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Effective Advocacy: Oral Argument

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*635 PERSUASION IS AN ART . . . BUT IT IS ALSO AN INVALUABLE TOOL IN ADVOCACY

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> ***636** [Persuasion, a] subject, which has exhausted the genius of Aristotle, Cicero, and Quinctilian [sic] can neither require nor admit much additional illustration. . . . [T]o obtain a perfect familiarity with their instructions is to arrive at the mastery of the art. [1]

Persuasion is an art form that has been studied and written about for millennia. It is also a technique that every person naturally employs in one form or another at one time or another starting at a very early age. Whether it is persuading parents to borrow the car or persuading a tribunal to rule in one's favor, people commonly use the techniques of persuasion to achieve their goals. This Article is designed to provide advocates with a systematic ***637** study of the tools and techniques of effective advocacy that can be utilized in representing clients. It will aid advocates in learning to incorporate the tools of persuasion for both writing and oral advocacy.

In most situations, advocates will be asked first to submit written memoranda or briefs advancing and supporting their claims. After a tribunal has had an opportunity to digest the written submissions (and form initial opinions), the parties will proceed to oral arguments designed to support and further their written submissions. Accordingly, this Article will be split into two sections: one devoted to written advocacy and the other to oral advocacy. Before discussing those areas, though, the Article will first discuss some foundational principles of legal advocacy.

I. The Foundations of Legal Advocacy

Since calculated arguments are crucial for successful advocates, relying on classical rhetoric can help the advocate formulate persuasive arguments. [2] As far back as 450 B.C., Greco-Roman authors have recognized the need for crafting persuasive arguments. [3] As such, they worked incessantly, creating lengthy treatises on the subject of "rhetoric." [4] Rhetoric is "the faculty of discovering the possible means of persuasion." [5] Rhetoric was formulated as a tool to describe, in a narrowly focused fashion, methods of discovering, creating, and later advocating a cause on behalf of a person or entity. [6]

Today, ancient rhetorical principles are echoed in modern practice manuals and legal writing handbooks. [7] Despite some differences, these ***638** manuals and handbooks identify many of the same persuasive techniques created by Aristotle, Cicero, and Quintilian, showing how classical rhetoric can coexist flawlessly with modern persuasive techniques. [8] In fact, at times, advocates unknowingly make rhetoric decisions when creating and organizing their legal arguments, thereby creating persuasive arguments. [9]

Persuasion means "the successful communication of an idea from one person to another, with the result that the reader or listener ends up agreeing with the speaker or writer." [10] When addressing persuasion, Aristotle outlined it in terms of rhetoric: "Rhetoric . . . is comprised of three different modes of persuasion: logos, or reason; pathos, or emotion; and ethos, or character." [11] As will be discussed infra in Part II(C), "a skillful lawyer will be adept at all three modes of persuasion." [12] To begin to think about legal persuasion, it is important to think about process. Process involves everything from the initial fact-gathering stage, through researching the law, and finally culminating in the development of a theme and arguments to be presented in writing and orally. [13]

To advance a position and persuade others to adopt that position, an advocate must begin by carefully considering the case at hand. [14] Advocates must thoroughly review their case or record to find legally significant facts and applicable law to understand what it will take to convince someone of their position--in other words, to persuade. [15] The first step in the process is to thoroughly review the case record in order to isolate the legally ***639** significant facts. [16] The second step is to identify the rules of law that will potentially govern the outcome of the dispute. [17] Only after taking those two crucial steps can advocates, together with clients, develop the position that they wish to take regarding the dispute. And only then can advocates understand what it will take to convince others of their positions. This Section will focus on those two critical components: isolating the important facts in a legal dispute and identifying the legal arguments.

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A. The Importance of Facts

Advocates can only develop arguments or an argument strategy through a thorough understanding of the facts of their cases. Arguments are interconnected with the study of facts: "[T]he 'more facts [the advocate] has at his command, the more easily he will make his point; and the more closely they touch the case, the more germane they will be to his purpose, and the less like sheer commonplace . . . .'" [18]

Legally significant facts are divided into two separate categories: personal attributes and circumstances. [19] The subdivision ensures that the advocate will not miss any potentially relevant facts that can be used to craft arguments and ultimately to persuade. This Section will describe both of those inquiries and then discuss the SWOT (Strengths, Weaknesses, Opportunities, and Threats) technique for assessing relevant facts. [20] In the ***640** same way that classical rhetoricians searched for clues that gave them insight into the personality and backgrounds of individuals involved in a case, entrepreneurs created this concept known as SWOT analysis, which when applied in the context of persuasion, aids the advocate in pulling from the record legally significant facts. Using SWOT analysis, the advocate would comb the record to identify each party to discover the relevant facts in the case or record. By combining the classical and modern methods, advocates can identify important legal and personal characteristics of their clients that will help to strengthen their arguments and determine the most significant and persuasive arguments to present.

It is one thing to say that the facts of any case are important; it is another thing to go through the process of identifying what those facts are in any particular case. An effective advocate must be able to identify the important facts and harness them to make a persuasive case for the client. This familiarity with the facts includes familiarity with those facts relevant to making the client's arguments. However, familiarity should also be achieved with those facts that establish the opposing party's case, so that the advocate can refute the opposing party's arguments effectively. The process, perhaps not surprisingly, involves thorough and thoughtful preparation.

1. Personal Attributes and Circumstances

To better understand their clients' needs, wants, and goals, classical advocates considered many personal attributes, for example: birth, nationality, country, sex, age, training, name, nature, manner of life, fortune, habit, feeling, interest, purposes, achievements, occupation, accidents, and speeches. [21] This list of personal attributes is not exhaustive. [22] Any qualities that are unique to a party in a particular case are that party's personal attributes. [23] Any combination of those personal attributes might help modern advocates build cases for their clients.

***641** For example, in a contractual dispute, questions of interpretation often surface. If ultimately the question arises over whether a person understood a particular statement in a particular way, the person's training or understanding of the area being discussed would be relevant. So too might that person's educational background, cultural background, intelligence generally, language abilities, age, or other attributes. As such, the advocate must assess all of these personal attributes to make a valid and in-depth argument. The advocate must consider all of the personal attributes of every person and entity involved in the case and then must look at all circumstances surrounding each one.

The circumstances portion of the factual discovery process is distinct from the personal characteristics analysis. Whereas the personal characteristics analysis seeks to discover personal attributes of the parties involved, the circumstantial analysis inquires into the circumstances surrounding the case at hand. [24] As one author explained, the advocate should examine "the place where the events took place, the time they took place, the duration of events, the special circumstances surrounding events, the person's hope of success, and the person's hope of escaping detection." [25] Any of the circumstances of the events surrounding a dispute might be relevant and might help the advocate to build an argument. The way to determine these important attributes and circumstances is to review the record or case file carefully.

2. Absorbing the Record

Studying the record cannot be over-emphasized. With each reading of the record, the advocate should focus on different goals. Initially, the advocate should concentrate not on the detailed specifics of the case, but rather on the bigger picture the case

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presents.[26] The first read is an introduction that serves to familiarize the advocate with the main players and the specific predicament in which they find themselves.

On the second read through of the record, the advocate should make sure to note the important detailed facts of the case. On this read, the advocate should pay special attention to the distinction, described above, between (i) the personal attributes of the parties involved and (ii) the ***642** circumstances that may be relevant to the outcome of the case.[27] Each fact should be noted in a column or on a page identifying that fact as a personal attribute of a particular party or a relevant circumstance.

Upon subsequent readings of the record of the case, or as more facts come to the advocate's attention, more notes should be taken identifying additional relevant facts not noticed previously. Again, all facts should be identified and categorized as being personal attributes or circumstances.

When the advocate feels comfortable that he or she has discovered all the relevant facts, the advocate shifts his or her focus. Instead of reading through the record again from beginning to end, the advocate should review the notes and take an investigative pro-active stance about discovering the personal attributes of the parties involved and the circumstances of the dispute.

Regarding the personal attributes that are relevant, the advocate should ask and answer a series of questions: Who are the relevant parties? What does the advocate know about each of them that might help or hurt the case? Consider the background of each party, the education level, the language abilities, and the experience level of the party. Is there any personal characteristic that was overlooked as unimportant that might, in the end, prove significant in any way? Consider having a page for each relevant person in the dispute and listing all the personal attributes of that person on that page. As more facts are discovered through the process of reading and re-reading the record, add those facts to the relevant page.

With respect to the circumstances, the advocate should again ask and answer a series of questions: Do I know all of the relevant circumstances? Which of the circumstances are agreed upon by the parties and which are disputed? Are there timing issues that are important? Are there location issues that are important? Where did the action take place? What is the nature of the dispute? What are the exact terms of the contract that are relevant to the dispute? Is there any other provision in the parties' contract or contracts that impact the dispute? Is there any other circumstance that was overlooked as unimportant that might, in the end, prove significant in any way?

The reading of the record and the fact-finding generally should continue until the advocate feels comfortable that there are no more relevant facts. At that stage, the advocate can proceed to organize and analyze the facts of the case.

***643** 3. Organizing and Analyzing the Facts

Through the process outlined just above, an advocate should be able to identify the relevant and important facts of the case at hand. The next step is to analyze those facts. As discussed previously, modern theorists have applied an analytical framework known as the SWOT analysis to aid in fact assessment.[28] Through a SWOT analysis, an advocate carefully reviews the record of the case to identify (i) the Strengths of a party's case, (ii) the Weaknesses of a party's case, (iii) Opportunities to advance the interests of the party, and (iv) Threats to the party's case.[29]

In accordance with the SWOT process, after the facts have been identified, each of the facts should be categorized as a strength, a weakness, an opportunity, or a threat to the party's case. Any particular fact might actually fall into more than one of those categories. The advocate should then turn the information found into a checklist for each one of those categories. That way, the advocate can have a list, readily available, of the facts that will help the case and those that might hurt the case. In the end, the advocate has a list of the facts that are possible strengths for the party's case, a list of all possible weaknesses, a list of all opportunities, and a list of potential threats.

Following the procedures outlined above will allow the advocate to understand relevant and important facts to both sides of the case. Additionally, the SWOT process allows the advocate to understand how those facts might be used to fashion an argument. A fact that is a strength should typically be highlighted when making a case for a client. A fact that is a weakness may need to be acknowledged but then neutralized with other information that makes the weakness appear less important. Ultimately, the advocate can build a case emphasizing the good facts, seizing on opportunities, and distinguishing or minimizing the bad facts or anything that might threaten the client's desired outcome.

