STRATEGY OR STRATAGEM: THE USE OF IMPROPER PSYCHOLOGICAL TACTICS BY TRIAL ATTORNEYS TO PERSUADE JURORS

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I. INTRODUCTION

Many Americans have been captivated by the theatrics of the courtroom. Some have experienced the drama at home, watching a re-run of *The Practice*; or from a luxury box, mesmerized by the "razzle dazzle" of Billy Flynn—the best criminal defense attorney in *Chicago*; or curled up in bed, reading the last chapters of the latest John Grisham novel; or confined to a wooden, banister-enclosed jury box in fulfillment of their civic duty. In every one of these situations, the slickly dressed, overly confident, slightly irreverent, and coolly defiant attorney takes center stage. He attracts us with his charm, invites us to join him in the quest for justice, wins our hearts with his powerful voice and penetrating stare, and conquers our minds with his split-second judgment and nimble strategizing. By the end of the episode, musical, novel, or trial, we adjourn to deliberate. We weigh the evidence; we review the law; and we render a verdict. Back in the courtroom the decision is announced. Assured that we made the *right* decision, we attempt to share a glance with the attorney whose client now appears to have had the weight of the world lifted from his shoulders. Minute smiles creep onto our faces as the attorney adjusts his tie and shoots us a nod, as if to say we did the *right* thing. Somehow this reassurance completes the experience. We are ushered out of the courtroom, without any thought about what really persuaded us, or how our vote was actually won. Did we find the truth? Did we do justice? Or was it all just the bright lights, elaborate costumes and makeup, and the masterful performance of the lead act—the triumphant lawyer?

The jury trial plays a central role in the American conception of justice and distinguishes America's adversarial system of dispute resolution from the inquisitorial system used elsewhere.[1] Legal commentators explain that the purpose of the jury trial is to discover the

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1. *See* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 15 (1990).

truth.[2] Given that purpose, the litigation process should be designed to recreate reality in the courtroom, so that the findings of fact made by the jury "coincide with what actually occurred in the past."[3] Commentators disagree on whether conceptually the adversarial or inquisitorial system is best suited to discover the truth.[4] Under America's adversarial system, biased attorneys present partisan renditions of events to a jury, the finders of fact.[5] Conversely, in an inquisitorial system of justice, truth is sought through "state inquest."[6] A neutral judge acts as the state's representative in an inquisitorial system and predominately "'controls the court's investigation, calls witnesses and establishes the scope of the inquiry,'"[7] while the attorney's role in the trial is limited to "'proposing additional questions for the judge to ask.'"[8]

Considering the differing roles of the attorney in the adversarial and inquisitorial system, the adversarial system seems more ripe for attorney misconduct, which distorts the truth. The adversarial judicial system is more vulnerable to attorney misconduct because the attorney maintains more control over the case than the attorney in an inquisitorial system. The attorney in an adversarial system decides which legal arguments to make and which factual evidence to present to the jury.[9] Beyond framing a case's issues and strategically presenting evidence, attorneys further their clients' interests by engaging in a variety of persuasive

2. *See* Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 97-100 (1996) ("None of the trial's functions are more central to its legitimacy than the search for truth. . . . Arguably, the most compelling claim supporting the adversary system of trial court dispute resolution is that it is the best judicial system for truth-finding."); *see also* Brodin, *supra* note 1, at 22 ("The jury finds the truth. It decides the facts. This is the major function of the jury . . . . The jury does not decide the rules of law to be applied to the facts in the case.") (quoting J. FRANK, LAW AND THE MODERN MIND 183-85 (1963)).

3. *See* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 WASH. L. REV. 477, 530 (1990). The conception of the adversarial system of dispute resolution that identifies the "search for the truth" as the goal of trial "assumes roughly that some objective truth exists and that the processes of litigation recreate that reality in a courtroom to ensure litigants the right to a correct outcome—that the findings of fact coincide with what actually occurred in the past (or will occur in the future)." *Id*.

4. Strier, *supra* note 2, at 143. The question of which system, the adversarial or inquisitorial, is *better* is unanswerable. *Id*. The correct inquiry is, better at what? The value each system places on the roles of the attorney and the judge reflect the value the system places on truth-seeking. *Id*. "Under the inquisitorial system, the judge continues to search the facts until satisfied that she is well informed enough to render a correct decision. Under the adversary system, the partisan attorneys introduce only as much evidence as will help their cases." *Id*.

5. Strier, *supra* note 2, at 142.

6. *See id*.

7. *Id*. (quoting FRANKLIN STRIER & EDITH GREENE, *The Adversary System: An Annotated Bibliography* 3 (1990)).

8. *Id*.

9. *Id*.

behaviors that have relevance to neither the law nor the facts of the case.[10] One commentator explained the extent of the problem:

> The attorney's overriding allegiance is to *the client, not to the truth.* In pursuing the role of zealous advocate, it remains unclear to what lengths the attorney may go in *distorting or hiding the truth*. This is not to suggest that there are no formal limitations on attorney behavior under the adversary system. . . . The problem is that they are generally vague or rarely enforced. Hence the scope of the attorney's tricks is really limited more by the abundant fecundity of attorney imagination than by clear and enforced restrictions.[11]

Attorneys do not rely solely on their own imaginations in formulating "tricks" of persuasion. Psychological studies applied to the courtroom have revealed techniques to improve a lawyer's powers of persuasion that focus on the following: "(1) the impact of the evidence, (2) nonverbal behavior of the lawyers, witnesses, and parties, (3) the attractiveness of the criminal defendant, (4) the verbal content of evidence and arguments, (5) and the relative impact of jurors' attitudes about crime and defendants' characteristics."[12] Application of psychology to trial advocacy can both facilitate and hinder the truth-seeking function of the trial. An attorney's employment of "powerful speech" exemplifies a truth-furthering use of psychology at trial.[13] In general, a "powerful" speaker avoids the use of hedge words such as "sort of," intensifiers such as "really," meaningless filler such as "you know," and inquisitive intonation.[14] Jurors regard lawyers and witnesses who use powerful speech as more credible.[15] Employing such a technique to increase the effectiveness of a lawyer's presentation does not offend the truth-seeking function of trial.[16]

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10. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 484 (1987).

11. Strier, *supra* note 2, at 117 (emphasis added).

12. Lance Stockwell & David C. Schrader, *Factors that Persuade Jurors*, 27 U. TOL. L. REV. 99, 99 (1995).

13. Gold, *supra* note 10, at 484-85.

14. *Id*. ("Powerless speakers use hedge words (sort of, kind of, around), intensifiers (very, really), meaningless filler words (you know), and terms of personal reference (my good friend, Mrs. Smith). Another element of powerless speech is the use of an inquisitive intonation at the end of a declarative sentence, suggesting that the speaker seeks the listener's approval for the declaration. Powerful speech avoids the characteristics of powerless speech.").

