

## II

# THE PSYCHOLOGY OF PERSUASION

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### §2.1. *Introduction*

Trials are a re-creation of reality — an event or transaction that happened in the past. In trials, there are usually three versions of reality: your side's reality, the other side's reality, and the jury's reality. Each party firmly believes that its version of reality is correct and tries to persuade the jury to accept its version. However, the only reality that ultimately matters is the jury's reality — what the jury believes actually happened — because that reality will control the jury's verdict.

Which side's version of reality will the jury accept as its own? This depends largely on which side is more persuasive in presenting its version during the course of the trial. If neither side is persuasive, the jury will construct a version of reality entirely on its own. To persuade juries, you need to understand juries — their backgrounds, beliefs, and attitudes, how they process information, how they think, and how they make decisions. Only when you understand the psychology of persuasion can you understand how to persuade a jury to adopt your version of reality as its own. This understanding will influence everything you do during a jury trial, from jury voir dire through closing arguments.

This chapter reviews what behavioral science and jury research have learned about juror backgrounds, beliefs and attitudes, how they process information, what influences them, how they make decisions, and discusses how trial lawyers can use this knowledge to shape how they try cases. Although for the most part this research is consistent with what effective trial lawyers have learned through experience, it has organized and explained jury behavior in a systematic way that significantly contributes to our understanding of how jurors think, how they decide, and how they can be persuaded.

### §2.2. *Behavioral science and jury research*

Until perhaps 50 years ago, a common view was that jurors objectively absorbed the evidence presented by both sides during a trial, withheld making premature judgments, dispassionately reviewed that evidence during deliberations, and ultimately reached a logical decision, based on the evidence and the applicable law. Behavioral science research, beginning in the 1940s, and jury research, beginning in the 1960s, have emphatically rejected that view. "They," the jurors, do not think and decide like "us," the lawyers.

A caveat is in order, however. Much of this jury research has been conducted in environments that have little to do with courtroom realities. For example, researchers frequently use written questionnaires answered by undergraduate students receiving extra credit to test the researchers' hypotheses. Researchers frequently show videotaped scenarios to volunteers, who then answer questionnaires. Whether such research yields results that can be applied with confidence to jury trials is somewhat doubtful. Fortunately, in recent years some of that research has become more realistic, by using trial lawyers to help create courtroom scenarios, and by using actual or representative jurors in real courtrooms to test the hypotheses. Such research results have more credibility in the world of trial lawyers. What does the credible behavioral science and jury research tell us?

### 1. Affective reasoning

People have two significantly different approaches to decision making. Most people are primarily affective ("right brain") decision makers. Affective persons have several common characteristics. First, they are usually emotional and creative, and are more interested in people than problems. They see trials as human dramas, not legal disputes. Second, they use deductive reasoning, which is primarily emotional and impulsive, in which a few premises about how life works and relatively little factual information are used to reach decisions and attribute cause and blame quickly. Third, once they make decisions, they become committed to them, and they validate their decisions by selectively accepting, rejecting, or distorting later information to "fit" the already reached decisions. This allows them to justify their decisions and believe the decisions are logical and fair. People have an internal need to be consistent, which makes them committed to their original decisions despite the receipt of later conflicting information. Since information inconsistent with their decisions causes internal conflict and stress, they become resistant and soon hear and see only what they want to hear and see.

By contrast, cognitive ("left brain") decision makers are more interested in problems than people, enjoy accumulating information, defer making decisions until they have all the available information and, like trained scientists, use inductive reasoning to reach logical decisions. Cognitive decision makers are more likely to have higher education levels and math, hard science, or business backgrounds. After seeing a collision, affectives ask: "Was anyone hurt?" Cognitives ask: "Whose fault was it?" In short, affectives "feel"; cognitives "reason."

While most jurors are affective decision makers, most lawyers, trained in legal reasoning, are cognitive decision makers. The approach that is effective in persuading "them," the jurors, will not be the approach effective for "us," the lawyers. Lawyers must understand how jurors process information and make decisions before lawyers can communicate persuasively with them. This has significance at all stages of a jury trial.

### 2. Beliefs and attitudes

Beliefs (what we know about something) are how we perceive life works — our value system. Attitudes (how we feel about something) are the expressions of our beliefs. Our attitudes are our convictions, biases, and prejudices about people and events, our sense of what's right and wrong, what's fair and unfair. We try to make sense of the world around us, and use stereotypes — our beliefs and attitudes — to organize our views of that world. Beliefs and attitudes are formed throughout our lives through parental training, formal education, television, news, and, most importantly, personal observations and experiences. Once developed, attitudes are usually held for life and change slowly, if at all, over time.

