John P. Blumberg
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Persuasion science for trial lawyers

"THE GOOD THING ABOUT SCIENCE IS THAT IT'S TRUE WHETHER OR NOT YOU BELIEVE IN IT."
SCIENTIST AND ASTROPHYSICIST NEIL DEGRASSE TYSON

This article contains adapted excerpts from the author's book, Persuasion Science for Trial Lawyers, published by Full Court Press and available at https://www.persuasion-science.com (Editor's note: Buy this book! It's fantastic.)

We take cases to trial because we believe in the righteousness of our client's case and our ability to persuade a jury. But isn't losing a case terrible? It is a rejection by the jury of what we believed to be true. We say to ourselves, "I had such a great case; why wasn't the jury convinced?" We question our judgment, our strategy, our competence. I have tried nearly 100 jury cases and have asked myself this question more than once. I decided to search for answers. I discovered hundreds of scientific studies by psychologists, political scientists and sociologists who research the basis of the decision-making process. What did I learn? Neither eloquence nor mastery of courtroom procedures are the keys to persuasion. Our role as advocates is to present information to the decision makers comprising the jury. But, if we don't understand how the brain filters, processes, stores and recalls information, we are just throwing stuff on a wall, hoping something will stick.

There has been little application of this social science research to the practice of law in general and trial advocacy in particular, so I decided to write a book about it. *Persuasion Science for Trial Lawyers* demonstrates how persuasion science can be applied to client relationships, dealings with opposing counsel, and trials. It challenges anecdotal methods that lawyers have been using to communicate and persuade and takes a fresh and different look at how we can be better communicators and trial advocates. If trial lawyers understand why techniques work or don't work, and why arguments are accepted or rejected, then they can apply that knowledge to every case. This article summarizes some of this valuable *persuasion science*.

The role of trial lawyers is to persuade. In the courtroom, much of what we do when we communicate with judges and jurors is based on what we were taught, what we have observed, and from our own trial and error of what seems to work or not work. This is *anecdotal experience*. We consider it to be the *art* of trial advocacy. But while we are demonstrating our art in opening statements, witness examination and final argument, judges and jurors are filtering what they see and hear. And through those filters, they will accept, or reject, or ignore, or distort the information. Understanding and dealing with these phenomena requires some knowledge of *science*.

Many of us went into law because we were more inclined toward humanities than math, statistics and science. The mention of math or science causes some to quickly change the subject. But to be a trial lawyer, you must be willing to learn the science behind how people make decisions and judgments. Psychology and sociology are *social sciences*. Psychologists have been called, "people scientists," and there is a branch of psychology called decision science.

Most students learn about the *scientific method* in middle school. It applies to all forms of science. To refresh your recollection, the *scientific method* is a research process by which a problem or question is identified, a hypothesis is formulated based on conjecture that it may be true, and then relevant data is gathered to empirically test whether the hypothesis can be proved or disproved. There are numerous peer-reviewed journals that have published thousands of *scientific method* research studies that explore the process of decision making in general and persuasion in particular. Many social scientists spend their entire careers formulating and testing their theories, and then modifying them as new findings are realized. Then, these theories and findings evolve as other social scientists expand on and modify previous understandings. It is not enough to observe a social phenomenon and extrapolate how and why it occurred; rather, it is tested to prove how and why it occurred and under what circumstances. The results are objective observations that are not biased by anecdotal beliefs and experiences.

Stupid jurors?

Have you ever lost a case and blamed "stupid jurors" who ignored the evidence? Ignoring certain things is how the brain protects itself from being overwhelmed. It is an important aspect of how people process information. We would like to believe that decisions are the result of logic, common sense and critical thinking. And this belief is what drives us to craft our advocacy based on what seems to us to be inescapable logic. However, peer-reviewed studies have shown that there are things that influence decisions that have little or nothing to do with conscious thought. Decisions can be influenced by personality factors of the speaker or listener, or how the message was structured, or conditions that affected whether the information was understood, and how the message was processed depending on a person's brain structure.

We don't see things as they are; we see things as we are

Actor Colin Firth (The King's Speech) funded an academic study whose purpose (he humorously said) was "to find out what was biologically wrong with people who don't agree with me." The study results did not find that there was anything biologically "wrong," but did confirm a possible correlation between brain structure and how different people filter information. For example, the well-known senses of sight, touch, hearing, smell, and taste allow us to experience the world. The stimuli are identical but experienced differently from person to person. This

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is due to differences in individual processing. In other words, everyone has "filters" that are due, in large part, to evolution.

The earliest humans lived in an environment where they faced daily threats to their existence: wild animals, natural disasters, hostile neighboring tribes, injury, infection, and death. Fear of and protection from negative consequences became a valuable trait that likely allowed their survival as a species and our existence today. Numerous studies have resulted in a theory that the fear of negative consequences created a negativity bias that affects everyone differently. For example, in a crisis, some see only danger, but others see opportunity. Perception is not a reflection of universal reality; rather, it is filtered through the lens of each person's unique collection of experience and the remnants of evolutionary biological makeup. Can you imagine the advantage lawyers would have if they could understand how these filters and processes work? It might make the difference between winning or losing. One example that is important to lawyers who represent plaintiffs is how to overcome the resistance to changing the status quo.

