



The *what*, *why* and *how* of persuasion

First, tell them why they should care. Then give them decision-making information that is memorable. And be quick about it

BY JOHN P. BLUMBERG

We are in the business of persuasion. Most lawyers believe that the nature of persuasion is to present facts and that “the best argument will win.” When you have finished this article, you will realize that the nature of persuasion is really quite different. Why should you read this article? Because you will learn the shocking truth about how people make decisions that will forever change the way you approach the task of influencing others, whether it is a jury, a spouse, an employee, a boss or your children. In short, you will realize that before there can be persuasion, the listener must be willing to accept information. Therefore, persuasion is the art of preparing the listener to be receptive, and then presenting the information in a context that is so memorable that it sticks. And, by “information” I mean the facts that will form the basis of the conclusions you want your audience to reach.

We will begin our journey with a recollection of what most of us recall about miniature golfing (and what probably influenced me not to become a golfer): the windmill, the drawbridge and the clown’s mouth. The task was to putt the ball down the path before the windmill blade got in the way, the drawbridge went up, or the clown’s mouth closed. (Just thinking about it still makes me anxious.) What does that have to do with persuasion? Everything! You must insert your information at the precise moment that your listener’s brain is most open to receiving it. If you present the same information at the



wrong moment, it might be ignored, forgotten, or worse, rejected.

The goal of persuasion is acceptance. And, like a combination lock, acceptance happens when everything lines up. The idea here is that a listener will not accept information when the circumstances, context or timing are wrong. Hence the expression: “*This is not the time or place.*” David Ball’s treatise, *Damages 3*, describes the importance of “sequencing” in the presentation of information.¹ He deals with what to present and how to do it. “What” and “how” are important in every presentation, but perhaps more important is “why.”

The *why* of persuasion

There are two elements that most companies will present to market their product or service: *what* and *how*. *What* the product is and *how* it is made or rendered. For example: “We sell baby food (what) that we make by using the best ingredients (how).” And, as lawyers, we present *what* happened and *how* it happened. For example: the plaintiff was injured (what) when the defendant drove through a red light (how). But what is missing from both examples is *why*. Why should a customer buy the advertised brand instead of another brand, and why should a jury want to find in favor of plaintiff and award damages?

Although the human brain is a very complex organ, there are two parts that are fairly well known: the left brain and the right brain. I will greatly simplify the description by identifying them as the *rational* brain and the *emotional* brain. The rational brain comes up with the *reasons* that its owner should do something, but the *emotional* brain makes its owner desire, empathize and fear.

The elephant and the driver

I recently traveled to Thailand and had the opportunity to visit an elephant camp. I learned how to get on the elephant, give commands and ride. Although I had some influence on starting, turning, backing up and stopping, at no time did I really believe that I was in control. In their book, *Switch: How to Change Things When Change is Hard*, Chip Heath and Dan Heath describe our



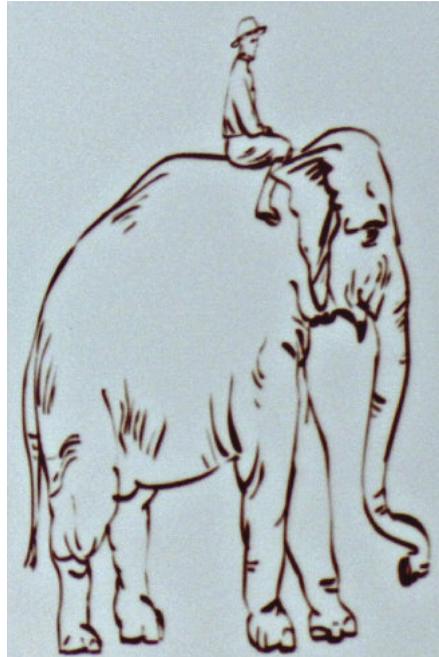
emotional side as an Elephant and our rational side as its Rider. “Perched atop the Elephant, the Rider holds the reins and seems to be the leader. But the Rider’s control is precarious because the Rider is so small relative to the Elephant. Anytime the six-ton elephant and the Rider disagree about which direction to go, the Rider is going to lose. He’s completely overmatched.”² The emotional will nearly always overrule the rational.

