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# The Jury EXPERT

*The Art and Science of Litigation Advocacy*

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## The Preparation of Narcissistic Witnesses

*Shortly after the July issue of TJE published, we received an email from an attorney-reader in response to the Christie Brinkley divorce coverage wherein the court-appointed psychologist described Peter Cook, as a "narcissist with an insatiable ego who needs constant reassurance that he is a terrific guy" (CBS News.com, 7/8/2008). "I wonder", wrote our reader, "how trial consultants would recommend proceeding with a narcissistic witness".*

*We asked three experienced trial consultants with different professional backgrounds to share their ideas about working with these difficult witnesses: Doug Keene (psychology), Charli Morris (communication), and Lisa DeCaro (theater). They describe their individual approaches with narcissistic witnesses on the following pages.*

### "I'm Better Than I Need To Be!": Preparing Narcissistic Witnesses

by Douglas L. Keene

*"I need you to come in and prep this witness before I kill him!"*

A few years ago a client called me and said his expert witness was making him crazy. The engineer had been hired to consult and then testify in a patent dispute, and was so proud of his idea of how to present his work that he was refusing to take any direction whatsoever. In this case, it meant that he was determined to tell a story that non-engineers could not possibly understand. Not surprisingly, the attitude that came along with his story reeked of, "If you don't understand what I am saying, you are not worthy." My frazzled client truly wanted to punch him.

So. Is he a narcissist? Is he just insecure? Is he just a jerk? How do you bring him around?

### What is narcissism?

While we all know what narcissism looks like to us, there are some very specific definitions it makes sense to review. In psychological terms, a narcissistic person is prideful and grandiose, feels unique and special, is vain and self-centered, and craves attention and admiration. A clinical diagnosis requires careful attention and specialized training. In real life, though, we usually identify them much more easily, and it boils down to the realization that, “(S)he is an insensitive, arrogant @\$\*%#!”. [I have just spared you six years of graduate training.]

What is egotistical to some is nothing more than positive self esteem to others. The most commonly administered test in clinical psychology is the Minnesota Multiphasic Personality Inventory or the MMPI (Hathaway and McKinley, 1942). When it was updated in 1989, one of the items that had shifted the most was a telling comment on American culture. A statement that in the past was rarely admitted was now commonly endorsed. The statement was “*I am an important person.*” What would have seemed narcissistic and prideful in the 1940s had turned into a statement of positive self-worth. Or, to slide back into psychobabble, it is healthy narcissism. This is different from unhealthy narcissism, which can make otherwise friendly trial lawyers want to punch you. I will focus on three degrees of narcissism: healthy narcissism, traumatic narcissism, and characterological narcissism. Over the course of a career as a litigator, you will manage witnesses in each category. Getting the best testimony from any witness requires that you understand them and know how to teach them.

### Which is which?

1) Healthy Narcissism is what allows you to maintain your self-esteem when the world is giving you a bad time. It is essential if a witness is going to stay upright during an aggressive cross-examination. Frequently, these witnesses enjoy the challenge of testimony. They can need reminding not to get carried away with what they might see as ‘the game of testimony’, but overall they can be worked with. The problems arise with the next two (and more severe) types of narcissism.

2) Traumatic Narcissism is very common in civil litigation, for understandable reasons. If you are a plaintiff, you are being accused of not deserving the recovery you are seeking. If you are a defendant, you are being accused of doing something so wrong that you caused serious harm to someone else. Both situations can leave the party feeling emotionally wounded.

It can be hard to understand why a witness is defensive about the slightest criticism, but if you look more closely, these witnesses tend to be people who feel disrespected and vulnerable. They may be the kind of person who feels responsible for everything (a burdensome form of narcissism), and they may be depressed. Anything that increases that sense of vulnerability—like the prospect of a contentious cross-examination—causes them to over-react.

Think of narcissism as a seeming abundance of self-confidence and self-esteem in one who is actually very fragile. When their self-image is shattered, the resulting trauma (which some call ‘narcissistic injury’) causes them to become self-protectively defensive.

For example, a plaintiff in a car wreck is being accused by the defense of causing his own injury, which is an intolerable idea to him. He is being accused of malingering or exaggerating claims of pain and disability, which he feels is adding insult to injury. In a different case, a defendant is being accused of breaching a contract and causing financial ruin to the plaintiff. The defendant is frustrated and angry, because she feels like she bent over backward to try to resolve the issues, and now the plaintiff is abusing her for those efforts.



3) Characterological Narcissism is the kind of narcissism that makes you want to punch someone. These individuals aren't narcissistic because their self-image is being shattered—they act this way because it is simply who they are. In their own minds, they are marvelous people, worthy of special privileges and the admiring attention of others. They insist that they know what is best, they refuse to compromise, they think people who disagree with them are stupid, evil, or against them, and they don't change. Ever. This is often called a character 'feature'. Your best efforts to comfort them, cajole them, and change them are for naught. Your time is better spent herding cats than trying to make them different people. But you *can* make them better witnesses.

### **How can you tell the difference?**

One simple strategy for sorting this out doesn't take very long. Here is what you do: Be nice to them. Be supportive. Listen to their story. Don't fan the flames of their biggest grievances, but let them know that you feel their distress and that you respect them. Do that for 10 or 15 minutes, and see what happens. If they are traumatized they will start to feel safer, and they will become more open to your suggestions. They will calm down.

If, on the other hand they are more characterological, they will respond to your thoughtfulness by becoming more agitated and morally indignant. Their sense of entitlement and desire for vengeance often escalates. They will not take what you say as reassuring, they will take your kindness as evidence that their entrenchment is justified. "Now you finally understand, so you must see how right I am."

An additional strategy for making the assessment between traumatic narcissism and characterological narcissism is through the use of focus groups. When reviewing or observing focus group reactions:

1. A narcissistically traumatized person will hear criticism and realize that to achieve his goals he will have to come across differently. It is an eye-opening experience.
2. A characterological narcissist will insist that the jurors were stupid, or that they would feel differently if they had more information. It confirms the view that the world is against them.

### **And what do you do?**

Pay attention to the type and degree of narcissism and tailor your interventions accordingly.

#### Healthy narcissism:

People who are operating with healthy narcissism want to be well received and well liked, so they tend to take advice well if it is couched in terms of, "You will be understood better if..."; "The jury is going to really like it if you..."; or "Your unique sense of fashion is likely to be misinterpreted by some members of the jury".

#### Traumatic narcissism:

Witnesses who are narcissistically wounded or traumatized need some comfort and support, and then you move into "reality-check mode". They need to understand that there is a limit to what a jury will understand in the brief time the court permits, but it will be enough. In a rational way, plot out goals for what needs to be accomplished in their testimony, what questions and answers will be best understood, and what answers create confusion or open up unnecessary cans of worms.

One of the messages that wounded witnesses struggle with the most is, "The jury will never understand everything you have gone through." Ironically, it is a great affirmation to any witness with narcissistic tendencies, and has the added virtue of being completely true. You can tell them that their story is going to be told through the famous Rule of Three, that instead of itemizing every complaint, or every symptom, or every effort that was made, that you give examples, and the jury will know that these are merely indicators of the larger situation.

Characterological narcissism:

The strategy for preparing characterological witnesses can require some creativity, but it is simple. The solution is to redirect them, but not to correct them. In the example of the witness my client wanted to punch, I realized that he was not merely a geeky engineer with poor social skills (who, by the way, can often be shaped up into wonderful witnesses)—he was a full-blown characterological narcissist.



The client had liked that about him when he was hired, because he was so certain about what the solution was, and how it would be proven. The testimony was going to be hellish because he was in love with his own ideas, and insisted on explaining every technical nuance of the findings.

What I explained to him is that this phase of his work is completely different than what he had been doing; the research part was over, and we are now moving on. He is the absolute best expert in the world in that engineering phase, but he is a gifted rookie in this new one. The goal now is to become a great teacher of average 9th graders. This is his audience. His findings had to be tailored to meet the needs of his students or he would not succeed at the task. He didn't enjoy it, but it was a frame of reference that he couldn't dispute, and ultimately he testified successfully.

The challenge with the characterological narcissist is to get them to answer questions with an external perspective that they can comprehend, instead of speaking from their own internal frame of reference that the world finds annoying. You get much further with them if you never correct them or say that they are wrong (which only prompts an argument from them), but ask them if their 9<sup>th</sup> grade class is likely to understand what they just said. You can insist that 9<sup>th</sup> graders will get lost in all of those words, which is the same as saying “settle down and cut the jargon”, but they won't take it so personally.

Another strategy is to insist that the witness rehearse testimony as if the only person that needed to clearly and completely understand the answer is...his mother. What would Mom understand, and what tone of voice would you use when you explain it to her?

If it is a witness who insists on sharing every minute detail of their story, ask them who the least patient person is that they really like, in spite of their impatience. Have them rehearse testimony that would avoid the irritation of this favorite critic. Would George be tapping his foot? Would George be wishing you would get to the point?

The least successful strategy for dealing with narcissistic people of any type is to explain to them that they are getting it wrong, and to tell them to do it differently. It creates a power struggle that will only bring frustration. They will not take your wise counsel. Instead, back up, be nice, redirect them, and redefine their task in terms that will elicit a more likable witness.

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## Preparing the Narcissistic Witness

by Charlotte A. Morris

When I hear or read the term “narcissism” I can’t help but picture the illustration in my undergraduate textbook from Greek & Roman Mythology. You know the one I mean: a sketch of Narcissus gazing contentedly at his reflection in a pool of water.



And when I hear psychologists use the term – like the one who recently described Christy Brinkley’s soon-to-be-ex-husband Peter Cook as narcissistic – I understand that it’s probably a little more complicated than, “Mirror, Mirror, on the wall...”

### One Size Does Not Fit All

Most often I encounter the narcissistic witness who is described first by the lawyer or client as self-centered, egotistic, arrogant or unsympathetic. In my experience none of these terms are one-size-fits-all, and that is the secret to addressing a host of witness traits that interfere with a person’s ability to effectively communicate the truth. I care less that those traits are present and more about why they persist in the context of the case.

Take, for example, preparing physicians for deposition and trial. Lawyers recognize how readily jurors may apply a common stereotype to doctors that reads a lot like the criteria for narcissism: arrogant, lacking empathy, and maybe even guilty of “playing God” a time or two.

Consider the following witness preparation stories of two emergency room physicians in separate medical malpractice lawsuits involving similar claims of missed or misdiagnosis. The doctors were both “stereotypical” in their communication styles at the start of our sessions – haughty, indifferent, impatient with the process, dismissive – but each for unique reasons.

### *Case One: What Seems to Be the Problem, Doctor?*

Dr. One had already given his videotaped deposition when the client called to ask for my help preparing him for trial. When the DVD arrived I could not believe my eyes. The doctor appeared at the head of the conference room table wearing a t-shirt, sunglasses on his head, one ankle crossed over the other knee, and his chair tipped back with one shoulder slung over the back of the chair....for the entire deposition.

Wait, that’s not true. There were times when his impatience manifested itself as deep, audible sighs, eye-rolling, and intermittent bouts of lurching forward aggressively with his elbows on the table. When asked to testify about medical records he was cooperative right up until the moment he slid the paperwork off to the side or back in the direction of opposing counsel, as if it were hot to the touch. I later learned that he rode his bike to the deposition – it was a case down at the coast, after all – which explains the t-shirt and tennis shoes.

In this case the facts were better than average for the doctor, the diagnosis was tricky at best, and we felt confident that despite a disappointing outcome for the patient the doctor’s conduct was well within the standard of care. Nevertheless, Dr. One was put off by most of our questions about the care he gave the patient – even the friendly ones we thought might be developed eventually for direct examination – and the lawyer was quickly frustrated.

At one point the lawyer left the room, and I remained with the witness who had been told we could not discuss the case with each other outside the presence of the attorney. As soon as he heard the door in the latch, the doctor started in on me.

*I know we can't discuss the case, but can I tell you why this makes me so mad?*

*I feel just fine about the care I gave the patient that night and I'm not embarrassed to defend it, but frankly I wish they would just pay the people a million dollars. I'm serious. That might be the only way our system will get fixed.*

*Our healthcare system today is broken: for doctors and for patients. People don't get the routine care they need and emergency rooms around here don't have the resources to take care of the growing population. I see patients one time – when they are really sick or really hurt or just don't have their own doctors – and there's no continuity in care. I don't have any control over what happens to them after I discharge them from the Emergency Department.*

*And anyone who wants to sue me can, so I'm stuck in a lawyer's office all day instead of treating patients. We ought to just pay the plaintiffs until the system is totally bankrupt, and start all over again from the ground up.*

This kind of confession happens more often than lawyers might think and we always learn something important and useful to turn an ineffective witness around. In this case, after heavy doses of empathy for the witness, I asked the doctor to share his concerns with the attorney. And then we spent time talking about his perspective and how it might be useful in his defense.

Together we reached the following conclusions:

1. **The physician could make our “system” work better by treating the litigation process with respect.** A witness can and should cooperate fully, consider the questions carefully, and answer thoughtfully every time. In return, jurors will approach our case with the same level of attention and degree of care. Jurors will also appreciate that the lawsuit is important to the doctor and meaningful to his professional practice.
2. **The jury may well agree that our “system” is broken.** Focus group participants tell me all the time about their frustration with healthcare. What if the jury understood that it's frustrating for doctors too? What if they knew that this doctor empathizes with patients who feel equally squeezed by the constraints on the system? Perhaps our direct examination could allow the doctor to talk a bit about how the practice of medicine has changed and whether or not he thinks it could be improved? Isn't it possible that – in this case with favorable facts/medical records – jurors would be reluctant to punish the doctor for problems that are systemic in healthcare?

### ***Case Two: Put the Shoe on the Other Foot***

Dr. Two was seemingly worse off than Dr. One, but the good news is that the attorneys invested in preparation *before* his deposition. Dr. Two was also impatient with the process, defensive and extremely anti-social. He greeted us by saying, “I know you guys like spending a day this way, but I don't.” Funny, bad attitudes like his are not exactly *why* I enjoy spending a day with lawyers and witnesses, but I didn't argue.

The lawyer in this case – confident in his thorough knowledge of the facts and medicine – thought I was there just to “fix” all of the doctor's verbal and non-verbal communication problems: nervous mannerisms, lack of eye contact,

monotone delivery, poor listening habits, answering too quickly, and others. True enough, all of those things needed fixing but once again it was the time spent getting to know the witness better that proved key to resolving the behaviors that made him appear so... *narcissistic*.

After more than half a day of the doctor telling us both that he couldn't be bothered with this lawsuit – and the attorney repeatedly, positively reinforcing the doctor's perspective that this was just a case of a greedy patient cashing in on his own misfortune – I asked a simple question that shifted the doctor's paradigm for the case considerably. It went something like this:

*Doctor I think I just heard you say something about being in a dispute with your former partners in business. Were you a plaintiff in a lawsuit?*

*Yes. I sued my partners and they settled out of court because they knew I could win.*

*So, in other words, you know what it's like to be on the other side of a case, with a legitimate claim? Is it possible that your partners **then** thought **your** lawsuit was also frivolous, that **you** were being greedy?*

*Pause. Pause. Pause.*

There are probably only a few times in more than a dozen years that I've experienced such a dramatic moment with lawyer and witness, with such a stunning shift in the witness' perspective. This counts as one.

