AGREEING TO BE AGREEABLE: A PROPOSAL FOR THE INTRODUCTION OF "THE REASONABLE LEGAL ADVOCATE STANDARD" IN A LAWYER'S PROFESSIONAL ETHOS

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ABSTRACT

Whether lawyers recognize it or not, they have immense power. For example, a lawyer can initiate a civil lawsuit against another individual that affects that person's livelihood, file criminal charges that restrict a person's liberty, or use legal mechanisms to protect a person's wealth. As a result, lawyers hold important positions of community trust, are under intense scrutiny, have an enormous responsibility to achieve their clients' goals, and must act in accordance with their professional responsibility rules. Consequently, lawyers often experience anxiety to be perfect; *i.e.*, to know the nuanced intricacies of the law, to create impeccable work product that advances their clients' interests, and to meet their professional obligations to their clients, opposing counsel, and the court. How then, does a lawyer fulfill these often competing—and sometimes opposing—obligations without experiencing overwhelming stress? In the author's view, the answer is simply to follow "the reasonable legal advocate standard," and be the most reasonable lawyer in the room.

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I. INTRODUCTION

Every lawyer has been an audience to "lawyer jokes." For example, it is not unusual for a person, after learning that they are speaking with a lawyer,

to tell a joke about that lawyer's profession. The person may ask the lawyer, "What's wrong with lawyer jokes?" and when the lawyer responds with, "I don't know, what?" the jokester provides the punchline, "Lawyers don't think they're funny, and nobody else thinks they're jokes."[1] While lawyer jokes are ubiquitous, they exist because people realize that lawyers both have immense power and the ability to abuse that power.[2] The problem with "lawyer jokes" is that they generally reflect American society's negative—yet-incorrect—attitude toward lawyers.[3] In society's view, lawyers are greedy, dishonest, and pretentious, operating only to serve their own interests at the expense of others.[4] However, American society does not typically have a negative view of other specialized professions, which require an advanced degree and provide that advanced degree holder with power. For example, the American public generally trusts, and has favorable views of, medical doctors.[5] In the author's opinion, Americans trust medical doctors because they have a strong professional ethos and apply this ethos to their work.[6]

Therefore, as lawyers, we must be cognizant of American society's general, negative perception of the legal profession during our interactions with witnesses, jurors, and clients and work *to change* this perception by promoting honesty, integrity, and reasonability.[7] In the author's view, the root cause of society's negative perception of lawyers is due to some lawyers' misplaced

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1. Allison J. Fairchild, *How Many Lawyers Does It Take To Change This Bias Against Lawyers?,* PLAINTIFF MAG. 1 (April 2012), https://www.plaintiffmagazine.com/images/issues/2012/04-april/reprints/Fairchild_How-many-lawyers-does-it-take-to-change-the-bias-against-lawyers_Plaintiff-magazine.pdf.

2. *Id.* ("It could be argued that the negative press against attorneys is based on the normal human desire for black and white answers . . . perhaps it is not surprising that our endless Socratic questioning of the facts might be mistaken for prevarication and manipulation.").

3. *Id.* at 1-2. ("Public opinion does not appear to track this reality . . . Contrary to the popular perception that attorneys prevaricate and manipulate for a living, most attorneys actually understand more acutely the difference between 'persuasion' and 'misrepresentation' of the truth.").

4. *Id.* at 3 ("The next time you are expected to honor the assumption that attorneys are all liars, or laugh at a joke about those lying, thieving lawyers, please remember that you are actually in a position to *teach* the lay public something about personal integrity."); *see also* STANLEY FISH, WINNING ARGUMENTS: WHAT WORKS AND DOESN'T WORK IN POLITICS, THE BEDROOM, THE COURTROOM, AND THE CLASSROOM 156 (2016) ("Like any other discipline or enterprise, the law views the world through the lens of its central purpose—the purpose, broadly speaking, of doing justice by righting wrongs and protecting rights.").

5. Cary Funk & John Gramlich, *Amid Coronavirus Threat, Americans Generally Have a High Level of Trust in Medical Doctors*, PEW RSCH. CTR., (Mar. 13, 2020), https://www.pewresearch.org/fact-tank/2020/03/13/amid-coronavirus-threat-americans-generally-have-a-high-level-of-trust-in-medical-doctors/ (explaining that while Americans generally distrust elected officials, business leaders, and the press, "74% of Americans said they had a mostly positive view of medical doctors.").

6. *Id.* (explaining that "[t]he public gave doctors high marks on several specific aspects of trust. Around half of Americans or more said medical doctors always or usually care about their patients' best interests (57%), do a good job providing diagnoses and treatment recommendations (49%) and provide fair and accurate information when making recommendations (48%).").

