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Article

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The practice of law, whether transactional or litigation, consists of efforts to convince an audience to accept the client's position. Lawyers seek to persuade the court, the jury, opposing counsel, the opposing party, mediators, arbitrators, and others to agree with the client's point of view. Rhetoric is the art of persuasion, whether orally or in writing. It includes all aspects of methodologies of argument, including grammar, invention, narrative, syllogism, analogy, metaphor, arrangement, and style, among others. Thus, we may consider the law as the practical application of rhetorical principles; inherently, the law is a rhetorical art. Whether consciously or unknowingly, attorneys apply the principles of rhetoric to convince others to accept the client's position, claim, or view of the facts or law.

For this reason, lawyers stand to benefit greatly from familiarizing themselves with the basic principles of rhetoric. Knowledge is power, and an understanding of rhetoric can give an advocate tools for more-effective client advocacy. To that end, this article attempts to illuminate for practicing attorneys the basics of rhetorical practices and principles. In addition, this series on classical rhetoric endeavors to provide practical examples of how these principles might function in the practice of law.

This article focuses on some essential rhetorical basics, including the three basic appeals of rhetoric (plus the concept of *kairos*), the five canons, and the common figures of speech, defining each and providing examples of the use of each in the practice of law. See the included bibliography for

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further reference. Future articles in this series will highlight the three branches of rhetoric, the common and special topics, and the logical fallacies.[1]

I. The Origins of Rhetoric

The Greek rhetorician, scientist, and philosopher Aristotle attributed the origins of formal rhetoric to two Sicilians, Corax and Tisias, who taught *logos*, or logical argument, beginning in roughly 467 B.C.E.[2] The study of rhetoric was the foundation of Greek and Roman education for almost 1,000 years.[3] The most well-known scholars of rhetoric in the ancient world were Aristotle, Cicero, and Quintilian.[4] They formalized and systematized its theory and practice.

Although many commentators view the Greek philosopher Plato as an opponent of rhetoric, this position is not entirely accurate. He was opposed to the supposed misuse of rhetoric by the Sophists to make "the worse appear the better reason."[5] Plato really was the first formally recognized practitioner and teacher of what we refer to as "rhetoric." He wrote his first dialogue *Gorgias* around 380 B.C.E., and his dialogues are based on the rhetorical techniques of argument, counterargument, hyperbole, inoculation, and many others.[6]

The term "rhetoric" originally referred to persuasive discourse of the kind frequently made in the Greek assembly.[7] Aristotle, born about the time *Gorgias* was written, expanded the study of rhetoric to poetry, drama, and logic. While Plato mistrusted rhetoric, Aristotle viewed rhetoric as an art.[8] The Romans carried on the great Greek rhetorical tradition through famous jurists like Cicero and Quintilian, who, in addition to being academics, practiced in the Roman courts much as liti-

1 The three branches of rhetoric—forensic, deliberative, and epideictic—are divisions of the art of persuasive argument by the circumstances in which certain types or classifications of rhetoric are appropriate. The common and special topics concern resources for or thought processes designed to serve as source material for an argument. Logical fallacies are examples of common logical errors or intentionally misleading uses of arguments, such as ad hominem attacks and strawman arguments.

2 AN INTRODUCTION TO CLASSICAL RHETORIC: ESSENTIAL READINGS 10 (James D. Williams ed., 2009); GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 8 (1980).

3 Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 614 (1988).

4 *Id.*

5 *See* PLATO, THE APOLOGY OF SOCRATES (Benjamin Jowett trans.), http://classics.mit.edu/Plato/apology.1b.txt (last visited June 15, 2017); EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 543 (3d ed. 1990).

6 *See* Plato, *Gorgias* (Benjamin Jowett trans.), http://classics.mit.edu/Plato/gorgias.html (last visited Feb. 23, 2017).

7 Brett McKay & Kate McKay, *Classical Rhetoric 101: A Brief History*, THE ART OF MANLINESS (Nov. 30, 2010), http://www.artofmanliness.com/2010/11/30/history-of-rhetoric/.

gators in America argue cases in courtrooms.[9] Thus, what began as an academic tradition quickly transformed into a practical tool for perfecting techniques of persuasive speech in the courts and legislative bodies. For this reason, rhetoric remains a foundational body of knowledge for those who practice the persuasive arts, whether in negotiation, deal-making, or the courtroom.

