PERSUASION SCIENCE FOR TRIAL LAWYERS by John Blumberg

Is trial advocacy art, science, or some of each? The answer is definitely the third, although the science part often gets lost in the shuffle or is alleged science with no data to back it up [think {80% of juries decide the case after opening" or "a picture plus words causes 60% fact retention"]. Finding the true science for persuasion takes some work but pays off grandly.

Efforts abound – trial advocacy texts now include a chapter on brain science; lecturers discuss seminal works such as *Thinking Fast and Slow:* and blogs on brain science, cognitive psychology and the courtroom try to fill the gap. Words like "dopamine" and "on the same wavelength [neural coupling"] are in our vocabulary and teaching slides. But to get a full picture, if there is but one book any trial lawyer or trial skills teacher should read this year, it is John Blumberg's *Persuasion Science for Trial Lawyers*. Reviews that begin in such a manner are often exaggerated or unreliable, but here the label fits.

Let me begin with who the author is - a trial lawyer and triple-board certified practitioner with extensive involvement in the National Board of Trial Advocacy and the American Board of Trial Advocates. More importantly, he is a lawyer who decided to search out the science of persuasion to inform the part of trial advocacy that is, indeed, science; and he undertook this with a thoroughness that demands attention.

What does *Persuasion Science* offer? After some introductory chapters it dives, deeply, into the world of psychology as applied or applicable to litigation and trials. It begins in a place we talk about too little - collegiality and the pre-trial relationship with opposing counsel – and makes the convincing case that adversarial hostility is detrimental to securing a beneficial outcome. Allowing the opponent to save face, and using the technique of "giving in to get your way," are guideposts for successful negotiation, a point confirmed by recent research. *See, e.g.* https://law.temple.edu/aer/2020/12/03/brain-lessons-negotiating-errors-when-the-adversarial-mindset-hurts-more-than-helps/

When it turns to the courtroom *Persuasion Science* is at its best and to some most unsettling. Blumberg does not abide by all conventional reasoning – he follows the science and comes to a number of conclusions that might seem provocative if not scary. Consider this one:

> 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 will resist; but when they arrive at their own conclusion, it sticks because they have persuaded themselves.

Persuasion Science, 56. Imagine a closing argument where the advocate does not say "the evidence *demands* a finding of…" but instead hands that to the jurors with a soft "could those be the result of carelessness…?"

This lesson is part of a broader one about "reactance." The author explains this in detail, with a personal experience driving it home:

> Reactance is the resistance to something that is perceived as a threat to one's autonomy or freedom of choice. Words like "must," "should," and "need" are known reactance triggers. I

learned this lesson during a mock trial. I was going through the verdict form and told the jurors how the questions should be answered. I had noticed that a young woman juror was paying close attention. I thought that I must have been very persuasive. Shortly afterward, while I observed deliberations on a remote monitor, I was stunned when she said, "Can you believe that douchebag plaintiff lawyer telling us what to do?"

Persuasion Science, 91. The book is replete with more lessons, some more familiar and/or less threatening:

- The use of visuals to supplement oral testimony is not limited to the role of pictures reinforcing words. Blumberg explains that memory processes visuals and words in two different "channels," each with limited capacity. Using the visuals reduces the need for words, making each channel more efficient and productive. And learning comes when the two channels are not competing – show the picture or read the words, not simultaneously. And if you have to show a visual with words – STAY SILENT. If you read the words aloud as jurors try to read along, it reduces comprehension.
  - o A related consideration is the age of the audience [juror]. As aging occurs, the efficacy of words may diminish but not so for pictures.

- Don't expect rational arguments to generate the emotional state required for a juror to support your position; rather,

    it is the emotional part that results in a *feeling* that causes the rational brain to justify a decision. *Caring* is *emotional*. *Self-interest* is *emotional*. *Empathy* is *emotional*. By using techniques that stimulate emotions, the rational brain finds the reasons to justify how the listener *feels*.

Persuasion Science, 48.

- Link factual depictions to the five senses – including what was smelled, heard and seen creates a more powerful, engaging and lasting image.

- Engender curiosity. If you begin an opening statement with a concern such as a child left at home, alone, with an unsecured firearm and pose the rhetorical question "imagine what might happen to that child" listeners want to know what the outcome is, predict what it might be, and then listen for whether their prediction is proved true.

- Using "devil's advocate" questions in jury selection can be a powerful tool to begin developing juror allegiance to your position and the inclination to argue that point on your client's behalf. An example would be asking jurors not whether corporations should be held responsible for their employees' actions but, instead, along thee lines of 'because corporations are responsible for lots of people and decisions and have lots of managers, is there any reason why a corporation should be responsible when an employee causes a harm? [The book does hits much more artfully – the example merely illustrates the proposition.]

Added value comes in samples from arguments the author has developed. Here is an exceptional one:

A powerful analogy might help defeat an argument that the absence of a prior accident is proof that there was no danger:

> Allowing a dangerous condition to exist is like Russian roulette. In Russian roulette, the cylinder of a six-shooter is spun, and then the trigger is pulled. If nothing bad happens the first five times, that doesn't mean it's safe. It's only a matter of time.

Other valuable insights are found in the chapter on experts, particularly on how to transform an expert's dry recitation of facts into the telling of a story. And Blumberg counsels us to use juror curiosity in establishing the expert's qualifications – asking the witness *why* they are able to give an opinion or otherwise assist the jury is being responsive to what jurors are asking themselves, albeit in the form of 'so why should I listen to this person?'

These are but a few of the lessons provided by *Persuasion Science*, a book amply annotated so that readers can 'go to the source." Use it to distinguish "empathy" from "sympathy" or to reconsider whether rapid-fire, staccato cross-examination is jury friendly or actually impedes comprehension. It is no surprise that the book is covered with tributes – and it is a text that warrants repeated readings and a prominent place on the advocate's bookshelf.

Information on PERSUASION SCIENCE can be found at *https://www.persuasion-science.com/*