2022 INTERNATIONAL CLIENT SEMINAR

MARCH 3-6, 2022

The Closing Argument

Ethos & Ethics

T. Thomas Singer
Moderator
HALL & EVANS, LLC
Denver, Colorado
singert@hallevans.com

Christin Krämer
TIEFENBACHER
Heidelberg, Germany
kraemer@tiefenbacher.de

Tom Bazemore
HUIE, FERNAMBUCQ & STEWART, LLP
Birmingham, Alabama
tbazemore@huielaw.com

In movies and plays about lawyers, the quintessential moment when lawyers display their persuasive prowess is the closing argument. That isn't reality. The truth is that as advocates and counselors, lawyers are constantly trying to convince someone to a different point of view – be it a mediator, a judge, an opposing attorney or party, co-counsel, or the lawyer's own client.

There are three keys to persuasion, according to Aristotle: Ethos, Logos, and Pathos. We will discuss all three, with a special focus on Ethos. Ethos means demonstrating character and credibility, or "appealing to ethics." If Aristotle has it right, a lawyer who demonstrates credibility during a trial or in negotiations or meetings is more persuasive than a lawyer who is not credible. That sounds correct, except we all know that some lawyers can seem credible, appeal to ethics, and be persuasive even though they (or their clients or experts) are making stuff up.

We are going to talk about what makes a lawyer credible. We will ask if it is OK for lawyers and parties to make stuff up. We will wonder if deceit is part of a lawyer's job. And we will ask about the appropriate response when another lawyer is less than forthright. Is it OK to fight fire with fire, or is it better to reach for a fire extinguisher? We will get to those questions a bit later, but we will start with something a little easier and more familiar – how to be persuasive in a closing argument while sticking to the truth.

What Makes an Effective Closing Argument?[1]

I. Context and Process – A Disclaimer

Closing arguments are the conclusion of a process. To disassemble the trial and remove for examination one final component from the remainder fails to appreciate the importance of all that comes before the closing. Like icing on a cake the closing represents a last step, but not a substitute for the work that preceded.

When a child comes home to report an "A" on a test should the parent meet that news by celebrating the grade? While that is certainly a natural reaction to good news, it does not effectively accomplish what the parent values most. Would it be more effective to praise the process that produced the "A"? The "A" is a result of a process, not a behavior or trait to be reinforced. Instead, the work, study, effort to produce the result seem more worthy of praise. How much better would it be to instead respond: "I am proud of all of the hard work, study and dedication that it took to earn that grade- that's what earned this A."

Similarly, to focus on the effective closing is like the parent praising the "A" but disregarding the prior endeavor that made it possible. It is with this recognition and limitation that we attempt to understand and describe the most effective means to present a final summation to a jury. No closing argument can

[1] This chapter written by Tom Bazemore

serve as a substitute for the preceding trial. If the effort and preparation for trial have not produced an effective presentation of the evidence, it is hard to imagine a closing argument that can overcome the deficit.

So, let’s assume the “cake has been baked” and the advocate has brought to bear the work, study and dedication throughout trial that will allow closing to be effective. What then?

II. The Effective Closing Argument Begins at the Start of the Case.

It is a mistake to begin to draft a closing argument for the first time after the evidence has been received. Over the course of the case the closing argument should have been considered countless times with the advocate imaging how the current version of the evidence would be described to the jury. The combination of evidence and advocacy compressed into one final conversation with a jury can be practiced informally dozens of times throughout the litigation. Each time the presentation is modified and layered to include the current issues being advanced and highlighting the most recent factual development of the case. The iterative process allows the closing to be refined in a way that simply is not afforded when closing arguments are drafted at the end of evidence. Through a repetitive “dress rehearsal” of the closing argument, the lawyer can add important emphasis and be certain that all the evidence, favorable and otherwise, has been addressed.

As trial approaches there is an opportunity for mock trials, focus groups and the collection of general jury research. This can be added to the now well-considered closing argument that has been developed from the very early stages of the case. Whether by informal surveys of friends and family or by sophisticated jury research projects, the ideas, themes, and evidence that are most critical should be long identified by counsel so that that a cohesive theme and trial strategy is formed long before the time for the closing argument arrives.

III. What Does a Good Closing Argument Look Like?

The closing argument has several mouths to feed. It must maintain the trial theme, address newly developed issues hatched during trial, portray the client as worthy of the verdict, and arm jurors with evidence that supports their verdict - and that is just the start.

So how is all of that supposed to happen? There are only two fundamental elements to the Closing: the messenger and the message.

The messenger, in rare circumstances, could be argued as more significant than the message. We are all familiar with the lawyer who has a stranglehold on a sparsely populated jurisdiction where reputation and fame matter significantly more than the evidence or what is said in closing argument. But that is clearly not the norm. The evidence and issues of the trial, often, overwhelm the impact or personality of a single advocate in the case. Even so, selection of the messenger matters.

The client must choose a messenger that has a suite of skills that allow for an effective delivery of the message. A concise list would include: a complete command of the facts and legal issues, an

unwavering commitment to executing the plan and theme developed for the trial and the confidence to deliver the result.

Turning to the message, there are a number of long-recognized features of the effective closing argument. Here a just a few:

1. Review the Facts and Inferences –

In the closing argument the lawyer is obligated to review the facts and reasonable inferences from them. It is important to address not only those facts deemed "favorable" but to immunize the closing argument from attack by confronting the unfavorable aspects of the case. Counsel should take time to address even the most challenging and "bad" evidence. If nothing else, the effort reflects the willingness to confront the opposing proof in a direct way. This is the analytical aspect of closing argument that calls for a clear-eyed view of the facts adduced at trial and a commitment to address those of significance to the verdict. It is not enough to simply address the trial evidence. The evidence must be examined thoroughly so that the jurors can put it in perspective and fit it to the theme of the case. This does not mean you should recite a chronology of the trial or a review of all the witness testimony. Such a generalized review has no real purpose. Focus on what matters to the verdict. Trial has certainly included testimony that for whatever reason simply does not drive the result. Ignore it in favor of commenting on the evidence driving the result.

2. Make it memorable –

Delivery of the closing argument can be a rote recitation of the testimony, or it can be offered to the jurors in a form that is memorable, sticky, hard to forget. Never read a closing argument. To the extent the closing can be delivered by the lawyer without reference to any note or outline it will be more favorably received. Consider the use of demonstratives and exhibits that have been developed for impact. Previewing these in opening and reminding the jury of these central artifacts of the trial can be a way of avoiding a closing filled with a word salad that lacks permanency. This aspect of the closing argument must be well-planned and practiced so that it can be delivered in a timely way and with maximum effect. Embrace any technology needed to share the evidence. Often documents, images or video can serve to punctuate or outline the argument. If it came into evidence and it matters to the result, be prepared to review it, and be experienced with the presentation systems and media to make the review seem comfortable. As closing argument is delivered, focus on eye contact with the jury. Often you can detect cues as to a juror's acceptance or rejection of a particular piece of evidence or argument. This allows the opportunity to direct attention to that juror and embolden them to make those arguments to their fellow jurors during deliberation.

3. Continue the Trial Theme –

The trial theme must be carried forward through the closing argument. The lawyer should remind the jury of the basic dilemma and choice offered by the case that was outlined in opening and furthered by the trial proof. This is a matter of "framing" the evidence so as to consistently remind the jury – "this is what we have been saying from the beginning."

