Persuading Yourself You Can Win

by Gerry Spence

What strange, unpredictable, unreliable creatures these trial lawyers! Let an opponent ask the lawyer if he or she can win, and the answer comes rolling out like fresh, hot buns in the bakery.

> Wait and see, pal. Just wait and see. We have experts lined up like the Russian army. Our client will have the jurors holding her to their breasts. I'll cross-examine the defendant until he turns to turtle soup. Can I win? What are you smoking these days?

Then we overhear the same trial lawyer talking to his client at settlement time with a few thousand on the table. The lawyer hasn't paid last month's rent. His secretary is threatening to quit, no paycheck yet. His wife is hollering that the credit card company is hounding her at work. The banker is talking about a foreclosure. The same lawyer to his client:

> This is a tough case, Helen. Our expert is a little mushy on his conclusion, and you can never predict what a jury will do. They could turn you loose with nothing. Nothing, Helen! We got money on the table. Not enough, but a "bird in the hand. . . ." And what that s.o.b. defense attorney can do to you on cross-examination! He's a vile reptile. Yes, Helen, I hate to say this, but I don't think we can win.

What does this lawyer say to partners?

> I know, guys, this is a clear case of negligence. That's why we took it. No defense. But one thing we didn't know. Helen is a flake. She comes off like a one-legged ostrich with the hiccups. And the juries in this jurisdiction hate plaintiffs. Greedy lawyer syndrome. Tort reform killed us. Remember, this firm lost our last three good cases. You know the drill. They offer a little, but it's better than nothing. Don't forget, we all have kids in college.

What does the same lawyer say to himself? Sounds like an argument made with Mozart's Requiem Mass in D minor as background music:

> I can't do this. I can't lose another case. I'm tired. God, I'm tired. And Joe Bigblow, the defense attorney—he knows every trick. He can't even spell ethics. Has the judge in his pocket—zipped shut. And old Judge Iron Nose is the hardest nosed old fatherless scrooge in the U. S. of A. In his former life, he hop-toaded 20 years for Health, Happiness, and Heaven Insurance Company. He wouldn't believe Helen's injuries if he had applied the tourniquets and gave her CPR himself. The settlement on the table would save my buttons for another couple of weeks. Man has to think of himself. Besides, I've lost it as a trial lawyer. I can never win another case. No, never!

There was a time when we thought we could win them all. We were young and innocent, like a marine who has never been in battle. We were afraid, but we didn't know exactly what we were afraid of, and we were willing to charge. Juries saw that we were teetering on the tightrope of helplessness and felt for us, and we weren't a threat to the judge, who picked us up once in a while, and we won. At least some of us did some of the time. But it's different now.

We should return to our innocence. But we know that once it's lost it's gone forever like a small flash in the ether. We're mindful of the classic refrain, "You can't go home again," when home is the personhood of the open, fumbling, but real young lawyer who loves his client and hates injustice and is

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there to fight for what is right even if he has so few experiential tools with which to wage his war. Jurors loved us then because we represented some of their own feelings of helplessness, and their yearning for a lawyer who was honest and wouldn't resort to all those tricks to fool and persuade them—someone who would show the jurors a worthy case even if the presentation fell short of Atticus Finch.

I tell lawyers that it all begins with you. Let me repeat it: *It all begins with you.* Yet we have been convinced from our earliest times that we do not measure up. We are not as bright as our older brother; we are not as beautiful as our younger sister. We are dumped into school where we are sorted and graded like cattle at the killing pens, according to the standards of teachers and administrators who have no idea about who we are—or, for that matter, who they are either.

We compare ourselves with others. If only I could look like Miss Pouty Face in *Vogue* or have a body like the guy in the magazine selling armpit safety. We have mentors we try to imitate, and in doing so, we cast aside our own beauty like one who finds a pearl on the beach and thinks it's only a cheap pebble. We become fans of rock stars and movie stars. We want to dress like the skinny models who adorn the pages of magazines, looking like they just drank a bottle of Clorox. We want to own certain automobiles and wear certain clothes so we can be seen as important, as cool, as special. But we do not feel important, cool, or special.

No one has told us that the entire game from our earliest days has been to make us feel inferior so others, who also feel inferior, can control and exploit us. If we all recognized our own unique beauty, this would be a different world, and the power structure would have to find other ways to enslave us. In fact, the power structure would no longer exist. It feeds on fear and lies and self-hatred and gorges itself on our insecurities.

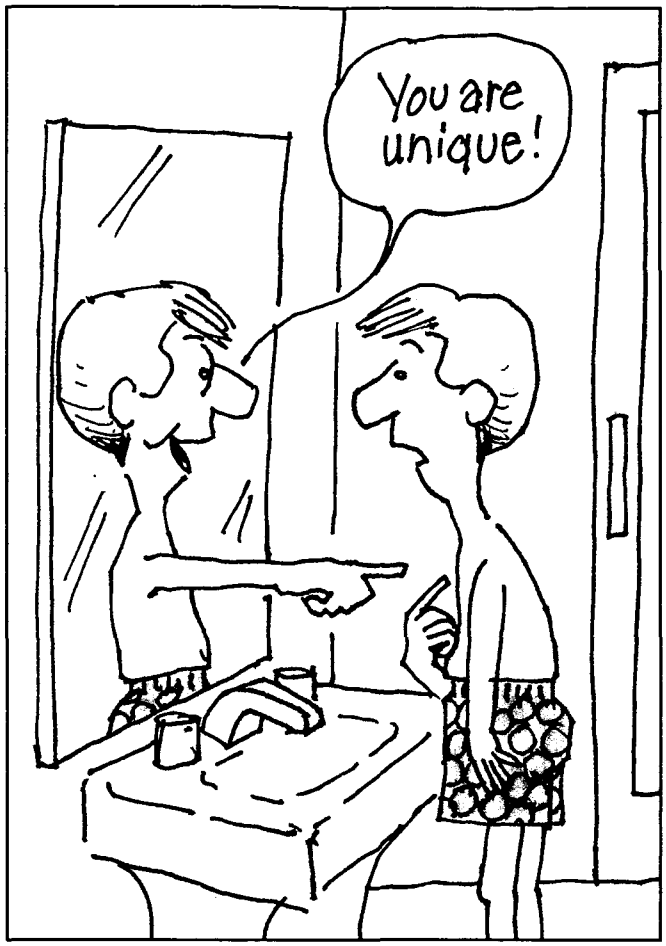
Given our history, it's a wonder that any of us can, out of forgotten places, muster sufficient belief in ourselves to lift up our scarred psyches and engage the monster out there that waits hungrily to consume us—an ogre called life—much less some bloody battle in the courtroom. And to believe we can win? How silly! We are only some blubberous, blundering hunk of blubber—and so we have been assured by all those we trust.

But the truth? The truth is each of us is unique! Each of us is the only person in the world like us. There has never been a person like us—not from the beginning of time. Never. Our beauty is distinct and singular. Our worth is incomparable. Moreover, there will never be another like us. No, never! Not if the human race endures forever.

Look at your thumbs. Go ahead! Look! Your thumbprints are unique. Never has there been one like either of them and never will be. So, too, is your personhood, your being, your sole-self, *your* soul. You are one of a kind, my friend, and there is no one to compare you to. No one.

Why, then, would you want to discard your own beauty to concoct a poor imitation of someone else's? Why would you even want to be like someone else rather than celebrating your own one-of-a-kind self? The fact that we are unique and therefore incomparably beautiful is a truth we have not been permitted to see. It is as if our eyes for our own beauty have been burned from our piteous skulls, and so far as seeing ourselves, we are blind.

I tell young lawyers, and old, that they can win—against anyone—if they can find their own unique self. The lawyer who can be frightened but who can be real and honest before



the jury, the lawyer with the unimposing stature and the frail voice—he or she can win against the most touted, handsome, blue-pin-striped, fancy-fannied lawyers in the business. You ask, how can that be?

A trial is always a race for credibility. If the lawyer is credible, fully credible, one who stands before the court or jury as his or her own true self, that lawyer will win. The jurors recognize that that lawyer is real, that that lawyer can be trusted. And the trusted lawyer will always win.

I hear young lawyers whimpering, "I cannot win against him—he's tried a thousand cases and I'm trying my first." But he who has tried a thousand cases has always tried them in the same way. Therefore, he has tried only *one* case, and you will win because you are more real, down to your shivering heart, your panting lungs, down to your cramped belly, yes, down to your honest, caring soul.

It takes courage to meet one's self because we have been taught that this person is so horridly insignificant, so unworthy, so useless, weak, and stupid—this no-talent lawyer. But fear is all right. Quite all right. We cannot be afraid unless we care—both about ourselves and our clients. Fear is good medicine. Without it, we cannot be courageous. Without it, we do not care. And we cannot ask a jury to care for our client if we do not care.

All of this is very simple. Yes? You need not persuade yourself that you can win. No. Just march into court, be more real than your opponent, be more honest, be more caring, prepare more, and fight harder—and you will prevail. That is the secret.

Classical Rhetoric and the Modern Trial Lawyer

by Paul Mark Sandler, JoAnne A. Epps, and Ronald J. Waicukauski

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

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 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.

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Appreciating the art of persuasion truly begins with Aristotle's *Rhetoric*. Although it is not light reading, his *Rhetoric* is deeply rewarding. In it, Aristotle identifies three elements of 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 argues, for the "whole affair of rhetoric is the impression to be made upon the audience."

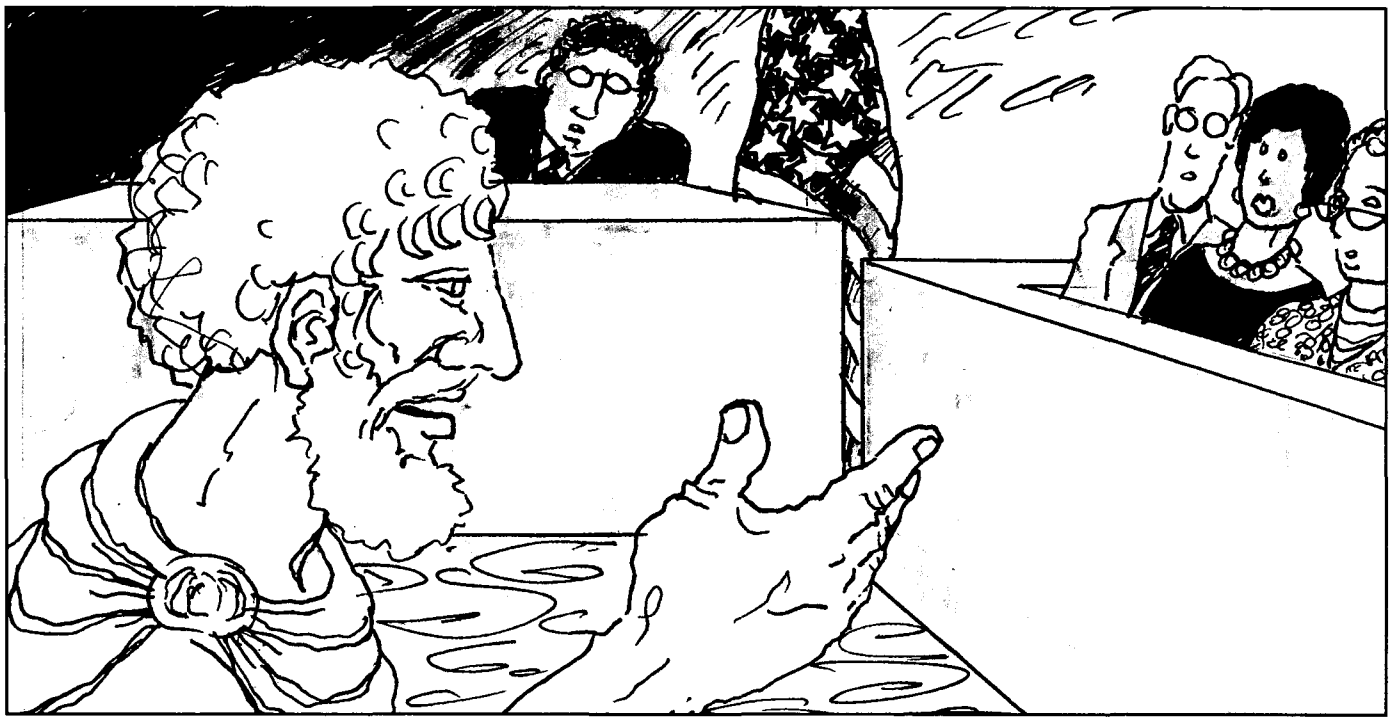
Aristotle observes what so many lawyers learn the hard way—that audiences differ in attitudes, beliefs, and preconceived notions about the matter at hand. An argument or presentation before one judge may fail before another. Just as each receiver is different, each argument should be unique, Aristotle insisted. The capacity to match one's rhetoric to one's 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 the listener's decision, including attitudes, beliefs, values, and personality. A person who 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.