Indeed, a great many of the rhetorical concepts discussed herein infiltrate our everyday lexicon and usage, so that techniques that the ancient Greeks originated and taught may seem like second nature to some practitioners. For an example from the popular media, consider the memory technique of the "mind-palace" practiced by Sherlock Holmes in the television series *Sherlock*.[10] The mind-palace is a variation on the Greek memorization technique of *loci* discussed later in this article. In this way, rhetoric is a living and thriving system of techniques for persuasion, the study of the theory and practice of which can only enhance the skill set of the thoughtful advocate.[11]

II. Rhetoric and its Tools

For attorneys, rhetoric includes the art of persuasion, a method of convincing another to change his or her actions, decisions, or beliefs. But rhetoric is broader still. Rhetorical practice includes not only persuasion but also the use of these techniques to enhance understanding, to educate, to encourage, to dissuade, to reinforce, and to plant ideas. For example, an attorney frequently must educate her client on the law and the issues in the case, and this education involves rhetorical practice. Because this article is directed at practicing attorneys whose primary focus is persuasion, however, it addresses primarily persuasive techniques and examples used to advance the client's position, although not to the exclusion of other uses of rhetoric.

A. Four Rhetorical Tools: The Three Appeals and *Kairos*

The three types of appeal constitute the different methods of persuasion, argument, and explication upon which rhetoric relies: *logos*

8 *See, e.g.*, Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review*, *in* THE RHETORIC OF LAW 225–26 (Austin Sarat & Thomas R. Kearns eds., 1994).

9 AN INTRODUCTION TO CLASSICAL RHETORIC: ESSENTIAL READINGS, *supra* note 2, at 316, 392.

10 This technique involves associating a memory with a location as a mnemonic device. *See The Secrets of Sherlock's Mind Palace*, SMITHSONIAN (Feb. 3, 2014), http://www.smithsonianmag.com/arts-culture/secrets-sherlocks-mind-palace-180949567/.

11 The literature on rhetoric is extensive. See the Bibliography following this article.

(logical argument), *ethos* (the character and reputation of the speaker), and *pathos* (an appeal to emotion). Another related tool is *kairos*, or proper timing and occasion. Each of these methods plays to a different aspect of the human psyche, but all follow patterns of logic and style to some extent. To learn to use them most effectively, therefore, one must understand their nature and their application. The following discussion explores these techniques in detail, with practical examples. Those who are already familiar with these appeals may wish to skim this section.

1. *Logos*

Logos is, in essence, an appeal to reason. As the name implies, it relies on logic and assumes a logical mindset on the part of the reader. The most basic *logos* argument is called a syllogism: a deductive style of reasoning which takes two premises assumed to be correct or mutually agreed upon and comes to a conclusion based on these premises. Deductive reasoning assumes the conclusion *must* be true, based on the validity of the premises. Inductive reasoning, by contrast, sees the premises as only a strong argument for the conclusion, not proof. It puts forth a probable outcome based on accepted facts. A deductive syllogism might follow this pattern:

> **Premise 1:** An inexperienced doctor cannot be competent to perform an advanced surgery.
>
> **Premise 2:** Dr. Jones was inexperienced.
>
> **Conclusion:** Dr. Jones was incompetent.[12]

Thus, a syllogism simply argues from accepted premise to factual evidence to conclusion.

The logical syllogism therefore consists of three parts: a major premise, which is given or accepted as true; a minor premise, which may be shown to be true; and a conclusion that flows from the premises. The force of the syllogism rests in the fact that if the premises are accepted as true, and if the reasoning is valid, the conclusion must logically follow.[13]

An abbreviated syllogism is known as an enthymeme, in which the major premise is assumed. An example might be, "Because wrongful-death cases are so difficult, attorney Brown hates them." The example assumes the difficulty of wrongful-death cases. In a syllogistic argument, the major premise is taken as true. The relative strength of the argument

12 *See generally* JOHN EDWIN SANDYS, THE RHETORIC OF ARISTOTLE WITH A COMMENTARY BY THE LATE EDWARD MEREDITH COPE (1877).

