

# Classical Rhetoric and the Modern Trial Lawyer

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

The average trial lawyer lacks time to read Aristotle, Demosthenes, Cicero, or Quintilian. But most trial lawyers will not settle for being average.

There is gold to be mined in *Rhetoric*, that dusty work of Aristotle's, along with the speeches of Demosthenes, and the works of their Roman heirs. Although these classical rhetoricians lived centuries ago in cultures very different from ours, their understanding of what makes a winning argument is timeless. Their techniques and steadfast belief in the rule of law are continually instructive and inspiring for modern trial lawyers. Spending time with the works of these sages will not only improve your performance in court but also give you a deeper appreciation for the rich history of our profession.

The study of rhetoric, the art of selecting the most effective means of persuasion, actually predates the classical age of Greece and Rome. The oldest known writing on the subject was composed in Egypt at least 4,000 years ago by Pharaoh Huni, who instructed his son on effective speaking. See James C. McCroskey, *An Introduction to Rhetorical Communication* 261–62 (5th ed. 1986).

Serious analysis of persuasion, however, first emerged among the Greeks. Isocrates (436–338 B.C.) developed ideas on style and on the proper education of the advocate. In his *Phaedrus*, Plato (427–347 B.C.) offered guidance on properly constructing a speech, and proposed that rhetoric was “the art of winning the soul by discourse.” But it was Aristotle (384–322 B.C.) who created the seminal work on persuasion that to this day dominates the field.

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Appreciating the art of persuasion truly begins with Aristotle's *Rhetoric*. Although it is not light reading, his *Rhetoric* is deeply rewarding. In it, Aristotle identifies three elements of argument: the speaker, the argument, and the listener. He names the listener as the most important component and develops a methodology involving three primary modes of persuasion: *ethos*, the personal character of the speaker as perceived by the listener; *logos*, persuasion by logic; and *pathos*, persuasion by emotion. Successful rhetoricians will focus these modes of persuasion on their listeners, Aristotle argues, for the “whole affair of rhetoric is the impression to be made upon the audience.”

Aristotle observes what so many lawyers learn the hard way—that audiences differ in attitudes, beliefs, and preconceived notions about the matter at hand. An argument or presentation before one judge may fail before another. Just as each receiver is different, each argument should be unique, Aristotle insisted. The capacity to match one's rhetoric to one's audience is well served by a sophisticated understanding of human nature, habits, desires, and emotions.

It is essential to consider the key factors that influence the listener's decision, including attitudes, beliefs, values, and personality. A person who is biased against doctors may be predisposed to reject an argument that relies on a physician's testimony. Deeply religious people may oppose the opinions of a self-confessed atheist. Likewise, a juror who cries upon hearing an assault victim's testimony could be more susceptible to tear-jerking closing arguments than a juror who rolls her eyes at emotional appeals. If such assertions sound like common sense, you would be surprised how often lawyers ignore the nature of their listeners and instead develop arguments to suit the tastes of other attorneys.

