

The Art of Legal Argument

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Saint Peter

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Rhetoric: The Art of Legal Argument

An art in its third millennium, legal rhetoric combines theory, skill, and practice as advocates craft arguments for a particular audience brought together to determine a specific matter that demands resolution. When law schools proclaim that they taught students how to ‘think like a lawyer,’ they teach future attorneys the substantive law and form of analysis that remains consistent with the ‘Socratic’ method. While valuable, the thrust of legal education provides only part of what it takes to create legal arguments, especially in the real world of one’s practice. By introducing you to the theories of legal rhetoric, we hope to achieve two goals: (1) to reveal the history of legal rhetoric in a way that enhances our appreciation of the art of legal argument; and (2) to offer instruction in the theories of legal rhetoric that is relevant to the contemporary attorney.

A. Argument is more than **acting**

1. Argument as a **process** in which one engages
2. Argument as a **product** that one creates
3. In this light, argument is **more than acting and delivery**

B. Argument is more than **aggression**

1. Lawyers are traditionally faulted for aggressive tactics in argumentation. Yet, a critical distinction must be made between argumentativeness and aggressiveness.
2. **Argumentativeness** means the willingness to defend one’s position on a controversial topic and to rebut other people’s positions on issues.
3. Verbal **aggressiveness** is the propensity to attack an opponent’s *person* instead of or in addition to the opponent’s argument. In situations in which an audience expects a substantive debate, the audience will tend to dislike verbal aggressiveness.

C. Argument and **probability**

1. Arguments: **validity**, **strength**, and **probability**

a. Arguments and **validity**

A *valid* argument is the strongest possible argument. Here, the term ‘valid’ is used in a very specific sense that focuses upon the relationship between *premises* and the *conclusion* of an argument. In the field of logic and argumentation, an argument is *valid* when, if the premises are true, the conclusion *cannot* be false.

b. Arguments and **strength**

2. Strength and **Probability**

In argumentation, **strength** and **probability** are closely tied. A stronger argument is more probable than a weaker argument.

Early rhetoricians (including the Sophists) recognized that, in the real world, arguments did not tend to be tested in terms of validity. The situations in which an argument in court, politics, or elsewhere would be logically *valid* are very rare. Premises are seldom *true* in the logical sense in actual arguments. Thus, it became profitable to teach students to understand the ways in which validity differs from likelihood and probability—and to understand how to make one’s argument more probable than the opponent’s argument.

As Aristotle taught, if a person could act more than one way on a matter—and if one cannot know for certain what the outcome of the decision will be in the future—then it makes sense to deliberate before making a decision. For this reason, **rhetoric is the art of deliberating and choosing.**

a. Probability and the **audience**

The strength or probability of an argument depends upon the quality of the premises. There *are* degrees of probability or strength of an argument. Audiences determine the probability that an argument reaches a sound conclusion.

The bulk of theory and scholarship on legal argumentation is audience-centered, and for good reason. If the audience does not accept the premises, the argument will fail.

b. Probability in **legal argument**

“The persuasiveness of an argument always depends upon what the relevant audience regards as persuasive. The audience decides when and to what extent a claim has been justified by the arguments.”

(Kurt Saunders, quoted in Cohen 260, emphasis added)

3. Probability and the **Inferential Leap**

Arguments that ask the audience to hold a new belief must negotiate the degree of probability that the audience and/or the rules of the argument require in the particular situation.

When an audience is asked to accept a new position (either when it had an opposing view or when it did not have a previously-held position), the audience is asked to ‘leap’ mentally to the new view. The steps of this process can be described as follows:

- i. The audience is asked to make **an inferential leap** from an existing belief or presumption to adoption of a new belief (or reinforcement of an old belief);
- ii. The advocate presents an argument that offers a **sufficiently probable** argument to justify the leap;
- iii. The burden of proof attempts to **regulate the degree of probability** that the audience should require;
- iv. The **opponent** will ask the audience to reach a different conclusion and/or contend that the first advocate has failed to present a sufficiently probable argument; and
- v. The advocates openly engage in **adversarial testing of claims** (see Brockreide)

