

WHO CARES?

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Gentlemen of the jury . . . what had the [British] soldiers to expect, when twelve persons armed with clubs . . . were daring enough, even at the time when they were loading their guns, to come up with their clubs, and smite on their guns; what had eight soldiers to expect from such a set of people? Would it have been a prudent resolution in them, or in any body in their situation, to have stood still, to see if the [American] sailors would knock their brains out, or not? Had they not all the reason in the world to think, that as they had done so much, they would proceed farther?

—John Adams, Lawyer, President, Rhetorical Question Enthusiast¹

INTRODUCTION

What form of question is recommended by some legal commentators as an effective way to persuade a jury, while derided by others as totally ineffective? What form of question do many trial advocates utilize, but few use with knowledge of when, how, or why it is persuasive? What form of question has been established by experimental scientists to be highly persuasive in some contexts but to decrease persuasiveness in others?

It is, of course, the *rhetorical* question.

A rhetorical question (RQ) is made when one asks a question “not for the purpose of eliciting an answer but for the purpose of asserting or denying something obliquely.”² It stands in opposition to the

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1. John Adams, *Argument for the Defense*, in 3 LEGAL PAPERS OF JOHN ADAMS 242, 262 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). This quote is taken from Adams’s closing argument in the 1770 Boston Massacre trial in which he successfully defended British soldiers accused of murdering American colonists. *Id.*

2. EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 404 (4th ed. 1999).

declarative assertion, instead replacing a statement with a question that leads the audience to fill in the desired blanks. For example, during a closing argument at trial, an attorney could use a declarative statement to remind the jury that “the defendant’s behavior was suspicious because he could not remember where he was on the day of the murder.” Alternatively, the attorney could instead employ an RQ and ask the jury, “Why is it that the defendant can’t remember where he was on the day of the murder?”

This Article is about RQs and their use and misuse by attorneys during closing arguments in jury trials.³ The method by which this Article addresses RQs is unique because it utilizes both the teachings of the ancients and the findings of modern scientists. Specifically, it traces the advice given to advocates about the use of RQs from the time of Aristotle to the present.⁴ It then reveals how modern research has redefined scientists’ understanding of their effectiveness.⁵ This Article suggests that legal advocates can, and should, update their thinking about the role of RQs in closing arguments by extrapolating this scientific research.⁶ In turn, this Article uses this single example as an archetype to suggest that the legal community make better use of science to make wholesale revisions to the way we approach the question: “What is persuasive?”

I. WHY YOU SHOULD CARE ABOUT THIS ARTICLE

Imagine you represent a criminal defendant convicted of second-degree murder for killing his own father. Assume that the jury is charged with deciding the defendant’s prison sentence and that you, as his attorney, are tasked with making a closing argument seeking the shortest potential sentence. You have been presented with two options as to how to do it: you can make a closing argument that uses RQs to summarize and reinforce key points, or, alternatively,

3. Based on the scientific literature, arguably, RQs may also effectively be used in bench trials, trial court motion practice, or even appellate arguments. However, arguing before a judge is different than arguing before the average juror. For example, persuasion knowledge—knowledge of methods used to persuade—is one factor used to predict a person’s response to an RQ. *See infra* Part IV.C. Presumably, the persuasion knowledge of a judge, who has presided over innumerable proceedings where she was exposed to attempts at persuasion, is significantly greater than the average juror. For this reason, among others, this Article focuses on the use of RQs in summations at jury trials.

4. *See infra* Part II.

5. *See infra* Part IV.

6. *See infra* Part V.

you can make a closing argument that instead uses declarative statements to summarize and reinforce key points.

Does it *really* make a difference which you choose? The answer is a resounding yes. A 1972 study using the above hypothetical found that test subjects playing the role of jurors who were exposed to the version of the closing argument that used RQs instead of declarative statements sentenced the defendant to a term more than one-third shorter than those exposed to an RQ-free argument that was otherwise the same.⁷ Simply by subtly re-wording the same message to include RQs, the advocate reduced the average sentence the subject jurors gave the defendant from 6.6 years to 4.1.⁸

This study established the idea that, if used properly, an RQ can allow an attorney to better connect with, and persuade, an audience. By contrast, misusing RQs can lead to negative consequences, such as an advocate losing credibility with the audience and thereby harming the client.⁹ As the study indicated, the subtle differences between effective and ineffective usage of RQs can translate to significantly different outcomes for real-world clients.

Do you care *now*?

The sort of investigation that this Article addresses also matters for some larger reasons than learning about a single figure of speech. More broadly, this Article is fundamentally about rhetoric — that is, the study of persuasion¹⁰ — and is therefore something useful for legal advocates to learn about. After all, lawyers *are* rhetoricians; the practice of law is the practice of rhetoric.¹¹ Yet, the study of rhetoric — once a hallmark in the training of law students — is some-

7. Dolf Zillmann, *Rhetorical Elicitation of Agreement in Persuasion*, 21 J. PERSONALITY & SOC. PSYCHOL. 159, 163 (1972). Zillmann's research is discussed in more detail *infra* Part IV.

8. *Id.*

9. See *infra* Part IV.C. While this Article focuses on the persuasiveness, rather than permissiveness, of RQs, the improper use of an RQ can result in even more significant consequences than turning off a jury. In some cases, the misuse of RQs has resulted in the overturning of a conviction. See *infra* Part V.C (summarizing key cases involving the use of RQs).

10. To many, the term rhetoric has a pejorative meaning for statements involving the use of insincere or grandiloquent language. However, that is not the definition intended in this Article. Instead, when I use the term rhetoric, it should be understood to refer to the study of writing or speaking as a means of persuasion.

11. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) (“[L]aw is most usefully seen not, as it usually is by academics and philosophers, as a system of rules, but as a branch of rhetoric.”).

thing that anyone involved with the profession should do.¹² All lawyers, whether making arguments in court or negotiating a contract on behalf of a client, spend much of their professional lives persuading others. For that reason, learning about RQs or any other single tree in *silva rhetoricae*¹³ – the forest of rhetoric – is a valuable activity for all legal thinkers. Hopefully, it will lead to continued investigation of other topics related to persuasion and allow advocates to see one of the key skills of their profession – being persuasive – in a new, and better, light.

This Article is important for larger reasons than just understanding the use of the RQ, because it seeks to encourage those who spend their life practicing, teaching, or thinking about the law to consider what studying persuasion in other disciplines can teach those involved with legal advocacy about persuasion. I am not the first to suggest this. For example, in a 1993 article, Professor Paul Wangerin noted:

People in various professional fields who talk or write about the process of “persuasion,” and, consequently, the “structure” of persuasive arguments, seem to assume that the only people who have anything of value to say about these two related topics are people from within the professional field to which the speakers or writers themselves belong. For example, when lawyers and legal educators discuss persuasion and persuasive arguments they appear, for the most part, to be interested only in the ideas of other lawyers and legal educators. Likewise, when journalists and journalism educators talk and write about persuasion and persuasive arguments, they seem convinced that no one other than someone trained or experienced in journalism could have anything worthwhile to say about the topics. One can say the same things about debaters and communi-

12. Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 613–14 (1999) (describing the 1000-year role of the study of rhetoric in Greek and Roman education and its absence from current legal training).

13. I borrow this term from Professor Gideon O. Burton of Brigham Young University. Burton has a fantastic website that serves as a guide to the terminology and taxonomies of classical and renaissance rhetoric. Gideon O. Burton, *Silva Rhetoricae*, <http://rhetoric.byu.edu> (last visited Apr. 16, 2011).

cation theorists, indeed about any group of people who study and use persuasive arguments.¹⁴

Since Wangerin wrote those words in 1993, some scholars have begun to take a closer look at applying the various tools of persuasion practiced in other professions.¹⁵ Yet, for the most part, not much has changed and there remains a shortage of articles written by legal scholars seeking to implement the persuasion-related research gained in other professional disciplines to legal advocacy.¹⁶

Perhaps most importantly, this Article encourages a closer link between legal advocacy and science in general. This is something that is largely lacking from the study of legal advocacy, and I see that as being a significant detriment to the legal profession. As Professor Kathryn Stanchi has opined, “The study of persuasive [legal] writing has been dominated by a kind of ‘armchair psychology’—a set of conventions and practices, handed down from lawyer to lawyer, developed largely from instinct and speculation.”¹⁷ Advancing from a persuasion-as-craft to persuasion-as-science model is a necessary, and overdue, step for those who study legal rhetoric or work as legal advocates. To that end, the RQ serves as a microcosm for how I envision the marriage of science and legal advocacy.

Finally, I have attempted to write this Article from a scientific perspective, in the sense that I am not as focused on convincing readers to use RQs, but instead on summarizing and synthesizing the research on the topic. When there are gaps or criticisms within the

14. Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL’Y 195 (1993).

15. See, e.g., Elyse Pepper, *The Case for “Thinking Like a Filmmaker”*: Using Lars von Trier’s *Dogville* as a Model for Writing a Statement of Facts, 14 LEGAL WRITING: J. LEGAL WRITING INST. 171 (2008); Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASS’N LEGAL WRITING DIRECTORS 108 (2004) (arguing attorneys who utilize modern typographic and visual-design theory are able to write highly-persuasive briefs).

16. Several notable exceptions exist demonstrating a trend in the right direction. See, e.g., Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169 (2004); Michael Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213 (2010); Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631 (2009) (outlining why attorneys should concentrate on non-verbal communication as well as verbal communication); Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411 (examining psychological underpinnings of argument sequencing and its effect on persuasion).

17. Stanchi, *supra* note 16, at 412.

scientific community regarding the literature on RQs, I have made an effort to point them out, holes and all. When there are questions about how the scientific research I synthesize will apply to legal persuasion, I have likewise attempted to identify them.