15. *Id*.

16. *See generally id.* Unlike Professor Gold, this Comment argues that all extra-legal decisionmaking, that is making decisions based on information irrelevant to the legal issues and facts presented, does not subvert the truth-seeking process of trial. The credibility of counsel is irrelevant to the legal issues and facts; however, an attorney's effort to tailor her presentation according to psychological findings in order to more effectively communicate with the jury does not necessarily

Contrastingly, attorneys use some psychological tactics to contravene the truth-seeking function of the jury trial.[17] Improper witness examination techniques, for instance, may inhibit the discovery of truth. Attorneys are able to induce jurors to draw incorrect inferences "in the absence of confirming testimony" by simply asking a question.[18] For example, a lawyer representing a defendant on trial for rape will ask the rape victim about his or her prior sexual history, even if the attorney has no information corroborating an inference that the victim was promiscuous in the past, simply to plant the idea in the jurors' minds.[19] Additionally, defense counsel can "undermine the force of a plaintiff's evidence simply by lengthening the presentation of the defendant's case, thereby causing the jury's memory of the plaintiff's evidence to fade."[20] Manipulating the jury into drawing incorrect inferences or applying diminished weight to the prosecution's evidence, without any legal grounds, differs significantly from the use of "powerful speech." These *stratagems* do not increase the impact of substantiated facts, as the use of "powerful speech" does. Rather, such psychological techniques mislead the jury as to the operative or circumstantial facts of the case, as well as the proper value to assign to such facts. This brand of psychological strategy flies in the face of the truth-seeking function of the jury trial and transforms the courtroom into nothing but theater—possibly a reflection of the truth, but a distorted, biased, and misleading version at best.

Unfortunately, the widespread and relatively unhampered use of improper psychological tactics persists since lawyers associate their ability to win a case with the use of such techniques.[21] The notion is that if an attorney utilizes improper psychological tactics, the opposing counsel must follow suit to level the playing field.[22] Reform of the

contravene the truth-seeking function of trial. Using psychological study to improve public-speaking skills cannot be per se improper.

17. *Id*. at 481-83.

18. *Id*. at 488.

19. *Id*.

20. *Id*. at 497.

21. *Id*. at 484-85.

22. *See generally* Brian E. Mitchell, *An Attorney's Constitutional Right to have an Offensive Personality?* United States v. Wunsch *and Section 6068(F) of the California Business and Professions Code*, 31 U.S.F. L. REV. 703, 703 (1997). This article addresses a wide variety of offensive behaviors employed by attorneys during trial and thus covers a broader scope of tactics than this Comment. However, its discussion of the overall breakdown in the ethical or "civil" practice of the law by litigators applies to the analysis of the use of improper psychological tactics at issue in this Comment, because both Mitchell's article and this Comment argue that such behavior is unethical. "For every practicing attorney there is a line between conduct that connotes the zealous representation of the client and conduct that is abusive, unprofessional, and offensive. Increasingly, many attorneys appear willing to

American Bar Association Model Rules of Professional Responsibility is necessary to ensure success independent of the use of improper tactics. Such tactics must be condemned as unethical, and lawyers must be empowered to punish abuses. This Comment argues that an additional provision to the American Bar Association's Model Rules of Professional Conduct castigating the use of improper psychological tactics is necessary to safeguard the truth-seeking function of our adversarial trial system.

Part II of this Comment examines various psychological tactics employed by litigators to persuade jurors and attempts to distinguish those tactics that contravene the truth-seeking function of trial from those that properly enhance a lawyer's effectiveness. Additionally, Part II explores various means of policing the use of those psychological tactics that subvert the discovery of truth, and concludes that the American Bar Association should adopt an ethical rule addressing the use of improper psychological tactics.

In particular, Section A provides examples of legitimate and improper psychological tactics and distinguishes those tactics that are legitimate trial strategy from those that subvert the truth-seeking function of the jury trial. Section B argues that reform is needed to prevent and punish attorneys who use improper psychological tactics and suggests various means of reform. The three main participants in trial—the judge, jury, and attorneys—are considered possible conduits for reform. First, subsection (1) explores judicial control of the use of improper psychological tactics through the use of Federal Rule of Evidence 403 or the contempt power. Next, subsection (2) considers modification of the normal operation of the jury as a means to control the effects of improper psychological tactics on jury decisionmaking. Suggested reforms include allowing jurors to question witnesses, providing jury instructions that warn jurors about the use of psychological tactics before the presentation of evidence, and altering the composition of the jury. Both the judge and jury means of controlling the use of improper psychological tactics share the same flaw—they shift power from the attorneys to the judge or the jury—and thus frustrate the delicate balance of power between the trial participants unique to the adversarial system of justice. Finally, subsection (3) suggests that in order to maintain such a balance attorneys should control the use of improper psychological tactics.

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cross that line." *Id*. Commentators suggest that this trend may be due to the fact that lawyers think this is the way trials are won, clients expect this behavior from their attorney, and the increasing number of attorneys. "[C]ourts and state agencies . . . have turned to ethical and civility codes to prevent this conduct from having a negative impact on the proper administration of justice." *Id*. at 703-04.

Next, Section B proposes a Rule for inclusion in the American Bar Association's Model Rules of Professional Conduct condemning the use of improper psychological tactics and placing responsibility on attorneys to recognize and report such abuses. Finally, Part III concludes in an appeal to the public at large and members of the legal community to embrace and advocate adoption of the proposed Rule.

II. DISCUSSION

In his article, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, Professor Victor Gold argues that all attorney use of psychological persuasion "influence[s] juries subconsciously and induce[s] decisions on legally improper bases."[23] Professor Gold explains that these techniques deprive the jury of its *ability to function properly*.[24] One of the main purposes of the jury trial is to discover the truth; it logically follows that a properly functioning jury is one that is able to discover the truth. In this way, the jury acts as a conduit for the detection of truth. Thus, where the utilization of psychological tactics yields jury decisions that do not reflect truth, the adversarial system of justice has been undermined. The subsequent section discusses various legitimate and improper uses of psychological persuasion, distinguishes improper tactics as those that contravene the truth-seeking function of trial, and suggests judicial, jury, and attorney methods of control to restrict the use of improper psychological tactics.

A. Psychological Tactics Employed by Litigators to Persuade Jurors

Most commentators identify the search for truth as the main purpose of the trial.[25] However, sometimes the overall objective of the jury trial and the lawyer's perceived purpose, to win the case, are incompatible.[26] Routine jury manipulation is one impediment to the truth-seeking

23. Gold, *supra* note 10, at 481.

24. *Id*.

25. Raveson, *supra* note 3, at 530 (noting that where the search for truth is considered the purpose of the trial, it is assumed that some objective truth exists and the process of litigation recreates that reality in the courtroom to ensure litigants the right to a correct outcome).

