

PERSUASION

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Any analysis of persuasion should consider a broader analysis of:

- why cases are won and lost
- how cases are decided by juries
- how best to establish rapport with others
- how to get people's interest and maintain it
- what tools exist to enhance natural persuasive abilities

Why Cases Are Won Or Lost

There are a number of factors which influence why cases are won or lost. They include:

1. The character, personality and qualifications of the attorney.
2. The character and personality of the plaintiff.
3. The character and personality of the defendant.
4. Which jury has been selected to hear and decide the case.
5. The facts of the case entering trial.
6. The facts of the case as proved at trial.
7. All else that happens at trial (i.e. the success of cross-examination, the emotional power of the direct of the plaintiff, etc.).

Qualifications Of The Attorneys

By far, to my understanding, the most important single variable which determines the outcome of any lawsuit is the relative abilities/disabilities of the lawyers. By this, I do not mean qualifications in its traditional sense -- schooling, who is smarter, smoother, more glib or "cute" -- you can easily, if not careful, be too "cute" by half.

What I **do** mean is which attorney is more in touch with, and aware of, his/her own inner feelings. What I **am** referring to is which attorney has more consciousness and

awareness of what is really going on around him/her and why. This awareness usually only comes from a lot of experience -- too often painful -- and a lot of introspective questioning. What I **am** talking about is to what extent either attorney has been able to get in touch with who he/she *really is* as opposed to who he/she has been being.

The more in touch with our own feelings we each are:

1. ***the more natural we can be with ourselves, our clients and the jury.***

The more natural we are, the more we can truly sense what is going on in the courtroom and then act on that truth. If we are not in touch with our feelings it is extremely difficult to really understand the people we are dealing with, what their needs are or where they are coming from because we can't see past our own problems.

By being in touch with our own feelings I do not mean being emotional, hysterical, out of control in the courtroom or crying at the drop of a hat. The best example I can give as to what I do mean comes from a character played by Robert Duvall in a great movie entitled "Tender Mercies". Duvall plays a washed-up country singer whose career hits the skids of alcohol abuse. He finds himself at a gas station/motel on a Texas plain in the middle of nowhere. He falls in love with the widow who runs the service station, marries her and becomes a father figure to her young son. One day, a group of teenage boys drive up to ask for Duvall's opinion as to what they have to do to make it in starting their own band. Duvall's only answer, in a deep gravelly, beautifully Texan accent was simply

"Play it the way you feel it, boys, just play it the way you feel it."

That gut level contact with one's inner being is what I am talking about.

2. ***the more we can understand people and what motivates them.***

This is because we can be somewhat freed from the distractions, obsessions and arbitrariness that comes from being in a permanent, cognitive state. The more in touch with our own feelings we are, the more objective we can be about our case and better understand what we really have to do to communicate what has happened.

3. ***the more we can understand that our case will be decided by the jury on a gut level, emotional feel basis.***

This is key. All cases will be decided this way. What we need to know is that, this being true, we must prepare, present, argue and try all of our cases on a gut level basis.

4. *the better we can identify the gut level emotional truth of our cases.*

This is critical. The more in touch with our own feelings we are, the better we can identify the true theme of our case -- that is, the heart and soul of our case. Also, we are better able to discuss the case's sub-themes and the value of the case.

5. *the better able we will be to develop a gut level emotional link with the jury.*

This is true for ourselves and for our plaintiffs.

6. *the better able we will be to educate our plaintiffs of the need for them to be at their gut level so that they can best establish their own gut level link with the jury.*

The more in touch we are with our inner feelings, the better we will be able to let our clients know that the gut level is where they have to be. My experience has been that, if I can get my clients in touch with the most powerful emotional event which has ever happened to them and/or that person for whom they have the deepest/strongest emotional feelings and work carefully with them around that, they will get as close to gut level as they can. For example, in a recent medical negligence case the husband/plaintiff got emotionally in touch with his mother and the wife/plaintiff got emotionally in touch with her two daughters, respectively. They were in the courtroom (figuratively) with my clients. As a result, my clients were truthful, not deterrable on cross-examination and could not, and therefore did not, emotionally exaggerate the impact of their injuries (since they were genuinely in touch with their own deep, inner emotional feelings). After the jury's verdict, one kind juror approached the husband/plaintiff and said that "all we wanted to do was ease the burden from your shoulders". That same juror also said that "we all noticed that the first time you smiled the whole trial was when you heard our verdict." Clearly, a gut level emotional link had been created between my client and that juror, at least.

7. *the better able we are to allow our natural instinct to work for us.*

Decisions as to all parts of our cases -- from the decision to take a case through closing arguments are ultimately governed by our instinct. When and how we object to questions and/or evidence is an example.

Of course, years of detailed, intellectually exhausting preparation in each case is an absolute requirement to give us the experience and confidence to actually feel secure enough to let us rely on our instinct.