Rhetoric reminds us of the importance of conducting due diligence on the judges that hear our cases. It compels us 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 the judge, there are a number of effective ways to glean information about them. 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. Although many jurisdictions do not allow counsel to conduct a full voir dire, in some cases, a full voir dire is permissible, in which case how you frame questions about jurors' attitudes and beliefs becomes extremely important.

Limited voir dire, in which counsel submits questions for the judge to ask, is also 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. Finally, mock trials 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-makers 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, the advocate of today must be conscious of the decision-maker from the outset to the conclusion of an argument.

As mentioned earlier, Aristotle believed that the bases of listener-centered persuasion are *logos, ethos,* and *pathos. Logos,* or logical reasoning, he argued, 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 you will be able to refute opposing arguments 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. It also makes clear, however, that even a logically impeccable argument will fail if the audience does not trust the speaker, for Aristotle viewed *ethos* as the most important aspect of argument. He defined "ethos" as the character of the advocate *as perceived by the listener.* Modern trial lawyers draw upon this idea when they become "personal advocates" who are 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. It is the latter that matters. Thus, we come to view Aristotelian advocacy as something like a performance, a means of winning the trust of our listeners, regardless of who we are and what we believe.

What qualities will boost your *ethos*? Integrity, intelligence, friendliness, sincerity, conviction, professional appearance, and enthusiasm, among others. Aristotle identified integrity 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.

A healthy *ethos* will help you apply in court what Aristotle believed was the third most important component of advocacy: *pathos*, or emotion. Aristotle recognized that effective advocates use emotion to provoke listeners to identify with their causes (i.e., their clients). Aristotle cautions, 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* with *logos*, along with a high *ethos*, is the foundation upon which successful listener-centered arguments are built.

The only trouble with Aristotle's *Rhetoric* is that it is a theoretical text. To see theory in practice, turn to 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. His example shows that advocacy can be learned. His first public oration was a failure. With self-improvement, he mastered the art. His *Philippics*, speeches against the encroachments of Philip II of Macedon, are legendary, as is his oration known as "On the Crown."

As Plutarch observed, the orations of Demosthenes differ from Cicero's: 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 of his orations.

In the *Philippics*, he assailed Philip of Macedonia's eviscerations of Athenian liberties that 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 argument 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 will soon create another Philip, if this is how you attend to your business.

Philippic 1, quoted in R.D. Milns, "The Public Speeches of Demosthenes," *in Demosthenes: Statesman and Orator* 212 (Ian Worthington ed., Routledge 2000).

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.

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.

Philippic 1, quoted in Milns.

We 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 we 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.

Philippic 2, quoted in Milns.

Reading classical rhetoric can reinforce one's respect for the rule of law—and for the ease with which it can be lost. Cicero, the Roman lawyer, politician, and philosopher (106–43 B.C.), 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

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him his life. Antony, 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.

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

Cicero knew exactly what to call the conduct of Verres but mocks the crime as a "consuming interest in Art." Cicero 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.

The *exordium*, according to Cicero, prepares the court for the argument. It is divided into two parts: introduction and insinuation. The introduction creates goodwill among the listeners and, ideally, influences the listener to be receptive. The second part of the *exordium*, 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.

To continue with Cicero's structure, the "narration" is the presentation of the facts. The "partition" explains disagreement between the parties, and the "confirmation" presents the argument. Cicero divides the confirmation into three distinct

parts: proposition, reason, and conclusion. This separation is very helpful. It calls attention to the need to base one's argument on *logos*. According to Cicero, many inexperienced trial lawyers are not actually arguing; they are only discussing the matter at hand. Today's lawyer would be emulating Cicero if he or she argued the following proposition: "The nurse should have performed an EKG, as the patient experienced chest pain." The 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."

"Refutation" disproves the opposing view, and the "peroration" summarizes the case and the decision requested. Cicero subdivides the peroration into three parts: a summing up, inciting the court against the opponent, and arousing pity or sympathy for the cause.

In his work *In Re Inventione*, Cicero also gave attention to preparing the argument. He emphasized that preparation of an argument consists of five distinct parts. (1) *Invention*: 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. (2) *Disposition*: the arrangement of the argument. Here again we are reminded of the importance of carefully ordering how we present witnesses, ask questions, and structure openings and closings. In considering arrangement, Cicero recommends placing the strongest points first, following them with weaker arguments, and concluding with strong arguments. The doctrines of primacy and recency—we remember best what we hear first and last—springs from

The doctrine of primacy and recency springs from Cicero.

Cicero. (3) *Elocution*: proper diction. Here Cicero calls attention to style, the form in which we 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. (4) *Memory*: 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. (5) *Delivery*: For Cicero, delivery 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 that prepares one to succeed when the time comes.

No review of classical rhetoric would be complete without mentioning Quintilian. Although he was known in the court as a successful advocate, he 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 man." He writes that, "*ethos* in all its forms requires the speaker to be a man of good character and courtesy." Quintilian, *Institutio Oratoria* VI.2.18 (H.E. Butler, trans., Harvard 1922).

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 realised in action, not in the result obtained." Quintilian, *Institutio Oratoria* II.17.25–26. He viewed the highest aim of rhetoric to be speaking well.

Still, persuasion was his aim and, like Aristotle, Quintilian gives attention to knowing your listener, the temperament of the judge, and the proper use of logic and emotion. He advises that assertions must be supported by facts or law and underscores the value of "charm." In other words, he appreciates the importance of a well-timed smile, a laugh, a courteous bow. He suggests that one begin an argument with a concise statement crafted to draw in the listener. Here are two examples from Quintilian's 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." Quintilian, *Institutio Oratoria* IV.2.121. 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 their first sentences, which are the best opportunity one has 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. Quintilian, *Institutio Oratoria* V.7.11. 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?

At heart, Quintilian was a lawyer's lawyer, an orator who believed deeply in the power of speech to command attention and direct action. In reviewing Cicero's *De Oratore*, Quintilian observes that Cicero wrote:

> [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.

Quintilian, *Institutio Oratoria* IX.1.26–28.

Therein we see the sophistication of the classical orators. To "lend brilliance to our style" and characterize our 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, we have more guides than did our classical predecessors, but there are no better guides than Quintilian, Cicero, Demosthenes, and Aristotle. 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. ☐

WRITING THE STATEMENT OF THE CASE: THE "BEAR" NECESSITIES

RANDY LEE*

The statement of the case may well be the foundation of any brief. If the judge can read what happened and feel one's client has been wronged, she is much more likely to view the client's legal arguments sympathetically. Thus, we are taught to write persuasively in the statement of the case: "to kick the judge in the stomach with the force of our story."

Unfortunately, for many it remains a mystery how one writes a persuasive statement of the case. Law schools are much quicker to supply a list of "don'ts" than one of "dos": Don't lie; don't omit facts; don't "mischaracterize"; don't be obvious; don't get caught. Legal ethics aside, one might wonder what is left. It is, in fact, easy to listen to a lecture on writing a statement of the case and to leave feeling that such a creature cannot be written.

And yet, hope springs eternal. When writing a statement of the case, an attorney has three effective and subtle tools of persuasion at his disposal: theme, perspective, and organization. A fourth tool, characterization, is also available; however, unless used in a craftsmanlike fashion, characterization will lose more in credibility than it will gain in persuasion.

This Article will look first at two versions of a conflict between two parties. In each of these versions, a different party is viewed sympathetically although both versions rely on the same core facts. The

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Article will then examine how each tool was used to create the differing views of that conflict.

The first tool examined will be theme. Theme is the idea upon which the story focuses. Theme directs all other aspects of the statement of the case. In particular, it determines which facts are relevant to the statement of the case and whether facts strengthen or weaken the case. The first version selects as its theme the violation of a family home while the second takes the same situation and uses as its theme the plight of a child lost in the woods.

The Article will next turn to perspective. When an attorney chooses a perspective, he chooses a character through whom the reader can experience the story which the attorney has written to communicate his theme. Perspective is an effective tool because we are more likely to believe someone was right in what she did if we understand why she did it, and we are more likely to understand why she did it if we can experience the situation as she experienced it. To allow the reader to most effectively experience the theme of the violation of a family home, the first version is told from the perspective of the family. Meanwhile, in the second version, the story of the lost child is experienced through the child.

The Article will then turn to organization. Whether it is general organization or organization at the sentence or paragraph level, if an attorney groups good facts together and displays them early, he can create presumptions in the reader's mind which will be hard for opposing counsel to overcome. Furthermore, by surrounding a bad fact with good facts, the attorney can provide the reader with the ammunition she needs to rationalize away any doubts that the bad facts may invite. Both versions of the story rely heavily on this tool as well.

Finally, the Article will look at nonfacts and characterization. Nonfacts are facts many attorneys miss. They are things that should have happened but did not. The Article will suggest that in many cases, what did not happen is at least as important as what did. Characterization is defined as the heavy-handed approach to word-choice that has given us sentences like, "The ruthless killer blasted the helpless, bloodied victim with more of the same cold, hard, steel bullets." The Article will point out that characterization in its more blatant form will turn off a judge and then will suggest ways an attorney can protect his client from the more subtle forms of characterization.

The Article takes the conflict between two parties, which generates the two versions of the statement of the case presented here, from

the story "Goldilocks and the Three Bears." The value of this particular children's story, which has been entertaining lawyers and law students in this context for five years now, is that it forces the author to play fair: There are no confusing facts here to distract the reader, nor could facts be changed to make the tools appear to work better. By using a simple, well-known story, the Article can prove that the persuasive tools that it explains can work in any setting. Let's face it; if the tools can get "Goldilocks and the Three Bears" into a Law Review, they must be persuasive.

