THE ANCIENT ART OF JURY PERSUASION

By Judge John W. deGravelles and J. Neale deGravelles

"THE PAST IS NEVER DEAD. IT'S NOT EVEN PAST."

—William Faulkner, *Requiem for a Nun*

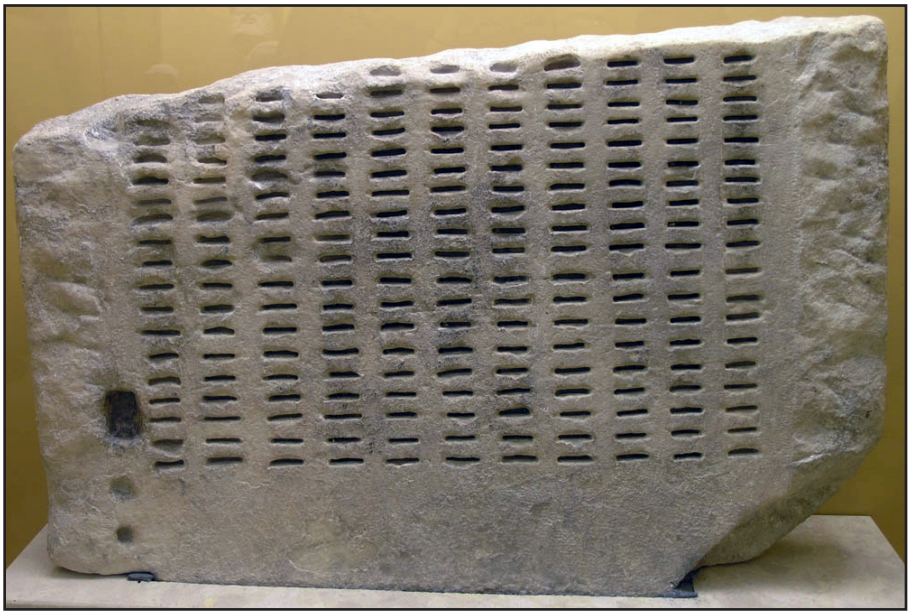
From lectures at local CLEs to intensive week-long getaways and seminars that offer the latest techniques of persuasion, litigators spend countless hours perfecting their craft. Books, DVDs and how-to manuals offering supposedly cutting-edge theories in how to reach and move jurors are also wildly popular. From *Reptile*[1] to *Psychodrama*,[2] authors tout the latest scientific or pseudo-scientific studies supporting advice on how to pick a jury and get a favorable verdict in today's environment.[3] Indeed, lawyers' use of psychological principles in jury selection, jury persuasion, and understanding how juries reach their decisions is now commonplace.

But much of what passes today as the latest and greatest methods of jury persuasion have been around for thousands of years. Ancient Greece used jury trials for both criminal offenses and civil disputes between citizens.[4] While these trials were different in many ways from the jury trial we know here in America, one feature common to both was the right of the litigants to argue their case to the jury.

Not only have many ancient jury arguments survived to the present day,[5] but so have the contemporaneous writings of teachers of rhetoric who performed exquisite analyses and critiques from which lessons were drawn and passed on to their students and the public. When reviewed, these writings demonstrate the point of our article — while historical and cultural changes necessarily dictate changes in how to move an audience, many of today's "secrets" of successful jury persuasion have been around a very long time and, indeed, still have much to teach lawyers today about this ancient and noble art.

THE ANCIENT GREEK JURY TRIAL

Imagine you are about to argue your case. You are at a rostrum in the Agora, the center of ancient Athens. A jury of some 500 citizens is spread before you.



A Kleroterion was used for the jury selection system in Athens. Bronze identification tickets were inserted to indicate eligible jurors who were also divided into tribes. By a random process, a whole row would be accepted or rejected for jury service. There was a kleroterion in front of each court. Ancient Agora Museum in Athens. *Photo by Marsyas via wikipedia.org under the Creative Commons Attribution-Share Alike 2.5 generic license.*

You have no microphone. What will you say? How will you sway this jury who will render not only a verdict of guilt or innocence but will decide the punishment as well? For that matter, how will you speak loudly enough to reach them all?