As to instinct, it is my experience that the more we share the instincts of average, normal people (i.e. the jury), the better we will be able to relate to them and the more we will share their resolution process (i.e. we will instinctively know which questions they wanted asked and in what sequence). In closing argument, I often will suggest to the jury where to begin deliberations -- either with an exceptionally strong plaintiff's point or an exceptionally weak defense argument. If we share the same instinctive decision making process, the jury may well begin their deliberations where I suggest and then, of course, chances of a favorable verdict are enhanced.

8. *the better able we are to open ourselves up before the jury, and be vulnerable and real with them.*

It is my experience that the more we share who we really are with the jury -- by being real and in touch with our feelings -- the more they will share, be real with and trust in us.

9. *the better able we will be to speak in visual images and not just words, words, words.*

Visual images create and keep interest. They help jurors to feel and maintain that feeling.

10. *the better able we will be to know where to draw the line/how to create the balance between thinking and feeling.*

So often I am asked how do you know where to "draw the line" so that you are not too emotional.

The more in touch with our inner feelings we are, the more intuitively we will simply draw that line in a real, gut level place. As I practice more and more years, I have come to believe that at trial and before, it is the mistakes we don't make which win cases

as much as the things we may do well. So often the restraint we exercise is as powerful as any emotionally compelling closing.

Contact with who we are at a gut level unquestionably enhances the ability to instinctively choose correctly when and what to do and what not to do.

The Character And Personality Of The Plaintiff

The purpose of direct examination of a plaintiff is, first and foremost, to establish a gut level emotional link between him/her and the jury. That can best be done if our client naturally shares the same instincts as average/normal people. Not all of our clients are blessed with such natural likability. We can help in preparation by educating him/her/them that the case will be decided by the jury on a gut level emotional feel basis. Jurors usually are not physicists, physicians or scientists and usually do not have such knowledge before trial. We must educate our clients that, although jurors may not fully comprehend the message, they can and do determine at a gut level which messenger they choose to believe.

Our clients, as we do, have to present as real, genuine and at a gut level.

The Character and Personality of the Defendant

If there is any question but that the defense recognizes the importance of being human before a jury, the following advice given by the Defense Research Institute concerning medical negligence cases should be taken seriously.

How to showcase a defendant:

1. "He cared, he thought, he tried",
2. "As emotionally involved as the plaintiffs",
3. "Concerned for the plaintiff",
4. "Concerned for plaintiff's family",
5. "Concerned for his own reputation and future because of the jury's message",
6. "Very involved in community activities",
7. "Have the spouse and family in court", and,
8. "The defendant doctor should mingle with spouse and family members at breaks. This will reinforce the message that the physician is as personally

involved in the suit, as interested in the outcome and suffering the same anxieties as the plaintiffs.”

Which Jury is Selected

The purpose of voir dire is to find out which jurors cannot be objective about your case. You want to find out which jurors have fears or insecurities which will prevent them from acquiring an understanding of, and feel for, your proof.

Several keys to voir dire exist. First and foremost, you want jurors who are psychologically healthy and able to discern reality, that is, jurors who are able to understand what is *really*, as opposed to *apparently*, going on around them. You want jurors who have the capacity to see you as being right and to feel for your client’s damages. On the other hand, jurors who are psychologically unhealthy make great defense jurors. They are apt to go off on irrelevant tangents -- any one of which can cause you to fail in your satisfaction of the burden of proof.

In one recent automobile products liability case where a question of my client’s comparative negligence was raised, a prospective juror stated that she had been in two prior car accidents in which she was injured. She then added that she was at fault in both collisions. At first, I was concerned that having blamed herself she would feel free to blame my client. I decided to keep her on my jury because I realized that anyone who could take such personal responsibility for her own conduct had to be healthy enough to be able to understand and feel for my case and client. She became a very strong juror on my client’s behalf.

Asking appropriate questions and, more importantly, listening carefully to each prospective juror’s answers can help tell you which jurors can see reality. Clearly, a juror who consistently answers questions not asked cannot tell the difference between what is and what is not. Unfortunately, it is much more difficult to distinguish between good and bad jurors in the gray areas of consciousness in which most people live.

How can you tell if your prospective jurors are in contact with reality and are psychologically healthy? One way to make such a determination is to observe the potential jurors’ appearance. Do they smile, appear happy, generally look healthy?

Whether or not jurors seem to care how they look (i.e. attire, neatness, cleanliness) is revealing regardless of whether you find their manner of dress attractive or stylish.

A second guideline I use is that if I like the way a juror looks, the chances are he/she will like the way I look. I believe the opposite is also true.

As I mentioned above, whether prospective jurors respond to questions directly or answer questions not asked can be a clear giveaway as to their contact with reality. Again, the most difficult judgment call involves which jurors at the gray area margin of health and awareness are good or bad for your case.