Attitudes subconsciously filter information about the world around us and help sort out conflicting information and fill in missing information. Attitudes are the rose-colored glasses through which we "see" information in our own unique way, accepting information that we like, and rejecting, minimizing, or distorting information that we dislike, thereby achieving personal consistency and comfort.

Most jurors do not passively sit and uncritically absorb evidence. They rarely have "open minds" that are receptive to new ideas. Instead, they "test" new information by how consistent it is with their preconceived ideas of how life works, and how it fits into the picture of the case they have constructed in their minds. Jurors rapidly construct stories of what probably happened in the case, then subconsciously use their attitudes to accept, reject, or distort evidence, or supply missing information, to create a complete, plausible story. This lets jurors reach decisions they believe are consistent with the evidence, and are therefore logical and fair. The more circumstantial the evidence of liability or guilt, and the more familiar jurors are with the subject matter of the trial, the more important jurors' beliefs and attitudes become.

Juror attitudes have great significance throughout a trial. These attitudes determine if the jurors will be receptive or resistant to the parties, evidence, and themes presented during the trial. Lawyers can only persuade if jurors are willing to accept, and jurors' attitudes, not logic or reason, control whether they will accept or reject particular information or messages during a trial. Therefore, lawyers need to understand the jurors' relevant attitudes, whether these attitudes are consistent with or in conflict with each other, and how intensely those attitudes are held. This must be explored before and during the jury selection process, since it is highly unlikely that any jurors will change their attitudes about any important matters during the course of a trial.

Although reliable juror demographic information (such as sex, race, age, marital status, family history, residence information, education, and job history) is easy to obtain, those demographics at best reflect likely general attitudes about life, and have limited use in predicting individual juror attitudes relevant to the issues in a particular trial. Single demographic characteristics, such as sex, race, and age are almost useless in predicting juror attitudes (unless, of course, the case itself involves issues of sex, race, or age).

By contrast, direct information of juror attitudes should be a better source. However, jurors are frequently inaccurate, whether intentionally or unintentionally, in describing their own attitudes about issues relevant to a particular trial. Self-disclosure of true attitudes during jury selection, particularly attitudes on sensitive issues, is notoriously unreliable, because the jurors' need to fit in and be accepted by others usually overrides the obligation to be truthful. As a result, jurors usually give socially acceptable answers to questions that probe attitudes on sensitive issues. Creating a relaxed, nonjudgmental environment for self-disclosure improves its reliability. Questioning jurors individually, out of the presence of the other jurors, improves the amount and accuracy of self-disclosure. Using written questionnaires, rather than questions in open court, also significantly improves the candor and completeness of self-disclosure.

Lawyers usually seek to learn juror attitudes indirectly, by asking about jurors' hobbies, interests, involvement with groups and organizations, and personal experiences in life, from which attitudes can be inferred. Personal experiences similar to the case being tried are particularly important, because jurors consider these experiences to be evidence and frequently spend as much time during deliberations discussing their collective experiences as they do discussing the formally introduced evidence.

Jury selection (assuming the law and court permit such latitude) usually pursues all these approaches — getting basic demographic information, as well as direct and indirect information on attitudes — so that lawyers can make informed decisions on which jurors to accept or reject in a particular case.

### 3. Decision making

A jury verdict is a product of two forces: individual decision making, and group decision making. Individual juror decisions are influenced principally by affective reasoning and the jurors' beliefs and attitudes, discussed above. However, it is also important to understand that most jurors go through an emotional progression during the course of a trial, because that progression will influence how lawyers present themselves, their evidence, and their arguments. Lawyers who understand and respond to the jurors' emotional needs during the trial have a significant advantage.

At the beginning of a trial, particularly during the jury selection process, most jurors experience varying levels of anxiety. This is natural, since uncertainty creates anxiety. They are unsure of their role as jurors, unsure that they will be selected to sit as jurors, unsure of their capacity to understand what the case is all about, and unsure of their ability to reach the right verdict. For the rest of the trial those jurors are using subconscious strategies to cope with their unwanted anxiety.

As the trial begins, after they have been selected to sit as jurors, and after they have heard the opening statements, that uncertainty and anxiety, for most jurors, subsides. Their uncertainty lessens as they begin to

understand courtroom procedure and their role in the trial process. They begin to come to terms with the case by constructing stories in their minds of what the case seems to be about. These stories may turn out to be accurate or inaccurate, but they are constructed just the same. The stories are the mental process by which jurors strive to make sense of the information they receive. This is not the same thing as reaching a final decision, but does have a great deal to do with how those jurors perceive the actual evidence when they receive it.