4. Earn Credibility -

Consistent accuracy builds credibility. A demonstrable command of the facts of the case and the technical aspects of the proof, over time, will gain the lawyer much needed credibility. Credibility is currency and without it the lawyer is simply broke. This is one aspect of the closing argument that can be maximized by careful attention to detail and case facts. Credibility is a character trait than can exist to some degree in isolation from all the other features mentioned here. By paying great attention to detail and refusing to guild or overstate the evidence the lawyer can gain the much-needed credibility with the jury that can pave a road to the verdict.

5. Build a Sense of Responsibility –

"The greatest service of citizenship is just duty" – Abraham Lincoln. Jurors should be reminded (and thanked) for the significant role they have taken on. The jury systems stand as a unique form of resolution in the entire world. Within that system jurors hold an incredible ability to determine fact and have a direct effect on the world around them. Remind them of the incredible influence they possess.

6. Complete the verdict form –

At the end of any closing argument the jury retires to deliberate. An effective advocate sends the jury to that task having already described the process and the result. Share with the jury what is about to happen, the jury charge, deliberations, and the verdict form. Build a sense of confidence in what comes next and how the jurors will accomplish the verdict sought. Often the verdict form has been determined by the Court in advance of closing argument and the lawyer can demonstrate for the jury how to fill out the verdict form. For those jurors prepared to vote in favor of the result being sought by the lawyer, completing the verdict form can be a powerful way to help arrive at the verdict.

Who Should Give the Closing?[2]

As important as it is for lawyers to say the right things while incorporating the telling evidence and using appropriate inflection and tone of voice, none of that will matter when the lawyer delivering the argument is someone the jurors cannot respect or will not listen to. The risk of that happening may be small, but it is a risk that cannot be ignored, especially in these polarized times. Imagine how a jury of democrats would react to an argument presented by former-President Donald Trump, or how a jury of republicans would react to an argument presented by former-Senator Hillary Clinton.

To be sure, few lawyers enjoy the notoriety of Trump and Clinton. Most lawyers toil in obscurity, so jurors, judges, and opposing parties are not likely to close their ears and minds instantly based on an

[2] This chapter written by Tom Singer

attorney's political affiliations, prior public statements, or reputation. The things that are more likely to trigger negative reactions from jurors are harder to anticipate, and more difficult to tease out during voir dire and in conversation. Everyone, and especially prospective jurors, will hesitate before revealing their own biases, especially biases they perceive as unpopular or politically incorrect. Rarely will a member of a jury panel identify themself as gay, or racist, or homophobic, and a prospective juror being questioned by a Muslim female attorney is unlikely to say, in front of a crowded courtroom, that the lawyer should go back where she came from, that her hajib makes her look like a terrorist, that she does not sound American, or that women belong in the home and not in professional careers. If such a panelist stays mute and survives voir dire to sit through trial, the stereotypes are likely to persist, unknown to the Court and counsel, keeping the juror for hearing and absorbing the closing arguments the Muslim woman makes. And the same behavior also happens in environments less fraught than trial.

In the 17th century, Sir Edward Coke asserted that, "Reason is the life of the law."[3] In the 19th century, Coke's assertion was qualified by Oliver Wendell Holmes, Jr.: "The life of the law has not been logic; it has been experience…."[4] Today, neuroscience suggests the life of the law is neither logic nor experience, but is essentially tribal empathy and antipathy. That means successful legal arguments depend principally on making an emotional connection and telling a compelling story that draws the listener into the lawyer's tribe.

Jurors and judges, like all people, respond positively to people they think are like them. People rely first on stereotypes to determine who is part of their tribe. We react to skin color, of course, as well as hair texture and style, clothing, speech patterns and accents, demeanor, and dozens of other cues that may or may not be meaningful to the argument being made.

Studies show that our stereotyping doesn't end as we learn more about others. Students who read that they happened to have been born on the birthdate of Rasputin, the Mad Monk of Russia, thought of him more positively than did the students who read Rasputin's actual birthdate.[5] Sports fans who hear messages containing sports metaphors process them more carefully than neutral messages, and those messages have a greater impact on attitudes, while for other readers, the sports metaphors backfire, attenuating interest and considerably reducing persuasion.[6]

Of course, for most people, stereotypes often can be overcome simply by spending time in the same room as the other person and watching them interact with people we know or view positively. A smile can be enough to establish empathy because people tend to mirror each other. Smiling at someone will

---

[3] Edward Coke, *Commentary Upon Littleton* 97b (1628).
[4] Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).
[5] Kevin Dutton, *Split-Second Persuasion: The Ancient Art & New Science of Changing Minds* 188 (2011).
[6] *Id.* at 191.

prompt them to smile back, that is unless they have concluded that our smile is insincere, or that our motives are questionable.[7]

However, there are times when a smile will not pierce the stereotypes, or when there isn't enough time to both pierce the stereotypes and make an effective argument. There are times when picking the right messenger is as or more important than honing the message. Choosing an Ivy-league lawyer with a New England accent and a tailored pinstripe suit to argue a case in rural America may not be wise. Hiring lawyers and experts who look and sound something like the people who will render judgment may be sound strategy.

When that means selecting counsel based on race or gender or nationality, some will suggest that is unfair discrimination, and in jurisdictions that have adopted Rule 8.4(g) of the ABA's Model Rules of Professional Conduct, that argument may have some teeth.[8] However, it seems unlikely that any professional disciplinary action is likely to be pursued, especially when the choice of counsel is based on an analysis of the forum, including the judge and likely jury pool, and the knowledge and experience of attorneys who have practiced there.

Lawyers are obligated to protect their clients' best interests. Finding the best spokesperson is certainly a critical part of fulfilling that obligation.

Are Lawyers Just Hucksters Selling Our Clients' Wares?[9]

Lawyers have to be more than spokespersons for clients. Otherwise, going to law school would be a waste of time. Corporate executives, PR managers, press agents, and salespeople can speak as fluently as attorneys, and they generally are a lot less expensive. However, in most countries, only licensed attorneys have the right to speak for their clients in court. That exclusive privilege is justified by bar associations and judges as a means of protecting litigants from untrained and unlicensed opportunists

---

[7] Craig Lambert, "The Psyche on Automatic: Amy Cuddy probes snap judgments, warm feelings, and how to become an 'alpha dog,'" *Harvard Magazine* 48, 52 (November-December 2010), hereinafter cited as "Cuddy." Many of the same ideas are also presented by Cuddy in a Ted Talk that can be viewed at https://www.ted.com/talks/amy_cuddy_your_body_language_shapes_who_you_are (last visited January 5, 2022) and in this article: Amy J.C. Cuddy, Matthew Kohut & John Neffinger, "Connect, Then Lead," *Harvard Business Review* (July 2013), available at https://hbr.org/2013/07/connect-then-lead/ar/1.

[8] ABA Model Rule 8.4(g) reads: "It is professional misconduct for a lawyer to:
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules."

[9] This chapter written by Tom Singer.

who might prey on victims of domestic abuse, traffic accidents, unscrupulous bankers, or greedy corporations.