7. Fairchild, *supra* note 1, at 3.

adherence to *solely* be a "zealous advocate" for their respective clients.[8] While serving as a zealous advocate is laudable and can achieve positive results for one's client, it becomes problematic when zealous advocacy is the *only* goal a lawyer undertakes.[9] Moreover, taken to the extreme, zealous advocacy can morph a lawyer's practice into one of "scorched earth" where they refuse to communicate with opposing counsel, reject stipulations, and object for the sake of objecting. Although premised on "zealous advocacy," a lawyer's actions may appear obstructionist, and ultimately negatively affect their interactions with lawyers and layman alike. A consequence of focusing solely on zealous advocacy is that a lawyer may appear unreasonable, which may ultimately bely the lawyer's goal of achieving a successful outcome for his client.

However, as the author will advocate in the forthcoming paragraphs, it is reasonableness *combined with* zealousness, which positively impacts a lawyer's case and by extension, results in a positive outcome for their client. This article explores the benefits of being the most reasonable lawyer in the room by encouraging lawyers to apply "the reasonable legal advocate standard" to their legal ethos. First, this article will highlight the importance and pervasiveness of "argument"—in American society, in general, and the legal profession in particular—and explore how being a "reasonable lawyer" can, by itself, advocate a powerful argument. Second, the author will enumerate several rules contained within the North Dakota Rules of Professional Conduct to identify how reasonableness is already both expressly and impliedly encouraged in these professional responsibility rules. Third, this article will highlight how lawyers can apply stoicism in their legal practice, which will allow lawyers to act both reasonably *and* zealously. Finally, to provide a framework for the "reasonable legal advocate standard," the author will present a legal maxim, a vision statement, and a list of eight rules which will serve as a barometer when incorporating this standard.

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8. *See* N.D.R. PROF. CONDUCT, Preamble: A Lawyer's Responsibility, para. 9 (including a reminder to lawyers to temper their zealous advocacy by stating "[t]hese principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, *within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system*.") (emphasis added).

9. *Id.*

II. ARGUMENT HAS BOTH A SOCIETAL AND LEGAL FUNCTION

A. ARGUMENT IS A PART OF LIFE

Human beings argue.[10] In fact, argument is pervasive in human society.[11] One need only reflect back a few hours (or maybe even a few minutes) to picture their last argument with another person. Arguments are simply disagreements between two individuals who each use their persuasive skills in an attempt to sway the other person to their position.[12] For example, by the time a person arrives at work in the morning, he or she may have engaged in multiple arguments, including with: his toddler about whether it is necessary for that toddler to wear a coat outside; his spouse about that day's dinner plan; and his coworker about which player to blame for their favorite sport team's recent defeat. These arguments need not contain an emotional element and may simply be part of a person's everyday routine.[13] However, all arguments have one thing in common, they represent communication of ideas through language.[14]

Argument has benefited society through the sharing of ideas, perspectives, and positions.[15] Specifically, through argument, humans are able to express different viewpoints in a persuasive manner. As a result, argument can foster positive change when it promotes rational alternatives to complicated problems by asking the principal question, "What's the best thing to do?"[16] However, argument may also encourage negative change when the primary purpose is to elicit emotional responses, such as fear or sympathy.[17] Such an argument is negative because it relies on the principal question, "What can I do to win?"[18] Therefore, argument is not, in and of itself, bad or nefarious. Rather, it "can be either good or bad depending on the circumstances and the spirit in which it is deployed."[19]

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10. *See* Fish, *supra* note 4, at 2 (stating that "[c]onflict, not agreement, is the default condition of mortality.") (alteration in original).

11. *Id.* at 3 ("So repeat after me: argument is everywhere, argument is unavoidable, argument is interminable, argument is all we have.").

12. *Id.* at 7-8 ("One general thing that can properly be said about argument is that is essentially the art of persuasion, the art of trying to move someone from an adherence to position A—which might be political, economic, domestic, aesthetic, military, theological, whatever—to an embracing of position B.").

13. *Id.* at 5-8, 44-47.

14. *Id.* at 16 ("It follows that we can't 'go around' language to get at things directly; we can only pass from one vocabulary that delivers the world to us in a particular shape to another vocabulary that will deliver the world to us in another particular shape.").

15. *Id.* at 46 ("Good persuasion aids in the rational sorting through of alternatives that characterizes a democratic society . . . .").

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 44.

B. POSITIVE ARGUMENT

A key factor in every argument is that there are at least two participants who, at alternating times, both speak and listen.[20] During a positive argument, both parties respect one another by allocating sufficient time to allow each side to present their case, listening carefully to the other side's argument, and providing rational responses to these arguments. To successfully resolve an argument, both parties should utilize a thought process employed by pragmatic philosopher John Dewey known as "reflective thinking."[21] This cogitation method requires listeners to suspend their judgment, maintain a state of doubt, and "carry on systematic and protracted inquiry." According to Dewey, this method promotes effective problem solving; and therefore, contributes to the successful resolution of disagreements because "habits of active inquiry and careful deliberation in the significant and vital problems of conduct afford the best guarantee that the general structure of the mind will be reasonable."[22] Consequently, reflective thinking allows a person to act—and respond during argument—with *good* judgment. However, the setting of an argument will likely dictate that argument's subject matter and, necessarily, change how a participant applies their judgment. Therefore, "[t]o know what is *good* judgment we need first to know what judgment is."[23] As explained below, to apply good judgment during an argument, a person must first understand the setting of this argument and then tailor their argument points to the rules contained within that argument's setting. In particular, the author will explore the rules contained within the setting of "legal arguments."