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B. Discovering Legal Issues and Arguments

Once the facts of the case have been identified, organized, and analyzed, the advocate can begin to consider the potential legal issues presented. [30] ***644** Once the issues are identified, the advocate will need to craft the best arguments possible to advance the client's interests with respect to those issues. [31] Classical advocates described many different types of arguments. [32] Generally, however, arguments were primarily subdivided into two basic categories: (i) affirmative arguments and (ii) counter-arguments. [33] Of course before an advocate can make an effective, well-organized legal argument, the advocate likely will need to engage in research to discover and understand the potential issues raised by the case.

1. The Research Process

There is simply nothing as persuasive as solid research on an issue that clearly indicates that the client should prevail in a certain matter. For that reason, research is incredibly important and perhaps the most daunting aspect of presenting a persuasive case. The process is more manageable when viewed as a series of smaller steps that all form a part of a process as a whole. [34] In fact, discovering and understanding the legal issues presented in any particular case necessitates a somewhat circular progression of smaller steps. Only after the research has been completed can the advocate effectively create his or her arguments for the client.

a. Identify the Legal Issues

To fully comprehend the legal issues involved in any case, the advocate should (as with identifying the important facts) read the record of the case again. [35] This time, the advocate should read the record with the goal of identifying all the potential legal issues involved. It is important to view this step broadly and to note anything that might be potentially relevant. It is frequently difficult to know at this initial stage what legal issues will ultimately be dispositive of a dispute and so, on this first read through, being as expansive as possible is helpful. However, it is also necessary to understand that many legal issues may be missed in this first step. It is ***645** perhaps comforting to understand that subsequent steps should help to catch any of those missed issues.

b. Research the Issues

In a second step, the advocate should research the rules of law governing the legal issues identified so far. Again, this step should be taken as expansively as possible. [36] It should cover virtually every aspect of law that could possibly be involved in the case. Start with treatises in the relevant area, then focus on any governing law, including constitutions, case law, and statutes. Is a statute at issue? Are there cases that may interpret it? Is there any legislative history that might shed light on how to interpret an applicable statute? Think about what jurisdictions' laws might be relevant. Make sure to research all the different laws that might be relevant to discover the various outcomes that would occur under the various different sources of law.

Depending on the type of dispute, whether it is criminal or civil, state or federal, domestic or international, etc., the advocate must keep in mind that depending on the governing law, there may be different kinds of binding legal authority. Nonetheless, even if a particular authority is not binding, it may have great persuasive value and should not be overlooked or discarded.

Notes should be taken of all the research conducted, including specific cites to relevant sources so that the sources can be found again easily. The last thing any advocate needs is to have found a perfect case or piece of legislation and then be unable to locate it again later. Granted, finding exact words and phrases has become much easier than the days of the classical advocates, as modern advocates have the advantage of the Internet for research. Nevertheless, having to find the proverbial “needle in the haystack” is something all advocates should avoid.

c. Repeat the Process as Needed

When the advocate is reasonably comfortable with the research that has been completed and the notes that have been taken, the process circles back to the beginning and starts again. Once again the record of the case should be read with a focus on identifying potential legal issues. This time, the advocate will be armed with the information learned about the relevant issues and the nuances and facts that often determine the outcomes of those ***646** issues. On this re-reading, the advocate should

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make note of any additional critical legal issues. In addition, it is also possible at this stage to identify certain facts as pivotal that might have previously been thought to be irrelevant. [37]

After re-reading the record, the process circles around to research again. Having gleaned new insights, the advocate will identify other issues that need to be researched, or issues identified earlier might need additional research. After that research is completed, the advocate should read the record of the case carefully again. Then, conduct more research. Overall, this process should continue until the advocate feels comfortable that all of the relevant issues have been identified and researched.

d. Organize the Research and Formulate Arguments

Organizing research is intimately connected to formulating logical arguments. [38] If the advocate lacks the ability to organize research, then he or she could fail to convey his or her points. [39] Accordingly, the advocate should make a concerted effort from the very first day of the research process to organize all relevant research to produce the most coherent arguments. In the organization, the important facts that have been identified should be matched up with the legal issues that they relate to.

One possible way to organize the research at this stage is to write each issue found on a separate page. Then include on that page the possible arguments that could be made on behalf of the client. Additionally, note the possible arguments that could be made on that issue on behalf of the opposing party. Integrate into that page the relevant facts (including Strengths, Weaknesses, Opportunities, and Threats for the client) that bear on the outcome of that issue. [40] In thinking about the affirmative arguments the advocate will make for the client, one should imagine how the opposing ***647** party will refute them. How should the advocate answer that refutation? Build that reasoning into the argument to craft a stronger, more persuasive affirmative argument. [41] After identifying all the possible legal issues and the arguments relating to those issues, the arguments should be categorized as affirmative arguments or counter-arguments.

2. Affirmative and Counter-Arguments

Affirmative arguments are those that lend credit, authority, and support to the client's contentions. [42] Such arguments can be based on statute, precedent, definition, time, consequence, motivation, conflicting facts, cause and effect, legislative intent, equity, procedure, or ambiguity. [43] Classical authors explained that an equitable argument is one in which "'there is a question about the nature of justice and right or the reasonableness of reward or punishment.'" [44] An argument based on procedure is one in which "the right person does not bring the suit, or that he brings it against the wrong person, or before the wrong tribunal, or at a wrong time, under the wrong statute, or the wrong charge, or with a wrong penalty . . . ." [45] Affirmative arguments are those that advocates should typically emphasize in making their case. These are the positive arguments made "for" the client. On the other hand, counter-arguments are made in response to the points the opponent will likely argue.

Counter-arguments were referred to as "refutation" by classical authors. [46] According to those authors, such arguments are used as a vehicle to impair or highlight the flaws in an opponent's case. [47] Counter-arguments are used as a mode of impairing, disproving, or weakening an opponent's case. [48] Just as with affirmative arguments, counter-arguments can be based ***648** on statute, precedent, definition, time, consequence, motivation, conflicting facts, cause and effect, legislative intent, equity, procedure, or ambiguity.

To identify helpful counter-arguments, advocates should first consider what their opponents' affirmative arguments will be. [49] Once understood, advocates must then attempt to find the weakness in those arguments. Those weaknesses become the strongest counter-arguments. All of these things together--facts, research, affirmative and counter-arguments--help advocates to develop a theme.

3. Theme

Theme is the ultimate persuasion device. A theme is a compelling story-telling mechanism [50] that stirs the audience's mind. [51] The advocate should reflect on the client's case and highlight the aspects of the client's story that will evoke the audience's emotions (or pathos). [52] In most cases, it should be more emotional than intellectual. [53] Advocates should find a way of weaving

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the theme throughout the persuasive document, a memorandum, for example, beginning with the introduction, continuing through the fact section and into the argument itself. [54]

A theme has a great effect in persuading the tribunal to side with the advocate. According to Cicero's maxim of persuasion, Faci Dicionis Rei Audientes (drawing the audience into the story) is a central tool of persuasion that can be achieved by utilizing pathos (an appeal to ***649** emotions). [55] Classical authors focused themes on pathos to arouse the reader's intimate feelings. [56] Further, different pathos can be used in different situations. [57] In one situation, an author might want to evoke sympathy for the client. In another, the author might find it more effective to evoke disdain for the opposing party. Both can be extremely effective in winning over a tribunal.

A theme should not be outrageous or inflammatory but should be anchored in common sense, reason, and, most importantly, the law. [58] Cicero stated that an effective theme makes a tribunal receptive because it draws the tribunal's attention toward the advocate's argument. [59] An effective theme creates that emotional connection between the legal arguments and the tribunal, but it is still very much connected to the legal arguments. [60] That sort of theme gives the tribunal a reason to apply the law in the advocate's favor. [61]

An outrageous or inflammatory theme, by comparison, will potentially evoke the wrong emotions from the tribunal. [62] The tribunal may end up angered by the advocate for attempting to manipulate the story of the dispute or for attempting to confuse reason and legal analysis with a purely emotional plea. To that end, advocates should know their audience.

4. Know Your Audience

To achieve a persuasive objective, advocates must be cognizant of their audience. "A [writer] is persuasive to the extent that the message resonates with the audience." [63] A good advocate will learn as much as possible about the audience. [64] Advocates should learn about the listener's philosophy, ***650** organization, background, the type of proceeding, and the type of tribunal. [65] Advocates should emotionally engage the tribunal and capture its attention. [66] But the advocate should also ensure that what is being written about or spoken of is anchored in the facts and law so that the advocate exemplifies credibility (or ethos). [67]

Based on their observations, advocates ought to consider the tribunal's tendency to become impatient, bored, inattentive, or even distracted while reading the memorandum or listening to oral arguments. [68] The advocate should use this information to engage the audience's attention. [69] Remember that, by guiding the audience, advocates have a better chance of persuasion. [70]

After the advocate has taken all of the above-listed preliminary steps, then it is time to write and prepare for oral argument. According to the Greco-Roman authors, part of the rhetorical process concerns the arrangement or organization of arguments. [71] Aristotle maintained that "[t]here are two parts to a speech; for it is necessary [first] to state the subject with which it is concerned and [then] to demonstrate the argument." [72] Once the important facts and key legal arguments have been identified, advocates are ready to craft the written submission.

***651 II. Written Advocacy**

Perhaps the advocate's first consideration is that for writing to be persuasive, it must be clear and well organized. [73] Any deviation from that standard will detract from the author's credibility and from the reader's belief that the author has carefully considered and prepared the arguments in the written submission. [74] It should go without saying that clerical or grammatical errors will significantly detract from the ability to appear credible, and therefore be unconvincing for the audience. [75]

A written memorandum of law may be organized in a variety of ways, each of which can be effective. An effective and persuasive memorandum of law might contain the following three sections: an introduction, a fact section, and the body of the argument. [76] A memorandum might include other sections, including a section on submissions to the tribunal, summarizing what is being presented to the tribunal and what relief is requested. A memorandum might also include a formal conclusion. What sections

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to include is partly a function of the norms of any particular institution, and partly a function of the preferences of the author. A persuasive memorandum might have only two sections (facts and arguments) or could have five or more.

It is in the written submissions that the advocate has the opportunity to harness certain tools and techniques to persuade the audience. In most courts, the first time the arguments will be presented is through the written submission.

A. The Introduction

At the very beginning of a written submission, an introduction is helpful. This is where an advocate begins to make the case for his or her client. The introduction should immediately create a theme, including sympathy for the client and the client's situation. [77] The theme should be ***652** introduced with a strong opening sentence that will draw in the reader. The introduction should also give the reader an overview of the case to make the case easy to understand and digest. As a factual matter, the introduction should identify who the parties are, what the dispute is about, and what the tribunal is being asked to do. [78] This Section should contain only true statements and should not attempt to present only one side of the story. However, the overview contained in the introduction should be written with strong emphasis on the sympathy deserved by the client and on the facts and legal arguments that are most favorable to the client.

