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USING PRINCIPLES FROM COGNITIVE BEHAVIORAL THERAPY TO REDUCE NERVOUSNESS IN ORAL ARGUMENT OR MOOT COURT

Larry Cunningham*

Sarah, a new attorney at a public defender's office, is assigned to the appeals bureau. Ordinarily, Sarah spends her days researching and writing briefs, talking with clients, and brainstorming legal issues with colleagues. Today, however, she opened the mail to find a notice from the court setting a date for her first oral argument. She suffers the first of several anxiety attacks: rapid heart rate, racing thoughts, shortness of breath, sweaty palms, nausea, and feelings of panic and tension. As she reads the form letter, her hands tremble. This is the day she has dreaded. She loves to write and research, but the thought of appearing in front of three robed judges and getting questioned for thirty minutes seems insurmountable. Sarah tells her supervisor that she is not feeling well, takes a sick day, and goes home. There, she crawls into bed, cries, and sleeps the day away. Later, still nervous, she has two glasses of wine "to take the edge off."

As the days go by, Sarah suffers from similar panic attacks whenever she thinks about the upcoming oral argument. Her mind has thoughts of all the worst-case scenarios. What if she is unable to deliver her oral argument? What if she stumbles? What if she embarrasses herself? What if she says something that causes her client to lose the case? What if the judges ask questions that she doesn't know the answer to? She confides in a coworker that she is "a little nervous." Her colleague doesn't help matters. He says, "Yeah, you'll feel

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I would like to thank Dean Michael A. Simons for providing a summer research grant that made this article possible.

And, as always, I thank my husband, Jonnathan Kessler, for his unwavering support.

trapped up there and it will be awful. The judges on your panel are real monsters. But you'll muddle through. Don't worry."

Over a glass of wine one night, she thinks of ways she can get out of the oral argument. Perhaps she can ask to observe someone else do the oral argument and volunteer to do the next one? What if she calls in sick that day? Ultimately, she remembers that the rules of the appellate court allow her to waive oral argument and submit the case "on the papers." She does so, to the detriment of the client, whose argument would have been stronger had Sarah taken the opportunity to try to persuade the court one last time.

INTRODUCTION

Many lawyers experience trepidation before and during a high-stakes court appearance like an appellate argument. Yet Sarah's fear may be beyond normal nervousness; she may be experiencing an abnormal level of anxiety,¹ since hers is causing "considerable distress and interference in daily living."² If that is the case, she would not be alone; anxiety disorders are common within the general population and even more so in the legal profession.³

In this article, I propose using principles of Cognitive Behavioral Therapy ("CBT") to help law students and attorneys overcome their fear, anxiety, or nervousness about moot court or oral argument. CBT is a recognized form of therapy for treating anxiety disorders.⁴ It focuses on identifying the feelings, thoughts, and behaviors that are components of anxiety; recognizing and self-correcting the exaggerated thoughts that are triggering the body's anxiety response; and exploring the underlying feelings that are contributing to unhealthy ideas. It is, at bottom, an educational tool. Indeed, there are at-home workbooks that can teach CBT's principles and techniques without the assistance of a therapist.⁵

This article will describe how CBT's core teachings can be applied by an attorney like Sarah, who is nervous about delivering an oral argument and who may even be showing signs of an anxiety disorder. Legal writing professors and

¹ A few definitions are in order. "Fear is a primitive automatic neurophysiological state of alarm involving the cognitive appraisal of imminent threat or danger to the safety and security of an individual." DAVID A. CLARK & AARON T. BECK, COGNITIVE THERAPY OF ANXIETY DISORDERS: SCIENCE AND PRACTICE 5 (2010) (emphasis omitted). On the other hand, "[a]nxiety is a complex cognitive, affective, physiological and behavioral response system (i.e., threat mode) that is activated when anticipated events or circumstances are deemed to be highly aversive because they are perceived to be unpredictable, uncontrollable events that could potentially threaten the vital interests of an individual." *Id.* (emphasis omitted). Fear is, thus, an appraisal of imminent threat, while anxiety is a "more enduring state of threat." *Id.*

² *Id.* at 6.

³ See *infra* Part II.

⁴ See *infra* Part III.

⁵ See, e.g., WILLIAM J. KNAUS, THE COGNITIVE BEHAVIORAL WORKBOOK FOR ANXIETY: A STEP-BY-STEP PROGRAM (Brady Kahn ed., 2008).

continuing legal education providers should address head-on the nervousness many lawyers and law students experience around oral argument by introducing CBT principles as part of their teaching.⁶

This is not to suggest that we, as educators, should provide unlicensed therapy by diagnosing and delivering treatment. Without appropriate training and experience, we could do more harm than good. However, what I do suggest is that nervousness—regardless of whether it has reached the level of clinical anxiety—is something that can and should be addressed through education.⁷ Just as we teach students how to respond to judges' questions, so too should we provide students with suggestions for reducing their nervousness. CBT gives us the framework for doing so. Addressing anxiety and fear may not only make students happier and calmer, but it may also improve their effectiveness as advocates.⁸

In addition, as educators, we should be on the lookout for signs that a student's nervousness is beyond mere "butterflies in the stomach," but may be something more severe, like an anxiety disorder, that warrants a discussion with the student about seeking counseling. By educating ourselves about anxiety, we can become better teachers and advisors to our students.

I will proceed by first discussing oral argument and its importance in appellate advocacy (Part I). Next, I will discuss the widespread nature of the fear of public speaking, which sometimes manifests itself as anxiety. The pervasiveness of this fear is only compounded by the extent to which anxiety disorders exist in not only the general population but also among lawyers and law students in particular (Part II). I will then turn to describing CBT in the abstract and focusing on its role in treating anxiety-related disorders, specifically (Part III). Finally, I will apply CBT principles to the oral argument setting, noting the exaggerated thoughts, core beliefs, and behaviors that are contributing to the body's fight-or-flight response and how law school professors can introduce CBT principles in their teaching to help students minimize their nervousness.

