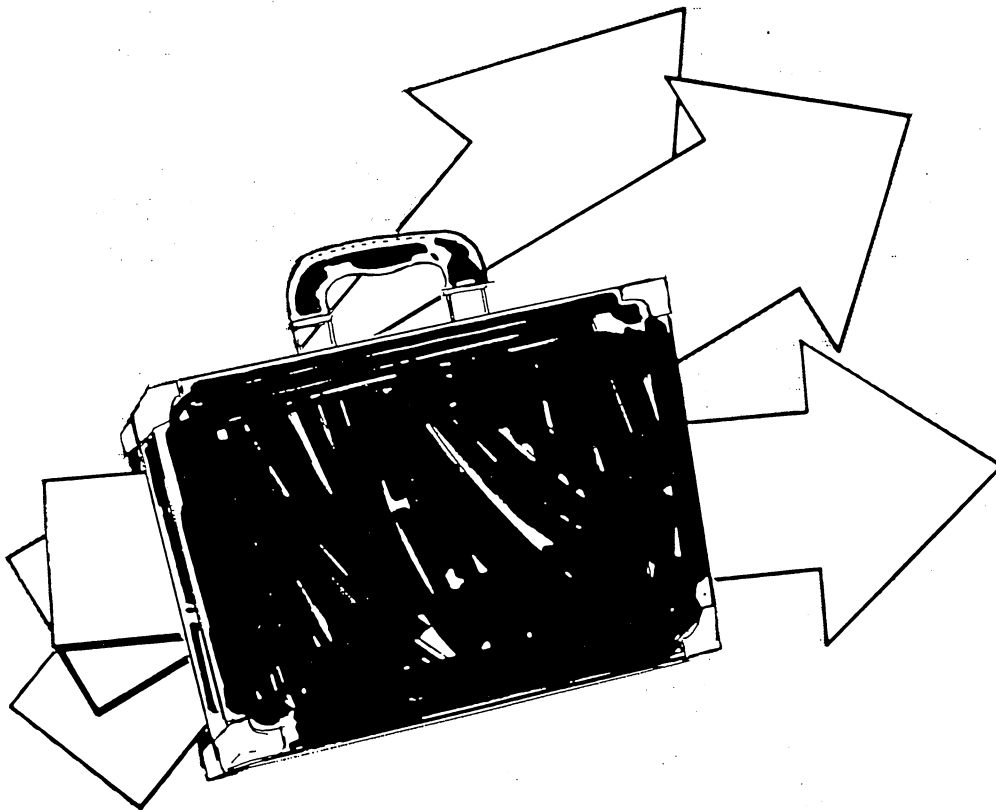


# *Mastering the Art and Science of Persuasion*

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Not just the facts, Ma'am.



**I**N AN IDEAL WORLD, trials would be decided solely on facts, evidence, and reasoned arguments. And in truth, ample research proves that

strong evidence is the single most important factor in jury decisions. However, if you believe that evidence alone will consistently yield “just” verdicts,

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you will overlook complex and dynamic psychological and sociological realities that shape a jury's decision-making. Consequently, effective litigators should not confine their efforts to simply reporting facts:

"Every action, every word, every gesture of the attorney, his client, his witnesses will filter through the mind of each juror, assume the flavor of his experience and background, blend with the distillates from his fellow 'fact finders' and generate a feeling for the case. This then will be the concern of the advocate—to create the proper "feeling," cultivate the response mood, generate a desire to reach the "right" conclusion. In doing so, you will incidentally, but only incidentally, produce the facts that will support the desire." Jones, *Trial Advocacy*, p. 144 (1975).

In any trial, you must shift the judge's or jury's attitude from neutrality to supportiveness and agree-

ment. Since "letting the facts speak for themselves" is unreliable—particularly in close or emotionally charged cases—the art and science of *persuasion* has increasingly interested a growing number of trial attorneys.

**W**HERE DOES PERSUASIVENESS ORIGINATE? • What makes one litigator, or for that matter, salesman or marketer, more persuasive than another? Is persuasiveness an innate ability or does it consist of specific skills that can be learned and developed?

Social science research suggests the latter, and has identified several key elements that enhance the persuasiveness of a message. Psychologists and communication specialists have designed powerful new techniques to maximize a message's persuasiveness. This article will review several of these persuasion techniques and offer suggestions on how to use them in litigation.

