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Ethos, Pathos & Legal Audience

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I. Introduction

When preparing their arguments, modern lawyers sometimes fail to consider how their own credibility or the emotional aspects of their case affects a judge or jury. Instead, they generally focus most of their attention on the substantive and logical integrity of their arguments. They are far more interested in logical and organizational coherence than in the emotional climate within which they argue or in their own credibility while arguing a case. By focusing as they do on logic and organization, they often ignore the importance of two especially effective nonrational means of persuading judges and juries to accept their arguments: emotional appeals based on the facts of the case or the decisionmaker's personality and their own personal appeal or credibility.

Although treatises on appellate advocacy and other general advocacy treatises sometimes discuss the part that emotion and lawyer credibility play in persuasive discourse,[1] the fullest treatment of the topic appears in trial advocacy treatises. Trial advocacy treatises and manuals usually discuss how emotion and lawyer credibility play an important part in persuading courts and juries to the lawyer's point of view.[2] And, in their periodical literature and journals, trial lawyers frequently remind one another, formally and informally, that legal arguments are not won solely on the basis of logical consistency and substantive merits and that

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1. Appellate advocacy treatises focus on these topics with a *judicial* audience in mind, whereas trial advocacy texts focus on both judicial and jury audiences. Appellate advocacy texts deal with the subject of lawyer credibility by focusing on the advocate's command of substantive matters or by emphasizing the advocate's "professionalism" and personal "style." Although they sometimes discuss emotion in connection with the statement of the case, the subject is not treated in much detail.

For a representative sampling of appellate advocacy books treating these matters see, BOARD OF STUDENT ADVISERS, HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY 140 (4th ed. 1985); CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 370 (1990); WESLEY GILMER, JR., LEGAL RESEARCH, WRITING AND ADVOCACY 258 (1987); KAREN K. PORTER ET AL., INTRODUCTION TO LEGAL WRITING AND ORAL ADVOACY 175 (1989); EDWARD D. RE, BRIEF WRITING AND ORAL ARGUMENT 167 (5th ed. 1983); HELENE A. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 281 (2nd ed. 1991); and UCLA MOOT COURT HONORS PROGRAM, HANDBOOK OF APPELLATE ADVOCACY 36 (1993).

2. "[C]redibility is the only thing a lawyer has to sell." THOMAS MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 46, 48 (3rd ed. 1992).

intangible factors often affect the outcome. The trial bar clearly understands that legal arguments must be tailored to suit various audiences and that this skill must be learned and practiced. Their interest in audience is reflected in everything from elaborate jury selection techniques and discussions regarding the proper way to manage exhibits to anecdotal exchanges of information about how judges or juries respond to particular arguments and lawyers. By focusing as they do on the importance of emotion and lawyer credibility, modern trial lawyers, perhaps instinctively, are relying on time-honored persuasive techniques that Greek and Roman philosophers, lawyers, and rhetoricians described, analyzed, and used more than 2,000 years ago.

A. Classical Rhetoric

Aristotle's *Rhetoric* is the earliest authoritative analysis of persuasive discourse and argumentative techniques and is the source of most Roman treatises on the topic.[3] The Roman treatises, principally by Cicero and Quintilian, were written for inexperienced advocates or for anyone who might sometime argue a case in court.[4] The treatises were not written solely for lawyers or students but were intended for use by all members of the educated classes.[5] In effect, they were practice manuals replete with examples drawn from famous cases. They described the analytical methodology and practice of experienced lawyers and, for the most part, were descriptive, rather than prescriptive, in force. With varying degrees of success, these treatises systematized legal analysis and suggested ways of effectively organizing and presenting commonplace arguments.

Roman rhetoricians and lawyers like Cicero and Quintilian, relying on Aristotle's rhetorical analyses, divided persuasive discourse, and legal arguments in particular, into three categories: logical argument (*logos*), emotional argument (*pathos*), and ethical appeal or credibility (*ethos*).[6]

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3. In this Article, the term "rhetoric" sometimes refers to a rhetorical treatise written by a Greek or Roman author. Rhetoric is also used in the Aristotelian sense of being the "faculty [power] of discovering in the particular case what are the available means of persuasion." ARISTOTLE, THE RHETORIC OF ARISTOTLE 7 (Lane Cooper trans., 1932).

4. In addition to serving these functions, classical rhetorical treatises also described a comprehensive educational curriculum and provided instruction on public speaking for ceremonial and political occasions.

5. For a fuller description of the typical treatise-user see MARIUS FABIUS QUINTILIAN, INSTITUTIO ORATORIA 5-19 (H.E. Butler trans., 1954); Susan Miller, *Classical Practice and Contemporary Basics*, *in* THE RHETORICAL TRADITION AND MODERN WRITING 46 (James J. Murphy ed., 1982); Donovan J. Ochs, *Cicero's Rhetorical Theory*, *in* A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 96 (James J. Murphy ed., 1983).

6. Classical rhetoricians created these divisions for purposes of analysis and discussion, but did not consider *logos*, *pathos*, and *ethos* as completely separable from one another. Each part is

Both Quintilian and Cicero extended and amplified points Aristotle had made in his *Rhetoric*[7] regarding the effect that emotion and lawyer credibility have on a judge or jury's receptivity to lawyers' arguments.

What distinguishes the Greek and Roman analyses of legal discourse from modern analyses is their consistent focus on audience, the depth and detail of their analysis, and their candid discussions of how to manipulate judges and juries. Based on their close observations of human nature and on their own considerable experience in arguing cases, Greco-Roman rhetoricians composed comprehensive treatises which analyzed persuasive discourse in great detail. Because they thought emotional arguments and lawyer credibility were critically important to persuading legal audiences, they devoted fully as much attention to those aspects of persuasive discourse as they did to logical, definitional, or organizational aspects. They were especially interested in the interplay between various types of argument and the manner in which advocates make them and were acutely conscious that good legal arguments can fail because advocates disregard the nonrational factors which affect persuasive discourse. A comparison of Greco-Roman and modern analyses of the part *ethos* and *pathos* play in legal argument reveals not only that the classical materials are more comprehensive in scope but also that they are as relevant today as they were 2,000 years ago.

Classical rhetoricians, beginning with Aristotle, constantly remind their readers of the importance of remembering their audience. In his *Rhetoric*, Aristotle observes that,

> the individual man is as truly a judge or decider as an entire audience; so, in the wider sense, whoever it is you have to persuade is "judge . . . ." [Y]ou compose your speech for an audience, and the audience is the "judge." As a rule . . . the term "judge" means simply and solely one of the persons who decide the issue in the disputes of civil life, where, as in law-suits, there is a question of fact to be settled, or, as in deliberations of State, a question of policy.[8]

However, although Aristotle emphasizes the importance of audience he does not always hold a very high opinion of their legal acumen, analytical

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connected to and helps define the others. ARISTOTLE, *supra* note 3, at 8.

"There are . . . three aims which the orator must always have in view; he must instruct, move, and charm his hearers." QUINTILIAN, *supra* note 5, at 397 (H.E. BUTLER trans., 1954). Marius Fabius Quintilian (circa 35-95 A.D.) was a Roman teacher of public speaking and rhetoric whose major rhetorical work is INSTITUTIO ORATORIA. Marcus Tullius Cicero (circa 106-45 B.C.) was a Roman statesman, lawyer, and teacher whose major works on rhetoric include DE ORATORE (E.W. Sutton trans., 1942) BRUTUS, and ORATORE.

7. ARISTOTLE, *supra* note 3.

8. *Id.* at 141.

abilities, or fairness. In fact, much of his advice regarding persuasive discourse is based on the assumption that legal audiences are insufficiently educated and trained and overly susceptible to emotional arguments and charming advocates.[9]

B. Greco-Roman Audiences

The Roman rhetoricians shared Aristotle's general skepticism regarding the capabilities of judges and juries to decide a case properly. In large part, their skepticism arose from the fact that in both Greek and Roman systems, the judges who usually heard routine civil cases were not professional jurists but regular citizens, frequently drawn from the senatorial class, who heard only a few cases in their entire lifetimes.[10] Under Roman law, for example,

> [t]he trial of an action under the *legis actio* procedure . . . was characterized by a remarkable division of the proceedings into two states, the first of which took place before the magistrate, under whose supervision all the preliminaries were arranged, while the second in which the issue was actually decided, was held before a *iudex* (judge), who was neither a magistrate nor a professional lawyer, but a layman agreed on by the parties and appointed by the magistrate.[11]

Most judges were amateurs because "it was a part of the philosophy of the Romans that the duty of a citizen included taking his share of the burdens of the law: acting as judge, arbitrator or juror and supporting his friends in their legal affairs by coming forward as witness, surety and so on."[12] Most judges, acting out of a sense of noblesse oblige, "were members of the Roman upper class, for even public and political office were only incidents in lives of leisure, and it was therefore an amateur activity just as much as being a historian or an agricultural expert."[13]

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9. Aristotle wrote that, "Nevertheless, as we have said, external matters do count for much, because of the *sorry* nature of an audience." *Id.* at 193-94.

10. "At Rome, most private suits were heard by a single judge, the *iudex privatus* or *arbiter*." GEORGE KENNEDY, THE ART OF RHETORIC IN THE ROMAN WORLD 198 (1972).