I. ORAL ARGUMENT

An appeal begins with the appellant assembling the record from the court below and then filing a brief that articulates the issues and arguments that warrant reversal. After receiving the appellant's brief, the appellee prepares his or her own brief, which argues why there should be an affirmance. Sometimes the appellant will file a reply brief. Once both sides have filed their written submis-

⁶ See *infra* Part IV.

⁷ And, if severe enough, a referral to a counseling center or other mental health services provider might be in order.

⁸ Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 666 (2009) (“[A] strong message coupled with strong nonverbal cues can result in greater effectiveness as an advocate.”).

sions, oral argument may be scheduled. While some appellate courts hear argument in every case,⁹ others do so only upon request or if the court itself determines that argument would be helpful.¹⁰

Oral argument is an opportunity to continue the “conversation” that was started in the appellant’s and appellee’s briefs. It serves several purposes.¹¹ For the judges deciding the case, it enables them to hear counsels’ responses to their concerns about the issues.¹² Sometimes the court will want clarification of the facts in the record or the parties’ reasoning.¹³ Judges also use oral argument to test the boundaries of an advocate’s argument or proposed rule.¹⁴ Ultimately, then, oral argument helps the court to decide the case and write a reasoned decision.

Oral argument also serves as a way of facilitating conversation among the judges themselves. By questioning and debating with an attorney, a judge may try to persuade a colleague.¹⁵ Likewise, oral argument also serves a purpose for the attorneys. Professor Henry Gabriel described it as distilling a “single integrated theme” to a particular case or issue.¹⁶ This theme may not be crystallized until after the reply brief is submitted.¹⁷ From the attorney’s perspective, oral argument has great value because it “allows [him or her] to address the actual concerns of the court rather than what [he or she] thought the concerns might

⁹ See, e.g., APPELLATE RULES COMM., N.C. BAR ASS’N, GUIDE FOR COUNSEL FOR ORAL ARGUMENTS BEFORE THE SUPREME COURT OF NORTH CAROLINA (2013), available at http://www.ncbar.org/media/109612/guideforcounsel_supremecourt.pdf (“The Supreme Court of North Carolina generally hears oral argument in all cases either selected for discretionary review or appealed as of right.”).

¹⁰ See, e.g., GA. CT. APP. R. 28(a)(1).

¹¹ See Michael A. McGlone, *The Silence of Oral Argument*, FED. LAW., Sept. 2011, at 4 (discussing value of oral argument on trial-level motions, even though fewer courts are hearing argument on such motions).

¹² Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 AM. J. TRIAL ADVOC. 571, 573 (1999).

¹³ *Id.* at 577–78 (asking such questions as, “Are you familiar with (a recent case decided since you filed your brief)?,” “Where in the record is . . . ?,” “Will the record support . . . ?,” “Do you have any authority for that proposition?,” or “What is your strongest argument?”).

¹⁴ *Id.* (asking, “If I adopt the rule you are suggesting, what are the parameters of the rule? How far does it go?” or “State the rule of law as you would have us make it.”).

¹⁵ See Timothy R. Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices’ Behavior During Oral Arguments*, 55 LOY. L. REV. 331, 333–36 (2009).

¹⁶ Gabriel, *supra* note 12.

¹⁷ *Id.*

be.”¹⁸ Nevertheless, there is debate among academics, lawyers, and judges about whether oral arguments matter to the outcome of cases.¹⁹

Oral arguments are relatively brief. In the New York Supreme Court, Appellate Division, where I argued many cases, the court often allotted each side only four or five minutes. The average in most federal appeals courts is ten to fifteen minutes, but only if the court has granted oral argument.²⁰ Even the U.S. Supreme Court puts time limits on arguments. Unless a case presents extraordinarily complex issues,²¹ each side will have only thirty minutes to present its case.²²

Counsel begins by introducing himself or herself, typically preceded by the customary greeting, “May it please the court.”²³ The opening is typically rehearsed. Counsel states the issues he or she plans to address and a summary of why his or her side should prevail.²⁴ Since the judges have read the briefs, they are usually familiar with the facts and legal argument.²⁵ Thus, veteran appellate advocates will not rehash this basic information. Instead, they will summarize their theme and respond to their adversaries’ contentions. During the argument, the court may ask questions.²⁶ Lawyers should view these as opportunities rather than distracting interruptions that require only a brief deviation from the prepared script.²⁷

One advocate described oral argument as sometimes “daunting” and causing “self-doubt.”²⁸ He described some of the thoughts that may go through a

¹⁸ *Id.*; Lawrence D. Rosenberg, *Aristotle’s Methods for Outstanding Oral Arguments*, LITIG., Summer 2007, at 33, 39 (“Oral argument presents a great opportunity to focus your audience on the key points of your case.”).

¹⁹ TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 13–17 (2004); Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451 (2002).

²⁰ Lawrence T. Gresser & Elizabeth F. Bernhardt, *Oral Argument: An Endangered Species?*, N.Y. L.J., Aug. 22, 2011, at S12, S14 n.19.

²¹ For example, in the cases challenging the Patient Protection and Affordable Care Act, the Supreme Court allotted six hours, spread out over three days, to oral argument. *Florida v. Dep’t of Health & Human Servs.*, 132 S. Ct. 1618, 1618–19 (2012) (No. 11-400).

²² SUP. CT. R. 28(3).

²³ Gabriel, *supra* note 12, at 582.

²⁴ *Id.*

²⁵ *Id.* at 583.

²⁶ For an interesting biosocial analysis of oral argument, see James N. Schubert et al., *Observing Supreme Court Oral Argument: A Biosocial Approach*, 11 POL. & LIFE SCI. 35, 35 (1992). The study’s authors analyzed audio tapes of over 300 Supreme Court cases and developed a methodology for coding and tracking certain events and behaviors during oral argument. *Id.*

²⁷ Gabriel, *supra* note 12, at 585 (“Answering questions is what oral argument is all about; everything else is secondary. You should welcome questions. Questions show the court is interested in your case. Questions also show where the court’s concerns are and thereby give you an opportunity to address them.”).

