

The Art of Persuasion: *Essays on Rhetoric in the Courtroom*



by Paul Mark Sandler, Esquire

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For many years I have been fascinated by the aura of great advocates in history. It is not so much how eloquent they were; rather, it is the lessons they taught—and still teach us today—that intrigue me the most.

A decade ago I joined Ronald Waicukauski, Esq., and JoAnne Epps, Esq., in writing the book *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009). Since then, I have been studying and writing on the subject of rhetoric. By rhetoric I mean the art of selecting the most effective means of persuasion. I drew upon the principles of persuasion presented in *The 12 Secrets of Persuasive Argument* to also write a brief discussion of rhetoric in my book *Anatomy of a Trial: A Handbook for Young Lawyers*.

I have continued to write on the subject of rhetoric in five essays—all of which have been published. Sharing these articles with you now in this revised format, with permission, will allow you to consider that there is more to successful trial and appellate advocacy than meets the eye.

Beneath the surface, as with many disciplines, lies the secret of success. So it is with trial and appellate advocacy. Read on and discover for yourself the principles of times past that will help you today to improve your talents in succeeding for your clients and the causes you champion.

It is my hope that these essays will stimulate discussion among colleagues in educational settings and beyond. Surely the study of classical rhetoric is essential to modern advocates. Hence, I share these essays with my compliments.

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Foreword: A Fine Gift for the Modern Advocate

Here is a great gift from Paul Mark Sandler, Esq., guiding us to a survey of the history and the art of persuasive techniques for the modern lawyer seeking to persuade 21st century judges and juries.

Paul begins with a chapter that provides a brief introduction to the persuasive arts of the classical Greeks and Romans. This is followed by four chapters based upon the wisdom of great advocates and teachers of the persuasive arts. He speaks of argumentative ornaments that serve as do musical flourishes within a symphonic masterpiece and the clarity of expression that provides the foundation for a convincing contention. Paul provides input from masters of courtroom advocacy, ample examples of the arts, and a valuable discussion of the use of logic and direct and indirect effective uses of emotion. This work also provides references for those who may wish to read further of the ancient and modern art of persuasive advocacy.

This gift will be of great value to the beginner as well as the established senior engaged in modern advocacy.

Marvin J. Garbis
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Classical Rhetoric and the Modern Trial Lawyer

Classical Rhetoric and the Modern Trial Lawyer

The average trial lawyer lacks time to read Aristotle, Demosthenes, Cicero, or Quintilian. But most trial lawyers will not settle for being average.

There is gold to be mined in *Rhetoric*, that dusty work of Aristotle's, along with the speeches of Demosthenes, and the works of their Roman heirs. Although these classical rhetoricians lived centuries ago in cultures very different from yours, their understanding of what makes a winning argument is timeless. Their techniques and steadfast belief in the rule of law are continually instructive and inspiring for modern trial lawyers. Spending time with the works of these sages will not only improve your performance in court, but also give you a deeper appreciation for the rich history of this profession.

The study of rhetoric—the art of selecting the most effective means of persuasion—actually predates the classical age of Greece and Rome. The oldest known writing on the subject was composed in Egypt at least 4,000 years ago by Pharaoh Huni, who instructed his son on effective speaking.¹

Serious analysis of persuasion, however, first emerged among the Greeks. Isocrates (436-338 B.C.) developed ideas on style and on the proper education of the advocate. In his *Phaedrus*, Plato (427-347 B.C.) offered guidance on properly constructing a speech, and he proposed that rhetoric was “the art of winning the soul by discourse.” But it was Aristotle (384-322 B.C.) who created the seminal work on persuasion that—to this day—dominates the field.

ARISTOTLE

Appreciating the art of persuasion truly begins with Aristotle's *Rhetoric*. Although it is not light reading, *Rhetoric* is deeply rewarding.

Aristotle observed what so many lawyers learn the hard way—that audiences differ in attitudes, beliefs, and preconceived notions about the matter at hand: An argument or presentation before one judge may fail before another. Just as each receiver is different, each argument should be unique, Aristotle insisted. The capacity to match your rhetoric to your audience is well-served by a sophisticated understanding of human nature, habits, desires, and emotions.

It is essential to consider the key factors that influence your listener's decision, including attitudes, beliefs, values, and personality. For example, a person who

1 See James C. McCroskey, *An Introduction to Rhetorical Communication* (5th ed. 1986), 261-62.

is biased against doctors may be predisposed to reject an argument that relies on a physician's testimony. Deeply religious people may oppose the opinions of a self-confessed atheist. Likewise, a juror who cries upon hearing an assault victim's testimony could be more susceptible to tear-jerking closing arguments than a juror who rolls her eyes at emotional appeals. If such assertions sound like common sense, you would be surprised how often lawyers ignore the nature of their listeners and instead develop arguments to suit the tastes of other attorneys.

Deconstructing the Argument

In *Rhetoric*, Aristotle identifies three elements of the argument: the speaker, the argument, and the listener. He names the listener as the most important component and develops a methodology involving three primary modes of persuasion:

- Ethos, the personal character of the speaker as perceived by the listener;
- Logos, persuasion by logic; and
- Pathos, persuasion by emotion.

Successful rhetoricians will focus these modes of persuasion on their listeners, Aristotle argued, for the “whole affair of rhetoric is the impression to be made upon the audience.”²

Ethos

Ethos was viewed by Aristotle as the most important aspect of the argument and is relied upon by modern trial lawyers as they become “personal advocates” intricately involved in the jury's evaluation of a case. It is important to appreciate the distinction between the actual character of the speaker and the perceived character: But it is the latter that matters most. Thus, you will come to view Aristotelian advocacy as something like a performance—a means of winning the trust of your listeners, regardless of who you are and what you believe.

² See chapters 3, 4, and 6, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).

Qualities that boost ethos include: integrity, intelligence, friendliness, sincerity, conviction, professional appearance, and enthusiasm, among others. Aristotle identified integrity, however, as the most important of these. Creating the impression that you are a person of honesty enhances your ability to persuade. Admitting unfavorable facts, a bit of self-deprecation, and demonstrating a sense of fair play will help win you points for integrity, as will avoiding ad hominem attacks and extreme positions.

Similarly, a knowledgeable advocate will appear to be intelligent, organized, well-prepared, and hence, persuasive. To engender goodwill, be courteous and civil, do not talk down to your audience, and use *voir dire* to establish a rapport with the jurors. How you dress and move about the courtroom, your enthusiasm, and your sincerity will also affect your ethos. It is important to appreciate that, during a trial, your ethos can rise and fall. The goal, of course, is to establish a high ethos early on and maintain it.

Logos

Logos is logical reasoning and should be of primary concern when developing the substance of an argument. Understanding the rudiments of Aristotelian logic in the context of persuasion is beneficial for three important reasons:

- Arguments are more convincing when based on sound logic;
- Understanding basic principles of logic will enable you to build watertight arguments and avoid fallacies; and
- Opposing arguments can be refuted by identifying their logical fallacies.

Rhetoric offers an extensive discussion of inductive and deductive reasoning, Aristotelian syllogisms, fallacies, and various methods of developing logical arguments. However, even a logically impeccable argument will fail if the audience does not trust the speaker.

Pathos

Pathos, or emotion, was believed by Aristotle to be used by effective advocates to provoke listeners to identify with their causes (i.e., their clients). Aristotle cautioned, however, that *pathos* is powerful only to the extent that it is based on a foundation of logical argument.

Applying Aristotle's lesson in court, trial lawyers work to humanize their clients and develop arguments with moving stories and figurative analogies.

They are right to avoid overtly manipulating the jurors' feelings; doing so can backfire, as can relying on emotional appeals that are blatantly divorced from the facts at hand. *Pathos* is a powerful force, and it is best to rely on it with moderation and always hand in hand with sound reasoning.

For Aristotle, the marriage of *pathos* and *logos*—along with a high *ethos*—is the foundation upon which successful listener-centered arguments are built.

Rhetoric also reminds of the importance of conducting due diligence on the judges that hear your cases. It should compel you to read a judge's prior opinions and writings, contact people familiar with the judge, observe the judge in other proceedings, and, in some instances, conduct online research on the judge. Such investigation will help you avoid arguing directly in opposition to a judge's preconceived notions or even prior opinions. If you must argue against a stated view of the court, your awareness of this conflict may prompt you to couch your argument in this fashion:

“Your Honor, I appreciate that you do not favor civil RICO claims; however, in this case, the facts fit well within even the most conservative view of the elements of a RICO claim and justify the result we seek. Therefore, we asserted the claim on behalf of our client, who has been severely damaged by the wrongful conduct we will prove. We hope you will understand and carefully consider the claim.”

Although learning about jurors is more difficult than learning about judges, there are a number of effective ways to glean information about the former. When possible, obtain a jury list in advance of trial and research the individuals online. You can sometimes prepare a jury questionnaire and request that the court allow you to present it to jurors before formal voir dire begins. If your jurisdiction allows full voir dire, be mindful of how you frame questions about jurors' attitudes and beliefs, as that is extremely important.

However, even limited voir dire, in which counsel submits questions for the judge to ask, is a valuable opportunity to reveal vital information about the jurors. Throughout the voir dire process and the trial, jury consultants and facilitators can create a “jury profile” and help you strike jurors who could harm your case. Also, consider mock trials, which can help you learn how jurors are likely to react to your case, in whole and in part. Listening to the mock jurors deliberate can provide crucial insight into how the real jury may respond when it counts.

Your appreciation of the decision-maker's viewpoint should inform not only the overarching theme of your case, but also your development of that theme—the structure of your opening statement, the witnesses you select, the order in which you call them, the questions you ask on cross and direct, and the tone of your closing argument. Never hesitate to adjust your argument or presentation if you discover you have lost the attention of the audience. For example, if in arguing a motion for summary judgment, you observe that the judge is listening to your first argument but seems uninterested in your second, consider moving smoothly—but quickly—to the third. Or, if the second point is important, adjust your presentation to obtain the court's attention.

Just as in Aristotle's time, advocates of today must be conscious of the decision-maker from the outset to the conclusion of an argument. The only trouble with *Rhetoric* is that it is a theoretical text. To see theory in practice, you should turn to Demosthenes.

