CLASSICAL METHODS FOR THE MODERN LAWYER:

THE INTERPLAY BETWEEN ETHICS, MORALITY AND EFFICACY IN THE TRANSACTIONAL CONTEXT

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I. INTRODUCTION

A. Ethics, Morality and Efficacy

As lawyers, we are bound by a code of ethics that regulates both what we do and how we do it. There are any number of technical rules that govern a lawyer's behavior, from rules limiting lawyer advertising to rules regulating conflicts of interest, and, apropos to this article, rules regulating how we conduct ourselves in transactional negotiations. Much of the substance of the ethical rules can be summed up by the Cub Scout's exhortation to "do your best" and "tell the truth."

The rules that govern a lawyer's behavior are commonly referred to as "legal ethics" or the "ethical rules." This nomenclature can be confusing to those of us who, prior to being taught otherwise, tended to conflate "ethics" with "morality." At least in the legal arena, the two bear only a passing resemblance to one another. The ethical rules require a minimum standard of conduct that, as we will see, is not particularly demanding.

The precise definitions of ethics and morality are well beyond the scope of this article. Nevertheless, a brief discussion of ethics and morality will be useful both as a counterpoint to the ultimate conclusion of this article and as a measure of just how far the ethical rules fall short of what most consider ethical or moral behavior. I will use Aristotle's *Nichomachean Ethics* and West Point's honor code as reference points for what it means to be "ethical" in the classical sense of the word.

I will also discuss the advantages of using the techniques of classical rhetoric in the corporate transactional context. Through that discussion, I will argue for why and how holding oneself to a higher standard of truthfulness is actually both in a lawyer's self interest and in the client's self interest. Ultimately, being seen as an honest negotiator is advantageous both to you as a lawyer and to your client, and thus is both desirable in its own right and entirely consistent with the goal of being an effective negotiator for your client.

B. Legal Ethics

As stated above, a transactional lawyer's ethical obligations basically come down to two guiding principles: first, do a good job for your client, and second, refrain from lying in doing so. In the words of the ABA's model rules of professional conduct, "[a]s [a] negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." In that regard, there are a couple of specific rules that apply:

First, we should be competent: "Rule 1.1 Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." And second, we should tell the truth: "Rule 4.1 Truthfulness In Statements To Others. In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client… ." This rule has been expounded upon by the ABA in the context of the transactional lawyer: "ABA Formal Opinion 06-439. [S]tatements regarding a party's negotiating goals …, as well as statements that can fairly be characterized as 'puffing,' are ordinarily not considered 'false statements of material fact'… ."

While the Cub Scout's oath to "do your best" translates pretty well into Rule 1.1, it is doubtful that many pack leaders are instructing their scouts in the nuances of Rule 4.1. To begin, note that the rule only prohibits false statements of material fact or law. Immaterial falsehoods appear to be permitted, albeit not encouraged. But more tellingly, note the prohibition on omissions. Omissions are only prohibited where the failure to make a disclosure is *necessary* to *avoid assisting* a client in a *criminal or fraudulent act.* As a moral code, this rule fails the red face test. But consider it in context. As lawyers, we are an agent for the client. Rule 4.1 tells us at a minimum what we must do and what we can't do regardless of our client's interests. We need to dig a little deeper to understand how we should behave when there are multiple ethically permissible choices available.

C. Ethics and Morality

Ethics and morality are not synonyms. Not only are they not the same thing, but the terms themselves have different meanings to different people. Over history, there have been any number of definitions of ethics or ethical codes. As one notable example, in his *Nichomachean Ethics*, Aristotle postulated that the goal of ethics was to achieve the highest end, which to him was human happiness. All activities were but a means to that end. Happiness was achieved by living in accordance with appropriate virtues, including courage, justice, temperance, modesty and truthfulness. Each of these virtues was not, as is common in modern discourse, at the opposite end of the spectrum from its correlative vice. Rather, each occupied the middle ground, or mean, between two extremes, neither of which were desirable. So, for example, in the realm of fear and confidence, courage is the appropriate mean between rash action and cowardice. Similarly, truthfulness is the appropriate mean between boastfulness and understatement. Note that ethical conduct, at least to Aristotle, bears only a passing resemblance to what many would call "morality." It is more like Jeremy Bentham's philosophy of "utilitarianism," which in fact owed much to Aristotle's worldview.

