

If They Don't Like You They Won't Hear You: An Essay on Persuasive Communication

by Steven E. Perkel

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Twenty-three hundred years ago in *Rhetoric*, Aristotle wrote that persuasive speech was dependent on three variables: the speaker, the subject matter, and the listener. More specifically, Aristotle taught us that three key issues impact persuasiveness; the character of the speaker or *Ethos*, the veracity of the argument itself, *Logos*, and the emotional state of the audience or *Pathos*. The principles *Ethos-Logos-Pathos* (which I refer to in this essay as *ELP* which is not to be confused with NLP) provide lawyers with a handy framework for considering persuasive speech and likability.¹ Why persuasion and likability? Very simply, if your audience does not like you they probably will not hear you. If you are not heard it will be virtually impossible to be persuasive and win your case.

Effective application of the *ELP* framework in legal processes suggests that successful lawyers be sincere, credible, and trustworthy (*Ethos*); they must offer arguments that are factually accurate and logical (*Logos*) and finally, effective trial advocates must establish resonant emotional connections with their audiences (*Pathos*). When *ELP* is effectively operationalized, a lawyer is more likely to be perceived as likable by judge and jury.

Character of the Lawyer	<i>Ethos</i>	Lawyer is authentic	} Likeability
Veracity of the Argument	<i>Logos</i>	Facts are credible	
Emotions of Jurors	<i>Pathos</i>	Positive resonance	

The importance of being trustworthy and likable is reinforced by Supreme Court Justice Antonin Scalia when he advises lawyers, “Your objective in every argument... is to show yourself as worthy of trust and affection.”² Trust, according to Justice Scalia is won by fairly presenting the facts, honestly characterizing the issues, even those that cut against you and by respecting the intelligence of your audience. I would add that a lawyer who communicates that she respects the importance of the task before jurors enhances her trustworthiness and likability.

On likability Justice Scalia offers the following:



*You show yourself to be likable by some of the actions that inspire trust, ...lack of harsh combativeness... displays of collegial attitudes toward opposing counsel... refusing to take cheap shots... maintaining an unassuming manner ... and perhaps above all, your even tempered good humor.*³

Finally, Justice Scalia observes that some people are inherently likable and advises, if you're not — work on it.⁴

Ethos: Presentation- of- Self and Likability

Even though jurors are expected to make decisions based upon the law and the facts presented, their decision-making is influenced by attitudes about specific case issues, observations of the lawyers as they interact, prior experiences, other jurors and emotions. The outcomes of legal processes and decisions as well as likability are affected by a lawyer's presentation-of-self. If a lawyer wants to be seen and treated as a person of positive character, according to dramaturgical theory, she must do more than simply adopt the role of advocate; she must also *play the part*.⁵ Playing the part is achieved by dressing appropriately, speaking understandably, arguing honestly and generally behaving in a respectful manner toward jurors, opponents and the court. It is clear that mindfully and ethically managing the presentation-of-self impacts ELP and how a lawyer is perceived in and out of the courtroom.

By now you have figured out that I believe likability is essential to being an effective advocate and I hope you are asking, "How can I use and improve my innate likability to better serve my clients?" The first thing I suggest you do is become comfortable with being in a legal fish bowl where your behavior is visible and fair game to all parties. In legal proceedings, whether you are questioning your expert, observing your opponent cross-examine your client, or listening to the judge explain the law, jurors will watch you like a hawk. This causes anxiety unless you are prepared for it. In addition to being exposed like a goldfish in a glass bowl, jurors will note and evaluate your appearance. They will observe your nonverbal behavior, often giving it more credence than what you say. Your audience will note whether or not you are organized and knowledgeable about all of the facts. Jurors, judges and arbitrators will listen carefully to your choice of words when you speak. Confusing language and complex explanations that are perceived to distract or deceive will alienate your audience. If you are rude, arrogant or sarcastic your audience will be "turned off". With this information in mind how can you ingratiate yourself with your audience and ethically enhance your likability? Recent research helps us answer this question.

Stanley Brodsky and his colleagues identify the following list of verbal and nonverbal factors as being associated with high likability:⁶

- a pleasant, smiling facial expression
- use of "we" or "us" when referring to groups
- demonstration of a less controlling attitude
- physical attractiveness
- use of deferential speech and considerate disagreement (as opposed to aggressive, defiant contradiction)
- low degree of arrogance exhibited in verbal responses (such as acknowledging potential for error)
- use of informal speech (such as referring to an individual by name and use of less technical jargon)
- direct eye contact
- truthfulness (suspicion of lying was negatively associated with likeability)

While this research addresses likability and juror's judgments about the credibility of expert witnesses, I would argue that the same variables have an impact on a lawyer's likability quotient.