DEMOSTHENES

A contemporary of Aristotle's, Demosthenes was perhaps the greatest orator of ancient times, but greatness did not come to him naturally. Legend has it that to eliminate a stutter, he secluded himself in a cave and practiced speaking with pebbles in his mouth. It is said that he copied down Thucydides many times to improve his own style. Demosthenes is proof that advocacy can be learned. His first public oration was a failure, but with self-improvement, he mastered the art. His speeches against the encroachments of Philip II of Macedon, known as the *Philippics*, are legendary, as is his oration known as "On the Crown."

As Plutarch observed, the orations of Demosthenes differ from Cicero's because they do not rely on rhetorical ornaments such as humor, jest, or satire. Instead, Demosthenes relied heavily on reasoning. But according to Quintilian, when Demosthenes was asked about the three most important parts of a speech, he responded: "Delivery, Delivery, and Delivery." Demosthenes could cast a spell over the audience that, to this day, can be cast upon a modern reader with his orations.

In the *Philippics*, he assailed Philip of Macedon's evisceration of Athenian liberties, which ended the era of Greek democracy. The arguments reflect techniques worthy of emulation today. For example, Demosthenes forcefully substantiated his assertions with evidence and facts. He followed each assertion with a presentation and conclusion, often using short, precise sentences. Effective advocates today can embrace this idea in presenting arguments

not only to juries and judges but also to appellate courts. Demosthenes's speeches are replete with rhetorical questions and imaginary dialogues with his listeners. Consider this passage from one of his orations assailing Philip's aggressiveness:

“When, then, Athenians, when will you do your duty? What must first happen? ‘When there is a need for it.’ What then should we consider what is now happening? For in my opinion the greatest ‘need’ is a sense of shame at the political situation. Or do you want, tell me, to go around and ask each other ‘Is there any news?’ Could there be anything more newsworthy than a fellow from Macedonia defeating Hellenes in war and regulating their affairs? ‘Is Phillip dead?’ ‘No, he’s not, but he’s ill.’ What difference does it make to you? If anything happens to him, you’ll soon create another Philip if this is how you attend to your business.”³

With his series of provocative questions and replies, Demosthenes's speech dramatizes the debate about the “political situation” and challenges the Athenians' complacency. His method is confrontational and meant to engender action. He rightly acknowledges that there is resistance to the action he desires, and he works with and through that resistance by giving it voice and responding to it with force. This technique of directly taking on the opponent's views is vital to any advocate. A trial lawyer who anticipates, acknowledges, and explicitly addresses the jurors' uncertainties or doubts about the case before them will enjoy a much higher *ethos* than one who ignores the jury's equivocation.

Another technique Demosthenes relied on was figurative language. In the same speech cited above, Demosthenes compares the way the Athenians combat Philip to the way a barbarian combats a Greek. Later, he says that Philip strikes like a fever even those at a great distance from him. Such metaphors and similes are second nature to trial lawyers. “Stab the corporate monster in the pocket book and award punitive damages” is a familiar appeal. As Demosthenes knew, figurative language works particularly well when the comparisons they make strike an emotional chord with the listener. To characterize the Athenians as barbarians surely cut close to the bone, and in ancient times, when illness could quickly ravage entire populations, comparing Philip to a fever likely struck fear in the listeners' hearts.

³ Philippic 1, quoted in RD Milns, “The Public Speeches of Demosthenes,” in Demosthenes: Statesman and Orator (Ian Worthington ed., Routledge 2000), 212.

In the following example, observe how Demosthenes used the technique of anaphora (repetition of words or phrases at the beginning of sentences):

“It was not safe in Olynthus to urge Philip’s cause without at the same time benefiting the masses by giving them Potidaea to enjoy; it was not safe in Thessaly to urge Philip’s cause without at the same time Philip’s benefiting the majority by expelling their tyrants and giving back Thermopylae to them; it was not safe in Thebes until he gave Boeotia back to them and destroyed the Phocians.”⁴

You will sometimes see this same technique in the context of witness examinations. “Tell us what time you returned home. When you returned home at midnight, did you see anyone? When you returned home at midnight and saw your mother, did you notice anything unusual about her appearance?” The effect here, as in the quotation above, is to drill important assertions into the memory of the listener, who too quickly forgets what you want him to remember.

Demosthenes blended logic and reasoning by using many valuable stylistic devices. He was at his best when employing simple words in short sentences:

“Guard this; cleave to it; if you preserve this, you will never suffer any dreadful experience. What are you seeking? Freedom. Then do you not see that even Philip’s titles are most alien to this? For every King and every tyrant is an enemy of freedom and a foe to the rule of law.”⁵

CICERO

Reading classical rhetoric can reinforce your respect for the rule of law—and for the ease with which it can be lost. Cicero (106-43 B.C.)—the Roman lawyer, politician, and philosopher—saw the Roman Republic fall into civil war and succumb to dictatorship during his lifetime. Often a staunch supporter of Republican rule, Cicero became the spokesperson for the senate after the assassination of Julius Caesar. In this position, he assailed Marc Antony, a supporter of Caesar and consul, in a series of speeches he named after Demosthenes’s *Philippics*. His defense of the rule of law, unfortunately, cost

4 Philippic 1, quoted in Milns.

5 Philippic 2, quoted in Milns.

him his life. Anthony, after forming the Second Triumvirate with Octavian and Lepidus, had Cicero named an enemy of the state and assassinated.

Cicero's writings have survived and are still read for their insights into Roman history as well as the art of advocacy. Like many Romans of his day, he studied Greek oratory, and he applied the lessons he learned from it in court.

Cicero's speeches are marked by a certain savvy and dry humor. Consider this excerpt from Cicero's prosecution of Verres, who was charged by citizens of Sicily for abusing his office by stealing valuable works of art:

"I come now to what Verres calls his consuming interest in Art, what a sympathetic friend of his might describe as his weakness and aberration and the Sicilians call highway robbery. I am not sure what name to attach it, so let me merely lay the case before you to judge on its own terms rather than by its name. Familiarize yourselves with the type of thing it is, gentlemen of the jury, and you will probably have little difficulty in applying the appropriate name to it."⁶

Cicero knew exactly what to call the conduct of Verres but mocks the crime as a "consuming interest in Art." He then piled on the evidence that he obtained after a lengthy investigation and allowed the jury to make up its own mind.

Cicero also gave great attention to the arrangement or structure of his speeches. Whereas Plato suggested that all arguments should have a beginning, a middle, and an end, Cicero favored a six-part structure or arrangement: *exordium*, narration, partition, confirmation, refutation, and peroration.

(1) The *exordium* prepares the court for the argument. It is divided into two parts: the introduction and the insinuation. The introduction creates goodwill among the listeners and, ideally, influences the listener to be receptive. The insinuation is where the advocate unobtrusively penetrates the minds of the listener. This section is analogous to the opening statement, as it speaks to the need to connect with the listener on the level of pathos, to form a positive emotional bond between advocate and audience.

(2) The *narration* is the presentation of facts.

6 2 Cicero, *The Verrine Orations* (L.H.G. Greenwood, trans., Harvard 1953), 283.

(3) The *partition* explains disagreement between the parties.

(4) The *confirmation* presents the argument. Cicero divided the confirmation into three distinct parts: proposition, reason, and conclusion. This separation is very helpful. It calls attention to the need to base your argument on *logos*. According to Cicero, many inexperienced trial lawyers are not actually arguing; they are only discussing the matter at hand. Lawyers today would be emulating Cicero if they argued the following:

- Proposition: “The nurse should have performed an EKG, as the patient experienced chest pain.”
- Reason: “The nurse’s notes reflect that the patient had, in fact, complained of chest pain, and the nurse has even admitted on the stand that patients in such situations are normally given EKGs.”
- Conclusion: “The failure to conduct an EKG in this instance was a careless mistake.”

(5) The *refutation* disproves the opposing view.

(6) The *peroration* summarizes the case and the decision requested. Cicero subdivided the peroration into three parts: summing up, inciting the court against the opponent, and arousing pity or sympathy for the cause.

Cicero also gave attention to preparing the argument and emphasized five distinct parts.⁷

- *Invention* is the discovery of proper ways to present the case. This point underscores the importance of developing a theme or theory of the case early on.
- *Disposition* is the arrangement of the argument. Here again, you are reminded of the importance of carefully ordering how you present witnesses, ask questions, and structure openings and closings. In considering arrangement, Cicero recommended placing the strongest points first, following them with weaker arguments, and concluding with strong arguments. The doctrines of primacy and recency—you remember best what you hear first and last—spring from Cicero.

7 In Re Inventione.

- *Elocution* is proper diction. Here, Cicero calls attention to style—the form in which you express ideas. Imitating classical rhetoric in this respect may not work for you. Better to adapt a style that is natural and comfortable, relying on simple but vivid language, colorful metaphors and similes, and varied rhythms.
- *Memory* takes time and helps ensure preparedness. Cicero never read from notes, but devoted hours to preparation to ensure that he was well-prepared. Thus, he could be spontaneous in presenting his case.
- *Delivery*, for Cicero, involved gestures and movement in presenting the case. His advice is helpful when considering where to stand at certain moments in a trial, whether to question a witness standing or seated, and when to make eye contact with the jurors. Even a timely removal of glasses can be part of delivery.

Note that Cicero would work through all five steps listed above *before* the presentation of an argument. The list is merely the necessary work to prepare for success when the time comes.

QUINTILIAN

No review of classical rhetoric would be complete without mentioning Quintilian. At heart, Quintilian was a lawyer’s lawyer, an orator who believed deeply in the power of speech to command attention and direct action. Although he was known in the court as a successful advocate, Quintilian is best known today for his 12-volume work, *Institutio Oratoria*. The work, eclectic in some of its recommendations on persuasion, does contribute ideas to the education of the advocate. Quintilian’s idea of education of the advocate is based on his belief that an advocate should be a “good [person].” He writes that, “*ethos* in all its forms requires the speaker to be a man of good character and courtesy.”⁸

Like many Romans, Quintilian seems to have viewed rhetoric through an aesthetic lens. Rhetoric was valuable for its own sake. It was an art that could be taught, and the art of rhetoric...is realized in action, not in the result obtained.”⁹ He viewed the highest aim of rhetoric to be speaking well.

