ASPEN COURSEBOOK SERIES

Thomas A. Mauet • Stephen D. Easton

Trial Techniques and Trials

ELEVENTH EDITION

Thomas A. Mauet, University of Arizona
Stephen D. Easton, Dickinson State University

Trial Techniques and Trials unveils the strategies and thought processes that lawyers use in the courtroom as they present evidence and construct persuasive arguments. Clear writing and abundant examples explain and illustrate every step of the jury trial process. The **Eleventh Editio**n of this comprehensive text provides authoritative coverage, from opening statements to jury selection, direct-examination, cross-examination, exhibits, objections, and more.

Trial Techniques and Trials, Eleventh Edition, features:

- **Integrated discussion of the strategy and psychology of persuasion**—particularly regarding jury selection, opening statements, and closing arguments
- **Numerous illustrations** from tort cases, criminal cases, and commercial trials
- **Broad and flexible examples** that allow readers to focus on either the plaintiff's or the defendant's side of the case—or both
- **Logical organization** that follows the chronology of a trial process
- **A companion website** with additional examples, a trial notebook, and other tools for trial lawyers
- **Video lectures about critical trial moments,** in addition to a complete jury trial

Also Available

Materials in Trial Advocacy, Ninth Edition
Thomas A. Mauet, Warren D. Wolfson, and Stephen D. Easton
2019. 672 pages. ISBN: 978-1-5438-0518-5

Pretrial, Tenth Edition
Thomas A. Mauet and David Marcus
2019. 526 pages. ISBN: 978-1-5438-0502-4

Trial Evidence, Seventh Edition
Thomas A. Mauet and Warren D. Wolfson
2020. 512 pages. ISBN: 978-1-5438-1067-7

Mauet
Easton

Trial Techniques and Trials

ELEVENTH EDITION

www.AspenPublishing.com

10051261-0003

ISBN 978-1-5438-2531-2

SUSTAINABLE FORESTRY INITIATIVE Certified Sourcing
www.sfiprogram.org
SFI-00756

ASPEN PUBLISHING

Mauet_cover_25312_R5.indd 1
12/1/20 9:40 AM

Trial Techniques and Trials

EDITORIAL ADVISORS

Rachel E. Barkow
Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

Richard A. Epstein
Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson
Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier
Earl Warren DeLano Professor of Law Emeritus
The University of Michigan Law School

Tracey L. Meares
Walton Hale Hamilton Professor of Law
Director, The Justice Collaboratory
Yale Law School

Richard K. Neumann, Jr.
Alexander Bickel Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff
John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky
Stanley Morrison Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Stanford Law School

ASPEN COURSEBOOK SERIES

Trial Techniques and Trials

Eleventh Edition

THOMAS A. MAUET

Director of Trial Advocacy, Retired
and Milton O. Riepe Professor of Law, Emeritus
University of Arizona

STEPHEN D. EASTON

President
Dickinson State University
Former Dean and William T. Schwartz Professor of Law
University of Wyoming

ASPEN PUBLISHING

Copyright © 2021 Thomas A. Mauet and Stephen D. Easton.

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.AspenPublishing.com.

Cover image: iStock.com/ftwitty

Video icon: Icon made by Kiranshastry from www.flaticon.com.

To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-2531-2

Library of Congress Cataloging-in-Publication Data

Names: Mauet, Thomas A., author. | Easton, Stephen D., 1958- author.
Title: Trial techniques and trials / Thomas A. Mauet, Trial Advocacy, Retired and Milton O. Riepe Professor of Law, Emeritus, University of Arizona; Stephen D. Easton, President, Dickinson State University, Former Dean and William T. Schwartz Professor of Law, University of Wyoming.
Description: Eleventh edition. | Frederick, MD: Aspen Publishing, [2021] |
Series: Aspen coursebook series | Includes bibliographical references and index. | Summary: "A coursebook for law students enrolled in a Trial Techniques course. Also useful for practicing lawyers" — Provided by publisher.
Identifiers: LCCN 2020044650 | ISBN 9781543825312 (paperback) | ISBN 9781543825329 (ebook)
Subjects: LCSH: Trial practice—United States. | LCGFT: Casebooks (Law)
Classification: LCC KF8915 .M38 2021 | DDC 347.73/75—dc23
LC record available at https://lccn.loc.gov/2020044650

About Aspen Publishing

Aspen Publishing is a leading provider of educational content and digital learning solutions to law schools in the U.S. and around the world. Aspen provides best-in-class solutions for legal education through authoritative textbooks, written by renowned authors, and breakthrough products such as Connected eBooks, Connected Quizzing, and PracticePerfect.

The Aspen Casebook Series (famously known among law faculty and students as the "red and black" casebooks) encompasses hundreds of highly regarded textbooks in more than eighty disciplines, from large enrollment courses, such as Torts and Contracts to emerging electives such as Sustainability and the Law of Policing. Study aids such as the *Examples & Explanations* and the *Emanuel Law Outlines* series, both highly popular collections, help law students master complex subject matter.

Major products, programs, and initiatives include:

- **Connected eBooks** are enhanced digital textbooks and study aids that come with a suite of online content and learning tools designed to maximize student success. Designed in collaboration with hundreds of faculty and students, the Connected eBook is a significant leap forward in the legal education learning tools available to students.
- **Connected Quizzing** is an easy-to-use formative assessment tool that tests law students' understanding and provides timely feedback to improve learning outcomes. Delivered through CasebookConnect.com, the learning platform already used by students to access their Aspen casebooks, Connected Quizzing is simple to implement and integrates seamlessly with law school course curricula.
- **PracticePerfect** is a visually engaging, interactive study aid to explain commonly encountered legal doctrines through easy-to-understand animated videos, illustrative examples, and numerous practice questions. Developed by a team of experts, PracticePerfect is the ideal study companion for today's law students.
- The **Aspen Learning Library** enables law schools to provide their students with access to the most popular study aids on the market across all of their courses. Available through an annual subscription, the online library consists of study aids in e-book, audio, and video formats with full text search, note-taking, and highlighting capabilities.
- Aspen's **Digital Bookshelf** is an institutional-level online education bookshelf, consolidating everything students and professors need to ensure success. This program ensures that every student has access to affordable course materials from day one.
- **Leading Edge** is a community centered on thinking differently about legal education and putting those thoughts into actionable strategies. At the core of the program is the Leading Edge Conference, an annual gathering of legal education thought leaders looking to pool ideas and identify promising directions of exploration.

Summary of Contents

Contents

CHAPTER 12

Preface to the Eleventh Edition

For the Eleventh Edition of this industry-leading text, legendary Professor Thomas A. Mauet has decided to add a co-author. He has bestowed the considerable honor of co-authorship on yours truly. As the newcomer to this project (but not to the book, as I have assigned it as required reading to my Trial Practice students for over two decades at two different law schools), I have a perspective that differs from Professor Mauet's vantage point. Permit me to make a few observations about this book that reflect that perspective.

First, it is difficult for me to imagine the teaching of trial advocacy without this book. Newcomers to the simultaneously terrifying and exhilarating world of the courtroom need a guide to the many situations they will face as student lawyers and real-world practitioners. For decades, they have turned to Professor Mauet's guidance about how to conduct a direct examination, how to get an exhibit introduced, how (and when) to object, and on and on. This book gives them that crucial starting point.

Indeed, in a sense there really was no teaching of trial advocacy before this book. A few law schools offered trial advocacy courses in the 1960s and 1970s, but only a few. Professor Mauet's first edition of *Fundamentals of Trial Techniques* appeared in 1980. This book made it possible for law schools to add trial advocacy training for their students.