C. THE ARGUMENT SETTING

Arguments occur in a variety of different settings including politics, domestic life, academia, and most importantly for this article, law.[24] Each setting affects and shapes the rules of an argument made therein. What may be permissible and persuasive during a domestic or political argument, where there are few structured rules, may not be permissible in the structured world of a legal or an academic argument.[25] For example, in domestic and political arguments it may be permissible (although potentially unwise) for one participant to make ad hominem attacks, which target the veracity, character, or

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20. *See generally Mark Twain's Quotes*, QUOTEIKON (last visited July 16, 2021), https://www.quoteikon.com/mark-twain-quotes html ("If we were meant to talk more than listen, we would have two mouths and one ear.").

21. JOHN DEWEY, HOW WE THINK 11-12 (2005 ed.) (1910).

22. *Id.* at 55.

23. *Id.* at 101.

24. Fish, *supra* note 4, at 49, 97, 129, 159.

25. *Id.*

other negative qualities of the other participant.[26] Argument participants often make these types of attacks during an emotional exchange, which compromises the argument and causes the participants to have a negative experience. However, as noted below, in the legal field, the courts—through interpretation of their respective legal rules—limit the emotional nature of argument and generally prohibit such attacks.[27]

Legal proceedings are adversarial in nature with each party advocating "the versions of the truth that support the outcome they respectively prefer and wait for the trier of fact to decide between them . . . [in] a battle of verbal gladiators."[28] Legal arguments are made in a "bounded-argument space," meaning that permissible versus impermissible arguments are "formally identified and known to everyone working in the field."[29] Specifically, courts and legislatures have established legal arguments as "bounded-arguments" by creating a list of rules by which attorneys must abide, *i.e.* the Federal Rules of Criminal Procedure, or by requiring lawyers to obtain a minimum knowledge standard before entering the legal field, such as graduating from an accredited law school and passing a bar examination.[30] Non-lawyers often have difficulty making legal arguments because "not everything can be heard or said" and "[t]he categories 'that's not the kind of thing we do around here' and 'that's not the kind of thing we say around here' are always in force for those in the know and are likely to be mysterious to outsiders."[31] For example, to admit testimony, documentation, or pictures during a court proceeding, these items must be admissible according to the rules of evidence, such as relevance, hearsay, authentication, character, and privilege.[32] Additionally, courts follow precedent which a lawyer must cite in their argument, even if this citation harms their argument.[33] While courts divide precedent between "binding" and "persuasive" authority, "[t]he truth is that [precedents] are binding *if* persuasive, if they have been successfully argued for."[34] Since a lawyer may distinguish the holding of a "binding" precedent by arguing its inapplicability to the facts of the present case, "[m]erely to call a prior case a precedent will not be decisive; it must be linked in a persuasive way with the issues thought to be in play in the present case. There has to be an argument to support the argument."[35]

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26. *Id.*
27. *Id.* at 129-132.
28. *Id.* at 132.
29. *Id.* at 72, 129-30.
30. *Id.* at 129-31. ("The evidence must be admissible and admissibility is defined by rules.").
31. *Id.* at 130, 157.
32. *Id.* at 130-31.
33. *Id.* at 11.
34. *Id.*
35. *Id.*

D. ARGUMENT IN THE LEGAL PROFESSION

How then, can a lawyer make a successful argument in the legal field? The answer, in short, is to be "reasonable." The first question a lawyer must then ask is, "What does it mean to be "reasonable?" Webster's Dictionary defines the word "reasonable" as "agreeable to reason or sound judgment; logical," "not excessive," and "capable of rational behavior."[36] Additionally, the dictionary lists the following synonyms for the word "reasonable": "intelligent, judicious, wise, [and] equitable."[37] Therefore, although it may sound contradictory to advocate "reasonableness" in a profession which prides itself on being adversarial, being intelligent, judicious, wise, and equitable—*i.e.* being reasonable—enables a lawyer to make impactful legal arguments.

Based on the author's experience working in North Dakota, a lawyer will frequently interact with the same judges, opposing counsel, and court staff over the course of their legal career. A lawyer's reputation is premised, in part, on how they have conducted themselves during these previous interactions. Over time, a lawyer gains a reputation in the legal community for their conduct during legal proceedings, including their practice on filing objections, stipulating or not stipulating to legal or factual issues, entering into agreements, and cooperating with opposing counsel to resolve disputes. Additionally, in the author's experience, a lawyer also gains a reputation in the legal community for their level of "reasonableness."

