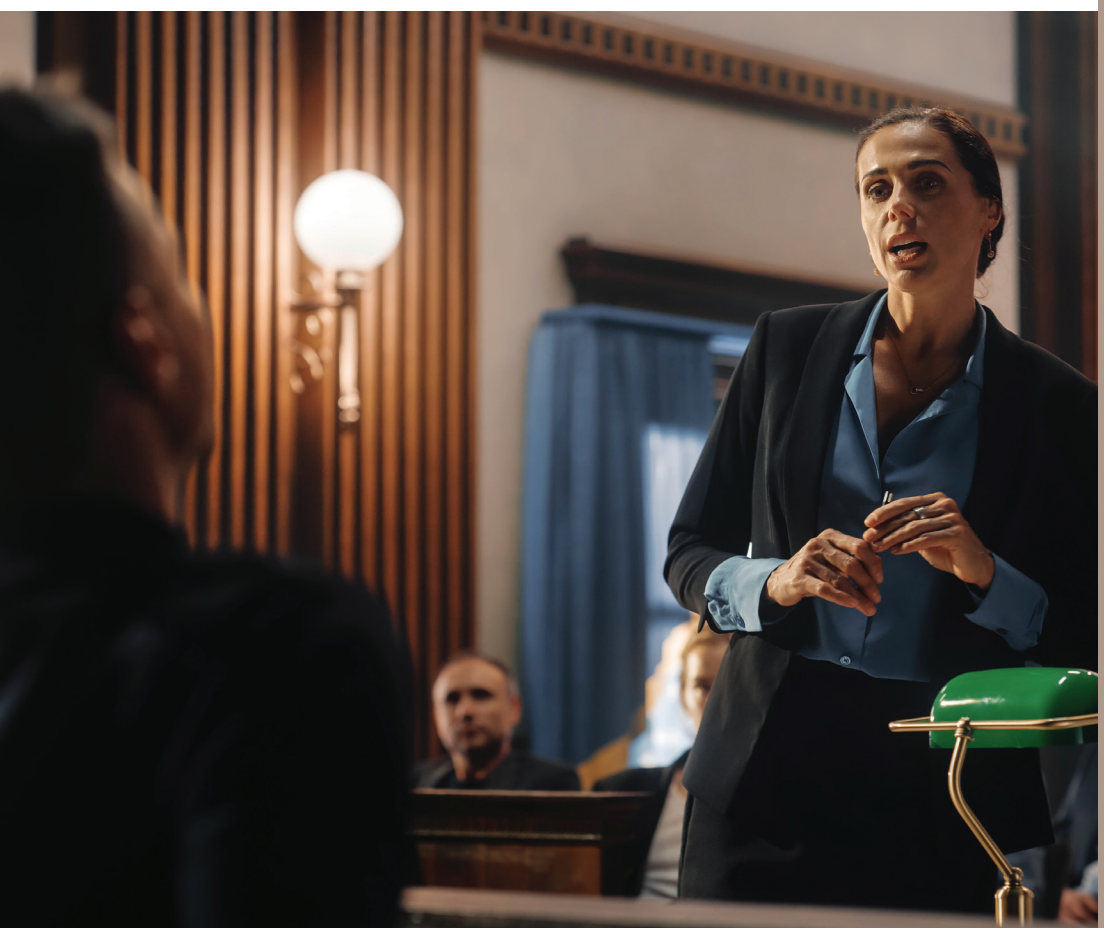
Part Two of a five-part series.

What I Learned From Teaching Trial Advocacy

The essential elements of persuasion: What to do and how and why to do it.



TAKEAWAYS >>

- The three "c" words—character, competency, and conviction—summarize successful persuasion based on Aristotle's teachings regarding the need for trustworthiness (ethos), logic (logos), and emotional appeal (pathos).
- Attorneys must master how to personalize their case, and also when and how to introduce, combat, or reframe negative information. Tactics for doing so are not always compatible for both plaintiff and defense counsel.
- Small details during opening statements matter, including positioning, use of notes, and eye contact.