B. The Fact Section

The fact section should explain the story of the case including all the facts relevant to the body of the argument. This Section is a critical part of the written submission and, for some, the determining factor; many agree that cases are won or lost on the facts alone. [79] The goal of the advocate is to compel the reader to believe the facts as presented. [80] Narration is an integral part of telling the factual story. Narration "is an account 'of the facts and . . . a base and foundation for the establishment of belief.'" [81] The facts "are the most important part of the [case], because any feeling of, 'injustice' [usually flows] . . . from the facts of the case." [82] In addition, many tribunals "will have their minds pretty well made up right after they know the facts" of the case. [83] To that end, the advocate should take care to present the facts in such a way as to persuade the tribunal to support the advocate's position. The best way to do so is to: (1) present the facts in a narrative, story-like fashion, (2) be organized, and (3) be credible.

1. Tell a Story

The facts can be most persuasively set forth if they are described like a story, continuing to weave the theme of the case throughout the story line. [84] ***653** Once again, the theme can and should be echoed in a powerful opening sentence that sets the stage for the story that will follow.

The challenge in drafting the fact section is to tell a story that starts to condition the tribunal to rule in the advocate's favor without "leaping into legal arguments." [85] The advocate can and should tell a powerful story, conveying the theme, and generating some significant empathy for the client, with a simple recounting of the facts without argument or any legal conclusions. [86] The distinction between facts and legally conclusive statements, however, is not always so clear.

The idea of presenting an argument to an audience through a story was originally developed by the classical orators. [87] The assumptions of those advocates were grounded in their study of human nature and the emotions that triggered a predictable reaction. [88] According to these classical thinkers, certain emotions--such as love, hate, anger, fear, and pity-- influenced the audience. [89] An appeal to pathos (emotions) through the use of story-telling causes the reader not just to respond emotionally but to identify with the advocate's point of view. [90] If pathos is used accordingly, it can enhance the advocate's argument because language choice affects the audience's emotional response. [91] In this sense, pathos should evoke a positive response from the tribunal in favor of the advocate's case. Although the advocate must persuade the tribunal by telling the audience a good story, the organization of that story is just as significant for persuasion purposes.

2. Be Organized

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Further, the writing should be straightforward and concise. [92] In preparing the statement of the facts, advocates should tell the reader a simple narrative, most likely in chronological order from the start of the ***654** story to the end. [93] Since the statement of the facts should tell a story, it is generally most effective to organize the facts chronologically--in that way the story is more easily understood by the reader. [94] Realize also that the reader likely knows nothing about the case so that all the relevant facts must be included. [95]

It is, however, possible to use different organizational methods. For example, the fact section might start with where the parties find themselves at the time of the dispute and then develop the background to the dispute afterwards. In any event, the advocate should organize the facts in such a way that, by doing so, the most significant and helpful facts are clearly emphasized and the story is clearly understood. [96]

Another alternative that is quite popular, but is of questionable persuasive value, is to set the facts forth as a timeline. Using this method, dates are set forth on the left hand margin and a brief description of what happened on that date that is relevant to the story is set forth to the right of the date. The fact section continues in this way, presenting a series of dates on the left and descriptions of what happened on the right. This method has the advantage of clearly setting forth the timeline of events. [97] It is also a handy reference to turn back to when looking for a particular date in the story. However, the timeline presentation makes the storytelling somewhat disjointed and can preempt opportunities to persuade. Usually, specific dates in any particular dispute are not particularly relevant and a narrative can simply describe what happened in chronological order to achieve a more fluid and compelling story, instead of a bullet-point list.

One alternative that is not recommended is explaining the facts based on the documents included in the record. [98] This document-by-document explanation of the facts can be "repetitive and can result in a disjointed story" [99] or bullet-point list. The writer never wants to confuse the reader in any way because confusion can lead a reader to question what happened and therefore question the advocate's credibility.

***655** 3. Be Credible

In the fact section, the advocate should strive to be honest, reliable, and thorough. The fact section should contain just that, the facts. They should be accurate and include even the facts that might work against the client's case. [100] However, it is absolutely permissible and appropriate to organize and emphasize the facts to support an argument and convey a theme. [101]

Each fact presented should be a statement that neither party would challenge as untrue. [102] There should be no embellishment that the opponent could argue actually misleads the reader. However, bad facts should be included:

> [I]t is not permissible to state the facts inaccurately or omit significant unfavorable facts. Such misstatements will seriously undermine [the advocate's] credibility [ethos] . . . . It is far better [for the advocate] to acknowledge and attempt to deal with bad facts than to omit them and hope that the [judge] . . . [will] overlook [the] omission . . . . [The advocates'] job is to convince the court that [they] should prevail irrespective of the bad facts. [103]

In doing so, the advocate has a better chance of convincing the tribunal to trust the advocate and rule in the client's favor. [104] As a result, the advocate maintains credibility and at the same time earns the tribunal's respect, which enhances the advocate's persuasive abilities. [105]

This juxtaposition of a bad fact next to a good fact is a great technique to neutralize the bad facts. Of course, the good fact must be true and not misleading in any way. Rather, the fact section should "sound more like an opening statement at trial" (state the facts and leave the argument for later) ***656** instead of being a "regurgitation of the trial testimony and exhibits." [106] Ways to be persuasive and not overly argumentative in the fact section include adding adjectives to impact certain facts, using short quotations from the record to show the witness's own words, or simply stating that the "absence of evidence on a certain point is itself a fact!" [107] A persuasive opening statement can engage the audience's attention or, on occasion, divert it; since

persuasion culminates in the interconnection of theme, structure, and language in an overall factual argument, the advocate can use persuasion to enlist the audience's sympathy. [108] The advocate's goal is to create an atmosphere of trust by conveying to the audience a non-argumentative story to which the audience can relate or connect. [109] As shown, once the facts are organized in an engaging, clear, unbiased manner for the audience, classic and modern authors agree that the fact section prepares the reader for the argument that follows. Engaging, clear, and unbiased facts prepare the reader for the legal arguments, the heart of the written submission.

C. The Argument

"[T]he best and fullest opportunity for persuasion is usually provided by the" argument section in the written submission. [110] An advocate should analyze the facts of the case, and weave facts and theme with the law found through the research process. [111] This can be accomplished by first outlining the applicable law and then demonstrating how and why the facts of the case compel a certain result. The "writer must combine law, facts and policies in just the right proportion; create a tightly knit organization; craft every sentence for maximum persuasiveness; and demonstrate the client's story to be a winner under the relevant law and applicable policies." [112]

The argument section gives the advocate the opportunity to weave not only the facts and law, but also pathos (emotions), ethos (credibility), and ***657** logos (logic) together into a persuasive argument. [113] That argument should further develop the theme of the advocate's case and compel the result the advocate seeks for the client. Because the argument often constitutes the bulk of the written submission, it is critical that advocates understand some basic principles that should guide the writing of this Section.

1. Organizing Arguments

The significance of an organized argument section cannot be overstated. This characteristic may be the single most important requirement because poor organization results in confusion and unnecessary repetition. [114] To achieve clear organization, the writer should use roadmaps to set forth for the reader how the argument will proceed. [115] The writer should also use subheadings to signal where and when new topics are introduced and discussed. [116] The advocate must decide the order in which to present his or her arguments. Finally, the organization should be clear and convincing.

a. Use Roadmaps

A roadmap in an argument is an outline of the points that will be covered further in the document. [117] The roadmap functions as a tool to focus the tribunal's attention on the most crucial points made by the advocate. [118] As such, the roadmap should be located near the beginning of an argument. [119] The advocate should keep the roadmap short to avoid repetition in the argument section of the memorandum. [120] The roadmap is ***658** simply an organizational preview of the argument that follows--an introductory paragraph that tells the reader where the advocate is going. [121] In sum, the advocate should use a roadmap not only to keep the tribunal focused on the advocate's argument, but also to keep the argument simple. [122] The roadmap can provide a knowledge base for the later section containing more detail. [123]

A roadmap is a useful organizational tool keeping with classical or modern principles of organization. Even Greco-Roman rhetoricians believed in the importance of providing a short summary of an argument before the argument was presented. [124] For example, Quintilian states that the summary adds:

> [T]o the lucidity and grace of our [writing]. For it not only makes our arguments clearer by isolating the points from the crowd in which they would otherwise be lost and placing them before the eyes of the [tribunal], but relieves his attention by assigning a definite limit to certain parts of our [writing], just as our fatigue upon a journey is relieved by reading the distances on the milestones which we pass. [125]

And to help identify those milestones further, subheadings guide the reader through the legal arguments.

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b. Use Subheadings

A subheading is a "Roman numeral-based numbering scheme and different spacing and typefaces to denote the different levels of the sub-arguments." [126] Subheadings provide the "super-structure" of the document. [127] In accordance with the roadmap described above, the effective advocate should include subheadings to separate one thought from ***659** the next. [128] These sub-argument headings are a "single declarative statement at the start of the argument" and can function as short summaries preceding specific individual arguments. [129] Building on classical teachings, this stylistic technique provides the advocate with a way of selecting and presenting the best arguments. In addition, the reader may appreciate the use of argument subheadings because they "help break up long passages of text." [130] "It is not uncommon to have such subheadings every couple of pages in an argument" as they are used to transition to a new point of law. [131]

Without subheadings, the reader would face a vexatious reading experience. Headings are the visual signposts of the document that make it easier for the reader to find a particular provision. [132] Although "[h]eading formats aren't substantive, . . . it takes a lot of care and attention to get them right." [133] Because, in some cases, readers might remember headings even more so than details of writing, the advocate should make the headings count: "[They] should be persuasive and contain the conclusion." [134] The reason for this time-consuming project is that there is "no standard way of formatting headings." [135] The best advice for the advocate is to select a style and to stay consistent throughout the memorandum. [136] But, if the tribunal has a special formatting requirement, the advocate should conform to that requirement. [137]

c. Ordering Arguments

There are many different ways to organize arguments. Generally speaking, arguments are best organized by beginning with any jurisdictional issues that would preclude hearing the merits of the dispute and then moving to the merits themselves. [138] When ordering the arguments that get ***660** to the merits of the dispute, the first issues to confront are any issues that involve which law to apply.