In some contexts, the notion of ethical behavior takes on heroic proportions. In the military, particularly at military academies, people are expected to comport to a rigorous honor code that generally prohibits all forms of dishonesty. West Point's formulation of the honor code is representative in that regard: "A Cadet will not lie, cheat, or steal, nor tolerate those who do." As in all things military, there are rules and regulations that back up that simple statement, but without diluting the rigor of the basic rule. So, for example, under West Point's honor code, "lying" is defined as deliberately deceiving another by stating an untruth or by any direct form of communication, including the telling of a partial truth and the vague or ambiguous use of information or language with the intent to deceive or mislead. Compare that to ABA's Rule 4.1. Similarly, "tolerating" is defined as failing to report an unresolved incident with honor implications to proper authority within a reasonable length of time. Unyielding in its ethical simplicity.

At the end of the day, morality is one of those terms that everyone uses, everyone knows what they mean when they say it, but in fact has no unambiguous definition. According to Merriam-Webster (paraphrased), "Morality" is a doctrine or system of behavior relating to principles of right and wrong or sanctioned by or operative on one's conscience or ethical judgment. This definition, of course, begs the question of what is "right" and what is "wrong"? That question is often profoundly difficult, as in, for example, the case where you have one too many persons riding in a sinking lifeboat. But in this context, the question is not that difficult. It is virtually always, regardless of what code you live by, morally right to be forthright and honest and morally wrong to be dishonest or duplicitous. The question is not whether it is *right* to be honest, but whether it is *smart*. Is it advantageous to us as lawyers and to our clients to be honest and forthright? That is where classical rhetoric comes in.

D. Classical Rhetoric

What is "rhetoric"? Put simply, rhetoric is the art of persuasion, deconstructed and analyzed for maximum effect. It formed the basis of an elite education in classical Greece and Rome and for centuries was an important part of any advanced liberal education in western Europe and the United States. Aristotle wrote what is still the defining treatise on rhetoric. Cicero studied and practiced rhetoric at the highest level. The Founding Fathers were highly schooled in rhetorical principles. Rhetoric has a long and distinguished pedigree.

Somewhere along the way, rhetoric as a field of study came into disfavor -- think of the phrases "empty rhetoric" (useless at best, misleading at worst) and "rhetorical question" (a useless question that does not merit an answer). To the ancients, rhetoric did not carry a connotation of "emptiness." The ancients, including Aristotle, Cicero and others whose names are not typically associated with vacuity of any kind, recognized that there is value in consensual agreement, and that the alternative is often either a deadweight loss associated with failing to reach agreement, or worse (in the political sphere) the imposition by force of what could not be agreed by rhetorical persuasion. Remember -- for all

their sophistication, ancient Greece and Rome were societies where impeachment often came at the business end of a dagger.

So, again, what is rhetoric? To put it a little less simply, rhetoric is a method of categorizing and utilizing various tools and techniques, both substantive and stylistic, to persuade. Rhetoric uses, but does not limit itself to, logic as a means of persuasion. In fact, its principal distinction from logic as an academic discipline is in the permission it grants the practitioner to digress from purely logical arguments. As we will see, logic is a predominant tool in the transactional lawyer's toolkit, but it is not the only one and in fact the reason for its predominance is in its persuasive ability, not any inherent value.

So what does rhetoric have to do with legal ethics? As we've seen, the lawyer's job is to be competent in furthering his client's goals while meeting at least minimum standards of honesty. What does rhetoric have to do with ethics and morality? As we will see, rhetorical principles would cause the lawyer to be more honest than is minimally required, to act in such a way as would cause both the lawyer and the client to be seen in a positive moral light. Rhetoric bridges the gap between the minimum standards of legal ethics and the higher aspirations of ethics and morality. Rhetoric gives lawyers and clients a reason to behave well and honorably in a negotiation -- not just because it is the right thing to do, but because it is *effective*.