BY GINO L. DiVITO

ISBA RESOURCES >>

- Amanda Hamilton, *Oral Arguments: More and Less Remote*, 108 Ill. B.J. 30 (Nov. 2020), law.isba.org/46rkHue.
- Timothy S. Midura & Colleen L. Sahlas, *Case Management Lessons From 'The Art of War'—Part 1: Introduction*, Trusts & Estates (Jan. 2020), law.isba.org/3rts1XA.
- Judge Debra B. Walker & Niharika Reddy, *Perspectives, Preferences, and Pet Peeves From the Bench*, Family Law (Sept. 2019), law.isba.org/2oybkJt.

TRIALS ARE ALL ABOUT PERSUASION. And no one has explained the elements of persuasion better than Aristotle. What that storied Greek philosopher taught about persuasion, so many centuries ago, persists to this day. And they apply in every aspect of trial advocacy.

Aristotle's "Rhetoric" examines the art of persuasion through appropriate language in speaking and writing, the latter of which is essential but not relevant for our purposes here. It should not be confused with its frequent alternative meaning, which describes a false argument such as: "What he said is just plain rhetoric." In his "Rhetoric," Aristotle taught that there are three modes of persuasion for every argument: ethos, logos, and pathos. He stressed that persuasive arguments require the speaker to be familiar with all three modes and to use them effectively.

His three modes of persuasion apply in opening statements, and they also apply throughout trial. They answer the "who" question addressed in Part One of this series, available at law.isba.org/3LPmiCe, and which is so important for the jury's perception of the speaker. They are presented here as essential for opening statements, but it is important to understand their significance for every aspect of a trial, for they will be referred to frequently below and throughout the remaining parts of this series.

Aristotle's primary focus on the three modes of persuasion was on the speaker (for ethos), the argument (for logos), and the audience (for pathos). In this discussion of the three modes, however, my emphasis is on the primary speaker (as should be expected in an essay such as this), so the focus is on the lawyer's role. But it should be obvious that lawyers must ask their witnesses questions that aid them in displaying the three modes as well, while asking adverse witnesses questions that may expose, if possible, their failure to have one or more of those qualities.

Ethos relates to a speaker's "credibility" and "authority"—necessary traits that result in trustworthiness. Where a speaker is deemed to be untrustworthy, persuasion is not possible. No one trusts a person believed to give misinformation or disinformation. For example, would you buy a used car from a seller whom you catch in a lie or whom you simply don't trust? Using a first "c" letter for each of the three modes of persuasion, my word for what best describes ethos is "**character**"—shorthand for good character. Though my emphasis on trustworthiness in this series is on the attorney, it obviously applies to your witnesses as well.

Logos describes arguments that are "reasonable" or "logical"—traits that recognize a speaker's knowledge and application of plausible facts. Without that perception, persuasion is impossible. For example, would you buy a used car from a seller who is unable to address relevant concerns about the car? My "c" word for logos is "**competence**"—shorthand for the combination of the lawyer's demonstration of competence in the courtroom and for asking appropriate questions leading to trustworthy and logical witness-answers so essential for persuasion.

From October 2023 through February 2024, the Illinois Bar Journal will be publishing a five-part series on trial advocacy by **GINO DiVITO**, *who cofounded and is a partner in the Chicago law firm of Tabet DiVito & Rothstein LLC. He has served as a trial judge and as a justice of the First District of the Illinois Appellate Court. He is the author of the ISBA publication, "The Illinois Rules of Evidence: A Color-Coded Guide," which is updated annually.*

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IN ANY EVENT, IN ALL CRIMINAL CASES AND IN MOST CIVIL CASES, YOU DON'T WANT THE JURY TO CONSIDER OPPOSING COUNSEL'S THEORY ON YOUR TIME. YOU MAY BE WRONG ABOUT THE TACT YOUR OPPONENT WILL TAKE, THUS GIVING THE JURY AN ADDITIONAL (AND PERHAPS PREFERABLE) ADVERSE THEORY TO CONSIDER.