26. *Id*. at 532 ("From the investigation of the facts to the presentation of the evidence, partisan advocates control the process of developing the truth and have a broad arsenal for manipulating the perception of the truth in order to achieve the result they desire—victory for their clients. Where victory and truth are mutually incompatible, as they often are, for one side or the other, the lawyers' duty is to achieve victory, not to expose the truth.").

objective of trial.[27] In fact, persuasive tactics used by attorneys are the single greatest source of truth distortion and dissimulation in the adversarial system.[28] With the infusion of modern science into all fields of study, litigators no longer rely on common-sense principles of persuasion, but apply psychological study to enhance their persuasive abilities. Commentators are concerned that lawyers' use of psychological persuasion gives them an unfair advantage over their opponents and ultimately undermines the attainment of justice.[29] This section discusses various psychological tactics employed by litigators and distinguishes tactics that legitimately persuade jurors in subversion of the truth-seeking function of trial.

1. Legitimate Uses of Psychological Tactics to *Persuade* Jurors

An effective trial lawyer must master the art of *persuasion*. However, persuasion differs from *manipulation* and *coercion*.[30] The term "persuade" means to "move by argument, entreaty, or expostulation to a belief."[31] In contrast, "manipulate" means to "control or play upon by artful, unfair, or insidious means especially to one's own advantage,"[32] and "coerce" means "to compel to an act or a choice."[33] One commentator distinguished persuasion from manipulation and coercion as follows:

> Persuasion is in itself compelling, but it does not compel; persuasion changes the action of the one persuaded because his or her basic belief and thoughts on a subject are changed by what is seen or heard, *not from force and not from reluctance*. True persuasion, unlike manipulation [or coercion], does not entail a person reluctantly overcoming misgivings to agree with the manipulator for reasons of their own. Unlike manipulation, true and complete persuasion is permanent; it does not change when the manipulator is out of sight and hearing.[34]

An ethical trial lawyer should never lie or distort the truth, nor use manipulation or coercion to affect a juror's decision.[35] While the study

27. Strier, *supra* note 2, at 98.

28. *Id*. at 116.

29. J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 741 (1988).

30. Celia W. Childress, *An Introduction to Persuasion in the Courtroom: What Makes a Trial Lawyer Convincing?*, 72 AM. JUR. TRIALS 137, § 9.

31. WEBSTER'S NEW COLLEGIATE DICTIONARY 849 (1981).

32. *Id*. at 693.

33. *Id*. at 215.

34. *See* Childress, *supra* note 30, § 9 (emphasis added).

35. *Id*. ("Outright lies or distortion of the truth should never play a part in the reasoned discourse

and employment of *persuasive* techniques by trial lawyers to influence jurors is fully consistent with ethical norms, *manipulation* and even *coercion* of jurors contravenes ethical norms. Therefore, psychological tactics aimed at persuading jurors, as opposed to manipulating or coercing jurors, are per se ethically permissible. The following subsection discusses various legitimate psychological tactics, including the strategic use of oral rhetoric and visual and aural cues, and strategic structural techniques regarding the presentation of evidence.

Perhaps the most obvious influence of psychological study on trial advocacy is the study and application of oral rhetoric or public-speaking skills. Behavioral scientists at the Duke University Law and Language Project studied the use of verbal strategies in the courtroom and concluded that lawyers "can induce jurors to make judgments about the credibility of a speaker through the manipulation of the 'powerfulness' of the speaker's language."[36] The distinction between "powerful" speech and "powerless" speech depends on word choice and delivery:

> Powerless speakers use hedge words (sort of, kind of, around), intensifiers (very, really), meaningless filler words (you know), and terms of personal reference (My good friend Mrs. Smith). Another element of powerless speech is the use of an inquisitive intonation at the end of a declarative sentence, suggesting that the speaker seeks the listener's approval for the declaration. Powerful speech avoids the characteristics of powerless speech.[37]

Studies show that jurors perceive powerful speakers as more credible than powerless speakers and award plaintiffs that employ powerful speech significantly larger damages than plaintiffs that use powerless speech.[38] These results encourage lawyers to employ powerful speech and train their witnesses to do the same.[39]

The strategic use of visual and aural cues in an attorney's presentation to the jury is another application of psychological study on trial

in any public forum; our moral code leaves no room for lies. Neither are coercion or manipulation acceptable in the judicial process. Coercion uses intimidation, threats, or pressure to force an individual to think or act in a certain way; manipulation influences deviousness.").

36. Gold, *supra* note 10, at 484.

37. *Id*. at 484-85.

38. *Id*. at 485 ("However, linking credibility with speech style proved to be a mistake. The researchers found that the 'power' component of linguistic style was not correlated with witness truthfulness. Instead, it was correlated with witness social status. Witnesses who were poor, uneducated, or unemployed had a tendency to use powerless speech while witnesses with business or professional backgrounds tended to use powerful speech. Nonetheless, the perceived correlation between speech style and credibility was strong; jurors persisted in linking credibility with the power component of speech even when the judge's instructions cautioned against it.").

39. *Id*.

advocacy.[40] Visual cues include facial image and expression; eye contact and eye movement; wardrobe choice; nonverbal communication through gestures, stance, and movement; physical appearance; and objects held.[41] Visual cues are important to a juror's evaluation of the lawyer's qualifications and abilities,[42] since observance of certain visual cues allows jurors to impute certain personality or character traits to a lawyer.[43] As a result, lawyers who master certain visual cues proven to suggest capability will more effectively persuade the jury to accept their clients' positions.[44] For instance, an attorney wearing a vividly colored geometric tie may suggest to the jurors that he has a flamboyant personality.[45] Similarly, shaking a pen or pencil ever so slightly can indicate that an attorney is anxious.[46]

Aural cues have also been studied and applied to courtroom behavior, since "the voice can be a potent tool that, together with good visual cues, improves the chance to win cases."[47] Any speaker, including an attorney, who uses her voice as a tool of persuasion will more effectively influence her audience, such as a panel of jurors.[48] Aural cues, like visual cues, serve to impute personality and character traits on a lawyer. For instance, certain aural cues can indicate confidence, nervousness, and even deception; therefore vocal quality can repel or compel jurors.[49] In particular, continual throat clearing indicates nervousness; repeating words and hesitating in speech indicates a lack of confidence; and pausing before a critical statement indicates deceit.[50] Conversely, a rich baritone voice indicates credibility.[51]

Oral rhetoric, as a means to persuade jurors, is an obvious application of psychology to trial advocacy.[52] Another less apparent and more contemporary application of psychology in the courtroom arose in reaction to technological advancement. Generally, technology has

40. Childress, *supra* note 30, §§ 15-18.

41. *Id*.

42. *Id*. § 15.

43. *Id*. § 16.

44. *Id*.

45. *Id*.

