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

"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 phases "I mean" and "ummm" and the half read a transcript without these hesitations. In addition, some students where 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

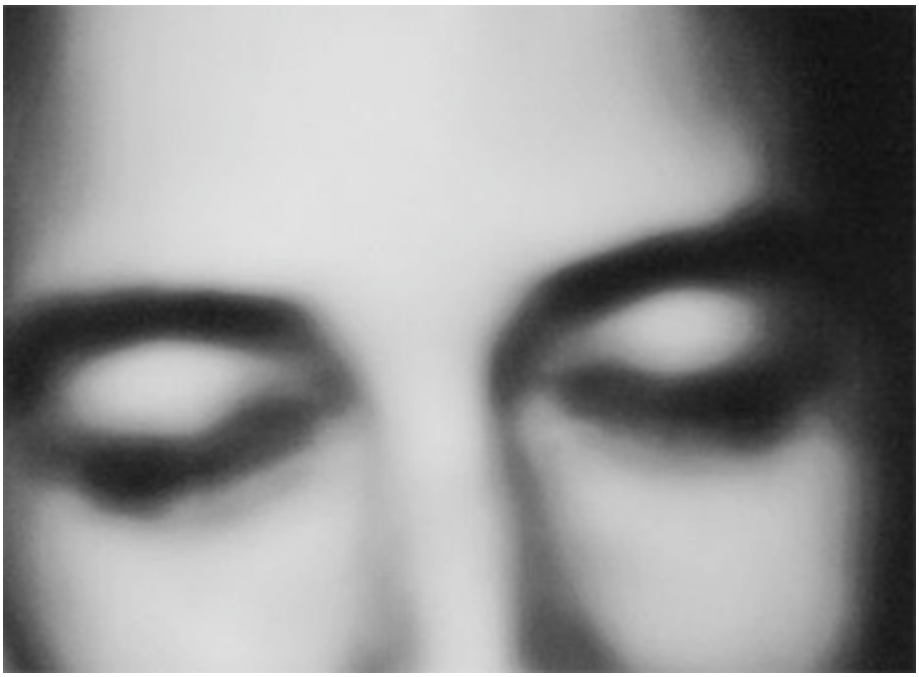
Wear them down. From brainwashing in POW camps to fraternity hazings, there are many ways that people use fatigue to get others to comply with a request (e.g., Taylor, 2004). These are extreme situations, but they rely on the basic human process of needing energy to combat social influences. Recent investigations 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 particular 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:

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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:

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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.

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
Editor, The Jury Expert

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