



Public speaking and the art of persuasion in the courtroom

How *pathos* and *logos* fit into the equation

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The second part of a two-part series

Pathos is your appeal to emotion

In law school, we were all taught to suppress our humanity in favor of “thinking like a lawyer” – setting aside emotions and engaging in a cold and calculated analysis of facts followed by a dispassionate application of the law.

But a skilled *trial* attorney must unlearn what we were taught. Human beings do not reason through problems and issues the way that lawyers and judges do. You have worked diligently to hone and maximize your linguistic intelligence, but now is the time to focus that same energy and effort into developing emotional intelligence.

Have you ever walked into the middle of a conversation to find others laughing at a joke, yet you find yourself laughing along with them despite your ignorance of the joke? Have you ever noticed that you have a more difficult time controlling your temper when arguing with someone who has already lost theirs?

These reactions are all the result of a special class of brain cells known as “mirror neurons,” which prompt the brain to mimic certain actions or emotions whenever we witness them in another person. Social interaction has been so fundamental to our survival as a species that we are literally hard wired to empathize with one another. We do not merely perceive the emotions of others; we can also *feel* them as though they were our own.

Contemplate the implications this has on trial practice. Care deeply about clients and the harm they have suffered

and infuse that compassion into the presentation instead of giving a dispassionate analysis of facts and law. This activates the mirror neurons in the jury and prompts them to feel the same way. This aids with *ethos* too, insofar as it provides another opportunity to subconsciously bond with the jury over a shared emotional experience. Conversely, expressing little to no emotion when speaking can leave your jury profoundly devoid of emotion.

This does not mean going overboard or exaggerating something that you do not truly feel. Unless you are an Oscar-worthy actor (and you probably are not) it is highly unlikely that you can activate mirror neurons with fake emotions. Worse, the jury may even realize that you are being insincere, completely devastating your *ethos*.

Instead, one must *actually* feel love and sympathy for one’s client, moral outrage at the defendant’s lawless behavior, or whatever other emotion you hope to stir in your audience. Keep this in mind at the case-selection phase. Instead of merely analyzing the merits, collectability, and profitability of a case, take the time to determine how you actually feel about the client and their story.

What if the case doesn’t move you?

If the case does not tug at your heart strings at the intake phase, you will have a much more difficult time effectively deploying *pathos* throughout the entire litigation. If the case does move you, turn inwards and reflect on what emotions it stirs, why it stirs them, and try to connect with other times you have felt the same or similar emotions. Once you are fully attuned to your feelings, you can begin to think strategically about how best to utilize the emotional undercurrents of the

case to enhance its framing and storytelling in every deposition, brief, hearing, and, ultimately, at trial.

This process can be uncomfortable at first. When we turn inwards to observe our feelings, it can bring up painful and traumatic memories, memories we have buried down deep to mitigate our own pain. But imagine if you were to finally acknowledge these feelings, embrace them, and use them in the service of others. Lawyers are made stronger by recognizing and channeling our feelings in the pursuit of justice.

As trial lawyers, we are uniquely positioned to shield others from similar emotional trauma and to seek fair recompense for that trauma when it has occurred. To do this most effectively, we must first accept a truth – emotions are as valid and important as logic. In fact, when attempting to persuade non-lawyers, emotions are typically far *more* important.

Make bonding with your clients a priority in your day-to-day practice. Visit them in their homes, eat dinner with their families, carefully observe their daily lives, and their personalities. Learn their hopes, dreams, aspirations, and their fears. Learn about their suffering and what brings them joy. Use these experiences as a way to remind yourself why you chose to represent human beings in the first place, instead of faceless entities or heartless insurance companies.

Fear and hope

To add a bit of empiricism, we will discuss a lesson that is taught to every introductory marketing and mass-communications student. From a persuasion standpoint, the two most powerful human emotions are *fear* and *hope*. View



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any professionally developed television commercial, newspaper advertisement, or billboard, and one or both of these emotions will be utilized. If you die today, would your family be financially secure? Buy a whole-life insurance policy and they will. Do you hope to meet beautiful singles at an exclusive after-hours party? Buy our product and you can be a part of it, too.

It is no coincidence that our last two presidents picked these two emotions, respectively, as the lynchpins of their campaigns. There is a large body of research from cognitive scientists that focuses on why hopeful rhetoric tends to work better with progressives and fearful rhetoric tends to work better with conservatives. For our purposes, though, understand that utilizing both emotions will maximize the persuasive impact of courtroom advocacy for audiences that are often a mix of both progressives and conservatives.