As the trial progresses, and they actually hear and see the evidence, jurors subconsciously accept, reject, or distort that evidence, depending on whether the evidence is consistent or inconsistent with the stories they have constructed in their minds. This is the filtering process, where jurors subconsciously use their attitudes and beliefs to screen the evidence as they hear and see it. For most jurors, the evidence, as filtered, serves to validate the stories they have already constructed in their minds, and serves to "prove" that their initial impressions were right. The anxiety most jurors experienced at the beginning of the trial has subsided, as these jurors become confident of what the right outcome of the case should be.

At the end of the presentation of evidence, most jurors, now confident of and committed to their decisions, look forward to sharing their views with others during deliberations. For these jurors, the closing arguments will have little influence, since they already know what the right decision should be (although hearing arguments supporting their decision may make them stronger advocates for that decision during deliberations). Closing argument will usually influence only those jurors who are still unsure of their decision, or who do not have confidence in their decision. Closing argument may also influence those jurors who realize that their decisions are not permitted under the verdict options given in the court's instructions on the applicable law, and must now reassess their decisions.

When the jurors retire to the jury room to deliberate, this is the time they may first realize that other jurors may not share their views and decisions, and group dynamics has a strong influence in determining whose decisions will prevail and speak for the jury as a whole.

Individual decisions are influenced by the dynamics of group decision making, since a jury is a group charged with reaching a decision — the verdict. Jury research has focused much of its attention on the dynamics of group decision making, the critical concern being the extent to which individual decisions can be overcome by group decisions.

Group dynamics do not involve an even exchange among the members of a group. Some members have more influence on the group than others. For these purposes members are usually defined as persuaders, participants, or nonparticipants.

Persuaders are persons who make assertive statements about the evidence, freely express their opinions, and actively build coalitions supporting their views. Persuaders are the opinion leaders who have the most influence and dominate the discussion in a group. They usually have higher education levels and have positions of authority or expertise in

their work. They are articulate, talk readily, and are comfortable in group settings. Many will have prior jury service. Persuaders constitute approximately 25 percent of a group. In a typical jury deliberation, three jurors do more than 50 percent of the talking, and those are the persuaders.

Participants are persons who also engage in group discussions. However, they are followers, not leaders, and value social approval and acceptance by others. They defer to others' having stronger egos, more education and higher intelligence, more experience, and greater career success. Participants readily join coalitions, since the coalition validates their decisions, but they do not lead them. They will be actively involved in the deliberations, but are likely to state things in terms of their opinions, and do not actively try to have others accept their views. Participants constitute approximately 50 percent of a group. In a typical jury deliberation, about six jurors will be participants.

Nonparticipants are persons who rarely engage in group discussions. Jurors who are nonparticipants rarely become involved in deliberations other than to express agreement with a particular view or vote. Nonparticipants are usually followers who will go along with what the majority decides to do. (However, nonparticipants who are loners and are detached from and avoid involvement with others may exhibit independence and not be easily swayed by the majority's view.) Non-participants constitute approximately 25 percent of a group. In a typical jury deliberation, three jurors will be nonparticipants.

Categorization of potential jurors is, of course, particularly important at the jury selection stage of the trial, where the peremptory challenges should be used first to eliminate unfavorable persuaders. It is more important than trying to identify the potential jury foreperson, who, research has shown, is more likely to be a compromiser and consensus builder than an opinion leader or authoritarian personality.

#### 4. What influences the jury

What influences jurors to accept our version of reality as their own? Communication is based on perception. It is a process involving senders (witnesses and lawyers), messages (evidence and arguments), media (testimony and exhibits), and receivers (jurors). Learning, for the receivers, is also an active process involving receiving, processing, remembering, and retrieving messages. Learning and persuasion will only occur if the messages you intend to send to the jury are the same as the messages the jury actually receives and retains.

##### a. Sender credibility

The senders — witnesses and lawyers — must be credible sources of information before they can influence the jury. Influence is largely a function of credibility, and credibility is largely a function of the sender's personal attributes. People develop opinions about others quickly, often

within a few minutes. Three principal characteristics of credibility are trustworthiness, expertise, and dynamism.

First, trustworthiness refers to impartiality. Jurors obviously prefer witnesses who have no apparent bias, interest, or motive to slant testimony one way or another, or, if expert witnesses, are not hired guns willing to say anything for a fee. For lawyers, it means that the lawyers are candid in dealing with both good and bad facts, and do not try to pull the wool over the jurors' eyes.

