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## Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems

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# Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems

Thomas Michael McDonnell \*

## TABLE OF CONTENTS

Introduction .....	286
I. The Significance of Audience and of Unpublished and Often Unwritten Law .....	290
A. Why Researching the Main Characters in the Lawsuit Matters .	290
i. Researching the Relevant Audiences .....	296
ii. The Audience's Needs or Interests .....	299
B. Why Discovering Unpublished Rules and Practices Matters ....	301
II. Methods of Researching the Audience and Unpublished Rules and Practices .....	303
III. Rhetoric, Problem Solving, and Application to Law Teaching .....	306
A. Creatively Developing Arguments and Strategies .....	306
B. A Linear Model for Researching the Complete Case .....	311
C. Ethical and Moral Considerations .....	314
D. Integrating Audience Research in Substantive, Clinical, and Research and Writing Courses .....	317
i. Simulations and Writing and Research Assignments .....	317
ii. Audience Analysis and the Clinical Law Teacher .....	319
iii. Incorporating Rhetoric and Audience Awareness into the Substantive Law Class .....	320
Conclusion .....	321
Appendix A: A REALIST AND RHETORIC-BASED APPROACH TO LEGAL RESEARCH AND LEGAL PROBLEM SOLVING ...	323
Appendix B: A REALIST AND RHETORIC-BASED APPROACH TO LEGAL RESEARCH AND LEGAL PROBLEM SOLVING: A NON-LINEAR MODEL .....	326
Appendix C: SAMPLE PROBLEM INCLUDING RESEARCH PLAN INCORPORATING AUDIENCE AND UNPUBLISHED RULES RESEARCH, AND PROBLEM SOLVING STRATEGY .....	327

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## INTRODUCTION

American law schools teach legal research from the formalist perspective. Formalism reached its height in the nineteenth century, embodying Langdell's ideas that law consisted of scientifically identifying the relevant rules and applying them to the individual case.<sup>1</sup> In this century, however, formalism was eclipsed by legal realism.<sup>2</sup> Legal realists tell us to watch what judges and other public officials who interpret the law do and not what they say. Realism did not abandon rules or consider them unimportant or irrelevant. Rather, in the words of Karl Llewellyn, rules were helpful to the extent that they predicted what judges and other interpreters of the law would do when faced with a dispute.<sup>3</sup> Otherwise, written rules, whether embodied in statutes, regulations, or case law are simply "pretty playthings."<sup>4</sup> Law, according to the realists, is not contained in codes, cases, or regulations; law is what officials of the law do when faced with a dispute, nothing more.<sup>5</sup>

Broadly construing the phrase "officials of the law," the realists include not only judges and police, but also wardens, juries, clerks and lawyers—anyone who has some authority to resolve a legal dispute.<sup>6</sup> Given that the vast majority of cases (perhaps ninety percent or more) are concluded without formal adjudication,<sup>7</sup> the attorneys for the opposing sides play significant roles as interpreters of the law in working out a settlement of most legal disputes.<sup>8</sup> That role, however, is typically overlooked in formalist analysis.<sup>9</sup> In the last half of this century, realism itself has

1. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13 (1983).

2. See, e.g., Roscoe Pound, *Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706 (1931) ("[T]here is a distinct advance in [young law teachers'] frank recognition of the alogical or non-rational element in judicial action which the legal science (philosophy?) of the nineteenth century sought to ignore"); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908) (criticizing law as a science and instead arguing for "putting the human factor in the central place and relegating logic to its true position as an instrument").

3. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 5 (1960).

4. *Id.* Professor Llewellyn was criticized for so defining law, but on grounds different from those upon which the thesis of this article is based. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 135, 132-44 (1961); see also *infra* note 22.

5. See also JEROME FRANK, *LAW AND THE MODERN MIND* 48 (1930) (asserting that "not the rules but the personalities of the judges [are] of transcendent importance in the workings of the judicial process"); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, 5 (1986) (observing that the realists "refused to believe that legal concepts and rules were the sole determinants of judicial decisions"); see also HART, *supra* note 4, at 3-4.

6. See LLEWELLYN, *supra* note 3, at 3.

7. See, e.g., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 62 (1988) [hereinafter ANNUAL REPORT] (noting that for both civil and criminal cases, the trial rate is less than ten percent). Furthermore, in a significant number of cases, pleadings or charges are never filed.

8. Lawyers often play a law making function. "[T]he attitudes of each individual lawyer play a central role in how consumer bankruptcy law is used on behalf of each lawyer's clients." Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 504 (1993). Professor Braucher conducted a study of consumer bankruptcy and of the bases for choosing Chapter 7, which completely discharges the debt, or Chapter 13, in which the court sets up a payment plan. See *id.*

9. See Walter O. Weyrauch, *Aspirations and Reality in American Law*, in LAW, MORALITY, AND RELIGION 217, 219 (Alan Watson ed., 1996).

been seriously challenged, but it is undeniable that the major decision-makers in the legal system possess a large reservoir of discretion—a discretion that written, published law fetters loosely, if at all.<sup>10</sup> This universe of decision-making—virtually unbounded by formal, published rules of law—legal research instruction has not yet begun to probe. This article argues that it should do so.

Aside from the debate between the realists and the formalists, practicing attorneys intuitively sense that the outcome of a case depends not solely on the relevant statutes and the court reported opinions,<sup>11</sup> but also on a largely oral tradition of unpublished rules and practices and on the proclivities of the leading characters of the legal drama presented by the client's problem. For example, experienced attorneys have observed that one judge will interpret the same binding statutes and case law differently from another judge handling a case containing identical facts.<sup>12</sup>

In selecting a jury, trial lawyers are concerned about backgrounds and predilections of the potential jurors.<sup>13</sup> Able attorneys also recognize that they need

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10. Prosecutors have virtually unreviewable discretion in determining whether to charge a person with a crime, what charge to bring, and what plea offer, if any, to make. Juries in criminal cases have discretion in determining whether to find a defendant guilty of a crime. Juries may, in fact, nullify the law and acquit or find the defendant guilty of a lesser offense than the evidence would otherwise suggest. Juries sometimes nullify in favor of the prosecution. One commentator notes that juries often nullify valid insanity defenses when the killing of the victim is horrific. See Lawrence Kessler, Criminal Law Professors' Discussion List, (posted Oct. 30, 1998) <<http://crimprof@chicagokent.kentlaw.edu>>. In jurisdictions without sentencing guidelines, judges have wide discretion in sentencing convicted offenders. In settling a case, the parties have broad discretion in determining the basis of the settlement. The written law may affect, but have little to do with the ultimate outcome. See *infra* notes 72-80 and accompanying text. Other alternative dispute resolution methods likewise typically grant the decision-makers considerable flexibility. See also HART, *supra* note 4, at 132 (“[i]n every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents”).

Concerning realism and its relationship to modern schools of jurisprudence, see Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 633-38 (1989).

11. Some cases, of course, turn not on statutes or court opinions, but on other sources such as state or federal constitutions, administrative regulations, agency decisions, municipal charters, ordinances, court rules, executive orders, treaties, or customary international law. See WILLIAM P. STATSKY, *LEGAL RESEARCH AND WRITING* 14-15 (3d ed. 1986).

12. See FRANK, *supra* note 5, at 11 (stating, “[t]he peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law”).

13. If attorneys relied solely on applying the facts to the published law contained in statutes, court opinions, and other sources, then Andrew Hamilton would have had nothing to argue in the Peter Zenger case. Zenger was charged with criminal libel for calling the British governor of New York a barnyard animal. *THE WORLD OF LAW* II 169-75 (Ephraim London ed., 1960). The jury acquitted Zenger of criminal libel in the face of law that did not recognize truth as a defense. See *id.* at 171. A formalist, however, might argue that jury nullification is the exception, a unique feature of United States' jurisprudence, that permits juries to disregard the law if they wish. The evidence, however, indicates that official decision-makers—judges, juries, and prosecutors—often fail to follow written law. See, e.g., Braucher, *supra* note 8, at 502 (noting that local bankruptcy practices differ widely from district to district, often in direct contradiction to published, written law); see also Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1529 (1996).

to know the unpublished rules and practices governing, for example, how a court conducts business<sup>14</sup> or how those in a particular field of law typically negotiate a settlement.<sup>15</sup> What practicing attorneys intuitively sense reflects one of the most fundamental principles of classical rhetoric: audience and audience awareness as central to the advocate's ability to persuade that audience.<sup>16</sup>

Yet legal research instruction and legal research texts' discussions of research method have focused almost entirely upon finding out the relevant published law. They have downplayed, if not ignored, research methods for learning about the people who play the leading roles in the lawsuit and about the informal rules and practices that help determine the outcome.<sup>17</sup> This narrow, formalistic conception

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(same). In any event, decision-makers often possess broad discretion in reaching their ultimate decision. *See supra* note 10.

14. As Judge Ruggero J. Aldisert of the Federal Court of Appeals for the Third Circuit puts it: The legal profession in a given community has a "book" on every trial judge. The "book" isn't written, although some large litigating firms may have reduced comments to writing. Rather it is the sum total of impressions by lawyers who have appeared before the judges: How does the judge rule on evidence questions or react to opening and closing statements? How far afield can I go in cross-examination? In personal injury [sic] cases is the particular judge plaintiff-oriented or defendant-oriented? What about sidebar conferences? Suggested jury instructions? Trial Memoranda (or must we sell the law clerk)? Are we chained to the counsel table or the lectern or may we wander around the room when we ask questions? This is the type of material that's in the "book" on trial judges.

RUGGERO J. ALDISERT, *WINNING ON APPEAL* 227 (Rev. 1st ed. 1996).

Another example of unpublished rules and practices is a district attorney's unpublished policies governing the range of plea bargains to accept in drunk driving cases. Such policies may be far more important to resolving a DWI case than the DWI statute itself. Furthermore, the culture of the particular district attorney's office often suggests how a case will ultimately be resolved. *See infra* note 86.

15. What are acceptable bargaining techniques in a labor management dispute may not work well in contract negotiations between potential joint venturers. *See* ROBERT A. WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* 85-86, 89 (1985).

16. *See* CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC* 17-26 (John Wilkinson & Purcell Weaver trans., 1989); *THE RHETORICAL TRADITION* 3 (Patricia Bizzell & Bruce Herzberg eds., 1990).

17. Most of the research texts do contain some information about researching the audience, but they do not include audience research (outside of court opinions themselves) as part of the texts' chapters on the research process. *See, e.g.*, ROBERT C. BERRING, *FINDING THE LAW* (10th ed. 1995) (including two page section on legal directories); *see also* J. MYRON JACOBSTEIN & ROY M. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* (7th ed. 1998) (containing the most extensive coverage of audience research of the standard research texts, including an eleven page chapter on "Other Research Aids," which covers, among other sources, legal directories, verdict and settlement awards, and briefs, records, and oral arguments on appeal; the text devotes a chapter to the Internet, but chapter 2 on "Preliminary Procedure in Legal Research Process" omits audience or unpublished practices research); CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* (4th ed. 1996) (including chapter on non-legal materials, but not covering audience research or unpublished practices); CHRISTOPHER G. WREN & JILL ROBINSON WREN, *THE LEGAL RESEARCH MANUAL* (2d ed. 1986) (stressing a process approach to research, but not covering audience research); C. EDWARD GOOD, *LEGAL RESEARCH WITHOUT LOSING YOUR MIND* (1993) (no coverage of unpublished law or audience research). This article invites the text writers not to include less on researching published law, but to include more on unpublished law and on audience research. *But see* Videotape: *Commando Legal Research* (Robert C. Berring 1989) (discussing fact research).

of legal research marginalizes the subject and the research process.<sup>18</sup> Since that process includes legal problem solving,<sup>19</sup> the first-year law student is thus introduced to an incomplete model for solving legal problems, a model that offers limited guidance in handling clients' problems when the student begins to practice.

This article proposes that legal research instruction accept a definition of law that combines realism and rhetoric, namely, what the officials of the law and any other relevant decision-makers do when faced with a dispute.<sup>20</sup> These decision-makers (relevant audiences) include not only judges, juries, and police officers, but also attorneys, the parties, and other critical players, such as complaining witnesses,<sup>21</sup> who have some power to influence the outcome of the case or transaction. This article does not put forward realism as the best or as a universal philosophy of law. Indeed, as a legal philosophy, realism is flawed, because it implies that the rule of law can be underemphasized if not disregarded altogether.<sup>22</sup> Realism, especially when coupled with rhetoric, however, helps the law student (and for that matter the advocate and counselor) navigate the legal system and lawyering as a profession better than any other school of legal thought.<sup>23</sup>

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18. As one commentator has noted, "[a]s experienced lawyers work with clients, judges, and other lawyers, they make relatively little use of written law. . . . For every point they research, they make hundreds of applications of their shared mental model [in which they consider the audience and unwritten rules and practices.]" LoPucki, *supra* note 13, at 1529.

19. See MARJORIE DICK ROMBAUER, *LEGAL PROBLEM SOLVING* (5th ed. 1991).

20. "Rhetoric is part of the law, just as the law has from earliest times been part of rhetoric." Bernard E. Jacob, *Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg's "Topics and Law,"* 89 NW. U. L. REV. 1622, 1637 (1995) (book review).

21. Yankee baseball player Dwight Gooden's misdemeanor assault charges were dropped when he agreed to a reported \$100,000.00 settlement with a Texas cabdriver, the complaining witness, whom he had fought with over a \$5.00 fare. David Lennon, *DA Pondering Whiten Charge*, *NEWSDAY*, July 23, 1997, at A77 (noting, in an article on another baseball player, Mr. Gooden's difficulties with the law).

22. See Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1395-96 (1996); Minda, *supra* note 10, at 662 n.228 ("[U]ltimately, the rise of fascism in World War II made it difficult, if not impossible, for legal academics to sustain the realists' assault on the legitimacy of American law"); KALMAN, *supra* note 5, at 121 (quoting Edward Purcell, *American Jurisprudence between the Wars: Legal Realism and the Crisis of Legal Theory*, AM. HIST. REV. 75, 438, 441 (1969) (noting that although realists advocated societal reform, they "[h]ad undermined the concept of a rational moral standard. Their ethical relativism seemed to mean that no Nazi barbarity could be justly branded as evil, while their identification of law with the actions of government officials gave even the most offensive Nazi edict the sanction of true law."); Weyrauch, *supra* note 9, at 217 (suggesting that realism neglects the values and aspirational aspects of rules).

23. This is not to disparage other schools that have emerged which have in many ways displaced realism. Many of these offer great insight on the nature of law. But realism focuses on the official audience, "maintain[ing] that general principles do not exist: law is always the creation of some specific lawmaker, whether legislator, administrator, or judge, and it usually reflects the policy predilections of that lawmaker." Rubin, *supra* note 22, at 1395. On the micro-level, it does not help the attorney handling a specific case to recognize that parties generally will maximize their economic interests or that the courts usually (or usually do not) follow neutral principles. The attorney's question here is how this specific lawmaker, this audience will interpret the law, what other factors might persuade this audience, and how the advocate might best persuade the audience. Realism's focus on audience helps the attorney assist a client to jump through the hoops of the legal system, distinguishing

The proposed realist and rhetorical approach to legal research applies to every conceivable legal problem and provides the student a conceptual foundation not only for solving any legal dispute, but for successfully completing any transactions with which he or she will be confronted. Part I of this article will demonstrate why law students should learn to research the relevant audiences in the legal drama and to research the unpublished and often unwritten rules and practices that these audiences follow. Part II will show how. Part III will present a comprehensive legal problem solving model that integrates these new dimensions of legal research with traditional research, and will illustrate how the substantive law teacher, the legal research teacher, and the clinical law teacher can incorporate this model into the classroom and into case simulations and writing and research assignments.

## I. THE SIGNIFICANCE OF AUDIENCE AND OF UNPUBLISHED AND OFTEN UNWRITTEN LAW

### A. Why Researching the Main Characters in the Lawsuit Matters

As Langdell's heirs,<sup>24</sup> we law teachers today continue to abide by many of the principles Langdell established over a century ago. Despite challenges by the problem method and the rise of clinical law teaching, the case method of instruction

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realism from other schools of thought, which often tend to look at the legal system as a whole instead of the specific actors in that system with whom the attorney must deal.

Many other schools of thought that have emerged within the last 25 years are direct descendants or close relatives of realism: The Critical Legal Studies (CLS) movement views law as "basically unjust because it is systematically distorted or biased (towards men, whites and/or the rich and powerful)." BRIAN BIX, *JURISPRUDENCE, THEORY AND CONTEXT* 186 (1996). Critical Race Theory arose "as an offshoot of CLS in the late 1980s." *Id.* at 193. Critical Race Theory observes that "[r]acism is pervasive in the legal system and in society and that it can be covered in many allegedly neutral concepts, procedures and analytical approaches" and that "[p]ersons from minority ethnic groups . . . have distinctive views, perceptions and experiences which are not properly recognized or fully discussed in mainstream . . . discussions of the law [such as] in court rooms, law school classrooms, law review articles or newspaper articles that touch on legal matters." *Id.* at 193-94; see also Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER J. 85 (1994); Eleanor Marie Brown, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513, 519 (1995). Feminist legal theory resembles critical race theory in exposing "[t]he extent to which the legal system reflects and reinforces a male perspective," but within feminist legal theory there is a division about "[h]ow women's differences from men should or should not be reflected in legal rules, legal institutions and legal education." BIX, *supra* at 187-88. See also FEMINIST LEGAL THEORY xvii-xviii (D. Kelly Weisberg ed., 1993); Anne-Marie Storey, *An Analysis of the Doctrines and Goals of Feminist Legal Theory and their Constitutional Implications*, 19 VT. L. REV. 137, 147-48 (1994). At least one scholar asserts that law and economics, generally associated with the conservative University of Chicago school, likewise may claim realism as its ancestor. Minda, *supra* note 10, at 636 (arguing that the scientific strand of realism may be considered a source of the law and economics movement).

24. See Audiotope of presentation by Professor Suzanna Sherry at Conference on Constitutional Law, Town Meeting—Canon & Modern Constitutional Law, held at University of Michigan School of Law (June 12-16, 1993)(available on audio-cassette, Recorded Resources Corp., P.O. Box 647, Millersville, MD 21108-0647).

dominates in law schools.<sup>25</sup> The case method tends to focus on the discovery of relevant published, written rules and their application and tends to ignore the character of the decision-makers, be they judges or jurors. It also tends to downplay historical influences<sup>26</sup> on the law's development and overlooks alternative dispute resolution methods and informal (unpublished) rules and practices that may govern the outcome of a legal dispute.

Langdell was the consummate formalist, believing it "indispensable" to demonstrate that "law is a science"<sup>27</sup> and that "[i]ndividual cases, properly organized and classified, fall naturally into patterns revealing underlying principles."<sup>28</sup> Perhaps this is not surprising, given that formalism had dominated the ideology of American lawyers and judges since before the Revolution. When the colonists came here from England, they brought the English common law with them. Blackstone's Commentaries, published in 1765, had enormous influence on the colonial bench and bar.<sup>29</sup> Blackstone wrote that the judges had to find out what the law was and then apply it to the facts of the given case, noting that law does not depend on "the arbitrary caprice of the judge, but on the *settled and invariable principles of justice*."<sup>30</sup> This had become the traditional American philosophy of law and endured well into the twentieth century.<sup>31</sup>

Social critics have observed, however, that American judges and lawyers interpreted the law in anything but a neutral or politically disinterested manner.

25. See Russel L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 543 (1991).

26. See, e.g., David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791, 792 (1993).

27. GARY J. AICHELE, *LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE* 13 (1990) (quoting CHRISTOPHER C. LANGDELL, *RECORD OF THE COMMEMORATION . . . ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE (1887)*); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 62 (1977); Grey, *supra* note 1, at 5; Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196, 196-98 (1995); but see Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980) (arguing that Langdell served as a bridge between formalism and realism). See also Alica Juarrero Roque, *Failsafe or Safe-Fail: Suggestions Towards an Evolutionary Model of Justice*, 69 TEX. L. REV. 1745, 1756-57 (1991) (finding that Langdell's legal philosophy stems directly from modernism's divorce from and rejection of Aristotelian rhetoric and logic, largely because of Descartes' attack, which limited "rationality" to "theoretical arguments that achieve quasi-geometrical certainty.") (quoting Stephen Toulmin, *COSMOPOLIS, THE HIDDEN AGENDA OF MODERNITY* 20 (1990)).