After jurisdictional and governing law issues have been handled, if there are several legal issues related to the merits of the claim that remain, the arguments are likely best set forth chronologically as the disputes arose between the parties. [139]

The argument section could also be organized in accordance with the strength of the arguments, placing the strongest arguments up front and grouping the weaker arguments together after the strongest arguments have been made. [140] The winning argument should be placed up front in the affirmative case. [141] Aristotle supported this organization, but also suggested that a strong argument be used to conclude the argument section:

> (1) [T]he strongest arguments should be placed at the beginning and at the end of the pleading; (2) those of medium force, and also those that are neither useless to the discourse nor essential to the proof, which are weak if presented separately and individually . . . should be placed in the middle . . . (3) when ceasing to speak . . . [it is useful] to leave some very strong argument fresh in the hearer's mind. [142]

The argument may "lend [itself] to an 'even if' organizational format." [143] Even if the primary argument fails, there is an alternative argument: "In such arguments, [the advocate] first articulate[s] the main or strongest reasons why [he or she] should prevail. After that [he or she] include[s] an 'even if' argument--an explanation of why [he or she] should still prevail even if the court finds against [him or her] as to [his or her] first arguments." [144] Although many feel that this strategy will weaken the advocate's argument, in reality it strengthens it. Many times, alternative arguments give decision-makers a safer way to rule in the advocate's ***661** favor. [145] They show the advocate's position is a winner, even if the primary argument fails.

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Another organizational strategy involves avoiding convoluted arguments. [146] If the argument is long and complex, the advocate might lose the reader in the complexity. The most persuasive arguments are the simplest ones, appealing to common sense and inherent logic. [147] Of course, some complex arguments are compelling as well. If that is the case, the writer should use roadmaps, subsections, and subheadings to make the complex argument as easy as possible for the reader to understand.

One additional consideration is responsiveness. The advocate may want to consider what arguments the opponent will raise and then address those arguments and meet them with counterarguments. Considerations of whether, where, and when to address the opponent's arguments in this way, tends to require a case-by-case analysis. Logically, it may be best to address the opponent's arguments after presenting all of one's own affirmative arguments. However, the opponent's arguments may so clearly relate to the client's own affirmative arguments that they should be addressed when and where the affirmative argument is addressed. [148]

Crafting a respondent's memorandum (as distinct from a petitioner's memorandum) requires an additional level of organizational consideration. [149] Frequently, a respondent's memorandum is best organized in accordance with the organization of the petitioner's memorandum that respondent is responding to. [150] This is just a general rule, however, and more effective organization might proceed according to the considerations set forth above (for example, making arguments according to the chronological occurrence of the events of the dispute). [151]

d. Keeping the Arguments Simple

As a final principle to keep in mind, the writer should keep the "arguments simple to follow even if the case involves complex facts and ***662** complex legal principles." [152] Since the reader is not as familiar with the case as the writer is, the reader may be unfamiliar with the law or facts involved. [153] If the reader cannot follow the argument, he or she is not likely to be persuaded. [154] The advocate "cannot assume that the court will have the desire or the patience to sort through an extremely intricate argument." [155] The advocate's task is to "[b]reak complicated arguments into smaller [ones or break them into] more digestible parts that [logically] build upon one another." [156] Moreover, the advocate should "[e]liminate extraneous details that are only likely to confuse the reader." [157]

The art of written advocacy in the argument section involves taking complex legal arguments and conveying them to the reader as though they were simple. [158] The reasons the advocate's client should prevail should be equally as simple and compelling. [159] With respect to any particular legal argument, the advocate should begin the discussion by identifying the legal issue under consideration. [160] Then, the writer should set forth the language of the relevant statute or the holding of the relevant cases. [161] The argument should then flow to a discussion of how the law is generally interpreted. [162] Finally, the writer should apply the relevant law to the facts of the case at issue and make a conclusion about how the issue should be resolved. [163] This method is commonly referred to as IRAC. [164] The Issue is set forth, followed by the Rules of law, the Application of the rules to the facts, and the Conclusion. [165]

***663** 2. Analysis

The crux of the argument section of the memorandum is the analysis or "application" as described above. The argument section of the memorandum must include not only a well-developed theme that runs through each individual argument, but also what Aristotle defined as persuasion through logos. [166]

According to Aristotle, an argument based on logos is an argument based on reason. [167] In other words, logos refers to the internal consistency of the message--the clarity of the claim, substance, the logic of its reasons, as well as the effectiveness of its supporting evidence. Effective legal arguments are based upon well-established principles of logic. [168] Creating logical arguments not only bolsters the advocates' credibility, but also maximizes their chances of persuading the tribunals to rule in their favor. [169] "[P]ersuasion is possible only because all human beings are born with a capacity for logical thought." [170]

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Logical arguments are grounded in reason. Two types of reasoning include analogous reasoning and syllogistic reasoning. [171] In the first instance, the advocate draws a generalized conclusion based upon some number of particular experiences or examples. [172] The strength of the conclusion is related in part to the similarity between the various experiences or examples. [173] The advocate will compare the facts of the analogous situation with the facts of the advocate's case. This process is a form of reasoning by analogy. [174] The classic form of deductive reasoning is the syllogism involving a major premise, a minor premise, and a conclusion. [175] Syllogistic reasoning is when an advocate applies a rule to ***664** facts. [176] "The most rigorous form of logic, and hence the most persuasive, is the syllogism." [177] Both analogy and syllogistic argumentation should be utilized for the advocate to persuade.

In addition, the advocate should make sure that the arguments are free of logical fallacies, such as post hoc ergo propter hoc (assuming that one thing caused another because one occurred after the other) and non sequiturs (conclusions that do not follow from the underlying premises). [178] The advocate needs to scrutinize the logic of his or her own arguments and eliminate such fallacies. [179] More so, the advocate should also scrutinize the logic of the opponent's argument so the advocate can effectively demonstrate any fallacies in the opponent's reasoning. [180]

There are several commonplace arguments, beginning with those that are used when the law is adverse to an advocate's case. When faced with such an adverse law, the advocate often argues that the rule is "inequitable, ineffective, self-contradictory, ambiguous, outdated or in conflict with another law." [181] Tribunals realize that advocates must confront such situations (where the law does not favor the advocates' case) and appreciate advocates who have the candor to acknowledge that fact. [182] Tribunals are more likely to trust advocates who are honest enough to admit that some parts of the case favor their opponents. [183] Advocates should also remember that the case need not be perfect to prevail. Advocates do not have to win every single point in dispute to achieve the client's goals.

Most cases implicate many different kinds of public policy considerations, like upholding the sanctity of contracts, equity, fairness, party intent, autonomy, and promoting an alternative to dispute ***665** resolutions. [184] At times, it is not enough for the advocate to rely on primary law alone or other legal authorities to carry the day. [185] The audience may need to understand the public policy implication underlying the rule of law. [186] In discussing these public policy implications, the advocate should persuade the tribunal why it should rule in the advocate's favor and why a decision in the client's favor will make sense in other cases involving different facts. [187] This is the part of the argument where the advocate is usually in the best position to argue the equities of the case. That is, the advocate is less constrained by precedent and can articulate a persuasive case as to why a decision in the client's favor would advance the overall interest of fairness and justice. [188] Public policy should be supported:

> While it is important to address these public policy implications, it still is necessary to support [the] argument with sound analysis of the relevant case law and other authorities. Do not rely on naked public policy arguments devoid of any legal analysis and precedent. Such an approach will fail in all but the rarest cases. [A] discussion of these public policy considerations may fit after [the advocate has] laid out [the] legal analysis and may warrant one or more separate argument subheadings.
>
> . . . .
>
> [The advocate must] show the court how flawed [the] opponent's argument is through a straightforward and sound analysis of the law and facts [and not] give the argument some conclusory and inflammatory label. [189]

Moreover,

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> [Tribunals] get irritated with such artificial attempts to embellish arguments. In a similar, although less egregious vein, avoid over reliance on words such as "clearly," ***666** "patently," and "obviously." These conclusory terms are no substitute for a well-developed argument and often signal to the court that the point is anything but clear or obvious. [190]

Furthermore, the advocate should avoid the urge to retaliate against opposing counsel or any other individual. [191] Often the best response to such an attack is to ignore it. [192] "Likewise, while it is appropriate to challenge the opponent's arguments, avoid using inflammatory rhetoric and sarcasm . . . ." [193] The advocate should "[r]efrain from describing the opponent's argument as 'outrageous,' 'ridiculous,' or 'specious.'" [194] Rather, the advocate should use legal arguments to express the flaws in the opponent's argument--language that is neither personal nor hostile. [195]

Advocates should "avoid making arguments and points that, while perhaps accurate, are utterly inconsequential." [196] Such attention to detail is "likely only to distract from the truly important arguments [the advocate] make[s]." [197] The advocate should not exaggerate the argument. [198] The advocate should also "avoid efforts to 'beef up' [the] argument by resorting to boldface, underlined, italicized and/or super-sized typeface." [199] The inclusion of such formatting tricks will only diminish and weaken legitimate arguments. [200] It would be best to eliminate such behavior from the memorandum. Doing so would increase the advocate's ethos (credibility) with the tribunal. [201]

*667 D. Polishing the Memorandum

At this stage, the memorandum is complete. The writer has begun with a theme set forth in the introduction, added the fact section set forth as a story, roadmapped the argument section, broken up the argument using subheadings, applied law, logic, and policy to make affirmative arguments on behalf of the client, and set forth counter-arguments to offset any arguments the opponent might make. Tables of authorities and a table of contents have been added. Only one more important task remains to be completed: polishing.

Polishing includes proofreading, revising, and editing. [202] The best advice given when the advocate finishes writing is to let the memorandum "simmer" in the mind of the advocate for a couple of days, then reread the product, check if anything needs improvement, and move on to editing the work. [203] Perhaps the most time-intensive part of the writing process, the polishing process, is also the most important after research because it is where the arguments get ironed-out. [204] This ironing may require additional research and, sometimes, completely re-working arguments between editing sessions. Then, much of the written product will need to be revised, based upon what research and re-working glean. The editing phase should include an overall review of the document's accuracy, consistency, and completeness. [205] The strength of a very good argument can be masked with typos, inconsistencies, and formatting problems. [206] A Polishing Checklist, attached as Appendix A, will be helpful during the polishing phase of drafting. [207] Once the written product is drafted, revised, and polished, advocates can concentrate on preparing for oral argument.

III. Oral Advocacy

Oral arguments are extremely important persuasive tools in any setting. "The most fundamental thing to remember about oral argument is that it is a ***668** conversation with the court . . . not an oral recitation of [the] brief or [memorandum] . . . ." [208] The oral argument is a Socratic dialogue-- advocates have the "opportunity to find out what may be troubling the court" because the members of the tribunal have the opportunity to ask questions about their concerns. [209] Oral argument is an opportunity to make the first impression of the case strong and persuasive. [210] The tribunal will have already formed certain ideas about the case from the written documents. [211] This oral stage is an opportunity to either further convince the tribunal of the merits of

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the case or change the judges' minds if they seem to be leaning the other way. In fact, many of the same persuasive techniques utilized in writing are absolutely fundamental to oral advocacy. [212]

This Section will address how advocates should prepare for oral submissions, structure the argument, communicate with the court, answer questions, and rebut the opponent. An effective oral argument must be able to blend, adapt, and transcend diverse styles to be receptive to the widest array of listeners.