Additionally, the social psychological literature provides some important research-based clues on how you can maximize your likability. First, understand the halo effect of presenting yourself in an attractive way. If you have to be in the legal goldfish bowl you better be the most attractive goldfish around. It seems that people who are seen as attractive are also seen as being more talented, kind and intelligent. Another research finding you can favorably apply is letting adversaries, jurors, witnesses, courtroom staff and judges know that you like and/or respect them. If you do this the research indicates that they are likely to reciprocate and view you as worthy of being liked and/or respected.⁷ So dress professionally, say hello, and smile - you will enhance your likability and the possibility of winning your case.

Generally speaking, according to social psychological research, people like people who are seen as being similar to them; this rule applies even to jurors and judges. Using the persuasive power of similarity during litigation can be helpful, especially when you view it broadly. For example, *mirroring* is a form of maximizing similarities that can be learned and effectively applied in a variety of matters.⁸ Finally, having repeated contact over time can enhance likability because your audience has an opportunity to see you behave correctly and consistently. This is also when playing by the Golden Rule can enhance likability and the possibilities of winning.

Ethos: Person-Based Persuasion

- Know how you want your audience to perceive you
- Behave in ways that are consistent with how you wish to be perceived
- Use understandable, powerful language to serve your client
- Listen carefully and respectfully
- Be polite to jurors, judges, witnesses and opponents
- Use the Golden Rule as your gold standard
- Remember that being persuasive and likable has less to do with your intent than your behavior
- Never lose sight of the fact that jurors' understandings, knowledge and interpretations of a case are ever evolving
- Stay alert for clues that help you infer what they heard rather than assuming they got what you intended for them to get

Logos: Logical Persuasion and Credibility

We have explored *Ethos*, or person-based persuasion and likability. Next we turn our attention to *Logos*, the logic-driven element of the ELP framework that relies on rational processes to persuade. An argument that is logically sound and consistent with the law is compelling; it enhances both credibility and likability. There are several ways to build persuasive arguments that are logical and consistent with the law. Start with the facts, identifying and explaining them clearly and using natural language. Avoid jargon whenever possible. If both sides have stipulated to facts or findings, reference or frame them as examples of agreement and logically use them as well as you can to demonstrate the merits of your position.

If your argument is built on definitions, rules or standards describe what they are, where they come from and why they are important. Be certain to tell the jury how these definitions, rules or standards relate to your client's position. Define all terms as simply as you can without eroding meaning. If your success requires jurors to understand the features of a device, the safety procedures used by your client, the onset and progress of a disease, an error of commission or omission or a violation of an agreement, present yourself in the role of teacher-advocate. This will enable you to take persuasive advantage of a "teaching moment".

Consider using analytic demonstratives but do not rely upon slide shows to replace your conversation with judge or jury. At best demonstratives and electronic media should enhance your capacity to communicate and bolster your relationship with your audience.⁹

If you are relying upon expert testimony to persuade make sure the trial testimony is consistent with the deposition transcript. An expert whose testimony at trial is different than his deposition testimony always is a problem. Similarly, an expert who offers a definitive opinion in an equivocal manner is sending jurors a mixed message. You do not want that to happen! It is essential that your expert's behavior and testimony are behaviorally congruent.

All witnesses and clients need to be supported prior to, during and after testimony. This does not mean coaching them about what to say or how to say it. The best thing you can do is tell clients and witnesses, "Tell the truth. Tell the facts as you know them." In all likelihood they will still be nervous about testifying but when asked by

opposing counsel about pre-trial preparation they can simply say, “Yes, I met with my attorney. She told me to tell the truth”.

Helping witnesses who are strangers to the courtroom adapt to the environment and its unique atmosphere and rituals is always beneficial. Teach witnesses what they can expect to happen when they testify and help them develop a reasonable level of comfort as they anticipate their upcoming appearance. Here is a rule that I have never seen fail... reduce ambiguity and anxiety will also be reduced. By the way this same rule applies to your preparation for trial. If you anticipate various scenarios and plan how to manage them you will be better prepared and will feel less anxious.

The information that a jury is asked to absorb and understand is often complex. The courtroom and its procedures are unfamiliar and the stakes are high for jurors who want to do the right thing, as well as for plaintiffs and defendants. Likable lawyers who help jurors do their jobs while strenuously but logically representing clients have a decided competitive advantage.

Logos: Where Logic and Persuasion Join

- State and describe the facts confidently to enhance credibility
- Make logical arguments based on the facts
- Affirm the importance of a jury’s task to help establish rapport
- Establish and maintain connections with jurors
- Be prepared, organized, alert and civil
- Remember that likability, while important, compliments logic but never replaces it

Sincerity, likability and credibility start with first impressions. This means maintaining a professional appearance, speaking appropriately, and being unfailingly honest and courteous from the “get-go”. When you demonstrate empathy for the jury’s important job, followed by a logical, fact-based case presentation you establish the foundation for building Pathos: emotional resonance with judge and jury.

