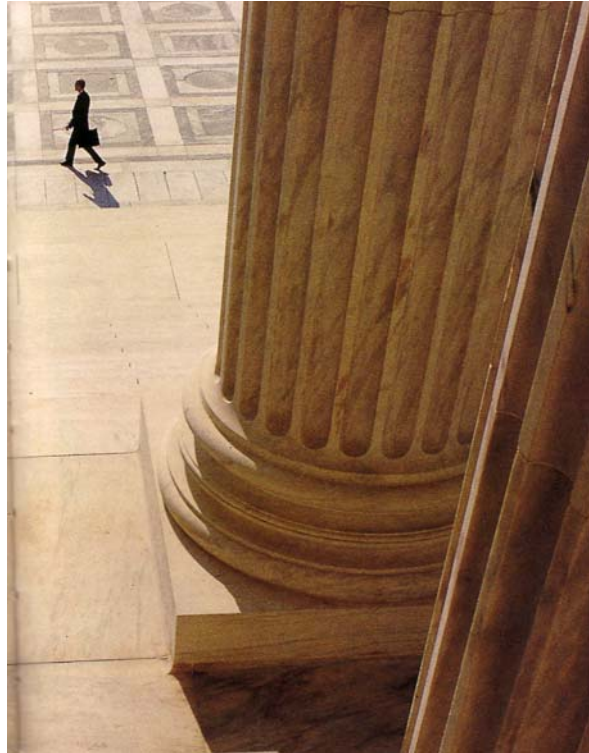


Creating and Changing the Perceptions of Judges, Jurors, and Arbitrators



By
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“In presenting a case in trial, it is more important to be concerned about the concepts and the connotations of our presentation, than the actual words used. Once the concepts are right, then the words will follow.”

There are many interesting tools that we have created or used over the millennia to create, maintain, and change perceptions. These tools are derived from our understanding about our cognitive (thinking) processes and our affective (feeling) processes. We will look at three of these tools that are most useful in the courtroom. They are language, schema and affect.

The Importance of the Right Language

Mark Twain once said, “The difference between the right word and the almost right word is the difference between lightning and a lightning bug.”

Language is a powerful communication tool in many respects. In a very basic way, it helps us to organize our thoughts and information in systematic ways. Language can be used in the form of words, concepts, or style of expression. Words convey meaning and concepts and the same words can be spoken or displayed in many ways. Language is flexible and, in this sense, is a tool, not a constraint.

As children, we acquire language early on as symbols and concepts. It is not until later that we learn the spelling of the words and the rules of grammar. In presenting a case in trial, it is more important to be concerned about the concepts and the connotations of our presentation, than the actual words used. Once the concepts are right, then the words will follow.

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However, many times as lawyers we perceive language as a technical construct rather than a free flowing modern of communicating. We tend to be hyper-technical about our use of particular words that fit legal patterns rather than focused on central concepts and messages that jurors will need to hear and see if we are to be persuasive.

Understanding Schemas

As human beings, we tend to form preconceptions and expectations around our previous life experiences. Technically, psychologists refer to these preconceptions and expectations as schemas. A stereotype is a type of schema.

A schema is a group of concepts and perceptions and the systems we use to organize them. They are a type of mental shorthand. Schemas help us to quickly make sense of the things that are happening around us. For example, when we are following a car down the freeway and the car begins to swerve from a blown tire, we consult our schemas to try to understand what is happening and what, if anything, we need to do about it.

Depending upon one's proximity to the event, evasive action might be prudent as one senses danger based upon past direct or indirect experience. At some point, one might consider the reasons that the tire blew out. Was it an old tire that should have been changed? Was the tire under inflated? Was the tire manufactured improperly?

Interestingly, all of these thoughts might be prompted from one's perceptions of a single event. Our brains tend to store information in an order that seeks to make sense or order out of life's

events and to avoid disorder or inconsistencies.

When judge, jurors, or arbitrators are listening and watching your trial presentation, they are constantly testing and comparing the thoughts and messages in your presentation with their own life experiences in order to make sense out of the presentation. If there is an identical match between the decision makers' schemas and the messages in the presentation, they will readily accept the new information. If the decision makers' schemas are different from the messages or ideas in the presentation, they will generally feel uncomfortable with them and may even reject them. If the judges, jurors, or arbitrators have no schema to compare the ideas in the presentation to, they will consider the attendant circumstances and how much they trust the presenter in order to form a new schema. Or they might reject the ideas in the presentation altogether.

Consider this example. If a trial lawyer tries to paint his corporate client as a company that makes decisions based upon their business interest in keeping customers happy, judges, jurors, and arbitrators will likely accept the message. This message will make sense to them, based upon their own life experiences. On the other hand, if the trial lawyer tries to paint his corporate client as a company that makes decisions solely on the basis of humanitarian considerations, these same decision makers will likely reject the message. Their experience tells them that this message is not true.

When there is a match between the decision makers' schemas and the messages, the relationship between these decision makers and the trial lawyer is enhanced. When they reject a message, however, their relationship with the trial lawyer suffers.

One of the primary reasons for conducting pretrial judge, juror, or arbitrator research is to identify the schemas that these decision makers will use to process the case and reach a decision. We have learned through experience that when we try to guess the schemas courtroom decision makers will use, we are often wrong. Scientific judge, juror, and arbitrator research also helps us to identify which of the schemas decision makers will use will be dominant in reaching a verdict.

