Chapter 1

The Nature of Persuasion

Persuasion has been defined in various ways, but for our purposes, to persuade is to prevail on a person or persons to do something or to believe something.[1] For example, a lawyer may persuade a judge to issue a discovery order—that is, to prevail on the judge to do something. Similarly, as part of a brief, a lawyer might persuade an appellate court that the law should be interpreted or applied in a certain way. A lawyer might, for example, argue that the First Amendment does not prohibit states from restricting judges' ability to solicit campaign funds. The lawyer might then argue that the appellate court should affirm the lower court's ruling. In that case, the lawyer has convinced the judges to believe something and then argued that a course of action should follow from that belief. Oral persuasion, too, aims to prevail on the court to believe something or to do something.

To persuade a judge or a panel of judges, the advocate must transfer the view of the universe in the advocate's head into the head of the judge or judges before whom the advocate is appearing. Only then—when the court perceives the universe as the advocate does—will the court be moved to act in the advocate's favor.

I. Principles of Persuasion

To bring the court around to your view of the universe, your argument must take into account the three parts of persuasion: the source of

1. *See, e.g.*, Ken Kister, *The American Heritage Dictionary of the English Language* 1352 (Anne H. Soukhanov ed., 3d ed. 1992) (defining "persuade" as the ability to induce someone "to undertake a course of action or embrace a point of view by means of argument, reasoning, or entreaty").

the message, the content of the message, and the audience that receives the message. By understanding those three components of persuasion, and by putting each to use, you can determine how best to persuade a court. This chapter explains how the source of a message, the content of a message, and the audience hearing the message each play a part in whether a message—such as your legal argument—will be persuasive.

Source, content, and audience are not, however, the only ways to think about persuasion. The field of classical rhetoric recognizes three modes of persuasion: *ethos*, *logos*, and *pathos*. *Logos* is the appeal to the logic and reasoning of the listener. *Ethos* is an appeal based on the credibility and trustworthiness of the material and the author. *Pathos* is an appeal to the emotion or passion of the listener. To effectively persuade, you will use all three principles in varying degrees depending upon your audience and the purpose of the communication.

This chapter explains the relationship between the ideas of source, content, and audience on the one hand and *ethos*, *logos*, and *pathos* on the other. It concludes by examining how those different modes of persuasion can be used in combination to persuade judges.

What Is Classical Rhetoric?

> Originating in Greece around 450 B.C., classical rhetoric involved the comprehensive and systematic study of the art of persuading through written and verbal expression. In fact, Aristotle—one of the first and best known of the classical rhetoricians—defined rhetoric as the power "of discovering in the particular case what are the available means of persuasion."

Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 11 (3d ed. 2012) (footnotes omitted).

A. Source and *Ethos*

As mentioned above, the source of a message plays an important role in persuasion. In persuasive legal writing and oral argument, *you* are the source of the message. Thus, you must ask yourself, what about you will enhance, or detract from, the persuasive force of your message? The short answer is this: your credibility.

Credibility is the "quality, capability, or power to elicit belief."[2] That is to say, whether the source of a message persuades depends on whether

2. Kister, *supra* note 1, at 438.

that source is credible to the audience. You enhance your credibility as a source by using the persuasive method of *ethos* from classical rhetoric.

A number of factors influence the audience's perception of the source's credibility. In some instances, you may be able to immediately influence your audience's perception of your credibility, perhaps based on the professional look of your work or by your status as a lawyer in the community. In other instances, you must wait and allow the acquisition of time and experience to develop your credibility before your audience. Whether or not you can take immediate action to increase your credibility, you should be aware of all the factors that will affect it.

The first factor that influences the audience's perception of the source is the source's status or position. Imagine, for example, that you are a judge. You read a brief stating that no court anywhere in the country has held that distinctions based on sexual orientation are subject to strict scrutiny for purposes of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On the cover of the brief, you note the name of the attorney who wrote the brief, and you note the attorney's bar number. The bar number shows that he is newly admitted to the bar. You then turn to an opposing brief stating that a number of intermediate state appellate courts have held the opposite—that sexual orientation classifications are subject to strict scrutiny. That brief, you observe, was written by a noted constitutional scholar.

Without doing any research, which source are you likely to find more credible? The constitutional scholar, you might agree, will have greater initial credibility and his brief will, at the outset, be more persuasive. Has the constitutional scholar done anything to enhance his credibility by what he wrote? No—he is highly credible simply because of his status.