### **Try This with Narcissistic Witnesses in Any Case**

**Listen to their fears.** It is easy to think that a highly capable, well-educated, experienced physician who faces the most serious medical emergencies would be fearless. But tough-talking witnesses are often compensating for their insecurity. The first example illustrates the importance of allowing (and inviting) a witness to share his fears, concerns and frustrations before digging right into the Q&A.



**Be willing to go where a witness takes you.** The first example also reminds us that witnesses themselves often hold the keys to case themes and strategies. By adopting the doctor's perspective on a "broken system" we were able to strategically focus on the limited amount of care the patient received before and after a single visit to the ER, so that jurors would understand how little time the defendant had to observe and consider the patients' history and symptoms.

**Voir dire your witness.** We wouldn't think of starting a trial without asking jurors if they've ever been in a similar situation, ever considered filing a lawsuit, or ever been involved in any way in a lawsuit. The same goes for witnesses. Be sure you know much more than what the records reveal so you can make good connections with – and encourage cooperation from – your own witnesses.

**Encourage consideration of other perspectives.** The doctor in the second example was actually incredibly insightful as he repeated back to me the point he understood me to be making. Within half an hour he was fully engaged in the process of preparing. At the end of the day, he was thankful for the experience. All it took was an opportunity for him to see the lawsuit from a different angle.

## Mirror, Mirror On the Wall...

In stark contrast to the Roman mythological figure, I have observed that narcissistic witnesses do not look lovingly in the mirror at their reflections. In fact, many of them would prefer that all of us kindly look away; the scrutiny a witness endures is perhaps the worst of what a person goes through in the course of litigation.

There really is no secret to success with some witnesses: ask good questions that the lawyers may not have considered before; watch closely, and listen carefully. Deliver empathy in heavy doses without condescending or coddling. Believe that a witness – of any type – wants to be heard *before* he testifies.

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## **“Joe is the Worst Witness I’ve EVER Seen”: Preparing the Narcissistic Witness without Losing Your Own Sanity**

**by Lisa L. DeCaro**

Christie Brinkley’s ex-husband, Peter Cook, was labeled a “narcissist” by the court-appointed psychiatrist in the recent Brinkley/Cook divorce proceedings. Whether Cook is a narcissist or not, this is a label which carries very specific implications about a person’s character. To many of us, this label implies more than just extreme self-absorption. To a lawyer preparing the witness, that label sends the message: This guy comes across as a jerk, and he’s going to be difficult to work with. These are obviously not qualities which make for an effective and credible witness.

The psychiatrist’s categorization of Cook has brought this question to the fore for many attorneys: What do you do when your witness seems to fit the label of “narcissist?” What do you do when your key witness comes across as arrogant, self-absorbed, maybe even untruthful? By definition, these witnesses believe they already know how to do everything – including testify in court – better than others, so why should they listen to your advice or instructions?

We all know how vital the testimony of a key witness can be. His attitude can lose the case for you, and you know it.

For those of us who specialize in preparing “difficult” witnesses, this is a label we hear a lot. The call comes early in the morning, as if it kept the poor attorney up all night: “Okay, so this is absolutely the worst witness you’ve ever had to prepare. He’s a CEO, he’s used to being in charge, and he won’t listen to me when I tell him to change his behavior on the stand. His deposition would have been a disaster if he’d been videotaped. He comes across as an arrogant jerk, and he won’t believe me when I tell him to just answer the question!”

Narcissist or not, it’s clear that this witness – we’ll call him Joe – appears arrogant, is difficult to prepare, and generally rubs people the wrong way. We don’t know Peter Cook personally, but we all know the type. And Joe is a textbook case.

In the limited time his attorney has to prepare Joe for the stand, it is unlikely there will be any psychological breakthroughs which would make Joe a different person. Fortunately, we don’t really need to fix Joe’s psyche; we only need to discover what will make Joe *want* to testify in the most effective way, and teach him how to *look* like a good witness. You can make Joe a solid, maybe even great, witness, by making changes to his behavior, even without making major changes to his personality. By changing the way he sits, letting him get himself into a hole during prep, teaching him how to avoid that hole in the future, and teaching him what it means to “win” the exchange (which is what he wants to do), you can make Joe’s arrogance look like confidence, and make his narcissism work for you. After all, one thing Joe definitely wants is to look good on the stand. Make sure he understands that following your instructions will make that happen.



**First, teach Joe how to sit.**

Most egotistical witnesses aren't narcissists, they are just very insecure people who try to look confident in all the wrong ways, and end up looking arrogant. If you have a witness who slouches back in his chair, seems defensive or abrasive, or has an attitude problem, sometimes all it takes to fix the attitude is to change the way he or she is sitting.

Teach Joe to lean forward (as opposed to against the back of the chair) with a straight back, and clasped hands resting on the table. This is a strong, available, and confident position. Mock jurors rate witnesses who sit in this position as more credible than witnesses who sit back in their chairs. This is true even if the person sitting back is sitting up straight, with good posture. This forward position should be “home base” – Joe can gesture from here, but always comes back to this position. Suddenly, Joe appears to be confident, but also helpful, open, interested and other-centered.

But there's a catch. Joe will need to be able to maintain this position for an extended period of time. He must be consistent throughout his testimony. If he sits this way on direct, but then regresses to his arrogant leaning-back position on cross, he'll do himself more harm than good. In addition to looking arrogant, he'll also look like he was acting on direct.

Unfortunately, this forward and upright position can put strain on a person's back and make one tend to slouch or fidget. To make it easier to maintain this posture, tell Joe to sit *far* forward on the front of his chair. This position does not feel natural – you are literally perched on the front edge of your chair – but it is comfortable. And, it will take the strain off Joe's lower back, and enable him to maintain this position for a longer period of time. He should maintain this position at all times during your prep sessions – this will make it a habit which Joe can rely on when the adrenaline starts flowing.

Remind him to maintain this position no matter what the examiner does. This will help to eliminate the nonverbal cues or “tells” that signal when the examiner has scored a point or otherwise made Joe feel uncomfortable.

**NOTE:** It is not enough to tell your witness what *not* to do. You must also tell him what *to* do. Give him active skills to solve the problems you observe. For example, if a witness tends to swivel in his chair or fidget with his feet, have him anchor both feet flat on the floor, or bring his feet further under the chair. Find what works to help him lock his legs in place, and make the position more comfortable.

**Let him get himself into a hole during prep, and teach him how to avoid that trap in the future.**

When you begin preparing the witness, remember that we learn and retain new information more effectively in an interactive session than in a lecture. This is especially true for Joe, since he already thinks he knows everything, and just tunes you out when you're trying to give him a lecture. You are better off skipping your usual laundry list of do's and don'ts, and getting right to practicing. When Joe gets himself into a huge pit, he'll be much more likely to listen to your helpful advice about how to get out of it, and to avoid it in the future. He'll also start to trust you to get him out of the next pothole he finds himself in.

## Re-evaluate the notion of “winning.”

Remember the classic scene from *Raiders of the Lost Ark*, where the villain’s henchman swings his sword around in an elaborate show of skill, only to have Indiana Jones look at him, unholster his pistol, and take him down in a single shot? Don’t let your witnesses go into battle swinging madly with a sword only to get swiftly shot down. Arm them with the skills they’ll need to come through unscathed.

## Avoid battles.

Many times, narcissistic witnesses are ineffective because they are trying to beat the examiner at her own game. They think they can “win” the exchange, or that they can outsmart or outmaneuver the examiner. They see it as a battle, but they don’t know what ammunition they really have: their ability to tell their truth with credibility. You must discuss with Joe what “winning” means in this context. If you’re preparing him for a deposition, let him know that he cannot win (in the traditional sense) the case in deposition, but he can certainly lose it. Let him know the reality: that it is not his time to tell his side of the story and that opposing counsel will not walk out of the deposition and say, “Oh, boy. We’d better settle this thing because we just don’t have a chance!” He should know that the best way to win at the deposition is to make opposing counsel leave the room with nothing except the knowledge that Joe will be a great witness at trial.

## Practice makes (almost) perfect.

This is true of all witnesses: practice makes (almost) perfect. Lectures and explanations simply do not work to change behavior. Many witnesses are told to answer only the question they are asked, but few are taught how to do it. This is a difficult concept for many witnesses to master, especially Joe, who thinks he knows the best answer to every question already. They are told to be open and honest, to tell their story, but then they are told to keep their answers short. They are told to listen to the question and correct any misconceptions in the question, but then they are told not to argue with the examiner. This confusing information is even more frustrating to someone like Joe, who is used to being in charge. The best way to teach Joe how to handle this very unique experience is to have him practice answering questions over, and over, and over again.



## The bottom line:

With an arrogant, narcissistic, or otherwise difficult witness, you should be doing very little talking during your prep sessions – it should be all about practice. Just let Joe do the talking; he’ll think he’s in control and all the while he’ll be learning how not to be a difficult witness.

Some practice elements for Joe:

- Teach him how to sit. Don’t forget to tell him WHY you want him to sit this way (“Jury research shows that witnesses who sit this way are rated much higher”).
- Don’t lecture him. Jump right into practice sessions. Stop when you need to, to discuss his testimony, your themes, etc., but then get back to the practice.
- Let him get himself into a hole, then stop and discuss what happened (“You can see how avoiding that answer gave opposing counsel the chance to repeat the question over and over again”), and how to avoid it next time (“Just answer confidently, ‘Yes, I did.’”).

- Remember to focus a lot of time on practicing cross examination. This is going to be Joe's Achilles heel, so spend a lot of time preparing him for it. Also don't forget to explain and practice re-direct. When he gets a feeling for being "beaten up" on cross, and then saved by you on re-direct, his faith in you will go up, and he will be less likely to fight you.
- Play to Joe's strengths. He is difficult because he is used to being in charge, and he is used to being right. Show him how he has control in this situation: by careful listening and short, concise responses.

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# SOLUTION FOCUSED MEDIATION

by Fredrike P. Bannink

*“Winning will depend on not wanting other people to lose.”*

--R. Wright. *Nonzero. History, Evolution and Human Cooperation*

## INTRODUCTION

Using mediation, conflicts can often be resolved rapidly, economically and at an early stage, with a satisfying outcome for the clients involved. From the perspective of ‘game theory’ mediation revolves around a non-zero-sum game (‘win-win’), whereas a judicial procedure revolves around a zero-sum game (‘win-lose’). ‘Win-win’ means you swim together. ‘Lose-lose’ means you sink together. ‘Win-lose’ means you swim and the other party sinks, or if the other party swims, you sink. (Schelling, 1960; Wright, 2000). Mediation can help to form or strengthen relationships encouraging trust and respect or, alternatively, to end relationships in as pleasant a manner as possible. Not all forms of mediation accomplish the same goals in the same way.

## THE SOLUTION FOCUSED MODEL

Solution focused mediation asks: What would you prefer instead of the conflict? The focus is on the preferred future. Clients are considered competent in formulating their own hopes for the future and of devising solutions to make it happen. The mediator’s expertise lies in asking solution focused questions and in motivating clients to change. The concept and the methodology differ significantly from other types of mediation. Conversations become more positive and shorter; ensuring that solution focused mediation is also cost-effective.

Developed during the 1980s by De Shazer, Berg and colleagues, the solution focused model expands upon the findings of Watzlawick, Weakland and Fish (1974), who found that the attempted solution would sometimes perpetuate the problem and that an understanding of the origins of the problem was not necessary. Propositions of the solution focused model include (De Shazer, 1985):



- *The development of a solution is not necessarily related to the problem (or conflict).* An analysis of the problem is not useful in finding solutions, whereas an analysis of exceptions to the problem is.
- *The clients are the experts.* They determine their preferred future and the road to achieving it. De Shazer (1994) assumes that problems (or conflicts) are subway tokens: they get a person through the gate (to the table of the mediator) but do not determine which train he will take, nor do they determine at which stop he will get off.
- *If it is not broken, do not fix it.* Leave alone what is positive in the clients' perception.
- *If something works, continue with it.* Even though it may be something completely different from what was expected.
- *If something does not work, do something else.* More of the same leads nowhere.

Building solutions is different from problem solving. According to the cause-and-effect 'medical' model, one should explore and analyze the conflict in order to make a diagnosis, before the 'remedy' can be administered. This model is useful where it concerns relatively simple problems, which can be reduced to uncomplicated and distinct causes, for example simple medical or mechanical problems. A disadvantage is that this model is problem focused. If the conflict and its possible causes are studied, a vicious circle may be created with ever increasing problems. The atmosphere becomes loaded with problems, bringing with it the danger of losing sight of solutions.

## LOOKING TO THE FUTURE

De Bono (1985) distinguished four dimensions in conflict thinking: is the action *fight*, *negotiate*, *problem solve* or *design*? The *fighting* approach revolves around tactics, strategy and weak points. It includes the language of the courtroom, where winning is the goal. *Negotiating* suggests a compromise, whereby the possibilities are limited to what already exists, rather than envisioning something new. *Problem solving* concerns the analysis of the problem along with its causes. These three ways of thinking about conflict look *backward* at what already exists.

The fourth and best conflict resolution approach is the *design approach*. It is *solution focused* and looks *forward* at what might be created. One possibility is to first determine the end point and then to see what solutions may get us there. Another approach is to simply jump to the end and conceive a 'dream solution'. Its content can be illogical, because it concerns a fantasy. More importantly it can suggest circumstances in which the conflict would no longer exist: '*Imagine the conflict resolved, what would you then be doing differently?*'

Salacuse (1991) mentions a few rules to ensure that clients are 'paddling the same canoe in the same direction'. First, precisely define the goal of the negotiations and investigate new possibilities for creative solutions that serve the interests of all clients. Emphasize the positive aspects of the goal and of the relationship, and stress those moments when agreements are (already) reached and when progress is (already) being made. Salacuse (2000) also discusses the importance of having a vision of the end result. Michelangelo could already see in a block of marble the magnificence of David, as Mozart already heard in his quiet study the overpowering strains of the Requiem. What clients seek is not just help but help with their future: 'Whether an advisor is a doctor, a lawyer, a financial consultant or a psychotherapist, his or her mission is to help the client make a better future' (p. 44).

Mnookin et al. (2000) note that lawyers and clients tend to overlook solutions possibly lying *outside* the field of the original conflict. Frequently, these solutions have *nothing* to do with the formal conflict and the agreement may be of an order that could never be envisaged in a courtroom.

A mediator can only mediate in the future tense (Haynes, Haynes & Fong, 2004). They propose that a mediator uses future focused questions to initiate change: ‘Most clients are highly articulate about what they *do not* want and equally reticent about what they *do* want. However, the mediator is only useful to the clients in helping them to determine what they do want in the future and then helping them decide how they can get what they want. It is difficult for the mediator to help clients not get what they do not want, which is what clients expect if the mediator dwells with them on the past’ (p. 7).