28. See AICHELE, *supra* note 27, at 12-13.

29. See Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 88-89 (1973).

30. AICHELE, *supra* note 27, at 4 (citing WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, vol. I, 151; vol. III, 434 (London: Sweet and Milliken, 1821)(emphasis added). Blackstone's full quote is as follows:

What the law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament . . . The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law fact . . . which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice.

*Id.*

31. See AICHELE, *supra* note 27, at 3.



"Arbitrary caprice of the judge[s]" as well as politics and economic interests, in fact, often shaped the common law and the construction of statutes.<sup>32</sup> That reality did little to dissuade formalist thinking in the first six score years of the country's existence. In the last twenty years of the nineteenth century, however, formalism came under attack by, among others, Oliver Wendell Holmes, Jr.. Holmes noted that the main value of precedent is not as an objective principle but as a means of predicting what a court might do to resolve a legal dispute.<sup>33</sup> Other scholars joined Holmes to demystify formalism and expose its static, mechanistic, and impersonal underpinnings.<sup>34</sup>

Despite the defeat of formalism, law schools have clung to formalist notions in teaching methodology.<sup>35</sup> Nowhere is this more evident than in substantive law courses given in the first year of law school, including legal research, typically taught as part of the legal writing course. As we know, that year stresses the student's learning doctrine, primarily through the case method.<sup>36</sup> Learning case

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32. See, e.g., FRIEDMAN, *supra* note 29, at 412-14 (noting that "contributory negligence kept pace with [train] crossing accidents" and that the judges "were disturbed by the looseness of juries. . . and that they used contributory negligence as a brake of their own").

33. Holmes stated the following: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

34. See FRANK, *supra* note 5, at 48-56 (criticizing the formalists' attempt to reduce law to pure, scientific principles); Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931) (calling for a "[t]emporary divorce of Is and Ought, for purpose of study," that is, observing "[w]hat courts are doing [and] disregard[ing] what they ought to do."); Pound, *Mechanical Jurisprudence*, *supra* note 2; Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A.J. 357 (1925) (noting with approval that the New York Court of Appeals obtained a proper result without resorting to established legal principles in concluding that a restaurant engaged in a sale (creating a warranty of fitness) when it served a patron bad food for which the patron paid and received food poisoning).

35. This is not to suggest that Socratic questioning and the case method have no place in law school teaching. Indeed these methods can be both powerful and effective. See, e.g., William Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. LEGAL EDUC. 399, 411-19 (1982). What is suggested, however, is that we can create a wider menu of available teaching methods and materials to more closely reflect the reality of law and dispute resolution. See Weaver, *supra* note 25, at 596 ("[The case] method is nothing more than a tool in the legal educator's arsenal.").

36. Many substantive law teachers believe that the case method not only trains students to read cases, but also that it is a superior way to introduce students to the law and to develop critical analysis skills. See Weaver, *supra* note 25, at 547-50. Other skills the case method may teach, according to some, include "[d]eveloping mental toughness and the ability to think on one's feet," and "learning legal process" and "the system of precedent." *Id.* at 552-53. See also Philip E. Areeda, *The Socratic Method (SM) Lecture at Puget Sound*, 1/31/90, 109 HARV. L. REV. 911, 917-18 (1996) (defending the Socratic Method as an excellent tool to develop students' abilities to analyze legal problems and the inevitable uncertainty in the law, but warning law professors against abusing the Method by, for example, continually critically questioning the student who is obviously floundering). *But see* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3, 46-48, 63, 80 (1994) (attacking the Socratic Method on the grounds it disproportionately affects women students by, among other things, creating an intimidating educational atmosphere, establishing a hierarchy of values that helps stifle entering students' zeal for public interest law, and devaluing characteristics traditionally associated with women such as empathy, relational logic, and non-aggressive behaviour). Cf. Elizabeth Garrett, *Book Review of Lani Guinier, Michelle Fine & Jane*

analysis and analogical reasoning is a necessary part of the intellectual equipment the law student needs, but it is far from sufficient. Most law teachers do show the open texture of rules, the diverse policy choices judges possess in interpreting precedent and statutes, and the difference between drawing broad and narrow holdings. We, thus, implicitly indicate that the courts can, if they wish, manipulate the case law to reach the result they desire.<sup>37</sup> But often we do not show how the advocates persuaded or failed to persuade the appellate court.<sup>38</sup>

The United States' lengthy history of accepting formalism may account for the exclusion of the subject of rhetoric from Langdell's Harvard Law School and for the limited role that rhetoric has played in American legal education. It was not always so. Prospective lawyers in ancient Greece and Rome studied rhetoric. By 350 B.C., Aristotle established the fundamentals of the discipline, most of whose principles remain valid today.<sup>39</sup> Classical rhetoric classified discourse into three classes: the ceremonial speech, the political speech, and the forensic speech.<sup>40</sup> It stressed, however, the creation and formation of arguments to persuade those with authority to legislate or those with authority to decide a legal dispute.<sup>41</sup> Until the latter part of the nineteenth century, rhetoric was a required subject for all lawyers, but Langdell's Harvard had no place for it.<sup>42</sup>

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Balin, *BECOMING GENTLEMAN: WOMEN, LAW SCHOOL, & INSTITUTIONAL CHANGE*, (Beacon Press 1977), 1 GREEN BAG 2d 199, 200-205 (1997) (defending the modern uses of the Socratic Method as being neither "[i]nherently alienating [n]or abusive" and criticizing Guinier et al. for focusing on a stereotype of Socratic teaching).

37. See Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72-73 (1928), for a good illustration. Langdell refused to teach statutes, believing that the judges' interpretations of the law were the most pure. See Roger Fisher, *Coping with Conflict, What Kind of Theory Might Help?*, 67 NOTRE DAME L. REV. 1335, 1338 (1992). Statutory interpretation still tends to get overlooked in the first year and in law school generally, but more law teachers are covering statutory interpretation in their courses and showing how the courts may, if they wish, manipulate the canons of construction to reach a desired result. See HARRY W. JONES ET AL., *LEGAL METHOD—CASES AND TEXT MATERIALS* 255-737 (1980).

38. For example, case books contain appellate opinions but rarely appellate briefs submitted in those cases.

39. See Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566, 569 (1994); ARISTOTLE, *RHETORIC* (W. Rhys Roberts trans. 1954).

40. See RICHARD A. LANHAM, *A HANDLIST OF RHETORICAL TERMS* 131, 164 (2d ed. 1991) (citing ARISTOTLE, *supra* note 39, at I, 1358a). The three classes are also described as the deliberative, the judicial, and the epideictic (ceremonial) speeches.

41. The popular meaning of "rhetoric" refers to use of language only and carries a pejorative connotation, e.g., "mere rhetoric." This article, however, uses the term, "rhetoric" in its classical sense, as "one of the seven liberal arts," the discipline of persuasion. *Id.* at 131. See also Perelman & Olbrechts-Tyteca, *supra* note 16, at 6-9.

42. See Roy T. Stuckey, *Persuasion from A to P: Back to the Basics*, 30 SANTA CLARA L. REV. 677, 678 n.6 (1990) (quoting Reike, *Argumentation in the Legal Process*, in *ADVANCES IN ARGUMENTATION THEORY AND RESEARCH*, 363, 366 (1982) as follows: "At Harvard, the theory was that legal education should consist of study in philosophy and principles of law. The rhetorical-communicative elements were completely rejected on the grounds that all one needed to be an effective advocate was knowledge of the law"). Rhetoric remains neglected by lawyers and law teachers. There are some notable exceptions, however. See, e.g., JAMES BOYD WHITE, *HERACLES' BOW, ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); Stuckey, *supra* (attempting to cast the dense language of Perelman and Olbrechts-Tyteca's

Rhetoric and realism have much in common. The former studies the manner in which the advocate can persuade an audience; the latter observes in particular what that audience decides, rather than the body of authority the audience may rely upon in making its decision. Despite differences in emphasis, both the legal realist and the classical rhetorician keep the audience center stage.<sup>43</sup>

Rhetoric implicitly rejects Langdell's notion that law is scientific. The rhetoricians have recognized that humans are not moved to action by logic alone, but that emotional appeals and the credibility of the advocate affect how an audience decides a legal dispute.<sup>44</sup> One hundred metric tons of empirical evidence pointing in favor of a party to a lawsuit does not necessarily indicate that the party will prevail. Nor does a kilo of statutes or case law in support of one party's position guarantee the outcome. Rhetoric notes that scientific evidence or analysis cannot establish a legal argument: "[L]egal claims cannot be formally or empirically proved. Instead they must be judged to be reasonable by the adjudicator; the lawyer must gain the adherence of the audience to the client's position."<sup>45</sup> The advocate's awareness of the audience and the audience's values underlie rhetoric.<sup>46</sup>

In his still recognized seminal work on rhetoric, Aristotle noted that every successful argument presupposes an audience.<sup>47</sup> Likewise approximately 2,000 years ago, Quintilian wrote:

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NEW RHETORIC, *supra* note 16, into terms American lawyers and law teachers can understand); James B. White, *Law and Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688-92 (1985); James B. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 871-72 (1983); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1720-31 (1995); Joseph William Singer, *Legal Storytelling: Persuasion*, 87 MICH. L. REV. 2442, 2442-44 (1989). *See also* Juarrero Roque, *supra* note 27.

43. "[I]t is the . . . the hearer, that determines the speech's end and object." LANHAM, *supra* note 40, at 164 (quoting ARISTOTLE, *supra* note 41, at I, 1358a) in *THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH*, II (W.D. Ross ed. 1924)).

44. *See* THE RHETORICAL TRADITION, *supra* note 16, at 3, 29 & 160-61 (citing ARISTOTLE, RHETORIC, Book II).

45. Saunders, *supra* note 39, at 567 (relying upon PERELMAN & OLBRECHTS-TYTECA, *supra* note 16). Admittedly, the outcome of a significant number of cases can be predicted with a high degree of certainty. Since, however, human beings ultimately decide the outcome of law cases, the advocate can never be absolutely certain what that outcome will be.

46. *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 16, at 6-7, 17-40. Note also that the contest between chess champion Gary Kasparov and Deep Blue, the IBM computer, could not be replicated in a legal dispute. One might imagine that a computer could be devised to analyze evidence and make strategic choices as to how to present that evidence, but the outcome of the case -assuming full adjudication- would still depend on the audience's perception of the strength of the claim. In other words, although winning a chess match can be objectively proved, winning a lawsuit cannot be. *See id.* at 13-14, in which the authors make the same distinction between logic and rhetoric.

47. *See* THE RHETORICAL TRADITION, *supra* note 16, at 160-61 (quoting ARISTOTLE, RHETORIC, Book II) ("The orator has therefore to guess the subjects on which his hearers really hold views already . . ."); ("[i]t adds much to an orator's influence that his own character should look right and that he should be thought to entertain the right feelings towards his hearers."). We would use the term "credibility of the advocate" for Aristotle's term "orator's character." *See also* Stuckey, *supra* note 42, at 681 ("Knowledge about the audience is a precondition of all effective persuasion . . .").

I should also wish if possible to be acquainted with the character of the judges. For it will be desirable to enlist their temperaments in the service of our cause where they are likely to be useful, or to mollify them if they are likely to prove adverse, just as accordingly they are harsh, gentle, cheerful, grave, stern, or easy going . . . .<sup>48</sup>

But neither legal research texts nor legal research teachers tell students how to systematically research the audience. Granted, legal research instruction does stress finding court opinions, and such court opinions do shed light on the predilections of the judges who have written or joined in them. In most jurisdictions, however, only appellate judges' opinions are published. In jurisdictions that do publish trial court opinions, most of a given trial judge's opinions are never published. Even more significantly, nine out of ten cases filed in federal and state courts never reach trial.<sup>49</sup> These cases are settled or otherwise resolved without full adjudication. Since the vast majority of lawsuits are not decided by judges, legal research teachers (and substantive law teachers) are obligated to show students how to obtain the necessary information to analyze and prepare these cases effectively.<sup>50</sup>

Cases not fully adjudicated are generally resolved by "alternative dispute resolution" (ADR) methods, including negotiation, mediation, minitrials, summary jury trials and arbitration.<sup>51</sup> But given the number of cases resolved without full adjudication, it would be better to call full adjudication the "alternative" form of resolving a lawsuit. Negotiation remains the predominant form of resolving a legal dispute without trial. Many of the other ADR methods help facilitate negotiation. Consequently, this article will primarily discuss negotiation as the alternative to trial.<sup>52</sup>

Whether the lawsuit ultimately ends after full adjudication or by negotiation, the advocate's first task, from the perspective of both the legal realist and the rhetorician, is to identify the potential audiences that the advocate must persuade to produce a favorable outcome.<sup>53</sup> In the fully adjudicated case, the advocate must persuade the judge or jury or both. If the case is appealed, the advocate must also persuade a majority of the appellate judges. In the case settled through negotiation,

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48. GARY BELLOW & BEA MOULTON, *LAWYERING PROCESS* 855 (1978) (quoting BROWNE, *UNDERSTANDING APPELLATE ADVOCACY* 90-101 (1977) (quoting Lloyd P. Stryker, *The Art of Advocacy*, in *SELECTED WRITINGS ON THE LAW OF EVIDENCE AND TRIAL*, iv.i.17 (W. Fryer ed., 1957)).

49. See *ANNUAL REPORT* *supra* note 7. Of those cases that proceed to judgment, relatively few are appealed. In cases that are settled, trial courts do play an important pretrial role. There is a fairly extensive pretrial motion practice in both state and federal courts on both the civil and criminal side.

50. Cf. Weyrauch, *supra* note 9, at 220 (questioning the methodology and curricula of law schools given the reality that the vast majority of cases are settled, not adjudicated).

51. See LINDA R. SINGER, *SETTLING DISPUTES* 16 (2d ed. 1994).

52. The instructor should, however, alert students to the other possible methods that may be appropriate for the legal problem solver to explore.

53. This article focuses on litigation problems rather than transactional problems. The proposed approach to research and problem solving, however, applies equally well to a transactional practice: "The ultimate challenge of transactional lawyering is convincing a variety of parties to balance competing interests in a fashion that serves the interests of the lawyer's client." ROGER S. HAYDOCK ET AL., *LAWYERING PRACTICE AND PLANNING* 100 (West 1996). Thus, the attorney handling a transactional problem should research the various audiences that must be persuaded in order to achieve a successful outcome. See *infra* note 144 for a detailed transactional case simulation.

the advocate must persuade opposing counsel that the settlement is a propitious one, and must convince not only the opposing party,<sup>54</sup> but also the advocate's own client of the soundness of the settlement. In criminal cases, the advocate must generally persuade the judge as well or at least obtain the judge's acquiescence in the plea bargain, and, in lawsuits involving corporations, generally the corporation's board of directors also must approve the settlement.<sup>55</sup>

In preparing to resolve the dispute, the advocate must formulate arguments that will likely persuade these potential audiences. Usually such arguments include those based on statutes, case law, administrative regulations or other published law, which are the standard focus of legal research instruction (or for that matter substantive law instruction). The thesis of this article is that standard legal research is a necessary, but not a sufficient, element of case preparation. To persuade the relevant audiences, the advocate often has to know about the hierarchy of values the audience possesses and about the audience's needs and goals, all of which may have little to do with the published, written law.

### *i. Researching the Relevant Audiences*

As soon as the advocate becomes aware of the potential decision-makers and influential players that need to be persuaded, considerable progress has been made towards solving the client's problem. Once all potentially relevant audiences have been identified, strategies for persuading them begin to emerge.<sup>56</sup> A respected clinician has observed that "[k]nowledge of an audience cannot be conceived independently of the knowledge of how to influence it."<sup>57</sup>

The next inquiry focuses on the type of information the advocate should attempt to obtain about each potential audience. Proust observed that each person is a universe.<sup>58</sup> The object of the advocate is to "[c]rawl into . . . [the] universe"<sup>59</sup> of the audience. The universe of the audience can, indeed, be vast, but some useful areas to explore can be plotted.

Our background and experiences affect how most of us view the world and make decisions. Educational background and especially professional experiences often shape the world view of judges and lawyers. Was the judge a former prosecutor? Was the judge a member of the ACLU? What is the judge's political affiliation? Was the judge or a family member a victim of crime?<sup>60</sup> Was the judge

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54. Generally, this is accomplished through opposing counsel.

55. See *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981) (noting the general principle but permitting the board to delegate its authority to settle lawsuits to a litigation committee).

56. Cf. Richard K. Neumann, *On Strategy*, 59 FORDHAM L. REV. 299 (1990).

57. Stuckey, *supra* note 42, at 698.

58. See BELLOW & MOULTON, *supra* note 48, at 863 (quoting BROWNE, *supra* note 48, at 85-88) (citing MARCEL PROUST, *THE REMEMBRANCE OF THINGS PAST* (1934)).

59. *Id.*

60. See, e.g., Donald P. Baker, *Inmate Waits for Decision on Clemency; Death by Injection is Set for Tonight*, WASH. POST, Dec. 3, 1996, at B6 (noting that the father of Fourth Circuit Court of Appeals Judge J. Michael Luttig was murdered in the course of a car jacking, that Judge Luttig testified at the death penalty phase of the killers' murder trial, urging that the jury recommend the penalty of death, and that Judge Luttig has subsequently refused to recuse himself from habeas corpus petition cases involving capital defendants).

a victim of gender discrimination?<sup>61</sup> The audience's background and experiences thus, may illumine the audience's view of the present dispute.

Individuals brought up in different cultures or subcultures may see the world differently. Persuading such an audience often requires special knowledge of that culture's customs and values. For example, Japanese business executives, in general, have different goals than their North American counterparts. Japanese executives are more concerned about continued growth, superiority over competitors, and steady employment of their workers and of their nation's workers as a whole.<sup>62</sup> On the other hand, North American business executives typically give profit their first priority. For the Japanese, profit comes after the other four.<sup>63</sup> In trying to reach an agreement with a Japanese firm, American executives would probably be less effective if they stressed the profit a deal would bring as opposed to fulfilling the Japanese's other major goals.<sup>64</sup> For the same reasons, the effective advocate is also well advised to be sensitive to differences between a majority culture and a subculture<sup>65</sup> to which the audience belongs.<sup>66</sup>

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61. Upon graduating first in his class from Stanford Law School in 1952, Chief Justice William Rehnquist obtained a position as a law clerk for Supreme Court Justice Robert H. Jackson. Sandra Day O'Connor, who graduated third from that same class, was rejected by the major law firms, and was only offered instead a position as a legal secretary. See Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134, 135 (1993). Although Justice O'Connor has adopted fairly conservative views as a Supreme Court Justice, she has been quite sensitive to gender bias issues, a sensitivity that may stem from her personal experience of gender based discrimination. But see Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 971 (1992) (noting Justice Thomas's difficult childhood and upbringing in Pin Point, Georgia, and his suffering from the effects of racial discrimination). Thomas's conservative views on civil rights and other issues underline the importance of not relying upon stereotypes, but upon researching the audience in depth. Cf. KALMAN, *supra* note 5, at 7 (noting that Jerome Frank stressed the importance of analyzing the judge's "uniquely individual factors" rather than "anything that could be described as [general] political, economic, or moral bias" of the particular judge in rendering a given decision) (citation omitted in the original)).

62. See HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS NEGOTIATOR* 340 (West 1977) (quoting Van Zandt, *How to Negotiate in Japan*, HARV. BUS. REV. 45-46 (1970)); see also William Flannery, *Keys to Cutting a Deal with Japanese*, ST. LOUIS POST DISPATCH, July 8, 1991, at 11 (quoting Duke law professor Percy R. Luney as follows: "Americans favor hard, aggressive bargaining, while the Japanese favor a more peaceful, harmonious exchange establishing a long-term relationship between the parties.").

