[Classical] Lawyers as [Digital] Public Speakers: Classical Rhetoric and Lawyer Digital Public Commentary

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Arguably the contexts of speaking and writing for lawyers of ancient Greece and Rome and lawyers of today could not be more different. But, classical rhetorical theory, developed 2,000 years ago for face-to-face interactions in public squares and courtrooms, can be productively applied to improve our understanding of modern lawyers' digital communication practices. This article first argues that lawyers have an ethical responsibility to write as "citizen lawyers" and provide legal commentary in the digital public sphere. Then, applying classical rhetorical theory, this article explores the problems and possibilities of lawyers' digital rhetoric. The article is not a handbook of rhetorical techniques; rather it offers lawyers a rhetorical perspective on public commentary in a digital environment.

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INTRODUCTION

"Rhetoric would be a very easy and small matter, if it could be included in a short body of rules, but rules must generally be altered to suit the nature of each individual case."

—Quintilian, Institutio Oratoria, II.13†

OLD RHETORICS, NEW MEDIA, AND COMMENTATING ON THE LAW

As the epigraph above identifies, in Ancient Rome nearly two millennia ago, Quintilian, a Roman citizen, rhetorical scholar, and lawyer,[1] recognized that speaking to influence the thoughts and actions of others—that is, speaking rhetorically—was a situation-specific activity that resisted uniform rules and relied on the careful judgment and discernment of the speaker to adapt to the complexities, constraints, and conditions of those situations. Even at a time when rhetorical situations[2] were predominantly those in-person, face-to-face interactions or, in some cases, in written form between those who were literate, Quintilian (and other classical rhetoricians) knew that every instance of persua-

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† This quote from Quintilian's *Institutio Oratoria* appears in QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING: TRANSLATIONS FROM BOOKS ONE, TWO, AND TEN OF THE *INSTITUTIO ORATORIA* xiii (James J. Murphy & Cleve Wiese eds., 2d ed. 2016) [hereinafter QUINTILIAN TEACHING SPEAKING & WRITING].

[1] THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 38–39 (Patricia Bizzell & Bruce Herzberg eds., 2001); *see also* QUINTILIAN TEACHING SPEAKING & WRITING, *supra* note †, at xiii.

[2] For a description of the "rhetorical situation," see Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 1–2 (1968). Generally speaking, the "rhetorical situation" is context for a rhetorical act and includes the setting, the constraints and exigencies confronting the speaker and message, and the audience who will hear the message. *See id.* at 5.

sion required adaptation and individuation if one wanted to effectively persuade an audience.[3]

In Quintilian's Rome as well as in ancient Greece—the birthplace of rhetoric—citizens and lawyers spent their time speaking and writing in and for the fora of the physical world.[4] They argued before juries of their physically present fellow citizens; in public squares and legislative bodies; and before judges in courts of law, presenting arguments about guilt and innocence, public policy, and even legal reform.[5] Their messages, both spoken and written, were regulated and contextualized by the bounds of the physical fora in which they spoke (i.e., the public square, legislative bodies, and courtrooms), and were focused on the immediately present audience.[6] For citizens and lawyers of the ancient western world, audiences for persuasive messages were local and messages, usually, fleeting.

Quintilian's world of persuasion appears significantly different from the possibilities for persuasion that confront the contemporary lawyer. While lawyers still speak to influence and persuade others in traditional lawyering spaces, the lawyer's sphere of influence has expanded beyond the courtroom, the office, and even the local newspaper to the *digital public sphere*—the electronic and computerized spaces where lawyers can speak to broader, more numerous, and more diverse audiences they would like to influence about legal issues of common concern.[7]

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[3] *See, e.g.*, JAMES A. HERRICK, THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION 89–90 (5th ed. 2013) (noting that "rhetoric [in the form of 'verbal skills'] provided a method for conducting political debates, undertaking trials, and addressing the citizenry on important topics."). Likewise, Athenian democracy that preceded the Roman Empire required that an individual have the "speaking skill" for public influence, and Athenian males needed the "ability to listen, understand, and speak about deliberative and judicial affairs." *See id.* at 28–29. The Greek Sophist, Isocrates, helped transform Greek culture from primarily oral to literate "where speaking and writing were emphasized equally." JAMES J. MURPHY ET AL., A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 52 (4th ed., Routledge 2014) (1983).

[4] *See generally* the discussion in THE RHETORICAL TRADITION, *supra* note 1, at 19–21.

[5] *See* HERRICK, *supra* note 3, at 89–92 (describing the places and kinds of argument in the Greek and Roman traditions).

[6] *See id.*

[7] The concept of a "public sphere" is not a new idea. Jürgen Habermas theorized the public sphere as a private people gathered together to convey to the government the needs of the state. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 27–31 (Thomas Burger & Frederick Lawrence trans., 1989). Rhetoric scholar Gerard Hauser defines the public sphere as "a discursive space in which individuals and groups associate to discuss matters of mutual interest and, where possible, to reach a common judgment about them." GERARD A. HAUSER, VERNACULAR VOICES: THE RHETORIC OF PUBLICS AND PUBLIC SPHERES 61 (1999). The idea of the "digital public sphere," while newer in origin, is not without controversy about its characteristics and accessibility. *See, e.g.*, Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 95 WASH. U. L. REV. 1353, 1358–60 (2018) (warning of the dangers of romanticizing the internet as a new "town square" and encouraging differentiation between various forms of digital media when considering the accessibility and treatment of digital spaces).

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In digital public spaces, like the internet, lawyers speak as legal educators, social influencers, public policy commentators, and service marketers. In the digital world, there is virtually no limit to the ways lawyers can present (and re-present) themselves or the audiences lawyers can reach with their messages. The messages can be visual, oral, or textual; they can resist linearity, coherence, and closure; and audiences can use messages in whole or in part for purposes unanticipated and unregulated.[8] Messages are easily attainable, readable, and translatable,[9] and the rate of a message's circulation is infinite and quantum—messages fly across the virtual world in ways unknown before communication became electronically connected.[10] Lawyers today function in a complex communication world that requires constant adaptation to audiences and speaking situations. Reading Quintilian's thoughts above suggests that he might have anticipated these changes in his classical view of rhetoric because he recognized that one must constantly adapt to effectively engage new audiences in new situations.

One might argue there could not be much that is more different about the lawyers of the classical period in ancient Greece and Rome speaking and writing in the Greek agora and the courtrooms of Rome and today's lawyers speaking and writing in the digital public sphere. But classical rhetorical theory[11] can be productively applied to better understand lawyers' writing in the digital public sphere. In other words, if we did not know better, Quintilian might have been commenting on the rhetorical experiences of lawyers speaking digitally today.

What This Article Is About

This Article is an initial foray into—not an exhaustive treatment of—the problems and possibilities for lawyers writing commentary about the law in the digital public. This exploration connects digital rhetorical theory—theory about messages that are electronic or computerized—and classical rhetorical theory with the messages of the citizen lawyer—a lawyer as public speaker who has ethical responsibility to publicly address issues of justice, including legal education, law reform, and rule of law.[12] Making these connections is meant to

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[8] *See* discussion *infra* Part II.

[9] *See infra* Section II.C.

[10] *See infra* Section II.C.

[11] The classical rhetorical period is defined as the time from the birth of rhetoric in ancient Greece, about the fourth century B.C.E., to about 400 C.E. *See* THE RHETORICAL TRADITION, *supra* note 1, at 2, 19.

[12] For the discussion of how the "citizen lawyer" concept is grounded in the Preamble of the American Bar Association's Model Rules of Professional Conduct, see *infra* Section I.B. Others have discussed the idea of the citizen lawyer. *See, e.g.*, Ann L. Schiavone, *Writing the Law: Developing the "Lawyer Citizen" Identity Through Legislative, Statutory, and Rule Drafting Courses*, 55 DUQ. L. REV. 119, 120–21, 123–24 (2017) (noting the origins of the term with Thomas Jefferson and defining citizen lawyer as one that "in some way, take[s]

stimulate thought and critique about how applying classical rhetoric to contemporary lawyer speech in the digital public can provide a more robust perspective on how lawyers might craft effective digital "public commentary."

For the purposes of this Article, both the digital sphere, where lawyers might share their messages with audiences, and the lawyers' messages themselves, are treated as intentionally "public."[13] In other words, the Article begins with the premise that the messages relevant to this Article are those messages a lawyer writes that are intended for consumption by public, not private, audiences. The Article presumes citizen lawyers' messages mean to engage the public not necessarily on behalf of clients but to influence public thinking, through education or argument, on legal issues. Examples of these kind of public messages are what one might call, as Jennifer Murphy Romig has, "public legal writing," which includes, for example, blogs about legal issues or law reform, tweets about the most recent Supreme Court case, or online articles in a lawyer's area of expertise.[14]

This Article also distinguishes these messages as "public" because they appear in the digital "public sphere" rather than in the "technical sphere" of legal practice.[15] In the public sphere, the internet has opened new avenues for lawyers to influence the public on legal issues with the stroke of a key and a connection to the internet.[16] In the technical sphere, however, lawyers' audiences are not public: in the technical sphere, lawyers speak for example, to juries and judges in courtrooms and clients in the privacy of their offices.[17]

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responsibility for their role in promoting the public good through development and reform of law.").

[13] Scholar Michael Warner explores the meaning of a "public" in his work and offers a definition particularly useful for digital publics: a "public that comes into being only in relation to texts and their circulation." *See, e.g.*, Michael Warner, *Publics and Counterpublics (Abbreviated Version)*, *in* CONTEMPORARY RHETORICAL THEORY: A READER 257 (Mark J. Porrovecchio & Celeste Michelle Condit eds., 2d ed. 2016) [hereinafter CONTEMPORARY RHETORICAL THEORY]. In the spirit of Warner's definition, for the purposes of this Article, the "public" refers to an ever-transforming body of readers and listeners who engage with a lawyer's commentary through digital media. This "public" is made up of more than those who are "official" legal discourse participants, like lawyers and judges. For this Article, "public" commentary is that which is intended for any audience who can access the message.

[14] *See* Jennifer Murphy Romig, *Legal Blogging and the Rhetorical Genre of Public Legal Writing*, 12 LEGAL COMM. & RHETORIC 29, 29 (2015) (defining "public legal writing" as "writing by lawyers not for any specific client but for dissemination to the public or through wide distribution channels, particularly the internet.").

[15] *See* G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation*, *in* CONTEMPORARY RHETORICAL THEORY, *supra* note 13, at 202 (describing argument in public, technical, and personal spheres).

[16] *See* Romig, *supra* note 14, at 30 (noting that "public legal writing has never been easier: technology enables lawyers and everyone else to readily [communicate with the public]").

[17] *See* Goodnight, *supra* note 15, at 202. Goodnight describes the public sphere as one which transcends the private and technical spheres and is not reducible to any particular professional communities or social customs. *Id.* He describes the "technical" sphere, on the oth-

Speaking to "public" audiences in the "public sphere" is the focus of this Article; speaking to and for exclusively technical legal audiences through technical legal messages is outside the Article's scope.[18]

Finally, this Article focuses on citizen lawyers as "commentators" making legal "commentary" in the digital public sphere. The Preamble to the Model Rules of Professional Conduct defines one of the lawyer's roles as the role of citizen lawyer: a "public citizen" with a "special responsibility" for justice.[19] In that role, lawyers arguably are expected to engage in public discourse, or in other words, to be commentators on the law.[20] As described below, the American Bar Association (ABA), in connection with the ethical rules for lawyer conduct, has identified "lawyer commentary" as a category of lawyer speech.[21]

The distinction between a commentator and a commenter is important for talking about discourse in the digital world. A "commentator" is "someone who provides commentary," defined as "a series of remarks, explanations, and interpretations."[22] This is different from a "commenter," a term most often used to refer to someone who makes an isolated, perhaps less well-thought-out remark or "comment" online.[23] Arguably, a more extensive "comment," one that provides greater depth of explanation, could be considered "commentary," even if it appears in a digital space for "comments," such as at the bottom of a blog entry.

HOW THE ARTICLE PROCEEDS

The Article starts by introducing how the ABA's Model Rules of Professional Conduct (Model Rules) describe the role of the lawyer as a "public citizen" with a special responsibility for justice. Then it introduces the ABA's recent ethics opinion that identifies a new category of lawyer speech, "public commentary," which expressly includes online or digital commentary.[24] The

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er hand, as one "where more limited rules of evidence, presentation, and judgment are stipulated in order to identify arguers of the field and to facilitate the pursuit of their interests." *Id.*

[18] This is not to say, however, that documents written for official court audiences cannot also be documents written for the public. Certainly, a good lawyer knows that, because of digital technology, documents written for courts, legislatures, and other regulatory bodies are always and irrevocably written (or should be written) for public audiences.

[19] *See infra* note 27 and discussion *infra* Section I.B.

[20] *See* Kirsten K. Davis, *Rhetorical Criticism as Essential Legal Skill: Some Thoughts on Developing Lawyers as 'Public Citizens'*, 16 COMM. L. REV. 43, 48 (2016) ("Trained as rhetorical critics, lawyers can better perform as public citizens, unpacking the complications in the language of rules and policies, explaining those complications, offering and arguing for justice based upon their evaluation of the moral valence of the law.").

