



TEN TIPS TO SECRETLY SWAY JURORS

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Dear Colleague:

My objective is to get you thinking about persuasion, and to begin what I hope will be a process of discovery that will continue through my email newsletter. **So make sure you subscribe online at my website, now.** You may not accept all of my ideas at first blush, and that's okay. Learning is often preceded by some confusion and resistance, and it doesn't matter if everything I say is "true", only that it works.

I did not coin the phrase "secret sway". The term comes from the title of an article in the A.B.A. Journal, excerpted below:

"Secret Sway--More lawyers are using the subtle communication technique of neuro-linguistic programming (NLP) to present their cases to jurors, with winning results ... NLP could persuade jurors to find for the party whose lawyer is using the technique or it could influence a witness to give up the store on the witness stand ... Proponents of NLP say it is hardly a tool of the devil. It is, they explain, a way of teaching, of best presenting a story in a strategically structured way ... Now, more and more lawyers are looking for an edge. For some, NLP is that little bit extra. It is conceivable that soon lawyers on both sides of a case will be using NLP in a kind of psycho-duel"

---A.B.A. Journal, September 2001

Since I use NLP in connection with my trial consulting practice, I adopted the term "secret sway" because I believe it is a colorful metaphor for the subtle courtroom persuasion techniques that I teach.

All of my ideas are the product of over two decades of making mistakes in and out of the courtroom, while searching for a better way, and learning from a lot of very bright people. I am just a lawyer, like you, looking for an edge.

"The wise woodsman knows when to stop and sharpen his blade"

-- Old Czech proverb

TIP NUMBER ONE

All persuasion is based upon perception, not reality.



"Clinton & Gore" ¹

Our beliefs, values, personalities, and past experience create filters through which all visual, auditory and sensory input must first pass. These filters form our perceptions that determine what we think, see, hear, feel, and ultimately how we behave.

Many people looking at this photograph, at first blush, think they see an image of Bill Clinton and Al Gore. Of course, both images are that of Clinton. The faces are identical with only slight differences in hairstyle and color. Parenthetically, what does that tell you about the reliability of eyewitness testimony!

We see what we expect to see based upon our beliefs and life experience. Since it is unlikely that two Clintons would appear in the same photograph, and because Clinton & Gore were often pictured together, our perceptions are altered by our expectations, beliefs and past experiences.

Whether you saw Clinton and Gore or not, the fact is that our brain deletes, distorts and generalizes data constantly. Although tens of thousands of bits of data are contacting our senses at any given time, our conscious mind can only process between 5 and 9 "chunks" of information at a time, which is the limit of our awarenessⁱⁱ The rest of the data and information is deleted, distorted and generalized. Many people suffer sensory overload after 5 pieces of information, and are most comfortable with only three. It is no coincidence that zip codes are five numbers (nine digit codes predictably failed miserably), telephone numbers are seven digits, and the "rule of three" is the most powerful of the rhetorical devices.

"Deceptions of the senses are the truths of perception"---Johannes Purkinje

Many "filters" are identifiable. If you know a person's filters, you can predict and alter perceptions and maximize persuasion. You are probably not aware of the sensations in your foot touching the floor, until I directed your conscious awareness to that area of your body. By directing your conscious attention to one area, I can cause you to delete other information. When magic uses your filters it's called "sleight of hand". In upcoming newsletters, I will show you how to do this conversationally, using "sleight of mouth".

The Clinton-Gore image also invokes the psycho-physics principle of perceptual contrast, which states: when two or more elements are perceived together or in close proximity, they will be perceived differently than if they were presented independently of each other. If you pick up a heavy object after picking up a light one, it will appear heavier than it really is. If you look at a beautiful model, and then your spouse or date, he or she may look less desirable, due to perceptual contrast. Savvy sales people use this all of the time, when showing you two homes, cars, or suits-- after seeing something unappealing, the other looks so much nicer!

Perceptual contrast is at play everywhere in the courtroom. Oversized clothing can make a person look like a victim because of the perceptual contrast created. A male attorney contrasted with an opposing female attorney, may appear more aggressive than he really is; or the female may appear too passive, so both attorneys may need to tone down or tone up how they are perceived through demeanor, voice or wardrobe.

The mere order in which evidence is presented, the order in which witnesses are called, and the order testimony is elicited from the same witness, all can dramatically alter the jury's perceptions-- due to the law of perpetual contrast.