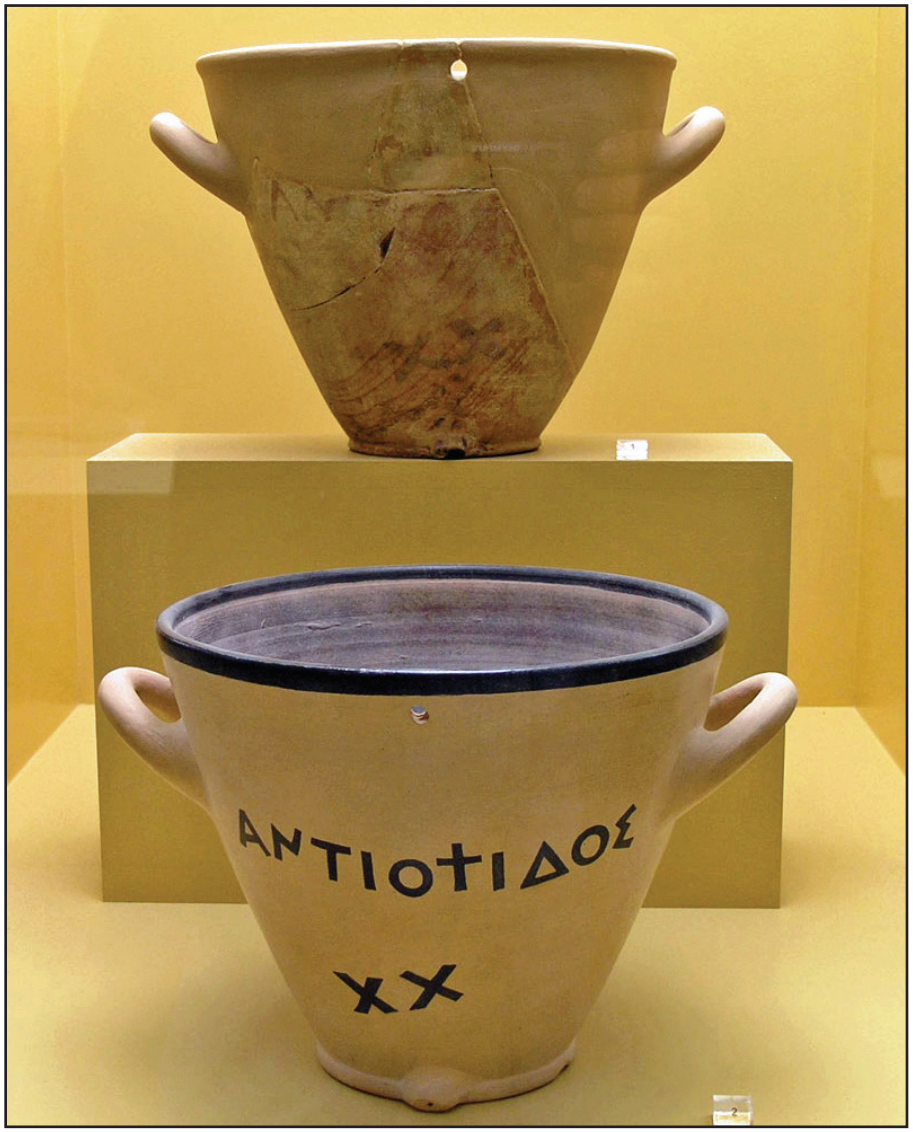
Historians credit the right to trial by jury as one of the two "pillar[s] upon which Athenian democracy was founded." Essentially the same has been said about the importance of the jury trial in American democracy. In classical Greece, most civil and criminal cases were tried to the *dikasteria*, the jury courts. Juries were large, "numbering hundreds or even thousands." Each year, a new jury pool of 6,000 citizens (*heliaea*) was chosen randomly by lot from those who applied. It was from this pool that individual juries were chosen for a given trial. And jury trials were common, occurring as many as 175 to 225 days per year. As one historian has stated, Athenians "had an itch to litigate."[6]

Jurors were required to be at least 30 years old. Beginning in the 450s BCE, jurors were paid a daily stipend for jury service. To keep corruption to a minimum, members of a given jury were selected randomly at the last minute by an "allotment machine" (*kleroterion*). Once chosen, jurors would take an oath "of which the most important clauses were to listen to both sides without fear or favor and to judge according to the laws."[7] Jurors were "answerable to nobody" and "speakers addressing the juries universally expected the jurors to care about issues of fact, law and justice . . . ."[8]

The "courtroom" was one of several buildings in the Agora in the center of Athens. In particularly serious cases, where the jury was very large, the trial would be on the Pynx, the side of a hill where the Assembly regularly met. Without a microphone, how could speakers be heard before such a large audience? Public speaking was a large part of Athenian society and there were many venues where citizens could practice and utilize their oratorical skills. In addition, speakers like the famous Demosthenes consciously trained at the art of projection.