## SOLUTION FOCUSED MEDIATION IN PRACTICE

Solution focused conversations revolve around four main questions: 1) What is your best hope? 2) What difference would that make? 3) What is already working towards it? 4) What would be the next step?

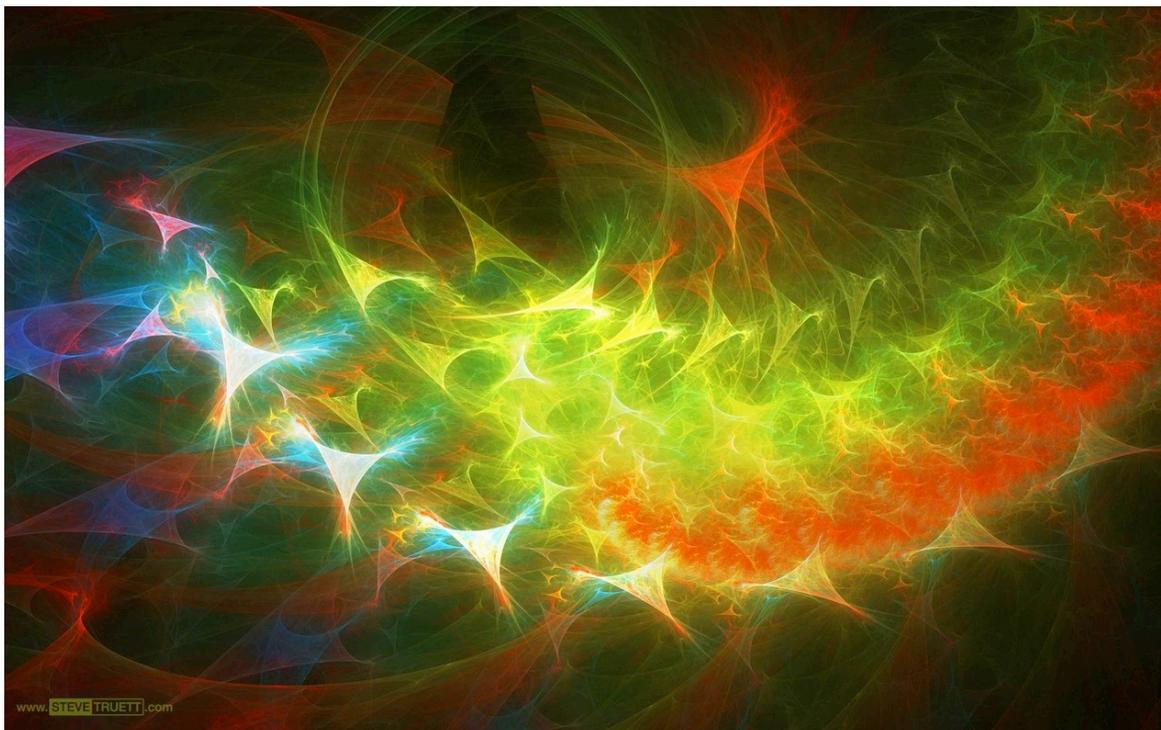
- *What is your best hope?* The first question follows introductions, an explanation of solution focused mediation, and a presentation of the structure and rules of play. It focuses on what needs to come out of the mediation. Clients may react to this with a (brief) description of the conflict, to which the mediator listens with respect, or they may immediately indicate their hopes and wishes. In solution focused mediation it is important to both acknowledge and validate the influences of the conflict *and* to help clients to change the situation. It may be helpful to give clients one opportunity to say what needs to be said at the start of the mediation to reduce reverberating of negative emotions.
- *Developing a clearly formulated (mutual) goal.* Clients are invited to describe their (shared) preferred future: What difference would that make? Sometimes the *miracle question* is put forward: ‘Imagine a miracle occurring tonight that would (sufficiently) solve the conflict which brought you here, but you were unaware of this as you were asleep. What would be the first sign tomorrow morning that you would tell you that this miracle has happened? What would be different (between you)? ‘What would you be doing differently?’
- *Assessing motivation to change.* The mediator assesses the relationship with each client. Did the participant personally come forward in search of help? Is the participant suffering emotionally, but does not (yet) see herself as part of the conflict and/or the solution? Does the participant see himself as part of the conflict and/or solution and is motivated to change his behavior?

The solution focused mediator goes beyond the verification of commitment: he is trained in relating to the existing motivation and in stimulating change. This early assessment of each client’s level of motivation is of essential importance for the strategy of the mediator.

- *Exploring the exceptions.* There are always exceptions to the problem (Wittgenstein, 1968). Questions are asked regarding the moments when the conflict is or was less serious and who does what to bring these exceptions about. The mediator can also ask about moments that already meet (to a degree) the clients’ preferred future.
- *Utilizing competence questions.* The mediator evaluates the clients’ competences through questions such as: ‘How did you do that? How did you decide to do that? How did you manage to do that?’ The answers are empowering and may help reveal whether something which helps or has helped at an earlier stage can be repeated (*if it works, continue with it*).

- *Utilizing scaling questions* (10 = very good, 0 = very bad). On a relationship scale 10 would mean ‘pure collaboration’, clients having identical preferences regarding the outcome and 0 would mean ‘pure conflict’ (Schelling, 1960). Scaling questions can be asked in order for the mediator to assess improvement. ‘What is already working in the right direction? What else? And what else?’ Scaling questions can also serve to measure and speed up progress in the mediation, to measure and stimulate motivation and confidence that the goal can be achieved. ‘What would be the next step?’ is a nice way to continue the conversation.
- *Feedback at the end of the session*. At the end of a solution focused conversation the mediator may formulate feedback for the clients, which contains compliments and usually some homework suggestions. The compliments emphasize what clients are already constructively doing in order to reach their goal and can be seen as a form of positive reinforcement. The suggestions indicate areas requiring attention by the clients or further actions to reach a higher point on the scale. The solution focused mediator also invites the clients to give their feedback at the end of every session.
- *Evaluating progress*. Progress is evaluated in every session on a scale of 10 (goal achieved) to 0 (worst situation the clients can imagine). The conversation continues to explore what is yet to be done before the clients would consider the preferred future (sufficiently) reached and would deem the mediation process complete. Every solution focused conversation is considered the final one; at the end of every conversation the mediator asks whether another meeting is still considered necessary. If the clients deem that it is, they determine the scheduling of the next meeting.
- The *attitude of the mediator* is one of ‘not knowing’ and ‘leading from one step behind’. In a sense the mediator stands behind the clients and prods them with solution focused questions, inviting them to look at their preferred future and defining solutions to get there.

See Table 1 for an overview of differences between problem focused and solution focused mediation.



**Table 1**

Problem-Focused Mediation	Solution-Focused Mediation
Past/present-oriented	Future-oriented
Conversations about what clients do not want (the conflict)	Conversations about what clients do want instead of the conflict (preferred future)
Focus on the conflict: exploring and analyzing the conflict	Focus on exceptions to the conflict: exploring and analyzing the exceptions
Conversations about the same and impossibilities	Conversations about differences and possibilities
Conversations for insight and working through. Conversations about blame and invalidation	Conversations for accountability and action. No invitations to blame and invalidation. Insight may come during or after mediation
Clients are sometimes seen as not motivated (resistance)	Clients are seen as motivated (although their goal may not be the goal of the mediator)
Client is sometimes viewed as incompetent (deficit model)	Client is always viewed as competent, having strengths and abilities (resource model)
Mediator gives advice to client: he is the expert	Mediator asks questions: clients are the experts. Attitude of the mediator is ‘not-knowing’ and ‘leading from one step behind’
Mediators theory of change	Client’s theory of change
Expression of affect is goal of mediation	Goals are individualized for all clients and do not necessarily involve expression of affect
Recognition and empowerment are goals of mediation	Recognition and empowerment can be means in reaching the preferred future
Interpretation	Acknowledgement, validation and opening possibilities
Big changes are needed	Small changes are often sufficient
New skills have to be learned	Nothing new has to be learned: clients are competent and have made changes before
Maybe feedback from clients at end of mediation	Feedback from clients at the end of every session
Long-term mediation	Variable/individualized length of mediation: often short-term mediation
Mediator indicates end of mediation	Clients indicate end of mediation
Success in mediation is defined as the resolution of the conflict	Success in mediation is defined as the reaching of the preferred outcome, which may be different from (or better than) the resolution of the conflict

## CONCLUDING REMARKS

In mediation the measure of success is not whether one client wins at the other client's expense, but whether he gets what he wants *because* he enables the other to achieve his dreams and to do what he wants. Mediators could be trained to help their clients design their dreams and solutions and assist them in the motivation to change. Clients can be motivated to work hard to achieve their goal.

Research has shown that solution focused conversations have a positive effect in less time and that they satisfy the client's need for autonomy more than problem focused conversations (Stams et al., 2006). The solution focused model has proved to be applicable in all situations where there is the possibility of a conversation between client and professional, in (mental) health care (De Shazer, 1985; De Jong & Berg, 2002; Bannink, 2006, 2007, 2008c; Bakker & Bannink, 2008), in management and coaching (Cauffman, 2003, Stam & Bannink, 2008), in education (Goei & Bannink, 2005), in working with mentally retarded people (Roeden & Bannink, 2007) and in mediation (Bannink, 2006ac, 2008abd). The solution focused model helps clients *and* mediators create their future with a difference.

### CASE EXAMPLE: SOLUTION FOCUSED MEDIATION

Driving to work one morning Ben Johnston (age 44) is hit from behind by a van while waiting at a traffic light. The collision is not too serious, with damage limited to the back of the car. The driver of the van apologizes and the accident claim forms are completed.

A few days later Ben begins to experience neck pain. The pain increases, he is unable to continue his job as a construction worker and remains at home. He is diagnosed with whiplash.

Two months later Ben is still unable to work: his condition has not improved. He is considering making a compensation claim and on more than one occasion he calls the van driver's insurance company, with discussions becoming increasingly heated. Due to the lack of progress, he engages a lawyer to act on his behalf. The conflict escalates: the insurance company states that the seriousness of the whiplash injury cannot be solely the result of a small collision and that the complaints are probably mostly psychological. A connection with problems at work at the time of the collision is suggested. Finally the insurance company offers a settlement of \$10,000.

Ben and his lawyer do not accept this proposal, which in their view is much too low – Ben is at risk of losing his job – and initiate legal proceedings against the insurance company. The company responds by requesting an independent report from both an orthopedic specialist and a psychiatrist. Ben reacts furiously to the suggestion that he has psychological problems and later, following an emotional confrontation in court, the judge proposes mediation. After some hesitation the parties agree.

Seven months after the collision the first meeting takes place. Ben, his lawyer, a representative of the insurance company (Fred), and a company lawyer are all present.

The mediator welcomes everyone and gives an explanation of the (solution focused) mediation procedure. The focus in the conversations will be on what those concerned would like instead of the conflict and how they can achieve this, rather than on the conflict itself and what has already transpired.

The mediator also *compliments* everyone's willingness to mediate: all appear motivated to resolve this case through mediation. The mediator gives Ben and Fred the opportunity to briefly express their emotions; they get '*one chance to say what definitely needs to be said*'. Ben vents his anger about the slow progress and the demands made by the insurance company. The mediator gives *recognition* to Ben's anger and concerns: they are understandable. Fred indicates that he would like to resolve the case fairly. In addition he says that he can understand that Ben is worried about his future. This remark lessens the tension in the room.

The mediator then asks *what they are hoping for* and *what difference that would make (goal formulation)*. Ben is hoping for a quick conclusion. He is not willing to cooperate with respect to the proposed medical examinations; he finds the necessity for a psychiatric report particularly ridiculous. The *difference* for him would be that he would no longer need to feel insecure about the outcome of this lengthy case and he could put it all in the past. He feels angry and is not sleeping well. He is also worried about his health and about keeping his job. The mediator asks what he would like to see *instead* of the worry and anger if his hope were to become reality. Ben states that he would then sleep well again and his mood would improve. Furthermore he would feel confident that he could continue with his life.

Fred says that he has no desire to prolong the case, he too is hoping for a quick settlement. For him the *difference* would be that he would be free of this emotional man and that he would feel like he has settled the case in a decent and proper manner.

Then, the mediator asks *what is already going in the right direction* in order to achieve their goal. It appears that Ben is surprised about the insurance company's willingness to engage in mediation, apparently he had not expected it. Also helpful is the fact that at the table they talk more calmly than they did on the telephone. Fred's sympathetic remark is also constructive. Moreover, both sides consider the presence and support of both lawyers, specialized in physical injuries, to be beneficial. Again the mediator gives *compliments* for the steps that have already been taken in the right direction.

The mediator asks a *scaling question*: if a 10 is total cooperation and a 0 is pure conflict, where would both say they are right now? Ben gives a 4, Fred a 5.

At the end of the first meeting the mediator asks Ben and Fred if they would find a return visit useful. Both agree and schedule another appointment. The mediator ends the meeting with the request that in the meantime both reflect on *what could be the next step*. Which step can they take themselves and which step would they like to see the other person take? They will discuss this with their lawyers in the intervening period and focus on this in the next meeting.

At Ben and Fred's request, the second and final meeting takes place three weeks later. Both lawyers are again present. The mediator opens the conversation with a question relating to *what is better*. In the past weeks Ben has begun to feel better, his anger has diminished to some extent. However, the neck pain persists. Fred is pleased that the first meeting put both on speaking terms: the air has cleared somewhat. This is also evident from the fact that Ben and Fred begin the session with a handshake. The mediator *compliments* both on this progress.

As a proposal for *the next step* the insurance company lawyer offers an amount of \$25,000. As a *next step* Ben and his lawyer see compensation of \$50,000 to be acceptable. After some negotiating the lawyers arrive at an amount of \$40,000, payable within a month as compensation for material damages

and loss of working ability. This is included in the settlement agreement which is signed at the end of the meeting.

Ben is visibly relieved that the case has ended. He says that he is now able to continue with his life. Fred is satisfied: he feels that the case has been resolved fairly. There are also positive reactions from the lawyers, who had not expected to achieve a satisfying result so quickly. The mediator *gives compliments* to all for their efforts and motivation to reach a solution together. The mediation is concluded.

\*Interestingly, the insurance company referred to in this example has since changed their policy to attempt to hold face-to-face meetings rather than attempt to resolve disputes through telephone conversations.

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**We asked two experienced ASTC-member trial consultants to react to Dr. Bannink's article on Solution Focused Mediation. On the following pages, Jill Holmquist and Matthew McCusker give us their thoughts on this approach to mediation.**

## The Client Is the Focus: A response to Dr. Fredrike P. Bannink's "Solution Focused Mediation"

by Jill P. Holmquist

*Jill Holmquist, J.D. ([jill@fai-insight.com](mailto:jill@fai-insight.com)) is a trial consultant based in Lincoln, Nebraska. She works on civil and criminal cases nationwide.*

One of the challenges counsel face, and trial consultants help to address is the challenge of seeing a case from others' perspectives, including those of jurors, witnesses, opposing counsel and the judge. Awareness of others' perspectives is invaluable in preparing for trial.