The movement toward trial advocacy courses had picked up steam by the time the ABA formed the Task Force on Law Schools and the Profession in the late 1980s. The Task Force's 1992 work product, widely referred to as the MacCrate Report, criticized American law schools for their dearth of practical training. This report pumped considerable energy into the movement to teach trial advocacy, prompting many law schools to add courses in this discipline. This book was the backbone of most of those courses. It has also been used widely outside the United States.

Though Professor Mauet has now added a co-author, not much has changed. The book is still at least 98 percent Professor Mauet's work. My rather modest contributions consist largely of revising the relatively few sections that needed updating to reflect new law, making the occasionally minor editorial change, and adding a few (but only a few) short discussions of previously uncovered matters—usually about aspects of trial that seem to confound newcomers (based upon my trial advocacy teaching experience). Law students and new trial lawyers will continue to turn to the guidance and samples that Professor Mauet has provided.

This gets us squarely to the point of this book and how it should be used. Any new trial attorney, in or beyond law school, would be well served by first reviewing this book in total. (Indeed, I now require my trial advocacy students to read the entire book before the first class for my concentrated Trial Practice class.) This review will provide new trial attorneys with an impressively comprehensive overview of situations they will soon face in the courtroom.

When you face one of these situations, like the aforementioned attempt to get an exhibit introduced, go back to the relevant section of the book. First, review Professor Mauet's advice about how to best accomplish your goal. (Please do not make the mistake of turning directly to the second step.) After you have done this, but only after, turn to the specific examples in the book that most resemble the situation you face. When you do so, though, remember that these are examples, not straightjackets.

This is not a cookbook. It is, instead, a book chock full of valuable advice about how to "cook" in court, with examples that will help you get a feel for your upcoming task. Your actual time in court will almost never track the example. That, of course, is the great fun, but also the great challenge, of trial advocacy: Things happen differently than you expect. Come with a plan, to be sure, but be prepared to adjust.

That reality leads to another fundamental principle of trial advocacy that must be kept in mind when reviewing this book and its timeless advice. I call this the "default" principle. As a newcomer to trial work, you need to learn the default way to conduct a direct examination, introduce an exhibit, skewer a witness on cross, etc. In your first trials, you should endeavor to follow the default. You need to retrain your brain by jamming the default methods into it via repetition.

Defaults, though, are not "universals." For every principle of trial advocacy, even the timeworn advice that you should use leading questions on cross-examination (*see* section 6.5(1)), there are exceptions or, at least, possible exceptions. It is a major mistake to focus on or even think about the exceptions when you are in those first trials. Instead, during those first trials, you should be zealously following the defaults until they are indeed jammed into your brain. Until they become second nature, you need to force them in. Thus, for your first trials, you should only use leading questions during cross.

Once the principle has indeed become second nature, you can sometimes open yourself up to the possibility of not following the default methods. If you are a newcomer to trial advocacy, as even the most experienced of us once were, you should ignore the possibility of not following the defaults. If you think there might be an exception to the default before that default is second nature, you won't really learn the default.

Though there are a few exceptions, this book is mostly about the default tactics you need to learn well to become an effective trial attorney. Frankly, there isn't enough space in the book (or enough time in an introductory Trial Practice course) to deal with the exceptions to the default. But even more fundamentally, newcomers should be focusing exclusively on the defaults, not the exceptions.

Sometimes there is room for reasonable disagreement about the default tactics. Different trial lawyers have different experiences that lead them to different views, even about the default tactics. Even though I have tremendous respect and admiration for Professor Mauet, on a few—but only a few—occasions, I have disagreements, often minor, about the best default approaches. When I believe

my views contrary to Professor Mauet's views are worthy of your consideration, I have noted them in the footnotes.

Please note, though, that there are not very many footnotes of this nature. On a huge percentage of trial tactics issues, I agree with Professor Mauet. His advice is, indeed, timely and comprehensive.

One more quick suggestion before I end this preface: Keep this book. If there is any chance you will be entering the courtroom after you graduate from law school, you will want to have this book in your office during your trial preparation and then in the briefcase you take to court. When something comes up that you have not previously experienced, you will find yourself turning to this book, as I have done many times with previous editions. In this way, Professor Mauet has sat in co-counsel's chair in thousands, if not tens of thousands, of trials. You will be glad to have him in that role in your trials.

Indeed, this book likely will be even more valuable to you than to those of us who are collecting grey hair toward the end of our trial careers. We had the good fortune of starting our practices when there were more trials. The growth of the alternative dispute resolution movement and budgetary pressures on state and federal courts have resulted in substantially fewer trials in recent decades. Thus, it probably will take you a bit longer to drill the defaults into your head, as your first trials might be spread over several years. Keep this book with you. It will help you through those first trials and then comfort and help you in later ones.

There are relatively few gems in legal writing. You are currently reading one. Congratulations on your purchase of the book and on your decision to pursue trial work!

Stephen D. Easton

Dickinson, North Dakota
November, 2020

Preface to the Tenth Edition

Why this new text? And why now? Because both jurors and trials have changed, so trial lawyers must change as well to be successful in the new millennium.

In 1980, when *Fundamentals of Trial Techniques* was first published, psychological research on the jury trial process was in its infancy, and teaching trial skills through the learn-by-doing method was in its early stages. At that time, young lawyers learned trial skills by observing, then emulating, experienced, successful trial lawyers. *Trial Techniques* reflected this reality, by showing how experienced lawyers performed the various tasks involved in jury trials, and that became the blueprint for young lawyers.

By 2005, when *Trials—Strategy, Skills, and the New Powers of Persuasion* was first published, much had changed. Jury research showed how juror attitudes about lawsuits, courts, and lawyers have all changed. Jury research also extensively studied how juror clusters—seniors, Baby Boomers, Gen X, Gen Y—have different preferences in how they learn, how they think, and how they make decisions. *Trials* focused on the psychology of juror learning and decision making, and how these preferences have changed the way trial lawyers now perform the various tasks involved in jury trials.

In this new text I have combined *Trial Techniques* and *Trials* by taking the best from each book. From *Trial Techniques* I have kept the overall structure of the book and the chapters that discuss the trial process, the psychology of persuasion, trial preparation and strategy, and bench trials. From *Trials* I have incorporated the chapters that discuss jury selection, opening statements and closing arguments, and direct and cross-examinations. The remaining chapters take significantly from both books. The examples throughout the text now reflect the three principal kinds of trials—tort, criminal, and commercial—so that readers can either read all the examples or can focus immediately on the plaintiff's and defendant's side of a particular kind of case. The text's format has also been modernized, and the difference between text and examples has been made clearer.

In addition, the website that accompanies the text contains an edited video of a trial so that students and lawyers can see a complete jury trial in 80 minutes. The website also contains the structure and contents of a completed trial notebook that students and lawyers can use as a blueprint to customize their own trial notebooks and forms as well as all the exhibits in full color and motion from the exhibits chapter. And the website contains additional examples of opening statements, direct examinations, and closing arguments.

For the Tenth Edition, I have added dozens of video lectures and demonstrations covering key components of trial. Professor Steve Easton and I are featured in several of these lectures, as is the late Professor Irving Younger. Other lectures are presented by the skilled trial attorneys, judges, and court reporters who served as the volunteer guest faculty for the 2013 University of Wyoming Summer Trial Institute at the University of Wyoming College of Law. Thanks to Steve Easton for his skillful integration of the videos with the text.

Boxes like this one, which contain the movie camera icon, draw attention to video resources.

Finally, the teacher's manual, available to instructors, contains my suggestions on how to organize a law school trial advocacy program and how to teach trial advocacy skills effectively.