In an often-cited study performed by social scientist Solomon Asch, two groups were asked to give impressions of Steve after reading two different descriptions of him:

- (a) Steve is intelligent, industrious, impulsive, critical, stubborn and envious.
- (b) Steve is envious, stubborn, critical, impulsive, industrious and intelligent.

Steve was rated much more positively by the group reading version (a) which described his positive traits first. Note that both versions are identical except for the "order" of the traits.

Present strong and favorable witnesses, testimony, evidence, ideas, arguments and themes first, because the order creates perceptual filters through which all subsequent data passes. The favorable will be perceived as more favorable, and the unfavorable, less so, merely by the order in which the same information is presented. Of course, the corollary is also true. When trying to create negative impressions of your opponent's case, evidence and testimony, start off with the most damaging and negative traits and characteristics.

Another important principle at work in the Clinton-Gore images is the extraordinary power that clothing and personal appearance factors can have on perceptions. Only the hair color and style in the Clinton-Gore photo differ slightly, yet they appear to be two different people.

Perceptions can be altered through all aspects of personal appearance including choices of jewelry, clothing style, color and size, tailoring, hairstyle and length, and makeup. Perceptions are also formed by non-verbal behaviors, including posture, gestures, eye contact and voice tonality. Unconsciously, we make determinations of credibility, believability and approachability, based upon a myriad of non-verbal behaviors and personal appearance considerations.

When you are lost and ask a stranger for directions, in an instant, your unconscious mind does a search and sort of all of these variables to determine who, among various persons to choose from, would be best to ask. The conscious mind then makes a choice based upon perceptions.

Proper witness-client preparation should not only include preparing for their "testimony", but also preparing for "perceptions". In the end, it doesn't matter to the jury if your client is telling the "truth". All that matters is what the jury perceives.

"A throne is only a bench covered with velvet"---Napoleon Bonaparte

It behooves the trial attorney to tailor perceptions to the jury's expectations.

TIP NUMBER 2

Do not try to change a juror's belief, instead transform its meaning.

"I can't believe that", said Alice. "Can't you", the queen said in a pitying tone. "Try again, draw a long breath, and shut your eyes". "There is no use trying", said Alice. "One can't believe impossible things". "I dare say you haven't had much practice", said the Queen. "When I was your age, I always did it for half an hour a day. Why, sometimes, I believe as many as six impossible things before breakfast"

---Alice Through the Looking Glass, Lewis Carroll

For much of my life, I tried to persuade jurors to change their beliefs through a direct, logical presentation of evidence and argument. I always believed that logic is more powerful a force. Wrong, wrong, wrong.

I am reminded of the story of the famous psychologist, Dr. Abraham Maslow. You may recall his "hierarchy of needs". Maslow was seeing a patient who claimed to be a corpse. After trying all types of therapeutic techniques and persuasion to convince him otherwise, without success, the Doctor asked his patient if he believed that corpses bleed. "Of course not, a corpse's bodily functions have stopped", the patient replied. Maslow then sought and got the patient to agree to a sterile pinprick of the finger to see if he would bleed, which was performed. Sure enough, he began to bleed. With a look of shock and astonishment, the patient gasped, "Ill be damned, corpses do bleed"!

Although we all have a graveyard full of discarded beliefs, when confronted with new data that is contrary to existing beliefs, values or opinions, people will usually delete, distort or generalize the new data to conform to their beliefs. Opinions, attitudes and beliefs are born, evolve and die in a cycle that requires the passage of time and life experience. It is not likely that you will bury them at trial.

Try putting your hands together, palm to palm, in front of you. Now, push with your right hand. Chances are you resisted the force with your left hand. When you push people you get resistance.

Psychological "resistance" is a naturally occurring phenomenon in belief vs. belief. The question is how do you overpower it?

Typically, lawyers meet juror's natural resistance to their case, like boxers in a ring, jabbing with logic and linear arguments. Presumably, the "stronger" more forceful argument should prevail, but that is often not the case in the courtroom, or anywhere else.

There is another approach called "reframing", which involves the subtle, conversational transformation of meaning and belief. Like Oriental martial arts, reframing does not oppose force with force, instead you align yourself with the other person's resistance or "force" and redirect its trajectory, away from your belief and often against the listener (see Judo). That is the metaphorical theory behind all subtle, covert persuasion.