[21] *See infra* Section I.A.

[22] *See, e.g.*, *Commentator vs. Commenter*, GRAMMARIST, http://grammarist.com/usage/commentator-commenter [https://perma.cc/A77J-HBEH] (last visited Mar. 8, 2020).

[23] *See id.*

[24] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) [he reinafter ABA Formal Opinion], https://www.americanbar.org/content/dam/aba/admin

Article then connects that commentary to the lawyer's public citizen role. This Part of the Article argues that lawyers should consider themselves public speakers as well as client advocates and that the availability and ubiquity of digital media demands that lawyers communicate digitally to the public about issues like legal reform, rule of law, and social justice.

To fulfill their unique ethical commitment to speak publicly on legal topics and, perhaps, to use the digital public sphere to do so (although this commitment is not enforceable through professional discipline), lawyers must understand "digital rhetoric." Thus, the next Part highlights the features of digital rhetoric and how lawyers' public commentary might be seen as a type of digital rhetoric. Finally, the Article explores the connection between digital rhetoric, modern lawyers producing digital public commentary, and classical rhetorical theory. The goal of this final Part is to apply classical rhetoric to lawyers' digital public commentary to explore the possibilities, problems, opportunities, and constraints of a digital public commentary genre of legal writing.[25]

This Article is not a *Rhetorica Ad Herennium*[26] handbook of recipe-like instructions to guide lawyers on how to use rhetorical techniques in the digital sphere. Instead, the Article offers a *rhetorical perspective* on what lawyers might understand about themselves, their ethical responsibilities, their messages, their purposes, their communication media, and their audiences when commentating digitally. This Article does what Quintilian urged classical rhetors to do 2,000 years ago: consider how their rhetorical sensibilities might need to adapt to fit new rhetorical situations.

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istrative/professional_responsibility/aba_formal_opinion_480.pdf [https://perma.cc/AX6Q-2 WB8].

[25] What makes a group of texts amount to a rhetorical genre? A genre exists when a "constellation of elements" of rhetorical artifacts are sufficiently similar that they can be placed in the same classification. *See* Karlyn Kohrs Campbell & Kathleen Hall Jamieson, *Form and Genre in Rhetorical Criticism: An Introduction*, in FORM AND GENRE: SHAPING RHETORICAL ACTION 21 (Karlyn Kohrs Campbell & Kathleen Hall Jamieson eds., 1978). The artifacts of a particular genre share "substantive, stylistic, and situational characteristics." *Id.* For a different view on genre as form of action and motivation rather than as the physical characteristics of texts, see Carolyn R. Miller, *Genre as Social Action*, 70 Q. J. SPEECH 151 (1984). For an exploration of legal blogging as rhetorical genre, see Romig, *supra* note 14.

[26] [CICERO], RHETORICA AD HERENNIUM, (Harry Caplan trans., Harvard Univ. Press Report 1964). This text is thought to be "the earliest Roman systematic rhetoric" and was written in the first century B.C.E. Silva Rhetoricae, Rhetorica ad Herennium *(1st Cent. B.C.)*, rhetoric.byu.edu/Primary%20Texts/Ad%20Herennium.htm [https://perma.cc/5A2R-DNLM] (last visited Mar. 8, 2020). It was influential from the Roman period through the Renaissance. *Id.* It provided extensive textbook-like information on types and parts of oratory, particularly judicial oratory, and in its fourth book, it provided an extensive list of figures of speech. *Id.* Although scholars originally attributed the text to Cicero, its authorship is now considered unknown. *See* Caplan's introduction to [CICERO], *supra*, at vii–ix ("It is wisest, I believe, to ascribe the work to an unknown author.").

I. Digital Public Commentary, the Citizen Lawyer, and Classical Rhetoric's Contribution to Legal Ethics

The Preamble to the ABA's Model Rules describes one of the roles of the lawyer as a "public citizen having special responsibility for the quality of justice."[27] This role entails an obligation to improve the law, improve access to justice, promote the rule of law, and further the values of democracy.[28] In the digital public sphere, lawyers can use their legal expertise to influence, educate, and lead in the public in ways that go beyond face-to-face interactions in offices, boardrooms, and courtrooms and written communications in print books, magazines, and newspapers.[29] A recent ABA Formal Ethics Opinion defined this kind of public speaking as lawyer "public commentary" and specifically included digital forms of communication in the category.[30] Effectively, the Model Rules and the Ethics Opinion, read together, describe a specific speaker role, the citizen lawyer, delivering a specific type of message, "public commentary."

A. Lawyers' Digital Public Commentary

A 2018 Formal Ethics Opinion by the ABA Standing Committee on Ethics and Professional Responsibility considered for the first time how a blogging lawyer must treat the confidentiality of client information.[31] In deciding that the Model Rules applied to blogging, the ABA defined a category of lawyer speech it named "communicat[ion] about legal topics in public commentary."[32] The opinion recognized that while lawyers have historically "comment[ed] on legal topics in various formats" through "education[al] programs" and "articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews," the "newest format [for comments] is online publications such as blogs, listserves [sic], online articles, website postings, and brief online statements or microblogs (such as Twitter®)."[33] The Committee noted that "[o]nline public commentary provides a way [for lawyers] to share knowledge, opinions, experiences, and news."[34]

Although the ABA was examining lawyer public commentary from the perspective of the *ethical constraints* imposed on lawyers in the digital public, it established that lawyer public commentary in digital spaces also has rhetorical implications. But is digital public commentary more than an ethical *possibility* for lawyers who choose to speak this way? Or could digital public com-

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[27] Model Rules of Prof'l Conduct pmbl. no. 1 (Am. Bar Ass'n 2019).

[28] *Id.* at pmbl. no. 6.

[29] *See* Romig, *supra* note 14, at 30–31.

[30] ABA Formal Opinion, *supra* note 24, at 1.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

mentary be an ethical *responsibility* of lawyers? Because the Model Rules cast the lawyer in the role of a citizen with a special responsibility for justice, digital public commentary might be not only an option for legal communication but also an expectation for modern lawyering.

B.   *The Preamble: Lawyer as Citizen Lawyer*

The Preamble to the ABA's Model Rules is a "general orientation"[35] to "a lawyer's responsibilities."[36] In its first paragraph, the Preamble states that not only are lawyers "representative[s] of clients" and "officer[s] of the legal system," they are also "*public citizen[s] having special responsibility for the quality of justice*."[37] As special citizen lawyers, lawyers have, among other responsibilities, the responsibility to improve the law, to promote the rule of law, and to further the values of participatory democracy.[38]

As public citizens with a responsibility to improve the law, lawyers are expected to turn their attention away from individual clients and instead focus their attention on the central role that lawyers play in society regarding the rule of law.[39] The Preamble says that "a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law[,] and work to strengthen legal education."[40] The Preamble also asserts that as a citizen with the obligation to promote the rule of law and further the values of participatory democracy, the "lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and sup-

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[35] MODEL RULES OF PROF'L CONDUCT scope no. 21 (AM. BAR ASS'N 2019).

[36] *Id.* at pmbl. no.1.

[37] *Id.* (emphasis added).

[38] *Id.* at pmbl. no. 6. Model Rule 6.1(b)(3), the Voluntary Pro Bono Publico Service Rule, says that lawyers should, as part of the aspiration to annually provide pro bono legal services, provide services through "participation in activities for improving the law, the legal system or the legal profession." *Id.* r. 6.1(b)(3). Comment 8 to rule 6.1 describes these activities to include, among "the many activities that fall within" the rule, "acting as a continuing legal education instructor," and "lobbying to the improve the law." *Id.* r. 6.1 cmt. 8.

[39] Other scholars have discussed these concepts as well. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 14 (1993) (expressing concern for the demise of the lawyer as a citizen with broader public interests); Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1211 (2009) (describing the citizen lawyer as "the idea of the lawyer as patriotic leader outside the everyday professional work of representing clients."); James E. Moliterno, *A Golden Age of Civic Involvement: The Client-Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261, 1262 (2009) (defining citizen lawyer as "the lawyer in public life, government office, or leadership in a profession's organizations."); Schiavone, *supra* note 12, at 120–21, 123.

[40] MODEL RULES OF PROF'L CONDUCT pmbl. no. 6 (AM. BAR ASS'N 2019).

port to maintain their authority."[41] Relatedly, the Preamble ends by reminding lawyers that they "play a vital role in the preservation of society."[42]

The take-away from the Preamble's guidance is that the lawyer should speak not only *privately* as a client advocate, but *publicly* as a citizen lawyer addressing the legal issues of the day. This is not to say the state courts, as regulators of the legal profession, can compel a lawyer to speak in public as a citizen lawyer.[43] But, the implication of the Preamble is that a lawyer has a professional responsibility to perform as a public speaker—a legal educator, a law reformer, a public intellectual of sorts, who furthers understanding and confidence in the rule of law.[44] This activity requires some involvement beyond the legal technical sphere into the public sphere where messages can reach a broader audience.[45] And while a lawyer could fulfill this responsibility by writing for a newspaper or giving only in-person public talks,[46] that approach in modern digital society is largely anachronistic because of the reach of digital messages;[47] a robust fulfillment of the citizen-lawyer role arguably requires at least some digital rhetorical performances. If the goal of the citizen lawyer is to educate the public, shore up public support for the rule of law, and preserve society, citizen lawyers must meet the public where they are—online.

While the Preamble creates the role of the citizen lawyer, the Model Rules that follow say very little to guide the lawyer on how to speak as a citizen lawyer. Instead, the Model Rules focus on limiting the lawyer's public speech about matters concerning clients. For example, Rule 1.6 insists lawyers main-

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[41] *Id.*

[42] *Id.* at pmbl. no. 13.

[43] Because of their professional status, Lawyers' rights to free speech under the First Amendment are more limited in comparison to members of the public. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on the Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998). For example, lawyers are ethically prohibited in certain circumstances from making certain statements to the press. *See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074 (1991). They are prohibited from making false or misleading advertisements. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350, 381–82 (1977). Although courts are generally more deferential to the states in *limiting* the speech of lawyers for public protection purposes, Sullivan, *supra*, at 580, it is unlikely that a court would permit a state bar to *compel* lawyers to engage in any specific kind of public speech. For example, the United States Supreme Court held that a state bar association could collect mandatory bar dues from lawyers and use them for activities related to regulating the legal profession and improving legal services, but it violated the First Amendment to use those same dues for other political or ideological positions the bar wanted to support. *See, e.g.*, Keller v. State Bar of California, 496 U.S. 1, 15–16 (1990).

[44] Scholars have also recognized that "lawyers are sometimes perceived as classic speakers in public discourse . . . ." Sullivan, *supra* note 43, at 569.

[45] *See* Davis, *supra* note 20, at 46 (arguing that lawyers have a duty to "manage[] discourse in the public sphere consistent with virtuous deliberative engagement and democracy [and] as public citizens [to] create space in the public sphere for substantive engagement.").

[46] *See* Romig, *supra* note 14, at 29 (noting that "[p]ublic legal writing is not new").

[47] *See infra* Section II.C (discussing the greater circulation, range, and speed of digital messages).

tain the confidentiality of client information,[48] and Rule 3.6 prohibits lawyers from making public statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding" when the lawyer is participating in the legal matter.[49]

Moreover, the Model Rules impose a duty of technological competence on lawyers, but this duty does not address how lawyers can speak competently to the public while using digital technology.[50] Rather, the rules simply state that a lawyer's competence with digital technology is satisfied by "keep[ing] abreast of . . . the benefits and risks associated with relevant technology."[51] In the absence of guidance in the Model Rules, classical rhetorical theory can help lawyers gain a perspective on and adopt effective strategies for speaking in the digital public.[52]

C. What Classical Rhetorical Theory Adds to Our Understanding of the Citizen Lawyer as Public Commentator

Classical rhetoric provided the foundation for civic participation and legal argument in Greek and Roman democracies.[53] The classical rhetorical theorists described the rhetor as one who spoke in situations that demanded a call to action related to public policy and the common good.[54] Classical rhetoric, then, may be useful for theorizing the citizen lawyer in the role of public commentator.

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[48] MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2019).

[49] *Id.* r. 3.6.

[50] *Id.* r. 1.1 cmt. 8 ("To maintain the requisite knowledge and skill [required to be competent as a lawyer], a lawyer should [know] . . . the benefits and risks associated with relevant technology . . . .").

[51] *Id.*

[52] If we think of lawyers speaking in public as practicing "digital rhetoric" (*see* discussion *infra*), Elizabeth Losh suggests that "basic competence" would mean "to understand the conventions of many new digital genres . . . [as] specific[ally] and socially regulated forms of digital text that are composed as files of electronic code." ELIZABETH LOSH, VIRTUALPOLITIK: AN ELECTRONIC HISTORY OF GOVERNMENT MEDIA-MAKING IN A TIME OF WAR, SCANDAL, DISASTER, MISCOMMUNICATION, AND MISTAKES 54 (2009); *see also* DOUGLAS EYMAN, DIGITAL RHETORIC: THEORY, METHOD, PRACTICE 37 (2015) (quoting LOSH, *supra*). Competency might also involve understanding how ideologies are reproduced and reflected in digital genres and texts. *Id.* (citing LOSH, *supra*, at 56). Competency in digital rhetoric might also relate to Model Rule 8.4(g), which prohibits a lawyer from engaging in conduct that is "discriminat[ory] . . . in conduct related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2019). Comment 4 states that "[c]onduct related to the practice of law includes . . . business or social activities in connection with the practice of law." *Id.* r. 8.4 cmt. 4.