In Solution Focused Mediation, Dr. Fredrike P. Bannink presents a model of mediation that encourages seeing the mediation process from a different perspective than is typical in litigation-related mediations. In this model, the perspective of the client, rather than that of the mediator, is primary. The mediator and the parties consider the conflict from the perspective of the goals the parties want to achieve, rather than the perspective of the strength of evidence or the likelihood of success is at trial. And it invites counsel to see options for resolution from a new and broader perspective.

In my experience with traditional mediations between litigants, the nominally collaborative process that promises party empowerment and mutually (or, at least, more) satisfactory outcomes, quickly devolves into shuttle diplomacy aimed at badgering one or both parties into moving from their positions to a compromise. Often, the end point is determined by the mediator's personal judgment about how far the parties are willing to go and sometimes that judgment is incorrect. As a mediator, I know the process can be truly collaborative, more empowering and more satisfying, but it requires a different and more creative perspective.

Dr. Bannink describes the process from such a perspective, distinguishes solution focused mediation from traditional ("problem focused") mediation, and provides tools to engage successfully focus on solutions. Although in some cases revisiting the original issues is necessary in order to meet parties' needs for being acknowledged, maintaining the ultimate focus on meeting the parties' future interests will prevent the parties from getting bogged down in the past. This approach can be useful in many litigation scenarios if mediators and counsel can trust the clients and the process. Institutional defendants and old school mediators might resist such an approach, but by adapting new methods, counsel can find new ways to make their clients' lives better. And that's what it's all about.

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## A Peer Review of Solution Focused Mediation

by Matthew McCusker

*Matt McCusker, MA [[matt@SheldonSinrich.com](mailto:matt@SheldonSinrich.com)] is a trial consultant based in Atlanta, Georgia. He does both civil and criminal work in venues across the country and specializes in negotiation preparation, research, case strategy, and jury selection.*

As a former mediator, I was delighted to review Dr. Bannink's article on solution focused mediation. I had heard of this technique before, but had little knowledge about how it is practiced. Dr. Bannink's article begins with an outline of the solution focused mediation style and then utilizes a case example to demonstrate the technique in action. I found this design to be an excellent teaching aid which clarified what can be complex concepts.

When I mediated, I used to tell people that we were beginning with a large pile of poker chips in the middle of the table. These chips had different values and would actually change value as they slid from one side of the table to the other. Our goal in mediation was to find the split that provided the necessary balance for a settlement. When everything went right, both sides left the table content.

Solution focused mediation seems to have a similar goal, which is finding the win-win scenario. However, Dr. Bannink's process puts the onus on the parties to imagine what they would consider to be a win and asks the mediator to help them create that goal. In essence, it invites the mediator to be a blend of artist, psychologist, and fortune teller.

This technique could be particularly effective in domestic situations, contract negotiations, and even criminal mediations. These are all scenarios where non-traditional agreements are more easily developed. Additionally, these situations are usually accompanied by a great deal of emotion from both parties. As a result, words of validation and apology can carry significant weight. I have always believed that these types of mediations are fertile ground for creative solutions because the issues at hand are far more complex than simple dollar figures.

It strikes me that mediations which are focused only on money (as we so often see) would be the biggest challenge to the solution focused mediation model. However, as Dr. Bannink's case example demonstrates, a skilled mediator may be able to help parties realize that no conflict can be as simply defined as a matter of dollars and cents.



## Some Juror Rules For Determining Damages

by David Davis

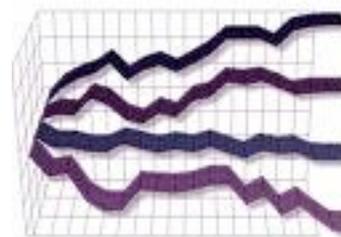
Ever tried a case in which a jury has awarded damages? If so, you probably know that the model of the jury as a group of rational decision makers who evaluate all the available evidence to make an informed damage award is not a useful or accurate one. Instead many lawyers come away from the experience believing that jurors are entirely irrational and that the damages awarded bear no relationship to the damage theories presented. These lawyers see the damage awards as entirely unpredictable and uncontrollable.

A more measured and accurate model views jurors as people who try to maximize the quality of their decisions by relying on the cues of others, utilizing heuristics (or short hand rules of reasoning to deal with uncertainty), making comparative judgments, and being influenced by subjective emotions. Significantly, many of the damage decisions jurors make may not be rational in the traditional sense but they may still follow predictable patterns and systematic rules of reasoning.

The new field of economics called behavioral pricing looks at these factors in understanding how consumers make pricing decisions in deciding whether or not to purchase a product. Analogously, jurors determining a damage amount are making a pricing decision. They are deciding what the appropriate “price” is for the damages that have been caused. Studies in behavioral pricing show that consumers have systematic biases that come into play in evaluating the magnitude of prices and pricing differentials. The following review summarizes some of the findings and implications for jurors’ damage awards.

### 1. Jurors’ evaluation of the magnitude of a damages figure can be affected by how precise the number is.

Consumers have a propensity to judge precise amounts of money to be lower in magnitude than similar round prices (Thomas, Simon, & Kadiyali, 2007). In research conducted by Cornell University economists, consumers were found to pay higher prices for real estate when the list prices were more precise. Because we tend to use precise numbers for small amounts and round numbers for large amounts, sellers can make buyers perceive a price is smaller by replacing zeros with other digits. A precise price like \$325,425 is seen as lower than a round one like \$325,000 even though the latter is, in fact, lower. This has implications for the presentation of damage awards. The more precise the damage request, the lower (and perhaps more reasonable) the request will be seen. Most requests for punitive damages are given in round numbers. It may be more effective to give a precise number for a punitive damages reward request. Counter to this, in offering an alternative damages figure it may be more effective to suggest a round number as this will be perceived to have a greater magnitude. To take a hypothetical example, a defendant in a personal injury case may calculate medical expenses to be \$27,225. If the defendant presents the jury with a figure of \$27,000 it may be perceived to be more generous than \$27,225.



- 2. Jurors' assessment of the difference between the plaintiff's damage request and the defense's alternative damages number can be influenced by the left digits in the two numbers.** Research has shown what is called a left digit anchoring effect (Thomas & Morwitz, 2007). People tend to focus on the left digit of a number in judging its magnitude in comparison to another number. People will tend to judge the magnitude of difference between \$4.00 and \$2.99 to be greater than the difference between \$4.01 and \$3.00 because of this anchoring effect. This has implications for alternative damages theories where the perceived difference with the plaintiff's damage request may be magnified by this effect under certain circumstances. In this instance, if the evidence justifies it, it may help if the alternative damage award figure has a left digit that is as close as possible to the plaintiff's damages figure. This may lead to a greater probability of the jurors using the defendant's damage figure as it will appear to be more reasonable and less likely to be seen as a "low ball" figure even if it is not substantially different from what the defendant might otherwise have presented.
- 3. Jurors may evaluate damages figures differently depending on numbers they may have already heard even if those numbers are completely unrelated to damages.** Another anchoring effect that is found among consumers is that they will judge the magnitude of a price based on a number they heard or saw prior to seeing the price. Exposing a consumer to a high number can make the price of a product seem less expensive. This is true even when the information is presented subliminally and is not even a price (Thomas & Menon, 2007). When consumers were told the weight of something in grams and the number of grams was high, this made the price of a product subsequently presented to them seem less expensive than when the weight had not been told to them. Plaintiff lawyers may intuitively know this when they discuss a corporation's annual revenue when asking for punitive damages. But this research would argue for lawyers to find a context for presenting any large number before introducing their damage request.
- 4. The way in which damages numbers are presented in demonstrative exhibits can affect how jurors evaluate the magnitude of those numbers.** It turns out that the size of the font used affects how high or low a price is perceived to be (Coulter & Coulter, 2005). Consumers were more likely to perceive the price of a product to be lower when the price was represented in smaller as compared to larger font. This was especially true when two prices were next to each other. Following the idea that jurors will be more inclined to award what they perceive to be lower damage requests as opposed to higher ones and combining it with the use of demonstrative exhibits in the courtroom, the implications of this research are obvious for both plaintiff and defense lawyers.
- 5. Even how easily the names of the litigants can be pronounced can have an effect on the damages that jurors award.** Many damage request rest on "but for" theories where juries are asked to listen to evidence of what future worth might be. While there is little that can be done about it, the research of Alter and Oppenheimer (2006) shows that stocks with easily pronounceable names either do or will be predicted to do better than those with hard to pronounce names. Students predicted that stocks with hard to pronounce names would perform more badly than other stocks and the authors' review of actual stock market performance bore this finding out. As we said there is little the lawyer can do about this other than in his or her choice of clients. Although this finding may affect the way in which a lawyer chooses to refer to his or her client.

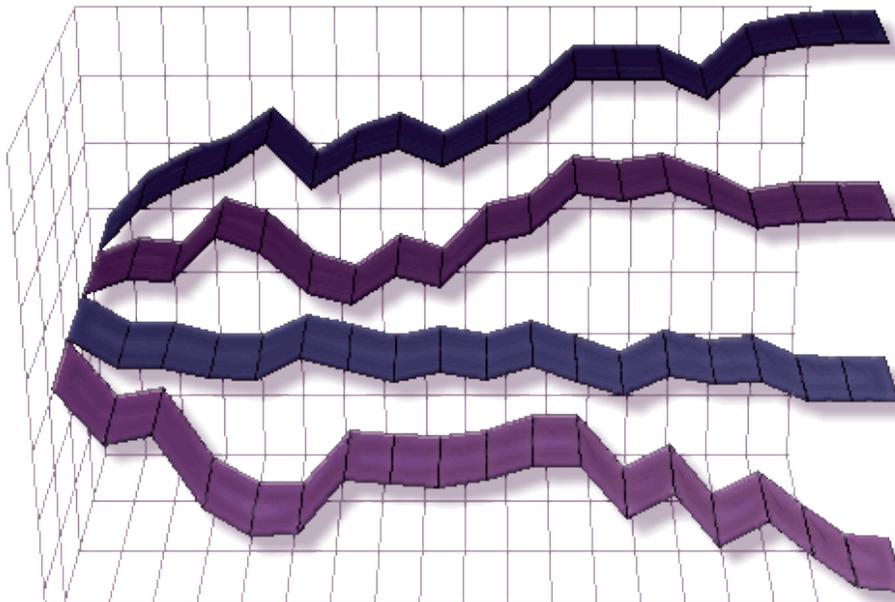
This was not designed to be an exhaustive list of findings from the field of behavioral pricing. But it does illustrate how jurors when deciding damage awards may be biased in very systematic ways; ways that can be controlled to some

extent. Many of these finding also have implications for settlement discussions and what numbers are proposed to the other side. One important caveat: these rules are only one part of the process by which jurors determine damages. Factors like the strength of jurors' belief in the liability of the defendant, anger at the defendant, a desire to set an example, and others are obviously critical.

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## The 3 Cs in Using Visual Aids to Tell Legal Stories: Communication, Credibility and the Central Image

by Amy Pardieck

Many attorneys are masters of verbal presentation; however, in most litigation, words are no longer enough. Jurors are reluctant to take anyone's words at face value.<sup>1</sup> When only listening to oral presentations, jurors develop unanswerable questions, suspicions or alternative explanations, of which neither they nor attorneys in the case may be aware. When words are supported by visual aids, jurors experience consistent communication in two channels: auditory and visual. Consistency builds credibility and comprehension.

The trial of a case is, in its simplest form, telling a story jurors can understand.<sup>2</sup> Some attorneys believe good storytellers don't need visual aids, as in the days of radio, when we used our imaginations to conjure pictures to go with the stories.<sup>3</sup> Today's audiences, however, are accustomed to spoon fed images. When we communicate with one another, the communication is multi-dimensional. We see, hear and feel in many contexts and on multiple levels, but visual communication has become more prevalent and powerful. Visuals are delivered via screens: computer screens, TV screens, movie screens, even cell phone screens stream rich colors and images.



Visual images are now a key component in decision making. Advertising companies capitalize on this decision making process in creating commercials: heavy on images, sparse on words. Product decisions are influenced when stored images from advertisements or televisions commercials are retrieved at the opportune buying moment. In the same way, when jurors reach the deliberation room, imagery determines what is recalled and the meaning those recollections have. The goal is to create strong images with corresponding verbal messages that are easily stored and retrieved.

Constant inundation of visual stimuli means that when appropriate visual images do not accompany the verbal story being told about the case, jurors' memories will fill in with available images retrieved from personal archives. These random images are unlikely to be constructed from the words heard about the case, as in the radio era, but stem from images on the most recently viewed screens. There is a high risk that jurors will link the case to images from American Idol, personal texting, Iraq, the election or whatever is current. If lawyers don't want jurors filling in the blanks in their mind's eye with the most immediate images provided by the media, they need to adapt.

Using technology effectively in the courtroom provides a method of visual communication to accommodate the needs of today's jurors. A high-tech presentation, however, is not synonymous with strong visual communication. Technology can clash with the human touch when used to display disparate facts, or when the presenter is clumsy with the hardware, or when PowerPoint slides are too wordy or full of bullet points. Written words are not processed visually like images, but rather auditorily, as if heard. Technology can also turn off those less technically inclined when used without consistent meaning or context. Technology is an effective communication tool when used to show and tell a story consistently.

## COMMUNICATION

The first question: What story does your side want to communicate? Start by showing jurors images on demonstrative aids illustrating the big picture and use exhibits as supporting details.<sup>4</sup> The demonstratives portray the story and give meaning to the facts in the exhibits. Exhibits without demonstratives are facts without meaning.

Many attorneys show jurors facts on the exhibits first and the story points on the demonstratives second, if ever, without appreciating that only lawyers think that way, i.e. facts first, story second. Jurors base their decisions on the story first, and “filter” the facts they see and hear based on the story they have constructed in their heads about the case.<sup>5</sup> “Filtering” is commonly called “selective listening.” Selective listening is much less dangerous when jurors are not dependent on only “listening” to learn the story.

A visual story shows the major characters and minor characters, major actions and minor actions, time and place. It is not advisable to include all the facts, details or information in visual aids as too many visuals can confuse or overwhelm jurors. One image for every major story point in the case is ideal. The major story points vary case by case, but may include: the rules or standard of care, risks, locus of control, relationships, time frames, the right way compared to the wrong way, wrongdoing, causation and consequences. A minimum of three demonstrative aids is advisable: one each for the beginning, middle and end of the story about the case. Demonstratives should not be, but too often are, composed of material that is easily available -- for example company manuals, websites, accident reports or medical records. The best starting place for constructing effective visual aids is learning the story that your side wants to communicate.