"Each *iudex* was appointed to serve only in a particular case, some might have been called on frequently; when called on it was their duty to serve, for the office of *iudex* was a public office which could be declined only for valid reasons." *Id.* at 231.

11. H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 176 (1972).

12. JOHN ANTHONY CROOK, LAW AND LIFE OF ROME 33 (1967). *See also* BRUCE W. FRIER, THE RISE OF THE ROMAN JURISTS: STUDIES IN CICERO'S *PRO CAECINA* 96 (1985), where the author notes that, "The normal judge in a Roman civil case was emphatically not a legal professional, nor even a magistrate, but instead a layman with no special training in the law."

13. CROOK, *supra* note 12, at 89.

Although most cases were heard by a single judge, "many [notorious or important] civil actions went before a much bigger jury, the Court of One Hundred, *centumviri* . . . . The *centumviri* had no exclusive competence in any particular field; inheritances, for example, could equally well go before a single *iudex* (judge)."[14] Sometimes, in the case of international disputes, cases of particular urgency, or social importance, a panel of judges known as *recuperatores* heard the case.[15]

Given the amateur status of both the judges and juries who decided legal disputes, Greek and Roman rhetoricians understandably stressed persuasive techniques based on emotional arguments and the advocate's personal credibility instead of relying solely on legal arguments. Much of their assessment of what would persuade judges and juries was grounded in basic human psychology rather than jurisprudential philosophy or statutory law. Consequently, throughout their works, they emphasized rhetorical and psychological strategy as much as they do legal strategy. *Pathos* and *ethos* were at the heart of all their analyses of persuasive discourse.

II. Pathos

A. Emotion and Argument

In his *Rhetoric*, the preeminent rhetorical treatise of the classical period, Aristotle consistently analyzed legal arguments in terms of both rational and nonrational or affective methods of persuading an audience. The *Rhetoric* examines legal arguments in terms of "human nature, with its ways of reasoning, its habits, desires, and emotions."[16] In effect, the treatise is a "practical psychology,"[17] which provides a detailed examination of human nature as the Greeks and Romans understood it.

Although Aristotle's psychological assumptions may occasionally strike modern readers and professional psychologists as somewhat mechanistic and over-simplified, they are nonetheless grounded on astute observations of how hate, love, pity, anger, impatience, boredom, and inattentiveness affect a judge or jury's reasoning abilities and legal decisions. Any short-comings attributable to Aristotle's "mechanistic" psychology are more than compensated for by his close analysis of the interplay between emotion and argument and his detailed advice regarding how to measure an audience and manipulate its emotions.

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14. *Id.* at 79-80.
15. KENNEDY, *supra* note 10, at 198-99.
16. ARISTOTLE, *supra* note 3, at xxi.
17. *Id.* at xvii.

To begin with, Aristotle and the other rhetoricians decry the effect emotions may have on judges, but grudgingly concede that, since they often have a profound effect, advocates must exploit them whenever possible. For example, near the beginning of his *Rhetoric*, Aristotle says that "the man who is to judge should not have his judgment warped by speakers arousing him to anger, jealousy, or compassion. One might just as well make a carpenter's rule crooked before using it as a measure."[18] Nonetheless, he later notes that while "strict justice . . . would lead us . . . to seek no more [of an emotional effect] than that we should avoid paining the hearer without alluring him" and that "the case should, in justice, be fought on the strength of the facts alone . . . [n]evertheless . . . external matters do count for much, because of the sorry nature of an audience."[19] Quintilian made a similar point while explaining that the purpose of emotional arguments is not simply to play on the court's emotions but also to provide adequate emphasis for emotionally sympathetic facts:

> Meanwhile I will content myself with the observation that the aim of appeals to emotion is not merely to shew the bitter and grievous nature of ills that actually are so, *but also to make ills which are usually regarded as tolerable seem unendurable* . . . . For the force of eloquence is such that it not merely compels the judge to the conclusion toward which the nature of the facts lead him, *but awakens emotions which either do not naturally arise from the case or are stronger than the case would suggest.*[20]

When discussing how emotions affect arguments, Aristotle and his successors took it as a commonplace that,

> the same thing does not appear the same to men when they are friendly and when they hate, nor when they are angry and when they are in gentle mood; in these different moods the same thing will appear either wholly different in kind, or different as to magnitude.[21]

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18. *Id.* at 2.

19. *Id.* at 183-84. *See also* QUINTILIAN, 2 INSTITUTIO ORATORIA 155 (H.E. Butler trans., 1954), "There have been certain writers of no small authority who have held that the sole duty of the orator was to instruct: in their view appeals to the emotions were to be excluded for two reasons, first on the ground that all disturbance of the mind was faulty, and secondly that it was wrong to distract the judge from the truth by exciting his pity, bringing influence to bear, and the like. Further, to seek to charm the audience, when the aim of the orator was merely to win success, was in their opinion not only superfluous for a pleader, but hardly worthy of a self-respecting man."

20. QUINTILIAN, *supra* note 19, at 431 (emphasis added).

21. ARISTOTLE, *supra* note 3, at 91. Elsewhere Aristotle observes that, "[a]ppeals to the hearer aim at securing his good will, or at arousing his anger; sometimes at engaging his attention, or, on occasion, at diverting it—since engaging it is not always an advantage, and for that reason a speaker will often try to set his audience laughing." *Id.* at 223.

Aristotle's frank recommendation that advocates deliberately try to manipulate a judge and jury's emotions is echoed by subsequent rhetoricians. Cicero, for instance, emphasized the importance of emotions when he observed that one "potent factor" in the successful argument of a case is "the feelings of the tribunal . . . [which must] be won over, as far as possible, to goodwill towards the advocate and the advocate's client as well."[22] He too recommended playing on the court's emotions and, like Aristotle, suggested that advocates speak in a way which "excites and urges the feelings of the tribunal towards hatred or love, ill-will or well-wishing, fear or hope."[23] Quintilian, Cicero's greatest admirer, made similar recommendations, primarily because he thought that emotional arguments have the greatest appeal of all. In fact, he claimed that, "this emotional power . . . dominates the court[;] it is this form of eloquence that is queen of all."[24] And, like Aristotle, he thought that "the duty of the [advocate] is not merely to instruct: the power of eloquence is greatest in emotional appeals."[25]

Aristotle and the other rhetoricians not only identified a few emotions (hate, love, anger, fear, hope, pity) as being especially powerful in creating persuasive arguments, they also thought that judges and juries reacted to those emotions in predictable ways.[26] It is here that the Greco-Roman analysis seems overly simplistic. Cicero, for instance, thought that "love" is won based primarily on the justness of the advocate's cause or the court's own self-interest:

> [S]ince the emotions which eloquence has to excite in the minds of the tribunal . . . are most commonly love, hate, wrath, jealousy, compassion, hope, joy, fear or vexation, we observe that love is won if you are thought to be upholding the interests of your audience, or

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See also QUINTILIAN, *supra* note 19, at 419-21, "[A]s soon as [judges] begin to be angry, to feel favourably disposed, to hate or pity, they begin to take a personal interest in the case, and just as lovers are incapable of forming a reasoned judgement . . . so the judge, when overcome by his emotions, abandons all attempt to enquire into the truth of the arguments, is swept along by the tide of passion, and yields himself unquestioning to the torrent."

22. MARCUS TULLIUS CICERO, DE ORATORE 327 (E.W. Sutton trans., 1942).

23. *Id.* at 331.

24. QUINTILIAN, *supra* note 19, at 419.

25. *Id.* at 139.

26. *Id.* at 13. In several places, Quintilian hinted at some of the techniques he used to stir the court's emotions: "Sometimes it is desirable to set forth [the client's] merits . . . . Sex, age and situation are also important considerations, as for instance, when women, old men or wards are pleading in the character of wives, parents or children. For *pity* alone may move even a strict judge." *Id.*

> to be working for good men, or at any rate for such as that audience deems good and useful.[27]

Quintilian made a similar observation when he generalized about how a defendant's class or behavior provokes the court's jealousy, hatred, or anger. He asserted that "*jealousy* will be produced by the *influence* of the accused, *hatred* by the *disgraceful nature of his conduct*, and *anger* by his *disrespectful attitude toward the court*."[28]

Quintilian may have overstated his case by suggesting that the defendant's cause or rank or conduct always produces the same emotions in the judge. Nevertheless, his analysis of how to manipulate the judge's emotions was based on his own considerable experience as an advocate. Notwithstanding their oversimplistic and somewhat dogmatic analyses, both Cicero and Quintilian were primarily interested in calling attention to the play of emotions that is present in every trial and making suggestions about how to control those emotions.