Ironically, however, polls of Americans show that:

- attorneys' honesty and ethical standards are rated low or very low by more than a third of respondents,
- half think we would be better off with fewer attorneys,
- a substantial majority believe lawyers are more interested in making money and promoting themselves than in serving their clients' best interests, and
- three-fourths agree lawyers are more interested in winning than seeing justice served.[10]

So, although attorneys may think of themselves as adhering to elevated standards of behavior, most people believe lawyers comport themselves only slightly better than business executives, advertising practitioners, car salespeople, and members of Congress.[11]

Not that the public perception of attorneys as hucksters is unwarranted. As Professors Nancy Levit and Douglas O. Linder of the School of Law at the University of Missouri – Kansas city observe in their book, *The Good Lawyer: Seeking Quality in the Practice of Law*, "When lawyers consciously tailor arguments to trigger irrational thinking, they risk being seen less as key members of a system designed to produce justice than as something akin to Madison Avenue hucksters."[12]

Levit and Linder made that comment in a chapter that discusses "cognitive traps," their term for the myriad ways in which humans act and think irrationally, and that offers advice about how good lawyers can and should counteract their irrational impulses. They cite the research on traps such as confirmation bias, mental blind spots, too narrow framing, and negative implicit attitudes.[13] They summarize the chapter by observing that "[i]ntuitions precede reasoning and, for the most part, play a larger role in our decision making, both in our lives and in our professional careers. We use effortful reasoning mostly to rationalize the decisions of our automatic thinking and rarely to override it."[14]

While falling into cognitive traps is typical of all humans, Levit and Linder argue that good lawyers should work to avoid such traps by using checklists, adopting procedures, and seeking advice from colleagues.[15] They assert that lawyers become good when they have learned to "confront counterevidence and have a sense for what they don't know. [Good lawyers] understand the tendency of most people to underestimate their own level of ignorance, and guard against it in themselves. …. Only when they've

---

[10] See https://lafleur.marketing/blog/overcoming-the-negative-stigma-associated-with-attorneys/ (last visited January 5, 2022).
[11] https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx (last visited January 5, 2022).
[12] Nancy Levit & Douglas O. Linder, *The Good Lawyer: Seeking Quality in the Practice of Law* 151 (2014).
[13] *See generally, Id.* at Chap. 5.
[14] *Id.* at *155.*
[15] *Id.* at 155-56.

sifted through and weighed all the relevant information do they adopt an opinion, and then one commensurate with the evidence."[16] In other words, good lawyers develop the ability to think more rationally than non-lawyers.

One cognitive trap Levit and Linder say good lawyers learn both to avoid in themselves and, also, to use to their clients' advantage is called "anchoring." Anchoring is the increasingly common practice by attorneys of asking at trial or in mediation for an unjustifiably high noneconomic damage award because "the more you ask for, the more you get."[17] As one group of commentators observed, "Plaintiffs' attorneys are aggressively asking jurors to award ever-higher sums for pain and suffering, and often getting it."[18] The fact that lawyers are engaging in the "conscious manipulation of human irrationalities" raises a "troubling question" for Levit and Linder, to wit: "The anchoring effect is real, but is there something a bit unseemly about [lawyers] it exploiting it."[19]

Regarding anchoring specifically, Levit and Linder acknowledge that, "Critics might note that by emphasizing techniques that exploit the irrational tendencies or jurors, judges, and fellow attorneys, law schools move the legal system away from truth-seeking and toward one that rewards manipulation."[20] Indeed, critics have asserted that a lawyer who uses anchoring at trial may violate rules of professional conduct by implying that a verdict amount "is supported by facts or by law" even though it would be "well beyond any award sustained for a similarly situated individual with comparable injuries."[21] Moreover, anchoring has been prohibited or limited in about one-third of American states through statutes, court decisions, or rules that constrain "lump sum" and "per diem" arguments.[22]

Courts routinely instruct juries to base their verdicts on the facts and evidence introduced at trial. And an attorney who makes "Golden Rule," "Reptile Theory," or other arguments that blatantly appeal to sympathy or community safety, takes a risk of a mistrial, reversal, and even sanctions.[23] The arguments are objectionable precisely because they effectively manipulate human irrationality. The same is true of summation anchoring, and it is or should be objectionable for the same reason. Yet Levit and Linder argue that, given the effectiveness of anchoring, "[t]he attorney who decides to unilaterally disarm, and

---

[16] *Id.* at 148.
[17] Mark A. Behrens, Cary Silverman, & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?* 44 Amer. J. Trial Advocacy 321, 321 (2021) (hereinafter *Behrens*) (*quoting* Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519, 519 (1996)).
[18] Behrens, *supra* at 321 (quoting the statement, "Settlement statistics show a steady rise in the largest U.S. verdicts from 2014 to 2018," from David Tobenkin, *Panic! In the Courtroom*, Leader's Edge (March 2020), https://www.leadersedge.com/industry/panic-in-the-courtroom.
[19] Levit & Linder, *supra* at 151.
[20] *Id.*
[21] Behrens, *supra* at 333.
[22] *Id.* at 330-32.
[23] See 12 *Moore's Federal Practice - Civil* § 59.13 (2021); Larry D. Ottaway, Jordyn L. Cartmell, Fredrick H.L. McClure, & Amanda E. Reagan, *Finishing Strong, Closing Arguments for Both Sides*, 48 The Brief 48, 53 (2019).

swears off any conscious manipulation of human irrationalities, does a disservice to his or her client, the person to whom an attorney's highest duty lies."[24]

That advice seems short-sighted. A lawyer's duty to a client does not compel them to risk mistrial or reversal, or to do anything the attorney believes to be unethical or morally repugnant. And the duty to clients does not require lawyers to use skills of persuasion to seek outcomes that are unsupported by evidence or that impose losses on opposing parties that are unjustified or grossly unjust.

What Can Lawyers Learn from Aristotle's Elements of Persuasion?[25]

In an ideal world, persuasion might be based solely on pure facts, but in reality, persuasion always involves emotion, so communication skills are of substantial importance.[26] By using rhetorical skills, it is possible to convince an opposing party, a jury or a judge to change an opinion. Furthermore, speeches can have a great impact. In particular, the appearance, style, structure and content should be precisely tailored to the audience and the topic in order to achieve the desired effect.

Aristotle, a Greek philosopher and polymath, developed the basics of the rhetorical system. Influenced by Plato, Aristotle stated that a good speaker must have three things under control: his speech, his own appearance, and the audience.[27] His book "Rhetoric" is considered the most important ancient textbook on the art of oratory.[28]

A. Rhetoric – an attempt of a short definition

Rhetoric is an inherently fuzzy term, which makes it more difficult to define. The core of rhetoric is the speech. However, the speech itself contains many different elements, starting with the content of the speech, the way it is delivered, the speaker's performance and appearance, and many other elements.

For Aristotle, rhetoric was, among other things, the ability to recognize the persuasive elements inherent in everything. Consequently, persuasion is the meaning and purpose of any speech.

---

[24] Levit & Linder, *supra* at 152.
[25] This chapter written by Christin Krämer.
[26] Howard L. Nations, *Overcoming Jury Bias*, https://www.howardnations.com/overcoming-jury-bias-toc/ (last visited January 12, 2022).
[27] *Rhetoric – The Art of Speech*, https://www.br.de/telekolleg/faecher/deutsch/sprachkompetenz/01-rhetorik102.html (October 31, 2016).
[28] Melissa Love Koenig & Lori D. Johnson, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 Nev. L.J. 1037, 1065 (2020).