Judges, jurors, and arbitrators, like the rest of us, often form schemas around subjects. Consider the example of banks. With reference to banks, courtroom decision makers expect to see a bank president, loan officers, tellers, vaults, cash drawers, expensive rugs, and elegant wood paneling. We expect banks to make loans to people with good credit and to deny loans to people who have bad credit. We often expect bankers to be more interested in making money than benefiting society. Besides these perceptions, each of us has many other perceptions of banks and the people who work there. If a trial involves a bank or banking issues, these schemas will come into play. The question, then, in pretrial development of the case is to discover ahead of time how these schemas and representations will figure into decision makers' thinking.

Schemas are formed primarily by perceptions and ideas that have been related to us by others. Socialization is perhaps the most powerful influence on how schemas (and stereotypes) are formed, maintained and changed. The significant people in our lives have a profound influence on how we view the world.

Individual perceptions held by courtroom decision makers are highly individualized. Even when the facts of a

case are not disputed, each judge, juror, or arbitrator will likely have a different version of the same schema to figure out what happened, why things happened as they did, and what the verdict should be. These schemas are pre-existing. Therefore, the job for a trial lawyer is to set the stage with powerful messages that will cause a judge, juror, or arbitrator to put these schemas into motion.

Interestingly, within the framework of our schematic structure often lies the key to changing attitudes or perceptions. Our value structure forms the backbone of our belief system and can often be of great use to a trial lawyer who wishes to change the perceptions that jurors might have at the outset of a trial.

Consider the example of a medical malpractice case set for a jury trial brought against a hospital, and an OB/GYN relating to brain deficiencies suffered by a baby girl. In the facts of our case, we discover that the mother, a lawyer, had had a fairly normal pregnancy until the morning of the delivery. At 6:00 a.m. she called the doctor's office to report bleeding that concerned her. A nurse returned the phone call and after some discussion determined that the bleeding was slight and not abnormal. Several hours later the mother went into labor and was taken to the hospital for delivery. Within less than 12 hours, the nursing staff noticed that the baby's blood chemistry showed signs of brain damage due to oxygen depletion and they began treating her immediately.

Clearly this is a case where causation would be in issue. But jurors have little experience with the professional side of pregnancy and hospitals, depending upon their other life experiences. Research and experience tell us that most jurors will come to one of three conclusions. They will either

believe that the hospital is omnipotent and could have prevented brain damage altogether, that the cause of the brain damage was apparent before the mother arrived at the hospital and that the hospital could not be liable, or that brain damage is simply an act of God. In order to decide causation, therefore, jurors will compare the information learned about the case to their schemas, which are limited by their knowledge about the subject.

Research and experience also tell us that juries decide in favor of medical malpractice plaintiffs in fewer than one case in three and their decisions on liability are not related to the severity of the injury suffered by the plaintiff. Furthermore, studies have shown that jury verdicts in medical malpractice cases coincide with the findings of medical investigations of the same events. This tells us that for most jurors, the schemas they have of health care providers are historically positive.

The Effect of Affect

The last tool that we will discuss is affect. In contrast to our thinking processes, we share other experiences with jurors through our feelings. To demonstrate the differences, let's assume that you missed an important filing deadline in a trial court. On one hand, you know what happened factually from your cognitive processes. On the other hand, you are probably quite upset and perhaps even frightened about the possible consequences. These emotional reactions or emotional states we call affect.

In our example, the cognitive processes brought about the emotional state because we have learned from our experience to associate the two together. In other words, we have learned to link certain cognitive thoughts and

perceptions to certain sets of emotions. The emotions only come as a result of our perception that a certain state of events or facts exist.

Now let's work on changing the perception and observe what happens. What would happen if the trial judge assigned an order extending the deadline? The facts have now changed. Our perception of the state of the world has changed. And of course, our mental state changes from anxiety to calm.

Let's see what happens when we apply these principles to a particular case. This time let's consider a contract and fraud dispute between two businesses. One company is a Fortune 500 company that manufactures computer hardware and software. The company uses small companies to manufacture certain parts of their computer equipment. One such small company complains that the big company promised to order 1,000,000 parts a year for 10 years. It claims that in reliance on this promise, it borrowed and spent money to expand its plant size and machinery capacity. It also complains that the big company now orders only 200,000 parts per year. The big company replies by saying that the 1,000,000 parts number was only a projection, not a promise. Furthermore the big company says that it would order more parts when the economy in the industry improved and its customer demand increased.

What will jurors think? How will they feel about the big company? Will they mistrust the officers of the big company under the assumption that officers of big companies will tell a lie just to protect their jobs? Will they feel sorry for the small company because it had less power and control? Will they believe that the drop in the number of parts ordered was due solely to the

unexpected changes in the industry, and therefore, not a breach of contract or result of fraud?

To be sure, each new set of facts and circumstances in the case will prompt different cognitive and emotional responses from jurors based upon their attitudes, life experiences, personality traits, values, and demographic influences. The keys to success, therefore, lie in understanding the jury's attitudes, life experiences, and beliefs. By understanding which attitudes, life experiences, and beliefs will dominate the jury's thinking, we have a better chance of developing a targeted presentation that will be persuasive. In addition, by understanding the breadth and depth of thinking or feeling about the issues that a jury will experience, we can shape the arguments and communication opportunities so that they coincide with jurors' schemas as well as their cognitive and affective processes. This important information about jurors is also one of the objectives of pretrial jury research.

The construction of a powerful argument is the product of systematic analysis and methodical development of messages and information that can be communicated effectively. An unforgettable example is those powerful words, "If it doesn't fit, you must acquit."

About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

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The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, ***Courtroom Psychology and Trial Advocacy***, published by American Lawyer Media.

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