

Persuasion science for trial lawyers

By John P. Blumberg

We take cases to trial because we believe in the righteousness of our client's case, and our ability to persuade a jury. When we lose, we question our judgment, our strategy, our competence. "I had such a great case; why wasn't the jury convinced?" I have tried over 100 cases and asked myself this question. 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 processes, stores and recalls information, we are just throwing stuff on a wall, hoping something will stick.

Anecdotal versus Scientific Understanding

Lawyers learn to be trial advocates by reading or observing how successful trial lawyers do it. Successful techniques are experienced, shared, and then used by others who teach, "this is how to do it," or "this is now not to do it." I call this, "anecdotal education." Our ancestors learned from anecdotal experience. Their daily routine of surviving, hunting and gathering did not include science. They learned from experience. For example, they learned that some plants would cause death if eaten, but others might aid in digestion. But many conclusions drawn from experience were incorrect, being coincidental rather than causative. Although experience-based advice can be worthwhile, it is important for trial lawyers to understand the cognitive science that leads to successful persuasion. Why? Have you ever lost a case and blamed stupid jurors who ignored the evidence? Ignoring certain things is an aspect of how people process information. Psychologists have been called, "people scientists," and there is a branch of psychology called decision science. Understanding this science can make the difference between winning or losing.

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*. 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.

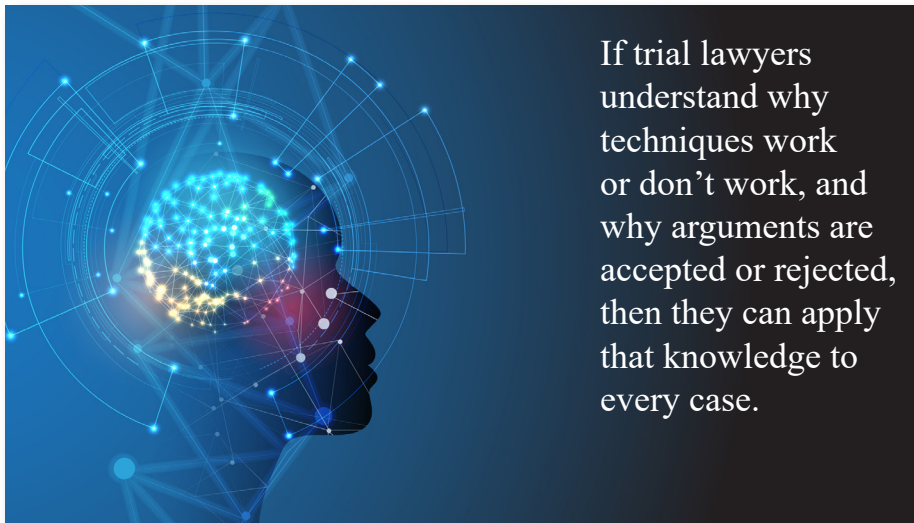
There are numerous peer-reviewed journals that have published thousands of *scientific method* research studies that explore the process of decision making in general and persuasion in particular. Many social scientists spend their entire careers formulating and testing their theories, and then modifying 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.

We all like to believe that the decisions we make are the result of logic, common sense and critical thinking. However,



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peer-reviewed studies have shown that there are things that influence our 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.

There has been little application of this research to the practice of law in general and trial advocacy in particular. There is a wealth of information that has been developed by social scientists that can be applied to client relationships, dealings with opposing counsel, and jury trials. 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*. For example, for there to be persuasion, the jury must understand your evidence and your argument. But, for there to be understanding, there must be education, which is now considered to be a form of science. What are the tools to assisting jurors to understand and process the unfamiliar information that is presented at trial? Words, pictures, analogies, and metaphors.

How We Learn

A "learner" is anyone who is placed in a situation where they must comprehend something that was either completely unknown or that was known but not understood in detail. Jurors fit this definition. They may be exposed to both completely

foreign concepts and things they never had to give much thought to. An example of something completely foreign: An industrial machine alleged to be unreasonably dangerous. An example of something vaguely known: That a concussion injures the brain, but not how, why, or to what extent. Jurors, as learners, will not be persuaded if they do not understand, absorb, and remember. Therefore, in order to persuade, trial lawyers must be teachers.

