The psychological science of jury persuasion

The "devil's advocate" technique can overcome barriers to persuasion

By John P. Blumberg

There are powerful psychological barriers that protect everyone – including jurors, from being overwhelmed by new information. Components of these barriers might be described as a "belief system" or "world view" in which people can make sense of their environment. To maintain the comfort of the status quo, the brain is skeptical. And this skepticism can prevent juries from being persuaded by lawyers representing plaintiffs who are asking that the status quo be changed. In part one of this article (Plaintiff magazine, October 2017), the concepts of *cognitive dissonance*, *reactance* and *mental overload* were explored to understand the psychological basis underlying the tendency to reject persuasion.

Cognitive dissonance is the mental state of discomfort when conflicting beliefs exist simultaneously, resulting in distortion or rejection of the conflicting information.

Reactance is the instinct to resist being told what to think, sometimes resulting in a "boomerang effect" where the opposite view is adopted.

Mental overload occurs when the amount of information presented exceeds the brain's ability to analyze it, resulting in resort to heuristics, or simplistic "rules of thumb."

These barriers to persuasion can be overcome by techniques that allow jurors to arrive at the desired conclusions by self persuasion. I call it "the devil's advocate approach to persuasion" and it can be used at every stage of the trial.

Voir dire

Your first opportunity to persuade is voir dire. The statutory goal of voir dire is to find bias in prospective jurors. (Code of Civ. Proc. § 222.5.) However, the process can also start jurors down the path of considering concepts that are crucial to your case. Plaintiff attorneys frequently start early in their advocacy to the panel:

- "Can you award a lot of money?" "Why not?"
- "Will you hold the defendants accountable for their misdeeds?"
- "You won't? "Why?"
- "Do you think doctors should be required to follow the rules?"
- "Please explain why you think there are exceptions?"

And if you represent a plaintiff, don't you hate it when defense counsel gets jurors to agree:

- "Just because somebody can file a lawsuit doesn't mean it has any merit," or
- "I'll be able to look the plaintiff in the eye at the end of the case and tell her she won't get any money," or
- "People need to take responsibility for their own actions."

It's pretty low-hanging fruit because that's what most people believe. And, as previously discussed, it's their belief system, locked securely in their left brain.

In voir dire, the jurors don't want to be there. And you are not persuading anybody. In fact, the more you try to get jurors to agree with the proposition you're advocating, the more they will resent your intrusion into their private thoughts and beliefs. (*Reactance*, remember?) In the 2015 Republican presidential debates, the moderator (like a lawyer) posed so-called "gotcha" questions to candidates. But, unlike prospective jurors, the candidates felt more empowered, and when the moderator asked questions that they didn't like, they didn't answer; instead, they attacked the moderator. This was not a new tactic: Newt Gingrich used it in 2012 when asked about how he had treated a former wife. He said he was "appalled" that he would be asked such a question, and the audience applauded wildly. Jurors can't do that, but what they can do is decide to take a contrary position to the one you are trying to force them to take. (*Boomerang effect*, remember?) This is not a good way to start.

The devil's advocate approach

In his book, "Twelve Heroes, One Voice" (Trial Guides, 2011), attorney Carl Bettinger concluded that trying to persuade in voir dire can hurt your case. He suggested, "Try arguing the defense's story." This is the devil's advocate approach. Some of his examples:

- "What difference does it make if an elderly person with Alzheimer's gets good care or bad care; who cares?"
- "A death is a death; so what difference does it make if some person slips and falls on the church steps and dies, or they die due to neglect in a nursing home?"
- "You can't undo the sexual assault; if someone loses their arm due to negligence, you can't give them their arm back. So what good is money?"

Bettinger's theory is that "the jurors will save you" because they will assume the role of "hero" whose role it is to speak up for what is right. If his theory is correct, jurors will argue your case for you, and if they agree with the "defense" position, they have disclosed their bias.

The possibilities for devil's advocate questions are limited only by the advocate's imagination.

- In a trip and fall case: "Sure, there's a defect in the sidewalk, but why

isn't it all the pedestrian's fault if she trips?"

• In a malpractice case: "The doctor spent years in medical school and training; it's not believable that he'd do something wrong, is it?"

• In an auto collision case: "So, the driver hit the bicyclist when she was answering a phone call. Lots of people talk on the phone while driving. Why should a person be held responsible for that?"

• In a misrepresentation case: "If a person is gullible enough to believe an untrue statement, why should the liar have to pay him back?"

Be careful not to phrase a question in a way that will draw an objection (or admonition from the judge) because the question seeks to "precondition" the juror or "prejudge the facts." So, the lead-in to the question is important. For example, a common (unobjectionable) voir dire question is, "Do you believe that corporations should be accountable for the actions of their employees?" Phrased in the "devil's advocate" style: "We know that corporations are business structures with managers and boards of directors. Why should corporations have to be responsible for the actions of its employees?"