²⁸ Rosenberg, *supra* note 18, at 33.

lawyer's mind: "What if the judge doesn't like me? What if the judge thinks my case is terrible? What if the judge is bored by what I say or, worse, falls asleep?"²⁹

Judges do not help matters. During an appellate oral argument, the bench is clearly in control, and lawyers know it. The court is free to interrupt counsel at any time and, sometimes, judges will even interrupt each other. Exchanges can get tense, as the court pushes attorneys to defend each and every proposition of fact and law. Consider the following exchange from the oral arguments in *Shalala v. Whitecotton*,³⁰ a case before the U.S. Supreme Court. During oral argument, the Court pressed counsel for a citation in the record for a certain proposition. When counsel provided citations that did not actually stand for the proposition in question, the following occurred:

COURT: Mr. Moxley, we've been questioning you several times about findings of aggravation. You answered me just a moment ago that the special master made no finding. Now Justice Ginsburg points out that he made a very express finding. How can you stand up there at the rostrum and give these totally inconsistent answers?

MR. MOXLEY: I'm sorry, Your Honor. I don't mean—

COURT: Well, you should be.

MR. MOXLEY: I don't mean to confuse the court.

COURT: Well, you—perhaps you haven't confused us so much as just made us gravely wonder, you know, how well-prepared you are for this argument.

MR. MOXLEY: Your Honor, it is our assertion that the onset of a residual seizure disorder in table time is a significant—

COURT: Your time has expired.³¹

In a recent Supreme Court argument, one of the Justices even called out an attorney for reading his oral argument rather than presenting it extemporaneously:

COUNSEL: Here, the patent did not reserve any interest in the 1875 Act—

JUSTICE SCALIA: Counsel, you are not reading this, are you?³²

It is not surprising, then, that many lawyers report getting nervous before or during oral arguments. This can also happen at the trial level. One attorney described her early days as a litigator: "I used to get so nervous that I'd skip breakfast."³³ One associate, describing her first oral argument, worried, "About a month before the scheduled argument, I got anxious. What if I had missed an issue in my brief? What if I had misstated the holding of a case? What if I

²⁹ *Id.*

³⁰ *Shalala v. Whitecotton*, 514 U.S. 268 (1995).

³¹ Transcript of Oral Argument at 39–40, *Shalala*, 514 U.S. 268 (No. 94-372).

³² Transcript of Oral Argument at 4, *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) (No. 12-1173).

³³ Sunny Choi, *Judicial Presentation: More Than Knowing Your Oral Argument*, ABOVE THE LAW (November 5, 2013), <http://abovethelaw.com/career-files/judicial-presentation-more-than-knowing-your-oral-argument/>.

couldn't answer a judge's question?"³⁴ Seventh Circuit Judge Ilana Diamond Rovner, describing her own experience as an appellate advocate, said, "I full well recall the way I used to walk into the courtroom trembling. . . . I'd walk in trembling and walk out trembling . . ."³⁵

To assist with their preparation for oral argument, many attorneys engage in a mock argument, dubbed a "moot court," before an actual oral argument, practicing with colleagues at the firm or agency who play the role of judges.³⁶ "Moot court" also refers to an intramural or extracurricular activity in law schools in which students argue hypothetical cases against one another. Law students are usually introduced to appellate advocacy in their first or second year, during which they will conduct a moot court in their legal writing class. Later, they may try out for the moot court program and then travel to competitions, typically hosted by other law schools.³⁷ While the moot court program is voluntary, most schools have a compulsory oral argument component as part of their legal writing curricula.³⁸

First-year oral arguments can be one of the most stressful experiences for law students.³⁹ One set of authors used the oral argument exercise as an "anxiety-arousing 1st-year milestone[]" for the purpose of their study into predicting performance among law students.⁴⁰ They noted that oral argument "fosters competitiveness in students and can be intimidating due to the prospect of having to speak in public in an evaluative setting."⁴¹ The study went on to recommend that administrators "sanction[] and encourag[e]" students to seek out

³⁴ Mary Ann Couch, *An Associate's Reflections on Her First Oral Argument*, A.B.A. (July 1, 2014), <http://apps.americanbar.org/litigation/committees/appellate/articles/summer2014-0714-associates-reflections-her-first-oral-argument.html>.

³⁵ Daniel C. Vock, *Appellate Lawyers' Version of High Wire Act: Oral Argument*, CHI. DAILY L. BULL., Apr. 24, 2004 (first ellipsis in original) (quoting Judge Rovner).

³⁶ DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY: MASTERING ORAL ARGUMENT* 128 (2d ed. 2010).

³⁷ See generally James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 STETSON L. REV. 75, 75 (2008) ("Virtually all law students are required to learn oral advocacy skills at some point during their legal education. Typically, these skills are cultivated through at least one oral argument assignment, which often consists of an appellate oral argument that is given as part of the students' first-year legal research and writing course or as part of a moot court competition.").

³⁸ Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 592 (2009).

³⁹ Dimitri, *supra* note 37 ("Unfortunately, the prospect of learning this critical skill through an oral argument assignment can be disquieting to students."). Professor Dimitri attributes students' "unease" to lack of experience with oral argument. *Id.* at 75–76.

⁴⁰ Rolando J. Díaz et al., *Cognition, Anxiety, and Prediction of Performance in 1st-Year Law Students*, 93 J. EDUC. PSYCH. 420, 420 (2001).

