



Persuasion Science for Trial Lawyers

DESERVES TO JOIN THE PANTHEON OF TRIAL-PRACTICE TEXTS

By **John P. Blumberg**
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I have been a lawyer for over three decades. And although my practice focuses on appellate work, I try to stay current on trial-practice books because, as the techniques they lay out become widely adopted, they often generate appellate issues. It has long been my view that the Pantheon of trial-practice texts includes three titles: *Trial Notebook* by James W. McElhaney; *Rules of the Road*, by Rick Friedman and Patrick Malone; and *David Ball on Damages* by David Ball. John P. Blumberg's new book, *Persuasion Science for Trial Lawyers* (Full Court Press, 2022), deserves to join that group. Simply put, I think it will help you win trials.

Chapter 8 of the book is titled, "Keep it simple – the brain has limitations." Blumberg has applied this view to the book itself, which is divided into 18 short, easily-digested chapters that build on what was explained before.

While Blumberg's advice is grounded on scientific research, he presents the science in a way that is accessible to those without scientific training, adhering to the maxim often credited to Einstein that "everything should be made as simple as possible, but no simpler." The book discusses the literature of how our brains work and how we tend to make decisions and distills it into discrete rules. It then provides concrete examples of how to apply those rules to succeed in trial.

Blumberg examines trials from both a top-down perspective, explaining how to best structure your entire case, as well as from a task-centric perspective, showing how voir dire can be made more useful, how direct examinations can be made engaging, how experts can be more effectively used or attacked, and how to make opening statements and closing arguments more compelling.

Some of his advice mirrors advice I have read or heard before. Much is new. I was particularly intrigued by his

discussion of the psychological barriers that we all erect to protect ourselves from being overwhelmed by new information. He explains:

The brain's resistance to persuasion cannot be overcome by overwhelming evidence or eloquent oration. When a person's belief is challenged with solid evidence to the contrary, the belief often becomes stronger. When people are told what they should believe, many reject the message and strongly consider the opposite.

Evidence and eloquence are the tools that trial lawyers use to bring jurors to their side. If their use ends up deepening a juror's bias against your client, what is to be done? Happily, Blumberg doesn't raise questions that he cannot answer. He goes on to explain reflexive cognitive triggers and how to recognize and avoid them. At some levels, it can be as easy as avoiding the use of words that frequently elicit a negative response. Be cautious in telling jurors what they "must" or "need" to do.

Blumberg also explores a technique that I have seen referenced in other trial-practice materials: "self-persuasion." The idea is that people tend to be the most persuaded by conclusions that they draw for themselves. The trick is to set up the argument in a way that points to the conclusion you want the listener (or reader) to draw, without actually supplying the conclusion. But Blumberg adds an interesting wrinkle, explaining that "[t]he only way self-persuasion can occur is if you aren't talking."

He provides an example:

- "Photo No. 1 is the stop sign when the adjacent tree is pruned."
- "Photo No. 2 is the stop sign on the day Jimmy was killed."

Blumberg explains, "Just let the jurors look at the photos. Allow them to conclude for themselves that . . . the stop sign was obscured . . ." And don't label the photos with captions that mirror the words you are saying because it

diminishes cognitive processing and interferes with the self-persuasion you are seeking to engender. (For the same reason, he cautions against showing jurors slides of text while simultaneously reading the text to them.)

Chapter 14 is particularly timely in our polarized times, "Finding Shared Values of Liberals and Conservatives." Blumberg describes the chapter as taking "a deep dive into the significant differences between liberal and conservative thinking, and explores how trial lawyers can use this knowledge in presenting their cases." While we all know that liberals and conservatives often hold different beliefs, the chapter explores how they actually have different ways of thinking. The book explains that actor Colin Firth (from "The King's Speech") once funded an academic study in this area, which confirmed "that liberals and conservatives do appear to have biological differences in the structure of their brains that suggest a possible link between brain structure and psychological mechanisms that correlate with political orientation."

One of the (many) differences discussed in the book deals with how the liberals and conservatives diverge on issues of morality and ethics, which are often at the core of how trial lawyers try to frame their cases. For example: "Liberals emphasize the value of outcomes, that is the larger impact of decisions, and conservatives emphasize whether the act itself is wrong."

Blumberg provides a detailed approach to how to present cases in a way that will appeal to both liberal and conservative brains, even though research has demonstrated that each side tends to respond to different kinds of arguments.

In sum, if you try cases, you need to be aware of the data that Blumberg discusses, and you will likely profit from his discussion of how to use that data to present your cases to juries.