A lawyer who practices "reflective thinking" promotes reasonableness to the court and opposing counsel by suspending their initial judgment about a particular issue and instead, carefully applying the facts to the legal authority.[38] If legal arguments are "bounded-argument spaces," where specific rules dictate what is or is not permissible, then a reasonable lawyer is one who operates well within the bounds of the evidentiary rules, procedural rules, and case law.[39] Additionally, a lawyer demonstrates "reasonableness" by promoting fairness to opposing counsel in discussions, plea negotiations, and courtroom demeanor. By incorporating these traits, a "reasonable lawyer" projects confidence, knowledge, and—most importantly—trust. When a court, or jury, must decide who to believe in a given matter, they look to the confidence, knowledge, and trust of the advocate presenting the argument. If a "reasonable lawyer" embodies these qualities, they have made an important argument for their case.

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36. *Reasonable*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1608 (2d ed. 2003)
37. *Id.*
38. DEWEY, *supra* note 21, at 12, 43.
39. Fish, *supra* note 4, at 72, 129-30.

III. NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

A NORTH DAKOTA LAWYER'S PROFESSIONAL OBLIGATIONS

Lawyers practicing in the state of North Dakota must adhere to the North Dakota Rules of Professional Conduct (hereafter "Rules").[40] These Rules serve several important purposes, but primarily provide lawyers with context about their professional obligations, their ethical responsibilities, and matters pertaining to legal compliance.[41] Some of these Rules are mandatory by stating the word "shall" and others are discretionary by stating the word "may."[42] As a result, in practice, the Rules themselves serve as both a set of regulations describing what lawyers can and cannot do as well as a guide for what lawyers should do.[43] The drafters of these Rules acknowledge this fact by stating "[t]he Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."[44]

B. ZEALOUS ADVOCACY AND REASONABLENESS

In the Preamble to these Rules, the drafters acknowledge a lawyer's responsibility to "zealously" advocate for their clients.[45] However, this same Preamble cautions lawyers to conduct this zealous advocacy in accordance with these Rules, "within the bounds of the law," and by carefully exercising their "special responsibility for the quality of justice."[46] As a result, while lawyers are tasked to zealously advocate for their clients, they must temper this zealousness by acting in accordance with the Rules, the law, and—in the author's opinion—reasonableness. Moreover, several enumerated rules either expressly or impliedly advocate for lawyers to apply reasonableness in their daily practice. In the forthcoming paragraphs, the author will highlight three examples, which demonstrate how pervasive the term "reasonable" is listed in these Rules.

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40. *See* N.D.R. PROF. CONDUCT; *see also* N.D.R. LAW. DISCIPLINE. 1.1(B), (explaining that "[e]ach member of the Bar of North Dakota has taken an oath to support the Constitution and laws of the state and of the United States. As an officer of the North Dakota Supreme Court, each lawyer is charged with obedience to those laws, whether in or out of court, and observance of the highest standards of professional conduct. These rules are promulgated to assure compliance with those standards of conduct.").

41. N.D.R. PROF. CONDUCT (SCOPE).

42. *Id.*

43. *Id.*

44. *Id.* at para. 2.

45. N.D.R. PROF. CONDUCT, Preamble: A Lawyer's Responsibility, para. 2, (stating that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

46. *Id.* at para. 1.

Rule 1.3, titled "Diligence," expressly mandates that a lawyer apply reasonableness in their daily practice by stating, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[47] In the comments to this brief rule, the drafters specifically list circumstances where a lawyer *should* act with reasonableness by stating that "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with *courtesy and respect*."[48] Furthermore, the comments state that "[a] lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from *agreeing to a reasonable request* for a postponement that will not prejudice the lawyer's client."[49] Therefore, the "Diligence" rule encourages lawyers to act in a reasonable, respectful, and considerate manner toward all participants in legal proceedings.

Rule 1.4, titled "Communication," asserts that "[a] lawyer shall . . . *reasonably* consult with the client about the means by which the client's objectives are to be accomplished . . . [and] make *reasonable* efforts to keep the client reasonably informed about the status of a matter."[50] Furthermore, the commentary to this rule highlights how "[t]he guiding principle is that the lawyer should fulfill *reasonable* client expectations for information."[51] Consequently, the "Communication" rule mandates that lawyers act reasonable toward their clients by communicating often, honestly, and candidly with their clients about their clients' cases.

Rule 3.2, titled "Expediting Litigation," mandates that "[a] lawyer shall make *reasonable* efforts to expedite litigation consistent with the interests of the client."[52] Additionally, the comments to these rules further explain that "[n]or will a failure to expedite be *reasonable* if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."[53] As a result, in this rule, the drafters not only encourage lawyers to act reasonable by expediting litigation, but they also specifically caution lawyers that failing to act reasonable can violate this rule.