13 Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 493 (2003).

often relies on how true the premises may be. If Premise 1 does not hold true, this fact invalidates the conclusion. Similarly, if one believes wrongful-death cases are not so difficult, she might not tend to hate them.

A common *logos*-style form frequently incorporated in legal rhetoric is the RAC structure.[14] RAC—incorporated in CREXAC, IRAC, CREAC, or TREAT—is an extended form of syllogism. The letters in these legal versions stand for Issue, Conclusion (or Major Premise), Rule, Explanation of Rule, Analysis (which incorporates the facts, or Minor Premise). Importantly, each of these adapted syllogisms breaks an issue down into subissues.[15] Each subissue must, in effect, be separately proved. For example, when making multiple arguments in defense of a medical-malpractice client, one RAC formulation likely could not account for the overall conclusion of negligent or not negligent. Each RAC formulation must address a specific concern, or Issue, such as, "Did the doctor fail to suture the wound correctly?" or "Did the physician wait too long to prescribe anti-nausea medication to prevent vomiting and rupture of the sutures?" Once each argument has been analyzed using RAC, one can more convincingly draw the ultimate conclusion of relative culpability. For example, the applicable syllogism might be this:

Major Premise: It is negligent to leave a surgical instrument in a patient.

Minor premise: Dr. Smith left a surgical instrument in the patient.

Conclusion: Dr. Smith was negligent.

The Major Premise should state what is sought to be established. For example, in the surgical instrument hypothetical, the physician might argue that the nurses were responsible for counting the surgical instruments. A doctor's CREXAC argument might look as follows:

Conclusion: The nurses were negligent in leaving an instrument in the patient.

Rule: Nurses are responsible for counting surgical instruments.

Explanation: Nurses, not surgeons, count sponges and instruments before closing. Analysis (or Application of the Rule, the Major Premise, to the Minor Premise, the facts at issue): The nurses did not count instruments, and one was left in the patient.

Conclusion: The nurses were negligent.

14 For more information about the origins of this structure, see Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: JALWD 39, 42–47 (2016).

15 Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 328–31 (2011).

Another common use of this structure in a less formulaic way is storytelling, discussed below, in which logical connections govern the flow of events, one to the next.

Once the attorney offers the Rule, explains it, and combines it with the Conclusion, he or she must pair it with the facts through Analysis. One cannot assume that the Conclusion is obvious given the Rule provided; the author must show the reader exactly how the facts at hand intersect with the Rule to produce the Conclusion, through evidence of facts. As in any *logos* appeal, thorough deductive reasoning requires the Analysis to produce a watertight Conclusion. The attorney must then restate the key word Premise (here, "negligence") in the Conclusion. *Logos* appeals constitute an essential component of legal rhetoric because the law in its very nature frequently (but not always) uses an "if . . . then" formulation. Although different people certainly can interpret the law differently, an advocate must be able to approach the law critically to draw and prove logical conclusions from the facts provided. Thus, the CREXAC version of syllogistic reasoning using *logos* is a fundamental tool for attorneys, whether in litigation, mediation, arbitration, or negotiation.[16]

Narrative theory is closely related to *logos*. The idea of narrative (or logical storytelling) in presentation is ancient: Aristotle said that narrative "is an imitation of an action that is complete and whole . . . ; [a] whole is that which has a beginning, a middle, and an end."[17] Narrative, now subsumed under a movement in rhetoric and the law known as Applied Legal Storytelling, makes use of logical story structure to convey information in a way that holds the attention of the audience.[18] The technique uses storytelling to organize the facts the attorney hopes to prove into a compelling tale in order to capture the imagination of the audience.[19] Narrative organizes facts in a logical sequence that follows one upon the other in a causal chain. This method allows the advocate to appeal simultaneously to the emotional connection the story creates and to the logic it follows, thereby presenting the facts in the most compelling way, painting a picture the listener can both imagine emotionally and follow logically.