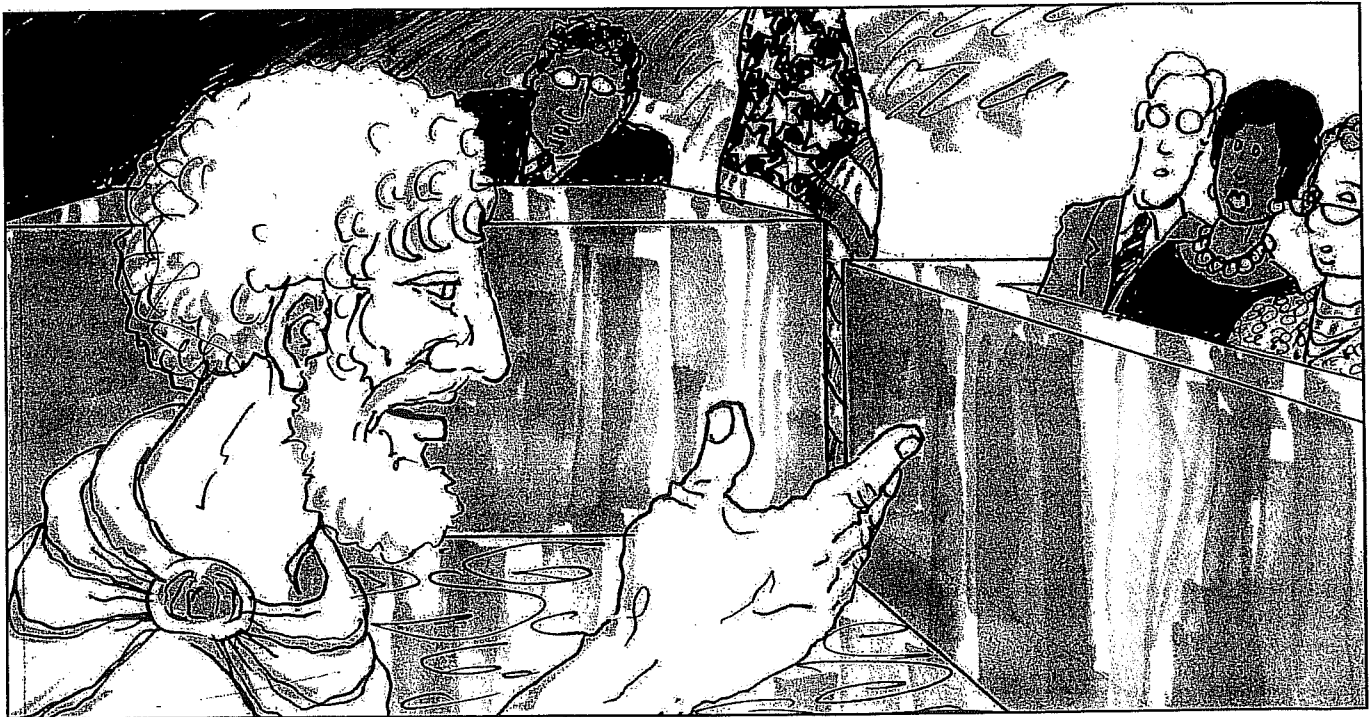
*Rhetoric* reminds us of the importance of conducting due diligence on the judges that hear our cases. It compels us to read a judge's prior opinions and writings, contact people

familiar with the judge, observe the judge in other proceedings, and, in some instances, conduct online research on the judge. Such investigation will help you avoid arguing directly in opposition to a judge's preconceived notions or even prior opinions. If you must argue against a stated view of the court, your awareness of this conflict may prompt you to couch your argument in this fashion: "Your Honor, I appreciate that you do not favor civil RICO claims; however, in this case, the facts fit well within even the most conservative view of the elements of a RICO claim and justify the result we seek. Therefore, we asserted the claim on behalf of our client, who has been severely damaged by the wrongful conduct we will prove. We hope you will understand and carefully consider the claim."

Although learning about jurors is more difficult than learning about the judge, there are a number of effective ways to glean information about them. When possible, obtain a jury list in advance of trial and research the individuals online. You

them, the questions you ask on cross and direct, and the tone of your closing argument. Never hesitate to adjust your argument or presentation if you discover you have lost the attention of the audience. For example, if in arguing a motion for summary judgment, you observe that the judge is listening to your first argument but seems uninterested in your second, consider moving smoothly but quickly to the third. Or, if the second point is important, adjust your presentation to obtain the court's attention. Just as in Aristotle's time, the advocate of today must be conscious of the decision-maker from the outset to the conclusion of an argument.

As mentioned earlier, Aristotle believed that the bases of listener-centered persuasion are *logos*, *ethos*, and *pathos*. *Logos*, or logical reasoning, he argued, should be of primary concern when developing the substance of an argument. Understanding the rudiments of Aristotelian logic in the context of persuasion is beneficial for three important reasons: Arguments are



can sometimes prepare a jury questionnaire and request that the court allow you to present it to jurors before formal voir dire begins. Although many jurisdictions do not allow counsel to conduct a full voir dire, in some cases, a full voir dire is permissible, in which case how you frame questions about jurors' attitudes and beliefs becomes extremely important.

Limited voir dire, in which counsel submits questions for the judge to ask, is also a valuable opportunity to reveal vital information about the jurors. Throughout the voir dire process and the trial, jury consultants and facilitators can create a "jury profile" and help you strike jurors who could harm your case. Finally, mock trials can help you learn how jurors are likely to react to your case, in whole and in part. Listening to the mock jurors deliberate can provide crucial insight into how the real jury may respond when it counts.

Your appreciation of the decision-makers should inform not only the overarching theme of your case, but also your development of that theme—the structure of your opening statement, the witnesses you select, the order in which you call

more convincing when based on sound logic; understanding basic principles of logic will enable you to build watertight arguments and avoid fallacies; and you will be able to refute opposing arguments by identifying their logical fallacies.