[53] *See* THE RHETORICAL TRADITION, *supra* note 1, at 1–3.

[54] *See* CONTEMPORARY RHETORICAL THEORY, *supra* note 13, at 2 (noting that teachers of classical rhetoric thought to be essential the ability to contribute to debates of public policy and community matters).

For example, the Sophist[55] Isocrates, teaching rhetoric during the Golden Age of Greece, suggested that the point of rhetoric was to move people to action for the common good.[56] The purpose of educating rhetors, then, was to prepare them for success in both courts and as public leaders.[57]

Isocrates's writings seem to anticipate today's lawyers providing public commentary on the legal issues of the day; he recognized the connection between effective rhetoric and a duty to speak in pursuit of justice:

> [W]e have come together and founded cities and made laws and invented arts; and, generally speaking, there is no institution devised by man which the power of speech has not helped us establish. . . . [A good rhetor] will [not] support causes which are unjust or petty or devoted to private quarrels, [but rather the rhetor will speak to those things which are] great and honourable, devoted to the welfare of man and our common good.[58]

Roman rhetoric emphasized engagement. Quintilian, for example, defined a good orator as one who engaged in the discussions of the state—one must be a "true statesman," not withdrawn from life but engaged with it, practice and experience.[59] Contemporary rhetorical scholar Celeste Condit notes that "[t]he ability to contribute to public policy debates and to affect the direction and life of the community through public discourse was taken by classical teachers of rhetoric as an essential attribute . . . ."[60]

The Preamble to the Model Rules gives citizen lawyers an implicit responsibility to publicly comment on matters of social importance, and classical rhetorical theory takes the view that rhetoric is the foundation of public engagement on issues of public policy and the common good. Classical rhetoric and lawyer commentary that educates the public about the law and speaks to matters of public concern are connected; thus, classical rhetoric has something to offer lawyers in enacting their roles as citizen lawyers. Because the digital pub-

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[55] "The Sophists were a diverse group of early philosophers who were interested in exploring all branches of knowledge." THE RHETORICAL TRADITION, *supra* note 1, at 22. They took the position that "[c]ertainty or absolute truth is not available to humans, . . . but probable knowledge" gained through offering and examining arguments is. *Id.* How does one pronounce "Sophist"? The Cambridge Dictionary says that in American English, the "o" is pronounced with a short vowel sound; in British English, the "o" is a long vowel sound. *See Sophist*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/pronunciation/english /sophist [https://perma.cc/7KED-3FD6] (last visited Feb. 28, 2020).

[56] THE RHETORICAL TRADITION, *supra* note 1, at 67. For an overview of Isocrates rhetorical approach and teachings, see JAMES J. MURPHY ET AL., *supra* note 3, at 51–54.

[57] *See* JAMES J. MURPHY ET AL., *supra* note 3, at 51 ("Isocrates believed that rhetoric must be devoted not only to training for the law courts but to training statesmen who will speak for the benefit of the entire Greek culture.").

[58] ANTIDOSIS, *in* 2 ISOCRATES 327, 339 (George Norlin trans., 1929). Excerpts of *Antidosis* appear in THE RHETORICAL TRADITION, *supra* note 1, at 75–77.

[59] QUINTILIAN, 12 INSTITUTES OF ORATORY ch. 2 (John Selby Watson trans., 1856), *in* THE RHETORICAL TRADITION, *supra* note 1, at 419 [hereinafter QUINTILIAN, INSTITUTES OF ORATORY].

[60] CONTEMPORARY RHETORICAL THEORY, *supra* note 13, at 2.

lic sphere is the place where lawyers are likely to reach the public with their commentary,[61] the Article now turns to the concept of "digital rhetoric" and its problems and possibilities for citizen lawyers.

II. Digital Rhetoric: New Media, New and Old Rhetorics, New Features

This Part discusses how scholars have defined and described "digital rhetoric" and then explores four features of digital rhetoric and explains how they are related to lawyer commentary in the digital public sphere.

"Digital" for the purposes of "digital rhetoric," means rhetoric that is electronic or computerized.[62] "Digital" can also refer to new forms of communication produced with new forms of technology.[63] Digital communication fundamentally involves speakers producing and audiences receiving messages, which is the purview of rhetoric.[64] This has led to scholars considering what the term "digital rhetoric" means. Digital rhetoric has no single unifying theory.[65] Instead, digital rhetoric theory is influenced by ideas coming from disciplines as far ranging as computational studies, mathematics, media studies, and, of course, rhetoric.[66] For example, digital rhetoric scholar Elizabeth Losh posits four different and alternative definitions for digital rhetoric: (1) "[t]he conventions of new digital genres that are used for everyday discourse"; (2) public rhetoric, "represented or recorded through digital technology and disseminated via electronic distributed networks"; (3) "[t]he emerging scholarly discipline concerned with the rhetorical interpretation of computer-generated media as objects of study"; and (4) "[m]athematical theories of communication."[67]

For the purposes of citizen lawyers' digital public commentary, the first two of the four definitions provide the most explanatory power. As the ABA

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[61] *See* Laura J. Gurak & Smiljana Antonijevic, *Digital Rhetoric and Public Discourse*, *in* The Sage Handbook of Rhetorical Studies 497 (Andrea A. Lunsford et al. eds., 2009) (calling the phrase "digital rhetoric" redundant because no communication is "beyond the realm of the digital" and noting this is the "ubiquitous digital age").

[62] Eyman, *supra* note 52, at 18. "Digital" can also mean "coded differences," as opposed to "analog," which means "a continuous range of values." *Id.* at 18–19. It also refers to the content of any message represented with 1s and 0s. *Id.* at 19. Digital messages are different from analog messages in that they can be easily replicated and compressed, and they can be more securely transmitted. *Id.*

[63] *See id.* at 17–18.

[64] "[T]he definition of 'rhetoric' is itself a highly contested concept, and its meaning has varied widely, both across the ages and within any given time period." Contemporary Rhetorical Theory, *supra* note 13, at 1. However, "rhetoricians agree that . . . every rhetoric [(meaning 'message')] is always in some ways addressed to some audience that it seeks to influence or persuade." *Id.* at 10.

[65] Eyman, *supra* note 52, at 61 ("[T]here is such a wide range of digital domains and contexts that digital rhetoric . . . should be viewed as a field that engages multiple theories and methods rather than as a singular theory framework.").

[66] *See id. passim*.

[67] *Id.* at 37 (citing Losh, *supra* note 52, at 47–48).

noted in its Ethics Opinion discussed above, digital media offer lawyers a new way of commenting on the law for public consumption.[68] Accordingly, we might think of this type of writing as a new type of legal writing, "digital public commentary," that requires competence in identifying and understanding the unique conventions, if any, for writing in this medium, which is meant for public audiences.[69]

Another way to understand digital rhetoric is to see it as "the application of rhetorical theory," both classical and contemporary, "to digital texts and performances" for both analyzing and producing digital messages.[70] While some scholars argue that digital rhetoric represents a "fundamental paradigm shift"[71] in rhetoric, others have relied heavily on classical rhetoric as a way to understand the production of rhetoric in the digital environment.[72] That is, although digital rhetoric can be seen as asserting a "new canon," it can also be seen as drawing upon the rhetorical constructs of the "2,000-year-old tradition that constitutes the field of Western rhetoric."[73] In other words, the classical rhetorical canon can be a productive lens for studying digital rhetoric. As Richard Lanham notes, "[r]hetoric has been the central repository of wisdom on how we make sense of and use information since the Greeks first invented it sometime in the middle of the last millennium [before the common era]."[74]

A final way for understanding digital rhetoric is as a "secondary orality," a deployment of an oral consciousness amid a dominant literate (written) one.[75] Theorist Walter Ong suggested that three stages of consciousness exist in relation to the way in which we communicate: "primary orality," "literacy," and "secondary orality."[76] "Primary orality"[77] existed before the emergence of a

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[68] ABA Formal Opinion, *supra* note 24, at 1 ("Lawyers comment on legal topics in various formats. The newest format is online publications . . . .").

[69] *See* Romig, *supra* note 14, at 29–30 (explaining a related discussion of her thoughts on identifying the genre of "public legal writing"). Her work, while related, is focused more on genre analysis and less on the idea of digital rhetoric as a perspective.

[70] Eyman, *supra* note 52, at 13.

[71] *Id.* at 38 (quoting Losh, *supra* note 52, at 84).

[72] *See, e.g.*, *id.* at 63–71; *see also* Kathleen E. Welch, Electric Rhetoric: Classical Rhetoric, Oralism, and a New Literacy 6 (1999) (applying the teachings of Isocrates to the digital environment).

[73] Gurak & Antonijevic, *supra* note 61, at 499; *see also* Eyman, *supra* note 52, at 37 (noting that digital rhetoric can be seen as "the employment of rhetorical techniques in digital texts.").

[74] Richard A. Lanham, The Economics of Attention: Style and Substance in the Age of Information xiii (2006).

[75] *See* Welch, *supra* note 72, at 65. ("[L]iteracy does not cancel out orality.").

[76] *See* Walter J. Ong, Orality and Literacy: The Technologizing of the Word 10–12 (1982) (discussing the relationship between these terms); Welch, *supra* note 72, at 57–58 (discussing Ong's work).

[77] Primary orality existed in cultures . . . where consciousness was formed by reliance on oral discourse . . . . Primary orality is a dominant kind of consciousness and is characterized by an emphasis on speaking not only for instrumentalist communication but for the transmission of cultural values, norms, and behaviors . . . .

culture based on writing and had discursive features such as "formulas, repetition, [and] the addition of phrases . . . , concreteness . . . , agonistic verbal behavior, and audience participation."[78] Literate consciousness, which relied on the invention of the phonetic alphabet, introduced a new way of thinking that relied on abstraction, analysis, and writing to examine and reflect on the world.[79]

"Secondary orality" relies on a form of consciousness that exists within the dominantly literate culture.[80] It is a deliberate and self-conscious orality, based permanently on the use of writing and print because it is less ephemeral than the purely spoken word.[81] A secondary orality consciousness came into being through the emergence of electronic technologies for communication in the mid-nineteenth century.[82] Secondary orality places a "new emphasis on the ear and a change in the emphasis on the eye."[83] Kathleen Welch explains that culture has returned to a kind of orality because

> [t]he spoken word is now electrified, instantaneous, repetitive, and so familiar that we have normalized it. . . . Like the air, it exists and sustains us and is us. Secondary orality is "present-day high-technology culture, in which a new orality is sustained by telephone, radio, television, and other electronic devices that depend for their existence and functioning on writing and print."[84]

At least one scholar argues that the internet is evidence that society is in a post-literate/secondary orality period; unlike during the "Gutenberg Parenthesis," when knowledge was formed through literate practices, contemporary knowledge is formed through secondary orality on the internet.[85] Kathleen Welch further observes that communication in the digital space is a form of "new merger of the written and the oral," which can be theorized through classical rhetoric.[86] Similarly, Elizabeth Losh writes that "classical rhetoric that fo-

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WELCH, *supra* note 72, at 57.

[78] *Id.*

[79] *Id.*

[80] *See* ONG, *supra* note 76, at 10–12.

[81] *Id.* at 133; Liliana Bounegru, *Secondary Orality in Microblogging*, MASTERS OF MEDIA (Oct. 13, 2008), www.mastersofmedia.hum.uva.nl/blog/2008/10/13/secondary-orality-in-mi croblogging [https://perma.cc/Q7XP-DV6D].

[82] WELCH, *supra* note 72 at 58 (discussing Ong's theory of secondary orality).

[83] *Id.*

[84] *Id.* (quoting ONG, *supra* note 76, at 10–11).

[85] *See* Tom Pettitt, *Before the Gutenberg Parenthesis: Elizabethan-American Compatibilities*, ACADEMIA.EDU 2–3 (2007), https://www.academia/edu/2946207/Before_the_Guten berg_Parenthesis_Elizabethan-American_Compatabilities [https://perma.cc/HB8K-RTHY] (describing the Gutenberg parenthesis as "original," "individual," "autonomous," "stable," and "canonical," and describing the "post-parenthetical" as "sampling," "remixing," "borrowing," "reshaping," "appropriating," and "recontextualizing").

[86] WELCH, *supra* note 72, at 104. Eyman criticizes Welch's view as "too limiting" because it does not "move[] beyond print literacy." EYMAN, *supra* note 52, at 42.

cuses on public oratory, . . . may be remarkably relevant" to studying digital rhetoric.[87]

Some digital rhetoric scholars suggest that the rules of orality apply more directly to the digital space than the rules of written communication because the unique features of the digital space make communicating within it more like speaking than writing.[88] Twitter, for example, shares features of both speaking and writing—in fact, it might be characterized as speaking *in the form of* writing. That is, although tweets are written and read, tweets "feel" more like words spoken in a conversational tone.[89] And, like the publicly spoken word, a tweet is a "rapid communication with large groups of people in a speed that . . . resemble[s] oral storytelling, without having to share the same physical space with [the] audience."[90]

For lawyers as public commentators, four features of digital rhetoric[91] present new challenges and opportunities for educating and interacting with the public about legal issues: (1) the virtual nature of speakers, audiences, and messages; (2) the interactivity of speakers and audiences; (3) the circulation and reach of messages; and (4) the challenges digital environments present for both invention and memory.