II. A BRIEF HISTORY OF RHETORICAL QUESTIONS

The ancients' ideas about effective oratory form the basis of modern legal advocacy. Their concepts have become the foundation for our generation's beliefs. Therefore, knowing a bit about how past generations thought about RQs, and rhetoric in general, can help us understand how we have arrived at where we are today.

For more than two millennia, RQs have been included in the canon of rhetorical figures that trained orators were taught to understand and apply. RQs have been used in the most influential means of communication—from the Bible¹⁸ to modern advertising.¹⁹ In fact, the RQ was considered so important during the Middle Ages that it merited its own unique punctuation mark.²⁰ Their significance stood the test of time among rhetors: rhetoricians in each of the three key historical times during which the study of persuasion most significantly developed—the Greek, Roman, and Renaissance eras promoted and used RQs in various forms.

The most famous Greek philosopher, Aristotle, is also one of the most famed figures in the study of rhetoric. Among his body of work on rhetoric, Aristotle is responsible for identifying the value of RQs and placing it in the canon of rhetorical techniques he identified. His work served as the basis for our understanding of RQs and encouraged readers to consider their effect.

Specifically, Aristotle urged his students to use the RQ in situations in which the speaker was interacting with an opponent (rather than in situations in which the speaker was attempting to influence

18. E.g., *Isaiah* 66:7-8 (Contemporary English Version) ("Have you ever heard of a woman who gave birth to a child before having labor pains? Who ever heard of such a thing or imagined it could happen? Can a nation be born in a day or come to life in a second?"); *Matthew* 16:26 (Contemporary English Version) ("What will you gain, if you own the whole world but destroy yourself? What would you give to get back at your soul?").

19. See generally Daniel J. Howard, *The Positioning of Rhetorical and Non-Rhetorical Questions and the Use of Self-Referencing in Print Advertising*, 5 J. BUS. & PSYCHOL. 397 (1991) (conducting a study on thousands of print advertisements utilizing RQs).

20. See LYNNE TRUSS, EATS, SHOOTS & LEAVES 142 (2004).

an audience).²¹ Aristotle outlined four types of questions which he saw as useful.²² The type that is closest to our modern understanding involved the suggestion that an effective form of stating a conclusion is through a question utilizing a previously offered answer.²³

Following Aristotle, among the Romans, RQs were discussed in *The Rhetorica ad Herennium*, which was an anonymous tome on rhetoric written around 90 B.C.E. and often (and controversially) attributed to Cicero.²⁴ The book's author called the use of the RQ in argument "exceedingly well adapted to a conversational style," and stated that "both by its stylistic grace and the anticipation of the reasons, [the RQ] holds the hearer's attention."²⁵ *Rhetorica ad Herennium* attributed the effectiveness of "Reasoning by Question and Answer" to the ability of the RQ to make audience members "ask ourselves the reason for every statement we make, and seek the meaning of

21. Aristotle concentrated on three different situations in which one could use rhetoric: the deliberative, the forensic, and the epideictic. Athenian culture was an early democratic society, and citizens were expected to represent themselves in public situations rather than relying on the talents of others. As such, numerous sophist works were freely available, essentially requiring the reader to adapt preset speeches to the situation at hand. Aristotle disagreed with this approach (and with the sophists themselves). He wrote *On Rhetoric* as a means of teaching his fellow citizens how to construct an argument from its basic components, instead of merely changing the words around from a pre-existing work. See George A. Kennedy, *Introduction to ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 1, 9–11, 17 (George A. Kennedy trans., Oxford Univ. Press 2d ed. 2007) (c. 333 B.C.E.). In the context of the law courts, while a party might call witnesses and introduce evidence, there was no cross-examination. Rather, opponents could directly ask a question of and expect an answer from their opponent. This form of adversarial proceeding helps us to understand why Aristotle's description of interrogation concentrated on defusing an opponent's argument rather than increasing the persuasiveness of the speaker's argument standing alone. See ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* bk. III, at 246–47 (George A. Kennedy trans., Oxford Univ. Press 2d ed. 2007) (c. 333 B.C.E.).

22. The four types of *erotesis* are not specifically named by Aristotle. Broadly, they can be summarized as (1) the *reductio ad absurdo*—in which the questioner corners the respondent into a position where the logical answer according to the respondent's stated reasoning is absurd on its face, (2) the stating of the speaker's conclusion in the form of a question, (3) the unpopular answer—in which the opponent's answer to the question is unpopular, and (4) the question which requires an evasive and vague answer that undermines the respondent's ethos. See ARISTOTLE, *supra* note 21, at 247.

23. See *id.* (Thus, when Meletus denied that Socrates believed in the existence of gods but admitted that he talked about a supernatural power, Socrates proceeded to ask whether "spirits were not either children of gods or something divine." When Meletus replied that they were, Socrates replied by asking, "Does anybody think there are children of gods but not gods?").

24. THE RHETORICA AD HERENNIIUM ON LACUS CURTIUS, 287–91 (Harry Caplan trans., Loeb ed. 1954) (c. 90 B.C.E.), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Rhetorica_ad_Herennium/.

25. *Id.* at 289–91.

each successive affirmation."²⁶ The book did not include specific advice on how or when to insert an RQ into an argument, but it provided examples of a few different forms of RQs to inspire its readers.²⁷ Similar to Aristotle, the main method the author of *Rhetorica ad Herennium* suggested was most effective was to give the audience a chain of questions and answers, building each question off of the preceding answer.²⁸

Later Romans gave a much more involved analysis and description of the role of RQs in rhetoric. A few generations after Cicero came Quintilian. In his famed book *Institutio Oratoria* (The Orator's Education), Quintilian built on the legacies of Aristotle and Cicero by further codifying the study of rhetoric. A figure of speech to Quintilian was any language that amounted to an unexpected or "artful" deviation from its normal meaning.²⁹ Among the figures of speech defined in *Institutio Oratoria*, Quintilian spent significant energy describing RQs. He classified a question as a figure whenever it was used to emphasize a point, as opposed to being used for its usual purpose of inquiry.³⁰ Quintilian provided several examples of RQs and what purpose they can have in effective oratory. Specifically, he explained (rather idiosyncratically by contemporary stan-

26. *Id.* at 287.

27. The form of question and answer is rather dizzying, and, based on the example, it is hard to see how the recommended pattern of RQ usage would be persuasive (as opposed to confusing or frustrating). For example, the author suggests the following chain of question and answer:

When our ancestors condemned a woman for one crime, they considered that by this single judgment she was convicted of many transgressions. How so? Judged unchaste, she was also deemed guilty of poisoning. Why? Because, having sold her body to the basest passion, she had to live in fear of many persons. Who are these? Her husband, her parents, and the others involved, as she sees, in the infamy of her dishonour. And what then? Those whom she fears so much she would inevitably wish to destroy. Why inevitably? Because no honourable motive can restrain a woman who is terrified by the enormity of her crime, emboldened by her lawlessness, and made heedless by the nature of her sex. Well now, what did they think of a woman found guilty of poisoning? That she was necessarily also unchaste?

Id. While the form of question and answer used in RHETORICA AD HERENNIIUM is rather befuddling, the reason the author believes it will be successful—because it holds the hearer's attention and encourages reflection on the underlying question—appears consistent with why more modern commentators believe RQs are useful. Perhaps something is just, both literally and figuratively, lost in translation from the original.

28. *Id.*

29. CORBETT & CONNORS, *supra* note 2, at 379.

30. See Bill Thayer, *Quintilian: Institutio Oratoria, Book IX, Chapter 2*, LACUSCURTIUS, http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Quintilian/Institutio_Oratoria/9B*.html#2 (reproducing English translations of Quintilian's book).

dards) that the RQ can best be used to excite pity,³¹ to embarrass an opponent,³² express wonder,³³ or to issue a sharp command.³⁴

The Renaissance rhetoricians, building on the Greek and Roman work, became the last major pre-modern group that expended significant energy on developing the field of rhetoric. Renaissance educators used classical texts, like *Rhetorica ad Herennium*, as the basis to teach their students oratory.³⁵ However, writers in this era did not solely rely on the Greek and Roman rhetoric texts. Instead, they continued to investigate and improve upon the field. One notable example was the work of Henry Peachum, who identified and explained a total of 184 different rhetorical figures in his sixteenth century book, *The Garden of Eloquence*, thus more than doubling the number that his predecessors had identified.³⁶ Among the figures, Peachum addressed RQs, calling them “erotema” – a Greek term originally meaning “question” – which he defined as “a forme of speech by which the Orator doth affirme or deny something strongly.”³⁷ Peachum did not suggest to readers how or when to create and deploy an RQ, but he did provide various examples drawn from biblical texts.³⁸ In explaining why they were important, Peachum suggested that this form of rhetorical figure is useful to “giveth to speech not onely life and motion, but also great strength and a coragious countenance, which is much comended in the sup-

31. See *id.* (“Alas, what lands, he cried, / What seas can now receive me?”).

32. See *id.* (“Do you hear? The will which we impugn is the work of a madman, not of one who lacked natural affection.”).

33. See *id.* (“To what dost thou not drive the hearts of men, / Accursed greed of gold?”).

34. See *id.* (“Will they not rush to arms and follow forth / From all the city?”).

35. See CORBETT & CONNORS, *supra* note 2, at 378.

36. See *id.* This number increased the number of figures from sixty-five in *RHETORICA AD HERENNIUM*, which was the most popular classical text during the Tudor era.

37. HENRY PEACHUM, *THE GARDEN OF ELOQUENCE* 106 (photo. reprint 1973) (1593).

38. *Id.*

Erotema is a forme of speech by which the Orator doth affirme or deny something strongly.