4. The Inferential Leap and ‘**Minding the Gap**’

a. Key concepts: **premises, conclusions, and assumptions**

b. Assumptions

5. Enthymemes skillfully **mind the gap**

- a. Arguments, including those in the law, rarely involve syllogisms in the sense of arguments in which all of the premises and the conclusion are explicitly stated.
 - i. Instead, advocates find themselves constructing **enthymemes**, which are a variant of the syllogism in which one or more premises (or, sometimes, the conclusion) go unstated.
 - ii. “Enthymematic reasoning leaves unstated whatever premises the audience itself can be counted on to provide. Thus, the enthymeme is a deductive argument in which the audience itself helps construct the proofs by which it is persuaded.”
(*Encyclopedia of Rhetoric*, 249)
- b. Enthymemes embrace the **gaps** in arguments
 - i. In an enthymeme, the premises are **mostly** or **probably true**, depending upon the situation.
 - ii. Enthymemes are **more audience-friendly** than syllogisms

6. Expression of **certainty** v. logical certainty

- a. In deductive and inductive arguments, the advocate will often state the conclusion as being *true*. In doing so, the advocate presents the argument in **absolute** terms (allowing for no exception). Please recall our discussion of validity and truth. The fact that an argument is not logically *valid* does not prevent an advocate from choosing to express the conclusion in absolute terms.
- b. Alternatively, a conclusion may be expressed in **moderate** terms. Such arguments typically include an adverb—a modifier—that indicates the degree of probability regarding the conclusion. For example, a moderate claim appears in the preceding sentence.

“Since absolute negatives are hard to prove, and hence hard to be sure of, you should rarely permit yourself an unqualified ‘never’.”
(Justice Antonin Scalia)

II. Inventing an Effective Argument

A. Seeing the Available Means of Persuasion

1. **Invention** is the central feature of rhetoric. The capacity to invent a strong argument separates outstanding advocates from others.
2. **Aristotle's definition** of invention stands the test of time

Rhetoric is the power or ability to see, in each particular case, the available means of persuasion (Book I, Chapter 2)

- a. **The ability to see**
 - b. **In each particular case**
 - c. **The available means of persuasion**
3. Argument is an **art**

The ultimately indeterminable factors in a dispute—including the facts, law, audience, client, and objective—render legal advocacy an art. In each case, the argument that will be seen as most probable by the relevant audience(s) cannot be determined with absolute certainty.

The capacity to recognize the potential arguments and appeals to use in a given situation requires a deft combination of knowledge, experience, and creative ability.

4. As an **art**, legal argument requires the exercise of **practical wisdom**
 - a. Seeing the strongest *and* most appropriate arguments requires the exercise of prudential judgment and practical wisdom.
 - b. Selecting from among the available means of persuasion is a key step

“The most important—the very most important—step you will take in any presentation, whether before a trial court or an appellate court, is selecting the arguments that you will advance.... Pick your best independent reasons why you should prevail—preferably no more than three—and develop them fully.” (Justice Antonin Scalia)

“I think there is a real art in identifying the issues that are the ones that give ... the best chance of success.” (Justice Thomas Fitzgerald (IL), quoted in Rosenberg)

- c. A key part of selecting arguments is recognizing the ‘available means of persuasion’ that one should *not* use

“On the surface, it may seem that a ten-point argument has been overanalyzed. In reality, it has been underanalyzed.” (Justice Antonin Scalia)

B. Classical Rhetoric’s Three Proofs

1. The three proofs of classical rhetoric

- a. **Logos:** Logical, rational appeal
- b. **Ethos:** Appeal to character and credibility
- c. **Pathos:** Emotional appeal

2. Logos

- a. Definition
 - i. An argument primarily offered for an audience’s rational inquiry.
 - ii. For Aristotle, logos is key to persuasion. The speaker develops an argument designed to influence the audience by asking the audience to exercise its judgment about the claims presented. The argument is typically based upon enthymemes that are created through logos.
 - iii. The persuasion is based upon the truth or apparent truth of the propositions stated.

b. Logos is **situational**

To Aristotle, logical arguments are *persuasive not because of something inherently true about logic*, but rather because the audience values and responds to logical arguments. (Steve Jamar, quoted in Cohen 258).

c. Logos and **narrative**

- i. The logic of storytelling
 - 1. Narrative coherence
 - 2. Narrative fidelity
 - 3. Framing

- ii. Tell a coherent, compelling and consistent story
 - 1. “It is critical that [the facts] are packaged in a way that presents a compelling and reasonable story and explanation for the actions taken by your client.” (Rosenberg)
- iii. The argument must include a **compelling theme**