A.　*Speakers, Audiences, and Messages are Virtual*

In the digital space, speakers, audiences, and messages exist virtually— either having no physical existence at all, like the text of a blog, for example, or having accessibility primarily by means of a computer, like a video of a courtroom oral argument, where the speakers and courtroom physically exist but the video record of the argument is available only on the internet in digital form.[92] Virtuality means that digital messages are not confined to specific contexts for consuming them; rather, the rapid circulation of messages on the internet means that they can be consumed anytime, anywhere.[93] Digital messages can exist perpetually outside of their original contexts and beyond control of the speakers that generated them, meaning they are polysemic.[94] Virtual messages,

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[87] LOSH, *supra* note 52, at 63–64.

[88] Bounegru, *supra* note 81.

[89] *Id.*

[90] *Id.*

[91] For a more thorough discussion of the novel features of digital rhetoric, see Gurak & Antonijevic, *supra* note 61, at 499–501 (identifying speed, reach, anonymity, interactivity, kairos, and collaboration and community as features).

[92] While the lack of physical existence is one way of thinking about what is "virtual," another is to think of virtuality in terms of relationships. That is, the virtual might "designate[] the reality of the relation between substances, a reality that exists only in process, in time." Eric S. Jenkins, *The Modes of Visual Rhetoric: Circulating Memes as Expressions*, 100 Q. J. SPEECH 442, 447 (2014).

[93] *See* Gurak & Antonijevic, *supra* note 61, at 499 ("The Internet allows [messages] . . . to be circulated around the world . . . .").

[94] *See* Jenkins, *supra* note 92, at 445.

one author suggests, are "collective[] [and] emergent phenomena," defined by the audience's "manner[] of engagement" with the message, not by an "examination of distinct texts and contexts."[95]

The virtual nature of digital messages allows for greater public access to lawyer commentary and legal documents, extending the reach of these texts.[96] For example, court documents in the United States have nearly always been "public,"[97] but prior to digitization, "public" meant something very different—it meant a trip to the courthouse or access to case reporters housed in law libraries. Today, the digitization of public records means that if one has a computer, one might have access to the full text of a court document anywhere in the world.[98] Digital audiences do not need intermediaries like lawyers to "translate" a public record or even provide access; in the virtual environment, public audiences can see it, read it, watch it, and consume it themselves.

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[95] *Id.* at 443, 452.

[96] *See, e.g.*, Natalie Gomez-Velez, *Internet Access to Court Records—Balancing Public Access and Privacy*, 51 Loy. L. Rev. 365, 367 (2005) (noting that "[f]ederal and state courts across the country are becoming publicly accessible as never before. Growing reliance on computer technology generally and on the Internet specifically, has made the prospect of placing court case records and information online via the Internet a reality."). Another example of the widespread availability of court documents online and for free public consumption is Google Scholar, which has an extensive database of Federal and State court opinions as well as scholarly literature. *See Google Scholar*, Lawyerist, https://lawyerist.com/revie ws/online-legal-research-tools/google-scholar [https://perma.cc/56BN-CRJ2] (last visited Feb. 25, 2020). Entire current statutory compilations are now found online. *See, e.g.*, Fla. Legislature, The 2019 Florida Statutes, www.leg.state.fl.us/STATUTES/ [https://perm a.cc/B9YS-66V9] (last visited Feb. 25, 2020). These two examples do not include the extensive for-pay databases that make the whole of United States' law and many other jurisdictions' legal documents available to consumers at the touch of a button. *See, e.g.*, *Westlaw*, Lawyerist, https://lawyerist.com/reviews/online-legal-research-tools/westlaw [https://per ma.cc/HF3X-F46V] (last visited Feb. 25, 2020) (describing Westlaw as a site for "comprehensive legal research," and noting that it includes case law and statutes for all 50 states and for the United States as well as a "comprehensive secondary sources database"). The United States Courts website further notes that "[m]ost documents in federal courts—appellate, district, and bankruptcy—are filed electronically . . . [and] [t]he media and public may view most filings." *Accessing Court Documents—Journalist's Guide*, United States Courts, https://www.uscourts.gov/statistics-reports/accessing-court-documents-journalists-guide [htt ps://perma.cc/AF3L-ZGQ2] (last visited Feb. 25, 2020). It is common knowledge for lawyers that prior to the advent of digital data, legal documents were available only in traditional print.

[97] *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. Ill. L. Rev. 1385, 1400 ("[P]ublic access to court proceedings and records is longstanding and deeply ingrained in the American legal system.").

[98] *See, e.g.*, *Search Tips: Which Court Opinions Do You Include?*, Google Scholar, https://scholar.google.com/intl/en/scholar/help.html#coverage [https://perma.cc/7ERM-E8 PW] (last visited Mar. 9, 2020) (including in its court opinions database the full-text, searchable, published opinions of "US state appellate and supreme court cases since 1950, US federal district, appellate, [and other cases] since 1923[,] and US Supreme Court cases since 1791.").

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With respect to lawyer commentary, the same is true. Prior to the digitization of legal information and the availability of documents on the internet, to get a lawyer's view on a legal issue, a layperson would have needed an appointment at a legal office or access to print law materials, many of which would have contained primarily technical writing for professional legal audiences not meant for general public consumption.[99] Today, however, and largely because of the ability to create digital messages, lawyers widely provide education and information about the law in digital forms, and those messages are often written for lay audiences.[100]

While this kind of accessibility is positive for creating new opportunities for learning and engagement, virtuality also has the downside of making it difficult for audiences to judge the credibility of messages.[101] In the virtual world, digital speakers can be anonymous or take on multiple identities.[102] Thus, it is sometimes difficult for a digital audience member to know who is speaking in order to judge the value of the message. In addition, virtuality also makes messages themselves hard to evaluate because virtual messages are often removed in both time and space from their original contexts. That is, a message written for another time and set of conditions can persist in its digital form into new times and conditions.[103] Thus, even more so than with face-to-face or print messages, digital messages may be misunderstood.

Digital speakers also face challenges from the virtual nature of the digital communication environment. Unlike the speaker that classical rhetoricians may have contemplated, who was likely to know the specifics of his or her audience and tailor the message to fit the audience's needs, virtual audiences in the digi-

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[99] *See, e.g.*, Alvin M. Podboy, *The Shifting Sands of Legal Research: Power to the People*, 31 Tex. Tech L. Rev. 1167, 1183 (2000). Podboy notes that prior to the digitization of legal materials, "[t]he law library was a physical place." *Id.* It "was a members-only club; it was not a place for the general public. . . . The materials were difficult to use. They required expert understanding and training." *Id.* Even after digitization, computerized legal research workstations "were originally housed in the law library." *Id.* at 1184. He notes that "[t]he Internet has . . . destroyed the concept of the [law] library as a place. Through the Internet, users have direct access to legal materials. Users can access these materials anytime, anywhere. . . . They do not need special legal skills." *Id.* at 1186.

[100] *See, e.g.*, SCOTUSBLOG, https://www.scotusblog.com [https://perma.cc/5CFY-ZKK9] (providing news and commentary on cases before the United States Supreme Court); *see also* Sarah Mui, *Best Legal Twitter Accounts of 2018*, A.B.A. J. (Dec. 1, 2018, 12:15 AM), https://www.abajournal.com/magazine/article/best_law_twitter_2018 [https://perma.cc/62 XC-WCV4]; Stephen Rynkiewicz, *Best Law Podcasts of 2018*, A.B.A. J. (Dec. 1, 2018, 12:20 AM), https://www.abajournal.com/magazine/article/best_law_podcasts_2018/ [https://perma.cc/2CV9-RN8A].

[101] *See* Eyman, *supra* note 52, at 31 (discussing the "challenging questions about message credibility" because "markers of authorship and expertise are often missing or difficult to find").

[102] *See* Gurak & Antonijevic, *supra* note 61, at 500 (identifying anonymity as a feature of digital rhetoric).

[103] *See id.* (noting that the reach of digital messages "create[s] . . . online communities spanning distance and time.").

tal sphere are often unknown to the speaker.[104] That is, audiences may be made up of countless individuals, each receiving the same message at potentially different times and in different contexts.

As a result, audiences might receive, use, and recompose messages in ways that digital speakers did not and could not have anticipated or intended.[105] Although traditional print written messages persist beyond the control of the writers who generated them, in the digital space, virtual persistence presents perhaps even more intense problems of gatekeeping and information accuracy for lawyers making public commentary.[106] For example, even if a legal speaker knows that information on a legal blog has become stale or is affected by changes in the law, that may not be obvious to a consumer of legal information, which may lead to misunderstanding.

B.   Speakers and Audiences Interact

We are living in the age of digital engagement.[107] Even though they are virtual, speakers and audiences interact with each other in digital spaces; the opportunities for interaction in the digital world might even exceed those possibilities for interaction in the physical one.[108] Through chat rooms and comment fields, audiences instantly become speakers, and speakers, audiences. Thus, digital audiences are not necessarily passive but instead interact with the text in a flattened hierarchy[109] between speaker and listener that promotes lis-

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[104] Not being able to know the audience can result in the speaker needing to "project" rather than know the audience. *See* CONTEMPORARY RHETORICAL THEORY, *supra* note 13, at 292. Projecting an audience can have negative consequences for the audiences not implied by the communication because it excludes potential audience members from its address. *Id.* at 292; *see also* Philip Wander, *The Third Persona: An Ideological Turn in Rhetorical Theory*, 35 CENT. STATES SPEECH J. 197, 209 (1984).

[105] In their work on "rhetorical velocity," Ridolfo and DeVoss implicitly acknowledge the virtuality of audiences and the challenges of speakers to anticipate how messages are received. "Rhetorical velocity is . . . a strategic approach" to composing a message that encourages a speaker to consider "how a text might be recomposed (and *why* it might be recomposed) by third parties." Jim Ridolfo & Dànielle Nicole DeVoss, *Composing for Recomposition: Rhetorical Velocity and Delivery*, 13 KAIROS: J. RHETORIC, TECH., & PEDAGOGY (2009), *available at* http://kairos.technorhetoric.net/13.2/topoi/ridolfo_devoss/velocity.html [https://perma.cc/8UEF-DKMN].

[106] *See, e.g.*, Gurak & Antonijevic, *supra* note 61, at 500 (noting the digital environment's problem of "diminished ability to gatekeep information").

[107] *See, e.g.*, Justin Ellis, *What Happened After 7 News Sites Got Rid of Reader Comments*, NIEMANLAB (Sept. 16, 2015, 1:48 PM), https://www.niemanlab.org/2015/09/what-happened-after-7-news-sites-got-rid-of-reader-comments/ [https://perma.cc/C3E6-JADY] (inteviewing Reuters.com executive editor, who said, "I consider us to be in the age of engagement right now . . . .").

[108] *See* Gurak & Antonijevic, *supra* note 61, at 500 (noting that interactivity is a "key feature of digital communication").

[109] *See id.* (noting that interactivity "demands a[] . . . two-way exchange, ending forever the Aristotelian, managed approach to keeping audiences in line with the persuasive intent.").

teners to speakers who exert control over messages not originally their own.[110] The control over the rhetorical situation can bring those on the margins to the center of the conversation through being able to interact with and reshape the text.[111] While bringing marginalized voices to the center is a good thing, one need only look at the controversies around the disabling of comment fields that allow readers to respond to online writing to see instances where audiences of digital messages have wrested control of the messages in arguably damaging ways.[112]

The ability of the audience to respond to the text inevitably changes the rhetorical situation in which lawyers publicly address matters of law. When a digital message is published for audiences, the interactions between speaker and audience in the digital space can change the message repeatedly, creating a form of message instability not necessarily present in physical print (or even broadcast radio and television) environments.[113] This can have both positive and negative results. Some comments can lead to greater discussion and debate, an effect that serves a democracy built on citizen participation and the rule of law.[114] On the other hand, aggressive, bullying, or threatening comments to a digital speaker can shut down conversation and debate, a result inconsistent

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[110] *See id.* ("Internet users are expected to interact with information . . . until the final product no longer resembles the original.").

[111] *See, e.g.*, Filippo Trevisan, *Using the Internet to Mobilize Marginalized Groups: People with Disabilities and Digital Campaign Strategies in the 2016 U.S. Presidential Election*, 13 Int'l J. Comm. 1592, 1592 (2019) (discussing mobilization and inclusion of citizens with disabilities in campaign discourse); *see also* the work of Sarah Jackson, Moya Bailey, and Brooke Foucault Welles, who describe their research as directed toward "how and why Twitter hashtags have become an important platform for historically disenfranchised populations to advance counter narratives and advocate for social change." Ne. U.: NULab for Texts, Maps, & Networks, *#Hashtagactivism: Networked Counterpublics in the Digital Age*, https://web.northeastern.edu/nulab/hashtagactivism-networked-counterpublics-in-the-digital-age/ [https://perma.cc/E7BL-8SVL] (last visited Mar. 9, 2020). The project began as a NULab project and was released in print by MIT Press on March 10, 2020. *See* Sarah J. Jackson et al., #Hashtagactivism: Networks of Race and Gender Justice (2020).