Still, persuasion was his aim and, like Aristotle, Quintilian gave attention to knowing your listener, the temperament of the judge, and the proper use of logic and emotion. He advised that assertions must be supported by facts or

8 Quintilian, *Institutio Oratoria* VI.2.18 (H.E. Butler, trans., Harvard 1922).

9 Quintilian, *Institutio Oratoria* II.17.25-26.

law, and he underscored the value of “charm.” In other words, he appreciated the importance of a well-timed smile, a laugh, a courteous bow.

Quintilian also suggested beginning an argument with a concise statement crafted to draw in the listener. Here are two examples from his work: “The mother-in-law wedded her son-in-law: There were no witnesses, none to sanction the union and the omens were dark and sinister.” And, “Milo’s slaves did what everyone would have wished their slaves to do under similar circumstances.”¹⁰ Quintilian’s point about the first line is extremely valuable. Don’t allow yourself to waste the first minute of an opening statement with platitudes; instead, dive right into the heart of your case. Lawyers too often waste the first sentence, which is the best opportunity you have to make a lasting impression.

Regarding witness examination, Quintilian wrote that the advocate must put his witnesses through their paces thoroughly in private before they appear in court.¹¹ For the lawyer of today, what better way to heed Quintilian’s advice than by conducting a mock trial either formally with a facilitator or informally in the law office conference room?

Conclusion

In the words of Cicero:

“[A]s soon as we have acquired the smoothness of structure and rhythm ... we must proceed to lend brilliance to our style by frequent embellishments both of thought and words...with a view to making our audience regard the... [case] which we amplify as being as important as speech can make it.”¹²

Therein you see the sophistication of the classical orators. To “lend brilliance to our style” and characterize a case as being “as important as speech can make it” is the heady and thrilling work of the advocate. While the labor is no less difficult, you have more guides than did your classical predecessors, but there are no better guides than Aristotle, Demosthenes, Cicero, and Quintilian. Spending time with them will improve your advocacy skills. Go to the library now and begin reading. And tell your colleagues that you will be late returning to work because once you begin your studies, you will not be able to stop.❖

10 Quintilian, *Institutio Oratoria* IV.2.121.

11 Quintilian, *Institutio Oratoria* V.7.11.

12 Quintilian, *Institutio Oratoria* IX.1.26-28.

Overcoming the Greatest Challenge of Persuasion: Connecting With Your Listener

Overcoming the Greatest Challenge of Persuasion: Connecting With Your Listener

The most important component in the process of communication is the listener. Other components—such as you, the lawyer, or your carefully crafted argument—while important, are not *as important* as the object of your persuasion, the listener.

Knowing how the judge or jury might process your argument, and decide in your favor, is a formidable challenge. Mastering this challenge is the foundation of successful advocacy.

Study the Process of Decision

Gaining insight into the way a listener thinks allows you to connect with the listener, and the listener to connect with you. Consider the distinguished career of the 19th century English barrister, James Scarlett. He is known for having more success than other barristers of his time. His secret was knowing how to blend his mind with the minds of the jurors: Their thoughts were his thoughts.

In Scarlett's own memoir, his son related the following quote: "I have it on Lord Chelmsford's authority that the Duke of Wellington said of my father: 'When Scarlett is addressing a jury there are thirteen jurymen.' This is both characteristic of the influence he exercised when addressing juries and of the Duke's terse manner of expressing himself."¹

Now consider Scarlett's own words:

"I found from experience, as well as theory, that the most essential part of speaking is to make yourself understood. For this purpose it is absolutely necessary that the Court and jury should know as early as possible *de qua re agitur*. It was my habit, therefore, to state in the simplest form that the truth and the case would admit the proposition of which I maintained the affirmative and the defendant's counsel the negative, and then, without reasoning upon them, the leading

1 Memoir Right Honourable James, First Lord Abinger Chief Baron of Her Majesty's Court of Exchequer, Peter Campbell Scarlett, James Scarlett (1877). See also, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).

facts in support of my assertion. Thus it has often happened to me to open a case in five minutes, which would have occupied a speaker at the Bar of the present day from half an hour to three-quarters of an hour or more. Moreover, I made it a rule in general rather to understate than overstate facts I expected to prove. For whatever strikes the mind of a juror, as the result of his own observation and discovery, makes always the strongest impression upon him, and the case in which the proof falls much below the statement is supposed for that very reason not to be proved at all.”²

For many years, psychologists and other experts have studied the process of decision-making and the formation of judgments. While there is no universal agreement, numerous explanations have emerged.

Daniel Kahneman, professor of psychology at Princeton University, focuses on two modes of thinking: one that operates automatically, and one that involves “effortful mental activities.”³ Heuristics are automatic conclusions drawn often from experience. For example, two individuals are on trial for murder, and one looks guilty to the jury. A juror says to herself, “Birds of a feather flock together. The second one must also be guilty.” As counsel, your task is to intuit this conclusion, and perhaps incorporate it sub-silencio by either correcting or supporting it, depending on your side of the case.

Some people react emotionally (“left brain people”), while others are more rational in their decision-making process (“right brain people”). Thus, you the advocate cannot make the mistake that all jurors will use the same process of decision-making. Shape the argument that fits your listeners.

Further, biases relate to attitudes and beliefs that may also influence a decision. Attitudes are predispositions that cause a person to think a particular way. They can be based on prior experience. For example, a negative experience in a hospital can create a predisposition of disbelief of a health care provider testifying in support of a hospital in a negligence case.

Beliefs are the degree of truth one assigns to something. Rarely does a listener come before you with a blank slate. The challenge is to identify attitudes and beliefs that might be supportive and to build upon them. For those who are unsupportive of your argument, you must work to erase—or reshape—them.

² Ibid.

³ See Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Strauss, and Giroux 2011), 21. See also, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).

Obtain Specific Data on How the Listener May Be Thinking

Judges and Arbitrators

Understanding the nature of decision-making is one thing, but knowing how your judge, jury, or arbitrator may decide the case is another. When it comes to ascertaining a judge's approach to your argument, read prior opinions relating to the issues in your case. Stop in the court room to observe, and ask other lawyers, former law clerks, and around the legal community. Read comments, if available, on social media.

Learning as best you can about how the judge—or arbitrator—might view the case is helpful in that it will allow you to build upon their presumed outlook on the matter at hand. Consider an example where you are confronting a motion to dismiss a lawsuit. The judge is “on record expressing agitation, when complaint exceeds 15 pages.” Your complaint is 32 pages. To attempt to dissolve any hostility, begin: “Your Honor, before I explain why you should not dismiss the complaint, I would like to apologize for filing such a lengthy complaint. There are 35 defendants in this case. I really had no choice. I hope the court appreciates my situation, and I thank you.” Hopefully, you establish goodwill and boost your ethos—the listener's perception of your character—an essential ingredient in persuasion.

Juries

With juries, the task of ascertaining how the case will be decided is more difficult. Hence, consider a mock trial, or focus group. With a jury consultant, mock jurors can be assembled to hear all or part of the case. Watching the mock jury decide can be enlightening. Discussing the decision with them afterward can also be revealing. The closer in thought process to the actual jury, the more beneficial the mock jury.

Often advocates reshape their arguments based on what is learned from the mock trial. For example, during a mock trial, counsel cross-examined the person portraying a plaintiff's witness in a way that the team members thought was brilliant. But the mock jury felt counsel had treated the witness unfairly. The trial team revised its strategy for the real case, avoiding what could have been a disaster.

Also, the benefits of a mock presentation before a retired judge should not be overlooked in non-jury cases. Even a mock presentation before an arbitrator

not affiliated with the actual case has value. Listen carefully to the feedback and adjust accordingly.

Appellate Arguments

Participating in moot court exercises in appellate cases has comparable benefits to the mock trial. Many years ago, when Justice Thurgood Marshall was solicitor general of the United States, he told me that moot court was essential to him in his appellate arguments. He stated, during a moot court argument the evening before he argued *Brown v. Board of Education*, a law student at Howard University asked him a question that he could not immediately answer. But after “burning the midnight oil,” Marshall developed his response. The next day, he related to me, the Court asked him this exact question, and he answered with confidence and enthusiasm. Marshall told me to never forget the importance of the moot court.

Engage the Listener

Once you know—as best you can—the strong and weak points of your case, having assessed the mindset of your listener, it is time to focus on your argument. Here are some important elements to consider and include in your effort to convince the listener that your view of the matter is correct and should be adopted.

- Shape your argument to appeal to the listener. Keep in mind the concept fostered by James Scarlett of “blending your mind with the mind of the listener.”
- Remember the importance of your *ethos*, the listener’s perception of your character.⁴
- Use inductive and deductive reasoning when applicable.⁵ Inductive reasoning examines particulars and reaches a general conclusion. Three meals at the corner restaurant were bad; therefore, all meals there are bad. Deductive reasoning examines a general conclusion to reach a specific one. All claims for defamation must be filed within one year of the alleged wrong. Plaintiff filed her case three years after the alleged defamation. Her case must be dismissed.

4 For a more detailed discussion of *ethos*, see the first essay in this series, “Classical Rhetoric and the Modern Trial Lawyer.”

5 For a more detailed discussion of inductive and deductive reasoning, see the fifth essay in this series, “Logic and Emotion: The Alpha and Omega of Persuasion.”

- Consider your style. Use plain, easy-to-understand language, including schemes and tropes.⁶ A scheme is the rearrangement of words in a sentence for drama or effect. “A good man is Jim.” A trope occurs when you change the significance of words in a sentence. Metaphors and similes are considered tropes. Keep in mind the secret to Daniel Webster’s success: “By addressing the understanding of common men... I must use language perfectly intelligible to them. You will therefore find in my speeches to juries no hard words, no Latin phrases, no *fieri facias*, and that is the secret of my style.”
- Concentrate on the arrangement of your presentation. Bear in mind the ideas of primacy, recency, and frequency. You remember best what you hear first and last. The power of repetition brings rewards.
- Use and show emotion as appropriate; do not overdo it. Consider the value of understatement.
- When using demonstratives, assure that they can be seen clearly.
- Immunize your argument as appropriate by suggesting what the opposition might argue—and refute it before it is proffered.
- Give attention to your delivery—how you move in the courtroom. Facial expressions, eye contact, gestures, and modulating your voice are all important aspects of delivery.
- Observe the listener and match your argument to his or her state of mind as you perceive it during the presentation. Then lead the listener to your conclusion.