Second, expertise refers to how knowledgeable the witnesses are about the facts and issues of the case. Knowledgeable and authoritative persons have more influence on others. With lay witnesses, it refers to how well the witnesses saw, heard, or knew about the relevant events and transactions, and how well they remember and recount the details surrounding them. With expert witnesses, it refers to the experts' education, training, and experience, and how thoroughly they did their tests and analysis. It also refers to the uniqueness of the experts' qualifications, since people put more weight on information seen to be scarce and therefore valuable. The less the jurors are able to understand the testimony, the more important trustworthiness and expertise of the witness becomes.

Third, dynamism refers to the witnesses' and lawyers' ability to communicate. Jurors prefer witnesses and lawyers who are likeable and attractive, both physically and personally. They are more influenced by people they like and who appear to be much like themselves. They prefer witnesses and lawyers who project energy, enthusiasm, and confidence when they testify or argue. All the components of effective delivery — verbal content (the actual spoken words), nonverbal delivery (paralinguistics, such as speech rate, volume, pauses, and voice inflection), and body language (kinesics, such as posture, body, arm, and hand movement, facial gestures, and eye contact) — must work in a coordinated way. Boredom is the enemy of effective communication, and dynamic delivery is the best antidote. Any lawyer or witness can be taught how to be a more effective communicator.

Finally, jurors think — erroneously — that they are good at detecting deception, and use stereotypes to make such assessments. They believe that mannerisms such as lack of eye contact, nervousness, hand over mouth, hesitancy in answering, and using words like "honestly" or "believe me" indicate uncertainty or deception. These are the kinds of mannerisms that witness training and preparation can minimize.

##### b. Receiver capacities

The receivers — the jurors — come with diverse interests and abilities and represent a broad spectrum of today's adult population. Many, however, have limited attention spans, limited interest in learning, and limited channels through which they are willing to learn.

First, most people's attention spans are short. The average person can only maintain a high level of concentration for about 15 to 20 minutes. After that, attention levels drop significantly. That's why half-hour television programs are more common than one-hour programs — advertisers know that viewers are likely to change channels before the

hour is over. In addition, listening to others talk occupies only a small portion of the brain's capacity, allowing the rest of the brain to fade in and out and think about other things. While some jurors will pay close attention throughout a trial, most jurors will have varying levels of attention, and periodically drift off and think about other things.

Second, most people have limited interest in learning, particularly when there is no perceived self-interest involved. Learning new things takes effort. Many jurors did not like formal learning, and once their schooling was done, resist situations that repeat their school-years experience. A trial, of course, represents in many ways the formality of classroom learning, which, for these jurors, dredges up unpleasant memories.

Third, most people have been trained, principally through television, how to expect new learning. They are part of the "sound bite" generation. They now want it fast, painless, interesting, and visual. They form perceptions quickly, based on little information. Observe any television news program. Notice how each news item is short, usually less than two minutes, leads off with a few seconds introduction from a "talking head," cuts quickly to visuals with a background voice, focuses on the human impact of the story, and wraps up before boredom sets in. If this is what makes people watch television news, it speaks volumes about how lawyers in today's environment should try cases to juries.

Fourth, what people see as "evidence" is different from what lawyers understand as evidence. When people become jurors, they see as evidence any information relevant to their decision, whether it is formally introduced evidence from witnesses and exhibits, their personal experiences in life they believe, rightly or wrongly, to be relevant to the case, and their attitudes about how life works. Everything that jurors see as evidence goes into their decision making. Jurors frequently spend as much time discussing their experiences in life — such as the automobile accidents they've been involved in, their experiences with doctors and hospitals, and their experiences with the police — which they feel are as relevant to their decision, as they do to the witness testimony and exhibits. It's all "evidence" to the jurors.

### c. *Effective messages*

Effective communication must come from credible sources and must be attuned to the realities of today's listeners. The message itself, whether witness testimony, exhibits, or lawyer arguments, must also be effectively structured. Research has contributed much to understanding the components of effective communication.

First, memory is a severe limitation on what we can effectively communicate. It makes no sense to communicate if the listeners do not retain the essence of what has been communicated. The average person forgets most of any communication within a few hours, and after two or three days retains but a small part. Trial lawyers need to understand that memory is indeed fleeting, and must use strategies to improve jurors' retention of the key information presented during a trial.

Second, people use simplification strategies to deal with sensory over-load. People are bombarded with information during a trial through testimony, exhibits, and arguments. They quickly become overloaded with information and subconsciously employ simplification strategies to cope with the avalanche of information, since sensory overload is a stressful situation that people try to avoid.

A key simplification strategy recognizes that people instinctively use psychological anchors, which are mnemonic devices to help them remember the gist of what they have learned. Much like we use yellow highlighters to mark key words and phrases on written material, jurors create psychological anchors to do mentally what highlighters do physically.