Each trial lasted no longer than a day. There were no lawyers; each party presented his own case,[9] although wealthy citizens would often hire skilled orators and speechwriters to prepare their speeches and presentations which the litigant would then deliver at trial. Each side had an opportunity to present his case, rebut his opponent, cite the law, present testimony and sum up. Other than the parties' oral presentations, there was no live testimony and, therefore, no direct or cross examination as we know it.[10] Witness testimony was presented in the form of sworn depositions read to the jury by the clerk.[11] Other documentary evidence and the applicable laws were also read out by the clerk during the course of the presentation.

Each side was given the same amount of time which was measured by an ingenious water clock, the *klepsydra*.[12] The plaintiff or prosecutor would go first, followed by the defendant. When the trial was over, the jury was not instructed on the law and did not deliberate but would immediately vote by secret ballot for one side or the other. A simple majority decided the case. In a criminal case, if the accused was convicted, argument would again be made, this time on the issue of punishment, after which the jury immediately voted, choosing between the punishment suggested by the prosecutor or that by the accused.



A Klepsydra is made up of two clay pots with the water flowing from the top by a spigot at the bottom of the pot to the bottom container pot which has interior markings that show various units of time. These water clocks are from the Ancient Agora Museum in Athens, Greece. The top is an original from the late 5th century BC. The bottom is a reconstruction of a clay original. *Photo by Marsyas via wikipedia.org under the Creative Commons Attribution-Share Alike 2.5 generic license.*

THE ANCIENT ART OF JURY PERSUASION

By the mid-fifth century BC, the craft of public oratory was highly developed and routinely taught to Athens' young men for a fee by schools of rhetoric and teachers called sophists.[13] The art culminated in Aristotle's monumental work on the subject, *Rhetoric*.[14] What we know about specific jury arguments made in the law courts comes from some 100 law court speeches which have survived[15] as well as books devoted to critical analyses of the best of these.[16]

ADVICE FROM THE PAST AND THE PRESENT

What law students and lawyers are taught today about jury persuasion mirrors in many ways what has been taught for thousands of years. We draw primarily on Critical Essays of Dionysius of Halicarnassus, a Greek who migrated to Rome in 30 BC where he taught the art of rhetoric and literary composition. In these essays, he draws principles of oral persuasion by analyzing the speeches of the great speakers and writers of classical Greece — Lysias, Isocrates, Isaeus, Demosthenes and Thucydides.

We compare these lessons to three contemporary works. The first is *Opening Statements*[17] by Alfred Julien, a text written in 1980, a relatively short time after the older of this article's authors began trial practice. The next is the widely read *David Ball on Damages*,[18] published shortly after the

younger author of this article began trying cases. The third is Thomas A. Mauet's *Trial Techniques*,[19] used extensively in law school litigation classes. No doubt there are texts hitting the bookshelves (or e-bookshelves) today that will mirror advice given in 400 BCE, 1980, 2005 and 2010 AD.

Your Presentation Must Be Simple, Lucid and Efficient

Aristotle taught that "lucidity was the essential virtue of style." Dionysius agreed. Describing one of his featured orators, Lysias, he said, "His arrangement of material is simple and for the most part uniform, and his development of arguments straightforward and uncomplicated."

Many a modern trial lawyer has been taught the "K.I.S.S. principle" (*i.e.*, Keep It Simple, Stupid) by a professor or mentor. Albeit not as eloquent as put by Dionysius, the underlying rule has remained the same over the centuries.

Julien puts it this way: "The true art of the advocate is simplifying the case so that the jury has to make none but the minimum findings for their side to recover."