When a person falls in love, it is a cascade of *feelings* that emanate from the *emotional* brain. But when the person justifies why to create a committed relationship (e.g., he’s honest, hardworking and reliable, or she’s talented, caring and funny) it is the *rational* brain at work. Which one drives the other? It’s a good bet that the rational brain doesn’t persuade the emotional brain. So, does the emotional brain drive the rational? When persuasion is involved, the answer is yes.

If a car buyer doesn’t get a good *feeling* about that Audi, no amount of rational thought will result in a sale. Quite the opposite: It’s the good feeling that results in the rational brain coming up with good reasons to spend the money. (It’s safe. It’s got good fuel economy. The resale value will hold up. I’ll look successful if I drive it, etc.) If we accept the proposition that the emotional brain drives the rational brain, an appeal to the rational brain in hopes that it will influence the emotional brain will likely be unsuccessful. Stated another way: putting the cart before the horse will not result in getting the product to market and will not persuade the jury.

Start with *Why*

In his book, *Start With Why*, Simon Sinek explains that when a customer experiences an emotional connection to the product, he or she will not only buy it, but will remain a loyal customer, even though the competition’s product may be less expensive or have other desirable features. The theory behind this conclusion is that the emotional brain has made the decision and the rational brain is left to come up with reasons to justify the decision. And



when the listener experiences a feeling, the result can be “don’t confuse me with the facts because I’ve made up my mind.”

So, how can this phenomenon be applied in the trial of a lawsuit? By speaking to people’s *feelings*. David Ball and Don Keenan have explored this subject in their groundbreaking book, *Reptile*. They advocate that for years, the defense has won cases they should have lost by playing on juror’s fears, and that the same techniques can be used against the defense. This, they write, is the appeal to the reptile brain that is concerned with survival. And the companion to *Reptile*, is *Rules of the Road* by Rick Friedman and Patrick Malone which discusses recipes for how to construct practically foolproof appeals to rational thought.

But neither the *Reptile* approach to fears and survival, nor the *Rules of the Road* approach to rational thought contains the powerful connection of *why*. Why start with *why*? Because it can appeal to the emotional brain. Apple’s Steve Jobs is a master of this approach. Remember the ad that introduced the Macintosh computer in 1984? The young woman running

through the audience of grey-suited men to throw a hammer into the screen of the droning leader? And the message, “Why 1984 won’t be like 1984.” It appealed to women, it appealed to those who wanted to separate themselves from what *everyone else* was doing, and it appealed to those who wanted something *really cool*. Nothing rational there. Just something that gave people an urge and a desire. These are *feelings*. If the message begins with *what* or *how*, the rational brain will take over and begin a debate. But if the message begins with the right kind of *why*, the emotional brain will be in control.

So what? or Why should I care?

How can your case be presented in the context of *why*? To begin with, most jurors are thinking (consciously or subconsciously) “*Why should I care?*” So, the underlying theme of every case must answer that question. People care about things that appeal to their self interest and that matter to them. Self interest is emotional. Benjamin Franklin observed: “*If you would persuade, you must appeal to interest rather than intellect.*”

The classic appeal to self-interest is the so-called “golden rule” argument (“how much would you charge to suffer this pain.”) Although it is prohibited in relation to awarding damages,³ there is no case that prohibits the golden rule argument in connection with liability issues. But even if you are hesitant to use the word “you,” an equally effective substitute is “the community.” Many examples are found in *Reptile* by Ball and Keenan, e.g., *allowing this conduct will endanger your children*. Another example in a case involving a catastrophically injured, but uninsured, victim might be “Should the community be saddled with the cost of care, or should it be the responsibility of the negligent defendant?”