B. Elements of persuasion

Aristotle determined three key elements of persuasion: ethos, pathos and logos. Each of these elements is useful for a lawyer's work.

I. Ethos

The element ethos means that people are more likely to believe a person with a good character.[29] The audience's perception of the credibility of the persuader plays a key role in whether persuasion is achieved. According to Aristotle, ethos consists of three sub-qualities of the persuader:

1. professional intelligence,
2. virtuous nature, and
3. goodwill.

The importance of ethos in persuasion has been further investigated — and supported — by modern scholars of rhetoric and by many legal scholars.[30]

The persuader's credibility is on one hand determined by his qualifications, but also by the way he connects with the audience. It is important that the speaker is credible and has integrity. Furthermore, the speaker should evoke emotions in the audience and find convincing arguments. This implicates some classic requirements of presentation, such as confidence in presentation itself, body language, facial expression, gesture and speaking style.[31] Credibility will also arise from similarities of the persuader to the receiver in features like race, gender or religious belief.[32] A speaker's character is affected negatively if he uses exaggerations that are pointed out by his opponent. To gain credibility it is a good practice to identify obvious counterarguments or contrary law and to acknowledge it.

The speaker must pay attention to volume, tone of voice, and rhythm in his presentation. The best effect is achieved when the speaker appears natural and uses common colloquial language.[33] Lawyers tend to use overly complex wording that is difficult for other people to understand. One of the most important tasks of a speaker is to choose the right mixture between objectivity and rhetorical means. The choice made between these two elements often determines the audience's judgment of the speaker's quality and thus the effect of the speech given.

---

[29] Karl-Heinz Göttert, *Introduction to Rhetoric* 28 (1991).
[30] *See,* Melissa H. Weresh, *Morality, Trust and Illusion: Ethos as Relationship*, 9 Legal Communication & Rhetoric: JALWD 229, 233 (2012).
[31] Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom* 138 (2014)
[32] *Id.*
[33] *Id*. at 139.

II. Pathos

The second key element of persuasion is pathos. Pathos involves delivering an argument in a way that appeals to the receiver's emotions and sympathetic imagination.[34] For example, a scientist speaking at a public forum with great credibility and perfectly logical arguments will have trouble reaching his audience if he fails to get them emotionally involved. Emotions such as anger, fear, pity, hate or love affect the reasoning abilities and legal decisions of a judge or jury or any listener.[35] To use this element of persuasion, one must know where this emotion comes from and to which persons or things the emotion relates. The insights gained from this are then used to influence the audience. However, people differ greatly in their affects - depending on their age, character, and circumstances. Overall, they are susceptible to different emotions.

It is argued that lawyers should only appeal strictly to logic. But combining emotion and logic in an argument can help the audience understand a particular party's perspective or visualize the risk of making a specific decision.[36] Furthermore, it is highly unlikely that there is a way to communicate with people without creating any emotions.

A speaker can use many different rhetorical figures to convince an audience. For example, a rhetorical figure like asking the audience to consider themselves in the place of the client ("golden rule argument") is a strong tool to gain empathy for the own point of view. Similar effects are achieved by using figurative speech, supported by alliterations or metaphors.

III. Logos

Logos means the persuaders appeal to reason, by the use of logical arguments.[37] According to Aristotle, any form of reasoning has to start from a set of premises, and in rhetoric those premises are mostly common knowledge that is generally accepted by the audience.[38] Starting from this basis, any further point should necessarily derive and leave the audience no choice but to accept it. For Aristotle, objections to arguments can be raised in four ways: by denying the existence of the factual situation, by presenting good reasons for the contrary factual situation, by showing that there can be many other consequences, and by showing a discrepancy with past decisions.[39]

Aristotle increased the effect of logos using syllogism or by encouraging the audience to reach an obvious conclusion of an argumentation on their own.[40] For example, certain conclusions can be drawn

---

[34] Karl-Heinz Göttert, *supra* at 28.
[35] McCormack, *supra* at 139.
[36] Kathryn R. Abrams & Hila Keren, *Who's Afraid of Law and Emotions?* 94 Minnesota Law Review 2034 (2010).
[37] Josef Kopperschmidt, *Wir sind nicht auf der Welt, um zu schweigen: Eine Einleitung in die Rhetorik* 163 (2018).
[38] Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection,* Scribes J. Leg. Writing 5 (2001).
[39] Gail Fine, *Aristotle's Objections to the Argument from Relatives*, https://oxford.universitypressscholarship.com/view/10.1093/0198235496.001.0001/acprof-9780198235491-chapter-13.
[40] Jamar, *supra* at 6.

from circumstantial evidence on the basis of common knowledge. In the event of a rear-end collision, it can be assumed that the driver behind has regularly not kept enough distance. Many people will relate to this statement, even though they do not know the specific situation of the accident.

Finally, to convince an audience through logic, the speech must be clearly structured. Therefore, each speech should be divided into the parts of facts or conclusion and evidence. Furthermore, a frequent part of speeches is defending against criticism, either by disproving the accusations or by a counterattack. However, the presentation of the facts should always be long enough to clearly state an issue, but short enough to keep the audience's attention. The speaker should not bore the audience with unnecessary facts, but neither should he make the statement of facts so detailed that he loses the audience's attention. This task is particularly difficult because adding more details may be appropriate to arouse emotions or promote the audience's understanding of the argument.

C. Key takeaways

Aristotle was a great scholar and even after more than 2000 years we can still learn a lot from him. Especially, there are the following ten key takeaways:

1. Rhetoric means the ability to persuade other people;
2. Persuasion consists of three key elements:
    a. Ethos
    b. Pathos
    c. Logos
3. As a speaker, be credible and maintain your credibility;
4. Connect with the audience;
5. Evoke emotions and find convincing arguments;
6. The manner of delivery is of paramount importance (e.g. the speed, the rhythm, the wording);
7. Know your audience;
8. Adapt your speech to the audience;
9. An argument must be as short as possible, as long as necessary;
10. Structure every argument clearly.

D. Importance of rhetorical skills in the German legal system

The U.S. and German legal systems differ significantly in several aspects. Especially in Germany there is only a very small jury system for few cases. Therefore, the judge plays a more significant role. The most important German judicial bodies in criminal law at the regional courts consist of two voluntary judges and three regular judges. Most decisions are solely made by the judge (or multiple judges in specific cases), who generally takes an active role in cases by asking questions, viewing or requesting evidence, and conducting legal research.

However, this does not mean that rhetoric plays a subordinate role in criminal proceedings. The opposite is the case. Convincing a judge is regularly much more difficult than convincing a jury. Judges are often only enthusiastic about rational arguments. This limits the use of rhetorical stylistic devices,

and the focus must be on the argument itself. That's why logos plays such an important role in the German criminal justice system.

In civil proceedings written pleadings by the opposing parties are of paramount importance. In Germany most court cases are decided by a single judge. Oral proceedings play only a subordinate role for the verdict itself. The absence of a legally untrained jury and the reduced importance of oral hearings in German courts result in the fact that rhetorical means like the three elements of persuasion by Aristotle play only a minor role in influencing the decision of the judge. On the other hand, in German trials, judges repeatedly try to encourage an amicable settlement between the opposing parties, whereby the skills of persuasion are required. The work of German lawyers in civil court proceedings consists almost exclusively of writing pleadings to the court. In doing so, the lawyer is mainly concerned with his own argumentation and tries to disprove the opposing arguments.