Challenging the status quo

Lawsuits are filed and prosecuted because the plaintiff wants to change the status quo. The defense tries to keep things the way they are. The jurors must decide whether the defendant keeps its money (the status quo) or has to give it to the plaintiff. Long before social scientists discovered the psychological and evolutionary basis for why change is hard, philosophers had an inkling. In the 16th century, Niccolo Machiavelli stated in his political treatise, *The Prince*, "There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things." When trial lawyers present new information to jurors, their first thought isn't, "What an interesting and logical idea." More likely, it is, "Yeah, not so sure about that . . . ." Jurors will not change their beliefs, so it is incumbent on trial lawyers to frame their cases so that the message is consistent with what jurors already believe. Understanding liberal versus conservative orientation may be the key.

There is broad consensus that the brains of liberals and conservatives process information differently, leading to their respective political alignment. But beyond political alignment, the differences in cognitive processing also results in different attitudes and values. For the trial lawyer, it is important to recognize that these differences may be the reason that facts and arguments are accepted or rejected. The degree to which one's filter is focused on fear and negativity creates the liberal versus conservative belief system and worldview. Conservative inclinations include security, conformity, authority, predictability, certainty, preference for order, tradition and traditional values. These all favor maintaining the status quo. Such pre-dispositions should be the building blocks of how you frame plaintiff's case.

An example of framing that reaches those typically opposed to change is found in the inaugural address by President Bill Clinton on January 20, 1993:

> When our founders boldly declared America's independence to the world and our purposes to the Almighty, they knew that America, to endure, would have to change. Not change for change's sake, but change to preserve America's ideals: life, liberty, the pursuit of happiness. Though we march to the music of our time, our mission is timeless. Each generation of Americans must define what it means to be an American . . . and the urgent question of our time is whether we can make change our friend and not our enemy.

Clinton's message was carefully designed to reach conservatives who were resistant to change by framing his message in terms of the original intent of our founders. When framing plaintiff's case, instead of advocating a change in the status quo, your message should be to apply traditional values to *restore the status quo*.

Security, conformity, and protecting the status quo

One view of protecting the status quo is not to change anything. You can advocate that adherence to rules and values preserves the status quo. If the defendant violated the rules, it was the defendant, not the plaintiff, who threatened the status quo. Example: "Stability of our community comes from rules that are followed, not broken." Conservatives see tradition, stability, conformity and order as rule-based, and their concern about negative outcomes results in a more harsh and demanding expectation of behavior. Therefore, it is important that the rules be presented as concrete, detailed, and clearly defined so that it is clear that the defendant knew specifically what was prohibited. In this way, the rules are seen by conservatives as strict and mandatory, not discretionary. Conservatives believe generally that rule violators endanger society and should be condemned for their transgressions.

Studies have shown that conservatives are more critical of transgressions rather than omissions. Therefore, whenever possible, an omission should be re-characterized as a rule-breaking action. For example, in a case involving a child hit by a car driving through a neighborhood, the negligence should not be described as the failure to keep a lookout, that is, an omission. Instead:

> The driver knew that there could be children, knew that safe driving rules required that he be vigilant to protect the children, and intentionally drove as if he were on the open road. And that action had predictable consequences.

The conservative view of fairness was examined by psychologist Jonathan Haidt in his book, *The Righteous Mind – Why Good People Are Divided by Politics and Religion,* as a combination of the Protestant work ethic and the Hindu law of karma: "People should reap what they sow. People who work hard should get to

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keep the fruits of their labor. People who are lazy and irresponsible should suffer the consequences." This view can be used to advantage by framing the case to fit this concept of right and wrong. For example:

> Lindsey always took personal responsibility for her life and the lives of her family. She didn't believe in laziness; she worked hard, but now she doesn't get to enjoy the fruits of her labor. Why not? Because of the irresponsibility of the person who took everything away from her that she had earned. That person wants a free ride, trying to blame anyone but himself and refusing to accept responsibility.

Putting it all together

The status quo is not a reality; it is a perception. Perspective is the key. Viewed one way, it can cause a jury to resist change, but framed differently, it can impel the jury to require change to set things right. Liberal jurors are more likely to award damages to relieve the suffering of a plaintiff and to promote his or her well-being. But conservative moral values can result in an award of damages to the plaintiff as punishment of a defendant whose violation of the rules caused a burden on society or the damaging of a person who was an asset to the community. Together, liberal and conservative moral values, fairness, and sense of social justice and social order can combine to reach a common ground that honors each and benefits the plaintiff.

Conclusion

Changing the status quo is but one aspect of how persuasion science can benefit trial lawyers. There is much more. The science of education will change our understanding of how jurors learn new information. The science of how memory is created will change how we structure our presentations. The science of cognitive processing requires our recognition that jurors will reject information that is too difficult to absorb. And the science of cognitive bias impels us to realize that people are persuaded when they hear what they already believe is true. There is much to learn, and this knowledge can make the difference between winning and losing.

John P. Blumberg specializes in tort litigation. He is triple-board certified: as a trial lawyer by the National Board of Trial Advocacy, as a medical malpractice specialist by the American Board of Professional Liability Attorneys, and as a legal malpractice specialist by the State Bar of California, Board of Legal Specialization. He is a member of the American Board of Trial Advocates with the rank of Advocate. Mr. Blumberg has served on the boards of local, state and national trial lawyer organizations and is an emeritus member of the CAALA Board of Governors, serving as its parliamentarian.