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# ARTICLES

## Harmonizing Legal Ethics Rules with Advocacy Norms

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### ABSTRACT

*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 legal ethics and adjudication rules that facially prohibit such widely accepted advocacy practices. This Article addresses the disconnect between these 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 legal ethics and adjudication rules 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.<sup>1</sup> O.J. Simpson’s defense team replaced photographs of white people in Simpson’s house with those of African-Americans prior to a jury view.<sup>2</sup> Lawyers dress down in court and adopt an “aw-shucks” demeanor. They wear lapel pins and remove wedding rings.<sup>3</sup> They weave narrative stories with villains and heroes and their journeys. They

1. See RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED 147–48 (1999).

2. See 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, 309–10 (1998). Professor 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).

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.<sup>4</sup>

This isn't new. Advocates have studied rhetoric—the art of persuasion—since the 5th century BCE.<sup>5</sup> Two millennia later, we 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 spell of the dark art of persuasion. Or so the theory goes.

This Article addresses the disconnect between unambiguous legal ethics rules and adjudication regulations, which prohibit appeals to extra-evidentiary matters, and longstanding advocacy norms, which 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 considers existing legal ethics rules and adjudication regulations and concludes that they flatly prohibit advocates from doing much of what they currently do and have long done. Part III addresses what should be done about this disconnect between what advocates do and what the rules governing their conduct prohibit.

The Article concludes that the lack of congruence between the 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 lawyer ethics rules and trial-procedure regulations 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.”

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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.’”).

5. Edward Schiappa, *Sophistic Rhetoric: Oasis or Mirage?*, 10 RHETORIC REV. 5, 5 (1991).

## I. WHAT ADVOCATES DO TO PERSUADE

Lawyers advocate 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<sup>6</sup> 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.”<sup>7</sup> While historians credit Corax of Syracuse with inventing rhetoric,<sup>8</sup> Aristotle provided many of the fundamental persuasion techniques that modern lawyers continue to study and employ.<sup>9</sup>

Aristotle recognized that people are persuaded by “*logos*”—logical arguments.<sup>10</sup> 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 arguments also include those that use informal reasoning to inductively draw conclusions about uncertain facts from examples and analogies.<sup>11</sup> 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,

6. 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 J. THOMPSON & JERRY B. 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: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 614 (1999) (“[T]he term rhetoric is now usually associated with meaningless political exaggeration or mere stylistic embellishment.”).

7. Frost, *supra* note 6, 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 25 centuries in a field of study known as rhetoric.”).

8. Frost, *supra* note 6, 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).

9. 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).

10. ARISTOTLE, *ARISTOTLE’S ART OF RHETORIC* 12 (Robert C. Bartlett trans., University of Chicago Press 2019).

11. WILLIAM M. KEITH & CHRISTIAN O. LUNDBERG, *THE ESSENTIAL GUIDE TO RHETORIC* 36–38 (2008).

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.<sup>12</sup> In so doing, advocates appeal to the brains of decision-makers.<sup>13</sup>

But Aristotle knew that people do not make decisions with their brains alone; *logos* only goes so far.<sup>14</sup> He understood that decision-makers also decide with their hearts.<sup>15</sup> For that reason, effective advocates use *pathos*—appeals to emotion.<sup>16</sup> Orators stir the emotions of their audiences to make them more favorably disposed to the orator’s message.<sup>17</sup> For example, they appeal to positive emotions, such as common group identity, hope, courage, kindness, compassion, trust, self-benefit, and respect. And they channel negative emotions toward their opponents, 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.<sup>18</sup> The message matters; but the messenger matters more. To persuade, speakers must adapt their character to the character of their audiences.<sup>19</sup> 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.<sup>20</sup>

Although recognized more than two thousand years ago, these fundamental persuasion techniques—“Aristotle’s Big Three”<sup>21</sup>—remain core principles of

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

13. See JAY HEINRICH, *THANK YOU FOR ARGUING* 38 (4th ed. 2020).

14. Marcel Becker, *Aristotelian Ethics and Aristotelian Rhetoric*, 23 *IUS GENTIUM* 112, 114 (2013) (“[L]ogical 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 generally DALE CARNEGIE, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE: UPDATED FOR THE NEXT GENERATION OF LEADERS* (2022).

15. HEINRICH, *supra* note 13, at 38.

16. 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).

17. KEITH & LUNDBERG, *supra* note 11, at 39.

18. See ARISTOTLE, *supra* note 10, at 76 (“[I]t is necessary [for the speaker] . . . to establish that he himself is a certain sort of person.”); HEINRICH, *supra* note 13, at 44 (noting that Aristotle believed *ethos* was “the most important appeal of all”); David McGowan, *(So) What If It’s All Just About Rhetoric?*, 21 *CONST. COMMENT.* 861, 864 (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* 24 (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*, 36 *LITIGATION* 16 (2010); Becker, *supra* note 14, at 112 (noting that the orator must appear to have trustworthy characteristics), 115 (“*ethos* is the most effective means of persuasion”); Colin Starger, *Constitutional Law and Rhetoric*, 18 *U. PA. J. CONST. L.* 1347, 1365 (2016) (“[E]thos persuades through the authority of ‘character,’ not through character itself.”).

19. See Jamar, *supra* note 16, at 73–74 (discussing Aristotle’s concept of character).

20. HEINRICH, *supra* note 13, at 45–54.

21. *Id.* at 37.

advocacy that are taught to and used by 21st-century lawyers.<sup>22</sup> “Logos, ethos, and pathos appeal to the brain, gut and heart of [an] audience,” and thus “form the essence of effective persuasion.”<sup>23</sup> We teach and encourage contemporary lawyers to employ *logos* by using good organization, rational and logical presentation, and well-sourced law and facts.<sup>24</sup> We teach them to avoid formal and informal fallacies in making legal arguments.<sup>25</sup>

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.”<sup>26</sup> Judges and jurors routinely and unwittingly decide cases partly “on the basis of emotion and not reason.”<sup>27</sup> Emotion is so powerful because it “releases the legal imagination to see relevant similarities and therefore permits the final leap to judgment.”<sup>28</sup> For that reason, we teach and encourage lawyers to use *pathos*.<sup>29</sup>

22. JOAN M. ROCKLIN, ROBERT B. ROCKLIN, CHRISTINE COUGHLIN & SANDY PATRICK, 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. JURIS. REV. 131 (2014); Frost, *supra* note 6, at 635 (“[A] growing number of modern lawyers, judges, and legal academics have begun employing classical rhetorical principles in their analyses of legal discourse.”), 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.”).