Persuasiveness techniques are based on recent research exploring how the human brain processes information and how individuals make decisions. The brain is remarkably specialized for specific functions, such as speech, motor movements, memory, and various aspects of personality. We know, for example, that a person suffering a stroke or brain damage in the right brain hemisphere will display distinctly different personality and behavioral changes from those occurring after a left hemisphere stroke.

The left hemisphere is primarily responsible for comprehending verbal and written logic, while the right hemisphere provides the visual, creative, and emotional input.

### ***Right-Brain Decisions***

Persuasion research has revealed that people typically make decisions based on subjective emotion or "feel," a predominantly right-brain function, and then validate decisions with logic, a left-brain function. Consequently, when attempting to persuade the judge or jury, you typically communicate with verbal logic to the listener's left (verbal/linguistic) brain, but the listener is probably responding to you with his or her right (emotional/creative) brain. When the listener decides, generally based on the right-brain response, the listener will explain the decision to himself and others in logical or left-brain terms. The extent to which this process occurs is related to an individual's left- or right-brain dominance.

Your primary goal in persuasion, then, should be to reach the subjective experience of the individual; or, in psychological terms, hold the attention of the left-brain with words and content, while creating a favorable right-brain response.

**H**OW TO WIN FRIENDS AND INFLUENCE FACT FINDERS • People are more easily influenced by others they like or who seem similar to themselves because they perceive that other per-

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*During trials, you should seek to emphasize the similarities among you, your client, and the jurors.*

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son to think and act like them. Part of your job as a litigator, then, is to convince the fact finder that you are similar to him.

### **Similarity Perception**

People perceive similarity on two levels: biographical and attitudinal. Overtly, people give higher attractiveness, credibility, and likeability ratings to those of the same or similar race, sex, age, style of dress, and so forth. Despite similar appearance or background, however, interpersonal influence quickly erodes if basic values, beliefs, and attitudes conflict. For example, in emotionally charged social issues such as abortion, the extent of attitudinal similarities may influence interpersonal attraction—and persuasiveness.

This is called a "halo effect" and can result in negative or positive biases toward unrelated issues, or the person as a whole.

### ***Maximize Your Similarity to the Fact Finder***

During trials, you should seek to emphasize the similarities among you, your client, and the jurors. To do this, listen carefully during voir dire to learn

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how jurors perceive the world. If a written juror questionnaire is used, invaluable information about juror backgrounds, beliefs, and values will be available. When possible, use words and phrases, behavior, and pace picked up from the jury or judge.

### *You're More Like Them Than They Think*

Since attorneys are often quite different from jurors when it comes to intelligence, socioeconomic status, and so forth, giving jurors the feeling that you are (or at least were) like them is critical. For example, if you try cases in rural communities, you might make an offhand reference like "When I used to visit my Uncle Henry's farm, he taught me valuable lessons. . . ." If several jurors have young children, you could remark during opening that "When I was tucking my boys in last night, there was something troubling me about this case. . . ."

Jurors need to see attorneys as real people, much like themselves, who truly believe in the cause they are arguing for. Consequently, if you can convince them of it, they will unconsciously reason that "He is like me, and he believes strongly in this position, therefore, so should I."

### *Techniques*

In the same vein, you can enhance your appeal to the fact finder through specific techniques. Researchers have consistently found that very subtle behavioral cues can significantly enhance interpersonal appeal. These behaviors include increased eye contact, smiling, attentive and encouraging actions such as head nods, and so forth. In general, the courtroom is a formal and sterile environment. You should consider, however, how jurors would rate you on a continuum from cold and aloof to warm and approachable. Jurors have a harder time bringing down a verdict against an attorney they truly like, and in very close cases, this may mean the difference between a favorable and unfavorable verdict.

**B E BELIEVABLE** • Credibility may be the single most important factor in attempting to persuade someone. Snake oil salesmen on street corners seldom persuade. But the same snake oil, endorsed and sold exclusively by a leading physician and only under FDA guidelines, might be ea-

gerly sought after. Why the difference? The credibility of the salesman has changed.

### **Keys to Credibility**

Jurors unconsciously ask themselves at least three essential questions about an attorney:

- Is he a valid and reliable source of information?;
- Can I trust him to tell me the truth?; and
- How confident is he that this is the truth?

Hence, your credibility will depend on your apparent competence, trustworthiness, and dynamism.

### ***Competence, Knowledge, and Expertise***

Overall competence is often demonstrated by academic degrees, experience, publications, and the like. Litigators routinely seek this out in expert witnesses (Is the doctor board certified? Has he written books on the subject? Is he recognized by the public as an expert?) and fact finders look for it in litigators. Well-known and respected attorneys have an edge in this respect.

