[194] MODEL RULES OF PRO. CONDUCT scope ¶ 19 (AM. BAR ASS'N 1983).

[195] Bell, *supra* note 191, at 200 ("A change in circumstances can render precise rules ineffective or even harmful"); Bray, *supra* note 171, at 150 ("The rule of reason is a tool that does many, many things, like a chef's knife. A garlic press does only one thing well."); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 57 (1990) (arguing that standards provide a better "mechanism for legal change" than do rules "known to all in advance and not subject to change through judicial interpretation").

[196] Sunstein, *supra* note 152, at 1022.

[197] Carlson, *supra* note 102, at 795-802. For example, lawyers in the 1920s famously pulled "stunts" that reasonable modern lawyers would never do. Louis Nizer describes one in which a lawyer defending a husband charged with poisoning his wife drank a vial of the alleged poison during summation to show that the substance was not poison at all. During the next recess, doctors pumped his stomach. The jury acquitted his client. *See id.* (quoting LOUIS NIZER, REFLECTIONS WITHOUT MIRRORS 58 (1978)).

[198] Sullivan, *supra* note 157, at 69 (noting that standards promote judicial legitimacy because they "'affirm rather than deny… responsibility.' Rules block the dialogue that standards promote. What the Court says about why a law is to be upheld or invalidated matters, and winners and losers alike benefit from

Fourth, a general standard would be better than a categorical rule because it would provide more leeway for lawyers to advocate for their clients without concern over violating the prohibitions of a categorical rule.[199] Courts have long recognized the essential role that lawyers play in the judicial system and its adversary process.[200] To permit advocates to function in this role, courts must give lawyers "generous latitude" because "the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument."[201] A standard would provide this latitude by allowing courts and regulators to evaluate persuasion techniques on a case-by-case basis and, in so doing, to distinguish acceptable lawyer zeal from "devilish designs."[202]

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explanations.") (quoting Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-36 (1986)).

[199] The "competing conceptions" of lawyer as zealous advocate versus lawyer as officer of the court is a fundamental tension in legal ethics. The "dominant" modern approach places more emphasis on lawyers as "morally neutral advocates" rather than on lawyers as (additional) judges assisting tribunals. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 51 (2000); *see also* FREEDMAN & SMITH, *supra* note 59, at 8 ("[T]he lawyer's function—as an officer of the court in a free society—is to serve the undivided interests of individual clients."); *id.* (a "lawyer's traditional function is to serve the lawful interests of individual clients, even against the interests of the state"); Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 30 (2006) (noting that the modern "adversary imperative impels trial lawyers to place a far greater premium on persuading the trier of fact than it does on adhering to the Byzantine subtleties of evidence doctrine."). Of course, the "classic articulation" of the lawyer as champion of the client rather than arm of the court is found in the *Trial of Queen Caroline*: "'An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons.'" *See* Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244-45 (1991) (quoting Trial of Queen Caroline 8 (1821)).

[200] Mount Hope Church v. Bash Back!, 705 F.3d 418, 426 (9th Cir. 2012) ("The lawyer as advocate plays a key part, along with judges and scholars, in assisting the sound development of the law and of legal rules that further justice.").

[201] State v. Gibson, 31 A.3d 346, 350 (Conn. 2011); *see also Mount Hope Church*, 705 F.3d at 426 (noting that over-enforcement "may chill an attorney's enthusiasm and creativity, in turn impeding both a tribunal's decision-making process and the creation of new case law"); In re S. Coast Oil Corp., 566 F. App'x 594, 596 (9th Cir. 2014) (refusing to sanction mere "aggressive advocacy").

[202] MHT Housing, Inc. v. Colony Ins. Co., No. 12-CV-13649, 2014 WL 12659918, at *2 (E.D. Mich. Feb. 13, 2014).

Fifth, and most importantly, a general standard would further the rule of law by making Rule 3.4(e) "congruent" with long standing advocacy norms. As a standard rather than a categorical rule, the proposal would be capable of being enforced[203] by judges and regulators. Thus, the standard "in action" would not flatly contradict the "law on the books." Considering that the persuasion regulations in Rule 3.4(e) exist solely to further the rule of law, they too should comply with that bedrock principle.

2. Reconsider Adjudication Rules

In addition to revising professional conduct rules, the rules governing the adjudicative process should be reconsidered. More particularly, jury instructions and evidence rules should acknowledge the role that long-used persuasion techniques play in adjudication. However, they should limit those techniques with a reasonableness standard similar to that proposed in the preceding section.