[112] *See, e.g.*, Farnoush Amiri, *YouTube to Disable Comments on Most Videos That Include Minors*, NBC News (Feb. 28, 2019, 12:18 PM), https://www.nbcnews.com/tech/tech-news/youtube-disable-comments-most-videos-including-minors-n977821 [https://perma.cc/AL9C-U4FG]; Ellis, *supra* note 107. But, bringing those on the margins to the center can have a positive impact on inclusion for marginalized populations. *See, e.g.*, Trevisan, *supra* note 111, at 1592 (discussing mobilization and inclusion of citizens with disabilities in campaign discourse).

[113] *See* Gurak & Antonijevic, *supra* note 61, at 500 ("Internet users are expected to interact with information, even to transform [messages] until the final product no longer resembles the original.").

[114] *See* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491, 498 (2011) (connecting free expression of ideas to democratic self-governance and noting that "[t]he opportunity for each citizen to participate in the speech by which public opinion is formed is . . . vital to the legitimacy of the entire legal system.").

with the goals a citizen lawyer would have in engaging in public commentary about legal issues.[115]

C. *Messages Have Greater Circulation, Range, and Speed*

Digital rhetoric scholars say that speed of circulation is perhaps *the* dominant feature of digital communication.[116] In other words, messages circulate with greater velocity and reach numerically more and more-diverse audiences than one could reach with print or even television or radio.[117] While the speed of circulation increases the reach of messages, this velocity pressures digital speakers to spend less time creating and composing messages and instead focus on quickly distributing short bits of information as fast as possible to as many audiences as possible.[118]

This high-speed circulation lends itself to action, not contemplation,[119] which can present a competency challenge for lawyers as public commentators. While lawyers may not have an *enforceable* ethical duty to be competent as public commentators,[120] there is an implicit responsibility to be thoughtful and accurate commentators when educating the public about the law and advocating for legal reform.[121] At minimum, a lawyer's reputation can turn on the quality of her public communications, and there is risk of an inverse relationship between the pressure to quickly produce information and to provide thoughtful, deliberative opinions on legal issues confronting society.[122]

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[115] *See, e.g.*, Jaime Loke, *Readers' Debate a Local Murder Trial: "Race" in the Online Public Sphere*, 6 COMM., CULTURE & CRITIQUE 179, 179 (2013) (examining the rhetoric of 6,000 comments on news articles about a murder trial, which included racist and bigoted rhetorics).

[116] *See, e.g.*, Gurak & Antonijevic, *supra* note 61, at 499.

[117] *See id.* at 500.

[118] *Id.* (discussing how the reach of digital messages puts pressure on speakers to generate lots of messages without as much attention to their structure or logic); *see also* Ridolfo & DeVoss, *supra* note 105 (discussing the need for digital speakers to anticipate how their messages might be repurposed by audiences of digital messages).

[119] *See* Gurak & Antonijevic, *supra* note 61, at 500 (noting that "nonhierarchical distribution" is a feature of the internet and that persuading becomes less important than simply reaching many audiences on the internet).

[120] Rule 1.1 of the Rules of Professional Conduct provide that "[a] lawyer shall provide *competent representation to a client*." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2019) (emphasis added). By its language, this Rule does not apply to a citizen lawyer engaged in public commentary. *See id.*

[121] The responsibilities to "cultivate knowledge of the law" and "further . . . public[] understanding" of the law carry with them an implicit expectation that the lawyer will do so with effort to be accurate and thoughtful. MODEL RULES OF PROF'L CONDUCT pmbl. no.6 (AM. BAR ASS'N 2019).

[122] On the question of deliberative versus intuitive thinking in the context of legal analysis, see Kirsten K. Davis, *"The Reports of My Death Are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471, 494–95 (2013).

Moreover, circulation speed creates a perceived sense of immediacy of the speaker's performance of a message, and any "lag time" between writing and reading associated with print media seems to disappear in digital spaces.[123] That is, speakers and audiences appear to be active in the same rhetorical situation at the same time, but the reality is that they are probably not.[124] As Kathleen Welch writes, the electronic context has the "attractiveness of . . . liveness,"[125] meaning that we are drawn to digital media because humans value the relationships of "live," real-time, simultaneously experienced interactions, and, in digital media, it is possible to feel that an interaction between speaker and audience is contemporaneous even when it is not.

Imagine asking a question to a lawyer on Avvo.com. Avvo provides on its site "[f]ree Q&A with attorneys."[126] Avvo states that "[e]very 5 seconds someone gets free legal advice from Avvo."[127] Individuals are invited to ask a question, which is posted anonymously.[128] All users, not just those who ask questions, can see recently asked questions and lawyers' answers to those questions.[129] Avvo reports that people have asked 191,015 questions.[130]

Avvo's Q&A service and its description rhetorically crafts a sense of immediacy between the person asking the question and the lawyer answering. This immediacy extends even to those audiences for the questions and answers (i.e., someone looking for an answer to their own legal question) who are reading the questions and answers long after they are published together on Avvo's website.

Although questions and answers are not necessarily contemporaneously generated,[131] the questions and answers are presented as if the inquiring person and the lawyer are engaged in a conversation about the individual's problem. Moreover, readers can respond to those answers, rating the answers with a

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[123] Kathleen E. Welch, *Electrifying Classical Rhetoric: Ancient Media, Modern Technology, and Contemporary Composition*, 10 J. ADVANCED COMPOSITION 23, 26 (1990).

[124] *See* EYMAN, *supra* note 52, at 76 (noting that the internet "collapse[s]" the distinctions of the traditional rhetorical situation and noting the immediacy of Twitter, which is "more as a continuous stream than a discrete conversation.").

[125] Welch, *supra* note 123, at 26.

[126] AVVO, https://www.avvo.com/ask-a-lawyer [https://perma.cc/W2AJ-JHVD] (last visited Mar. 9, 2020).

[127] *Id.*

[128] *Id.*

[129] See for example the divorce Q&A page, which displays recently asked questions and answers from lawyers. AVVO: DIVORCE, https://www.avvo.com/topics/divorce[https://perma.cc/9U4C-HD3S] (last visited Feb. 19, 2020). The ability of others to read the answers to questions is one way that the contributions lawyers make on Avvo.com are as much "commentary" as they are individual client "advice."

[130] *Id.*

[131] On Avvo, for example, a question generated on October 28, 2019, about a divorce issue was answered the next day by two different attorneys. *See* AVVO, https://www.avvo.com/legal-answers/are-there-risks-in-me-signing-a-quit-claim-deed-if-4666858.html [https://perma.cc/4SJR-KDWH] (last visited Feb. 19, 2020).

thumbs-up or thumbs-down, which further suggests other audience members' participation in the interaction.[132] These rhetorical performances, although chronologically distant, appear immediate to each other, connected in both time and place. Imagine, for example, if the same questions were answered in a print newspaper column. An individual would have to submit a question and then wait for the answer to appear in next week's paper. Nothing appears "live" in the context of print commentary, but in the digital context, messages can circulate so quickly they appear as contemporaneous interactions.

Even more interesting to the questions of circulation and immediacy is the service Facebook Live. Facebook Live is a "live video streaming service that lets [users] broadcast from their mobile devices straight to their Facebook News Feed."[133] According to online reviews and marketing materials, Facebook Live allows users to "essentially . . . meet[] [with followers] in person, since the event is happening 'face-to-face' and in real time. Facebook Live gives [users the] chance to show there are real, caring humans [involved], which in turn builds trust . . . ."[134] In addition, the live session can be recorded and posted to get "in front of a larger but still relevant audience."[135]

Facebook Live offers a digital platform that takes advantage of digital rhetoric's immediacy and circulation in all its forms. It attempts to replicate face-to-face interaction in a virtual space (even though the speaker cannot necessarily see the faces of audience members) while also extending the reach of the interaction by implementing rapid circulation of the recorded message to larger audiences. Because it is designated as "live," however, even in its recorded form, the message still can appear immediate and contemporaneous.

For lawyers speaking to the public in digital spaces, the speed and range of message circulation along with the ability of those messages to have a sense of immediacy present both opportunities for public engagement and challenges to accuracy of message, as the above discussion suggests.

D. Digital Messages Facilitate Invention but Challenge Memory

In the digital world, messages are easily remixed and recombined.[136] This access to more resources for thought, argument, and influence can improve

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[132] On Avvo, for example, generated on October 29, 2019, in response to a question about a divorce issue was rated "thumbs up" (helpful) twice by anonymous raters. *Id.* Lawyers can also indicate whether they "agree" with the advice given in the answer. *Id.*

[133] Sophia Bernazzani, *How to Use Facebook Live: The Ultimate Guide*, HUBSPOT, https://blog.hubspot.com/marketing/facebook-live-guide [https://perma.cc/8PC7-BRAM] (last visited Feb. 19, 2020).

[134] Margot Whitney, *The Ridiculously Awesome Guide to Facebook Live*, WORDSTREAM BLOG, https://www.wordstream.com/blog/ws/2017/07/31/facebook-live-guide (last updated Nov. 28, 2018).

[135] *Id.*

[136] *See* EYMAN, *supra* note 52, at 72 (noting the "malleability of digital work" and that "digital work can be easily manipulated and remixed"); Gurak & Antonijevic, *supra* note 61, at

speakers' inventive capacities while at the same time challenge both speakers' and audiences' abilities to remember what they have heard and seen and to make sense of those messages.

For digital speakers, creating digital texts is social and involves interactions with other texts.[137] Moreover, creating messages is at least in part an activity of remixing and recombining message fragments made available for use in other digital texts.[138] This is because "more elements and others' elements [are] much more readily available to mix, mash, and merge."[139] Theorizing digital rhetoric means thinking about how one might "select[] ready-made works and reconstitut[e] them into new works."[140]

Think of the hyperlinks[141] in a legal blog that include hypertext,[142] for example. Those hyperlinks represent pieces of information that are simultaneously part of and outside of the blog's text; the blog content relies in part on the hyperlinked information for its own creation.[143] Another example is a video montage on YouTube (e.g., a compilation of news outlets covering a story or of funny cat videos) that combines bits and pieces of other videos to re-present information that has already been presented in another form or through other media.[144] In a similar way, legal commentators on a recent court case might pull information from the court case, other court cases, and other commentators into their own writing or speaking. In each of these instances, the speaker's inventiveness comes not only from speaker's internal resources and thoughts but

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500 (noting that audiences are expected to "transform texts . . . until the final product no longer resembles the original.").

[137] *See* Eyman, *supra* note 52, at 77.

[138] *See id.* at 131–32 (describing "[a]ppropriation and editing" as composition practices in digital rhetoric).

[139] Ridolfo & DeVoss, *supra* note 105.

[140] *See* Eyman, *supra* note 52, at 70.

[141] "Hyperlink" means a "word, phrase, or image that you can click on to jump to a new document or a new section within the current document." *Hyperlink*, TechTerms, https://techterms.com/definition/hyperlink [https://perma.cc/QT74-6CMW] (last visited Feb. 19, 2020).

[142] "Hypertext" means "text that links to other information." *Hypertext*, TechTerms, https://techterms.com/definition/hypertext [https://perma.cc/G5NK-YX63] (last visited Feb. 19, 2020).

[143] *See* Jay L. Gordon, *Teaching Hypertext Composition*, 14 Technical Comm. Q. 49, 55, 57 (discussing the hyperlink in hypertext documents and suggesting that the hyperlink can serve many purposes in digital documents); Wendy Morgan, *Heterotropes: Learning the Rhetoric of Hyperlinks*, 2 Educ., Comm., & Info. 215, 216 (2002) (noting hyperlinks are "necessary to the reading of . . . hypertext and do much to create meaning."); *see also* Davis, *supra* note 122, at 512 (noting that "[r]eading on-screen generally involves more browsing, scanning, and reading selectively . . . , [a problem] exacerbated by hypertext presentation of the material on screen.").

[144] *See, e.g.*, America's Funniest Home Videos, *101 SUPER Weird Cats/AFV Funniest Cat Videos 2018*, YouTube (Aug. 18, 2018), https://www.youtube.com/watch?v=5qHfyk3VT vM [https://perma.cc/K2CR-3VY2] (compiling videos of cats that had appeared the television show Funniest Home Videos as submitted by the show's viewers).

also from his or her ability to marshal and recombine information from other sources.

In many ways, lawyers should be well-suited for writing public commentary in the digital space. Lawyers are trained to synthesize cases, quote statutes, marshal facts—that is, they are trained to identify and use the law and facts as resources for new thoughts and arguments.[145] Legal scholar James Boyd White identifies the lawyer's behavior of finding those legal and factual fragments as a performance of Aristotle's original definition of rhetoric: using the ability to identify all the available "means of persuasion."[146] In the digital environment, then, lawyers come with a rhetorical orientation toward the text that is already attuned to using existing messages to create new ones.