II. CLASSICAL RHETORIC FOR THE MODERN LAWYER

A. The Principal Rhetorical Tools

To most observers, a negotiation is a debate, a debate is a matter of pure logic, and logic is something like math, only using words. Not true in a rhetorical world. In rhetoric, the goal is not simple accuracy, but rather it is persuasion, and to that end there are three basic tools at the rhetorician's disposal: *ethos*, *logos* and *pathos* (argument by character, argument by logic and argument by emotion). The wide variety of tactics and tools available to the persuader generally fall into one of these three categories. Let's

take a quick look at the “big three” rhetorical tools before we take a deep dive into each by turn.

The first rhetorical tool is *ethos* -- argument by character. Basically, this comes down to some variation on saying “trust me,” whether it’s because I know what I’m talking about, or because I have great experience in these matters, or because I never change my mind once I’ve spoken. In essence, it is tacitly saying that you should be persuaded not (only) by what I’ve said, but by the fact that I’m the one who said it. You would think that a modern sophisticated listener, not to mention a sophisticated lawyer on the other side of a transaction, would completely reject any such appeal. You would be wrong. More on that later.

The second rhetorical tool, and the easiest to understand, is *logos* -- argument by logic. In fact, one would think that if you had the right logic, you would win every time. In fact that is not always true. Like it or not, fair or not, alogical, even illogical, arguments win with disappointing regularity.

The third and last rhetorical tool is *pathos* -- argument by emotion. Again, you might think that a purely emotional argument would be rare, perhaps even dangerous, in a business setting. You may be surprised at how often emotional arguments are used. You may be even more surprised at how many seemingly logical arguments are, at their core, actually based on emotion and not based on logic at all.

Remember, in rhetoric (and in negotiation), you are not in the game to win debating points. You are in the game to persuade your audience -- your negotiating adversary -- to agree to your negotiating position. The rules are simple: if it’s persuasive, it’s good. Other than that, there are no rules. So far, this would seem to be at odds with the notion of honesty as an effective negotiating tool, but as we will see, this analysis actually highlights the perception of honesty as one of the single most effective tools in successful negotiation.

1. *Ethos* -- Argument by Character

Ethos basically comes down to credibility and likability. If you are credible, you will be believed. If you are likable, you will be listened to. Needless to say, being listened to and believed are two prerequisites to persuasion.

We have all been on the receiving end of the argument by character. It started as a child when your parents answered the question "why" with a stern "because I said so." That was the sound of raw *auctoritas*, or authority, speaking. There was no logic, no emotion. It was persuasive because of the identity and power of the speaker. The same persuasive element exists with a traffic cop -- "license, please" (did he really have to say "please"), your boss -- "come into my office, please," or your spouse -- "Honey, can you take out the garbage." In each case, there may have been some logic behind the "request," but your compliance rested almost entirely on who was speaking, rather than on what they were saying or why.

But surely that can't work absent compelling authority, can it? We're talking about persuasion, not compulsion. Well, yes and no. Aristotle actually believed *ethos* to be the most compelling of the three rhetorical tools. The identity (perceived or actual) of the speaker has a lot to do with the persuasiveness of the speech. There is much that you can do to enhance your persuasiveness in that regard.

The three traditional elements of *ethos* are *shared values, practical wisdom* and *disinterest.* They are extremely important for establishing your credibility and likability, but in the context of transactional negotiations, I would add *honesty* as an important element of ethos. Absent a real perception of honesty, it is unlikely that any amount of the other three will cause you to be persuasive on any issue of real importance.