⁴¹ *Id.* at 421 (citation omitted).

counseling and to use cognitive-behavioral approaches to help students manage their anxiety.⁴²

II. ANXIETY, PANIC, AND THE FEAR OF PUBLIC SPEAKING

Mark Twain is reported to have said, “There are two types of speakers: Those who get nervous and those who are liars.”⁴³ Consistent with that view, public speaking is routinely cited as the number one fear in the United States, surpassing even the fear of death.⁴⁴ Jerry Seinfeld joked, “Does that sound right? This means to the average person, if you go to a funeral, you’re better off in the casket than doing the eulogy.”⁴⁵

People who are nervous about public speaking may experience anything from “butterflies in the stomach” to a full-fledged panic attack that prevents them from performing competently.⁴⁶ Sweating, palpitations, trembling, nausea, and light-headedness may all be present. Some report that their “mind goes blank”⁴⁷ while others experience “negative self-focused cognitions” like “I’m concerned I’ll appear incompetent.”⁴⁸ Fear of public speaking has been studied widely by the scientific community.⁴⁹ Over time, people who are fearful of public speaking try to avoid it whenever possible.⁵⁰

Nervousness and anxiety, on the one hand, should be distinguished from “anxiety disorders,” on the other. Nervousness is, to an extent, a normal part of the human condition and, indeed, a valuable evolutionary tool. It triggers the body’s fight-or-flight response—the adrenaline-pumping mechanism that heightens strength and speed. When that fight-or-flight response is triggered in a situation in which there is not, in fact, the presence of a dangerous stimulant, anxiety is the result. As one author noted:

We all feel afraid sometimes. This is an appropriate feeling and can be a signal of real danger or threat. At the same time, we sometimes feel afraid without reason. Our guesses and fantasies about what might happen keep us afraid of events and experiences that may never befall us.⁵¹

⁴² *Id.* at 427.

⁴³ Jerry Weissman, *Another Humorous View on the Fear of Public Speaking*, FORBES (June 17, 2014), <http://www.forbes.com/sites/jerryweissman/2014/06/17/another-humorous-view-on-the-fear-of-public-speaking/>.

⁴⁴ DAVID WALLECHINSKY ET AL., THE BOOK OF LISTS 469 (1977).

⁴⁵ Weissman, *supra* note 43.

⁴⁶ Douglas H. Powell, *Treating Individuals with Debilitating Performance Anxiety: An Introduction*, 60 J. CLINICAL PSYCHOL./IN SESSION 801, 802 (2004).

⁴⁷ *Id.*

⁴⁸ Graham D. Bodie, *A Racing Heart, Rattling Knees, and Ruminative Thoughts: Defining, Explaining, and Treating Public Speaking Anxiety*, 59 COMM. EDUC. 70, 71 (2010).

⁴⁹ *See, e.g., id.* at 70.

⁵⁰ *Id.*

⁵¹ DAVID RICH, EVERYDAY COMMITMENTS: CHOOSING A LIFE OF LOVE, REALISM, AND ACCEPTANCE 21–22 (2008).

In some cases, anxiety can rise to the level of being a disorder. How does one tell the difference? One way is to ask whether the individual is experiencing “considerable distress and interference in daily living.”⁵² Clark and Beck differentiate abnormal states of fear or anxiety based on the presence of five criteria: (1) dysfunctional cognition (the person erroneously believes there is a threat), (2) impaired functioning (anxiety interferes with one’s daily life), (3) persistence (anxiety persists longer than would be expected), (4) false alarms (panic or anxiety ensues even though there is little to be alarmed about), and (5) stimulus hypersensitivity (while a normal individual would not perceive something as a threat, the abnormally anxious individual might).⁵³

The *Diagnostic and Statistical Manual of the American Psychological Association* (“DSM”) recognizes several different forms of anxiety disorders.⁵⁴ All have at their core thoughts and fears that impact behavior.⁵⁵ Those with panic disorders are “primarily concerned” with physical harm that will be caused by panic symptoms themselves.⁵⁶ In other words, they are afraid of having a panic attack and the consequences that will flow from it. This is called a “fear of fear.”⁵⁷ A person with social phobia, on the other hand, fears social failure.⁵⁸ Generalized anxiety disorder patients experience a “more diffuse” fear—the fear of losing control—which causes “heightened vigilance for threats of both a social and a physical nature.”⁵⁹

Although there is not a specific DSM diagnosis for public speaking-related anxiety, it is typically thought of as a “characteristic of social phobia or social anxiety disorder.”⁶⁰ The “hallmark” of this form of anxiety is “the threat of unsatisfactory evaluations from audiences.”⁶¹ It is necessarily situation-based.⁶² Compounding the problem is that when audience members perceive that a speaker is nervous, his or her credibility and possible impact both suffer.⁶³ This can lead to a self-fulfilling prophecy: the speaker is nervous that he or she will

⁵² CLARK & BECK, *supra* note 1, at 6.

⁵³ *Id.* at 6–7.

⁵⁴ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 189 (5th ed. 2013) [hereinafter A.P.A., DSM-V].

⁵⁵ *Id.*

⁵⁶ Dianne L. Chambless & Martha M. Gillis, *Cognitive Therapy of Anxiety Disorders*, in *ADVANCES IN COGNITIVE-BEHAVIORAL THERAPY* 116, 116–17 (Keith S. Dobson & Kenneth D. Craig eds., 1996).

⁵⁷ *Id.* at 117.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Powell, *supra* note 46, at 803; *see also* A.P.A., DSM-V, *supra* note 54, at 202.

⁶¹ Bodie, *supra* note 48 (quotation marks omitted); Barry R. Schlenker & Mark R. Leary, *Social Anxiety and Self-Presentation: A Conceptualization and Model*, 92 *PSYCHOL. BULL.* 641, 646 (1982).

⁶² Bodie, *supra* note 48.

⁶³ *Id.* at 76; *see also* Higdon, *supra* note 8.

get nervous and not please the audience, which leads to signs of nervousness, such as trembling, and that leads to negative audience reactions.

While many anxious individuals focus on the obvious physical symptoms (e.g., racing heart rate, hyperventilation, trembling, nausea, and sweating), they often experience a cognitive component to their anxiety. Racing through their mind may be thoughts such as:

- It is important that everybody like me, all of the time.
- If I make a mistake, people will think I am incompetent.
- If someone stares at me, they must be thinking negative thoughts about me.
- It would be terrible to blush, shake, or sweat in front of others.
- People can see when I am anxious.
- I must try to hide my anxiety symptoms.
- Anxiety is a sign of weakness.
- I will not be able to speak if I am too anxious.⁶⁴

As I will demonstrate in Part III, a particular form of therapy—CBT—taps into these unhealthy ideas and tries to change them.