3. Pathos

a. Definition

- i. Some hold that a pathos appeal is “directed to the audience’s emotions.” This oversimplifies and mischaracterizes the role of emotional appeals in arguments.
- ii. In *The Rhetoric*, Aristotle offers an early, thought-provoking analysis of how emotional appeals might work in arguments. First, however, he criticizes the writers of popular handbooks on rhetoric, charging them with teaching students to use emotional appeals to ‘warp’ the audience’s reason.
- iii. Aristotle explains that proper use of emotional appeals was essential to legal argumentation. The advocate who uses emotional appeals properly brings the audience to the emotional state that will enable the listeners to render a meaningful, rational decision.
- iv. In legal cases, the audience is not directly self-interested in the controversy. Thus, concluded Aristotle, it was incumbent upon the advocate to ‘interest’ the audience by inducing the appropriate emotional state—fear, pride, anger, and the like—to pay attention to the arguments and render a just verdict.

b. Significance of pathos appeals

Pathos appeals are significant because audiences assess arguments differently when in different emotional states. The adept advocate has a broad understanding of emotions, how they are induced, and how people reason when in each emotional state.

c. **Apprehension** regarding pathos appeals

Rules of professional conduct explicitly discourage the use of emotional appeals in legal argument, as is discussed below under “Ethical Constraints.”

The concern is that emotional appeals distract audiences from assessing the comparative logical merit of the opposing arguments.

Despite this apprehension, it is evident that legal argument regularly utilizes pathos appeals, often in subtle and effective ways. Moreover, if we are to believe Aristotle, people may listen more carefully and critically if they are emotionally invested in resolving a controversy.

d. Focusing upon **the equities in favor of your client**

- i. Highlighting “why ruling in your client’s favor is the fair and just outcome” is a way to “elicit a favorable emotional response from the court.” (Rosenberg)
- ii. Similarly, one might emphasize the ways in which the opponent’s position is antithetical to a fair and just result

e. Pathos appeals and **arguments regarding justice**

“There is a distinction between appeal to emotion and appeal to the judge’s sense of justice—which...is essential. *Of course* you should argue that your proposed rule of law produces a more just result, both in the present case and in the generality of cases.” (Justice Antonin Scalia)

Justice is an essential component of a successful legal argument. Juries are determined to see that justice is done. Justice Scalia quoted Lord Denning, who wrote of his “root belief...that the proper role of a judge is to do justice between the parties before him.” Scalia later noted, “You need to give the court a reason you should win that the judge could explain in a sentence or two to a nonlawyer friend.” (Justice Antonin Scalia)

f. Pathos appeals are often used to invoke the **morally appropriate** emotion in the audience. As we shall see, the skilled advocate will contend that her position is the morally/ethically superior one.

- i. A belief that one position is morally superior to another often motivates an audience to internalize the argument and defend it against counterattack.

g. Arguments **combine logos and pathos appeals**

- i. Logical appeals that establish that the advocate's claim is logically required by the law and the facts;
- ii. Pathos appeals that encourage an audience to pay attention; and
- iii. Pathos appeals that establish that the advocate's desired outcome is just/appropriate/good (that the advocate's position is one that will satisfy the emotions generated in the course of the arguments).

4. **Ethos**

“The good person speaking well” is the eloquent advocate.
--Quintilian

People are more receptive to arguments ‘from a person who is both trusted and liked’ (Justice Antonin Scalia)

a. **Definition**

- i. An appeal based upon the advocate's character and credibility.
- ii. Ethos is the character and credibility of a speaker **as established in the argument and as determined by the audience**. Thus, ethos does not involve innate characteristics of a speaker that exist before the argument begins (although **reputation**, as we shall see, can be very important in legal rhetoric).
- iii. Ethos focuses upon the characteristics that the audience attributes to the advocate once the argument begins. When two arguments seem equally plausible and have similar emotional appeals, an audience will often choose the argument from the advocate who projects a superior ethos.

b. The **three elements** of ethos

- i. Good will (**Trustworthiness**)
- ii. **Good character**
- iii. **Good sense**

c. **Good will/trustworthiness**

- i. Audiences more readily accept the arguments of advocates who they trust.
- ii. Honesty regarding legal authorities and other matters enhances ethos
 1. Concede weaknesses (see below)
 2. Answer questions forthrightly
- iii. Strategic concessions can enhance trustworthiness.