23. HEINRICHS, *supra* note 13, at 38.

24. ROCKLIN, ROCKLIN, COUGHLIN & PATRICK, *supra* note 22, at 8–9; STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE § 2.3.1.1, at 19 (6th 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.”).

25. ALDISERT, *supra* note 12, at 139–44 (“Introduction to Fallacies”).

26. 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 reached a logical decision, based on the evidence and the applicable law. Behavioral science research, beginning in the 1940s, and jury research, beginning in the 1960s, have emphatically rejected that view.”).

27. STERN & SALTZBURG, *supra* note 9, at 52.

28. McCormack, *supra* note 22, at 140 (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)).

29. Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41, 42 (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, ROCKLIN, COUGHLIN & PATRICK, *supra* note 22, 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) (“Appeal 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 DIRS. 154, 163 (2006) (discussing role of emotion in appellate advocacy);



Advocates use *pathos* to call decision-makers to action by, for example, making their cases bigger than their facts.<sup>30</sup> They use it by asking jurors to send messages to the community.<sup>31</sup> They tailor their arguments to “appeal to the biases, prejudices, preferences, and leanings [of] those who decide the case.”<sup>32</sup> 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.”<sup>33</sup> Further, skilled advocates take their time; “[p]athos tends to work poorly in the beginning of an argument.”<sup>34</sup> As a substantive matter, they target appropriate emotions such as anger, patriotism, emulation, nostalgia, and desire.<sup>35</sup>

Finally, we teach and encourage lawyers to use *ethos*.<sup>36</sup> 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.”<sup>37</sup> As a result, the credibility of lawyers plays “a large part in shaping [a] trial’s outcome.”<sup>38</sup> Legendary trial advocacy teacher Herbert Stern has argued that *ethos* is the “most important weapon of a trial lawyer”; *ethos* is “bigger than the facts and bigger than the law.”<sup>39</sup>

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Ronald H. Clark, George R. Dekle, Sr., & William S. Bailey, *Cross-Examination Handbook: Persuasion, Strategies, and Techniques* 11 (2d ed. 2015) (CROSS-EXAMINATION MUST TAKE INTO ACCOUNT THAT PEOPLE MAKE DECISIONS “‘BY GUT EMOTIONS RATHER THAN BY RATIONAL, ANALYTIC THOUGHT.’”) (QUOTING SHARON BEGLEY, *ADVENTURES IN GOOD AND EVIL*, NEWSWEEK, APR. 25, 2009, AT 32–33).

30. STERN & SALTZBURG, *supra* note 9, at 48 (noting that emotion is “potent stuff”).

31. *Id.* at 49.

32. *Id.* at 58.

33. HEINRICHS, *supra* note 13, at 85 (emphasis omitted).

34. *Id.* at 86.

35. *Id.* at 98–99.

36. See ROCKLIN, ROCKLIN, COUGHLIN & PATRICK, *supra* note 22, at 6–7; MAUET, *supra* note 26, at 27 (“An effective advocate is always credible[,] . . . trustworthy, knowledgeable, and dynamic so that the jurors see [the advocate] as the teacher, helper, and guide.”); ROSE & ROSE, *supra* note 29, at 604 (“Your character (ethos) is critical.”); Fajans & Falk, *supra* note 29, 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, L. Timothy Perrin & Christopher L. Frost, *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”).

37. JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS* 118 (2012).

38. LUBET, *supra* note 24, § 3.2.1, at 38. “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 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, at 37.

39. STERN & SALTZBURG, *supra* note 9, 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, 18 (“When jurors believe in the lawyer, they are likely to believe his witnesses.”).



Advocates use *ethos* by appearing sincere, intelligent, knowledgeable, and trustworthy. They use it by appearing to be more prepared than their adversaries.<sup>40</sup> They use it by showing respect to everyone in court, by not appearing partisan,<sup>41</sup> by giving away or embracing what they can't win,<sup>42</sup> and by resisting the urge to contaminate good arguments with bad ones. Advocates use it by appearing conservative in behavior and by matching the audience members' values<sup>43</sup> and expectations as to "tone, appearance, and manners."<sup>44</sup> They avoid lawyer speak, they do not condescend, and they appear to be fair.<sup>45</sup> And, they exhibit "practical wisdom" by appearing to be knowledgeable, sensible, experienced, and well skilled in their craft.<sup>46</sup>

## 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 modern social science and psychology. Storytelling influences what fact-finders think and feel about an advocate's case.<sup>47</sup> This is so because humans are "symbol-using creature[s]" and "story-telling animal[s]"<sup>48</sup> and trials are "shot through with narratives."<sup>49</sup> 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.<sup>50</sup> For these reasons, we teach and

40. 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.").

41. See HEINRICH, *supra* note 13, at 74. By showing "disinterested goodwill," a persuasive advocate "combines selflessness and likeability." *Id.* Some tools to generate this aspect of *ethos* include exhibiting "[t]he reluctant conclusion," using *dubitatio* ("doubt in your own rhetorical skill"), and displaying apparent authenticity. *Id.* at 81.

42. *Id.* at 64–65 (noting the benefit of "changing your position" and "pretend[ing] you were for your new stand all along").

43. *Id.* 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.

44. HEINRICH, *supra* note 13, at 45 ("Rhetorical decorum is the art of fitting in.").

45. STERN & SALTZBURG, *supra* note 9, at 21–34 ("Establishing Your Rule I").

46. HEINRICH, *supra* note 13, at 67–73.

47. See 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."), 457 ("Legal practitioners recognize the importance of storytelling in the courtroom."); ROSE & ROSE, *supra* note 29, at 604 ("Tell stories."); see also ZITRIN & LANGFORD, *supra* note 1, at 145 ("Those who teach trial techniques—psychologists, sociologists, and yes, acting coaches, as well as lawyers—often emphasize another point: the art of storytelling.").

48. Conti, *supra* note 47, at 469.

49. 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).

50. LISA L. DECARO & LEN MATHEO, *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

encourage lawyers to tell “vivid” stories using “sensory language” and “visceral[] and visual images.”<sup>51</sup>

In addition, an advocate’s movement, demeanor, and body language affect decision-making.<sup>52</sup> As a result, a lawyer “must create a sense of credibility and believability” with body language.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

Likewise, social science and psychology inform lawyers on persuasive techniques.<sup>56</sup> 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.”<sup>57</sup> For example, decision-makers remember best what they

organizing a presentation by witness order.”); *see also* 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).