Shared values is a term of art in the rhetorical world. Note that the term "values" is not used here in its moral sense. Perhaps it would be better to think of "values" as "goals" or "objectives." Do you share, or appear to share, the same goals for the transaction as your

counterparty? Whether it is adequate disclosure in a securities offering, deal certainty in a public company M&A deal, or a "market deal" in a private M&A deal, can your counterparty trust that you share the same overall goals, even if you differ somewhat in the tactics to achieve them or your client has a different economic interest in how they are achieved? You are much more likely to be persuasive if your counterparty believes you share the same goals than if they believe you are merely looking out for your client's interest.

Practical wisdom, or *phronesis*, is a quality that every client wants, most lawyers think they have, and is actually quite rare. Here we have to distinguish between a practical solution (which succeeds based on its *logos*, not its *ethos*) and a reputation for practical wisdom, which is based on a history of generating practical solutions. Of course, as a lawyer you have a client, and your practical solutions will tend to favor your client, but if your *ethos* has a heavy dose of *phronesis* attached to it, your solutions will be seen as more *practical* than *interested*.

Disinterest would seem to be a nonstarter as a transactional lawyer. You have a client, that client has an interest, and your job is to protect it. Everyone knows that. You are, by definition, *not* disinterested. The challenge, therefore, is to appear to be as disinterested as the situation permits. You start by being an honest broker. Admit your interest … it will largely be defanged. Don't argue the inarguable… you will undermine your credibility. Be honest about the meaning of contract language… your opponent will be less inclined to mistrust your motives in suggesting alternative language. Come to your conclusions reluctantly ("I hate to say this, but we're going to insist on keeping that covenant at its current level"). Taking too much joy in your adverse positions will erode your ethos.

To these three traditional virtues, I would add *honesty*. This is where I would draw a distinction between the minimum legal requirements of Model Rule 4.1 and what you and I would ordinarily mean by that term. There is a reason people say that nobody likes a liar and cheaters never prosper. You might get away with shading the truth once, maybe twice. Shading the truth

might be permissible under Model Rule 4.1. But you will not be perceived as *ethical* in either sense of the term over the medium or long term, and that lack of credibility will cause you to be less effective for your client. So, to come full circle, your *ethos* as a transactional lawyer comes down to being *likable* and *believable*. If you undermine those two qualities, whether by being dishonest or otherwise, you undermine your effectiveness as a lawyer.

2. *Logos* -- Argument by Logic

Argument by logic is the lawyer's specialty. The lawyer's ideal negotiation would be a *dialectical* argument, one that is strictly logical, formulaic, almost mathematical. "If we don't have indemnification, our client is at risk. Our client can not bear that risk. Therefore we must have the indemnification." In reality, logos will be but one part of the negotiation, but it will carry, or it will seem to carry, a disproportionate share of the persuasive quality. You can be certain that in a legal negotiation, if you can expose a material flaw in your opponent's logic, you will be much more likely to win a point. Similarly, if you can create a compelling logical argument for your position, you will be more likely to win it. The problem, of course, is that many of the points we negotiate do not have a single correct logical answer. Then you're back to ethos or pathos.

There are basically two classifications of logical arguments: deductive logic and inductive logic. Deductive logic starts with an agreed principle and then extends that principle to cover the current question. "You have provided indemnity for tax obligations, this is a tax obligation, therefore you have provided indemnity for this obligation." If deductive logic goes from the general "you have provided indemnity for tax obligations" to the specific "you should provide indemnity for *this* tax obligation," inductive logic goes from the specific to the general. "You have provided indemnity for environmental laws, securities laws and tax laws…. you should provided indemnity for all legal obligations." This is argument by example, and in my experience is the most commonly used persuasive tool used in contract negotiations. It's done in the positive (like the tax example above) or, even more commonly, in the negative "we can't give you indemnity for

violations of law… we shouldn't have to indemnify you if we didn't get something immaterial like an elevator license."

Just as honesty is an important element in establishing and maintaining your *ethos*, making honest arguments is also important in maintaining your *logos*. There are a series of logical errors, or rhetorical felonies as I like to call them, that undermine your logic and as a result your persuasiveness. These are covered in section III. below.