46. *Id*. Also, a lawyer leaning back or rocking in his chair, instead of sitting straight and still, communicates to the jury that the lawyer does not have the proper respect for the courtroom and possibly the trial process as a whole.

47. *Id*. § 17.

48. *Id*.

49. *Id*.

50. *Id*. § 18.

51. *Id*.

52. *Id*. § 2.

transformed the way humans receive and process information.[53] Specifically, technology has changed the way evidential information is communicated to the jury during trial. Attorneys no longer rely solely on oral presentation of their cases, but rather construct and display visual aids to enhance the persuasive quality of their presentations.[54]

A particular technological advancement, television, has affected the way people receive information, and attorneys have had to adjust accordingly.[55] Television has had a remarkable impact on how Americans judge people.[56] Because of the time constraints posed by the TV medium (most shows being an hour or less), writers have had to simplify characters so that viewers are able to instantly evaluate whether they like and trust, or dislike and distrust, a particular character.[57] "Where in past decades people often reserved judgment, in America today they have been trained, through thousands of hours of TV watching, to react quickly to the 'characters' they see around them."[58] Extending these realities to the courtroom, attorneys must be aware that although jurors may insist that they waited until the case's conclusion to make up their minds about the parties, consistent with their TV conditioning, jurors usually form opinions of the parties and lawyers much more quickly.[59] "Jurors usually form an opinion rapidly—allegiance or non-allegiance to one side or another—and spend the remainder of the case substantiating that opinion."[60] Armed with this knowledge, lawyers are urged in trial practice books to make a strong showing for their clients in their opening statements.[61]

Not only do jurors form opinions of the attorneys and the parties prematurely, but as a result of TV viewership, jurors' attention spans have decreased such that ten to twenty minutes of concentrated listening seems to be the limit.[62] "[J]urors have come to expect the short, dramatic, and pithy opening statements and closing arguments made by

53. *Id*. § 3 ("The wide national shift into the technological age has influenced the way cases are tried today.").

54. *Id*. Modern technology has also affected aspects of trial outside the courtroom. For instance, the methods of evidence examination and document retrieval have been transformed in light of modern technology.

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*.

61. *Id*.

62. *Id*.

television lawyers every week on popular television shows."[63] Therefore, lawyers are well-advised to use such knowledge in preparing their opening and closing statements.[64]

Besides applying oral rhetoric, visual and aural cues, and principles of persuasion gleaned from scientific studies on the effects of modern technology, lawyers also structure the presentation of evidence to ensure maximum persuasion. Strategic lawyers will structure their arguments and presentation of evidence according to the "primacy effect" to emphasize their most favorable arguments or evidence and diminish the impact of unfavorable arguments or evidence.[65] The most favorable evidence and arguments are presented first to ensure the greatest possible impact and impression on the jury.[66]

While Professor Gold regards as improper all uses of psychological persuasion that induce jurors to render decisions based on extra-legal factors,[67] this Comment distinguishes proper from improper psychological tactics. All the strategies discussed in this subsection are fully consistent with the ethical practice of the law. Even though such persuasive techniques induce jurors to decide cases on extra-legal bases—for instance, the attorney's speaking skills, which are irrelevant to the legal and factual issues of the case—this Comment does not adopt Professor Gold's position that *all* extra-legal decisionmaking is improper.

The psychological tactics discussed in this subsection are legitimate advocacy techniques because they simply increase the impact, impression, or influence that the lawyer, and therefore the arguments and evidence presented by the lawyer, has on the jury. These techniques do no more than aid in the communication of the factual and legal issues

63. *Id*.

64. *Id*.

65. Gold, *supra* note 10, at 495-96.

66. *Id*. at 495.

67. *See id*. at 483. Professor Gold's article argues that all psychological techniques that induce jurors to base their decisions on extra-legal factors are improper. According to Gold, tactics such as placing the client's strongest arguments first and prolonging the presentation of evidence, so that the jury will be less likely to recall some of the prosecution's testimony, induce jurors to base their decisions on factors outside of the facts and legal issues of the case. Gold has termed these techniques as "weight manipulators" since they induce the jurors to prescribe a higher or lower probative value to certain evidence. Gold considers any decision based on extra-legal factors to be improper and thus condemns the use of weight manipulation. This Comment considers what Gold terms "weight manipulators" as proper uses of advocacy techniques. This Comment argues that weight manipulators do not controvert the truth-seeking function of the trial, since all things equal, the jury is still rendering a decision on correct facts and inferences. The jury is simply persuaded to assign value to certain facts and testimony according to the persuasiveness of the lawyer. This Comment argues that such persuasion is not improper or unethical.

of the case. They do not induce jurors to draw incorrect inferences or intentionally seek to distract jurors from testimony or evidence. Therefore, these tactics do not subvert the truth-seeking function of the jury trial and, therefore, are ethical. The next subsection examines psychological tactics used by trial lawyers that exceed the boundaries of ethical advocacy. Such improper psychological techniques include the use of prejudicial witness examination to induce jurors to draw incorrect inferences and meaning manipulation to induce jurors to incorrectly decide that evidence is not probative of a fact in issue. Since such techniques subvert the truth-seeking function of the jury trial, they are unethical.

2. Improper Uses of Psychological Tactics to *Manipulate* Jurors

Some psychological techniques subvert the truth-seeking function of the jury trial and are therefore improper and unethical. Perhaps the most often utilized truth-distorting psychological technique is the witness examination question designed to induce incorrect inferences. "[R]esearch reveals that juries are highly susceptible to the indirect assertion of facts by a lawyer during witness examination."[68] Sometimes, simply asking a question is sufficient to induce the jury to draw an inference in the absence of confirming testimony.[69] For instance, while cross-examining an alleged rape victim, a defense attorney may ask a question about the victim's prior sexual history and thereby induce the jury to draw the inference that the alleged victim is promiscuous.[70] This inference may result even though the attorney has no information supporting such an assertion.[71]

Additionally, the manner in which a question is phrased can generate varying and often incorrect inferences. Consider these two questions: "The defendant is not a friend of yours, is he?" and "The defendant is not an enemy of yours, is he?" While the first question implies that the defendant is an enemy, the second question implies that the defendant is neither a friend nor an enemy.[72] A lawyer skilled and willing to use these psychological techniques will formulate inquiries to deliberately induce jurors to draw specific inferences. Naturally, psychological tactics that produce incorrect, or untrue, deductions in the jurors' minds about the operative facts of the case undermine the truth-seeking goal of

68. *Id*. at 488.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*. at 488-89.

the trial and are therefore improper and unethical.