63. See EDWARDS & WHITE, *supra* note 62, at 341.

64. See *id.*; Van Zandt also observed that high pressure sales approaches are generally ineffective with the Japanese, "[s]ince the Japanese prefer a low-pressure sales approach and value sincerity so highly, Westerners are advised to build up their case a step at a time, using modest language rather than making extravagant claims." *Id.*

65. Furthermore, the cultural background of witnesses may also influence their credibility in the eyes of the audience.

66. This can be more generally stated that the audience's gender, age, ethnicity, and social class likewise may have an impact. Edwards and White discuss the role that such cultural differences may play and how sensitivity to cultural differences may help the negotiator to be more effective:

It is our hypothesis that not only the cultural differences caused by different nationalities but also the cultural differences arising from the different race, sex or ethnic backgrounds of negotiators may often be important factors in determining the outcome of negotiations between persons of different backgrounds.

Aside from the audience's experiences and cultural background, the audience's reputation may provide a clue on how to persuade the audience. Does the judge ordinarily treat first offenders leniently if there is a special program they can be sent to? Defense counsel, in handling a case before such a judge, might be well advised to find such a program that would be willing to accept the client. Does the judge typically deny attorneys' second motion for a continuance? Is the judge a stern sentencer—particularly after a jury has rendered a guilty verdict? Does the judge like to move cases quickly or tend to adopt a relaxed attitude towards case management? The audience's reputation thus may suggest how the audience will deal with the present case.<sup>67</sup>

An audience's reputation is based on past conduct. Of particular importance to the advocate is whether the audience has previously decided a similar case. Although the audience could change its mind, the audience's prior decision on similar facts is telling. If the prior decision is favorable, the advocate can attempt to similarly tailor the facts and argue that the cases are analogous; if the prior decision is unfavorable, the advocate can try to tailor the facts differently and show why the cases are distinguishable. Arguments based on this information (prior decision of the audience) can be made not only to judges, but also to any audience the advocate needs to persuade to resolve the dispute. If, for example, an assistant district attorney has offered a plea bargain to A, a second DWI offender, the same or roughly the same plea bargain should be offered to B, also a second DWI offender, all other things being equal. The advocate need not necessarily expressly mention A's case, but simply stress the key facts in B's case that resemble A's.<sup>68</sup>

The audience's background, reputation, and past conduct often also suggest the audience's general socio-political attitudes, which frequently indicate how the audience might view the present dispute. Although the audience's socio-political attitudes might be thought to affect only the so-called "political case,"<sup>69</sup> such attitudes may also influence the resolution of even the most routine cases. If, for

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EDWARDS & WHITE, *supra* note 62, at 319.

67. See ALDISERT, *supra* note 14.

68. This assumes that the plea offer to A would be favorable to B. For example, the United States Attorney for the Southern District of New York entered into a plea bargain with former Judge Sol Wachtler, agreeing that he serve 18 months imprisonment on extortion charges. Had he been convicted on the charges, the sentencing guidelines would have required a 57 to 72 month term of imprisonment. See Alan M. Dershowitz, *Justice on Trial*, N.Y. TIMES, Nov. 18, 1992, at A27. If an attorney is representing a white collar client facing similar charges and if the client has an exemplary record and no prior convictions, then the attorney should be able to argue against a more onerous plea offer by pointing to the Wachtler case. The defense counsel's argument may not necessarily persuade the U.S. Attorney, who might stress that the Wachtler case was unique, because of the defendant's being the Chief Judge of New York State. Nonetheless, the principle that similarly situated individuals regardless of status should receive like treatment by the law may provide a powerful argument. (This is not to suggest that Sol Wachtler received a light sentence, but the notoriety of his case illustrates the principle here.)

69. See, e.g., Emile Zola, "*J'accuse! . . .*": *An Open Letter on the Dreyfus Case*, January 13, 1898, reprinted in THE WORLD OF LAW II 229 (Ephraim London ed., 1960); *The Trial of John Peter Zenger*, reprinted in *id.* at 229; see also PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1991) (retelling the Leonard Peltier case); WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST (1983) (analyzing the Rosenberg case); Walter Schneir, *Desanctifying the Courts*, reprinted in RADICAL LAWYERS (Jonathan Black, ed., 1971) (examining The Chicago 8 case).

example, an audience believed that physicians have been plagued by frivolous lawsuits, such an audience—be they judge or jurors or both—may have a bias towards the defense in a malpractice case.<sup>70</sup> If aware of this bias, plaintiff's counsel may wish to stress that the medical profession as a whole does an excellent job, but that this particular physician is a bad apple and has let the profession down.<sup>71</sup>

## *ii. The Audience's Needs or Interests*

In law school, we stress the rights of the parties and the published rules of law that the courts are supposed to follow in adjudicating disputes. We tend to neglect the interests of the parties and of the adjudicators—the needs that they have when confronted with a dispute. Yet their needs may ultimately drive the resolution of the problem. For example, a district attorney may wish to prosecute a co-defendant far more than your client, but may need your client's testimony to convict the co-defendant. Even though the prosecutor may have an ironclad case against your client, the prosecutor may be willing to have the client plead guilty to a lesser offense in return for the client's testimony. Similarly, a debtor may have a complete defense to the debt because the statute of limitations has run. The debtor may nevertheless wish to settle the case favorably to the creditor to maintain continuing business relations or to establish good credit.<sup>72</sup> Consequently, counsel should research the needs and interests<sup>73</sup> of the relevant audiences in determining how best to persuade them.

The question of the audience's needs or interests is related to whether the audience is under pressure from an institution, particular persons, or the public generally to reach a particular result in the advocate's case or similar cases. For example, trial judges are typically evaluated—in part—on how efficiently they manage their docket. There is typically institutional pressure on these judges to move their dockets quickly.<sup>74</sup> Aside from institutional pressure, the general public can exert pressure, particularly in cases involving controversial issues<sup>75</sup> or

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70. See DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION* 144-45 (1984).

71. See *id.*

72. See DAVID W. CASEY, *DISPUTE RESOLUTION & NEGOTIATION* (audiotape) (The Barrister Project, 1989) (on file at Pace University School of Law Library).

73. We often fail to recognize that resolving a dispute without full adjudication is sometimes superior to full adjudication. Not only is ADR generally more efficient and less costly, negotiation possesses a flexibility that full adjudication lacks. For example, Israel returned the Sinai to Egypt on the condition that the Sinai be demilitarized. A court would have difficulty fashioning such a remedy, even assuming for argument sake that the International Court of Justice were given the dispute to resolve. At best, the Court could have ruled on which nation had the right to the territory. It would have had difficulty concluding that one nation had the right to the territory, but not the right to put military assets on it. See ROGER FISHER & WILLIAM URY, *GETTING TO YES*, 42-43 (1981).

74. In addition, a judge whose docket is heavy may be willing to accept guilty pleas to less serious offenses than one whose docket is light.

75. The controversy over *Roe v. Wade*, 410 U.S. 113 (1973), probably played a major role in the Supreme Court's reversing, without a single dissent, the Second and the Ninth Circuit's rulings that statutes criminalizing assisted suicide violated the Constitution. See *Vacco v. Quill*, 521 U.S. 793 (1997); See also Jeffrey Rosen, "Nine Votes for Judicial Restraint," N.Y. TIMES, June 29, 1997, at 4, 15, col. 1 (observing that *Roe* was "the dramatic subtext in the litigation over doctor-assisted suicide").



especially heinous crimes.<sup>76</sup> Pressure may be applied in more pedestrian ways: A client may be pressuring the attorney to settle the case more quickly. A legal services attorney may be working under enormous case loads. A junior associate may be under pressure to produce more billable hours. Recognizing these pressures on the audience can help the advocate create persuasive arguments and strategies and better understand the bargaining power he or she possesses.

Similarly, audiences with legal authority are often influenced by national and sometimes international trends.<sup>77</sup> The woman's movement has changed perceptions concerning the status of women generally throughout the society, resulting in dramatic differences in the way, for example, that the legal system views sexual harassment, gender based discrimination, rape, and assault and battery of women by their partners and boyfriends. The last decade has also seen a striking revolution in the way society views the gay and lesbian community.<sup>78</sup> Furthermore, drunk driving cases are treated differently now than twenty years ago because of, among other things, pressure brought to bear on the criminal justice system by Mothers Against Drunk Driving. The vaunted war against drugs has resulted in considerably sterner treatment of drug offenders than previously. The successful advocate needs to be aware of these socio-political trends, for they may indicate growing sand bars to avoid and mark newly dug channels for clear sailing.<sup>79</sup>

Since human beings decide every legal dispute and since they often possess considerable discretion in doing so, the advocate must get as much information as possible on these decision-makers so as to be able to present the most persuasive argument. Researching the written law, published in court opinions, statutes, administrative regulations, and other sources is a significant part of this inquiry, but it is not enough. Factors touching the decision-makers' goals, values, needs, and background also count.<sup>80</sup>

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76. Most state judges are elected or must go through a retention election to remain on the bench. See John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50 (1996) (observing that a Tennessee Supreme Court judge was ejected from the court as a result of a retention election, because of a single decision in which she joined an opinion ordering a new death sentencing hearing for a convicted murderer).

77. See Walter O. Weyrauch, *Fact Consciousness*, 46 J. LEGAL EDUC. 263, 264 (1996).

78. In upholding the Colorado Supreme Court's invalidation of that state's anti-gay and lesbian referendum, the United States Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996) seems to have *sub silentio* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986). But see Equality Found. of Greater Cincinnati v. City of Cincinnati, 119 S.Ct. 365 (1998) (denying certiorari in a Sixth Circuit case dismissing an equal protection claim against a city that planned to hold a referendum on limiting gay and lesbian people's rights). In an unusual concurring opinion to a denial of certiorari, Justices Stevens, joined by Justices Ginsburg and Souter, stressed that the denial of certiorari should not be taken as a decision on the merits. *Id.* at 365-66. *Bowers* had recognized states' rights to use sodomy laws to prosecute consenting gay adults acting in the privacy of their home. Dissenting in *Romer*, Justice Scalia complained that the Court had contradicted *Bowers*. *Romer*, 517 U.S. at 636.

79. For example, trial courts are increasingly reluctant to exclude from evidence an alleged rapist's record of sex abuse offenses. Aside from Congress's amending Federal Rule of Evidence 413 to permit evidence of a defendant's predisposition in rape and other sexual abuse cases, state courts are increasingly permitting such evidence to be admitted at trial. See Huey L. Golden, *Knowledge, Intent, System and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 LA. L. REV. 179, 200-01 (1994).

80. Cf. FRANK, *supra* note 5.

## B. Why Discovering Unpublished Rules and Practices Matters

Aside from often overlooking the audience, legal research and substantive law instruction generally ignore unpublished rules or practices that may govern how courts and other officers of the law, not to mention parties to a negotiation, resolve a legal dispute.<sup>81</sup> Often such rules and practices deal with the background to the dispute resolution process.<sup>82</sup> Other times these rules are, for all practical purposes, the basis upon which the dispute will be resolved.<sup>83</sup> Advocates who know nothing of this unpublished and often unwritten law proceed at their peril. Unpublished rules and practices include, for example, the procedures for obtaining oral argument on a motion,<sup>84</sup> the speed that a case usually proceeds to trial,<sup>85</sup> the types of pleas the district attorney will offer,<sup>86</sup> and the differing customs followed in negotiating

81. See Weyrauch, *supra* note 77, at 263-65.

82. Many court procedures, for example, are not published in written form. Numerous courts do, however, have their own published court rules, but "[t]he court rule which appears in the rule book in black and white may be substantially different from the rule enforced by the court or clerk's office in actual practice." JOHN W. COOLEY, CALLAGAN'S APPELLATE ADVOCACY MANUAL § 2.14 (student ed. 1989) (noting, for example, that a rule stating that a brief must be filed on the fortieth day after docketing might possibly be filed by mail on that day if the court practice permits). The court's practice is also often supplemented by "unpublished internal operating procedures." *Id.* Counsel is well advised to speak to the court clerk to confirm the validity of a given rule and to determine whether any unpublished rule or practice governs the question. See *id.* at 168.

83. The United States Attorney's Office for the Southern District of New York, for example, had a policy of refusing to indict bank embezzlement cases when the amount embezzled was less than \$10,000.00. (Conversation with former assistant United States Attorney from that office.) If a bank teller were indicted, nonetheless, for embezzling \$9,000, the defense counsel should attempt to persuade the assistant United States Attorney prosecuting the case to voluntarily seek to dismiss. Defense attorneys would, however, only be able to make such an argument *if* they were aware of the policy.

84. See John K. Larkins, Jr., *Oral Argument on Motions*, 23 LITIG. 16, (1997) (observing that the local practices for getting on the motion calendar "vary considerably [from court to court], even in the presence of 'uniform rules'").

85. The authors of a study observing marked differences in the speed at which cases are brought to trial from one local jurisdiction to the next noted as follows:

It is our conclusion that the speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than it can be explained by court size, caseload, or trial rate. Rather both quantitative and qualitative data suggest that both speed and backlog are determined in large part by *established expectations, practices, and informal rules of behavior of judges and attorneys.*

THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED 54 (1978) (italicized emphasis added; bolded emphasis in the original).

86. For example, most district attorneys develop office policies governing charging and plea bargaining. Generally, such policy guidelines are not made available to the public. Criminal defense attorneys experienced in dealing with a given district attorney's office, however, are familiar with them. The New York County District Attorney created the following policy regarding plea bargaining in the drug sale context: "(a) Ordinarily, defendants charged with street sales of drugs are not arrested unless there has been more than one street sale. A plea to one transaction on a drug indictment is in order, even though two or three street level sales are alleged." FRANKLIN E. ZIMRING & RICHARD S. FRASE, THE CRIMINAL JUSTICE SYSTEM, 600, 604 (1980) (quoting Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48, 48-61 (1975)) (District Attorney Kuh's is one of the few prosecutor office policies ever to be published.). Armed with this

various types of disputes and transactions.<sup>87</sup>

Not only do unpublished rules and customs pervade the legal system and law practice, they may often trump statute and case law. For example, as of this writing, no officially reported decision of any state or federal court has recognized the cultural defense.<sup>88</sup> Yet district attorneys in many parts of the country have, both in their charging function and in the offering and acceptance of pleas, decreased the ultimate sanctions immigrants would otherwise have received.<sup>89</sup> Courts have acquiesced in this practice and have often sentenced such offenders accordingly.<sup>90</sup>

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rule, a criminal defense attorney representing a defendant charged with three street sales of heroin would have been better equipped to argue for a plea reduction to a single sale than an attorney who was unaware of this policy.

Some district attorneys' offices and other public agency offices may not prepare detailed guidelines, but adopt an "office culture":

Public officials may place limits on their own freedom of action that range from formally adopted regulations, enforceable until formally repealed, to informal customs that create expectations on the part of staff and those with whom the agency deals. Between these [two] extremes are formal guidelines, office memoranda, and public or internal statements on matters of general policy

James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1543 (1981).

87. A survey of negotiation styles of business lawyers revealed that threatening to sue during negotiations of commercial matters was considered too aggressive, and, at least in that community of lawyers, was customarily not done. See Gerald R. Williams, *LEGAL NEGOTIATION AND SETTLEMENT* 57 (1983). Presumably the interest in continuing relations among the opposing parties and among the lawyers was the basis for this custom.

88. The cultural defense is in the nature of a mistake of law defense and is usually invoked by foreigners who assert that they were operating under the cultural norms of their own society and should thus be excused from violating the cultural norms of the United States. See generally Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1293, 1294-95 & n.4 (1986) (noting that neither British nor American courts recognize a cultural defense). A California Court of Appeals had recognized the defense, but the California Supreme Court later depublished that decision. *People v. Wu*, 286 Cal. Rptr. 868 (Cal. App. 4th Dist. 1991), *review denied and ordered not to be officially published* Jan. 23, 1992, 286 Cal. Rptr. 868 (Cal. 1992).

89. See Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1053-54 (1994) (noting that the number of cases in which the "cultural defense" has been raised "has increased tremendously in recent years").

90. Some of the results of the cultural defense are quite dramatic. A Japanese mother of two is allowed to plead guilty only to manslaughter for intentionally killing her two young children. She killed the children and attempted to kill herself after learning that her husband had a mistress. She was sentenced to a year in prison and five years probation. See Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 147-48 (1994). A Hmong man is permitted to plead guilty to simple assault after being charged with kidnapping and rape. He said he believed that the victim was making the required ritual protest to the Hmong courting custom. Note, *The Cultural Defense in the Criminal Law*, *supra* note 88, at 1294 n.9. Despite the absence of published law that would authorize either reducing the charges or the sentence, officials of the law, at least in some areas, are in essence acknowledging the cultural defense.

Defense counsel, relying solely on statutory law and published decisions would be ill equipped to represent immigrants who, because of their cultural upbringing, are in fact less culpable, but who, under the letter of the law, are fully responsible for their actions.

Legal scholars are beginning to note the centrality of an oral tradition (the use of unpublished rules and practices) to both private and public law.<sup>91</sup> At the local level, the oral tradition predominates, resulting in decisions that may be contrary to established, written, published legal doctrine.<sup>92</sup> It has been suggested that much of the divide between theory and practice could be bridged more effectively if unpublished rules and practices were recognized by the academy as part of the reality of the application of the law: "The theoretical structure of law could be revitalized, and perhaps the application of state-made law would even gain somewhat in popular acceptance."<sup>93</sup>

Whatever the contribution a study of unpublished rules and practices may make to a student's understanding of law generally, the obligation of the legal research teacher (not to mention that of the substantive law teacher or the clinical teacher) is plain. The student needs to appreciate the significance of this body of law and needs to know how to find and apply it. Fortunately, there are methods available for the legal research teacher and for other law teachers to accomplish these goals.

## II. METHODS OF RESEARCHING THE AUDIENCE AND UNPUBLISHED RULES AND PRACTICES

The first step is the realization of the importance of the audience. Then, ways in which to find necessary information about the relevant audiences begin to appear. Aside from intuitive approaches, there have been conventional approaches to researching the audience and unpublished rules and practices. Attorneys have generally used informal means of obtaining this information. Attorneys speak to more experienced practitioners or to lawyers who have handled trials before a given judge

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91. See, e.g., Walter O. Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993). Weyrauch and Bell adopt a broad definition of law:

Law is an existential condition in which men are carriers of rights and duties, privileges and immunities. No formal structure supporting the system of law need be visible. Those accustomed to seeing law only in its formal institutions, in terms of statutes, decisions, judges, legislators and administrators miss the point. Law can be found any place and anytime that a group gathers together to pursue an objective. The rules, open or covert, by which they govern themselves, and the methods and techniques by which these rules are enforced is the law of the group. Judged by this broad standard, most law-making is too ephemeral to be even noticed. But when conflict within the group ensues, and it is forced to decide between conflicting claims, law arises in an overt and relatively conspicuous fashion. The challenge forces decision, and decisions make law.

*Id.* at 328 (quoting Thomas A. Cowan & Donald A. Strickland, *The Legal Structure of a Confined Microsociety* (Univ. of California, Berkeley, Working Paper No. 34, 1965) at i).

In addition, note that custom is expressly considered an integral part of international law: "The [World] Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (b) international custom, as evidence of a general practice accepted as law; . . ." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *done at San Francisco*, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052 (entered into force for the United States, Oct. 24, 1945), art. 38(1).

92. See LoPucki, *supra* note 13, at 1505-1507 (noting the wide variance in the manner in which bankruptcy rules are applied from district to district and explaining the differences as a product of the local legal culture); Braucher, *supra* note 8, at 559-61 (same).