C. APPLYING REASONABLENESS IN A LAWYER'S PRACTICE

Although the Rules do not proscribe a specific "reasonable legal advocate standard," as noted above, language contained in the Rules demonstrate how the drafters value reasonableness and encourage lawyers to apply

47. N.D.R. PROF. CONDUCT 1.3.
48. *Id.* at cmt. 1 (emphasis added).
49. *Id.* at cmt. 3 (emphasis added).
50. N.D.R. PROF. CONDUCT 1.4(a)(2)–(3) (emphasis added).
51. *Id.* at cmt. 2 (emphasis added).
52. N.D.R. PROF. CONDUCT 3.2. (emphasis added).
53. *Id.* at cmt. 2 (emphasis added).

reasonableness to their legal practice. Whether it is a rule pertaining to diligence, communication, or expediting litigation, the drafters of these Rules have specifically encouraged lawyers to act reasonable. As a result, an adroit lawyer can apply reasonableness in their legal practice, satisfy their professional responsibility obligations, and by embodying reasonableness, can make effective legal arguments.

If argument and conflict are persuasive in society—and ubiquitous in legal practice—how can lawyers learn to effectively practice reasonableness while occupying a job where argument and conflict form the backdrop of their professional lives? It is easy to maintain reasonableness in positive situations; however, it is challenging to maintain reasonableness when lawyers are stressed, overwhelmed, or are engaged in contentious proceedings with opposing counsel. While the Rules of Professional Conduct either expressly or impliedly mandate that lawyers act reasonable, they do not provide a guide or roadmap to aid lawyers in applying reasonableness in their legal practice. The author proposes that philosophy, or the study of life, can offer such a roadmap. Specifically, as described in detail in the next section, Stoic Philosophy can provide lawyers with the necessary building blocks to practice reasonableness and apply a "reasonable legal advocate standard" to their legal practice.

IV. STOICISIM AND REASONABLENESS

A. THE PHILOSOPHY OF STOICISM

Prior to defining, and thereafter embracing, the "reasonable legal advocate standard" we must first apply principles which may form the foundation for this standard. In the author's view, the philosophy of Stoicism best provides this foundation. Philosopher Radoslav Tsanoff provided a succinct and apt description of Stoic philosophy, by explaining that "Stoicism was, first and last, a Philosophy of life. All of its inquires and doctrines were oriented toward its principle aim, the right way of living."[54] Most importantly for this article's purposes, Radoslav speaks to the heart of Stoicism, by summarizing how Stoic philosophers applied this "[P]hilosophy of life" as "a fruitful field; logic is its wall, physics is its soil and planting, *but its harvest and fruit are ethics*."[55] Specifically, the Stoics asserted that ethics, living the right life, meant living "[a] strictly rational life without any concession to desire or emotion."[56] In fact, Stoics placed value on a person's inner, self-representative actions, and dismissed external stimuli, by highlighting that "[o]ur well-

54. RADOSLAV A. TSANOFF, THE GREAT PHILOSOPHERS 110 (2nd ed. 1964).
55. *Id.* (emphasis added).
56. *Id.* at 120.

being or frustration depends not on external events, but upon the way in which our will confronts them."[57]

B. THE GOAL OF STOICISM: LEARNING TO FOCUS ON WHAT YOU CAN CONTROL

The goal of Stoicism is to achieve absolute independence from the emotional responses obtained from application of external stimuli and instead, find happiness inside one's own self irrespective of these stimuli.[58] Lawyers often find themselves subject to the whims of external stimuli over which they cannot control. For example, whether a jury will acquit or convict a defendant in a criminal case, if a client wishes to proceed to trial or settle their case, or whether a judge will grant or deny their pleadings or motions are all situations which represent uncontrollable external stimuli that impact a lawyer's emotional state. If a lawyer "wins" a trial, case, or motion they may feel happiness; however, should the opposite occur, and they "lose" they may feel sadness. The Stoics reject the proposition that these types of external stimuli are responsible for a person's happiness. Epictetus, the quintessential Stoic philosopher, during his lifetime as a slave turned philosopher in first century A.D. Rome, served as "[an] authority on Stoic morals."[59] Scholars attribute several powerful statements to Epictetus, which serve as touchstones of Stoic morality. Three are important for this article:

> Have this thought ever present with thee, when thou losest any outward thing, what thou gainest in its stead; and if this be the more precious, say not, I have suffered loss.[60]
>
> If any be unhappy, let him remember that he is unhappy by reason of himself alone. For God had made all men to enjoy felicity and constancy of good.[61]
>
> No man is free who is not master of himself.[62]

The above three maxims highlight the importance of determining over what things in life we have control, embracing the positive nature of those controllable items, and reframing perceived negative experiences to live a more satisfying life. Unfortunately, for many individuals, including the author, anger or fear is often the initial emotional response to a setback, a

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57. *Id.* at 119-20 ("The wise man bears and forbears; he is continent among the profligate, calm among the violent, self-possessed and serene amid the tumults and fury of passionate lives.").