“Trust is enhanced ‘by owning up to those points that cut against you’” (Justice Antonin Scalia)

d. **Good Character**

- i. Being **perceived as a good person** is critically important for an advocate.
- ii. **Acting in a manner** that the audience deems **appropriate to the situation** confirms good character.
- iii. **Empathy**
- iv. **Likeability**

An attorney can prove to be more likable “by some of the actions that inspire trust, and also by the lack of harsh combativeness in your briefing and oral argument, the collegial attitude you display toward opposing counsel, your refusal to take cheap shots or charge misbehavior, your forthright but unassuming manner and bearing at oral argument—and, perhaps above all, your even-tempered good humor.” (Justice Antonin Scalia)

e. **Good sense / practical wisdom**

- i. Establishing one’s **sound judgment** is a keystone of legal argument and practice.
- ii. Often, this means making decisions during the argument that coincide with what the audience would decide.

iii. **Preparedness** is a key marker of good sense.

1. Knowing the case, record, and authorities
2. Creating a system of organizing key materials so that they may be retrieved easily during oral argument

f. **Attorney ethos** and oral argument

i. At the end of an oral argument, the attorney might hope that the panel would use the following terms to describe the advocate:

- Professional
- Honest
- Sincere
- Intelligent
- Polite
- Fair
- Consistent
- Forthright
- Diligent

C. *Dissoi-logoi* analysis

1. Definition

- a. In every dispute, two sides or more exist. In a legal dispute, the two sides represent opposed views on justice, responsibility, and truth. *Dissoi-logoi* analysis reaffirms the experience of every attorney—there are **two sides in every dispute**.
- b. *Dissoi-logoi* analysis is a process of logical analysis that **precedes** crafting and presenting an argument to an audience.
- c. The Corax-Tisias dispute demonstrates a key feature of legal argument: the application of *dissoi-logoi analysis*.
 - i. Classical argumentation scholars known as **the sophists** were attacked for teaching students how “to make the worse case to seem to be the better one.” Specifically, a 4th-century BCE text called *Dissoi Logoi* (said to have been influenced by Protagoras) maintained that things could be both good and bad, just and unjust, wise and foolish, and so on.

- ii. A person could present an argument on either side of the question. A skilled advocate, it was said, could find something to say on any side of any issue.
- iii. Plato would later sharply critique this perspective. He sought to limit the application of logos to philosophic investigation of the truth rather than acknowledge that logos had a place in the ‘real world’ of political and legal argument.
- iv. Part of Plato’s indictment of the sophists rested upon Plato’s characterization of *dissoi logoi* as ethically suspect (because it maintained that truth is relative to a specific audience and because it could be read to say that one *should* argue either side of an issue).
- v. In actuality, the sophists taught **disputation**, in which students learned to construct arguments through use of *dissoi-logoi* analysis. Students would argue one side of a controversy in the morning and the other side in the afternoon.

2. Use of *dissoi-logoi* analysis

- a. *Dissoi logoi* analysis is premised upon the principle that reasonable sides existed in disputes.
- b. By crafting the strongest argument *against* one’s position, the advocate would strengthen his or her own arguments.
- c. The *dissoi-logoi* process would also identify the opposition’s points that an advocate would counter in her or his argument.

“Your case must take into account the points the other side is likely to make. You must have a clear notion of which ones can be swallowed (accepted but shown to be irrelevant) and which must be vigorously countered on the merits.”

“Constantly ask yourself what *you* would argue if you were on the other side.” (Justice Antonin Scalia)

- d. An advocate must take care to avoid the temptation to create **straw person arguments** (weakened versions of an opponent’s positions that are overly easy to refute).

3. **Dissoi-logoi questions** that each advocate should ask
 - a. What is the **theory** of the case?
 - b. What **arguments** best support your theory?
 - c. What is the **opposition's theory**?
 - d. What are the **best opposition** arguments?
 - e. How do your arguments **effectively respond** to the opposition's best arguments?