*Rhetoric* offers an extensive discussion of inductive and deductive reasoning, Aristotelian syllogisms, fallacies, and various methods of developing logical arguments. It also makes clear, however, that even a logically impeccable argument will fail if the audience does not trust the speaker, for Aristotle viewed *ethos* as the most important aspect of argument. He defined "ethos" as the character of the advocate *as perceived by the listener*. Modern trial lawyers draw upon this idea when they become "personal advocates" who are intricately involved in the jury's evaluation of a case. It is important to appreciate the distinction between the actual character of the speaker and the perceived character. It is the latter that matters. Thus, we come to view Aristotelian advocacy as something like a performance, a means of winning the trust of our listeners, regardless of who we are and what we believe.

What qualities will boost your *ethos*? Integrity, intelligence, friendliness, sincerity, conviction, professional appearance, and enthusiasm, among others. Aristotle identified integrity as the most important of these. Creating the impression that you are a person of honesty enhances your ability to persuade. Admitting unfavorable facts, a bit of self-deprecation, and demonstrating a sense of fair play will help win you points for integrity, as will avoiding ad hominem attacks and extreme positions.

Similarly, a knowledgeable advocate will appear to be intelligent, organized, well-prepared, and, hence, persuasive. To engender goodwill, be courteous and civil, do not talk down to your audience, and use *voir dire* to establish a rapport with the jurors. How you dress and move about the courtroom, your enthusiasm, and your sincerity will also affect your *ethos*. It is important to appreciate that during a trial, your *ethos* can rise and fall. The goal, of course, is to establish a high *ethos* early on and maintain it.

A healthy *ethos* will help you apply in court what Aristotle believed was the third most important component of advocacy: *pathos*, or emotion. Aristotle recognized that effective

advocates use emotion to provoke listeners to identify with their causes (i.e., their clients). Aristotle cautions, however, that *pathos* is powerful only to the extent that it is based on a foundation of logical argument.

Applying Aristotle's lesson in court, trial lawyers work to humanize their clients and develop arguments with moving stories and figurative analogies. They are right to avoid overtly manipulating the jurors' feelings; doing so can backfire, as can relying on emotional appeals that are blatantly divorced from the facts at hand. *Pathos* is a powerful force, and it is best to rely on it with moderation and always hand in hand with sound reasoning. For Aristotle, the marriage of *pathos* with *logos*, along with a high *ethos*, is the foundation upon which successful listener-centered arguments are built.

The only trouble with Aristotle's *Rhetoric* is that it is a theoretical text. To see theory in practice, turn to Demosthenes.

A contemporary of Aristotle's, Demosthenes was perhaps the greatest orator of ancient times, but greatness did not come to him naturally. Legend has it that to eliminate a stutter, he secluded himself in a cave and practiced speaking with pebbles in his mouth. It is said that he copied down Thucydides many times to improve his own style. His example shows that advocacy can be learned. His first public oration was a failure. With self-improvement, he mastered the art. His *Philippics*, speeches against the encroachments of Philip II of Macedon, are legendary, as is his oration known as "On the Crown."

As Plutarch observed, the orations of Demosthenes differ from Cicero's: They do not rely on rhetorical ornaments such as humor, jest, or satire. Instead, Demosthenes relied heavily on reasoning. But according to Quintilian, when Demosthenes was asked about the three most important parts of a speech, he responded: "Delivery, Delivery, and Delivery." Demosthenes could cast a spell over the audience that, to this day, can be cast upon a modern reader of his orations.

In the *Philippics*, he assailed Philip of Macedonia's evisceration of Athenian liberties that ended the era of Greek democracy. The arguments reflect techniques worthy of emulation today. For example, Demosthenes forcefully substantiated his assertions with evidence and facts. He followed each assertion with a presentation and conclusion, often using short, precise sentences. Effective advocates today can embrace this idea in presenting argument not only to juries and judges but also to appellate courts. Demosthenes's speeches are replete with rhetorical questions and imaginary dialogues with his listeners. Consider this passage from one of his orations assailing Philip's aggressiveness:

When, then, Athenians, when will you do your duty? What must first happen? "When there is a need for it." What then should we consider what is now happening? For in my opinion the greatest "need" is a sense of shame at the political situation. Or do you want, tell me, to go around and ask each other "Is there any news?" Could there be anything more newsworthy than a fellow from Macedonia defeating Hellenes in war and regulating their affairs? "Is Phillip dead?" "No, he's not, but he's ill." What difference does it make to you? If anything happens to him, you will soon create another Philip, if this is how you attend to your business.