Psychological anchors are simply what trial lawyers call themes. A theme is a memorable word or short phrase — "this is a case about greed" — that summarizes and encapsulates lengthy descriptive and evaluative information. Research shows that it is human nature to condense voluminous information to an easily remembered word or phrase, so that hearing or seeing the word or phrase later will trigger some of the supporting detail. Anchoring information to a theme makes the information easier to retain and retrieve. If trial lawyers do not provide the themes during a trial, jurors will instinctively create themes themselves. An important part of trial preparation is selecting themes that are emotionally based, are catchy and memorable, summarize the liability and damages positions in the case, fit the undisputed and disputed evidence, and are consistent with the jurors' beliefs and attitudes. If this is done well, and used periodically during the trial, jurors will adopt your themes during their deliberations.

Third, this is the era of visual learning. People today are part of the television age or, more recently, computer age, and are used to receiving information visually. Trials, however, largely involve witness testimony. Research has shown that after two or three days listeners retain only about 10 percent of aural messages, but they retain about 20 percent of visual messages. Retention is improved several-fold if both aural and visual messages are used to present the same information. Trial lawyers have to focus on improving the level of retention from witness testimony and lawyer argument by using visual aids whenever possible to repeat and reinforce aural messages.

Fourth, research has shown that the impact of aural information — witness testimony and lawyer argument — can be significantly improved. Witnesses and lawyers can be trained to use "powerful language" to improve their persuasiveness and eliminate or minimize speaking styles that detract from credibility. Powerful language use the active voice, has good speech rate and volume, uses plain English and good diction, uses present tense, and makes descriptions vivid and visceral. It avoids using tentative language, such as hollow intensifiers ("very," "really"), unnecessary hedges ("I guess," "well"), and indications of uncertainty ("it seemed like"). Witnesses and lawyers can be taught to use sensory language to make what is verbal appear to be visual by creating unique images and symbols. They can be prepared to testify about details of events and transactions that enhance their credibility. They can be prepared to

demonstrate what happened, rather than just tell what happened. They can be taught to create emotional messages, both positive and negative, and express confidence and certainty whenever possible.

Fifth, this is the era of the visual trial. Visual aids — photographs, diagrams, charts, models, enlarged documents, and computer simulations — that are large, clear, and vivid usually have much more immediate and lasting impact than the spoken word. They dramatically improve retention levels of the information. Whenever possible, show rather than just tell. Whenever the information is important, make it visual.

Finally, research has shown that several concepts can be used to increase memory and persuasion. Repetition is a powerful influence. Repeating a message — such as a theme in opening statements or closing arguments — three or four times substantially improves retention. More repetition can be effective, but its form must be modified so that jurors do not turn off to seemingly endless identical repetition, and the repetition does not become legally objectionable. Jurors may forget the details over time, but they will retain the impressions that have been repeated during the trial.

Cues are a powerful influence. A cue is simply a verbal or visual warning that something important is about to happen, so that listeners will pay particular attention. A cue can be direct — saying “this is important” — or indirect — using tone of voice, pregnant pauses, body language, rhetorical questions, and the like.

Rhetorical questions also have a strong influence because they stimulate active thinking. Self-generated ideas have greater strength and retention. When jurors respond to rhetorical questions and reach the desired conclusions themselves, their conclusions will have a stronger and more lasting impact.

Order effects are particularly important. Where a message is placed in relation to other information has much to do with how well the message is received and retained. Because most people make up their minds quickly and become bored and tune out quickly, it is particularly important to begin with information that has impact. People remember better what they hear first — this is the concept of primacy. On the other hand, people also remember better what they hear last — this is the concept of recency. It also is important to end with information that has impact. In short, the most important information should be at the beginning and end of any message.

Order effects can sometimes be used to enhance less credible sources. Because people tend to forget the source of information over time — the sleeper effect — information from a less impressive witness can be placed in the middle of the presentation.

Order effects are important within the component parts of a trial, such as opening statements, closing arguments, and direct, examinations, as well as the trial as a whole. When trials are short, primacy is the more important concept. When trials last more than a few days, recency is probably more important.

There also are specific techniques that can effectively deal with the fact that trials involve two opposing sides that are constantly bombarding

the jurors with conflicting information and messages. Forewarning and inoculation are particularly important techniques for the side presenting information or arguing first. Forewarning is giving the listeners advance warning that they are going to hear contrary information and appeals from the other side. Inoculation is anticipating the other side’s argument and giving the listeners information and arguments that they can use to resist the other side’s arguments. Research shows that when forewarning and inoculation are used, listeners become more resistant to later contrary information and arguments.