For both speakers and audiences, the sheer volume of digital messages raises a question about the ability to remember what is seen and read digitally. For remembering the content of digital texts, memory is not so much the *capacity* that an individual has to remember information but more of an individual's willingness to engage in an *activity* that requires persistence.[147] To remember the endless flow of digital content that appears on their screens, both speakers and audiences must build and maintain patterns to organize the digital information that comes at them in bits and pieces.[148] They must be able to stay focused, sort information into categories, discard irrelevant information, and evaluate the credibility of sources, all while taking in information that is delivered at rapid speed, in various forms, and often all at the same time (e.g., a news feed that provides a video news brief while at the same time providing additional information at the bottom and sides of the screen). To compose messages that make use of existing messages, speakers, like audiences, must also be able to persist in organizing and remembering the information that will be used to build a new message.[149]

In sum, digital rhetoric is rhetoric that is mediated electronically or through computers.[150] As a rhetorical genre, it has features that set it apart from other

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[145] *See Standard 302: Learning Outcomes*, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, at 15 (2019-2020), *available at* https:// www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_ the_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf [https://perma.cc/PL 6L-V4UB] ("A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context . . . .").

[146] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHIC. L. REV. 684, 689 (1985).

[147] *See* EYMAN, *supra* note 52, at 72.

[148] *See id.* (noting Brooke's definition of memory as "the ability to build and maintain patterns, although those patterns may be tentative and ultimately fade into the background . . . persistence is a practice of bricolage").

[149] Ridolfo & DeVoss, *supra* note 105 ("[W]riting often requires composers to draw upon multiple modes of meaning-making.").

[150] *See* EYMAN, *supra* note 52, at 17.

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rhetorical genres: its speakers, audiences, and messages exist in a virtual world, and speakers and audiences have the capacity for rapid interaction that sets digital media apart from print or broadcast. Digital messages tend to circulate at a higher speed and with further reach than print messages, and messages can be used as resources by speakers to invent new messages that may challenge both speakers and audiences to remember and make sense of the messages they compose and hear.

Classical rhetorical theory can inform digital rhetoric and has been repeatedly applied in that context.[151] Although digital rhetoric presents challenges not familiar to the ancients, digital rhetoric still involves inventing, delivering, organizing, remembering, and composing messages meant to influence others.[152] These five activities are the five parts of the classical rhetorical canon.[153] Accordingly, the Article now turns to an initial exploration of lawyer digital commentary as a function of classical rhetorical theory. This Part considers what questions we might ask by examining lawyer public commentary through digital rhetoric and what perspectives citizen lawyers might adopt when performing as digital rhetors. This Part is not meant to explore or resolve every issue but rather to draw attention to the conundrums and possibilities that exist for citizen lawyers who want to persuade and influence in a digital world.[154]

III. EXPLORING LAWYER PUBLIC COMMENTARY THROUGH THE LENS OF CLASSICAL RHETORICAL THEORY

When Cicero looked at the Greek texts to write his own guide for practicing rhetoric in the Roman Republic, he had a specific goal in mind:

Cicero aimed at acquainting his generation with the best that had been thought and said on the subject of rhetoric; and not content with the scholastic teaching, he return[ed] to the fountain-heads, to Plato and Aristotle, Isocrates[,] and Theophrastus, and with their work as a basis he attempt[ed] a new synthesis, selecting, combining[,] and extending [what had already been written about rhetoric].[155]

This Part takes a Ciceronian perspective and attempts the Ciceronian task: it combines ideas from classical rhetorical theory with ideas about a lawyer's

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[151] *See, e.g.*, *id. passim*; WELCH, *supra* note 72, *passim*.

[152] *See* EYMAN, *supra* note 52, at 61–79 (discussing these topics).

[153] *See id.* (organizing his discussion of digital rhetoric around the five classical rhetorical canons to show how classical rhetorical theory has been applied).

[154] The western rhetorical canon is not without its detractors who rightly point out that the canon itself excluded other voices, including those of women, see, e.g., CHERYL GLENN, RHETORIC RETOLD: REGENDERING THE TRADITION FROM ANTIQUITY THROUGH THE RENAISSANCE 1–2 (1997), and that legal scholars should decenter reliance upon the western rhetorical canon in legal education to the benefit of non-western rhetorics. *See, e.g.*, Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 SCHOLAR 255, 274 (2019).

[155] MURPHY ET AL., *supra* note 3, at 150 (quoting J.W.H. ATKINS, LITERARY CRITICISM IN ANTIQUITY, at I1.26 (1952)).

engagement with digital public commentary. Looking to the work of digital rhetoric scholars who first identified some of these connections between classical and digital rhetoric,[156] this Part makes some observations about how lawyers' digital public commentary might connect to classical rhetoric.

A. *The Transformative Potential of Style and Delivery*

In the digital sphere, language mediates experience and meaning is radically subject to the contexts in which communications are received. The digital sphere—and the actions of speakers within it—reflects the contingency, situatedness, and transformative potential that the Sophists[157] considered to be the human condition.

In ancient Greece, the Sophists recognized the transformative potential of language.[158] The Sophists thought that truth in human interactions was contingent, dependent upon context, and open for transformation through language and argument.[159] In *Encomium of Helen*, for example, the Sophist Gorgias said, "[s]peech is a powerful lord, which by means of the finest and most invisible body effects the divinest works."[160] Here, Gorgias was discussing the invisibility of the rhetorical techniques that operate within language itself to persuade, influence, and transform.

To transform digital audiences with messages, speakers must be able to command attention in the digital sphere, and "[t]he devices that regulate attention are stylistic devices."[161] The classical advice on style can be helpful in thinking about attention-getting. Style was a subject of the rhetorical canon.[162] Aristotle, for example, devoted multiple chapters in *On Rhetoric* to style and stylistic devices.[163] Cicero did, too.[164] These discussions encourage readers to

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[156] *See, e.g.*, COLLIN GIFFORD BROOKE, LINGUA FRACTA: TOWARD A RHETORIC OF NEW MEDIA 27 (2009) ("[W]e can turn to the [classical] rhetorical canons to construct a rhetoric that will allow us to both understand and produce interfaces."); EYMAN, *supra* note 52, at 62–76 (reviewing application of classical rhetorical canons to digital rhetoric); WELCH, *supra* note 72, at 7 (discussing her adaptation of "Isocratic Sophistic theories" of digital rhetoric); Ian Bogost & Elizabeth Losh, *Rhetoric and Digital Media*, *in* THE OXFORD HANDBOOK OF RHETORICAL STUDIES 759 (Michael J. MacDonald ed., 2017) (discussing interaction between classical and digital rhetoric).

[157] The Sophists were teachers of rhetoric in ancient Greece and included Protagoras and Gorgias, among others. MURPHY ET AL., *supra* note 3, at 37, 40.

[158] *See, e.g.*, THE RHETORICAL TRADITION, *supra* note 1, at 43 (discussing Gorgias's "strongest possible case for the power of language" in *Encomium of Helen*).

[159] *See, e.g.*, *id.* at 22. For a specific example, see [ANONYMOUS], *DISSOI LOGOI*, which showed how to explore all possible sides of a question by presenting opposing arguments. *Id.* at 48–55 (reproducing the translation that appears in T.M. ROBINSON, CONTRASTING ARGUMENTS: AN EDITION OF THE "DISSOI LOGOI" (1979)).

[160] *Id.* at 45 (reproducing George A. Kennedy translation).

[161] LANHAM, *supra* note 74, at xi.

[162] *See infra* notes 163, 164 (discussing Aristotle and Cicero as examples).

[163] *See, e.g.*, ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE bk. III (George A. Kennedy trans., 2d ed. 2007) (discussing the canon of style).

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think of style not as ornamentation but as the way in which "ideas are embod-ied in language and customized to communicative contexts."[165]

As this Article has demonstrated, the digital sphere is a new context for persuasive communication style. Eyman notes that "[s]tyle takes on new im-portance for digital rhetoric, particularly in terms of visual style: for . . . digital rhetoric, style is equivalent to 'design.'"[166] Understanding this connection be-tween style and design opens up new avenues for speakers to command atten-tion in digital spaces: "document design, including color, font choice, and lay-out, as well as multimedia design possibilities,"[167] are all available means of persuasion in the digital world.[168] In the digital public sphere, effective style helps garner attention to one's message in an environment where "[a]ttention is the commodity in short supply."[169]

A specific example of an attention-sustaining stylistic device borrowed from classical rhetoric that connects to today's modern digital environment is the aphorism. Protagoras, a Sophist, valued aphorisms—the "precise and pithy phrases" that capture ideas "in a few words."[170] Examples of an aphorism in-clude "[p]ride goeth before a fall" and "[t]he simplest questions are the hardest to answer."[171] Today, we might call these aphorisms examples of "writing short"—writing that is brief but effective such as a tweet or a headline.[172] The aphorism's instructive capacity is in the audience's unpacking of the phrase.[173] In the digital world, however, the aphorism has additional value in its ability to increase audience engagement. By trying to unpack the meaning of a tweet, for example, by reflecting on it and connecting it to other tweets in a thread, the audience is engaging with the message and focusing attention on it.

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[164] *See, e.g.*, CICERO, ON THE IDEAL ORATOR (DE ORATORE) bk. III (James M. May & Jakob Wisse trans., 2001) (discussing style).

[165] EYMAN, *supra* note 52, at 70 (quoting Gideon O. Burton, *Silva Rhetoricae: Style*, *availa-ble at* http://rhetoric.byu.edu/Canons/Style.htm [https://perma.cc/8DUV-LTGF] (last visited Mar. 29, 2020)).

[166] *Id.*

[167] *Id.*

[168] For discussions on legal document design in digital contexts, see among others, Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC 1, 15–21 (2015); 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, 111–14 (2004); *see also* Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narra-tive in Legal Briefs*, 7 J. ASS'N LEGAL WRITING DIRECTORS 87, 88, n.2 (2010) (listing a number of sources relevant to legal document design).

[169] LANHAM, *supra* note 74, at xi.

[170] MURPHY ET AL., *supra* note 3, at 39.

[171] *Aphorism*, LITERARY DEVICES, https://literarydevices.net/aphorism [https://perma.cc/3 J58-ZGZ6] (last visited Feb. 22, 2020).

[172] ROY PETER CLARK, HOW TO WRITE SHORT: WORD CRAFT FOR FAST TIMES 6–7 (2013).

[173] MURPHY ET AL., *supra* note 3, at 39.

The need to get and sustain attention in the digital public sphere makes the classical canon of delivery relevant to the digital environment. Not only does attention-getting evoke the rhetorical canon of style, it also draws on the canon of delivery. Ancient rhetoricians thought about delivery primarily in terms of "volume, change of pitch . . . , and rhythm"[174] as well as "facial expression, tone of voice, and gesture."[175] Even though Aristotle preferred that persuasion "contend by means of facts themselves," he thought attending to delivery was necessary because it had "great power."[176] Cicero added that delivery "is the one dominant factor in oratory. Without it, even the best orator cannot be of any account at all . . . ."[177]

Ancient rhetoricians considered delivery in terms of ethos (credibility) and pathos (emotion) and considered how body language and gestures might create universal modes of understanding.[178] For example, Cicero said that emotions are often "confused" in speech but can be "especially" and "prominent[ly]" expressed through delivery: "every emotion has its own facial expression, tone of voice, and gesture. The entire body of a human being, all the facial expressions and all the utterances of the voice, like the strings on a lyre, 'sound' exactly in the way they are struck by each emotion."[179]

Classical rhetoric explored delivery in physical, not virtual, spaces, but the detailed exploration of delivery in classical texts still may provide a way to think about delivery in the digital space, particularly because digital speech evokes a "secondary orality" where the oral features of speech exist in a literate (written) environment.[180] The classical teachings on delivery might encourage citizen lawyers to think about how to represent their bodies digitally, for example, in videos or avatars.[181] Commentators can think about the speaking speed, vocabulary use, and tone with which they deliver a podcast[182] as a means for

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[174] ARISTOTLE, *supra* note 163, at 195.

[175] CICERO, *supra* note 164, at 292; *see also* QUINTILIAN, *INSTITUTIO ORATORIA*, at bk. 11, ch. 6, § 14 (Harold Edgeworth Butler ed., 1922), *available at*, https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0069%3Abook%3D11%3Achapter%3D6 [https://perma.cc/S5QB-BAR6] (last visited Mar. 9, 2020) (placing voice and gesture in the canon of delivery).

[176] ARISTOTLE, *supra* note 163, at 195–96.

[177] CICERO, *supra* note 164, at 290.

[178] *See* Gurak & Antonijevic, *supra* note 61, at 502 (discussing ancient rhetoricians' treatment of delivery).

[179] CICERO, *supra* note 164, at 292.

[180] *See supra* Part II.