93. Weyrauch & Bell, *supra* note 91, at 399.

or even to opposing counsel. Attorneys speak to court clerks, to court reporters, to the judge's clerk,<sup>94</sup> and sometimes even to the judge.<sup>95</sup> Attorneys also observe the audience, and may consider, for example, attending court well before their scheduled appearance to gauge the judge's manner, approach, and temperament.<sup>96</sup>

Students should be exposed to this type of informal research today. Whether by attending specialty bar section meetings or by telephoning an experienced attorney out of the blue, students need to appreciate the long tradition of lawyers exchanging this type of information. This informal method applies to researching other relevant audiences, such as opposing counsel, a district attorney's policies, and typical attitudes of juries from a particular county or district. Aside from speaking to other attorneys, the advocate can resort to a considerable amount of printed materials to research relevant audiences. Profiles of state and federal judges are available both in legal newspapers and in specialized volumes and directories.<sup>97</sup> In the case of federal judges, there may be valuable information in the confirmation hearing record. Martindale-Hubbell provides basic background information on firms and individual attorneys.<sup>98</sup> Jury verdict and settlement summaries are available in most jurisdictions.<sup>99</sup> Furthermore, practice treatises sometimes discuss

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94. Consulting the judge's former clerks can provide a font of information about the judge. MICHAEL TIGAR, *FEDERAL APPEALS* 378 (2d ed. 1993) (cautioning the reader, however, to be aware of former clerks' "bias by their professional association with the judge"). Clerks can be particularly helpful in telling the advocate how the judge conducts court, what the judge expects, for example, in terms of trial memoranda, pretrial motions, motions in limine, proposed jury instructions, oral argument on motions, and latitude on cross-examination. *See id.*

95. *See* Larkins, *supra* note 84, at 15 (also observing that the source for discovering the procedural peculiarities of a particular court can be local rules, but noting that they are "amazingly rare and often unreliable"); when speaking with the judge, counsel should be careful to abide by the *ex parte* contact rules. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(b).

96. *See* Larkins, *supra* note 84; *see also* Weyrauch, *supra* note 77, at 263-64.

97. *See, e.g.*, THE AMERICAN BENCH (Forster-Long, Inc., Sacramento, California). This biennial biographical directory of federal and state courts covers almost every judge in the United States; information includes legal background, current and previous judgeships, important decisions, posts of honor, awards, military service and membership in civic organizations. *See also* THE ALMANAC OF THE FEDERAL JUDICIARY (Law Letters, Chicago), a two-volume, looseleaf publication providing information on federal judges, including noteworthy rulings, media coverage, and lawyers' evaluations of each judge's ability and temperament. *See also* BNA's DIRECTORY OF STATE COURTS, JUDGES AND CLERKS (Washington, D.C.); JUDICIAL STAFF DIRECTORY (Staff Directories, Ltd., Mount Vernon, Va.); UNITED STATES COURT DIRECTORY (Administrative Office of the United States Courts). *See generally* JACOBSTEIN & MERSKY, *supra* note 17, at 443-48, 52-58.

98. Besides Martindale-Hubbell, there are other directories for obtaining some background information on lawyers: *See, e.g.*, WHO'S WHO IN AMERICAN LAW; and MARKHAM'S NEGLIGENCE COUNSEL. *See also* KIME'S INTERNATIONAL LAW DIRECTORY (listing legal practitioners and law firms throughout the world, with limited biographical information); U.S. LAWYERS REFERENCE DIRECTORY (listing information about bar associations and legal aid); THE AMERICAN BAR (a professional directory of law firms and leading attorneys throughout the United States and the world); AMERICAN BAR ASSOCIATION DIRECTORY (also known as the "Redbook," listing and describing individuals in leadership positions within the Association and related organizations). There are also legal directories for several states and state bar associations and local directories published by local bar associations.

99. *See, e.g.*, The New York Jury Verdict Reporter; published weekly, it covers civil jury verdicts and settlements throughout the state of New York. The Reporter organizes decisions by county and provides a statistical summary of each week's results. The Reporter also includes post-trial decisions on previously published cases, several indices to quickly locate attorneys, experts, insurance

unpublished rules and customs that the relevant audiences may apply in resolving the dispute.<sup>100</sup>

But the advent of computer assisted legal research and the Internet have made conducting this type of research much easier than ever before. Since LEXIS and Westlaw became widely available 20 years ago, field searches have permitted easy retrieval of published opinions<sup>101</sup> of individual judges, especially on the appellate level.<sup>102</sup> Putting legal newspapers on-line has made readily accessible many opinions of trial judges,<sup>103</sup> not formally published in reporters. Furthermore, these databases and the now readily available Nexis and Dialog databases supply information on judges' appointments, confirmation hearings, background, speeches and public activities and, in some cases, on opposing counsel<sup>104</sup> and the parties.<sup>105</sup>

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companies and judges associated with reported cases, and discussions of important verdicts in other parts of the nation.

100. See, e.g., RICHARD A. GIVENS, *MANUAL OF FEDERAL PRACTICE* 179 (4th ed. 1991) (discussing various local rules, but noting that "an attorney unfamiliar with a district, circuit, or court system should always consult—and often retain counsel who know—its customs, traditions, and unwritten rules. Ignorance of these can trap one as fatally as ignoring a written rule").

101. Both services also include the reported cases in which a particular attorney or law firm has appeared.

102. One treatise author, however, recommends not using field searches, because they only reveal opinions that the judge (assuming an appellate judge) has written, not cases that the judge has joined in. TIGAR, *supra* note 94, at 378. Professor Tigar recommends using the following search (on Westlaw) to get all the relevant opinions of the judge: "For example, in a case involving a search and seizure issue to be argued in the Fifth Circuit, the Westlaw request would be made to database CTA5, and the query would be 'search arrest warrant & topic (110) & A B C,' where 110 is the topic number (to restrict the search to criminal and criminal-related searches) and A, B, and C, are the last names of the panel members . . . . If the judge has a common name, such as Smith, the proposed search must be constructed to retrieve only instances of the name within the same sentence as *circuit*." The researcher, however, may consider retrieving all the opinions of the judge to get a general sense of the judge's judicial philosophy. Or the researcher may want to first do a narrow search covering the relevant issues, and should there be only a few cases found, a broader search may be constructed.

The researcher should be sure to check if the judge has served on other courts, state court, for example, in the case of a federal judge. See *id.* Opinions of the judge while sitting on another court can be illuminating. See, e.g., *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (Kennedy, J., dissenting). There, now Supreme Court Justice Kennedy took an uncharacteristically pro-defendant position regarding the so-called ostrich instruction, the instruction that equates a defendant's "willful blindness" with knowledge, thus satisfying the mens rea element of the offense.

103. Aside from the Legal Newspapers on-line databases, the advocate should search the LEXIS or Westlaw reporter databases for any appellate opinions that have reviewed a decision of the trial judge in question.

104. The MARTINDALE-HUBBELL LAW DIRECTORY is available both on CD-ROM and on LEXIS. West also has its own on-line WEST'S LEGAL DIRECTORY (database WLD). For each listed attorney, there is a basic attorney profile and a professional profile; WLD-JUDGE profiles judges. West also has the National Association for Law Placement's DIRECTORY OF LEGAL EMPLOYERS (NALP-DIR), consisting of law firm resumes gathered and disseminated by NALP. LEXIS has its own directory (LEXIS-JUDDIR), listing judges.

105. Articles on particular judges can often be helpful. *The Los Angeles Daily Journal*, for example, runs a regular column, profiling a judge sitting in either the California courts or in federal courts serving California. These profiles contain comments of attorneys who have appeared in front of the judge and can be quite illuminating. The articles are easily retrievable, on-line, through LEXIS or Westlaw.

As databases expand, on-line jury verdict and settlement services will make researching typical juries from a given county (or district) much more efficient and effective.<sup>106</sup> E-mail and the Internet have extended the informal method by making it far easier to inquire of other attorneys about particular judges or lawyers.<sup>107</sup> The proliferation of web sites should likewise enable the advocate to research relevant audiences far more easily.<sup>108</sup>

Students (and attorneys) must be made aware of the importance of identifying and then researching all the possible audiences that they have to persuade to resolve a dispute and taught how to obtain the necessary information to persuade these audiences. Students (and attorneys) need to be aware of the available print sources, the on-line sources, and the informal mechanisms to research the audience effectively. They must also be advised to be on alert for newly emerging sources, particularly in the electronic media, that may in the future be available to research potential audiences even more effectively.

### III. RHETORIC, PROBLEM SOLVING AND APPLICATION TO LAW TEACHING

#### A. Creatively Developing Arguments and Strategies

Aristotle noted that the rhetorician's task is that of "discovering all the available means of persuasion."<sup>109</sup> Such a task necessarily included hypothesizing

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106. Westlaw and LEXIS have on-line data bases that contain information on verdicts and settlements (since 1987 both for Westlaw's LRP-JV database and for LEXIS's VERDCT library). Covering both federal and state courts, these list the nature of the injury, the state, county, court, counsel, brief fact summary, settlement or verdict amount, and the experts for each side. As of this writing, LEXIS's system is much more detailed and helpful than Westlaw's, which describes the facts of the case in a summary fashion.

107. For example, a colleague of mine recently put the following post on our faculty's Internet discussion list: "Does anyone have any information about Judge Lacava—a Westchester County Judge hearing criminal cases? A friend of a friend is handling a criminal case that has been referred to him. Thanks. Adele Bernhard." This query led to a productive response. One faculty member had tried a case before this judge; another faculty member, a former judge herself, knew this judge quite well.

108. For example, New York Law Journal has a web site profiling New York Judges. See <<http://www.nylj.com/profiles.html>>. The profiles are brief, the service is new, and coverage limited, but they do include the judge's education, professional experience, and citations to the judge's important cases. Other representative web sites that may be useful in audience research are as follows: Martindale-Hubbell Listings: <<http://www.martindale.com/locator/home.html>>; West's Legal Directory: <<http://www.wld.com/>>; New York Law Journal's biographies of U.S. Supreme Court justices: <<http://www.ljextra.com/public/daily/Bio.Justices.html>>; Court TV's listing of each state's disciplinary authority: <<http://courttv.com/legalhelp/check.html>>; Counsel Connect Law Search: <<http://www.counsel.com/lawyersearch/>>.

Virtually all the major law firms have home pages. See, e.g., Craig Pinkus, *Sites for Sore Eyes Firm Websites*, IND. LAW, Sept. 17, 1997, at 27. See also Carol L. Schlein, *Creating Firm's Web Page with Zing*, THE N. J. LAW., Sept. 1, 1997, at 17. With the relative ease of putting up one's own page, the vast majority of all law firms will soon have their own home pages. Home pages usually contain a great deal of background information on the attorneys in the firm. See Pinkus, *supra*.

Given the relative youth of the medium, the advocate should be on the alert for a growing number of websites that can aid in audience research.

109. ARISTOTLE, *supra* note 39, at 24.

to produce several potential arguments and then selecting the best to try on the audience.<sup>110</sup> This approach anticipated problem solving theory. Although problem solving theorists differ in emphasis, they generally agree that effectively solving a problem requires suspending judgment, constructing hypotheses, examining the problem from diverse, if not completely opposite perspectives, considering redefining the problem,<sup>111</sup> developing numerous possible solutions to the problem, and finally, choosing the solution.<sup>112</sup> A growing number of legal scholars have urged that problem solving be applied to handling cases.<sup>113</sup> Problem solving methods have, in fact, been successfully applied to law practice.<sup>114</sup>

Because law practice is so intimately bound up with rhetoric, with persuading relevant audiences, a somewhat different approach to legal problem solving is called for, which nevertheless retains the major themes that those in other fields have recognized. The proposed approach to legal research and legal problem solving sees the audience as the nucleus. In every legal dispute, the advocate has to persuade one or more audiences to reach a successful outcome. Consequently, a legal problem solving approach should first include a plan for persuading relevant audiences. Second, since the advocate may be able to select the audience or audiences that would be most receptive,<sup>115</sup> a legal problem solving approach should, whenever possible, identify such audiences<sup>116</sup> and devise a plan to address only

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110. "[T]opics [in the rhetorical sense] involves more than producing a number of interesting hypotheses (*inventio*); it also involves the act of judgment or application that chooses among them." Jacob, *supra* note 20, at 1646 n.84 (citing THEODOR VIEHWEG, *TOPICS AND LAW* 27 (Cole Durham trans., 1993)).

111. Research suggests that the creative mind is reluctant to accept at face value the manner in which a problem is defined. See Neumann, *supra* note 56, at 318.

112. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 760-61 (1984); COOLEY, *supra* note 82, at § 2.09-2.11; Neumann, *supra* note 56, at 301 n.19; Gordon A. MacLeod, *Creative Problem-Solving—For Lawyers?!*, 16 J. LEGAL EDUC. 198 (1963); Andrea Kupfer Schneider, *How to Brainstorm Your Way Out of a Rut*, 13 ALTERNATIVES TO HIGH COST LITIGATION 161 (1995).

113. See, e.g., FISHER & URY, *supra* note 73, at 64; Menkel-Meadow, *supra* note 112.

114. For a most thorough and provocative discussion of problem solving as applied to appellate practice, see COOLEY, *supra* note 82, at § 2.01, 2.09-2.28.

115. Forum shopping enjoys a long tradition in law practice, and, despite some efforts at control, attorneys in many situations can and should forum shop. See Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 828-29 (1995). Cameron and Johnson discuss *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in which the statute of limitations for libel had run in every jurisdiction but New Hampshire, whose six year statute of limitations permitted the plaintiffs to sue *Hustler* and obtain a judgment of two million dollars. Despite the obvious forum shopping, Justice Rehnquist, writing for the Court, stated that plaintiff's "successful search for a state with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." Cameron & Johnson, *supra*, at 829 (quoting *Keeton*, 465 U.S. at 779). See also LoPucki, *supra* note 13, at 1546 (observing the prevalence of forum shopping in bankruptcy practice). In addition, defendants in some civil cases may be able to remove a lawsuit brought in state court to federal court. See ROBERT C. CASAD, *JURISDICTION AND FORUM SELECTION* Ch. 2 (Supp. 1995).

116. A criminal defense attorney might conclude that negotiating a plea with the assistant district attorney would lead to a better outcome than going to trial before a judge or jury or both.



those decision-makers or influential players.<sup>117</sup> Third, the legal problem solving approach would aim at developing numerous alternative solutions to the client's problem. Lastly, particularly given the adversary system, a legal problem solving method would draw on the field of strategy, and at a minimum include devising a main strategy for reaching desired goals, sub-strategies to bolster weaknesses in the main strategy, and contingent strategies should the main strategy fail. Strategic thinking about audiences is ultimately the matter<sup>118</sup> with which legal problem solving deals.<sup>119</sup>

"Fear of making a fool of yourself"<sup>120</sup> can, more than almost anything else, stifle the creativity needed for problem solving. Virtually all the problem solving theorists recognize that suspending judgment about ideas is essential to stimulate the imagination and to develop a series of alternative means of resolving the problem from which a superior solution can be selected.<sup>121</sup> The notion here is to risk coming up with wild ideas,<sup>122</sup> wild solutions to the client's problem to heighten

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117. Waiving a jury trial is another example of counsel determining which audience to address. See, e.g., Victoria Slind-Flor, *Safe Sex Rules Held Political Speech*, THE NAT'L L. J., July 1, 1991, at 6. In that Oakland, California case, State Superior Court Judge Jacqueline Taber, sitting as the fact finder, rendered a \$5.3 million damage award in favor of a gay man who alleged he was dismissed from a Shell Oil subsidiary, because he had left in the photocopier at work a copy of house rules for a safe sex gay party. Plaintiff's attorney stated that he waived the jury because "gay sexual activities are a highly inflammatory subject." *Id.* See also Matthew Goldstein, *Officer Acquitted of Homicide; Judge Found Proof at Trial Inadequate*, N.Y. L. J., Oct. 8, 1996, at 1 dealing with a racially charged case in the Bronx, New York, where a white police officer used a forbidden choke hold, resulting in the death of an Hispanic man. The victim had been playing football at 1 a.m.; the ball hit the police car; and an altercation ensued. The defense waived jury trial, and the court concluded that the officer's conduct although improper did not rise to the level of criminally negligent homicide. See *id.* The New York ACLU criticized the strategy of waiving jury trial in police abuse cases. See *id.* See *infra* note 145-59 for a discussion on the ethical uses of rhetoric. See also John Zebrowski, *Judge or Jury: The Judge's Perspective*, 21 (no. 1) LITIG. 28, 29 (1994) (discussing the importance of investigating the judge before making the decision to waive).

118. The evidence, of course, is also critical to the outcome of most cases, but it should be presented with the audience in mind. See BINDER & BERGMAN, *supra* note 70, at 151-53.

119. This is not to suggest that strategies must be purely competitive. Cooperative and integrative negotiating approaches are more common and may be more effective than competitive ones in many situations. See Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 45-46 (1985); Menkel-Meadow, *supra* note 112, at 762.

120. Neumann, *supra* note 56, at 323 n.76 (quoting K. Hegland, TRIAL AND PRACTICE SKILLS IN A NUTSHELL 181 (1978)).

121. At least one theorist uses the term "vertical thinking" to mean an analytical, sequential, and classifying mode of thought, and the term "lateral thinking" to mean a mode of thought that is non-linear, provocative, non-classifying, original, and without limits. COOLEY, *supra* note 82, § 2:03 at 40-42 (quoting EDWARD DE BONO, LATERAL THINKING: CREATIVITY STEP BY STEP 29-45 (1970)).

122. To the law-trained mind, this concept of brainstorming, of suspending judgment, appears soft, almost touchy-feely, reminiscent of the sixties. First-year law school and law school in general steeps students in intense analytical thinking, which is judgmental at its core. Creative thinking, however, demands some suspension of judgment. Law students and lawyers are presented with numerous opportunities to think creatively, but often let the opportunity go by. When used discriminatingly, brainstorming combined with judgmental thinking can boost students' and attorneys' creativity and their problem solving ability. Compare General George C. Marshall's approach to educating army officers. When he became commander of the Infantry School at Fort Benning in 1927,

the chances that a creative solution will emerge.<sup>123</sup>

There are different approaches for suspending judgment and creating ideas and hypotheses to develop numerous alternative solutions to the problem. Commonly, the suspension of judgment period is followed by an evaluative one: "Since judgment hinders imagination, separate the creative act from the critical one; separate the process of thinking up possible decisions from the process of selecting among them. Invent first, decide later."<sup>124</sup> The means of suspending judgment and developing hypotheses<sup>125</sup> include, among others, reverse thinking,<sup>126</sup> random stimulation,<sup>127</sup> developing original analogies,<sup>128</sup> and brainstorming,<sup>129</sup> which can be carried out individually<sup>130</sup> or in a group.<sup>131</sup> Suspending judgment and formulating

he "[i]ssued an order that 'any student's solution of a problem that ran radically counter to the approved school solution, and yet showed independent creative thinking, would be published to the class.'" Neumann, *supra* note 56, at 334 n. 101 (quoting F. POGUE, *GEORGE MARSHALL: EDUCATION OF A GENERAL 1880-1939*, 256 (1963)).

123. For an example of a strategy that jumped clear of the ruts of routine legal thinking, consider Charles Houston, former head of the NAACP, and his approach to restrictive covenant cases. Before *Shelley v. Kraemer*, decided in 1948, restrictive covenant cases were handled routinely; the plaintiffs alleged they were white, the defendant homeowner black, and the court ordered the defendants ejected. Neumann, *supra* note 56, at 308 n.20. Occasionally, the defendants made constitutional arguments, but such arguments were dismissed. Houston, however, decided to deny that either the plaintiffs were white or the defendants black. The plaintiff then had to prove they were white. *See id.* This strategy resulted in probing cross-examinations of the plaintiffs' ancestries, going back generations, "stunning the plaintiffs and the communities they represented," *id.*, and thus, showing the meaninglessness of racial classifications. *See id.*

124. FISHER & URY, *supra* note 73, at 63.

125. Here researchers ask themselves, "What if . . . ?" COOLEY, *supra* note 82, § 2.12 at 144.

126. An example of reverse thinking would be practicing making your adversary's oral argument. Such practice might lead to new insights about your argument's strengths or weaknesses. *See* COOLEY, *supra* note 82, § 2.17, at 180-84.