An example of Esay: ‘Are you not children of Adultery and a seed of dissimulation?’ *Esay.57.*

Another: ‘Is not thy wickednesse great, and thine ungratious deedes abominable?’ *Job.22.*

Another: ‘Doth God pervert the thing that is lawfull, or doth the Almighty pervert justice? can a rush be green without moisture, or may the grasse grow without water?’ *Job.8.3.11.* that is to say, it cannot.

Id.

porting of good causes”³⁹ He warned that the RQ can be abused “by subtilty and impudency,” or by excessive boldness.⁴⁰

Reviewing the historical literature on RQs from representative Greek, Roman, and Renaissance sources reveals several interesting things about the roots of the teaching of oratory. One concept that becomes apparent is that the experts in antiquity focused more energy on defining, classifying, and providing examples of RQs (and other rhetorical figures) than actually helping their students know how to create one on their own or suggesting when to use or not use it. In the fourth age of rhetoric—the present day—authors have moved from a focus on defining RQs to suggesting when they should and should not be used. The next Part takes the leap into contemporary times.

III. RHETORIC IN THE MODERN ERA: LEGAL ADVOCACY

With the disappearance of rhetoric from mainstream education,⁴¹ training in persuasion has become, by and large, a field-specific skill, learned only by certain subsets of society. So, rather than requiring that people learn the skill of oratory to complete school, in our era, along with people working in fields like advertising and journalism, it is legal advocates who get training in persuasive communication.

In the legal field, students typically encounter the study of rhetoric in first-year legal reasoning courses and in upper-level trial advocacy courses. After joining the Bar, new attorneys learn how to “be persuasive” from experienced colleagues who allow them to sit as second-chair at trials and to co-write motions. To aid in this process, there are also several texts that give instruction about persuasion to modern day legal advocates, including several that cover RQs. Therefore, this Part briefly reviews the literature regarding how those working and training in the field of legal advocacy address RQs.

A review of the current legal advocacy texts on persuasion reveals that the range of advice given regarding RQs is frighteningly incon-

39. *Id.*

40. *Id.*

41. Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTER-DISC. L.J. 613, 635 (1999) (“Only rarely, however, do modern rhetoricians or scholars devote much attention to how classical rhetoric applies to modern judicial or legal discourse.”).

sistent.⁴² It includes those commentators who see their use as a cataclysm⁴³ to enthusiastic endorsements of their use.⁴⁴ Some even consider the use of RQs an “essential” element to a closing argument.⁴⁵

The advice about whether advocates should use RQs that appears in the legal literature can be broken into two general categories: incorrect/unscientific and incorrect/quasi-scientific.⁴⁶ The scariest, of

42. The texts covering RQs are almost exclusively treatises aimed at practitioners. A review of the literature geared towards law students reveals that guidance is quite sparse with respect to using RQs during closing argument. Much of the advice is framed around the use of RQs in writings, like motions and other persuasive legal documents. *See, e.g.*, MICHAEL R. SMITH, *ADVANCED LEGAL WRITING* 336–38 (2008) (dissecting different forms of RQs and giving examples of their use in judicial opinions). Typically, advice on RQs in oral advocacy texts focuses on their use during a legal argument before a judge. *See, e.g.*, DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 159–60 (2003) (recommending attorneys avoid RQs during oral argument before a judge and stating that they are rarely successful and may result in “an unsympathetic member of the court . . . [chiming] in with an answer that may not necessarily assist the advocate . . .”). My review of trial advocacy texts indicates that the advice given to upper-level students on the use of RQs in summation is rather sparse as well. One example is the author who suggests that an RQ can be used in a closing argument to help jurors consider questions that “challenge [the] opponent with difficult or unanswerable questions.” THOMAS A. MAUET & MILTON O. RIEPE, *TRIAL TECHNIQUES* 395–96 (8th ed. 2010). Presumably, this would be done in a situation where the attorney making the closing argument rhetorically asks the jury something like, “And did counsel for the defendant effectively explain where his client was at the time of the murder?” *See id.*

43. James H. Seckinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51, 69–70 (1995).

44. *See, e.g.*, 4 FRED LANE & SCOTT LANE, *LANE GOLDSTEIN TRIAL TECHNIQUE* § 23:115 (3d ed. 2010).

The rhetorical question is a most valuable device in closing arguments. The rhetorical question provides an effective technique for getting the attention of the jurors and for persuasively emphasizing a point. Counsel may himself answer the question he poses or allow the jury to provide the answer during their deliberations and by their verdict. It is good technique to start every portion of the outline and references to specific corroborative matters with a rhetorical question. The rhetorical question will help you to make the transition from one part of the outline to the next.

Id.

45. RQs are one of four “essential tools of closing argument.” BILLIE COLOMBARO WOODARD ET AL., *LOUISIANA CIVIL TRIAL PROCEDURE* § 12:57. The others are selectively recalling specific pieces of evidence; use of analogies, anecdotes, and stories; and appealing to common sense. *Id.*

46. I do not discount the idea that, in theory, someone could offer correct advice on use of RQs without citing scientific studies. I did not, however, include it in the list because my literature review indicated that no one actually has done so. The type of general advice that suggests that RQs are good or bad, or should be used or not be used, simply misses the nuance (and thus misses the point). It is like responding to the question “Is it effective to speak in a loud voice?” with a yes or a no when in actuality, the answer is dependent on a number of variables not disclosed in the question. Unfortunately, this sort of oversimplified, unsupported, incorrect, or unscientific advice—whether for or against use of the RQ in summation—is the most dominant. *See, e.g.*, LANE & LANE, *supra* note 44, § 23:70 (“Each piece of documentary evidence or exhibit ought to be picked up individually and discussed with the jury. The

course, is the incorrect/unscientific advice. This is the body of information offered with no reference to anything but personal belief. It tends to be, at best, misleading and, more realistically, just outright wrong when viewed in light of the science. For example, one article in a prominent trial advocacy journal advises the following regarding the use of RQs: "Questions do not persuade; they inquire. Questions do not enhance a logical progression; they provoke a hiatus and a questioning process. Thus, although debaters love rhetorical questions and rhetorical questions have become popular in academic circles, they are not effective in the art of persuasion."⁴⁷ This advice is unhelpful and represents what is wrong with how legal advocates learn about persuasion.⁴⁸ The author makes a series of concrete, categorical statements about how the author purports RQs work that are—as proven in ways that apply the scientific method—wrong.⁴⁹ If followed, it will make advocates worse, not better, at their jobs. It is advice such as this that the study of persuasion theory can improve so that future generations of advocates are not led astray.

In addition to unscientific advice, there is also advice that, to some degree, claims to have its grounding in science. This is what I have termed incorrect/quasi-scientific. Unfortunately, the existing examples purporting to apply scientific research to the subject of RQs do so in a flawed, typically over-simplistic way. For example, "The rhetorical question can be of benefit. It can help increase the juror's attention by actively involving them in answering a question. . . . Rhetorical questions utilize the concept of Cialdini, Petty, and Cacioppo that it is harder to persuade people once active thinking has be-

rhetorical question may be used to introduce the comment on each of the exhibits."); 2 JOHN ELLIOT LEIGHTON, LEIGHTON, LITIGATING PREMISES SECURITY CASES § 11:2 (2010) ("Rhetorical questions—especially those you know the evidence will answer—are effective in developing themes . . ."); STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING & DEFENDING WRONGFUL DISCHARGE CLAIMS § 25:23 (2010) ("Another effective device is the rhetorical question. Ask the question; then provide the jury with the answer and the supporting facts.").

47. Seckinger, *supra* note 43, at 69.

48. In Part IV, *infra*, I provide precise details supporting my position. I do not hold my own work above criticism and welcome those who disagree with my analysis to offer their own analysis and critique based on the existing science. My ego will not be bruised, and if it helps legal advocates improve their skills, then it is well worthwhile.

49. Seckinger's argument even includes a subtle use of the *ad hominem* fallacy by associating academics and debaters with RQs and implying that because they are "popular" among those groups, they are bad, misleading, or otherwise problematic. See Seckinger, *supra* note 43, at 69.

gun.”⁵⁰ This advice is problematic because Cialdini, Petty, and Cacioppo’s findings were far more subtle than to allow one to merely suggest that people who are actively thinking are harder to persuade, or that RQs are useful to persuade in all circumstances.⁵¹ In fact, this advice could cause severe problems for any practitioner who took it seriously because the lesson of the cited authors on RQs is that they are quite helpful to persuasion in certain circumstances, but very unsuccessful in others.⁵² Because the above-excerpted text makes no effort to distinguish those situations, it is counter-productive.

A Florida practitioners’ guide also attempts to use science to provide advice on the use of RQs, but disfavors their use, suggesting, “Keep rhetorical questions to a minimum. One study on this subject revealed that at least one third of the jurors will realize that the lawyers are trying to persuade them with the questions.”⁵³ This text also demonstrates the use of incorrect quasi science: it implies that the effectiveness of RQs does not include any variables, and it also implies without backing that a target’s awareness of persuasion attempts is inherently negative.⁵⁴ While I believe any effort to use science to support advice on persuasion is laudable, this tip, like too many others, is presented in a problematic way because it is overly simplistic and references, but does not actually apply, the research.

50. 3 RUSSELL SMITH, AMERICAN LAW OF PRODUCTS LIABILITY § 76:57 (2010).