B. Emotions and the Character of the Judge

Both rhetoricians were more on point, however, when they relied on their observations about "human nature" to predict how judges would react to arguments or when they recommended investigating the character of the judge when preparing a case. Before beginning a case, Cicero always carefully investigated the character and predispositions of the court:

> when setting about a hazardous and important case, in order to explore the *feelings* of the tribunal, I engage wholeheartedly in a consideration so careful, that I scent out with all possible keenness their thoughts, judgements, anticipations and wishes, and the direction in which they seem likely to be led away most easily by eloquence.[29]

Quintilian also recommended learning as much as possible about the "character" of the judges. To increase his chances of success, Quintilian thought it was "desirable to enlist [the judges'] temperaments in the service of our cause, where they are such as like to be useful, or to mollify them, if they are like to prove adverse, just according as they are harsh, gentle, cheerful, grave, stern, or easy-going."[30] Quintilian's analysis of judicial audience provides detailed suggestions on a variety of points. He suggests, "[f]or instance, in pleading for a man of good birth

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27. CICERO, *supra* note 22, at 349.
28. QUINTILIAN, *supra* note 19, at 391 (emphasis added).
29. CICERO, *supra* note 22, at 331.
30. QUINTILIAN, *supra* note 19, at 15.

we shall appeal to his (the judge's) own high rank, in speaking for the lowly we shall lay stress on his sense of justice."[31] Almost ruefully he reminded advocates that "it would be folly for me to warn speakers not to say or even hint anything against [the judge], but for the fact that such things do occur."[32]

Although both Cicero and Quintilian began their case preparation by finding out as much as possible about the judge who will hear the case, their preparations did not end there. As experienced advocates and close observers of human nature, both Cicero and Quintilian had fixed opinions about typical judicial behavior and attitudes, and therefore, they offered numerous suggestions about trial strategies.

Quintilian, for example, was especially sensitive to the judge's temperament and needs during the course of the trial. "Above all it is important, whenever we suspect that the judge desires a proof other than that on which we are engaged, to promise that we will satisfy him on the point fully and without delay . . . ."[33]

> Elsewhere, he observed that, the judge is always in a hurry to reach the most important point. If he has a patient disposition he will merely make a silent appeal to the advocate, whom he will treat as bound by his promise [to get to the point.] On the other hand, if he is busy, or holds exalted position, or is intolerant by nature, he will insist in no very courteous manner on [the advocate] coming to the point.[34]

Quintilian also warned against boring the judge with all the available arguments,[35] against "dry repetition of facts" which may suggest the advocate's lack of confidence in the judge's memory,[36] and against "over-elaboration" of arguments, a practice which usually makes judges

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31. *Id.* at 15.

32. *Id.* at 11.

33. *Id.* at 147.

34. QUINTILIAN, *supra* note 19, at 143. *See also id.* at 125-27, where Quintilian observed that impatient judges especially dislike digressions in the statement of the facts because, "as soon as he has heard the facts set forth in order, the judge is in a hurry to get to the proof and desires to satisfy himself of the correctness of his impressions at the earliest possible moment. Further, care must be taken not to nullify the effect of the statement by diverting the minds of the court to some other theme and wearying them by useless delay."

35. "We must not always burden the judge with all the arguments we have discovered, since by so doing we shall at once bore him and render him less inclined to believe us." *Id.* at 303.

36. "[T]he points selected for enumeration (in the closing argument) must be treated with weight and dignity, enlivened by apt reflexions and diversified by suitable figures; for there is nothing more tiresome than a dry repetition of facts, which merely suggests a lack of confidence in the judge's memory." *Id.* at 383.

suspect that the advocate is not confident about the argument.[37] From these remarks and others, Quintilian's experience in the courtroom becomes clear, and his portrait of a typical judge strikes a familiar chord.

C. *Emotion and Organization*

Greco-Roman analysis of how judges react to the emotional aspects of a case was also closely linked to their assumptions about the most logical and persuasive way to organize arguments. Classical rhetoricians divided legal arguments into five parts: Introduction (*exordium*), Statement of Case (*narratio*), Argument Summary (*partitio*), Proof of the Case (*confirmatio*), and Conclusion (*peroratio*).[38]

Based on their observation that effective discourse usually followed predictable logical patterns, they described the function of each part and discussed its connection to the overall argument. They did not, however, limit their analysis to the logical and substantive interrelationships among the parts, they also discussed the emotional effects appropriate to each part and judges' tendencies to become impatient, bored, inattentive, or distracted unless they are also emotionally engaged in the case.

1. Opening Statement.—Although Aristotle was skeptical about whether advocates even needed to provide an *exordium* or introduction for their arguments,[39] he nonetheless noted that advocates can use the introduction to make the "audience *receptive*."[40] Subsequent rhetoricians, however, attached more importance to introductions. Cicero thought that emotion was "especially important in the *exordium*; it is essential that [the *exordium*] should have the power of stirring the minds of the audience . . . [because it has] a very great effect in persuading and arousing emotion."[41] He also noted that arousing the judge's emotions is "easier in the introduction, because the audience [is] most attentive when [it has] the whole of the speech to look forward to, and also [it is] more receptive at the start" because the advocate's position is usually clearer at the beginning than in the middle of the argument.[42]

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37. *Id.* at 343.

38. For a fuller analysis of this topic, see Michael Frost, *Brief Rhetoric—a Note on Classical and Modern Theories of Forensic Discourse*, 38 KAN. L. REV. 411 (Winter 1990).

39. ARISTOTLE, *supra* note 3, at 224. "But we must not forget that such things (as introductions) are, every one of them, extraneous to a speech. They are for the audience, an audience that is weak enough to accept utterances beside the point; and if audiences were not what they are, there would be no need of any *proem* (opening statement) beyond a summary statement of the matter in question . . . ."

40. *Id.* at 223 (emphasis added).

41. CICERO, *supra* note 22, at 435.

42. *Id.* at 443.

Like Cicero, Quintilian thought that the introduction exercised a "valuable influence in winning the judge to regard us with favor."[43] Quintilian also suggested that advocates should use a temperate or low-key delivery in their introduction. "[I]n our opening any preliminary appeal to the compassion of the judge must be made sparingly and with restraint."[44] And, to pique and maintain an impatient judge's interest, he suggested that advocates should "create the impression that [they] shall not keep [the judge] long and intend to stick closely to the point . . . . The mere fact of such attention makes the judge ready to receive instruction from [them], but [they] shall contribute still more to this effect if [they] give a brief and lucid summary of the case which [they have] to try."[45]

2. Statement of the Case.—In contrast to his skepticism about the usefulness of *exordia*, Aristotle was very enthusiastic about the persuasive value of the Statement of the Case or *narratio*. Aristotle thought that the Statement of the Case offered advocates a unique opportunity for creating a favorable impression of their clients and he made numerous suggestions about how to exploit this opportunity. He emphasized that, "[t]he narration should depict the *ethos* (character) [of the client]. One thing that will give this quality is the revelation of moral purpose; for the quality of the *ethos* is determined by the quality of the purpose revealed, and the quality of this purpose is determined by its end."[46]

The most comprehensive analysis of ways to exploit the emotional or affective content of the Statement of the Case comes from Quintilian who thought that, "the purpose of the statement of the facts is not merely to instruct, but rather to persuade the judge."[47] Quintilian made the familiar observations about the importance of clarity, conciseness, and

43. QUINTILIAN, *supra* note 19, at 18.

44. *Id.* at 21.

45. *Id.* at 25.

46. ARISTOTLE, *supra* note 3, at 230. Aristotle's advice even extended to small details of wording as when he observed, "things that impart character are the traits that belong to each type; thus: 'Still talking, on he went'—which reveals the type of blusterer and boor." *Id.* at 231. And, later, he advised advocates to "employ the traits of emotion. Use symptoms familiar to all, and any special signs of emotion in the defendant or his adversary. For example: 'With a scowl, he left me' . . . . These touches carry conviction; the hearer knows them, and, to him, they evince the truth of what he does not know." *Id.*

47. QUINTILIAN, *supra* note 19, at 61.

relevance in the statement of the case,[48] but also added warnings against excessive concision,

> We must avoid . . . terseness . . . and shun all abruptness of speech, since a style which presents no difficulty to a leisurely *reader*, flies past a *hearer* and will not stay to be looked at again; and whereas the reader is almost always a man of learning, the judge often comes to his panel from the country side and is expected to give a decision on what he can understand.[49]

He also warned against tediousness and offered suggestions about how to avoid it: "[d]ivision of our statement into its various heads is another method of avoiding tedium . . . . Such a division will give the impression of . . . short statements rather than [a] long one."[50]

Finally, in keeping with his conviction that emotion, more than logic or justice, is the primary ground on which cases are decided, Quintilian focused on emotion's place in the *narratio*. He stressed, for instance, that "there is no portion of a[n] [argument] at which the judge is more attentive, and consequently nothing that is well said is lost. And the judge is, for some reason, or other, all the more ready to accept what charms his ear and is lured by pleasure to belief."[51] And, in rebuttal of those who discounted the importance of the statement of the case, he said,

> I am . . . surprised at those who hold that there should be no appeal to the emotions in the statement of the facts . . . . [W]hy, while I am instructing the judge, should I refuse to move him as well? Why should I not, if it is possible, obtain that effect at the very opening of the case which I am anxious to secure at its conclusion, more especially in view of the fact that I shall find the judge far more amenable to the cogency of my proof, if I have previously filled his mind with anger or pity?[52]

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48. "We shall achieve lucidity and clearness in our statement of the facts, first by setting forth our story in words which are appropriate, significant and free from any stain of meanness, but not on the other hand farfetched or unusual, and secondly by giving a distinct account of facts, persons, times, places and causes, while our delivery must be adapted to our matter, so that the judge will take in what we say with the utmost readiness." *Id.* at 69-71.