Underlying these “automatic thoughts” may be core beliefs, the most basic assumptions people make about themselves or the world. Examples include:

- People cannot be trusted.
- I am an unlovable person.
- I am incompetent at my job.⁶⁵

Cognitive errors (or “thinking errors”) can occur with any of us. Beck and others have grouped them into categories: (1) “arbitrary inference” (drawing a conclusion without evidence); (2) “selective abstraction” (focusing on a detail out of context); (3) overgeneralization (drawing a general rule from isolated incidents); (4) magnification and minimization (distorting perception); (5) personalization (relating events to the person when there is no basis to do so); and (6) dichotomous thinking (experiences are placed in one of two categories; there is no middle ground).⁶⁶

Anxious individuals often engage in “probability overestimations”—they exaggerate the chances of something bad occurring.⁶⁷ For example, someone with a fear of flying may believe that the chances of a plane crashing are much greater than they actually are. They also engage in “all-or-nothing thinking,” such as:

⁶⁴ MARTIN M. ANTONY, 10 SIMPLE SOLUTIONS TO SHYNESS: HOW TO OVERCOME SHYNESS, SOCIAL ANXIETY & FEAR OF PUBLIC SPEAKING 8 (2004).

⁶⁵ *Id.* at 31.

⁶⁶ See Robert J. DeRubeis & Aaron T. Beck, *Cognitive Therapy*, in HANDBOOK OF COGNITIVE-BEHAVIORAL THERAPIES 273, 276 (Keith S. Dobson ed., 1988).

⁶⁷ ANTONY, *supra* note 64, at 31.

- If even one person doesn't like me, I feel like I'm a complete failure.
- It is essential that I always make a perfect impression on everyone I meet.
- I should be able to control all of my anxiety symptoms at all times.⁶⁸

Likewise, they may engage in “mind reading”: “making assumptions about what other people are thinking in the absence of any hard evidence.”⁶⁹ Some also personalize negative outcomes. For example, a speaker may believe that a sleepy audience indicates that he or she is not a good presenter.⁷⁰ In reality, the audience may be tired because they have had a long day in a warm room listening to speeches.⁷¹ They may also engage in “selective attention and memory.”⁷² Their thoughts may focus on isolated instances or reactions to draw broader, negative conclusions, while ignoring positive experiences. For example, the anxious public speaker may focus on the handful of audience members who yawn or seem disinterested but ignore the vast majority who seem to be enjoying the presentation; the speaker may also fail to consider that the yawning audience member may be tired for reasons wholly unrelated to the speaker.⁷³

Anxiety is a common disorder. Kessler et al. found that there was a twelve-month prevalence of anxiety of 18.1 percent in the U.S. population; 22.3 percent of those cases were classified as “serious.”⁷⁴ Among law students, the situation is even more grim: “[L]aw students almost always reported higher levels of anxiety than comparison groups, including medical students. In some cases, they report mean scores on anxiety measures that are comparable to psychiatric populations.”⁷⁵ Lawyers are at greater risk than the general population for depression and alcohol abuse.⁷⁶

Some anxious individuals experience panic attacks, which are particularly acute episodes. Panic has a “vicious cycle” that feeds on itself.⁷⁷ At its core, people experience panic attacks when they catastrophically misinterpret bodily sensations. For example, a person giving a speech may experience stress-induced heart palpitations—a completely normal biological response to a stressful event. A panic attack results because the person misinterprets the mi-

⁶⁸ *Id.* at 33.

⁶⁹ *Id.*

⁷⁰ *Id.* at 34.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 34–35.

⁷⁴ Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 617, 617 (2005).

⁷⁵ Matthew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 L. & HUM. BEHAV. 55, 63 (1999).

⁷⁶ G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 234 (1990).

⁷⁷ See DeRubeis & Beck, *supra* note 66, at 288–89.

nor palpitations as something much more severe and catastrophic, such as an imminent heart attack.⁷⁸ This causes the person to perceive a threat and become apprehensive. This, in turn, causes a biological response (fight-or-flight) that increases the number and severity of the palpitations, which, in turn, causes even more catastrophic thoughts, and so on.⁷⁹ The catastrophic misinterpretations can take on different forms. A person may interpret a “benign arousal-related sensation[.]” as a sign of a more serious physical symptom.⁸⁰ For example, the person may think his or her dizziness is a sign of a brain tumor.⁸¹ This explains why many patients who experience panic attacks wind up in the emergency department of a hospital.⁸² They perceive their panic symptoms as a much larger physical problem, such as a heart attack or cancer. Some patients recognize that their symptoms are panic-related but nevertheless misinterpret their severity. A patient may have thoughts like, “I could wind up psychotic if my anxiety becomes too intense.”⁸³ Patients may also exaggerate the severity of their symptoms. They may believe that their symptoms will “never end” and are “unbearably horrible.”⁸⁴

Compounding the problem is that there is sometimes a “grain of truth” to the catastrophic misinterpretation.⁸⁵ A patient’s fear may have come true during past incidents. Professor Steven Taylor, a clinical psychologist, describes a patient who panicked every time he felt nauseated:

He vividly recalled an embarrassing experience where he vomited uncontrollably in public after eating food that was later discovered to be tainted. After that, each time he felt nauseous he feared he was about to vomit. This exacerbated his gastrointestinal distress, and caused him to enter the vicious cycle leading him to panic (although he did not vomit).⁸⁶

A patient experiencing a panic attack may also have “catastrophic imagery.”⁸⁷ They may visualize themselves being taken to the hospital in an ambulance, running out of a supermarket, or passing out during a speech.⁸⁸ These images can be just as catastrophic and panic-inducing as thoughts.

⁷⁸ STEVEN TAYLOR, UNDERSTANDING AND TREATING PANIC DISORDER: COGNITIVE-BEHAVIOURAL APPROACHES 44, 44 (2000).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 45.