Two-sided argumentation is also important. Research shows that when one side has a strong case and the listeners are already favorably disposed, one-sided arguments — discussing only that side’s strengths — are more persuasive, since they reinforce already held views. However, where both sides have reasonably equal cases and the listeners are not disposed one way or another, two-sided arguments — including the other side’s arguments and a refutation of them — are more persuasive. Because most cases actually tried have strengths and weaknesses on both sides, two-sided argumentation will usually be the more effective technique.

### §2.3. *What research means for trial lawyers*

What does this behavioral science and jury research tell us as trial lawyers about how to approach a jury trial? What are the keys we need to keep in mind throughout our trial preparation and the trial itself? Six concepts stand out.

#### 1. Prepare from the jury’s point of view

The only reality that counts in the courtroom is the jury’s reality. The jury’s perception of reality is *the* reality. Therefore, all courtroom communication must be juror centered — it must be planned and executed from the jury’s point of view. If it’s not persuasive to the jury, it’s not worth doing, no matter how logical it may be to you. Always ask: What does the jury want to know? How does the jury want to learn it?

This means we must recognize that for many jurors, serving on a jury involves stress and anxiety. We must employ strategies that quickly and easily help jurors understand the trial process and what the case is all about. And it means we must understand that most jurors are affective decision makers, are emotional and people oriented, and make decisions quickly, based mostly on their preconceived views of how life works, then resist changing their minds. It means we must recognize that jurors filter evidence through their beliefs and attitudes and subconsciously decide whether to accept, reject, or distort it. It means we must make our witnesses, and ourselves, trustworthy, knowledgeable, and dynamic. It means we must make the trial vivid and visual. And it means we must be efficient, move the story forward, and make our points quickly before boredom sets in and jurors tune out.

Jurors, like everyone else, are a product of their environment. They have been trained, primarily through television and film, to expect drama, an emphasis on personalities, and sophisticated visual effects. They expect to get everything quickly, in simple, digestible sound bites. And they want it all to be interesting and enjoyable. Anything less and you've violated the "boring rule," and jurors often complain: "The jury just didn't understand the case." That is a lawyer problem, not a jury problem.

After a verdict, the losing lawyers often complain: "The jury just didn't understand the case." That is a lawyer problem, not a jury problem. The lawyer didn't understand that everything you do must be from the jury's point of view.

## 2. Develop a theory of the case

A theory of the case is a clear, simple story of "what really happened" from your point of view. It must be consistent with the undisputed evidence as well as your version of the disputed evidence and the applicable substantive law. It must not only show what happened, but also explain why the people in the story acted the way they did. It should be consistent with the jury's beliefs and attitudes about life and how the world works. It must be a persuasive story that will be the basis of your evidence and arguments throughout the trial. If you cannot state your theory of the case in one minute or two, it needs more work. If you do not construct a clear, simple story that puts all the evidence together into a coherent whole — your theory of the case — the jury will construct one without you.

The theory of the case obviously needs to be developed as the facts of the case become known, and well before trial. Consider, for example, an automobile collision case, where there is evidence that the plaintiff-driver may have been drinking before the collision with the defendant's car. Plaintiff must decide if her theory of the case is that (1) the accident was caused solely by the defendant's negligence and that no drinking occurred, (2) plaintiff had been drinking but her drinking played a part in causing the collision, or (3) plaintiff's drinking did play a part but the defendant's negligence was the primary cause of the collision. In a murder case, the defendant must decide if his theory of the case is (1) mistaken identity, (2) self-defense, or (3) accident. In a contract case, the plaintiff must decide if his theory of the case is (1) defendant failed to perform his obligations under the contract, resulting in consequential damages, or (2) defendant intentionally breached the contract in bad faith, resulting in punitive damages. Although alternative and inconsistent theories are proper and useful at the pleading stage, by the time of trial they must be distilled down to one simple, clear story.

Trials are in large part a contest to see which party's version of "what really happened" the jury will accept as more probably true. In civil cases, the opposing sides usually have directly competing versions of reality, and each side tries to present a persuasive version (particularly when the defense is presenting an affirmative defense), but frequently the contest is as its own. In criminal cases, this is also often true (particularly when the defense is presenting an affirmative defense), but frequently the contest is whether the jury will accept the prosecution's version, when the defense is

defending on the existence of reasonable doubt and is not offering a competing version of reality.

## 3. Select themes and labels

Themes and labels are the trial vocabulary that become the psychological anchors you want the jurors to accept and adopt as their own during the trial. Once you have developed your theory of the case, you have to condense it into themes and labels.