4. Dissoi-logoi and **oral argument**
 - a. One benefit of engaging in dissoi-logoi analysis is that it can help the advocate anticipate questions
 - i. "In one sense, **this may be the most important part of the [argument] preparation process.**" (Rosenberg)
 - b. This practice will help one develop succinct responses to anticipated questions
 - i. "Given the prevalence of 'hot' benches and abbreviated argument times,... your preparation should place a premium on making points concisely: you should have at your fingertips 30-second answers to the most likely questions." (Justice John Roberts, quoted in Rosenberg)
 - c. The court's questions should be **answered directly and honestly**
 - i. "This is effectively **the 'prime directive' of oral advocacy**" (Rosenberg)
 - ii. "[s]ome lawyers are terribly afraid of answering questions, because they're afraid it's a trap and that their answer is going to be treated as a fatal concession. So they fence and they evade, and that, of course, annoys the judges." (Judge Richard Posner, quoted in Rosenberg)

5. **One-sided arguments** and *dissoi-logoi* analysis
 - a. **Definition** of "one-sided argument"
 - b. One-sided argumentation is **inconsistent** with *dissoi-logoi* analysis

- c. One-sided arguments are **insufficient** in a legal context

“You’ll harm your credibility—you’ll be written off as a blowhard—if you characterize the case as a lead-pipe cinch with nothing to be said for the other side. Even if you think that to be true, and even if you’re right, keep it to yourself. Proceed methodically to show the merits of your case and the defects of your opponent’s—and let the abject weakness of the latter speak for itself.” (Justice Antonin Scalia)

- d. **One-sided arguments can be dangerous**, especially in a legal setting

- i. Study results indicate that the *least* effective argument is the one-sided argument presented when the audience knows there are two sides. (Linz and Penrod, 1984)
- ii. A one-sided argument is a dangerous invitation to the audience to create its own **rebuttal arguments** against your position.
- iii. The audience may react negatively when an advocate attempts to **overly constrain the choices** (which a one-sided argument tends to do), unless the advocate skillfully justifies the limited range of choices that the audience can make.
- iv. An audience may adopt the contrary position simply to **affirm its independence**, especially when one side fiercely advocates a one-sided argument.
- v. Attorneys should be very confident that the audience will accept their one-sided argument if they want to avoid inducing **psychological reactance** in the audience. (Jones and Brehm, 1970)
- vi. For these reasons, a one-sided depiction of the case can be detrimental in a legal argument.

6. **Two-sided Arguments** and *dissoi-logoi* analysis

- a. **Definition** of two-sided argument

- i. A two-sided argument presents the strengths and the weaknesses of both sides of a dispute.
- ii. Two-sided legal arguments can produce more significant effects with an audience in certain situations.

b. **Situations** that call for a two-sided argument

- i. When an audience believes that **two tenable sides exist** to the dispute
- ii. When an audience attained **higher educational levels**
- iii. When an audience is relatively **neutral** regarding the dispute
- iv. For these reasons, two-sided argument is appropriate in legal argumentation

c. **Concessions** and two-sided argument

- i. To create an effective argument, the attorney must work against a basic instinct learned in law school: to identify and use every conceivable theory that might support one's position.
- ii. Trained attorneys can discern and reject implausible arguments.
- iii. It is important for attorneys to recognize when to make a concession rather than to debate each point.

“Don't try to defend the indefensible.... Rarely will all the points, both of fact and of law, be in your favor. Openly acknowledge the ones that are against you.” (Justice Antonin Scalia)

d. **Advantages** of concessions

- i. An increase in *ethos* as the audience concludes that the advocate is **trustworthy**. This works in much the same way as a perceived willingness to engage in two-sided argumentation.
- ii. Concessions demonstrate that an advocate is a reasonable person who has carefully considered the case and does not consider the conceded matters to be significant.
- iii. Concessions “avoid the impression that you have tried to sweep these unfavorable factors under the rug.” (Scalia)
- iv. Concessions **focus the audience's attention** upon the *material* issues (not the conceded side points), ensuring that the audience understands the case and the advocate's argument.

e. Concessions and making **the second argument**

“When an advocate speaks second (e.g., an appellee) and damaging points have been made, don’t pass them by in sullen silence. Make a virtue of a necessity. Boldly proclaim your acceptance of them—thereby demonstrating your fairness, your generosity, and your confidence in the strength of your case, and burnishing your image as an eminently reasonable advocate.... then go on to explain why the conceded point makes no difference or why other factors outweigh it.”
(Justice Antonin Scalia)

D. Anticipating and Refuting Opposing Counsel

1. **Active** participation aids argumentation

- a. Judges are typically active participants in the argument process.
- b. Active audiences, such as courts, manipulate, integrate, and elaborate upon the arguments, especially if the attorney crafts an argument and presents it in a manner that encourages active participation.
- c. With an active audience, the advocate can take steps to counteract the opposition’s arguments.