127. In random stimulation, problem solvers keep their mind blank, but pay attention to information coming from sources completely irrelevant to the problem they are trying to solve. *See* COOLEY, *supra* note 82, § 2.23-24, at 202-09. They may talk to persons in completely different fields, or wander around a bookstore. The notion is that an outside and seemingly irrelevant source may stimulate the problem solver. For example, a professor of art discusses a new seminar, teaching art through the masters, in which art students select a master to study, such as Degas, try to copy his style in their first painting, and then in subsequent paintings add elements of their own style while borrowing elements of their chosen master's style. A professor of law, listening to the conversation, considers developing a seminar in which the students choose a great justice, for which the students first attempt, in an initial paper, to copy the judge's style or analysis, and, in subsequent assignments, the students incorporate elements of their own style while borrowing some from the chosen justice.

128. This is not arguing by analogy, but developing an analogy to describe the problem. *See* COOLEY, *supra* note 82, § 2.21, at 197-200. Justice Brennan, for example, used the metaphor "breathing space" to justify the N.Y. Times malice/reckless disregard of the truth standard in defamation cases involving public officials. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964).

129. *See* FISHER & URY, *supra* note 73, at 63-65, for procedures on brainstorming; *see also* Schneider, *supra* note 112; and COOLEY, *supra* note 82, § 2.16.

130. Many studies suggest that individuals are most creative when alone, not in groups. *See* Neumann, *supra* note 56, at 333 n. 98 (citing T. Amabile, *THE SOCIAL PSYCHOLOGY OF CREATIVITY* 142-46 (1983) (summarizing the research)). Some discussion of ideas with others, however, is probably fruitful. In brainstorming by oneself, some have found it helpful to first draw circles or irregular

hypotheses to produce myriad ideas and alternative solutions are the axes upon which problem solving turns. Followed later by judgmental-evaluative thinking, this problem solving method can successfully be employed at every stage of the lawyering process.

Preparing a case does not necessarily follow a linear development. The single and best strategy to follow may occur to an attorney (or law student) within moments of speaking to the client, or it may follow only after all formal legal research, audience research, and discovery have been completed. The proposed approach sees audience research as critical and gives it a high priority while recognizing that the researcher may wish to start at a different point depending upon the particular circumstances of the case.<sup>132</sup> Furthermore, each branch of the research tree may not be completely explored on the first trip. The researcher often comes back to different branches as the research is carried out. Consequently, two

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shapes on several pieces of paper and then write down the ideas in those rather than to feel compelled to put ideas on the lines in an ordered fashion on a lined pad.

131. It generally consists of two phases: an idea-generating or suspension of judgment phase and an evaluation or judgmental phase. In the brainstorming or idea-generating phase, the participant or participants are encouraged to let their imagination go, to permit even strange or seeming irrational ideas to come out. For the idea-generating phase, the participant or participants should also be asked to create hypotheses including those that are speculative, not based on the known evidence. During this phase, no member of the group may criticize or put down any idea that anyone suggests. (de Bono provides examples of often used put downs or attempts at evaluation, all prohibited during the idea-generating phase of brainstorming: "That would never work because . . ."; "But what would you do about . . .?"; "It's well known that . . ."; "That is a silly, impractical idea." "That would be much too expensive." "No one would accept that." COOLEY, *supra* note 82, § 2:16, at 190).

In the case of brainstorming by oneself, one tries to let the ideas come without trying to judge or evaluate them. Each idea is written on a blackboard or pad. After every idea that the group or individual can think of is written down, the evaluation or judgmental phase begins.

In the evaluation-judgmental phase, the group or individual analyzes the ideas and culls them, discarding the unhelpful ones and concentrating on the best ideas, usually ranking them for estimated effectiveness. Although an analytical phase, the problem solver should not be afraid either to redefine the problem or to fashion an unorthodox solution. All the analytical skills that law school stresses can, nonetheless, be brought to bear at this second phase of brainstorming.

When brainstorming in a group, de Bono recommends keeping the session as formal as possible to make the idea-generation goal—without any judgment whatsoever—firmly planted in the group members' minds. He suggests selecting a chair to preside over the session. The chair's duties include assuring that the group does not fall into judging any ideas until the idea-generation stage is completed. See COOLEY, *supra* note 82, § 2:19, at 192 (citing DE BONO, *supra* note 121, at 149-56); but see FISHER & URY, *supra* note 73, at 63-65 (recommending that the brainstorming session be kept as informal as possible).

132. Many researchers may feel most comfortable starting off with formal legal research. One commentator argues that

[a]s taught [in law school], doctrinal law turns out to provide the major 'starting points, notional and emotional,' for the evaluation of arguments, including arguments that try to evaluate those very starting points. The rest, in rhetoric and law, is practice in evaluating those arguments and in evaluating the motives of judges and litigants.

Jacob, *supra* note 20, at 1641 (citations omitted).

The disadvantage of this approach, however, is that the advocate may undervalue the audience, unpublished law and practice, and solutions that consider the needs, goals, and values of the parties and other audiences. If, however, the advocate pursues those avenues as well as the formally published rules, that approach can be equally effective.

models are presented: a linear model that will be set forth below and a circular model that contains the same steps, but seeks neither to order nor to rank them; this circular model may be adapted to the specific needs of the researcher.<sup>133</sup>

### B. A Linear Model for Researching the Complete Case

Not only does the advocate have the obligation to represent the client to the best of the advocate's ability, but the advocate should view the client as a critical audience. In fully adjudicated cases, the advocate needs to persuade the client about the proposed handling of the case and, in settled cases, the advocate needs to persuade the client to agree to the settlement. The recommended approach suggests that the advocate first research the client as audience, determining not only the relevant evidence that the client can provide, but also finding out what the client really wants, based on his or her goals, needs, values,<sup>134</sup> background, reputation, etc.<sup>135</sup> The attorney should also explore the power the client has for satisfying these goals, needs, or values and for satisfying those of any other audience, including the opposing party.<sup>136</sup>

After thoroughly understanding the client, the attorney should identify other potentially relevant audiences.<sup>137</sup> Secondly, the attorney should research them, listing, analyzing, and ranking, from the audiences' perspective, their individual goals, needs, values, and other characteristics. Thirdly, the attorney should examine the power each audience has to fulfill the goals, needs, and values of themselves and of the other audiences.<sup>138</sup> Often, the advocate can carry out research of the

133. The linear model is set forth in outline form in Appendix A, *infra* notes 183-87 and accompanying text. The circular model is set forth in Appendix B, *infra* note 188 and accompanying text. A hypothetical problem in which audience and research analysis is carried out appears in Appendix C, *infra* notes 189-200 and accompanying text.

134. A client may have the right to evict a homeless family from his vacant farm land, but may wish to resolve the dispute without resort to the sheriff, because of the client's position as head of the community's Aid the Homeless Organization and because of his personal beliefs.

135. See *supra* notes 56-80 and accompanying text.

136. COOLEY, *supra* note 82, § 2:16, at 176-80.

137. Professor Stuckey says the advocate should "anticipate" the key audiences. Stuckey, *supra* note 42, at 684.

138. See COOLEY, *supra* note 82, § 2:16, at 176-80. See also Menkel-Meadow, *supra* note 112, at 760-61. In the negotiation context, Professor Menkel-Meadow recommends the following approach:

1. Does the solution reflect the client's total set of "real" needs, goals and objectives, in both the short and the long run?
2. Does the solution reflect the other party's full set of "real" needs, goals and objectives, in both the short and the long run?
3. Does the solution promote the relationship the client desires with the other party?
4. Have the parties explored all the possible solutions that might either make each better off or one party better off with no adverse consequences to the other party?
5. Has the solution been achieved at the lowest possible transaction costs relative to the desirability of the result?
6. Is the solution achievable, or has it only raised more problems that need to be solved? Are the parties committed to the solution so that it can be enforced without regret?
7. Has the solution been achieved in a manner congruent with the client's desire to participate in and effect the negotiation?

unpublished rules and practices in tandem with audience research.

In addition to researching all potentially relevant audiences and unpublished rules and practices, the advocate must, of course, research the published law—statutes, cases, administrative regulations and other sources—the traditional approach of legal research. Brainstorming can be helpful in thinking of finder words to enter legal indexes; hypothesizing about the best research paths to follow can help the researcher design an effective plan to find relevant authorities.<sup>139</sup> After researching the formal law, the advocate should develop multiple alternative legal theories under which the case can be successfully concluded.<sup>140</sup>

Aside from following the above research steps, the advocate in most cases needs to research the evidence—to formulate a discovery plan.<sup>141</sup> The advocate should likewise identify potentially relevant witnesses, documentary evidence, and physical evidence and then, using the suggested problem solving methods, devise the full discovery plan. This means developing multiple discovery approaches including informal interviews, depositions, interrogatories, requests for admissions, pretrial motions, preliminary hearings, negotiations with opposing counsel, and other investigative techniques. After numerous multiple approaches have been identified, the advocate must select the best approach for obtaining the evidence, including contingent approaches if the selected approach proves unsuccessful.

In devising a final strategy for resolving the client's problem, the advocate needs to create arguments to persuade each relevant audience. To do so, the advocate should consider the most telling facts, the most important emotional or justice-based appeals, the relevant published rules of law, the corresponding unpublished rules or practices, and the policy-based appeals or socio-political currents that might influence each audience. Here the research of audience and law, both published and unpublished, helps. In creating persuasive arguments, the advocate should compare and contrast the differing needs, goals, values, characteristics, and power each audience possesses. As part of developing a final strategy, the advocate should hypothesize several possible solutions to the client's problem.

The advocate may then stand back and fix upon a strategy to handle the case. For example, the advocate may select the most receptive audience or audiences, if possible, and determine the best solution among the multiple alternatives. The

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8. Is the solution "fair" or "just"? Have the parties considered the legitimacy of each other's claims and made any adjustments they feel are humanely or morally indicated?

Menkel-Meadow, *supra* note 112.

139. See Thomas M. McDonnell, *Joining Hands and Smarts: Teaching Manual Legal Research Through Collaborative Learning Groups*, 40 J. LEGAL EDUC. 363, 468 n.24 (1990).

140. See BINDER & BERGMAN, *supra* note 70, at 165 ("[b]ecause clients and witnesses usually do not understand what substantive law may be applicable in a given situation, they do not usually report all relevant information that they know. Therefore, if one is to learn all relevant information which a client or witness knows, one must usually be aware of all potentially applicable theories.").

141. See THEODORE Y. BLUMOFF, PRETRIAL DISCOVERY 17-27 (1993). This is not to suggest that either the legal research teachers or the substantive law teachers need have their students taking depositions or serving sets of interrogatories. When designing problems, those teachers could, however, instead of giving the students the facts in a prefabricated fact description, provide the students with, for example, a transcript of a deposition, answers to interrogatories, or a completed arrest report.

advocate should also develop tactics<sup>142</sup> to support the main strategy and sub-strategies to bolster weaknesses in the main strategy and to ensure its success. The advocate should then determine the best alternative to the main strategy selected.<sup>143</sup> Not only should the advocate recognize that contingent strategy, but the advocate should take steps to support and prepare it.<sup>144</sup>

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142. See Gifford, *supra* note 119, at 46, in which Dean Gifford identifies three modes that the attorney can adopt in negotiation: (1) the competitive style, (2) the cooperative style, and (3) the integrative style:

The competitive negotiator seeks to force the other party to a settlement favorable to the negotiator by convincing his opponent that his case is not as strong as previously thought and that he should settle the case. The cooperative strategy mandates that the negotiator make concessions to build trust in the other party and to encourage further concessions on his part. The third strategy, integrative bargaining, seeks to find solutions to the conflict which satisfy the interests of both parties.

*Id.* at 46.

Dean Gifford suggests that advocates should use each of these styles, depending upon the particular circumstances. For example, the cooperative style or integrative style should be used when the party will have continuing relations with the opposing party. The integrative style works when there are multiple issues, when the negotiation has at least one issue that goes beyond zero-sum. The cooperative or integrative styles also work when the attorney is representing the considerably weaker party. Dean Gifford recommends that students learn this theory and thus know what style to adopt in a given case. *Id.* These styles come closer to tactics than to strategy, but they can support a given strategy to resolve the case.

143. In the negotiation context, Fisher and Ury suggest that in preparing, the negotiator should develop a best alternative to a negotiated settlement. This has two components:

(1) not only knowing what the client's alternative is should negotiations fail, (2) but also developing the alternative to make it as effective as possible. Having a clear idea of the best alternative, in essence a contingent strategy, surprisingly strengthens the negotiator's bargaining power.

See FISHER & URY, *supra* note 73. See also the hypothetical in the next footnote.

144. For example, A, a pet store owner, informs her lawyer, B, that obtaining a lease for a store in the Acme Shopping Mall is absolutely critical to her business. Instead of accepting A's statements at face value, the attorney questions her further and does some independent investigation of other locations that might be suitable, yielding two other locations that A agrees would be roughly comparable. A, nevertheless, would prefer to locate in the Acme Mall. Researching the rents and the lease terms available in the alternative locations indicates that the first alternate location has a rent that is 15 % lower than what Acme will probably be asking, and the second alternative location is 20 % lower, but is offering only a one year lease. A informs you that she must have at least a three year lease with an option to renew for another three years.

B also researches Acme: she consults with other tenants, speaks to other tenants' lawyers, and checks the Mall's deed, recorded in the County Clerk's office. Her research reveals the following: Acme has several vacancies, because of a newer, more upscale mall that was constructed right next to Acme; Acme is slow to make repairs, but is nevertheless pursuing an aggressive advertizing campaign to hold tenants and customers; and Iris Anders owns Acme, but her son Jack runs the mall. Jack apparently is worried that more tenants will be leaving Acme. John Bartholomew is the counsel generally retained by Acme to handle leases and tenant matters. Bartholomew has a reputation of being a tough, but fair negotiator.

After fully researching the audiences, B should research the law governing mall leases and any regulations concerning the operation of pet stores, that is, the attorney should conduct formal research. She should, however, go beyond the material in the books and the computer and find out about unpublished rules and practices. Assuming she has no experience in handling such a matter, she

### C. Ethical and Moral Considerations

The two major forms of classical rhetoric, legislative and forensic, aim at persuading the audience. At least one strand of realism implicitly deals with how to persuade the particular adjudicator. These aspects of rhetoric and realism thus attempt to teach the advocate how to win. They do not attempt, however, in any systematic way to teach the advocate ethical means of persuasion. From ancient times, rhetoricians and philosophers recognized that the art of rhetoric could be abused by the unscrupulous.<sup>145</sup> Plato denounced the discipline of rhetoric as the teaching of sophistry.<sup>146</sup>

The quandary in which lawyers often find themselves usually stems from preventing "an ethical success [from becoming] a persuasive failure,"<sup>147</sup> while assuring that "a persuasive success [is not] an ethical failure."<sup>148</sup> The goals of rhetoric and

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should check with a respected practitioner handling commercial leases to determine the customs generally followed in negotiating such a lease, such as the types of opening offers usually made, what the common terms in mall leases are, the standard points to cover, and the pitfalls to avoid.

Note how the attorney has strengthened A's bargaining position as a result of this research. The attorney has first identified her key audience, the client herself. Second, the attorney researched the audience thoroughly and imaginatively, finding out the client's goals and needs and was thus able to begin investigating alternative solutions to the client's problem. Meanwhile the attorney began researching the second set of audiences: the mall owner, the mall manager, and the mall's attorney. Given Acme's precarious financial situation, B can credibly argue for significantly better terms and conditions for A. If she wants to, B can point out the pending offers from the other locations: she has a best alternative to a negotiated settlement and has developed that alternative strategy. She can note that A is taking a risk in getting a lease at a mall that is losing tenants and clientele, that A can make a significant contribution to strengthening Acme, and that under the circumstances, Acme should concede to A's demands. If Acme nonetheless proves uncooperative and unyielding, B can credibly threaten to walk away. If that tactic is unsuccessful and the terms Acme is offering fall outside A's bargaining range, B can in fact walk away and still have a reasonable alternative for A.

(This hypothetical was adapted from an example given by CASEY, *supra* note 72.)

145. Aristotle stated:

If it is urged that an abuse of the rhetorical faculty can work great mischief [he wrote], the same charge can be brought against all good things (save virtue itself), and especially against the most useful things such as strength, health, wealth, and military skill. Rightly employed, they work the greatest blessings; and wrongly employed, they work the utmost harm.

WAYNE C. MINNICK, *THE ART OF PERSUASION* 277 (1957) (quoting *THE RHETORIC OF ARISTOTLE* 6 (Lane Cooper trans. 1932). See also ARISTOTLE, *supra* note 39, at 23-34. Minnick identifies two principal ways rhetoric can be abused: "judging ethics according to the end sought by the persuader" and "judging ethics by the means employed by the persuader." MINNICK, *supra*, at 277-79. Minnick criticizes Aristotle for adopting essentially an amoral approach—an approach similar to that adopted by many practicing lawyers: "[Aristotle's] view, that persuasion is sound unless perverted to wicked ends, is difficult to apply, and Aristotle, whose attitude was basically amoral, did not try to teach us how to apply it." *Id.* at 278.

146. See PLATO'S *GORGAS* in *THE COLLECTED DIALOGUES OF PLATO* 232-49 (Edith Hamilton & Huntington Cairns eds., 1961); WHITE, *THE LEGAL IMAGINATION*, *supra* note 42, at 850-53) (discussing "The Cost of Argument: The Mind of the Sophist").

147. See WHITE, *HERACLES' BOW*, *supra* note 42, at 4.

148. *Id.*

the demands of the adversary system frequently place attorneys in challenging ethical dilemmas. As one commentator has suggested, attorneys are often faced with a "trilemma": the duty to vigorously represent the client within the bounds of the law, which requires discovering all relevant facts known to the client, the duty to safeguard the client's confidences, and the duty to be truthful to the tribunal.<sup>149</sup> He concludes that the attorney often has to violate one of these oft conflicting duties.<sup>150</sup> This so-called trilemma, however, presupposes substantial, if not full, adjudication, which entails at least minimal supervision of the attorneys' conduct by the tribunal. Most disputes, however, are resolved through negotiation, which is often conducted in the privacy of attorneys' offices, unexposed to public view, and hardly supervised by the courts.<sup>151</sup> The rules of professional responsibility are not particularly helpful in governing negotiations<sup>152</sup> and, in any event, are rarely enforced.<sup>153</sup>

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149. See MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 27-28 (1975); see also Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer*, 64 MICH. L. REV. 1469, 1477-78 (1966) (arguing that criminal defense attorneys can ethically elicit perjured testimony from their client on direct examination). The presentation on which the Michigan Law Review article was based and, particularly, Professor Freedman's assertion regarding attorneys' knowingly eliciting client perjury without informing the tribunal caused considerable controversy at the time, resulting in disciplinary proceedings brought against Professor Freedman—proceedings that were subsequently dismissed. Freedman, 64 MICH. L. REV. at 1469 n.1. He later changed his mind, concluding that such a direct examination would constitute "actively participating in—indeed, initiating—a factual defense that is obviously perjurious." See FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra*, at 73.

150. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 149, at 28; but see DAVID LUBAN, *LAWYERS AND JUSTICE* (1988). Professor Luban argues that even during their representation of clients lawyers have the same moral responsibilities as do other citizens. Only in representing individuals accused of a crime or in representing the powerless in civil proceedings, may attorneys rely on their role as lawyers to exempt themselves from moral standards of the lay citizenry. LUBAN, *supra*, at 51. "This conception of role-morality gives obvious and decisive relevance to Luban's justification of adversary criminal defense: the role of [the] zealous criminal advocate is sufficiently desirable to immunize the agent for otherwise immoral acts, while the role of zealous civil advocate is not." David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 397 (1990) (reviewing LUBAN'S *LAWYERS AND JUSTICE*) (citing LUBAN, *supra*, at 58-66).