Our understanding of jury trials has changed since 1980 in several significant ways. First, we now know that juror beliefs and attitudes heavily influence whether jurors will be receptive to particular themes, messages, and evidence. Second, we know that trials must be visual, because most jurors today have been raised largely on television and computers and expect evidence during trials to be presented the same way. Third, we know that opening statements are a critical stage of the trial process where trial themes and people stories are first presented and juror impressions are first formed. Finally, trials today must be conducted efficiently, as juror attention spans have shortened. These changes have fundamentally altered how successful trial lawyers conduct themselves in all stages of a jury trial and are discussed and illustrated throughout the text.

Some things have not changed. Successful trial lawyers know that organization and preparation before trial remain essential. They know that they need effective trial skills to implement a realistic trial strategy. And they know that to get favorable verdicts they need to reach the jurors' hearts and minds. These concepts are also emphasized throughout the text.

It is the combination of understanding jury psychology, pretrial preparation, and executing a realistic trial strategy with persuasive courtroom skills that produces effective trial advocacy. *Trial Techniques and Trials* is the result of over 40 years I have spent as a trial lawyer and trial advocacy teacher. I hope you are pleased with the result.

Thomas A. Mauet

Tucson, Arizona
January 2017

Website Information

This text contains references to a website where certain additional materials can be accessed. Using the access code found inside your book, visit **www.CasebookConnect.com/Resources** for more information.

The website contains the following:


Website references will be called out in a website box like this.

Videos and Transcripts

Chapter 1—video of jury trial (*Gable v. Cannon*)

Chapter 4—additional opening statements in criminal case (*State v. Rausch*) and commercial case (*Thompson v. Thermorad*)

Chapter 8—additional direct examinations of experts (pathologist in criminal case; accountant in commercial case; and engineer in products case) and direct and cross-examination of an economist in a wrongful death case)

Chapter 9—additional closing arguments in criminal case (*State v. Rausch*) and commercial case (*Thompson v. Thermorad*)

Exhibits

Chapter 7—all exhibits in full color that are contained in the exhibits chapter

Trial Notebook

Chapter 11—example of a trial notebook and forms

Video Lectures and Demonstrations

You will find references to relevant lectures and demonstrations throughout the text.


Videos will be called out with a video text box that looks like this.

CHAPTER 1

The Trial Process

1.1 Introduction

You have just been called into the office of a partner of the litigation firm that recently hired you. The partner tells you he has a case scheduled for trial soon that seems "just right" for you. Discovery has been completed. Pretrial motions have all been ruled on. Witnesses have been interviewed. Trial memoranda have been prepared. Settlement negotiations have just collapsed. The case now needs to be tried, and you're the person who will try it. With a smile, the partner hands you the file. Apprehensively, you walk out of his office, thinking: "My God. What do I do now?"

Jury trials are the principal method by which we resolve legal disputes parties cannot settle themselves through less formal methods. Although alternative

dispute resolution methods, such as arbitration, mediation, summary trials, private trials, and the like, are becoming increasingly important, jury trials in the federal and state courts remain the most important dispute-resolving method in the United States.

In our jury trial system, the jury determines the facts, the judge determines the law, and the lawyers act as advocates for the litigants. Our adversary system is premised on the belief that pitting two adversaries against each other, with each interested in presenting her version of the truth, is the best way for the jury to determine the probable truth. The tools the litigants have, and must understand, are fourfold: substantive law, procedural law, evidence law, and persuasion "law." The first three, being principally legal, can be learned in a few years. The last, the psychology of persuasion, is what fascinates true trial lawyers, and they spend a lifetime learning about, and learning how to apply, psychology in the courtroom.

Integrating substantive law, procedural law, evidence law, and persuasion "law" and applying the result to our jury trial system is what this book is all about. Chapter 1 is an overview of the trial process. Chapter 2 discusses the psychology of persuasion. Chapters 3 through 10 cover all the specific stages of a jury trial, from jury selection through closing arguments and evidentiary objections. Chapter 11 provides a comprehensive approach to trial preparation and strategy. Chapter 12 covers bench trials and discusses how the psychology of persuasion applicable to jury trials also applies, with modifications, to bench trials.

For an introduction to trial advocacy, please watch Video A.1, "Wyo STI: Introduction to Trial Practice."

1.2 Local Practices and Procedures

Jurisdictions differ in how they conduct trials. First, the applicable substantive law may differ. Second, the applicable civil and criminal procedural rules may differ. Although many jurisdictions follow the Federal Rules of Civil Procedure, many do not. Criminal procedural rules vary widely. Third, the applicable evidence law may differ. Although most jurisdictions have adopted the Federal Rules of Evidence, some states, including some of the more populous ones, have not. Fourth, court rules and local rules implementing procedural statutes can vary widely. Indeed, trial procedures and customs differ from county to county and judge to judge. Judges, particularly in federal court, may impose additional limitations on the parties, such as how voir dire will be conducted, how many experts each side may call, how much time each side will have to present its case, and how much time can be used during opening statements and closing arguments.

Small wonder, then, that a trial lawyer's first job is to learn and understand all the "rules" that will be applied to the upcoming trial. Accordingly, the outline of the jury trial process in this chapter must be taken as an overview of that process. While common variations in practices and procedures will be pointed out, not all can be.

1.3 Trial Date Assignment

Cases are set for trial in two basic ways: individual calendars and central assignment systems. With individual calendars, each trial judge is responsible for the overall handling of every case assigned to that judge's docket, including setting the trial date and trying the case. In civil cases, after discovery is completed and the parties state that the case is ready to be tried, the judge will set a trial date. That date will vary, but frequently the trial date in civil cases is at least three to six months after the case is ready to be tried. Criminal cases, because of speedy trial requirements, usually get trial dates within three to four months of arrest or arraignment.

Central assignment systems are found more frequently in large urban areas. Under that system, cases remain on one central calendar for trial assignment purposes. The oldest cases are at the top. New cases then creep their way from the bottom to the top of the list. Depending on the jurisdiction, this may take from perhaps one to more than five years. When the case reaches the top, it is sent to a judge for trial. Jurisdictions having a central assignment system usually publish the trial calendar in the daily legal newspaper, and it is the lawyers' responsibility to keep track of their cases as they move up the calendar. Many jurisdictions whose court records are stored electronically also allow lawyers to access the electronic database to determine the status of any case.

1.4 Jury Selection

Congratulations! It's the day of trial. You've done all the preparatory work (discussed in Chapter 11) and the case is actually going to trial. What happens now?

You and your opposing counsel arrive in the trial judge's courtroom at the designated date and time. Clients will usually be there. Sitting on the bench is the trial judge. Other courtroom personnel will include the court clerk, court reporter, and bailiff. Other lawyers and spectators may be present.

The clerk calls the case—your case—for trial. You, your client, and the other lawyer move up and stand at the lawyers' tables in the courtroom (frequently marked "Plaintiff" and "Defendant"; if not, find out ahead of time where the sides customarily sit). The judge asks whether both sides are ready for trial. You and the other lawyer both respond "ready, your honor."

The judge next "orders a jury" and directs the bailiff or other court personnel to go to the jury room and bring a panel of 15 to 50 jurors back to the courtroom. In the meantime, the judge may again explore the possibility of settling the case, try to resolve any remaining procedural and evidentiary issues, and address any questions about how the jury will be selected. This may be done in the judge's chambers.