Themes are the anchors that summarize your case. They are the memorable words or phrases that encapsulate the essence of your case, your position on liability and damages, and project the images you want the jury to retain about the case. A case should not have more than three or four themes, which will be repeated throughout the trial, from jury selection to closing arguments. If selected properly, the jurors will adopt your themes as their own, and use your themes to argue for your side during deliberations.

A key part of trial preparation is selecting themes that are emotional, create memorable images, state your position on liability and damages, summarize what happened (conduct), who did it (people), and why they did it (motive), and are consistent with the jurors' beliefs and attitudes. The best themes come from time-honored sources that contain universal truths about life, such as the Bible, Aesop's Fables, or Americana sayings. Single words such as love, hate, fear, trust, honor, duty, responsibility, power, greed, and revenge are powerful explanations of human motives. Phrases such as "two seconds of carelessness," "a time bomb waiting to go off," and "desperate times call for desperate measures" create powerful images of events. Phrases such as "taking responsibility for your actions," "false friends," and "profits over safety" create strong moral images.

Themes should be selected with an eye toward the central issues in the case. Trials usually revolve around three kinds of issues. First, most trials involve elements issues. Have the parties proven, to the required degree of proof, each element of the claims and defenses? Second, many trials involve inferences issues. The parties do not disagree over the basic facts, but disagree over the inferences to be drawn from the facts. This is often the case when the issue is whether the facts circumstantially prove a mental state, such as intent or knowledge. Third, many trials involve credibility issues. When the testimony from witnesses clashes over important events, the jury must decide whose testimony to believe. Themes must be tailored to focus on the elements, inferences, and credibility issues the jurors will need to resolve to decide the case.

Labels are the tags you put on the people, events, and things involved in the case. Words convey images. Calling someone "the plaintiff" or "my client" conveys a different image than "Mrs. Johnson" or "Helen." Calling a tractor-trailer truck a "vehicle" conveys a different image than a "50,000 pound rig" or "eighteen-wheeler." Calling a death an event in which someone "died" is different from saying someone was "slaughtered." Calling an accident an "incident" or "event" is different from

calling it a "collision" or "crash." In these examples, the plaintiff will want to use the emotional labels, the defendant will want to use the bland ones. You need to decide how you will label the parties, witnesses, events, and things to convey the emotional images you want the jury to see and accept, and use those labels consistently during the trial. They should be introduced in opening statements, carefully employed during witness examinations, and hammered home during closing arguments.

#### 4. Emphasize the people

Most jurors are people oriented. During trials, they want to hear about the people, not the legal problems. Jurors want to know who to silently root for, who wears the white hat. Jurors want to feel good about their decisions, and they can't unless they learn enough about the key people to get a feel for them and reach a verdict that is consistent with their feelings about those people. With key people, such as parties, jurors want three-dimensional information about them.

People do things for a reason. Jurors want to know not only what they did — the conduct — but also why they did it — the motivation. Jurors always want to know who the people are, what they did, why they did it, and what effect it had on their lives.

Notice how television news understands and uses this knowledge. Stories of an event invariably focus on the human element. Coverage of disasters, wars, and economic events all zoom in on a particular person and tell about the event through its effect on that person. This puts a human face on the news, which viewers like because they can relate to the story on a personal level. Good trial lawyers understand that trials involve the same elements.

#### 5. Use storytelling techniques

Storytelling is the way people have communicated with each other since the beginning of time. Long before written language, storytelling was the way information was passed on to others, and the way oral history was preserved. People instinctively use storytelling to communicate with others, and use the story framework to organize, understand, and remember information. Jurors do the same thing during trials. If lawyers do not organize the evidence into a clear, simple story, jurors will do so on their own. It's human nature.

Good stories organize, humanize, and dramatize. They have plot, characters, and emotion. They have a narrative structure. Notice how television and film use the story framework. Someone becomes involved in an event, a conflict arises, a crisis is reached, which culminates in a resolution. The story uses sensory language, vivid, visceral, and visual images, present tense, pace, and simplicity to give life to the story and dimensions to its characters. The story is told in a way that puts the members of the audience into the picture, engaging their hearts and

minds, so that the audience cares about the people and what happens to them. The story's moral is consistent with the audience's beliefs and attitudes, so that the ending of the story is fair and justice is served. The story is highlighted with gripping visual aids. And the story is told efficiently and always moves forward, so that it never stalls or becomes boring.

Trials involve much more than merely introducing a set of facts; those facts must be organized and presented as part of a memorable story. Effective storytelling is the basis for much of what occurs during a trial, including the opening statement, direct examinations, and closing arguments. Small wonder, then, that good trial lawyers are invariably good storytellers.