⁸² See TAYLOR, *supra* note 78, at 4, 297; Richard P. Swinson et al., *Brief Treatment of Emergency Room Patients with Panic Attacks*, 149 AM. J. PSYCHIATRY 944, 944–45 (1992).

⁸³ TAYLOR, *supra* note 78, at 45.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 46.

⁸⁸ *Id.*

People who experience panic attacks may employ “safety behaviors” to cope.⁸⁹ They may avoid situations, places, or people that they believe are likely to trigger a panic attack. They may try to “escape” from a situation once a panic attack begins.⁹⁰ The problem is that this can reinforce the cycle of panic.

III. COGNITIVE BEHAVIORAL THERAPY

Cognitive Behavioral Therapy (“CBT”) is a recognized, respected, and frequently studied form of psychotherapy. It has been successfully used, either alone or in combination with medication or other therapies, to treat a variety of psychiatric conditions, including depression, anxiety, panic disorder,⁹¹ schizophrenia,⁹² and bipolar disorder. CBT was developed by Dr. Aaron Beck, a psychiatrist, in 1956.⁹³ Since then, it has been the subject of over three hundred controlled trials and thousands of studies.⁹⁴

Simply put, CBT examines a person’s “information processing” to understand dysfunctional ways of thinking, feeling, and acting.⁹⁵ “[P]atterns of cognition”—thinking—“shape the emotional and behavioral consequences of that cognition.”⁹⁶ CBT is based on three principles: (1) “cognitive activity” (thinking and feeling) affects behavior; (2) cognitive activity can be understood, monitored, and changed; and (3) change in cognitive activity can lead to more desirable behavior.⁹⁷ In treatment, the patient works with a trained therapist to examine and change his or her thinking, behavior, and emotional responses. To accomplish this goal, the therapist provides “psychoeducation” about anxiety, panic attacks, and the cognitive models discussed in the previous section.⁹⁸ The therapist and patient also work together to restructure the patient’s cognition.⁹⁹ One of the advantages of CBT over psychoanalytical approaches to treatment is the accessibility of cognition. Patients can be trained to report and examine the “cognitive content” of their “reaction[s] to . . . upsetting event[s] or stream[s] of thought.”¹⁰⁰ Thus, CBT can even be practiced without a therapist at all. Many

⁸⁹ *Id.* at 50.

⁹⁰ *Id.* at 51.

⁹¹ BRAD A. ALFORD & AARON T. BECK, THE INTEGRATIVE POWER OF COGNITIVE THERAPY 115–36 (1997).

⁹² *Id.* at 137–63.

⁹³ *Id.* at 13.

⁹⁴ COGNITIVE-BEHAVIOR THERAPY, at xv (Jesse H. Wright ed., 2004); Keith S. Dobson & Lory Block, *Historical and Philosophical Bases of the Cognitive-Behavioral Therapies*, in HANDBOOK OF COGNITIVE-BEHAVIORAL THERAPIES, *supra* note 66, at 3, 8–12.

⁹⁵ ALFORD & BECK, *supra* note 91, at 11–13.

⁹⁶ Keith S. Dobson, *Preface* to HANDBOOK OF COGNITIVE-BEHAVIORAL THERAPIES, *supra* note 66, at ix.

⁹⁷ Dobson & Block, *supra* note 94, at 4.

⁹⁸ TAYLOR, *supra* note 78, at 287.

⁹⁹ *Id.*

¹⁰⁰ DeRubeis & Beck, *supra* note 66, at 273.

workbooks are available for self-study.¹⁰¹ “Unconscious” motivations, on the other hand, depend on a trained therapist to ascertain.

In treatment for anxiety, “catastrophic beliefs” are replaced by “more realistic, noncatastrophic ones.”¹⁰² The patient is invited to view such beliefs as hypotheses to be tested.¹⁰³ The patient asks himself if he has overexaggerated the likelihood of a disastrous outcome, ignored positive aspects of an experience, overpersonalized stimuli, or engaged in mind-reading. The patient reexamines his thoughts and puts the perceived danger in proper perspective.

If the content of this new view is not upsetting to the client, then by virtue of changing the relevant belief, change in the emotional reaction should follow. That is, with the attenuation of the cognitive basis for an emotionally upsetting reaction to an event or problem, the emotional reaction will subside.¹⁰⁴

After this process is repeated several times, the person’s thoughts about prior events become less distressing.¹⁰⁵ Additionally, the person is able to understand what was previously unexplainable: why he or she was experiencing anxiety.¹⁰⁶ This leads to greater use of the CBT techniques to deal with both large and small difficulties.¹⁰⁷

CBT helps patients correct cognitive errors by, first, having them keep a careful record of their dysfunctional thoughts. An instrument developed by Beck called the “Daily Record of Dysfunctional Thoughts” (“DRDT”) helps achieve this goal. On a chart, patients record each “unpleasant or puzzling affective state” by noting, under separate columns, the “situations, thoughts, and emotional reactions (preferably at the time of the event and on paper).”¹⁰⁸ A fourth column has the patient reflect and write a rational response to the erroneous automatic thought.¹⁰⁹ The DRDT can be examined in therapy sessions; the therapist can offer additional insights or probe further. The therapist teaches the patient to ask three questions: (1) “What is the evidence for and against the belief?”; (2) “What are alternative interpretations of the event or situation?”; and (3) “What are the real implications, if the belief is correct?” The patient may also receive psychoeducation in his or her particular disorder.

Exposure strategies then test the patient’s ability to more accurately assess stressful situations and thoughts; they also provide data that can be studied at

¹⁰¹ See, e.g., KNAUS, *supra* note 5.

¹⁰² TAYLOR, *supra* note 78, at 287.

¹⁰³ DeRubeis & Beck, *supra* note 66, at 274.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 275.

¹⁰⁸ *Id.* at 281; see AARON T. BECK ET AL., COGNITIVE THERAPY OF DEPRESSION 287, 403 (1979).