When the jurors are first brought into the courtroom, they usually sit in the spectator rows. The judge introduces herself, the lawyers, parties, and court personnel, mentions the case on trial, and explains how jury selection will be conducted. In a few jurisdictions, lawyers make short introductory statements about facts and issues of the case (and a few judges require opening statements before

jury selection). The court clerk swears in the prospective jurors to answer questions asked by the judge and lawyers. Jury selection then begins.

How a jury is selected in a particular courtroom varies greatly, probably more than any other phase of a trial. Jury selection is controlled by statutes, court rules, and individual judicial practices. These control how jurors are initially called and qualified for jury service, how many jurors will decide the case, whether alternate jurors will be selected, the bases for cause challenges (statutory grounds to dismiss, or "strike," jurors), and the number of peremptory challenges (a party's right to strike a juror for almost any reason) each party will have and how they will be exercised. These also control what jury selection system will be used (the most common are the strike system, used in most federal courts, and the panel system, used in many state courts), the permissible topics on which jurors can be questioned (will they include questions about law or be limited to questions about jurors' backgrounds and life experiences?), and who will do the actual questioning (judge, lawyer, or both). Written questionnaires for jurors are frequently used in complex cases.

How long does the jury selection process take? While most cases take between one and three hours, in a complex or highly publicized case jury selection can take much longer. When the selection process is completed, the jurors and any alternates are sworn in by the court clerk as trial jurors to decide the case.

1.5 Preliminary Instructions of Law

After jury selection and before opening statements, the judge usually gives the jury preliminary instructions on the law. This orients the jurors and lets them know what will happen during the trial. For instance, the judge will probably summarize their duties as jurors (to follow the law, determine the facts and credibility of witnesses, and apply the facts to the law), instruct them on how to conduct themselves during recesses (do not discuss the case among yourselves or with others, do not visit the scene, and do not research the case in any way including using your cellphone or computer to do Internet research), and describe how trials are conducted. In recent years, more judges also summarize the pleadings and instruct the jury on the applicable substantive law. In a few jurisdictions, jurors are told that they may discuss the evidence during the trial when recesses occur, as long as all jurors are present in the jury room when the evidence is discussed. The judge's reading of preliminary instructions usually takes several minutes.

By this time one of the lawyers might have asked the judge to order the exclusion of witnesses during the trial (sometimes called "separating witnesses" or "invoking the rule"). This prevents witnesses from sitting in the courtroom while other witnesses are testifying. The exclusion does not apply to parties, a party's representative, or someone whose presence is essential.


For a discussion of exclusion of witnesses, please watch Video H.4, "Wyo STI: Exclusion of Witnesses."

Many jurisdictions permit note-taking by jurors. Some jurisdictions encourage it by providing jurors with notepads and pencils. In lengthy trials, jurors are sometimes given notebooks containing admitted exhibits, photographs of each witness, and paper for note-taking.

Other jurisdictions expressly bar note-taking. If note-taking is allowed, the notes are collected and destroyed after the jury returns its verdict.

1.6 Opening Statements

Plaintiff and defendant now give their opening statements. Opening statements are the lawyers' opportunities to tell the jury what they expect the evidence will be during the trial. This helps the jury understand the evidence when it is actually presented. The opening statements should be factual, not argumentative, although jurisdictions and judges vary considerably in how much "argument" and discussion of law they allow in opening. While many jurisdictions permit opening statements to be waived, this is rarely done.

Most opening statements are based on themes and storytelling, usually giving a chronological overview of "what happened" from either the plaintiff's or defendant's viewpoint. The statement should be engaging and memorable, presenting each side's case in the best possible light and drawing a picture that will make the jury want to find in that side's favor, and anchored to memorable, emotionally based themes. Lawyers know the importance of a good opening statement. Research has shown that most jurors return verdicts that are consistent with their impressions made during the opening statements.

How much time do the opening statements take? Most last 10 to 20 minutes per side; longer statements run the risk of either boring the jurors or overloading them with details. The judge may put time limits on opening statements as well as on other phases of the trial.

Some jurisdictions require that plaintiff's opening statement make out a prima facie case because lawyers' statements are taken as admissions. If this is the case, plaintiff's lawyer (and defendant's lawyer, if affirmative defenses or counterclaims are also involved) must be sure that the opening statement is legally sufficient.

In most jurisdictions, the defendant may reserve the opening statement until after the plaintiff has rested his case-in-chief. While this is infrequently done, the defendant may sometimes not want the plaintiff to know her specific trial strategy. (This may happen in criminal cases where the discovery rules are restrictive, and the defendant plans to present an affirmative defense and doesn't want the prosecutor to know its details.)

Finally, some judges have the lawyers make their opening statements to the entire jury panel, before jury selection is conducted. The idea is that jurors will be more likely to disclose attitudes they have that might affect their suitability to be jurors if they know more about the case being tried.

1.7 Plaintiff's Case-in-Chief

Plaintiff, having the burden of proof, presents evidence first. (This is always the case, unless defendant has admitted the plaintiff's claims, so that only affirmative defenses or counterclaims, on which the defendant has the burden of proof, remain to be proved.) This means that in the plaintiff's case-in-chief, plaintiff

must present sufficient proof on each element of each legal claim alleged in the complaint or indictment, using four possible sources of proof: witnesses, exhibits, judicial notice, and stipulations.

When a witness is called to testify, he is first sworn to tell the truth by the court clerk. Once the witness is seated in the witness chair, questioning begins. Direct examination is that part of the questioning done by the plaintiff's lawyer (the side calling the witness). When the direct is completed (the lawyer usually says "nothing further on direct, your honor," "pass the witness," or "your witness," depending on local custom), the defendant's lawyer begins cross-examination. In most jurisdictions, the scope of the cross-examination is limited to the subject matter of the direct. A few states, however, follow the "English rule" under which cross-examination can go into any relevant matter.

When the cross-examiner announces she is done, the direct examiner may conduct a redirect examination (limited to explaining or refuting matters brought out on cross). The cross-examiner may be permitted to conduct a recross-examination (limited to matters brought out during the redirect). (In most jurisdictions, the judge may ask the witness questions, and a few jurisdictions allow jurors, usually through written questions submitted to the judge for approval, to ask the witness questions.) The witness is then excused, and plaintiff calls another witness.

Exhibits are the other principal source of evidence. The four principal types of exhibits are real objects (guns, blood, drugs, machinery), demonstrative exhibits (diagrams, models, maps), writings (contracts, promissory notes, checks, letters), and records (private business and public records). Exhibits need "foundations" to be admitted; that is, the party seeking to introduce the exhibit in evidence must present evidence that the exhibit complies with the applicable rules of evidence. The foundation may come from witness testimony, certification, or other methods. The formalities required in establishing the appropriate foundation for a particular exhibit vary somewhat, depending on the jurisdiction. If admitted in evidence, the exhibits may be considered by jurors just like any other evidence presented during the trial.

Judicial notice is the third method of getting information to the jury. The judge can take judicial notice when the fact is either well known in the jurisdiction where the trial is being held (the Empire State Building is in Manhattan) or the fact can be easily determined and verified from a reliable source (on July 5, 2020, the moon was full).

For a discussion of judicial notice and stipulations, please watch Video H.3, "Wyo STI: Profs. Easton and Younger on Judicial Notice and Stipulations."

The fourth method of proof is a stipulation, an agreement between the parties that certain facts exist and are not in dispute. This makes the presentation of undisputed evidence more efficient. Stipulations are usually made in writing and are shown or read to the jury much like any written exhibit. The judge usually instructs the jury on what a stipulation is.

