

TEXAS LAWYER

April 9, 2012

An ALM Publication

OUT_{of} | ORDER

Opinion • Commentary • Humor

Channel Aristotle to Win the Next Hearing

by JAMES M. STANTON

Stripped of case law citations and the rules of evidence and procedure, a lawyer's next hearing is really just an exercise in persuasion. So, where should attorneys turn for guidance to hone their persuasive techniques? Aristotle's "Rhetoric" is widely regarded as the most influential work on

TRIAL PRACTICE

persuasion ever written. My time on the state district court bench taught me that lawyers who effectively use Aristotle's three-legged stool of ethos, logos and pathos were most likely to win their next hearing.

- *Ethos* — *credibility of the speaker*. The best way for an attorney to establish credibility with the court is to demonstrate competence and confidence. The credible advocate is the one who the judge trusts. Anything perceived by the judge as tricky maneuvering, gamesmanship or sharp practices reduces credibility. Why would the judge trust an attorney who doesn't play above board with opposing counsel?

Preparation is the key to becoming the credible voice in the courtroom. Knowledge of the court

rules and applicable legal concepts usually pays dividends before the hearing even begins. By timely filing all the papers and bringing a hearing binder with an extra copy of all the pleadings for the judge, counsel ensures everyone has an opportunity to read them well in advance of the hearing. If the judge is missing something, counsel has established himself as the go-to person for reliable information. Once the hearing begins, the credible advocate — after reading all the briefs and cases — is ready to acknowledge his opponent's best arguments while still explaining why his client should win.

- *Logos* — *rational demonstration*. Counsel should present her strongest legal argument and then sit down. The judge expects the lawyer to start the hearing (and hopefully the brief) with

The best way for counsel to lose a hearing he should have won is to demonstrate to the court that he is "all head and no heart."

her best argument. The most difficult task for a trial attorney is to know when to stop talking. A corollary is for the trial lawyer to avoid the urge to distract from her best argument by flooding the judge with three or four backup arguments. What once was clear to the judge can become confusing and lead to more questions on matters that previously seemed unimportant.

The disciplined advocate uses laser-like focus to stay on point. Remember that judges used to be lawyers. All lawyers (and especially judges) appreciate a well-reasoned legal argument supported by authorities and evidence. Counsel should be prepared for the judge to learn best through use of appropriate visual aids. Psychologists say that people learn best when they can hear and see. Scratching out a Venn diagram or a chart on a legal pad to explain a legal or factual argument goes a long way toward clarifying important points.

Acknowledging the weaknesses of your argument makes it more logical and believable. Would you ever believe someone who told you their argument didn't have weaknesses? There always are counter-arguments to distinguish cases or call a witness' credibility into question — that's why there are judges and hearings. Counsel are best prepared to win by knowing their arguments' strongest and weakest points.

• *Pathos — emotional appeals.* The best way for a lawyer to lose a hearing he should have won is



to demonstrate to the court that he is “all head and no heart.” Appropriate use of pathos in bench advocacy usually involves a theme or story to enhance the argument. Most stories are built around the human desire to do good. Effective storytelling involves changes in cadence, volume and tone and building suspense. Counsel should not feel as if he needs to rush right to the climax; instead, he should make sure the court develops an understanding of the characters and the timeline.

Lawyers also should not lose sight of the fact that judges want to do justice by their decisions. For the trial lawyer attempting to persuade the court, this means demonstrating that the desired

outcome will result in an ethically and morally fair result. Remember, though, that emotional appeals only work if the two other legs of the stool — ethos and logos — are planted firmly on the ground.



James M. Stanton is a commercial trial counsel at Andrews Kurth in Dallas. He represents corporations and entrepreneurs in business disputes that go to court. He previously served as a state district judge in Dallas. He is board certified in civil trial law by the Texas Board of Legal Specialization. As a lawyer and judge, his experience includes more than 100 trials and thousands of hearings.