Conclusion

Rhetoric—choosing the most persuasive argument for the occasion—is an art, not a science. Devoting time to consider the mindset of the listener is the cornerstone of the art. The tools of engagement are not universal, but they arise from centuries ago and can be adapted to suit our post-modern times. ❖

⁶ For a more detailed discussion of schemes and tropes, see the third essay in this series, “Style: The Measure of a Great Argument.”

Style: The Measure of a Great Argument

Style: The Measure of a Great Argument

Rhetoric is the art of selecting the most effective means of persuasion, which ultimately translates to the refinement of your own style of expressing yourself in the courtroom. Words are important, yes, but it's *how* you use them that matters most.¹

As discussed in the first essay in this series, “Classical Rhetoric and the Modern Trial Lawyer,” the three most important ingredients of a well-crafted argument, as suggested by Aristotle, are *ethos* (the listener’s perception of the speaker’s character), *logos* (logic), and *pathos* (emotion). Allow these three principles to guide you as you polish *your* individual style—perhaps the most important rhetorical element of persuasion.

Words can be symphonic, and elevate your emotions. Words can also be clumsy tools that cut your very own fingers. Carefully selecting your choice of words—and arranging them to achieve eloquence—is the essence of style.

Consider Emerson’s appraisal of Montaigne’s use of words:

“The sincerity and marrow of the man reaches to his sentences. I know not anywhere the book that seems less written. It is the language of conversation transferred to a book. Cut these words, and they would bleed.”²

Now take, for example, two personal injury cases. Both trial lawyers seek damages in their closing arguments. Imagine one lawyer exhorting, “Let’s turn to the measure of damages.” Now imagine the other quietly stating, “Let’s turn to the grim, grueling audit of pain.” Which style is most effective? It is impossible to evaluate without first knowing to whom these lawyers are speaking. Tailoring the argument to the listener is, therefore, a significant principle of rhetoric. So, in choosing your style, you might select the first version if arguing before a judge, but—if arguing before a jury—the second version may serve you well, if you believe members would be receptive. Remember: Choosing the appropriate style is important. But it is perhaps even more important to know when to alter that style.

1 See chapter 9, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).

2 See Jeffrey Collin’s book review of Phillippe Desan’s *Montaigne: A Life*, *Wall Street Journal*, January 28, 2017.

Select carefully and tailor your language to your listeners so that your style choices do not backfire. During closing argument for a jury trial in Los Angeles, defense counsel from Baltimore once used the term “waterman” in an effort to come across as down to earth. However, the jury had no idea what that word meant. While those from Baltimore know that a “waterman” is one who fishes the Chesapeake Bay, this West Coast jury was confused. Word choice clearly matters. The right choice can make you relatable; the wrong one can just as easily alienate the listener.

With diligence, you can improve your style. While some have natural born talent as advocates, many of the best have perfected their skills through hard work and practice. Remember Demosthenes? He practiced speaking with pebbles under his tongue to eradicate his stutter, and is now often regarded as the supreme example of the perfect advocate. His *Philippics* against Philip II of Macedon are legendary.

Woodrow Wilson practiced his speeches alone in the woods, carefully crafting his language over time. Winston Churchill spent hours working on and practicing his speeches. Often, listeners thought Churchill was speaking extemporaneously. He was not. His speeches were the result of a deliberate choice of style.

Ultimately, style is personal so you should develop one that is your own. Regardless of which words you choose, always strive for clarity with logic and emotion when appropriate.

So how can you polish your style? One effective means is to study the classical rhetorical figures of speech known as *schemes* and *tropes*.

An example of a scheme is when you change the traditional—or expected—order of words in a sentence for effect or drama, such as: “A great lawyer was Hank.”

Tropes are figures of speech that occur when you change the significance of the words in a sentence. The most familiar examples of tropes are metaphors and similes. Metaphors are implied comparisons between two things that are unlike, but that have something in common: “The defendant’s case went down in flames.” A metaphor transforms a word or phrase from its literal meaning into something else. A simile, however, uses “like” or “as” to explicitly compare two things that are not alike: “These facts are clear as a fire bell in the night.”

The proper use of schemes and tropes will add zest to your courtroom arguments, and will enhance your arguments and the testimony of your witnesses, should counsel help them in expressing their answers with “style.”

Studying these figures of speech can be tedious—and even dry—but, oh, how you will reap the rewards of your efforts. If you consider them carefully, and mull over them, you will accomplish impressive improvement in persuasive abilities. But do not be hasty. Learn just one or two schemes and tropes at a time. Then attempt to use them. Even Shakespeare recommended a conservative approach. He suggested to “practice rhetoric in your common talk.”³

Listed below are 10 classical schemes and 10 classical tropes that you—as the modern advocate—should study. Practice using them if the inclination strikes you.

SCHEMES

(1) Changing the normal order of words in a sentence. (Anastrophe)

Traditional Usage	Scheme	Benefit to Advocate
On direct examination: <ul style="list-style-type: none"> ▪ “Mrs. Smith, how would you describe your late husband?” ▪ “John was a wonderful man.” 	<ul style="list-style-type: none"> ▪ “A wonderful man was my husband, John.” 	Adds drama; emphasizes an important point under the doctrine of primacy—the judge/jury remember best what they hear first.

(2) Repetition

a. Consecutive repetition of words in a sentence. (Epizeuxis)

Traditional Usage	Scheme	Benefit to Advocate
On direct examination: <ul style="list-style-type: none"> ▪ “How do you feel about what happened?” ▪ “I feel sad.” 	<ul style="list-style-type: none"> ▪ “I feel sad, sad, sad about what happened.” 	Emphasizes your point pursuant to the doctrine of frequency (repetition), which helps judge/jury remember and appreciate your witness’s reaction.

³ Taming of the Shrew, Act 1, Scene 1.

b. Consecutive repetition of phrases. (Epimone)

Traditional Usage	Scheme	Benefit to Advocate
<p>At opening statement:</p> <ul style="list-style-type: none"> ▪ “We shall prove that the landlord was negligent for not repairing the screen door that Mr. Jones fell through when he was pushed.” 	<ul style="list-style-type: none"> ▪ “This is the case of the careless landlord. He was careless because he did not care for the safety of little Tommy Jones, and he was careless because he did not repair the screen door.” 	<p>Uses repetition to emphasize a main point with rhythm to engage the judge/jury.</p>

c. Repetition of words at the beginning of a sentence. (Anaphora)

Traditional Usage	Scheme	Benefit to Advocate
<p>On direct examination:</p> <ul style="list-style-type: none"> ▪ “What was your reaction to what you observed?” ▪ “Despair.” 	<ul style="list-style-type: none"> ▪ “Despair, despair, despair.” 	<p>Injects emphasis and drama at the outset of the sentence for primacy and repetition (frequency).</p>

d. Repetition of words at the end of a sentence. (Epistrophe)

Traditional Usage	Scheme	Benefit to Advocate
<p>At closing argument:</p> <ul style="list-style-type: none"> ▪ “You should conclude that the evidence of liability for breach of contract and fraud is overwhelming.” 	<ul style="list-style-type: none"> ▪ “The evidence of breach of contract is overwhelming. The evidence of fraud is overwhelming.” 	<p>Adds drama and effect; takes advantage of recency—judge/jury remember what they hear last.</p>

e. Repetition of words at the beginning and end of a sentence. (Symploce)

Traditional Usage	Scheme	Benefit to Advocate
At closing argument: <ul style="list-style-type: none"> ▪ "This case is about Ms. Walters' breach of her duty of care to Ms. Johnson. Based on the evidence, you should render a verdict in favor of Ms. Johnson." 	<ul style="list-style-type: none"> ▪ "Negligence is what this case is about, and based on the evidence, you should find Ms. Walters liable for her negligence." 	For effect, employs both primacy (what is heard first) and recency (what is heard last).

(3) Interruption of normal flow of words by inserting a phrase. (Parenthesis)

Traditional Usage	Scheme	Benefit to Advocate
At opening statement: <ul style="list-style-type: none"> ▪ "The evidence will show that the plaintiff herself contributed to the accident." 	<ul style="list-style-type: none"> ▪ "The evidence will show, and you will believe, that the plaintiff herself contributed to the accident." 	Injects sincerity; emphasizes your point without pounding the table or using more words.

(4) Deliberate omission of words implied from the context of the subject. (Ellipsis)

Traditional Usage	Scheme	Benefit to Advocate
At opening statement: <ul style="list-style-type: none"> ▪ "To prove our case, we shall call an expert from whom you will learn that the defendant was negligent, and hence liable to the plaintiff." 	<ul style="list-style-type: none"> ▪ "From the testimony of our expert, you will find negligence, from negligence, liability." 	Conveys your point concisely and with good effect.

(5) A sudden halt in speech for effect. (Aposiopesis)

Traditional Usage	Scheme	Benefit to Advocate
At closing argument: ▪ "His suffering was too much to bear."	▪ "His suffering (silence) was too much to bear."	Draws additional attention to your point, and the moment of silence evokes emotion.

(6) Stating something by not saying it, or disregarding it. (Praeteritio)

Traditional Usage	Scheme	Benefit to Advocate
At closing argument: ▪ "Of great importance is the rate of speed the defendant drove his car."	▪ "I shall not remind you about the speed the defendant drove his car."	Engages the judge/jury to think about the point you are making.

(7) Correcting yourself. (Metanoia)

Traditional Usage	Scheme	Benefit to Advocate
At closing argument: ▪ "The defendant's fraud will be clear from the evidence."	▪ "The defendant's unfairness, I am sorry, the defendant's fraud will be clear from the evidence."	Adds a bit of irony for effect.