[181] *See* Gurak & Antonijevic, *supra* note 61, at 504. In multiuser 3-D virtual environments, "speaker and audience come together without regard for physical distance; but, in those environments, speaker and audience still come together with regard to the communicative aspects of virtual bodies and, hence, with an increased regard to digital delivery." *Id.* In addition, "YouTube and other sites provide[] an entirely new, open, and inexpensive way for people to create powerful video messages that are accessible to millions." *Id.*

[182] "When we look at effectiveness and excellence in delivery, the voice undoubtedly plays the most important part." CICERO, *supra* note 164, at 295.

reaching and keeping the attention of their audiences through emotional engagement. Attention to delivery may in fact be the best way to improve connection with remote and diverse audiences in the digital sphere because, as Cicero said:

> [W]ords only affect those who are joined to the speaker by the bond of a shared language . . . . But delivery, which displays the feelings of the soul, affects everyone, because everyone's soul is stirred by the same feelings, and it is through the same signs that people recognize them in others and reveal them in themselves.[183]

Classical rhetorical principles can give citizen lawyers a way to imagine "standing before" the audience when the audience is not there to provide immediate feedback on the message or to see physical non-verbal cues.

B.   An Ethos for Digital Audiences

For lawyers who normally interact with their traditional "legal" audiences—judges, juries, and clients—through either face-to-face interactions or written texts for which the message's audience members are known, the inability to know the digital audience presents thorny problems. Lawyers commentating on issues of public concern likely do not know the exact audience members they are seeking to influence or how, exactly, to tailor messages to meet the needs and interests of the potentially diverse and multiple audiences for the message.

To engage digital audiences, ethos, or the way in which a speaker is seen as having good character, competence, and goodwill,[184] is of the utmost importance. "[F]or the majority of online information[,] . . . ethos is simply the most powerful and important of the classical appeals, the one that holds up best and is most explanatory of the bulk of digital rhetoric."[185] In other words, when speakers and audiences are invisible to each other and time is short to evaluate information, audiences may be particularly inclined to substitute a speaker's perceived credibility for other ways to evaluate the quality of a message (e.g., looking at the message's logical structure and content accuracy).

But, thinking of ethos as only the credibility of the speaker is too limited a view for explaining ethos's function in the digital environment:

> In digital rhetoric, it is the ethos of the message in its entirety—not just the author but the power of the visuals, the sound and style of the text, the speed with which it was delivered, the people to [whom] it was sent, the connection it may have to others who have credible online reputations—that is the key element.[186]

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[183]   *Id.*

[184]   *See* ARISTOTLE, *supra* note 163, at 112–13.

[185]   Gurak & Antonijevic, *supra* note 61, at 501.

[186]   *Id.*; *see also* EYMAN, *supra* note 52, at 31–32 (discussing ethos in digital rhetoric and the way in which it extends beyond the speaker).

In other words, digital audiences evaluate a message's credibility through more than the message's logical value alone and ethos through more than a speaker's personal reputation alone.

Aristotle's writings on ethos suggest that he agreed that ethos was much broader than the reputation the speaker brought to the rhetorical situation; Aristotle said that ethos "result[s] from the speech, not from a previous opinion that the speaker is a [particular] kind of person."[187] In other words, the entire context of the speaking situation contributed to the formation of the speaker's ethos. Accordingly, citizen lawyers speaking in the digital public sphere should consider how messages themselves convey their individual ethos as speakers. This is why style, as discussed above, for example, is important for citizen lawyers wanting to influence members of the public. Style not only grabs attention in digital spaces, it also works to convey ethos.

Both Cicero and Quintilian had ideas about ethos relevant to digital commentary. Quintilian was a lawyer and rhetorical scholar during the Roman Empire, when the practice of rhetoric was largely confined to legal speech in the law courts of Rome and to the education of Roman citizens (in part as a means of enculturation of conquered peoples).[188] That is, when tyrants came to rule Imperial Rome, citizens stopped practicing the habits of self-governance that had been part of life in the Roman Republic.[189] The Empire no longer valued the creative rhetorical process and instead preoccupied itself with rhetorical education on matters of style.[190] It was in this context that Quintilian was challenged to think deeply about the ethos of the "perfect" or "ideal" orator.[191] Quintilian's characterization of the ideal public speaker's characteristics or ethos was revolutionary for his time—and is applicable to citizen lawyers.

Quintilian concluded that a public speaker needed both eloquence ("consummate ability in speaking") and good moral character ("excellence of mind").[192] One could not be an orator and be of poor character.[193] Quintilian's ideal orator was "publicly active, possessed of both integrity and eloquence, constantly learning, and courageous in pursing his ideals."[194] Quintilian high-

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[187] ARISTOTLE, *supra* note 163, at 39; *see also* William Benoit, *Isocrates and Aristotle on Rhetoric*, 20 RHETORIC SOC'Y Q. 251, 257-58 (1990) (discussing Aristotle's approach to ethos).

[188] *See* MURPHY ET AL., *supra* note 3, at 182–86 (discussing the Roman Empire and the life of Quintilian).

[189] *Id.* at 185.

[190] *See id.* at 184.

[191] *Id.* at 187 (describing Quintilian as working toward the "perfect orator").

[192] QUINTILIAN TEACHING SPEAKING & WRITING, *supra* note †, at 6. In other translations, this language is provided as "possession of exceptional gifts of speech" and "excellences of character." *See* MURPHY ET AL., *supra* note 3, at 187.

[193] *See* QUINTILIAN, INSTITUTES OF ORATORY, *supra* note 59, at 413.

[194] MURPHY ET AL., *supra* note 3, at 187.

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lighted that the orator needed to be wise to be a true orator.[195] As Quintilian reflected, "[I]t is one of the greatest misfortunes of ignorance to fancy that whoever offers instruction is a [person] of knowledge."[196]

The orator needed to be able to tell the difference between virtue and vice and act with prudence and discernment. Importantly, Quintilian said that the orator must be sincere, consistent in thought and speech:

> [A] bad [person] must of necessity utter words at variance with his [or her] thoughts; while to good [people], on the contrary, a virtuous sincerity of language will never be wanting, nor (for good [people] will also be wise) a power of producing the most excellent thoughts, . . . since whatever is said with honest feeling will also be said with eloquence.
>
>   . . . .
>
> Will not an orator have to speak much of justice, fortitude, abstinence, temperance, and piety? Yet, the good [person], who has a knowledge of these virtues, not by sound and name only, not as heard merely by the ear to be repeated by the tongue, but who has embraced them in his [or her] heart, and thinks in conformity with them, . . . will express sincerely what he [or she] thinks.[197]

Key to Quintilian's "ideal orator ethos" is his expectation that an orator is one who is engaged in the world as an active citizen, addressing matters of public concern.[198] In distinguishing the "philosopher" from the "orator," Quintilian said:

> Which of the philosophers, indeed, ever frequented courts of justice, or distinguished [themselves] in public assemblies? . . . But I should desire the orator, whom I am trying to form, to be a kind of *Roman wise* [*person*], who may prove himself a true states[person], not by discussions in retirement, but by personal experience and exertions in public life.[199]

Quintilian's "ideal orator ethos" provides a model for lawyers performing as citizen lawyers with a special responsibility for educating and influencing others about the law. Looking at the question of ethos from Quintilian's perspective, a lawyer making public commentary in digital spaces might develop the ethos of the ideal orator in all aspects of his or her message. The lawyer's messages should be well-researched, thoughtful, and referenced to demonstrate wisdom. In addition, demonstrations of sincerity of the commentator's statements can be a governing principle; in other words, the rhetorical choices the commentator makes can be designed to demonstrate the commentator is sincere, delivering consistent messages, and fulfilling the responsibility to act on behalf of interests other than his or her own.[200]

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[195] *Id.* (noting Quintilian's reference to wisdom); *see also* QUINTILIAN, INSTITUTES OF ORATORY, *supra* note 59, at 422.

[196] QUINTILIAN, INSTITUTES OF ORATORY, *supra* note 59, at 422.

[197] *Id.* at 416, 420.

[198] *See id.* at 419.

[199] *Id.*

[200] The lawyer's role as a "representative of clients" can pose a challenge to developing a "sincere" ethos in public life because sometimes a client's representation may conflict with a

Moreover, in the digital environment, the style of presentation, who endorses a citizen lawyer's commentary, and with whom the lawyer affiliates all tell the audience something about the sincerity of the lawyer speaking. Even the advertisements that scroll alongside a lawyer's blog entry, for example, are the kinds of contextual cues—even if unintentional—that would inform an audience about the sincerity of the lawyer's commentary.

While Quintilian helps citizen lawyers in the digital space think about ethos, Cicero's rhetorical theory helps lawyers imagine those invisible digital audiences as *communities* of listeners. Cicero argued that it was not wisdom, religion, or even law that held social communities together; instead, Cicero argued, public speaking—eloquence and oratory—held communities together:

> [W]hat other force could have gathered the scattered members of the human race into one place, or could have led them away from a savage existence in the wilderness to this truly human, communal way of life, or, once communities had been founded, could have established laws, judicial procedures, and legal arrangements?[201]

For Cicero, audiences become communities when messages are unifying, when groups of people pay attention to a text that organizes them around a common set of ideas.

For lawyer commentators in a digital space, commentary itself has the power not only to hold communities together but also to create them through messages that hold their attention.[202] A digital speaker has the benefit of reaching an unlimited number of people and the possibility to create a community of interest from them—if the lawyer is sufficiently eloquent to grab their attention. Cicero's idea that speakers can "unify humanity" and "maintain civilization" through speech should be empowering to a citizen lawyer who wants to broadly share his or her message about improving the law, promoting the rule of law, and furthering the values of participatory democracy.[203]

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lawyer's views as a citizen lawyer. *See, e.g.*, Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?*, 111 PENN ST. L. REV. 1, 36–46 (2006) (discussing the problems of sincerity, credibility, and positional conflicts when lawyers take conflicting positions on behalf of different clients). Given lawyers' increasing access to public audiences for their messages, the topic of how to best balance the identities of "representative of clients" and "citizen lawyer" deserves research and scholarly attention because the conflict between a lawyer's public commentary and clients' interest is emerging as a potential conflicts of interest matter. *See, e.g.*, D.C. Bar Legal Ethics Comm., Ethics Op. 370(II)(A)(ii) (Nov. 2016) (relying on ABA Model Rule 1.7(b)(4) to warn of the potential for unethical conflicts of interest between lawyer's social media comments and client's interests). *But see* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 5 (AM. BAR ASS'N 2019) ("[R]epresenting a client does not constitute approval of the client's views or activities.").

[201] CICERO, *supra* note 164, at 65.

[202] *See* EYMAN, *supra* note 52, at 44 (digital rhetoric's primary activities include the "potential for building social communities").

[203] Cicero's view of citizen-orators as community builders can be compared with Elizabeth Losh's view that government orators work to establish a "virtualpolitik" in the digital sphere that preserves their own power rather than empowering citizens to create communities around which the state is organized. LOSH, *supra* note 52, at 19.

For the citizen lawyer, making digital public commentary means developing an ethos for one's self and one's messages. It means addressing the question of who the lawyer is in the digital public sphere and recognizing that ethos is not confined only to the speaker but includes the messages' visual, textual, and contextual features. Finally, it means considering not only the speaker's eloquence but also the speaker's character—paying attention to Quintilian's "public duty" of projecting a good moral character as a public speaker,[204] one who speaks sincerely, and one who, in Cicero's eyes, helps to maintain social communities.

C. *The Connection of Kairos to Circulation*

In the digital public sphere, because of the rapid circulation and indefinite storage of digital messages, a speaker may never know when or how a message is used, changed, or reappropriated.[205] On the other hand, as discussed above, this quick movement of messages creates a sense of immediacy between speaker and listener in that it "erodes the distance between rhetor and reader, producer and user."[206] Paradoxically, then, audiences can feel unknown and distant but at the same time can seem like they are very familiar and close. This dualism that disrupts notions of time and space in the digital sphere renews the importance of the classical concept of *kairos*.[207]

Kairos is the classical rhetorical concept that messages can be offered at the right "time," in "opportune" moments, or with the right "fit" for an occasion.[208] The speed at which messages move in the digital space requires citizen lawyers to be especially sensitive to kairos in the sense that messages have the "right" timing.[209] In the digital space, not only do opportune moments to offer public commentary come and go quickly, they also arise more frequently for citizen lawyers as new rhetorical situations emerge.[210] Because messages rapidly circulate, "where the same topics might not have otherwise inspired [a] response, [the digital space may expect one] in part due to [digital] features of

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[204] *See* MURPHY ET AL., *supra* note 3, at 187 (noting that Quintilian's "concept of goodness is close[ly associated] to the Stoic ideal of 'public duty,' " meaning "active public life is required").

[205] *See* EYMAN, *supra* note 52, at 91–92 (noting that "circulation is the principle mechanism . . . for adding use-value to the rhetorical object via its reproduction, appropriation, and use within a particular circulation ecology or . . . across multiple circulation ecologies.").

[206] *Id.* at 69.

[207] *See* Gurak & Antonijevic, *supra* note 61, at 501.

[208] *See* THE RHETORICAL TRADITION, *supra* note 1, at 69 (associating Isocrates with the concept). Rhetoric scholar John Poulakos defines rhetoric using the concept of kairos: "Rhetoric is the art which seeks to capture in opportune moments that which is appropriate and attempts to suggest that which is possible." John Poulakos, *Toward a Sophistic Definition of Rhetoric*, 16 PHIL. & RHETORIC 35, 36 (1983).

[209] *See* Gurak & Antonijevic, *supra* note 61, at 501 (noting kairos "can be used . . . to create interest and action around a topic.").