In what order does plaintiff present the various witnesses, exhibits, and other evidence in his case-in-chief? This is totally up to plaintiff; whatever is most persuasive (and logistically practical) is permitted. Plaintiff must have some idea how long the witnesses are likely to testify so that he will neither run out of witnesses during the day nor have witnesses wait hour after hour to testify. Most witnesses are on the stand between 15 and 90 minutes, although some, particularly parties and experts, may take substantially longer.

When plaintiff is finished presenting all his evidence, he "rests." This is done simply by standing up and announcing to the judge and jury, "Your honor, plaintiff rests." The judge tells the jury that the plaintiff has finished presenting evidence; the judge then will probably take a recess to hear defendant's motions.

1.8 Motions After Plaintiff Rests

After plaintiff rests, and the jury has been excused and has left the courtroom, defendant usually moves for a directed verdict. While the motion may have different names in different jurisdictions (in criminal cases, for example, it is commonly called a "motion for a directed judgment of acquittal"; in federal civil cases it is called a "motion for judgment as a matter of law"), its purpose is identical. The defendant asks the judge to terminate the trial in whole or part, and enter judgment for the defense, because plaintiff has failed to "prove a prima facie case." While the motion is sometimes made orally, the better and sometimes required practice is to file a written motion with the court.

If plaintiff has failed to present any credible evidence to support any element of any claim brought in the complaint or indictment, the judge should grant the motion as to that unproved claim. The standard applicable to the motion is that the judge must view the evidence "in the light least favorable to the movant." Accordingly, if there is any credible evidence, either direct or circumstantial, supporting the claim, the motion should be denied. Hence, it is up to the defendant to point out why there has been a fatal absence of proof on any required element of plaintiff's claims, or that there is only one reasonable conclusion that can be drawn from the evidence that was admitted.

The judge may grant all, deny all, or grant part of the motion. For instance, the judge may grant the motion on one count of the complaint and deny the motion as to the other counts. In a criminal case, the judge may grant the motion on the charged offense but deny it as to a lesser-included offense (e.g., grant the motion as to the murder charge but deny it as to the lesser manslaughter charge). The trial then continues.

1.9 Defendant's Case-in-Chief

Defendant's case-in-chief has two possible components: evidence to refute plaintiff's proof and evidence to prove any affirmative defenses and counterclaims (as well as cross-claims and third-party claims in multiple-party cases).

Defendant, if she elects to present evidence, proceeds in the same way that plaintiff did—by calling witnesses and introducing exhibits, judicially noticed facts, and stipulations. The procedures are identical.

When defendant is finished presenting all her evidence, she "rests" by standing up and announcing to the judge and jury, "Your honor, defendant rests." The judge tells the jury that the defendant has finished presenting evidence; the judge then will probably take a recess to hear motions.

1.10 Motions After Defendant Rests

After defendant rests, and the jury has been excused and has left the court room, the judge again hears motions. Plaintiff can move for a directed verdict on any of defendant's affirmative defenses and counterclaims. The judge must again view the evidence "in the light least favorable to the movant" in ruling on the motions. If there is a failure of proof on any required element of any affirmative defense or counterclaim, the judge should grant the motion as to that defense or counterclaim.

1.11 Plaintiff's Rebuttal and Defendant's Surrebuttal Cases

After defendant rests, and after motions have been made and ruled on, plaintiff has an opportunity to introduce evidence that rebuts defendant's evidence. This rebuttal evidence usually proves a defense to defendant's counterclaims or contradicts other specific evidence presented by the defendant.

Defendant also may have a last chance to rebut specific matters raised in the plaintiff's rebuttal case. This is called the defendant's surrebuttal case.

1.12 Motions at the Close of All Evidence

When all the evidence is in and both sides have rested, plaintiff or defendant may again move for a directed verdict at the close of all the evidence. Again, the standard remains the same: The judge must take the evidence "in the light least favorable to the movant."

In many jurisdictions, a motion for a directed verdict at the close of all the evidence is required to preserve the right to move for judgment notwithstanding the verdict after trial.

1.13 Instructions Conference

At some point during the trial the judge will need to "settle instructions." This means that the judge must rule on which jury instructions will be submitted to the jury. The judge will probably have both plaintiff's and defendant's requested instructions before or at the beginning of trial (in civil cases, the final pretrial memorandum submitted by the parties will usually contain each side's requested instructions and any objections to the other side's). Usually, however, the judge cannot reach final decisions on which instructions to submit to the jury until she has heard all the evidence. For that reason, the instructions conference is usually held after both sides rest and before closing arguments.

During the instructions conference, plaintiff and defendant argue why instructions should be given, denied, or modified. During the conference, which may be

held in court (without the jury present) or in chambers, the court reporter should be present to record the objections and rulings. In most jurisdictions, the lawyers must make specific objections on the record to requested instructions before a judge's giving that instruction to the jury, or refusing to give a requested instruction, can be raised as error on appeal.

1.14 Closing Arguments

Plaintiff and defendant now give their closing arguments. The closing arguments are the lawyers' opportunities to tell the jury what the evidence has been, how it ties into the jury instructions, and why the evidence and law compel a verdict in their favor.

Effective closing arguments integrate themes, facts, and law, and argue that the credible evidence, when applied to the law, requires a favorable verdict. Lawyers can argue inferences from the facts, refer to important testimony, use admitted exhibits, tell stories, employ analogies, and use a range of other techniques to persuade the jury.

How much time do closing arguments take? Most last 30 to 60 minutes per side. If too short, they fail to use the available time persuasively. If too long, they run the danger of boring or irritating the jury. The judge may put reasonable time limits on the closing arguments.

In most jurisdictions the party having the burden of proof, usually the plaintiff, has the right to argue first and last. That is, plaintiff has the right to argue first and, after defendant has argued, make a rebuttal argument. A few jurisdictions allow only one argument per side (and in some of these, the defendant argues first, plaintiff last).

In situations where the only issue for the jury to decide is whether an affirmative defense or counterclaim has been proved, and the defendant has the burden of proof on these issues, the defendant usually will have the right to argue first and last.

1.15 Jury Instructions

The judge must instruct the jury on the law that applies to the case. Some judges instruct the jury before the lawyers make the closing arguments. Others instruct the jury after the closing arguments are completed. In most jurisdictions the judge will both read the instructions and give the jury a written set of the instructions to use during deliberations. A few jurisdictions follow the practice that instructions are only read to the jury.

The jury will also get verdict forms. There may be a number of verdict forms, since cases may have multiple parties, claims, counterclaims, and third-party claims. In some cases, the jury may also get special verdict forms asking how the jury finds on various specific issues of fact and law.

Reading and explaining the instructions in most cases take perhaps 10 to 20 minutes, although in complex cases they can take much longer.

1.16 Jury Deliberations and Verdict

The jury is then sent to the jury room to begin deliberations. Before leaving the courtroom, however, alternate jurors, if any, are usually dismissed, and the court bailiff is sworn in to safeguard the jury's privacy during its deliberations.

The bailiff usually carries the admitted exhibits and the written jury instructions back to the jury room for use during the deliberations.

Often the only guidelines the jury receives on how it should organize and conduct itself are the standard instructions that the jurors should first select a foreperson to preside over their deliberations and that the foreperson and, in some jurisdictions, the other jurors must sign the verdict forms that reflect the jury's decisions. How the jury organizes itself and conducts the deliberations is largely up to the jury.

Jurors sometimes have questions during their deliberations. These are usually written down and brought by the bailiff to the judge, who then confers with the lawyers on how to respond. After a response is prepared, the jury is brought back into the courtroom and given the response. Deliberations then continue.

