



We Feel, We Choose: Pathos, Decisions and Persuasion

By Robert A. Creo

Earlier columns have addressed the lawyer's identity and reputation and have explored self-awareness, perpetual learning, professional growth through civic service and persuasion. This column continues the exploration of effective communication and persuasion by focusing on the emotional elements of decision-making. Successful practitioners grapple with the complexity of human emotion in a legal system that often is unable to accommodate emotional transactions within the framework of law and precedent.



The Myth of the Reasonably Prudent Man

Based on the theory that law can be reduced to a logical system of rules akin to geometry, traditional legal education focuses on litigation and learning the law by the case method of teaching. By studying court cases lawyers learn a rational and consistent

set of legal principles that can be applied to the factual context of each problem.

This is done in the absence of emotional considerations. Indeed, many of us recall being admonished by professors and moot-court judges for using the language "I feel" when stating a position or framing arguments. Famed trial lawyer Gerry Spence states in *Win Your Case: How to Present, Persuade, and Prevail — Every Place, Every Time*:

Most of us walk into the battlefield pushing a huge wheelbarrow in front of us that bears a gigantic talking head — ours. Our feelings are crushed beneath the load of a noisy brain. As has become pathological in these times, our ability to feel has been supplanted by that tyrant called the intellect. We think. We do not feel. ... [F]or the truth is most often a feeling.

Randall Kiser frames it a little differently by commenting that by usually being "aggressively rational, linear and goal oriented," lawyers are often not aware of the "wishes, fears, beliefs and defenses that motivate our actions."

Antonio Damasio is a leading proponent of what he frames as "Descartes' Error" in a book by that title. This theory of the brain and mind rejects a duality between reason and emotion in favor of an integrated decision-making process. Damasio contends that categorical thinking forms interior boundaries between reason and emotion, which is incorrect because emotions guide reactions and are "mediated" or processed by other parts of the brain in reaction to stimuli. There is an ancient or limbic part of our anatomy that processes environmental stimuli before our conscious mind is engaged. This is commonly referred to as the flight/fright/freeze reaction that is automatic until it is "mediated" by the frontal cortex and executive-functioning areas of the brain. Humans make decisions in a complex, holistic and integrated manner.

Integration occurs when both the inside (mind/emotion/values) and outside (decisions/actions) align. This creates authenticity and credibility, and it differs from an attempt to create an objective and analytical decision-tree model based on statistics and probabilities.

Emotions motivate all the important choices we make. Emotions can override hunger, sex drive and the will to survive. We organize our lives to maximize the experience of positive emotions and to avoid and minimize the experience of negative emotions. Although thoughts are private, emotions are not.

Most researchers categorize emotions into seven separate "families," each with its own facial expression. These are anger, contempt, disgust, fear, happiness, sadness and surprise. Research has shown that facial expressions and vocal sounds relating to emotion are universal across history, geography and cultures. The emotional-signal system is always on and ready to broadcast emotions and is generally involuntary. Most of our emotions have a distinctive signal that tells others how we are feeling. The variations in intensity within each family of emotion are clearly marked on the face.

The voice is another emotional-signal system, which, while different, is equal in importance to facial expressions. There is an impulse to make a sound whenever an emotion is aroused, with a different sound for each emotion. The voice rarely

gives a false emotional message. People can easily suppress these sounds, although it is more difficult with surprise or when an unexpected event is occurring. All of us have the potential to feel the emotions that others feel empathetically by witnessing the emotional reactions of others.

**Courtroom as Theater:
Pathos Takes Center Stage**

Persuasion is most effective when framed as a morality drama appealing to normative judgment based on common sense and the natural aversion to unfairness. Statutes, jury instructions and the law give permission for the decision-maker to “do the right thing,” to give expression to his or her feelings.

Prominent commentator David Ball notes the following motivators underlying why jurors give monetary awards:

- When giving money would help fix or completely replace a loss;
- When money can help in a situation where it would otherwise not fully fix the situation;
- When angry at the defendant;
- When making a social statement;
- When making an example of the defendant;
- When making a party face responsibility for its actions;
- When the plaintiff is likable;
- When preventing future harm to others or to stop wrongdoing; and
- When they feel the need to get revenge (after perhaps having had a similar harm done to them or having been in or seen a similar situation).

And Ball contends that the following are motivations for jurors not to favor personal-injury plaintiffs:

- When they believe that money verdicts are too high and given out too frequently;
- When they worry about being criticized after the trial;
- When they compromise by lowering the amount of money;
- When the plaintiff’s actions show lack of responsibility;
- When they believe that the money will be misused;
- When they believe that the money is going to an unclear purpose;

- When they believe future medical/scientific developments could address the harm;
- When they believe the plaintiff has come back for more money;
- When they dislike and do not want to invest in the plaintiff;
- When they believe the plaintiff is doing fine without the money;
- When they believe it will not prevent future damages;
- When they do not want to make the plaintiff rich for being harmed;
- When they do not want to make lawyers rich due to the plaintiff having been harmed;
- When they believe that awarding damages will cause insurance rates to rise;
- When they believe that the plaintiff has already received insurance payments;
- When they have seen someone else in a worse or similar situation not being compensated;
- When they believe that people should pay for their own problems;
- When they believe that the harm was caused by the plaintiff’s earlier acts of wrongdoing;
- When they do not want to punish the defendant;
- When they see the defendant as remorseful; and
- When they see the wrongdoing as an unavoidable accident or beyond anticipation.

Successful persuasion involves empowering disputants to frame the outcome to promote positive emotions and avoid emotional dissonance while resolving a claim within an economic range that respects the differing risk tolerances of all participants. ¹⁶

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Takeaways

- Emotional expression is universal and natural.
- Avoid ignoring or suppressing emotional aspects of the case or client.
- Pathos is at the heart of persuasion.
- Positive emotions generate optimal outcomes.

**References and
Additional Sources**

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