VERSION I

Momma Baer and Poppa Baer live in a small two story cottage at 29 Storybook Lane. They have a young son named Baby who lives there as well.

On July 4, 1983, the Baer family sat down to dinner. Momma, Poppa, and Baby all found that their dinner was too warm to eat so the family decided to take a walk in the forest around their home until the food had cooled down a little.

While the Baer family was out, Ms. Goldilocks arrived at the door. Ms. Goldilocks had been wandering in the neighborhood near the Baers' home for some time. She immediately tried the door, found it unlocked, and entered the Baers' home. Once inside, Ms. Goldilocks ate Baby Baer's dinner, broke his junior rocking chair, and then passed out in Baby Baer's bed.

When the Baers returned home, they found the front door open. The three Baers proceeded cautiously to the kitchen. There, they found that someone had eaten all of Baby Baer's dinner. Furthermore, Momma and Poppa Baer's dinners had been tampered with.

When the family then entered their living room, they found their furniture in disarray. Momma and Poppa Baer's chairs had obviously been tousled, and Baby's had been broken completely.

Unsure if the intruder was still in their home, the family proceeded upstairs. Momma and Poppa Baer checked their own beds and again found indications that a stranger had been in their home. Meanwhile, Baby went to his own bed.

In his bed, Baby found Ms.Goldilocks. She was still asleep. All the noise that the family had made upon their return home had failed to wake her. When Baby saw the stranger in his bed, he began to cry. "Here she is! Here she is!"

Goldilocks bolted up at the sound of the cub's crying. Although Baby's parents responded immediately to his calls, Goldilocks was able to dart to the door and escape.

VERSION II

Goldilocks is a young girl with long blonde curly hair. On the Fourth of July, she went walking and got lost in the woods. Goldilocks tried to find her way home but couldn't. Finally, however, Goldilocks did come upon a house. Although the girl did not know it at the time, this was the house of the Three Bears.

When Goldilocks went to the door of the house, she found it open so she went inside. Once inside, she looked around but couldn't find anyone at home.

Goldilocks entered the kitchen of the house and found three bowls of porridge which had been left out. Seeing the porridge there, Goldilocks began to realize how hungry she had gotten trying to find her way home through the forest. The girl tasted one of the bowls of porridge. She didn't like it. Sitting out like that, the porridge had grown too cold to eat. Still she tried another bowl. Although that bowl was not too cold, it was very hot. Goldilocks couldn't eat that bowl either. Finally she tried the third bowl. She was surprised to find that that bowl was just right, and even ate all the porridge in the third bowl because she was so hungry.

Still no one was home so Goldilocks went into the living room to sit down. There the girl found three chairs. She walked over to one of the chairs and sat down. That chair was very hard and uncomfortable. She decided to try another chair. The second chair was also very uncomfortable—it was too soft. Finally she tried the third chair, and this chair seemed to be fairly comfortable, but while she was sitting in it, the chair broke.

And still no one was home so Goldilocks decided to go upstairs. Once upstairs, Goldilocks found three beds. Seeing the beds, the girl began to feel very tired. She had been lost in the woods for some time. She went over to one of the beds and lay down. That bed was too soft though. Then she went to the second bed. Goldilocks lay down on that bed, but that bed was so hard that it was like lying on the ground that she had been walking on for so long. Finally she went to the third bed. Goldilocks was relieved to find that that bed was just right. Lying down in that bed, Goldilocks drifted off to sleep.

Suddenly Goldilocks was startled from her sleep. She opened her eyes to find the son of the bear family staring down at her. He was

crying out, "Here she is! Here she is!" Goldilocks turned her head just in time to see the two older bears running toward her. The girl panicked. She bolted from the bed and dashed down the steps. Goldilocks rushed out the door back into the woods, and then, once again, Goldilocks found herself lost.

A. *THEME*

The theme of a story is the idea upon which the story focuses. Most simply, it is the answer to the question, "So what's the story about?" For the statement of the case, then, the theme is simply what the case is about. As a case presents two parties in conflict, it also presents at least two ideas in conflict. An attorney must identify the idea upon which his case will turn and make that the theme of his statement of the case. Turning to our stories, one might ask whether they present a case about a suburban home that gets violated or a case about a girl who gets lost in the woods. The answer depends on whose attorney one talks to and, consequently, on which statement of the case one reads.

The selection of a theme affects every other aspect of the statement of the case. Perspective, organization, and fact selection must all work to communicate the theme. Although perspective and organization will be discussed in later sections, the relationship of fact selection and theme is most appropriately covered here.

Although fact selection depends on theme, theme does not excuse the omission of legally relevant, though unpleasant, facts. When the judge asks you, "Counsel, why does your brief fail to mention that your client yelled, 'I intend to batter you, sucker,' just before he clubbed the plaintiff?", she will not be amused if you respond, "Your honor, it just didn't fit with my theme." Your theme must account for these legally relevant facts just as the themes of both stories here allow for the discussion of Goldilocks wandering the neighborhood, entering the home, eating the porridge, breaking the chair, sleeping in the bed, and leaving the house.

The theme, however, does affect the selection of other facts in two ways. First, the choice of theme determines what additional facts are relevant. The first story is about the violation of a home, and, therefore, the reader will want to know about the home: where it was, "29 Storybook Lane," and what it was like, "a small two story cottage." With such a theme, the reader will not be as concerned about the intruder: intruders are intruders, and we already know enough about them to know we do not like them. Meanwhile, the second story is

about a person lost in the woods. Now the reader will want to know more about the person, "a young girl with long blonde curly hair" who "tried to find her way back home but couldn't" and the reader will be less interested in what sort of house the person stumbled onto.

Second, the choice of theme determines which facts help and, therefore, need to be emphasized and which facts hurt. No fact is "good" or "bad" outside the context of a theme. Often facts which at first glance appear bad for a case can help that case if placed in the proper theme. For example, at first glance it might appear that the case of Goldilocks will be hurt because she tried all the bowls of porridge, sat in all the chairs, and lay down in all the beds. These facts seem to indicate that she was more disruptive. Yet, in the second story, these same three facts are emphasized and developed to show how unfortunate and frustrating Goldilocks' plight really was.

Finding the best theme is no easy task. To do so, one must first understand the facts and also the motivating factors behind them. The attorney should talk to laymen about the facts and see how their sympathies are shaped. Often their unpolluted minds are more sensitive to how reasonable people really operate. As the theme begins to take shape, the attorney should begin to search for a character in the event through whom the reader can experience that event. That search will bring us to the next section, on "perspective."

B. *PERSPECTIVE*

There is an old saying that before one condemns a person, she should "walk a mile in his shoes." That is the idea behind perspective: a theme is easier to accept if the reader can share the experiences with the person in the statement of the case who lived the theme. Thus, the attorney should write the statement of the case from the perspective of that person. In the first story, we creep step by step through the Baers' home side by side with the Baers, and, consequently, we understand their fear and relate to their moral outrage. In the second story, we are at Goldilocks' side, and we see her flailing from meal to meal, chair to chair, and bed to bed, and consequently, we can understand her emptiness and frustration. Thus in each story, the perspective facilitates the expression of the theme.

An attorney should not feel that the person who pays for her services is the only person from whose perspective the story can be told. Sometimes a key witness or subordinate worker may be a better choice. Furthermore, one may choose to write different segments of a

statement of the case from different people's perspectives. For example, a district attorney might begin the statement of the case in a probable cause for arrest case from the perspective of the victim-witness at the scene of the crime then shift to that of the officer at the site of arrest.

In the third paragraph of the first story, we find a more radical example of shifting perspectives: the Baers' story is told in that paragraph from Goldilocks' perspective. This choice of perspectives works because we are following Goldilocks through a series of unexplained intrusions in the Baers' home and, therefore, gain a negative view of her. Thus, just as perspective can be used to make the reader like a person, it can also be used to make her dislike someone else.[1] We should not, however, overemphasize the value of using perspective to generate animosity; although animosity toward an opposing side may aid an attorney in his ultimate goal, that ultimate goal remains showing that his client wins rather than someone else loses. Therefore, the predominant perspective of the piece should be one that allows for identification with the attorney's side. Furthermore, the first perspective of the piece should be one the attorney wants the reader to view positively. The reader will expect to identify with the first character to whom she is introduced, and, therefore, if an attorney initially introduces the reader to a "negative character," he may be inviting the reader to form an identification which the attorney will subsequently have to overcome. To avoid this, the Baers' story takes its momentary lapse to Goldilocks only after the Baers have had two paragraphs to establish their perspective.

Once the attorney has settled on a theme and a perspective, she must begin the most tedious but perhaps the most rewarding part of the task, organizing the facts. As the next section points out, although theme and perspective will suggest a pattern for organization, that pattern is only the beginning of a methodical trial and error editing process.

C. *ORGANIZATION*

A friend of mine once hit me with the startling revelation that judges were not born under rocks, that if a judge can feel herself being pushed, she's apt to push back rather than go docilely along. When a

1. At the risk of taking a lesson from one of the law's harsher critics, the best example of using perspective both to create good feelings and to create bad may be *A Christmas Carol*, by Charles Dickens.

statement of the case sounds biased, a judge will feel pushed, and when a judge feels pushed, she will probably stop reading.

The statement of the case, then, is not a place to argue for your theme or even state it explicitly; the argument section of a brief is called the argument section for a reason.[2] Rather, the statement of the case is a place where one leads the judge right to the edge of the cliff which represents the theme and then allows the judge to jump off herself rather than the attorney trying to shove her over.

To succeed in such an endeavor, one must be subtle, and the most subtle of all persuasive devices is organization. No reader will ever notice where one particular fact "happened" to appear, but many well-placed facts begin to act as subliminal images pounding the point across without seeming to be noticed.

In the statement of the case, the attorney must be aware of his organization at three levels: (1) the overall organization of the piece, (2) the organization of each paragraph, and (3) the organization of each sentence. In all of these levels of organization, the attorney invites the reader to prejudge the case and rationalize any subsequent inconsistent facts. To do this, the attorney must get his "good" facts out early. As the reader sees those facts, she will begin to prejudge the case. Her newly-formed prejudices will encourage her to rationalize away the "bad" facts as they come later because these facts are not completely consistent with what she already believes to be true. The attorney can facilitate this process by surrounding the "bad" facts with "good" facts. This amounts to a sort of halo technique. This halo technique prevents the bad facts from overwhelming the reader as she moves through the document, and guarantees the attorney will finish with strong facts.

A concrete example may help to show how preceding and surrounding facts can color an event. Let's imagine we have a friend and an enemy, and each of them spills a beer on us. Because we have seen good facts about our friend before and judged her to be a good person, we will pass the event off as an accident or as out-of-character. Meanwhile, because we have seen bad facts about our enemy before and judged him to be a bad person, we will see the same act as further evidence of his weak character. Now add in the halo technique and imagine that our friend was picking up our tab for the evening while our enemy was trying to pick up our date, and we can see how much preceding and surrounding facts affect our view of an event.

2. That is where an attorney's argument goes.

These effects are further illustrated in the stories. In the first story, the overall organization presents all of Goldilocks' major disruptions early and then changes perspectives to allow for a more expansive discussion of the damage. By the third paragraph and eighth sentence of that story, one knows that Goldilocks entered the home, ate Baby Baer's dinner, broke his chair, and fell asleep in his bed. Meanwhile by the third paragraph of the second story, Goldilocks has barely finished dinner although she has already eaten up seventeen sentences. The organization of the first story invites the reader to judge Goldilocks' actions before he meets her while the organization of the second develops the girl before the actions. Thus, both stories set the foundations early for the prejudices that they need to rely on later.