E. Summary – What lawyers can learn from Aristotle?

As we have seen, Aristotle already set out and explored the basic features of the art of persuasion more than 2000 years ago. Many of his findings are still valid today. For lawyers in particular, Aristotle's teachings remain important. Aristotle offers guidelines on convincing other people by means of rhetoric and offers a variety of practical suggestions for this purpose.

Lawyers and Story Tellers: Truth or Fiction[41]

Lawyers do not create the facts. We are supposed to deal with the facts we get and, from there, analyze what the law is or should be. Lawyers swaying from the truth creates the slippery slope that can be the downfall of our legal system. We perhaps see this more today than at any other time. Many people also assume that lawyers customarily sway from the truth which is why the legal profession sometimes has a bad reputation.

Lawyers in every state are bound by rules of ethics. In every state, an advocate has a duty of candor towards the tribunal. For purposes of illustration, let’s look at the Missouri rule.

Advocate-Candor Toward the Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

[41] This chapter written by Rudy Rivera

> > **(2)** fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> > **(3)** offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> **(b)** A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
> **(c)** The duties stated in Rule 4-3.3(a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 4-1.6.
> **(d)** In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[42]

There is a similar rule especially for prosecutors.

> The prosecutor in a criminal case shall:
> **(a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
> **(b)** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> **(c)** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
> **(d)** make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal…… [43]

Lawyers who are confronted with the pressure to win sometimes overlook the rules of ethics. This pressure may come from clients who want to win a case no matter what. Pressure can also come from a

---

[42] Mo.R. Gov Bar Jud. 4-3.3
[43] Rule 4-3.8

community that believes a defendant is guilty. In the archives of 20/20, Dateline, 48 Hours, 60 Minutes, etc., there are a litany of criminal cases where the prosecution and the police withheld evidence. That usually happens when an assumption is made that this person is guilty and the investigation just focuses on that without considering any other evidence or suspects. Prosecutors and police are so convinced of guilt that they have been known to withhold exculpatory evidence that could in some cases exonerate an individual.

Criminal cases draw more publicity on the prosecution side because there are a number of interest groups working to set aside convictions. We seldom hear about the criminal defense lawyer or the lawyer in a civil case suborning perjury or falsifying evidence although most of us have seen this during our years of practice. Many years ago, my opposing counsel in a civil case put his client on the stand to testify about a series of events. My client leaned over to me and whispered that the witness was never present at the location. We subpoenaed the witness's wife and she corroborated what my client had whispered. Did the lawyer know about this false testimony? A lawyer can always hide behind "that is what my client told me." Most of the time this seems to work for attorneys, but you cannot use that excuse forever.

Of course, lawyers need to assume that our clients and witnesses are telling the truth. Disbelieving them makes no sense. However, attorneys should at least reasonably investigate the plausibility and truthfulness of the testimony we offer. When I was a young attorney (many, many years ago), a man came into my office claiming to have a serious back injury from a fall that occurred at a box retailer. His injuries were legitimate. His witnesses, however, were very shaky. We declined the case. He retained another lawyer who tried the case and lost. Sometimes lawyers must make the hard decision to refuse to represent a client who is not telling the truth.

As lawyers, we are story tellers, and sometimes truth can be stranger than fiction. Notwithstanding, the story we weave should have the ring of truth. We cannot control what others think about the profession, but we can control our integrity. In the real world today, we have seen attorneys publicly alleging election fraud during the last presidential election without the slightest modicum of evidence. This has nothing to do with a person's political persuasion. A lawyer who is going to file a lawsuit alleging fraud must make sure she has the evidence to support the claim. Otherwise, the case is promoting a big lie. In defense of the legal profession, most lawyers are honest, trustworthy and transparent. The allegations made after the 2020 election is a clear example of the chaos that can occur if the legal profession were to lose its integrity.

Is It a Surprise that Some Stories Lawyers Tell Are Lies?[44]

We don't know yet what will happen to the lawyers who have represented President Trump, but we all know of instances where lawyers abandoned integrity and benefitted. One example is the Enron scandal, where lawyers at Vinson & Elkins, one of the largest and most prominent law firms in the world, had issued fairness opinions that the court-appointed bankruptcy examiner later concluded were "crucial to Enron's ability to complete" the fraudulent transactions that defrauded investors and bankrupted the company.[45] Vinson & Elkins was sued in the bankruptcy case and ultimately settled the claim against it by waiving $3.9 million in unpaid fees and paying $30 million to the Enron bankruptcy estate, which certainly seems like an admission of wrongdoing that should tarnish the firm's reputation. But the firm did not have to disgorge the $162 million in fees it had received from Enron in the four years before bankruptcy, no lawyer from the firm was required to defend charges of professional misconduct, the partner responsible for the Enron account was later promoted to managing partner of the firm, and a few years later the firm became the first in Texas in which average partner compensation exceeded $1 million per year.[46]

Ironically, shortly after Vinson & Elkins extricated itself from that scandal, the firm's webpage touted that: "We are committed to the highest ethical standards, both in our service to clients and in our personal lives," and "[o]ur success depends on maintaining an impeccable professional reputation."[47] When the firm said its professional reputation is key to its success, it was echoing a traditional economic theory, both elegant and simple, holding that: "Reputations are easy to destroy but difficult and expensive to build," which should mean "it is downright irrational for a company with a good reputation to treat even a single customer dishonestly or unethically…"[48]

However, Professor Jonathan R. Macey of Yale Law School thinks that theory is no longer true, and he asserts that Vinson & Elkins' "relentless representation of Enron" actually enhanced the firm's reputation, rather than tarnishing it, because "[c]lients like aggressive lawyers."[49]

Macey claims "it is highly doubtful that law firms continue to follow this model, if they ever did, ... [because i]mproved information technology, the passage of the securities laws, and the increase in both in-house counsel and specialization of lawyers' functions have decreased lawyers' incentives to monitor their colleagues and, by extension, their firms."[50]

---

[44] This chapter written by Tom Singer.
[45] Jonathan R. Macey*, The Death of Corporate Reputation: How Reputation Has Been Destroyed on Wall Street* 157 (2013).
[46] *Id.*, at 156-57.
[47] The webpage is no longer available. It was at http://www.velaw.com/overview/VinsonElkinsFirstPrinciples.aspx (accessed on December 19, 2013).
[48] *Id.* at 7-8.
[49] *Id.* at 158.
[50] *Id.* at 149.