51. See *infra* Part IV (discussing at length why this treatise’s approach to the research on this topic is problematic). Cialdini, Petty, and Cacioppo popularized the Elaboration Likelihood Model (ELM). The ELM was the dominant model for examining RQs for more than twenty years—from the 1980s to the early 2000s. I focus on the ELM because it was the most typical model used to test and explain RQs. The ELM is what gave rise to the persuasion knowledge model, described below, which currently represents the cutting-edge of understanding the mechanism of a persuasion attempt’s effect. The ELM has since been replaced, although the authors can hardly be faulted for that, given that it was cutting edge when their advice on RQs was published.

52. See *infra* Part IV.B for a detailed analysis of the ELM and its application to RQs.

53. 5 PHILIP J. PADOVANO, FLORIDA PRACTICE, CIVIL PRACTICE § 17:10 n.6 (2009) (citing BERGER, MITCHELL & CLARK, TRIAL ADVOCACY PLANNING, ANALYSIS & STRATEGY 180 (1989)).

54. But see *infra* Part IV.C (discussing work in the Persuasion Knowledge Model indicating that awareness of a persuasion attempt is only a bad thing in certain circumstances, such as situations with high audience salience and low audience favorability for the person making the argument).

IV. THE SCIENCE OF RHETORICAL QUESTIONS

Scientific advances in the twentieth and twenty-first centuries mean that the study of rhetoric can grow beyond guesswork and mere conjecture and become a real science. However, as the above examples indicate, teachers of legal advocacy have yet to effectively integrate that science. The science of rhetoric should be integrated into the teaching of legal advocacy because it has the capability to revolutionize the approach to persuasion that legal advocates apply in courtroom settings and beyond.

The science of RQs can be thought of as a linear evolution, just like case law. This section reviews the three modern, scientific efforts to investigate the persuasiveness of RQs and to explain when and why they are persuasive. By examining these earlier efforts to analyze the effectiveness of RQs, one can more easily understand the most modern research, which integrates all of the research described below into its model.

That the RQ, as one small figure of speech, has been the subject of so much research is a testament to the complexity surrounding its effectiveness. One concept that has received widespread acceptance among scientists studying RQs: the use of RQs *generally* increases the persuasiveness of a message relative to a message not containing RQs.⁵⁵ However, research has established that the effectiveness of RQs is quite nuanced and dependent on multiple variables.⁵⁶ Indeed, research indicates that preliminary questions need to be answered even before one can frame a good RQ because, regardless of content, only certain audiences are receptive to RQs. With the potential effectiveness of RQs established through experimental science, researchers have focused on finding models to explain why they are effective. Once discussed, these concepts can be extrapolated and reproduced in everyday settings. This Part describes that research.

A. *Starting Points: Zillmann's 1972 Study*

Scientists have measured the effectiveness of RQs in a variety of contexts, including print advertising and editorial journalism.⁵⁷

55. Kevin L. Blankenship & Traci Y. Craig, *Rhetorical Question Use and Resistance to Persuasion: An Attitude Strength Analysis*, 25 J. LANGUAGE & SOC. PSYCHOL. 111, 112 (2006).

56. *See id.*

57. Rohini Ahluwalia & Robert E. Burnkrant, *Answering Questions About Questions: A Persuasion Knowledge Perspective for Understanding the Effects of Rhetorical Questions*, 31 J. CON-

However, the first experimental study on the persuasiveness of RQs, a 1972 study by the social psychologist, Dolf Zillmann,⁵⁸ focused on law. Specifically, Zillmann used a defense attorney's closing argument in a hypothetical murder case to test the effect of RQs on the "sentence" the subjects (acting as jurors) would impose.⁵⁹

Zillmann's theory was that the success of an RQ in persuading a listener was an extrapolation of the "agreement theory," which was first expressed in an 1864 book on tactics for successful debate.⁶⁰ The agreement theory, Zillmann explained, holds that the targets of persuasion attempts (like jurors during a closing argument) are more likely to be persuaded if the agreement is elicited by the person making the persuasion attempt.⁶¹ In other words, the agreement theory holds that asking an audience to express agreement about specific, small portions of an argument in advance will likely lead the audience to support the proponent's broader argument in general.⁶² Proponents of this theory explained that this was because seeking agreement would create the impression of superior knowledge and reasoning on the part of the speaker, thus causing the audience to favor him or her.⁶³

To test this concept, Zillmann developed an experiment that used ninety undergraduate students from an introductory psychology course as subjects.⁶⁴ He developed a fact pattern involving a hypothetical criminal trial and presented the study as a project sponsored by the American Bar Association that was said to be focused on the decision-making process of a jury.⁶⁵ The subjects were provided with a fact pattern involving a juvenile accused of second-degree murder in the killing of his father.⁶⁶ The defense claimed that the

SUMER RES. 26, 26 (2004) (describing varieties of subject matter used as a backdrop for testing the persuasiveness of RQs).

58. David R. Roskos-Ewoldsen, *What Is the Role of Rhetorical Questions in Persuasion?*, in COMMUNICATION AND EMOTION: ESSAYS IN HONOR OF DOLF ZILLMANN 297 (Bryant et al. eds., 2003).

59. Zillmann, *supra* note 7, at 162.

60. *Id.* at 159 (citing ARTHUR SCHOPENHAUER, *ERISTIK* (c. 1831), reprinted in BRIGITTE FRANK-BOHRINGER, *RHETORISCHE KOMMUNIKATION* (1963)).

61. *Id.* at 159-61.

62. *Id.*

63. *Id.* at 159.

64. *Id.* at 161.

65. *Id.* at 162.

66. *Id.*

killing was not a murder, but instead was manslaughter.⁶⁷ The participants got written information giving the background of the case, and then were exposed to a tape-recorded closing argument by the defense attorney.⁶⁸

Experimenters divided test subjects into a total of six different groups using a two-by-three design (i.e., half of the subjects were to be exposed to RQs; the other half to direct statements). Within these two groups (the RQ and the statement groups), Zillmann further divided the subjects into three sub-groups: those whose initial attitude toward the subject of the study (i.e., the defendant in the hypothetical case) were manipulated to be (1) unfavorable, (2) neutral, or (3) favorable.⁶⁹ To create these different initial attitudes toward the defendant, Zillmann provided the subject groups with slightly different fact patterns regarding the hypothetical case that influenced their views about the defendant as desired.⁷⁰

With respect to grammatical syntax, the subjects heard only one of two different versions of the closing argument: depending on their group, the subjects were exposed to a version of the closing that included either ten direct assertions interspersed with the rest of the defense closing or ten variations of the same statements that were converted into RQs when included in the closing argument. Zillmann used a mix of different forms of RQ with the groups selected to be exposed to them: some of the RQs were affirmative statements ("Frank Myers was a threat to his own daughter."), which were alternatively transformed into negative-interrogative forms ("Wasn't Frank Myers a threat to his own daughter?").⁷¹ Analogously, Zillmann transformed four negative statements to the affirmative-interrogative form ("But he never used his knife as a weapon before" became "But did he ever use his knife as a weapon before?").⁷² For the two remaining RQs, Zillmann changed their structure from simple affirmatives to affirmative statements with a negative-

67. *Id.* From a legal perspective, this seems somewhat unrealistic in that the study appears to blend the guilt/innocence phase of the jurors' role with the sentencing.

68. *Id.*

69. *Id.* at 161. Zillmann also tested the effectiveness of the attempted manipulation of the initial attitude of the subjects and found that his efforts were successful. *Id.* at 163.

70. *Id.* at 162.

71. *Id.*

72. *Id.*

interrogative agreement-eliciting appending (“Johnny was a peaceful boy” became “Johnny was a peaceful boy, wasn’t he?”).⁷³

After hearing the closing argument, the experimenters asked the subjects, acting as jurors, to recommend a prison term for the defendant of between six months and sixty years.⁷⁴ The results established that RQs were generally effective in reducing the recommended prison terms after the closing argument.⁷⁵ Most remarkably, those with an unfavorable initial view of the defendant recommended, on average, a 6.6 year term of incarceration when presented with a closing argument using direct statements and only a 4.133 year term for the RQ group.⁷⁶ Those with a neutral initial view essentially had the same recommended sentence—2.433 for direct statements as compared to 2.533 for the RQ—regardless of argument form.⁷⁷ Those with a favorable view of the defendant sentenced him to 2.6 years if they heard a direct statement versus 1.533 with an RQ.⁷⁸

Prior to running the experiment, Zillmann considered three possible rationales to explain why RQs were persuasive: operant conditioning; awareness hypothesis; and RQs defining the person speaking as having high extroversion.⁷⁹ Under the operant conditioning theory, Zillmann explained that in natural conversation or debate, a speaker is most likely to elicit a respondent’s admission of agreement or concession in response to a particularly good argument.⁸⁰ By contrast, RQs would typically not be used with poor arguments, since an overt response to the question would likely result in disagreement and thus would have undesirable consequences for the persuader.⁸¹ Through socialization, the continued pairing of agreement questions with good arguments would eventually lead to a state in which the rhetorical agreement question came to “‘mark’ relatively powerful arguments.”⁸² Therefore, a speaker who used RQs would generally be more persuasive than one who did not

73. *Id.*

74. *Id.* at 162–63.

75. *Id.* at 163–64.

76. *Id.* at 163.

77. *Id.*

78. *Id.* Zillmann did admit that, while the effect of RQs on the subjects under favorable conditions was quite pronounced, it did not meet the conventional statistical criteria. *Id.*

79. *Id.* at 160–61.

80. *Id.* at 160.

81. *Id.* at 161.