151. BELLOW & MOULTON, *supra* note 48, at 442 ("Lawyers negotiate without the formal protection of trial or the commitments which foster trust in other relationships").

152. See DONALD G. GIFFORD, *LEGAL NEGOTIATION* 108 (1989) (noting that misrepresenting one's authority to settle a claim or the amount that the client would be satisfied with does not constitute a "false statement of material fact" within Model Rule of Professional Conduct Rule 4.1). Dean Gifford takes seriously such rules that do regulate attorney conduct in negotiations. See *id.* at 3-5, 13, 37, 41-42, 71, 104, 105, 108, 109, 133-34, 137, 185, 197-200. Whether most practitioners do so is, however, much more questionable. See also Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation and Moral Judgment*, 75 NEB. L. REV. 752, 759 n.14 (1996) (noting "[t]hat there is substantial agreement among commentators that the area of negotiation lacks specific and clear rules of procedure and ethics") (citing Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990); Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 174-80 (1989); Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 815, 823-29 (1987); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 2, 9, 13 (1987)).

153. See Peters, *supra* note 152, at 20.



In introducing students to a realist and rhetoric-based approach, the law teacher should broach some of the ethical and moral issues that students are likely to confront in practice. Aside from the formal rules of professional responsibility, students need to at least explore the extent to which law and different types of practice help enable students to act in harmony with their own moral standards. This is not to suggest that there are right or wrong answers or formulaic solutions.<sup>154</sup> Rather, students should be given an opportunity to consider the different moral and ethical choices that may be available granted the particular facts of the given case.<sup>155</sup> Discussion of in-class hypotheticals or real cases in which attorneys have made ethical choices may be used to heighten student consciousness.<sup>156</sup> A more fruitful method involves incorporating an ethical and professional responsibility component within a research or writing project or within a simulated counseling or negotiation exercise.<sup>157</sup> In such an exercise, the students themselves must act in the role of counsel and decide which ethical choices to make.<sup>158</sup> In any event, as part of their

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154. See Eyster, *supra* note 152, at 752 (noting the impossibility of indicating "a single formula" for law students or attorneys to follow to handle negotiations both competently and ethically).

155. For example, one commentator has suggested that the attorney first discuss the ethical questions with the client. The attorney should not assume that the client desires to win "by any lawful means," however cruel or immoral. See Kenny Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69, 75 (1982). Professor Hegland poses the example of a date-rape case in which the defendant being represented had a long relationship with the alleged victim before the charged crime occurred. Before conducting a savage cross-examination of the victim, the defense attorney might inquire whether the client really desires this, particularly given his past relationship with her. *Id.* at 76.

See also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). Professor Simon criticizes standard approaches to legal ethics, arguing that "lawyers should exercise judgment and discretion in deciding what clients to represent and how to represent them." *Id.* at 1083. In exercising this discretion, the lawyer should seek to "do justice" and should consider, among other things, the merits of the case, the client's and the opposing party's goals, and the "the reliability of the standard legal procedures for resolving the problem at hand." *Id.* See also David Wilkens, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 217 (1996).

156. See, e.g., THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* 273-308 (1985) (discussing the generally pretextual charges brought against Louis B. Brandeis by opponents to his confirmation as Associate Justice of the United States Supreme Court).

157. See, e.g., Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995) (arguing that through case-based simulations legal education can foster students' moral reasoning and development); Guilda Tuoni, *Teaching Ethical Consideration in the Clinical Setting: Professional, Personal and Systemic*, 52 U. COLO. L. REV. 409 (1981) (arguing that ethics and professional responsibility can best be taught in the clinics); see also Hegland, *supra* note 151, at 70.

158. Such exercises can help students probe some of the thornier issues, such as lying during negotiations. See Gerald B. Wetlauffer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990) (noting that attorneys often lie during negotiations); Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195, 211 (1996) (noting the impact of lying on the lawyers themselves and on the legal system). But see James J. White, *Machiavelli and the Bar, Ethical Limitations on Lying in Negotiations*, 1980 AM. B. FOUND. RES. J. 926-29 (comparing negotiators to poker players and noting that concealing one's ultimate settling point is the essence of negotiation, thereby approving attorney puffing, but not affirmative misrepresentations). Students can be assigned materials such as the Wetlauffer, Shaffer, and White articles, above, before they are given the negotiations simulation in

research planning and problem solving, students should consider the moral and ethical choices of their ultimate strategy.<sup>159</sup>

#### **D. Integrating Audience Research in Substantive, Clinical, and Research and Writing Courses**

It is not difficult to incorporate this approach within the law school class to raise the students' awareness concerning the importance of audience and to enable them to research the audience effectively. Although the techniques below are separately subdivided for the legal research teacher, the clinician, and the substantive law teacher, many of the techniques can be used regardless of the kind of law one teaches.

##### *i. Simulations and Writing and Research Assignments*

Those teaching legal research are generally already pressed by coverage concerns. How can yet an additional subject be added to the already crowded legal research curriculum? Surprisingly, audience research takes relatively little time either for the teacher or for the students. If properly structured, the audience analysis component of legal research can be economical, rewarding, and stimulating.

There are four means of obtaining information about relevant audiences: (1) speaking to the audience itself or to individuals who know the audience;<sup>160</sup> (2) observing the audience; (3) consulting published hard copy materials; and (4) consulting electronic information sources. The legal research teacher can use one or more of these means in a given writing project or research assignment fairly easily. There is *no* need to require that the student use all four methods for every assignment. One approach would be to add methods as the semester or (in a two semester course) semesters progress.

These methods can be easily incorporated into legal research and writing courses. For example, role playing can be used to simulate informal audience research.<sup>161</sup> Additionally, the students may be required to observe the audience, for

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which they have to decide whether they will engage in any misrepresentations during the negotiation exercise. I am indebted to my colleague, Vanessa Merton, who suggested this exercise to me.

As part of a writing assignment, the students can be asked to determine whether they should waive a jury trial before a jury composed primarily of minority jurors from Bronx County, New York, for example, in the trial of a white police officer charged with killing a minority suspect. The substance of the writing assignment could be, for example, whether the officer's using a prohibited choke hold to subdue the apparently violent suspect constituted criminally negligent homicide when the hold, along with the suspect's asthma, caused his death. The New York Chapter of the American Civil Liberties Union criticized defense counsel for making such a waiver in a case presenting similar facts. See Goldstein, *supra* note 117.

159. See Stuckey, *supra* note 42, at 685; see also Menkel-Meadow, *supra* note 112, at 761 (stressing that the advocate should aim for a "fair" or "just" settlement); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1 (1975).

160. As noted above, e-mailing attorneys who know the audience is a particularly effective variant of this approach.

161. One might start out by having one's teaching assistant play the role of the chair of the local bar association section relating to the question in issue. The students should be told to inquire of the

example, by attending a court in session.<sup>162</sup> When the students are taught manual research tools, one or two such tools dealing with relevant audiences<sup>163</sup> can be included.<sup>164</sup> When the students are taught computer assisted legal research, methods of researching the audience on-line can easily be added.<sup>165</sup>

In creating hypothetical cases, the legal research teacher should consider choosing real, high profile actors for the major roles. Trial judges and opposing counsel who have gained prominence would be good candidates. The students will be better able to obtain audience information on such high profile individuals. Setting a subsequent hypothetical before a state high court can likewise give students an opportunity to apply these techniques to an audience. Typically, there is a lot of material available on the high court judges. By researching such high profile audiences, the students will come to realize the significance of audience research. Students may then be told that they may have to resort to more informal methods when researching less well known judges, opposing counsel, and parties.<sup>166</sup>

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teaching assistant about the reputation of opposing counsel, about the judge assigned to the case, and about any relevant unpublished rules or practices. In addition to reporting the product of their formal rules research, the students can likewise report the audience and unpublished law research. A second teaching assistant can play the role of the court clerk or opposing counsel. The students can all be instructed to use, for example, any of the following means of contacting the "chair of the criminal justice section": speaking in person, telephoning the chair, or sending an e-mail message.

162. This applies when the court observed is the assigned audience. Many state high courts have permitted their oral arguments to be videotaped. If the hypothetical is set before the high court in question, the students may be required to watch the videotape, not only to pick up oral argument techniques, but also to measure the court's temperament.

163. For civil cases, the legal research teacher can have the students compare and contrast jury verdict reports. If the plaintiff has some choices as to where to lay venue, it could be instructive for the students to see what the jury verdict results reveal. That can be followed up with a discussion with the teaching assistant in the role of chair of the local bar section in the area in question.

164. The research teacher could introduce them to one or two of the major directories, such as the Federal Almanac of the Judiciary, the American Bench, or Martindale-Hubbell. (The Federal Almanac of the Judiciary gives particularly detailed descriptions and analyses of every federal judge and is a good tool to have the students examine.)

All the directories are relatively simple tools to use. If the research teacher employs closed universe problems, she could add, for example, the Federal Almanac's selection on the federal district court judge who will be hearing the case. (Audience research works best if real people are chosen to play the key roles.)

In conjunction with teaching digests, the research teacher could also cover jury verdict reporters. They resemble digests in that they summarize the key facts of the reported case, including the amount of the verdict rendered. They go far beyond digests, however, by covering trial cases, which generally are neither officially nor unofficially reported. Jury verdict reporters are likewise relatively easy to use. The researcher teacher might wish to have students compare the jury verdict services that are on-line with those that are published in hard-copy form.

165. Computer Assisted Legal Research can help the attorney conduct audience research in three principal ways: (1) by using the databases of reported cases, to provide the opinions of the judges who are relevant audiences; (2) by using the databases of legal newspapers and other newspapers to provide the judge's unofficially reported cases and other information about the judge (or about opposing counsel for that matter, particularly if the opposing counsel is well known); or (3) by using jury verdict databases, to obtain the range awarded by juries from that county in similar cases.

166. In addition, simulations can be designed to begin at the trial level, naming a real judge to preside at the trial. Then a second assignment can be the appeal of the original case, before the

As Professor Marjorie Rombauer observed over 20 years ago, legal research instruction acquires both context and meaning by being included as an integral part of legal problem solving.<sup>167</sup> The legal research teacher gains a great deal by adopting Professor Rombauer's legal problem solving approach both when teaching the subject and when having the student work on a writing or research assignment. Law courses, including legal research and writing classes, stress full adjudication. Typically, writing and research assignments ask students to determine whether the party the student represents will prevail on a given issue or issues. This approach curtails problem solving. Since most cases never reach trial, legal research and writing teachers should encourage students to consider developing a strategy that not only considers full adjudication but also a settlement that would meet the goals, needs, and values of the party. A modified problem design and a call of the question at the end of the instructions for each assignment can fairly easily accomplish this objective.<sup>168</sup> Expanding legal research to include audience and unpublished law takes little effort for the instructor and relatively little time for the student. But the time and effort can deepen the student's understanding of law considerably.

## *ii. Audience Analysis and the Clinical Law Teacher*

Most clinical teachers probably pay considerable attention to audience analysis already.<sup>169</sup> This article suggests, however, that audience analysis and unpublished rules and practice research be made a formal part of case preparation. The students should be required to conduct audience research on their own. The clinical instructor should resist the temptation to tell the students the particular attributes and character of the judge before whom the student will appear, the opposing counsel who will be handling the case, or the typical jury from the district or county in question. Likewise, the clinical instructor should resist telling the

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corresponding appellate court, with a panel consisting of real appellate judges. Students can develop a fairly sophisticated sense of audience by such a paired exercise—particularly if audience analysis is stressed. For each assignment, the students should conduct an audience analysis. Examples of such exercises can be obtained by contacting the author.

167. See MARJORIE DICK ROMBAUER, *LEGAL PROBLEM SOLVING, ANALYSIS, RESEARCH AND WRITING* (2d ed. 1973).

168. The hypotheticals need to be devised to encourage the students to consider settlement. See the hypothetical problems included in the leading negotiation and ADR texts. See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATION* (1990); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT, TEACHERS' MANUAL* (1983). In designing these hypotheticals, one should strive to make the question of liability arguable while including facts that might give rise to integrative bargaining approaches as well as competitive ones, e.g., the possibility of negotiating a structured settlement in a personal injury action or of arranging some form of restitution in a criminal case.

169. My sense is that clinical faculty generally provide the students with a legal problem solving approach, so the focus here will be predominantly on audience analysis. Clinical faculty who do not do so may wish to consider requiring students to strategize formally, by, for example, having them complete a series of short strategy memos, two to three pages each, as the case develops. See Appendices A and B for guided approaches. Appendix C contains a hypothetical case and the corresponding audience research and analysis. See *supra* note 133 for specific references to the appendices.

students about unwritten or unpublished practices the courts or the attorneys in this particular field follow. As part of the clinical experience, the student should be taught how to find out this information.<sup>170</sup>

*iii. Incorporating Rhetoric and Audience Awareness into the Substantive Law Class*

Likewise, substantive law teachers can fairly easily integrate rhetoric and audience awareness with substantive course material. There are several methods of bringing audience awareness into the substantive law class. For example, the students may be required to analyze state high court cases or United States Supreme Court cases that have overruled their own precedent within a short time. Often, a change in composition of the court will have preceded the court's action.<sup>171</sup> The students should be assigned both the overruling case and the overruled case. This assignment lends itself to a discussion of the relationship between law and politics as well as between advocacy and audience analysis.<sup>172</sup>

Aside from this method, substantive law teachers can assign not only the court opinions from decided cases, but also excerpts of the appellate briefs submitted in those cases.<sup>173</sup> The students can compare the final opinion with both sides' briefs.

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170. For the simulated clinical course, many of the suggestions for legal writing and research teachers apply. If the instructor plays the role of judge, students may be required to try to find students who have taken the course before to get an audience analysis of the instructor.

171. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (school child may not be expelled for refusing to salute the flag), *overruling* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (school child may be expelled for refusing to salute the flag); *Payne v. Tennessee*, 501 U.S. 808 (1991) (state may introduce victim impact statements in penalty phase of defendant's capital murder trial), *overruling* *Booth v. Maryland*, 482 U.S. 496 (1987) (holding that under the Constitution, states may not introduce victim impact statements in the penalty phase of defendant's capital murder trial); *Agostini v. Felton*, 921 U.S. 203 (1997) (under the First and Fourteenth Amendments, state boards of education may send school teachers into parochial schools for remedial teaching), *overruling* *Aguilar v. Felton*, 473 U.S. 402 (1985) (barring the state, under the Establishment Clause, from sending public school teachers into religious schools for that purpose).

172. Students could be questioned as follows. What was the law six months before the Court overruled the precedent? Would all actors in the legal system still have viewed the old precedent as good law at that time? Should they have? What is the relationship between politics and law? Shouldn't the courts be independent of politics? Isn't the genius of our system of individual justice stifled when politics intervenes? Is there any alternative? Students should be asked (a) to identify any change in composition of the court; and (b) to identify who left the court and who joined, who appointed the new judge(s), and what their background, goals, and values were. Was there anything in the background of the new judge(s) that might have signaled the courts shift? Given the background of the new judge(s), how would you have counseled a client with the same problem as that in the original precedent case, had the client come to you six months before that precedent was overruled?

Aside from changes in composition of the high court, sometimes a particular justice's or justices' views will change. One might explore with the students whether any social currents or historical events, or political or other pressures, contributed to the justices changing their minds. See *supra* note 78, discussing the United States Supreme Court's apparent about face on gay and lesbian rights.

173. Briefs filed in the United States Supreme Court have been available on LEXIS since 1979. Selected briefs filed in state high courts are available in some law libraries. If requested, counsel will usually supply a copy of the briefs free of charge. A well edited series of volumes contain not only the briefs submitted in notable Supreme Court cases, but also transcripts of the oral arguments and other

In addition to focusing on the substantive law, discussion can center on which of the two briefs was more persuasive and why one of the briefs was more effective than the other.<sup>174</sup> Such a discussion can include both audience analysis and strategy.

To supplement case analysis, students can be shown a video of an oral argument<sup>175</sup> or of a trial. Particularly effective are videos of an oral argument dealing with a case that the class is discussing. The court's questions on oral argument and counsel's responses can be analyzed and then compared to the final opinion itself. Observing a video of such an argument can give an insight into judges and the court system that is not apparent through the bare pages of the reported decision.<sup>176</sup>

One of the most powerful methods is to create a simulated case, requiring that the students, for example, conduct a negotiation, argue a motion, or submit a memorandum in support of a motion. As part of the simulation, the students can be required to conduct audience research. Substantive law teachers report that such simulations have also sharpened students' understanding of the substantive law.<sup>177</sup> Simulations can be designed to take relatively little class or instructor time.<sup>178</sup>

## CONCLUSION

Since Langdell, law schools have concentrated upon what Aristotle would probably fit under *logos*, that is, upon written, published law that can be dissected into rules which can be systematically applied to particular cases. Justice Holmes' famous aphorism, "The life of the law is not logic, but experience," was written in a critical review of Langdell's work.<sup>179</sup> To gain for law schools the prestige that science had acquired by the last decades of the nineteenth century, Langdell developed his formalistic rule-based approach that left out rhetoric from the law school curriculum. Rhetoric does include logical and therefore empirically based

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materials. See *LANDMARK BRIEFS AND ARGUMENTS* (Philip B. Kurland & Gerhard Casper eds., 1975—to date).

174. For an excellent discussion of Professor Laurence Tribe's masterfully employing the concepts of audience awareness in persuading the United States Supreme Court to uphold the striking down of Colorado's referendum that limited gay and lesbian rights, see Jeffrey Toobin, *Supreme Sacrifice*, *NEW YORKER*, July 8, 1996, at 43.

175. Unlike the United States Supreme Court, many state high courts have permitted videotaping and televising oral arguments.

176. Videos on famous judges and lawyers can be equally instructive. See, e.g., PBS's program entitled, *Mr. Justice Brennan*, released in Fall 1996 (containing interviews not only with Justice Brennan, but also with Justices Breyer and Scalia). To save class time, students can be required to watch such videos outside of class.

177. See, e.g., Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, in *CLINICAL LEGAL EDUCATION* 191 (AALS/ABA, 1980).

178. In a large substantive law class, for example, students can conduct a negotiation simulation out of class, but be required to audiotape the negotiation session. The instructor can have one or two sets of negotiators conduct their session before the entire class or the instructor can have a few pairs videotape their negotiations and then show one or two videotapes followed by class discussion. See Harbaugh, *supra* note 177.

179. Grey, *supra* note 1, at 4 (citing Oliver W. Holmes, Jr., *Book Review*, 14 *AM. L. REV.* 233, 234 (1880) (reviewing Langdell's most important book, *SUMMARY OF THE LAW OF CONTRACTS* (1880)). Holmes also characterized Langdell as a "legal theologian." *Id.*

appeals. It also recognizes, however, that the advocate needs to consider the audience when constructing an argument and that the audiences are persuaded not only by logic, but also by emotional appeals and the advocate's credibility.

This article proposes that law teachers, in general, and the teachers of research, in particular, stop following a narrow Langdellian path, but instead take a broader one that integrates standard approaches with a realist and rhetoric-based method. Given the electronic information revolution, students are better able to research relevant audiences than ever before. Given the reality that the overwhelming number of law cases are resolved before trial, the academy has an obligation to inquire into the manner in which these cases are ultimately disposed of and to prepare students to handle such resolution processes competently. The proposed realist and rhetoric-based approach to legal research and problem solving seeks to expand the inquiry beyond written, published law to include an investigation of the needs, customs, and human qualities that those with the power to resolve cases possess. By incorporating these critical data with the fruit of standard legal research, law students will be better equipped to prepare cases and to resolve legal disputes creatively and effectively.