### ***Trustworthiness***

In addition to being knowledgeable and competent, you must persuade the fact finder that you are trustworthy. Again, using expert witnesses as an example, even a good doctor who routinely testifies as an expert may be

perceived as a "hired gun." If so, the jury's trust in him will erode. Litigators often have trustworthiness problems because of a negative public perception of attorneys in general.

### ***Dynamism***

"Dynamism" means being bold, active, emphatic, and energetic rather than timid, hesitant, passive, and tired. You have to communicate the dynamic quality and conviction of your message before you can persuade the fact finder. Successful communicators are bold, convincing, and incisive. Since dynamism is primarily a characteristic of speaking style, critically examining your oratorical skill may be the best way to become more dynamic.

This can be accomplished in a number of ways, including:

- Audiotaping or videotaping your presentation;
- Utilizing a speech coach; and
- Interviewing jurors after the trial.

Be prepared: attorneys are sometimes surprised to find adjectives like "pompous," "harsh," "unorganized," "condescending," "boring," and so forth, used to describe them.

Studies comparing effective and ineffective speaking styles, have verified that brisk, fast delivery makes a greater impact. Scrupulously avoid hedges, stuttering, "um"s, "ah"s, and

slang. Pitch and vocal quality should be expressive, but not overly harsh or dramatic.

**DO UNTO OTHERS?** • We've probably all fallen prey to reciprocity, one of the most common persuasive techniques. People feel obligated to repay an apparent kindness regardless of whether they like the gift or the giver. In fact, people typically acquiesce with a larger favor than the one they received.

However, this scheme doesn't work as well as it used to—it's been used and overused to such patently cynical ends that it has become readily recognizable and easily defused. For reciprocity to work, there cannot be any overt implication that the giver will be indebted. Since all but the most innocent now generally believe that "nothing in life is free," instant suspicion follows the too-familiar "free gift."

### Be Subtle

Therefore, you must make the receiver aware of the gift or favor, and make him feel indebted, without exposing that your purpose was to induce obligation.

### Negotiations

Reciprocity can work effectively in negotiations. This sometimes means giving in on minor points and offering small concessions. Your opponent may return the favor by conceding on larger issues.

### In Court

Utilizing reciprocity in the courtroom is more difficult and requires some creativity. In general, you should take every opportunity to give jurors the perception that you have done them a favor: "I know you all have busy lives, so I'm going to expedite these proceedings by. . . ." Additionally, suggesting to the jury that you've given in to several of your opponent's demands while he or she has not conceded to any of yours may give jurors the impression that you are owed a favor or two.

**OBTAINING COMMITMENTS** • Salespeople usually try to get a series of "yes" responses from the customer. The theory is that once prospects give in on minor points, they're more likely to concede larger ones, too. So instead of bluntly asking whether the customer wants to buy an item, a salesperson will ask "smaller" questions first: "Do you need a car? Do you like the color/features of this car?" By answering "yes" to these questions, the buyer is likely (in theory) to say "yes" when he considers whether he wants to buy the item.

### Just Say "Yes"

You can subtly get commitments from jurors, too. This begins with voir dire, when asking them to "keep an open mind" or "reserve judgment." Attempt to establish an internal dialogue whereby jurors are saying "yes" in response to your requests for commit-

nents. Then, in closing, remind them I'd like for you to do me *another* favor. . . ."

### Aim High

Another way to get commitments is with the "foot-in-the-door" technique. Aptly used to described door-to-door salespeople, this method is based on the notion that getting inside the customer's door is nine-tenths of the battle. The opposite technique to foot-in-the-door is "door-in-the-face," which is actually more powerful in certain situations. This involves an excessive initial request far exceeding what you actually want—or expect. For example, if a person wanted a \$5,000 raise, a foot-in-the-door approach would probably go like this:

"Am I valuable?"

"Yes."

"Do I deserve a raise?"

"Yes."

"How about \$5,000?"

"No."

With the door-in-the-face approach, the initial request will far exceed the desired amount, and will almost certainly be refused. But the employee can now keep the dialogue moving, and "concede" his way to \$5,000. This method also uses what psychologists term "perceptual contrast" (in this case, between \$5,000 and a much higher amount). Obviously this technique is not new to experienced negotiators who usually begin bargaining

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by seeking significantly more than what they will accept. Simply put, this method works.