By showing jurors visuals, the trial team controls the visual stimuli to which juror attention is directed. Each demonstrative should ideally have approximately the same number of exhibits supporting it; balancing the number of exhibits per demonstrative helps decision makers weigh the corresponding significance of the story's points.

The second question: Do the visual aids provide an overview of the story? Visual aids are not a substitute for live storytelling. They should assist jurors' understanding of the story and serve as a lens through which the jurors can view the evidence. The visual aids should be self-explanatory. If the images require explanation, they are not doing their job. The audience should be able to grasp the essential story by reading only the titles.

The last question: Do the visual aids hold the audience's attention? Attention spans are prolonged by use of effective visual aids, by offering variety to the conscious mind. As our conscious minds are open to only one channel at a time, we can stay engaged by moving between the visual and auditory channels. Our unconscious minds leave all channels open all the time and can compute more information at each moment than our conscious minds.<sup>6</sup> In terms of quantity, aim for five visual aids per 15 minute segment.

## CREDIBILITY

While jurors believe what they can clearly visualize, this visualization is dependent on the relationship between attorney and juror. When attorneys develop rapport with jurors, they enhance jurors' receptivity to seeing, hearing and feeling communication. This is the first step in building credibility and opening their eyes and ears to the story. Without rapport, a wonderful story falls on deaf ears and blind eyes. After establishing good rapport, the attorney must be ready to deliver a story worth seeing and hearing.

Check the opening statement, and the key witness testimony for language and images that appeal to the senses. These are elements such as color, light, climate, heat/cold, sizes, proportions, movements, speed, volume, sound, pressure, touch, taste. What does pain look like? What color and temperature is it? Bring critical anecdotes to jurors through at least two of their senses: visual and auditory. The critical moments are the ones jurors must remember in order for your side to prevail.

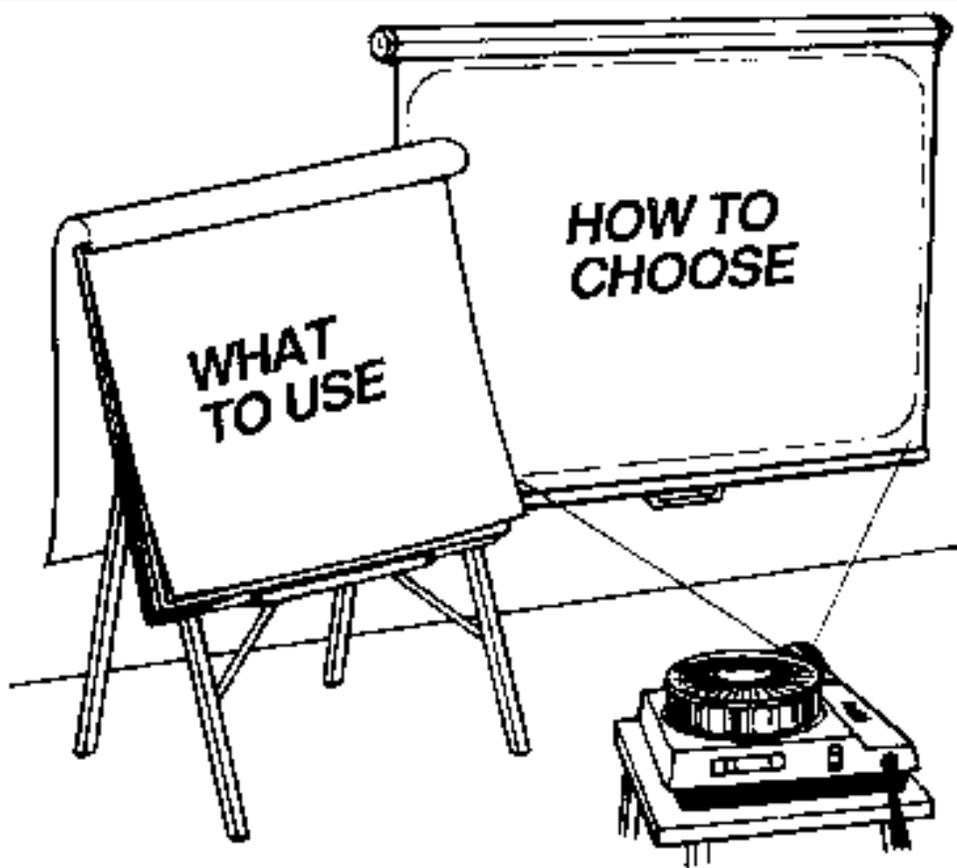
Through technology, visuals can be delivered in the opening, and reinforced on direct and cross examination of witnesses as well as closing arguments. Include input from experts and laywitnesses on the content; their credibility is reinforced when they testify on the stand that they participated in the development of the visual aids. Credibility is lost when visual aids are only used in opening and/or closing, by indirectly suggesting that the witnesses do not support them.

Credibility is enhanced by a united visual front. All visual aids of the story can be united by using the same background color and style for each, as well as using the same size, font and location for the titles. The titles do their job best when jurors can grasp the focus of the story by reading only the titles.<sup>7</sup> Against this consistent background, the content of each slide should be varied enough to hold audience interest.

Credibility is diminished when attorneys try to substitute easily available photographs, manuals, CVs, documents or even clip art for images that have been created to capture the real essence of the story. These items are helpful factual exhibits, but are often meaningless in the absence of images that summarize the overarching importance of the individual items. Use of factual exhibits alone invites jurors to focus on details alone and miss the larger significance of the story.

## CENTRAL IMAGE

At the heart of every case is a Central Image.<sup>8</sup> This is an image that the whole story presented in the case supports. The central image is a carefully selected visual portrayal of the theme, the primary image, based on the facts, that we want the jurors to imagine and that reinforces our case theme. Research demonstrates that pictures are remembered better than words.<sup>9</sup> However, memory is also dependent on the message accompanying a picture, the



message that gives the image meaning. Therefore, the theme and central image go hand in hand. Only demonstrative aids and exhibits that support the theme belong in trial, otherwise they are distractions.

In a recent plaintiff's case, the central image was an x-ray of two pedicle screws, visually underscoring the key elements of the case: the correctly placed screw that met the standard of care appeared next to the incorrectly placed screw crushing a nerve, and the image showed the total number of opportunities the defendant doctor had to see and correct the problem. The theme was: "Medical Responsibility: to Help, not Hurt". This theme and image injected control, awareness and the responsibility of the defendant doctor as key elements early in the presentation.

Another example is a defense case in which the injured plaintiff sued a cement company alleging failure to maintain one of their trucks. The central image was a map comparing the shortcut the plaintiff driver took with the safer route the defendant company recommended to the plaintiff driver. The shortcut used a hazardous road leading to the accident scene, and simultaneously exemplified the plaintiff's many poor choices that jeopardized his own safety, without having to directly point fingers at the injured party. The theme was: "*Where* are the facts?" At the accident scene. With the primary setting, action and main character miles from the company or its recommended practices, any facts about company responsibility that could possibly support the plaintiff's claims were hard to find.

The most persuasive central image comes from the most pivotal action, place or circumstance in the story. That might involve a comparison between right and wrong practices, between reasonable and unreasonable actions, or between the mechanism of injury and alternatives. The locus of control is usually directly or indirectly defined in the central image, as well as the setting in which our story takes place. The central image is usually one which many witnesses can support, whereas only one witness may be able to testify to other images on the demonstrative aids.

Without visual aids, a juror cannot see the dangers in the driver's shortcut or feel the pedicle screw crushing the nerve. Words alone minimize these experiences. Visual aids bring jurors one sense closer to the topic. Engaging the senses invites jurors to experience the shortcut leading to the accident or endure the pain from the screw. This can affect jurors in one of two ways: a juror has a micro-experience of the event him/herself, or a juror remembers the event more clearly. Both are desirable outcomes compared to the alternatives of this event blending in with others without standing out, or this event being distorted by associations with personal experiences.

Having selected an effective central image, fully present it in the opening statement. In the example with the two pedicle screws above, fully presenting means jurors see, hear and feel what is the same and what is different about the two screws. Pictures, sounds and feelings are engaged to give jurors the full sensory effect.

Avoid telling the audience the significance of the central image. Instead, allow them to attach their own personal significance to it. If lawyers try to tell jurors the importance of the central image, there is a tendency to reject the lawyer's meaning. Many advertising campaigns employ this approach. They provide potential customers samples and a good experience without the sales pitch. Focus groups and mock trials facilitate testing central images to make sure they are noticed and have the desired persuasive qualities on the audience.

## CONCLUSION

There are numerous advantages in using visual aids to show jurors the story, including but not limited to: increased retention by the audience, streamlined presentations and expedited proceedings. More importantly, "show-and-tell" is always better than just "tell," regardless of the audience. Telling a visual story increases the chances of a

favorable outcome, and is best viewed as an essential part of the strategy for presenting the story about a case to any jury panel, mediator or judge.

### Notes and References

<sup>1</sup> This article refers to jurors as the primary audience; however, these concepts and strategies apply to all legal decision makers: judges, opposing counsel, opposing party, insurance adjustor, mediator, arbitrators, etc.

<sup>2</sup> Gerry Spence, Defrauding our Nation's Lawyer's, <http://gerryspence.wordpress.com/2008/07/28/defrauding-the-nation's-lawyers/> (last visited August 5, 2008).

<sup>3</sup> Jim Perdue, Winning with stories 6 (2006).

<sup>4</sup> Eric Oliver, Facts Can't Speak for Themselves 372 (2005).

<sup>5</sup> For further discussion on filtering see Amy Pardieck, I Can See What You Are Saying, 29 Verdict (3) 51 (2007).

<sup>6</sup> Genie Laborde, Influencing with Integrity 51 (1994).

<sup>7</sup> Cliff Atkinson, Beyond Bullet Points 5 – 8 (2005).

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## Using the Science of Persuasion in the Courtroom

by Edward Burkley & Darshon Anderson

Oftentimes, our ultimate goal when interacting with others is to change their mind and eventually their behavior. This change is called *persuasion* (Brock & Green, 2005). The judicial process is itself a display of social interaction with the ultimate goal of persuasion, from the authoritative figure of the judge to the prosecution and defense attorney's attempts to convince the jury to adopt their version of events. Even interactions between jury members during deliberation are a display of persuasion. In appreciation of this fact, the present article offers some recent findings in persuasion as potential tools to be utilized in the courtroom.

Early findings on persuasion found that, depending on the audiences' ability and motivational state, the presentation of strong arguments and/or a perceived credible source (i.e., an expert) tended to be the most effective approach (for a review in relation to the courtroom, see Williams & Jones, 2007). This makes intuitive sense; the more arguments you can produce from a reputable source, the more persuasive you should be. However, recent research suggests that what you are saying is not the only factor that can make a difference. How and when you present your arguments can make or break your persuasive attempts.

In this article, we will review some of the more recent developments in the science of persuasion and offer a variety of techniques as suggestions for possible use by lawyers in the courtroom. We structure these persuasion techniques into two categories: *How to say it* and *when to say it*.

### ***How to Say It***

*Ask them to think about it.* At first blush, it would seem that the more arguments an audience can generate in favor of your position, the more persuasive you will be. However, like so many things about human nature, it is not that simple. Researchers have shown that how easily something comes to mind can also influence the way a person thinks. People rely on this shortcut to determine if something is right or wrong. If an individual can easily generate arguments for a position, they are more likely to perceive the position as correct. If it is difficult to generate these arguments, they will likely judge the position as incorrect. For example, one study asked college students to generate reasons that making senior exams mandatory is a bad idea (Tormala, Petty & Brinol, 2002). Half were asked to come up with two reasons this was a bad idea and half were asked to come up with eight reasons. Students asked to list two reasons did so quite readily and were more opposed to mandatory exams; however, students who listed eight ways did so with some difficulty and were less opposed to the exams. These individuals felt that if a mandatory exam was such a bad idea, then it should be easy to list a number of reasons to support this fact. But because these students had difficulty just listing eight reasons, they became uncertain that it was in fact a bad idea. The ease with which one can bring to mind supporting arguments is taken as a form of confidence; two arguments will strengthen a belief whereas eight arguments will weaken it. Thus, strengthen your position by asking the jury to think of a few ways (no more than three) that you are correct. Weaken the plausibility of your opponent's position by asking the jury to come up with numerous reasons that this position is correct.

*It's about style.* Even if people do have cogent arguments for their position, it still needs to be delivered by a credible source. Recent research shows that credibility can be communicated to an audience through the type of language used. A study of courtroom transcripts found that when lawyers used hesitant phrases, such as

Audience,  
Please believe  
me, I wouldn't  
lie to you.

“umm,” “I mean,” and “you know”, they were viewed as less credible (O’Barr, 1982). Further investigation found the same effect among college students who read a product testimonial (Sparks & Areni, 2008). In this study, half of the students read a testimonial with the phrases “I mean” and “ummm” and the half read a transcript without these hesitations. In addition, some students were given 5 minutes to read the transcript and others had only 20 seconds. The results showed that people were less convinced about buying the product when there were hesitation phrases and this effect was even more pronounced when time was limited. Thus, when speaking in front of the judge or jury, it is important to deliver your arguments with confidence and clarity, especially if you are limited on time.

*Be a chameleon.* In some cases, subtlety can be just as effective as delivering a blatantly strong argument. In everyday interactions, many of our behaviors are in response to how others have behaved. When others smile we automatically smile back. Researchers have investigated the purpose of such mimicry and have shown that when others mimic our gestures (e.g., touching face, crossing legs) we actually like them better (Chartrand & Bargh, 1999). Furthermore, because we are more persuaded by people that we like, such mimicry can also increase persuasive appeal. One recent study showed that salespersons who mimicked their target were over four times more likely to make a sale than those who did not use mimicry (Maddux, Mullen & Galinsky, 2008). A similar study showed that when product representatives mimicked the verbal and physical behaviors of their target, the product was rated more positively (Tanner, Ferraro, Chartrand, Bettman & Van Baaren, 2008). Interestingly, when asked about this chameleon effect, the targets were unaware that they had been mimicked or that such mimicry had any real effect on their product evaluations.

Mimicry is effective because people are naturally ego-centered and prefer things that remind them of themselves (e.g., Pelham, 2005). A great deal of research demonstrates that the more similar something is to us, the more we like it (e.g., Byrne, 1971). Mimicry is simply one example of this relationship. Taken as a whole, this body of work suggests that when possible, you should sound and act like the people you are trying to persuade, making them more willing to submit to your requests. However, there is an important word of caution when using this technique. This tactic will only work in a one-on-one situation and when the target does not believe you are trying to use a tactic to persuade them. When people believe that others are trying to persuade them, they display reactance and will often become more entrenched in their original position. Thus, mimicry can be an effective tool in the courtroom but you must be subtle and if you think your target is becoming aware of your mimicry, cease the act immediately.

### ***When to Say It***

*Wear them down.* From brainwashing in POW camps to fraternity hazings, there are many ways that people use fatigue to get others to comply with a request (e.g., Taylor, 2004). These are extreme situations, but they rely on the basic human process of needing energy to combat social influences. Recent investigations provide empirical evidence of the link between fatigue and persuasion, showing that resistance to persuasive appeals both requires and consumes energy.