51. MAUET, *supra* note 26, 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.”); LUBET, *supra* note 24, § 14.5.2, at 506 (discussing importance of “body and hand movement”); 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 29, 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 118–22 (1999) (arguing that lawyers should “examine the techniques used by master storytellers like the Brothers Grimm and Hans Christian Andersen”); CLARK, DEKLE & BAILEY, *supra* note 29, at 10 (noting the importance of storytelling during cross-examination); STEFAN H. 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”).

52. *See* ROSE & ROSE, *supra* note 29, at 142 (“Persuasion can occur without arguing when movement, language and delivery come together.”).

53. *Id.* at 140–41.

54. *See* Laurie C. Kadoch, *Seduced by Narrative: Persuasion in the Courtroom*, 49 DRAKE L. REV. 71, 80 (2000); *see also* LUBET, *supra* note 24, § 14.5.3 at 506 (discussing the importance of “pacing” speech “to convey perceptions of time, distance, and intensity”).

55. 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), 27 (“[I]f you want jurors to follow, remember, and be persuaded by what you are saying, you must gesture.”); *see* BALL, *supra* note 47, at 4–9.

56. *See also* STERN & SALTZBURG, *supra* note 9, at 64 (noting that “[s]ocial scientists and psychologists have . . . made a major contribution” to trial advocacy). *See generally* ROBBENOLT & STERNLIGHT, *supra* note 37.

57. ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION, at vii (rev. ed. 2007), 7–9 (These techniques, which subjects “rarely perceive,” allow persuaders to “manipulate without the appearance of manipulation.”).

hear first (“primacy”) and last (“recency”).<sup>58</sup> They remember vivid descriptions of things and events better than those that are less detailed.<sup>59</sup> They have “reptile brains” that are influenced by primitive fear and a biological need for security.<sup>60</sup> They are moved by tribalistic appeals to race,<sup>61</sup> religion, and geography.<sup>62</sup> “Source credibility” and “relational attributes” make advocates who establish “familiarity, similarity, and attraction” with their audiences more persuasive.<sup>63</sup> For these reasons, we teach and encourage lawyers to appeal to the superficial “peripheral route” of human decision-making<sup>64</sup> through the use of primacy, recency, vividness, and other psychology-based techniques like priming,<sup>65</sup> “reciprocation,

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58. See JOHNSON & HUNTER, *supra* note 55, at 77–80 (discussing primacy and recency); ROBBENNOLT & STERNLIGHT, *supra* note 37, at 123 (same).

59. STERN & SALTZBURG, *supra* note 9, at 64; see also ROBBENNOLT & STERNLIGHT, *supra* note 37, at 122 (noting that because of the “concreteness effect,” vivid examples and analogies are more memorable).

60. See 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, *Taming the Reptile: A Defendant’s Response to the Plaintiff’s Revolution*, 25 JURY EXPERT 4, 4 (2013) (“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 DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION (2009).

61. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 76 (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 153 (“‘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.”).

62. See BRODA-BAHM, SPIECKER & BOULLY, *supra* note 60, 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)?’”); see also Corey J. Clark, Brittany S. Liu, Bo M. Winegard & Peter H. Ditto, *Tribalism is Human Nature*, 28(6) CURRENT DIRECTIONS IN PSYCH. SCI. 1, 1 (Aug. 20, 2019) (“[S]elective 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*, ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/membership/archive/2018/10/trouble-tribalism/573307/> [<https://perma.cc/VWW9-7R27>] (“Tribalism, understood as ‘groupness’ or ‘group affiliation,’ is rooted in human psychology. Everyone, everywhere, has tribal instincts and the need to belong.”). See generally Jared T. Miller, *The Psychology of Tribalism*, N.Y. MAG. (Sept. 26, 2017), <https://nymag.com/intelligencer/2017/09/the-psychology-of-tribalism.html> [<https://perma.cc/JFX4-7XQ9>].

63. Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC 229, 234 (2012). However, some may understand Weresh’s arguments as little more than psychobabble for the rhetorical concept of *ethos*.

64. See ROBBENNOLT & STERNLIGHT, *supra* note 37, at 116 (noting that the “peripheral route” is “more superficial, less effortful,” and “can depend more on heuristic or peripheral cues that may not be linked to the actual quality of the message”).

65. See Kathryn M. Stanchi, *The Science of Persuasion*, 2006 MICH. ST. L. REV. 411, 415 (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.”).

social proof, authority, liking, and scarcity.”<sup>66</sup> We do all of this to help the more learned and better skilled advocate win.

## II. WHAT CURRENT LEGAL ETHICS RULES AND ADJUDICATION REGULATIONS 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.<sup>67</sup> 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, on the one hand, adjudication regulations and ethics rules, and on the other hand, advocacy norms.

### A. ADJUDICATION REGULATIONS 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 “play[ed] a pivotal role in so many contexts.”<sup>68</sup> A prominent theme associated with this ideal is that we live under “‘the rule of law, not man;’ ‘a government of laws, not men.’”<sup>69</sup> 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, government officials, or fellow citizens,”<sup>70</sup> 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.”<sup>71</sup> The rule of law requires them to be “truly independent of all influences extraneous to the case to be decided.”<sup>72</sup> Thus, the

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66. See CIALDINI, *supra* note 57, at vii.

67. 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).

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

69. TAMANAHA, *supra* note 68, 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.”).

70. TAMANAHA, *supra* note 68, at 122.

71. *Id.*

72. BINGHAM, *supra* note 68, at 93.

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.<sup>73</sup>

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”<sup>74</sup> and that any verdict “must be based solely upon the evidence received.”<sup>75</sup> Further, judges charge jurors to remain mindful that statements, questions, and arguments by lawyers “are not evidence.”<sup>76</sup> Indeed, to give any evidentiary weight to 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.”<sup>77</sup>

Likewise, rules regulating the admissibility 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.”<sup>78</sup> 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.”<sup>79</sup> 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.<sup>80</sup> These relevancy rules serve the rule of law by excluding information that “has a tendency to influence by improper means,” through “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.”<sup>81</sup> In discouraging

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73. 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).

74. 1A KEVIN F. O’MALLEY, JAY E. GRENIG & WILLIAM C. LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 10:01 (6th ed. 2022) (“This evidence consists of the testimony of witnesses and exhibits received.”).

75. *Id.* § 20:01; *see, e.g., Craven*, 475 P.3d at 1044 (approving instruction that jury must make “an intellectual, not an emotional, decision”).

76. O’MALLEY, GRENIG & LEE, *supra* note 74, § 10:01; *see also id.* § 103:30 (“The lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times . . . is not evidence.”); *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).