Quintilian advises in another passage, "The statement of facts will be brief, if in the first place we start at that point of the case at which it begins to concern the judge, secondly avoid irrelevance, and finally cut out everything the removal of which neither hampers the activities of the judge nor harms our own case." *Id.* at 73.

49. *Id.* at 75 (emphasis added).

50. *Id.* at 77.

51. QUINTILIAN, *supra* note 19, at 115.

52. *Id.* at 111.

3. Argument Summary, Argument, Closing Argument.—When discussing the argument summary (*partitio*) and the argument itself (*confirmatio*), classical rhetoricians understandably focused more on the logic and substantive coherence of the argument than on its emotional content. Even so, like Cicero, they thought that "*all* arguments must be rounded off either by enlarging on your points or by *arousing the feelings* of the judge or calming them down."[53]

Quintilian suggested that while an argument summary sometimes allays a judge's fears[54] or makes him more attentive and receptive,[55] it should be omitted if the advocate will be making unique or unpopular arguments,

> Sometimes we shall even have to hoodwink the judge and work upon him by various artifices so that he may think that our aim is other than what it really is. For there are cases when a proposition may be somewhat startling: if the judge foresees this, he will shrink from it in advance, like a patient who catches sight of the surgeon's knife before the operation. On the other hand, if we have given him no preliminary notice and our words take him unawares, without his interest in them having been previously roused by any warning, we shall gain a credence which we should not have secured had we stated that we were going to raise the point.[56]

Despite their disagreements about the necessity or usefulness of argument summaries, classical rhetoricians all agreed that the closing argument or *peroration* was an extremely important place for exploiting the emotional content of the case. Aristotle said that an advocate should use his closing argument to "put the audience in the right state of emotion" and that the advocate should "make the audience feel the right

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53. CICERO, *supra* note 22, at 449 (emphasis added). *See also* QUINTILIAN, *supra* note 19, at 417, "There is scope for an appeal to the emotions. . . in *every* portion of a speech" (emphasis added).

54. "For it not only makes our arguments clearer by isolating the points from the crowd in which they would otherwise be lost and placing them before the eyes of the judge, but *relieves his attention* by assigning a definite limit to certain parts of our speech . . . . For it is a pleasure to be able to measure how much of our task has been accomplished, and the knowledge of what remains to do stimulates us to fresh effort over the labour that still awaits us." QUINTILIAN, *supra* note 19, at 149.

55. "Partition may be defined as the enumeration in order of our own propositions, those of our adversary or both. It is held by some that this is indispensable on the ground that it makes the case clearer and the judge more attentive and more ready to be instructed, if he knows what we are speaking about and what we are going subsequently to speak about." *Id.* at 137.

56. *Id.* at 139.

emotions—pity, indignation, anger, hatred, envy, emulation, antagonism."[57]

Quintilian concurred with Aristotle and maintained that "[t]he peroration is the most important part of forensic pleading, and in the main consists of appeals to the emotions."[58] Moreover, given its placement at the end of the case, it "provides freer opportunities for exciting the passions of jealousy, hatred, or anger."[59] Although the peroration also gives advocates a chance to refresh the judge's memory,[60] its principal purpose is to play on the feelings of the court:

> [I]n the peroration we have to consider what the feelings of the judge will be when he retires to consider his verdict, for we shall have no further opportunity to say anything . . . . It is therefore the duty of both parties to seek to win the judge's goodwill and to divert it from their opponent, as also to excite or assuage his emotions . . . .[61]

Quintilian especially recommended using the peroration to play on the fears of the court.[62]

In addition to analyzing the emotional content of legal arguments and suggesting ways to manipulate the emotions of judges and juries, these rhetoricians also offered technical advice about effective ways to modulate the court's emotions. Aristotle noted that advocates vary their emotional appeals depending on their purpose. "Appeals to the hearer aim at securing his good will, or at arousing his anger; sometimes at engaging his attention, or, on occasion, at diverting it—since engaging it is not always an advantage . . . ."[63] Cicero too noted that advocates must vary the emotional climate of their argument according to need:

> But closely associated with this [other style] is that dissimilar style of speaking which, in quite another way, excites and urges the feeling of the tribunal towards hatred or love, ill-will or well-wishing, fear or

57. ARISTOTLE, *supra* note 3, at 240.

58. QUINTILIAN, 2 INSTITUTIO ORATORIA 417.

59. *Id.* at 391.

60. ARISTOTLE, *supra* note 3, at 240. Aristotle said that advocates should use the epilogue to "refresh their memories." *See also* QUINTILIAN, *supra* note 19, at 383, where Quintilian observes, "There are two kinds of peroration, for it may deal either with facts or with the emotional aspect of the case. The repetition and grouping of the facts . . . serves to both refresh the memory of the judge and to place the whole of the case before his eyes . . . ."

61. QUINTILIAN, *supra* note 19, at 389.

62. Quintilian especially recommended using the peroration to play on the fears of the court. *See id.* at 391 ("The appeal to fear . . . occupies a more prominent place in the peroration than in the exordium . . . ."). *Id.* at 391.

63. ARISTOTLE, *supra* note 3, at 223.

> hope . . . or by it they are prompted to whatever emotions are nearly allied and similar to these passions . . . .[64]

Quintilian was more specific about just what approach should be used in each part of the argument. He thought the *exordium* and *peroration* were distinguishable in that,

> in our opening any preliminary appeal to the compassion of the judge must be made sparingly and with restraint, while in the *peroration* we may give full rein to our emotions, place fictitious speeches in the mouths of our characters, call the dead to life, and produce the wife or children of the accused in court, practices which are less usual in *exordia*.[65]

He also emphasized the strategic necessity of emphasizing emotional connections between the statement of the facts and the closing argument:

> [i]f you wait for the *peroration* to stir your hearer's emotions over circumstances which you have recorded unmoved in your statement of facts, your appeal will come too late. The judge is already familiar with them and hears their mention without turning a hair, since he was unstirred when they were first recounted to him. Once the habit of mind is formed, it is hard to change it.[66]

As the foregoing analysis shows, classical rhetoricians regarded *pathos* as one of the most important rhetorical tools in legal discourse. While they sometimes decried its effects, they nonetheless thought emotion was a critical tool for emphasizing sympathetic facts and for determining how judges perceive those facts. Accordingly, they developed a comprehensive system for using emotion to cultivate good-will toward both advocates and their clients. This system included suggestions about which emotions to use for particular causes of action, particular classes of clients, and particular kinds of conduct. It also stressed the necessity of thoroughly investigating the judge's background and predispositions and of sensitivity to the judge's emotional fluctuations during the course of the trial.

According to classical rhetoricians, the emotional component plays an important part throughout the argument, but plays slightly different roles depending on whether it appears in the opening statements (*proem* or *exordium*), the statement of the case (*narratio*), the argument itself (*confirmatio*), or in closing argument (*peroratio*). Opening statements

64. CICERO, *supra* note 22, at 331.
65. QUINTILIAN, *supra* note 19, at 21.
66. *Id.* at 111.

and the statement of the case should create a good first impression of the advocate, disclose the client's good character, and show the justness of his cause. Closing arguments are important for establishing a favorable emotional climate just before the judge retires to reach a decision and for refreshing his memory of sympathetic facts and arguments.

Flexibility is a key theme throughout their analysis. Each emotion has a particular purpose and must suit the particular context in which it appears and, above all, it must suit the audience to whom it is addressed. Given the amount of space and detailed, systematic analysis devoted to the subject of *pathos*, classical rhetoricians clearly thought it played an important part in persuasive discourse.

III. Ethos

Under classical theory, effective persuasive discourse depended almost as much on the advocate's character and credibility, or *ethos*, as it did on logical integrity (*logos*) or emotional content (*pathos*). Moreover, for Aristotle, and for Cicero and Quintilian after him, *projecting* the proper *ethos* is as important as actually possessing it;

> the speaker must not merely see to it that his [argument] shall be convincing and persuasive, but he must *give the right impression of himself*. . . . This is [especially] true in forensic speaking . . .; [F]or in conducing to persuasion it is highly important that the speaker should *evince* a certain character, and that the judges should *conceive him* to be disposed towards them in a certain way . . . .[67]

Given the importance he attached to projecting character or credibility, Aristotle offered some pointed suggestions about how to create the right impression, "[T]here are three things that gain our belief, namely, intelligence, character, and good will . . . This being so, the means by which one may *give the impression* of intelligence and good character are to be found in our analysis of the virtues."[68]

During his analysis of the virtues, Aristotle noted that affective or emotional arguments (*pathos*) frequently depend on an advocate's *ethos*. Accordingly, he advised advocates to exploit the connections between *pathos* (emotion) and *ethos* (character or credibility) in order to make the judge more attentive, "[Y]ou may use each and all of these means (of emotional arguments) . . . with a view to making your audience receptive,

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67. ARISTOTLE, *supra* note 3, at 91.