When the jury reaches a verdict (either a unanimous or majority verdict, depending on the jurisdiction) and signs the appropriate verdict forms, it signals to the judge (usually through a buzzer system or a message delivered by the bailiff) that it is ready to return the verdict. The lawyers, if they are not in the courthouse, are called, and everyone reappears in the courtroom. The jury is brought in, and the judge asks if the jury has reached a verdict. When the foreperson answers "yes," the foreperson is directed to give the verdict to the bailiff, who gives it to the judge (who checks to see that all verdict forms are accounted for and have been signed properly), who usually gives it to the court clerk to be read aloud.

After the verdict has been announced, the judge will ask whether any parties want to "poll the jury." If so (and it is common that the losing side requests it), the clerk will then ask each juror if the verdict read in court is that juror's verdict. If all say "yes," that ends the jury's service. If any jurors necessary for the verdict (some jurisdictions do not require unanimous verdicts in all cases) say "no," the jury continues deliberating.

How long does the jury deliberate? Most verdicts are probably reached in one to four hours, although every trial lawyer can tell a story about getting a 15-minute verdict or having a jury deliberate more than a day, perhaps several days, in a lengthy or complicated case.

What happens when the jury cannot agree on a verdict? The judge usually asks the jury whether further deliberations might be useful or whether the jury is hopelessly deadlocked. If the former, the judge often gives the jury an "Allen charge," which encourages the jurors to listen to each other's views and attempt to reach a verdict. If the latter, the judge declares a mistrial, excuses the jury, and schedules a retrial.

The court then usually sets a date for a hearing on any post-trial motions and, in a criminal case following a guilty verdict, sentencing. This does not occur in a criminal case when the jury enters not guilty verdicts on all counts, as such a decision will result in a dismissal that ends the case.

1.17 Post-Trial Motions and Appeal

After the verdict a party usually has a specific number of days in which to file written post-trial motions. The most common are a motion for judgment notwithstanding the verdict, which asks the judge to set aside the jury's verdict and enter judgment for the other side, and a motion for a new trial, which asks the judge to order a new trial because of claimed errors made during the first trial. These motions are frequently made alternatively. Also common in some jurisdictions are motions in civil cases for additur or remittitur, which ask the court to increase or decrease the dollar amount of the jury's verdict.

The judge will usually schedule a hearing on the motions and allow the parties to argue orally. The judge will then rule on the motions and usually will prepare a written order.

When post-trial motions have been decided, the judge enters judgment in accordance with the jury verdict and post-trial motion rulings. Entering judgment is the jurisdictional act that ends the case in the trial court. A party wishing to appeal the judgment must file a timely notice of appeal with the clerk of the trial court. In civil cases, a party must usually post an appeal bond in the amount of the judgment. This act begins the appellate process.

1.18 Conclusion

There is nothing mysterious or complicated about trial procedure. The important thing to remember is that federal and state courts historically have developed different ways of conducting the various stages of a trial, and they continue to experiment with changes today. Consequently, every trial lawyer must know how his case will be tried in the court, and before the judge, where it is scheduled. If you don't know, you must find out. Ask the judge's law clerk, court clerk, and trial lawyers who have tried similar cases before that judge how cases are tried there. Whenever possible, go to the courtroom and watch a case being tried. This will give you a feel for the judge's demeanor and how she conducts a jury trial.

See the website accompanying this text for a videotape of a jury trial that demonstrates the trial process.

CHAPTER 2

The Psychology of Persuasion

2.1 Introduction

Trials are a re-creation of reality—an event or transaction that happened in the past. In trials, there are usually three versions of reality: your side's reality, the other side's reality, and the jury's reality. Each party firmly believes that its version of reality is correct and tries to persuade the jury to accept its version. However, the only reality that ultimately matters is the jury's reality—what the jury believes actually happened—because that reality will control the jury's verdict.

Which side's version of reality will the jury accept as its own? This depends largely on which side is more persuasive in presenting its version during the course of the trial. If neither side is persuasive, the jury will construct a version of reality entirely on its own. To persuade juries, you need to understand jurors—their backgrounds, beliefs, and attitudes, how they process information, how they think, and how they make decisions. Only when you understand the psychology of persuasion can you understand how to persuade a jury to adopt your version of reality as its own. This understanding will influence everything you do during a jury trial, from voir dire through closing arguments.

This chapter reviews what behavioral science and jury research have learned about juror backgrounds, beliefs, and attitudes, how they process information, what influences them, and how they make decisions. It also discusses how trial lawyers can use this knowledge to shape how they try cases. Although for the most part this research is consistent with what effective trial lawyers have learned through experience, it has organized and explained jury behavior in a systematic way that significantly contributes to our understanding of how jurors think, how they decide, and how they can be persuaded.

2.2 Behavioral Science and Jury Research

Until perhaps 50 years ago, a common view was that jurors objectively absorbed the evidence presented by both sides during a trial, withheld making premature judgments, dispassionately reviewed that evidence during deliberations, and ultimately reached a logical decision, based on the evidence and the applicable law. Behavioral science research, beginning in the 1940s, and jury research, beginning in the 1960s, have emphatically rejected that view. "They," the jurors, do not think and decide like "us," the lawyers.

For an overview of jury research and its impact on trial advocacy, please watch Video A.2, "Mauet on the Psychology of Trial Practice."

A caveat is in order. Much of this jury research has been conducted in environments that have little to do with courtroom realities. For example, researchers frequently use written questionnaires answered by undergraduate students receiving extra credit to test the researchers' hypotheses. Researchers frequently show videotaped scenarios to volunteers, who then answer questionnaires. Whether such research yields results that can be applied with confidence to jury trials is somewhat doubtful. Fortunately, in recent years some of that research has become more realistic, by using trial lawyers to help create courtroom scenarios, and by using actual or representative jurors in real courtrooms to test the hypotheses. Such research results have more credibility in the world of trial lawyers.

What does the behavioral science and jury research tell us?

1. Affective Reasoning

People have two significantly different approaches to decision making. Most people are primarily affective ("right brain") decision makers. Affective persons have several common characteristics. First, they are usually emotional and creative, and are more interested in people than problems. They see trials as human dramas, not legal disputes. Second, they use deductive reasoning, which is primarily emotional and impulsive, in which a few premises about how life works and relatively little factual information are used to create "stories" of what probably happened, reach decisions, and attribute cause and blame quickly. Third, once they make decisions, they become committed to them, and they validate their decisions by selectively accepting, rejecting, or distorting later information to "fit" the already reached decisions. This allows them to justify their decisions and believe the decisions are logical and fair. People have an internal need to be consistent, which makes them committed to their original decisions despite the receipt of later conflicting information. Since information inconsistent with their decisions causes internal conflict and stress, they become resistant and soon hear and see only what supports their decisions.

By contrast, cognitive ("left brain") decision makers are more interested in problems than people, enjoy accumulating information, defer making decisions until they have all the available information, and, like trained scientists, use inductive reasoning to reach logical decisions. Cognitive decision makers are more likely to have higher education levels and math, hard science, or business backgrounds. After seeing a collision, affectives ask: "Was anyone hurt?" Cognitives ask: "Whose fault was it?" In short, affectives "feel"; cognitives "reason."

While most jurors are affective decision makers, most lawyers, trained in legal reasoning, are cognitive decision makers. The approach that is effective in persuading "them," the jurors, will not be the approach effective for "us," the lawyers. Lawyers must understand how jurors process information, create "stories," and make decisions before lawyers can communicate persuasively with them. This has significance at all stages of a jury trial.