Pathos: Emotional Persuasion and Resonance

Pathos is ethical persuasive communication designed to activate jurors’ emotions. In the ELP framework you can use an effective appeal to *Pathos* to help jurors identify with the facts, themes, behaviors and outcomes that support your case. Jurors’ emotions are often aroused by a rhetorical device known as a “hook”. An effective hook captures jurors’ interest and causes them to consider things from your viewpoint. But the power of an effective emotional hook will be limited if you do not establish resonance between yourself and jurors. Resonance may be established through the use of storytelling, easily understood demonstratives, good witnesses, respectful but assertive cross-examination and compelling statements of facts. To capture the imagination and good will of your audience, step into their shoes and tailor your presentation so that it resonates with them.

Emotional Intelligence and Resonance

Good lawyers, like good leaders can hone their emotional intelligence (EI) to facilitate resonant interactions between themselves, judges and jurors. Space does not allow for a comprehensive discussion of EI models and skills in this essay. However, I have taken the major elements of Daniel Goleman’s EI model and modified them to illustrate their heuristic potential for lawyers. Developing the skills related to each element can help you effectively manage professional relationships, courtroom behavior, persuasive communication, and changing circumstances throughout the course of litigation.

Emotional Intelligence and Persuasion¹⁰

1. Self-awareness – the ability to know your own emotions, recognize their impact and maximize their value as decision-making guides throughout the litigation process.
2. Self-management – monitoring and controlling your emotions while maintaining the capacity to adapt to changing circumstances.

3. Social awareness – the ability to sense, understand, and effectively react to others' emotions, especially clients, adversaries and jurors.
4. Relationship management– the ability to inspire, influence, and communicate with your audience so as to establish resonance.

The Likability Formula

The additive impact of combining *Ethos, Logos and Pathos* as described in the ELP framework is high likability. Lawyers who are likable have resonant rather than dissonant relationships; they understand the value of maximizing their emotional intelligence and generally are described as being sincere and credible.



- Likable lawyers are civil to others.
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- Likable lawyers are assertive advocates, not bullies.
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- Likable lawyers convey empathy.
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- Likable lawyers are friendly.
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- Likable lawyers balance competence and humility.
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- Likable lawyers are excellent self-managers.

Are you a likable lawyer?

Selected References

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³ Id at xxiv.

⁴ Id.

⁵ Goffman, E.(1959). *The presentation of self in everyday life*. New York: Anchor Books.

⁶ Brodsky, S.L., Neal, T., Cramer, R.J., and Ziemke, M.H. (Dec, 2009). *Credibility in the court room: how likeable should an expert witness be?*, *J.Am Acad Psychiatry and Law*, 37, 4:525-532.

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⁹ See for instance, Solomon, S.H. (Ed.), Gallant, J., & Esser, J.P. (Co-Eds.). (2008). *The science of courtroom litigation: jury research and analytical graphics*. New York, New York. ALM Publishing.

¹⁰ Goleman, D. (1998). *Working with emotional intelligence*. New York: Bantam Books.

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Editor's Note

Welcome to the May 2010 issue of [The Jury Expert](#)! It's spring (although in Texas it definitely feels like summer)! This issue we have reptiles in the courtroom (and in a departure from tradition, we have four trial lawyers responding to the article rather than trial consultants); a *Batson* update; a piece on juror intimidation inside the jury deliberation room; an article from two journalists on pre-trial publicity and what defense advocates can learn from the Duke lacrosse case (with responses from three trial consultants); a piece using sense-making theory to discuss how Supreme Court Justices behave like jurors; that age-old question of whether size matters when it comes to juries; an essay on persuasive communication and attorney likability; and finally--a trip across the country (and, kind of, through time) as consultants tell stories about rural courthouses time forgot (and stories about a few other things too).

Of course, we also have a couple of Favorite Things and want to remind you about the upcoming [ASTC conference](#) in beautiful Minneapolis, Minnesota. The theme this year is '[Perfecting Your Game](#)' and it's always a good time for that.

This is the first issue in which we have benefitted from visual graphics experts in pulling together the issue. Special thanks to Jason Barnes ([Barnes & Roberts](#)), Ted Brooks ([Litigation-Tech](#)) and Nate Hatch ([Resonant Legal Media](#)). Click anywhere in this issue of [The Jury Expert](#) for challenging, educative and fun reading for Spring 2010. You'll see us again in July and 24/7 on-line. Read us. Tell your friends and colleagues.

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