82. *Id.* at 164.

because his arguments, through prior conditioning, would appear to be stronger. Zillmann characterized this theory as best explaining the outcome.⁸³

The awareness hypothesis states that, when a person hears an RQ, they have heightened curiosity and want to know the answer to the question. Consequently, after hearing an RQ, this theory holds that a person will access information that is relevant to it in an attempt to provide an implicit answer to the question.⁸⁴ RQs, in other words, motivate the message recipient to more fully and systematically process the message contained in the RQ.⁸⁵ Zillmann believed that the impact of the RQ depended on how the message recipient responded to the information highlighted in the question.⁸⁶ If the recipient had a positive response, persuasion would be enhanced, and if negative, persuasion would be reduced.⁸⁷ Obviously, given the strong reduction in sentence awarded by those subjects who already had a negative view of the defendant and still gave a lighter sentence when presented with RQs, this hypothesis did not bear out. In fact, Zillmann found that "the outcome [was] clearly counter to predictions."⁸⁸

Finally, Zillmann posited that use of RQs could draw attention to the person making the RQ and make the persuasion attempt more apparent.⁸⁹ As a result, the subjects might protect themselves against this by discounting the arguments.⁹⁰ In discussing the results, Zillmann admitted that the results did not support this argument.⁹¹

Indeed, with three theories of why RQs were effective, and only one even arguably applying to the results, Zillmann's results were difficult to explain. Two years after this initial foray into RQs, Zillmann, working with Professor Joanne Cantor, performed a second

83. *Id.* Zillmann recognized an inconsistency with those who had a neutral view toward the defendant. He theorized that when the subjects with neutral views toward the defendant gave roughly the same sentence regardless of whether the closing argument included RQs or only statements, the RQ's apparent lack of effect was demonstrated "by the relatively uninformed communicatee's motivation to attend carefully to the content of the message in order to fulfill his assignment." *Id.*

84. Roskos-Ewoldsen, *supra* note 58, at 308.

85. See Zillmann, *supra* note 7, at 160-61.

86. See *id.* at 161.

87. Roskos-Ewoldsen, *supra* note 58, at 308-09.

88. Zillmann, *supra* note 7, at 165.

89. *Id.* at 161.

90. *Id.*

91. *Id.* at 165.

study on RQs.⁹² In that scenario, they found that the use of RQs increased persuasion for those with an initially favorable attitude but decreased persuasion for those with an initially unfavorable attitude.⁹³ With a tantalizing result in the 1972 Zillmann study indicating how powerful RQs can be, and subsequent results that seemed not to align with the initial study, the stage was set for other scientists interested in testing new models of persuasion to attempt to use other methods to explain why, and when, RQs were effective.

*B. A More Sophisticated Approach to RQs:
Elaboration Likelihood Model*

Merely knowing that RQs could work in persuading people, without a good way to explain why that was true, was insufficient to researchers. Scientists working in the field wanted a deeper understanding, so they began to develop and test more sophisticated theories to attempt to understand and explain how RQs work.⁹⁴ Soon, social psychologists like Zillmann were joined by consumer researchers tasked with advising advertisers on what methods were most effective. Together, the social psychologists and consumer researchers got more deeply involved with the study of RQs through the testing of newer, more sophisticated models.

Beginning in the early 1980s, the dominant model for understanding how persuasion attempts work became the Elaboration Likelihood Model (ELM).⁹⁵ The ELM is a more sophisticated model than the Zillmann hypotheses because the ELM assumes that multiple variables are at play with respect to determining if a persuasion attempt is effective. Created by Professors Richard E. Petty and John T. Cacioppo, the ELM states that persuasive messages can be processed in two ways: the central route and the peripheral route.⁹⁶

92. See Dolf Zillmann & Joanne Cantor, *Rhetorical Elicitation of Concession in Persuasion*, 94 J. SOC. PSYCHOL. 223 (1974).

93. *Id.* at 232–35.

94. See Ahluwalia & Burnkrant, *supra* note 57, at 26 (stating that early research of RQs indicated a lack of source-related theories to account for the effects of RQs, so they began to use newer, richer theoretical frameworks in an attempt to explain them).

95. Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123, 125 (Leonard Berkowitz ed., 1986).

96. *Id.* at 125–26.

Under the ELM, “central route” processes require conscious, thoughtful analysis of an idea under consideration.⁹⁷ One uses “central route” processing when consciously thinking about something; for example, weighing the merits of a debate, speech, or editorial. Under “central route” processing, a person’s unique cognitive responses to the message are a factor in determining the persuasive outcome.⁹⁸ If favorable thoughts are a result of the person’s “central route” thought process, the person will most likely accept the message. By contrast, if unfavorable thoughts are generated while considering the merits of the presented arguments, the person will most likely reject the message.⁹⁹

The second possibility, “peripheral route” processes, does not involve considering the message through extensive thought related to the merits of the argument presented.¹⁰⁰ Instead, the processes often rely on outside, environmental characteristics of the message, like the credibility of the source, the way in which the source presents the persuasion attempt, the attractiveness of the source, or other tangential factors, like a catchy jingle or slogan that contains the message.¹⁰¹

Motivation, defined as the desire to process a message, and ability, defined as the capability of performing the evaluations, are the two factors that most influence whether a person processes a message centrally or peripherally.¹⁰² Which route the individual takes is determined by the extent of their elaboration. Both motivational and ability factors, in combination, determine elaboration.¹⁰³ Motivational factors include things like the personal relevance of the message topic, accountability, and a person’s innate desire to enjoy thinking.¹⁰⁴ Ability factors include the presence or absence of time pressures or distractions for the audience and relevant knowledge needed of the topic to carefully scrutinize the arguments.¹⁰⁵

97. Richard E. Petty, John T. Cacioppo & David Schumann, *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135, 135 (1983).

98. *Id.*

99. *Id.* at 138 (using a consumer’s purchase of a refrigerator as an example).

100. *Id.* at 135–36.

101. *Id.* at 136.

102. *See id.* at 143.

103. *See id.* at 143 n.5 (demonstrating possible conflict between motivation and ability in the study).

104. *Id.* at 137, 143.

105. *Id.* at 143.

Research on the ELM model has been performed to test a variety of persuasive techniques, including studies devoted specifically to predict the effect of RQs on an audience using the ELM model. In 1981, Professors Petty and Cacioppo, along with Martin Heesacker, conducted the first major study using the ELM to test an RQ's ability to enhance or detract from persuasion.¹⁰⁶ Their study utilized three variables: message style (RQ or statement); argument quality (strong or weak); and personal relevance (high or low).¹⁰⁷ The authors theorized that when the message had low personal relevance for the subjects (i.e., where the subjects did not care very much about the results), the use of RQs would enhance message elaboration, and the subjects' attitudes and cognitive responses to both strong and weak messages would be more extreme when the arguments were presented in RQ, rather than statement, form.¹⁰⁸ They further theorized that under high personal relevance conditions, the use of RQs would likely disrupt message elaboration and, as a result, the subjects' attitudes and cognitive responses to the messages would be more extreme when the arguments were presented in statement rather than rhetorical form.¹⁰⁹

To perform this study, the subjects, who were undergraduate students at the University of Missouri, were told they were being given the chance to earn extra credit in a psychology class. Their purpose, they believed, was to help the university's journalism program by evaluating radio editorials, including those sent in by other colleges and universities.¹¹⁰ The subjects' task would be to provide ratings of the broadcast quality of the editorials. There were actually four different versions of the radio editorial the students heard, with each one advocating a requirement that seniors pass a comprehensive exam in their declared major prior to graduation.

Before listening to the editorial, the students were asked to read an introductory paragraph.

For subjects in the high involvement conditions [i.e., those for whom the study had high personal relevance], the paragraph explained that as a result of a recent academic

106. Richard E. Petty, John T. Cacioppo & Martin Heesacker, *Effects of Rhetorical Questions on Persuasion: A Cognitive Response Analysis*, 40 J. PERSONALITY & SOC. PSYCHOL. 432 (1981).

107. *Id.* at 434.

108. *Id.* at 434-35.

109. *Id.* at 435.

110. *Id.*

re-evaluation, the president of their university (Missouri) had recommended a number of changes to begin the next academic year. The editorial would describe one of those changes that would personally affect each of the students. [By contrast, for those assigned to the group with] low involvement conditions, the background paragraph explained that the editorial would concern a proposal that the president of a distant university . . . had recommended be instituted at his institution in 10 years. Thus, none of the students present would be personally affected by the proposal.¹¹¹

To control the arguments' strength, the group assigned to hear "strong arguments" received communication in favor of senior comprehensive exams that were "logically sound, defensible, and compelling."¹¹² By contrast, the weak argument group was presented with eight major arguments "that were open to skepticism and easy refutation."¹¹³

Finally, with respect to the use of a declarative statement versus an RQ, "Each of the major arguments in the regular version of the strong and weak messages" ended with a summary sentence in the form of a statement (for example, "Thus, instituting a comprehensive exam would be an aid to those who seek admission to graduate and professional schools," or "Thus, whatever educational value the exams have for graduate students would also benefit undergraduates.")¹¹⁴ In the RQ versions of the strong and weak messages, six out of eight summary statements were transformed into RQs (for example, "Wouldn't instituting a comprehensive exam be an aid to those who seek admission to graduate and professional schools?" or "Wouldn't whatever educational value the exams have for graduate students also benefit undergraduates?").¹¹⁵ The other five questions in the RQ versions of the strong and weak messages began with: (1) "Don't you agree that . . ."; (2) "Doesn't this show how . . .";

111. *Id.*

112. *Id.*

113. *Id.* Both sets of arguments were determined to be strong or weak by criteria developed in earlier work by Professor Petty. *Id.* (citing Richard E. Petty et al., *The Effects of Group Diffusion of Cognitive Effort on Attitudes: An Information Processing Approach*, 38 J. PERSONALITY & SOC. PSYCHOL. 81, 86 (1980)).

114. Petty, Cacioppo & Heesacker, *supra* note 106, at 435-36.

115. *Id.* at 436.