Other psychological techniques, "meaning manipulators," induce the jury to incorrectly decide that evidence is or is not probative of a fact in issue and, accordingly, subvert the truth-seeking function of the jury trial.[73] An example of meaning manipulation used to "diminish the ability of jurors to perceive evidence simply by manipulating other stimuli in the courtroom" involves loading the courtroom with spectators during examination of a witness who may be damaging to the lawyer's case.[74] The lawyer hopes that the introduction of a variety of new stimuli in the courtroom will drown out the stimuli offered by the witness testimony.[75] Other common attorney tactics intended to distract or mislead the jury through meaning manipulation include: raising objections to interfere with opposing counsel's opening and closing statements; interrupting the witness simply to be disruptive; dropping books and paraphernalia on the floor to distract the jury; making unsubtle remarks and gestures in the hallway near, but not directed at, the jurors during recesses; and positioning exhibits not admitted into evidence so that jurors will see them.[76]

Lawyers do not increase the effectiveness of their case by dropping books and paraphernalia on the floor to distract jurors during a crucial moment in the opposing counsel's case. The jury entirely misses portions of testimony or is unable to fully digest the testimony because of the distractions. Likewise, positioning excluded exhibits so that jurors can see them does not increase the persuasive impact of properly admitted evidence, but rather seeks to inject improper and perhaps misleading evidence into the record. Unlike the psychological techniques discussed in the previous section, this sort of manipulation undermines the truth-seeking function by preventing the jury from receiving testimony or by introducing false or misleading evidence into the record.

Given that one of the main purposes of the trial is the discovery of truth, it follows that one of the main functions of the jury is to render decisions based on the truth. Thus, the proper administration of justice depends largely on the conveyance of all the relevant facts and applicable law to the jury. Lawyers play an integral part in the truth-seeking function of the trial by acting as the conduit through which the jury receives evidence. Great responsibility rests with the lawyer to

73. *Id*. at 494-95.

74. *Id*.

75. *Id*. at 495.

76. Strier, *supra* note 2, at 122.

ensure that the jury bases its decisions on the truth. Naturally, the use of tactics to subvert the truth-seeking function of the trial is improper and unethical. The lack of adequate checks on the employment of such improper psychological tactics creates a deficiency in America's adversarial system of dispute resolution. In order to remedy this deficiency, the following section suggests several possible means of monitoring and punishing the use of such techniques.

B. Various Means of Preventing the Use of Improper Psychological Tactics

An inherent conflict exists between the overall goal of trial and the lawyer's duty to zealously represent the client.[77] While a trial is designed to discover the truth, a lawyer seeks to win the case.[78] Today, attorneys frequently utilize stratagems to advance the interests of their clients to the detriment of the truth-seeking process.[79] One scholar suggests that conduct exceeding the bounds of zealous representation inhibits the proper administration of justice and is necessarily unethical:[80]

> For every practicing attorney, there is a line between conduct that connotes the zealous representation of the client and conduct that is abusive, unprofessional, and offensive. Increasingly many attorneys appear willing to cross that line. Commentators have suggested many reasons for this trend, including: attorneys' belief that abusive, unprofessional, and offensive conduct wins lawsuits; client demand for

77. *Id*. at 117.

78. Raveson, *supra* note 3, at 532.

79. Strier, *supra* note 2, at 116.

80. Mitchell, *supra* note 22, at 711. This article discusses the constitutional implications of California Business and Professions Code Section 6068(f) which mandates that an attorney shall "abstain from all offensive personality." *Id*. at 704. Although the U.S. Court of Appeals for the Ninth Circuit declared the section unconstitutional, other circuits' interpretations of the section reveal that the mandate was adequately limited. *Id*. at 705-06. *Hawk v. Superior Court* and *Snyder v. State Court* reveal that the section only applies where the attorney's behavior *actually* interferes with the proper administration of justice. *Id*. at 706-07. In these cases the attorney charged with violating section 6068(f) made disparaging comments about and directed towards opposing counsel during trial. *Id*. "The courts' decisions in *Snyder* and *Hawk* illustrate how the California courts have balanced the need for advocacy with the need for the orderly administration of justice. A careful reading of case law involving section 6068(f) validates the conclusion that an attorney is only charged with a violation of the statute in conjunction with other aggravating conduct if the conduct in question has its own adverse effect on the administration of justice." *Id*. at 707. The courts in these cases seemed to consider the attorneys' behavior as interfering with the proper administration of justice because judicial resources, like court time, had to be allocated to the offensive behavior. *Id*. Such case law is relevant to this Comment because it involves attorney behavior that is extra-legal and does not promote the discovery of truth.

> more aggressive behavior from their attorneys; the increased pace at which law is being practiced; and the increased number of practicing attorneys. For these reasons, courts and state agencies . . . have turned to ethical and civility codes to prevent this conduct from having a negative impact on the proper administration of justice.[81]

Since the purpose of trial is to discover the truth, then the proper administration of justice must promote and ensure this goal. It follows then that attorney behavior that is designed to interfere with the truth-seeking process of trial disrupts the proper administration of justice. Professor Gold argues that all psychological tactics are improper.[82] However, not all decisions affected by psychological persuasion fail to reflect the truth. Psychological tactics that are consistent with the attorney's duty of zealous representation and those tactics that are unethical are distinguished by the overall goal of trial—the discovery of truth. The employment of psychological tactics that either promote or at least do not contravene the truth-seeking function of trial is proper, and the use of psychological tactics that subvert the truth-seeking function is improper.[83]

Assuming that attorney use of psychological tactics that subvert the truth-seeking function of trial can be identified and distinguished, the problem of preventing and punishing such behavior remains. As an initial matter, three categories of participants in a trial, the judge, the jury, or the attorney, are the bodies through which the use of improper tactics may be controlled.[84] The following subsection analyzes each participant's ability to control the use of improper psychological tactics and discusses the implications of granting each participant the sole responsibility of preventing and punishing such behavior.

1. Judicial Control of Improper Psychological Tactics

The judge is one participant in the trial who could police the use of improper psychological tactics. The judge's main sources of authority to deter the use of improper psychological tactics are the power to exclude evidence and the power to hold attorneys in contempt of court.[85]

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81. *Id*. at 703-04 (emphasis added).

82. Gold, *supra* note 10, at 497 (stating that all covert advocacy persuades subconsciously "without the jury's full conscious awareness of what is affecting its thinking or why").

83. The distinction between the use of psychological tactics that subvert the truth-seeking function of trial and those that do not was drawn in Section II.A.