In several studies, Burkley (2008) investigated how people’s energy levels influence their ability to resist persuasive messages. One study found that participants who resisted persuasion became more fatigued. Then, in another study, Burkley (2008) found that fatigue made participants more vulnerable to persuasion. For instance, half of a student sample completed a strenuous physical activity and the other half did nothing. Then all students were asked to read and rate their opinion of an essay topic (e.g., mandatory senior exams). The results showed that the individuals who exerted energy on the exercise task were more persuaded by the essay than those who did not. This fatigue effect was more pronounced when the participant was presented with very strong essay

arguments. Collectively, these studies suggest a cyclical relationship – by resisting one will become fatigued, and once fatigued, will be more vulnerable to future persuasive influences.

There are several ways that a lawyer can capitalize on this fatigue effect in the courtroom. First, because of this cyclical relationship, you can be very effective if you just keep pushing your strong arguments over and over with no chance for your target to rest. Eventually your persistence should wear down your target's resistance. Any parent who has been bombarded with an onslaught of requests from their child is aware of this strategy's effectiveness.

Second, take advantage of the fact that energy levels fluctuate throughout the day. People are particularly fatigued before lunch time and at the end of the day, so this research suggests that these are peak persuasive time periods. If possible, save your strongest arguments for these situations, when your audience will be more open to influence. Keep in mind, though, that fatigue is also associated with negative behaviors, such as aggression (DeWall, Baumeister, Stillman, & Gailliot, 2007), sexual hostility (Gailliot & Baumeister, 2007), and stereotyping (Richeson & Shelton, 2003). Thus, you should consider how these factors may interact with your case specifics before utilizing this approach.



*Forewarned is forearmed.* Thus far, we have discussed research findings in terms of increasing your persuasive power. However, there are times when you may want to decrease your opponent's persuasive power instead. Research on forewarning offers a way that you can build up resistance to an opponent's appeals.

People do not like to know that they are being persuaded. When people feel their freedom is being attacked, they often respond by standing firm in their original position (Petty & Cacioppo, 1979; Quinn & Wood, 2004). Fortunately, this tactic can work to your advantage. You can simply and effectively point out to the jury that your opponent is going to use a variety of persuasive tricks to try and change their mind.

*Inoculation is preventative.* In addition to forewarning, increase resistance to your opponent's message through inoculation. Modern medicine prevents our bodies from becoming ill by presenting a potential threat in a safe and easily destructible form. During an inoculation, an individual is injected with a weak form of a pathogen and the body quickly eradicates the bug. By building up a resistance to the injected strain, the individual is better prepared to combat the full force of the pathogen if later exposed. Build up resistance to a persuasive appeal by offering the audience a set of weak and easily deflected arguments. When the audience is given these weak arguments in advance, they have time to reject the spurious statements and generate their own counter-arguments (see McGuire, 1964). Early on in trial, before your opponent has the opportunity, present the jury with weak versions of specific arguments, thereby inoculating them against later exposure to the opponent's stronger arguments.

## *Caveat*

The majority of the studies discussed in this article were conducted in laboratories under controlled settings and there is always a concern when applying the findings to other contexts. As social scientists, we are less familiar with the internal workings of a courtroom setting and although we have tried to describe ways that these research findings can be extended to trial situations, we recognize that there are likely additional factors that may influence the effectiveness of these techniques. The techniques offered in this article are potential practices to be used at your own discretion. That being said, the theories that provide the foundation for these techniques are well-established explanations of basic human behaviors and should therefore apply to a wide variety of social interactions, including that of the courtroom. The only way to know for sure if these techniques work in the courtroom setting is to conduct studies in this environment. In the mean time, however, attempting these techniques personally is the fastest way to find out their effectiveness. In sum, we suggest that these techniques be utilized with cautious optimism.

## *Summary*

The ancient Greeks looked to the goddess Peitho to increase the effectiveness of their persuasive attempts. In modern times, we are fortunate enough instead to rely on science to indicate how we can improve our persuasive skills. Recent research on persuasion offers lawyers a variety of techniques that can be used to sway the judge and jury in their favor. Common sense (and early research) suggests that first and foremost you should be seen as a credible source and provide strong arguments for your position. However, recent research has added some more creative tactics: When possible, wear down your target by being persistent and capitalizing on low-energy time periods, avoid hesitant language, mimic when appropriate, ask the jury to think of a few reasons why your position is correct, inform them that your opponent will try to persuade them and offer a few weak arguments from your opponent's side so the jury can effectively build up resistance. In the end, be aware of the fact that just as you may be using these techniques to sway others, others may be using these techniques on you.

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**We asked two experienced trial consultants to respond to this article. On the following pages, Chris Dominic and David Cannon react to ‘Using the Science of Persuasion in the Courtroom’.**

### **Chris Dominic responds:**

**Chris Dominic ([chris.dominic@tsongas.com](mailto:chris.dominic@tsongas.com)) is a Senior Consultant at Tsongas Litigation Consulting, Inc., in Portland Oregon.**

Edward Burkley and Darshon Anderson’s article “Using the Science of Persuasion in the Courtroom” targets relatively unsung elements of persuasion in the litigation arena. While it is common for an attorney to be concerned with *what* they are saying, it is less common for them to be concerned with *how* and *when* they are saying it.

In practice, the art of mastering the *what, how and when* is vital to the overall execution of a persuasive event. When looking at the jury trial setting specifically, the authors’ suggestions are relevant to the acts of motivation and arming. That is, 1) how motivated a juror is to advocate for a particular position, and 2) how “armed” a juror is with the right evidence, arguments, and themes to persuade others in the jury room. The ultimate debate in a jury trial is often jury deliberations, not closing arguments.

The authors begin their “*How To Say It*” section with “*Ask them to think about it.*” This section addresses the concept that less can be more in persuasion. Everyday examples remind us of just how important

this concept is. Winston Churchill's famous quote is remembered today as "Blood, Sweat, and Tears," but in actually Churchill's words were "I have nothing to offer but Blood, toil, tears and sweat." The elimination of toil is proof of the power of threes. Think "faith, hope, and charity." Threes work. Four can sometimes be one theme too many. This is why many speech constructions are done in three main points; why political campaigns are centered around three principles; why plays are done in three acts; and why Churchill's speech lost its "toil" over time. This principle serves as three checks (unsurprisingly) on your litigation checklist: 1) Have I simplified my case theory enough?; 2) Does my opening statement provide a simple story structure through which jurors can understand the case?, and; 3) Do I have a closing argument that is simple enough for key jurors to easily access and use the evidence, arguments, and themes that are most favorable to my client?

The authors' section, "*It's about style*" in practicality, translates into, "*Your delivery matters.*" While many know this, few put the time they should into developing their delivery skills to get ahead of the competition. An attorney who speaks: 1) free from dysfluencies (e.g., "um," "er," "like," etc.); 2) has a dynamic speaking voice (i.e., uses multiple tones and volumes); and 3) uses their body and or hands confidently in a way that is congruent with their message, is typically a far more effective persuader when compared with an adversary whose content is equal in strength, but who lacks the key components of nonverbal credibility.

When the authors suggest, "*Be a Chameleon,*" they offer the same advice about likability addressed in Neurolinguistic Programming (NLP) literature. Research shows that the more likable the speaker, the more persuasive he or she is. My concern for the practicing attorney is that the risk of being seen as a "trickster" outweighs the benefit that could be garnered just as easily through well developed case strategy and well executed attorney presentation. If attempts to be likable are not seen as genuine, the jurors could consider such attempts pandering.

In the "*When to Say It*" section of the article the authors suggest practitioners "*Wear them down.*" This principle is widely known to the attorney in civil practice. The late afternoon period of a deposition is often the time the witness will give you the answer you've been hoping to get all day. The witness is tired and giving in could mean a quick ticket home. Or perhaps the witness feels he or she is not giving the right answer and finally breaks down. It is worth noting that this principle being applied at trial should be done with great caution. The risk of looking like you are intentionally stalling or otherwise wasting the jury's time is an important consideration.

The authors remind us of an important maxim – "*Forewarned is Forearmed.*" However, choosing when to inoculate an adversary's position should be assessed on a case-by-case basis. There are times when short, powerful responses clashing with the positions of the adversary are extremely potent. But, there are also times when doing so highlights the adversary's theme. As advised by George Lakoff, when you make the warning, "Whatever you do, don't think about an elephant," the first thought will be of an elephant. Be careful with the application of inoculation.

"*Inoculation is Preventative*" refers to pointing out the persuasive attempts of the adversary. Again, this can be useful at times and disastrous in others. It is not unusual for the modern jury to be attuned to the fact that we have an adversarial system and that both attorneys are advocates for their clients. Calling out the other attorney as a manipulator can have an unintended boomerang effect. With that said, if there is severe manipulation occurring, such as an attorney implying that the jury instructions or verdict form says something other than they actually do, there can be a very good opportunity to utilize what the authors describe.

Again, by considering *how and when* you present information and arguments, you inherently garner an advantage over those who only consider *what* they say. The authors provide us with the relevant research in this area that points to what tactics and what specific benefits can be obtained. By carefully considering the findings, your practice can significantly benefit.

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### **David Cannon responds to Using the Science of Persuasion in the Courtroom:**

***David Cannon, Ph.D. ([dcannon@jri-inc.com](mailto:dcannon@jri-inc.com)) is a trial consultant in Los Angeles, California. He works on civil and criminal case nationwide.***

Dr. Burkley's article encompasses a variety of different tactics that may be effective at persuading a target or targets, and the most important "take home" message is that persuasion may occur through a variety of means other than just the soundness of an argument and the credibility of the source or sources delivering the argument. We have all likely observed instances where extra-legal factors, or factors other than central arguments, influenced jurors. One that stands out to me occurred when I contacted jurors in a post-verdict interview following a defense verdict in a pharmaceutical case. Several jurors stated that they had empathized with the plaintiff and had wanted to award money to him, but they were "put off" by the plaintiff's "arrogant" attorneys who were often overheard talking about their expensive boats, cars and exotic trips. Jurors were also bothered by the "flashy" brand name watches worn by the attorneys. The jurors questioned the motives, credibility, and likability of the plaintiff's attorneys compared to the more professional and understated defense attorneys. While elements of the case were persuasive to the jury, concerns about the plaintiff's attorneys had a strong influence on the outcome of the case.

Most studies in persuasion have not involved a legal issue, and the legal system is a unique arena when it comes to persuasion. Persuasion tactics other than just the central argument and credibility of the sources may be particularly important at trials because so many cases that make it to trial have compelling arguments on both sides. In the presence of compelling competing arguments and credible expert witnesses offering expert opinions that contradict one another, jurors often must rely on a variety of other factors to arrive at their decisions. Furthermore, jurors are skeptical of attorneys. They fully expect an attorney to attempt to manipulate them. Jurors may ask, "What exactly is this attorney trying to sell me?" As a result of this suspicion, jurors are much more mindful of persuasion tactics than many people in other settings or students who are participating in persuasion studies. Tactics that may not appear obvious in a setting other than a legal one may appear more obvious to a jury because of this heightened suspicion.

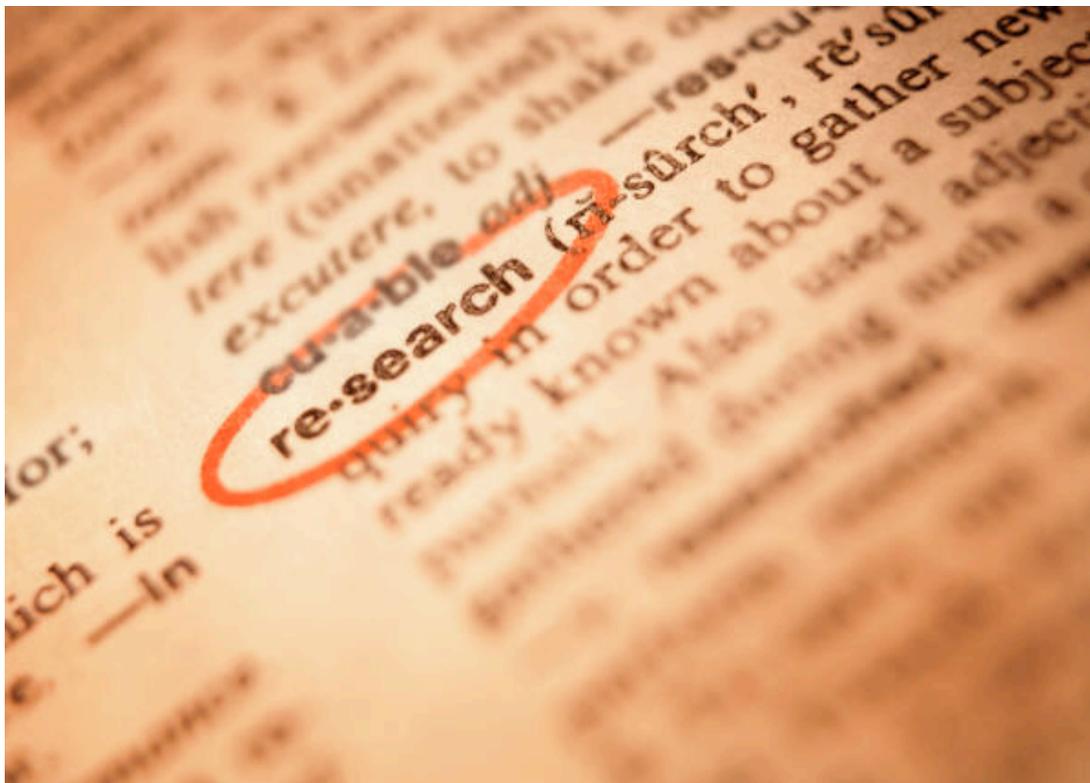
The jury is also unique in that attorneys are attempting to manipulate a *group* of individuals in a public forum rather than one single person. In addition to the unique difficulties of persuading more than one person, the jury represents a group of people with diverse backgrounds and characteristics. Peripheral persuasion tactics work better on some individuals than others. For instance, jurors who are bored and who have a lower need for cognition are much more likely to be influenced by something other than a central argument. Yet jurors who base their decisions on something other than the central argument are often much more flexible during deliberations than those who based their decision on a central argument.

This summary of persuasion research speaks to the importance of conducting empirical research on persuasion tactics with respect to legal decision making. This document provides a great resource of potential topics for a researcher to examine how persuasion tactics operate in legal cases. I certainly would have appreciated a resource like this when I was a graduate student at the University of Alabama.

## Our Favorite Thing[s] for September 2008

Granted. Our Favorite Thing[s] this month are not for everyone. Actually, it's plural this month in a nod to just how geeky (yet quirky and oddly attractive) these two resources are to the curious mind. One writer describes our first favorite thing as "[Napster for Nerds](#)". (You may want an external hard drive for this one....).