There are three cognitive elements necessary for learning: to understand, to absorb, and to remember. A failure to understand will prevent the ability to absorb, which, in turn, will result in a lack of recollection. The plaintiff's burden of proof is not achieved by presentation of facts and concepts; it requires understanding that becomes firmly planted in jurors' memory. In a post-trial discussion, if a juror explains that the other side was more convincing, it may be because your evidence was not effectively learned. Although learning begins with processing information, the capacity to process is far from unlimited. The key to making your evidence and your argument memorable is to present it so that it does not exceed limited capacity.

Memory

Memory has two aspects: working and long term. Working memory is used for temporarily holding knowledge. Long-term memory is a storehouse of knowledge that can be held over long periods of time. Cognitive processing of information requires that long-term memory be accessed

so that working memory can be understood, absorbed, and join the learner's storehouse of knowledge. An example of purely short term, or working memory, is the ability to recall random words. Five random words is about the maximum that can be easily recalled. However, when the words are combined into a coherent sentence, about fifteen words can be recalled because long-term memory is also accessed. Cognitive processing is the way people make sense of what they see and hear. But to integrate incoming information with other knowledge requires paying attention and organizing incoming information.

Paying Attention

The limitations on processing capacity force everyone's brains to make rapid decisions about which pieces of incoming information to pay attention to, the degree to which connections should be made among the selected pieces of information, and the degree to which those connections should be incorporated into existing knowledge. In other words, limited cognitive resources must be allocated. That allocation may be affected by a lack of interest. Listeners will not pay attention if they have no interest. Interest may be created by presenting the subject matter so it is personally relevant. But, more importantly, there can't be interest without understanding. Studies have shown that there is actually an emotional reaction when students understand lessons; when they make sense of lessons, they tend to enjoy the experience.

Organizing Incoming Information

There are three kinds of cognitive processing that will fill up cognitive reserves: extraneous, essential, and generative. Extraneous cognitive processing is that which does not serve the instructional goal. Examples include interesting but immaterial facts and redundant information. In other words, if it is not essential, it is unnecessary. Extraneous material competes for cognitive resources in working memory, distracts from attention to the important material, and disrupts the crucial mental process of organizing the information. Learning is improved when extraneous material is excluded rather than included. For the trial lawyer, it means

that the information presented must be carefully selected. Not everything needs to be, or should be, presented.

Essential information is that which is necessary to comprehend. The more complex the information, the more cognitive processing is required, and the greater the possibility of overload. *Essential processing overload* occurs when the basic material in the lesson is so demanding that it overwhelms capacity, preventing deeper processing (called generative), and

results in relatively shallow comprehension. This tends to occur when the learner is completely unfamiliar with the subject matter or the presentation is too fast paced. For the trial lawyer, this can be where the case is won or lost, depending on how the material is presented.

Generative cognitive processing occurs only after extraneous processing is reduced and essential information has been understood so that it can become organized and integrated into something that makes

sense. Hopefully, by this point, there will be sufficient cognitive capacity available, and the jurors, as learners, will be motivated to use that capacity. That is where multimedia learning comes in.

Words and Pictures

People learn better from words and pictures than from words alone, according to Richard E. Mayer, Distinguished Professor of psychological and brain science at the University of California, Santa Barbara. Mayer's expertise is the science of learning. He explains that the ability to learn is hindered when the teacher does not present information in ways that the students (or learners) are able to understand, absorb, and remember.

There are two ways that information reaches learners: words and pictures. Words can be heard or read, which requires some mental effort to translate from abstract to concrete. For example, when you see or hear the word "cat," you must form a mental image, but when you see a picture of a cat, a different part of the brain is at work. Words require intellectual understanding; pictures typically don't require interpretation. Words occupy a different part of working memory than pictures, and each part has separate storage capacity. This is important, because if words alone are used to convey information, the limited cognitive capacity will be reached before the lesson has been finished. Stated differently for trial lawyers: after a while, the jurors will be listening but not understanding.

The existence of these dual channels of information processing led Professor Mayer to write a book: *Multimedia Learning*. According to Mayer, understanding is increased significantly when both channels are engaged by the teacher. However, different combinations of printed words, spoken words, and pictures will result in different levels of comprehension. The dual-channel assumption is that there are separate information-processing channels for what is seen and what is heard. Working on the assumption that each channel has limited processing capacity, care must be taken in how words and pictures are combined. Otherwise, even though there is increased capacity, there can be overload. That is why it is important to understand how different combinations

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of printed words, pictures, and narration can help or hinder learning. In other words, there are good and bad combinations of multimedia.