A. Preparing for Oral Argument

Preparation is vital: "The key to presenting an effective oral argument is meticulous preparation . . . [The advocate must] know [the] case backward and forward . . . ." [213] A strong and carefully prepared case should shine through, and in turn, the advocate will gain the confidence needed to present the argument and convince the tribunal to rule in the client's favor. Initially, an advocate should decide what points to argue [214] and prepare an outline of the points to be addressed. This list should include references to the facts of the case and the relevant authorities. [215] The advocate should know the record--have it "marked, tabbed, or indexed" so that relevant material is easy to find. [216] Even if the tribunal knows the law well, it is the ***669** advocate who has the most in-depth knowledge of the case. [217] The advocate should, however, be well-versed on the law and should anticipate having to answer questions from the tribunal. Thus, the advocate should prepare to respond to these questions.

At this point, advocates should not be concerned with the length of their arguments because, ultimately, the act of summarizing and organizing arguments will greatly aid the advocate in formulating a concise presentation later on. What is important here is that the advocate understands, internalizes, and owns those key issues that should be addressed as well as what law, facts, and policy should be used in support. Common sense, good manners, and professional behavior are key components to persuasion. [218]

The process is usually formal, and attitude toward and deference to the tribunal are critical elements of persuasion. [219] An advocate must think about these things in advance and build them into his or her arguments. [220] Be prepared to treat the proceedings, the panel, and the opposing counsel with respect. Always remember to be courteous, honest, flexible, professional, and deferential. To effectively prepare for oral advocacy presentations, the advocate should practice whether it is in front of different individuals, alone in front of a mirror, or on videotape. Practice is essential to commit the structure of the argument to memory. [221] Similar to the polishing process used in memorandum writing, oral arguments need to be constantly refined. Fortunately, this will come naturally through constant practice, which will reveal strengths and weaknesses in arguments. An Oral Advocacy Preparation Checklist is attached as Appendix B. [222]

B. Structuring the Argument

As with the written document, the structure of an oral submission is essential to a good oral presentation. To be successful, advocates must have a cohesive and fluid argument. The issues should then be incorporated ***670** into a roadmap, which will set forth both the issues that will be addressed and, more importantly, the theme of the argument. [223]

First, the advocate should do an introduction. The introduction includes explaining what is happening procedurally. Then, advocates should persuasively present key facts relevant to their issues in a story-like fashion. [224] The roadmap can be incorporated at this point, or in some instances, before the key facts. [225] A roadmap of the points the advocate intends to make in the oral argument is important for two reasons. It gives the advocate at least one opportunity to make these points. [226] It also adds structure to the argument by giving the tribunal the points that will be addressed in the order they will be addressed. [227] Critically, though, here is where the advocate's theme should be introduced. "A theme is important for the brief, but it is critical for the oral argument . . . [the theme] should be more emotional than intellectual." [228] In other words it falls in line with Aristotle's pathos. Most themes deal with justice, policy, or fairness. [229] The theme should resonate throughout the entire oral argument.

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Advocates should address each issue mentioned in their roadmaps while making sure to incorporate a logical and chronological story with each. As each new issue is presented, the advocate should make sure to use an oral signpost to indicate to the tribunal that it is shifting to a new argument. An example of an oral signpost is to say, "turning to the second issue . . . ."

Again, the advocate should be as concise and clear as possible, because even the greatest of arguments can get lost in confusing and ill-structured presentations. The advocate should use the time very wisely and stress the most important reasons why the tribunal should rule in the client's favor.

It is normal for an oral advocate to be interrupted by questions. Questions must be answered directly and concisely, but in a manner that supports the client's case. [230] "When [the advocates] are not addressing questions raised by the court, [they should] use the time to persuade the court and personalize the case. [The advocate can p]ersonalize [the] client ***671** and speak in terms of fundamental fairness." [231] By doing so, the advocate might persuade the tribunal to "find a way to rule for the client." [232] Because advocates have a bit more freedom orally than they do in writing, advocates should attempt to emphasize the persuasive theme throughout the oral argument. [233]

The advocate should conclude the argument by telling the tribunal what the client is requesting and why the tribunal should rule in the client's favor. [234] Also, before concluding, the advocate should ask the listeners if there are any further questions. If there are none, thank the tribunal members for their attention.

C. Communicating with the Tribunal Communication is the key to successful oral advocacy.

> There are three aspects of communication: content, structure, and style. Content includes the substance of the advocates' argument--the facts and the law. When many of us think of legal argument, it is content that first comes to mind. In fact, it is the content of the communication that will typically decide cases. However, content may be misunderstood or lost without structure and style. [235]

As discussed above, "[s]tructure includes the use of roadmaps and signposts to inform the listener about what to expect and how to expect it. Without structure, the importance or relevance of a particularly important detail may be completely lost in the torrent of information provided to the listener." [236]

In addition to persuasive speech, Greco-Roman authors tailored rhetoric to symbolic communication achieved by gestures such as facial ***672** expressions, stance, voice, dress, and decorum. [237] "Style, or non-verbal communication, may be the most significant of all three" aspects of communication. [238] "Classical rhetoricians devoted as much . . . attention to . . . style as they did to" creating arguments. [239] "[S]tyle is impossible to achieve without worthy ideas. Conversely, ideas remain lifeless without stylistic distinctions." [240] In other words, the Greco-Romans believed that style not only reinforced arguments, but was essential to successful arguments. [241] Style enhances the effectiveness of the argument by helping to facilitate communication. What the advocate says is as important as how it is said.

Some have suggested that those who listen to persuasive arguments may focus too much on style (or style and structure), as opposed to substance (or content). [242] "The substantive content of the presentation is of course crucial." [243] However, "substance is often subject to reasonable debate," [244] and the disputes that come before a tribunal often involve close judgment calls. "In close cases, style may very well matter--not because it is more important than substance, but because style is the communications vehicle through which the tribunal comes to understand the substance." [245] In deference to competitive fairness (whether classical or modern), "the arguments of the [advocates] are judged not on the merits, but on their effectiveness, given the substantive circumstances presented." [246] In fact, justice and fairness would not allow an honest tribunal to focus more on style than substance. [247] The justice system would surely collapse. If the ***673** complete substance of a dispute were easily apparent to all, then we would have no need for advocacy or advocates:

> Moreover, success . . . is not measured simply by winning and losing on the merits. Success in rhetoric includes two measures: (1) victory, the external end of rhetoric; and (2) whether the rhetorician makes the best possible argument on behalf of a particular position,' the internal end of rhetoric. This internal end may be important, in and of itself, particularly when one considers the fact that 'victory' may take various forms and over various time frames. [248]

Although it is true that "[w]ithout content or substance, structure and style cannot carry the day . . . . Once the [advocate] has marshaled the relevant facts and law, he or she must communicate them effectively. This is where structure and style become important[.]" [249]

Style is also important:

> Style involves the delivery of the communication--body language, facial gestures, speech inflections, pace, and eye contact . . . . If an advocate's body language is distracting, or pace of speech too rapid, then again the content, no matter how sound, may be lost. However, a well-structured argument, complete with clear and distinct signposts, delivered with appropriate pace and emphasis, while engaging the eyes of the listener, will almost certainly convey the content of the argument to the mind of the listener. [250]

In the Aristotle view, style instructs, delights, and moves the audience to belief or action. [251]

One of the "most obvious style issues involves speaking pace." [252] The advocate should speak loudly enough for the listeners to hear, but must also ***674** speak slowly so the tribunal can follow the chain of logic. Pause periodically. In fact, the pause might be the "rhetorical device most undervalued . . . and ignored." [253] An effective speaker will pause to add emphasis, highlight points, prepare the listener for transitions, and clarify the organization of the advocate's thoughts. [254] Simply put, though, it will aid the speaker in slowing down and articulating the points clearly. "[A] rapid pace may inhibit communication of substantial portions of the [advocate]'s substantive argument. It [may end up] as if the substance was never argued," even though the problem was simply an ineffective style. [255] It also shows nervousness, which is distracting and indicates a lack of confidence in one's case.

The importance of eye contact is also quite real:

> [I]t is simply easier to remain engaged and focused on the argument from a person with whom you are making eye contact. When following a complex argument, perhaps in a second or third language, such an engaged focus may make the difference between understanding and missing the advocate's point . . . . [I]t is important to look the [listeners] in the eye for signs of understanding or confusion, so that the [advocate] may attempt to adjust his or her presentation accordingly. [256]

Do not look down at notes; remember it is a conversation with the tribunal, not the podium. Eye contact may also enhance an advocate's credibility with the listeners. [257] It evidences credibility, which was known in Aristotle's world as ethos-the speaker's character. [258] If someone looks another directly in the eye, the person is more credible.

"[T]he style of communication may substantially affect the substance of what is communicated to the listener. In evaluating the effectiveness of ***675** communication, . . . what the listener hears is far more important than what the speaker says . . . ." [259]

Ultimately, the advocate should avoid doing anything that might distract the tribunal members from listening to what the advocate says. Since the advocate is trying to engage the listener in a dialogue rather than give a speech, the advocate should

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be conversational while still maintaining an air of formality. Relax--but do not slouch or otherwise appear disrespectful. Above all, it is essential that the advocate speak with conviction. In Aristotle's view, "style is simply a matter of genre." [260] Advocates must keep all of these "style" guidelines in mind when answering questions as well.

D. Response to Questions

In most oral arguments before courts, tribunals, or individual judges, the judges will ask questions during the argument. In fact, it can be helpful to engage the panel and get the judge to ask questions. [261] One way to turn off a panel is to avoid answering those questions or to do so in a manner that suggests defeat. [262] The following most commonly suggest defeat: body language, filler words, looking away from the questioner, stumbling over words, talking too fast, and not listening. [263] Two of the most important things to do while answering questions are to listen and respond directly. [264]

The only way to address a concern is to listen carefully, know the facts and law, and then answer the question head-on. [265] If the advocate appropriately prepares, then the advocate knows the material better than anyone else. The key is to have confidence in that knowledge. No one wants to be ignored, and therefore directly responding to the panel makes all of the difference. People want to feel respected, and human nature is to appreciate a straight answer to a question. If at all possible, answer with a "yes" or "no" and then explain the reasons for the answer. [266]

***676** The questioning process is a perfect time to persuade the listener and add valid and important information that will aid in the understanding of the argument and in ruling in the advocate's favor. Responding with well-thought-out answers is better than eluding the audience or distracting the panel with the details the advocate wants to submit, but that does not seem to matter to the judge. [267] The advocate must read the audience and understand the differences there may be, adjusting style and speech to accommodate the listener. Some judges will read the entire record and memoranda in advance; others will want to walk through the memorandum. Still others will sit and listen for the first time and save questions until the end.