## Appendix A

### A REALIST AND RHETORIC-BASED APPROACH TO LEGAL RESEARCH AND LEGAL PROBLEM SOLVING

1. Identify potentially relevant audiences (decision-makers and influential players<sup>180</sup>) that you might have to persuade to resolve the dispute or transaction favorably.
  - (a) If the matter is fully adjudicated, what audiences will you will have to persuade?
  - (b) If the matter is resolved without full adjudication, what audiences will you have to persuade?
  - (c) If the matter is transactional, what audiences will you have to persuade?
2. Research sources that may help you persuade the relevant audiences:
  - (a) Research the relevant published legal rules:

What published rules of law contained in statutes, court opinions, administrative regulations, or other sources<sup>181</sup> might persuade any of the relevant audiences to help resolve the dispute or transaction favorably?<sup>182</sup>
  - (b) Research the relevant unpublished rules or practices:

Are there any unpublished rules or practices that might help you or any of the relevant audiences to resolve the dispute or transaction favorably?
  - (c) Research each relevant audience.
    - (1) What is the audience's background and reputation?
    - (2) Has the audience previously decided any similar cases?<sup>183</sup>

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180. Key witnesses fit under the category of "influential player," and are thus an audience to research. Be sure to include your client as a relevant audience.

181. See *STATSKY*, *supra* note 11, setting forth other sources of published, written law.

182. In researching written, published law, consider combining problem solving with the search for finder words (likely index entries or useful terms in framing CALR queries). One such approach is to brainstorm for the following: legal theories (actions or defenses), potentially relevant persons or parties, things or subject matter, equities of the different parties, and requested relief whether the case is fully adjudicated or resolved without trial. The acronym, APTER, may help: Actions or defenses, Persons or parties, Things or subject matter, Equities, and Relief requested. Issue statements can then be formulated, followed by devising a research and problem solving plan.

183. Although this question may overlap with (2)(a), a precise focus on the particular audience's decisions, such as those of the trial judge, for example, is necessary for conducting complete audience analysis.



- (3) What general needs, goals, and values does the audience have? What specific needs, goals and values does the audience have?
    - (4) Are there any pressures on this audience, brought about by institutions, the public generally, or by specific individuals that may affect how the audience might resolve the dispute or transaction?<sup>184</sup>
    - (5) Are there any cultural differences that might affect how this audience will view and resolve the dispute or transaction?
  - (d) Compare and contrast the goals, needs, values, and power each relevant audience possesses.<sup>185</sup>
    - (1) Have you listed all the information obtained about the audience, including both the general and specific needs, goals, and values of the audience?
    - (2) Have you listed the power, if any, the audience has for fulfilling the needs, goals, or values of itself, of your client, and of any other decision maker or influential party?
    - (3) Have you indicated how each audience would have prioritized the items in 7(a) and 7(b)? For example, what needs of the audience are paramount? What power would the audience feel most comfortable in exercising? What power the least?
3. Research the evidence, that is, develop a discovery plan.
  - (a) Identify potential witnesses (including experts), and identify potentially relevant documentary evidence and potentially relevant physical evidence.
  - (b) Develop several alternative means of obtaining this evidence.
  - (c) Choose the best strategy for obtaining the evidence, specifically determining whether and how to use interrogatories, depositions, discovery motions, motions to produce, pretrial motions on other issues to provide information concerning the case-in-chief, pretrial hearings, negotiations with opposing counsel, examination of the scene, informal interviews, and other investigative techniques.
4. Devise a strategy for persuading the key audience(s).
  - (a) After analyzing the available evidence, the formal rules of law, any relevant unpublished rules and practices, and comparing the audiences,

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184. BELLOW & MOULTON, *supra* note 48, at 866.

185. This is adapted from COOLEY, *supra* note 82, § 2.16, at 176-79 (1989).

develop several alternative strategies to resolve the case. Determine how best to persuade each relevant audience, by considering the following:

- (1) What facts might help you persuade the audience to resolve the dispute or transaction favorably?
  - (2) What emotional appeals or equity-based arguments might help you persuade the audiences to resolve the dispute or the transaction favorably?
  - (3) What arguments based on formal legal rules might help you persuade the audiences?
  - (4) What arguments based on unpublished rules or practices might help you persuade the audiences?
  - (5) What policy considerations or socio-political currents might help you persuade the audiences to resolve the dispute or transaction favorably?
- (b) After considering all the alternative strategies and determining how to persuade each of the relevant audiences, choose the best strategy for resolving the problem.
- (1) Develop the strategy by obtaining the necessary evidence to support it and, whenever possible, choosing the audience or audiences most likely to be receptive to your arguments.
  - (2) Develop sub-strategies to shore up weaknesses in your main strategy.
  - (3) Develop a contingent strategy or strategies should the main strategy be unsuccessful.
    - (a) What is your best alternative strategy should your main strategy fail?
    - (b) Have you prepared your best alternative strategy to make it as strong as possible?<sup>186</sup>
5. Consider the “moral implications” of the proposed strategy.<sup>187</sup>

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186. These questions (from 8(b)(3)(a) and (b)) can, of course, be addressed to additional contingent strategies, should the first contingent strategy fail as well.

187. *Stuckey*, *supra* note 42, at 685, and *supra* notes 145-59 and accompanying text.

**Appendix B****A REALIST AND RHETORIC-BASED APPROACH  
TO LEGAL RESEARCH AND LEGAL PROBLEM SOLVING*****A Non-Linear Model*<sup>188</sup>**

-Identify potentially relevant audiences that you might have to persuade to resolve the dispute or transaction favorably.

—Research the relevant published legal rules (conduct formal legal research).

—Research the evidence, that is, develop a discovery plan.

—Devise a strategy for persuading the key audience(s), developing at least one main and one contingent strategy.

—Research the relevant unpublished rules or practices.

—Research each relevant audience.

—Compare and contrast the goals, needs, values, and power each relevant audience possesses.

—Consider the moral implications of the proposed strategy.

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188. This non-linear approach merely outlines the model; refer to the corresponding points under Appendix A, above, for the detailed components of the proposed legal research and problem solving method.

## APPENDIX C

**SAMPLE PROBLEM INCLUDING RESEARCH PLAN  
INCORPORATING AUDIENCE AND UNPUBLISHED RULES  
RESEARCH, AND PROBLEM SOLVING STRATEGY**

The following hypothetical is drawn from the leading legal research text.<sup>189</sup> The hypothetical is written and designed well. It does, however, need to be supplemented to enable students to perform full audience analysis and to employ richer problem solving techniques. Changes are crossed out; additions are italicized.

Imagine yourself a lawyer in a small firm in ~~Taos, New Mexico~~ *White Plains, New York*, and consider the following fictional client problem:

Your client, Emilia Canoga, began her career as a flutist for *the Phillips Symphony*, a small symphony orchestra in ~~Taos, New Mexico~~ *White Plains, New York*, when she graduated from the Juilliard School ~~five~~ *nine* years ago. She has enjoyed her job and performed well. However, she has disagreed from time to time with the Symphony's general manager, especially over personnel issues. One such disagreement led to her termination on January 7, ~~1995~~ *1997*.

Throughout the preceding year, the general manager had been pressuring all smoking members to quit smoking. He argued that smoking is a health risk and increased the Symphony's health care costs substantially. More particularly, he argued that smoking impairs the wind capacity, and hence performance, of brass and woodwind players. In September of ~~1994~~ *1996*, he banned smoking at work. In early December, he issued a memo ~~asking~~ *recommending* these musicians to sign either a statement indicating that they did not smoke, whether on-duty or off-duty, or a pledge to embark on a no-smoking program. This memo was met with varying reactions and provoked significant discussion among the Symphony's members.

In particular, Ms. Canoga, a smoker who had tried to quit several times, was perturbed by the manager's early efforts and incensed by the December memo. She returned it with a signed note indicating that she intended to sign neither the statement nor the pledge.

The general manager called Ms. Canoga to his office shortly after receiving the note. *He told her that she did not have to sign the pledge; he said he just suggested that she do so.*<sup>190</sup> Nevertheless, a heated discussion ensued. Ms. Canoga

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189. KUNZ ET AL., THE RESEARCH PROCESS, *supra* note 17, at 2. To be fair to Kunz et al., they designed this hypothetical as a vehicle to illustrate the vast array of research tools, and not necessarily to serve as a hypothetical for law students to practice writing, research, and problem solving. This hypothetical, nonetheless, is fairly typical of well drafted hypotheticals used by law schools.

190. New York, like New Mexico, clearly makes regulation of employees' consumption habits outside of working hours illegal. Casting this as a "recommendation" rather than a requirement makes the case more arguable.

accused the general manager of overstepping his bounds as an employer and intruding into her personal life. He told her she was fired for insubordination. Ms. Canoga angrily left his office.

Two days later, Ms. Canoga received her paycheck with a note stating that her employment was no longer needed by the Symphony. Ms. Canoga sought advice from a senior colleague about how to get her job back. He suggested that she exercise her right to plead her case before the board of directors, as stated in the Symphony's employee handbook. The handbook reads:

It is the Symphony's intent to resolve all employment disagreements amicably. If at any time during your employment or thereafter, you are unable to resolve a disagreement by discussing the issue with management, you may bring the matter to the board. The board will make every effort to listen to both sides and facilitate a just solution.

~~Ms. Canoga wrote a letter to the board president requesting board consideration of her termination according to the handbook. About a week later, she received a letter stating that the board was aware of her situation, believed management had handled it appropriately, did not intend to revisit the topic, appreciated her contributions to the Symphony, and wished her well in her future endeavors.~~

(End of Original Hypothetical)

Instead of having the board already having resolved the question, consider initially leaving that open.

#### *Revisions*

*Ms. Canoga consults your law firm about her discharge.<sup>191</sup> In a second interview, she provides the following information. Ms. Canoga was born and raised in Madrid, Spain, of Spanish parents. She came to the United States to enroll in Juilliard at the age of 22. She is outraged at what happened to her, believing that the Symphony engaged in "Big Brother" tactics. She has been smoking since she was 16, and has tried to stop several times, but cannot. She smokes about two packs a day. She would like to see the Symphony or at least the manager punished in some way for their attempt to invade her privacy and for what she perceives to be her unlawful discharge.*

*Above all, she wants to get her job back. She loves her work, and few orchestras provide the pay, benefits, and exposure that she gets from being a member of the Phillips Symphony. The classical music business is highly competitive. She*

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191. After the students have the basic facts, a colleague could come in and role play Ms. Canoga. The students can interview her collectively. They should have been instructed beforehand about the rudiments of interviewing techniques and some of the basics of audience analysis, namely, finding out what the clients' needs, goals, and values are in general and specifically with regard to her case. In practice, this often takes several interviews to obtain.

*believes that she might get a job elsewhere, but that she would probably have to relocate. She currently lives in New Jersey and commutes to New York. She is married, and has a 12-year-old daughter, Susana, who had difficulty adjusting to elementary school, but seems to be doing particularly well in junior high. Although Ms. Canoga's husband supports Ms. Canoga's career and would be willing to relocate, she does not want to take Susana out of her present school environment.*

*A second interview revealed that Ms. Canoga's father is first violinist with the Royal Philharmonic, that he enjoys an international following, and that he tours throughout Europe, the United States, and Latin America. Having traveled with her father since she was 13, Ms. Canoga herself knows most of the world's leading conductors and many of the most highly regarded musicians. In addition, Ms. Canoga informs you that three of the five members of the Symphony's board of trustees reside in New York County (Manhattan).*

#### **Assignment 1.**

Fully research Ms. Canoga's case, and:

- (a) identify
  - (1) all potentially relevant audiences, their relevant backgrounds, needs, goals, and values;
  - (2) relevant, published, written law; and
  - (3) any relevant unpublished rules or practices;
- (b) design a discovery plan;
- (c) craft a problem solving strategy; and
- (d) consider any moral or ethical issues that may arise as a result of your strategy.

Teaching Assistant A is a senior member of the Symphony, a friend of Ms. Canoga, and knows the politics of the Symphony intimately. You may wish to consult him.

#### ***A Possible Answer***

### **I. Problem Solving Before Filing an Action**

#### **1. Identifying all *potentially* relevant audiences.**

- the client
- the members of the board
- the manager
- the Symphony's attorney
- the New York Supreme Court judges sitting in Westchester County
- the New York Supreme Court judges sitting in Manhattan County
- the typical Westchester County jury
- the typical Manhattan (New York County) jury
- the N.Y. Appellate Division, Second Department (if we file in Westchester)

- the N.Y. Appellate Division, First Department (if we file in Manhattan)
- the N.Y. Court of Appeals (state's highest court)
- the federal district court judge(s) within the Southern District of New York (if there is a federal issue or if diversity jurisdiction is possible)
- the pool of judges in the Westchester "branch" of the Southern District of New York (note there is no formally designated "branch" for the federal district court judges sitting in Westchester, only an ad hoc division between the Manhattan "branch" and the Westchester one, both of which are within the Federal Southern District Court of New York)
- the pool of judges in the Manhattan "branch" of the Southern District of New York
- typical federal jury from the Westchester "branch" of the Southern District of New York
- typical federal jury from the Manhattan "branch" of the S.D.N.Y.
- Federal Court of Appeals for the Second Circuit
- U.S. Supreme Court

2. Researching Sources that may help you persuade the relevant audiences:

(a) *Research the relevant published law (legal rules):*

**BEFORE TOUCHING A BOOK OR A COMPUTER TERMINAL:**

***Brainstorm for theories, finder words, and possible solutions***

**Legal Theories:**

*Actions*

- breach of contract.
- breach of covenant of good faith and fair dealing.
- public policy exception to the employment-at-will doctrine.
- intentional infliction of severe emotional distress.
- negligent infliction of severe emotional distress.
- complaint to human rights commission.
- breach of state constitutional right to privacy.
- breach of state statutory right of privacy.
- complaint under the American with Disabilities Act ("ADA") that Canoga is addicted to nicotine and therefore is disabled within the meaning of the Act.
- complaint to granting agencies that fund the Symphony.
- complaint to musicians' union (even though the Phillips Symphony is not a union shop and Ms. Canoga is not a union member).
- complaint to any organization of orchestras.
- publicity about the arbitrary action the Symphony has taken.
- complaint to Canoga's influential father and to others in the music world.
- possibility of diversity jurisdiction since Canoga resides in New Jersey although she works in New York.

*Defenses*

- Canoga is an employee-at-will and therefore may be discharged, for a good reason, a bad reason, or any reason at all.
- Exceptions to the at-will rule do not apply, because at least so far, the Symphony has not violated its personnel policies nor does such a discharge fall within the public policy exception.
- Canoga was admittedly insubordinate in yelling at the manager.
- the ADA will probably not be interpreted to mean that one allegedly addicted to nicotine is “disabled” within the meaning of the Act.
- The policy was not mandatory.<sup>192</sup>

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192. A good research approach includes preparing questions presented for each legal issue arguably possible under the facts, followed by designing a research flow chart, so that every possible source of authority is thought of before touching a book or a computer terminal. Possible research questions are set forth below. For an example of a research flow chart, see KUNZ, *supra* note 17, at 1 & 28.

**RESEARCH QUESTIONS:**

Under N.Y. common law, does a privately owned orchestra breach an implied contract with an employee to act in good faith when the orchestra discharges the employee, an accomplished flutist, because the employee refuses to sign a pledge that she will stop smoking or try to stop smoking outside of working hours?

Under N.Y. statutes, does a privately owned orchestra violate an employee's statutory right when the orchestra discharges the employee, an accomplished flutist, because the employee refuses to sign a pledge that she will stop smoking or try to stop smoking outside of working hours?

Assuming Ms. Canoga prevails on either of the first two issues, does the court have the power to issue an injunction to reinstate her or is she limited to an action for damages?

Under the N.Y. State Constitution, does a privately owned orchestra violate an employee's right to privacy when the orchestra discharges the employee under these circumstances?

Under N.Y. common law, does N.Y. recognize the public policy exception to the employment-at-will rule and does that exception allow an action in favor of an employee under the facts here?

Under N.Y. common law, does the orchestra manager and the orchestra intentionally subject Ms. Canoga to severe emotional distress, under the facts here?

Under the federal Americans with Disabilities Act, is a person addicted to nicotine disabled within the meaning of the Act, and, if so, is a musician who has smoked two packs of cigarettes a day since she was 16 and has been unable to stop smoking addicted within the Act?

Under federal statutes, rules of civil procedure, or court rules, does venue lie in the Manhattan District of the Federal Court for the Southern District of New York, when the manager and two of the majority board members, all potential defendants, reside in Manhattan, but when the orchestra's place of business is in Westchester County?



**Persons or Parties:**

Orchestra, musicians, employer-employee, master-servant, board of directors, managers, executives, supervisors, boss, worker, flutist, smoker, non-smokers, addict, at-will employees, disabled persons.

**Things or Subject Matter:**

Workplace, orchestra, symphony, workplace environment, home, outside work, tobacco, drugs, illicit substances, substance abuse, addiction, nicotine, personnel manual, privacy, vices, smoking, smoking bans, anti-smoking ordinances and regulations, insubordination, discharge for cause, discharge without cause, firing, firing for cause, firing without cause, dismissal, arbitrary dismissal, disability.

**Equities and Public Policies:**

**The Symphony:** Anti-smoking initiatives have swept through municipalities and the states. Recent revelations about the tobacco companies withholding data from the public on the health effects of tobacco use is causing increased anger at tobacco companies. Given the human devastation and the health costs that result from tobacco, a private employer's absolute no-smoking ban may reduce health costs and enhance employee health and productivity, worthy public policy goals.

The policy did not *require* that employees stop smoking outside the workplace. The policy only *recommended* that employees make a pledge to try to stop smoking outside the workplace.

Ms. Canoga admits to yelling at the manager while complaining about the no-smoking ban, refusing to abide by his recommendations, and thus arguably engaged in insubordination.

The employment-at-will rule is designed to promote several policy objectives: by giving employers wide discretion to fire employees, employers may be less likely to arbitrarily refuse to hire, knowing that they can always fire a person if he or she does not work out; the employment-at-will rule encourages businesses to locate or stay in this state, because in general it is attractive to business and allows businesses to be more efficient.

**Ms. Canoga:** At least from a lay perspective, the Symphony appears to be violating her right to privacy. As long as she performs well and agrees not to smoke on the Symphony's premises, it appears to be none of the Symphony's business that she smokes when outside of work. If the company wants to protect itself against higher health insurance premiums, it probably can arrange with its carrier to have smokers pay out of their own pockets an extra premium.

Her getting angry at the manager who imposed what appears to be an arbitrary policy is certainly understandable under the circumstances.

Ms. Canoga is a competent musician and appears to have performed her duties satisfactorily in every other way.

The value of privacy—of leaving a person alone—outweighs the employer's interest in trying to make its workforce smoke free outside of the workplace.

The revelations about the tobacco industry may help her case. Their withholding information from the public about the dangers of smoking and about tobacco's addictive properties and their targeting teenagers with advertizing may allow us to portray Ms. Canoga as a victim. We can argue that she lacked complete information when she started to smoke and that she did so as a teenager, because of industry advertizing that depicted smoking as glamorous and sophisticated.

In her culture, smoking is not viewed with the same degree of disfavor. Operating out of that context, Ms. Canoga may have understandably overreacted to the policy.

Congress, the state legislatures, and the courts have created exceptions to the employment-at-will rule to prevent employers from overreaching, from arbitrarily discharging employees and from engaging in discrimination on the basis of race, gender, religion, and possibly sexual orientation. The invasion of privacy caused by the manager and his policy here may fall within certain exceptions to the at-will rule.

#### Relief Requested:

##### **(1) by adjudication:**

If the case goes to trial, we might seek compensatory damages, punitive damages, back pay, declaratory judgment that the policy was illegal, and an injunction to reinstate her. (We will have to research whether all these forms of relief are available to her.) We should explore whether we can file in federal district court and whether a state or federal action would be more advantageous and whether in either a state or federal action we can lay venue in Manhattan rather than Westchester.

##### **(2) by settlement or other resolution:**

We may be able to settle this case before trial or before even filing a lawsuit. Apparently, Phillips' employment manual gives employees the right to present employment disputes to the Phillips Board of Directors. We should first consider approaching the manager himself, who presumably has the right to reinstate Ms. Canoga. If he turns us down, we might then consider going to

the board. If neither approach is successful, we should then file a lawsuit.<sup>193</sup>

*(b) Researching the relevant unpublished rules or practices.*

A informs you that hearings before the Board, when granted, are exceedingly informal. The board has permitted an attorney to participate, but does not permit the attorney to cross-examine the manager. The board is pretty free about letting witnesses address them and generally allows any relevant documentary evidence to be considered.