(8) Anticipating the opponent’s objections and meeting them in advance.
(Prolepsis)

Traditional Usage	Scheme	Benefit to Advocate
<p>On direct examination:</p> <ul style="list-style-type: none"> ▪ “Tell us, what happened to you that day?” ▪ “I walked into the food market and slipped on a very wet floor.” ▪ “Did you suffer any injuries?” 	<ul style="list-style-type: none"> ▪ “Tell us what happened to you that day.” ▪ “I walked into the food market and slipped on a very wet floor.” ▪ “Did you see a sign warning that the floor was slippery?” ▪ “No.” ▪ “Why not?” ▪ “There was no sign.” ▪ “Really?” 	<p>Immunizes the witness from cross-examination; continues your argument/theme of case from opening statement: “Mrs. Smith will prove that the owner of the store was negligent by not warning pedestrians of the wet floor. The defense will claim contributory negligence. But we shall prove otherwise.”</p>

(9) Using the same letter or sound at the beginning of adjacent—or closely connected—words. (Alliteration or Assonance)

Traditional Usage	Scheme	Benefit to Advocate
<p>At closing argument:</p> <ul style="list-style-type: none"> ▪ “This action was no mistake. It was purposeful.” 	<ul style="list-style-type: none"> ▪ “This big, bad mistake was no accident.” 	<p>Engages the listener with rhythm.</p>

(10) Repeating the ending of the sentence at the beginning of the next.
(Anadiplosis)

Traditional Usage	Scheme	Benefit to Advocate
<p>On direct examination:</p> <ul style="list-style-type: none"> ▪ "What did you observe?" ▪ "I saw Mr. Smith speeding through the red light." ▪ "Then what did you observe?" 	<ul style="list-style-type: none"> ▪ "What did you observe?" ▪ "I saw Mr. Smith speeding through the red light." ▪ "After you saw Mr. Smith speeding through the red light, did you see anything else?" 	<p>Emphasizes your point through repetition.</p>

TROPES

(1) An implied comparison between two things that are unlike, but have something in common. (Metaphor)

Traditional Usage	Trope	Benefit to Advocate
<p>At closing argument:</p> <ul style="list-style-type: none"> ▪ "The conduct of the corporate defendant was horrendous. You know that. I know that." 	<ul style="list-style-type: none"> ▪ "The conduct of the corporation was despicable. You know that. I know that. This is a case for punitive damages.... The only way to stop a beast in the woods is to stab it in the heart. The only way to stop this corporate monster is to stab it in the pocketbook." 	<p>Adds drama and effect; paints a picture with words.</p>

(2) An explicit comparison using words introduced by “as” or “like.”
(Simile)

Traditional Usage	Trope	Benefit to Advocate
On direct examination: <ul style="list-style-type: none"> ▪ “How could you see what occurred when it was 11:00 p.m. at night?” ▪ “The moon was bright.” 	<ul style="list-style-type: none"> ▪ “The moon was bright as the sun that evening.” 	Engages the judge/jury; paints a picture with words.

(3) Asking a question, and not answering it—also known as a rhetorical question. (Erotema)

Traditional Usage	Trope	Benefit to Advocate
At closing argument: <ul style="list-style-type: none"> ▪ “As you can observe, and have observed during the trial, Lucie Baines does not even look like the type of person who could have committed this heinous crime.” 	<ul style="list-style-type: none"> ▪ “Look at her, ladies and gentlemen. Does she look like the type of person who could have committed this heinous crime?” 	Empowers the judge/jury to render the answer you desire without explicitly being told to do so; makes them feel engaged in forming their own opinions.

(4) Asking a question, and then answering it. (Hypophora)

Traditional Usage	Trope	Benefit to Advocate
At closing argument: <ul style="list-style-type: none"> ▪ “Mrs. Livingston brought this case to seek recompense.” 	<ul style="list-style-type: none"> ▪ “Why did Mrs. Livingston bring this lawsuit? Because she seeks recompense for the horrible treatment she received from her employer, the defendant Mr. Jones.” 	Engages judge/jury by reinforcing the theme of your case in a sophisticated way.

(5) Understatement, by expressing the affirmative in the negative of its contrary meaning. (Litotes)

Traditional Usage	Trope	Benefit to Advocate
<p>At closing argument:</p> <ul style="list-style-type: none"> ▪ "You heard her testimony; her memory was excellent. You will be pleased to believe her and happy with your verdict of not guilty." 	<ul style="list-style-type: none"> ▪ "You heard her testimony; her memory was not bad. She told us exactly what occurred. You, as members of the jury, would never be sorry that you believed her. You will never be ashamed rendering a verdict of not guilty." 	<p>Implicitly rallies support for your witness.</p>

(6) Understatement, by giving the impression that something is less important than it is. (Meiosis)

Traditional Usage	Trope	Benefit to Advocate
<p>On direct examination (plaintiff is testifying about noticeably serious injuries that she suffered when she fell many feet to the ground through a wooden deck):</p> <ul style="list-style-type: none"> ▪ "So now, Ms. Bursum, will you please describe for us the injuries you suffered as a result of the serious incident?" 	<ul style="list-style-type: none"> ▪ "So now, Ms. Bursum, will you please tell us about the injuries you suffered from this <i>little incident?</i>" 	<p>Compels the judge/jury to view the situation seriously with your ironic understatement of it; the opposite of hyperbole.</p>

(7) Exaggeration. (Hyperbole)

Traditional Usage	Trope	Benefit to Advocate
On direct examination: <ul style="list-style-type: none"> ▪ "Mr. Smith, how would you describe the sound from the rifle shot?" ▪ "It was very loud." 	<ul style="list-style-type: none"> ▪ "It was so loud it could be heard around the world." 	Infuses dramatic exaggeration for effect; stirs the judge/jury to see the case your way.

(8) Addressing someone or some personified abstraction that is not physically present. (Apostrophe)

Traditional Usage	Trope	Benefit to Advocate
At closing argument: <ul style="list-style-type: none"> ▪ "Ladies and gentlemen of the jury, in conclusion let your verdict be just." 	<ul style="list-style-type: none"> ▪ "Justice. Justice cries out: Let your verdict be for Mrs. Jones." 	Adds dramatic effect.

(9) Using words to convey the opposite of their literal meaning. (Irony)

Traditional Usage	Trope	Benefit to Advocate
At opening statement: <ul style="list-style-type: none"> ▪ "Ladies and gentlemen, he blatantly breached his duty to those who elected him, and stole valuable artwork from the museum." 	<ul style="list-style-type: none"> ▪ "His great love of art caused him to borrow indefinitely the museum's most cherished possessions." 	Pairs drama with sarcasm to engage the judge/jury, and to keep them working with you for the "proper" result.

(10) Omitting the major premise of syllogistic reasoning in deductive arguments when the listener knows the premise. (Enthymeme)

Traditional Usage	Trope	Benefit to Advocate
<p>At closing argument:</p> <ul style="list-style-type: none"> ▪ “Ladies and gentlemen, we know that when a witness looks at you in the eyes, he is testifying honestly and is someone you can believe. John Jamaca looked you in the eyes when he testified. You can believe him.” 	<ul style="list-style-type: none"> ▪ “Ladies and gentlemen, John Jamaca looked you in the eyes when he testified. You can believe him.” 	<p>Eliminates the formality of the argument; creates a bond with the judge/jury based on shared values of the valid major premise.</p>

Conclusion

Schemes and tropes have come down to us through the ages, and you should continue to extoll their value. Some might classify these figures of speech as ornaments, like musical flourishes within a symphonic masterpiece. However, the masterpiece excels because of its flourishes. So will you in court, if you master your style using schemes and tropes.

Of course, perfecting your style involves more than studying the schemes and tropes mentioned above. You must consider other important traits of style, such as clarity of expression, and selecting words that you believe will resonate with the listener—words that convey humor, emotion, or anger. Consider whether you desire an active or passive voice, or concrete or abstract words, and whether you wish to employ short or lengthy sentences.

Above all, ensure that the language you use is clear and particularly tailored to the listener. Simply put, do not insult or confuse the very listener you hope to persuade. Knowing your audience, judge, arbitrator, or jurors—before you present your case—is a critical step in choosing your words wisely. ❖

Clarity of Expression: The Keystone of Successful Advocacy in Dispute Resolution

Clarity of Expression: The Keystone of Successful Advocacy in Dispute Resolution

Clarity of expression is the essence of legal persuasion. Whether in court, arbitration, mediation, or settlement talks, favorable dispute resolution relies on effective communication.

Yet, in the practice of law, you will often be confronted with vague and opaque writing and speech. This opacity has many causes, chief among which are lack of preparation, the abandonment of logic, and the failure to mold the message to the audience. Other causes include a misuse of emotion, lazy delivery, careless arrangement, confusing visuals, and the simple failure to recognize when to stop talking.

There are, of course, countless examples of the lack of clarity in the legal profession. For a small sample, consider the following:

- Counsel asks a witness in trial: “Do you know Tyra Jackson, and that she is the girlfriend of the defendant?”¹
 - If the answer is “yes,” to what does “yes” pertain? Knowing the girlfriend? Or that she is the girlfriend of the defendant?
 - Counsel should have delineated the compound question into two separate questions.
- During an appellate court oral argument in a case involving a question of jurisdiction, a judge once asked counsel: “Well, how did you get here?” Counsel responded: “I drove from Baltimore,” prompting robust laughter from observers.
 - Replacing “you” with “the case” would have clarified the question sufficiently.
 - This example calls to mind one of Mark Twain’s quips that “the difference between the almost right word and the right word...is the difference between the lightning bug and the lightning.”²
- Consider this boilerplate text from a contract under the heading Dispute Resolution: “The parties hereto agree that before filing any lawsuit in any court they will initiate and complete mediation in an effort to resolve their differences.”

1 See Stephen Saltzburg, *Trial Tactics*, 54 (3rd ed. 2012).

2 George Bainton, *The Art of Authorship*, 87-88 (1890).

- The contract fails to clarify the substantive question of what would occur if a dispute were to arise between the parties on the last day before the statute of limitations expires. The term “complete mediation” is poorly defined.

These three examples are hardly unusual. They illustrate just how frequently legal communication leads to misunderstanding. You can always do better. Described below are a variety of practices that can help you sharpen your oral and written communication, in and out of court, arbitration, or mediation. Although they are especially useful to young lawyers, all lawyers can use a refresher now and then.

1. Identify a theme.

Clear expression is the product of clear thinking. A theme can help you organize your ideas. Whether you are in settlement talks or preparing for mediation, arbitration, or trial, develop a theme and adhere to it. The theme serves as the road map for presentation. It keeps you going straight ahead, avoiding rhetorical detours.

