

Principles in Persuasion: Beyond Characteristics of the Speaker

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*"We are so clothed in rationalization and dissemblance
that we can recognize but dimly the deep primal impulses that motivate us."*

- James Ramsey Ullman

Strictly defined, persuasion is a deliberate effort to change a person's attitude. When we talk about persuasion we tend to focus on characteristics of the speaker – credibility, likeability, expertise, trustworthiness, and so on. And speaker characteristics are important. Without those things, there can be no persuasion. However, the ability to persuade is also dependent on other factors, including how the message is framed, characteristics of the listeners, and how the listeners influence each other. This article focuses on those issues and how it all applies to litigation.

How the Message Is Framed

In its most basic form, a trial consists of two people telling different versions of the same story. How each person tells the story – that is, how it is framed – plays a major role in how jurors react to the evidence.

People respond to examples. Providing examples and letting jurors come to their own conclusions strengthens their feelings on the issue because they feel like they have solved the puzzle themselves. Instead of just saying, "Steve is dependable," the attorney should provide examples of Steve's dependable behavior. For example, "Steve is the kind of guy who always arrives to work early and stays late when the boss needs him. In his six years with the company Steve has never taken a sick day."

In addition, examples provide anecdotal evidence, which trumps statistical evidence because anecdotal evidence is much more vivid. Say you are in the market for a new appliance – maybe a dishwasher. You do your homework and learn that Consumer Reports gave the best rating to a particular make and model that is within your price range. But before you pull the trigger on your new dishwasher, you find out that the reason a maintenance man has been spending so much time next door is

because the neighbor bought the same product and it has been nothing but trouble. After hearing the neighbor's horror story, would you still buy one?

We would like to think that our decisions are made based on the more reliable source (e.g., consumer satisfaction ratings) but the vividness of the anecdotal evidence creates a more lasting impression than statistics. The same is true for jurors. A corporate defendant may have the best safety rating in the industry but that rating can be rendered meaningless by the vividness of the plaintiff's experience. The most persuasive message is one that is presented as a case study and then supported by the statistic evidence, instead of the other way around.

Monetary anchors also shape the way jurors perceive the case. A monetary anchor is a numerical value that influences the perception of another (sometimes unrelated) numerical value. During deliberations, jurors use the anchor as the starting point of negotiations within the group. Anchors most often come from a number suggested by an attorney during closing arguments, but they also come from less predictable sources, such as witness testimony or even the first number mentioned during deliberations. Once the anchor is identified, jurors adjust up or down depending on how they feel about the case. Theoretically, a higher request by the plaintiff attorney will lead to a higher award. However, there is a point at which the suggested anchor will be disregarded. If the attorney asks for an amount that jurors deem unrealistic, they will completely disregard the number and the attorney's credibility is diminished.

Car dealers are the kings of monetary anchors. If the sticker price is \$30,000 you will value the car at that amount and then be thrilled if you negotiate the price down to \$27,000. If the same car has a sticker price of \$33,000 you will be happy paying \$30,000. The only thing that has changed is the anchor. Now assume the same \$30,000 car had a sticker price of \$50,000. In all likelihood you would never enter negotiations for the car because of the unrealistic starting point. Whoever listed the vehicle for \$50,000 will have lost credibility.

This principle applies to damage awards as well. Attorneys that set the starting point too high (plaintiff) or too low (defense) will lose credibility and jurors will completely disregard the number. Therefore, identifying the optimal number is critical. Jurors almost always adjust away from the anchor; as oppose to accepting the specific number. However, they rarely adjust enough to account for the influence of the anchor. By identifying the jury's threshold and accounting for the inevitable adjustment you can select an anchor that will lead jurors to the optimal award. Mock trials are one way to identify that threshold.

Interestingly, demands are viewed as more valid if the number is not a perfectly round number. Asking for \$10 million dollars seems arbitrary. Asking for slightly more (\$10.2 million) or slightly less (\$9.8 million) gives the appearance of careful consideration. That does not mean you should ask for an amount right down to the penny. Doing so seems petty and makes it more difficult for the jurors to remember your request. After all, if they cannot remember it, there's no chance they will use it as the anchor.

