

**State-of-the-Art  
Techniques for  
Increasing Your Power  
and Exceeding Your  
Expectations in the  
Courtroom**



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TRIAL & ADVOCACY SCIENCES

## State-of-the-Art Techniques for Increasing Your Power and Exceeding Your Expectations in the Courtroom

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***“... we must begin to use a Decision Maker Oriented (DMO) approach to developing arguments in the courtroom if we hope to increase our persuasive power and exceed our expectations of our own performances.”***

*“Winning is not a sometime thing; It’s an all the time thing. You don’t win once in a while; you don’t do things right once in a while; you do them right all the time.”*



- Vince Lombardi (1913-1970)

Every lawyer has a hidden potential for increasing his or her persuasive power in the courtroom. Moreover, we now have sources of information about how judges, jurors and arbitrators are likely to react to different arguments that were only a dream a few years ago.

As a lawyer you have been given two great gifts – the capacity to learn and the potential for influencing the world around you. You have the opportunity to inspire judges, jurors and arbitrators and to motivate them to do something that they would not ordinarily do without your persuasive power.

We have learned through many years of psychological research and hundreds of years in the courtroom, that the decisions made in trial or arbitration say more about the decision makers than the trial lawyers who seek to persuade them. Therefore, we must begin to use a Decision Maker Oriented (DMO) approach to developing arguments in the courtroom if we hope to increase our persuasive power and exceed our expectations of our own performances.

We live in an age where trial lawyers and corporate litigation managers are tempted to become technocrats. The average day is saturated with demands for a lawyer’s immediate attention to mountains

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of detailed information. In such an environment, it is easy for any person to lose touch with the deeper meanings in life and, therefore, to lose touch with the important perceptions and motivations of people we seek to persuade in the courtroom.

Fortunately, our capability for maintaining a connection with the vital essence within humanity is always inside us, even though it may have been ignored for a while. In addition, there are some remarkable new methods for staying in touch with the world of judges, jurors and arbitrators as it constantly changes.

This article is intended to help us to rediscover some important aspects of our capability to communicate and persuade and to learn how to better use some of the organization and research tools that are available to provide vital information for us.

When we talk to judges, jurors, and arbitrators after their deliberations, they reveal some amazing explanations for their decisions. We have found that at the nucleus of their perceptions is their feeling of agreement with the themes and meaning of the winning side's version of the story and the commitment and passion with which it was told by the winning trial lawyer. In other words, at the core of every winning argument is a story that appeals to the hearts and minds of judges, jurors and arbitrators.

This finding is supported by more than 40 years of social psychological research. Essentially the overall premise is that all courtroom decision makers make important decisions the same way you do. They gather all the details, try to make sense of them in accordance with their life experiences, and then make a decision that makes them feel good about themselves. It sounds simple enough. But when you are trying to create a story from scratch, how do you create one that will win over the hearts and minds of people who do not know anything about you or your case and you know very little about the attitudes and life

experiences that will influence their decisions?

The answer involves both the best of use of your personal persuasive skills as well as reliable and carefully researched information about the perceptions of the likely audience (i.e. judge, jury or arbitration panel). It requires a careful blend a few psychological principles behind persuasion with familiar trial advocacy techniques. Courtroom decision makers rely mostly on the message and meaning of your case, but they also consider the messenger's commitment and passion about the case.

### **What is State-of-the-Art?**

One of the reasons that the practice of trial advocacy is so interesting is that it offers opportunities to incorporate principles and ideas that are traditional and familiar with the dynamic and constantly changing world around us. In every motion hearing, bench trial, jury trial, and arbitration hearing, real life is being re-enacted and described for the benefit of the fact finders. In the course of the trial, the attorneys, witnesses, and decision makers are constantly influenced by core aspects of humanity, while adapting them to the behavior of people in the 21<sup>st</sup> Century.

Moreover, the world of trial lawyers has changed since the days of Abraham Lincoln and Clarence Darrow. Although there is much we can learn from the wisdom and experience of venerable practitioners in by-gone eras, judges, jurors and arbitrators have changed dramatically over the decades. News travels to the farthest reaches of the earth very quickly. Courtroom decision makers are saturated with information about products, people, and ideas. Most of them are comfortable with the most advance visual and computer technologies. Millions of people in the United States move their residences every year, compared to populations that were fairly stable at the time of Lincoln and Darrow. Ideas about social philosophies and how the world works are changing.

It is very likely that if Clarence Darrow were to argue the Leopold and Loeb case today in Chicago, he would adapt his themes and messages to today's audiences and he would get to the point a lot quicker. In order to keep up with judge and juror perceptions, he would be wise to invest time and resources into studying them by looking at previous jury verdicts or conducting his own mock trial jury research study.

The point here is that the current state-of-the-art trial advocacy practice is a product of a building process using past experience and knowledge as a foundation and strengthened by new information and methods that have proven to be successful. Although a full discussion of this subject would require much more time and space, perhaps we can touch on several key concepts that are now in use by many successful trial attorneys.