Macey also contends that the intense regulation of the financial services industry in the United States has actually undermined ethical behavior among the investment banks, law firms, accounting firms, and credit reporting agencies that serve that industry.[51] Moreover, other "[b]usiness ethics researchers have come to recognize that while a compliance-driven approach may help people become aware of the rules, it does little to cultivate, support, and build the moral competencies necessary for ethical strength."[52]

That conclusion will not surprise anyone who has studied human psychology. After all, lawyers and people, and people are not honest. Daniel Ariely, professor of psychology and behavioral economics at Duke University, who has studied dishonesty extensively, believes:

> [O]ur behavior is driven by two opposing motivations. On one hand, we want to view ourselves as honest, honorable people. We want to be able to look at ourselves in the mirror and feel good about ourselves (psychologists call this ego motivation). On the other hand, we want to benefit from cheating and get as much money as possible (this is the standard financial motivation). Clearly these two motivations are in conflict. How can we secure the benefits of cheating and at the same time still view ourselves as honest, wonderful people?[53]

Ariely has found that most people cheat regardless of the amount of money to be gained or the probability of being caught, and people are more likely to be dishonest when they have watched someone else benefit from dishonest behavior, or are in a culture that gives examples of dishonesty; people also are more likely to be dishonest if they are creative, are tired or depleted, have a conflict of interest, or can rationalize their dishonesty.[54]

On the other hand, people are more likely to be honest when they are supervised, receive moral reminders, sign their name, or pledge to be honest.[55] So, making witnesses swear oaths, reminding people of the Ten Commandments, and having people sign their tax returns are all effective ways of promoting (though not guaranteeing) honest behavior.

But nothing will make everyone act honestly all the time. And that may be a good thing. Deceit is actually an important social skill, a skill that is practiced not only by humans, but also by monkeys, birds, and elephants.[56] It is not just that we like to deceive others or use deceit to get what we want. We also

---

[51] See, e.g., *Id.* at 269-75.
[52] Leslie E. Sekerka, *Compliance as a Subtle Precursor to Ethical Corrosion: A Strength-Based Approach as a Way Forward*, 12 Wyoming Law Review 277, 278 (2012).
[53] Daniel Ariely, *The (Honest) Truth About Dishonesty* 27 (2012).
[54] *Id.* at 245.
[55] *Id.*
[56] Katherine Harmon, *The Social Genius of Animals*, Scientific American Mind 67, 70-71 (Nov./Dec. 2012).

expect to be fooled, and often want to be. How else can we explain our enchantment with magic, Santa Claus, and sleight-of-hand?[57]

As Billy Joel said, honesty is such a lovely word. But we have no reason to expect anyone, including lawyers, to be honest all of the time, and even though we regularly say we expect honesty of ourselves and others, the fact is most of us are dishonest routinely and all of us admire some acts that are dishonest. It just isn't black or white.

Can Lawyers Be Both Persuasive and Ethical?[58]

Persuasion is the art of moving a person's opinion to a position that they do not currently hold. When practicing law, it often comes in handy or even is necessary to change someone's point of view on a specific topic. If a lawyer defends the interests of a client in court, the client expects his representative to use every possible option to win his case. One of these options could be the use of his rhetorical skills and to manipulate a jury (or someone else) to make a decision based on pure emotion and ignore the logical arguments of the opposing attorney. On this point every lawyer must ask themself, whether his or her methods are compliant not only with written law but also with personal ethical standards. This question is not easy to answer since it is a fine line between using persuasion for the pursuit of truth or deceit. This article will identify the ethical benchmark persuasion must be tested on, and try to give an answer to the question if we can be both persuasive and ethical.

A. The impact of persuasion

In general, persuasion is the idea of influencing the process of decision making or shifting an existing opinion. This concept is inherited in social interaction and used in many different ways, from convincing friends to see a favorite movie, to prompting teenagers to refrain from smoking. This generally accepted use of persuasion is to be contrasted with the clearly reprehensible coercion or deception.[59] While the reprehensible character of coercion lays in the use of force, in deception it is seen in the falsification of facts. Furthermore, persuasion must be categorized in open persuasion, where the receiver is aware of being influenced and knows the goal of the persuader, and hidden persuasion. So, the impact of persuasion can differ widely.

The goals a persuader is trying to achieve also can vary.[60] On one hand, persuasion can be used to show the truth or to clarify a position. This is by using logical arguments to bring an understanding to an audience. On the other hand, persuasion can be used to follow purely personal interest. Mostly, these

---

[57] See generally, Alex Stone, *Fooling Houdini: Magicians, Mentalists, Math Geeks, and the Hidden Powers of the Mind* (2012).
[58] This chapter written by Christin Krämer.
[59] Hoffeld Group, *The Difference Between Persuasion & Manipulation*, https://www.hoffeldgroup.com/the-difference-between-persuasion-manipulation/ (last visited January 12, 2022).
[60] Sherman J. Clark, *An Apology for Lawyers: Socrates and the Ethics of Persuasion*, 117 Michigan L. Rev. 1012 (2019).

goals do not oppose each other, and we can often find them side by side. Overall, we can say that persuasion is always aimed at convincing someone else of something they were not convinced of beforehand.

But when we do have both goals side by side, when does persuasion become unethical? Or is persuasion per se unethical, because you can change someone's mind?

B. Why we need ethical standards

We can imagine persuasion as a set of tools, like hammers, screwdrivers, and so on. The way we use these tools determines if we act ethically or unethically. For example, if a hammer is used to build a house, that action usually is highly ethical. But if the hammer is used to kill another person, that action will be quite the opposite.

This concept also applies to persuasion. So, the goal of the use of persuasion is thus a key factor whether the use is ethical or not. Linguistically, a separate term has emerged for the unethical use of the tools of persuasion: manipulation. Although the term is not used exclusively in a negative sense, it does have a negative connotation at its core. Manipulation means the targeted exertion of influence on people without their knowledge and often against their will, such as through advertising or political influence with the aim of using them in a controlled manner for one's own purposes.[61] In the process, only the appearance of freedom of choice is maintained. Techniques of manipulation include falsification or omission of information.

The other key factor in determining whether persuasion is ethical is the persuasive tools used themselves. In general, there are methods which are ethical and others which are clearly unethical.

However, to determine if the use of persuasion is ethical or not, we, as a society, need a set of rules to determine when persuasion can be used and when it can't. Therefore, ethical means moral action, whereby moral is subject to the change of the social conception. In contrast, legal science is concerned with the interpretation and implementation of such moral concepts. It thus covers only a part of ethics. Consequently, unethical behavior does not necessarily mean violating the law.

A recent example of how important these ethical standards are is the case of Cambridge Analytica. As you will remember, a small firm used the algorithm of Facebook to heavily influence the outcome of political elections. The most important example from a European perspective was the referendum held on Brexit in the United Kingdom on June 23, 2016. As was subsequently discovered, the referendum was influenced in advance by the company.[62] To do so, the firm used highly emotional messages, which were mostly false, to target a very specific audience. The result is widely known. Many Europeans are

---

[61] Varun Nagaraj & Jeff Frey, *The Ethical Edge of Persuasion*, Psychology Today (February 25, 2021) https://www.psychologytoday.com/us/blog/leading-in-the-real-world/202102/the-ethical-edge-persuasion.
[62] *Which role does Cambridge Analytica plays at Brexit?,* https://www.sueddeutsche.de/politik/cambridge-analytica-brexit-1.3921387 (2018).

convinced that without this firm, the United Kingdom would still be part of the European Union. The methods used by this company raised a multitude of ethical questions and in the end the company was dissolved. Many of the questions remain unresolved to this day.

We need ethical standards to protect society and the individual. The ethical standards are determined by recent moral action.

C. The human mind

One of the basic assumptions of persuasion is that the human mind is freely influenceable. Every person can be somehow influenced. Nearly every opinion can be changed.