Overall, the advocate should gather relevant material and then present it in an organized and succinct manner. The advocate should appeal to some intelligent common denominator, without assuming anything. Many times, an advocate will reply with beliefs or thoughts in an attempt to garner favor with the tribunal or be "friendly" and personal. These tactics do not work. Judges expect answers that have foundations in the law and are based upon the transaction before them. [268] Focus on these important matters, and make sure that the speaker has thought through the answers and has a clear idea of the repercussions of the answers. This takes a depth of knowledge and preparation that many avoid.

Pay attention to everything. Read the judge (if it is an individual), but also watch each member of the bench or tribunal if it is a panel and see what each one is thinking, how each is responding. Make sure to maintain eye contact with each one of them; really look and observe. [269] Speak to every one of them, even if one or two are not asking questions. They, too, have to be convinced. Make sure to pay attention to confused or quizzical looks or clear indications that a panelist is not buying what is being said. Try to rephrase or slowly and deliberately articulate the point, maybe by way of example. Ensure that the panel accepts the points and never ignore the panelists' concerns. The idea is to be convincing and thorough. [270]

Thus, the advocate must "[l]isten carefully to [the] questions the [tribunal] poses"; answer the questions and "[d]o not try to evade [the] ***677** difficult issues." [271] The oral submission will be most effective when the tribunal sees not only the advocate's weaknesses but also how the advocate addresses those weaknesses. [272]

E. Refuting the Opponent's Argument

The oral submission provides the advocate with a "final opportunity to address [the] opponent's arguments." [273] The advocate should do several things:

> Take advantage of this opportunity when appropriate, but [do not waste time] by responding to every point [the] opponent attempts to make. [The advocate should k]eep the big picture in mind and try to read the court. If the

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> court seems to be responding positively to one of [the] opponent's major points, then [the advocate should] by all means address it. On the other hand, if [the] opponent raises issues that fail to rouse the judges and have little chance of carrying the day, then [the advocate should] resist the temptation to score debating points . . . at the expense of losing the court's interest. Instead, [the advocate should] stick to [the] theme and ignore those parts of [the] opponent's presentation. [274]

Never personally attack the opponent or argue directly with the opponent. The tribunal should be addressed when an advocate speaks. [275] As such, the advocate should always be on his or her best behavior while still zealously advocating for the client. Professionalism should be woven through everything, at all times, during all stages of advocacy.

IV. Conclusion

When considering how long the art of advocacy has existed, it is not difficult to understand why it is so important to human nature. Advocacy ***678** skills can take years to cultivate, and they can continue to improve over time. As has been described above, effective advocacy involves enormous preparation. In any particular case, before crafting persuasive arguments, advocates must first identify the critical facts and issues of law. Capturing those arguments in an effective written document involves careful attention to conveying the facts and the arguments with theme and logic, highlighting the strengths, and acknowledging the weaknesses of one's case. Oral advocacy is similar to written advocacy with the exception that the interpersonal communication skills provide an additional opportunity for the advocate to connect with the tribunal and persuade it. In oral advocacy, deference to the tribunal and the style of the presentation will be integrally linked to the substance that is communicated. Ultimately, persuasion in dispute resolution is about making connections--the logical connections between the facts of a case and the governing law and the human connections between the advocate and the tribunal. If advocates master all of these things, persuasion will overcome all obstacles and the client will be rewarded.

*679 Appendix A

POLISHING CHECKLIST

A. Accuracy

___Record cites accurate?

___Facts accurate? Law accurately presented?

___All authorities updated?

___Parties' names accurate?

___Party designation correct?

___Parts of the memorandum in correct order?

___Headings in outline form?

___Table of Contents and Table of Authorities in correct format?

___Font allowed by the rules?

___Margins correct?

___Memorandum within the allowable page limit?

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___All cites in proper form?

___Proofread and edited carefully? (Be sure to check all parts of the document.)

___Does the end of each page match the beginning of the next?

B. Consistency

___Same fonts?

___Same typeface conventions?

___Same words capitalized?

___Are the issues in the same format?

___Has the record been cited consistently?

___Headings and subheadings in the same format and worded in a similar manner?

___Do any arguments contradict each other?

___Have the same conventions been used?

___Does the Table of Contents match the body of the brief?

___Are all authorities cited consistently in the Table of Authorities and body of the document?

___Proofread and edited for consistency?

***680 C. Completeness**

___Have all required parts been included?

___Does each part contain each required element?

___Have enough facts been included? (Check to see whether facts emphasized in the argument have been included in the fact section.)

___Have all important issues been addressed? Omitted? If so, was the omission intentional?

___Are all elements of a claim discussed? If not, is an explaination included?

___Record cites included throughout memorandum?

___Legal authority cited for each legal proposition made?

___Have referenced documents been attached as appendices?

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D. Persuasiveness

___Do all sections start by mentioning or discussing the client's position?

___Are the arguments clear?

___Have roadmaps and thesis sentences been used?

___Does each section end with a mini-conclusion?

___Is the request for relief repeated throughout?

___Have block quotes been eliminated, except when quoting a statute or rule?

___Are quotations overused?

___Are the best legal sources possible used?

___Are the legal arguments bolstered with policy arguments (if possible)?

___Is analysis complete and persuasive?

___Have facts been effectively used in the analysis?

___Writing style readable?

___Proofread and edited for persuasion?

***681 Appendix B**

ORAL ADVOCACY PREPARATION CHECKLIST AND TIPS

A. Oral Preparation Checklist

___Learn about the audience.

___Know the procedural rules of the tribunal.

___Reread written submission, adversary's submission, and all appendices.

___Reread and absorb the record.

___Know the key law and relevant provisions by memory.

___Prepare a roadmap.

___Prepare bullet-point outline, with points that must be made.

___Do more research.

___Anticipate questions.

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___Practice, practice, practice.

___Have copies of cases, citations to record, outline, and any other materials needed for oral argument ready to bring to podium.

B. Style Tips

___Show respect.

___Beware verbal ticks like "um."

___Relax--but do not slouch or otherwise appear disrespectful.

___Make good eye contact.

___Do not read. If the advocate must glance at notes, do it quickly from time to time.

___Speak loudly enough for judges to hear.

___Use good voice inflection.

___Give no false praise ("that was an excellent question, sir," for example).

___Watch non-verbal reactions (such as swaying, rolling eyes, looking at ceiling, hand gestures, facial expressions). [276]

___Speak slowly so the listeners can follow the chain of logic.

***682** ___Pause periodically, so that judges can ask questions without feeling that they are interrupting.

___If standing, no wandering around while speaking; stay behind the podium.

___No feet tapping.

___No fidgeting.

___Be honest!

___Above all, it is essential to speak with conviction.

Footnotes

a1 Stephanie A. Vaughan is an Assistant Professor of Legal Skills, the Associate Director of International Programs, and the Moot Court Advisor at Stetson University College of Law. Professor Vaughan has been teaching Legal Research and Writing for almost fifteen years and has coached over thirty-five Moot Court teams since 1996.

It is well known that writing is a collaborative enterprise. However, trying to thank everyone who has helped me develop thoughts and ideas expressed within these pages would require yet another article. Although plowing through a list of names is rarely an enjoyable task for the reader, there are some individuals to whom I am in debt and, thus, must acknowledge here. I wish to thank four professors from Stetson University College of Law: Dean Ellen Podgor, for her continuous support and encouragement throughout the writing process; Professor Brooke Bowman for reading this Article in manuscript form and meticulously editing the footnotes; Professor Joseph Morrissey for providing the impetus for my writing; and Professor Kelly Feeley for aiding in the final editing process. I would also like to express my sincere gratitude to my mentor and friend, Darby Dickerson, Vice President and Dean of Stetson University College of Law.

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Additionally, I thank my research assistant, Dayanna Lopez, for all of her hard work without which this never would have been accomplished.

1 Michael H. Frost, Introduction to Classical Legal Rhetoric 1 (2005) (quoting 1 John Quincy Adams, Lectures on Rhetoric and Oratory 28-29 (Russell & Russell, Inc. 1962) (1810)).

2 See id. at 23.

3 See id. at 2.

4 Lawrence Jenab & M.H. Hoeflich, Forensic Oratory in Antebellum America, 51 U. Kan. L. Rev. 449, 452 (2003).

5 Jerry Frug, Argument as Character, 40 Stan. L. Rev. 869, 872 (1988) (quoting Aristotle, The "Art" of Rhetoric 1355b (J.H. Freese trans., Harvard Univ. Press 1975) (1926)).

6 In ancient times, rhetoric functioned as a flexible tool for training advocates to present their cases before Greek and Roman courts. See Michael Frost, Ethos, Pathos & Legal Audience, 99 Dick. L. Rev. 85, 86 (1994). Although Aristotle wrote mainly about speaking, "most of his teachings on style apply to writing as well." Steven D. Jamar, Aristotle Teaches Persuasion: The Psychic Connection, 8 Scribes J. Legal Writing 61, 101 (2002).

7 See, e.g., Frost, supra note 1, at 23, 57, 78 n.1. Examples of advocacy books discussing these are numerous. See, e.g., Carole C. Berry, Effective Appellate Advocacy: Brief Writing and Oral Argument (3d ed. 2003); Charles R. Calleros, Legal Method and Writing (5th ed. 2006) (1998); David C. Frederick, The Art of Oral Advocacy (2003); Louis J. Sirico, Jr. & Nancy L. Schultz, Persuasive Writing for Lawyers and the Legal Profession (2d ed. 2001).

8 See Frost, supra note 1, at 13-15. For examples of modern advocacy books that echo rhetorical principles, see supra note 7.

9 See Frost, supra note 1, at 44.

10 Sirico & Schultz, supra note 7, at 13.

11 E.g., Brett G. Scharffs, The Character of Legal Reasoning, 61 Wash. & Lee L. Rev. 733, 752 (2004) (citing Aristotle, On Rhetoric: A Theory of Civic Discourse, I.2.1356a.1-4, I.2.1356a.17-19, I.2.1356a.5-10 (George A. Kennedy ed. & trans., Oxford Univ. Press 1991)).

12 Id. at 756.

13 See Joseph T. Sneed, Appellate Litigation Skills Training: The Role of the Law Schools, 54 U. Cin. L. Rev. 129, 134-35 (1985).