Finally, you should always explain how you came to your dollar figure. If it is a reasonable justification, you can shape the way jurors will discuss damages. Jurors want to know where the numbers originated. For economic damages the amount usually speaks for itself. Jurors may not agree with the cost of the life care plan or future lost wages, but at least they understand what the numbers mean. Noneconomic damages are more complicated. For the jury to accept your suggestion, you must tie it to something tangible. Just pulling random numbers out of the sky does not help the jury. They can do that on their own. For example, if economic damages are high, asking for the same amount in noneconomic damages is often effective for the plaintiff. The same is true for the defense if economic damages are low. Asking for the same amount is one logical way to put a price tag on something as ambiguous as pain and suffering.

Characteristics of the Listeners

Persuasion requires a willingness to accept an idea, which is influenced by what the person already believes. Therefore, it is easier to persuade someone when you understand that person's motivations, interests, and beliefs, and then you tailor the message to coincide with those preexisting beliefs.

The way a message is delivered should depend entirely on the audience because jurors are less likely to scrutinize information that is in line with their own values and beliefs. In almost every case there are issues in which jurors can relate, and issues in which they have no experience. Either way, the issues must be presented in a way that is understood by the least "informed" juror. For example, most jurors will not have a lot of personal experience with complex financial transactions, but they will all understand the concept of "pushing around the little guy" or "trying to get something for nothing."

To do this, you must understand your jurors. Unfortunately, the easier information is obtained from a juror, the less useful that information will be in predicting the extent to which the juror will understand your case. Demographics (i.e., any measureable characteristics of people within a society that make it possible to group them based on categories) are relatively easy to obtain but generally worthless with regard to their predictive qualities. The problem with disregarding demographics altogether is that the courts usually do not allow enough time during voir dire for the attorney to explore more valid sources of bias. That is, the attorney is not allowed to base her decision on the juror's race but often doesn't have enough time to base her decision on anything more meaningful.

Relying on stereotypes is a strategy that helps us make judgments more efficiently. The problem is that stereotypes are often misleading. We label a person in with a particular group and then assume he has all the same characteristics. From there we notice behavior that confirms the stereotype and fail to notice behavior that does not confirm the stereotype. This is known as confirmation bias. So if you believe old people are bad drivers, that stereotype will be reinforced every time you see an elderly driver going too slow or going over the curb while turning. What you do not notice are all the times that elderly drivers blend in with everyone else. This same principle can be applied to race, religion, gender - pretty much anything.

So demographics are used to make predictions about people based on stereotypes, and stereotypes are poor predictors. However, there is nothing wrong with using the stereotype to generate questions. Striking a juror because the color of his skin is both unconstitutional and unwise. The color of a person's skin does not define who that person is. However, it may be reasonable to assume that a person's perception of the world was influenced by, for example, growing up as a minority in a predominately white community. If that is somehow relevant to the case then you should ask questions about his experience as a minority. You are using information about the juror's race to ask relevant questions about his life experiences. However, any potential challenges would be based on those experiences, not his race.

Instead of using your own stereotypes to decide which jurors you do not want, find out about their stereotypes and use that as a bases for removing them. All men do not think the same. Nor do all teachers or all nurses. So striking someone for that reason is silly. Instead, you want to know which jurors believe, "All lawsuits are frivolous." Or, "All companies are greedy." Those opinions are also based on stereotypes and knowing a particular juror believes those stereotypes is valuable information.

Experienced attorneys tend to be the most prone to rely on stereotypes because they have more anecdotal evidence from past cases. “No way I will ever let another engineer sit on my jury! I got killed by an engineer that ended up being the foreperson.” It is true that engineers tend to think logically and expect things to fit together nicely. But that does not mean engineers are always bad for the plaintiff.