77. O’MALLEY, GRENIG & LEE, *supra* note 74, § 12:02.

78. FED. R. EVID. 402.

79. FED. R. EVID. 401.

80. FED. R. EVID. 403.

81. *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 22, at 140–41 (“[T]here are those that have argued that emotions are not only present in the courtroom, but dispositive in jury trials to the detriment of justice.”).

decision-making on “a purely emotional basis,”<sup>82</sup> these rules are at the core of “the very conception of a rational system of evidence.”<sup>83</sup>

When juries go astray from rule-of-law jury instructions, courts fix their errors.<sup>84</sup> For example, one district court ordered a new trial when the verdict was “the product of impermissible speculation, sympathy, and emotion.”<sup>85</sup> Said the court: “[t]he jury decided the case with its viscera, not its reasoning, and therefore permitting the verdict to stand would constitute the gravest miscarriage of justice.”<sup>86</sup> Many other decisions are in accord.<sup>87</sup>

## B. LEGAL ETHICS 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 tribunals and to promote just decision-making.<sup>88</sup> Because lawyer “zeal cannot go unchecked,” courts enforce these standards “to ensure that advocacy supports instead of erodes justice.”<sup>89</sup> Thus, professional conduct rules universally prohibit advocates from appealing to irrelevant matters such as inadmissible evidence, emotion, and their own knowledge or

82. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules.

83. 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, 131 n.6 (1968) (noting that “an important element of a fair trial is that a jury consider only relevant and competent evidence”); PAUL THAGARD, HOT THOUGHT: MECHANISMS AND APPLICATIONS OF EMOTIONAL COGNITION 155–56 (2006) (“[I]f emotional bias helps to prevent the jury from arriving at true answers, then . . . [its] influence . . . would seem to be normatively inappropriate.” And, 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”); 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 13, at 83 (noting that “[t]he tools of *pathos* work just as well [for good as] for evil”).

84. STERN & SALTZBURG, *supra* note 9, 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 26, 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).

85. *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 266, 269 (D.N.J. 1991).

86. *Id.*

87. *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).

88. 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.” GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, PETER R. JARVIS & TRISHA THOMPSON, *THE LAW OF LAWYERING* § 29.03 (4th ed. 2022).

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



trustworthiness.<sup>90</sup> The most significant of these rules, Model Rule of Professional Conduct (“Model Rule”) 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.<sup>91</sup>

The principles in this rule are not new. The earliest 19th-century lawyer conduct standards published by Hoffman, Sharswood, and others contained similar prohibitions.<sup>92</sup> The 1908 American Bar Association (“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.”<sup>93</sup> 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.<sup>94</sup>

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90. 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 PROF’L CONDUCT pmbl. ¶ 9 (2018) [hereinafter MODEL RULES]; *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” may preclude “strategically desirable, or even indispensable, arguments” when ethical responsibilities conflict with “the best possible case on the client’s behalf”).

91. 1983 MODEL RULES OF PROF’L RESPONSIBILITY R. 3.4(e) [hereinafter 1983 MODEL RULES].

92. *See, e.g.*, DAVID HOFFMAN, FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPARTMENT ¶ 47 (1836) (“My 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.”); CANONS OF PROF’L ETHICS Canon 22 (1908) [hereinafter 1908 CANONS] (prohibiting a lawyer from asserting a fact “which has not been proved”); ALA. CODE OF ETHICS Canon 5 (ALA. STATE BAR ASS’N 1887) (prohibiting a lawyer from “offering evidence which it is known the Court must reject as illegal, to get it before the jury, under guise of arguing its admissibility”), Canon 19 (prohibiting a lawyer from asserting “a personal belief of the client’s innocence or the justice of his cause”).

93. 1908 CANONS Canons 22, 23 (addressing candor, fairness, and “attitude toward jury”).

94. MODEL CODE OF PRO. RESP. DR 7-106 (1969) [hereinafter 1969 MODEL CODE] (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.” 1969 MODEL CODE DR 7-106(5-7).



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.<sup>95</sup> Model Rule 3.4(c) prohibits a lawyer from disobeying an obligation to a tribunal.<sup>96</sup> Model Rule 3.7 limits the extent to which a lawyer appearing before a tribunal can serve as both advocate and witness.<sup>97</sup> Model Rule 8.4(d) prohibits a lawyer from “engag[ing] in conduct that is prejudicial to the administration of justice.”<sup>98</sup> Similarly, the 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” from deciding the case only “on the evidence.”<sup>99</sup> 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.”<sup>100</sup>

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.”<sup>101</sup> 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.”<sup>102</sup> The professional conduct regulations in every state are in accord with

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95. 1983 MODEL RULES R. 3.3(a) (“A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . (4) offer evidence that the lawyer knows to be false.”).

96. 1983 MODEL RULES R. 3.4(c) (“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.”).

97. 1983 MODEL RULES R. 3.7; *see also In re Estate of Waters*, 647 A.2d 1091, 1098 (Del. 1994) (“Rule 3.7 and Rule 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.”).

98. 1983 MODEL RULES R. 8.4(d) (“It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.”).

99. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standards 3-6.5(c), 3-6.8(b–c) (Am. Bar Ass’n 4th ed. 2017).

100. *Id.* at The Defense Function, Standards 4-7.5(c), 4-7.7(d), 4-7.8(c–d).

101. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 107(1) (2000) (“Prohibited Forensic Tactics”). This section “is designed to prevent interjection of the lawyer’s own credibility into the issues to be decided.” RESTATEMENT OF THE LAW GOVERNING LAWYERS § 107 cmt. b (2000).

102. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 107(2) (2000). 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.” RESTATEMENT OF THE LAW GOVERNING LAWYERS § 107 cmt. d (2000). However, appellate courts are loath to reverse trial court judgments for such lawyer conduct. *See* Ronald L. Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 CRIM. L. BULL. 293, 296–97 (1973) (“Typically, courts have treated digression from the record as opprobrious conduct, but not reversible error.”).

this *Restatement* and with the ABA's *Model Rules* and standards in forbidding such lawyer conduct.<sup>103</sup>

These lawyer 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.”<sup>104</sup> They are “not based on etiquette, but on justice” and serve to channel fact-finders into determining the issues on “the evidence.”<sup>105</sup> Further, they strive to assure “[f]air competition in the adversary system.”<sup>106</sup> 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.<sup>107</sup> 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 ‘un-ring the bell,’ even after the court gives a cautionary instruction.”<sup>108</sup>

### C. THESE RULES AND REGULATIONS PROHIBIT WIDELY ACCEPTED PERSUASION METHODS

The regulations governing evidence and jury deliberations clearly prohibit the admission and consideration of irrelevant evidence. They exclude relevant evidence that would unduly influence the emotions of decision-makers. And they