2. Beliefs and Attitudes

Beliefs (what we know about something) are how we perceive life works—our value system. Attitudes (how we feel about something) are the expressions of our beliefs. Our attitudes are our convictions, biases, and prejudices about people and events, our sense of what's right and wrong, what's fair and unfair. We try to make sense of the world around us, and use stereotypes—our beliefs and attitudes—to organize our views of that world. Beliefs and attitudes are formed throughout our lives through parental training, formal education, television, news, and, most importantly, personal observations and experiences. Once developed, attitudes are usually held for life and change slowly, if at all, over time.

Attitudes subconsciously filter information about the world around us and help sort out conflicting information and fill in missing information. Attitudes are the rose-colored glasses through which we "see" information in our own unique way, accepting information that we like and rejecting, minimizing, or distorting information that we dislike, thereby achieving personal consistency and comfort.

Most jurors do not passively sit and uncritically absorb evidence. They rarely have "open minds" that are receptive to new ideas. Instead, they "test" new information by how consistent it is with their preconceived ideas of how life works and how it fits into the "story" of the case they have constructed in their minds. Jurors rapidly construct stories of what probably happened in the case, then subconsciously use their attitudes to accept, reject, or distort evidence, or supply missing information, to create a complete, plausible story. This lets jurors reach decisions they believe are consistent with the evidence, and are therefore logical and fair. The more circumstantial the evidence of liability or guilt, and the more familiar jurors are with the subject matter of the trial, the more important jurors' beliefs and attitudes become.

Juror attitudes have great significance throughout a trial. These attitudes determine if the jurors will be receptive or resistant to the parties, evidence, and themes presented during the trial. Lawyers can only persuade if jurors are willing to accept, and jurors' attitudes, not logic or reason, control whether they will accept or reject particular information or messages during a trial. Therefore, lawyers need to understand the jurors' relevant attitudes, whether these attitudes are consistent with or in conflict with each other, and how strongly those attitudes are held. This must be explored before and during the jury selection process, since it is highly unlikely that any jurors will change their attitudes about any important matters during the course of a trial.

Although juror demographic information (such as sex, race, age, marital status, family history, residence information, education, and job history) is easy to obtain, those demographics at best reflect likely general attitudes about life, and have limited use in predicting individual juror attitudes relevant to the issues in a particular trial. Single demographic characteristics, such as sex, race, and age

are almost useless in predicting juror attitudes (unless, of course, the case itself involves issues of sex, race, or age).

By contrast, direct information of juror attitudes should be a better source. However, jurors are frequently inaccurate, whether intentionally or unintentionally, in describing their own attitudes about issues relevant to a particular trial. Self-disclosure of true attitudes during jury selection, particularly attitudes on sensitive issues, is notoriously unreliable, because the jurors' need to fit in and be accepted by others usually overrides the obligation to be truthful. As a result, jurors usually give socially acceptable answers to questions that probe attitudes on sensitive issues. Creating a relaxed, nonjudgmental environment for self-disclosure improves its reliability. Questioning jurors individually, out of the presence of the other jurors, improves the amount and accuracy of self-disclosure. Using written questionnaires, rather than questions in open court, may also significantly improve the candor and completeness of self-disclosure.

Lawyers usually seek to learn juror attitudes indirectly, by asking about jurors' hobbies, interests, involvement with groups and organizations, and personal experiences in life, from which attitudes can be inferred. Personal experiences similar to the case being tried are particularly important, because jurors consider these experiences to be evidence and frequently spend as much time during deliberations discussing their collective experiences as they do discussing the formally introduced evidence.

Jury selection (assuming the law and court permit such latitude) usually pursues all these approaches—getting basic demographic information, as well as direct and indirect information on attitudes—so that lawyers can make informed decisions on which jurors to accept or reject in a particular case.

3. Decision Making

A jury verdict is a product of two forces: individual decision making and group decision making. Individual juror decisions are influenced principally by affective reasoning and the jurors' beliefs and attitudes, discussed above. However, it is also important to understand that most jurors go through an emotional progression during the course of a trial, because that progression will influence how lawyers present themselves, their evidence, and their arguments. Lawyers who understand and respond to the jurors' emotional needs during the trial have a significant advantage.

At the beginning of a trial, particularly during the jury selection process, most jurors experience varying levels of anxiety. This is natural, since uncertainty creates anxiety. They are unsure of their role as jurors, unsure that they will be selected to sit as jurors, unsure of their capacity to understand what the case is all about, and unsure of their ability to reach the right verdict. For the rest of the trial those jurors are using subconscious strategies to cope with their unwanted anxiety.

As the trial begins, after they have been selected to sit as jurors, and after they have heard the opening statements, that uncertainty and anxiety, for most jurors, subsides. Their uncertainty lessens as they begin to understand courtroom procedure and their role in the trial process. They begin to come to terms with the case by constructing stories in their minds of what the case seems to be about. These stories may turn out to be accurate or inaccurate, but they are constructed just the same. The stories are the mental process by which jurors strive to make sense of the information they receive. This is not the same thing as reaching a

final decision, but does have a great deal to do with how those jurors perceive the actual evidence when they receive it.

As the trial progresses, and they actually hear and see the evidence, jurors subconsciously accept, reject, or distort that evidence, depending on whether the evidence is consistent or inconsistent with the stories they have constructed in their minds. This is the filtering process, where jurors subconsciously use their attitudes and beliefs to screen the evidence as they hear and see it. For most jurors, the evidence, as filtered, serves to validate the stories they have already constructed and to "prove" that their initial impressions were right. The anxiety most jurors experienced at the beginning of the trial has subsided, as these jurors become confident of what the right outcome of the case should be.

At the end of the presentation of evidence, most jurors, now confident of and committed to their decisions, look forward to sharing their views with others during deliberations. For these jurors, the closing arguments will have little influence, since they already know what the right decision should be (although hearing arguments supporting their decision may make them stronger advocates for that decision during deliberations). Closing argument will usually influence only those jurors who are still unsure of their decision, or who do not have confidence in their decision. Closing argument may also influence those jurors who realize that their decisions are not permitted under the verdict options given in the court's instructions on the applicable law and that they must now reassess their decisions. Closing argument can also arm jurors who know what the correct decision is with arguments they can use to persuade jurors who disagree.

When the jurors retire to the jury room to deliberate, this is the time they may first realize that other jurors may not share their views and decisions, and group dynamics has a strong influence in determining whose decisions will prevail and speak for the jury as a whole.

Individual decisions are influenced by the dynamics of group decision making, since a jury is a group charged with reaching a decision—the verdict. Jury research has focused much of its attention on the dynamics of group decision making, the critical concern being the extent to which individual decisions can be overcome by group decisions.

Group dynamics do not involve an even exchange among the members of a group. Some members have more influence on the group than others. For these purposes, members are usually defined as persuaders, participants, or nonparticipants.

Persuaders are persons who make assertive statements about the evidence, freely express their opinions, and actively build coalitions supporting their views. Persuaders are the opinion leaders who have the most influence and dominate the discussion in a group. They usually have higher education levels and have positions of authority or expertise in their work. They are articulate, talk readily, and are comfortable in group settings. Many will have prior jury service. Persuaders constitute approximately 25 percent of a group. In a typical jury deliberation, three jurors do more than 50 percent of the talking, and those are the persuaders.

Participants are persons who also engage in group discussions. However, they are followers, not leaders, because they value social approval and acceptance by others. They defer to others having stronger egos, more education and higher intelligence, more experience, and greater career success. Participants readily join coalitions, since the coalition validates their decisions, but they do not lead them. They will be actively involved in the deliberations, but they are likely to state

things in terms of their opinions, and do not actively try to have others accept their views. Participants constitute approximately 50 percent of a group. In a typical jury deliberation, about six jurors will be participants.