Is the glass half empty or half full is a simple, but classic reframe. Jesus Christ was a master reframer. When a throng of villagers was about to stone a woman accused of adultery, to save her life Jesus said, "he that is without sin among you, let him first cast a stone at her". This is an example a reframe called "applying the belief to itself" To do so, Jesus redefined (chunked up) "adultery" to a larger category, "sin". Since most in the crowd had sinned before, they were asked to apply the same criterion and consequences to their own behavior. Jesus did not directly challenge the crowd's belief that adulterous women should be stoned; he just transformed the meaning of adultery. Secret Sway!

There are fourteen specific techniques to reframe beliefs that can be learned, and I will discuss them in greater length in upcoming newsletters. When used in the courtroom, you can overcome bias by transforming its meaning, which is much more effective than trying to change a belief.

TIP NUMBER 3

Be careful of what you object to, you just might get it. The law of scarcity.

When an objection is made and the judge instructs the jury to disregard what they just heard, a very powerful psychological mechanism is activated. Its called scarcity, and it holds: people desire information, products, services and even people that they deem are scarce, without regard to the intrinsic value. The opposite is also true; things in abundance are often considered less desirable and taken for granted.

Scarcity, whether real or perceived, is one of many "triggers" that produce a conditioned response. Scarcity is used all of the time: "limited offer", "there are only 2 left in stock", diamonds, out of state speakers and experts, playing hard to get. Did you ever lose a little desire shortly after someone said yes or they were too available? We want even more what we have to compete for. Did you know that many people pay more at auctions, than they would retail?

The notion of instructing a jury to disregard and believing that they will flies in the face of human nature and psychology. "I instruct you to disregard the fact that your spouse is cheating on you". Can't be done. In one study, where a jury was instructed to disregard that the defendant had insurance after an objection was made, the average award was of 46K. Where the jury was aware

of the existence of insurance but no objection to the information was made, the average award was 37K--a 24% difference.

When a judge instructs the jury to disregard, the instruction will not only be disobeyed, the excluded information just got "scarce" and that much more influential. Avoid objections whenever possible; and always use Motions in Limine to avoid any anticipated injection of objectionable information.

TIP NUMBER 4

Mesmerize and talk with your eyes. And Smile.

When you are face to face with someone, you are communicating with your voice, your tone of voice and through non-verbal behaviors. All three are "languages".

Studies show only 7% of a message comes from the words alone; while 38% is from the tonality of the voice and the "how you say it". There are a dozen shades of meanings of the word "no", including yes! Up to 55% of communication is derived from non-verbal behavior (body language). While you are choosing the next words you are going to say, you just overlooked up to 93% of the communication process!

"He that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his fingertips; betrayal oozes out of him at every pore"---Sigmund Freud

Most of the time, our strategy of communication focuses on the words we speak. That takes a lot for granted. Secret sway techniques require developing the other 93% of the persuasion process--both interpreting others' non-verbal behavior and voice tonality, and learning to communicate through these non-verbal channels or "languages".

We communicate through our eyes. People are mesmerized by eye contact and most attorneys don't do enough of it with jurors. You may feel uncomfortable doing so as if it were an ex parte communication in the hallways. The more you look at jurors the better. Do so at every opportunity, including while opposing counsel is speaking or addressing witnesses. Don't stare or coldly observe. Instead, try to maintain a natural, nice, warm eye contact up to 70% of the time! I also recommend not turning your back to the jury whenever possible, including when at the bench. And try to take the table closest to the jury box if plaintiff-defense tables are not assigned.

And smile. I could dedicate an entire "Tip" to the power of the smile. Smiling is one of the most powerful tools of persuasion. Lawyers are serious, and in the courtroom, too serious. Smile more and smile often. Watch the reaction you get from people. It's ok to smile at jurors.

It is possible to "talk" with your eyes, and more importantly listen to what eyes are "saying". I don't know of any rule that prohibits this type of "communication" with jurors, and it can be very effective, subliminally. Talking with your eyes occurs naturally and reflexively, but can be further developed and used strategically. Practice "saying" these emotions and thoughts with your eyes:

happiness, sadness, surprise, disgust, fear, anger, disgust, "he's not telling the truth", "he is credible", and so on.

Now, lets kick secret sway up a notch. When a person is attracted or interested in you, did you know that their pupils dilate? Master persuaders, when speaking to groups, will often deliberately speak directly to the biggest pupils in an audience. Studies show that you can increase your level of persuasiveness if you learn to dilate your pupils. Some animals will dilate their pupils when looking at their prey, which produces a brief trance-like paralysis, before they attack. Even some advertisers use dilated pupils in print ads to seduce you. Dilated pupils seduce subliminally. Top poker players look for pupil dilation as a "tell"-- indication of a good hand, as do sellers of expensive merchandise, as a sign of excitement.