¹⁰⁹ DeRubeis & Beck, *supra* note 66, at 281–82.

future treatment sessions.¹¹⁰ Finally, the therapist also provides suggestions to reduce the severity of anxiety, by introducing the patient to deep breathing and relaxation techniques to counter the body's adrenaline surge.

CBT is effective in treating anxiety disorders.¹¹¹ In an early paper on the subject by Beck, Laude, and Bohnert, the authors found that anxious patients experienced increased anxiety when they had thoughts or images of harm, social or physical.¹¹² The CBT treatment for anxiety involves identifying the irrational and extreme thoughts in one's mind, examining their accuracy, and replacing them with more balanced thinking. Patients practice recognizing and adjusting their unhealthy, automatic thoughts through gradual exposure to the stimuli. The therapy may entail keeping notes or completing worksheets detailing each anxious experience, the thoughts and feelings that accompanied it, and the behaviors that followed. The therapist and patient can use these documents to examine and rethink each anxious experience.¹¹³

CBT can also help effect change in the "core beliefs" (also called "schemata") that underlie the unhealthy thoughts.¹¹⁴ The core beliefs are often not as accessible as the automatic thoughts; however, they become apparent as the therapist and patient identify themes that run through individual experiences.¹¹⁵ These core beliefs, like the automatic thoughts on the surface of cognition, can be accessed and tested for validity.¹¹⁶

IV. APPLYING CBT PRINCIPLES TO THE ORAL ARGUMENT SETTING

A. *CBT in the Individual Case*

Returning to Sarah, the anxious appellate advocate, it becomes clear that her nervousness is affecting her work and causing her great distress. It is also apparent that she shows many of the classic signs of anxiety. Triggered by an identifiable event (the notice of the oral argument), she shows physical signs of rapid heart rate, racing thoughts, shortness of breath, sweaty palms, and nausea. She experiences thoughts of catastrophe (inability to speak, stumbling, or embarrassing herself) and incompetence (saying something that causes her to lose the case or not knowing the answer to a question). Her coworker exacerbates matters by talking about feeling "trapped," the experience being "awful," and the judges being "monsters." Sarah then employs coping mechanisms that are unhealthy behaviors: going home early from work, sleeping in the daytime,

¹¹⁰ TAYLOR, *supra* note 78, at 287.

¹¹¹ See generally Chambless & Gillis, *supra* note 56.

¹¹² Aaron T. Beck et al., *Ideational Components of Anxiety Neurosis*, 31 ARCHIVES GEN. PSYCHIATRY 319, 325 (1974).

¹¹³ See, e.g., KNAUS, *supra* note 5, at 36–37.

¹¹⁴ DeRubeis & Beck, *supra* note 66, at 275.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 275–76.

drinking alcohol, and ultimately escaping the harmful stimulus by waiving oral argument, to the detriment of her client.

Working with a psychotherapist, perhaps Sarah would discover some core belief that is impacting the way she looks at high-pressure situations such as oral argument. Arthur Nielsen, a psychiatrist, describes working with a lawyer named “Brian,” who was afraid of public speaking. Like Sarah, Brian avoided speaking where possible. Through talk therapy, Brian recollected incidents in his childhood in which his siblings would attack him for performing well. This notion—fear of praise—was at the root of his fear of public speaking.¹¹⁷

Sarah would no doubt benefit from working with a mental health professional. Perhaps employing CBT, a therapist could help Sarah identify her crooked thinking and replace it with more healthy and realistic thoughts, such as:

- I have an important role today, to advocate for my client.
- The judges are not “monsters” but instead have an important job to do and must care about reaching the correct outcome in my case.
- The court’s questions are not a bad thing; they show the judges are engaged with the case and wish to continue the “conversation” started in the briefs.
- I am not being graded, and the judges’ questions of me are not an assessment of me as a person or a lawyer.
- Judges often ask tough questions of both sides. Asking me a lot of questions is not a sign that they do not like or respect me.
- Throat tightness, sweating, and other physical symptoms are just symptoms of anxiety, which I know from prior episodes, will pass in a few minutes.
- I am well prepared. I thoroughly researched and wrote my brief. I know the record and case law. I have been living with this case for months; the court is still trying to discern the issue(s) in the case.
- It is ok if I misspeak; I can always correct myself.
- While at the podium, I am not trapped. In fact, I am not in any physical danger in the courtroom.

As an evidence-based tool, CBT’s principles may appeal to Sarah and other lawyers.

A therapist working with Sarah would likely also try to get Sarah to adjust her behaviors. Instead of avoiding oral argument, the therapist may try small exposures. For example, they could reenact the scenario of receiving the notice of oral argument or may visit the courtroom, while empty, together. Deep breathing and mindfulness exercises may help if Sarah starts to experience anxiety. The therapist may also assign a workbook so that Sarah can learn more about her condition and practice exercises that help her to adjust her thoughts, behaviors, and feelings.

¹¹⁷ Arthur Nielsen, *Psychiatric Brief: The Lawyer Who Could Not Speak in Public*, CBA REC., June/July 1997, at 38, 38.

B. CBT as an Educational Tool

While CBT may be of individual help to Sarah and other attorneys or law students suffering from anxiety, I believe that legal educators—particularly those of us who teach legal writing or appellate advocacy—can use the *principles* of CBT when teaching the skill of oral argument. All too often, we focus on the mechanics and strategy of oral argument without giving due regard to how students may be feeling about the experience. Based on the data about public speaking fear, generally, and anxiety in law students, specifically, we know that a large number of our students are approaching their first-year oral arguments with trepidation and anxiety. The following principles, based on CBT, can be employed to both make students better advocates but also to make the experience less painful—or perhaps even enjoyable.¹¹⁸

1. *Acknowledge and talk about the issue.* An important aspect of CBT is psychoeducation: informing the patient about how anxiety and the fight-or-flight response work. In the classroom, faculty should discuss nervousness and anxiety openly, including the fact that nervousness is perfectly normal. The subject is already on the minds of the students. Learning about how the body reacts under stress and identifying ways to reduce nervousness can only benefit students. It may also spur discussion about wellness in the legal profession.