Although you may not be able to change your status or position overnight, you can do other things as you interact with the court that will enhance your credibility. In classical rhetoric, the three components of *ethos* are character, intelligence, and good will. By demonstrating each of those three components, a source uses *ethos* to create credibility.[3]

For example, you can employ *ethos* by demonstrating your good character. As an advocate, you establish your good character when you are consistently honest, candid, and trustworthy in all professional interactions. You must always explain the law accurately, which requires you to acknowledge any weaknesses in the facts or law that may support the other party's argument. You should also pay attention to details. Submit documents that are grammatically correct, are properly cited, and conform to

3. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 127 (3d ed. 2013). Smith's book gives an excellent in-depth discussion of these three components with examples, and this chapter draws heavily from his excellent work.

***Ethos*—Establishing Credibility**

Amicus curiae (friend of the court) briefs in the United States Supreme Court must include a statement of the *amicus*'s interest in the case. In that section, most *amici* use *ethos* to establish their credibility. Consider, for example, this excerpt from a brief filed by the American Bar Association (ABA). In it, the ABA uses the breadth of its membership to establish its credibility:

> The ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its membership comprises nearly 400,000 attorneys in all fifty states, the District of Columbia, and the U.S. territories, and includes attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.
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> Since its founding in 1878, . . .

Brief of Amicus Curiae American Bar Association In Support of Petitioners in *Obergefell v. Hodges* (No. 14-556).

As a judge, aren't you likely to say to yourself, "Gee, these folks must know what they're talking about"?

court rules. Those details establish your reliability in small things and will lead the court to assume that you are also reliable in the larger issues of explaining the law and why that law supports the outcome you seek.

Portraying good character is vital for an audience to accept your argument:

> If a reader believes that a writer is, to use Aristotle's word, a rascal, that is, if a reader believes that a writer is not above lying, cheating, deceiving, or misleading, then the reader will view the writer's arguments with skepticism and doubt. Conversely, if a reader believes that a writer possesses good character—or at least if the reader has no reason to question the writer's character—then the reader will be more receptive to the writer's arguments and assertions.[4]

Thus, to persuade, begin by establishing and maintaining your good character.

In addition to developing a reputation as a trustworthy lawyer, you can also influence the court's perception of your credibility by demonstrating your intelligence. You can demonstrate your intelligence to the court by showing a comprehensive knowledge of the governing law and

4. *Id.*

The Pitfalls of Being Perceived as a "Rascal"

An advocate's inaccurate statements in a brief can cause judges to become skeptical of the source of the message:

> JUSTICE SOTOMAYOR: I — I have a real problem with whatever you're reading, because I'm going to have to go back to that article. I am substantially disturbed that in your brief you made factual statements that were not supported by the cited . . . sources and in fact directly contradicted.
>
> I'm going to give you just three small examples among many I found. So nothing you say or read to me am I going to believe, frankly, until I see . . . with my own eyes the context, okay?

Oral Argument in *Gross v. Glossip*, 135 S. Ct. 2726 (2015).

the facts of your case.[5] Such comprehensive knowledge will lead the court to believe you and to have confidence in your work product.

Finally, you can establish your credibility by showing "good will" toward others.[6] Attorneys show good will toward others in how they refer to parties, opposing counsel, the judges, or the jury. A respectful tone toward all players when writing or speaking to a court establishes your good will toward others involved in the litigation. A condescending, insensitive, or overly passionate tone can negate good will and leave the judge less favorably disposed toward you and your arguments.

To maximize your credibility through the use of *ethos*, you will want to ask yourself the following questions:

- Am I consistently professional, honest, and ethical in all my professional dealings?
- Do the arguments and authorities I assert accurately present the law and facts, while still representing the interests of my client?
- Does this document or oral argument reflect my competence and professionalism as a lawyer?
- Is the argument that I am presenting respectful of all parties involved in the litigation?

B. Content and *Logos*

Not surprisingly, *what* the source says to the audience strongly influences whether the audience will be persuaded. The content of the mes-

5. *Id.* at 155.
6. *Id.* at 144.

sage obviously matters. In written advocacy before a court, the content of the message is delivered through a brief, a motion, or a memorandum in support of a motion. In oral advocacy, the oral argument delivers the content. No matter the vehicle, the content of your message should be crafted to persuade.