(3) "Isn't it true that . . ."; (4) "Isn't it clear that . . ."; and (5) "Don't you think that . . ." ¹¹⁶

The results of the study generally supported the prediction that low-involvement arguments were strengthened by RQ usage and high-involvement arguments were weakened by them because they distracted from the content of the argument itself.¹¹⁷ Indeed, this study's results established that in situations when people are not normally motivated to think about the message arguments, speakers can provoke more thinking by summarizing the major arguments as questions rather than as assertions.¹¹⁸ Summarizing an argument as a question, the authors stated, causes people to engage in greater thought about the merits of the argument.¹¹⁹ It also pointed to a more nuanced understanding of RQs, indicating that the use of RQs could lead to more or less agreement with the advocated position, depending on whether thinking about the argument leads to favorable or unfavorable cognitive responses.¹²⁰

Indeed, subsequent research within the ELM has generally supported the idea that RQs can distract people from the text they are listening to or reading.¹²¹ Further research has also demonstrated that they can also increase a message recipient's motivation to process a message.¹²² For example, in a study in 1994, two scientists found that RQs did increase persuasion with a topic that was presumably minimally relevant to its subjects.¹²³

The ELM, as the dominant model for two decades, seems to *mostly* explain how RQs work, or at least to explain it better than past or competing models. However, the ELM cannot explain some things about why RQs are persuasive that a legal advocate should know, like why RQs disrupt the ability of an audience to process a message.¹²⁴ To attempt to bridge this gap, newer models have been tested seeking to build on what the ELM has helped scientists to learn.

116. *Id.*

117. *Id.* at 438.

118. Richard E. Petty et al., *To Think or Not To Think: Exploring Two Routes to Persuasion*, in *PERSUASION: PSYCHOLOGICAL INSIGHTS AND PERSPECTIVES* 81, 92 (Sharon Shavitt & Timothy C. Brock eds., 1984).

119. Petty, Cacioppo & Heesacker, *supra* note 106, at 438.

120. *Id.*

121. Roskos-Ewoldsen, *supra* note 58, at 300.

122. *Id.* at 303.

123. *Id.* (citing Daniel J. Howard & Roger A. Kerin, *Question Effects on Question Generation and the Mediation of Attitude Change*, 75 *PSYCHOL. REP.* 209, 209-10 (1994)).

124. *Id.* at 312.

C. *The Cutting Edge: RQs and the Persuasion Knowledge Model*

The most widely accepted theory regarding persuasion, in general, is the Persuasion Knowledge Model (PKM) put forth by Professors Marian Friestad and Peter Wright.¹²⁵ The PKM views a persuasion episode—in other words, an attempt to persuade—as consisting of two parties, each relying on three distinct sources of knowledge.¹²⁶ Each party constantly utilizes its reservoirs of information to combat the persuasive attempts utilized by the other party.¹²⁷

According to the PKM, any audience—whether a single person, a panel of jurors collectively, or a television audience in total—has a sum of experience and intuition which can be divided into three groupings for the purposes of persuasion: topic knowledge, other party knowledge, and persuasion knowledge.¹²⁸ Topic knowledge is the party's substantive knowledge of the issue in play between the two parties.¹²⁹ Other-party knowledge is what the party knows or believes about the entity on the other side of the persuasion attempt.¹³⁰ Persuasion knowledge is what a person knows about the art of persuasion; it is a medley of the behaviors one has learned to defeat previous persuasion attempts, insights into current persuasive attempts, and goals from a persuasion attempt.¹³¹ These three

125. See Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1 (2004).

126. See *id.* at 2. This is the most basic understanding of a persuasion episode, with one agent and one subject. Practically speaking, a persuasion episode can have more than two parties or it can have two parties fluidly slipping between subject and agent as each attempts to persuade the other. See *id.* at 3.

127. See *id.* at 4.

128. See *id.* at 3.

129. *Id.* For instance, if a salesperson in a cell phone store was attempting to persuade a prospective buyer to purchase a cell phone, each party's knowledge of cell phone technology and its market would be the topic knowledge for each party.

130. See *id.* Other-party knowledge can also be designated as agent knowledge. The point is that the success of a persuasion attempt relies in part on the speaker's perception of the listener, and vice versa. Thus, as later studies illuminated, a persuasion attempt may hinge on how the target perceives the persuader. See, e.g., Ahluwalia & Burnkrant, *supra* note 57, at 40.

131. Friestad & Wright, *supra* note 125, at 6. It is not clear if there is a limit to how much knowledge one party can have in a persuasion episode. It would seem reasonable that as long as people are attempting different mechanisms of persuasion, their targets will be attempting to cope. The key to discerning how much persuasion knowledge one has is how much effort goes into the coping technique. The more automatic and effective the coping response, the more likely that the subject is high in persuasion knowledge, at least for that particular persuasion attempt. See *id.* at 7.

bodies of knowledge are not static and also regularly reinforce each other.¹³²

The PKM theory encompasses every aspect of a persuasion attempt and, thus, is a framework that can explain the various effects of different persuasion techniques. The theory's basic premise regarding the efficacy of a persuasion attempt is that the party who expends more mental energy to comprehend the episode is at a disadvantage throughout the interaction. When one party is at a disadvantage, persuasive tools, such as an RQ, are going to have a larger effect on the subject than if both parties are managing their cognitive resources at equal levels.¹³³

Researchers utilizing the PKM framework can focus on individual acts within a persuasion episode and explain their import to determine what is effective and what is not. In fact, two consumer researchers, Professors Rohini Ahluwalia and Robert Burnkrant, have studied RQs in light of the PKM and have suggested that the response of the target of any persuasive attempt depends, in large part, upon how salient or noticeable the rhetorical format is to the audience.¹³⁴ In two experiments, they found that when a persuasion attempt using an RQ is not very salient or noticeable—for example, light usage of questions or only a rhetorical headline—people exposed to an RQ tend to simply answer the question.¹³⁵

Ahluwalia and Burnkrant found that when the use of rhetorical format, like use of an RQ, is very "salient" (i.e., noticeable to the

132. For instance, the subject of a persuasion attempt might note the tactics utilized by the persuasive agent and infer some source knowledge about the persuasive agent from the tactics utilized. For example, if an attractive salesperson (the persuasive agent) used her attractiveness as a persuasive tool, a potential client (the subject) might notice the salesperson's attractiveness and almost might notice the salesperson's utilization of her attractiveness in furtherance of a business proposition. The subject has now learned that the salesperson is willing to use her physical attributes to make a sale, a fact of which the subject was unaware at the beginning of the persuasion episode.

133. See Friestad & Wright, *supra* note 125, at 4 ("For example, someone watching a seemingly familiar sort of television ad may initially pay little heed to persuasion knowledge but then increase his/her use of it upon noting something unpredicted in the ad's format.").

134. Ahluwalia & Burnkrant, *supra* note 57, at 26. This study was particularly effective in demonstrating the efficacy of RQs utilized in consumer research because it studied RQs utilizing items similar to one a customer might see in the marketplace. Thus the reader may be assured that the findings of this study are not an artifact of the chosen method of observation. While this was a critique of earlier studies, the findings of this study negated any concerns raised by such a criticism. See *id.* at 40.

135. *Id.* at 39. This finding comes back to the management of cognitive resources. If people have no reason to devote more thought to something, they will not think about it for the sake of conserving energy.

audience), the audience directs its thoughts to the message source and the tactics being used, instead of focusing on the message content *per se*.¹³⁶ As such, once the audience has recognized that a party is making a persuasion attempt, the effectiveness of the attempt depends more on the audience's prior disposition towards the source (e.g., company, salesperson, candidate, and advertisement) than on the quality of the arguments.¹³⁷

With a source toward whom the audience feels favorably, the inclusion of RQs conveys the perception of the source having an open, less pressuring style which lets the audience "decide" and, therefore, enhances persuasion.¹³⁸ In stark contrast, when the audience dislikes the source, a similar usage of RQs is perceived by the audience as "pressuring" and "aggressive," and therefore, makes the audience more resistant to the message.¹³⁹

By contrast, when the audience does not view the persuasion attempt as "salient," something quite different happens. The audience addresses the persuasion attempt "covertly," which is something akin to the "peripheral processing" that the authors of the ELM identified.¹⁴⁰ Under the PKM, it is believed that in low salience situations, the inattentive audience is likely to have their persuasion increased if the argument quality is strong, have it remain unaffected if the argument is neutral, and have their persuasion reduced if the argument is weak.¹⁴¹

The Ahluwalia and Burnkrant study reveals how fluid a persuasion episode can be. The question does not become whether an RQ is persuasive or not, but rather what factors are at play in making an RQ persuasive. The effectiveness of an RQ depends first on the target's attentiveness and secondly on the target's perception of the

136. *Id.* at 33. When the subject is alerted by the "artful deviation" of the use of the RQ and his interest is piqued, he will devote more resources to understanding the use of the RQ rather than trying to answer the question.

137. *See id.* This understanding is the basis for the PKM's shift in our interpretation of persuasion episodes. Instead of asking if a particular persuasive tool, say an RQ, is persuasive in and of itself, the PKM allows us to step back and understand that anything may be persuasive if we understand the environment in which it is operating as a persuasive tool. Here, RQs are an "artful deviation" and, thus, are not an "anything" trying to be persuasive. *See id.* at 28-29. RQs have been proven persuasive both empirically and historically. *See id.* at 33.

138. *Id.* This finding also makes intuitive sense. We react positively to persuasion attempts from sources which we are inclined to agree with.

139. *Id.* at 33, 35. Again, this finding makes intuitive sense. We react negatively to persuasion attempts from sources which we are disinclined to agree with.