14 See Frost, supra note 1, at 26. Ancient advocates had to be "'critical thinkers, ready for service on juries that numbered five hundred....'" Frost, supra note 1, at 17 n.19 (quoting Susan Miller, Classical Practice and Contemporary Basics, in The Rhetorical Tradition and Modern Writing 52-53 (James J. Murphy ed., 1982)).

15 See Frost, supra note 1, at 26; Charles H. Rose III, Fundamental Trial Advocacy 36 (2007).

16 Frost, supra note 1, at 26.

17 See Rose, supra note 15, at 36.

18 Frost, supra note 1 at 26 (quoting Aristotle, The Rhetoric of Aristotle 157-58 (Lane Cooper trans., 1932)).

19 See id. In a discussion of modern legal reasoning, one author noted that "[f]acts are placed into categories with potential legal significance: the type of thing (real or personal property), the status of the persons (spouse, landlord, vendor, licensee), the nature of the interaction (tort or contract), and so on." Jamar, supra note 6, at 66.

20 The development of the SWOT analysis technique is credited to Albert Humphrey, a business management consultant, at the Harvard School of Business in the late 1960s. See Antonio Martelli, From Business Intelligence to Scenario Building, Futures Res. Q., Winter 2007, at 5, 7. SWOT analysis is a strategic tool used to evaluate the Strengths, Weaknesses,

Opportunities, and Threats involved in a project/business venture. Id. It involves specifying the objective and identifying the internal and external factors that are favorable and unfavorable in achieving that objective. See, e.g., Janez Nared, Legislation in the Field of Regional Policy in Slovenia and an Analysis of its Spatial Impact, 43 Acta Geographica 85, 90 (2007) (applying SWOT analysis to Slovenian law); see also Lisa A. Kloppenberg, The Balancing Act: Leadership in Strategic Planning, 36 U. Tol L. Rev. 103, 105 (2004) (discussing utilization of SWOT analysis in law school's strategic planning process).

21 See Frost, supra note 1, at 26 (citing 2 Marcus Tullius Cicero, De Inventione De Optimo Genere Oratorum Topica 71 (H.M. Hubbell trans., 1949)); 2 Marcus Fabius Quintilianus, Institutio Oratoria 213-15 (H.E. Butler trans., 1954) (1921)).

22 For a fuller discussion of the range of attributes classical rhetoricians considered, see S. Micheal Halloran & Merrill D. Whitburn, Ciceronian Rhetoric and the Rise of Science: The Plain Style Reconsidered, in The Rhetorical Tradition and Modern Writing 61 (James J. Murphy ed., 1982).

23 See Frost, supra note 1, at 26.

24 See id. at 26-27.

25 Id . at 26 (citing Rhetorica ad Herennium (H. Caplan trans., 1954)).

26 See Rose, supra note 15, at 34.

27 See Frost, supra note 1, at 26.

28 See Martelli, supra note 20, at 7 (discussing the SWOT analysis for assessing facts).

29 Id.

30 Aristotle called this system Topois or Topics (lines of arguments), and defined it as the "identification and description of argumentative premises." Frost, supra note 1, at 27.

31 See Rose, supra note 15, at 36.

32 Frost, supra note 1, at 27-28.

33 Id.

34 Christopher G. Wren & Jill Robinson Wren, The Teaching of Legal Research, 80 Law Libr. J. 7, 10 (1988).

35 See Rose, supra note 15, at 34-35.

36 See id. at 36.

37 See Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument §7.1, at 104-06 (rev. 1st ed., 1996).

38 See id.

39 Since the foundation of any legal argument is law, and in order to find law, it is necessary to research, it follows that the clarity of an argument depends upon the presentation of that research. For a discussion of formulating logical legal arguments see James A. Gardner, Legal Argument: The Structure and Language of Effective Advocacy 3-4 (2d ed., 2007) (discussing the grounding of legal premises in syllogistic argumentation).

40 See supra notes 20, 28-29 (discussing how the advocate will carefully review the record and identify relevant facts utilizing the SWOT analysis).

41 Myron Moskovitz, Winning an Appeal §4.5, at 45 (4th ed., Matthew Bender & Co. 2007) (1983).

42 See Frost, supra note 1, at 27 (quoting 2 Marcus Tullius Cicero, De Inventione De Optimo Genere Oratorum Topica 69 (H.M. Hubbell trans., 1949)).

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43 See id. at 25, 27-28.

44 Id. at 25 (quoting 2 Marcus Tullius Cicero, De Inventione De Optimo Genere Oratorum Topica 31(H.M. Hubbel trans., 1949)).

45 Id. (quoting 2 Marcus Tullius Cicero, De Inventione De Optimo Genere Oratorum Topica 23 (H.M. Hubbell trans., 1949)).

46 See id. at 33.

47 See id. at 34.

48 Id.

49 Moskovitz, supra note 42, at §4.5, 44-47.

50 The theme or "core theory" is "a concise story that describes the legal, factual, and policy issues at play in the case." Bd. of Student Advisors, Harv. L. Sch., Introduction to Advocacy, Research, Writing, and Argument 2 (7th ed. 2002). "One must use the facts and the law to construct a compelling story." Laurel Currie Oates et al., The Legal Writing Handbook: Analysis, Research, and Writing §8.4, 236 (3d ed. 2002).

51 The theme sets forth both the "flavor of the argument" and the mood. See Aldisert, supra note 36, at §12.1, 212.

52 See Oates et al., supra note 51, at §8.4, 236 ("A good story, or theory of the case, appeals both to the head and to the heart.").

53 See Moskovitz, supra note 42, at §5.3, 63 (although the author discusses oral advocacy, the concept holds true with writing as well). But see Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 31 (2008) (where the authors appear to disagree with this notion).

54 See Maria L. Ciampi & William H. Manz, The Question Presented: Model Appellate Briefs 4 (2000); Bradley G. Clary et al., Advocacy on Appeal 6, 60-61 (3d ed. 2008) (discussing the importance of theme).

55 Russ M. Herman, Courtroom Persuasion: Winning with Art, Drama and Science§5:2, at 219 (1997).

56 See id.

57 See Frost, supra note 1, at 66-67.

58 See Clary et al., supra note 54, at 60. A good theme is one that is constructed to be legally sound. Oates et al., supra note 50, at §8.4, 236.

59 Frost, supra note 1, at 66.

60 Oates et al., supra note 50, at 236.

61 See id.

62 See Moskovitz, supra note 41, at §4.5, 47.

63 Jamar, supra note 6, at 70.

64 Scalia & Garner, supra note 53, at 5 ("A good lawyer tries to learn as much as possible about the judge who will decide the case.").

65 Id. at 5-7.

66 See Clary et al., supra note 54, at 60. But the argument should not be purely emotional; it must be grounded in law. Id. Contra Scalia & Garner, supra note 53, at 31 ("[A] blatant appeal to sympathy or other emotions" will "not play well to a judge.").

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67 Clary et al., supra note 54, at 60. Aristotle also addressed style and format and what audiences find pleasing. Basically, advocates can "persuade by connecting the substance of [their] arguments and the style of their presentation to what the audience values." Jamar, supra note 6, at 70. This is as true in writing as it is in oral advocacy.

68 See Tom Corbett, The Lawyer-Advocate vs. The Poet-Advocate, 14 Widener L.J. 737, 740-41 (2005).

69 See id.

70 See Jamar, supra note 6, at 70.

71 See Frost, supra note 1, at 45.

72 Aristotle, Aristotle on Rhetoric: A Theory of Civil Discourse 230 (George A. Kennedy ed., 2d ed., Oxford Univ. Press 2007). However, he did concede that, in practice, advocates generally added two or more elements to the organization of argument, which he classified as the introduction and the conclusion of a case. Id. Following Aristotle's steps, Cicero and Quintilian added another element: the argument summary section. Frost, supra note 1, at 45. Taken together, this classical arrangement mimics the five-part structure appellate advocates use when writing an appellate brief: introduction (exordium or statement of the issues), statement of the case (narration), argument summary (partition), argument (conformation), and, lastly, conclusion (peroration). Id.

73 Michael R. Fontham et al., Persuasive Written and Oral Advocacy in Trial and Appellate Courts §1.5, 10 & §2.2, 27 (2d ed. 2007).

74 See id. at §1.5, 10.

75 Mary Beth Beazley, A Practical Guide to Appellate Advocacy 198 (2d ed. 2006).

76 See generally Oates et al., supra note 50.

77 In appellate briefs, this would probably be considered the Summary of the Argument section. For an example, see Moskovitz, supra note 41, at 53-54. In some written documents, the Summary of the Argument contains the same things an Introduction would.

78 Fontham et al., supra note 73, at § 8.7, 238.

79 Clary et al., supra note 54, at 45.

80 Aldisert, supra note 37, at §9.4.1, 156.

81 Frost, supra note 1, at 48 (quoting 4 Marcus Tullius Cicero, De Partitione Oratoria 335 (H. Rackham trans., 1921)).

82 Moskovitz, supra note 41, at §4.3, 21.

83 Id.

84 Aldisert, supra note 37, at §9.2, 152.

85 Clary et al., supra note 54, at 49.

86 Id.

87 See Frost, supra note 1, at 60-67. Cf. J. Christopher Rideout, Storytelling, Narrative Rationality, and Legal Persuasion, 14 Legal Writing: The Journal of the Legal Writing Institute 53, 55 (2008) (noting the use of rhetorical models of persuasion along with narrative models of persuasion).

88 Frost, supra note 1, at 61.

89 Id. at 60-61.

90 See id. at 74-76.

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91 See id.

92 See Oates et al., supra note 50, at 680; Moskovitz, supra note 41, at 23.

93 Aldisert, supra note 37, at §9.4, 158; Moskovitz, supra note 41, at 23.

94 Moskovitz, supra note 41, at 23; see Aldisert, supra note 37, at §9.4, 158.

95 Moskovitz, supra note 41, at 24.

96 See id. at 23-24.

97 Id.

98 Id. For further reading on appellate advocacy see Jean H. Toal, Robert A. Muckenfuss, and Shahin Vafai, Four Steps to Effective Appellate Brief Writing, 10 S.C. Law. 36 (1999).

99 Clary et al., supra note 54, at 46; see Moskovitz, supra note 51, at 23.

100 See id.

101 Clary et al., supra note 54, at 45; see Scalia & Garner, supra note 53, at 94.

102 See Sarah B. Duncan, Pursuing Quality: Writing a Helpful Brief, 30 St. Mary's L.J. 1093, 1112 (1999).

103 Clary et al, supra note 54, at 47; see also Model Rules of Prof'l Conduct R. 3.3.(a)(1) (2009).

104 Kathleen Dillon Narko, Persuasion: Aristotle Still Works for Webb, Wood, and Kocoras, Chi B. Ass'n Rec., Apr. 2005, at 54, 55.