2. *Pathos*

Pathos, like Applied Legal Storytelling, relies in part on an emotional appeal to the audience.[20] This approach attempts to evoke familiar feelings

16 See Jewel, *supra* note 14, at 42–47, for the origins of this structure in classical rhetoric.

17 ARISTOTLE, THE POETICS OF ARISTOTLE 30–31 (S.H. Butcher ed. and trans., 3d ed. 1902).

18 KENDALL F. HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 15 (2007); J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

19 Rideout, *supra* note 18, at 248.

20 *See* KENNEDY, *supra*, note 2, at 82.

and, therefore, both empathy and sympathy from the audience. Consider a plaintiff's attorney in the above malpractice case. In addition to establishing on a legal basis that the doctor was negligent, the plaintiff's attorney might appeal to the judge or jury on the basis of the client's story, the nature of the injury, the egregiousness of the conduct, the client's pain and suffering as a result of the injury, or general community values and standards about a doctor's responsibility to his patient. A good advocate and storyteller knows how to play on the sympathies of the audience, bringing a human element to the narrative of any case.

From a more modern perspective, author Michael Smith discusses two types of *pathos*: substantive appeals to emotion in the classical sense, and "mood control," the subtler method of influencing emotions through nonverbal clues.[21] For example, as I sit at my computer, I am influenced by the lighting, the temperature, the color of the text I am reading, the font, the comfort level of my chair, and many other factors. Advertisers, of course, know this, and make ready use of nonverbal clues in setting the mood of their advertisements and commercials.[22] Likewise, telling a story in a specific sequence can influence the mood or feelings of the audience.[23] We frequently are oblivious to techniques of persuasion that rely on mood control.[24]

Pathos relies heavily on the nature and feelings of the audience, which the advocate attempts to mold to his use. This technique considers "human nature" to predict the way a particular judge, panel, or jury will respond to an argument. The emotions evoked are many, including but not limited to love, hate, anger, fear, hope, pity, and sympathy.[25] For example, some plaintiffs' attorneys attempt to make contact with the jury's "lizard brain" to access a visceral fear that what happened to the plaintiff will happen to them or their loved ones. The techniques of *pathos* evaluate what appeals will affect the audience most powerfully and avoid boredom and confusion while promoting a sense of self-interest, justice, class, or emotion.[26]

Another iteration of *pathos* is the Applied Legal Storytelling movement, mentioned above in connection with *logos*.[27] This genre uses applied rhetoric and narrative methods to elicit emotions, set a mood, and

21 MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 11–12, 90–92 (2d ed. 2008).

22 *See* CORBETT, *supra* note 5, 5–9.

23 Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 316 (2010) (citing SMITH, *supra* note 21, at 11–12).

24 CORBETT, *supra* note 5, 5–9.

25 Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 91 (1994).

26 See Frost, *supra* note 3, at 619.

27 *See generally* Ruth Anne Robbins, *An Introduction to this Volume and to Applied Legal Storytelling*, 14 LEGAL WRITING 1 (2008).

generate structure, all through the application of applied narrative techniques. The literature is rich with examples of the creative modern application of classical rhetorical principles.[28] In Applied Legal Storytelling, the advocate crafts a narrative of the facts designed to elicit the desired emotion, response, or mood, as well as logical reaction that will encourage the audience to reach the desired result.[29] For example, in a contract case, the advocate might tell a story about how an uneducated farmer was taken advantage of by an unethical, sophisticated bank. While the story might proceed in a step-by-step, logical structure, the facts are told in such a way as to elicit sympathy and empathy for the farmer, thus evoking both *pathos* and *logos*.

3. *Ethos*

Ethos depends on establishing the credibility and reputation of the speaker.[30] If the advocate can prove herself a reliable source, this lends believability to her assertions. Creating an *ethos* argument involves many strategies. Advocates often tout their experience as grounds for credibility, especially in comparison to less seasoned opponents. Showing obvious signs of thorough preparation likewise lends credibility. An attorney who does not appear to know all of the essential facts of the case will almost inevitably seem less convincing before a judge or jury. Consistent honesty, integrity, and ethical behavior, however, are the most essential elements in the *ethos* strategy. Treating others with respect will always garner more support than belligerence or disdain. A lawyer's demonstration of ethics and character provides strong *ethos* support to a *logos* or *pathos* argument. Similarly, the *ethos* of one's client plays a significant part in successfully pursuing or defending a case. But, of course, on a simple level, as all lawyers know, being a so-called "good person" is not enough to win a case.