If you want to dilate your pupils on command, naturally without drugs, you can (1) think of something that excites you visually; or (2) learn to defocus your eyes by expanding your peripheral field of vision while not focusing on what is in your direct line of sight.

Even if you are skeptical about the power of pupil dilation, if key jurors are not making eye contact with you or do not return your smile, or their pupils are not wide when they do, I suggest that you settle the case!

TIP NUMBER 5

Tell the jury what you want, not what you don't want. The Polarity Response.

When you hear a word, your mind performs a search and sort for meaning, automatically. It isn't possible to instruct your mind not to perform the search or even to cancel the search, once it begins the process.

Think about a kangaroo. Are you thinking about a kangaroo? Good. Now, stop thinking of a kangaroo. Don't let the idea of a kangaroo come into your mind. I wouldn't want you to think of a kangaroo.

Now think your last meal. To get rid of the kangaroo you have to think of something else that is positive. The brain does not understand a negative or does not stop its search for meaning, unless turned into a positive. What you resist in the mind persists in the mind.

You can also trigger searches for a state of mind or mindset. I see this during voir dire all of the time. Do you have a "problem with the burden of proof" or "quarrel X"...do you "disagree" with Z...do you feel it would be "improper" to ... would it more "difficult" for you to ...By using these words, you are triggering the mind to search for a problems, quarrels and disagreements with you and your case. Instead, state things in the affirmative, positively, what you want--do you agree with the proposition that ... Don't phrase things in a way that communicates what you don't want.

On the other hand, you may want the jury to have a problem or quarrel with elements of your opponent's case, without appearing to be adversarial. In that scenario, consider stating things in

the negative or using words that trigger negative states of mind. For example, a prosecutor can ask the rhetorical question, "Do you have a problem or quarrel with the notion that the defendant is presumed innocent until proven guilty?" By phrasing the question this way, is he probing for bias, or suggesting, subliminally, that the jury have a problem with the presumption of innocence (notice the use of the word "notion", which is lighter than "burden" of proof). I am not recommending this usage, which raises ethical issues, but you need to be aware of the potential for abuse, as well.

"Don't slam that door!" And the next thing you hear is the slamming of the door. The sign says, "don't write on the wall", and there is graffiti everywhere below the admonition. Don't read any more of this article. Don't think of the bright color red.

Did you see red? There is an automatic reaction to do the opposite of what we are told, and it's called the "polarity response". It works, in part, because the unconscious mind does not compute negatives, and in part because we react adversely to being given an order. The important thing is that it works and it is alive and well in jury instructions, and other aspects of courtroom communication.

When the judge instructs the jury "you must not be influenced by sympathy", or when defense counsel wraps himself in this charge, you might as well be saying: this is a very sympathetic case and I want you to rely on sympathy.

Defense counsel should avoid making statements like this in opening or closing--although you hear them all of the time. Plaintiff's attorneys should consider triggering the polarity response by telling the jury, "the judge will instruct you: 'do not be influenced by your sympathy', so when you consider this child's trauma to the brain and hemorrhaging ..."; or "I don't want you to be frightened by my client's appearance when you see his scarred and burned face ...". Secret Sway.

The important thing is to always consider the polarity response when drafting special jury instructions, and how and if you want to refer to standard jury instructions in opening statements and closing arguments.

TIP NUMBER 6

Let the tail wag the dog: using physiology to alter moods.

Persuasion is inextricably tied to a person's physiology. You can change your mood and that of others, by simply changing posture and body movements. People that are happy and depressed have postures and body movements that are unique to that state of mind. Many habitual physiological patterns leave telling marks on a person's body and face. For one of numerous possible examples, you may see smile or frown lines that tell you about a person's temperament. And I will discuss face and body language reading in future newsletters.

Try to look depressed, as in a "oh woe is me", by: dropping your shoulders and head, drooping your eyes and frowning. Add a tired sigh of frustration. Hold that position. Now, suddenly jump

up and make a Tiger Woods move as if you just got a hole in one, or a similar body movement and facial expression change, demonstrating overwhelming joy--as in YESsssssss!