Your general theme will be shaped by particulars. Survey the building blocks of your case: evidence, legal authorities, precedents, public policy, the facts, the adversary. What theme do these various elements suggest? Will that theme help you achieve your goals? Once you have identified a suitable theme, you will be in a much better position to develop coherent, well-organized arguments that advance your cause.

2. Consider the audience.

Remember that clarity is measured only by the extent to which your audience understands you. Terms and ideas that are clear to a judge or another attorney may confuse a jury. If you persistently ignore your audience’s particular needs, biases, and habits of mind, it may very well decide against you.

Knowing something about psychology and how people make decisions is essential for litigators. Daniel Kahneman, a noted figure in behavioral economics, suggests a two-system approach to judgment: Step one is an automatic or unconscious response toward a decision based on associated memory. Step two involves the cognitive thinking that requires the brain to work.³

3 Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus, and Giroux 2011).

Understanding these principals is challenging but worth the effort. For example, if you adhere to the view that people form opinions quickly by intuition, you might want to take advantage of the doctrine of primacy by beginning your presentation with your strongest point rather than building up to it. Primacy embraces the idea that you remember best what you hear or see first.

Hence, clear expression is sometimes referred to as “listener-centered.”⁴ To mold the presentation to the listener, it is necessary to understand what elements will most likely influence the listener’s decisions. Attitudes and beliefs are two such factors.

- Attitudes are predispositions to think or behave in a particular way. They are often based on prior experience. A person who has had a bad experience in a hospital, for example, may not like health care providers.
- Beliefs, on the other hand, are perceived truths a person applies to a new issue or question; for example, a member of a jury might believe that police are, on the whole, good people who work hard to protect the public. You can speak more clearly and effectively to someone if you know something about your listener’s attitudes and beliefs.

There are numerous ways to learn about your audience. You can read about the judge or arbitrator; inquire in the legal community; or in the case of a jury, arrange focus groups or mock trials.

3. Use logic and formal reasoning.

Sound reasoning clarifies understanding and thus advances your cause. It is difficult to disagree with conclusions arrived at through logic. When developing the reasoning that supports your presentation, consider deduction and induction, the two types of formal reasoning.⁵

A deductive presentation focuses on a general premise. The reasoning progresses from the general to the specific, with the conclusion following from a valid premise, without the addition of new information.

Deductive arguments, or syllogisms, will often strike your audience as undeniable. Imagine you are in mediation and the mediator presses you to advise your client to pay the plaintiff. You respond: “The plaintiff’s case is a

4 See James C. McCroskey, *An Introduction to Rhetorical Communication* (Allyn & Bacon 1997), 25.

5 For a more detailed discussion of deduction and induction reasoning, see the fifth essay in this series, “Logic and Emotion: The Alpha and Omega of Persuasion.”

nuisance. The statute of limitations for the claim is three years; the case was filed five years after the breach of the contract; the case should be dismissed.” Is this not as clear as a fire bell in the night?

Another example of deductive presentation includes the use of definition. Here you define a term and illustrate that the conduct of your client falls or does not fall within the term. For example, “Paragraph 24 of this contract reads that amicable resolution includes mandatory mediation. Plaintiff did not seek mediation before filing suit. The case should be dismissed.” Again, this airtight syllogism is difficult to refute.

Inductive reasoning, on the other hand, progresses from the specific to the general. Examples include using life expectancy tables to argue the life expectancy of your client, or arguing for lost profits based on prior years’ performance.

If you try to balance an inference on the back of flimsy specifics, your argument will collapse. For instance, if you base a client’s lost profits on only one year’s performance, your adversary could claim that you’ve provided insufficient evidence; the year in question could have been anomalous. Ideally, the facts from which you draw your inference will clearly point your audience to the desired conclusion.

Induction by analogy can also help you communicate clearly. It often comes into play in the application of case law. You may appeal to a judge, for instance, to decide your case based on a decision in a previous case with similar facts.

Causal correlation is a third aspect of induction. You could observe that a group of tourists all became ill after being exposed to a visibly ill tour guide. Thus, you conclude, exposure to the guide caused the group to become sick. An adversary might counter that correlation is not causation. To refute this truism, you will need strong evidence. In the example of the tourists, if only a few of them fell ill, and did so after being exposed to a variety of other people, your claim that the guide was to blame will look flimsy. On the other hand, if you can show that *all* of the tourists became sick and were not exposed to other contaminants, you will be on surer footing.

Whether inductive or deductive, sound logic enhances clarity because it takes your listener through the thought process by which you have arrived at the desired conclusion. By taking these steps with you, the listener will more likely grasp their import and feel convinced.

4. Appeal to emotions.

Emotion can be conducive to clarity, though it is important not to overdo it, and to always be sincere. Convey emotions through body language, expression, voice, and pacing.

Often, a situation can be so obvious that it would be counterproductive to pound the table or repeat yourself. In such instances, consider the power of understatement and restraint. When discussing sad events, for example, skilled advocates may often lower their voice, slow their pace, and clasp their hands in front of their body.

Figurative analogy can also heighten the emotional import of your argument. Whereas induction by analogy requires a comparison between like subjects, figurative analogy involves comparison between unlike subjects. Consider the example, a bird in hand is worth two in the bush. In other words, be satisfied with what you have, and don't strive for something that may be illusive.

Delivered the right way, this single simile can concisely and memorably reveal the plaintiff's degraded condition and arouse pathos in the listener.

A successful appeal to emotion clarifies in a way that logic cannot. Emotion provides strong motivation to decide in your favor. It communicates the deeper purpose at a visceral level.

5. Perfect your style.

Your style of expression has a tremendous effect on clarity. Using language that is familiar to the audience is a step in the right direction. When steeped in a case concerning an arcane subject, a lawyer may fail to recognize that the terminology could easily confuse a judge or jury.

Daniel Webster, one of America's greatest trial lawyers, once remarked, "In addressing the understanding of the common person, I must use language perfectly intelligible to them. You will therefore, find in my speeches ... no hard words, no Latin phrases"⁶

His point is well-taken, and Latin phrases are not the only culprit. Overly complex sentences can also trip up your listeners. Here is a needlessly complex sentence: "Let us recognize that the plaintiff, my client Mrs. David, has indeed labored in all good faith to fix and rectify the relationship in question."

6 Lloyd Paul Stryker, *The Art of Advocacy* (Corner Stone Library 1956), 56.

A more effective rephrasing would be: “Mrs. David has worked hard to repair her friendship.” Such simplicity and concision will help your listener follow the argument.

When seeking to condense and simplify complexity, consider figurative language. Metaphors and similes convey ideas and sentiments with force: “Seeing his wife with another man was a dagger to his heart.” Another example: “After she was wrongfully indicted, her career went down in flames.”

In addition to condensing sentiments, such statements arrest attention. Varying sentence structure can likewise cause your listeners to mark your words. Rather than stating: “This case is about the defendant perpetrating a fraud upon the plaintiff,” invert the sentence structure to begin on a more forceful note: “Fraud is what this case is about.”

In rhetoric, such unusual sentence structures are known as “schemes.”⁷ Repetition is a scheme: “How did you feel after the accident?” “Horrible, horrible, horrible.” Parenthesis is another: “Defendant’s action, *and it is a tragedy*, caused the collision.” Playing with sentence structure in this way can be conducive to clarity when it helps you emphasize the facts, ideas, and sentiments you want the listener to act upon in resolving the dispute at hand.

6. Refine your delivery.

When preparing to argue a case, consider the movement, body language, and eye contact you’ll use when speaking. If you are arguing that a witness was not wearing her eyeglasses when she claimed to have seen your client committing the crime, you could hold glasses in your hand and point with them to the jury to emphasize the point. This would visually anchor the idea you are conveying.

Body language, however, can just as easily hinder clarity. You often send messages inadvertently by your movements (or lack of movement). Indeed, sometimes your actions may be at cross-purposes with your intent. In the midst of an emotional argument, a careless expression or lack of eye contact can reflect a lack of sincerity. Remember President George H.W. Bush checking his watch during one of the 1992 presidential debates? Similarly, you may suggest to your audience that you disbelieve your client if you never seem to give your client attention.

⁷ For a more detailed discussion of schemes, see the third essay in this series, “Style: The Measure of a Great Argument.”

7. Structure your presentation.

Clarity of expression benefits from a balanced arrangement of your presentation. All arguments should have a beginning, a middle, and an end. This is true for opening statements, appellate arguments, motion hearings, and even examinations of witnesses.

Developing the substance of your presentation within the various parts of the presentation is an art improved by experience. Consider beginning with the most important point to take advantage of the “doctrine of primacy.” This doctrine holds that you remember best what you hear first. It is often tactical to arrest the attention of the listener by stating at the very outset the action you want the listener to take: “We are asking this court to reverse the judgment below because the Jones Company did not exhaust its administrative remedies.” You would only then develop the facts and procedural history.

While crafting the arrangement of your presentation, also consider the “doctrine of recency,” which holds that you remember best what you hear last. It is often helpful to conclude your presentation with a major point that you wish the listener to remember. In addition, consider the “doctrine of frequency,” which holds that effective repetition helps clarify your message.

The most effective advocates often employ techniques such as “looping” or “incorporation” to have the witness repeat a particularly important point. For example, “Did you *see the collision*?” “Yes.” “When you *saw the collision*, did you obtain a good look at the driver of the blue car?” Here, the questioner wants to emphasize that the witness saw the collision as a predicate for other questions. How you craft your presentation using primacy, frequency, and recency is individualistic. What is most important, however, is that you are aware of these doctrines.

Another technique of arrangement is to use topical sentences: “I am now going to address the issue of the statute of limitations.” Or when examining a witness: “Mr. Fox, I am now going to ask you some questions about where you were when the murder occurred.”

8. Take care of the visuals.

While a picture may be worth a thousand words, poor visuals—and an overdependence on them—can confuse your listeners.

When using PowerPoint, be sure you don’t crowd the slides with too much information. Ideally, your audience will be able to grasp the import of each slide almost immediately. Large lettering, plenty of whitespace, and vivid

imagery will all help, as does the effective use of color. Remember that colors have a psychological impact. While color psychology is not for everyone, and opinions vary on whether the color of blue communicates confidence or yellow optimism, it still makes sense to consider how color relates to the nature of the information presented.

Presenters often give in to the temptation to read from their slides. Do this too often and you will bore the audience. Rather than reading from visuals, paraphrase and elaborate on what they show.