*(c) Research each relevant audience.*

**—the client:**

Much of the research on the client herself has already been conducted, primarily through client interviews. That the client is Spanish may prompt the attorney to inquire into any cultural differences that might affect the way she views the dispute. Calling up a university professor who is from Spain reveals that Europeans in general smoke much more than North Americans, that in social settings smoking is considered common, that the ever present no smoking rules and regulations here are generally absent there, and when present, are loosely enforced, if at all.

**—the members of the board:**

After inquiring of A concerning the Board, the attorney learns the following: The Symphony is experiencing difficult financial times. Both government and state grants upon which the Symphony relied have been reduced dramatically. The board, however, is confident that the expanding economy in Westchester will eventually lead to private benefactors filling the gap. The board is also aggressive. It wants to increase the number of performances the Symphony gives and wants the Symphony not only to tour in state, but out of state. Despite the financial difficulty, it would like to hire a world renowned musician. The board is currently cultivating a donor who might be able endow such a chair to attract such a person.

As a result of the financial difficulty the board is more divided than in previous times. Three members, Maria Anderson, Paul Hernandez and Cynthia Larson, pushed to have Gerald Harris hired as manager. He had a reputation of being a particularly effective fund raiser and a tight manager, which these board members found desirable. Since arriving at Phillips two years ago, however, Harris has alienated many of the musicians through his abrasive personality. Five long standing, well respected musicians left the Symphony largely because of his autocratic style. Harris, however, has been fairly effective in his fund raising efforts though not as effective as the board had hoped. The other two board members, George Phillips and Maryanne Gonzalez, opposed Harris's hiring, believing that he

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193. This material is more fully developed in the strategy section set forth below. The advocate can, however, develop a preliminary strategy at this stage.

lacked artistic sensibility. By the way, both Phillips and Gonzalez smoke and opposed the no-smoking policy. The board itself did not vote on the ban; Harris imposed it himself.

The board dealt with three other instances of members of the Symphony being discharged in the last five years. On one occasion, the board let stand the previous manager's decision to dismiss a member for failing to perform up to standard because of a substance abuse problem. In another case, the board worked out a financial settlement with the member; and in the case of a third musician, Harold Murcillo, whom Harris had discharged, the board mediated between the two, and the musician was reinstated. There apparently was a personality conflict between the two that was the source of the initial discharge.

**—the manager**

A informed the attorney in addition to the above information that Harris is a little disappointed in his fund raising. He was expecting to do far better. He also knows that Gonzalez and Phillips are against him. Harris wants to have his four year contract renewed. He actually likes Canoga, but he hates when anyone defies him. His mother was a two pack a day smoker and died of lung cancer five years ago. He has been a strong anti-smoking advocate ever since.

**—counsel for the Symphony**

Skadden Arps, a major law firm, is on retainer by the Symphony. James C. Freund handles the Symphony's legal matters. He has a reputation for being a shrewd negotiator; the firm's home page profiles Mr. Freund, noting that his "primary focus has been on negotiated acquisitions, a subject on which has written and lectured extensively."<sup>194</sup> The profile notes that he "defended a number of companies against hostile takeovers" and that he has been "active in resolving business disputes through negotiation." The firm's home page indicates that he has written several books, including *Smart Negotiating*; *Lawyering*; *Anatomy of a Merger*; *The Acquisition Mating Dance And Other Essays On Negotiating*; *Advise and Invent: The Lawyer as Counselor-Strategist and Other Essays*. He also is an adjunct professor at Fordham Law School. Given the resources of the firm and Mr. Freund's expertise and experience, we have a quite formidable opponent. We have learned, however, that the firm, out of its concern for the arts, handles this client on an almost *pro bono* basis, substantially reducing legal fees charged to the Symphony.<sup>195</sup>

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194. See <<http://www.skadden.com/mainpage.htm>>.

195. The firm's role here and that of Mr. Freund are obviously fictitious. Nothing in this hypothetical is intended to suggest the current policies or practices of either Skadden, Arps or of Mr. Freund. When students are, however, confronted even in a role play with real opponents, they necessarily have to adopt attitudes and strategies to meet the situation.

*(d) Compare and contrast the goals, needs, values, and power each relevant audience possesses.*

**Client:**

Her primary goal is to get reinstated.  
Her secondary goal is to have the manager punished or fired.  
She believes he was trying to invade her privacy and opposes the unlimited no-smoking policy as a matter of principle.  
Although possibly able to stop smoking, she has, so far, been unable to quit.  
She does through her own contacts and those of her father have the power to help the Symphony attract outstanding musicians.  
She also has the power through the same contacts to damage the reputation of the Symphony and of the manager in particular.

**The Board:**

Its primary goal appears to be to get the Symphony out of its financial crisis and to enhance its reputation.  
The Board has the power to reinstate Ms. Canoga.  
The Board has the power to rescind or modify the manager's no-smoking policy.  
The Board has the power to renew the manager's contract and may discharge him for cause before his four-year term expires.  
The Board wants to maintain good relations with the manager. Although he hasn't raised as much money as they had hoped, he is doing well.  
The Board minority just needs a single vote to rule in Ms. Canoga's favor.

**The Manager:**

His major goal is to keep his position. He must improve his fund raising or he may lose his job.  
His secondary goal is to advance the reputation of the Symphony.  
He values respect for his position and hates defiance.  
He is genuinely interested in promoting the health of members of the Symphony, but again he permits little disagreement with him.  
He has the power to rescind his dismissal of Ms. Canoga.  
He has the power to rescind or modify his no-smoking policy.

**Opposing Counsel:**

He probably believes in vigorously representing the Symphony.  
He probably wants the Symphony's reputation to get better.  
He probably wants to help ensure the financial health of the Symphony.  
He probably wants to avoid a lawsuit if it would damage either the reputation or the financial health of the Symphony.  
He has the power to advise the board on settlement.

He has the power to advise his firm regarding their *pro bono* policy towards the Symphony.

3. Research the evidence, that is, develop a discovery plan.

(a) informal research: interviews with Teaching Assistant A, a senior member of the Symphony very knowledgeable in the politics of the Symphony, interviews with the minority board members, Phillips and Gonzales (Teaching Assistants B and C), and with Murcillo (Teaching Assistant D), the musician that Harris initially fired, but whom the board reinstated.

(b) interrogatories to the manager and the board.<sup>196</sup>

(c) depositions of the manager and the three members of the board majority.

(d) requests for admissions.

(e) request for production of documents.

4. Devise a final strategy<sup>197</sup> for persuading the key audience(s).

We may be better off waiting until we approach the manager and the board before filing. The threat of a lawsuit may give us greater bargaining power than the settled fact of having filed the lawsuit, because filing may bring unwanted publicity to the manager, the board, and the Symphony. The threatened prospect of such publicity may give us more leverage than the publicity itself. We will, however, prepare the complaint ahead of time to show we are serious.

The manager has the power to end the dispute: A possible strategy would be to see if Ms. Canoga would be willing to apologize for yelling at the manager but remaining firm on her objection to the policy. The threat of a lawsuit and accompanying bad publicity may hamper the manager's fund raising efforts and diminish his position in the eyes of the board. We may be able to point to Ms. Canoga's cultural background as partially explaining her outburst. It might give the manager a face-saving way out. We might persuade our client to offer to give a benefit concert for the American Cancer Society, which would fit in with the manager's personal crusade against smoking. Additional interviews indicate that she is genuinely interested in quitting smoking and certainly wants to cut back from two packs a day to one-half of a pack a day. She believes she can meet this latter objective. We may be able to persuade our client to give an understanding that she is interested in stopping, but that she does not have to pledge to do so and nothing adverse will flow from her failure to in fact stop smoking. We should be able to

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196. Local court rule 46 of the Southern District of New York limits the first set of interrogatories to the names and addresses of potential witnesses and custodians of documents.

Some attorneys might wait until depositions are taken before serving a set of interrogatories on the chief opposing witnesses on the theory that the interrogatories may merely help to prepare the witnesses for the other side.

197. In the "Relief Requested" part of the formal legal research section, the researcher has set forth a preliminary strategy for resolving the dispute. After she has completed or come near to completing audience research, formal legal research, and necessary discovery, she can develop a final strategy.

point out that the manager's policy probably violates N.Y. law and that he should withdraw it.

The board has the power to end the dispute: the board is very ambitious. We could appeal first on the issue of fairness to Ms. Canoga, that a symphony aiming for national and world class status needs to have a reputation of being fair to musicians, that other nations of the world do not view smoking in the same light as we do, that if the Symphony truly wants to attract top talent from abroad, this type of policy reflects parochial thinking at its worst, that the manner of dismissal is unquestionably illegal under New York statute<sup>198</sup> and possibly illegal under the ADA, that the accompanying lawsuit will almost certainly produce negative publicity for the Symphony, both locally, nationally, and possibly internationally, and that consequently the board should reinstate Ms. Canoga. Compensatory and possibly punitive damages against the Symphony would be possible. Granting agencies may hear of the case and be less disposed towards the Symphony as a result.

We should also point out that Ms. Canoga has the contacts and network to help the Symphony in many ways. Her father could help the Symphony recruit an outstanding musician and might be able to help raise the Symphony's profile. Without saying so directly, we might subtly suggest that if they do not act reasonably, our client can use her contacts to harm the Symphony's reputation and its ability to raise funds. If neither the manager nor the board were to reinstate Ms. Canoga, then the remaining alternative would be a lawsuit in either state or federal court, with venue laid either in Westchester County or Manhattan. Laying venue in Manhattan would probably be more favorable to our client, because both Supreme Court Judges and the jury pool there would probably tend to favor working people more than employers. Jury verdict research indicates that Manhattan juries

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198. Formal legal research reveals that a New York statute specifically prohibits an employer from discharging an employee for the "legal use of consumable products" outside of working hours. N.Y. LAB. LAW § 201-d (McKinney 1998). The legislation grants an aggrieved employee the right to seek both legal and equitable relief. The main purpose of the legislation is to prohibit employers from making employees quit smoking. The plain meaning and legislative intent suggest that even the Symphony's recommended policy is illegal.

The Symphony may try to invoke an exception that provides: "Nothing in this section shall apply to persons who, on an individual basis, have a professional service contract with an employer and the unique nature of the services provided is such that the employer shall be permitted, as part of such professional service contract, to limit the off-duty activities which may be engaged in by such individual." N.Y. LAB. LAW § 201-d(5) (McKinney 1998). Ms. Canoga did have an at-will personal service contract; performing in a Symphony arguably renders the services "unique," and therefore the exception applies. The stated reason for the no-smoking policy is not only to lower insurance costs, but also to assure the high quality of each musician's performance. The legislative history behind this exception is unclear. No court opinions have yet interpreted it, but we should argue that nothing in the language or the legislative history suggests that musicians were denied protection under the Act.

Unlike many other jurisdictions, New York courts have been reluctant to make broad exceptions to the employment-at-will rule. *See Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987); *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). Consequently, section 201-d would probably be the strongest basis for recovery. (The ADA claim is weak.)

tend to grant personal injury plaintiffs more generous awards than Westchester juries (although Westchester juries are not stingy). Informal research (a conversation with an experienced practitioner) confirms that Manhattan would be the better venue not only for the jury, but also for the judges. Most of the Supreme Court judges in Manhattan have a Democratic affiliation whereas most in Westchester County are Republicans. This type of generalization does not necessarily translate into the prospect of our being assigned a favorable judge.<sup>199</sup> It is, however, probably more likely that we would obtain a more plaintiff-oriented judge and jury if we file in Manhattan than if we file in Westchester. More Clinton appointees, however, have been assigned to the Westchester "branch" of the Southern District of New York. Consequently, if we file a federal lawsuit in Westchester, we will probably get a more sympathetic judge.

Because the manager likes Ms. Canoga, we should appeal to him first. We have little to lose by such an approach. He may lobby the board against us if he turns us down, but he is likely to do so anyway. If we gain reinstatement from him, the case is over.

Should he deny the request for reinstatement, we should petition the board. We have to make the strongest case we can at these two levels. A lawsuit, even though successful, may not satisfy our client's main needs, that is, reinstatement.<sup>200</sup> Negotiations to obtain reinstatement may be more difficult after the suit itself has been filed, because the filing itself might cause negative publicity as noted above. If, however, neither approach works, we should be ready to file a lawsuit immediately. Not only will we have the complaint prepared well before our meeting with the board, but also we will have a legal memorandum completed, containing the state statute and supporting argument, demonstrating that the law clearly supports our position. In summary, we have begun informal discovery and are positioned to move the action ahead as fast as possible, if negotiations fail.

## II. Audience Analysis in the Litigation Context

Assume both the manager and the board deny Ms. Canoga's request for reinstatement.

The next major question is which audience to choose, that is, where to lay venue. The advantages of suing in federal court in Manhattan are that the jury will be drawn primarily from Manhattan and the Bronx, with a small percentage from Westchester County. Manhattan and Bronx juries are generally pro-plaintiff, certainly more so than if venue was laid in the Westchester "branch" of the Federal Court for the Southern District. Juries there are drawn primarily from Westchester and other upstate counties, where juries are generally not nearly as sympathetic to plaintiffs as are juries from Manhattan and the Bronx. The federal judiciary in this district is generally of high caliber and we can probably get a trial within a year and

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199. See FRANK, *supra* note 5.

200. As it turns out, N.Y. LAB. LAW § 201-d (McKinney 1998) does provide for equitable as well as legal relief, presumably allowing an aggrieved employee to gain reinstatement upon meeting the requirements of the act.



certainly within two years. The federal judges in Manhattan are, however, generally more conservative.

The advantages of suing in state court are that we could conduct voir dire of the jury and that we could obtain an interlocutory appeal if necessary. The state supreme court (the general trial court) sitting in Manhattan would be a better choice in which to lay venue than the corresponding court in Westchester County. Manhattan jurors are generally sympathetic to plaintiffs. They may be able to better identify with Ms. Canoga's plight, particularly since Manhattan jurors are often sophisticated concerning cultural and business matters. Manhattan judges have the reputation of being highly regarded; there are fewer political hacks sitting there as compared with those in the outer counties. One disadvantage of filing in the supreme court in Manhattan is that it would take much longer for the case to go trial than if we filed in federal court.<sup>201</sup>

[Assume that counsel decides to file in state supreme court in Manhattan, although federal court would probably have been the author's preference here. Researching state judges, however, is more difficult than researching federal judges. The example below provides an illustration of how to conduct such research.]

Suit has been filed in the Supreme Court of New York, New York County. New York Supreme Court Justice Sheila Abdus-Salaam has been assigned the case. Audience research indicates as follows: before coming on the Supreme Court, Judge Abdus-Salaam, from 1991-93 was a New York Civil Court judge. She was elected to the Supreme Court in 1993. Before serving as a judge, she was a staff attorney with East Brooklyn Legal Services; Assistant Attorney General, New York State Department of Law; and General Counsel, New York City Division of Labor Services.

She is a graduate of Barnard College and Columbia Law School (Charles Evans Hughes fellow). She is a member of the New York Women's National Conference of Black Lawyers; the National Lawyers Guild, and the Association of Black Women Attorneys. She is a member of the NAACP, former board chair of Harlem Legal Services, a member of Columbia Law School Board of Visitors; board member of Women's Housing and Economic Development Corp. and a board member of Contemporary Guidance Services. She is a Democrat.

It would appear that this judge would probably be sympathetic towards working people. On the other hand, some physicians and the American Cancer Society objected to Labor Law section 201-d on the grounds that it ultimately harms people's health and that the tobacco lobby supported the legislation. Furthermore, Ms. Canoga was earning \$70,000 annually before she was terminated, and, as the talented daughter of a famous musician, probably could find a position elsewhere. Nonetheless, this judge would appear to be sensitive to labor issues and would

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201. The above information on where to lay to venue was based on jury verdict reports, on New York Law Journal's web site profiling New York judges, and on a conversation with an experienced plaintiff's attorney.

probably be likely to construe the exceptions to the statute narrowly.

Her opinions<sup>202</sup> suggest, however, that she demands strict adherence to procedural requirements. She sanctioned attorneys representing the plaintiffs in an age discrimination suit, because the attorneys failed to allege sufficient facts to support necessary elements of the cause of action.<sup>203</sup> In the same case, she dismissed the complaint with prejudice.<sup>204</sup> Furthermore, she set aside a large verdict that a jury had given a plaintiff who had received substantial injuries.<sup>205</sup> The First Department later overturned her decision and reinstated the verdict, but reduced the award significantly.<sup>206</sup>

In a wage dispute, she did rule in favor of workers who had complained that a government agency had wrongfully computed their wages.<sup>207</sup> She has ruled in favor of employees in other cases as well.<sup>208</sup>

If there is any question that our complaint has not met the requirements for stating a cause of action, we should file an amended complaint, which we can amend as of right within the next five days. On the whole, however, if we prepare vigorously, we should receive, at the very least, a fair shake from this judge. We will probably be able to point this out to opposing counsel in our negotiations before trial. We can also mention the jury verdict research indicating how Manhattan juries are typically plaintiff oriented when the plaintiffs are either personal injury victims or working people.

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202. Research on Judge Abdus-Salaam was conducted from the following sources: New York Law Journal Web Site, which profiles New York judges; New York Law Journal LEXIS database; full text searching in Westlaw's New York cases database.

203. *Stephenson v. Hotel Employees and Restaurant Employees Union Local 100*, N.Y.L.J., August 29, 1996, at 21 (Sup.Ct. N.Y. County), *aff'd as modified* by 668 N.Y.S.2d 193 (N.Y. App. Div. 1998).

204. *Id.* See also *Keles v. Kennedy*, 656 N.Y.S.2d 239 (N.Y. App. Div. 1997) (reversing Justice Abdus-Salaam's granting defendant's motion for a default).

205. See *Place v. Federal Pacific Electric Co.*, N.Y.L.J., September 23, 1996, at 25 (N.Y. Sup.Ct.) (vacating jury's verdict for \$2,955,000 for electrician when electrical switch manufactured by defendant exploded when plaintiff tried to turn it off).

206. See *Place v. Federal Pacific Electric Co.*, 659 N.Y.S.2d 29 (N.Y. App. Div. 1997) (reducing award which it identified as \$595,000 to \$175,000).

207. See *Matter of Diano v. Hevesi*, N.Y.L.J., Jan. 27, 1997, at 28, col. 4.

208. See *Matter of Montella v. Bratton*, N.Y.L.J., Feb. 7, 1997, at 28, col. 3 (Sup. Ct., N.Y. County) (upholding City Civil Service Commission's decision to reinstate police officer who used cocaine); *Schwaller v. Squire Sanders & Dempsey*, N.Y.L.J., Aug. 22, 1997, at 22, col. 1 (Sup. Ct., N.Y. County) (denying law firm's motion for summary judgment in gender discrimination suit where junior associate alleged that her breaking up relationship with a partner led to her being denied a partnership); *Cherry v. Coudert Brothers*, N.Y.L.J., May 28, 1996, at 1, col. 1 (Sup. Ct., N.Y. County) (refusing to dismiss gender discrimination suit against firm for allegedly giving plaintiff the "option" to transfer to Singapore but not New York after she returned from her three month maternity leave).

*Moral Considerations*

The strategies fit within the Rules of Professional Responsibility. By choosing the best audiences possible for the best results and bargaining power, we are zealously representing the rights of our client. We are making use of the available options that the law provides. In our representation, we are not engaged in making false statements of fact or law to either opposing counsel or to the court. From a moral point of view, maximizing Ms. Canoga's bargaining power is justified, particularly given the highly competitive nature of the classical music business. The employer here has considerably more bargaining power than she. Furthermore, the employer is represented by highly competent counsel with enormous resources. Lastly, the employer has seriously encroached upon her privacy. Consequently, the strategies fit well within the bounds of moral precepts and professional responsibility.