Credibility involves matters not only of trustworthiness, but of caring, a sense of justice, temperance, wisdom, and demeanor or comportment.[31] According to Aristotle, trust and credibility are created by the speech itself, not just by the speaker's reputation.[32] *Ethos* also involves an intentional mindfulness of the attorney's duties and ethical constraints.[33]

28 *See, e.g.,* Rideout, *supra* note 18, 255–64 (listing selected articles relevant to Applied Legal Storytelling).

29 *See* RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 37–50 (2013).

30 Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC: JALWD 229, 233 (2012).

31 Robbins-Tiscione, *supra* note 15, at 333.

32 ARISTOTLE, THE RHETORIC OF ARISTOTLE (Lane Cooper trans., Prentice-Hall, Inc. 1960) (c. 333 B.C.E.) 8–9, quoted in Robbins-Tiscione, *supra* note 15, at 333.

33 *Id.* at 334.

It may also be crucial to demonstrate the *ethos* of the client. In a trial setting, for example, the attorney may want to show that her client has experience, education, ties to the community, a record of honesty and trustworthiness, and reasons to be truthful. In this way, the jury and judge may see the client as a person of character whose testimony is likely to be credible.

Another modern approach to *ethos* involves "constitutive rhetoric." This concept involves the communal character of rhetoric—the fact that there is always a rhetorical community to which the advocate attempts to appeal, the *ethos* of the combination of the speaker and the audience.[34] The lawyer wants to access the shared values of the community represented by the audience and to make that audience feel that she is "one of them." The audience and speaker represent a community of persons talking about and to one another.[35] For example, an advocate who lives in the local rural jurisdiction will sometimes refer to himself as a "hometown boy" and portray the big-city lawyer as a "deep carpet" attorney or otherwise refer to his opponent's supposed relative sophistication. In this way, the advocate from the small town calls upon the listener to relate to him as a member of the community, suggesting that he shares the jury's values and beliefs.

4. *Kairos*

Kairos is the rhetorical theory of "right moments." According to Linda L. Berger, *kairos* is the "opportune moment—what point in time—to make a particular argument"; in other words, the proper time to advance a legal argument, both in the sense of societal time (when society is ready for it) and in the context of a specific argument (when the argument will make the most impact).[36] The artful practitioner will develop a sense of *kairos* to know when an argument is timely. For example, is the state of the law and the state of society such that it is the right time to advance an argument for equal rights for gays? When in my closing argument should I make my emotional appeal? *Kairos* is the rhetorical concept that helps answer these questions. Indeed, *kairos* can encompass a series of "right moments" at which particular facts or arguments are inserted into the argument or presentation of the case. In this situation, *kairos* is art of knowing when in

34 James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688–89 (1985).

35 *Id.* at 690.

36 *See* Linda L. Berger, *Creating* Kairos *at the Supreme Court:* Shelby County, Citizens United, Hobby Lobby, *and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147, 148 (2015). Aristotle makes reference to *kairos* in his teachings about deliberative rhetoric and justice, but the idea does not jump out as easily as *ethos*, *logos*, or *pathos*. ARISTOTLE, RHETORIC, *supra* note 12, Book I, as explained in James L Kinneavy and Catherine R. Eskin, Kairos *in Aristotle's* Rhetoric, 17 WRITTEN COMMUNICATIONS 3, 432–44.

the situation at hand is the right time or essential moment to make the winning argument.

The moment at which the advocate delivers the argument also affects the type of rhetorical device that would be most impactful.[37] Further, *kairos* has at least two aspects, the temporal and the special: "one [must] be in the right place and under the right circumstances," including the situation and the actor.[38] Consider for example, being in the U.S. Supreme Court to have a case decided versus being in a federal district court: the circumstances affect the significance of the outcome as well as the likely result. A decision by the federal district court may still be appealable, and it has less precedential value than a ruling by the Supreme Court. Further, it may sometimes (but certainly not always) be easier to predict the outcome of the case in the Supreme Court based on the Court's track record in similar cases.

Closely related to *kairos* is the concept of the "significant moment."[39] This concept represents the ideal moment in the story to present the theme. James Parry Eyster gives the example of the Rodney King beating trial.[40] The defense team for the police used the videotape not of the beating, but of King's aggressive behavior *before* the police attacked to justify their actions, with great success.[41] The attorneys thus were able to identify the significant moment at which to act.

