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## Three Keys to Creating Winning Arguments: Pathos, Logos, and Ethos

**B**y late December 2022, it became apparent that the New York Giants would finally return to the playoffs. On Christmas eve, however, the Giants lost to the Minnesota Vikings in the final minutes of the game, and fans became worried that the team did not have what was required to return to the Super Bowl. The Giants' last Super Bowl appearance was 10 years earlier, in 2012, when they beat the New England Patriots, and since that time the team had not even won a playoff game. Fans and radio talk show hosts wondered what it would take to get the Giants back to the Super Bowl. And then, like a bolt of lightning, the answer came to me — the bacon-wrapped breadsticks. Of course! The reasoning was clear. I just needed to make the bacon-wrapped breadsticks, and the team would be destined for a championship.

### Logical Fallacy

It started in 2011, during that historic playoff run. The game was in Green Bay. No one thought the Giants had a chance against the Packers, certainly not at Lambeau Field, and certainly not in January. My friend Tom

came over to watch the game. I made a treat that I knew he would enjoy, even in defeat — bacon-wrapped breadsticks. A culinary delight! Crispy bacon bathed in a sugary ham glaze, wrapped around an Italian breadstick, and baked in the oven. Tom enjoyed them thoroughly. But more importantly, the game ended in a Giants victory. Tom returned a week later to watch the Giants defeat the San Francisco 49ers in the NFC Championship game in overtime and, of course, I served the bacon-wrapped breadsticks once again. It became clear that the reason these improbable wins were occurring was not the team or the coaching of Tom Coughlin; it was the bacon-wrapped breadsticks. The rest is history. Eli Manning led the team to a last-minute score, and the Giants won the Super Bowl. But Eli could not have done it alone. No. He had the help of the bacon-wrapped breadsticks. Surely, if I made those same treats in 2022, the Giants would win once again.

This reasoning, while perhaps humorous, exemplifies the logical fallacy called *post hoc ergo propter hoc* — the assumption that one thing caused another merely because the first thing preceded the other.<sup>1</sup> *Flawed logical reasoning*, such as this, is highly unlikely to persuade others. *Sound logical reasoning*, on the other hand, which *is* persuasive, is one of the most essential tools for the trial attorney.

Trial attorneys advocate for the resolution of a conflict. Two opposing sides meet in a battlefield called the courtroom. The lawyers who represent each side are warriors, and communication skills are their weapons. Trial skills are taught throughout the United States, and instructors focus much attention on the who, what,

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BY STEVEN EPSTEIN

when and why, and the art of opening statements, direct and cross-examination, and summation. Too often ignored is the *how*. How do attorneys communicate and persuade others to think and act in the courtroom?

### Pathos, Logos, and Ethos

Understanding how to apply *pathos*, *logos*, and *ethos* can help. This article provides attorneys with a brief overview of pathos, logos, and ethos, and offers examples of ways to integrate these key concepts into trial advocacy.

Aristotle taught that a speaker's ability to persuade is based on how well the speaker appeals to the audience in three different areas: pathos, logos, and ethos. These techniques are commonly referred to as the rhetorical triangle. Pathos is what drives listeners to act. It is an appeal to the emotions, beliefs, and values of the listener. Pathos is the focus of the role of the audience in the argument.<sup>2</sup> *Logos* appeals to reason. It is the argument itself, and this strategy incorporates logic and reasoning into its effectiveness. *Ethos* is the credibility of the communicator — an appeal connected to the persuader's character or knowledge. This technique is especially critical in arguments pertaining to the sciences, where knowledge of certain facts is not commonplace.

The use of pathos requires a close examination of the receiver of the message and the emotions that generate action. It requires a willingness to accept the limitations of the power people have to persuade others. In essence, get over yourself. Law school — and even more, becoming a member of a Bar — invites the pitfall of ego into the power to persuade. Some lawyers believe they have the ability to persuade others because they can make an argument that drives others to act. They believe they have the power, but that power lies elsewhere. Effective persuasion requires an understanding of the motivation of the audience to listen and be persuaded.<sup>3</sup>

By understanding pathos, advocates can look at various components of a trial through a new lens. In jury selection, for example, an understanding of pathos teaches that defense lawyers must talk less and listen more. This skill is especially important in jurisdictions where time to communicate with a jury is limited. Lawyers must avoid the ego-driven desire to educate

Chart	
Major Premise	Measuring devices that are not properly calibrated do not produce reliable results.
Minor Premise	The chromatograph was not properly calibrated.
Conclusion	Therefore, the chromatograph did not produce...

the audience. One cannot educate an audience unless and until the audience is prepared to listen to the information being provided and incorporate the information into their analysis.