Pathos is an appeal to emotions—a persuasive motivating consideration for the listener. Aristotle meant it as a speaker's incitement for action by the listener, based on an array of emotions, such as fear, pride, hatred, hope, betrayal, joy, and love. But, consistent with my goal of focusing on what enables the lawyer's ability to persuade, my "c" word for pathos is "**conviction**"—shorthand for evoking jurors' emotions through lawyers' personal display of belief in the rightness of their cause. For example, would you buy a used car from a seller who did not convey personal conviction for the car's worthiness?

In sum, and for ease of recollection, my proposed three "c" modes for successful persuasion—based on Aristotle's teachings regarding the need for trustworthiness, for logic, and for appeal to emotions through the speaker's personal display of conviction—can be summarized as **character**, **competency**, and **conviction**. When you possess those qualities and your opponent lacks one or more, success may overcome your opponent's otherwise weightier evidence.

It's common knowledge that some persons who lack ethos, logos, and pathos are nonetheless able to fake those qualities. All types of charlatans thrive on such fakery. And, sadly, so do some lawyers. But the best way to ensure obvious ownership of those attributes is to possess them. How wonderful the world would be if everyone had those traits. Surely, the preeminence of our justice system would be enhanced even more if every participant—especially every lawyer—possessed those virtues. Developing skill in trial advocacy must never be used as a tool to deceive or for self-enrichment.

A few random considerations for opening statements

Well before a trial begins, you must know everything there is to know about the case: the parties; prospective witnesses; all relevant documents about the case, including oral and written statements, reports, and prior testimony; and any other relevant information. Your quest for knowledge applies even to the judge and to opposing counsel. Preparation for every aspect of your case and your opponent's case is essential.

Also, well before beginning a trial, you must have a **theory** that supports the basis for winning the case. This requirement is essential and deserves significant attention. It's not discussed here because, despite its absolute relevance to the beginning of trial in opening statements, theory will be discussed in Part Five of this series, under the topic of closing arguments, where it shares the same important requirement. Likewise, a good **theme**, one likely to resonate with jurors, will help to support a basis for winning. That too is discussed under the topic of closing arguments in Part Five.

Opening statements and closing arguments are customarily prefaced by acknowledging the judge, opposing counsel, cocounsel, and then the jury. They are nice gestures and should be followed, because they demonstrate mutual respect for all the trial participants. The proper acknowledgement for the judge is, "May it please the court" (which is usually followed by the judge's return acknowledgement by stating your name), followed by simply looking at and stating the names of opposing and cooperating attorneys, and turning to the jury and starting with, "Members of the jury." In today's climate of gender identification, the acknowledgment to the jury in that form might be safer than "ladies and gentlemen of the jury."

Your opening statements should conclude by informing the jury what you seek, such as a conviction, a not-guilty verdict, money damages, a finding of no liability, or some other form of relief.

Focus on your case

As a plaintiff or a prosecutor, generally talk only about your case; let your opponents present their case. Though you should anticipate what your opponent will do during trial, don't disclose it to the jury. That's certainly true in criminal cases, where a prosecutor may not comment on the defendant's anticipated defense, because defendants have no burden of proof and may offer no information during opening statements and no evidence during their case-in-chief. Even if before trial criminal defense attorneys have signaled a possible defense theory, they're not bound by it.

In any event, in all criminal cases and in most civil cases, you don't want the jury to consider opposing counsel's theory on your time. You may be wrong about the tact your opponent will take, thus giving the jury an additional (and perhaps preferable) adverse theory to consider. None of that applies to defense counsel, who has heard the plaintiff's theories and is free to comment. Always, as noted in Part One, have faith that jurors will compare opening statements and will focus on evidence presentation to determine whose version is correct.