84. Gold, *supra* note 10, at 498-502.

85. *Id*. at 510 ("Judges already have broad discretion to exclude evidence that threatens to mislead, confuse the issues, or work unfair prejudice."); Raveson, *supra* note 3, at 485 ("Courts have always claimed the inherent power to protect themselves by punishing for contempt individuals who

a. Federal Rule of Evidence 403 as a Means of Judicial Control

An expansive application of Federal Rule of Evidence 403 to exclude evidence admitted through or transmitted to the jury as a result of improper psychological tactics is a judicial method of ensuring the discovery of truth.[86] The Federal Rules of Evidence favor admissibility of evidence over exclusion.[87] "This orientation toward admissibility suggests an underlying faith that triers of fact can separate the wheat from chaff," which may not always be an accurate assumption.[88] Therefore, Federal Rule of Evidence 403 limits the tendency towards widespread admissibility by granting the judge discretion to exclude otherwise admissible evidence "when the probative value of that evidence is 'substantially outweighed' by, among other things, 'unfair prejudice.'"[89]

"Rule 403 is intended to provide protection against the danger that the enlarged scope of admissibility under the Federal Rules will place before the trier of fact evidence which may lead to an *improper decision*."[90] Therefore, where evidence is admitted or communicated to the jury through the use of improper psychological tactics, a liberal interpretation of Rule 403 suggests that evidence tainted by improper covert advocacy techniques is too prejudicial to admit.

In a typical application of Rule 403, the evidence *itself* is "unfairly prejudicial" and thus excludable. Under the more extensive application of the Rule proposed herein, evidence that was admitted through the use of improper psychological tactics or communicated to the jury accompanied by the use of such tactics would be excludable. For instance, where an attorney places an exhibit that was excluded from evidence in the corner of a courtroom where he knows that the jury can

defy their authority or interfere with the administration of justice.").

86. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497-98 (1983) ("Rule 403 gives the court the discretion to exclude otherwise admissible evidence when the probative value of that evidence is 'substantially outweighed' by, among other things, 'unfair prejudice.'").

87. *Id.*

88. *Id.*

89. *Id.*; *see also* Gold, *supra* note 10, at 510-11 ("[E]vidence that threatens to induce the jury to employ an extralegal basis for decisionmaking or act illogically can be controlled by the traditional power of the court to exclude such evidence. Short of excluding evidence, judges have the power to control also what takes place in the courtroom during trial to ensure that the trial is fair and the jury understands the evidence that is introduced. Courts have invoked this power to reorder evidence, prohibit confusing questions, ask clarifying questions, separate issues for trial, limit irrelevant questioning, and force counsel to ask a particular question. *Many courtroom style techniques and other techniques designed to manipulate the meaning or weight of evidence could be controlled by more extensive use of this authority*.") (emphasis added).

90. Gold, *supra* note 86, at 497.

see it, or where an attorney crowds the courtroom to distract jurors during the examination of a potentially harmful witness, Federal Rule of Evidence 403 as construed by this Comment would act to prohibit the jury from considering the exhibit entirely by excluding it and would require the witness's testimony to be re-given or at least re-read to the jury to dissipate the adverse effects of the distraction.

At least one legal commentator's conception of "unfair prejudice" under Rule 403 seems to include information admitted into evidence or communicated to the jury using improper psychological tactics.[91] If "unfair prejudice" includes "inferential error," Rule 403 would grant judges the authority to exclude evidence and therefore prohibit the jury from making decisions based on improper psychological persuasion. "Inferential error occurs when the jury *incorrectly* decides that evidence is probative of an alleged fact or event."[92] The effect of inferential error is similar to the effect of improper psychological tactics described as "meaning manipulators."[93] "Meaning manipulators" cause the jury to "evaluate[] evidence illogically when it *incorrectly* decides that evidence is or is not probative of a fact in issue."[94]

Therefore, if "unfair prejudice" under Rule 403 is defined as "inferential error," then evidence is excludable when it is admitted or communicated through the use of psychological tactics that cause the jury to incorrectly ascribe value or ascribe more or less value to that evidence. Pursuant to the authority granted by Rule 403, the judge would have the discretion to exclude this evidence.

b. The Contempt Power as a Means of Judicial Control

Another possible judicial means of controlling the use of improper psychological tactics is through the judge's contempt power. Judges have the "*inherent power* to punish misconduct that interferes with the judicial process as criminal contempt."[95] "Contempt is an extremely

91. *Id*. at 531-33. This Comment rejects the prevailing notion that prejudicial evidence is anything that induces the trier of fact to employ emotion rather than logic in its judgment. Rather this Comment defines unfair prejudice in terms of inferential error. Where evidence unintentionally leads the jury to commit inferential error, the evidence is unfairly prejudicial. *Id*. at 503-10. This notion of unfair prejudice possibly would include evidence admitted through the use or communicated with the use of improper psychological tactics because these tactics either induce the jury to attribute more or less probative value to evidence or completely commit an inferential error.

92. *Id*. at 506 (emphasis added).

93. Gold, *supra* note 10, at 494-96.

94. *Id*. at 494 (emphasis added).

95. Raveson, *supra* note 3, at 477 (emphasis added).

powerful tool to control the attorneys' behavior"[96] because courts have historically claimed that the power is derived from "the court's power of self-preservation as an institution of government."[97] Since the power is inherent, it is virtually free from legislative authorization and control.[98]

Because the judiciary's contempt power operates largely without any legislative checks, rules, or regulations, courts have used the contempt power to punish a wide variety of attorney behavior.[99] Historically, courts have used the contempt power "to punish disruptions of their work," otherwise known as "obstruction."[100] With little constraint, courts have used the contempt power to "censor dissent and to command any level of respect or decorum desired by an individual judge."[101]

Today, federal law limits the use of the contempt power to punish attorney misconduct by restricting the substantive definition of "contempt" to behavior that "obstruct[s] the administration of justice."[102] Attorney utilization of improper psychological tactics may cognizably fall within the definition of contempt. If the purpose of trial is to discover truth, then the proper administration of justice must facilitate this goal. Therefore, the range of attorney behaviors that contravenes the truth-seeking function of trial necessarily obstructs "the administration of justice." For instance, crowding the courtroom with spectators to distract the jury contravenes the truth-seeking function of trial by inducing jurors to ascribe less importance to the testimony given. This tactic inevitably obstructs the administration of justice by creating a disorderly atmosphere for the proceedings to occur and truth to be discovered. Therefore, according to the definition of contempt, such behaviors may be punished by the judge. Applying such a severe punishment as contempt to the use of improper psychological tactics over time will deter the employment of such tactics in the future.

c. Problems with Judicial Controls

An extensive application of Rule of Evidence 403 and the contempt

96. *Id*. at 481.

97. *Id*. at 486.

98. *Id*. The courts have accepted some legislative restrictions on the operation of the contempt power, but courts still maintain that their inherent power to protect their authority cannot be checked. *Id*. at 486-89.

99. *Id*.

100. *Id*. at 486. Initially, judges equated "disagreement with disrespect, and confused disrespect with obstruction." *Id.*

101. *Id*.