Nonparticipants are persons who rarely engage in group discussions. Jurors who are nonparticipants rarely become involved in deliberations other than to express agreement with a particular view or vote. Nonparticipants are usually followers who will go along with what the majority decides to do. (However, nonparticipants who are loners and are detached from and avoid involvement with others may exhibit independence and not be easily swayed by the majority's view.) Nonparticipants constitute approximately 25 percent of a group. In a typical jury deliberation, three jurors will be nonparticipants.

Categorization of potential jurors is, of course, particularly important at the jury selection stage of the trial, where the peremptory challenges should be used first to eliminate unfavorable persuaders. It is more important than trying to identify the potential jury foreperson, who, research has shown, is more likely to be a compromiser and consensus builder than an opinion leader or authoritarian personality.

4. What Influences the Jury

What influences jurors to accept our version of reality as their own? Communication is based on perception. It is a process involving senders (witnesses and lawyers), messages (evidence and arguments), media (testimony and exhibits), and receivers (jurors). Learning, for the receivers, is also an active process involving receiving, processing, remembering, and retrieving messages. Learning and persuasion will only occur if the messages you intend to send to the jury are the same as the messages the jury actually receives and retains.

a. Sender Credibility

The senders—witnesses and lawyers—must be credible sources of information before they can influence the jury. Influence is largely a function of credibility, and credibility is largely a function of the sender's personal attributes. People develop opinions about others quickly, often within a few minutes. Three principal characteristics of credibility are trustworthiness, expertise, and dynamism.

For a review of ways to increase your credibility in the eyes of the jurors, please watch Video A.4, "Wyo STI: Attorney Credibility."

First, trustworthiness refers to impartiality. Jurors obviously prefer witnesses who have no apparent bias, interest, or motive to slant testimony one way or another, or, if expert witnesses, are not hired guns willing to say anything for a fee. For lawyers, it means that the lawyers are candid in dealing with both good and bad facts, and do not try to pull the wool over the jurors' eyes.

Second, expertise refers to how knowledgeable the witnesses are about the facts and issues of the case. Knowledgeable and authoritative persons have more influence on others. With lay witnesses, it refers to how well the witnesses saw, heard, or knew about the relevant events and transactions, and how well they remember and recount the details surrounding them. With expert witnesses, it refers to the experts' education, training, and experience, and how thoroughly they did their tests and analyses. It also refers to the uniqueness of the experts' qualifications, since people put more weight on information seen to be scarce and therefore valuable.

Third, dynamism refers to the witnesses' and lawyers' ability to communicate. Jurors prefer witnesses and lawyers who are likeable and attractive, both physically and personally. They are more influenced by people they like and who appear to be much like themselves. They prefer witnesses and lawyers who project energy, enthusiasm, and confidence when they testify or argue. All the components of effective delivery—verbal content (the actual spoken words), nonverbal delivery (paralinguistics, such as speech rate, volume, pauses, and voice inflection), and body language (kinesics, such as posture, body, arm, and hand movement, facial gestures, and eye contact)—must work in a coordinated way. Boredom is the enemy of effective communication, and dynamic delivery is the best antidote. Any lawyer or witness can be taught how to be a more effective communicator.

Finally, jurors think—erroneously[1]—that they are good at detecting deception, and they use stereotypes to make such assessments. They believe that mannerisms such as lack of eye contact, nervousness, hand over mouth, hesitancy in answering, and using words like "honestly" or "believe me" indicate uncertainty or deception. These are the kinds of mannerisms that witness training and preparation can minimize.

b. Receiver Capacities

The receivers—the jurors—come with diverse interests and abilities and represent a broad spectrum of today's adult population. Many, however, have limited attention spans, limited interest in learning, and limited channels through which they are willing to learn.

First, most people's attention spans are short. The average person can only maintain a high level of concentration for about 15 to 20 minutes. After that, attention levels drop significantly. That's why half-hour television programs are more common than one-hour programs—advertisers know that viewers are likely to change channels before the hour is over. In addition, listening to others talk occupies only a small portion of the brain's capacity, allowing the rest of the brain to fade in and out and think about other things. While some jurors will pay close attention throughout a trial, most jurors will have varying levels of attention, and periodically drift off and think about other things.

Second, most people have limited interest in learning, particularly when there is no perceived self-interest involved. Learning new things takes effort. Many jurors did not like formal learning, and once their schooling was done, resist situations that repeat their school-years' experience. A trial, of course, represents in many ways the formality of classroom learning, which, for some jurors, dredges up unpleasant memories.

Third, most people have been trained, principally through television and computers, how to expect new learning. They are part of the "sound bite" generation. They now want it fast, painless, interesting, and visual. They form perceptions quickly, based on little information. Observe any television news program. Notice how each news item is short, usually less than two minutes, leads off with a few seconds' introduction from a "talking head," cuts quickly to visuals with a background voice, focuses on the human impact of the story, and wraps up before

1. Junior co-author Easton recognizes that simulated jury research suggests that individuals are not good at detecting deception but believes the collective group of twelve jurors can often detect deception.

boredom sets in. If this is what makes people watch television news, it speaks volumes about how lawyers in today's environment should try cases to juries.

Fourth, what people see as "evidence" is different from what lawyers understand as evidence. When people become jurors, they see as evidence any information relevant to their decision, whether it is formally introduced evidence from witnesses and exhibits, their personal experiences in life they believe, rightly or wrongly, to be relevant to the case, or their attitudes about how life works. Everything that jurors see as evidence goes into their decision making. Jurors frequently spend as much time discussing their experiences in life—such as the automobile accidents they've been involved in, their experiences with doctors and hospitals, and their experiences with the police—which they feel are as relevant to their decision as they do to the witness testimony and exhibits. It's all "evidence" to the jurors.

c. Components of Persuasive Messages

Effective communication must come from credible sources and must be attuned to the realities of today's listeners. The message itself, whether witness testimony, exhibits, or lawyer statements and arguments, must also be effectively structured. Research has contributed much to understanding the components of effective communication.

First, memory is a severe limitation on what we can effectively communicate. It makes no sense to communicate if the listeners do not retain the essence of what has been communicated. The average person forgets most of any communication within a few hours, and after two or three days retains but a small part. Trial lawyers need to understand that memory is indeed fleeting, and they must use strategies to improve jurors' retention of the key information presented during a trial.

Second, people use simplification strategies to deal with sensory overload. People are bombarded with information during a trial through testimony, exhibits, and arguments. They quickly become overloaded with information. Sensory overload is a stressful situation that people try to avoid, so they subconsciously employ simplification strategies to cope with the avalanche of information.

A key simplification strategy recognizes that people instinctively use psychological anchors, which are mnemonic devices to help them remember the gist of what they have learned. Much like we use yellow highlighters to mark key words and phrases on written material, jurors create psychological anchors to do mentally what highlighters do physically.

Psychological anchors are what trial lawyers call themes. A theme is a memorable word or short phrase—"this is a case about greed"—that summarizes and encapsulates lengthy descriptive and evaluative information. Research shows that it is human nature to condense voluminous information to an easily remembered word or phrase, so that hearing or seeing the word or phrase later will trigger some of the supporting detail. Anchoring information to a theme makes the information easier to retain and retrieve. If trial lawyers do not provide the themes during a trial, jurors will instinctively create themes themselves. An important part of trial preparation is selecting themes that are emotionally based, catchy and memorable, summarize the liability and damages positions in the case, fit the undisputed and disputed evidence, and are consistent with the jurors' beliefs and attitudes. If this is done well, and used periodically during the trial, jurors will adopt your themes during their deliberations.