Winning by science instead of by accident

Much of human knowledge is based on experience rather than lecture or



study. I recall visiting a botanical garden on the island of Kauai where only native Hawaiian plants and trees grew. There were descriptive signs in front of the flora and fauna explaining that this plant aided in digestion, that plant relieved pain from burns, and another plant would cause a painful death. I wondered how the ancient Hawaiians came to this knowledge. Most likely by experience. A friend ate the plant and his upset stomach went away, and when someone ate another plant, she died. So, through the years, a system of identification came into being.

That's how most of us have learned to try lawsuits. For example: "When Gary used this argument, the jury awarded a million dollars, so I'll use it." Or, "when I asked that question on cross-examination, I got hammered, so I won't do that again!" But what if we could craft our trials based on the science of how the brain works? After all, it's the brain that makes the decisions; shouldn't we try to present our arguments and our evidence so that the listener's brains are receptive? Stated another way, it's best to walk through a door when it's open, not closed.

How the brain functions is *science*, and *scientific researchers* have studied how the brain works. John Medina is one such scientist. Dr. Medina is a developmental molecular biologist who is the director of the Brain Center for Applied Learning Research in Seattle. His fascination in how the mind reacts to and organizes information resulted in his book, *Brain Rules*. Dr. Medina's book discusses the science behind the brain's acceptance of information, and then translates it in simpler terms, *e.g.*, "The brain doesn't pay attention to boring things." And what does he believe are the most common communications mistakes? "Relating too much information, with not enough time devoted to connecting the dots. Lots of force-feeding, very little digestion. This does nothing for the nourishment of the listeners, whose learning is often sacrificed in the name of expediency." His observations are relevant and valuable to those who are *persuaders*. I have tried to apply Dr. Medina's discussions

about the science of the brain to what we do as trial lawyers.

Timing: The 10-second, 10-minute rule

Everyone's brain is remarkably similar regarding when it is most receptive to information and how long it is inclined to pay attention. The first ten seconds of a message find the most fertile soil for impact. That's when the brain decides whether to pay attention. Medina explains that this is probably the result of early man who had to be alert if he wanted to avoid being lunch for a hungry carnivore. Those who were alert, survived, and we are their descendants; those who weren't alert, didn't survive. Think about it. You're home alone and about to fall asleep when you hear something downstairs. Or, the phone rings at 2:00 a.m. Or, you hear the screech of brakes. All of the senses are heightened: sight, hearing, smelling, feeling. You are immediately alert because your early ancestors were alert. As persuaders, we should take advantage of this sensory heritage.

In the first ten seconds, the imprint must be made. David Ball, in *Damages 3*, advocates that the beginning of opening statement is the time to present "the rule," *i.e.*, "The rule is that . . ." This must be presented in a way that will immediately appeal to the emotional brain and satisfy the question, "Why should I care?" In a medical malpractice case involving a child, it might be, "The rule is that when a surgeon is going to operate on a child, he must first make sure that he is cutting in the right place, because not doing so might cost the child his life."

Once you have the listener's attention, then, according to John Medina, you have only ten minutes before the listener's attention will fade. His award-winning solution to the attention loss was to create ten-minute modules. Each module begins with the *gist*, or general idea of the core concept, followed by an explanation of the detail. The detail is made understandable by use of *examples* that the listeners can relate to. Then, before the expiration

of a ten-minute segment, a *hook* is employed that is both relevant and which triggers an emotion, such as fear, humor, happiness, nostalgia or incredulity. The hook can be a look backward, or forward. And throughout the presentation is a roadmap of "where are we now?"

The application of this technique in trials requires conscious planning of nearly every aspect of the trial: opening statement, witness examination and argument. Loss of attention means your message is not being received. But using the structure of *gist, detail, and examples*, spaced in ten-minute segments with a "where are we now" display board, can keep the jury alert and receptive.

Imprinting the memory with sensory stimulation

The brain does not easily remember random facts that are presented in a boring fashion. One way to keep the listener's interest is to stimulate the senses. When a fact is paired with a sensory reference, it is more memorable. To heighten the impact of an important event, engage the jury's senses:

When he *pushes* open the door of the nursing home, he *smells* the acrid odor that bleach never quite covers up. He *hears* moaning coming from his grandmother's room. When he *walks* in, he *sees* her lying on the floor in a pool of blood. He *kneels* down and *hears* her say . . .