For a practical example of *kairos*, assume a medical-malpractice plaintiff's attorney in a gall-bladder case decides to focus her presentation on the very moment in the surgery when the surgeon's scalpel severed the patient's common bile duct. That act, that instant, will now affect the patient for the rest of her life. This could be the significant moment in telling the story of that alleged malpractice. Or she might rely on the concept of *kairos* to know when in presenting the evidence to drop the information that the defendant physician lost his board certification. In either case, the key is knowing the right moment in time to emphasize a fact or argument.

B. The Five Canons of Rhetoric

The canons of rhetoric are the methods by which the author or speaker employs the tools discussed above to select and sequence her

37 Ruth Anne Robbins, *Three 3Ls,* Kairos*, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 MICH. ST. L. REV. 1359, 1359–60 (2015).

38 *Id.* at 1361.

39 *See* James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 LEGAL WRITING 87, 116 (2008).

40 *Id.* at 118.

41 *Id.*

rhetoric. From inception to presentation, these methods ensure successful and compelling communication, an essential skill for a practicing lawyer.

1. *Invention*

Invention constitutes the sources from which one produces an argument and the methods then used to understand that information and to craft an argument from it.[42] Invention involves thorough research and investigation, as well as comprehension of the law and facts, a clear vision of the goal to be attained, and an idea of how to achieve that goal.[43]

For example, before making the argument that a surgeon incorrectly sutured a patient's wound, one must know the proper technique for closing an incision. One must furthermore investigate the methods used and review the documentation carefully for all pertinent facts. Knowing the case documents thoroughly allows the advocate to craft a fact-based argument and prevents any unwanted surprises from the other side. Invention requires the legal process of discovery as well; logically, the advocate wants all possible facts at her disposal, so steps must be taken to elicit any and all relevant materials from the opposing party. Further, one must research and be familiar with the relevant law and statutes, an important part of invention. The attorney must thoroughly research the applicable law to understand how the relevant precedents apply. He must find out as much as possible about the audience—judge and jury—in order to tailor the argument best suited for those listeners. The advocate then crafts an argument suitable to the information and ideas she has developed, thinking carefully about which of the three appeals best apply and at what moment in the case to present the key information. Thus, invention is a *process*, a strategy for creating the most effective argument.[44]

2. *Disposition*

The second canon of rhetoric is *disposition*, or the *arrangement* of an argument. This outline provides a concrete approach for advocates. Classical Greek disposition follows six steps:[45]

Introduction: This step establishes the topic and any *ethos* argument of credibility.

Statement of the case: The next step gives the background and introduces the reader to the narrative at hand.

Outline of the argument: This is the roadmap for the reader to follow the argument.

42 *See* Frost, *supra* note 3, at 617–18.

43 The advocate uses the common lines of argument or topics (*topoi*) to craft the argument from the facts and law. *Id.*

44 Robbins-Tiscione, *supra* note 15, at 326–27.

45 CORBETT, *supra* note 5, at 25.

> **Proof of the argument:** The previously discussed CREXAC structure makes its appearance here. The writer should work through each component of the argument thoroughly and completely, with an approach that utilizes the most effective appeals, whether *pathos*, *logos*, *ethos* or a combination of all three.
>
> **Refutation of opposing arguments:** In this stage, the author should anticipate the criticisms of the opposing counsel and address the weaknesses of their own argument before the other side has the chance to use them. The author must, in essence, inoculate his argument against potential contradiction.[46]
>
> **Conclusion:** The last step is the appeal and summary. A *pathos*-based argument can be effective here when appropriate to evoke the sympathy, prejudice, feelings, or shared values of the audience. The conclusion also includes a clear, concise final review of the essential facts and central arguments of the case, as well as a restatement of the theme.[47]

Interestingly, the classical Greek system of disposition continues to be in use today in the form of the CREXAC structure of argument. Advocates use this arrangement of ideas in the appellate brief, in which the typical parts are the introduction or statement of the case, the argument outline, the argument (including refutation of the opponent's argument), and the conclusion.[48]

3. *Elocution*

The third consideration in the creation of a rhetorical argument is *elocution*, or the *style* of delivery.[49] Elocution primarily considers the intended audience in selecting an appropriate register for the writing or speech.[50] Speaking directed to a layperson audience, for example, is known as low or plain style, with a lower level of complexity, higher accessibility, and fewer specialized terms.[51] Middle or forcible style, by contrast, typically appears in court argument, in which technical terminology and a more formal style seem more appropriate.[52] One reserves high or florid style only for special occasions, such as weddings or funerals, or occa-

46 *See* Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 424 (2008) ("[A]n inoculation message can make the audience resistant to a broad array of attacks on the message. It does not merely deflect the particular attack anticipated and rebutted, but also provides some protection against any number of novel, unanticipated attacks.").