Notice how your feelings and state of mind changes with changes in physiology. The tail can wag the dog, and does, all the time. This principal has many applications in the courtroom. If opposing counsel delivers an emotional opening or closing, or a witness' testimony alters the jury's state of mind, the mood created can persist and even act as a filter to delete, distort and generalize the data you present causing you (the messenger) and it (the message) to be perceived negatively. When you ask someone for something, you don't do it when they are in a bad mood, because that could bear on the request's outcome. Mood is a powerful filter in the persuasion process. So change it, and not by words alone.

You can do this in a myriad of ways. When it is your turn to address the jury on cross or otherwise, stand and move quickly in a direction and manner that causes them to shift in their seats or change postures; or present evidence in a way that causes them to do so. Like a "conductor" of emotions and states, use hand gestures that get jurors' eyes moving away from the downward position or worse, the downward right quadrant. Get them looking straight ahead or up.

What does "eye accessing cues" have to do with your state or presentation of evidence? A lot more than meets the eye. When a right handed person is "feeling" or processing information kinesthetically, a neurological trigger often causes their eyes to look down, or down to their right (if face to face, down and to your left). Get their eyes out of the down-right quadrant (opposite is true for left handed people).

You can take this one step further, because the corollary is true. When presenting emotional messages, to maximize the jurors' capacity to "feel" and have gut level responses to your presentation, use gestures at emotional plot points (climaxes) that get the jurors to look down, or better yet, downward and to their right (your lower left). By doing so, you will increase the level and intensity of their feeling and emotional response to your presentation.

When presenting or responding to emotional state altering testimony or argument, consider using physiology and eye positions to interrupt or enhance a person's emotional state. Let the "tale wag the dog".

TIP NUMBER 7

Words are like Rorschach ink blots; their meaning is uniquely based upon one's experience, not the dictionary.

"When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean--neither more nor less" ... "The question is", said Alice, "whether you can make words mean different things" ... "When I make a word do a lot of work like that, said Humpty Dumpty, I always pay it extra"---Lewis Carroll, Alice Through The Looking Glass

One of the reasons that words account for only 7% of the message in the communication, is because people attempt to use them to convey literal meaning, when in fact words are metaphors that are inextricably linked to a person's own experience.

Like Rorschach ink blots, words mean different things to different people. A house may mean comfort, privacy or one's castle. A house to others may be four cold and solitary bare walls where parents always fought. A home is not a house. A dog may be a best friend, or a dangerous animal. Words, as metaphors, trigger different meanings, emotions and states of mind. When words are used metaphorically, as they are by great writers and communicators, they become very powerful indeed.

"Words are the most powerful drug used by mankind. Not only do words infect, egotize, narcotize and paralyze, but they enter into and color the minutest cells of the brain"--- Rudyard Kipling

People don't buy "products"; they buy how they make them feel. We use logic in the conscious mind, to ratify our emotional decisions made in the unconscious mind. Your conscious mind may send you out to buy "Consumer Reports", but it is the unconscious mind and emotional states that get you to buy the Mercedes, Jaguar, and Porsche.

Jurors don't buy legal arguments as readily as they buy states of mind. They need to feel "right" or "good" about their verdict. You may want to make them angry, or cold and impersonal. The important thing is that you try to create the appropriate emotional state. Usually, the strategies of the plaintiff and defense will be mirror images of each other. Try to use words metaphorically to trigger a search for the listener's experience in a way that taps into their emotional state, rather than rely on linear, logical dictionary meanings.

Notice how you feel differently about words that describe the same thing: "medical malpractice" connotes driving health care costs up and frivolous lawsuits. It is not the same as physician negligence, which is not the same as a doctor running a medical red light. Was the plaintiff in an "accident" (implies no fault) or a "crash"? Is it a products liability case or public safety case? Are you a criminal defense or constitutional rights lawyer? Is it a cult or a denomination, a child or an offspring? Do you want to sign a contract or ok the paperwork? Is he a plaintiff, or my friend, John? Is it the "burden" (implies heavy) or standard of proof?

Use words to alter states of mind and search for experiential meaning. When drafting opening and closing statements, consider the metaphoric value of words and,

"Use the right word, not its second cousin"--- Mark Twain

TIP NUMBER 8

The jury sees your case not as it is, but as they are. It is the "I" not "eye" that does the seeing. You need see and present your case through the "I"s of the jury.

To alter perceptions, you first need to know what jurors' perceptions are or are likely to be. Then you need to develop a strategy to alter them consistent with your case or alter your case consistent with perceptions. The master persuader first attempts to learn the unique perceptual characteristics of the listener and audience---how they see the world and, equally important, what they don't "see" and what they can't "see".