58. THE HARVARD CLASSICS, THE GOLDEN SAYINGS OF EPICTETUS 116 (Charles W. Elliot ed., Hastings Crossley trans., P.F. Collier & Son 1909).

59. *Id.*

60. *Id.* at 126.

61. *Id.* at 162.

62. *Id.* at 183.

negative experience, or a situation involving the loss of control.[63] An interesting aspect about anger is that it causes the person experiencing the setback to focus their attention on someone or something—usually in the form of blame—instead of focusing on the setback itself, which makes this negative experience or setback even worse.[64] Similarly, fear serves as a negative emotion during a setback because it instills a paralyzing effect that causes a person to focus on the worst case scenario, instead of focusing on how to prevent that worst case scenario from occurring.[65]

C. APPLYING STOICISM TO OVERCOME SETBACKS

Ultimately, instead of experiencing either anger or fear, a lawyer can apply Stoicism to negative experiences, including arguments, to redirect these emotional responses into constructive problem-solving tools.[66] If a pipe were to burst in a person's home, the first step should be to turn off the water supply, not to fix the leak.[67] Similarly, when experiencing negative emotions, a lawyer should take steps to limit the flow of these negative emotions before attempting to address the underlying setback.[68] Luckily, Professor William Irvine and writer Dale Carnegie have created two separate, yet equally effective methods, to respond to anger and fear respectively, that lawyers may use to overcome both fear and setbacks.

1. The Stoic Test Strategy

Philosophy Professor William Irvine created a solution to anger generating experiences titled the "Stoic test strategy," which lawyers may employ to reframe negative, frustrating experiences into a positive light.[69] Specifically, Professor Irvine highlights, when experiencing a setback, a person "should treat it as a test of [their] resilience and resourcefulness, devised and administered . . . by imaginary Stoic gods."[70] This test can be especially

63. WILLIAM B. IRVINE, THE STOIC CHALLENGE: A PHILOSOPHER'S GUIDE TO BECOMING TOUGHER, CALMER, AND MORE RESILIENT 16 (2019).

64. *Id.* at 36.

65. DALE CARNEGIE, HOW TO STOP WORRYING AND START LIVING xiii (1975) (explaining that "[a]s the years went by, I realized that another one of the biggest problems of these adults was *worry*. A large majority of my students were businessman-executives, salesmen, engineers, accountants: a cross section of all the trades and professions-and most of them had problems!"); *id.* at 11-17 (explaining how failure causes a person to worry, lose sleep, and focus on the potential consequences of this failure).

66. IRVINE, *supra* note 63, at 16.

67. *Id.* at 115. Professor Irvine describes how "when a water pipe bursts, our first priority should be to turn off the water. Only then should we start thinking about cleaning up the mess the water has made, getting the pipe fixed, and getting water for coffee."

68. *Id.*

69. *Id.* at 16 (italics removed).

70. *Id.* at 16-17. Professor Irvine also explains that "the Stoic test strategy is based on their appreciation of a phenomenon that has been rediscovered by modern psychologists, who christened

beneficial because it allows lawyers to focus on the problem at hand, instead of the emotional response, because as Professor Irvine describes "[w]hen the number of options available is limited, it is foolish to fuss and fret."[71]

How then, does a lawyer apply this "Stoic test strategy?" Professor Irvine imparts a two-pronged approach.

> To employ it, we assume that the setbacks we experience are not simply undeserved tribulations but tests of our ingenuity and resilience, administered by imaginary Stoic gods. To pass these tests, we must not only come up with effective workarounds to setbacks but must also, while doings so, avoid the onset of negative emotions.[72]

To succeed under this two-part test, a person can "reframe" setbacks by changing the way they think about these events.[73] For example, a person can transform how they perceive a difficult experience by seeing it as an interesting "setback story" that they will tell others in the future after they successfully navigate the setback and reach a positive conclusion.[74] Additionally, a person can respond to a negative experience with humor.[75] Such a response has several benefits including creating levity, preventing complaining, and staving off criticism.[76] Finally, a person can view a negative experience or setback by looking at it through the lens of a game or challenge that the person must overcome.[77] This "game frame" can be especially helpful for lawyers. When an opposing counsel files a last-minute motion to which you must respond, do not see it as an insult, but instead treat it like part of a game that you must play to completion.[78]

2. The Worst-Case Scenario Strategy

Similarly, writer Dale Carnegie engineered a three-part solution to overcome fear generating experiences.[79] When an individual experiences a setback, instead of focusing on the worst-case scenario which only serves to debilitate the individual, the individual should instead take three steps:

1. Ask yourself, "What is the worst that can possibly happen?"

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it the *framing effect*: how we mentally characterize a situation has a profound impact on how we respond to it emotionally." Ultimately, the goal of this test is to minimize the frequency and intensity of negative emotions.