68. *Id.* at 92. The "virtues" Aristotle had in mind are best summarized in Cicero's list given below. *See infra* note 71 and accompanying text.

and withal give an impression of yourself as a good and just man, for good character always commands more attention."[69]

And, at the risk of appearing to encourage duplicity and trickery, Aristotle warned advocates against inadvertently betraying their manipulative intentions, "[P]resent yourself from the outset in a distinctive light, so that the audience may regard you as a person of this sort, your opponent as of that; only *do not betray your design*. It is easy to give the right impression."[70] All in all, Aristotle was convinced that an advocate could manipulate the court's perception of his character as effectively as he controlled its emotions or the logic of his own arguments. Under Aristotle's analysis, *ethos*-control is as much an acquired skill as it is an inherent characteristic of the advocate.

Both Cicero and Quintilian accepted and elaborated on Aristotle's basic premises regarding the part *ethos* plays in persuasive discourse. Like Aristotle, they emphasized *projecting* good character as much as they did *possessing* it. And, like Aristotle, they seemed to sanction a certain deliberate disingenuousness by advocates who want to disguise their intentions. For instance, when Cicero listed virtues which contribute to an attractive or convincing *ethos*,— "a mild tone, a countenance expressive of modesty, [and] gentle language," he added that advocates should also develop the "faculty of *seeming* to be dealing reluctantly and under compulsion with something you are really anxious to prove."[71] Occasionally, Cicero offered specific advice on how to cultivate and project the proper *ethos*. He believed, for instance, that,

> much is done by good taste and style in speaking, [so] that the speech seems to depict the speaker's character. For by means of particular types of thought and diction, and the employment besides of a delivery that is unruffled and eloquent of good nature, the speakers are made to appear upright, well-bred and virtuous men.[72]

However, ever mindful of the need to vary delivery depending on audience and purpose, Cicero also stressed that, in order to be convincing, advocates must sometimes abandon the restrained or temperate *ethos* and adopt instead the passionate emotions they are trying to instill in their audience:

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69. *Id.* at 224.

70. *Id.* at 231 (emphasis added).

71. CICERO, *supra* note 22, at 327-29. Cicero offers a list of virtues the credible advocate should project, "It is very helpful to display the tokens of good-nature, kindness, calmness, loyalty and a disposition that is pleasing and not grasping or covetous, and all the qualities belong to men who are upright, unassuming . . . ." *Id.* at 329.

72. *Id.*

> [I]t is impossible for the listener to feel indignation, hatred or ill-will, to be terrified of anything, or reduced to tears of compassion, unless all those emotions, which the advocate would inspire in the arbitrator, are visibly stamped or rather branded *on the advocate himself*.[73]

Cicero also noted that in a complex case an advocate must frequently vary his approach and intermingle temperate and passionate emotions.[74] According to Cicero, success in controlling these emotions and the court's reaction depends on the technical skills and "personal urbanity of the advocate."[75]

Quintilian approached the topic of *ethos* in much the same way as his predecessors, Aristotle and Cicero. Like Aristotle, he believed that "the strongest argument in support of a speaker is that he is a good man."[76] And, like Cicero, he offered copious advice regarding how to cultivate a convincing *ethos*. Quintilian thought that an advocate's credibility depended mainly on his perceived motives for taking a particular case: "It is . . . pre-eminently desirable that he should be believed to have undertaken the case . . . [from a] moral consideration."[77] Credibility also depends on avoiding "the impression that we are abusive, malignant, proud or slanderous toward any individual or body of men, especially as cannot be hurt without exciting the disapproval of the judges."[78]

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73. *Id.* at 333 (emphasis added). But see, *id.* at 335, where Cicero made it clear that the advocate's emotions must be genuine, not feigned: "[I]t is not easy to succeed in making an arbitrator angry with the right party, unless he first sees you on fire with hatred yourself; nor will he be prompted to compassion, unless you have shown him the tokens of your own grief by word, sentiment, tone of voice, look and even by loud lamentation."

To illustrate this point, Cicero gave an example from one of his cases where "On seeing [his client] cast down, crippled, sorrowing and brought to the risk of all he held dear, I was myself overcome by compassion before I tried to excite it in others. Assuredly I felt that the Court was deeply affected when I called forward my unhappy old client, in his garb of woe, and when I did those things . . . *not by way of technique* . . . but under stress of deep emotion and indignation—I mean my tearing open his tunic and exposing his scars." *Id.* at 339 (emphasis added).

74. "But these two styles, which we require to be respectively mild and emotional, have something in common, making them hard to keep apart. For from that mildness, which wins us the goodwill of our hearers, some inflow must reach this fiercest of passions, wherewith we inflame the same people, and again, out of this passion some little energy must often be kindled within that mildness: nor is any style better blended than that wherein the harshness of strife is tempered by the personal urbanity of the advocate, while his easy-going mildness is fortified by some admixture of serious strife." CICERO, *supra* note 21, at 355.

75. *Id.* at 355.

76. QUINTILIAN, *supra* note 19, at 303. Quintilian also observed that although an advocate "may be modest and say little about himself, yet if he is believed to be a good man, this consideration will exercise the strongest influence at every point of the case." *Id.* at 9.

77. *Id.* at 9.

78. *Id.* at 11.

Quintilian, like the others, paid considerable attention to the artfulness or skill needed to create credibility. One technique he recommended was a kind of false humility, that is, "representing that we are weak, unprepared, and no match for the powerful talents arrayed against us."[79] For maximum effect, this false humility can be accompanied by a "certain simplicity in the thoughts, style, voice and look of the speaker."[80]

He also warned advocates against burdening "the judge with all the arguments we have discovered since by so doing we shall at once bore him and render him *less inclined to believe us.*"[81] And, finally, to be persuasive the advocate should present the entire case with an air of confidence: "Our advocate must . . . adopt a confident manner, and should always speak as if he thought his case admirable."[82]

During his analysis of how an advocate's confidence creates credibility, Quintilian repeated his predecessors' caveats regarding the disingenuousness which frequently accompanies persuasive discourse. He pointed out the dangers of appearing too confident, "For as a rule [a] judge dislikes self-confidence in a pleader, and conscious of his rights tacitly demands the respectful deference of the orator."[83]

Quintilian's advice about deliberately cultivating credibility and maintaining appearances is accompanied by several warnings about the adverse consequences of a judge discovering that an advocate has been deceptive or insincere. He noted, first, that disguising artfulness is extremely difficult "[t]o avoid all display of art in itself requires consummate art."[84] Later, in reference to the statement of the facts, Quintilian stressed how careful advocates must be:

> It is . . . specially important in this part of our speech to avoid anything suggestive of artful design, for the judge is never more on his guard than at this stage. Nothing must seem fictitious, nought betray anxiety; everything must seem to spring from the case rather than the art of the orator.[85]

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79. *Id.* at 11.

80. QUINTILIAN, *supra* note 19, at 37.

81. *Id.* at 303. *See also id.* at 343, where Quintilian said, "There is another serious fault into which pleaders fall: the anxious over-elaboration of points. Such a procedure makes his case suspect to the judges, while frequently arguments which, if stated without more ado, would have removed all doubt, lose their force owing to the delay caused by the elaborate preparations made for their introduction, due to the fact that the advocate thinks that they require additional support."

82. *Id.* at 343.

83. *Id.* at 37.

84. QUINTILIAN, *supra* note 19, at 39.

85. *Id.* at 119.

As the foregoing analysis shows, persuasive discourse depends as much on the advocate's character and credibility (*ethos*) as it does on the logic of the argument or the emotional content of the case. According to Quintilian, the perfect orator is a good man speaking well.[86] Under classical analysis, the advocate's credibility depended primarily on the perception that he took his case from good or moral considerations and that he was completely confident in its outcome. It also depended on his ability to convince the judge or jurors that he is intelligent, has goodwill toward others, and is of upright character.

Given the importance of *ethos*, classical rhetoricians felt that *projecting* the proper *ethos* was as important as actually possessing it. For them, projecting the proper *ethos* was an acquired skill, an art that disguised art. And, like the skillful manipulation of arguments or emotions, it required flexibility and constant practice. They encouraged advocates to look for ways to connect their *ethos* to the emotional undercurrents of a case and to develop the ability to deliver arguments in a restrained or an impassioned manner, depending on the circumstances.

If the occasion demanded it, they even sanctioned certain types of disingenuousness by advocates, so long as their deceptions went undetected. And, they illustrated how difficult it was to project and control the proper *ethos* by showing how advocates lose their credibility by over-elaboration of trivial arguments, by transparent over-confidence or unseemly arrogance, or by being detected in a posture of false humility. Throughout their discussion of *ethos*, classical rhetoricians constantly reminded advocates that their success depended heavily on the decisionmaker's perception of their character.

IV. Ethos and Pathos: The Modern View

When compared with the classical treatises, modern analysis of how *pathos* and *ethos* affect legal audiences appears sketchy and widely scattered. It lacks the overarching theoretical framework that the classical rhetorical treatises provide. Although modern authorities discuss many of the topics covered in the classical texts, they do so in a less comprehensive and clearly organized fashion.

