

NOTA BENE

BY KATHLEEN DILLON NARKO

Persuasion: Aristotle Still Works for Webb, Wood, and Kocoras

There are, then, these three means of effecting persuasion. The man who is to be in command of them must, it is clear, be able (1) to reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions—that is, to name them and describe them, to know their causes and the way in which they are excited.

—Aristotle's *Rhetoric*, Book I:
Chapter 2.

As lawyers, we want to persuade. We seek to persuade juries, judges, clients, and even opposing counsel. But what makes one lawyer more persuasive than another? Who is more persuasive – the table-pounding screamer or the soft-spoken-but-brilliant logician? Aristotle propounded three elements of persuasion in classical Greek rhetoric: *ethos*, *logos*, and *pathos*. These ele-

ments are akin to the English terms ethics (or credibility), logic, and emotion. The Greeks believed that the most persuasive speaker was one who balanced all three. That is, raw emotion without logic or credibility would fail to persuade, as would dry logic, without sincerity and a bit of drama. Persuasion is central to our role as advocates, and yet often we deal with it by instinct rather than through careful study.

I wondered how some experts on persuasion – two judges and a trial lawyer – viewed the importance of each of Aristotle's elements. I spoke with Dan Webb, of Winston & Strawn, who has tried more than 100 jury cases. Webb is currently on trial in Washington, D.C., defending Philip Morris in its case against the federal government and will defend former Governor George Ryan in his trial this fall. I also spoke with Charles P. Kocoras, Chief Judge of the U.S. District Court for the Northern District of Illinois. Kocoras took the bench in 1980, after serving as an Assistant U.S. Attorney.

And to gain the perspective of an appellate judge, I spoke with Diane P. Wood, of the U. S. Court of Appeals for the Seventh Circuit. Judge Wood joined the court in 1995 after serving on the faculty at the University of Chicago Law School and in the Antitrust Division of the U.S. Department of Justice.

All three stressed that persuasive lawyers find a balance among the elements of persuasion. "I studied what the classical Greeks wrote after I graduated from law school. I'm amazed how little has changed," says Webb.

The Speaker's Credibility

By *ethos*, or ethics, the Greeks considered the character of the speaker—whether he or she was believable, honest, and credible. We are more likely to believe someone who appears trustworthy. For lawyers, credibility before a judge or jury is "pretty powerful," says Webb. Webb views credibility as a "precursor" to persuading a jury. "You cannot expect to persuade a jury until you accomplish two things," he says. The jury "must respect you as a lawyer," and "they have to like you," says Webb. "You cannot expect to engage in persuasion otherwise." Judge Kocoras echoed this sentiment. A lawyer "must manifest sincerity and belief in the propriety of the case." He or she "can't be viewed [by the jury] as someone [merely] doing a job," says Kocoras.

When arguing to an appellate court rather than a jury, credibility is expressed more in terms of reliability in presenting the law accurately. Judge Wood explains that a lawyer shows his or her credibility through accurate citations to the record and explanations of case law. "There is a boundary on how far to go" in interpreting a case, says Wood. A lawyer who stretches case law too far risks losing credibility with the court. Instead, judges are looking for a

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“person who plays it straight,” according to Wood. Once a lawyer establishes that credibility, the court is “inclined to accept other things they say in the rest of the brief.” Thus, a lawyer’s credibility can affect his or her ability to persuade.

Logic: The Foundation of Persuasion

Isolating one element of persuasion is a difficult and perhaps impossible task. Inextricably tied to *ethos* is *logos*. *Logos* is present when a lawyer has mastered the law and facts of the case and explains them clearly to the judge or jury. Webb stresses that this mastery is essential to gaining a jury’s respect. Jurors must believe that the lawyer is honest and develops the evidence in a logical way, says Webb. When arguing to a judge rather than jury, *logos* takes center stage. “A judge wants to know the facts and law,” says Webb. Kocoras and Wood confirm this. “Facts and law trump everything” in a bench trial, says Kocoras. Wood underscores, saying that a “logically coherent argument, that is well presented,” is the most important factor in being persuasive. In the appellate court system, a clear theory of the case is more effective than stressing the emotional facts—however compelling—of an individual case, according to Wood. Logic is the bedrock, the foundation upon which credibility and emotion stand.

How Much Emotion is Too Much?

Non-lawyers and lawyers alike may envision the table-pounding attorney as the winner in the persuasion contest. It is hard to let go of images of *Perry Mason*, *L.A. Law*, and *Law and Order* as our archetypes for the Persuasive Lawyer. Yet all three jurists I interviewed agreed that raw, unbridled emotion hurts the lawyer’s ability to persuade. In the Seventh Circuit, judges may even go so far as to admonish attorneys for making emotional pleas, according to Wood. Lawyers may be told to focus on the law, as the time for emotional appeals has passed. While the appellate court may be open to arguments for “a just and appropriate result,” says Wood, “Individualized emotional arguments are not likely to be the best way to go.”

Even in a jury trial, a little emotion goes a long way. Webb describes two levels of

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emotion. First, even in presenting a logical argument, the lawyer should appear to be excited about the case, says Webb. Changes in voice intonation and pace of speaking can help accomplish this. A lawyer should use the second level of emotion, strong displays of grief, sorrow, or anger, for example, “with a great deal of caution and care,” according to Webb. Jurors expect lawyers to be actors, says Webb, and are “wary of phony emotion.” If the trial lawyer lays it on too thick, jurors are less likely to believe him or her. “In all my years of practice,” says Webb, “I have *never* shed tears in the courtroom.”

Although Webb uses emotion to personalize a client or to show anger at callous misconduct, he recommends keeping

emotion low-key. Even if his opposing counsel appeals to the jury with a rousing, emotional appeal, Webb often replies with an argument based in logic, rather than emotion. He acknowledges the emotion and goes on to remind the jury of the key facts. “Shouting and yelling is not going to change the facts of this case,” he says. Similarly, Judge Kocoras notes, “You don’t have to match fire with fire, but you need to recognize that there is fire.” Know what your opponent is seeking to do, and counter it with a logical argument.

None of us can control the facts we are dealt in any given case. However, by balancing ethics, logic, and emotion, we can present our case as persuasively as possible. ■



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