A third tool I use specifically to help make this determination is to ask jurors open-ended questions as to how they feel about a particular issue involved in my case and/or about the kind of case itself. An example in a medical negligence case would be, “how do you *feel* about medical negligence lawsuits” or “how do you *feel* about people filing claims against doctors/hospitals for medical negligence”? Most people will not answer how they feel (emotion) but will tell you what their thoughts (cognition) are on the issue. That type of indirect response itself is revealing. Very few people will actually answer the question asked and respond based on their feelings. So long as their response is not antithetical to your position, jurors who can express their feelings are jurors you want.

A fourth guideline I employ is that although the brightness/smartness of prospective jurors is an important criteria, it is of secondary significance to the jurors psychological health. In other words, it is more important that jurors be psychologically healthy than be smart. The two crucial factors of psychological health and brightness interact as follows in terms of preferable combinations in your jurors.

Most preferable are psychologically healthy and smart jurors. They will be healthy enough not to be governed by their insecurities and smart enough to see reality and act on it.

Second choice are jurors who are psychologically healthy and not bright. At the very least, they will be able to feel for your case. The danger is that they can become confused and led by bad jurors.

Third choice are jurors who are psychologically unhealthy and not smart. They are not a threat to dominate a jury against your position.

Your last and worse choice are jurors who are unhealthy and smart. They are ideal defense jurors. They have the strongest psychological defenses which are extremely difficult, if not impossible, to penetrate and may be smart enough to dominate a jury against your position.

Your success in selecting a jury is directly related to how well you understand people and what motivates them. The more your instincts are like those of the average person, the more you will be able to establish rapport with your prospective jurors and thus understand them and their decision-making process. Instinct is a key because, however prepared you are, you cannot pre-plan every question and its follow up.

How Cases Are Decided by Juries

I believe all cases are decided by juries on a gut level emotional feel basis. As a result, all cases should be prepared, presented, argued and tried with this truth in mind.

Success at trial depends on preparation, instinct and experience. Your ability to obtain justice for your client is directly related to the amount of preparation you have done, the years of experience you have had in court and the degree to which your instincts are the same as, or at least similar to, that of the average person, i.e. the jury. Instinct, the intangible, is, I believe, the most important.

Preparation means concentration. The more we concentrate the more we will see what is to be done. The greater our ability to concentrate, the greater our ability to find the details which, when wound together, allow us to understand and as a result instinctively create the reality of our cases. Preparation allows us to find the proof which is our case. At its essence each case has a reality. Preparation permits our instinct and experience to work to find this gut level truth. It is at this gut level that juries respond. However uptight, uneducated or out of control each juror is, he/she literally survives because of a gut level sense of security and awareness. They may act out in unhealthy ways -- as we all do -- on a more superficial level but not at their gut level. If we understand that we instinctively share the same gut level security, awareness, understanding and feeling, we may be able to find the reality of our cases **with** the jury. They will become our partners. They will, to the extent that they are in touch with their

gut level or we are able to take them there, grow to trust and actually love us for what we stand for, for what we are trying to do for our clients and most importantly for what we are doing for them.

Tools of Persuasion

There are methods of persuasion. A few follow:

A. Storytelling

All of us can easily imagine a young child asking his/her parent for one more story before going to sleep. We get people's interest and maintain it by telling stories. Storytelling is the common denominator in communication.

To tell a successful story, certain techniques are effective.

1. Speak in visual images which evoke feelings. A successful closing really consists of one visual image after another.
2. Tell the story in the present tense. This puts the jury in the operating room, on the boat or in the plane with your client -- not just in the courtroom, after the fact.
3. Use sensory language and not just filler words, words, words.
4. The theme should be repeated in the story. It should be able to be stated in less than 10 words. Remember less is more.

B. Focus Groups

Focus groups are, to me, the most invaluable pre-trial tool which exists. They help define issues, tell you which key words to use and how people are persuaded and moved by the arguments in your case. Story development is enhanced by focus group feedback.

Conclusion

There is an atmosphere within which persuasion best occurs. Hard sell, strong arming, imposing ourselves and our intensity on jurors simply does not work. In fact, it has an opposite negative result. What does work is opening ourselves up, being strong by being vulnerable and giving the jurors room to get in touch with their own feelings and to act on them. It is hard, if not impossible, to open up with a jury if we do not know, or

even have a glimpse of, who we are. The first step to persuasion is getting in touch with our own inner feelings about ourselves, life in general and, ultimately, about our case.

Persuasion means softly contacting a listener's soul. There is a sense of sacred trust to persuasion. If someone listens, opens up and lets us in, a fragile bond now exists which has to be protected fiercely and truly. We protect it by being human, real, open and vulnerable.

We can possess no more valuable personal trait than the ability to speak with others in a real, compassionate and caring way.