47 CORBETT, *supra* note 5, at 307–08.

48 *Id.* at 25.

49 *Id.* at 26.

50 *Id.*

51 *Id.*

sionally when required by convention.[53] To compare the two most common forms, consider the following examples:

> **Low/plain (to the jury):** The doctor is guilty in this case because he did not do what any other reasonable surgeon would have done in his place. He simply didn't stitch the wound tightly enough, which led to the patient's death.
>
> **Middle/forcible (to a medical board):** The doctor can be proven negligent because he fell below the standard of care by failing to suture the epidermis with sufficient tension, leading to the patient's demise.

Terms such as "negligent" and "standard of care" are legal technicalities and require definition when presented before laypeople, such as jury members. One does not need to remind a judge or medical board, on the other hand, of these definitions, and elaborating upon them would only waste time and weigh down the presentation. Therefore, one must consider elocution and audience when preparing a rhetorical argument.

4. *Memorization*

The effective oral presentation of an argument requires *memorization*.[54] As such, legal practitioners must develop adequate techniques for recollection. One such technique used by Greek rhetoricians is called "the walk through the house," an example of the concept of *loci*.[55] In this exercise, the advocate envisions a house or room and mentally explores its contents. As he passes through the space, he associates one detail of the argument with each room.[56] This form of association allows the attorney to recollect visually the various components of her argument in or out of sequence, either by walkthrough or by search for an individual room.[57] These and other devices for memorization reinforce the importance of having a strong mental grasp on one's argument, which not only prevents errors but also contributes to one's *ethos* appeal.[58]

5. *Pronunciation*

In the rhetorical context, *pronunciation* refers to one's skill in delivery.[59] This canon becomes especially important in oral argument. It encompasses both how the lawyer frames the case and the physical elements of presentation (tone of voice, enunciation, pace, pitch, posture, dress, etc.).[60] This canon is the culmination of all the effort one has put

52 *Id.*

53 *Id.*

54 *Id.* at 27.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.* at 27–28.

into the creation of an argument. As such, one must take the utmost care in this aspect of rhetoric.

C. Figures of Speech

Especially in written rhetoric, several common figures of speech prove incredibly useful.[61] These techniques add depth, clarity, and richness to advocacy by explaining or emphasizing a point beyond mere plain statement. Here, we examine some of the most effective forms:

Metaphor: "An implied comparison between two things of unlike nature that yet have something in common."[62] For example, consider the following quotation from *Harrison v. United States*: conspiracy is "that darling of the modern prosecutor's nursery."[63] This example implies that prosecutors routinely engage in allegations of conspiracy, but does so in a pointed and poetic way that both clearly makes the point and engages the reader.

Allusion: An implied comparison or indirect reference to a person, idea, or event.[64] For example, take this excerpt from *Hensley v. Eckerhart*: "[Section] 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine . . . which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape . . . ."[65] This quotation uses a simile (a metaphor using "like" or "as" to compare the two components) comparing the "artificial . . . doctrine" to Frankenstein's monster, a common literary figure. The phrase is therefore an allusion to Mary Shelley's famous novel.

Alliteration: The use of two or more words in close proximity that begin with the same letter or sound.[66] For example, an attorney might argue, "The negligence and neglect of the surgeon, who needed pay only the minimum necessary attention, has resulted in a nightmare for my client." Alliteration serves two purposes. It creates rhythm and flow in a composition or speech, and it draws attention to particular sections of the text.

60 *Id.*

61 *See generally id.* at 427–60; SMITH, *supra* note 21, at 195–339.

62 CORBETT, *supra* note 5, at 444–45.

63 *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.).

64 SMITH, *supra* note 21, at 319.

65 *Hensley v. Eckerhart*, 461 U.S. 424, 455 (1983) (Brennan, J., with Marshall, Blackmun, and Stevens, JJ. concurring in part and dissenting in part).