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103. The supporting authorities from across the United States are numerous. For a representative sample, see CAL. RULES OF PROF’L CONDUCT R. 3.4(g) (STATE BAR OF CAL. 2018); D.C. RULES OF PROF’L. CONDUCT R. 3.4(e) (1991); FLA. RULES OF PROF’L. CONDUCT R. 3.4(e) (2021); ILL. RULES OF PROF’L. CONDUCT R. 3.4(e) (D.C. BAR 2009); LA. RULES OF PROF’L. CONDUCT R. 3.4(e) (LA. ATT’Y DISCIPLINARY BD. 2004); N.Y. RULES OF PROF’L. CONDUCT R. 3.4(d) (N.Y. STATE BAR ASS’N 2009); PA. RULES OF PROF’L. CONDUCT R. 3.4(c) (PA. DISCIPLINARY BD. 1988); TEX. DISCIPLINARY RULES OF PROF’L. CONDUCT R. 3.04(c) (STATE BAR OF TEX. 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 CODE OF CONDUCT FOR EUROPEAN LAWYERS § 4.2–4.4 (COUNCIL OF BARS & L. SOCIETIES OF EUR. 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).

104. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 107 cmt. c (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.”).

105. *Cherry Creek Nat’l Bank v. Fidelity & Cas. Co. of N.Y.*, 202 N.Y.S. 611, 614 (N.Y. App. Div. 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.”).

106. 1983 MODEL RULES R. 3.4 cmt. 1.

107. STERN & SALTZBURG, *supra* note 9, at 14.

108. HAZARD, HODES, JARVIS & THOMPSON, *supra* note 88, § 33.14; see also Carlson, *supra* note 104, 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 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* 162 (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.”).

restrict the deliberations of fact-finders to the law and admitted evidence only.<sup>109</sup> Complementary lawyer ethics rules likewise prohibit advocates from alluding to irrelevant matters, appealing to emotion, and asserting personal knowledge and opinions about disputed facts.<sup>110</sup> Taken together, these rules and regulations 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.<sup>111</sup> After all, these techniques—old and new—overtly and covertly encourage decision-makers to decide cases illogically<sup>112</sup> using irrelevant and inappropriate extra-evidentiary factors. So, the law and rules prohibit advocates from using *pathos*.<sup>113</sup> They prohibit *ethos*.<sup>114</sup> They prohibit storytelling<sup>115</sup> and body language and grooming and primacy and reptile-brain appeals and tribalistic<sup>116</sup> arguments and lapel pins. All of it.

But lawyers use these persuasion techniques every day.<sup>117</sup> Law students learn them in law schools. Instructors teach them in continuing legal education

109. See *supra* Part II.A.

110. See *supra* Part II.B. Some commentators have contended that the ethics rules are gray in this context. See GARDNER, *supra* note 90, 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 1983 MODEL RULES R. 3.4(e) (“A lawyer shall not . . . allude . . .”).

111. 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)).

112. ALDISERT, *supra* note 12, at 144 (noting that “[f]allacies of Irrelevant Evidence are arguments that miss the central point at issue and rely principally upon emotions, feelings and ignorance”). Judge Aldisert said about illogical arguments containing logical fallacies: “[t]hey shift attention from reasoned argument to other things that are always irrelevant, always irrational and often emotional.” *Id.* at 174–75.

113. See Spottswood, *supra* note 29, 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.”).

114. Stern and Saltzburg have observed that “[i]t is a violation of ethical rules for a lawyer to express his personal opinion in the courtroom.” STERN & SALTZBURG, *supra* note 9, at 13. “Yet that is what every good trial lawyer always has striven to do.” *Id.* at 14.

115. See CLARK, DEKLE & BAILEY, *supra* note 29, at 11 (noting that “[Model Rule] 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 54, at 76, 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.”).

116. MAUET, *supra* note 26, at 438 (“Asking the jury to base its verdict on some personal characteristic of a party, such as race, sex, or citizenship, is obviously improper.”).

117. Judge Aldisert said these techniques “are ploys, but ploys that are used every day, everywhere.” ALDISERT, *supra* note 12, 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 29, at 213.

classes.<sup>118</sup> Judges permit them in their courtrooms. And lawyer regulators don't care.<sup>119</sup> Rather than being subjected to discipline,<sup>120</sup> sanctions, or even the opprobrium of peers,<sup>121</sup> 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 rules and regulations 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.<sup>122</sup> Thus, although there are strict rules regulating lawyers' use of these techniques in their "rhetorical community,"<sup>123</sup> 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.<sup>124</sup>

How did this come to be? Maybe it never occurred to the drafters of the evidence and professional conduct rules that the broad, prohibitory language that they chose forbids even widely accepted advocacy norms.<sup>125</sup> Maybe the drafters were thinking about only the most egregious instances of misconduct in which lawyers *overtly* infect adjudicative proceedings with emotions, personal opinions,

118. The advice of many trial advocacy experts "seems to fly in the face of the ethical rules." STERN & SALTZBURG, *supra* note 9, at 16.

119. 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 scope ¶ 16.

120. 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 *supra*. Decisions imposing discipline on lawyers for appealing *overtly* to emotion or asserting personal opinions are few and limited to only the most egregious and prejudicial misconduct. *See, e.g., In re Vincenti*, 704 A.2d 927, 940 (N.J. 1998); *In re Ungar*, 389 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").

121. Typically, lawyers whom the profession views as "unprofessional" are subject to such opprobrium. *See* RESTATEMENT OF 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").

122. *See* RIEKE & STUTMAN, *supra* note 50, at 142 ("Trial lawyers have reported for years that evidence, both admissible and inadmissible, plays the central role in the courtroom drama."), 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").

123. Sammons, *supra* note 67, at 99.

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

125. However, 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[] the lawyer to practice at his or her peril." AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 486 (Art Garwin ed., 2013).

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.<sup>126</sup>

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.<sup>127</sup> 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 and regulations governing lawyers and trials. 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.<sup>128</sup>

### III. HARMONIZING LEGAL ETHICS RULES AND ADJUDICATION REGULATIONS 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 regulations, lawyer ethics 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-evidentiary allusions and long-standing advocacy norms.<sup>129</sup> 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

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126. Or maybe the ethical issues associated with persuasion techniques were not a significant concern. *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) (noting that “ethical problems are not high” on the lists of concerns of lawyers and judges).

127. Pound, *supra* note 124, at 27.

128. 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.”).