First, judges should continue to charge jurors that they must "determine the facts solely from the evidence admitted in the case"[204] and that any verdict "must be based solely upon the evidence received."[205] However, judges should also instruct jurors to:

> Be mindful that the actions and arguments of the lawyers were designed to persuade you to decide this case in favor of their respective clients. The lawyers and their clients want to prevail in this case. While what the lawyers said and did may assist you in understanding and evaluating the evidence, you must decide the case only on the testimony and exhibits that I allowed into evidence and not on the skill or apparent credibility of the lawyers.

As to other technically irrelevant evidence, judges should instruct jurors that "you may have been moved by emotion or

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[203] LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 152 (2008) (discussing the importance of drafting rules that can "be given effect").

[204] 1A O'MALLEY ET AL., *supra* note 72, § 10:01; *id.* ("This evidence consists of the testimony of witnesses and exhibits received.").

[205] *Id.* § 20:01.

empathy to favor one of the parties over the other or to dislike one more than the other." Further, they should instruct as follows:

> You may have a hunch, a gut feeling or an intuition that one party should win or lose. Such feelings are natural. But you must decide this case based only on the evidence—that is, on the testimony and exhibits. Be careful not to allow yourself to decide the case based on your feelings about the parties or their lawyers or on your emotions.

While these instructions would not be substantively different from those currently in use, they do explicitly admonish jurors to beware of persuasive lawyers advocating for their clients and to be mindful of the effects that System 1 thinking may have on their deliberations. Both proposed instructions would further the rule of law by channeling jurors into a discussion of the admitted evidence.

Second, evidence rules should be revised to permit lawyers to use widely accepted persuasion techniques. Other commentators have proposed thoughtful revisions to give trial judges "a broader set of solutions" to address emotional evidence.[206] At a minimum, however, relevance rules should expressly acknowledge, as the Supreme Court did in *Old Chief*, that some emotional evidence is appropriate "not just to prove a fact but to establish its human significance."[207] Furthermore, the rules should acknowledge that "background" information relating to undisputed matters currently "is universally offered and admitted as an aid to understanding"[208]—even though a strict logical relevance test would exclude it. To fit this longstanding practice, the rules should expand the definition of "relevant evidence" to include any information that will "reasonably aid the understanding" of the factfinder. The comments could elaborate that this includes the type of emotional evidence discussed in *Old Chief* and the persuasion techniques that advocates have used for millennia.

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[206] Spottswood, *supra* note 27, at 97-101.

[207] *Old Chief*, 519 U.S. at 187-88.

[208] FED. R. EVID. 401 advisory committee's note to 1972 proposed rules ("Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.").

Finally, the rule governing the "mode and order" of presenting evidence[209] should be revised to include a new paragraph entitled "Persuasion Techniques." Perhaps that new paragraph could provide that "unreasonable persuasion techniques should not be used." The rule could provide further that:

> Ordinarily, the court should not allow an advocate or witness: (1) to unreasonably allude to anything that will not be supported by admissible evidence; (2) to unreasonably allude to personal knowledge of disputed facts in issue except when testifying as a witness; or (3) to state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

This language would mirror the revisions proposed for lawyer conduct rules in the preceding section. In so doing, it would make evidence rules and professional conduct standards not only compatible but coextensive in regulating unreasonable persuasion techniques.

3. Applying the Proposed Reasonableness Standard

How would the proposed standard work in action? To apply the standard to an advocate's use of a persuasion technique, judges and regulators would have to evaluate whether the extra-evidentiary allusion or assertion at issue will be or was "unreasonable." This evaluation would be prospective when considering whether a technique should be allowed under the rules of evidence; it would be retrospective when considering whether an advocate should be disciplined or sanctioned for having used it.

The reasonableness of a persuasion technique will turn in part on a consideration of the legal profession's history, traditions, and customs. Courts often look to custom when determining the reasonableness of an actor's conduct. For example, an actor's "departure from the custom of the community," is evidence of unreasonable conduct under the Restatement (Third) of Torts.[210]

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[209] FED. R. EVID. 611 ("Mode and Order of Examining Witnesses and Presenting Evidence").

[210] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 (AM. L. INST. 2010) ("Custom").

Persuasion techniques that have a long history of use by advocates in general, and by lawyer advocates in particular, will tend to be "reasonable" under this factor.

The reasonableness of a persuasion technique will also turn in part on a consideration of contemporary practices in the professional community. Do other lawyers routinely use the technique in courthouses in the community? Is the technique taught in modern advocacy classes and continuing legal education seminars? Is it described in publications targeting lawyers and law students? Persuasion techniques that are currently used by advocates will tend to be reasonable under this factor.