Stereotypes also give the impression that a particular juror will identify with your client (e.g., they share some hobby or experience). However, it is possible for a juror to have a shared interest but still be critical of your client. Risk takers, such as motorcycle riders, are a good example. On the surface, a plaintiff’s attorney might want risk takers on the jury because they would identify with the plaintiff, who is also a risk taker. But risk takers are just as likely to look at what happened to the plaintiff and say, “That’s the chance you take.” Their interests are the same but their perception of the lawsuit could be very different. If so, the juror is likely to treat the plaintiff more harshly than anyone else on the panel.

Life experiences are tied to demographics because we experience the world differently based, in part, on how we are treated by others. Since people treat us based on what they see (and, to some extent, how we let them treat us), life experiences are linked to demographics. Taking it a step further, our life experiences shape our view of the world and our view of the world shapes our behavior. When you add in other variables (e.g., values and personality), you are left with the “chicken or the egg” argument. A twenty-year veteran of the police department has lived most of his adult life within certain rules and boundaries. Does he like rules because he was a police officer or did he become a police officer because he likes rules? On some level it does not matter but it illustrates the relationship between attitudes and behavior. If you are trying to predict behavior (e.g., juror decision-making) based on the person’s attitudes, you must consider issues like values, life experiences and personality.

How the Listeners Influence Each Other

Fortunately, no single juror is likely to rule over the group with an iron fist. Power and control (in the absence of physical force) is an illusion. A person has power because other people give it to him. With that power, he is in the position to influence others. If you take away the power, the ability to influence will also disappear. The people who maintain power for an extended period of time do so through cooperation of others. During deliberations, power can be earned with a strong, convincing argument. But the strength of the argument is often less important than the charisma, likability, and perceived expertise of the individual juror. The most persuasive jurors (and people in general) are those with perceived status who know how to use the cooperation of others to manipulate conditions within the group. Of course, this only works in ambiguous situations. If something is obvious, convincing people otherwise is unlikely. But how often are jury issues obvious?

In addition to the influence of the powerful, appropriate behavior within a group is largely determined by the behavior of others. This is known as social proof. For example, in some courts it is customary for everyone to stand when the jury enters the courtroom. In other courtrooms everyone remains seated. If you are new to a particular courtroom you will just do what everyone else does. Parking behavior works the same way. If you think street parking is legal but there are no other cars parked along the street you will probably keep circling until you find an area where other people have parked. All it takes is for one person to park in the street and everything changes. We cue off of the

behavior of others. To see this in action, the next time you are in a crowded area, look up at the sky. No need to point or do anything else to draw attention to yourself. Just stare. Within seconds everyone around you will be looking straight up.

Pluralistic ignorance works the same way. Since people cue off the behavior of others, you are much less likely to receive help from a group of strangers than you are from a lone stranger. For example, if your car brakes down on a small road with very little traffic, there stands a good chance that the first person to drive by will stop and offer to help. If you brake down on the busiest road in town, you are probably on your own. It is not because people driving on small rural roads are friendlier (although that may be true as well). The difference is two fold. First, on a busy road the perceived responsibility of any individual is reduced. Each person can justify not helping because there are so many others there to help. Unfortunately, everybody is saying the same thing: "Somebody should stop and help that guy." On a rural road, however, it is more difficult to diffuse that responsibility. Second, ambiguity inhibits involvement. Unless we see the car's tire blow out we really don't know why he pulled over. Maybe his kid is going to the bathroom in the woods. The ambiguity makes it easier to justify not helping.

The most disturbing consequence of conformity to the behavior of others during deliberations is situations in which more than one juror did not speak up because he thought he was alone. We have seen this happen in mock trials and have heard jurors talk about it in post-trial interviews. That is, two different jurors will say something to the effect of, "I didn't really agree with the verdict but everyone else seemed so sure that I just agreed with them." Had the two jurors known that someone else felt the same way, the verdict may have been very different.