[210] *Id.*

speed, reach, and interactivity."[211] So, a citizen lawyer sensitive to kairos will ask questions like: Is this issue too stale for commentary? Has the moment for influence passed? Would it be appropriate to comment on these issues in this forum?

The flip side of this, however, is that digital environments arguably extend the kairos of messages. A message is more likely to be perceived of as kairotic (i.e., offered at the right time and fitting for the occasion) because the moments at which the speaker and the audience *appear* to be engaged with each other (even when they are not) are more frequent.[212] If digital audiences can engage lawyer commentary on demand (such as through a Google search), then the "right time" for that commentary is the exact time the audience seeks out the message. For example, a citizen lawyer writing a blog about the propriety of a new state supreme court opinion has multiple moments of *kairos* to consider. The lawyer must consider whether a blog entry is published at the right moment for commenting on a case and also whether the entry is a fitting response for future audiences and future contexts.

D.   The Possibilities of Invention and Proof for Public Commentary

The digital environment's tendency toward enabling message remixing offers challenges to lawyers engaged in digital public commentary. Lawyers writing in public must be aware that the texts they compose can be remade and reused by other speakers who may not honor the original intent of the commentary. But, the volume of digital messages also offers possibilities for expanding citizen lawyers' creativity in making effective public arguments. In the digital public, lawyers can make arguments that are not constrained by rules that normally apply to legal arguments in traditional legal spaces, like the rules of evidence or rules of procedure. Instead, lawyers can be creative in how they use already-circulating messages as effective appeals and proofs. Classical rhetoric in the form of Cicero's teachings on invention and Aristotle's instruction on proof of argument can be applied to help explore the possibilities of effective argument for lawyers in the public sphere.

Cicero's model of invention was based on finding materials for argument and establishing relationships between them.[213] Cicero emphasized the speaker's ability to use materials already circulating in culture as a resource for invention.[214] That is, a speaker could use all the materials available—facts, documents, and physical evidence—in combination with a method for identifying

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[211] *Id.*

[212] *See supra* Section II.C (discussing circulation of digital messages and immediacy).

[213] *See* EYMAN, *supra* note 52, at 65 (noting scholars who see Cicero as a "shift from Aristotelian 'discovery of inferential connectives to the discovery of materials for arguments' ").

[214] *See id.*

issues (i.e., stasis doctrine[215])—to generate arguments. Contemporary scholars see Cicero's theory of invention as a "process of discovery" that is well-suited for explaining how arguments are invented in digital spaces.[216] That is, Cicero's work supports the idea that "[i]nvention, as a function of digital rhetoric, includes the searching and negotiation of networks of information[] [and] seeking those materials best suited to creating persuasive works . . . ."[217]

Rapidly circulating digital messages serve as resources for invention. For citizen lawyers, this reality might mean a conscious reorientation from the ways in which lawyers think about what counts as "law," "facts," or "evidence." In the digital world, lawyers can seek out new and different materials to incorporate into their arguments. They can invent arguments not only by drawing upon archives of digital data but also through social media interactions and new networks of connection.[218] By expanding their ideas about what might count as inventive resources, such as videos, blogs, or tweets, lawyers may be more inventive in the methods by which they build and express public commentary.

Moreover, citizen lawyers' messages to the public may be more kairotic, fitting for their times and occasions, because the messages are built with an awareness of the audiences' larger context for understanding those arguments. This context may include the reuse of circulating messages that are, at least in part, produced by the same audiences that will hear the lawyer's message. By looking to already circulating messages to build "new" commentary, lawyers can construct arguments that fill the spaces between other arguments already in circulation.

If a commentator looks not only inward for arguments but, like Cicero, looks outward, the influence of commentary lawyers make to the public about issues of social concern may be more creative and powerful. Moreover, digital fragments of all types become new resources for lawyers in influencing public views on law and matters of justice.

An example for thinking about new ways to persuade public audiences by reconfiguring other digital messages is the internet meme. An "internet meme" is a phenomenon of the digital world, and the term relies on Richard Dawkins's original term "for a cultural replicator that gets passed from human to human via imitation."[219] Memes are messages about an "idea, behavior, style, or usage that spreads from person to person within a culture" or "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread

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[215] Stasis is a method for thinking introduced by Cicero that "involve[s] anticipating likely points of conflict." *See* Herrick, *supra* note 3, at 96–97 (discussing Cicero's ideas of stasis).

[216] Eyman, *supra* note 52, at 66.

[217] *Id.*

[218] *See id.* at 67–68 (discussing these concepts of invention in the digital spaces).

[219] Jenkins, *supra* note 92, at 446.

widely online especially through social media."[220] Memes are made up of visual or textual fragments, or both, of other messages.[221]

The meme is arguably representative of Aristotle's concept of enthymeme. Aristotle defined the enthymeme as a "kind of syllogism,"[222] or an argument from probable premises, some of which may not be stated.[223] Aristotle's writings suggest that for popular audiences, arguments that are built on premises that are difficult to follow or are obvious can remain unsaid.[224]

For lawyers writing as public commentators, creating memes offers another potential strategy for informing and persuading digital audiences about legal issues of common concern without stating all the premises—or even the conclusions—of arguments. Memes might be thought of, in classical rhetorical terms, as enthymatic arguments; that is, they present a conclusion or an insight through a specific image with or without text, but they do not state their premises. In other words, the foundations for the argument asserted in the meme are implicit, and the audience can supply those foundations by drawing upon their own meanings and experiences.[225] The enthymeme is effective as argument, Aristotle suggests, because it avoids being too long or "stating what is obvious."[226] Instead, using enthymemes allows speakers to draw upon what the audience "know[s] and instances near their experience. . . . [T]he fact that what is said seems true should be clear to all or most people [in the audience]."[227] By combining both images and text drawn from other messages in circulation, lawyer commentators can draw new conclusions that might be highly effective in getting audiences' attention in the digital sphere.

Googling "legal memes" generates largely humorous, tongue-in-cheek memes.[228] But, for the purposes of citizen lawyers' digital public commentary, humor would not be the point of the meme. Instead, the "public commentary" meme would be meant to educate, persuade, or inform audiences[229] about seri-

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[220] *Meme*, Merriam-Webster, https://www.merriam-webster.com/dictionary/meme [https://perma.cc/VG76-YM8U] (last visited Feb. 19, 2020).

[221] Jenkins, *supra* note 92, at 446 (noting that "a meme is a fragment").

[222] Aristotle, *supra* note 163, at 168.

[223] *Id.* at 34 (translator explaining that enthymeme is a syllogism where the premises are probable and some may be left unstated).

[224] *See id.* at 169, n.122 (explaining the translation).

[225] *See id.* at 169.

[226] *Id.*

[227] *Id.*

[228] For example, the first result when using Google to search for "legal memes" is Pumphrey Law, *Legal Memes*, Pinterest, https://www.pinterest.com/PumphreyLaw/legal-memes/ [https://perma.cc/Z4ZY-RT9B] (last visited Feb. 19, 2020), a Pinterest board of humorous memes about lawyers.

[229] Jenkins suggests that it is the "mode" of the meme, or its site as a place of "interfacing between text and audience," that gives the meme its meaning. Particularly regarding images, the circulation of the image results in "different identifications and affections." Jenkins, *supra* note 92, at 443, 445. This analysis supports the idea that a meme can educate, inform, and persuade.

ous, timely legal issues. What might an informative or educational legal meme be?

The Center for Story-Based Strategy (Center) provides an example of what a "public commentary" meme might be. Each year, the Center gives awards for the best social justice memes.[230] Winning memes must "challenge the status quo, shape politics and culture (small 'p' and small 'c'), and have a viral 'it' factor, reaching significant scale."[231] One meme to recently win the award was an image (without text) that the Center titled "Face [M]asks & California [W]ildfires" meme.[232] The meme related to the intensification of wildfires in California in recent years, and the primary image was a picture of seven people, including men, women, and children, walking through smoky haze in a city, each wearing a face mask to protect themselves from the smoke.[233] The Center said this about the meme's image:

> This year, familiar skylines choked by fire's haze made the headlines in the U.S. The simple N95 face mask was a container for how connected we are to otherwise-distant catastrophe. The masks also hold the meaning of community mutual aid, as they were often the most immediately-useful resource shared to mitigate the impact of the smoke. Combine with scenes of suburban devastation in a place once thought immune to the immediate effects of climate change, and we have a meme that begins to represent humanity's stakes in the climate crisis.[234]

Arguably, also built into this meme is a potential legal argument about climate change, social welfare, and the need for laws that both reverse the progress toward climate destruction and protect individuals from the dangers of climate change. Through an image—people wearing masks during the California wildfires—viewers participate in constructing an argument based upon unspoken premises and even an unspoken conclusion a citizen lawyer might want the audience to draw: humans are killing the planet, and we need to change laws to stop that process and protect our fellow humans.

For lawyers as public commentators, memes enlarge the possibilities for image-centered logical argument to digital audiences whose time is limited and who may be less likely to engage with lengthy text-based arguments.[235] Using memes as public commentary on legal topics might reach audiences not willing to pay attention to textual ones. Memes could let audiences fill in some of the underlying argument premises themselves based on their own experiences,

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[230] *See* Angus Maguire & Lawrence Barriner II, *Top Social Justice Memes of 2018*, CTR. FOR STORY-BASED STRATEGY (Dec. 20, 2018), https://www.storybasedstrategy.org/blog-full/2018/12/18/top-memes-2018 [https://perma.cc/J5EY-RQ4V].

[231] *Id.*

[232] *Id.*

[233] *Id.* To view the image, please see *id.* at no. 7.

[234] *Id.*

[235] *See* Davis, *supra* note 122, at 511–15 (discussing the differences between reader engagement between hypertext and linear texts, and the nature of engagement with both in on-screen reading).

which could broaden the appeal of the meme to audiences that might not be known or predicted.

The danger, of course, for lawyers using memes (or any other image) as commentary is that the meme, as an image, is subject to unexpected interpretations and multiple meanings.[236] There is always a risk—more so than with text-based commentary—that an audience will not "fill-in" the premises that the citizen lawyer wanted or expected. Accordingly, citizen lawyers may be reluctant to cede that control to their audiences in an environment where lawyers are regularly held ethically responsible for the honesty of their communications.[237] A misinterpreted message perhaps presents a danger to this ethical norm while at the same time being the best way to reach an audience about a legal matter of public concern.[238]

<div align="center">CONCLUSION</div>

Lawyers have a professional responsibility to perform as citizen lawyers and speak to educate and inform the public about issues of law, rule of law, and participation in democratic government. The digital public sphere is the way lawyers are most likely to reach those audiences, so to be influential in those spaces, citizen lawyers should understand digital rhetoric and its features and begin to develop a revised rhetorical perspective for public engagement in digital environments.

This Article presented an initial and brief exploration of how classical rhetorical theory might offer a new perspective on citizen lawyers' rhetorical practices. First, classical rhetoric can help citizen lawyers think about their stylistic and delivery choices in the digital environment. Second, classical rhetoric, with

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[236] *See* Jenkins, *supra* note 92, at 445 (noting the possibility that internet memes evoke differing interpretations and emotions). The problem of "unexpected interpretations" of visual digital images is highlighted by recent events. This article was written before the COVID-19 Pandemic of 2020. Only the final edits to the article were remaining when people all over the United States began wearing masks in response to the novel coronavirus. Now, readers of this published article will likely have revised interpretations of a meme about face masks. This author could not have expected these reinterpretations when she was drafting the article months ago, which illustrates how digital messages have a tendency to persist and change meaning in unexpected ways.

[237] Although "public commentary" is not directly addressed in the Model Rules of Professional Conduct, dishonesty is widely prohibited in a variety of contexts. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2019). (prohibiting the lawyer from making a "false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); *id.* r. 4.1(a) (prohibiting a lawyer from making "false statement[s] of material fact or law to a third person"); *id.* r. 7.1 (prohibiting a lawyer from making a "false or misleading communication about the lawyer or the lawyer's services"); *id.* r. 8.4(c) (prohibiting a lawyer from engaging in conduct "involving dishonesty, fraud, deceit[,] or misrepresentation").

[238] For a discussion on using visuals in legal briefs as a way of improving legal communication, see, for example, Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 J. LEGAL WRITING INST. 57, 59–60 (2015).

its central emphasis on audience, can help legal commentators develop an ethos that establishes both the speaker's and the message's credibility. By considering Cicero's work, lawyers can imagine their audiences as communities of listeners and themselves as an integral part of participatory democracy, something that should be of central importance to the citizen lawyer.

Third, classical rhetoric offers ways for citizen lawyers to think about the rhetorical implications of a message's circulation speed as a function of kairos. Kairos lets digital speakers conceptualize whether their responses to rhetorical situations are timely and appropriate. In the digital space, kairos enables speakers to imagine how that fittingness can extend beyond original conceptions because of the internet's ability to create more opportunities for immediacy between speaker and audience.

Finally, classical rhetoric provides perspective on inventing and proving arguments in the digital public sphere. The ability to recombine messages in the digital space encourages citizen lawyers making public commentary to think more deeply about how arguments are constructed both textually and visually and how other digital materials can be reused and remixed. By doing so, citizen lawyers might find new ways of influencing public audiences that build on classical argument forms, such as the enthymeme, but transform those arguments into something new and perhaps more influential than before.