

# Persuasion Science for Trial Lawyers

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John P. Blumberg



Full Court Press

## What lawyers, judges, and jury consultants are saying about *Persuasion Science for Trial Lawyers*

*Persuasion Science for Trial Lawyers* places the tools of persuasion at your fingertips. John P. Blumberg has provided trial lawyers with a treasure trove of teachings. The pages will turn with ease as John dispels commonly followed myths and refocuses the reader on fact-based science. This publication possesses vital tools for persuasion that every trial attorney should study, know, and implement. It is filled with illustrations, references, and recommendations. Attorneys need to effectively communicate. This book provides the means to clarify your message, resonate with jurors, and achieve success. It should be required reading for all litigators. If you want to help your clients, read this book!—JONATHAN H. LOMURRO, ESQ. (Freehold, New Jersey), Author of *Dropping the Digital Anchor*, Certified Civil Trial Attorney (New Jersey), Board Certified in Medical Malpractice Law (American Board of Professional Liability Attorneys), Member, American Board of Trial Advocates, Master of Law in Trial Advocacy

Without doubt, the book *Persuasion Science for Trial Lawyers* should be a must read for all trial attorneys, whether they be novices or very experienced. Author John P. Blumberg, himself an experienced jury trial lawyer, breaks down the things that most influence trial jurors in reaching their verdict and does so in a very understandable way. The insights he presents as to how jurors have many preconceived mindsets and how to understand and deal with handling them in the presentation of your case is a most helpful tool for all of us to understand and put into practice. The book is presented in a most entertaining way. It is a pleasure to read and the lessons and insights it contains are invaluable and can be simply followed by all.—ROBERT N. STONE, ESQ. (Los Angeles, California) Past National President of the American Board of Trial Advocates, Member of the International Academy of Trial Lawyers, Fellow of the American College of Trial Lawyers, Board Certified in Medical Malpractice Law (American Board of Professional Liability Attorneys)

I have been practicing as a trial attorney for over 45 years, and I have read multiple books and articles dealing with juries and their selection, but I can unequivocally state the best analysis and explanation of the juror response and how to understand it is contained in the pages of *Persuasion Science for Trial Lawyers*! I've tried over 200 jury trials, but I have to say that every page of John P. Blumberg's book offered insights that never occurred to me in all those years. This book is invaluable, needs to be in your office, and available every time you go into a courtroom to select a jury.—GARY M. PAUL, ESQ., Waters, Kraus & Paul (Los Angeles, California), Past President: Consumer Attorneys Association of Los Angeles, Consumer Attorneys of California, and American Association for Justice, Member of the International Academy of Trial Lawyers and American Board of Trial Advocates (Diplomate rank)

Attorney John P. Blumberg has put together an insightful new book analyzing the art of persuasion for litigators. This is a book that I wish I had read before my first trial. I learned some of his observations the hard way during my 30 years of trial work, but didn't realize the reasons why some approaches worked and some didn't. The book is very readable with interesting examples sprinkled with humor. It should be required reading in every trial practice course in law school and for every beginning litigator. It's an invaluable gem of wisdom.—HON. WENDELL MORTIMER, Retired Judge of the Los Angeles County Superior Court. Member, National Board of Governors of the American Board of Trial Advocates

Among the sea of terrific books that teach trial lawyers techniques to be better trial lawyers, John P. Blumberg's *Persuasion Science* is the first that succeeds at teaching lawyers how jurors think . . . and why certain techniques are persuasive. As a jury consultant, I can attest that understanding how jurors judge information and make decisions is a rare but precious quality for trial lawyers. John does an amazing job of condensing and translating years of training and education in psychology into lessons that apply directly

to civil trials. Unless you have years to spend getting your own PhD in psychology, John's book will make you a better lawyer by helping you to understand why some trial techniques work, others don't, and when to deploy the right ones from your toolbelt for the unique facts of the case you're taking to trial next.—HARRY J. PLOTKIN, jury consultant (Los Angeles, California)