The two different organizations used here suggest an additional point for attorneys writing a statement of the case: A statement of the case does not have to be organized chronologically, and if it is, it may "begin" at many points in time and then flashback to previous times. An attorney should seek the organizational structure that most clearly and persuasively presents his story. Often that structure will move chronologically, but sometimes it may be more effective to de-emphasize events and describe something like an organization, activity, or procedure weaving the events into the description. When chronological organization is chosen, beginnings and tempos still must be set, and once the tempos are set, they may vary during the story. Here the two stories start at slightly different times and move through Goldilocks' travels in the house at much different tempos. Furthermore, while the first story moves very quickly while with Goldilocks, its tempo slows considerably while with the Baers. That variation in tempo reinforces in the reader's mind the primary choice of perspective in that story.

The organization of the paragraphs in the second story highlights the halo technique. In the third paragraph, for example, the reader does not just learn that Goldilocks ate the porridge; he also learns that the porridge had been left out and is reminded that Goldilocks was lost and hungry. Similarly, in the fifth paragraph, the reader does not just learn that Goldilocks slept in Baby's bed. He learns also that Goldilocks was thinking about being tired and lost and about how far she had walked and how hard the ground had been. These facts cushion what Goldilocks does to the bears' property. This cushioning is particularly effective since again at the paragraph level the good facts come first.

To use organization at the sentence level persuasively, one must understand sentence structure and how people read sentences. To understand that, we must return to fifth grade English class and review what none of us could bear to learn then.

A sentence is a complete thought communicated by a subject, verb, and usually an object. There are two types of sentences: long ones and short ones. Although the two types may contain a great difference in the number of words, each type still communicates only one complete thought; the longer one just has more going on to distract and confuse the reader. Thus, it does not take a linguist to understand that if an attorney wants a judge to focus on a fact, that fact should appear in its own short sentence, while if the attorney wants to de-emphasize a fact, that fact should share a long sentence with a lot of other facts.

The use of good facts in short sentences is demonstrated in the first story. In paragraph four, Goldilocks' greatest kitchen crime is covered in one short sentence of twelve words:

> There, they found that someone had eaten all of Baby Baer's dinner.

Meanwhile the second story requires a twenty-six word sentence just to indicate Goldilocks ate Baby's porridge:

> She was surprised to find that that bowl was just right, and even ate all the porridge in that bowl because she was so hungry.

While the short sentence points the reader at the empty bowl, the second paints a broader picture which makes the bowl but one of many things to retain. If the bowl is to be forgotten, it is more likely to escape the reader of the second story.

The length of the sentence is not the only thing in the longer sentence that de-emphasizes Goldilocks' eating. The location of that fact also de-emphasizes it. A reader's attention is highest at the beginning and ending of a long sentence and lowest in the middle. Thus, Goldilocks' eating the porridge needs to be in the middle of that sentence rather than at either end if the attorney wants the reader to weigh it less heavily.

Not all good facts can go in short sentences. A reader can only have so much fun with Dick and Jane:

> See Dick. Dick sees Jane. Dick sees Jane's purse. Dick steals Jane's purse. See Dick run.

Bombarded with a series of short sentences, the reader becomes desensitized to them or bored with them. Conversely, the most effective short sentences are those that fall between longer ones.

Meanwhile, not all bad facts must go in long sentences. These facts may also be de-emphasized by putting them in phrases or subordinate clauses. Like sentences, clauses must have a subject and a verb. Main clauses, in fact, can stand by themselves as complete sentences. Subordinate clauses, however, must always be associated with a main clause in a sentence. For example, the first sentence of the fifth paragraph of the first story reads:

> When the family then entered their living room, they found their furniture in disarray.

The main clause is "they found their furniture in disarray," because that clause could stand alone as a sentence. The subordinate clause is "[w]hen the family then entered their living room," since that clause must relate to a main clause because of the "when."

Main clauses are supposed to convey the main idea of the sentence, and subordinate clauses are supposed to convey subordinate ideas. If our fifth grade teachers could not get us to write that way, they did, at least, succeed in getting us to read that way. Thus, if an attorney wants the judge to focus less attention on a fact, he should put the fact in a subordinate clause. Facts to be emphasized should go in a main clause. In our example, the status of the furniture was the idea to be emphasized so that went into the main clause while the room in which the Baers found the furniture was less important and merited only a subordinate clause.

Phrases merit even less attention than do subordinate clauses, and, therefore, they are even better places to de-emphasize facts. Phrases do not have a subject and a verb. They are usually introduced by a preposition or a verb form, infinitive (to lie) or participial (lying). The second story seeks to emphasize how tired Goldilocks was while de-emphasizing where she chose to sleep. Thus, the first fact goes in a main clause while the second goes in a phrase. The last sentence of the fifth paragraph, therefore, reads:

> Lying down in that bed, Goldilocks drifted off to sleep.

A final element in the organization of the sentence is the voice of the verb. In active voice, we have an actor, reflected in the subject, an action, reflected in the verb, and an agent, reflected in the object. For example:

Subject/actor	*Verb/action*	*Object/agent*
Goldilocks	broke	the chair.

In passive voice, the agent becomes the subject, a form of "be" becomes the verb, the old verb/action takes its participial form, and

the actor, if it remains at all, becomes the object of the preposition "by." Thus:

Subject/agent	*Verb/be*	*Participial/action*	*By Object/actor*
The chair	was	broken	by/Goldilocks (optional).

The current vogue is to pass off passive voice as "weak" while active voice is "strong," whatever that means. More to the point, passive voice is clumsy and wordy, but because it makes the actor an optional fact in a sentence, it is useful when an attorney wants to de-emphasize the actor. For example, in the second story, the attorney would want to downplay Goldilocks' role so he would write, "the chair was broken," rather than "Goldilocks broke the chair."

The problem with de-emphasizing the actor through passive voice is that the technique is too obvious. Any good attorney should begin his study of any legal document by circling every passive verb in it and finding out all the actors missing from those verbs. Thus, when an attorney faces a good judge or opposing counsel, passive voice ceases to be a subtle device. However, almost all passive verbs have active verbs that carry similar meanings. Therefore, the subtle attorney should replace the passive verb with a similar active one. In our example, we can communicate the idea that "the chair was broken" by saying "the chair broke."

If "the chair broke" is placed in its proper context in the last sentence in the fourth paragraph of the second story, one finds a good review of the concepts related to sentence organization:

> Finally she tried the third chair, and this chair seemed to be fairly comfortable, but while she was sitting in it, the chair broke.

Here, the bad fact is in a long sentence with many other facts to distract the reader. Goldilocks has been removed from the chair breaking through passive voice followed by verb choice. Her remaining tie to the chair, that she was sitting in it, has been de-emphasized by being placed in a subordinate clause in the middle of the long sentence.

Theme, perspective, and organization are the three most important tools of an attorney writing a statement of the case. For most of us, they are painful and tedious tools of the editing process because few of us can put a jig-saw puzzle together without shuffling around some pieces. Although these three are the most important tools, time must still be given to some special issues of fact identification and presentation before we can conclude.

D. *NONFACTS*

No matter how gifted the writer, she cannot use facts effectively if she does not have them, and one group of facts is particularly likely to escape an attorney's attention. That group consists of the "nonfacts."

Nonfacts are things that could have, or should have, happened but did not. Often they go unnoticed as the two sides become overwhelmed by what did happen. Yet, often the nonfacts say more about the case than do the facts. For example, in a case involving a judicial immunity issue, the facts might indicate that the judge had learned before jury selection that the panel would contain a person who was hearing-impaired. They might also indicate that the judge called the person to the bench, verified that she was deaf and that she would require an interpreter, and then dismissed her. Although that may sound complete, the nonfacts would indicate that neither attorney had challenged the woman and that although the judge planned in advance to raise the issue, he never notified the woman of this, he never suggested she retain counsel to present her side, nor did he invite her to present her side.[3] If the woman were to show the judge stepped out of his judicial capacity, the nonfacts, or what the judge failed to do, would be more valuable than the facts; yet, an attorney would discover them not by reading what the record said but only by realizing what it did not say.

In the first story, the third sentence of the seventh paragraph contains a nonfact:

> All the noise that the family had made upon their return home had failed to wake her.

Although we do not know how soundly Goldilocks was sleeping, her failure to awaken may help determine whether she "drifted off" as the second story indicates or "passed out" as the first story indicates.[4]

E. *CHARACTERIZATION*

This Section seeks to show why this version:

> The ruthless killer then violently pumped five more vicious bullets into the helpless victim already bleeding profusely on the floor;

is not as persuasive as this one:

> Mr. Williams was now lying wounded on the floor. The defendant shot him five more times.

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3. *See* DeLong v. Brumbaugh, No. 87-369, slip op. (W.D. Pa. Jan. 12, 1989).

4. Note that the first story never indicates how much noise the Baers made, only that all of it failed to awaken Goldilocks. Read words like "all" and "most" with the same caution statistics require.

The reason rests in the way characterization is perceived.

Characterization is the enemy of the good attorney. With the billing meter running, an attorney may ask who has time to look for nonfacts, select a theme and perspective, and then chase words into subordinate clauses; why not just sprinkle in a few adverbs and adjectives and get the same result. The two examples that introduce the section demonstrate that the modifiers do not generate the same result. Characterization modifiers suggest bias on the attorney's part, and that bias distracts the reader. Beyond that, if the attorney has done his job, the modifiers are unnecessary: Well-constructed facts speak for themselves.

Characterization is the least subtle of all the persuasive devices and, therefore, the one the attorney is most likely to have to explain. A judge is much more likely to ask an attorney to explain how he knew Goldilocks had "passed out" rather than "drifted off" than she is to ask an attorney why Goldilocks' presence in Baby Baer's bed merited only a phrase rather than an independent clause. Therefore, an attorney should choose his words for their accuracy rather than their emotional impact because he should realize he may have to defend that choice later.[5]

From the standpoint of a judge or an opposing counsel, the most dangerous type of characterization is the word that appears to mean something different from what it really means. In the second paragraph of the second story, Goldilocks found the door to the house of the Three Bears "open." As it is commonly used, the word "open" can mean either not closed or not locked. Since either meaning would fit into the context, unless someone pursues this ambiguity, the judge runs a fifty per cent chance of falling into its trap. The first story more specifically indicates that the door was "unlocked."

The first story, however, has some interesting word choices of its own. In the fourth paragraph, the Baers discover that Baby's dinner has been eaten and that Momma's and Poppa's have been "tampered" with. Similarly in the fifth paragraph, the Baers find their furniture in disarray: one chair is broken and two have been "tousled." While we

5. It has been suggested that whenever we choose one word over another, we are characterizing and, therefore, characterization is not an evil in and of itself. That much would be conceded. The real issues about characterization, though, are what criteria we use when we choose between words, to what extent does our persuasiveness rest on these choices, and as we make these choices, how much credit do we give our reader.

might expect "tamper" to require some underhanded design,[6] arguably it is enough just to alter something without invitation,[7] perhaps by placing a spoon in a porridge bowl. Furthermore, while we might expect "tousled" chairs to be at least moved in a room in "disarray," it is enough that they have been "handled roughly."[8]

Two morals come out of these examples. First, every attorney should own a dictionary and use it humbly and faithfully. Second, if an attorney wants to argue the facts on his own terms, he must pin the other side down to what each of her words means; otherwise, he is allowing the other side to invite the judge to misunderstand the case.