So, a juror is less likely to speak his mind if everyone else seems to think otherwise. But, if one person agrees with him, it can open the floodgates. In that regard, jurors are like a stampeding herd. For a herd of zebras to change directions all it takes is for one zebra at the front of the pack to make a slight turn to avoid hitting a tree. That slight change has a rippling effect on all the other zebras and, suddenly, they are moving in a completely different direction. With juries, all it takes is for one person to present a new idea and it can send the entire group in a completely different direction. By encouraging jurors to stand up for what they believe during deliberations, you increase the likelihood of minority opinions being expressed.

Jurors also tend to be persuaded by information that seems to persuade others. If one juror notices another juror nodding his head in agreement while a witness is testifying, the juror will be more likely to be influenced by the witness's testimony. The same is true if the nodding comes from the gallery. If spectators seem to think something is important, jurors who notice them will pay more attention to what is being said. It is the same as canned laughter. Some television sitcoms have fake audiences. By playing an audio recording of people laughing, viewers watching on television will rate the program funnier than when there is no canned laughter.

Jurors' influence on each other can lead to group polarization, which is the tendency for arguments and decisions to be more extreme in a group than what was initially experienced as an individual. That is, opinions become more radicalized after discussing an issue. This is counterintuitive because one would think that extreme opinions would be minimized when subjected to the rigors of other opinions. Instead, extreme opinions become more extreme after learning that other people support your beliefs.

We see group polarization rather clearly when discussing politics. The more a person expresses his love or hate for a particular administration, especially around like-minded people, the stronger he feels about the issue. The validation of his opinion serves as a reinforcement of his beliefs and his beliefs become more extreme. Within the context of jury deliberations, polarization can occur for either liability or damages. If all twelve jurors agree on liability they will move forward with great confidence. Hearing that the other eleven jurors agree will reinforce each individual opinion and they polarize in that direction. However, if the jury is split on liability (say, six to six), it is likely that the two groups will polarize on opposite ends of the spectrum. Each group of six will reinforce each other within each group, driving the groups further apart, and possibly leading to a hung jury.

One possible explanation for group polarization is a phenomenon that Leon Festinger called social comparison. According to Festinger, people feel the need to evaluate their abilities and opinions. When there are no set rules or guidelines in place, they compare themselves to others. So if you take a test and receive a grade on a one to 100 scale, you have a general idea of how well you did. However, if it is an essay that is graded on a random scale, say one to 45, you will want to compare your score to others who were graded on the same scale. For most of us, if we learn that our score was lower than others, we will make the necessary adjustments on the next assignment to maintain a more desirable position within a group.

If an individual juror considers himself “middle of the road,” but then finds out his opinion is rather conservative as compared to others in the group, he will likely adjust to a more liberal position to keep himself in the middle. The problem is, like most things, shifts can be affected by arbitrary information or events. For example, people tend to speak in proportion to their status in the group. However, status is not necessarily determined by knowledge or expertise. Just because someone is quick to express his opinion does not necessarily mean he has something intelligent to say. But if the extreme opinion is expressed early in deliberations it can cause everyone else in the group to shift in that direction. According to social comparison, jurors gauge the position of others and then shift to maintain the desired position in the group.

The best way to prevent group polarization is to encourage dissenting opinions. In a group, congruent opinions are much less valuable than incongruent opinions. Unfortunately people are less likely to share an opinion if it is not in agreement with the majority. Because juries tend to be hierarchical, a small group of leaders can quickly silence dissenters. When groups make poor decisions, it is almost always because the leaders did not allow others to express their opinions freely. It is the diversity of opinions that makes group decision-making superior to individual decision-making. If there is no cognitive diversity then there is no point in having a group. Throughout history, the best leaders have been those who encourage dissenting opinions and listen to others (especially subordinates) before revealing their own position. A group that is led by a leader who is not interested in the opinion of others does not benefit from the collective knowledge of the group.

For the same reason, senior partners should get the opinions of junior associates before making their own opinion known. Doing so reduces the likelihood of conformity because of in-group pressures. If you really want to know what a subordinate thinks, get his opinion before giving your own.