Pictures, Printed Words, and Spoken Words (Very Bad)

When pictures, printed words, and spoken words are all presented at the same time, the redundancy causes extraneous processing. As previously discussed, this occurs when there is too much competition for the limited cognitive resources in working memory, distracting from attention to the important material. The simultaneous presentation of pictures, printed words,

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and spoken words causes overload in two ways. First, the visual channel gets overloaded by pictures and printed words competing for limited cognitive resources. Second, when words are simultaneously presented by spoken narration and visual means (i.e., the same thing is spoken and read at the same time), it does not add to comprehension and unnecessarily consumes cognitive resources. Use one or the other, but not both; otherwise, one is “extraneous” and will decrease the listener’s ability to process and learn.

Printed Words and Spoken Words (Bad)

Many lawyers will display a slide containing words, then read the words to the jurors. The words may be jury instructions or contained in an important exhibit. The lawyer may think that reading what is displayed enhances the ability of the jurors to understand. They are wrong; the effect is the opposite. Narrating aloud while jurors are trying to read the text actually distracts from their ability to process the information. A better technique is to stay quiet and allow the jurors to read what is displayed. Sure, there will be silence in the courtroom, but lawyers are not required to constantly fill the air with sound, particularly when the finders of fact need to concentrate. Then, after the jurors have finished reading, the text can be narrated,

perhaps emphasizing the most important passages.

Words and Pictures (Very Good)

Pictures include material presented in demonstrative form, including graphs, charts, photographs, maps, illustrations, animations, or video. By using pictures, material can be depicted in a form that mimics actual visual sensory experience. Pictures do not require much intellectual interpretation, or as English philosopher and poet Gilbert K. Chesterton (1874–1936) wrote, “There is a road from the eye to the heart that does not go through the intellect.” When a picture and a descriptive narration are presented at the same time, learning is enhanced. It is theorized that the learner is able to hold mental representations of both in working memory, and consequently able to build mental connections between verbal and visual representations. In the words of Professor Mayer, “People learn better from words and pictures than from words alone.”

Pictures and Older People (Good)

The ability to process information into long-term memory may be diminished in older adults. This form of mild cognitive impairment is not readily apparent and does not afflict all older adults in the same way, or at all. Nevertheless, about 25 percent of eligible jurors are over age fifty, and some in this group who appear to be cognitively sharp may have more difficulty learning than when they were younger. The bad news is that the memory impairment affects the ability to recall what was spoken. The good news is that memory and recollection are greatly enhanced when the information presented included pictures.

Analogies and Metaphors

Jurors are confronted with the challenge of understanding subjects that are new or unfamiliar. They will struggle to comprehend scientific, medical or technological information. Analogies and metaphors are important tools that trial lawyers can use. *Analogies* are mental shortcuts that allow the brain to avoid the hard mental work of analyzing something unfamiliar. This is accomplished by providing a point of reference that can be used to start the

process of understanding something new by incorporating preexisting knowledge about something else. By definition, an analogy is a comparison of two things, that is, “this is like that.” Before something unfamiliar can be learned, it has to be preceded by something already known. Analogies connect the known and unknown. Medical subjects are excellent candidates for analogies. For example:

The wires in your house carry electricity to make things work, and if one gets disconnected or broken, motors or lamps won’t work. Nerves in your body are like those wires because they also carry electricity. And, like a broken wire, when a nerve is injured, muscles and sensation stop working.

Just as analogies are comparisons, *metaphors* are also comparisons, although they are framed differently. This has been described as experiencing one kind of thing in terms of another. If you describe a car that caused a crash, you might say, “The car was like a bullet—it was going to kill somebody.” That’s a simile, which is a type of analogy. But if you said, “The car was a bullet—it was going to kill somebody,” that would be a metaphor because it described the car as a bullet. The effect isn’t just explanatory; it creates imagery.

Putting it all together

Before there can be persuasion, there must be understanding. Facts and eloquence are not enough. Jurors who are presented with subject matter that was previously unknown or only vaguely understood must be motivated to pay attention and enjoy the learning experience. They are the students and the trial lawyer is the teacher. But the science behind how jurors process and learn information is only the beginning. All of us who strive to advocate successfully for our clients need to understand how decisions are affected by emotions, cognitive capacity, biases, heuristics, reactance, cognitive dissonance, conservatism, and credibility. Cognitive science takes into consideration not only the predispositions and attitudes that color decisions, but also the limitations inherent in the ability of jurors to understand and absorb new and often complicated material. *Persuasion science* helps trial lawyers understand why facts are rejected by juries and how to avoid such rejection. ■