## Proven Persuasive Techniques

### 1. *Balancing Logic, Emotion and Character*

According to Aristotle, logic, emotion and character form the cornerstones of the most successful persuasive arguments. As a result of centuries of psychological research, we now realize that these same cornerstones are essential in persuading judges, jurors, and arbitrators.

Logic is the use of valid reasoning and making appropriate inferences from the factual evidence. Emotion has been defined as a strong surge of feeling that motivates someone to behave in a certain way. Character is the combination of personal traits that causes one person to be distinguished from another.

In the courtroom, judges, jurors, and arbitrators want trial attorneys to tell them what happened and to demonstrate the core logic behind their presentations. Decision makers need to feel that their perceptions and decisions are logical.

On the other hand, we know how important emotion is in the persuasion process. Even the most hardened and

logical person has an emotional component to their personality even though it may not be apparent. For this reason, every judge, juror or arbitrator needs to feel the passion and commitment to the case that you bring to the courtroom presentation. They need to sense the important meaning in the case that appeals to their emotional side.

In balancing the arguments, character is also important. Courtroom decision makers need to sense the strengths or weaknesses in the character of the trial attorneys, the parties to the case, and the witnesses. Character tells the judge, jury, or arbitration panel what kind of people are involved in the case and what motivated them to behave the way they have.

Knowing that these three elements are essential to your argument is not enough. Maintaining a proper balance between them is important. An argument that is out of balance or omits any of these cornerstones is likely to be ineffective.

### 2. *Meaning is More Important Than Facts*

Research has shown that people today are more concerned about the meaning of their lives and events occurring around them than ever before. Developmental psychologists tell us that one of the driving forces within everyone is the constant search for meaning within ourselves and in the world around us. We all want to feel that the activities we engage in have some purpose and significance.

In Jerome Bruner's book, *Acts of Meaning*, he reminds us that the human brain is not simply a computer that assimilates facts, but is rather a processing organism that is constantly trying to understand and interpret the outside world and make some sense out of one's perceptions in the context of social culture and individual needs. In other words, the "why?" of someone's behavior is more important to most people than the facts of that behavior.

The search for meaning is so powerful because it is at the core of our nature. For this reason, the persuasive strength of the values and beliefs embedded in the themes and messages that you demonstrate in your case will likely determine the outcome, rather than the facts.

### 3. *Storytelling is Powerful*

Since the time of our ancient ancestors, story telling has been a necessary and critical part of human interaction. Thousands of years ago, people used stories to help other people understand how to survive. Even today, we learn about the world from the stories that we hear from our parents and other people around us.

The power of a good story cannot be underestimated. The best stories are full of facts, interpretations, themes and meaning. Telling the judge, jury or arbitrators a compelling story is the single most important thing you can do to win your case.

## Sources of Information

When we talk about information that will help you in developing a compelling trial strategy, we could be talking about many things. In the context of this article, however, we are talking about information that will help you to understand the decision makers in your case and how to convince them that you should win the case.

### 1. *Historical Information*

From the study of social psychology, we know that we can study how a person or group of people are likely to perceive the issues in a case by looking at their past behavior or the past behavior of other people like them. It is fairly easy to research the likely perceptions and needs of judges and arbitrators by reviewing their past work. This information will help you to find out what they are likely to want to know and what issues they will find important.

With jurors and, to some extent, with arbitration panels, you can review previous decision in similar cases to get an idea of the meaning they attach to various fact scenarios. Extensive research has shown that the decisions of judges, jurors and arbitrators will likely be similar in most civil cases, although juries tend to be more predictable than either trial judges or arbitration panels. The focus of any review of historical information should be on the meaning and process the decision makers used in arriving at decisions, rather than the decisions themselves.

### 2. *Scientific Research in the Specific Case*

Even though you may have helpful and reliable historical information, the usefulness of the information in your specific case may be in doubt. After 30 years of scientific research into judge, jury and arbitrator decision making, we now believe that the only proven reliable and useful way to understand how courtroom decision makers are likely to perceive an upcoming case presentation is to test it with a sample of people from the same population of people as the actual decision makers who will sit in the case. Jury focus groups, mock jury trial research studies, private bench trials, and private mock arbitration studies often reveal an enormous amount of information that is useful in a specific case. As a result of scientific research and development activities by some of the more experienced trial consulting firms, research techniques like these are available to every trial lawyer and corporation regardless of the budget and resources in a case.

## Final Thoughts

The use of scientific information to help you in developing your most powerful arguments is simply the 21<sup>st</sup> Century version of what trial lawyers and advocates have done for centuries: study the needs and perceptions of their audiences before presenting the argument. Once you have

the information, you can feel more confident in releasing your own potential in inspiring judges, jurors and arbitrators to decide the case in your client's favor.

The job of a trial consultant is to make recommendations to a trial lawyer or corporate counsel about effective trial strategy and personal trial advocacy techniques. It is inspiring to watch a lawyer explore the use of a new trial advocacy or research technique and exceed their own expectations.

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### About the Authors

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The Advocates' clients include major law firms and corporations all over the United States ([www.theadvocates.com](http://www.theadvocates.com)).

**The Advocates** is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [\*\*Courtroom Psychology and Trial Advocacy\*\*](#), published by American Lawyer Media.

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