Bettinger cautions that, before he engages in devil's advocate-type questions, he discloses that the proposition is not his belief. Why is that important? Your role is to represent your client's interests, and the jurors know that. Without the disclosure, jurors may be confused or may think that you are trying to trick them. Honesty is essential. One way of approaching the question is a preface that says, "What if the defense lawyer were to ask you . . . ."

Opening statement

An opening statement is supposed to be limited to a disclosure of what the evidence will be during trial, and it is not the time for commentary that is appropriate only during final argument. However, as "devil's advocate," a lawyer should be able to couch "what the evidence will be" in terms of "what the evidence won't be." For example, "Our expert, Dr. Smith will *not* testify that the standard of care is to leave a scissors inside the body of his patient; he will testify that the surgeon must not close the patient before all surgical instruments are accounted for." Or, "The evidence will *not* establish that this corporation was unaware of the harmful potential of their product; the evidence will show that the people running this corporation knew their product would harm people."

In part one of this article, I discussed the beneficial effect of juror self-persuasion. The only way self-persuasion can occur is if you aren't talking. If there is demonstrative evidence that can tell a story, show it to the jury with only as much description as is needed so they know what they're looking at. For example:

• "Photo 1 is an X-ray of what an artificial disk is supposed to look like after implantation surgery."

• "Photo 2 shows what an artificial disk looks like when it is incorrectly implanted."

• "And Photo 3 is an X-ray of plaintiff's neck after the defendant implanted the artificial disk."

Then, just let the jurors look at the three photos. Allow them to conclude for themselves that the device wasn't implanted correctly.

Expert direct examination

Your expert witness is enormously important to proving your case, but expert testimony has the potential of causing a left-brain lockdown of the jurors. In other words, a lengthy exposition of complex and unfamiliar subjects will result in confusion. A confused jury is not a convinced jury. The starting point is to overcome the skepticism that the expert's conclusion is nothing more than a "bought and paid-for" opinion. This can be accomplished by establishing that there was a logical process that the expert used in his or her analysis. The methodology should be described in linear fashion, step by step, so that there is a confluence of protocol and evidence that leads to a logical conclusion.

Here is an example of how to start this examination:

Q: Before reaching a conclusion, did you use any method of evaluation?
A: Yes, I did.
Q: Would you please explain how you went about the analysis of what happened?
A: First, I reviewed the records. Second, I reviewed the sworn testimony from everyone involved. Third, I measured what happened against the standard of care, that is, what good doctors do in similar circumstances. Fourth, I reviewed the published medical literature on the subject.
Q: Why did you use that method?
A: Because it is the only honest and scientific way to reach a valid conclusion.
Q: Why can't you just start out with an opinion and then look for the evidence that supports it?
A: Because that can lead to a biased and invalid conclusion. You end up looking only for what will support your predetermined opinion and ignoring everything else.

The left brain will accept the information because it is logical and it is not preceded by anything that might conflict with a belief system. The next step is for the expert to explain the reason for the evaluation method. Here is an example:
Q: What records did you review?
A: I reviewed the medical records, the X-rays, the laboratory tests, and the depositions.
Q: Can you please explain why it was important for you to review these things?
A: Well, the medical records contain an explanation of what happened after the accident and before any treatment was received. This is called "the history." Then we see what medical tests were done so the treating doctors could arrive at a diagnosis of the patient's condition. Finally, the treatment records show what was done to help the patient. All of these things, together, tell the whole story.

Q: You said that you also read depositions. What was the importance of doing that?
A: Depositions contain testimony given under oath. I wanted to know what everybody involved said about what they did or what happened from their perspective.

In this way, you are providing answers to the silent questions jurors are asking themselves as their skeptical brains search for reasons to reject the testimony. The next step is to establish that the expert isn't just concocting a conclusion that has no basis; rather, that there is a solid basis for the opinion.

Here is an example:
Q: As part of the process of analyzing the subject, did you read any publications?
A: Yes.
Q: Why did you do that?
A: Because the medical and scientific articles and textbooks contain the combined knowledge and wisdom of many of the most reputable and experienced experts in the field. I believe that it's important to study the subject thoroughly before reaching a final opinion.
Q: What did you read?
A: I read two recent articles by Dr. Jane Jones on the subject of repeated head trauma.
Q: Did those articles contain information that was valuable in arriving at your opinion?
A: Yes.
Q: Would you say that the articles are reliable authority on the subject?
A: Absolutely. Dr. Jones is one of the most renowned experts in the field. And the journal is what is called "peer reviewed" which means that before it could be published, other doctors had to review it and confirm that it was a valid study.

Notice that the testimony does not mention what is in those articles; that would be hearsay. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 789.) But it is permissible for the expert to lay the foundation of what has been considered in arriving at the opinion. (*Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 901.) The jurors will likely assume that the expert's opinion is supported by what is written in the articles.

Finally, it's time for the expert to give the opinion and its basis. Hopefully, by now, the jurors' skepticism has been calmed; their left brains have not been confronted with a foreign idea that would be automatically rejected. But there is still the potential for rejection if your expert does not simplify the analysis. Your expert witness may want to present a multifaceted analysis but the testimony may not be accepted and retained because the human brain has limits.