Notwithstanding these shortcomings, modern trial advocacy treatises, practice manuals, and even recent law review articles periodically testify to the enduring value of *pathos* and *ethos* in legal discourse. Occasional references in various journals and treatises also demonstrate that audience consciousness is just as important to modern trial lawyers as it was to

86. QUINTILIAN, *supra* note 5, at 9.

Aristotle, Cicero and Quintilian, especially since trial lawyers often argue their cases before a dual and unpredictable audience comprised of an amateur jury and a professional judge.

A modern trial lawyer's general approach to advocacy is similar to the classical approach because trial lawyers argue their cases before lay juries. In fact, modern experts occasionally cite Cicero and Quintilian regarding various persuasion techniques.[87] While these experts' explicit reliance on classical sources is usually, and understandably, limited, the major classical themes nonetheless survive, albeit in altered, and sometimes diminished, form. They too stress the importance of emotion and lawyer credibility as they analyze and describe overall trial strategy, jury selection, opening statements, and closing arguments.

A. Modern Audience Assessment

Unlike Greek and Roman advocates who argued their cases before judges who were inexperienced amateurs, modern advocates argue their cases before both experienced, professional judges and inexperienced, amateur juries. Consequently, their task of audience assessment is more difficult. Nonetheless, modern experts' basic approach resembles that of their classical predecessors since both emphasize the importance of thoroughly investigating the prospective audience.

In the classical period, most litigants had the benefit of selecting a judge who was mutually agreeable to both parties.[88] By contrast, modern advocates have little say in the matter and usually must argue before whichever judge is assigned to the case.[89] Moreover, whereas the

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87. For a representative sampling, see Robert F. Hanley, *Brush Up Your Aristotle*, 12 LITIG. 39, No. 2 (Winter, 1986) (a regrettably short essay stressing both the accessibility and applicability of the Greco-Roman rhetorical principles discussed in this Article); Anthony G. Amsterdam and Randy Hertz, *An Analysis of Closing Arguments to A Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992) (quotes Aristotle, Cicero and Quintilian while analyzing rhetorical structure of closing arguments); James J. Brosnahan, *Overview: Basic Principles of Advocacy*, *in* MASTER ADVOCATES' HANDBOOK 29 (D. Lake Rumsey, ed. 1986) (periodically quotes Cicero during essay); JEFFREY J. HARTJE & MARK E. WILSON, LAWYERS' WORK 305 (1984) (quotes Aristotle, Cicero, and Quintilian in chapter devoted to persuasive discourse).

88. JOLOWICZ & NICHOLAS, *supra* note 11, at 179, "[T]he appointment [of a judge] was . . . made by the magistrate, but . . . he would in practice take account of the *wishes of the parties*, and . . . would not force any particular [judge] on an unwilling party" (emphasis added).

See also, CROOK, *supra* note 92, at 78, "[W]e hear sometimes of humble [judges], *chosen no doubt by* humble litigants. If the parties did not have anyone in particular in mind, or *could not agree*, the praetor would propose names from the annual list of 'select jurors . . .'" (emphasis added).

89. In the Federal system, advocates must prove that a judge is biased before he or she can be removed. In some states, advocates have a right to one peremptory challenge; thereafter, the advocate must file an affadavit alleging cause. Advocates have greater latitude regarding judges under some ADR procedures; that is, the parties may decide to hire a retired judge that is mutually

classical advocate, faced with an amateur, inexperienced judge, investigated the judge's personal qualities and background, the modern advocate, faced with a professional judge, analyzes and investigates the judge's professional background or track record. This investigation takes many avenues but frequently revolves around questions like:

> Is he plaintiff- or defense-oriented in personal injury cases? What kind of judgments has he entered in similar civil cases? Do his trial rulings have any particular bent? In criminal cases, is he prosecution- or defense-minded? Does he have known attitudes in certain types of cases? What sentencing disparity does he have between bench and jury trials?[90]

While the process of investigating a judge's decision-making predilections is undoubtedly supplemented by advocates' informal inquiries about personal habits and traits, their overall focus is on the judge's professional, rather than his or her personal, behavior. In this respect, it differs from the classical practice.

This difference is also reflected in the fact that classical investigative techniques and purposes are transformed in the modern era to focus on jurors, rather than judges. In some ways, the modern jury selection process resembles the Greco-Roman judge selection process. Instead of selecting a mutually agreeable judge, however, modern advocates select mutually agreeable jurors. The judge-oriented approach of the classical period has been transformed to a "juror-centered"[91] approach in the modern era. Despite these differences, both approaches emphasize the importance of knowing the audience.

Armed with elaborate questionnaires and supported in some cases with the research findings of social scientists, modern lawyers try to determine "the ideal type of juror in a given case."[92] To that end,

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satisfactory.

90. MAUET, *supra* note 2, at 14; *see also* Brosnahan, *supra* note 87, at 30 ("The advocate should know the background of the judge, what organizations he or she belonged to as a private lawyer before going on the bench, what his or her *professional* experience was, and what attitudes the judge has manifested since going on the bench. Argument should then be shaped as much as possible to convince that particular judge [or judges].") *and* Peter Perlman, *Jury Selection, in id.* at 51 ("If you are unfamiliar with the judge who will try the case, find out how much latitude will be allowed in asking questions [during voir dire], or if it will be the judge who asks all questions."). Some professional news services even offer to sell lawyers "profiles" of judges, see advertisements for *Judicial Profiles*, L.A. DAILY J., Aug. 10, 1993, at 7.

But see, J.P. Vero, *Nine Secrets for Living with Judges*, 17 LITIG. 18 (1991). Vero, not content with examining the professional record of the judge, pigeonholes judges according to "type" and offers advice as to how to accomodate each type.

91. MAUET, *supra* note 2, at 376.

92. LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 15 (1991). The authors

advocates investigate what they regard as "predictors of likely attitudes: age, education, employment history, residence history, marital and family history, hobbies and interests, reading and television habits, [and membership in] organizations."[93] Occasionally, their investigation even extends to assessments of jurors' "body language," "likability," and predisposition to be a "leader or follower."[94]

In the classical period, the principal purpose of this investigation was to enable the advocate to tailor the argument to suit the judge. While this "tailoring" function is retained in modern jury analysis and selection practice, the process also benefits modern lawyers before the case even begins because it helps them select sympathetic or neutral jurors and disqualify unsympathetic or biased jurors.

In sum, modern advocates have a more difficult task of audience assessment than their classical predecessors. Instead of investigating only one type of audience, modern advocates must investigate two types—one amateur (the jury) and one professional (the judge). When investigating the professional audience (the judge), modern advocates focus on the judge's professional, rather than his or her personal, background. However, when investigating the jury, advocates modify the classical practice and focus on the jurors' personal and professional background. In doing so, they transform the judge-oriented approach of the classical period to the jury-oriented approach of today.

V. Advocate Credibility

Since lawyer credibility is so important, most modern trial advocacy treatises devote considerable attention to analyzing and listing "credibility factors." According to one authority, "[t]he only thing a trial lawyer has to sell to the jury is his credibility."[95] Most of these modern lists of "credibility factors" resemble the lists of "virtues" referred to in Greco-Roman analyses of *ethos*.

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also note that, "The scientific selection of juries became popular in the early 1970's. Market researchers developed methods for conducting mock trials and testing the salability of a case in much the same way a product is tested before being distributed in the marketplace." *Id.*

93. MAUET, *supra* note 2, at 25.

94. *Id.* at 27. *See also* Perlman, *supra* note 90, at 50, for the proposition that, "There are various proper and ethical means which provide lawyers information about prospective jurors. Many jurisdictions provide jury lists which contain the jurors' names, addresses, marital status, children, and occupations. Various public records may also be helpful. These include voter registration lists and various cross-reference directories.

More sophisticated techniques include the use of expert handwriting analysts, market research studies, and community attitude surveys. Such studies provide a juror matrix summary through which the attitudes of various jurors are classified and assigned a probability rating."

95. MAUET, *supra* note 2, at 46.

Modern authorities, for example, think that, "the principal attributes of persuasive lawyers . . . are expertise, trustworthiness, impartiality, dynamism, similarity to jurors and personal attractiveness."[96] Beyond this, "the image of you in the jurors' minds . . . should be one of fairness, honesty, sincerity, courteousness and the desire for justice."[97]

Important as these inherent personal qualities are, however, modern experts also stress that the most persuasive advocates usually possess a non-arrogant confidence in and enthusiasm for their cases. Consequently, these experts suggest that advocates consciously demonstrate their "enthusiasm about trying the case"[98] whenever possible. To be most effective, an advocate's enthusiasm must also be coupled with a "total conviction in [the] case and [an] unwavering committment to [the client's] side."[99] Generally speaking, modern experts' emphasis on projecting enthusiasm and confidence recalls similar advice by Aristotle, Cicero, and Quintilian.

The classical approach also emphasized the importance of *projecting* the proper *ethos*. That is, persuasive discourse depends on *showing* the audience that the advocate is intelligent, knowledgeable, honest and fair. Classical authorities reluctantly conceded that advocates must sometimes feign these qualities, either by assuming a false humility or by appearing reluctant to make an argument they are in fact eager to make. But they regarded false humility and feigned reluctance as exceptions to the general emphasis on enthusiasm, confidence, and intelligence.