102. *Id*. at 488-89. The present statute defining contempt in the federal courts is 18 U.S.C. § 401(1) (2005).

power are both available means of preventing and punishing litigators who improperly use psychological tactics. An apparent drawback to both of these methods of controlling the use of improper advocacy techniques in subversion of the truth-seeking purpose of trial, however, is that the methods require judges to recognize the use of improper psychological tactics.[103] Utilizing Rule 403 and the contempt power requires judges to be educated and knowledgeable about the art of psychological persuasion so that improper techniques employed by attorneys are in fact recognized, punished, and their effects on the jury dissipated.[104] Even if judges are educated on the psychological principles of persuasion and their improper application in the courtroom, it will still be difficult for judges to recognize the subtle use of these tactics unless they compel attorneys to disclose their litigation strategies.[105] Punishment for the use of many of the improper tactics requires a finding of intent to contravene the truth-seeking function of trial. An attorney should not be punished for inadvertently distracting jurors; he must *intend* to do so. Requiring attorneys to truthfully disclose any expected uses of improper litigation strategies—and inquiring, after the fact, into an attorney's intentions—would be unrealistic, laborious, time consuming, and most likely ineffectual.

Granting judges the authority to exclude evidence or punish counsel for contempt of court for using improper psychological tactics increases the power of the judge, while decreasing the power of the advocates at trial.[106] For instance, according to current trial practices, "judges generally do not inquire into litigation strategy."[107] If judges were permitted to compel disclosure of attorney use of psychological tactics, attorneys would forfeit some of their power and independence as advocates for their clients to judges who would have the sole power to determine whether such psychological tactics tainted the evidence or disrupted the trial to an extent that such evidence is inadmissible or such attorneys need to be held in contempt.[108] Therefore, judicial means of controlling the use of improper psychological tactics upset the balance

103. Gold, *supra* note 10, at 510-11.

104. *Id*. at 511 ("Judicial education is the first step necessary if [judicial] controls are to become effective means of dealing with covert advocacy. Judges must become acquainted with the psychological principles that form the basis for covert advocacy techniques. Without that knowledge judges cannot hope to detect the use of covert advocacy or determine how to apply their powers to control its abuses.").

105. *Id*. ("A judge can be sure counsel is employing covert advocacy only if counsel discloses that fact to the judge.").

106. *Id*. at 511-12.

107. *Id*.

108. *Id*.

of power between judge and counsel.

Finally, judicial control of the utilization of improper psychological tactics through the judge's contempt power fails to dissipate the effect of the stratagem on the judicial decision. At least Rule 403 allows for the exclusion of such evidence or, where appropriate, modification of the evidence to remove the taint of improper persuasive techniques. Although the contempt power may sanction punishment for the use of improper psychological tactics, it utterly fails to dispel the taint of such tactics on the jury's evaluation of the evidence. In order to adequately *prevent* the use of improper psychological tactics, *remedy* the improper admission or transmission of evidence infected by the use of improper psychological tactics, and *punish* the use of such tactics through judicial control, both Rule of Evidence 403 and the contempt power would need to be employed conjunctively.

2. Jury Control of Improper Psychological Persuasion

In his article, *Covert Advocacy*, Professor Gold proposes three categories of reform that could prevent the jury from rendering decisions based on attorney manipulation: expanding the jury's powers, increasing and improving the flow of information to the jury, and improving the jury itself.[109]

First, changing the role of the jury from one of virtually complete passivity to that of active involvement in the trial could dissipate the effect of improper psychological persuasion.[110] By allowing jurors to question witnesses after the attorney completes examination, for instance, the jurors could hear spontaneous testimony free from improper persuasive techniques, thus alleviating the potential that jurors will confuse the meaning of evidence or incorrectly weigh the importance of evidence.[111] Moreover, the possibility that the jury's questioning might reveal an attorney's use of improper psychological tactics may effectively dissuade attorneys from using such tactics from

109. *Id*. at 512-14.

110. *Id*. at 513.

111. *Id*. ("[A]fter the parties have completed questioning a witness the jurors could write out their own questions. The judge then would screen the questions and put those deemed appropriate to the witness. The resulting testimony necessarily would be spontaneous and free of extralegal courtroom style developed by witness rehearsal with counsel. Witness demeanor in response to the jury questions could be compared to demeanor during examination by counsel, possibly revealing the effects of rehearsal in an embarrassing way. Responses to jury questions could also reveal that examination by counsel had been calculated to confuse the meaning of evidence now clarified only after the jury's intervention.").

the outset.[112] A number of courts already allow limited questioning of witnesses by the jury.[113]

Second, increasing and improving the flow of information to the jury may also control the effects and prevent the use of improper psychological persuasion.[114] Early in trial, the court could provide certain information to the jury that would aid the jury in resisting the influence of improper psychological persuasion.[115] The court could give jury instructions at the beginning of the trial to educate the jury about the important points of law at issue in the trial, instead of at the close of the evidence, as is customary. This way, the jury could be more attuned to the relevant facts and issues and hopefully less likely to resort to extra-legal decisionmaking.[116]

Even more deliberately, the court could provide jury instructions about the "nature and object of covert advocacy itself"[117] to minimize the effect of improper psychological tactics on the jury's evaluation of the case. Such an instruction would likely discourage attorneys from using improper psychological tactics in the first place. "Although such an instruction understood on a conscious level may not reduce the jury's susceptibility to covert advocacy, which operates subconsciously, its utterance might dissuade many attorneys from using at least the most obvious covert advocacy techniques."[118]

Last, at least one commentator has suggested that the composition of the jury itself could be improved in order to reduce the risk that attorney use of psychological tactics will cause the jury to render an illogical or biased decision.[119] Arguably, if jurors were more educated and sophisticated, they would be more resistant to the influences of improper

112. *Id*. ("The potential damage done by such revelations might be sufficient to dissuade some attorneys from using covert advocacy techniques.").

113. *Id*.

114. *Id*. at 514.

115. *Id*.

116. *Id*.

117. *Id*. Professor Gold proposes the following instruction:

> Ladies and Gentlemen of the jury, in considering the testimony of the witnesses and the arguments of the lawyers, please keep in mind that the lawyers may have selected you to serve on the jury because they believe you have certain prejudices that will favor their clients. They may have presented evidence to ignite those prejudices. They may have tried to confuse the meaning of their opponent's evidence and may have argued their own evidence is more important than it really is. When they did these things they tried to appear as attractive and friendly toward you as they could in order to convince you that they were being honest.

Id.

118. *Id*.

119. *Id*.

psychological tactics.[120]

These suggested alterations of the jury system may be less problematic than those previously suggested judicial reforms, since additional power is granted to multiple jurors versus a single judge. Nevertheless, controlling the use of improper psychological tactics by altering the character and nature of the jury upsets the balance of power between the trial participants. The jury wields more power, while the advocates' freedom and independence are sacrificed. Expanding the jury's power to question witnesses, increasing and improving the flow of information to the jury, and changing the composition of the jury in the manner discussed could only retract the limits of zealous advocacy to the detriment of the adversarial process. The measures proposed would likely result in a more cautious and conservative approach to litigation. Advocates erring on the side of caution would severely curtail the usage of psychological techniques, whether proper or improper, because the advantage in using such tactics would be far outweighed by the damage to their case if their usage was revealed.