The term "free will" comes from the Latin "liberum arbitrium", which means the ability to act at will. This term describes that before having formed a will there is none and that the will itself is the primary cause for any human action. This idea originates from St. Augustine, who stated that man alone is responsible for sin itself, because he or she has free will. Therefore, there is no origin for evil in God. Many philosophers have further developed this original concept of free will. One of the most famous was Immanuel Kant. According to Kant, man is a being between the instinct-driven animals, which have no reason, and God, who can do nothing but be reasonable.[63] In order to be worthy of God, man must not deny reason and thus must abide by the moral law. A free will, for Kant, is thus one that is always and only governed by moral laws. At the same time, these laws always cause the will to become free.[64]

These mostly theoretical approaches are increasingly called into doubt by today's brain research. In science it is doubted that free will exists.[65] Physical, chemical and biological processes run according to the principle of cause and effect. Even humans cannot free themselves from this. Voluntary action is based on brain activity and is its product. The brain itself is a result of evolution. Supporters of free will argue that the brain was formed in the course of evolution. But freedom of will is a relative and not an absolute concept. Latest studies show that decisions are already made before the consciousness takes note of them.[66] Freedom is made to appear to the brain.

Free will is also defended because it maintains public order. If we do not act out of responsibility but are remotely controlled from the depths of the brain, then apparently anything is allowed.

Free will is also a legal concept. People are responsible for their actions due to their ability to control them (and can also be punished for this in case of doubt). The entire criminal law is based on this

[63] Robert Johnson, *Kant's Moral Philosophy*, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/kant-moral/ (2016).
[64] *Id.*
[65] Christian List, *Science Hasn't Refuted Free Will*, Boston Review, January 20, 2020, https://bostonreview.net/articles/christian-list-has-science-refuted-free-will/.
[66] Oliver Burkeman, *The clockwork universe: is free will an illusion?*, The Guardian, April 27, 2021, 01:00 EDT, https://www.theguardian.com/news/2021/apr/27/the-clockwork-universe-is-free-will-an-illusion.

concept.[67] A person is not liable to prosecution if, at the time of the offense, he or she was not in a position to control his or her actions in a self-determined manner. The concept of free will is thus the theoretical basis for society's moral concept and, as a result, for social cohesion itself.

In Europe, there is also the concept of the responsible consumer. According to this concept, the legislator assumes that consumers are capable of informing themselves about the products they consume. Ultimately, this results in an increased duty of care for the end consumer and (at least in theory) a consequently lighter duty of information on the part of the producers.

However, for the purpose of this article, we assume that man has some kind of a free will, which can be influenced by others. Man is free to choose how he acts. However, this decision-making process can be influenced by various methods. Persuasion pursues this goal by means of language.

D. Goals of persuasion

As we have already lined out, there are various goals of persuasion. For lawyers, persuasion is the daily business. Mainly they must convince opposing or third parties or courts of the opinion of their clients. This takes place either in the context of court proceedings or out-of-court negotiations. But which purposes are unethical, and which are not? The answer to this question is lawyer like: it depends. The decisive factor in assessing this question is the specific situation. Therefore, only rough guidelines can be provided for this.

First, representation of interest is not unethical per se. It is a key part of human life. Everyone is entitled to represent their own interests. It is irrelevant whether these are persons, companies or organizations. In a society, there are a multitude of conflicting interests that must be reconciled, whether it is the neighbor who complains about the loud screaming of children in the neighborhood (a German classic) or whether it is companies that represent opposing positions in the context of a contract negotiation. Also, our political system is based on representation of interest. Our democracy lives from the process of reconciling different interests in a peaceful, organized way.

The representation of interests only becomes problematic and unethical if it leads to the other party being harmed to an extent that is no longer socially acceptable. As a rule, minor financial losses, such as those incurred in the context of giving way in a negotiation, will not be socially objectionable. However, the situation is different if one party acts solely with the aim of harming the other party. Excessive selfishness can also lead to the representation of interests becoming unethical. In this context, unethical is to be understood as a social concept of norms and values.[68] This concept itself is not fixed but is regularly adapted by society. The description of a behavior as ethical or unethical is therefore always a

---

[67] List, *supra*.
[68] Robert Noggle, *The Ethics of Manipulation*, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/ethics-manipulation/ (2020)

relative consideration at the time of consideration.[69] For example, 100 years ago, the ecological consequences played a rather subordinate role in decision-making. This completely changed in the last ten years.

Lawyers should frequently ask themselves if their actions are still aligned with common values of society. As a lawyer, you learn and perfect the special ability to convince other people of your opinion or the opinion of third parties. This skill should be used carefully and cautiously, especially in ethical gray areas. In principle, acting as a lawyer should not lead to harming others (beyond what is socially accepted). Written guidelines, such as rules drafted by the American Bar Association and the German Bar Association, can help determine whether or not your actions are ethical.

E. Methods of persuasion

After examining which goals are ethical and which are not, we will take a closer look at the methods used to persuade another person. In general, one has a variety of methods to persuade another person. Probably best known is rhetoric. In the context of rhetoric, the speaker uses various stylistic devices and ways of speaking in order to convince his opponent and to draw him to his side. We have already dealt with this in the chapter asking what we can learn from Aristotle.

There are several methods which are considered unethical. The most obvious is lying. Anyone who lies to convince someone else of his or her opinion is acting highly unethically. In Germany the legislature has stipulated in the professional law for lawyers that lawyers are subject to a duty to tell the truth.[70] Lawyers are thus not only obliged to tell the truth, but also to deliberately not omit any facts that might speak against the client. Furthermore, the attorney's relationship towards his or her client, the adverse party and the opposing attorney, other attorneys, courts, public attorneys and other government bodies and agencies possessing public authority shall be determined by the attorney's role as the protector of the rights of citizens and legal entities.[71]

Furthermore, the practice of law is essentially based on fact-based reasoning. Therefore, in order not to damage the integrity of the profession, lawyers should, when exercising their profession, essentially limit themselves to fact-based argumentation. Although it may be highly tempting to achieve goals for the client through emotion-based argumentation, such argumentation should be avoided. While such professional practice is not unethical in the sense that it is socially frowned upon, it does harm the profession itself, sometimes to a considerable extent.[72] Moreover, this brings us back to the issue of free

---

[69] Stephen P. Anderson, *Towards an Ethics of Persuasion*, UX Magazine, December 13, 2011, https://uxmag.com/articles/towards-an-ethics-of-persuasion.
[70] § 43a German Federal Lawyers Act (*BRAO*)
[71] § 1 German Federal Lawyers Act (*BRAO*)
[72] For further arguments against the use of emotions in court, see Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefit of Aristotelian Rhetoric in the Courtroom,* 7 Wash. U. Jur. Rev. 131, 141 (2014).

will. The social view of the lawyer is based on the assumption, dating back to antiquity, that lawyers essentially work with objective arguments.

In ancient times, scholars were already discussing the ethics of rhetoric and persuasion. Plato himself described rhetoric as a kind of deception, aimed only at the manipulation of the masses.[73] Aristotle countered this argument in his work "Rhetoric." For Aristotle, rhetoric serves in particular to bring the truth to light. Admittedly, such a definition will be considered too narrow nowadays. Nevertheless, it still retains its meaning.