**Favorite Thing One:** The glorious and often unsung Social Sciences Research Network ([SSRN](#)).



Download the law.  
Download social sciences research.  
Download odd facts and eccentric articles that make you interesting--and perhaps even geeky, quirky, and oddly attractive....at least to TJE Editor [Rita Handrich](#) who offers up this one from her favorite things bookmark folder. P.S. It's free!!!

**Favorite Thing Two:**  
Here's a gem. Also free with an option to upgrade for a fee. Suggested by ASTC

member trial consultant [Kacy Miller](#) as a data source for a site that details public opinion polls on a range of topics--the [Rasmussen Reports](#) serves up politics, polls, and plenty of data on changing public thoughts and attitudes. For example, there are polls on how people feel about the drinking age, whether small business owners work harder than CEOs, political perspectives and even what mode of music most people prefer (radio, CD, MP3, etc). Oh my, my.

Got The Jury  
Expert? Get it now  
by going [here](#).



## Lawyers Learning to Communicate

by Pat McEvoy

*“It’s honestly the best class I have taken in law school. This class is preparing students to be lawyers, not just how to act like one or read cases.”*

DePaul Law School student, 2008

*“What you are providing to your students is important and inspirational. These future lawyers will one day come to realize the significance of the experiences that they are receiving at this early stage in their professional lives.”*

Ed Burr, 2008

What are they talking about?

DePaul Law School in Chicago has taken a huge step in giving its students a glimpse into how law is communicated. In 2007, Michael Panter, an experienced trial lawyer created a new kind of law class – Litigation Lab. The concept was Panter’s brainchild; he came up with the idea, convinced DePaul to try it and made it happen.

Here’s how it works. Twelve law students (who have completed Rules of Evidence) meet once a week and work on real cases. For each class, a practicing lawyer comes in and gets help on an active case. The cases are in various stages of development: discovery to the eve of trial. For about two and a half hours lawyers, students, Professor Panter and trial consultants work together on a case. The work is tailored to fit the needs of the case and the attorney. One lawyer needs help in discovery, another needs feedback on damages and another needs feedback on the best way to deliver an opening statement. Attorneys pay \$350 to DePaul and get CLE credit, plus over two hours of help. It’s a bargain. As one participating lawyer said, “I would much rather obtain the [CLE] hours working on my cases than attending a lecture on something I either know or have no need to know.”

The result has been extraordinary. Lawyers are lining up to take advantage of this unique opportunity. During course registration, students filled the class within minutes based on word of mouth alone. In the fall 2008 semester the program is expanded to three sections. As one student told me, “Some classes I wonder if I’ll ever use the information – this one I knew right away I would.”

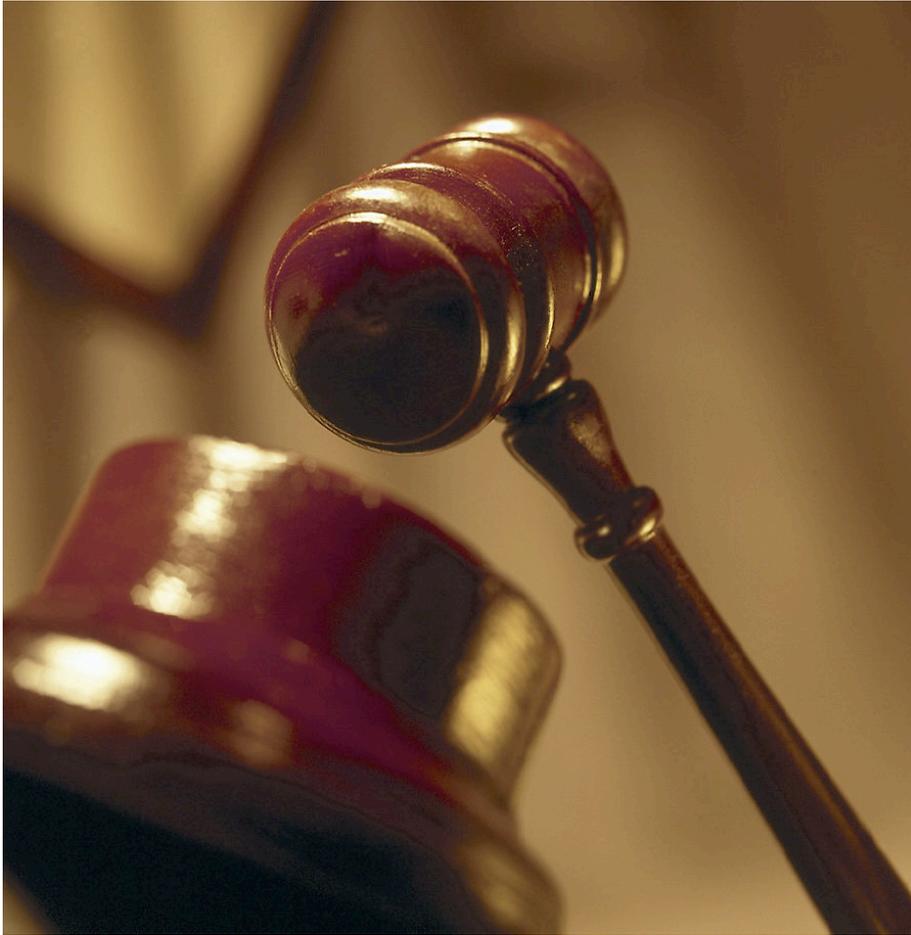
As a trial consultant I have had the privilege of participating in many of the classes. I am not the only trial consultant; Katherine James from California, David Ball from North Carolina and others have participated and are on the Board. I also invite my clients to bring cases to Litigation Lab. Some are cases I am already working on and some are smaller cases on which I would not normally work. While law students are not a representative sample from the venue, their perceptions are valuable nonetheless.

And there is more. Before the attorney arrives, the class does communication warm up exercises—they stand up and share a story about a member of the family, tell us something they know for sure or tell a story that expresses an emotion. We work on eye contact, speech anxiety and nonverbal communication habits. Most of all we work on authentically connecting with the audience.

My biggest reward is watching students “get it” and then run with it. They learn that knowledge of the law is not enough to practice law—you have to be able to communicate it well and persuade jurors. They get better at standing up

and delivering an argument extemporaneously. They are eager and become passionate about the work. They see a wide variety of speaking styles from the practicing lawyers and they are able to make a difference—they can help a real lawyer on a real case. They practice coming up with an idea or a theme that the attorney never considered. More than

one attorney said to me, “I wish I had had this class in school.”



In the Litigation Lab, law and the real world of litigation come together. For some students it is happening for the first time. The atmosphere is electric. Want more proof that the concept works? At the end of the semester, demand from lawyers for more sessions led 30 law students to sign up to participate for no credit.

Professor Panter and I have also learned a lot about how to improve the class. Of course, the class requires conflict checks and confidentiality agreements. For each class a Project Manager is assigned to each lawyer to help guide the class, and to make sure the attorneys' needs are met. Students are graded on class participation, journal entries and other assignments.

As a result of two semesters and three sections of Litigation Lab, the results are in: the class is a great idea that works.

Here are the results from just two of the attorneys who participated last semester.

*I greatly appreciate your help and that of your litigation lab students. I just returned from San Francisco and oral argument before the 9<sup>th</sup> circuit. The preparation with your class was invaluable in ferreting out the best and worst arguments as well as preparing me for the judges' questions. I used all of your advice and if you listen to the argument online, you will see that your class made my argument.*

And

*Last night the jury returned a verdict of 4.74 million dollars. We had asked them for a verdict of \$6 million, and we and the clients are just ecstatic. [We] mentioned a number of times during the trial, how helpful the ideas we had discussed with your class [sic], as we saw time and time again certain of those themes, good and bad for us, played out during the course of the case. Having the benefit of seeing how people responded to those things, and the time to prepare appropriate responses to them, was invaluable to our success. I actually went over the class notes again, the weekend before closing argument, and I was surprised at how our thoughts at the time were mirroring what was going on in the courtroom.*

Of course this class cannot replace the work done by a trial consultant. It does not replace research conducted with jury-qualified people. It does introduce students and lawyers to the work of a trial consultant. It does make the trial consultant an integral part of the team. They get that we bring different skills to the case. They get that their communication skills will have as much to do with their future success as their legal knowledge.

This is how I spent my pro bono time this year and I intend to participate for as long as I am invited. This is a class that should be everywhere in every law school.

Is there a law school near you that would be interested in teaching communication? For more information on the DePaul Litigation Lab or to receive a copy of an article published in the Chicago Lawyer, contact Mike Panter ([panterm@mikepanter.com](mailto:panterm@mikepanter.com)) or call him at (312) 493-9903. If you would like more information from me, email me ([pmcevoy@zmf.com](mailto:pmcevoy@zmf.com)) or call me at (312) 494-1700.

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Get your own free subscription to [\*The Jury Expert\*](#).

## Witness Preparation: Hidden False Assumptions, Real Truths, Recommendations (Part Three)

by David Illig

In Parts One and Two of this series (see the May 2008 and July 2008 issues of *The Jury Expert*) I taught that litigation has many assumptions about testifying and witness preparation. Those assumptions are false but do not operate at full awareness.

In part Three, I continue with additional assumptions and interventions to allow you to more effectively prepare your clients and witnesses. Remember that these false assumptions are operating even when we think they are not.

### False Assumption 5) Witnesses know their actual audience.

Witnesses usually speak to the questioning attorney and assume that is the appropriate audience. The attorney is almost never the real audience -- not in trial and not in deposition. Most attorneys don't tell witnesses that the attorney asking the questions is not the real audience, or more importantly who the real audience ought to be. You can.

Most witnesses give absolutely no thought to the real audience and how their messages should be adjusted to fit the audience. Jurors will sometimes say afterwards; "Why was he acting so mad at us? We're not suing him. Or we didn't hurt him." And the REAL audience is of course the JURY. They don't know, but want and need to know the truth.

The attorneys probably already know the answers to all of the questions. They are basically pretending to ask questions. They pretend they don't know and the witness pretends to provide answers: It's a pretend communication. Real communication between the witness and the jury is available and is critical to effective witness performance.

For trial, I generally recommend that you teach the witness to get the question from the attorney (you or the opposition) and give their answers to the jury by looking at them and talking with the jury. I want the witness to interact with the jury and connect with them. The witness really doesn't have anything to say to the attorney.

Sometimes there are exceptions to this and a few witnesses just don't do well when looking at the jury no matter the training. The vast majority should look and talk to the jury. It is difficult and takes training and practice. You need to assess before trial whether they can do it.

### A corollary to this false assumption is that witnesses realize that their real audience at deposition is the jury.

The product of the deposition is a book with the witness's name on the cover. The most important reader is the jury. Yes, the witness must answer the questions. But they must communicate and write their book to the jury (or an expert) as they answer the questions. The real audience at deposition is the same as the real audience at trial, the jury. Most witnesses "act" as if the deposition is actually the possession of the opposing attorney and concede control of the deposition. Interrogating Attorneys are taught to take control of the deposition. But it is still the witness's name on the book cover. Teach the witness that it is their deposition and they are writing the book for the true audience, most commonly the jury (or expert).

**What You Should Do to Deal with This Assumption:** Teach your witness about the actual audience. Teach your witness to prepare their answers to match the real audience. Most answers are things that we like to say, or usually say. Most are not messages custom-designed to have specific impact on our real audience. You want to teach your witness to shape their messages to the jury. What words do they understand? What experiences of the jury are similar to the experiences of the witness?

### TEACH YOUR WITNESS TO TAKE CARE OF THE JURY

First, teach your witness to take the time to consider the needs of the jury. Teach your witness to match everything to the real audience: Vocal tone, attitude, and word choice. Teach them to remain calm and keep a positive attitude. Many interrogators are mean and nasty in order to bring out a damaging attitude and tone from the witness. An angry witness can learn not to show their anger on the outside. Teach them to imagine the jury is sitting right behind the interrogating attorney even if it means having them imagine the jurors are little people sitting on the shoulders and head of the interrogating attorney.



Teach them to use a voice that is appropriate for talking to a neutral group of people who are curious about what happened to the witness. The “tone” of voice, and the attitude are very different than those that would typically be used in talking to an attorney. Interrogation school teaches the attorney that it is often wise to get the witness irritated, impatient, angry, et cetera. These reactions do not fit the jury. Why would you grump or be angry or frustrated with the jury? Your witness can talk about these negative emotions, but should rarely exhibit them in deposition.

Teach your witness to edit her answers slightly to better fit the jury audience. Teach her to think about what the audience needs to first understand, and then to believe her testimony.

### **False Assumption 6) Deposition testimony requires less preparation than trial testimony.**

Too many attorneys believe deposition testimony is less important than trial testimony. They believe it is less difficult and less important. Depositions are extremely important in litigation which doesn't end up at trial and, as most of us know, about 95% of cases don't go to trial. Depositions are critical in the quality of settlements or summary judgments. They can make a large difference in mediation.

However, most witnesses are not prepared very well [or at all] for deposition. The assumption is that witness preparation will happen at trial. But cleaning up the messes of deposition can often be difficult, impossible, or begin too late to be successful. Or there is never the opportunity to clean them up. Preparing your witness extensively for deposition can be one of the most cost effective investments you can make for your client.

**What You Should Do to Deal with This Assumption:** Put your important witnesses through deposition training. This combines a simulation of the deposition and teaching them new communication behaviors. Use the content of the case to practice the new behaviors and to cover the important issues of the case. You will almost always learn new case facts even though you are supposedly only preparing the witness about what you already know. It's a very efficient way to work up your case.

The witness learns and practices more effective communication while you learn more about your case and your witness. Use video all the time. Give your client homework to practice new communications on non-legal issues.

### **False Assumption 7) A witness's first duty is to answer the attorney's question.**

This is a powerful and influential false assumption.

The **FIRST** obligation of a witness at deposition, cross examination, or direct is to get some portion of their truth across to the audience and not leave distortions, errors, or miscommunication.

The **SECOND** obligation is to answer the question. The order is crucial. One sequence puts the interrogator more in charge, while the other puts the witness more in charge of their testimony.

The question asked by the attorney does need to be answered. But it can be answered with a communication that communicates the witness's truth. It's surprising how often JUST answering the question actually results in serious miscommunications with the jury and does not get the truth across. It gets something other than the truth across.

**What You Should Do to Deal with This Assumption:** The obvious intervention is to teach your witness the correct order of priority. Some witnesses will want to overdo it. They will appear to be avoiding the question. This hurts their credibility. You can teach them to do both steps with practice so they are BOTH answering the question and communicating a part of their truth.

How? You can teach them to use short powerful answers that say more than yes, or no but still satisfy a judge and jury about answering the question. Teach them to use more specific answers. A full sentence is more specific than a single word. By teaching your witness to make this change in sequence, they will be more active and exert more control in their own testimony.