In crafting your message, you may try this approach: (1) Decide where you want the court to go, that is, what result you seek; (2) give the court a reason to want to go there; and (3) provide the court with a valid means of getting there.[7] For example, when arguing in favor of a motion to dismiss an indictment, you first must know the relief you seek (dismissal of the indictment). You must then make the court *want* to dismiss the indictment. Finally—using the law and the facts—you must give the court a legally valid basis to grant the relief you seek.

To be persuasive, that content—the result you want, the desire to get there, and the means to go there—must be structured logically. The court must be able to see the relationship between the result you seek and the law and facts that support that result—and the court must want to reach the result you seek because it believes that result is the correct one.[8]

This idea brings us to the idea of *logos*. *Logos* is an appeal to logic. And logic, it has been said, is "the lifeblood of American law."[9] At its core, *logos* provides the substance of your legal argument in a clear, organized structure. In a sense, *logos* is the message's content, exclusive of the audience or the source.[10] Thus, regardless of the source and her credibility, regardless of the audience, a message must always be rationally and logically presented to be persuasive.

As a lawyer, you will invoke *logos*—that is, you will appeal to the court's logic—if you use an expected organizational structure. You likely already know the particular structures that lawyers use to present their arguments. Lawyers begin an argument by stating the issue the argument addresses or the conclusion the argument will reach. Lawyers then explain the relevant law, apply that law to the facts of the client's case, and

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7. Bradley G. Clary, Sharon Reich Paulsen, & Michael J. Vanselow, *Advocacy on Appeal* 4 (3d ed. 2008); *see also* Bradley G. Clary, *Primer on the Analysis and Presentation of Legal Argument* 45 (1992) ("You have to know where you are going before you can persuade someone else to go there with you.").

8. Making the court want to reach a certain result includes appealing to the court's emotions through the use of *pathos*, discussed below.

9. Ruggero Aldisert, Stephen Clowney, & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. Pitt. L. Rev. 1, 1 (2007). This article is both informative and witty—a great read for law students and attorneys.

10. Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 53 (4th ed. 2009).

conclude. "IRAC," "CREAC," "CRRPAP," and other organizational structures you may have learned are the mechanisms by which attorneys create rational, organized argument—using *logos* to persuade. Because these structures play such an important role in persuading, Chapter 7, *Organizing Persuasive Arguments*, is devoted to reminding you of the logical structures attorneys use in their written work, and it provides examples so that you can see how logical, organized structures can be used for persuasive effect.

In addition to structuring your arguments in a logical way, you can also enhance the persuasiveness of your message by emphasizing those aspects of your argument that are strongest and explaining why any weaknesses ultimately should not dissuade the court from reaching the result you seek. Chapters 8 and 9, *Developing Persuasive Arguments* and *Refining Persuasive Arguments*, explain how to craft such a message. Chapter 6, *Themes for Persuasive Arguments*, addresses how to use themes to tie the content of your message together.

Thus, when assessing the persuasiveness of your message content, ask yourself the following questions:

- Did I organize each argument in a logical manner?
- Is each argument rational and logical?
- Is each argument supported by relevant law and facts?
- Did I eliminate extraneous arguments and include only those arguments that are strong and directly relevant for the judge to decide the case?
- Did I clearly set out and deal with any weaknesses in my client's facts or relevant law?

C. Audience and *Pathos*

The final consideration in any attempt to persuade is the audience. Who is your target audience? What use will that person or those people make of your argument? What kinds of messages might the audience be predisposed to accept? How should you craft your argument in light of your responses to those questions? To be sure, many messages are directed at diverse audiences with different goals. Most advertising, for example, is directed at a diverse audience whose members will make different uses of the message. So, while you might pay attention to that slick car commercial because you are in the market for a car, your classmate may pay attention because he wants to know what band is on the soundtrack. Advertisers have to consider a diverse audience with myriad interests when they craft their persuasive messages.

Your job as a legal advocate is, in a sense, easier. Your goal is to persuade a judge or a panel of judges; that's a fairly narrow audience. That audience will use the information you convey for only one purpose: to

decide. Knowing that you have a judge audience whose goal is to decide a legal question will help you craft a more persuasive document or oral argument. At bottom, your message should be aimed at helping that audience do its job: issue a decision.

Moreover, because judges have the same goal, they share several predispositions. One predisposition that all judges are likely to share is the predisposition, discussed above, for a logically structured argument. Judges are educated, intelligent, law-trained decision makers. They have gone through the same educational system as the advocates and will thus be predisposed to "think like a lawyer." Use of *logos*—logical argument—will resonate with them.