Use Everyday Language

The ancient Greek orator Lysias was praised by Dionysius "for the expression of ideas in standard, ordinary, everyday language and lauded his success in making his subjects seem dignified, extraordinary and grand while describing them in the commonest words without recourse to artificial devices. He achieves elegance not by changing the language of everyday life, but by reproducing it. The speech should give the impression that its arrangement has not been deliberately and artistically devised, but is somehow spontaneous and fortuitous. For the artlessness is itself the product of art: the relaxed structure is really under control, and it is in the very illusion of not having been composed with masterly skill that the mastery lies."

Julien agrees: "Will the usual legalese jargon engage the minds of the listeners? Or must the language employed be the language of the listeners and not of the lawyers? For an opening to accomplish its full purpose, the language must of course be that of the living, not the dead legal phrases with which we conduct so much of our work. When we reach for the minds of the jurors, we must broadcast on their level and not on ours."

In sentiment uncannily similar to that of Lysias, Julien adds: "Further, an audience is always much more impressed by what seems to be unrehearsed and spontaneous. Any effective speaker will support this thesis."

Brevity: Short is Good

Lysias was held up as an example of "combining lucidity with brevity of expression. The reason for this success is that he does not make his subject the slave of his words, but makes the words conform to the subject. It is a manner of expression in which ideas are reduced to their essentials and expressed tersely, a style most appropriate. The short amount of time available for the ordinary citizen to explain his case is insufficient for an orator who is anxious to display his rhetorical powers."

Ball puts it this way: "No wasted words. Every word, literally every single word, must be a word the jurors will find useful. Most often, what you say in twenty words is more effectively said in seven. Learn how to do that and make it a habit. Jurors, along with everyone else, will like you a little better and listen to you with a lot more attention."

Have a Theme and A Powerful Beginning

While Dionysius recognized that themes will necessarily differ in each case, there should be a theme in every case which is introduced at the beginning of the speech.

Julien strongly suggests that lawyers not hide their themes, but strongly put them out front: "Those who hold back, and open only in the most general of terms for fear they will reveal theories and evidence to their opponents, sacrifice the more important opportunity in the trial to reach the minds of the jurors. The jury's opportunity to acquire information is greatest at the start of the case, when its thinking is unencumbered. The next special opportunity is the beginning of each day, from which impressions can cumulate as the days pile up, and the third time for good impressions is the climax just before a recess, either for lunch or for the day. With such fruitful opportunities to score, it is appalling how often even experienced trial lawyers fluff the first chance by using openings which are meant to obscure rather than explain."

Ball agrees, urging that the theme be revealed in the story of what happened: "The words 'Now let me tell you the story of what happened in this case' accomplish two important tasks: First, it tells the jurors that you are going to give them the information they need so they can decide for themselves . . . Second, when you say you're going to tell a story, they lean forward to listen. If they think you're going to throw a bunch of facts at them, they turn down their listening."

Use Stories to Make Your Client and His Cause Vivid and Real

In making a jury argument, counsels Dionysius, one must "convey the things he is describing to the senses of his audience so that nobody who applies his mind to the speech will be so obtuse, insensitive or slow-witted that he will not feel that he can see the actions which are being described going on and that he is meeting face-to-face the characters in the orator's story."

Julien puts it this way: "The most important point to remember is that your opening should be the presentation of the facts from your client's viewpoint. This is your story of how it happened. The jury is given a detailed description of the background, setting and circumstances of what happened."

Ball makes the same point: "Replace your generalized assertions with persuasive, concrete mini-stories of the facts. Jurors use them to make

solid conclusions about your client's unique situation. Jurors do not do that with generalizations. Compared to the disappearing ink of generalizations, stories about your client are indelible."

Vary Your Tempo, Tone and Volume to Make Your Points More Effectively and Keep the Jury's Interest

Speaking of Demosthenes, Dionysius says, "He discovered that there were differences between tones which make them seem dignified and others polished, in the same way as in music the mode governs the nature of the melody. He found that much the same happens in the case of rhythms also, so that some appear dignified and impressive, others delicate and soft; while variation gives us old fashioned severity at one point, and sweetness and novelty at another. And it is appropriateness that has the greatest power of all to sway and effect in either direction."