129. See *supra* note 114; HAZARD, HODES, JARVIS & THOMPSON, *supra* note 88, § 33.14 (discussing the ethical line between expressing lawyer opinions subtly and improperly); Koehlert-Page, *supra* note 81, 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”).

own force.”<sup>130</sup> 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.”<sup>131</sup> 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.”<sup>132</sup>

The problem with Professor Hazard’s view of Model Rule 3.4(e) is that the rule’s express language is categorical.<sup>133</sup> It is not “pregnant with discretionary nuances” and it admits no exceptions. In contrast, other rules employ more flexible and discretion-conferring terms, such as the terms “material” (Model Rule 4.1), “substantial” (Model Rule 8.3), and “unreasonable” (Model Rule 1.5). Such terms provide wide leeway for a broad range of acceptable lawyer conduct.<sup>134</sup> Model 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.<sup>135</sup> 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*,<sup>136</sup> 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.<sup>137</sup>

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130. HAZARD, HODES, JARVIS & THOMPSON, *supra* note 88, § 33.16. Professor Hazard likely would have characterized this rule as a “seemingly ‘imperative’ rule[]” that is “pregnant with discretionary nuances.” *Id.* § 1.25.

131. *Id.* § 33.14. This is a “subtle judgment call[]” which is “an inescapable element of a lawyer’s professional responsibility.” *Id.* § 1.26.

132. *Id.* § 1.26. Although Professor Green did not address Model 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 128, 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.”).

133. 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 scope ¶ 14. Model Rule 3.4(e) is one such “imperative” rule. MODEL RULES R. 3.4(e).

134. HAZARD, HODES, JARVIS & THOMPSON, *supra* note 88, § 1.25–1.26.

135. “[F]ormal legality is the dominant understanding of the rule of law among legal theorists.” TAMANAHA, *supra* note 68, 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).

136. LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

137. *Id.* at 210; see also Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 807 (1989) (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”).



Commentators overwhelmingly agree that congruence is critical in a legal system that adheres to the rule of law.<sup>138</sup> Indeed, congruence is one of the “fundamental normative commitments on which a legal system rests.”<sup>139</sup>

Considering the importance of the rule of law in general<sup>140</sup> and congruence in particular, doing nothing is untenable. As written, current 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.<sup>141</sup> What a paradox: anti-persuasion rules and regulations that exist solely 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 existing rules and 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<sup>142</sup> or some other doctrine should bar judges and regulators from enforcing them.

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138. See, e.g., TAMANAHA, *supra* note 68, 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 (4th ed. 2011) (discussing Fuller and noting that legal standards must actually be “applied”); Daniel B. Rodriguez, Mathew D. McCubbins & Barry R. Weingast, *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” Reconsidered*, 7 DREXEL L. REV. 365, 368 (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 Stacey, *The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication*, 67 AM. J. COMPAR. L. 435 (2019) [hereinafter Stacey, *The Magnetism of Moral Reasoning*]; Jutta Brunnee & 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) (“[G]overnment behavior that is congruent with stable legal rules is a hallmark, and a virtue, of the rule of law.”).

139. Stacey, *The Magnetism of Moral Reasoning*, *supra* note 138, at 473.

140. See *supra* note 68 and accompanying text; see also Rodriguez, McCubbins, & Weingast, *supra* note 138, 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.”).

141. 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”).

142. 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, 2210 (2006); see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17–22 (1982). For desuetude



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.<sup>143</sup> 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.<sup>144</sup> For example, in *Old Chief v. United States*,<sup>145</sup> the United States Supreme Court recognized the power and acceptability of appeals to emotion. There, the defendant offered to stipulate to his prior conviction in a felon-with-a-firearm prosecution to prevent the jury from learning about it. While the Court ruled in his favor,<sup>146</sup> 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.”<sup>147</sup> 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.”<sup>148</sup> Though illogical, emotion-laden 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.”<sup>149</sup> For this reason, many have

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to apply, however, the enactment must be “basically obsolete.” See *United States v. Elliott*, 266 F. Supp. 318, 325–26 (S.D.N.Y. 1967) (quoted in *United States v. Moon Lake Elec. 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 Rules of Evidence 401 and 402, and similar rules.

143. 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).

144. See generally DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 91–121 (2012); 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).

145. *Old Chief v. United States*, 519 U.S. 172 (1997).

146. 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.*

147. *Id.* at 187.

148. *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.

149. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 416 (1st ed. 2011).

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.<sup>150</sup> So, maybe we don't dislike 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: "[i]f you have a set of rules which conflict with reality, then reality normally wins."<sup>151</sup> That is why anti-persuasion rules are not strictly enforced now. And that is why they cannot and will not 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 regulations 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.<sup>152</sup> 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.<sup>153</sup> They also perform an "expressive function" by pronouncing a "social judgment"<sup>154</sup> about the value we collectively place in the notion that tribunals adjudicate cases in strict accord with the rule of law. Even if tribunals do not

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150. See, e.g., Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *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); Spottswood, *supra* note 29, 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").

151. 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, Nov. 29–30, 2003, at 6); cf. Pound, *supra* note 124, at 36 ("In a conflict between the law in books and the national will, there can be but one result."), 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").

152. Apologies to Colonel Jessup. See *A Few Good Men*, WIKIPEDIA, [https://en.wikipedia.org/wiki/A\\_Few\\_Good\\_Men](https://en.wikipedia.org/wiki/A_Few_Good_Men) (last visited Apr. 24, 2023) [<https://perma.cc/JM9W-J3FN>].

153. 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 Standard 1.1 (Am. Bar Ass'n 1992).

154. 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)).

really work that way, we just can't admit it. If we did, what would be the point of the robes, the law books, and the courthouses?

#### D. TAILOR LEGAL ETHICS RULES AND ADJUDICATION REGULATIONS 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.<sup>155</sup> Here's how to do it.

##### 1. RECONSIDER LEGAL ETHICS 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,<sup>156</sup> this revision would eliminate the current imperative rule that categorically prohibits a lawyer from making *any* allusions to irrelevant and inadmissible matters. The revision would replace the current imperative *rule*<sup>157</sup> with a reasonableness *standard*.<sup>158</sup>

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155. See Brunnee & Toope, *supra* note 138, at 116.

156. 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 the 1969 *Model Code* and the New York and Texas rules of professional conduct. See 1969 MODEL CODE DR-106 (entitled "Trial Concerns"); N.Y. RULES OF PROF. CONDUCT R. 3.4(d); TEX. DISCIPLINARY RULES OF PROF. CONDUCT R. 3.04(c).

157. 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." AM. BAR ASS'N, *supra* note 125, at 489. The drafters rejected it because they thought that it "was too vague to be a rule of conduct enforceable as law." *Id.*

158. 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 90, 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").