71. *Id.* at 56.
72. *Id.* at 73.
73. *Id.* at 83-94.
74. *Id.* at 86-87.
75. *Id.* at 89-91.
76. *Id.*
77. *Id.* at 91-93.
78. *Id.*
79. CARNEGIE, *supra* note 65, at 17.

2. Prepare to accept it if you have to.

3. Then calmly proceed to improve on the worst.[80]

By embracing and accepting the worst-case scenario, a person will begin to relax and stop focusing on their initial fear driven emotional response.[81] Thereafter, they are in a proper state of mind to determine the cause of the problem, the extent of the problem, and how to best proceed to mitigate the negative consequence this problem may cause.[82] Much like the "Stoic test strategy," Dale Carnegie's above listed steps allow a person to reduce or stop the negative flow of emotions and focus on solving the problem that could lead to this worst case situation.[83] In the forthcoming section the author will describe how a lawyer can use both the "Stoic test strategy" and "worst-case scenario strategy" to overcome setbacks and incorporate the "reasonable legal advocate standard" into their legal practice.

V. THE REASONABLE LEGAL ADVOCATE STANDARD

By applying the North Dakota Rules of Professional Conduct, the Stoic test strategy, and Carnegie's worst case scenario strategy, lawyers can develop skills which will assist them in their endeavors to be reasonable in a profession, which includes pervasive conflict. Individually, all three strategies provide lawyers with guidance on how to be reasonable advocates; however, by combining these avenues together, we can create a true "reasonable legal advocate standard." To create such a standard, the author will establish three separate, yet equally important, concepts: (1) a legal maxim that summarizes this standard into a single, cogent sentence; (2) a vision statement that establishes what this standard will accomplish; and (3) a brief set of rules of conduct that will provide general principles that all lawyers can apply to their practice.

A. THE REASONABLE LEGAL ADVOCATE STANDARD – LEGAL MAXIM

To summarize the purpose and goal of the "reasonable legal advocate standard," we must simplify this standard into a single legal maxim. A maxim is "an expression of a general truth or principle" and "a principle or rule of conduct," which provides a succinct, stable principle.[84] By incorporating the North Dakota Rules of Professional Conduct, Stoic philosophy, and Dale Carnegie's teachings, the author advocates incorporating the following maxim for the "reasonable legal advocate standard:" a lawyer is both a

80. *Id.*
81. *Id.* at 12.
82. *Id.* at 12-13.
83. *Id.*; IRVINE, *supra* note 63, at 73, 83-94.
84. *Maxim,* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1188 (2d ed. 2003).

member of the legal profession and society as a whole who shall strive to be a paragon of virtue by embodying the quality of "reasonableness" through the application of sound, logical, equitable, and stoic judgment in conflict resolution.[85]

After incorporating this legal maxim, a lawyer should strive to exemplify the goal of the "reasonable legal advocate standard" vision statement listed in the next paragraph.

B. THE REASONABLE LEGAL ADVOCATE STANDARD – VISION STATEMENT

In addition to incorporating a legal maxim, we must also establish a vision statement that describes the purpose of the "reasonable legal advocate standard." "A vision statement is a sentence or short paragraph that succinctly describes the goals of a company, nonprofit, or some other entity. It states what you are trying to build and serves as a touchstone for your future actions."[86] Therefore, to create a definite goal for the "reasonable legal advocate standard" the author proposes that lawyers aspire to the following vision statement: lawyers successfully resolving disputes through pragmatic decisions.[87]

Once a lawyer sets out to embody the goal contained within this vision statement, he or she will need guidance on the steps to take to achieve this goal. The forthcoming paragraph will provide a list of rules, which serve as guidelines for lawyers to achieve this vision.

C. THE REASONABLE LEGAL ADVOCATE STANDARD – "EIGHT RULES OF REASONABLE LEGAL ADVOCACY"

Finally, to properly apply the legal maxim and vision statement prescribed to the "reasonable legal advocate standard" we need an established set of rules, which will provide general tenets for lawyers to follow. These eight "rules of conduct" will serve as a quick reference guide for when a lawyer questions whether their proposed action will meet the spirit of the "reasonable legal advocate standard." The author formed these eight rules based upon the North Dakota Rules of Professional Conduct, the teachings of the Stoic philosophers, Professor Irvine's "Stoic test strategy," Dale

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85. *See generally* N.D.R. PROF. CONDUCT., Preamble: A Lawyer's Responsibility, para. 1 (stating that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."); *Reasonableness*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1608 (2d ed. 2003); IRVINE, *supra* note 63, at 16, 73; CARNEGIE, *supra* note 65, at 17.

86. Susan Ward, *What is a Vision Statement?: Definitions and Examples of Vision Statements*, THE BALANCE SMALL BUSINESS, (last updated June 23, 2020,), https://www.thebalancesmb.com/vision-statement-2947999.

87. *See generally* DEWEY, *supra* note 21, at 12, 43.