Jurors are motivated by a desire to be correct. During jury selection, therefore, counsel should find out how jurors endeavor to make correct decisions in their everyday lives. That will lead to a pathway to persuade them. Perhaps the client's case involves expert witness testimony, as many cases dealing with forensic science do. In these cases, it is essential to find jurors who will be able to listen to and evaluate an opinion. What does the juror do in his or her work or home setting to evaluate an opinion? If the juror answers by using words such as corroboration or consistency, the lawyer should let these words become part of his theme and his trigger words.

Trigger words convey emotion, and people act more with their emotions than with their thoughts. Emotional trigger words are valuable tools that help the audience to actively engage and lead to the successful utilization of the power of pathos in persuasion. Consider some of the great orators throughout history whose words effectively persuaded others to act. For example, think about how memorable the following statement became: "Ask not what your Country can do for you - ask what you can do for your Country."<sup>4</sup>

The argument that the Giants would win games if only I made bacon-wrapped breadsticks is logos gone wrong, and errors in logical reasoning result in lost opportunities to make powerful arguments and in the loss of the lawyer's credibility. Further, once recognized, flawed logic will also generate a negative emotional response in the listener.

Once jury members are in the position to listen and incorporate information into their analysis of issues in the case, the time has arrived for defense counsel to harness the power of logos and lead them to the conclusion. Logical reasoning is the heart of the theory of the case. It is counsel's story. There are many forms of logical reasoning; this article introduces three, beginning with the syllogism.

### Logical Reasoning

The syllogism is a form of logical reasoning that incorporates a major premise (usually pertaining to a universal truth) and a minor premise, and it leads to a conclusion, which naturally follows from the truth of the two premises. Syllogisms use deductive reasoning and move from the general to the specific. They are particularly effective when opposing inductive arguments, which, by contrast, move from the specific to the general.<sup>5</sup>

Cases involving the forensic sciences present particularly excellent opportunities to use the power of the syllogism. The aim of science, after all, is to build knowledge, and, through the use of the scientific method, construct scientific premises. Scientific premises aid arguments that go from the general to the specific. This article contains a Chart that is an example of a syllogism that argues a specific conclusion from a general scientific principal.

Based on the major and minor premises in the Chart, a listener will likely reach the conclusion that the chromatograph did not produce a reliable result. The beauty of this type of logical reasoning lies in its simplicity and how it allows the listener to reach the conclusion without being told how to think. People are easily persuaded when

they come to the conclusion themselves. The proof of a major and minor premise is far more likely to lead the jury to the conclusion the defense lawyer wants the jury to reach than a technique that tells the jury how to think. Aristotle was one of the first to discuss syllogisms in his writings,<sup>6</sup> and the syllogism is the most useful and important example of how to use logical reasoning to persuade.

A second example is the power of primacy and recency, which can also help a trial attorney win arguments, especially when combined with some other form of logical reasoning. The primacy/recency effect is the theory that information presented at the beginning and end of a learning event is retained more thoroughly by the listener, and, in turn, is more persuasive than information presented in the middle.<sup>7</sup> This is why, for example, the way people introduce themselves in the beginning of a job interview and the way they end the interview have such a tremendous impact on whether they secure the position. It is the reason classic movies have an opening scene that captures the audience's attention and close with a scene so memorable that audience members can picture it in their minds years after watching. A defense lawyer's communication to a jury should be guided by the same understanding. She should never start her summation by thanking the members of the jury for their service, unless she wants the jury to go into the deliberation room and think about how polite she was, but how her client is guilty, nonetheless.

By the time of closing arguments, defense counsel has worked long and hard on the theory of case, and she should have constructed a short statement that communicates what the jury should do and why they should do it. Counsel must give it to the jury up front, and then return to it at the conclusion of the summation.