Another predisposition that judges are likely to share is for an advocate to get to his or her point quickly. Judges are busy people. Federal appellate court judges read approximately 13,000 pages of briefs each year—and that staggering number does not include the pages of records, trial transcripts, and background materials for each case.[11] Because your reader is busy, write efficiently. Tell the court what decision you seek and provide the necessary law and facts to support that decision. Include only the most important arguments rather than presenting every possible argument. Do not include extraneous information, incorrect information, or incomplete information—all of which will slow the court down and make your argument less persuasive.

Other preferences are likely to be more specific to the court in which you are appearing or the particular judge who will be hearing the case. As an advocate, you should learn as much about your audience as possible. Although you know that your audience is law-trained, intelligent, and tasked with making a decision, there is more you can learn about the court. Is this a court that handles only Social Security matters, or is it a court that handles everything from dog bite disputes to intellectual property issues? Put differently, knowing whether your audience is composed of specialists or generalists may help you decide the depth or breadth of the content you provide. For example, if you are arguing to a specialized court or to a particular judge who you know has experience in the area, you may be able to omit background information about the law that governs the case. Conversely, if you are appearing before a generalist or a panel of generalists, you will need to begin your complex corporate income tax argument with some fundamental tax concepts.

On a more individual level, think about whether anything about the particular judge or judges before whom you are appearing will make that judge or panel of judges more or less receptive to your legal argument. If, for example, the judge before whom you are appearing has rejected

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11. Mark P. Painter, *Appellate Practice—Including Legal Writing from a Judge's Perspective* 2 (May 1, 2000), http://www.plainlanguage.gov/examples/legal (last visited June 26, 2015).

your position in the past based on a certain argument, you should consider a different argument. If you are presenting a statutory construction argument, evaluate whether the judge will be more likely to rely on legislative history to interpret the statute or simply to stick with the plain language.

Personal characteristics of the judge who will be hearing your case may also be relevant to how you go about persuading. Is the judge before whom you are appearing particularly conservative or liberal politically, "tough on crime" or pro-defendant, sympathetic to corporate interests or sympathetic to interests of the individual person or community? Has the judge had life experiences that are relevant to this case? Knowing that kind of information, like more general information about the court and about the court's legal preferences, will increase your ability to persuade.

Finally, remember that judges are human. That fact brings us to the third classical rhetorical device, *pathos*. *Pathos* involves persuading by appealing to the audience's emotions. Although subtle, *pathos* exerts its influence by appealing to your legal reader's emotion.

> The effective use of emotion involves creating a response in the audience that makes the audience want to do things your way. It means the audience not only believes at an intellectual level that you are right, but feels it at a gut level and wants to do something about it.[12]

Pathos is a powerful mode of persuasion because most people, especially legally-trained people who are taught to focus on *logos*, underestimate it. Watch, for example, any political or product advertisement. Which emotion was the advertisement designed to evoke? The political advertisement was probably designed to produce fear if the opposing party is elected and a sense of well-being based on the election of the proposed candidate. The product advertisement probably focused on happiness, love, and success based on the preferred product choice. All of these emotional appeals can be powerful and sometimes unconscious influences on your decision-making process.

With respect to your legal argument, you can use *pathos* to create a "commanding narrative"[13] that can move a judge in a variety of ways. You can use emotion to help the judge understand what motivated the parties to act or react in a particular way; emotion can help the judge understand why the outcome you seek is just or fair; and it can help the judge sympathize with your client's position.

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12. Louis J. Sirico, Jr., & Nancy L. Schultz, *Persuasive Legal Writing* 12 (4th ed. 2015).

13. *See* Steven D. Stark, *Writing to Win: The Legal Writer* 110 (2d ed. 2012).

The Use of *Pathos* in a Judicial Opinion

In *DeShaney v. Winnebago County Department of Social Services,* the Court held that a state agency that failed to adequately investigate reports of child abuse could not be held liable under the Due Process Clause for resulting injuries to the child, Joshua DeShaney. In his dissent, Justice Blackman employed *pathos* to make his point:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles — so full of late of patriotic fervor and proud proclamations about "liberty and justice for all" — that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

Although most judges are trained to check their emotions — law is, after all, a *logos*-based discipline — judges are still human. They too feel anger, fear of loss, guilt, sadness, and happiness. Importantly, they want to do the right thing. Subtly invoking emotions can powerfully influence rational judgment and a judge's decision. Reminding the court, for example, that your seemingly unsympathetic client is not just a criminal "defendant," but is also a human with typical human frailties invokes *pathos*. As mentioned above, your message's content should, among other things, make a judge *want* to reach the conclusion you seek. *Pathos* is the means to do that.