I cannot remember the last time, if ever, I actually found myself not only informed but truly entertained by a book on effective trial practice. John P. Blumberg has applied his successful career as a trial lawyer to his extensive review of the psychology of persuasion and created a wonderful new book that captures the essence of successful communication and persuasion with opposing counsel, jurors, and the Court. I was particularly struck by the chapter "Admonitions, Verbosity, and Other Mumbo Jumbo." It called to mind two examples I have held dear over a 27-year career as a litigator, as well as my time on the bench. First, my civil procedure professor promised to fail any student who drafted an exemplar complaint starting with the words "Comes now the plaintiff . . ." Second was when counsel asked an expert witness what the technical term was for the portion of a light bulb which "had a metal threaded cap, a ceramic insulator and an electrical contact in the middle" and was advised by the expert that it was called "the part you screw in." Lawyers get too caught up in "mumbo jumbo" and Blumberg shows them not only the way out, but the why. An interesting, enjoyable, and thoroughly researched read for practitioners at every level.—HON. JOE W. HILBERMAN, Retired Judge of the Los Angeles County Superior Court; Member, American Board of Trial Advocates (Advocate rank)

Replete with actionable advice based on scientific research in decision making, *Persuasion Science for Trial Lawyers* is a trial lawyer's companion at any stage of his or her career. Its insightful analogies and clear prose earn it a spot on the shelf next to *Reptile*, and books by Malcolm Gladwell and Jonah Lehrer, as well as other classics of the legal tactics genre.—WILLIAM F. McMURRY, ESQ. (Louisville, Kentucky) Past President, American Board of

Professional Liability Attorneys, Board Certified Medical Malpractice Specialist, Board Certified Legal Malpractice Specialist (American Board of Professional Liability Attorneys), Board Certified Civil Trial Specialist (National Board of Trial Advocates), Board Certified Civil Trial Specialist by the Florida Bar, Board of Legal Specialization

John P. Blumberg's new book, *Persuasion Science for Trial Lawyers*, takes a fascinating new approach to examining why certain advocacy techniques do and don't work to persuade trial juries. In particular, I found his discussion of how juries understand and process information to be eye opening and even counter to what many of us have been taught for decades. This book is a must read for trial lawyers and those who teach future trial lawyers the art of advocacy.—SUSAN G. POEHLS, ESQ., Director of Trial Advocacy Programs and William C. Hobbs Professor of Trial Advocacy, Loyola Law School, Los Angeles, California

John P. Blumberg's examination of the "Conservative Brain" is thought provoking and relevant for the trial lawyer in today's politically polarized country. He explains that conservatives can be persuaded to find for plaintiffs because they favor social order-based morality in which the emphasis is to protect the public from danger by avoidance of harm by compliance with the rules. He then demonstrates how best to present conservative concepts to juries by portraying a plaintiff as a person possessing the conservative values of personal industry and group identification who was injured by a defendant who broke society's rules. All trial lawyers would benefit from John Blumberg's well written and reasoned approach to understanding the differences in how we all think and reach conclusions based on our different value systems.—LUTHER J. BATISTE, III, ESQ. (Columbia, South Carolina) Past National President of the American Board of Trial Advocates

Science is typically black and white. John P. Blumberg has taken the art of persuasion science to the important reasoning of "why" we care about what is important enough to listen, attach, and

stay interested in the presentations. He has creatively built each chapter to engage the reader to continue to discover the “why” behind the strategy of building the trial presentation while always connecting the persuasion with phrasing, visuals, and timing. He illustrates that science has proven the 10-second/10-minute rule of interest and attention. John Blumberg’s style of writing is storytelling. His message to lawyers is to simplify your case with direct, clear, and easily understood testimony and evidence. If you uncomplicate the complicated, the jury will follow and stay interested. I highly recommend *Persuasion Science for Trial Lawyers* to anyone who wants to build impressionable case and engage the jury’s interest and connections.—MOLLY M. MURPHY, Trial Consultant (Los Angeles, California)

This book is not for trial lawyers who believe they have to beat verdicts out of juries. In an insightful application of scientific concepts of human decision making, John P. Blumberg reveals that the skillful advocate does not bludgeon, but rather guides jurors to persuade themselves of the key issues on which a case turns. Such an empowered jury truly fulfills its duty “to find the truth.”—RICHARD HONAKER, ESQ. (Wyoming) Past President: Wyoming State Bar, Wyoming Trial Lawyers Association, Wyoming chapter of the American Board of Trial Advocates, Fellow of the American College of Trial Lawyers