Modern authorities also recognize that credibility depends on projecting the advocate's intelligence and knowledge of the law and the case. They too think that appearing to be "fair" increases an advocate's credibility:

> First, appear interested in helping the jurors decide the case in a *fair* manner, rather than just appearing as a partisan advocate. Second, show *fairness* to all parties and witnesses.[100]

Echoing the classical rhetoricians' advice regarding appearances, modern experts suggest that advocates should, "strive to create an

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96. *Id.* at 379.

97. DUBIN & GUERNSEY, *supra* note 92, at 20. *Df.* CICERO, *supra* note 22, at 335 (Cicero provides a similar list of advocates' "virtues."). *See also supra* note 71 and accompanying text.

98. MAUET, *supra* note 2, at 42.

99. *Id.* at 284. *See also* Stuart M. Speiser, *Closing Argument* in MASTER ADVOCATES' HANDBOOK, *supra* note 87, at 236 ("The most compelling summations I have heard are those that convey a deep *personal conviction* of [sic] the client's cause, coupled with exposition of the evidence in light of the judge's final instructions.") (emphasis added).

100. DUBIN & GUERNSEY, *supra* note 92, at at 171 (emphasis added).

atmosphere of *sincerity*—that you and your client are *honest* and *moral* people. Throughout the trial, it is important to avoid exaggeration and deception."[101] In addition, many experts think that an advocate's credibility is increased by the frank confession of a weakness in the case;

> Some lawyers believe that volunteering their own weaknesses only puts undue emphasis on those weaknesses. They feel that it is better to let the opponent bring them out. This approach fails to recognize, however, that over the course of the trial the only thing that a lawyer has to sell is his credibility. Once the jurors feel that a lawyer is not being honest and candid with them, that credibility is lost.[102]

As the preceding analysis demonstrates, classical and modern authorities agree that merely possessing the proper *ethos* or character is not sufficient. The advocate must also take steps to insure that the audience perceives or appreciates the fact that the advocate possesses it. Although there are some small differences between the classical and modern experts regarding which attributes or approaches affect credibility, they nevertheless agree that persuasive discourse often depends on lawyer credibility.

Even though classical and modern experts usually agree regarding which factors affect an advocate's credibility, they disagree on the importance of non-verbal communication. Classical rhetoricians usually confined their remarks on this topic to a few observations about gestures, mannerisms, and stance, whereas modern experts' psycho- and sociological approach is much more comprehensive and ambitious.

In their discussions of nonverbal communication, modern analysts frequently use the language of psychologists and elocution coaches: "Since so little communication is grounded on bare word content, lawyers must understand how kinesics (posture, gestures, movement, eye contact, and use of space), paralinguistics (voice inflection) and personal appearance affect whether verbal communication will be persuasive."[103]

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101. Speiser, *supra* note 99, at 243; and Hon. James C. Hill, *The Importance of Sincerity*, in MASTER ADVOCATES' HANDBOOK 13 (D. Lake Rumsey ed. 1986).

102. MAUET, *supra* note 2, at 48. *See also* DUBIN & GUERNSEY, *supra* note 92, at 40 ("[Y]ou are usually better off revealing significant weaknesses before the opponent does. To allow opposing counsel to raise damaging information runs the risk that the jury will feel you have unfairly attempted to hide relevant information.") *and* Perlman, *supra* note 90, at 53 ("Exposing weaknesses and mitigating their damaging effect frequently disarms the opponent. At the same time, it confirms your sincerity and credibility.").

103. MAUET, *supra* note 2, at 379. *See also* DUBIN & GUERNSEY, *supra* note 92, at 42 ("The pitch, pace, tone, and volume of your voice should convey *credibility* and *sincerity*.") (emphasis added) *and* RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS 75 (1989).

According to these analysts, an advocate's credibility can depend on intangibles as small as a smile;

> Whether out of nervousness or aloofness, some lawyers forget such friendly but important gestures as a smile. Let the jurors know that you are a human being, that you have a sense of humor, and that no matter how important your client's case is to you, you still can remember the basic courtesies which people should extend to one another.[104]

Given their assumption that an advocate's credibility and personal rapport with the audience depends on nonverbal communication, modern experts commonly stress even small details, such as when to maintain good eye contact,[105] where to stand while addressing the jury,[106] and why it is inadvisable to read the argument.[107] They are convinced that attention to details such as these will ingratiate advocates with their audience *and* make their arguments more persuasive.

This modern emphasis on nonverbal factors which affect an advocate's credibility and rapport with the audience is far different from the classical emphasis on the advocate's character and personal integrity. At its most simplistic, the modern approach resembles a course in advanced elocution. It reduces *ethos* to common courtesy and careful staging. At best, it equates *ethos* with general competence or professionalism.

In most respects, modern and classical authorities agree on the importance of lawyer credibility. They agree regarding which personal qualities are most important, on which attitudes must be conveyed, and even, in some cases, on which techniques are most effective. And, finally, they agree that *projecting* personal integrity is as important as actually possessing it.

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104. Robert J. Jossen, *Opening Statements*, *in* MASTER ADVOCATES' HANDBOOK, *supra* note 87, at 69.

105. Robert Jossen advises practitioners to "*Look at* the jurors . . . and show them that you care about them as well as about your case. It is important to *look at* as many different jurors as possible . . .; do not devote all of your attention to one or two individuals." *See also* Perlman, *supra* note 90, at 54 ("[C]ounsel must maintain *eye contact* with the jury . . . .") (emphasis added) *and* DUBIN & GUERNSEY, *supra* note 92, at 173 ("Reading notes will preclude the opportunity for good *eye contact* with the jurors.") (emphasis added).

106. MAUET, *supra* note 2, at 49. *See* DUBIN & GUERNSEY, *supra* note 92, at 42 ("Where possible . . . it may create a warmer, more *trusting* atmosphere to *stand* in front of the first row of jurors or to the side of the podium.") (emphasis added).

107. "The ideal closing argument is organized, planned and delivered *without notes*. A reliance on notes relegates a closing argument into a formal speech . . . . Reading notes will preclude the opportunity for good eye contact with the jurors." *Id.* at 173 (emphasis added).

Modern and classical authorities part ways on the subject of non-verbal communication. Modern authorities place far greater emphasis on non-verbal methods of creating and projecting credibility. Relying on the recent work of psychologists, modern authorities emphasize non-verbal communication such as eye contact, posture, voice inflection, etc. much more than their predecessors.

VI. Arguments from Emotion

In their analysis of how emotion affects persuasive discourse, modern authorities differ somewhat from their classical counterparts. Even though classical rhetoricians preferred appeals to reason, they recognized the powerful persuasive effect of appeals to emotion. Even so, they disapproved of appeals to emotion because emotion impairs the audience's ability to reach a well-reasoned decision. While modern experts also recognize that emotion may impair the audience's ability to reason logically, they are more tolerant of nonrational "reasoning" than their predecessors.

In part, this tolerance springs from modern research regarding the nonlogical ways people "reason" or think. Many modern authorities, for instance, believe that, "most people are *affective*, not cognitive, thinkers. That is, most people are *emotional*, symbol-oriented, selective perceivers of information who base their decisions largely on previously held attitudes about people and events."[108]

This explanation is simply another way of describing how emotion and reasoning are inevitably intermingled. Moreover, given this explanation of the reasoning process, appeals to an audience's emotions are, in one sense, appeals to reason. Thus, even if an advocate's arguments are logical and "well-reasoned", the audience's *affective* response may be stronger than its cognitive response. Consequently, appeals to emotion become unavoidable and just as important as appeals to reason.

Despite different analytical approaches, classical and modern authorities agree that persuasive discourse depends on controlling the audience's emotions and the emotional climate of the trial. And, like their predecessors, modern authorities recognize that this emotional climate fluctuates during the trial. At the beginning, for example, jurors are anxious, curious, receptive, and looking for someone to trust.[109]

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108. MAUET, *supra* note 2, at 25 (emphasis added).
109. *Id.* at 42.

They are also more likely to be interested and attentive.[110] By the end of the trial, however, both the judge and the jury will be tired, perhaps bored, and occasionally confused.[111] Good advocates realize this and vary their arguments depending on which part of the trial is taking place.

A. Voir Dire and Opening Statements

Beginning with jury selection and their opening statement, experienced advocates try to set the emotional tone of the trial and begin to orchestrate the audience's emotions. As the preceding analysis has shown, the emotional tone of the case is closely connected to the advocate's credibility. Because of this connection, modern authorities recommend that advocates relieve jury anxiety during voir dire and "become the jurors' friend and guide by helping them understand the trial system, by reassuring them that they do belong here, and by letting them know that their participation is important to [them] and [their] party."[112] Moreover, modern experts point out that "voir dire examination is arguably your best contact with the jurors . . . [T]his is the only phase at which you can speak *with* them. During the questioning, you can engage in a dialogue with the jury and develop personal rapport with them."[113]

This emotional rapport is especially important during the advocate's opening statement. Both classical and modern authorities agree that a strong and emotionally engaging opening statement may determine the outcome of the case. In fact, some modern authorities believe that "80% of jurors make up their minds during opening and never change their opinions."[114]

Modern analyses of opening statements resemble classical analyses of *exordia* in that both stress the importance of first impressions; "As in life generally, the psychological phenomenon of primacy applies, and

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110. CARLSON & IMWINKELRIED, *supra* note 103, at 40.