Emotional appeals can be tricky, however, and should be done in an understated manner. The best way to make an emotional appeal without sounding emotional is to allow the facts to speak for themselves and to provide little to no commentary. For example, when Chief Justice John Roberts (then, attorney John Roberts) wanted to show the vital role a mine played in a remote Alaskan community, he did not say, "The Red Dog Mine is vital to the economy." Rather, he said this:

> Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. The vast majority of the area's residents are Inupiat Eskimos whose ancestors have inhabited the region for thousands of years. The region offers only limited year-round employment opportunities, particularly in the private sector . . . .

> Prior to the mine's opening, the average wage in the borough was well below the state average; a year after its opening, the borough's average exceeded that of the State.[14]

In other words, Justice Roberts allowed the facts to speak for themselves so that the Justices who read his brief could feel the importance of the mine to the community. Without making any overtly emotional appeal, his phrasing creates a commanding narrative that helps the legal reader connect to that litigant's side of the story.

As you consider your audience, ask yourself the following questions:

- Did I structure my arguments in a way that makes the judge feel good about ruling in my client's favor?
- Did I create and explain rules, and acknowledge unfavorable rules, from my client's perspective in a manner that advances my client's argument?
- Have I effectively addressed any weaknesses in my client's facts or authority?
- Have I made my client come across as likable?
- Does my brief or document (or my oral argument) evoke the intended emotion from my audience?

II. Using the Principles Together

When writing to a court and in oral argument, you will use all of the above principles in varying degrees depending on your audience and the purpose of the legal document or argument. *Logos*—the structure of your message—is the most basic mode of persuasion attorneys use, but *logos* is intertwined with other aspects of persuasion: the substantive content of your message; your credibility as the source of the message; and the judge's predisposition to agreeing with your message. Understanding these different aspects of persuasion and how you will use them in your arguments will enhance the persuasiveness of your document or oral argument.

Different sections of your document may rely more heavily on one mode of persuasion than another. For example, you are more likely to employ *pathos* in your statement of facts (see Chapter 12, *Statement of Facts and of the Case*), where *how* you present the facts can have a significant impact on how the court feels about your client. Your argument section likely will be more *logos*-intensive, but you should nonetheless consider how *pathos* may play into your argument. Finally, *ethos* should perme-

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14. From Brief for Petitioner, *Alaska, Dept. of Envtl. Conservation v. U.S. E.P.A*, 540 U.S. 461 (2004), available at 2003 WL 2010655 (citations omitted); *see also* Ross Guberman, *Five Ways to Write Like John Roberts*, http://www.legalwritingpro.com/articles/john-roberts.pdf (last visited October 9, 2015).

ate every part of every document you prepare, from the cover to the last page; you always want the court to perceive you as a reliable, believable, and credible source.

Different types of cases and the court in which you are appearing also will affect how you use the rhetorical devices introduced above and how considerations of source, content, and audience play out. For example, there may be less room for the use of *pathos* in a technical statutory construction problem before a supreme court. But skillful use of *pathos* is indispensable if you represent a parent in a termination of parental rights case, a defendant in a criminal case, or an injured plaintiff in a tort case—especially when you are addressing a trial court.

Consciously considering how the audience will perceive you, the message you want to convey, and the needs of your audience is vital to producing a persuasive document or oral argument. Similarly, crafting your message by creating just the right mix of *ethos*, *logos*, and *pathos* will allow you to transfer your view of the case and your desired outcome into the head of the judge to whom you are presenting your argument.

As you read the rest of this book, keep in mind considerations of source, message content, and audience. Think about how the rhetorical devices of *ethos*, *logos*, and *pathos* can be used together to persuade your judge audience. Finally, always be mindful of the purpose of your argument: to make the court want to rule in your client's favor and to give the court everything it needs to do so.

Practice Points

- In any attempt to persuade, you should consider the source, the message content, and the audience. Then, craft your message accordingly.
- Always use *ethos* to enhance your credibility and make your message more persuasive.
- Use *logos* to present a well-organized, logical, and coherent argument.
- Use *pathos* to involve your audience emotionally in your message.
- Use the three rhetorical devices together to best persuade your audience.