F. An example of highly unethical behavior in Germany: Cum ex

One of the biggest economic scandals in Germany took place due to the millionfold tax robbery in the course of the so-called cum-ex scandal.[74] The scandal illustrates the difference between what may be legally permissible and what is ethically unacceptable.

Simply put, to gain an (illegal) tax benefit, an investor sold shares to another investor on the day before a dividend payment was paid and bought them back again on the day after to create confusion about which investor owned the shares when the dividend was paid. Usually, the seller was a short seller. Under German law at that time, both investors claimed a tax refund even though only one investor actually paid taxes for the dividend gained.

Now to the interesting part: the German legislature, after years of study, voted to counter the practice but without closing the existing legal loophole. While some lawyers see this as confirmation that the legislature does not want to fight such tax schemes effectively, various courts have now ruled that the cum-ex scheme is punishable as tax evasion.[75] Logically, only taxes that have been paid can be refunded.

However, this retrospective view fails to consider the fact that for years there was a dispute as to whether such schemes were legal. There were several arguments in favor of this, and the change in the law described above gave the advocates an additional argument. Many banks and lawyers were involved in the scandal. It also triggered a debate among lawyers about the extent to which legal loopholes may or may not be exploited.[76] Only high moral and ethical standards can prevent such scandals. Not only

---

[73] Clark, *supra* at 1001.
[74] Theo Leggett, Manuel Daubenberger & Oliver Schroem, *Tax cheat scheme cost governments billions*, BBC, October 21, 2021, https://www.bbc.com/news/business-58984813.
[75] German Federal Court of Justice (BGH) as of July 28, 2021, file no: 1 StR 519/20 in NJW 2022, 90
[76] Karsten Polke-Majewski, Jennifer Lange, Christian Salewski & Oliver Schroem, *Cum-Ex-Process: „Everybody knew what they did“*, Zeit Online, October 29, 2019, https://www.zeit.de/wirtschaft/2019-10/cum-ex-prozess-bonn-kronzeugewarburg-bank.

did the scandal cause billions of euros in damage for the society, but it also severely damaged the integrity of the legal profession.[77]

G. Summary – Can lawyers be ethical and persuasive?

Persuasion is not per se unethical. Unethical behavior does not necessarily mean violating the law; rather, the goals and the methods used are decisive. Lawyers always represent the interests of their clients, but they are also part of the administration of justice. This function can only be fulfilled with high moral standards. In particular, two broad guidelines can be identified: persuasion must not be used to deliberately harm a person, and on the other hand, lawyers must not lie.

How Should Lawyers Negotiate with Difficult Lawyers?[78]

All of us come across people throughout our lives who are combative, confrontational, and always believe that they are never wrong. These people would believe in a benevolent dictatorship where they are the dictator because they think they have the answers to all the world's problems. Their way is the best. Therefore, when you engage with them in a conversation you go around in circles never reaching consensus. A good compromise is when both sides are not completely happy and not completely angry. The question we are asking here is: "How do you deal with difficult people in a negotiation?" Confronting them head on is like two rams banging their horns together until the one who was the most powerful beats the other. Either way they are both exhausted.

There are two primary schools of thought. The first is to be aggressive. Some lawyers believe in a scorched earth policy. Take no prisoners. They believe that being nice and cordial is a sign of weakness, and that being super aggressive is a way to impress the client. The reality is that type of attitude can cost the client more money because there will be no agreement, and the only option is a trial. Second, there is no reason to be super aggressive. Studies show that "the more assertive we are, the less persuasive we become."[79] No matter how intense the dispute, a case is more likely to settle if both sides truly understand their strengths and weakness. You can disagree and still feel strongly about your position but in the end, you know it is usually best to reach a compromise.

Fortunately, the US has mindset for alternative dispute resolution. Federal courts require a mediation of some sort in all cases. In countries like Mexico, negotiation with respect to litigation is next to

[77] Klaus Ott, *Bigger law firms: We must not leave the state to the lobbyists*, Süddeutsche Zeitung, October 24, 2017, 6:55 pm, https://www.sueddeutsche.de/wirtschaft/grosskanzleien-wir-duerfen-den-staat-nicht-den-lobbyisten-ueberlassen-1.3721987.
[78] This chapter written by Rudy Rivera.
[79] Vanessa Bohns,"*Why Do We Shout When We Argue? Lack of Confidence*," Wall St. J., August 21, 2021, https://www.wsj.com/articles/why-do-we-shout-when-we-argue-lack-of-confidence-11629518461?mod=Searchresults_pos4&page=1 (visited January 10, 2022).

impossible because no one will concede. They refuse to believe that there are flaws in their case and are usually confident of victory.

If your goal is to win every time in a negotiation, you will be sorely disappointed. This, however, is not a compromise. I would go further to say it's not a victory. A true victory is not always a conquest. A true victory can be when everyone at the table comes to an agreement.

What is the solution? First, do not negotiate while angry, upset or in some other emotional state that prevents you from looking objectively at the situation. Being calm is even more important especially when the other person is aggressive. Some people are just aggressive by their very nature. Strong emotions can be seen as a sign of desperation or just grabbing at straws. But, generally, people shout because they assume others are not listening; they feel as if they are shouting into the void.[80] "[O]vercompensating for lack of confidence in our proficiency as influencers leads us to use overly assertive language, which is actually an ineffective tool for persuasion."[81]

Second, learn as much as you can about the difficult person on the other side. Pick up the phone at the beginning of the matter so you can at least attempt an amicable relationship. Talk to colleagues, research prior cases handled. There is no substitute for preparation.

Third, define your goal. Be clear, concise, and consistent in what you want. If the other person tells you that you wrong do not respond with; NO I AM NOT. Ask him why he believes you are wrong. You can also say, I would truly like to understand your position more clearly. Ask him or her to elaborate. The victory is not always the winner takes it all, but in coming to an agreement. If the goal is to win always, then you may as well go to trial on all of your cases.

Fourth, begin with the areas where there is consensus. For example, it may be clear that an auto collision was the defendant's fault, so the dispute may be only with the damages. Why argue about liability? Finding common ground creates a situation where there is a rhythm in the negotiation. If there is no progress on one point, set it aside and move on to another issue. Otherwise, you can get bogged down for hours and waste a lot of valuable time.

Fifth, let them vent and just listen, while you remain calm. For many litigants and businesses, the negotiation is the first time they get to tell their story. After they do, they are ready to sit down and talk.

When you finally come to an agreement memorialize it in writing and have everyone sign. That way there is little chance of any misunderstanding. There are those who conveniently forget after the negotiation is completed.

[80] *Id.*
[81] *Id.*

Conclusion

All lawyers should master the tools of persuasion. Those tools can be used not only in court, but also in mediation, in meetings with their own clients, and in negotiations of all kinds. As Aristotle recognized millennia ago, effective persuasion means logical reasoning (logos), credibility (ethos), and appealing to the emotions of the audience (pathos). There is no precise recipe for mixing those ingredients, and they don't always mix easily or well. Telling the truth may increase credibility, but the truth may not be logical or emotionally appealing. And bending the truth may seem like the best way to advance a client's case, but it could damage both the lawyer's and the client's credibility as well as lead to unfortunate consequences professionally. The bottom line, of course, is each of us has to make decisions that we can live with. No regrets!