To be effective, every trial lawyer needs to understand and appreciate the jury. Mr. Blumberg’s book is an essential read for every trial lawyer, from novice to most experienced, as it provides the clearest window yet provided, backed by current social science, into how jurors best receive, process, and ultimately determine and judge the facts.—GARY ZIPKIN, ESQ. (Anchorage, Alaska); Past President of the Alaska Chapter of the American Board of Trial Advocates; Fellow of the American College of Trial Lawyers



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John P. Blumberg

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# Contents

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Preface	xiii
Acknowledgments	xvii
Introduction: A New Way of Looking at the Art of Advocacy	xix
Chapter 1. Get the Papers	1
Chapter 2. Persuasive Communication Skills	3
Chapter 3. Admonitions, Verbosity, and Other Mumbo Jumbo	9
Chapter 4. Be the Water, Not the Rock (Giving in to Get Your Way)	17
Chapter 5. The Science of Jury Education	27
Chapter 6. The What, How, and Why of Persuasion	39
Chapter 7. Attention, Memory, and Curiosity	49
Chapter 8. Keep It Simple—The Brain Has Limitations	57
Chapter 9. Expert Examination That Persuades	71
Chapter 10. Resistance to and Rejection of Advocacy	87
Chapter 11. Questions That Persuade	95
Chapter 12. Mental Shortcuts and Biased Preexisting Beliefs	109

Chapter 13. Overcoming Bias With Perspective and Framing	119
Chapter 14. Finding Shared Values of Liberals and Conservatives	133
Chapter 15. Trust Me, I'm a Trial Lawyer	153
Chapter 16. Why Should I Believe Anything You Say? Plaintiff Direct Examination	165
Chapter 17. In Praise of Trial Lawyers	177
Chapter 18. Final Thoughts on Science, Persuasion, and Trials	187
Appendix: Application of the Science to Trial Advocacy	197
Notes	211

## Chapter 5

# The Science of Jury Education

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*Education is not to reform students or amuse them or to make them expert technicians. It is to unsettle their minds, widen their horizons, inflame their intellects, teach them to think straight, if possible.*

—Robert M. Hutchins, university president  
and educational philosopher (1899-1977)

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*. This chapter will examine some of the ways of assisting jurors to understand and process the unfamiliar information that is presented at trial. The tools? 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.<sup>1</sup> *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. The science-based techniques for capturing and keeping the attention of learners are explored in chapter 7 ("Attention, Memory, and Curiosity").

## **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. This is explored in greater detail in chapter 8 (“Keep It Simple—The Brain Has Limitations”).

*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. The expert witnesses will be the most important teachers; therefore, expert witness preparation is crucial, which is discussed in chapter 9 (“Expert Examination That Persuades”).

*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 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 Psychology at the University of California, Santa Barbara. Mayer's expertise is the science of learning. In his book *Multimedia Learning*,<sup>2</sup> 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 Mayer to create, and write a book about, what he calls "multimedia learning." 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 of printed words, pictures, and narration can help or hinder learning.

## **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, 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 Richard E. 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.<sup>3</sup>

## Analogies

Analogies are helpful to explain and define complicated subject matter to jurors. 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*. As discussed earlier in this chapter, before information can be processed, it must be understood. An analogy serves this purpose.

Linguists and psychologists have actually studied the effect that analogies and metaphors have on the brain.<sup>4</sup>

Before something unfamiliar can be learned, it has to be preceded by something already known. Analogies connect the known and unknown. Analogies have been recognized in education science as a valuable aid for students to understand difficult subjects. But most jurors are not attending a trial the way students attend school. Rather than being intentional learners, jurors are *incidental* learners. And some may be *involuntary* learners. They didn't come to court for the purpose of learning, but the evidence they will hear will likely include things that are probably unknown or unfamiliar. Learning new things is hard mental work, and a jury trial environment is ripe for resort to mental shortcuts. (Later chapters will explore the cognitive processes by which people frequently avoid critical thinking by using mental shortcuts.) *Analogies* are one of many mental shortcuts that allow learners to bypass the more extensive deliberative process of systematic reasoning.

Medical subjects are excellent candidates for analogies. For example, everybody's house has plumbing where water flows through the pipes. Arteries are like the plumbing in your house, and blood is like the water that goes through

them. Another 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.