Use the power of primacy and recency throughout the case. It is most obviously an effective tool to use at the beginning and end of an opening statement or a closing argument, but it is equally important when considering how to construct and organize a cross or direct examination.

The third example of logical reasoning, or logos, is the power of the trilogy. It is the reason this article presented logos using three examples. The human brain has an uncanny ability to organize and process more efficiently in threes,

and using trilogies, therefore, will naturally allow the listener to compartmentalize and retain thoughts.<sup>8</sup> This strategy is essential in a trial because the persuasion does not occur when counsel presents the facts and arguments. The persuasion is most critical later when the jury begins to deliberate. Unless a lawyer is like the character Spock from the television series *Star Trek* and possesses the power of the Vulcan mind meld, or can use hypnosis without the judge putting a stop to it, the power of the trilogy may be a defense lawyer's greatest asset when attempting to get the jury not only to listen to and be persuaded by his arguments, but also to retain his proven facts or arguments and then call upon them when the time comes to deliberate.

Finally, in addition to pathos and logos, the rhetorical triangle suggests that ethos, an appeal connected to the persuader's character or knowledge, will also help convince an audience. This, again, is most evident in making arguments pertaining to the sciences, where the knowledge of certain facts and concepts is not commonplace. In these cases, it is essential that the attorney understand and have a command of the materials. Once the jury considers defense counsel to be knowledgeable and trustworthy, the jury also can be convinced to trust counsel's argument. The only person in the courtroom that should have more knowledge or be more trustworthy than defense counsel is the defense team's expert witness.

When utilizing the power of ethos, word choice is critical. Using scientific words that are not commonplace in the jurors' lexicon will surely demonstrate that defense counsel is knowledgeable, but it may also distance defense counsel from the jurors and confuse them. If lawyers use scientific vocabulary, they must make sure they also talk to the jury in plain language. For example, after questioning the expert about infrared spectroscopy, defense counsel should ask permission to call it breath testing from that point forward. Lawyers should be part of the jury and never place themselves above jurors. Never say, "Explain that to the jury." Instead, say, "Explain that to us."

### Conclusion

Trial skills are an art, not a science, and each attorney must use his or her own style and abilities to paint a canvas in an authentic way. This article discusses only some of the ways attorneys can

use the rhetorical triangle to advocate more persuasively. But remember, however advocates decide to use logical reasoning, emotions, and their own credibility, if all else fails, they can always make bacon-wrapped breadsticks!

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### Notes

1. See R.C. Pinto, *Post Hoc, Ergo Propter Hoc*, in *Argument, Inference and Dialectic: Argumentation Library*, vol. 4 (2001), [https://doi.org/10.1007/978-94-017-0783-1\\_6](https://doi.org/10.1007/978-94-017-0783-1_6).

2. Christof Rapp, *Aristotle's Rhetoric*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta, ed., Spring 2022).

3. R.E. Petty & J.T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 123 (1986).

4. Inaugural address of President John F. Kennedy, Jan. 20, 1961.

5. An example of inductive reasoning often used by the prosecution in a criminal case is the argument that by establishing the truth of several facts (x, y, and z), the People establish proof beyond a reasonable doubt that the accused committed the crime. Inductive reasoning asks the listener to go from specific assertions to general conclusions.

6. *Syllogism*. (July 1998). *Encyclopedia Britannica*.

7. Data WORKS Curriculum, *The Primacy Recency Effect*, March 18, 2023. <https://dataworks-ed.com/blog/2014/08/the-primacyrecency-effect/>.

8. ELIZABETH F. BARKLEY & CLAIRE H. MAJOR, *INTERACTIVE LECTURING: A HANDBOOK FOR COLLEGE FACULTY* (2018). ■

### About the Author

Steven Epstein is a Founding Partner at Barket Epstein Kearon Aldea & LoTurco LLP. He is an Adjunct Professor at Elisabeth Haub School of Law at Pace University.



NACDL MEMBER

#### Steven Epstein

Barket Epstein Kearon Aldea & LoTurco LLP  
Garden City, New York  
516-745-1500

EMAIL [sepstein@barketepstein.com](mailto:sepstein@barketepstein.com)

WEBSITE [www.barketepstein.com](http://www.barketepstein.com)