Cognitive load is the concept that the brain has only a finite ability to process new information and that learning and recall is impaired by overloaded short-term memory. Studies have shown that the less effort it takes to process a factual claim, the more accurate it seems. What if the expert has seven points of criticism or analysis? Figure out a way to group them into three categories. Why three? Human experience has demonstrated that people are able to understand and remember things that are grouped into three sections. The rule of threes has been applied for thousands of years and examples are found in the Bible and in classical Greek drama and rhetoric. It is practiced and applied in music, plays, stories, speeches and sayings. Whether it is an aspect of brain capacity or a memory device, the rule of threes is a tried and true method.

Even a vastly-simplified explanation of a complex subject may still be beyond the jurors' ability to make sense of it. Analogy is another technique your expert can use that will help the jurors understand the unfamiliar. "Analogies," Sigmund Freud reportedly said, "decide nothing, but they can make one feel more at home" and that a good analogy may help to clarify the issues. Simply stated, an analogy is a comparison between two things that can highlight similarity. Some examples:

- In a breast cancer misdiagnosis case: "When the cancer began to grow, it was like a wildfire that couldn't be controlled."
- In a slip and fall case: "The wax on the floor was like an invisible sheet of ice."

In the cancer case, the jurors might not understand oncology, but they know about wildfires. And in the slip and fall case, they might not know about coefficients of friction, but they know what happens when they slip on ice. Once the jurors can relate the subject to something they understand, it will be like an anchor (notice the analogy?) that will make them more secure in their understanding.[1]

Final argument

After days or weeks of trial, it is doubtful that jurors have waited until final arguments to make decisions. Each aspect of the trial carries with it the potential of winning or losing; convincing or confusing; capturing attention or inducing inattention. Certainly, decisions have been made, but are they convinced yet? You'll never know. But you do know that this is your last chance to influence the outcome. Each juror's brain is going to be "listening." The left brain's instinct is to reject and the right brain has the power to force a paradigm shift when compelling logic overwhelms status quo complacency.[2]

But, as discussed in part one of this article, self-persuasion is the goal of the devil's advocate technique. Therefore, the challenge for trial lawyers is to resist the urge to tell the jury what the evidence proved. Questions may be the key to self-persuasion. Rather than telling the jury what the witnesses said, consider gesturing toward the witness stand and asking, "Do you recall when Dr. Jones explained the rule 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?" The jurors will access the memory because they need to answer the question. If this is followed by displaying the

transcript, the memory is confirmed, thus immunizing against rejection.

The beauty of "devil's advocate" questions is that you don't have to provide the answer or even refer to evidence. What if the defense brought an expert from far away? An intriguing question can activate the left brain's structural skepticism. 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 training that they received on how to monitor a patient's hydration status. Why do you think that is?"

Reactance is what happens when the advocate's statement makes listeners feel as though their freedom of choice is threatened. Final argument should avoid words like "you need to," "you must," or "you should." that ignite this phenomenon. Better results are obtained by using words connoting choice, such as "possibly," "perhaps," "maybe" and "you might consider."[3]

Appeals to self-interest and community safety are discussed by David Ball and Don Keenan in their book, "Reptile." The premise is that a threat to safety generates fear for one's own survival. Studies have shown that a fear message is most effective when a solution to an apparent threat can be achieved.[4] The use of questions can be effective in presenting a threat to safety that can be remedied. For example:

"Doesn't a carpenter measure twice, and cut once? Should surgeons be held to a lesser standard? Is this the standard that should be acceptable for our community; for our neighbors?

By motivating jurors to arrive at their own conclusions, you can avoid message-rejection *reactance* and benefit from self-persuasion.

Conclusion

The brain is wary of new and unfamiliar information. It is designed to maintain the status quo, reject perceived threats to freedom of choice, and seek simplicity over complexity. This article has explored methods of persuasion that are compatible with how the brain accepts information and makes decisions. Devil's advocate persuasion is designed to address the need of every juror to be satisfied that he or she understood the evidence and arrived at a logical conclusion, independent of unwanted influence from a lawyer. Accordingly, persuasion may be most effective when it does not seem that you have been doing so. That is the *art of persuasion*.


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Endnotes

[1] A more detailed discussion of expert direct examination is found in my article, "Expert Examination that Persuades" (Plaintiff Magazine, March 2014.)
[2] V.S. Ramachandran, "The Evolutionary Biology of Self-Deception, Laughter, Dreaming and Depression: Some Clues from Anosognosia" (Medical Hypotheses, 1996)
[3] Steindl, et al., "Understanding Psychological Reactance" (Zeitschrift für Psychologie, Oct. 2015)
[4] Broda-Bahm, "Understand Why Fear (Often, not Always) Persuades" (Persuasive Litigator, www.persuasivelitigator.com, Apr. 27, 2017)