140. *Id.* at 27-29.

141. *Id.*

source in some situations and perception of the strength of the underlying argument in still others. Indeed, the form of question itself is of secondary importance because any positive effect inherent to the use of an RQ can be negated by other factors. Understanding what these factors are and the roles they play in a persuasion episode allows us to shape future use of RQs to ensure their efficacy on the persuader's behalf.

V. BUILDING A BETTER APPROACH TO THE USE OF RQS IN LEGAL ADVOCACY

With all this background knowledge, creating a framework for using RQs in closing arguments at trial is only a matter of a small extrapolation and application from the PKM work of Ahluwalia and Burnkrant. In short, once an advocate has a basic understanding of how and why RQs are persuasive, she is prepared to make the best decision as to whether to use one. It becomes as easy as running through a decision tree. The following sections provide a method for deciding when to use an RQ and offer guidelines about what the contents of the RQ should include when an advocate chooses to use one. This Part then identifies some questions that remain unanswered, but that will be relevant to the work of legal advocacy once studied by the scientific community.

A. Guidelines for Presenting an RQ

An attorney considering using an RQ in a closing argument will first have to focus her attention on a preliminary analysis to determine whether the situation is appropriate for it.¹⁴² Ultimately, considering the opinions of the jury is nothing new to legal advocacy; it is simply an adaptation of the time-honored skill of "reading a jury" that trial attorneys pride themselves in being adept at performing. However, rather than just attempting to glean the mood of the jury, applying the PKM model requires that the attorney consider a few very specific guidelines.

Under the PKM, the first decision an attorney must make is to decide if the use of an RQ to summarize a point in a closing argument will cause a *salient deviation* with the jury.¹⁴³ In other words, the

142. See *supra* Part IV.C (describing the PKM).

143. See *supra* text accompanying notes 136-37 (describing the relevance of salience to the PKM).

attorney must determine if the use of an RQ will be highly noticeable to jurors. An RQ is salient in a situation where the jury appears to be paying close attention to the closing argument and hanging on the attorney's words, which would cause it to be acutely aware of a technique, like an RQ, that was not mainstream.¹⁴⁴

First, we can play out the decision tree for RQs likely to be highly salient. Under the PKM, when a person facing a persuasion attempt (like a juror) is paying attention and becomes aware of an RQ, the listener focuses her attempt to interpret the RQ by asking questions about the message source.¹⁴⁵ Put differently, if the jury is intently focused on a closing argument and hears an RQ, they are likely to ask why the attorney has presented them with it and will consider if they view that attorney favorably. If the jury likes the advocate—or, more precisely, has a positive view of the advocate in the sense that they feel favorably about her—the use of the RQ will aid in persuasion by making the attorney appear more open.¹⁴⁶ If, by contrast, the jury does not view the advocate favorably, the use of an RQ will make the argument it supports less persuasive because jurors will perceive the attorney as pressuring.¹⁴⁷

Thus, the decision tree boils down to be rather simple in a scenario with an involved, active jury. Once an advocate determines the jury is likely to be paying attention, the advocate should use an RQ if she feels the jurors feel favorably about her; but should stick with statements if she feels they do not.

By contrast, an attorney should follow a different process if she has made a determination that the jury is not paying close attention during the closing argument. In low-salience situations, the jury is likely to focus on the message itself instead of the speaker.¹⁴⁸ In other words, the unfocused jury presented with an RQ will not focus on the attorney, but instead will shift their effort to determining if the message in the RQ is effective. At this decision point, the advocate must evaluate her own argument and ask herself if the ar-

144. See *supra* text accompanying note 136.

145. See *supra* text accompanying note 137 (explaining significance of audience's opinion of message source).

146. See *supra* text accompanying note 138 (explaining rationale under PKM for significance of the audience's positive view of message source).

147. See *supra* text accompanying note 139 (explaining rationale under PKM for significance of the audience's negative view of message source).

148. See *supra* text accompanying note 140 (explaining effect of RQs, generally, in low salience conditions).

gument is strong, moderate, or weak. If the argument is strong, an RQ will enhance the level of effectiveness of the persuasion attempt on the jury.¹⁴⁹ If the strength is moderate, the use of an RQ will not affect persuasion.¹⁵⁰ If the argument's strength is low, the use of an RQ will weaken the persuasiveness of the argument.¹⁵¹

*B. The Situation Is Right, Now What Do I Say?*¹⁵²

Once an advocate makes the determination that the situation is appropriate for the use of an RQ, her attention must turn to the form of the RQ itself. In other words, what's the lawyer to say? In contrast to the myriad of variables which must be weighed in getting the speaker to this point, the form of the RQ itself is not established to be dependent on environmental factors and has been shown, thus far, to have several relatively fixed attributes that can make it more persuasive.

First, RQs are most effective at the end, not the beginning, of an argument. Placement of the question after the argument has a larger positive effect than placement before the argument.¹⁵³ Research suggests that this effect occurs because the summarizing RQ encourages the target to think about the arguments just presented, whereas an RQ that is asked prior to presentation of the underlying argument is more likely to be perceived as distracting in a negative way and, thus, decreases persuasion.¹⁵⁴

Second, whenever possible, the questioner should ask the RQ in the second person.¹⁵⁵ This makes an RQ more salient, which is the

149. See *supra* text accompanying note 141 (explaining effect of an RQ in low-salience conditions with a *strong* underlying argument).

150. See *supra* text accompanying notes 141 (explaining effect of an RQ in low-salience conditions with a *moderate* underlying argument).

151. See *supra* text accompanying note 141 (explaining effect of an RQ in low-salience conditions with a *weak* underlying argument).

152. I give particular thanks and recognition to my research assistant extraordinaire, Mark M. Higgins, who took the lead in penning this sub-part.

153. See Daniel J. Howard, *The Positioning of Rhetorical and Non-Rhetorical Questions and the Use of Self-Referencing in Print Advertising*, 5 J. BUS. & PSYCHOL. 397, 407-08 (1991) (noting most post-argument placement of RQs in print advertisements also involves heavy use of self-referencing).

154. See *id.* at 407.

155. See *id.* at 400. Instead of the question, "Why did Madge even think of accepting that beer?" self-referencing principles would suggest the question, "Knowing what Madge knew and suspected, why would you have refused that cocktail?" Howard's study is predicated on the principle that the evolution of advertising and persuasion should give researchers insight

key attribute for which a speaker should strive. The more salient the artful deviation, the more the target will take the time to process the import of the question rather than merely answering the question itself.¹⁵⁶ As long as the audience does not think negatively about the source, this will aid in persuasiveness.¹⁵⁷

Third, a decision should be made about how often an RQ will be asked.¹⁵⁸ Essentially, if an advocate has a great argument, one can still over-utilize an RQ. One study found that the use of a high number of summarizing RQs, twelve in the case of this study, resulted in less message acceptance when an argument was strong.¹⁵⁹ An honest self-critique of the argument makes this decision easier and increases the probability of success.

Having followed the principles outlined above, it is difficult to imagine a situation where one could ask an RQ that is fatally flawed structurally for the purposes of courtroom persuasion. There may be some ideal structure of an RQ, but science has not yet discovered and delivered it to our understanding.¹⁶⁰ Further, even if there is a "perfect" RQ, the studies mentioned here have all shown that "imperfect" RQs can still be effective as persuasive tools. Thus, legal advocates should spend more effort determining whether the situation is appropriate for the use of RQs, not determining how exactly to phrase them.

C. Open Questions

For every door that the scientific research on RQs has opened, another still remains closed. Researchers continue to test and improve the theoretical models, like the PKM, for understanding RQs and

into what is effective because advertising is already effective. As such, broad trends in advertising will give insights into how individuals can be persuaded.

156. See Ahluwalia & Burnkrant, *supra* note 57, at 27-28.

157. See *supra* note 139 and accompanying text (describing effect of an RQ on high-salience audience with negative view of advocate).

158. See James M. Munch & John L. Swasy, *Rhetorical Question, Summarization Frequency, and Argument Strength Effects on Recall*, 15 J. CONSUMER RES. 69, 75 (1988). A non-statistically significant finding was that more frequent summarizing RQs increased message acceptance in weak arguments. See *id.*

159. See *id.*

160. See *infra* Part V.C for a more detailed explanation of possible perfect RQ structures. That there may be a more structurally perfect RQ is a linguistic argument which psychological research has not confirmed as necessarily more persuasive. Thus, the advocate can take solace in the fact that he is using the very latest in empirically confirmed science and has a glimpse at the possible future direction of research.

their effect on audiences.¹⁶¹ Advocates can benefit from knowing what researchers have learned so far, but should also be cognizant of some of the open questions that continue to perplex those who study RQs and persuasion theory.

How an RQ can most effectively be structured, and what variables define the efficacy of that structure, has not yet been thoroughly studied by the scientific community.¹⁶² To date, scientists have not yet shown that one form of an RQ is more persuasive than another. However, there is some inconclusive evidence that a positive confirmatory RQ (“And Johnny liked to play with guns, didn’t he?”) may be less persuasive in a typical situation than, for instance, a more open-ended RQ (“And was Johnny’s favorite toy his stuffed teddy bear?”).¹⁶³

Once the larger issues involving the effect of RQs have been hashed out in the scientific literature, researchers will likely begin to look for more minute differences to determine if there are more efficacious methods of asking an RQ. The work of linguists can help us see gaps in the legal literature regarding the persuasiveness of RQs. For example, linguists do not view negative or positive confirmatory questions as “true” RQs.¹⁶⁴ The guidelines which they have

161. See *supra* Part V.A–B (describing the PKM and its treatment of research).

162. See Roskos-Ewoldsen, *supra* note 58, at 314–18. Professor Roskos-Ewoldsen’s excellent summation of the research done on RQs following the initial Zillman study strongly makes this point. Researchers have yet to focus on rather subtle differences in the question being asked, preferring to manipulate more easily verified variables, such as placement, salience, and argument strength. As this part of the field begins to settle into an agreed upon theoretical framework, the next battle may be over what amounts to an RQ for purposes of research.