But just as analogies can be effective, they also can fall flat. They need to be carefully constructed and tested, and should never be the result of a spontaneous idea. A well-known example of an analogy gone wrong was when Homer Simpson was going to explain women to his son, Bart: "Son, a woman is a lot like . . . a refrigerator. They're about six feet tall, 300 pounds. They make ice, and . . . oh . . . No, wait a minute. Actually, a woman is more like a beer."

To be effective, an analogy must be simple, familiar, and not open to criticism. For example, after John Roberts had been nominated to be Chief Justice of the Supreme Court, he used an analogy during his Senate confirmation hearing: "Judges are like umpires. Umpires don't make the rules, they apply them. . . . I will remember that it's my job to call balls and strikes." It was an imperfect analogy and subject to criticism. The Supreme Court defines what the rules are, sometimes changes the rules and, in effect, often defines the strike zone. A poor analogy by a trial lawyer might be picked apart by opposing counsel.

## Metaphors

Just as analogies are comparisons, *metaphors* are also comparisons, although they are framed differently. George Lakoff and Mark Johnson described this process as "experiencing one kind of thing in terms of another."<sup>5</sup>

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 can be emotional and experiential because it creates imagery. Harvard philosophy professor Richard Moran has written about the power of metaphor:

Talk about the force or compelling power of metaphor is often bound up with reference to its imagistic capacity. Part of the dangerous power of a strong metaphor is its control over one's thinking at a level beneath that of deliberation or volition. In the mind of the hearer an image is produced that is not chosen or willed. The metaphorical assertion brings one to see something familiar through this image, framed by it, and this "seeing" persists concurrently with one's original sense of the dissimilarity of the two things here being brought together.<sup>6</sup>

## **Analogies and Metaphors in Persuasion**

A powerful analogy might help defeat an argument that the absence of a prior accident is proof that there was no danger:

Allowing a dangerous condition to exist is like Russian roulette. In Russian roulette, the cylinder of a six-shooter is spun, and then the trigger is pulled. If nothing bad happens the first five times, that doesn't mean it's safe. It's only a matter of time.

A metaphor can be effective in persuasion because it transforms the thing being described into something else. For example, if an analogy is used to describe a nursing home

as *like a prison*, jurors might reject the comparison because there are too many dissimilarities. But if the nursing home was described *as a prison*, jurors' cognitive processes would more likely seek to identify the similarities.

## 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*. As teacher, the trial lawyer's instructional aids will include documents, pictures, witnesses, and experts. But a good teacher will understand that his or her students have limitations on the amount of information that they can process. The science of education has demonstrated that extraneous, unnecessary, and redundant information can use up valuable and limited processing capacity. Accordingly, eliminate it from the trial presentation. Words alone can persuade, whether read to the jury or read by the jury, so long as both are not at the same time. Analogies and metaphors can also aid in understanding but also have the power to persuade. A metaphor that creates a verbal image can have a similar effect to an illustration, and may be more powerful because the image is conjured by the listener. The use of both words and pictures will enhance learning and the likelihood of a favorable verdict.



“This book is invaluable. It needs to be in your office and available every time you go into a courtroom to select a jury.”

—Gary M. Paul, Past President, American Association for Justice and Member of American Board of Trial Advocates

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In this must-have text for both new advocates and experienced trial attorneys, veteran trial lawyer John P. Blumberg shows the reader how persuasion science can lead to successful jury verdicts. Blumberg’s new methodology for approaching courtroom advocacy solves the mystery of what makes certain strategies successful, and why information is accepted or rejected by jurors. *Persuasion Science for Trial Lawyers* is presented in an easily understandable way, using examples of how to deploy winning tactics throughout every aspect of a trial. Blumberg expertly explains how decisions by juries can be affected by cognitive overload, mental shortcuts, and biases that cause some arguments to be dismissed. Trial lawyers who understand the science of persuasion will be able to avoid these pitfalls and gain a significant advantage over opponents.

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John P. Blumberg is a trial lawyer and 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 and the American Board of Professional Liability Attorneys. He has served on the Boards of Directors of trial lawyer organizations including the American Board of Trial Advocates (ABOTA), the American Board of Professional Liability Attorneys, and Consumer Attorneys Association of Los Angeles. Mr. Blumberg has published over forty articles on trial advocacy and law practice and has been actively involved in the training of trial lawyers for over forty years.