Avoid disclosing negative information *when you are in total control of its admission*. For example, some criminal defense attorneys mistakenly disclose negative information about a defendant's prior conviction, based on their belief that the jury will respect them for being forthright. But evidence of a defendant's conviction is totally under the defendant's control. It is admissible for the purpose of impeachment, but it cannot be raised by the prosecutor unless and until the defendant testifies, where it can be addressed during the defendant's testimony in a manner

consistent with considerations of primacy (not at the beginning of defendant's testimony, which should start with favorable persuasive evidence; and, with considerations of recency, not at the end of defendant's testimony, where it would be the last words the jury hears). In opening statements, revealing that defendants have served their sentence and have been upright citizens ever since their conviction does not justify counsel's inviting the jury to view them in an unfavorable light at the very beginning of trial, and to view all the evidence through the lens of their prior conviction(s).

Where negative information is intrinsic to a case, however, you may not be able to avoid it. Plaintiffs, who speak first, can expect opposing counsel to discuss a plaintiff's negative information during opening statements. Defendants, on the other hand, have the advantage of knowing whether plaintiff's counsel addressed defendant's negative information and, if not, it need not be revealed at this stage of trial. In any case, consider softening—and even enhancing—the effect of negative information. For example, where the defendant's car collided with the plaintiff who was riding a bicycle on the wrong side of the road, plaintiff's counsel might point out the plaintiff was cycling on that side of the road to better see oncoming traffic.

Personalize your side as best you can (and dehumanize your opponent) by starting with opening statements and throughout the trial. State prosecutors refer to themselves as "the People." They talk about "the defendant," usually not by name. Criminal defense attorneys personalize their clients by name, and refer to "the state" or "the government" or "the prosecutor" or "the prosecution." Plaintiff's attorneys don't talk about "the plaintiff," but about the person (by name) who has been injured in some fashion. And when plaintiffs' attorneys represent persons, they talk about "the corporation" or other business entity on the defense side, while defense attorneys personalize the entity they represent by talking about the people involved in the action. No one should refer to "my client" because it conveys an entity or a person who is paying the attorney to win, perhaps at any cost.

Position, notes, and eye contact are important considerations for opening statements. You must be aware of where to stand, how to use notes, and how to make eye contact with the jurors. Center position is ideal. Don't stand far away from the jury or so close that jurors' space might be invaded. Avoid pacing unless you use it minimally as a way to reach out to every juror. Don't hold notes. Don't read notes to the jury. Notes should be limited to topics for discussion and to remind you, if necessary, of relevant occurrences, names, dates, and places. Determine where to place notes for easy access, such as a podium, but don't let a podium imprison you or portray you as a lecturer. By the time trial begins, you should know every aspect of the case and have confidence in not having to rely on notes at all. Eye contact with jurors is essential. Speak to each one in a manner that projects genuine interest in each of them, as opposed to merely fleeting glances or lingering too long on a single juror or a group of jurors. Failure to speak to any juror may create hostility with disastrous consequences. Rehearsing opening statements with colleagues, friends, and relatives is encouraged. Use them to ascertain whether they understood your case, and to invite critiques. IBJ

WELL BEFORE A TRIAL BEGINS, YOU MUST KNOW EVERYTHING THERE IS TO KNOW ABOUT THE CASE: THE PARTIES; PROSPECTIVE WITNESSES; ALL RELEVANT DOCUMENTS ABOUT THE CASE, INCLUDING ORAL AND WRITTEN STATEMENTS, REPORTS, AND PRIOR TESTIMONY; AND ANY OTHER RELEVANT INFORMATION. YOUR QUEST FOR KNOWLEDGE APPLIES EVEN TO THE JUDGE AND TO OPPOSING COUNSEL.

Part Three of this series, concerning direct examination and evidence, will appear in the December Illinois Bar Journal.