Carnegie's worst-case scenario test, Thomas Jefferson's "10 Rules of Life," and the author's own personal legal experience.[88] Listed below are the author's proposed "Eight Rules of Reasonable Legal Advocacy."

(1) Always conduct a thorough pretrial investigation;[89]
(2) Concentrate fully on case preparation;[90]
(3) Establish time to prepare an effective case presentation;[91]
(4) Be fair, honest, and considerate to all parties involved in the legal process;[92]
(5) Timely communicate with your client, the court, and opposing counsel;[93]
(6) Remember to be compassionate and understanding to individuals with whom you interact;[94]
(7) Practice resilience by reframing a setback and embracing the worst-case scenario;[95]
(8) Have the courage to fail so that you can grow from that failure.[96]

When a lawyer encounters consternation, stress, or setback, he or she can consider these eight rules to overcome these negative experiences. Moreover, by considering each rule in sequence, a lawyer can actively solve

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88. TSANOFF, *supra* note 54, at 120; IRVINE, *supra* note 63, at 16, 73; CARNEGIE, *supra* note 65, at 17; Thomas Jefferson, *Decalogue of Canons for Observation in Practical Life*, THOMAS JEFFERSON ENCYCLOPEDIA, (Oct. 22, 2013), https://www monticello.org/site/research-and-collections/canons-conduct (explaining ten rules to follow in life: "1. Never put off till [sic] tomorrow what you can do to-day [sic]; 2. Never trouble another for what you can do yourself; 3. Never spend your money before you have it; 4. Never buy what you do not want, because it is cheap; it will be dear to you; 5. Pride costs us more than hunger, thirst and cold; 6. We never repent of having eaten too little. 7. Nothing is troublesome that we do willingly; 8. How much pain have cost us the evils which have never happened!; 9. Take things always by their smooth handle; 10. When angry, count ten, before you speak; if very angry, an hundred [sic]"). The author maintains a copy of these ten rules, which he purchased from the Thomas Jefferson Monticello gift shop, next to his desk and often refers to them when making complex or difficult decisions.

89. N.D.R. PROF. CONDUCT 1.1, 1.3; *see also* Michael J. Hargis, *A View from the Bench Military Rule of Evidence (MRE) 412 and Sentencing*, THE ARMY LAWYER 36-38 (March 2007) (emphasizing that "[p]retrial preparation and analysis is key to admitting MRE 412 evidence, as it is for all phases of the trial."). The author also would like to cite the teachings of Colonel Michael J. Hargis, United States Army (Ret.). From 2014-2016, the author represented defendants at courts-martial before Military Judge Colonel Hargis when the author served as a trial defense attorney and while Colonel Hargis was assigned to the United States Army Trial Judiciary at Fort Bliss, Texas. Colonel Hargis repeatedly emphasized to lawyers who practiced in his court that they must conduct the "three P's," which included conducting an excellent pretrial investigation, superb pretrial preparation, and effective trial presentation.

90. *See* Michael J. Hargis, *A View from the Bench Military Rule of Evidence (MRE) 412 and Sentencing*, THE ARMY LAWYER 36-38 (Mar. 2007).

91. *Id.*

92. N.D.R. PROF. CONDUCT 1.4, 3.2, 3.3, 3.4, 3.8.

93. *Id.*

94. *Id.; see also* IRVINE, *supra* note 63, at 83-94 (explaining how to reframe one's experiences to change their point of view).

95. IRVINE, *supra* note 63, at 16, 73; CARNEGIE, *supra* note 65, at 17.

96. IRVINE, *supra* note 63, at 16, 73; CARNEGIE, *supra* note 65, at 17.

problems by concentrating on case investigation, case preparation, client communication, and striving to understand and overcome the setbacks befalling them. These rules hopefully will serve the dual purpose of reducing a lawyer's anxiety *and* assisting the lawyer with solving the underlying setback. Additionally, by applying these eight rules, a lawyer can confidently continue to both zealously represent their clients *and* be reasonable. The author will conclude this article with a few words of *reasonable* lawyerly encouragement.

VI. CONCLUSION

Lawyers, by the nature of serving in their chosen profession, will experience argument, stress, and setback. However, by embracing the legal maxims, vision statement, and Eight Rules of Reasonable Legal Advocacy which embody the "reasonable legal advocate standard," a lawyer can reduce stressful situations, focus on conflict resolution, and make powerful and convincing legal arguments. Employing this standard will ensure a lawyer is able to combine both zealous advocacy and reasonableness, which will allow the lawyer to both achieve positive outcomes for their clients and actively practice their professional responsibility rules. Most importantly, enacting the "reasonable legal advocate standard" will provide a lawyer with the tools to lead an honorable, virtuous, and rewarding professional life. Even though people in society may continue to proliferate misleading "lawyer jokes," a lawyer who acts according to the "reasonable legal advocate standard" may one day transform these "lawyer jokes" into tales of "lawyer admiration."