2. **Anticipatory refutation** is one means of enhancing active participation

- a. The skilled advocate will encourage the audience to generate arguments against the opponent’s position (“counterarguments”). These strategies come under the general heading of *anticipatory refutation*.

“If your brief and argument come first, you must decide which of your adversary’s points are so significant that they must be addressed in your opening presentation and which ones can be left to your reply brief or oral rebuttal.” (Justice Antonin Scalia)

“If one speaks second, one must first address the opposite argument...and make space in the listener for the speech to come; and this will be done by demolishing the opponent’s case.”
(Aristotle/Scalia)

b. **Eight reasons** why anticipatory refutation is helpful

- i. An audience highly interested in an issue and motivated will more likely engage in counterargument.
- ii. An audience is more likely to counterargue against your opponent if the audience comes up with the counterarguments on its own.
- iii. An audience that thinks of objections to your argument before your opponent raises them will think that you missed these obvious problems.
- iv. Responding *after* your opponent raises obvious objections may make you appear reluctant, not eager, to confront them.
- v. By systematically demolishing your opponent's counterarguments before they are articulated, you turn the tables and put your opponent on the defensive.
- vi. Anticipatory refutation allows you to introduce your opponent's counterarguments on *your* terms.
- vii. An audience will more likely engage in counterargument if the opponent has low credibility with the audience.
- viii. Your ethos will be enhanced as you will appear trustworthy and competent.

c. Encouraging **counterargument**

- i. State the opponent's important points (in a weakened form)
- ii. Ask the audience to create counterarguments
- iii. Ask the audience to adopt your explicit list of counterargument
- iv. Remind the audience of its responsibility to listen critically
- v. Encourage the audience to analyze actively the opponent's arguments

d. **The structure** of anticipatory refutation

i. Refutation should appear in the **middle** of an overall argument

“It’s an age-old rule of advocacy that the first to argue must refute in the middle, not at the beginning or the end. Refuting first puts you in a defensive position; refuting last leaves the audience focused on your opponent’s arguments rather than your own.” (Justice Antonin Scalia)

ii. **Responding** when your opponent uses anticipatory refutation

1. Interpret the weaknesses in as positive a light as possible
2. Do not dwell upon the negative aspects of the case
3. Develop a well-crafted two-sided argument

e. **Anticipatory refutation through inoculation**

i. **Inoculation**

1. Inoculation minimizes the newness, severity, or “shock” value of opponent’s arguments.

ii. Two approaches to inoculation exist

1. Refutational treatment

- a. In this form of inoculation, the advocate provides the audience with a weakened form of the opposition’s arguments before the opponent speaks.
- b. The advocate then indicates how the opponent’s argument might be rejected.
- c. This tactic enables the audience to join in creating counterarguments and resisting the opponent in advance of the opponent’s turn to speak. Moreover, the audience is implicitly encouraged to be wary of other arguments from the opponent. (McGuire, 1964)

2. Supportive treatment

- a. Here, the audience is given reasons to support the advocate's position even in light of the opponent's claims.
 - b. It is usually **best to use both** refutational and supportive treatments.
- iii. The **time interval** in anticipatory refutation is important
 1. Audiences given adequate time before the opponent speaks create better counterarguments.
- f. **Dangers** of anticipatory refutation
 - i. One might "anticipate" arguments that the opposing counsel did not consider.
 - ii. Explicit anticipation of the opponent's point essentially repeats it—and repetition can ingrain a message in an audience's mind.

E. Structuring the Effective Argument

1. Chronological structure

2. Topical structure

3. Witness listing

4. Effective transitions

- a. Internal previews provide a **condensed version** of the argument that the advocate will develop.
 - i. These may be offered at the beginning of an oral argument or brief.
 - ii. Previews can also be helpful when the advocate turns to the next major section of an argument
- b. **Internal summaries** bring together the main pieces of information and argument that were just presented.
- c. A **complete transition** will provide both an internal summary of the point and an internal preview of the next major point.

5. Signposts

- a. Signposts alert the audience when the advocate is moving to the next major section of the argument. This aids audience comprehension.