You can also teach your witness that the deposing attorney is there in hopes of creating a document or part of a document that communicates the truth of his/her side, not the truth of the witness. The witness must exert effort to get their truth across despite the influence and goals of the interrogator. Witnesses often act as if the opposition attorney is there as a neutral party just looking for the truth. Teach your witness that it's not the opposition attorney's job to be neutral. He's supposed to be pushing his truth, not theirs. He's just doing his job by distorting things in his direction. Teach that it's the job of the witness to actively fight for their truth with the jury. They can be pleasant, but persistent.

### **False Assumption 8) "Normal" or "typical" verbal and nonverbal communication is critical to a witness's success.**

Interrogation, as experienced in trial or in deposition, is abnormal. Therefore, normal response patterns are often not sufficient or persuasive. Trying to act and appear normal is overrated in unusual settings. Being effective is much more important than appearing normal.

Looking normal does not overcome ineffectiveness in such areas as listening and saying what you mean. You actually want the witness to give up looking totally "normal". The jury quickly understands that this isn't a normal communication and the witness should be different. You don't get across a minefield by acting normal.

The witness needs permission from you. They need you to teach them that some unusual patterns are needed and acceptable. Ironically, the “strange” behaviors we’re talking about are simply very careful listening, very careful crafting of answers, and very careful thinking.

Here is an effective example you can use:

*“What are the ‘natural’ responses to ‘attack,’....*

*Well, there are three ‘natural responses’: Attack the attacker. Run away. Freeze.....*

*Those are the three “natural” responses. Interrogation during deposition or cross is actually an attack. However, those are never the ideal responses from a witness during interrogation. But that is where your body and brain go to instantaneously. So you will have to give up the idea of doing what’s natural.*

*You’re going to have to learn many ‘unnatural’ acts. Getting the truth across will often require actions and attitudes that go against the natural currents and pressures existing during the interrogation.”*

**A corollary to this false assumption is the false assumption that it is very important to keep up with the fast pace of attorneys and answering quickly is the best way to get the truth across.**

SPEED is one of the major ingredients of the Interrogation Effect and the most common and powerful single tool of interrogation used against witnesses. Excess speed damages more witnesses than almost any other single factor.

These interrogations are VERY, VERY dangerous and are best navigated VERY SLOWLY and VERY CAREFULLY. It’s a minefield and the jury quickly understands that moving slowly is good. Going slow takes training. Practice can make it seem more acceptable.

**Listening and thinking and creating powerful truthful responses takes time.**



Teach your witnesses that going slow is necessary. Slow is difficult and takes training and practice. Accurate listening and careful, safe, truthful answers that correctly impact the jury are so much more important than going fast. A witness can’t do the special listening and crafting answers we’re talking about at normal speed.

Ironically, most attorneys are addicted to speed. And most attorneys seem phobic to slow. Attorneys usually have to go very fast in their work and are dealing with other attorneys who go very fast. Many attorneys cannot go as slowly as

their witnesses should go. Even witnesses assume they can go much faster than what is safe. **In general, only very slow is safe.**

**False Assumption 9) Practice and preparation inhibits effective witness behavior. And related False Corollaries: “Spontaneous” communications are typically closer to the truth and communicate more effectively than carefully prepared and practiced communications. And Spontaneous Communicators communicate the truth more effectively than trained and practiced communicators.**

It’s hard to believe but this is a very active false assumption. What sports coach believes this? What musician believes this? What speechmaker? Name one other communication-oriented field that believes this for a second. Even musicians, comedians, or actors who improvise spend endless hours practicing the process of improvisation.

Specific answers usually don’t need to be practiced over and over. Witnesses **should not memorize** specific responses except very rarely. What is practiced is getting the truth out, no matter what the interrogator does or attempts to do. No matter what the interference is, the witness should be equipped to communicate the truth.

Juries want honest, sincere communications. They don’t like programmed robots. However, “spontaneous” communications are rarely the most successful communications, even by honest and sincere people. Most of the important meaningful communications in life rely on practice, rehearsal, and preparation to achieve effective communication. It usually takes practice and training to achieve sincere, truthful, heartfelt music or communication under great pressure.

This is a very powerful common and often unspoken false assumption in the world of law. Almost nobody in any other communication-intense field would say such things with a straight face. Extensive preparation and very thoughtful careful communication in such a dangerous situation is necessary if we care about the truth.

**What You Should Do to Deal with This Assumption:** Put your important witnesses through extensive simulations of their testimony. Teach them new communication tools. Give them practice with the new tools. Assess how your witnesses will perform under interrogation. This is important data-gathering.

Effective witness preparation is a combination of teaching about it and doing it. It’s a combination of new concepts and new behaviors. It’s about feedback. It’s about practice. It’s about repetition. Most attorneys simply don’t think they have the time to do proper witness preparation. They usually have a better-sounding theory about why they don’t do it.

Teach witnesses to use a voice that is appropriate for talking to a neutral group of people (the jury) who are curious about what happened to the witness. The “tone” of voice, and the attitude should match an interested jury rather than those that would typically be used in talking to an opposition attorney or even their own attorney. Interrogation school teaches the attorney that it is often wise to get the witness irritated, impatient, angry, et cetera in hopes of getting the attitude and voice that matches those reactions.

Teach your witnesses that they need practice and training even though they almost always wish they were somewhere else. Teach them that they have an especially wise and brilliant attorney because he/she is doing this kind of preparation that most attorneys don’t do.

Teach your witnesses that probably 98% of witnesses can get significantly better with training. You will be shocked at how many supposedly good witnesses don’t do well when you run your assessment. You will be shocked about how rarely it’s a waste of time. You will consistently be glad you did it and so will your client.

## **False Assumption 10) Witnesses cannot change how they are, how they come across, and what type of people they appear to be.**

People vary their behavior more greatly than we typically think they do. These variations might occur across time or settings. Fathers might talk to their wives or children differently than to people at work. They may talk differently to their brother than other men at work. Witnesses might talk to students differently than they talk to interrogators trying to discredit them.

Witnesses can learn to show feelings that would help their cause but which are often hidden. Jurors often misread witness behaviors and habits. These falsely communicating behaviors can often be changed so the witness is better understood. And most of us have experience learning and performing a wide variety of new behaviors throughout their lives.

Witnesses can change their impact. And you can help them do it. You can pick out specific witness behaviors that contribute to jurors' false conclusions and you can change them. For example, teach the witness to lower his chin when he talks so he doesn't seem arrogant. Then have him practice with his chin down. Teach and practice looking at a jurors' face and not turning away.

Ask yourself, and have them ask when looking at their video, what behaviors are contributing to the feeling or conclusion of concern. Don't assume they look arrogant because they are arrogant. Assume that they seem arrogant because they are acting in certain ways and remember that those behaviors can change. Experiment changing the behaviors and study the impact.

Assess. Train. Practice. Coach. The more you do the better the witness will do and the more effective they will be. It will become easier and more natural but never easy or truly natural.

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## A Jury of Your Peers: Venue, Vicinage, and Buffer Juries

By Jason C. Miller

Many understand the concept of venue -- the place where a trial is to be held. A change of venue is a popular strategic move, such as in the movie *A Time to Kill* where the defense attorneys seek, and are denied, a change of venue that would move a black defendant from a majority white to a majority black county and correspondingly alter the jury pool. Few people (attorneys included) have even encountered the word "vicinage" (which is the place from which jurors are to be drawn). That may soon change as Michigan State University Law Professor Brian Kalt's recent legal scholarship is increasing public awareness of the concept.<sup>1</sup> Kalt first came to write about vicinage after encountering the case of Clarence Terrell.<sup>2</sup>

Many boundary lines can reflect substantial demographic shifts in potential jury pools. Detroit, Michigan is largely poor and black. Oakland County, Detroit's northern suburb, is mostly rich and white. Terrell was a Detroit native accused of misdemeanor assault of a police officer in the City of Detroit. Though there was no reason to suggest that a Detroit jury would be biased, Terrell was tried and convicted by an Oakland County jury because he committed the crime near the Oakland County border. A crime committed within one mile of a county line in Michigan may be prosecuted in either county, and this choice can radically alter jury pool demographics.



Kalt's research reveals that 18 other states (which cover a majority of America's population) have similar boundary-line criminal venue statutes. These statutes are generally not abused. However, in the case of Clarence Terrell, the abuse prejudiced the rights of the criminal accused and also harmed the community by blocking its right to resolve crimes committed within its own boundaries with its own jurors. The potential for abuse is too great, which is why Kalt has called for the repeal of these statutes. The potential for prosecutors to abuse these statutes to radically alter the demographics of the jury pool is simply too great to allow the statutes to stay in place.

Long forgotten rules about venue and vicinage could also help criminal defendants. The Sixth Amendment to the U.S. Constitution reads, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The problem occurs where this intersects with Article III, § 2, cl. 3 which requires federal criminal trials to "be held in the State where the said Crimes shall have been committed." Professor Kalt identifies a loophole he calls the "Yellowstone Zone of Death" -- where portions of Yellowstone National Park in the states of Idaho and Montana are, as a curious product of history, actually in the federal judicial district of Wyoming.<sup>3</sup>

Thus, a crime committed in Yellowstone, Idaho should be tried by a jury that lives in the state of Idaho and the judicial district of Wyoming -- basically, residents of the park. The problem is that the relevant portion of Idaho has a population of zero and the part of Montana covered by the district of

Wyoming has only a tiny population. Crimes committed in Yellowstone, Idaho are tried a convenient nine hour drive away in Cheyenne, Wyoming before Wyoming jurors. This practice seems to violate the letter of the constitution and some day a criminal defendant may use it as a way to get away with a crime. The only case to challenge this circumstance was settled before a decision could be reached.<sup>4</sup> The practice of trying a crime committed within (a portion) of the state of Idaho or Montana in front of a Wyoming jury may not survive future constitutional scrutiny.



Other curious government planning also leads to potential problems. For instance, the Texarkana Federal Courthouse is located in both Texas and Arkansas as it straddles the state line.<sup>5</sup> The problem with that courthouse is more likely to be the right jury sitting in the wrong room, rather than a genuine deprivation of constitutional rights through an altered jury pool.

Boundary-line statutes serve an important purpose in lending some flexibility to the administration of justice. After all, most borders are simply fictitious lines drawn on a map and in many circumstances it may be appropriate to try a case on the other side of the boundary. However, if these statutes are exploited to produce a jury pool more likely to convict the accused, then they take on a seedy character and judges should act to limit overzealous prosecutors. Those interested in the mechanics of developing a jury should watch carefully the application of vicinage rules and buffer statutes to ensure that an appropriately representative jury is selected for their clients.

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## Conservative Court Buffers Buffers from Batson

by Edward P. Schwartz

*Edward P. Schwartz (email: [schwartz@eps-consulting.com](mailto:schwartz@eps-consulting.com); website: <http://www.eps-consulting.com>) is a trial consultant from Lexington, MA. He also teaches a course on jury trials at Boston University School of Law and writes a regular column on trial strategy for Lawyers USA.*

In his brief note, “A Jury of Your Peers: Venue, Vicinage and Buffer Juries”, Jason Miller discusses a subject – vicinage rights – that might seem esoteric to many lawyers, but can have profound implications for criminal defendants. A venue is a trial location, but a vicinage is the geographic location from which jurors (and judges) are chosen, and whose rules of procedure apply at trial.

Mr. Miller’s primary focus is “buffer statutes,” which permit a trial to be held in a neighboring jurisdiction if the alleged crime took place close enough to the border. Along the way, he touches on two of my favorite final exam questions from my courses on jury trials.

First, if a defendant waives his venue right by requesting a change of venue (usually due to pre-trial publicity concerns), does that defendant also waive all of his vicinage rights, as well? The answer, according to the courts, seems to be “yes.” The jury is to be drawn from a fair cross-section of the population of actual trial venue, even should that population look very different from that of the crime’s location. The judge is free to apply local rules of criminal procedure (most importantly those governing jury selection), even should they differ from those employed in the original venue.

The second question is whether there are any Constitutional restrictions on the choice of a new venue. This relates to Mr. Miller’s (and Professor Kalt’s) concern that prosecutors will use buffer statutes to circumvent the requirements of *Batson v. Kentucky*. They might attempt to secure racially homogeneous juries simply by moving trials over borders into mostly white suburbs (obviating the need to use peremptory strikes against minority jurors).

Consider the case of Jerome Mallett, an African-American man, who was accused in 1986 of killing a white state trooper in Perry County, Missouri. Mallett sought a change of venue due to pre-trial publicity. The judge asked each side to submit the names of counties to which the trial might be moved. The District Attorney submitted the names of counties with very small African-American populations while Mallett’s attorney suggested counties near St. Louis and Kansas City with greater minority populations. The judge rejected both lists and moved the case to Shuyler County, along the Iowa border, where there are *no African-Americans*.

Mallett was convicted and sentenced to death by an all-white jury in Shuyler County. On appeal, Mallett argued, inter alia, that the judge’s decision to move the trial to Shuyler County violated his 6<sup>th</sup> and 14<sup>th</sup> Amendment rights under *Batson v. Kentucky*. After all, the judge’s decision effectively precluded any African-Americans from serving on Mallett’s jury. A special magistrate initially granted his appeal and ordered a new trial. The Supreme Court of Missouri, however, reversed on the grounds that *Batson* only applied to the use of peremptory challenges.

The Supreme Court of the United States denied certiorari, refusing to address the legitimacy of the judge’s venue decision. In a fairly rare move, however, Justice Marshall wrote a dissent of the cert denial (joined by Brennan), arguing that the trial judge was a state actor, operating within a system that permitted “those who are of a mind to discriminate” to do so. As such, Mallett should have been given the opportunity to make out a prima facie case of discrimination based on the totality of the evidence. Supposing he could meet that burden, the judge would then have to provide a plausible race neutral explanation for his choice of venue.

According to Marshall and Brennan, *Batson* applies to any jury selection procedure that could be employed in a discriminatory manner. To my mind, the judge's choice of Shuyler County constituted a clear *Batson* violation.

Alas, this logic did not carry the day. As such, the choice of venue has never been subjected to the Constitutional limitations of *Batson* and its progeny. Returning to the question of buffer statutes, I would argue that *Batson* *should* apply to requests by prosecutors to move trials across county lines (as it should have applied to Mallett's case). Such a logical (and quite small) extension of *Batson* would obviate some of Professor Kalt's concerns that such statutes will be employed to discriminate against minority defendants (and jurors). Given that the current Supreme Court is even more conservative than the one that refused to apply *Batson* in Mallett's case, I fear that such protection for minority defendants isn't coming any time soon. In the absence of such protection, I would support Kalt and Miller's call for a repeal of these buffer statutes.



The September edition of *The Jury Expert* unveils several firsts: our first reader-requested feature (on preparation of narcissistic witnesses); our first law student author (Jason Miller on buffer statutes); our first author from the Netherlands (Fredrike Bannink on solution focused mediation); our first article on training law students (the DePaul program); and our first Favorite Things (we couldn't choose just one). Help us stay fresh--send in your wishes for upcoming issues--what would you like to see? Tell [me](#)...we'll see if we can make it happen.

*Rita R. Handrich, PhD  
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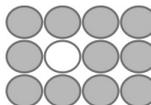
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