How can you determine how jurors are likely to "see" your case, your client, your arguments, your theme, your evidence, and those of your opponents?

Lets start with what does not work: hunches, running ideas past colleagues or office staff. What does work, and works well, is market research and asking the right questions. That is done by conducting jury focus groups, and utilizing case specific supplemental jury questionnaires ("SJQ"), and custom designed, case specific, voir dire questioning, where applicable.

"Failure to conduct pretrial focus groups may be considered grounds for malpractice"---ATLA past president, Howard Twigg

Focus groups are portals into jurors' minds. They are crystal balls. Did you ever wonder what it would be like to be in the jury room while the jury deliberates? You can. Focus groups are the best pre-trial diagnostic tool on the market.

Other invaluable tools are SJQ's, and custom designed voir dire questioning. I'm not talking about standard boilerplate questionnaires or tired and old voir dire litanies, but, instead, case specific questions that are carefully crafted and drafted on a case by case basis.

Answers prospective jurors give up can often tell you how a prospective juror will view your case, or what their decision making strategy is so you can present your case in a way that will resonate.

In most jurisdictions, state and Federal, supplemental jury questionnaires are allowed, and in many they cannot be unreasonably refused.

Jury focus groups and SJQ's are so crucial to the persuasion, that I cannot stress these tools enough. These suggestions are not unique. In fact, they are shared by every trial consultant I know, as well as most attorneys. But they are worthy of repeating, over and over again, because they are either not being utilized by some attorneys, or not utilized enough by others.

An attorney's failure to conduct jury focus groups and utilize SJQ's before presenting a case to a jury is tantamount to a surgeon's failure to use diagnostic tools such as x-ray or MRI before surgery.

Whenever possible, know and research your audience. Then design your case around their map of the world.

Tip Number 9

To persuade, less is more: the art of knowing what not to say.

The biggest mistake lawyers make in the courtroom, is they don't present their cases in a way that resonates with a jury. They try their case autobiographically: what would it take to convince themselves. Instead of persuading, they often confuse, bore and worse yet, make jurors do heavy lifting.

"The minute you read something you can't understand, you can be sure it was drawn up by a lawyer"---Will Rogers

Most cases have too many witnesses, direct and cross examinations that are too long, too many exhibits, too much lawyer-talk, too much extraneous introduction, foundation laying and duplication, too many objections, too many recesses, too much time wasted, and trials take too damn long. You see and hear the same thing at motion calendars--each lawyer vying to talk more than the other. Lawyers like to talk.

Persuasion is not a quantitative process; it is an art. More is often less. What ever happened to Shakespeare's, "brevity is the soul of wit". The power of the pause. There is persuasiveness in silence, and in knowing when to shut up.

Case presentations should be designed with the juror in mind. People have very short attention spans, and tune out after ten minutes of a continuous and uninterrupted presentations. We are accustomed to our commercial breaks. Most jurors are not that interested in serving on your jury, and would rather be somewhere else. Since they are there, they want to be entertained, and are accustomed to seeing cases presented on TV in the style of "The Practice" and "Law and Order". Don't give them a James Michner novel.

All jurors come into the courtroom filled with unfamiliarity and uncertainty. They are asked to hear a case they know nothing about and have little interest in; are surrounded by people they don't know; and have to judge people they've never met, based upon facts in dispute, and the law they don't understand or agree with. There have been reported cases where jurors, after rendering a verdict and confused by the verdict forms, asked the judge, who won!

The key to persuading juries is to (1) make the courtroom and ongoing processes familiar; and (2) don't make the jury think too much or work too hard.

The uncertainty and unfamiliar context creates an unconscious state of "situational anxiety" in jurors. Their minds will automatically seek out certainty, and anxiety reduction from the moment they enter the courtroom.

"The will to survive is not the strongest instinct in human beings. The strongest instinct in human beings is to do what is familiar"---Virginia Satir

Even more importantly, jurors will reward the client of a lawyer that helps them reduce their anxiety, and guides them toward familiarity. There is one more thing you need to do for the jury, and they will follow you anywhere: don't make them do any heavy mental lifting.