2. *Correct unrealistic thoughts about oral argument.* Particularly if they have seen an oral argument, students may have inaccurate thoughts about the experience. Like Sarah, they may see judges as “monsters” who are “grilling” the attorneys just for the sake of pleasure. Faculty should discuss why judges ask questions and provide students with techniques for answering them effectively. If students focus on unpleasant thoughts, the professor should redirect them to positive aspects of the experience such as the honor and privilege of advocating for a client in an appellate court and assisting the court with deciding the case. They can identify ways that the experience can be rewarding and enjoyable.

3. *Educate students about deep breathing exercises.* Anxious individuals often engage in shallow, chest-centered breathing. CBT workbooks, mindfulness meditation, and other resources teach deep breathing exercises, which help to relax the individual.

4. *Prepare.* If nervousness is stemming from worry about being unprepared, one antidote is to prepare thoroughly so that the advocate will be confident and ready for any questions that come up.¹¹⁹ A smartly-prepared binder or cheat sheet can also serve as a source of comfort while at the podium.¹²⁰

¹¹⁸ These principles could also be used in CLEs or training programs for practicing attorneys.

¹¹⁹ See generally Dimitri, *supra* note 37, at 76 (“However, students may ease their anxiety and ultimately deliver an excellent oral argument if they fully understand the purposes of the

5. *Provide opportunities for low-risk exposure to stimuli.* Before the graded oral argument, I invite students to join me in our school's moot courtroom—either alone or in small groups—sometimes just to take a tour of the empty courtroom, to practice standing at the podium, and to sit on the bench and see the courtroom from the judges' perspective. I also invite students who are nervous to practice their argument in my office or a conference room before moving on to the moot courtroom. Small group presentation exercises throughout the semester can also be helpful.

6. *Lower the stakes.* To the extent an aspect of student nervousness is about being graded, faculty can remove this stimulus by making the oral argument exercise pass/fail or a component of class participation.¹²¹ Likewise, a “no spectator” rule should be enforced. Parents and friends may unwittingly raise students' anxiety levels. As I tell my students, there will be plenty of opportunities—through moot court and mock trial, for example—for their family and friends to see them playing the role of lawyer.

7. *Invite individual discussion and inform students about resources available to help them cope with anxiety.* After a class session on oral argument, I invite students to visit my office if they are particularly nervous about oral argument and wish to talk. Discussion about nervousness can also be a catalyst to talk about the value of counseling and mental health services, generally. Many universities have free or low-cost counseling centers that provide a full range of mental health services, including CBT. Students may not be aware of those resources or have misconceptions about them. They may also have questions about whether going to counseling will be a reportable event on bar admission forms. Faculty should receive training from a mental health professional about appropriate ways to inquire and then make a referral to a counseling center. Many universities provide this training as a matter of course for new faculty.

8. *Orient judges.* If a professor has “judges” on the bench with him or her, they should be oriented accordingly. I often invite alumni to serve as co-judges with me. Beforehand, I go over basic “ground rules” with them, one of which is to inform them about how nervous the students are and the importance of making this first exercise a positive one. I discourage them from interrupting a student's introduction (even though that may occur in real life) and to throw “softball questions” if a student appears to be getting flustered.

9. *Set clear and realistic expectations.* Sometimes, as faculty, we unwittingly set unrealistic expectations of students. For example, by showing a video

argument and if they thoroughly prepare for the argument.”); Rosenberg, *supra* note 18 (discussing various ways that counsel can prepare for oral arguments).

¹²⁰ FREDERICK, *supra* note 36, at 69 (elements of an oral argument binder).

¹²¹ In real oral arguments, Professor Henry Gabriel argues that it is useful to remind oneself “that you are not being graded as an individual. The court has to decide the case, and really all you are for the court, from the court's point of view, is a tool to help the court achieve its goal of deciding the dispute.” Gabriel, *supra* note 12, at 589–90.

of an actual oral argument by an experienced litigator, we may also be communicating that we expect an equally effective argument from our novice students. To counteract this, we can clarify that the video is being shown as a model—an aspirational goal—not as a minimum floor of competence. Faculty can also communicate what is expected of students to earn a passing grade.

10. *Reinforce their qualifications.* Law school is a competitive environment, and sometimes students feel insecure about their own abilities. This insecurity may be a “schema” through which they view the world, including how they approach oral argument. If students are nervous about oral argument, the professor can ask them to think about how qualified they are to deliver the presentation. They know the record, the arguments, and the authorities backing them up.

11. *Encourage students to acknowledge nervousness but not dwell on it.* Judge Michael Ponsor advises, “If you are nervous, just be nervous. Do not make it worse by getting upset about it.” Indeed, he points out that some degree of nervousness is a good thing, as it mitigates against appearing arrogant or defensive. “Very frequently an older attorney who saunters into the courtroom with an ‘I’ve-done-this-a-million-times’ demeanor gets his clock cleaned by an associate who appears to argue for the first time, whose anxiety is barely under control who is twice as well prepared.”¹²² Mindfulness suggests noting the feeling, but not reacting to it, and allowing it to pass. Students can be encouraged to acknowledge their nervousness about oral argument and then dismiss it.¹²³

CONCLUSION

Oral argument, whether real or simulated, can be a stressful and nervous experience for students and attorneys alike. CBT presents a lens through which we can all understand that anxiety better. As educators, we can use CBT’s principles to address anxiety and help students and attorneys become healthier people and more effective advocates for their clients.

¹²² Michael A. Ponsor, *Effective Oral Argument*, in 1 FEDERAL CIVIL LITIGATION IN THE FIRST CIRCUIT § 4.2.13 (2d ed. 2008).

¹²³ Some early and limited research on “mindfulness-based cognitive therapy” (integrating mindfulness training in treatment) suggests promise for the treatment of anxiety. See Susan Evans et al., *Mindfulness-Based Cognitive Therapy for Generalized Anxiety Disorder*, 22 J. ANXIETY DISORDERS 716, 717 (2008).