**SCARCITY** • Advertisements typically blare "Hurry, limited time offer! Last remaining stocks, won't last long! Don't miss out!" Limited time or quantity suggest competition. Competitive creatures that we are, we jump at the "challenge" of obtaining these scarce items. This is an interesting psychological principle that compounds itself exponentially: the rarer an item becomes, the more valuable it becomes.

Utilizing this technique with jurors again takes creativity. For example, jurors can be informed that this is a "rare" opportunity for them to make a difference in society, change corporate habits, prevent a future tragedy, and so on. Statements that begin

"Time is running out for people like my client," or "Don't miss this opportunity to send a strong message," may enhance the jury's perception of scarcity and challenge them to take the opportunity you've presented.

**SOCIAL PROOF** • All behavior is evaluated in the context in which it occurs and is deemed normal or abnormal, appropriate or inappropriate, depending on social norms. A man is seen running down a hall sobbing hysterically, then collapses to the floor. Abnormal behavior? Not if he's in a hospital and just found out that his wife or child died. Similarly, if you were about to be brutally assaulted on a street corner, would you be better off if 30 people were around or just one? If you picked just one, you were right. Chances are greater that the one would intervene as opposed to any of the 30. The reason: social proof and diffusion of responsibility. Members of the group witnessing a heinous crime assume someone else will take responsibility and, noting that no one else is doing anything, conclude that it is socially appropriate not to intervene. A lone person, however, without "social proof" that inaction is appropriate will intervene in some manner.

### *One of the Gang*

In varying degrees we all seek social approval and social proof. It is a very strong persuasive force. Consequently, when you are arguing to ju-

rors, lead them to the conclusion that a verdict in your favor is the socially accepted and expected thing to do. For example, statements like: "Neighborhoods and entire towns have rallied to support a similar cause . . ."; "Our forefathers fought hard to . . ."; "The majority of Americans would love to have the opportunity to make this kind of difference you can make here today . . ."; and so on.

**LINGUISTIC ENGINEERING** • Since litigating relies primarily on verbal communication, word choice, phraseology, and the ability to tell your story with vigor will affect the persuasiveness of your case.

### **Catchphrases**

You probably develop general "themes" for your cases. You should take this one step further, however, and develop a "mnemonic catchphrase." This phrase may come from a key witness or other source.

For example, in a plaintiff's product liability case, the defendant might parade its safety standard compliance by saying "safety is our motto." You can repeat this as often as evidence comes in to the contrary, and can ironically weave it into the case theme, depicting the defendant as unconcerned about human safety. These catchphrases tend to stick in jurors' minds, and effectively communicate to right brain, subjective experience.

### Association, Metaphor, and Simile

Another powerful linguistic engineering device is association. A judiciously dropped reference to "Defendant X *and* corporate greed" can solidly plant a negative connotation in jurors' minds, and may bolster other case themes. But be wary: a blunderbuss approach will invite a meritorious objection and could make you look like you are overacting.

In a similar vein, you can make your presentation more persuasive through word choice or analogies, similes, and metaphors. Even subtle changes, for example, from "the plane went down" to "it crashed," may make a difference.

Effective analogies depend on vivid comparisons. For example, a nuclear facility may be referred to as a "pressure cooker ready to explode," or a violent defendant as a "walking time bomb." Analogies work because they provoke and reward the listener's intellect and knowledge. Similes ("tough as nails," "sweet as sugar," and so forth) can be just as effective.

Metaphors evoke emotional responses by substituting emotion- or value-laden (if less accurate) words for neutral ones. For example, a polluting company that "rapes" our environment or "oppresses" its workforce. Research proves that metaphors reliably communicate stronger attitudes than conventional expression.

### Appeal to Sensory Channels

Another way to increase persuasiveness is by appealing to three of the senses or "channels" that receive information: visual, auditory, and kinesthetic.

Some psychologists posit that an individual can be more readily persuaded by identifying his primary "channel" and utilizing those terms. Consequently, a car salesman may ask the customer to "*see* yourself owning this car," or "*feel* the power when shifting," or "*listen* to the hum of the engine."

Since you probably won't be able to identify each juror's preferred channel, and since it's unlikely that 12 strangers will all share the same one, you should try to utilize all three, and vary your use of them. You should then be able to appeal to each juror at least part of the time.

**CONCLUSION •** The skills and techniques of persuasion can be developed with practice and thorough feedback. You have probably utilized many of these techniques without knowing it. However, by developing conscious competence with persuasion techniques, you can apply them strategically throughout trial. Thus, your pretrial preparation should analyze how you can tactically incorporate and implement these techniques. The quality of your oral presentation will benefit, and you will get enhanced results from your effort.