3. Advocate Control of Improper Psychological Persuasion

Advocate controls of improper use of psychological tactics is superior to the judge or jury controls discussed previously, since advocates themselves are best suited to recognize the use of these methods of manipulation. The judicial methods of reform require judges to enforce Federal Rule of Evidence 403 and the contempt power; that is, judges, on their own accord, can order evidence inadmissible or hold the lawyer in contempt.[121] Likewise, the various methods of jury control ultimately place the responsibility on the jury to understand, recognize, and avoid being manipulated by improper psychological tactics. Therefore, judicial- and jury-controlled reforms are only as effective as the judge and the jury are proficient at identifying the use of improper tactics.

Furthermore, the judicial and jury methods of preventing improper use of psychological tactics may diminish lawyers' abilities to zealously represent their clients by potentially having important evidence deemed inadmissible, being held in contempt, or losing the trust of the jury if

120. *Id*. (suggesting that the composition of the jury could be altered to include more educated and sophisticated jurors by increasing the amenities offered jurors—jurors could receive fees, parking, and other civil privileges).

121. Gold, *supra* note 10, at 510 ("Judges already have broad discretion to exclude evidence that threatens to mislead, confuse the issues, or work unfair prejudice."); Raveson, *supra* note 3, at 485 ("Courts have always claimed the inherent power to protect themselves by punishing for contempt individuals who defy their authority or interfere with the administration of justice.").

exposed for using psychological persuasion. On the other hand, charging the advocates themselves with the responsibility of recognizing the use of and enforcing the rules against improper psychological tactics is completely consistent with lawyers' duty of zealous representation. What better participant in trial to police the behavior of counsel than opposing counsel? Lawyers have the incentive to enforce rules prohibiting the use of improper psychological tactics and to avoid these techniques themselves for fear that opposing counsel will report their usage to their Bar Association.

Because "[p]ersuasion in the courtroom always contains potential ethical issues involving the trial lawyer trying to influence jurors,"[122] an amendment to the American Bar Association Model Rules of Professional Conduct is an appropriate tool through which improper psychological tactics could be prohibited. Under the current Model Rules, an expansive reading of Rule 3.4(e) and 8.4(d) could be interpreted to prohibit the employment of certain improper psychological tactics discussed previously.

Model Rule 3.4(e) states:

> A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.[123]

The annotation to Rule 3.4(e) explains that the Rule prohibits lawyer misconduct at trial and limits certain trial tactics, such as asking questions about inadmissible evidence.[124] Therefore, Rule 3.4(e) prohibits specific psychological tactics, which subvert the truth-seeking function of trial by inducing the jury to draw inferences where there is no confirming testimony to support the deduction. For instance, according to this Rule it is unethical for an attorney to inquire about an alleged rape victim's prior sexual history in order to compel an inference that the alleged victim is promiscuous, without any confirming information. However, this Rule fails to cover the wide gamut of improper tactics explored in this Comment.

Similarly, Model Rule 8.4(d) deems it professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of

122. Childress, *supra* note 30, § 6.

123. MODEL RULES OF PROF'L CONDUCT R. 3.4 (e) (2003).

124. *Id*. at annotation to subsection (e).

justice."[125] Arguably, the employment of improper psychological tactics designed to induce jurors to make decisions in contravention of the discovery of truth amounts to "conduct that is prejudicial to the administration of justice," but prosecution based on this sort of reading of Rule 8.4(d) is likely to be attacked for vagueness or deemed inapplicable to such behavior.[126]

Given that current ethical guidelines do not formally and explicitly prohibit the wide-ranging litigation techniques discussed in this Comment, amendment of the American Bar Association's Model Rules of Professional Conduct is necessary to prevent and punish the use of improper psychological tactics. The following paragraph is a proposed Rule governing the use of psychological persuasion by attorneys: A lawyer shall not use any knowledge of psychological persuasion in order to contravene, in any way, the truth-seeking function of the trial by inducing the jury (1) to make inferential errors, (2) to incorrectly ascribe weight to evidence, (3) to ascribe more or less weight to evidence than it deserves, or (4) to render a decision based on any other irrelevant or illogical basis.

The addition of this Rule would effectively induce attorneys to monitor each other's conduct and ensure that the improper use of psychological tactics would not go unpunished.

III. CONCLUSION

Although psychological study has positively contributed to trial advocacy in many regards, it has also spawned an advent of improper tactics that litigators employ to influence jurors. The application of public speaking skills and knowledge of the effects of visual and aural cues improves attorneys' overall presentation of their cases and thus enhances the influence the attorneys have on juries. These psychological tactics differ from techniques that contravene the truth-seeking function of the jury trial. However, tactics designed to induce jurors to draw incorrect inferences or ascribe more or less weight to a particular fact or issue are inconsistent with the purpose of trial and are

125. MODEL RULES OF PROF'L CONDUCT 8.4 (d) (2003).

126. *Id*. at annotation to subsection (d). Even though courts have struck down vagueness and over-broadness challenges to Rule 8.4(d), prosecution under this Rule where a lawyer has allegedly used improper psychological tactics will likely be challenged. Those cases in which the court found that the Rule was not unconstitutionally vague were based on conduct that case law, court rules, and the lore of the profession would lead to a conclusion that such behavior was improper. Here, with the lack of case law, formal rules, and a pervasive use of such improper practices throughout the legal profession, a court would likely find that the provision did not apply to such behavior.

thus improper.

The roles of three major participants in trial, the judge, the jury, and the attorneys, could be modified to prevent and punish the use of improper psychological tactics. Judges could exclude evidence tainted by such improper techniques under Federal Rule of Evidence 403 or punish attorneys who employ such techniques for contempt of court. Moreover, allowing jurors to question witnesses, educating jurors about these psychological tactics before the presentation of evidence begins, and possibly altering the composition of the jury could minimize the influence of such improper tactics and prevent their usage. The judicial and jury means of controlling the use of psychological tactics both fundamentally change the balance of power between the participants in the trial by depriving advocates of power. Therefore, charging attorneys with the responsibility of recognizing and punishing the use of improper psychological tactics is superior to the judicial and jury controlled methods. A proposed rule for inclusion in the American Bar Association's Model Rule of Professional Conduct condemning the use of any psychological persuasion that seeks to subvert the truth-seeking function of trial is a superior method by which attorneys could attack the use of such techniques. Attorneys are best suited to recognize the use of improper psychological tactics by their opposing counsel. Furthermore, granting attorneys the power to enforce the proposed rule preserves the balance of power among the trial participants. In order to preserve the truth-seeking function of trial, the legal community in general and the American Bar Association in particular must acknowledge the problem presented by attorney use of improper psychological persuasion in the courtroom and consider the proposed rule herein to remedy this dilemma.