"There is no expedient to which a man will not go to avoid the real labor of thinking ...everything should be made as simple as possible, but not any simpler" ---Thomas Edison

PRACTICE POINTERS:

- Start out by telling the jury, "This is a very simple case" and make it so. Eliminate all unnecessary witnesses, testimony and reduce the number of exhibits to bare minimums. After doing so, pare your case down some more.
- Whenever possible, act as if you were the jurors' guide and mentor. Inform them of what is going to take place, when, how and by whom--so that they come to see you, as well as the judge, as someone they can rely on for uncertainty reduction.
- Try to make the presentation of your case "entertaining".
- Don't use legalese or lawyer talk, ever. The courtroom isn't the place to show how sophisticated and educated you are. You're trying to persuade the jury, not the judge.
- Skip a lot of preliminary and foundation on direct examination. Get right to the essence of the testimony, elicit it, and sit down. Let your opponent put the jury to sleep on cross, and they usually will.
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- On cross, make a few key points, get some concessions, and sit down.
- Elicit testimony in short story format. "It's all about storytelling", Jerry Spence
- Focus on concept more, and content less. Create a sound bite-size case theme, preferably tested on focus groups, that crystallizes your case, and repeat it over and over and over again. The jury will repeat this "mantra" during deliberations.
- At every opportunity, point out the complexities, unnecessary testimony, exhibits, etc., of your opponent's case, and the simplicity of your own. Subtly, them know how much *you* respect their time, and aren't wasting it.
- Opening statement and closing arguments are the greatest opportunities to persuade you'll have. Don't waste it by belaboring all the facts in opening, and rehashing them again in closing. You need to grab the jury's attention, and hold it by speaking to the unconscious mind through the use of metaphors, rhetorical devices and storytelling.
- Use professionally created, high impact graphics, storyboards and timelines that tell the story of your case visually.

TIPNUMBER 10

Likeability isn't just for the likeable, anymore.

It doesn't take an astute social scientist to know that lawyers are not among the most liked people in our society. In post-trial interviews with jurors, it is invariably the lawyer that jurors most liked (or least disliked) that won the case. Persuasion and liking are almost synonymous, and if the jury doesn't like you, all the secret sway tips in the world won't help.

Roger Ailes, a communication expert and advisor to United States presidents said:

"If you could master one element of personal communications that is more powerful than anything ... it is the quality of being likeable. I call it the magic bullet"

We like people who are like ourselves. Therefore, you must either pick a jury like yourself and your client, or be chameleon-like, and become like your jury. The former is not possible, but the latter can be done. Liking is normally a naturally occurring phenomenon outside of one's control. Using NLP techniques, that process can now be cultivated and home grown.

Watch Fred Astaire and Ginger Rogers dance. You see a state of grace and beauty. Look closer. Their every movement, postures, gestures, breathing rates and location (upper, middle, lower chest), eye contact, blink rate, facial expressions and body rhythms mirror, match and compliment each other. Their physiologies are in a state of synchronicity, of oneness. They are a total state of rapport.

Communication is also a dance. When two people are in a state of conversational rapport, something very interesting happens. Their physiologies and body movements, rhythms and expressions mirror and match each other, just like dancers. The deeper the rapport, the greater the matching behaviors.

Now watch people conversing who are truly enjoying each other's company. Notice their postures match, they are breathing and blinking at the same rate, they make the same amount of eye contact, their gestures and facial expressions match, and their speech, language patterns, verbal and vocal patterns are similar (tone, volume, pitch, rate, rhythm, types of words, sentence structure, syntax, types of expressions and verbal content). They share the same emotional states and experiences. So similar is the physiology, couples in rapport over long periods of time, may even start to look and act like one another.

While in rapport, people feel empathy, understanding and trust. They like each other, feel an oneness, and are on the same wavelength. So much so, they often know another's thoughts, and speak the same line simultaneously. The corollary is also true. If two people are out of rapport, you will see mismatching behaviors. Everything is out of sync. They are stepping on each other's toes.

Rapport, or the lack thereof, is a usually naturally occurring biofeedback mechanism, occurring below one's conscious levels of awareness. I say "usually", because rapport can be created and

maintained by pacing, mirroring and matching a persons physiology, body language and speech patterns. Hard to believe, but true. This is not new. These techniques are utilized by leading therapists with their patients to generate rapport and trust.

Creating rapport through mirroring, matching and pacing, in the hands of a skilled practitioner, this is one of the most powerful tools to create liking and to maximize persuasion. The only limits on your ability to gain rapport with another, is the degree to which you (1) can perceive another person's body language, postures, gestures, speech patterns, breathing, blinking, speech, language patterns, emotional state and experience; and (2) your skill to pace, mirror and match them. Done deliberately, it will appear to you as mimicry. You will fear detection. But if done properly with subtlety, the listener only feels closer and is drawn to you.