Even when the parties have stipulated to a word or the word has been established by the record, the danger of characterization still exists. The same word can leave different impressions depending on the different contexts in which it is used. For example, in the fourth sentence of the seventh paragraph of the first story, Baby Baer "began to cry. 'Here she is! Here she is!' " Meanwhile in the third sentence of the last paragraph of the second story he "was crying out, 'Here she is! Here she is!' " Although both stories use "cry" to communicate the action, the surrounding words and punctuation give different meanings to the word. Consequently these different meanings color the events in different ways. The fearful "cry" in the first story reinforces a view of the apprehension of the Baers while the "crying out" in the second helps to paint the bears as intimidators.

Just as words can mean something different from what they appear to mean, entire facts can mean something different from what they appear to mean. Not surprisingly, those facts that invite interpretation are just as dangerous a form of characterization as are those words. When a fact has potentially good implications and bad implications, the reader may infer meanings based on the prominence of the fact: since an attorney would not advertise a fact he felt would hurt his case, the more prominent the fact, the more likely that the fact helps the case. Needless to say, that rule of thumb does not always work, and when an attorney does not consider all the implications of a fact, and does not invite the judge to do the same, merely because the fact appears prominently in opposing counsel's brief, that attorney has asked to have his client's pocket picked.

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6. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANUGAGE 1451 (Unabridged ed. 1966).

7. *See id.* at 890, 1451.

8. *Id.* at 1459.

In the second story, two paragraphs begin by announcing that "no one was home," and a third ends with that fact. Thus three of the five paragraphs that occur in the Baers' house prominently indicate that the bears were not at home. Under the circumstances, the reader could easily assume that this fact was important because Goldilocks was waiting for the bears to return home. The story, however, never says that, and the fact could just as easily mean that Goldilocks found that she had more time to tear the place apart.

For the most part, then, characterization is a device to be unraveled defensively rather than used offensively. An attorney can be just as persuasive using the other devices, and by using those, he does not risk his credibility. As an attorney attacks the characterizations of the other side, he should realize some of them may not be obvious. We must remember that the humble attorney who asks is wiser than the haughty attorney who assumes.

E. *THE ETHICS OF PERSUASIVE WRITING*

Attorneys are instructed not to deceive the court. This Article suggests, however, that playing on ignorance, inviting prejudgments, and facilitating rationalizations differ so much from "deceiving" that they are not covered under that instruction. That is a suggestion worth questioning.

One could, of course, say that techniques do not lie; people lie. The rejoinder would then be to say that people lie better with better techniques. This exchange is perhaps no more dispositive here than it is in gun control debates; and yet, there just may be something in acknowledging that the problem is not in the what but in the who.

Persuasive writing can be defined as a means of more clearly presenting the truth just as accurately as it can be defined as a means of clouding the issue. Attorneys must know how to emphasize the most relevant facts and de-emphasize the distractions if they are to help the judge understand what really happened. To the extent that this is what the attorney wants the judge to understand, the techniques presented here do not conflict with a lawyer's responsibility to the court. It is only when the attorney sets out to abuse the system that the techniques threaten to abuse the rules.

As lawyers, we are sometimes too quick to question the rules and too slow to question ourselves. Perhaps, we feel that so long as the rules are good and we follow them, we need not question ourselves. However, just as the end does not justify the means, the means do not

justify the end. An attorney can no more lie honestly than he can tell the truth dishonestly.

The techniques discussed here are neither honest nor deceptive in their own right. They take their personality from the person who uses them. To the extent that an attorney seeks to be honest and candid, he will tell the truth and one hopes he will do so persuasively. To the extent that he looks for techniques that allow him to be less than candid, he will be deceptive, and he, rather than his words, will be to blame.

Ethos and the Art of Argument

by Ronald J. Waicukauski, JoAnne Epps, and Paul Mark Sandler

They may not have known how to surf the Net, but the ancient Greeks knew a lot about rhetoric and persuasion. In our rush to learn new technology, we litigators often forget the basic principles that they taught. Sometimes, it makes sense to look back a couple millennia to remember what we are all about and how we can be better at it.

Argument is the fundamental tool of the litigator's art. The facts and law may be the raw materials, but arguments are what we use to persuade juries to render favorable verdicts, to convince judges to grant motions, and to induce appellate courts to correct errors. And we also rely on arguments in less formal settings—persuading witnesses to cooperate, influencing clients to be reasonable, and convincing opposing parties to settle.

The ancient Greeks knew that whatever the context, there are elements common to any argument that will determine its effectiveness. One of the most significant of these elements, in fact Aristotle called it the most potent, is ethos—the character of the advocate as perceived by the listener. In other words, ethos concerns the persuasive effect that results from what the audience thinks of the speaker.

At first blush, you might think that ethos would stand wholly apart from the argument. And in one sense it does, because an advocate has an initial ethos with the listener before the first word is even uttered. This initial ethos is usually based on what the listener has previously seen or heard about the speaker through prior personal contact, by reputation, by way of an introduction, or by observing the appearance and conduct of the speaker before she speaks.

But during an argument, this initial ethos can change. And it often does. There is, in fact, an enormous opportunity to influence your ethos with the listener by what you say and how you say it. As lawyers, we have little influence over the facts of a case or over the applicable law, but we can affect how our listeners will perceive our ethos and thereby enhance the likelihood that our argument will succeed. To exploit this opportunity fully, we first need to understand the principal factors that contribute to ethos and to consider how those factors come into play in the courtroom and the conference room.

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Integrity

Aristotle identified integrity of the speaker as a key component of ethos. His Roman successor as a teacher of rhetoric, Quintilian, was even more emphatic about it. "An orator must above all things study morality, and must obtain a thorough knowledge of all that is just and honorable, without which no one can either be a good man or an able speaker." An advocate who creates the impression that she is a person of honesty and integrity will have a considerable advantage over one who is perceived otherwise.

More recently, social science research has confirmed that when a speaker is perceived as untrustworthy, his ability to persuade is significantly compromised regardless of the credibility of what he is saying. For example, research shows that if an audience is told that a speaker has ulterior selfish motives, his persuasive ability will be diminished because the audience will doubt that the speaker can be trusted. Similarly, lawyers, as hired advocates, will often be viewed suspiciously by those they seek to persuade. There are, however, steps that we can take to diminish this suspicion.

1. Avoid asserting any fact as true that the listener is unlikely to believe. If a listener thinks that you are speaking falsely about any fact, she will be less likely to believe other facts that you assert or inferences that you suggest should be drawn. Even if you are convinced of its truth, omit any statement that the listener is not likely to believe.

2. Minimize references to your role as a lawyer. Instead of referring to the party you represent as "my client," use the client's name. Every time you say "client," you remind the listener of your role as a hired gun on the client's behalf. And refrain from calling yourself a lawyer. The listener knows that you are a lawyer. Do not emphasize the point to your client's detriment.

3. Speak about truth and fairness. Demonstrate your con-

cern with truth and fairness by speaking directly about these values. Do not assume that the listener will recognize your allegiance to such fundamental values. In fact, opinion polls suggest the opposite. Speak expressly in terms of the truth of what happened and the fair and just resolution of the dispute. By speaking of truth and fairness as shared values, you reinforce in the listener's mind your own adherence to these values.

4. Admit unfavorable facts. A salesperson who is forthcoming about defects or weaknesses in his product enhances his personal credibility. Suppose that you are looking to buy a used car and the salesperson voluntarily reveals that the car in which you are interested was in an accident. By being candid in this respect, the salesperson has won your trust; you are more likely to believe him about other things. Similarly, when you disclose bad facts up front in the courtroom, you not only minimize the adverse effect of the bad facts, but you also make yourself appear more credible in the process.

5. Demonstrate your sense of fair play. If a prospective juror has a clear bias in your favor that would subject her to a challenge for cause, openly stipulate that she may be excused. Although it may appear to your disadvantage, by demonstrating your fairness that decision will strengthen your ability to persuade the remaining jurors. Whenever an opportunity is presented, show by your deeds that your words about fairness and your concern for justice are genuine.

6. Avoid taking extreme positions. In the heat of a legal battle, it is easy to argue your position in the strongest possible terms while belittling the opposing viewpoint. In the process, you will lose your credibility with the court. At least one federal judge has characterized such extremism in argument as a form of deceit and dishonesty that is far too prevalent. If you give the opposing position its due while arguing your own position in a moderate and reasonable light, you will strengthen your case and avoid damage to your own credibility.

7. Be fair and honest in all dealings. For purposes of persuasion, it is the *perception* of integrity that matters. Of course, it is possible to create that perception without a basis in fact. But you will run the risk of being exposed as a fraud if you simply strive to *appear* to be honest. And if you exercise license with the truth, you may be betrayed by evidence to the contrary or by your own body language. Judges may begin to view you with open skepticism. Juries will be suspect about what you say.

Great lawyers, like Abraham Lincoln and Daniel Webster, achieved prominence in part because what they said could be trusted. If you have been the victim of unscrupulous tactics by an SOB litigator, perhaps what we are suggesting may appear naïve or Pollyannaish. While there are, no doubt, some exceptions to the general rule, scholarly research and experience both indicate that the advocate with integrity will be more effective in the long run.

Knowledge

A second factor in ethos is knowledge—the perception that the speaker should be believed because she knows what she is talking about. Research confirms this commonsense principle in a variety of contexts. In one study, for example, a message about radioactivity was found to be much more effective when the speaker was identified as a professor of nuclear physics than when the speaker was identified as a student. Similarly, an article describing a cure for the common cold

was more likely to be believed if the reader was told that the article had appeared in the *New England Journal of Medicine* as opposed to *Life* magazine.

This research proves what Aristotle suggested more than 2000 years ago: the importance of knowledge as an element of ethos. A speaker who is perceived to be intelligent and authoritative will generally be more persuasive.

How does a lawyer create that perception? There are several ways.

1. Prepare. Prepare. Prepare. The most reliable way to appear knowledgeable is to be knowledgeable. You become knowledgeable about your case by thoroughly investigating and examining each fact, each principle of law, each witness, and each document. You also become knowledgeable by thinking about your case—carefully analyzing your and your opponent's strengths and weaknesses, considering how your opponent's strengths can be answered, figuring out how your weaknesses can be overcome.

Vincent Bugliosi, who successfully prosecuted Charles Manson, believes that thorough preparation means writing down the details of a case on a yellow pad—or, in a complex case, a dozen or more yellow pads. For most of us, there is no substitute for such intensive preparation. Being articulate and quick on your feet can help give the impression of knowledge and intelligence, but in the end it is all about preparation. As Louis Nizer put it: "All of the other qualities—improvisation, ebullience, resourceful thinking, felicity on your feet, and facility of expression—all of these are satellites, and they all revolve around the sun; and the sun is thorough preparation."

2. Organize logically. How you structure your argument will affect the impression you make on your listener. If you make your points haphazardly without considering their relationship to one another, the listener will question how well you understand the facts and the issues. Take the time to develop a coherent order. Present your points in a logical sequence. In the process of helping the listener to understand, you will enhance your ethos.