Paint a picture of the hopeful world the jurors can create with a verdict in your client's favor. Depict, in stark detail, the harm your client has suffered as a result of the defendant's unlawful or immoral behavior. Acknowledge that no amount of money can undo that harm, but fair compensation today can free your client to pursue the things that will bring them joy. If you have done your job, you can describe with clarity and conviction all the ways a just verdict will change lives.

But also paint a picture of the disastrous consequences of a defense verdict. All the pain, suffering, and fighting will have been for naught. The struggles will continue indefinitely into the future. Worst of all, the defendant and others like them will feel emboldened by the verdict, hindering change and resulting in the continued infliction of suffering onto others. There are generally two categories of persuasive fear – fear of *loss* and fear of *missing out*. Think creatively about ways to utilize them both. In the liability phase of a bifurcated trial or a trial with no punitive damages, the use of fear must be handled carefully to avoid a mistrial, but it can be done even within

the strictures of those rules with careful planning.

Do not lose sight of other emotions. Fear and hope are powerful, but do not forget about sadness, compassion, anger, jealousy, spite, and countless other emotions that may play a role in your case. Effective storytelling often means explaining or subtly revealing the emotions and motivations of the characters within the story. Emphasizing emotion helps the jury place individual witnesses into familiar narrative roles like the antagonist, mentor, henchman, and the like, and research shows that we all receive information better when it is presented to us in a familiar story format.

Logos is your appeal to reason

This component of the Aristotelian model is where lawyers feel most at home. In fact, after emphasizing the importance of *ethos* and *pathos*, many trial skills students will ask whether *logos* even matters. This is a valid question, particularly now, when “truth isn't truth” and everyday life increasingly resembles an Orwellian dystopia. But the answer is “yes,” reasoning still matters.

First, lawyers are not the only ones who have trained themselves to tune out their emotions. Despite the enormous importance of emotions, our post-Enlightenment society tends to stigmatize them. If one person is deemed “rational” and another person “emotional,” the undoubted conclusion is the first person is complimented while the second is denigrated.

The sociological and patriarchal roots of these beliefs are beyond the scope of this article, but it is important to note that there are certain people who believe the only correct way to reach a verdict is to do so dispassionately and without allowing themselves to feel *any* emotion. These people have often been socially or professionally conditioned to “think like a lawyer,” so a rational analysis of the facts and the law are critical to persuading them. Conversely, they will be far less motivated by emotional appeals, even

though very few people are completely immune to them.

Logos also matters because stories must make sense in order to persuade. People may reject a story if it contains flawed logic, even if they cannot appropriately articulate the precise ways in which the logic was flawed.

Logos is also important to the Court of Appeal. Appellate justices were trained to “think like a lawyer” as well, and it is unlikely whatever emotional pull they feel will cause them to overlook flawed reasoning. A just verdict for your client has no value if it gets overturned on appeal.

The most important thing to remember as a lawyer deploying *logos*: Few, if any, of your jurors will have been trained to understand it as well as you do. Formal logic and critical thinking skills are not a part of the core curriculum of academic institutions at any level – even graduate school. Be wary of using polysyllabic words (like polysyllabic), making logical inferences and deductions implicitly instead of painstakingly explaining them, and otherwise walking through a particular analysis in a way that may leave some jurors behind. As the adage goes, if you cannot explain it simply, you do not yet understand it well enough.

What you can do now

Understanding the physiological, emotional, and psychological underpinning of communication is the first step towards conquering public speaking anxiety and becoming a more effective advocate.

This article scratches the surface of an art form that is thousands of years old and which has been extensively researched from a wide variety of academic disciplines. For those who are interested, there are many publications available through NITA and Trial Guides that synthesize, harmonize, and apply the social and behavioral sciences to the art of trial practice. (See <https://www.nita.org/publications/books-dvds> and <https://www.trialguides.com/>.) Many of these publications are tailored to civil plaintiff-side practice.



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Our advice to those who seek to master this artform is to practice it as much as you can once the pandemic ends and we can venture back out into the world again.

There are many ways to practice and refine public speaking and persuasion abilities, skills that translate almost directly into enhanced trial performance. Join Toastmasters International, take an improv or psychodrama class. Some public defender and district attorney offices will accept volunteers to try misdemeanor, DUI, and other low-level offenses, simultaneously

performing a public service while giving you an opportunity to get trial experience.

Whatever you do, remember that you are not alone. All of the great trial lawyers are human, with the desire to be loved and accepted, just like you. They all fear judgment and embarrassment, just like you. And they all had the capacity for greatness inside them, waiting to be unlocked, just like you.

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