105 Id.

106 Clary et al., supra note 54, at 46.

107 Moskovitz, supra note 42, at 30-31.

108 See Rose, supra note 15, at 47.

109 See id.

110 R. Doak Bishop, The Art of Advocacy in International Arbitration 469 (R. Doak Bishop ed. 2004).

111 Clary et al., supra note 54, at 56.

112 Ciampi & Manz, supra note 54, at 11.

113 Frost, supra note 1, at 67.

114 See e.g. Fontham et al., supra note 73, at 198.

115 Sirico & Schultz, supra note 7, at 42; Ruth Anne Robbins, Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents, 2 J. ALWD 108, 124 (2004).

116 Clary et al., supra note 54, at 63; Robbins, supra note 115, at 125.

117 See Oates et al., supra note 50, at 581 (stating that roadmaps give readers an overview of the entire argument).

118 Frost, supra note 1, at 50. Greco-Roman rhetoricians did not call it a roadmap, but believed in the importance of providing a short summary before an argument was presented. Id. (citing 2 Quintilian, Institutio Oratoria 149 (H. Butler trans., 1921)).

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119 Kirsten K. Davis, Roadmap Paragraphs: Plotting Success from the Opening Line, Ariz. Att'y, Nov. 2004, at 26 (Kirsten K. Davis is the Director of Legal Research and Writing at Stetson University College of Law and has been tremendously supportive in this Author's writing process); Clary et al., supra note 55, at 62.

120 Davis, supra note 119, at 26-27.

121 Id.

122 See id. at 29.

123 Robbins, supra note 115, at 125.

124 Frost, supra note 1, at 50 (although Quintilian discusses speech, many of the same concepts are applicable to writing).

125 Id. (quoting 2 Quintilian, Institutio Oratoria 149 (H. Butler trans., 1921)).

126 Clary et al., supra note 55, at 58.

127 Robbins, supra note 115, at 125.

128 See Clary et al., supra note 54, at 63.

129 Id. at 57.

130 Id. at 63

131 See id.

132 See id. at 58-59.

133 Ian Gallacher, A Form and Style Manual for Lawyers 95 (2005).

134 Robbins, supra note 119, at 126.

135 Gallacher, supra note 133, at 96.

136 Id.

137 Id.

138 Scalia & Garner, supra note 53, at 14.

139 Moskovitz, supra note 41, at 19.

140 Frost, supra note 1, at 52.

141 Scalia & Garner, supra note 54, at 14.

142 Frost, supra note 1, at 34 (quoting Rhetoric ad Herennium 189 (H. Caplan trans., 1954)) (discussing speech, but such an organization is equally applicable to writing).

143 Clary et al., supra note 54, at 66.

144 Id.

145 See Moskovitz, supra note 41, at 41.

146 See Clary et al., supra note 54, at 61.

147 See id.

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148 See id. at 65-66.

149 See id. at 66-67.

150 See Fontham et al., supra note 73, at 69.

151 See supra Part C.

152 Clary et al., supra note 54, at 61.

153 Id.

154 Id.

155 Id.

156 Id.

157 Id.

158 Id.

159 Id.

160 Calleros, supra note 7, at 73.

161 Fontham et al., supra note 73, at 47.

162 Id. at 48.

163 See id.

164 There are many other acronyms used to teach the organization of writing, all of which encompass the same concepts. For example, CRAC stands for Conclusion, Rules, Analysis/Analogy, Conclusion. E.g. id. at 11-12.

165 See Oates et al., supra note 50, at 591.

166 See Frost, supra note 1, at 5; Aristotle, Rhetoric 24-25 (W. Rhys Roberts trans., Random House, Inc. 1954).

167 Aristotle, supra note 166, at 25.

168 Id.

169 Frost, supra note 1, at 72.

170 Scalia & Garner, supra note 53, at 41.

171 See Jamar, supra note 6, at 66.

172 Frost, supra note 1, at 5.

173 See Scalia & Garner, supra note 53, at 41-42.

174 Reasoning by analogy is an argument based in comparison. It is the typical common law case comparison method. This is yet another attribute of legal reasoning and one most commonly used by practitioners. Fontham et al., supra note 73, at 149.

175 Gardner, supra note 39, at 4.

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176 Aristotle refers to this deductive reasoning method as an "enthymeme." Aristotle, supra note 170, at 28; Jamar, supra note 6, at 81.

177 Scalia & Garner, supra note 53, at 41.

178 See G. Fred Metos, Appellate Advocacy, Champion, Mar. 1999, at 33, 33-34. Other logical fallacies include Argumentum ad antiquitatem (the argument to antiquity or tradition), Argumentum ad hominem (argument directed at the person), Argumentum ad ignorantiam (argument to ignorance), and Argumentum ad logicam (argument to logic) to name a few. Id.

179 Id. at 34.

180 Id.

181 Frost, supra note 1, at 31.

182 Raymond T. Elligett Jr. & John M. Scheb, Tell the Truth, Fla. B.J., Dec. 2001, at 38, 40; see Model Rules of Prof'l Conduct R. 3.3 (a)(2)..

183 Id. at 38.

184 See Ellie Margolis, Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs, Mont. L. Rev. 59, 60-61 (2001).

185 Id. at 81.

186 Id. at 81-83.

187 Id. at 81.

188 Id.

189 Clary et al, supra note 54, at 75, 78.

190 Id. at 77.

191 E.g. id.; Moskovitz, supra note 41, at 77 (viewing opposing counsel as the enemy should be avoided).

192 Id.

193 Id.

194 Id.

195 Id. at 78.

196 Id. at 76.

197 Id.

198 Id. at 77.

199 Id.

200 Id.

201 Frost, supra note 1, at 72-79.

202 See Christian C. Day, In Search of the Read Footnote: Techniques for Writing Legal Scholarship and Having It Published, 6 Legal Writing: J. Legal Writing Inst. 229, 245 (2000). In many instances, revising is also content-oriented.

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203 Moskovitz, supra note 41, at 54.

204 See Day, supra note 202, at 245.

205 See id.

206 Id.; Beazley, supra note 75, at 119.

207 See infra Appendix A. This is a revised list. The original list was generated by Dean Darby Dickerson for her Legal Research and Writing II Supplement (copy on file with Author).

208 Clary et al, supra note 54, at 97.

209 Id. at 98.

210 Bishop, supra note 110, at 478.

211 Id.

212 See supra Part I.

213 Clary et al., supra note 55, at 100.

214 Beazley, supra note 75, at 215.

215 Id.

216 Moskovitz, supra note 41, at 64.

217 Id.

218 John T. Gaubatz & Taylor Mattis, The Moot Court Book: A Student Guide to Appellate Advocacy 101-03 (3d ed. 1994).

219 Id. at 101.

220 Id.

221 Id. at 103.

222 The attached checklist has been modified and originally appeared in Dean Darby Dickerson's Moot Court Supplement (copy on file with Author).

223 See Davis, supra note 119, at 26-27.

224 See supra Part II.B.1; Fontham et al., supra note 73, at 197.

225 See Davis, supra note 119, at 28-29.

226 Beazley, supra note 75, at 222.

227 Id.

228 Moskovitz, supra note 41, at 63. But see Scalia & Garner, supra note 53, at 31.

229 See Frost, supra note 1, at 58-60.

230 Clary et al., supra note 54, at 116-17.

231 Id. at 99.

232 Id.

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233 Id.; see also Mark Hummels, Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination, 46 Ariz. L. Rev. 317, 326 (2004).

234 See id. at 325-26.

235 Jack M Graves & Stephanie A. Vaughan, The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity, 10 Vindobona J. Int'l Com. L. & Arb. 173, 193 (2006) (citing Erasmus Debating Society, Why Debate? Why One Would Learn to Debate (on file with Author)).

236 Id.

237 See Frost, supra note 1, at 68-69.

238 Graves & Vaughan, supra note 235 at 193. Psychologists suggest that non-verbal communications account for 65 to 70 percent of total communication between humans. Jansen Voss, The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom, 29 L. & Psychol. Rev. 301, 316 (2005).

239 Frost, supra note 1, at 4.

240 Id.

241 Id.

242 See, e.g., Alex Kozinski, In Praise of Moot Court--Not!, 97 Colum. L. Rev. 178, 182-83 (1997) (criticizing style over substance in moot court argument).

243 Graves & Vaughan, supra note 235, at 194, (citing Erasmus Debating Society, Why Debate? Why One Would Learn to Debate (on file with Author)).

244 Graves & Vaughan, supra note 235, at 193.

245 Id. at 194.

246 Id. at 193.

247 See Kozinski, supra note 242, at 183.

248 Graves & Vaughan, supra note 235, at 194 (quoting Scharffs, supra note 11, at 760-61).

249 Id. at 194.

250 Id. at 193.

251 See Jamar, supra note 6, at 65.

252 Graves & Vaughan, supra note 235, at 195.

253 Scalia & Garner, supra note 53, at 146.

254 See id.

255 Graves & Vaughan, supra note 235, at 195.

256 Id.; see also Ronald J. Rychlak, Effective Appellate Advocacy: Tips from the Teams, 66 Miss. L.J. 527, 536 (1997).

257 Voss, supra note 238, at 319.

258 Jamar, supra note 6, at 73. If the audience perceives the speaker to have "practical wisdom, virtue and good will, then the trustful connection is made." Id. Jamar notes, though, that it is not enough to persuade; logical substance is necessary to convince. Id.

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259 Graves & Vaughan, supra note 235, at 195.

260 Halloran & Whitburn, supra note 22, at 61.

261 See Rychlak, supra note 256, at 540.

262 Id. at 541; Clary et al., supra note 54, at 118.

263 See id. Rychalk, supra note 256, at 535-40.

264 Fontham et al, supra note 79, at 208-10.

265 Id.

266 Id. at 209; Clary et al., supra note 54, at 117.

267 See Fontham et al., supra note 73, at 183.

268 See Berry, supra note 7, at 159.

269 See Bryan A. Garner, The Winning Oral Argument 98 (2009) (discussing the importance and effectiveness of looking directly at all judges).

270 See id.

271 Clary et al., supra note 54, at 98.

272 Id.

273 Id. at 99.

274 Id. at 99; see also Berry, supra note 7, at 150; Beazley, supra note 75, at 229-31 (stating that advocates should try to explain away opponent's strong points).

275 See Gaubatz & Mattis, supra note 218, at 101-03.

276 See generally Michael Higdon, Oral Argument and Impression Management: Harnessingthe Power of Nonverbal Persuasion for a Judicial Audience, ___ U. Kan. L. Rev. ___ (forthcoming 2008) (available on SSRN http:// ssrn.com/ abstract=1270979).

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