Remember that the visuals are integral to your argument. They should be vivid and memorable. Used sparingly, they can do wonders in elucidating even the most complex information.

9. Do not re-argue your points.

When responding to opposing views, do not reargue points made previously. Instead, identify the topic or issue you wish to refute, then explain why that point is wrong. Conclude by explaining the correct view of the matter.

When rebutting an adversary, attorneys will sometimes meander and confuse their audience. Such drifting may indicate that the attorney was not prepared to respond to an opposing argument. To avoid such mistakes, anticipate your adversary's moves and rehearse brief, clearly phrased rebuttals.

10. Know when to sit down.

Long-winded talks detract from clarity. Bore your listeners and you risk losing their attention—and their good will.

Conclusion

Each of these 10 pointers underscores the importance of preparation. Clear arguments are rarely spontaneous. While there is a place and time for extemporaneous speaking and improvisation, most attorneys must practice and test their arguments before going to trial. Doing so will help you speak with clarity—the keystone of successful advocacy in dispute resolution. ❖

Logic and Emotion: The Alpha and Omega of Persuasion

Logic and Emotion: The Alpha and Omega of Persuasion

Sound logic, or reason, can go a long way in persuading a judge or jury. With emotion, your argument crosses the finish line. To understand the effective, synergistic use of logic and emotion in the art of persuasion, you must appreciate not only their individual elements but also the application of each to the case at hand.

These concepts were laid down long ago as the cornerstones of persuasion, as previously discussed in the first essay of this series, “Classical Rhetoric and the Modern Trial Lawyer.”

As Aristotle suggested in *Rhetoric*, his seminal book on persuasion, logic (*logos*) and emotion (*pathos*) are two of the three basic principles of persuasion.¹

Likewise, Cicero stated: “[T]he supreme orator...is the one whose speech instructs [logic], and moves ...his audience” [emotion].² And as a reminder of the importance of emotion in persuasion, he further explained that men decide far more problems by hate—or love or lust or sorrow or hope or fear or illusion or some other inward emotion—than by ...any legal standard, or judicial precedent.³

And these concepts continue to serve well the modern lawyer of today. On the one hand, logic adds power to arguments, and enables you to identify weaknesses (i.e., logical fallacies) in opposing arguments. On the other, emotion speaks to the heart, and arouses sentiments within the judge or jury.

Logic

According to Aristotle, logic includes both deductive and inductive reasoning. Both are invaluable in persuasion. In essence, deductive reasoning focuses on the premises, moving from the general to the specific. Inductive reasoning focuses on inferences moving from the specific to the general.⁴

1 The third is the listener’s perception of the speaker’s character (ethos).

2 *De Optimo Genere Oratorum*, Loeb Classical Library Cicero, vol. 2, (1993), 357.

3 *De Oratore*, Loeb ed. 1942 ii xlii 178, 325. See also, Lord David Pannick, *Advocates*, Oxford University Press, (1992), 2.

4 See chapter 4, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).

Deductive Reasoning

Deductive reasoning is the process of drawing a specific conclusion from premises based on generality. The basic mode of deductive reasoning is the syllogism, which provides structure to the deductive analytical process.

The typical syllogism consists of a major premise assumed to be true; a minor premise also assumed to be true; and the specific conclusion asserted, based on the assumed truth of the major and minor premises.

Here is an example of a syllogism:

- Major premise: All lawyers in the United States attended law school.
- Minor premise: John Smith is a lawyer in the United States.
- Conclusion: John Smith attended law school.

Observe that the conclusion can only be valid if both the major and minor premises are valid. In the above example of a syllogism, both premises are valid; therefore, the conclusion is certain and the argument succeeds. It does not extend beyond the premises and is contained within the original generalization: All lawyers in the United States attended law school.

However, if a deductive argument contains a false premise, the reasoning is flawed and the argument is rendered invalid. Perceptive listeners will recognize this logical fallacy, and your advocacy will be diminished in value.

Consider the following during oral argument by defense counsel on a motion to dismiss a complaint:

- Major premise⁵: The statute of limitations applicable to this case is three years.
- Minor premise: Mrs. Jones filed her complaint four years after the event in question.
- Conclusion: The court must dismiss this case.

⁵ The premises are provided for edification. It is not necessary to announce them in argument. However, sometimes it might be worthwhile.

Now consider the following syllogism when plaintiff's counsel responds to the above deductive argument, and asserts that opposing counsel's major premise—that the statute of limitations is three years—is not accurate.

- Major premise: In this jurisdiction, the Discovery Rule permits the filing of a complaint within three years after the plaintiff discovered the wrong, or should have discovered the wrong.
- Minor premise: In this case, plaintiff did not discover the wrong perpetrated against her until four years after the wrong was committed.
- Conclusion: The case should not be dismissed because there is a logical fallacy in defense counsel's deductive analysis. The major premise is false and so is the conclusion.

Interestingly, the plaintiff's counsel also argues deductively. However, her major premise is true; defense counsel's is not. Before advancing the deductive argument, it is imperative that you verify accuracy of both premises.

During argument, it is not necessary to announce specifically that you are advancing a major or minor premise. It may be more graceful to state the substance of the premises and the logic supporting your conclusion.

Aristotle recognized this when he created the "Enthymeme," which is a syllogism with only a minor premise and a conclusion. The major premise is implied—not stated—based on common values, attitudes, and beliefs of the listener, allowing the advocate to draw upon an accepted truth and build on it.

For example, assume in a particular community that those regularly attending religious services are considered honest people. In closing argument, defense counsel argues:

"Tom Dorsey took the stand. You saw him. You heard him. He told you about his life. One of the most important aspects of his life is his religion, and regularly attending religious services. He testified truthfully. Find him not guilty."

The *implied* major premise is that those regularly attending religious services are considered honest people. Both the minor premise (Tom regularly attended religious services) and the conclusion (Tom testified truthfully) are explicitly stated.

Interestingly, the major premise of a syllogism can be hypothetical and nevertheless effective. For example:

- Major premise: If Jessica Mason did not file her lawsuit within three years from the date of injury, she fails to satisfy the statute of limitations.
- Minor premise: She did not file her case within three years from the date of injury.
- Conclusion: The complaint should be dismissed.

Inductive Reasoning

Whereas deductive reasoning is the process of drawing a specific conclusion from premises based on generality, inductive reasoning is the process of reasoning from specific facts or data to a general conclusion. Deductive reasoning seeks to confine a conclusion to its premises, whereas inductive reasoning seeks to establish a conclusion often by inference beyond the facts or premises. A conclusion based on inductive reasoning is often probable, but not certain.

For example, when Robinson Crusoe washed up on the shore of the Island *Más a Tierra*, he was distraught. He believed there were no other human beings on the island. He went to sleep on the sand, lonely and dejected. In the morning when he awoke, he saw a human footprint in the sand that was not his own. By inference, he concluded that he was not alone. This was inductive reasoning—probable, but not certain. Some characterize the footprint as circumstantial evidence.

Inductive reasoning presents three types of arguments: (1) argument by example or particulars, (2) argument by analogy, and (3) argument by causal relationship.

(1) Argument by example or particulars

Argument by example or particulars identifies specific instances or characteristics within a given class or order and arrives at a general conclusion.

For example, in a criminal case, the prosecutor argues to admit prior instances of defendant's bad acts to then argue inductively in closing argument that the defendant, by example or particulars, committed the crime in question.

In a case where plaintiff seeks lost profits for breach of contract, counsel offers into evidence the plaintiff's profits for the prior five years. Counsel argues inductively from the particulars that the lost profits for the breach of contract are comparable to the five prior years.

As with deductive analysis, the proponent of inductive reasoning must be on guard against logical fallacies that opponents will identify to the proponent's detriment. When crafting arguments, it is important to keep potential fallacies in mind to be assured that your reasoning is immune from challenge.

Argument by example or particulars harbors such fallacies as selection of atypical examples, and the selection of insufficient examples. Also, in the case for lost profits above, what if in the third year the plaintiff received an unusually high unique payment? Defense counsel may have either revealed the logical fallacy known as negative instances or perhaps the fallacy of atypical example.

Perceptive counsel for plaintiff should anticipate in his or her presentation the response of defense counsel, and explain away the fallacy. Perhaps the alleged fee was not so atypical or that plaintiff discounted it in her calculation.

(2) Argument by analogy

Argument by analogy involves comparing several characteristics of an observed circumstance to the matter at hand, suggesting that as they are alike in relevant characteristics, the former controls the matter at hand.

For example, at trial plaintiff's counsel objects to a question posed by defense counsel on the basis of hearsay. Defense counsel responds: "Your Honor, with all due respect, you overruled my objection yesterday, when plaintiff asked the same question. You ruled that it was non-hearsay. You should please overrule his objection now for the same reason." The Court: "Counsel, you are correct. You presented an excellent inductive argument by analogy. I overrule the objection."

Using analogical reasoning by induction in legal arguments has been the basis of the development of the common law. The development of the common law is not based on deductive reasoning, but by inductive reasoning derived from particulars, and by analogy.⁶ When counsel cites a case on all fours arguing legal precedent, counsel is using inductive reasoning by analogy.

⁶ See Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps: *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009), quoting Judge Benjamin Cardozo, 59.

Techniques for effective use of analogy include identifying the points of comparison, and explaining any differences. Several logical fallacies giving rise to the expression “a false analogy” are affiliated with analogical reasoning: The compared cases are not alike in their essential characteristics; the characteristics are not accurately described; or the proposed analogy is a figurative analogy, not a logical one.

A figurative analogy bases a comparison on unlike circumstances. For example, in closing argument, counsel is justifying an employee’s discharge in a wrongful discharge case and recalls the Aesop fable where a man works hard to rescue a handsome dog from a deep well. The first thing the dog does is bite the man. The man [analogous to the employer in the case] tosses the dog back, explaining: “Don’t bite the hand that feeds you.” In this case, the employer did so much to help the employee, who nevertheless revealed vital trade secrets to the employer’s competitor. The employer had no choice but to terminate the disloyal employee. The figurative analogy compares unlike circumstances, and although it does not have the force of logic, it is often effective.