66 CORBETT, *supra* note 5, at 436.

Alliteration can be an extremely effective rhetorical tool; take care, however, lest your legal document start to sound like a Dr. Seuss book.

Hyperbole: The deliberate use of exaggeration.[67] For example, "Dr. Smith's surgical skill was worse than that of a Sears mechanic on his first day out of technical school." Hyperbole makes a point abundantly clear to the reader in a pointed way.

Irony: Irony occurs when the intended meaning of a statement is the opposite of its literal meaning.[68] For example, a lawyer might say on cross-examination: "So, Dr. Smith, you think you did a fine job in this surgery that cost my client her life. And I take it you are pleased with the job you did?" This is an example of sarcasm, which uses irony, but we discourage sarcasm in the courtroom.

Understatement: The deliberate de-emphasis of the intended meaning.[69] Asking, "So this complex surgery was 'merely routine' according to you, Dr. Smith?" would be an example of understatement. This technique actually draws attention to the point being made, rather than detracting from it, although on its face it appears to do the latter.

Metonymy: A reference to something by substituting a characteristic or word associated with the thing or object, such as referring to a businessman as a "suit" or to the Queen as the "Crown."[70] This device can prevent repetition in writing, or emphasize a particular aspect of the object in question. For example:

> "[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of *tongues*, than through any kind of authoritative selection." [71]

Personification: The ascription of human qualities to animals or inanimate objects.[72] For example, "You know how a dog smiles at me when he is happy?" In this case, the personification makes it easier for the audience to visualize the scene. In general, personi-

67 *Id*. at 451–52.

68 SMITH, *supra* note 21, at 329.

69 *See* SHORTER OXFORD ENGLISH DICTIONARY 3427 (6th ed. 2007).

70 CORBETT, *supra* note 5, at 446–47.

71 SMITH, *supra* note 21, at 330–31 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) (emphasis added)).

fication both arouses curiosity and gives readers a point of reference, namely human experience, to draw from in considering more-abstract concepts.

Repetition: The use of the same word or a group of words in a sequence.[73] Take, for example, this sentence: "The surgeon need only have used one technique, one diagnostic tool, and one instrument to correctly perform this surgery." The repetition of the word "one" emphasizes heavily the sense of similarity the speaker seeks to convey. Repetition, when used sparingly, draws attention to important points in an argument, and contributes to greater recall on the part of the audience.

Rhetorical questions: These are questions asked without expectation of an answer, because the answer is either assumed, implied, or provided later.[74] For example, what might Dr. Smith have done differently? He could have done an open gall-bladder removal, preceded by an X-ray, and used the correct surgical instrument. This type of question can be used to raise interest, provoke thought, state the obvious for emphasis, or frame an argument.[75]

As in all legal advocacy, the use of rhetorical devices enriches the speech and enhances the effectiveness of the argument. By varying the style, the attorney broadens the accessibility of the argument, as different rhetorical devices will appeal to different listeners. A thorough exploration of these and other devices belongs in any advocate's arsenal.

III. Conclusion

Learning the art and craft of rhetoric is essential to students and practitioners of law. Rhetoric assists the legal mind with locating and identifying arguments, making them effectively, and recognizing when they are fallacious or misused. Every lawyer should be aware of these basic rhetorical principles. These concepts constitute an essential tool for each practicing (or teaching) advocate. Rather than using them by instinct and feel, an attorney with knowledge of rhetorical basics will be better able to

72 *Id.* at 332–33.

73 *Id.* at 334–36.

74 *Id.* at 336–38.

75 *Id.*

craft effective argument, appeal to her audience, and convince her listeners.

Rhetoric is an art and practice that continues to develop. As demonstrated by the practitioners of applied legal storytelling, rhetoricians of *kairos*, and analyzers of narrative principles, rhetoric evolves even today. This article has focused on the three appeals of rhetoric (plus *kairos*), the five canons, and the common figures of speech. Future articles in this series will address the three branches of rhetoric, the common and special topics, and the logical fallacies, and again their relation to and application in the practice of law.

The author commends to the reader's further study the many resources—both historical and modern—cited herein that ground the study of rhetoric today, and wishes the best of luck to all advocates who seek to hone their skills in the practice of effective persuasion.

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