There are many sophisticated techniques of mirroring to avoid detection that enhance rapport. One is called cross matching, where you match different but similar movements. For example, the body can sway with the rhythm of their breathing; fingers can tap in unison with their foot movement; the head & neck can shift along with their posture. They pick up a fork; you raise your water glass. The possibilities are as infinite as one's creativity.

Once you've established rapport, and in order to test and calibrate its degree, you can lead a person, and they will follow. If your posture shifts, so will theirs. If you lift your hand, they will make the same or a similar cross-matching gesture. If your rate of speech increases, so will theirs, as your breathing slows, so will theirs.

Matching and mirroring have profound implications in the courtroom. You can create greater and instant rapport with judges, and witnesses, thereby enhancing your credibility and theirs. You can even learn to pace jurors, individually, and the jury as a whole (there is group pacing techniques and rapport).

Learning to destroy rapport by deliberate mismatching can be a powerful tool on cross-examination. You can lull a witness into a false sense of rapport, and suddenly use subtle mismatching behaviors that will result in the witness experiencing situational anxiety and cognitive dissonance. With the loss of rapport, the jury will perceive a corresponding loss of credibility and believability.

It is well beyond the scope of this article to fully develop this very important subject, which takes a lot of practice and is taught in my NLP workshops. Its mastery, however, can make you likeable, which is one of the secrets behind the sway.

BONUS TIP

Winning jury trials is all about persuasion, nothing more.

"The object of oratory is not truth but persuasion"--Thomas Babington Macaulay

Truth and justice. After 25 years of practicing law, I still haven't found it. Perhaps that is because there is no such thing where "reasonable minds may differ". Innocent, guilty and negligent are just

labels that are not uniformly applied from one jury to another. Your truth is another's lie. Justice for your client is someone else's injustice.

The *raison d'etre* of trial lawyers isn't to seek truth and justice; it is to win. To do so, it helps to understand what makes juries tick. A jury isn't a "riddle wrapped in a mystery inside an enigma". Jurors are just ordinary people, subject to all the laws of persuasion and influence at a lawyer's disposal.

"When dealing with people, remember you are not dealing with creatures of logic, but with creatures of emotion, creatures bristling with prejudice and motivated by pride and vanity"--- Dale Carnegie.

The "dream team" understood this, and I didn't. The case of *State vs. Orenthal James Simpson* taught me a great lesson. If you can get to a jury, any case can be won or lost, without regard to the "law" and the "facts". What makes a jury ignore a "mountain of evidence"? *They didn't see it*, because lawyers altered their perceptions through persuasion. Winning jury trials is all about persuasion, nothing more.

Some people consider tools of persuasion manipulative, and may even feel uncomfortable when unmasking the process and seeing the Wizard of Oz, behind the curtain. The secrets of persuasion are not for the faint of heart. They are for lawyers who want to win jury trials that are theirs to lose and who want to obtain far more favorable damage awards than the averages.

If I were starting out as a trial attorney today, with the benefit of hindsight, I would spend a lot more time and energy studying the laws and art of persuasion, and less trying to prove my case arguing the law and facts. The best trial lawyers understand this, and so do juries. It's not too late for any of us.

"A jury consists of twelve persons chosen to decide who has the best lawyer"---Robert Frost.

CONCLUSION

Some great persuaders are born, but for most of us, the art of persuasion is an acquired skill that is not taught in law school. Indeed, legal training and experience is often counter-intuitive to the process of influencing juries.

You may wish to pursue learning NLP skills for the courtroom attorney by:

- Registering online at my website, for my free jury persuasion newsletter.
- Attending my C.L.E. Programs.
- Registering for my NLP Training Workshops for Lawyers.
- Retaining me as a trial consultant.

Stay tuned and subscribed, because upcoming newsletters will allow me to discuss single topics in greater depth, and with more "practice pointers" (as I did in tip number nine).

I hope that I got you to think about the role of persuasion in the courtroom, and that you found my "ten tips" useful. I welcome your comments and suggestions.

With kind regards,

MARCUS AMBROSE, ESQ.

¹ The Clinton-Gore image is provided courtesy of Al Seckel.

ⁱⁱ "The Magic Number, 7 Plus or Minus 2", George Miller