(3) Argument by causal correlation

Inductive argument by causal correlation seeks to correlate a particular event or *cause* with a particular *effect*. To properly argue inductively by causal correlation, you must demonstrate a consistent, coherent relationship between cause and effect (i.e., when the cause occurs, the event occurs). Moreover, the cause and effect relationship must be strong.

Examples of inductive arguments based upon causal correlation include:

- The floor was wet; Mrs. Jones slipped.
- Everyone who dined at the restaurant became ill because the food was toxic.
- During surgery, the surgeon left the sponge in the patient, which necessitated further surgery.
- The electric tool did not have a warning sign and caused serious injury.

Logical fallacies to avoid in argument by causal correlation include the assumption that a mere chronology of events gives rise to causal correlation. This fallacy is known as “after this; therefore, because of this.” For those who appreciate Latin: “post hoc ergo propter hoc.” Another related fallacy includes little to no relationship between the cause and effect.

Appreciating the power of an argument based on logic provides the opportunity to advance a powerful argument not only for advocates invoking one of the modes of a logical presentation, but also for accomplished opposing advocates who can identify the logical fallacies and sway listeners in their favor.

In addition to the logical fallacies previously discussed, also consider the following examples, which are not exhaustive.

Logical Fallacy	Explanation	Example
Circuitous reasoning (or begging the question)	Exemplified by an argument that assumes what it intends to prove.	"He had the right to stand up in the movie theater and shout 'fire, fire' because of his right to free speech."
Red herring	Distracts attention from the genuine issue of the argument.	"If you allow flag burning, you will encourage revolution." The idea of encouraging revolution is the red herring in the conclusion.
Straw man	Creates a false argument to distort the actual argument, and then deflates the false argument.	Defense counsel argues a motion for reconsideration that his client's sentence of life imprisonment should be reversed because of legal error committed by the judge. The prosecutor states in response that she cannot believe defense counsel wants to open the doors of prisons to let loose murderers and rapists.
Ad hominem	Occurs when the advocate criticizes his or her opponent personally.	Counsel refers to his opponent as ridiculous or dishonest.

Brushing up on the elements of logic in the art of persuasion will enhance effectiveness in the courtroom for trial and appellate lawyers on both sides of the case. Before receptive judges and juries, arguments based on reason are the most powerful of all. Not only must you firmly understand the elements

of reason, but you must also recognize logical fallacies to avoid them—and to recognize when opposing counsel unknowingly embraces them.

Emotion

As logic is a powerful instrument of persuasion, so, too, is emotion. Since ancient times, harbored feelings such as passion, anger, pity, sympathy, happiness, and even indifference have played a significant role in decision-making by both judges and juries.⁷ Who is not familiar with the phrase “Go with your gut feeling?” What trial lawyer does not seek to tap into the emotions of the judge or jury using appropriate measures?

The objective of emotion in argument is to awaken or arouse desired feelings or sentiments—such as anger or sympathy—within the judge or jury, and induce them to render the preferred decision. Emotion can be used derivatively or directly, to enhance the theme or theory of the case.⁸

Derivative Use of Emotion

Derivative use of emotion can be effective to confirm a conclusion you believe the judge or jury currently harbors, either from the presentation of the case or from preconceived attitudes or beliefs. Consider this closing argument by the late Moe Levine, after he established the elements of proof relating to the tragic injuries of his client, who became a paraplegic.

“Ladies and gentlemen of the jury: Good afternoon. I note we saw each other from a short distance during lunch. It was a nice lunch, despite the sobering nature of this case. You may have observed during our lunch all of us used a knife and fork. But not my client. [Silence followed, and then in a quiet voice he spoke.] He ate like a dog.”⁹

Levine then sat down. The verdict was for the plaintiff.

7 See generally, Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Strauss, and Giroux 2011), 12, 323.

8 See chapter 6, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).

9 Loosely based on similar accounts published over the years. See also: *The Best of Moe Summations* ©, May 1972, Moe Levine, Minneola, New York, p. 229. Reprinted January 1983 by Condyne/Glanville Information Services, Inc., and Oceana Publications, Inc., Dobbs Ferry, New York.

Direct Use of Emotion

Direct use of emotion is the essence of exhortation, calling upon the empathy of the judge or jury to feel the emotion of the matter at hand as a means of convincing the judge or jury to render the desired judgment or verdict. It relies on the belief that most people make decisions based on emotion, and then justify that decision with logic. Hence, the exhortation stirs the emotions of the listener and touches upon the perceived attitudes to achieve the desired conclusion.

Here is an example of an exhortation from an excerpt of the closing argument by defense counsel in John Grisham's novel *A Time to Kill*. Counsel is defending the father for murdering one of his child's killers.

“I want to tell you a story. I'm going to ask you all to close your eyes while I tell you the story. I want you to listen to me. I want you to listen to yourselves. Go ahead. Close your eyes, please. This is a story about a little girl walking home from the grocery store one sunny afternoon. I want you to picture this little girl. Suddenly a truck races up.

Two men jump out and grab her... They drag her into a nearby field and they tie her up... they decide to use her for target practice. They start throwing full beer cans at her. They throw them so hard that it tears the flesh all the way to her bones.

Now comes the hanging... They have a rope. They tie a noose. Imagine the noose going tight around her neck and with a sudden blinding jerk she's pulled into the air and her feet and legs go kicking. They don't find the ground.

The hanging branch isn't strong enough. It snaps and she falls back to the earth. So they pick her up, throw her in the back of the truck and drive out to Foggy Creek Bridge. Pitch her over the edge. And she drops some thirty feet down to the creek bottom below.

Can you see her? Her... beaten, broken body, soaked in her blood, left to die. Can you see her? I want you to picture that little girl...”

Listed below are several effective ways to arouse emotion:

- (1) Tell a story. One way to arouse emotion is to tell a story, as in the above peroration. A story that embraces the theme can enhance the desired emotional response.
- (2) Use figurative analogy. Using a figurative analogy is another characteristic of emotion worthy of consideration, as exemplified by Moe Levine who suggested his client ate like a dog.
- (3) Consider schemes and tropes. The words you select—your style—are influential in stirring the emotions you seek to arouse. Using schemes and tropes, sometimes referred to as figures of speech, can be very effective in the art of persuasion.¹⁰

A *scheme* changes the traditional order of words in a sentence for drama or effect. For example, a traditional Q&A during direct examination might unfold as such:

Q: “Mrs. Jones, can you tell us what your late husband was like?”

A: “He was a wonderful, kind man full of personality.”

To stir the sympathy of the jury, consider this response, which uses the classical schemes of inverted words and repetition: “Wonderful, wonderful, a wonderful man was my dear husband, Henry. He was kind and full of personality. I miss him.”

A *trope* changes the significance of words in a sentence (e.g., metaphors and similes). Moe Levine’s figurative analogy—“ate like a dog”—is a simile.

- (4) Ask rhetorical questions. Rhetorical questions, which the speaker leaves unanswered for the listener to answer, can spark a jury to feel the distress of the client—or anger, if that is the goal. “Look at him, ladies and gentlemen. Does he look like the type of person who could commit this heinous crime?” Here, counsel is imploring the jury to conclude “not guilty.”

¹⁰ For a more detailed discussion of schemes and tropes, see the third essay in this series, “Style: The Measure of a Great Argument.”

- (5) Humanize the client. Humanizing the client can go a long way to obtaining emotional appeal. In the above scheme example, the manner in which the wife responded to the question about her husband could help cultivate emotional support for her case.
- (6) Don't underestimate the understatement. The power of understatement and restraint must not be ignored. In a criminal case, for example, the prosecutor states: "In closing argument, I will not dwell on the slight speed the defendant drove the getaway car, when he says he was slightly inebriated. The facts were clear that defendant was driving the car at 90 miles per hour, and that he was very inebriated." This understatement, in its context, effectively arouses anger in the jurors.
- (7) Be sincere. Above all, it is essential when seeking to arouse emotion that you show sincerity and demonstrate you feel the emotion you seek to arouse. Sincerity is demonstrated not only by your chosen words, but also by your tone of voice, body language, and presentation of photographs. For example, pictures of events, people, crime, and accident scenes can certainly generate sympathy, anger, pity, or even disgust. Other exhibits at trial can also be used to generate a desired emotion, such as medical records, or a chart depicting prior bad acts, if appropriate.

While the opportunities for cultivating emotion in the appellate courts are not as robust as during trial, opportunities do exist depending on the case. For example, public policy issues frequently play a major role in the development of the law, and these issues often have emotional undercurrents that can be stirred by adroit advocacy. Moreover, every erroneously decided case on appeal is saturated with emotion over the injustice of the errors below. Adroit advocacy can stir these emotions as well.

However, when briefing and arguing appeals, you must be mindful not to treat the appellate court as the trial court. The former exists to address alleged errors of law and is not receptive to emotional tirades.

Finally, remember that judges and jurors—like all of you—have entrenched attitudes and beliefs that they invoke during the proceeding. So bear in mind that connecting with a judge or jury on an emotional level requires an understanding of this frame of mind and whether the planned approach has the potential to be effective.

Although working with or against these attitudes is a challenge, it may be prudent to present a particular emotional appeal that takes piece of mind

into account. Even more challenging, however, is the probability that not all members of a jury or appellate court panel may have the same preconceived frame of mind. Therefore, it is wise to take time to learn more about the listeners, judge, jurors, arbitrators, or even clients. What are their attitudes and beliefs? What are their backgrounds?

Of course, it is not always possible to gain such information. Sometimes you must surmise, based on experience. Because judges are public figures and you have access to their written opinions, it is arguably easier to ascertain their thought processes and potential emotional responses. Jurors, on the other hand, pose a greater challenge because they are strangers, so attempting to gauge their thought processes and emotional responses can be difficult. Nevertheless, conducting focus groups or watching mock jurors deliberate in a mock trial exercise can be very constructive in ascertaining how particular jurors will react.

CONCLUSION

Advocacy is an art, not a science. Understanding the fundamental elements of logic and emotion, and how to apply them in the art of persuasion, is a lifelong quest well worth pursuing. Like many aspects of trial practice, you learn not only by reading and studying, but also through experience by applying concepts—in this instance, logic and emotion—during actual presentations both at trial and on appeal. ❖

Citations

1. Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, *The 12 Secrets of Persuasive Argument* (ABA Publishing 2009).
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