A “rule” forces decision-makers to “respond in a determinate way” to triggering facts; it captures the underlying policy and then operates independently.<sup>159</sup> 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.<sup>160</sup> As a classic example,<sup>161</sup> 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.”<sup>162</sup> 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 Model 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, 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.”<sup>163</sup> 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.”<sup>164</sup> 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

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

160. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992); Sunstein, *Problems with Rules*, *supra* note 154, 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.”).

161. See, e.g., Sunstein, *Problems with Rules*, *supra* note 154, 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 128, at 1430.

162. Sullivan, *supra* note 159, at 58; Sunstein, *Problems with Rules*, *supra* note 154, at 1022 (“Because of their *ex ante* character, rules will usually be overinclusive and underinclusive with reference to the arguments that justify them.”).

163. Sullivan, *supra* note 159, 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.*

164. Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL’Y 645, 645–46 (1991).

and requires inexperienced ones to slow down in the rain.<sup>165</sup> The proposed revision to Model 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.<sup>166</sup> For example, courts regularly employ reasonableness standards to evaluate the propriety of actors' conduct in constitutional law,<sup>167</sup> criminal law,<sup>168</sup> torts,<sup>169</sup> contracts,<sup>170</sup> property,<sup>171</sup> antitrust,<sup>172</sup> and virtually every other area of the law.<sup>173</sup> In lawyering law, the "reasonable lawyer" standard has long functioned in professional responsibility codes.<sup>174</sup> For example, the *Model Rules* require lawyers to have the knowledge, skill, thoroughness, and preparation "reasonably necessary"

165. For other examples of the rules/standards distinction, see Sunstein, *Problems with Rules*, *supra* note 154, at 1024 (*Roe* trimester rule versus "undue burden" standard; *Miranda* rule versus voluntariness standard; age-triggered retirement rule versus competence standard); Diver, *supra* note 153, at 69–71 (contrasting mandatory retirement for pilots at a fixed age versus retirement when continued employment would be "unreasonably dangerous").

166. 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 (Ct. of Common Pleas 1837) (noting that defendant "was bound to proceed with reasonable caution as a prudent man would have exercised"); *Blyth v. Birmingham Waterworks*, 11 Exch. 781 (1856) ("Negligence 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 C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 23 (2012).

167. See, 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 seizure. . . .") (emphasis added); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1484 (1985) (discussing rules/standards debate).

168. See, 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).

169. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 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).

170. See, 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).

171. See, e.g., RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.13(1)(c) (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).

172. 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).

173. 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).

174. 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 been and is approved by their fellows." George Sharswood, *Review of Sharswood's Professional Ethics*, AM. L. REG. 193, 194 (1855).

for the representation.<sup>175</sup> They require a lawyer to act with “reasonable diligence and promptness.”<sup>176</sup> They require a lawyer to keep the client “reasonably informed.”<sup>177</sup> They prohibit “unreasonable” charges for fees and expenses.<sup>178</sup> They permit the disclosure of confidential information when the lawyer “reasonably believes” disclosure is necessary to serve a permissible end.<sup>179</sup> And on and on and on. Given that conduct codes already define<sup>180</sup> 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.<sup>181</sup>

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.<sup>182</sup> The rules/standards debate typically considers the merits<sup>183</sup> of each approach using economics,<sup>184</sup> political philosophy,<sup>185</sup> or behavioral

175. MODEL RULES R. 1.1 (“Competence”).

176. MODEL RULES R. 1.3 (“Diligence”).

177. MODEL RULES R. 1.4 (“Communications”).

178. MODEL RULES R. 1.5 (“Fees”); *see also* 1908 CANONS Canon 14 (lawyer has “right to receive reasonable recompense for his services”); MODEL CODE OF PROF’L RESPONSIBILITY EC 2-16 (1980) [hereinafter 1980 MODEL CODE] (lawyers entitled to “reasonable fees”), EC 2-17 (“lawyer should not charge more than a reasonable fee”), DR 2-106(B) (fee is unreasonable when “lawyer of ordinary prudence” would believe the fee is “in excess of a reasonable fee”).

179. MODEL RULES R. 1.6(b) (“Confidentiality of Information”); *see also* 1980 MODEL CODE DR 4-101(D) (lawyer must exercise “reasonable care” to protect confidences).

180. The *Model Rules* define the terms “reasonable” and “reasonably” to denote “the conduct of a reasonably prudent and competent lawyer.” MODEL RULES R. 1.0(h). 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.” MODEL RULES R. 1.0(i).

181. 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 92, ¶ 47 (emphasis added).

182. *E.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 15–63 (1987) (discussing age-old tension between rules and standards); Duncan Kennedy, *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, *Problems with Rules*, *supra* note 154, at 963–64 (noting that there is no “untrammelled discretion” when “factors are pertinent to the decision, but there is no rule, simple or complex, to apply”); Korobkin, *supra* note 161, 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.”).

183. 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.”).

184. 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 153; Kaplow, *supra* note 160 (entitled “Rules Versus Standards: An Economic Analysis”).

185. Some have argued that rules further “democracy” better than standards. *See, e.g.*, Scalia, *supra* note 163, at 1176 (criticizing statutes that lack “clarity or precision” as “undemocratic”); Sullivan, *supra* note 159, 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. *See* Sullivan, *supra* note 159, at 63–64 (noting that “the



psychology.<sup>186</sup> For the following reasons, the proposed standard is preferable to the present rule because it would impose limits on lawyer advocacy<sup>187</sup> in a way that would be realistic, enforceable, and true to the rule of law.<sup>188</sup>

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.”<sup>189</sup> 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.<sup>190</sup> On the contrary, case law reflects that sanctions, reversals, and discipline are reserved for only the most egregious and harmful rule violations.<sup>191</sup> Because over-inclusiveness is the principal problem with Model 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.”<sup>192</sup> That difficulty exists when what is acceptable and unacceptable is clear “at the margins” but not in between.<sup>193</sup> Unfortunately, rules sweep together dissimilar people who find themselves in 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)).

186. Korobkin, *supra* note 161, 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.”).

187. 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, HODES, JARVIS & THOMPSON, *supra* note 88, § 29.03.

188. To address the over- and under-inclusiveness problem, lawmakers could use either a “highly flexible” standard or an “intricate regulatory formula.” Diver, *supra* note 153, at 75. This Article proposes a flexible standard because an “intricate” rule enumerating every unacceptable persuasion technique would be virtually impossible to draft.

189. Sullivan, *supra* note 159, at 58 n.236.

190. 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 183, 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. There are no separation of powers issues given that law-maker and law-enforcer are the same. See TAMANAHA, *supra* note 68, at 54–55 (discussing separation of powers as a rule of law principle in America).