3. Explain the source of your facts. When relying on facts in your argument, describe how you came to learn them. For example, explain that you know the witness had been drinking because the witness admitted in a deposition that he drank a six-pack of beer shortly before the accident. By providing this kind of information, you demonstrate the basis for your knowledge of the case and show that you know what you are talking about.

4. Corroborate what you say. Another way to create the perception of knowledge is to corroborate what you say. For example, if you refer to contract language, show the listener the con-

tract. Or if you speak of a bent fender, display a photograph of the fender. Let the listener see that there is a substantial basis for what you say. This will lend credibility to all your statements, including those that are not easily corroborated.

5. Avoid logical fallacies. This one may seem obvious, but it is so important that it is worth addressing explicitly. A speaker risks serious damage to his ethos if his reasoning is faulty. Take care to avoid common logical fallacies like false cause—the assumption that because one event follows another, there is a causal relationship. You may have heard of this fallacy by its Latin name—*post hoc, ergo propter hoc*—meaning "after this, therefore because of this." Just because something happened after something else does not mean that the former caused the latter. Unless you have proof to back up your claim, do not suggest otherwise.

Scholars have identified and categorized many such fallacies, such as hasty generalization, circular reasoning, or begging the question. You can pick up a book on logic and learn them. But even if you do not know them by name, you can uncover logical fallacies with rigorous consideration of whether the stated conclusion is genuinely proven by the premises on which it is based. Perform that logical exercise for every important conclusion in your case.

6. Do not read your argument. As every trial advocacy course teaches, you should never read your argument but should rather speak extemporaneously with your listener. One of the reasons for this principle is that if you read, you forfeit a golden opportunity to show your listener that you really know what you are talking about. Even an uninformed person can read a speech, but only a person who knows and understands her topic can speak extemporaneously.

Being freed from text also allows you to have better eye contact with your listener. Eye contact is helpful in promoting other qualities of ethos including integrity, described above, and sincerity, discussed below.

Goodwill

Aristotle referred to it as "goodwill"; some modern scholars have called it "likability." Whatever its label, the third component of ethos is based upon a simple concept: If a listener feels goodwill toward or likes a speaker, the listener is more likely to accept the speaker's argument. In fact, a survey of 600 jurors found that a lawyer's likability was as important as her skill in trying the case.

How does a lawyer engender goodwill? In his best seller, *How to Win Friends and Influence People*, Dale Carnegie identified six ways to make people like you. Although these principles may not apply to every context in which a lawyer argues, they suggest ways to make judges and juries like you.

1. Become genuinely interested in other people.
2. Smile.
3. Remember that a person's name is to that person the sweetest and most important sound in any language.
4. Be a good listener. Encourage others to talk about themselves.
5. Talk in terms of the other person's interests.
6. Make the other person feel important and do it sincerely.

Especially in recent years, some lawyers have been more adept at engendering ill will than good. In fact, *The New York Times* observed that "one reason companies lose lawsuits is that they are represented by obnoxious counsel." To minimize the risk of appearing obnoxious, here are a few additional guidelines for legal adversaries who must deal with stresses beyond those of the ordinary Dale Carnegie reader.

1. Be courteous and civil at all times. No matter how provocative the behavior of your opponent, you win nothing by abandoning common courtesy. In fact, any display of bad manners by you will inure only to your detriment. For example, if your adversary makes an ad hominem attack on you, it is natural to want to respond angrily in kind. Do not do it. If you stoop to your opponent's level, you will surely harm your own ethos as you try to inflict damage on your adversary. Refuse to be drawn into such exchanges. If you address the attack at all—and often it is better just to ignore it—point out only that a personal attack is usually the last refuge of an advocate when the facts and the law are against him. Make your retort briefly and without acrimony. Then return to the substance of your argument.

The next time you are in a hotly disputed case and are tempted to become hostile, consider this advice from Abraham Lincoln:

It is an old and true maxim that "a drop of honey catches

more flies than a gallon of gall." So with men, if you would win a man to your cause, first convince him that you are his sincere friend. Therein is a drop of honey that catches his heart; which, say what you will, is the great high road to his reason.

2. Never talk down to your audience. Some lawyers try to help lay jurors understand complex legal concepts by talking down to them as if they were simpletons. Although it is critical that your argument be clear, you cannot allow your presentation to sound like a schoolteacher talking to third graders. If the jurors get the impression that you do not respect their intelligence, they will not like you. They may not understand that intricate principle you were trying to explain, but they will understand that they do not want your side to win. And the latter is more important.

3. Establish rapport whenever possible. When you are lead trial counsel on a case outside your home territory, local counsel may ask to handle voir dire. At first blush, the idea has some appeal. After all, local counsel is more accustomed to dealing with the sort of folks who are on your jury panel. And if local counsel is an experienced trial lawyer, she may do a fine job in *voir dire*. Say no anyway. By letting local counsel question the jurors, you will have lost a crucial opportunity to establish your own rapport with the jurors. In fact, the best opportunity to display your likability and to create goodwill with individual jurors at trial is usually by conducting voir dire yourself.

Trial is not the only place where being likable can produce favorable results. In a negotiation setting, it can also be to your advantage to develop goodwill through friendly conversation. In a study of business negotiators, Neil Rackham found that the best negotiators consistently engaged in friendly small talk to establish rapport before knuckling down to negotiating.

Sincerity

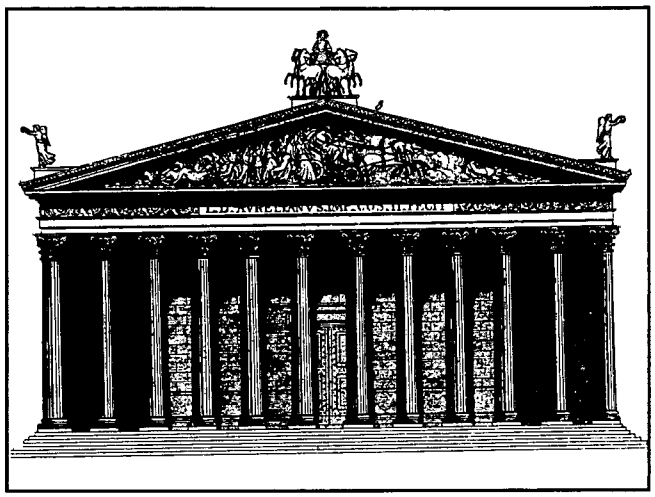
An advocate must speak with sincerity and conviction to be credible. As Cicero explained, "Unless there be, beneath the surface, matter understood and felt by the speaker, oratory becomes an empty and almost puerile flow of words." Great advocates come in many different shapes and styles, but one constant is their ability to convey to the audience their personal belief in what they are saying. Edward Bennett Williams called this the "affidavit quality of a lawyer." Whatever you call it, you can increase your effectiveness by following a few basic principles.

1. Be yourself. Do not try to imitate anyone else's style. If you do, your body language will reveal you as a phony.

2. Develop a theory of the case that you can believe in. If you take a case to trial, find a theory that you can sincerely espouse. If you cannot find such a theory, settle.

3. Speak like you mean it. Show that you are personally convinced of the truth and correctness of your cause. Marshall Hall, a renowned English barrister, tells the story of hearing a jury speech that was "perfect in composition and logic, but it left one cold." After rendering a verdict adverse to the speaker, one of jurors was asked why he was not convinced by the logical speech. "Oh," he said, "the speech was right enough, but he didn't believe a word of it himself; he had his tongue in his cheek all the time."

The key to speaking like you mean it is to confine your argument to statements that you believe. As Ralph Waldo



Emerson observed, "[T]hat which we do not believe, we cannot adequately say."

Identification

Research has confirmed that listeners are more easily persuaded by those they perceive as similar to themselves. Kenneth Burke, perhaps the pre-eminent writer on rhetoric in this century, has observed, "You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his." Put another way, you persuade more effectively when you show yourself to be a fellow member of the listener's tribe.

Psychologists have found that we trust and like people who are like ourselves. But long before the psychologists studied this phenomenon, it was exploited by Sir James Scarlett, a great figure at the English bar in the nineteenth century. He is said to have gained his victories because there were "12 Scarletts in the jury box. He blended his mind with the mind of the jury. Their thoughts appeared to be his."

How do you turn a jury of Smiths and Browns into Scarletts? There are several techniques.

1. Discuss areas of common experience. In the recent Oklahoma City bombing trial of Terry Nichols, defense counsel Michael Tigar commiserated with one prospective juror about their common ordeal of raising teenagers. With a former French exchange student, Tigar talked about France; with a farmer, he talked about farming; with a poet, he talked about poetry. He made connections with these jurors that lasted throughout the trial—connections that undoubtedly contributed to the jury foreperson's opinion that "Michael Tigar is one heck of an attorney." Not incidentally, he also helped to avoid the death penalty for his client.

In the rape trial of Mike Tyson, prosecutor Greg Garrison conversed with one juror about the ice cream at a local soda bar that they both frequented. Though logically irrelevant to the issues to be tried, discussing such matters of common experience can help the listener identify with the lawyer and become more receptive to his arguments.

2. Begin with points of agreement. At the outset of an argument, discuss facts, values, and attitudes with which the listeners are sure to agree. Try to match the listeners' belief systems. If the listeners think that you share similar

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involving the government. Why should tort claims be any different?

Whatever the historical validity of the charge that juries do not represent the community at large, today that charge has lost most, if not all, of its force. Years ago, jury pools were drawn from a narrow and elite segment of society, and those who chose not to serve were excused on the flimsiest of excuses. How different things are today, when even federal judges are not exempt from service. I was called for service myself but was excused. A distinguished federal judge in Chicago actually served on a jury, as have many lawyers. Undoubtedly, they all profited enormously from the experience. Undoubtedly, the system profited as well.

The distinguished economist Lester Thurow recently published an article in *The Atlantic Monthly* comparing economic and entrepreneurial practices in the United States with those in other countries. His explanation of our economic success is that, unlike other nations, we have always encouraged individual innovation and invention backed by a strong legal system. In Russia, genius and creativity flourish but then wither because there is no strong legal system to protect the rights of entrepreneurs and businesses. In nations like Japan, strong legal systems protect individual rights, but there is little room for an individual to make an impact. Only the United States has the right combination of innovation and order to advance and use knowledge. There must be a balance; neither too much order nor too much innovation will work.

A Balanced System

Thurow's explanation of our success in the financial world is only roughly parallel to the value of our judicial system, but I believe that we can learn a great deal from a comparison between them. Our judicial system balances the order of the court with the individuality and innovation of the jurors. Like our financial system, it is a reflection of our society; in a sense, it is democracy in action. Our courts reflect who we are. For that reason, we must always strive for as much public participation in the court system as possible.

If I ever had doubts about the wisdom of those who drafted the Seventh Amendment, they vanished long ago, and my views about their prescience have been amply confirmed by my experience at the bar and on the bench. Preservation of the right to trial by jury is, in my view, essential to the deep and abiding conviction that regardless of social status or education, there is an institution of government to which even the most disadvantaged of our people can look for honest and empathic redress.

At a time when the public is becoming more cynical of the legislative and executive branches because of blatant political posturing, ineffectiveness, and personal and financial scandals, courts and juries have generally maintained a positive reputation with the public. That reputation must not be allowed to wane. Protecting jury trials—and the participation of all Americans in the legal process—is a key step toward attaining that goal.