III. Oral Argument and Public Speaking

A. Preparing to Speak

1. The **preparation outline**: the tool for creating oral arguments
 - a. The general rule in public speaking is that advocates should create **two outlines**
 - i. A **preparation outline**
 1. The **purpose** of the preparation outline is to develop a clear, complete argument.
 2. Every advocate should use a preparation outline when preparing any argument or lengthy speech.
 - ii. A **presentation outline**
 1. A key-word outline to be used in the actual speech
 2. At no stage does the advocate create a manuscript that sets forth each word to be said in the speech.
 - b. **Elements** of a preparation outline
 - i. This is a highly detailed outline that incorporates facts, quotes, statistics, and other materials.
 - ii. The preparation outline is usually written in complete sentences, with transitions expressly stated.
 - c. The **advantages** of a preparation outline
 - i. One can ensure that there are **no logical leaps** in the argument
 - ii. Ideas needing more **support** or needed **subpoints** are identified
 - iii. One can **coordinate** the argument—make sure that equally important ideas are given equal attention

- iv. One can **identify key points** the argument—make sure that more significant ideas receive greater attention
- v. One can strategically deal with **concessions** and **weaknesses** through structural design of the speech
- vi. The **function** of each part of the oral argument (introduction, body, conclusion) is achieved
- vii. **Supporting** materials for each idea are **incorporated**
- viii. **Concluding remarks** are written out so that the closing paragraphs achieve maximum impact
- ix. The **theory** and **theme** are interwoven throughout the argument

2. Remembering what to say

- a. **Extemporaneous** presentation is preferable when addressing an audience
- b. Use of a **presentation outline**
- c. Speakers are encouraged to avoid use of a manuscript, which is a fully written speech

B. Delivering the Argument

1. Overcoming anxiety

- a. **Communication anxiety**, preparation, and delivery
 - i. Many people report considerable anxiety when they are asked to speak in front of an audience.
 - ii. It is especially important to recognize and reduce communication anxiety (CA) because once an audience detects significant CA, the speaker's ethos and persuasiveness are significantly hampered.
 - iii. The nonverbal signs of high CA include bodily tension, a lack of expressiveness and enthusiasm, low speaking volume, little inflection, and few or no facial expressions.

- iv. Research shows that, for people with significant communication anxiety:
 - 1. Lack of preparation is not commonly the reason why people experience communication anxiety. In fact, people with CA often spend **too much time preparing the text of a speech**;
 - 2. People with high CA spend **relatively little time in audience analysis and in rehearsing how they will present** the argument (in other words, they avoid thinking about the actual speaking experience);
 - 3. **Visualization** helps some high CA speakers overcome their anxiety and deliver a superior speech or argument
 - a. Under visualization, a speaker imagines a successful speaking experience
 - b. Practicing the argument in a moot court environment can help reduce CA
- v. **Training in public speaking** skills has been shown to be helpful for high CA speakers.
 - 1. Training reduces the speaker's uncertainty about public speaking by providing knowledge and techniques (Ayres)
 - 2. Creating a presentation outline can reduce CA

b. **Effective Public Speaking**

- i. The following qualities mark effective public speaking
 - 1. **Authentic** speech (true to oneself)
 - 2. **Extemporaneous** delivery
 - 3. **Variation in volume**
 - a. Volume should vary to emphasize key points
 - b. Listeners notice changes in a speech, so it is important to watch for audience feedback to ensure that volume and other elements of delivery are positively received.

4. Variation in **pitch** (placement of voice on a musical scale)
 - a. Avoidance of a **monotone** delivery
 - b. Avoidance of a **repetitive pitch pattern**, such as increasing the pitch at the end of sentences
 - c. Pitch increases as the speaker experiences **stress**
5. **Modulation of rate** (words per minute)
 - a. The **average** rate is between 120 and 150 words per minute
 - b. Rate will increase as the speaker experiences **stress**
 - c. Rate should be **varied** throughout a speech to maintain audience interest
 - i. Increasing and decreasing rate can build audience interest
6. **Pauses** (moments of silence in a speech)
 - a. Audiences usually appreciate the silent break of a pause because the pause gives the audience **a chance to understand a point**
 - b. Pauses can **emphasize key points**
 - c. Pauses can mark **transitions** in a speech
 - d. Pauses can **reduce stress** and bring pitch and rate back to normal
 - e. Some poor uses of pauses include
 - i. Pausing too often
 - ii. Pausing at awkward places
 - iii. Not pausing long enough/pausing too long