191. See *supra* note 120.

192. Scalia, *supra* note 163, 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)).

193. Scalia, *supra* note 163, at 1181.



middle;<sup>194</sup> rules “fail to distinguish between flagrant and technical violations.”<sup>195</sup> In legal ethics, it is often “difficult to differentiate between . . . ‘hard blows’ as opposed to ‘foul ones.’”<sup>196</sup> 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.”<sup>197</sup> 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 exists a need to adapt a regulatory scheme to changing norms.<sup>198</sup> Rules can “often be outrun by changing circumstances.”<sup>199</sup> Over time, the acceptability of various persuasion techniques has changed.<sup>200</sup> 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 are not would promote dialogue and encourage the development of advocacy law over time. Rules typically foreclose such dialogue.<sup>201</sup>

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.<sup>202</sup> Courts have long

194. 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.

195. Schlag, *supra* note 183, 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.

196. HAZARD, HODES, JARVIS & THOMPSON, *supra* note 88, §1.06 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

197. MODEL RULES scope ¶ 19.

198. Bell, *supra* note 194, at 200 (“A change in circumstances can render precise rules ineffective or even harmful”); Bray, *supra* note 173, 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”).

199. Sunstein, *Problems with Rules*, *supra* note 154, at 1022.

200. Carlson, *supra* note 104, 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)).

201. Sullivan, *supra* note 159, 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 explanations.”) (quoting Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17–36 (1986)).

202. 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: REFORMING THE LEGAL PROFESSION* 51 (2000); *see also* FREEDMAN & SMITH, *supra* note 61, at 8 (“[T]he lawyer’s function—as an officer of the court in a free society—is to serve

recognized the essential role that lawyers play in the judicial system and its adversary process.<sup>203</sup> 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.”<sup>204</sup> 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.”<sup>205</sup>

Fifth, and most importantly, a general standard would further the rule of law by making Model Rule 3.4(e) “congruent” with long standing advocacy norms. As a standard rather than a categorical rule, the proposal would be judicially and regulatorily enforceable.<sup>206</sup> Thus, the standard “in action” would not flatly contradict the “law on the books.” Considering that the persuasion regulations in Model Rule 3.4(e) exist solely to further the rule of law, they too should comply with that bedrock principle.

## 2. RECONSIDER ADJUDICATION REGULATIONS

In addition to revising professional conduct rules, the regulations 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”<sup>207</sup> and that any verdict “must

the undivided interests of individual clients.”) (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, 1245 (1991) (quoting 2 *Trial of Queen Caroline* 8 (1821)).

203. See e.g., *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.”).

204. *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”).

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

206. LAWRENCE E. FILSON & SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER’S DESK REFERENCE* 152 (2008) (discussing the importance of drafting rules that can “be given effect”).

207. O’MALLEY, GRENIG & LEE., *supra* note 74, § 10:01 (“This evidence consists of the testimony of witnesses and exhibits received.”).

be based solely upon the evidence received.”<sup>208</sup> However, judges should further advise jurors with an instruction like this one:

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 they “may have been moved by emotion or empathy to favor one of the parties over the other or to dislike one more than the other.” Further, judges 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.<sup>209</sup> 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.”<sup>210</sup> Furthermore, the rules should acknowledge that “background” information relating to undisputed matters currently “is universally offered and admitted as an aid to understanding”<sup>211</sup>—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 fact-finder. The comments could elaborate that this includes the

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208. *Id.* § 20:01.

209. Spottswood, *supra* note 29, at 97–101.

210. *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997).

211. 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.”).

type of emotional evidence discussed in *Old Chief* and the persuasion techniques that advocates have used for millennia.

Finally, the rule governing the “mode and order” of presenting evidence<sup>212</sup> 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, these revisions would make evidence rules and professional conduct standards not only compatible but also 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*.<sup>213</sup> 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?

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212. FED. R. EVID. 611 (“Mode and Order of Examining Witnesses and Presenting Evidence”).

213. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 (AM. L. INST. 2010) (“Custom”).

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?<sup>214</sup> What was the advocate's degree of culpability? Particularly, 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.<sup>215</sup> Such persuasion techniques have a long history and tradition of customary use by advocates. They are taught and used in modern advocacy classrooms and courtrooms. They are equally available to all parties' advocates and, therefore, can be deployed to counteract another advocate's use.

On the other end of the spectrum, however, overt references to highly prejudicial, inadmissible evidence should continue to be condemned in trial practice and legal ethics. Lawyers' repetitive and intentional assertions of personal opinion as to the justness of their clients' causes are and should remain intolerable. Likewise, the purposeful staging of a private home to mislead jurors during a jury view should be impermissible; such a technique is not routinely used, is not available to all parties, and is not readily subject to adversarial response. These techniques would tend to 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<sup>216</sup> because it targets jurors' primitive "need for security" to overwhelm their conscious minds.<sup>217</sup> When intentionally deployed in marginally relevant situations, such a

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214. 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").

215. For a discussion of the methods that advocates use to appeal to *ethos* and *pathos*, see *supra* notes 6-46 and accompanying text.

216. See *supra* note 60 and accompanying text.

217. See Broda-Bahm, *supra* note 60, at 4.

technique might be considered unreasonable. However, this technique is not uncommon and can be countered by opposing counsel; therefore, it may be considered reasonable. That is precisely the sort of analysis that future courts and regulators could undertake using a flexible reasonableness standard rather than ignoring categorical ethics rules and adjudication regulations.

### CONCLUSION

The laws of evidence, procedure, and ethics that forbid the use of age-old persuasion techniques are imperfectly drafted<sup>218</sup> and over-inclusive. The plain language of these laws prohibits a wide range of techniques that are longstanding norms in trial advocacy. In action, however, these laws are enforced only at the margins and 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”<sup>219</sup> 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 language or device is improper.”<sup>220</sup> On the contrary, the “occasional use of rhetorical devices is simply fair argument.”<sup>221</sup>

Legal ethics rules and adjudication regulations should be amended to reflect that reality. The judiciary<sup>222</sup> and the legal profession<sup>223</sup> 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 for courts and lawyer regulators to exhibit fidelity to indeterminate—but realistic—standards, than infidelity to determinate—but unenforced—rules.

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218. Sunstein, *Problems with Rules*, *supra* note 154, 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.”).

219. Korobkin, *supra* note 161, 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.”).

220. *State v. Gibson*, 31 A.3d 346, 350 (Conn. 2011).

221. *Id.*; *see also State v. Camacho*, 924 A.2d 99, 126–27 (2007).

222. 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 136, 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.”).

223. 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 124, at 36.