Avoiding the collision between rational and emotional messages

In their book, *Made to Stick*, Chip Heath and Dan Heath described research that sought to discover whether people would donate less money to charity if the request was preceded by statistical information. "The results were shocking. The mere act of calculation reduced people's charity. Once we put on our analytical hat, we react to emotional appeals differently. We hinder our ability to feel." Obviously, when asking a jury to award damages, we must present



calculations that include both economic and non-economic compensation. The calculation of economic damages is based on cold, hard facts, but the jury must be emotionally engaged to feel that such damages are warranted. The award of non-economic damages should be driven by emotion that jurors can justify with rational thought. But if the act of calculation hinders the ability to feel, then how can we achieve our goal of keeping the emotional brain engaged?

Start with the culpability of the defendant for the harm inflicted on the plaintiff. Next, talk about the harm in ways that will evoke emotions when jurors think about how they would feel if the harm were to a loved one, or maybe themselves. Then, introduce the subject of what money will be required to compensate for the harm. That way, the emotions are not muted by the analytical brain's calculations. But remember: the rational brain must be able to justify what the emotional brain wants to do. This is where a type of reverse *per diem* argument might be appropriate.

A *per diem* argument is one in which the lawyer suggests that the damage award be based on a specific daily sum that is multiplied by the number of weeks, months or years of loss or suffering. A *reverse per diem* argument focuses on what daily amount is clearly inadequate. Think of a common purchase that everyone knows about: a cup of coffee at Starbucks, or a Happy Meal from McDonald's. Here's how it works:

A small latte or espresso from Starbucks costs... what? about five dollars. Would it be appropriate if the defendant said to the plaintiff, "Tell you what. To compensate you for your lost fingers, we'll buy you a cup of coffee in the morning and another in the evening. That's ten dollars times 365 days a year times thirty-five years." Does that sound adequate to you? That's an insult; an outrage. That calculates out to \$127,750. Now we know what amount is inadequate.

The above argument allows a calculation that will not dampen your previous appeal to emotion and will, hopefully, create emotion. And, at the same time, it will satisfy the rational brain's need to justify the desires of the emotional brain.

Techniques for letting the jurors persuade themselves

A farmer doesn't throw seeds on dry dirt; he cultivates the soil so the seeds take hold. Similarly, a good lawyer doesn't throw facts at the jury without first preparing them to be receptive. This section will show you how to present your case in a way that will persuade the jurors that your facts lead to inescapable conclusions.

Moviegoers stay in their seats until the end of a mediocre movie by the need to know what will happen. This need to know is called *curiosity*. Curiosity has been described as the pain that the brain feels when there is a knowledge gap. The pain is like hunger pangs that can only be satisfied by the acquisition of information.

If a person knows nothing, he is not curious; curiosity occurs when some, but not all, facts are known. Curiosity compels attentiveness and a desire to predict an outcome. Therefore, a lawyer who can create curiosity during opening statement has the ability to influence the conclusions reached by jurors.

In *The Psychology of Curiosity*, George Loewenstein observed that "Exposure to a sequence of events with an anticipated but unknown resolution will almost inevitably create curiosity to know the outcome." He concluded that "such curiosity is exacerbated when an individual generates a prediction or forecast of the outcome, in which case curiosity about the outcome itself is combined with a desire to know whether the prediction was correct."⁴

Opening statement

How can Loewenstein's observation be applied in an opening statement? You can induce curiosity in the first sentence of your opening statement by providing information and then posing a question

that immediately confronts the jurors with the *pain* of a knowledge gap. For example: "The rule is that when a surgeon is going to operate on a child, he must first make sure that he is cutting in the right place. What might happen if the rule is not followed?"