Mauet gives the same advice: "Vary your verbal style to support your arguments and maintain jury interest. Good, persuasive speakers have learned to control and use the variables that make up speech. These include loudness, pitch, speech rate and rhythm, pauses, silence, articulation, and pronunciation. Each of these can and should be used and modulated to keep your speech patterns forceful and interesting."

Conclusion

For all of the advances provided to today's practitioners by modern forensic study, much of what students and lawyers are taught today is a direct legacy of an ancient art. Dionysius summarizes the essential qualities of persuasive speech in a way that anticipates much of the advice given by the modern experts: "Purity of language, correct dialect, the presentation of ideas by standard not figurative expressions, clarity, brevity, concision, terseness, vivid representation, the investment of every person with life and character, the pleasing arrangement of words after the manner of ordinary speech, and the choice of arguments to suit the persons and circumstances of the case."

Footnotes

1. David Ball and Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, Balloon Press, 2009. *Reptile* has built such a reputation that its opponents have tried to prevent its "use" at trial. Baxter v. Anderson, 277 F. Supp. 3d. 860 (M.D. La. 2017).

2. *See, e.g.*, Dana K. Cole, *Psychodrama and the Training of Trial Lawyers*: *Finding the Story*, The Warrior, Spring 2002.

3. Each age seems to think its predecessors' techniques are outdated and useless. Cicero, the great Roman orator, saw in Greek rhetoric "weakness and effeminacy and the beginnings of rot."

4. Robert Garland, *Athenian Democracy: An Experiment for the Ages*, The Teaching Company, 2018.

5. Approximately 100 "forensic speeches" (jury arguments) from classical Greece survive. S.C. Todd, *The Shape of Athenian Law*, Oxford University Press, 1993.

6. Durant, 260.

7. The oath included these words: "I will judge according to the laws and decrees of Athens, and matters about which there are no laws I will decide by the justest opinion." Douglas M. MacDowell, *The Law in Classical Athens*, Cornell University Press, 1986.

8. Carey, 74. Another historian has a more cynical view. Jurors "had themselves no knowledge of the law, and therefore, however impartial they sought to be, their decision was influenced by the dexterity of an eloquent pleader, and affected by considerations which had nothing to do with the matter at issue." J.B. Bury, *A History of Greece to the Death of Alexander the Great*, Random House, Inc., 1913.

9. But some historians note that a litigant could ask somebody to act as *sunegoros* (advocate) for him. These were "supporting speakers" who would, when the litigant finished, "use the unexpired time on his water-clock to deliver a short epilogue." To speak in court for a fee, like a modern lawyer, was not merely disreputable but an offense, for which a prosecution could be brought. According to one historian, "As the complexity of procedure rose, and litigants detected in the jurors a certain sensitivity to eloquence, the practice grew of engaging a rhetor or orator, versed in the law, to support the complaint or defense, or to prepare, in his client's name and character, a speech that the client might read to the court. From these special rhetor-pleaders came the lawyer." Durant, 260-261.

10. Limited cross examination was allowed before 470 BC (Garland, 142) but not after. *Id*.; (Durant 261.) But there were exceptions, the most famous being Socrates' cross examination of his accuser. MacDowell at 250, (citing Plato, *Apology).*

11. The deponent was required to be present to swear to his statement's accuracy before it was read to the jury. "But witnesses were not the primary source of information for the jury; it was the litigants themselves who told the story, periodically calling a witness to confirm the details." Todd, 97.

12. It consisted of a pot filled with water with a hole in the base. When the trial began, a stopper was removed from the hole. The amount of water (and so the number of pots) allowed varied according to the importance of the type of case; when the water ran out, the speaker had to stop.

13. The bad reputation that sophists have today stems primarily from their disparagement by Socrates and his student Plato.

14. Aristotle. *Rhetoric*. New York: Modern Library, 1954.

15. See Demosthenes *Orations 50-59*, Harvard University Press, 1939.

16. *See, e.g.*, Dionysius of Halicarnassus, *Critical Essays Vol. I*, Harvard University Press, 1974.

17. Alfred S. Julien, *Opening Statements*, Callaghan & Company, 1986.

18. David Ball on Damages: The Essential Update.

19. Thomas A. Mauet, *Trial Techniques*, Eighth Edition, Aspen Publishers, 2010.

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