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beliefs on certain salient matters, you can more easily bridge differences on other matters. Successful persuaders make it a routine practice to start with areas of agreement before moving to areas of disagreement.

3. Investigate the listener. The more you know about the listener, the more areas of common ground you are likely to find and be able to use. Before an argument, search for information about the listener—judge, jury, or opposing counsel. Try to find as many things in common as you can. Focus not only on similar jobs, places, and the like, but also on psychological elements such as cognitive attitudes and belief systems.

4. Listen and watch. During the argument, listen to what the decision maker says. Watch how the decision maker responds to what is being said. Look for clues about what the decisionmaker is thinking. Often, your judge's or jurors' body language will provide information you can use to build greater identification and rapport. Pay attention and adapt your argument accordingly.

Integrity, knowledge, likability, sincerity, and identification are, we believe, the most significant determinants of a speaker's ethos. But there are a few other factors that also play a contributory role, albeit a lesser one.

Attractiveness. Whether a speaker is attractive can affect his or her ethos. Research suggests that as a general rule, the more attractive the speaker, the greater the ethos. Perhaps that is why good-looking politicians tend to have an advantage over their more homely challengers. It is possible, however, to be too beautiful or too handsome. The facial features of a fashion model can negatively affect other ethos factors such as perception of intelligence, likability, and identification.

Of course, we can do little about our beauty or lack thereof. But we can practice good grooming. Whether blessed with good looks or not, try to look your best whenever you are engaged in an argument. How you dress may not be the most important factor in your ethos, but it can play a role and tip the balance.

Dynamism. Generally, the more energy and enthusiasm that an advocate shows, the more likely she is to get a favorable response. Some advocates think that in order to appear lawyerly, arguments must be somber and dispassionate. That is one reason why lawyers are often thought of as boring and dull. Of course, it is important to appear serious and intelligent, but that does not mean that you must speak in a monotone while maintaining rigid posture. Rigor mortis is for dead arguments. Be dynamic and enthusiastic about what you say.

The key to dynamism is emotion. If you care about what you are saying, do not be afraid to show it. Speak with emphasis and conviction. By doing so, you not only help keep the listener's attention but enhance your ethos in the process.

In preparing an argument, there are always strategic and tactical decisions that will influence your ethos with the listener. Think about those decisions—and their potential effect on your ethos—the next time you try a case or argue a motion or an appeal. Consider how a certain argument might affect the listener's perception of your integrity, of your knowledge, of your sincerity. Ponder whether your clever allusions will make the jury like you or identify with you. What Aristotle observed long ago, contemporary research has confirmed: Ethos could make the difference between whether your argument succeeds or fails.

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Oral Argument: The Continuing Conversation

by Talbot D'Alemberte

The best advice I ever got about oral argument was from Justice Ben Overton of the Florida Supreme Court. "Oral argument is the time when all the judges have read the brief and the record and are prepared to decide the case," he said. "You should think of your argument as the beginning of the judicial conference, and you are privileged to be there."

Oral argument is a conversation you have with the court at the beginning of its deliberations on your case. More than that, it is part of a continuing conversation that the court has with lawyers about the development of the law.

As you begin to think about your approach to oral argument, imagine that the judges on the bench are, instead, seated around a table. You have been invited to their conference to talk about your case and to answer any questions they may have. Your input should be contained and conversational. You would not read your remarks at such a conference, and you should not deliver a prepared, formal speech in an oral argument. Seated at their conference table, you would simply talk to the others, maintaining good eye contact and watching for body language that furnishes clues as to how the others are reacting to your remarks. You would recognize that you have a limited amount of time to participate in the conference, and you would want to get to the questions that are on the minds of the judges. You would try to participate in the conversation in a way that leaves the judges thinking well of your client's case.

So should it be with oral argument. Elegant speeches and rhetorical flourishes should give way to direct, persuasive conversation. Convincing the others at your closed conference should be your sole focus; looking polished before a courtroom full of observers should not even cross your mind.

You can enhance your level of preparation—especially if you have not appeared before the court or if there is a new panel member whom you do not know—if you take time to go to court before your argument and listen to arguments in other cases. Come time for your argument, you must be comfortable and familiar enough with both the surroundings and the judges that you will feel natural in the conversation you will have with the bench.

Remember that appellate courts frequently hear from very good lawyers, and the expectations for lawyer performance are, therefore, very high. Good appellate lawyers do not attempt histrionic arguments. They do not berate their opponents. They do not yield to the temptation to attack the trial judge for the egregious errors inflicted on the client. The apocryphal opening—"Judge Cannon was the judge below, but there are other reasons for reversal"—may release some emotion, but it is not wise advocacy. Stated another way, there may be some trial courts where "Rambo" litigation tactics are effective, but I do not know of any appellate forums where those tactics are useful or appropriate. Instead, the effective appellate advocate approaches argument as a calm, civilized conversation among students of the law in search of answers and solutions.

Civility is a fundamental aspect of oral argument, and any departure from that rule should be very carefully considered. Seldom are appellate judges nasty or threatening to lawyers, and lawyers should remember that civility toward their opposing counsel is likewise expected. Experienced judges frequently say that more cases are lost at oral argument than are won, so bear in mind the ancient rule of the physician: *First, do no harm.* Certainly, there can be some exchange of differences, but appellate lawyers should learn to be unfailingly courteous—even in pointing out errors that the other side has made. And when opposing attorneys concede points, it is important to praise their candor.

The appellate lawyer is privileged to practice in a very civil setting. Indeed, there are certain traditions of civility in virtually all appellate courts: the opening of the court with all in attendance standing and the opening line "May it please the Court" are two good examples. And some courts take extra steps to create a climate of civility. One federal court leaves the bench to shake the hands of all lawyers at the conclusion of each argument. The Florida Supreme Court, like many others, has a lawyers' lounge where the justices come to speak to the lawyers about half an hour before oral argument.

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In keeping with the decorum of the appellate court, you should be particularly careful to observe its preferences. The United States Supreme Court is particularly sensitive on this issue. There, the practice is to refer to each member of the court as "Justice." A story is told about a time that the Chief Justice admonished a lawyer who had failed to follow this custom and who then became extremely flustered. But, even then, civility prevailed. Justice John Paul Stevens interrupted and said, "Counsel, we understand, and please do not be upset. Actually, the Constitution makes the same mistake that you made."

There is no reason for an appellate advocate to be unfamiliar with the rules and preferences in any appellate court. Know the practice of the court and follow it.

One way to get the appellate panel to understand the importance of the substance of your case is to develop a theme. That theme should become the overall topic of your conversation with the court—a refrain that you can repeatedly relate back to the facts and law of your client's case.

United States Supreme Court Justice Anthony Kennedy once observed that the best oral argument he ever heard involved the exclusion of a venireman on the basis of race. Rather than talking about harm to his client, the lawyer focused on the excluded African-American juror, a citizen who eagerly awaited this first opportunity to serve on a jury as one aspect of his full citizenship. The description of the frustration and disappointment of this citizen was a powerful policy argument, and the attorney used it as his theme. It captured the Court's attention.

In developing a theme, remember that the judges themselves face an incredible case load. Giving the judges a thematic context in which your case can be discussed can be a very valuable aid, and it can make your client's case stand out in the court's collective mind.

Of course, your theme needs to resonate with the principles and arguments developed in the appellate briefs, but oral argument will allow you more license to characterize your case. Therefore, you should develop the organizing theme in your brief, but you should emphasize it even more as the unifying thread in oral argument. In more mundane cases, it may be difficult to develop a theme for oral argument. But try to do so anyway.

To prepare for oral argument, most lawyers will read the judges' opinions in similar cases. When you do this, mark language in the precedents that is particularly helpful to your case. Have that language handy, so that when the judge asking you a question is in an area where he has previously written, you can quote his own words in your response.

I find it equally useful to research cases the judges handled as lawyers. Quite frequently, you will find that a member of the appellate court has had a case in at least a general area of the law that you are arguing. Some reference to the earlier case, where appropriate, will remind the judge of a principle of law or a circumstance that the judge knew intimately as an advocate. Placing your client's position in a context familiar to the judge enhances the chances for success.

Pre-Argument Homework

Of course, before you step to the podium, you should have read all the cases that address the issues in your case. But make sure that your efforts are complete: Check with the clerk of the court and look for any slipsheets that have been issued by the court in the day or two prior to your appearance. Quite often, the slipsheets will provide you with useful authority, of particular importance because the case will be clear in the memory of the judges. Indeed, with electronic research now available, recent relevant cases—no matter how recent—should never escape the advocate's notice.

You should also be careful to check the court docket for the day and week of your oral argument, and you should look particularly for arguments in scheduled cases that touch your subject area. If a court is docketing similar cases close together, it is a signal that the court may be struggling for a resolution of principles of law that can impact your case. Learn the facts and arguments in those related cases. Indeed, you may be called on to distinguish one or more of them.

The transcripts or audio recordings many courts make of oral arguments can also help your preparation for oral argument. Some courts, such as the Florida Supreme Court, allow videotaped arguments. Where those records of previous oral arguments are available, it is extremely important to watch or listen to all the arguments that have any bearing on the issues you are arguing.

Since 1985, the Florida State University College of Law has been videotaping and archiving oral arguments before the Florida Supreme Court. When I argue in that court, I search the archives and frequently find several oral arguments that are quite pertinent to my case. Reviewing those videotapes has allowed me to anticipate questions that the court will ask.

Indeed, in watching the tapes, I have often been struck by the fact that oral argument is part of the continuing conversation of courts as they strive to develop public policy. Often, judges will ask questions in almost the same words as questions asked in earlier cases. But that should not be surprising. Judges are struggling to develop the law. Their struggle with an issue probably started when they first began to study the law and to think about its policy implications. Questions

from the bench, therefore, can reflect a judge's career-long search for the correct answer on an issue.

You can begin to appreciate the continuity of the bench's and bar's conversations about the law not only by reading and analyzing the case law, but also by learning, through any means available, the nature of the earlier dialogues the court has had with lawyers. If transcripts or recordings are not available, talk to lawyers who have handled similar cases. To be sure, you must be prepared on the facts and law of your case; but recognize also that your oral argument is part of an ongoing discussion that started long before and will continue long after your client's case is decided.

Another helpful development in judicial administration now adopted by most appellate courts is the "bench memo." Frequently, the judge to whom the case has been preliminarily assigned will be asked to prepare a memo for all other members of the court. This memo summarizes the basic facts and puts forth the issues—sometimes in only one or two paragraphs.

It is not always possible to get the bench memo, but there is a practice of modern courts that may allow you to see some part of it. Some courts release to members of the press a summary of the cases to be argued, and that summary is frequently taken from the bench memo. This summary may give you an idea about how the case is seen by at least one member of the court or her staff. Read any available press summaries. Needless to say, if you find that they are in error, address and clarify that error in your oral argument.

Moot courts, both formal and informal, can be extremely valuable tools in preparing for oral argument. I have sought multiple formal moot court experiences and have benefitted tremendously from them. Select people who are thoughtful and knowledgeable about the relevant area of the law as members of your moot court panel. Law professors are often extremely skilled in analysis and in developing hypotheticals. They can be of immense help in the preparation of your argument.