3. *Pathos* -- Argument by Emotion

One would think that in a calm professional environment like the practice of transactional law, argument by emotion would be uncommon… indeed it might even be a rhetorical felony. Not so. Raw anger or extreme sensitivity is certainly, at least usually, going to be unproductive. But the proper use and control of emotions in the negotiation is actually critical for success. To use the unfortunate rhetorical phrase, *pathetic* argumentation is a matter of putting your audience in the proper mood to be persuaded and controlling that mood to your advantage.

The first, and most important, mood control device is self control. The best business advice I've ever gotten is to never take business personally. Your life as a lawyer by definition consists of negotiation, argument, disagreement. It is the mark of a superior intellect to be able to disagree without becoming disagreeable. Both your *ethos* and your *pathos* depend on it.

The second, and almost equally important, mood control device is humor. Nothing breaks the ice, creates a convivial mood and keeps the discussion light and productive like a witty comment. Note that it is not usually consistent with the decorum of a business meeting to tell a full fledged joke. No one has the time or patience for that. But a well timed one liner, especially on a topic that is relevant to the discussion, is a real winner. The more off the cuff it is, the better. You enhance your *ethos* and your *pathos* by lightening the mood with a humorous comment. Of course, it's even better if you can make a substantive point in a humorous way. A false analogy that would otherwise be a *logical* fallacy

becomes a *pathetic* victory if it is both relevant and funny. So instead of saying "Failing to get this indemnity for taxes would be like us making your pre-closing tax payments for you," you say "failing to get this indemnity for taxes would be like me making your alimony payments for you." The former has better *logos* (although, admittedly, it is a bit of a syllogism); the latter has better *pathos* (although, admittedly, some people may not find it to be particularly funny).

The final pathetic tool is what transactional lawyers refer to as "a little righteous indignation." Used sparingly, this can be a very effective tool to win a critical point. Overused, it simply becomes pathetic, in the usual sense of the word.

On a related not, while it is somewhat counterintuitive, an appeal to popularity or "the market," which is commonly employed as a *logical* argument, is actually not a logical argument at all, but rather it is a rhetorically *pathetic* argument. The logic of appealing to the market is fundamentally the same as saying "all the other kids are doing it." Not so persuasive when you put it that way. When you appeal to the market, what you are really saying is some variation on "it's not fair to do otherwise" or, even more *pathetic* (in both senses of the term) "don't make me look stupid." Those are both obviously emotional, rather than logical, arguments. In the transactional context, the appeal to popularity is hidden in an appeal to "the market." Parties on both sides of a transaction will appeal constantly to what they think of as a "market" deal. Set aside for the moment the fact that lawyers will rarely concede that what they are asking for is not "market." Unhappily for the logician, market based arguments are legitimate in a transactional negotiation because one of the shared values in virtually all corporate transactions is that the deal should be within the range of a "market" deal. The fact that this is technically a logical fallacy, however, puts it in the realm of *pathos* rather than *logos*. That is not to say that it is inappropriate to make these arguments… just recognize them and accept them for what they are.

III. RHETORICAL FELONIES AND LOGICAL FALLACIES

As described above, as a general matter rhetoric does not admit the possibility of a foul. If it is persuasive, it is good. Whatever works. Remember, this is *rhetoric*, not *dialectic*. That said, there are some behaviors that are so likely to be unpersuasive that they almost reach the level of rhetorical felonies (or at least misdemeanors). There are also arguments that may seem persuasive, but have such flawed logic that upon reflection become unpersuasive. Done accidentally, these behaviors are simply mistakes. Honest mistakes. Done purposefully, they become dishonest. Again, under Model Rule 4.1, these would not be violations, as they typically do not involve misstatements of fact or omissions designed to assist in fraud or criminal activity. But they are certainly misleading. A moralist would say that it is morally wrong to mislead in this way. A rhetorician would simply say that it is ineffective. Either way it is to be avoided.