#### 6. Focus on the key disputed facts and issues

In most trials almost all of the relevant facts are undisputed, so the few disputed facts are critical. Trial lawyers need to understand what is disputed and what is not, focus on the disputed facts, deal candidly with both the favorable and unfavorable evidence, and marshal and present that evidence so that the jury accepts your version of the disputed facts.

Focus on your best facts. How can you highlight the best facts, whether testimony or exhibits? How can you make them vivid, visceral, and visual? And how can you repeat your best facts in ways that maintain juror interest? Focus also on your worst facts. How can you minimize the impact of those facts? Can you anticipate them, using the techniques of forewarning, inoculation, and two-sided argumentation? And can you rebut the worst facts with evidence that has impact? If key facts and events are disputed because witnesses remember them differently, how can you make your witnesses and exhibits more persuasive than your opponent's on these key disputed matters?

Inexperienced lawyers usually spend too much time belaboring undisputed facts, thereby boring the jury, and too little time proving their version of disputed facts, thereby failing to persuade the jury. Experienced lawyers spend a great deal of time finding witnesses and exhibits that support their version of the disputed facts, and preparing them so that they are dynamic, confident, detailed, and vivid. They understand that wars are won or lost depending on which side wins or loses a key battle. The same is true for trials.

#### 7. Understand your role as an advocate

These first six concepts are not self-executing. They require an advocate. An advocate does more than represent a client, or protect a client's rights. An advocate exhibits unrelenting commitment to the client's cause, and actively seeks to influence jurors by reaching their hearts and minds. Your role as an advocate at trial begins on the way to the

courthouse for the first day and ends only when the jury is polled after the verdict. Always assume that the jurors (as well as judge and opposing counsel) see and hear everything you, your client, and your trial team do and say. Always assume that you are "on camera," even when the trial is not in session.

An advocate is both a director and an actor. You are a director, because a trial is much like theater. While limited to the script (what the witnesses say and exhibits show), the director uses creativity in choreographing that script (how the witnesses say it and how the exhibits are presented). You are also an actor, because you are constantly on stage. In many cases you will be the most important "witness" as you communicate with the jurors throughout the trial.

An advocate is always credible. This requires that you act professionally and fairly with the judge and opposing counsel. You must be trustworthy, knowledgeable, and dynamic so that the jurors see you as the teacher, helper, and guide. And it means that you must be yourself, so that the jurors know you are genuine.

An advocate always conveys a sense of injustice. Jurors must recognize it and be compelled to correct it, so that they feel good in reaching their decision. Jurors subconsciously ask a critical question: Are you saying it because you've been paid to say it, or are you saying it because you believe it? You need to project passion and commitment to your cause, and expose the injustice to motivate the jurors to decide the case in your favor (without crossing the line into expressing personal opinions).

Finally, an advocate always seeks to control the atmosphere in the courtroom. An advocate grabs and holds the jurors' attention, sets the tone for the trial, and becomes the dominant influence as the trial progresses. Jurors should look to you for leadership and guidance, and look forward to when you do things. This means you need to plan how you, your client, and your trial team conduct themselves throughout the trial, not just in the courtroom, but also during recesses, during lunch breaks, and going to and from the courthouse. Plan how you interact with the judge, court personnel, opposing counsel, and your client whenever the jurors are present. And plan how to organize the visuals — your attire, counsel table, exhibits, notebooks, and files — down to the smallest detail. When you control the atmosphere in the courtroom, through your conduct and your visuals, you enhance your power to persuade.

In trials, good things happen when you make them happen. The true advocate understands this and acts on it.

#### §2.4. Conclusion

These are the key concepts that trial lawyers must understand and use during trial preparation and at every stage of a jury trial. They will influence your jury voir dire and peremptory challenges, shape your opening statements and closing arguments, structure your direct- and cross-examinations, and design your trial exhibits. They will influence

how you, the advocate, put them together into a persuasive whole. To repeat, the key concepts are:

- Prepare from the jury's point of view
- Develop a theory of the case
- Select themes and labels
- Emphasize the people
- Use storytelling techniques
- Focus on the key disputed facts and issues
- Understand your role as an advocate

Does this mean that, simply by using these concepts, any case can become a winner? Of course not. The facts of most cases determine their outcomes. In litigation, cases in which the facts strongly favor one side rarely go to trial. These usually settle. Cases in which both sides have strengths and weaknesses, so that the outcome is in doubt, are most likely to go to trial. And in these cases, effective trial lawyers — advocates — do make a difference.