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



With his series of provocative questions and replies, Demosthenes's speech dramatizes the debate about the "political situation" and challenges the Athenians' complacency. His method is confrontational and meant to engender action. He rightly acknowledges that there is resistance to the action he desires, and he works with and through that resistance by giving it voice and responding to it with force. This technique of directly taking on the opponent's views is vital to any advocate. A trial lawyer who anticipates, acknowledges, and explicitly addresses the jurors' uncertainties or doubts about the case before them will enjoy a much higher *ethos* than one who ignores the jury's equivocation.

Another technique Demosthenes relied on was figurative language. In the same speech cited above, Demosthenes compares the way the Athenians combat Philip to the way a barbarian combats a Greek. Later, he says that Philip strikes like a fever even those at a great distance from him. Such metaphors and similes are second nature to trial lawyers. "Stab the corporate monster in the pocket book and award punitive damages" is a familiar appeal. As Demosthenes knew, figurative language works particularly well when the comparisons they make strike an emotional chord with the listener. To characterize the Athenians as barbarians surely cut close to the bone, and in ancient times, when illness could quickly ravage entire populations, comparing Philip to a fever likely struck fear in the listeners' hearts.

In the following example, observe how Demosthenes used the technique of anaphora (repetition of words or phrases at the beginning of sentences):

It was not safe in Olynthus to urge Philip's cause without at the same time benefiting the masses by giving them Potidaea to enjoy; it was not safe in Thessaly to urge Philip's cause without at the same time Philip's benefiting the majority by expelling their tyrants and giving back Thermopylae to them; it was not safe in Thebes until he gave Boeotia back to them and destroyed the Phocians.

*Philippic 1*, quoted in Milns.

We sometimes see this same technique in the context of witness examinations. "Tell us what time you returned home. When you returned home at midnight, did you see anyone? When you returned home at midnight and saw your mother, did you notice anything unusual about her appearance?" The effect here, as in the quotation above, is to drill important assertions into the memory of the listener, who too quickly forgets what we want him to remember.

Demosthenes blended logic and reasoning by using many valuable stylistic devices. He was at his best when employing simple words in short sentences:

Guard this; cleave to it; if you preserve this, you will never suffer any dreadful experience. What are you seeking? Freedom. Then do you not see that even Philip's titles are most alien to this? For every King and every tyrant is an enemy of freedom and a foe to the rule of law.

*Philippic 2*, quoted in Milns.

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

succumb to dictatorship during his lifetime. Often a staunch supporter of Republican rule, Cicero became the spokesperson for the Senate after the assassination of Julius Caesar. In this position, he assailed Marc Antony, a supporter of Caesar and consul, in a series of speeches he named after Demosthenes's *Philippics*. His defense of the rule of law, unfortunately, cost

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him his life. Antony, after forming the Second Triumvirate with Octavian and Lepidus, had Cicero named an enemy of the state and assassinated.

Cicero's writings have survived and are still read for their insights into Roman history as well as the art of advocacy. Like many Romans of his day, he studied Greek oratory, and he applied the lessons he learned from it in court.

Cicero's speeches are marked by a certain savvy and dry humor. Consider this excerpt from Cicero's prosecution of Verres, who was charged by citizens of Sicily for abusing his office by stealing valuable works of art:

I come now to what Verres calls his consuming interest in Art, what a sympathetic friend of his might describe as his weakness and aberration and the Sicilians call highway robbery. I am not sure what name to attach it, so let me merely lay the case before you to judge on its own terms rather than by its name. Familiarize yourselves with the type of thing it is, gentlemen of the jury, and you will probably have little difficulty in applying the appropriate name to it.

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

Cicero knew exactly what to call the conduct of Verres but mocks the crime as a "consuming interest in Art." Cicero then piled on the evidence that he obtained after a lengthy investigation and allowed the jury to make up its own mind.

Cicero also gave great attention to the arrangement or structure of his speeches. Whereas Plato suggested that all arguments should have a beginning, a middle, and an end, Cicero favored a six-part structure or arrangement: *exordium*, narration, partition, confirmation, refutation, and peroration.

The *exordium*, according to Cicero, prepares the court for the argument. It is divided into two parts: introduction and insinuation. The introduction creates goodwill among the listeners and, ideally, influences the listener to be receptive. The second part of the *exordium*, the insinuation, is where the advocate unobtrusively penetrates the minds of the listener. This section is analogous to the opening statement, as it speaks to the need to connect with the listener on the level of pathos, to form a positive emotional bond between advocate and audience.