Finally, the reasonableness of a persuasion technique will turn on the totality of the circumstances surrounding the particular advocate's use of the technique. Was the advocate's use of the technique overt or covert, pervasive or incidental, repetitive or singular? What foreseeable harm to the decision making process was the technique likely to cause?[211] What was the advocate's degree of culpability? That is, was the advocate's use of a questionable technique purposeful, knowing or reckless, or was it merely inadvertent. Finally, was the advocate's conduct provocative or responsive? That is, was the advocate the first to deploy the technique or did the advocate simply respond to something done by opposing counsel?

So, for example, an advocate's use of age-old rhetorical techniques to appeal to *ethos* would tend to be "reasonable." It would be difficult to criticize a lawyer for striving to appear fair, experienced, skilled, sincere, intelligent, knowledgeable, trustworthy, and nonpartisan. Likewise, it would be difficult to fault an advocate for appealing to *pathos* by using storytelling, vivid and sensory language, and deliberate pacing and delivery. [212] Such persuasion techniques have a long history and tradition of customary use by advocates. Moreover, such persuasion techniques

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[211] Of course, the "foreseeable likelihood" that "conduct will result in harm," and the "severity of any harm that may ensue," are among the factors used to evaluate whether a "person's conduct lacks reasonable care" in a negligence analysis. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010) ("Negligence").

[212] For a discussion of the methods that advocates use to appeal to *ethos* and *pathos*, see *supra* Part I.A.

are taught and used in modern advocacy classrooms and courtrooms.

On the other end of the spectrum, however, an advocate's overt references to highly prejudicial inadmissible evidence would tend to be "unreasonable." Likewise, an advocate's repetitive and intentional assertions of personal opinion as to the justness of a cause would be unreasonable.

In between, courts and regulators could thoughtfully consider the reasonableness of persuasion techniques of more recent vintage. For example, some contend that the "reptile method" of persuasion is insidiously manipulative.[213] Using this method, advocates appeal to jurors' most primitive and biological "need for security" in an effort to have their "reptile" brains overwhelm their conscious minds.[214] When intentionally deployed in a marginally relevant situation, courts and regulators could conclude that such a technique is unreasonable.

CONCLUSION

The laws of evidence, procedure, and ethics that prohibit the use of age-old persuasion techniques are imperfectly drafted[215] and over-inclusive. In word, they forbid a wide range of techniques that are longstanding norms in trial advocacy. In action, however, they are enforced only at the margins and they are ignored in between by those obliged to comply. While the law on the books is comprised of hard-and-fast anti-persuasion rules, the law in action has "migrated across the legal form spectrum"[216] to become, in practice, a flexible standard permitting many commonly used advocacy techniques. Indeed, courts have long recognized—mostly implicitly but sometimes explicitly—that not "every use of rhetorical

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[213] *See supra* Part I.B at note 58.

[214] *See* Broda-Bahm, *Respond to the Reptile*, *supra* note 58.

[215] Sunstein, *supra* note 152, at 1022 ("Usually the crudeness of rules is tolerable, and most of the resulting inefficiency and injustice can be controlled through means short of abandoning rules. But sometimes the crudeness of rules counts decisively against them.").

[216] Korobkin, *supra* note 159, at 27 ("For example, if courts will enforce a rule that mothers are entitled to custody only after reviewing all the unique circumstances of a divorce and determining that the rule should not be abrogated for some reason, it is more appropriate to classify the law as a standard.").

language or device is improper."[217] On the contrary, the "occasional use of rhetorical devices is simply fair argument."[218]

The rules should be amended to reflect that reality. The judiciary[219] and the legal profession[220] should work together to draft standards harmonizing the laws governing adjudication with long-standing advocacy norms. They should do so not just for the sake of consistency. They should do so to further the rule of law. It would be far better courts and lawyer regulators to exhibit fidelity to indeterminate—but realistic—standards, than infidelity to determinate—but unenforced—rules.

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[217] State v. Gibson, 31 A.3d 346, 350 (Conn. 2011).

[218] *Id.*; *see also* State v. Camacho, 924 A.2d 99, 126-27 (2007) (same).

[219] As a general matter, the judicial branch is "entrusted the task of preventing a discrepancy between the law as declared and as actually administered." FULLER, *supra* note 134, at 81. But in the context of the lawyer regulation, it has an even greater responsibility. In that context, the judiciary branch has an unusual tripartite role. As legislator, it makes lawyer conduct rules. As executive, it enforces those rules. And as adjudicator, it decides when individual lawyers have violated them. *See id.* at 82 ("The supreme court of a jurisdiction, it may seem, cannot be out of step since it calls the tune. But the tune called may be quite undanceable by anyone, including the tune-caller. All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from . . . legality").

[220] Roscoe Pound opined nearly a hundred years ago that it should be part of "the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it . . . ." Pound, *supra* note 122, at 36.