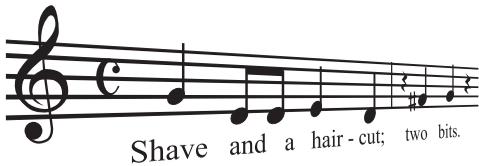
The next step is a careful sequencing of the facts. David Ball explains that in opening statement, you have no credibility whatsoever, and jurors have no reason to believe your conclusions. Facts, however, are not conclusions. A conclusion tells the listener what to think, *e.g.*, "the defendant was reckless." A fact is an element of a story, *e.g.*, "the defendant was texting as he drove." Ball recommends that the story of what the defendant did be disclosed in a series of short sentences with one factual event per sentence.

By combining the Loewenstein curiosity findings with the Ball fact-sequencing, you can lead the jurors to conclusions they will reach by persuading themselves. How? A properly-sequenced story is one that can lead to only one logical conclusion. For example: *the light turned red; the driver was texting; her car entered into the intersection at 60 miles per hour* As the sequenced story unfolds, the outcome is unknown. Because curiosity craves answers, the jurors will be anticipating what happened next. They will fill this information gap by making predictions about the outcome. At the same time, their heightened curiosity impels a desire to know whether the prediction was correct. And when the conclusion of the fact sequence confirms that prediction, each juror's critical judgments about the defendant's actions and culpability will be firmly in place. They have persuaded themselves.

Final argument

When you make your summation, the jurors will still be resistant to being told what they should conclude. Luckily, there are alternatives that will allow them to persuade themselves.

In the 1988 movie, *Who Framed Roger Rabbit*, when the rhythm of "shave



and a haircut” was tapped on the counter, Roger Rabbit came out of his hiding place and sang “two bits!” He couldn’t help himself. What does this have to do with closing argument? It is the application of the *curiosity* and *knowledge-gap* phenomena, discussed above, which compels the juror’s brain to fill in missing information when a question or riddle is presented.

When you present a question that has an obvious answer, the jurors will come to the inescapable conclusion by themselves. And when you then suggest the probable answer in the form of another question, their prediction is confirmed.

Some examples:

Why do you suppose that with all of the radiologists practicing in California, the defendant had to bring one all the way from Alabama?

[Pause while the jurors think about the answer]

Could it be that no self-respecting California radiologist would support the defendant’s interpretation of the MRI?

You’ll recall that the defendant nursing home didn’t call any witnesses to testify about all the training that they received on how to monitor a patient’s hydration status. Why do you think that is?

[Pause while the jurors think about the answer]

Could it be that . . . Well, you’ve probably already figured that out.

In the 17th century, French philosopher, Blaise Pascal, observed: “*People are usually more convinced by reasons they discovered themselves than by those found out by others.*” By enticing the jurors to fill in the missing information, they will reach the desired conclusions. If you tell them, they’ll resist; but when they arrive at their own conclusion, it sticks because they have persuaded themselves.

Conclusion

Advocacy involves good facts, logic, timing, maintaining interest, imprinting memories, and inviting curiosity. But the art of *persuasion* is the ability to employ these techniques in a way that motivates the emotional brain. When memorable facts are presented and emotions are stimulated, the rational brain finds the reasons to justify how the listener *feels*. Whether your audience is a jury, a spouse, an in-law, or a condominium board, these techniques will work.

Recommended Reading

How We Decide, by Noah Lehrer,

Brain Rules, by John Medina

Made to Stick, by Chip Heath and Dan Heath

Switch – How to Change Things When Change is Hard, by Chip Heath and Dan Heath

Start With Why, by Simon Sinek

The Presentation Secrets of Steve Jobs, by Carmine Gallo

Rules of the Road, by Rick Friedman and Patrick Malone

Reptile, by David Ball and Don Keenan

Damages 3, by David Ball

Endnotes

¹ David Ball on Damages 3 (3rd ed., 2011), Ch. 5

² The Elephant-Rider metaphor was described by psychologist and social scientist Jonathan Haidt in his book, *The Happiness Hypothesis*.

³ The “Golden Rule” is discussed in *Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn 11

⁴ George Loewenstein’s 1994 study, *The Psychology of Curiosity*, is discussed in *Made to Stick* by Chip Heath and Dan Heath



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