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

parts: proposition, reason, and conclusion. This separation is very helpful. It calls attention to the need to base one's argument on *logos*. According to Cicero, many inexperienced trial lawyers are not actually arguing; they are only discussing the matter at hand. Today's lawyer would be emulating Cicero if he or she argued the following proposition: "The nurse should have performed an EKG, as the patient experienced chest pain." The reason: "The nurse's notes reflect that the patient had, in fact, complained of chest pain, and the nurse has even admitted on the stand that patients in such situations are normally given EKGs." Conclusion: "The failure to conduct an EKG in this instance was a care- less mistake."

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

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

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Cicero. (3) *Elocution*: proper diction. Here Cicero calls attention to style, the form in which we express ideas. Imitating classical rhetoric in this respect may not work for you. Better to adapt a style that is natural and comfortable, rely- ing on simple but vivid language, colorful metaphors and similes, and varied rhythms. (4) *Memory*: Cicero never read from notes, but devoted hours to preparation to ensure that he was well prepared. Thus, he could be spontaneous in pre- senting his case. (5) *Delivery*: For Cicero, delivery involved gestures and movement in presenting the case. His advice is helpful when considering where to stand at certain moments in a trial, whether to question a witness standing or seated, and when to make eye contact with the jurors. Even a timely removal of glasses can be part of delivery.

Note that Cicero would work through all five steps listed above *before* the presentation of an argument. The list is merely the necessary work that prepares one to succeed when the time comes.

No review of classical rhetoric would be complete with- out mentioning Quintilian. Although he was known in the court as a successful advocate, he is best known today for his 12-volume work, *Institutio Oratoria*. The work, eclectic in some of its recommendations on persuasion, does contribute

ideas to the education of the advocate. Quintilian's idea of education of the advocate is based on his belief that an advo- cate should be a "good man." He writes that, "*ethos* in all its forms requires the speaker to be a man of good character and courtesy." Quintilian, *Institutio Oratoria* VI.2.18 (H.E. Butler, trans., Harvard 1922).

Like many Romans, Quintilian seems to have viewed rhetoric through an aesthetic lens. Rhetoric was valuable for its own sake. It was an art that could be taught, and the "art of rhetoric . . . is realised in action, not in the result obtained." Quintilian, *Institutio Oratoria* II.17.25–26. He viewed the highest aim of rhetoric to be speaking well.

Still, persuasion was his aim and, like Aristotle, Quintil- ian gives attention to knowing your listener, the tempera- ment of the judge, and the proper use of logic and emotion. He advises that assertions must be supported by facts or law and underscores the value of "charm." In other words, he appreciates the importance of a well-timed smile, a laugh, a courteous bow. He suggests that one begin an argument with a concise statement crafted to draw in the listener. Here are two examples from Quintilian's work: "The mother-in-law wedded her son-in-law: There were no witnesses, none to sanction the union and the omens were dark and sinister." And, "Milo's slaves did what everyone would have wished their slaves to do under similar circumstances." Quintil- ian, *Institutio Oratoria* IV.2.121. Quintilian's point about the first line is extremely valuable. Don't allow yourself to waste the first minute of an opening statement with plati- tudes; instead, dive right into the heart of your case. Law- yers too often waste their first sentences, which are the best opportunity one has to make a lasting impression.

Regarding witness examination, Quintilian wrote that the advocate must put his witnesses through their paces thor- oughly in private before they appear in court. Quintilian, *Institutio Oratoria* V.7.11. For the lawyer of today, what better way to heed Quintilian's advice than by conducting a mock trial either formally with a facilitator or informally in the law office conference room?

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

[A]s soon as we have acquired the smoothness of struc- ture and rhythm . . . we must proceed to lend brilliance to our style by frequent embellishments both of thought and words . . . with a view to making our audience regard the . . . [case] which we amplify as being as important as speech can make it.

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

Therein we see the sophistication of the classical orators. To "lend brilliance to our style" and characterize our case as being "as important as speech can make it" is the heady and thrilling work of the advocate. While the labor is no less dif- ficult, we have more guides than did our classical predeces- sors, but there are no better guides than Quintilian, Cicero, Demosthenes, and Aristotle. Spending time with them will improve your advocacy skills. Go to the library now and begin reading. And tell your colleagues that you will be late returning to work because once you begin your studies, you will not be able to stop. □