In scheduling these moot court exercises, go for the "full Monty"—stage it in a courtroom, if possible. At the very least, seat your panel and stand before them. It will feel silly at first, but this will help you overcome your nervousness when you stand before the real court.

Direct exchanges with opposing counsel are not appropriate during argument. I have found it very useful, however, to end an oral argument by posing a rhetorical question to my opponent. The question is not actually addressed to counsel but is made as a suggestion to the court. It highlights some flaw in the reasoning of your opponent, or some gap in the record, that you want to raise just before you sit down so that the court will have your point uppermost in its mind.

In his book on federal appeals, one of the great advocates of our day, Michael Tigar, offers this example of laying out a question for your opponent to answer at argument:

> The government claims that all it told the district judge during the secret hearing was information about the informer's identity—information that can properly be communicated ex parte. The problem is that they made the same claim in the court below and the district judge found that this is simply not the fact. Now they don't answer that finding in their brief. Maybe they have an answer today, and if so we look forward to hearing it.

Michael E. Tigar, *Federal Appeals: Jurisdiction and Practice* at 281 (Shepard's McGraw-Hill 1987).

This technique can work well whether you are appellant or appellee. Indeed, it can frequently be very powerful when, as appellee, you conclude your oral argument and put a very tough question to the appellant who must decide whether to address that question in rebuttal. Before making such a challenge, however, you need to think through all the possible responses your opponent may offer. A powerful response to your rhetorical question might well tip the balance against you.

You also must be prepared to field tough questions yourself. In preparing for oral argument, I have found it useful to develop what I call a "hard questions" list, which I begin compiling while reading the record and the legal authorities. I try to think of the weaknesses or perceived weaknesses in my case and the different ways that the court might ask questions to probe those weaknesses.

One of the best places to start is with the questions you had about the case when you first began to work on it. Judges who are facing these issues for the first time may have similar questions.

Questions about policy issues are frequently asked and difficult to answer. "Counselor, if we rule for you in this case, what will happen in a future case where . . . ?" Of course, lawyers begin to deal with such hypotheticals from the time that they enter law school. Indeed, I know of no other aspect of law school education that is so pertinent to the actual practice of law. When you begin to think about the hard questions—especially on policy issues—recall how your best law professor would take the facts and vary them slightly to question an applicable rule of law. Considering such hypotheticals will teach you a valuable lesson: You are better off submitting the case to the court on a very narrow rule that you can justify in all conceivable hypotheticals, rather than seeking some sweeping rule that might usher in a broad range of alternatives.

Knowing the law and anticipating questions about legal issues is only half of your preparation for oral argument; you must also be conversant about the essential facts of your client's case. For an appellate advocate, this means knowing every detail that might interest a judge. It also means having at your fingertips not only the significant case law, but also the vital portions of the record.

Judges will frequently introduce oral argument by telling all counsel that the court is familiar with the facts of the case, and there are times when judges will place particular emphasis on this point. Nonetheless, it is impossible to argue almost any case without some reference to the facts, and a mastery of the important facts is vital to every argument. So, do not take the presiding judge literally when he recites the standard introduction, "Counsel, the court has carefully read all briefs and is familiar with the facts and issues in the case, and we ask that you limit your oral argument to anything new or particularly important." Do not neglect to state the core facts.

This does not mean that you should recite the facts of your case by reading them from your brief. Indeed, that would be a bad mistake and would disrupt the conversational atmosphere you should strive to establish. Instead, introduce the statement of facts by saying something like, "As this court will remember, this case involves . . ." and then begin the conversation by summarizing the more important facts.

Sometimes, judges will be quite insistent that they do not want the facts stated. One such example was the famous argument in *Cohen v. California*, 403 U.S. 15 (1971). In that case, Mel Nimmer defended a Vietnam War-era protester who, in a California court, had worn a jacket emblazoned with the words "Fuck the Draft." In later describing that argument, Nimmer said that he thought it was very important that these words actually be said in the hallowed halls of the United States Supreme Court to demonstrate that the profanity would not crumble the walls of the reverent institution.

When Nimmer stood to argue the case, Chief Justice Warren Burger made it clear that he did not want to hear that phrase uttered in his presence. The Chief Justice admonished—with great emphasis—that the Court was fully familiar with the facts of the case and that it was absolutely not necessary to state them. Indeed, he insisted that Nimmer not recite the facts; the Court merely wanted to discuss the legal issues that these facts raised, the Chief Justice said. Nimmer then very graciously—and cleverly—began his argument by acknowledging and "honoring" the Chief Justice's wishes: "Mr. Chief Justice, members of the Court, may it please the Court. I will indeed adhere to your admonition. This case involves the simple issue of whether or not a citizen may be punished for wearing an article of clothing in a courtroom with the words 'Fuck the Draft.'" No lightning struck, no walls fell, no columns toppled. As every law student knows, the argument was successful.

Even if the question is not a friendly one, welcome it with relish.

Of course, you will not always be in total control of how you conduct your argument. There was a time when judges simply listened to speeches at oral argument, but for most courts that time has long passed. The modern norm is a "hot" bench—one where judges come to the oral argument armed with a great number of questions. The difficulty in preparing for an oral argument before a hot bench is that you do not know whether your case will be one that engages the judges and brings forth a number of questions, or whether you will be left to give your prepared presentation. You must be ready either way.

Delivery

Good appellate lawyers intentionally slow down the pace of their remarks. A pause is not a bad thing and can be used very effectively for emphasis. It can also invite questions—an important part of any conversation. During your pauses, scan the bench. Be alert to any body language that suggests that a judge wants to put a question to you. Every good conversationalist pays attention to the other participants, and you should be sensitive to the judges' interest in raising a point for discussion.

Even if the question is not a friendly one, welcome it with relish. It is far better to have this question raised in oral argument where you can respond to it, than left to the judge to answer on her own. When your argument ends and the court adjourns to its private conference room, you want the judges to take with them your answer to every question they might have.

Listen carefully to the court's questions and respond with candor. The most harmful thing you can do is to shade the facts, misinterpret the law, or deliver exaggerated rhetoric or hyperbole. Appellate courts expect candor. Indeed, more than any other tribunal, appellate courts emphasize the ideal of lawyers as "officers of the court."

But do not concede arguments that you need not concede, and do not fall victim to questions that lead logically to the slippery slope of defeat. Be especially careful in your answers if the question attempts to take you in the direction of some grand policy or sweeping principle. These are the most dangerous inquiries: Remember the wisdom of presenting your case on the narrowest principle that allows your client to prevail. If the court wants to use your case to announce some new broad rule of law, it does not need your argument to do so. Unless you must, never insist on a great change to justify a decision for your client.

Sometimes, you will face a judge who is hostile to your case and whose lengthy statements take up all your time. The judge who attempts to dominate a lawyer at oral argument in this fashion is not likely to be popular with the other members of the court. Where you sense clear hostility, and where the body language of other judges suggests impatience, there is some merit in dealing with it quite directly. It will take a great deal of courage, but you might turn to the judge and say, "Your honor, I do not think that I am going to convince you on these points, but I hope to convince your colleagues."

For me, the most difficult problem in oral argument is dealing with the judge who asks a question that is far afield from anything relating to the case. It is very difficult to answer such a question, and yet it must be answered. When faced with that type of question, restate the question: "I believe that you are asking me . . ." and then give the best answer possible. Sometimes, a candid "I do not know" is the

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Oral Argument

(Continued from page 15)

best answer to such a question, followed by a segue back to the main issues in the case.

Another difficult problem is the very intense, rapid-fire questioning in which one judge interrupts your answer to another judge's question by asking a second, sometimes unrelated question. Responding requires considerable diplomacy. Try to fix both questions in your mind, and make sure that they are answered in sequence.

When the court asks questions, answer them immediately and directly. It is almost never good strategy to put off the answer in any way at all. When a lawyer is in the unpleasant position of sharing oral argument (a circumstance to be avoided if possible), this is particularly precarious. Nonetheless, some answer should be given when the question is asked, even if the lawyer must respond, "Your honor, my co-counsel will expand on this point, but our answer to your question is . . ."

By all means, stay away from absolute statements unless you know you are on solid ground. The argument that includes the words "always" and "never" will invite the judges or their law clerks to search for examples contradicting those absolutes. When asked about the scope of your argument, limit it to the narrowest possible point unless there is some special circumstance that requires a very broad submission. Questions about absolute values can be very difficult to answer and may substantially undermine a lawyer's argument.

Never be intimidated. Frequently, judges will ask "Of course, counselor you will concede, won't you, that . . .?" Be very careful about answering this kind of question. It is hardly ever a friendly one. It is far better to say bravely that you will not concede an issue than to find out later that your concession, hastily made at oral argument, was the reason you lost. On the other hand, where a concession must be made, make it clearly and forthrightly. If you have anticipated the question—as you should have—you will probably be able to argue that the concession is not determinative of the case and to explain why.

Use exhibits only if they are central to your case and will be useful to the court. Some lawyers, accustomed to working before juries, will use exhibits that are displayed so far from the bench that they simply cannot be seen by the judges. Not only is that ineffective and frustrating for the bench, it is distracting during your oral argument as well.

And using exhibits during oral argument can also be embarrassing. Once, while arguing for a rules change that would allow cameras in Florida courts (*In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979)), I brought to the Florida Supreme Court, at its request, a videotape of certain trial court proceedings. I had carefully checked that the videotape machine worked and had verified that the picture could be seen from the bench. I failed to check, however, whether the copy of the videotape that I brought with me was a complete version. In the middle of my argument I learned, to my embarrassment, that some enterprising technician had copied a thirty-minute video onto a ten-minute tape. The lesson: If you are going to use exhibits, check them thoroughly.

Rebuttal argument—when available—is important. If you are the appellant in a court that permits rebuttal, make certain that you save time for it. I have found it very useful to go to the clerk, the marshall, or whoever is keeping time for the court, and to make a clear request for rebuttal time. That also gives me a chance to make certain that I understand what the lights on the podium or other signals indicate. If you do not plan accordingly, you may find that the red light that comes on during your principal argument has actually signaled the expiration of your entire time, and that you have lost your opportunity for rebuttal.

No other legal practice experience is quite as much like law school as an appellate oral argument. Indeed, you begin preparing for oral argument when you stand up to answer the first question asked of you in law school. But your role in the appellate courtroom is far different from what it was in the classroom. In the courtroom, it is up to you to "teach" your panel by answering their questions and engaging them in your conversation.

When you stand before the court, well-prepared and confident, you will probably feel intellectually challenged and energized. And you should. After all, that is what good conversation is all about. And oral argument is nothing more than that: lawyers and judges discussing the way legal principles are applied to the facts of your case—lawyers and judges having a conversation about the law.

Arguing for Changes

(Continued from page 41)

North America, Inc. v. Gore, 517 U.S. 559 (1996).

- **Be sure to check old case law.** Although Justice Holmes believed that the value of older decisions was "mainly historical," "The Path of the Law," 10 *Harv. L. Rev.* at 458, that is not always true. Sometimes, there are seemingly ancient cases that have been forgotten but are still good law. A court is more likely to agree with your position if it is consistent with prior precedent, even if that precedent was decided in the nineteenth century. And despite their respective vintages, a century-old decision of a supreme court stands on a higher judicial plain than yesterday's pronouncements of an intermediate appellate court in the same jurisdiction. Indeed, a long-established

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