111. MAUET, *supra* note 2, at 277. *See also* DUBIN & GUERNSEY, *supra* note 92, at 177.

112. MAUET, *supra* note 2, at 23. *See also* DUBIN & GUERNSEY, *supra* note 92, at 20 ("A legitimate and significant goal of voir dire is to begin the process of establishing your credibility to the prospective jurors.") *and* Perlman, *supra* note 90, at 49 ("[Jurors] are suddenly thrust into a totally unfamiliar and intimidating atmosphere in which they are unsure what is expected of them. They have a deep-seated need for guidance, self assurance, and recognition of their involvement in the process.").

113. CARLSON & IMWINKELRIED, *supra* note 103, at 40.

114. *Id.* at 64 (citing Jossen, *Opening Statements: Win it in the Opening*, 10 THE DOCKET 1, 6 (1986). The authors dispute Jossen's assertion which is based on findings of the Chicago Jury Project in the 1960's, but add that "common sense and psychological theory point to the importance of the opening . . . ." *Id. See also*, MAUET, *supra* note 2, at 4 ("Lawyers know the importance of a good opening statement. Research has shown that most jurors return verdicts that are consistent with their impressions made during the opening statements.").

initial impressions become lasting impressions."[115] Moreover, a good opening should "heighten" the jury's attention.[116] For the most part, these first impressions come from the advocate's overview of the case and from the statement of the facts.

B. Statement of the Facts

Like their predecessors, modern experts think that advocates should use the emotional facts of the case to predispose the judge and jury in the client's favor. To accomplish this, they recommend that the "story . . . focus on the *people*, not the problem. Most jurors view the world through *emotional* eyes. They are interested in people and what makes them do the things they do . . . . *Personalizing* [the] client or key witness is important because jurors want to help people they like."[117]

The advocate's storytelling style is also an important tool for exploiting the audience's emotions "your storytelling should be *emotional* and dramatic, since you want to draw the jurors into your story and create empathy for your party. Vivid, dramatic, *emotional* storytelling is engaging and keeps the jury's attention."[118]

Although they tend to concentrate on the jurors, modern analysts also note that while "the judge may know a good deal about the law governing the case; and the judge may even have presided at similar trials in the past . . ., the judge may be a complete stranger to the facts in the instant case."[119] Consequently, like lay jurors, judges may be responsive to the emotional aspects of the case and advocates should narrate the facts with this in mind.

C. Closing Argument

Like the classical rhetoricians, modern authorities attach a great deal of importance to the closing argument and regard it as one of the best opportunities for playing on the court's emotions. Ideally, a good closing

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115. MAUET, *supra* note 2, at 41. *See also* DUBIN & GUERNSEY, *supra* note 92, at 33 ("Psychologists tell us that what we hear first and last have the persuasive impact on us. If you, as plaintiff's counsel make an effective opening statement, immediately after it the jury should want to find for your client.").

116. MAUET, *surpa* note 2, at 44. This function is similar to that served by the classical *partitio* or argument summary.

117. *Id.* at at 43 (emphasis added). *See also id.* at 4 ("Most opening statements are based on storytelling, usually giving a chronological overview of "what happened" from either the plaintiff's or the defendant's viewpoint . . . .").

118. *Id.* at 43 (emphasis added).

119. CARLSON & IMWINKELRIED, *supra* note 103, at 65.

argument is "logic and *emotion* brought together."[120] They stress that closing argument gives advocates an opportunity for demonstrating their own emotional involvement with the case, but warn that "[s]howing honest emotion does not mean crying or other histrionics. Rather, it means . . . demonstrat[ing] the appropriate emotional response to the content of the closing argument whether it be sadness, happiness, anger or indignation."[121] They also note that "the delivery style that accomplishes this is as varied as trial lawyers are numerous. Some lawyers are *emotional* and *passionate*; other *quietly compelling* . . . ."[122]

Ever mindful of the audience, they frequently remind advocates that a closing argument should not be so long that it bores or confuses the audience.[123] And, given the audience's limited attention span, "key ideas should be repeated, since repetition is so important for retention."[124]

Although most authorities regard the closing as a good place for emotional argument, some of them warn advocates about the attendant dangers,

> Psychological studies show that appeals to reason are better than appeals to emotion. They [are] . . . more lasting. [V]ery strong emotions block out almost completely the ability to reason. [I]f a person is caught up in a storm of emotion, he will have . . . little memory of what was said. He remembers his feelings about the subject matter, but he will not be in a position to defend those feelings in the jury room.[125]

To summarize, modern authorities like their classical predecessors, stress sensitivity to and use of the fluctuating emotional climate of the case. They too urge advocates to exploit the audience's emotions

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120. MAUET, *supra* note 2, at 278.

121. DUBIN & GUERNSEY, *supra* note 92, at 174.

122. MAUET, *supra* note 2, at 284.

123. DUBIN & GUERNSEY, *supra* note 92, at 177 ("What you do not want is an argument longer than necessary. Do not either *bore* or *confuse* the jurors.") (emphasis added). *See also* MAUET, *supra* note 2, at 9 ("Most [closing arguments] last 30-60 minutes. If too short, they fail to use the available time persuasively. If too long, they run the danger of *boring* or *irritating* the jury.") (emphasis added).

124. MAUET, *supra* note 2, at 279. Cicero and Quintilian who thought that repetition betrayed a lack of confidence in the judge.

125. CARLSON & IMWINKELRIED, *supra* note 103, at 229. *See also* Speiser, *supra* note 101, at 243 ("One thing must always be kept in mind: overuse of emotional appeal may be disastrous. Loud, bombastic oratory should never be used. When emotion is used, it must be natural and sincere. If you switch into a highly theatrical delivery, the jury may interpret the emotional appeal as a substitute for reason or a screen for lack of confidence.").

strategically, depending on what stage of the trial (voir dire, opening statement, closing argument, etc.) is taking place.

The modern tolerance of emotion's place in persuasive discourse represents the biggest difference between classical and modern approaches. In part, this tolerance springs from modern experts' conviction that most people reason in an *affective* (emotional, symbol-oriented), rather than a cognitive, fashion. In addition, modern experts stress the overlapping effects of emotion and lawyer credibility much more than classical rhetoricians did.

VI. Conclusion

In their systematic and comprehensive analysis of legal discourse, Greco-Roman rhetoricians divided legal argument into three equal components: *logos*, *pathos*, and *ethos*. Even though they understood the importance of logic, they realized that judges and juries also make their decisions based on nonrational factors such as their sense of the advocate's personal integrity or the emotional content of the case. Taking these factors into account, classical rhetoricians devoted as much attention to these nonrational means of persuasion as they did to logic.

For them, advocacy was an art and could only be learned by practice. Using examples drawn from their own considerable experience, they emphasized audience assessment techniques, strategic approaches, recurring problems, and the importance of flexibility. Above all, they stressed the importance of *projecting* the advocate's personal integrity and *exploiting* the emotional climate of the case. Their overall approach was focused on humanizing the case in ways that would favorably affect the judge's decision.

Modern analysts, especially trial advocacy specialists, also realize the importance of *ethos* and *pathos* in persuasive discourse. In their discussions of trial strategy, they implicitly (and sometimes explicitly) endorse classical rhetorical principles and discuss many of the same topics as classical rhetoricians. Very often, they reach the same conclusions about what is effective and what is not. Of course, modern lawyers must sometimes modify classical principles to suit modern circumstances. For example, both classical and modern rhetoricians think an audience-oriented focus is important. But modern trial lawyers have a more difficult task than their predecessors because they they have two audiences—the judge (a professional) and the jury (nonprofessionals). Despite this difference, both modern and classical rhetoricians agree that advocates must tailor their arguments to suit the audience and make numerous suggestions about how to do so.

Occasionally, modern authorities adopt an altogether different emphasis such as when they focus on non-verbal persuasive techniques. Or, when they depend on *affective* reasoning instead of cognitive reasoning. Even then, however, they are drawing on principles which were first introduced in the classical treatises.

Although there are substantial similarities between Greco-Roman and modern ideas of how *pathos* and *ethos* affect legal audiences, modern authorities do not discuss these effects in a very systematic fashion. Compared to their predecessors, modern analysts lack an adequate overarching theoretical framework within which to discuss the nonrational factors in legal discourse. This lack of a systematic approach presents several dangers. First, it results in an over-emphasis on logic in most formal analyses of persuasive legal discourse. It also misleadingly relegates *ethos* and *pathos* to positions of secondary importance. Moreover, new trial lawyers do not have ready access to the available materials regarding *ethos* and *pathos*. Instead, they must glean their information from journal articles, parts of trial advocacy treatises, and from more experienced lawyers.

To correct this deficiency, modern experts should familiarize themselves with the rhetorical works of Aristotle, Cicero, and Quintilian. After doing so, they could utilize 2,000 year old treatises which provide an experience-based theoretical framework within which to place the essential rhetorical principles of *ethos* and *pathos*. By modifying these treatises for modern use, they would provide new lawyers with an invaluable resource.