- f. Speakers can initially find pauses awkward and resort to **fillers**, which are vocalized pauses (um, uh, you know, etc.)
 - i. These interfere with an argument and reduce ethos

7. **Articulation and enunciation**

- a. **Articulation** is the precise, clear production of individual vocal sounds within a word
 - i. At the same time, articulation can be culturally specific. Appropriateness can be audience-dependent.
- b. **Enunciation** is the precise, distinct sounds of words.
 - i. Like articulation, enunciation can be audience and culturally specific

2. **Nonverbal Communication**

- a. Audiences appear to learn more readily from a speaker who engages in nonverbal behavior that creates **immediacy**
- b. The affective relationship embedded in nonverbal communication stimulates the audience's motivation to learn and understand
 - i. These nonverbal behaviors tied to immediacy include
 1. Forward body lean
 2. Eye contact
 3. Smiling
 4. Vocal expressiveness
- c. **Clothing** and Grooming

d. **Gestures**

- i. “What to do with my hands” is a common concern
- ii. Gestures should be **controlled** and should **emphasize key points** in a speech.
- iii. Fidgeting, fumbling with coins or keys in a pocket, and other unmanaged gestures distract audiences and undermine ethos
- iv. Gestures start with an **anticipation step**
 1. The speaker brings the hands into the position from which an appropriate gesture is made
 2. Then, the **implementation step** occurs
 - a. The gesture is made
 - b. Most gestures occur between the waist and shoulders
 - c. The gesture should be **fully completed**
 - i. Half-gestures suggest an inexperienced or nervous speaker
 3. Finally, the **relaxation step** occurs
- v. Review of a recorded speech will identify **repetitive** gestures a speaker makes that can become distracting for an audience

e. **Eye contact**

- i. Eye contact is essential for an effective speech
- ii. Speakers who do not use eye contact effectively lose **credibility** and audience **attention**
- iii. Little eye contact reduces perceived **sincerity**
- iv. Eye contact allows a speaker to **monitor audience feedback** (attentiveness, daydreaming, confusion, etc.)
- v. Eye contact can make audience members feel important and included

- vi. See “Nonverbal Communication during Listening” below for advice on controlling facial expressions when your opponent is speaking.

3. **Reviewing one’s own public speaking skills**

- a. One’s speaking skills can be enhanced greatly through reviewing a recording
- b. Speakers are often reluctant to view themselves
- c. Review can identify strengths and areas needing improvement
- d. One should consider recording a practice speech in a variety of real or hypothetical situations, including client interviews, courtroom arguments, depositions, and more.

4. **A primer on speaking styles**

- a. Speaking styles can be described as **powerless** or **powerful**
- b. **Features of powerless speech**
 - i. **Excessive number** of words
 - ii. **Lack of forcefulness**
 - iii. **Hedges** (I think, I guess, sort of)
 - iv. **Hesitation** forms (uh, um, well, you know, like)
 - v. **Overreliance upon polite** forms (yes sir/madam, please)
 - vi. Question **intonation** (upspeak)
 - vii. **Empty** adjectives
 - viii. Adverbial **intensifiers** (absolutely, very)
 - ix. **Hypercorrect** speech

- 1. **More formal** than ordinary language

2. Such speakers are more likely to commit **grammatical and vocabulary errors**
 - a. The speaker may be attempting to speak appropriately to the forum and situation, but lacks a solid understanding of language usage
3. Hypercorrect speakers can be perceived as less competent, convincing, and qualified
4. The irony can be that, in the attempt to elevate the audience's perception of speaker credibility and competence, the speaker undermines his or her ethos

x. **Fragmented speaking**

IV. Ethical Constraints on Argument

A. Zealous Representation

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.... As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system....”

--Preamble, Minnesota Rules of Professional Conduct (MRPC) sections 1 & 2.

1. The duty of zealous advocacy and its consequences

“An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.

To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be such an unhappy fate to involve his country in confusion.” (Henry Lord Brougham)

a. **Changes to Comment 1 of MRPC 1.3 Diligence**

i. **Former Comment 1**

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer **must** also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, an attorney may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. **The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.**

ii. **Current Comment 1**

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and **may** take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer **should** also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. **However, a** lawyer is not bound to press for every advantage that might be realized for a client. For example, a lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2.