A. Rhetorical Felonies

The first rhetorical felony is to fight with your opponent. That may seem counterintuitive given that you are negotiating over a series of points, many of which are a zero sum game. You either win the point or you lose it. How can you do that without fighting? The fact is that you are trying to persuade you opponent, not debate them. It's not about winning debating points, it's about reaching agreement. You lose when you fail to reach agreement. Put yourself in the other person's shoes… how easily persuaded would you be if the opposing party constantly called you on every minor debating point. It's called winning the battle but losing the war. Pick your battles carefully and keep the big picture in mind.

The second felony, maybe a variant on the first, is to threaten your opponent, what the Romans called *argumentum baculum* (argument by the stick). Of course I don't mean to physically threaten. If that's your game, you'll need a criminal lawyer, not a transactional lawyer. In the transactional context, the ultimate threat is to walk away from the deal. How many times can you threaten that before it becomes ridiculous? And how can you

effectively threaten to walk away from the deal when you are trying to convince a seller that you are committed to the deal? To get a good result, you must at all times be *willing* to walk away from the deal, but rarely if ever say that out loud.

The third rhetorical felony is to argue the inarguable. Don't try to convince your opponent that the sun rises in the west. It doesn't, and you won't convince him that it does. Of course, what is and is not inarguable is a matter of perspective, but bear in mind that once you are caught arguing the inarguable, you will both lose your point and a healthy dose of *ethos* in one fell swoop.

The final rhetorical felony is assigning blame. In virtually any context other than a court of law, attempting to assign blame will only distract the parties from reaching agreement going forward and destroy whatever goodwill may be left in the room. Focus on the future and the path forward, not the past. This often comes up in a negotiation when one party says "I thought you had already agreed to this." Next thing you know, they are pulling out old e mails and reading more or less intent into those e mails than may or may not exist. It is virtually never productive and should be avoided. Once it starts, the best thing to do is say something like "Well maybe you thought I agreed and maybe I even did, but I don't agree now so let's talk about resolving it." The only certainty is that for so long as you are talking about whether you *did* reach agreement, you will not be talking about whether you *will* reach agreement.

B. Logical Fallacies

Lawyers by their nature are addicted to logic. Identifying a logical error in a lawyer's argument is typically a very effective means of disarming that argument, in a way that, for example, would not be likely to work against a rabid Yankees fan. Once again, honest mistakes in this regard are just that -- honest. Intentionally using bad logic is a pernicious form of dishonesty. The following is an incomplete list of logical fallacies that are often committed by transactional lawyers and how to defeat them.

The first logical fallacy is false comparison. Going back to the tax example described above. The seller argues that tax liabilities are just like any other ordinary course liability that you are inheriting as part of the business. "You are assuming my rent obligations, why not assume my tax obligations." While that argument has a certain intuitive appeal, it ultimately fails because taxes are different than rent. Rent is forward looking… it applies to the business for the period in which the buyer will own it. It is known and expected. Taxes on the other hand are paid on income earned during a certain period. The seller got the benefit of the income during that period, the seller should pay the tax. Everyone assumes you've already paid your taxes. A tax liability is unexpected. Note that not everyone would agree with every word of the argument just presented, but the rhetorical and logical point is made… just because someone draws an analogy from one thing to another, either deductively (by claiming the specific point falls within the larger deductive category) or inductively (by including it in a list of examples of why the broader point should apply) does not mean that the analogy holds water. Refute the comparison successfully and you have not only undermined your opponents *logos* vis-à-vis that particular argument, but also their *ethos* regarding their general credibility. By the same token, don't put yourself in the position where your *logos* and *ethos* can be similarly undermined.