163. See *id.* at 316. Conversely, it may also be true that positive confirmatory RQs are more persuasive. Most of the research which has been conducted has relied on negative confirmatory RQs (“And Johnny didn’t play with guns, did he?”). Linguists would argue that this is not an RQ at all. For the layperson, especially a juror, such fine distinctions can be reasonably set aside for the purposes of persuasion in the courtroom.

164. For linguists, true RQs have several characteristics not shared by other questions. Javier Gutierrez Rexach, *Rhetorical Questions, Relevances and Scales*, 11 REVISTA ALICANTINA DE ESTUDIOS INGLESES 139, 142–44 (1998). First, RQs are the only questions that can be used with the phrase “after all.” Second, RQs are the only form of question that can be followed by a phrase beginning with the word “yet.” Third, the phrase “by any chance” denotes an RQ. Finally, RQs can be interjected into other phrases such as non-restrictive relative clauses and do not need to be delineated by conjunct phrases. *Id.* at 142. For example, the question in the phrase “Symbolic logic, and by the way who invented it?, isn’t my cup of tea” is usually interpreted as an information question seeking an answer. *Id.* Alternatively, “Symbolic logic, which by the way who invented, isn’t my cup of tea” is usually interpreted as containing a rhetorical question. *Id.*

Additionally, RQs are usually denoted by what are known as Negative Polarity Items (NPIs). *Id.* at 145. NPIs are words or phrases used only in the scope of negation. *Id.* NPIs can

determined make a question an RQ would eliminate questions such as “And Johnny liked to play with guns, didn’t he?” Instead, the linguists’ view of a true RQ would fall closer to “an open-ended RQ.”¹⁶⁵ So while current psychological research has not yet differentiated between negative confirmatory questions and strict linguistically approved RQs, future advocates and the research upon which they rely might be led by influence from yet another field. That gaps may exist between linguistically ideal RQs and other types of questions should not give one pause before actively thinking about stocking the RQ in their advocacy arsenal.

Finally, beyond what amounts to more or less persuasive use of an RQ, legal advocates cannot forget other, larger concerns. This Article is also just a starting point in the decision making process about the use of RQs, or any rhetorical figure in general. For example, legal advocates must consider whether the rules of evidence even allow for an RQ to be used in a given situation, beyond thinking about whether, and when, they *should* be used. Luckily, the analysis about whether they can be used appears fairly straightforward: RQs have resulted in overturned verdicts on appeal when the underlying point of the RQ is to indirectly suggest something to the jury that would otherwise be inadmissible or inappropriate to argue before

be strong or weak. Weak NPIs are phrases such as “anybody,” “anything,” or “yet” used in the negation of a question. *Id.* For instance, in the following phrase the word “ever” is a weak NPI: “Nobody has ever been to Moscow.” *Id.* Strong NPIs are very specific idioms or turns of phrase which are nearly impossible to misinterpret. In the following example, the phrase “lifted a finger” is a strong NPI: “Not one of three policeman lifted a finger to help us.” *Id.*

A strong NPI used in a question automatically triggers a rhetorical reading of the question. A rhetorical reading is not obligatory when a speaker uses a weak NPI in her question. *Id.* at 146. Instead, the speaker gives other cues, such as the focus or intonation of the question, which would trigger a rhetorical reading. *Id.* With this understanding of what constitutes a “true” rhetorical question, it is easy to see where previous research as well as the layperson would be confused by the differences. However, an advocate may be emboldened to know that jurors are not as attuned as linguists to the subtle distinctions between questions using either a strong or weak NPI. Therefore, she is more likely to read both questions as rhetorical.

165. A negative (or positive) confirmatory question does not require much mental effort to process or ask, whereas, in some cases, the strict linguist type employs language used only in certain situations. To think of such language and then interpret it is a much more exhausting effort than a mere confirmatory question. As such, this readily visible cost difference strikes a chord with what this Article has outlined as reasons for rhetoric in general to affect the human mind. The party using more resources to process a message is the party more likely to be persuaded; the differences between these two types of RQs might affect the likelihood of a successful resolution of the persuasion encounter. *See* Friestad & Wright, *supra* note 125, at 7 (“As a consumer’s practice (familiarity) with persuasion coping tasks increases, . . . the cognitive effort they expend to do those coping tasks decreases and aspects of their coping behavior become automatic . . .”).

the jury. So, while courts have held that the use of RQs in summations is “generally within the scope of jury argument provided they are based on a reasonable deduction from the evidence,”¹⁶⁶ their use is objectionable when the RQs create an inappropriate impression of burden shifting¹⁶⁷ or draw attention to an impermissible inference, like the failure of a defendant to testify in his own defense in a criminal case.¹⁶⁸

CONCLUSION

Professor William J. McGuire, a Yale psychologist, has noted that our generation has the unique opportunity to advance the study of persuasion well beyond the work of the ancients:

[O]nly in four scattered centuries . . . did persuasion become a process so central to society that it evolved to the status of a craft whose master practitioners could abstract rules of thumb and convey them to apprentices by demonstration and description. In three of the four previous persuasive centuries . . . persuasion evolved [beyond the level of an art] to craft level. Only in the fourth era, our own 1925–2025 century, has persuasion evolved still further to a science, with general theories to organize the specific relations observed and to suggest further ones, and with empirical methods for testing the hypothesized relations between variables. When a field like persuasion evolves through stages of art, craft, and science, it does not lose something but, rather, adds to the earlier stages.¹⁶⁹

I hope this Article encourages legal thinkers to break from that pattern and to think of persuasion as a science and to apply that science to our field.

166. *Rodriguez v. State*, 90 S.W.3d 340, 366–67 (Tex. App. 2001) (citing *Wolfe v. State*, 917 S.W.2d 270, 280 (Tex. Crim. App. 1996)).

167. *United States v. Skandier*, 758 F.2d 43, 45 (1st Cir. 1985) (noting that rhetorical questions should not be used in closing argument where they could be perceived by the jury as shifting the government’s burden of proof to the defendant).

168. *Rodriguez*, 90 S.W.3d at 366–67 (“[A] rhetorical question may be an impermissible comment on the failure to testify if it is accompanied by a statement pointing to the lack of an explanation.”).

169. William J. McGuire, *Standing on the Shoulders of Ancients: Consumer Research, Persuasion, and Figurative Language*, 27 J. CONSUMER RES. 109, 111 (2000).

Perhaps you are like me; when I got through all of this work, I could not help but think: all this effort to prove that RQs can be helpful if used properly but can be ineffective if used improperly? Rather intuitive. However, a fairly recent study in the field of psychology can help us understand why it is important for legal thinkers to examine our instinct and conventional wisdom to see if they square with science. Consider bullying. For generations, mental health professionals believed that the sort of cruel abuse and violent aggression involved with a more powerful person picking on a person perceived as less powerful was rooted in the bully's low self-esteem.¹⁷⁰ This was the prevailing belief despite the absence of direct and controlled studies linking self-esteem to aggression.¹⁷¹ Indeed, once the topic was experimentally studied, it became clear that we could reasonably reject the belief that playground bullies secretly have low self-esteem.¹⁷² Rather, it appears that the cause of aggressive behavior is linked with narcissism.¹⁷³ So, the belief held by armchair psychologists that self-loathing was the cause of aggression was not only incorrect but appears to be the polar opposite of the grandiose views of personal superiority that are now considered a root cause of aggressive behavior. From a detached view, this may seem like a small oversight. But once one considers the likelihood that a generation of bullies was treated with therapy that actually made their behavior worse—boosting their belief in their self-worth increased their narcissism—the error becomes unfortunate and sad. Indeed, this exemplifies why guesswork and armchair psychology should be left behind when science is available to replace it. This mindset of science-over-conjecture should extend to law.

This Article, therefore, is ultimately an attempt to challenge and update the conventional wisdom on RQs, to challenge the conventional wisdom on what is persuasive, and to challenge the conventional wisdom on how an attorney should think about training for

170. Roy F. Baumeister et al., *Self-Esteem, Narcissism, and Aggression: Does Violence Result from Low Self-Esteem or from Threatened Egotism?*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 26, 26 (2000).

171. *Id.* at 26–27 (stating that “the theory seemed to enter into conventional wisdom without ever being empirically established,” and calling direct, controlled studies linking self-esteem to aggression “almost nonexistent”).

172. *Id.* at 28 (citing Dan Olweus, *Bullying at School: Long-term Outcomes for the Victims and an Effective School-Based Intervention Program*, in AGGRESSIVE BEHAVIOR: CURRENT PERSPECTIVES 97–130 (L. Rowell Huesman ed., 1994)).

173. *Id.* at 27 (stating that narcissism “seem[s] quite plausibly linked to aggression and violence”).

her role as an advocate. I posit that by examining and attempting to apply science to supplement the collective experience of advocates, attorneys can be more persuasive and, therefore, better at their jobs. Advocates should continue to challenge ideas about how to be more persuasive—including those assertions made in this Article—to improve their effectiveness and to improve the practice of law.

The rhetorical question is just a start. But starting somewhere is essential if legal advocates are to take seriously their role of representing clients in the justice system. Ultimately, the study of persuasion is more valuable than leaving it to guesswork, and science can contribute to improving the practice of law in important ways.

Don't you agree?