Another logical fallacy, somewhat less common, is the *tautology*. In formal logic, a tautology is a statement that simply repeats itself. "Chicago is a great town … there's no better place to live than Chicago." Insert the word "because" in the middle of that sentence and the logical flaw is revealed. A tautology can be hidden in a definition. "Cash equivalents are instruments that can be used in the same way as cash." Or they can be used in a lawyer's ineffective puffery. "I can't agree to that provision… that provision is totally unacceptable." The tautology is not a particularly effective (or dangerous) device precisely because it tends to be so transparent or meaningless to have little rhetorical value in the first place. It is usually the better approach to dismiss it and move on, as the best you can do when resisting a tautology is prove that it is definitionally true (which ultimately means that it

is true)… how much time do you really want to spend arguing that your opponent's point is technically correct?

A more pernicious logical fallacy is the false choice. Here, the lawyer presents an objection to a certain provision in an agreement, and follows by saying something like "If I agree to that provision, I must get the following concession or alternate protection." Again, this falls into a logical trap familiar to all parents… the failure to distinguish between wants and needs. The child says he "needs a new bike." No. He *wants* a new bike. We can all see through that. But it is fundamentally no different than a lawyer saying he "needs protection," is it? The false choice typically comes down to a simple factual error or omission: the choice is presented as limited to one of two (or three or more) alternatives, when there are actually other alternatives. The fact is, in transactional law as in life, there are rarely just two choices. For example, there is always the choice not to do the deal. There is also the choice to simply accept a provision even if you would rather not. The good transactional lawyer expands the client's range of choices and uses creativity to identify a better set of choices than those presented. A bad transactional lawyer narrows the range of choices and uses bad logic to present the alternatives as being limited to "my way or the highway."

One final fallacy in our woefully incomplete list is the wrong ending. In this fallacy, a solid and agreed claim is made in support of an illogical conclusion. "We are committed to full disclosure, so we can not enter into this confidentiality agreement." Everyone agrees on full disclosure… but (subject to compliance with law) that doesn't mean you can't agree to keep something confidential. A common variant on this logical fallacy is the slippery slope argument. You hear this one all the time. "I can't agree to indemnify you for taxes because it will inevitably lead to me indemnifying you for unpaid rent." No, it won't, at least not unless you let it. The slippery slope argument is negative variant of the baby and the bathwater problem. "I can't agree to an otherwise reasonable provision because it may lead to an unreasonable outcome." The better approach is to specifically address the unreasonable outcome (the bathwater) while preserving the reasonable provision (the baby). In a subtle fact intensive field

like the practice of law, the slippery slope argument can be a realistic concern in some limited circumstances. "I can't indemnify you for all stockholder litigation, because as a deep pocket I would be encouraging further stockholder litigation." But as an argument, it is probably made ten times for every one time it is a realistic concern.

IV. CONCLUSION

As we've seen, legal ethics require a certain minimal level of honesty in the negotiation context. Ethics and morality would generally require a higher level, but without a compelling reason to do so (beyond the simple satisfaction of being able to look yourself in the mirror). Rhetoric bridges the gap between the minimal requirements of the ethical rules and the aspirational goals of ethics and morality.

To Aristotle, rhetorical virtue was "a state of character, concerned with a choice, lying in the mean." These impenetrable words in their elegant brevity sum up the conditions for a healthy productive debate. "A state of character" is your *ethos*, your appearance (whether true or not) of being a likable and trustworthy adversary in the negotiation. It is not a permanent condition, you can lose it by committing the rhetorical felonies or otherwise being rude, but for however long you maintain it, it is your negotiating asset. "Concerned with a choice" is goal to persuade, not simply debate. You are dealing with the future, not the past. You are not arguing that you are right in some absolute objective way. You are trying to persuade, not bully, your opponent into agreeing with you. "Lying in the mean" is moderation. You are not taking extreme positions; you are taking reasonable positions that any reasonable person could accept. As usual, in less words than you or I could muster (I guess working with papyrus will do that to you), Aristotle got it just about right.

And so, as a good rhetorical practitioner and a great transactional lawyer, you will develop the state of character of being likable and trustworthy, you will stick to the task of reaching agreement for the future, giving the other side a meaningful choice in the matter, and you will avoid extreme or unreasonable positions.

Congratulations. Aristotle would be proud. And I'd be happy to sit across the table from you any day.