

JURY PERSUASION IN AN ‘ALT-FACT’ WORLD

By **Ken Broda-Bahm, Shelley Spiecker and Kevin Bouly**

This article first appeared in [Law360](#), November 8, 2017

In today’s digital environment, audiences have instantaneous access to information. Lots of it. While this reality suggests that jurors could be more fact-focused than before, the potential that the opposite may be true raises important questions about how today’s jurors process information and news.

According to a 2016 Pew Research Center poll,^[1] only 39 percent of American adults are very confident they can differentiate between fake news and real news, leaving 61 percent who do not feel very confident in making the distinction. In the same study, 64 percent of American adults said they think fabricated news causes significant confusion about political and social issues today. Satire has existed as long as news has been reported. So, what is different today?

There are over 2.01 billion active [Facebook](#) users, 755 million [Twitter](#) users and 700 million [Instagram](#) accounts. When somebody posts a picture of a shark supposedly swimming down the New Jersey turnpike, it has the potential to go viral in a hurry. It reaches millions of people faster than ever. Perhaps most importantly, the public is no longer only the audience of the news, but is also the source of news — a shift in information consumption that raises source credibility questions.

Simply by following the news and our own social media accounts, we know we live in an era of increasing complexity and competition when it comes to persuading others. Facts are not easily accepted, but rather, questioned and internalized based on beliefs, emotions and social affiliations that often go unacknowledged or underappreciated. As legal professionals, we must be sensitive to these changes and their impact on legal decision making and most importantly, persuasive advocacy in litigation.

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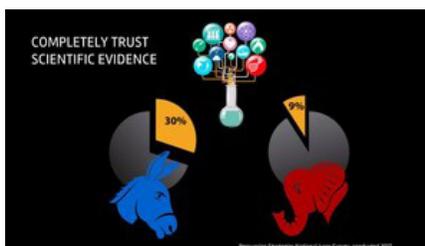
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- In cases with scientific experts, do juries bring a default support for science when it’s justified and explained, or do they have a cynical approach that says, anyone can gin up the studies and support what they’re trying to prove?
- In a criminal or civil rights litigation context, do jurors have a habit of trusting and supporting the police, or are they trying to look for abuses of power, abuses of discretion?
- In toxic tort energy litigation, is there a default belief that these industries are causing irreparable and lasting environmental damage, or are jurors primed to think that this has all been exaggerated and overblown in order to channel public panic?
- Looking at the believability of witnesses, parties, experts and lawyers, is education a credential: something that supports your ability to say what you’re saying, or does higher education just signal membership in a different tribe for some Americans?

While experienced litigators are masters of persuasion, today's climate requires continuous exploration of persuasive resistance in the context of legal decision making to identify the best ways to overcome these challenges. The four elements of persuasive resistance we explore in this article are: 1) Dominant Narrative; 2) Authoritarianism; 3) Fear; and 4) Tribalism.

A **Dominant Narrative** is a story we tell ourselves to explain phenomena we encounter in the world. These powerful stories shape our perceptions of reality and govern our responses. For example, if we think Whole Foods is too expensive, we will discount or ignore examples where Whole Foods is actually cheaper than other grocery stores.

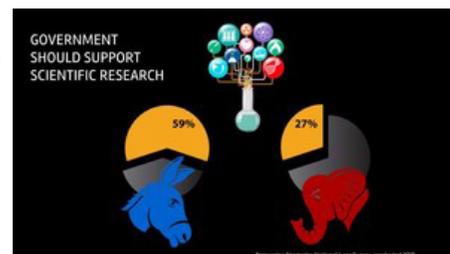


Currently, rejection of science is a dominant narrative receiving significant attention in the legal industry and beyond. Public perception is that science is no longer trustworthy. Over the years, science has become politicized and used to justify regulatory regimes or political platforms, leaving the public suspicious of its objectivity.

In the 2016 Pew Research Study, differences in opinions between a sample of scientists who were members of the American Association for the Advancement of Sciences and members of the public were measured and analyzed. After asking both populations if it was safe to eat genetically modified foods, 88 percent of the scientists answered yes, while only 37 percent of the public agreed. In other words, there was a 51 percent gap between what scientists tell us and what the public believes.

When asked whether climate change was due mostly to human activity, 89 percent of scientists said yes, but only 50 percent of the public agreed. When the same populations were asked whether humans evolved over time, 98 percent of scientists said yes, but only 65 percent of the public concurred.

Yet, litigants rely heavily on science and scientific evidence as they put forth experts to support their position. Jurors are asked to determine the credibility of the experts, their methods and their conclusions and to decide on the objectivity of that evidence. The rejection of science as a dominant narrative is a powerful influence on perceptions in a case.



One strategy for overcoming persuasive resistance due to a dominant narrative involves “lassoing the hurricane.” When the dominant narrative has the potential to override one’s thinking, use the narrative to your advantage rather than trying to fight against it.

For example, the belief that corporations are profit-hungry monsters that will take any action, ethical or unethical, to increase profits is a dominant narrative. Instead of trying to fight against the established perception, whether accurate or inaccurate, litigators can accept and use the dominant narrative to disrupt a juror’s expectations in a positive way. By harnessing the strength of the perception that corporations prioritize profits, the lawyer can persuasively demonstrate that seeking a profit motivated an ethical and legal action rather than an unethical or illegal action.

Authoritarianism is a psychological habit of respecting authority, the rules and one's own in-group, which leads to predictable attitudes and actions. The phenomenon of authoritarianism has been studied extensively in the context of the jury and the findings reveal that jurors with a proclivity toward authoritarianism are significantly more like to:

- Give strong presumption to conventional beliefs.
- Be rigid, rules-oriented individuals.
- Focus more on punishment as the goal, as opposed to justice, both in the civil and criminal context.
- Give less support to civil liberties.
- Base decisions on perceived similarities between themselves and a party or a witness.
- Convict more in criminal cases.
- Apply the death penalty more in capital cases.
- Place blame on a single party in a civil case, rather than distributing blame among parties.
- Side with the party with the greater social prestige.
- Rigorously follow jury instructions, even when they don't personally agree with those instructions.

While many consultants teach how to identify and deselect authoritarian jurors during jury selection, it is likely you will eventually need to persuade some authoritarians on your jury. The key to approaching any argument from an authoritarian perspective is to find the higher order principle that is at play.

If you have an individual contract claim against a corporation, the authoritarian juror is primed to trust the large body and distrust the individual. To persuade the authoritarians, you will need to reframe the argument. For example, say, "It's not about the individual, it's about the principle of the contract. The order of society depends on this binding agreement. In this case the individual was asserting the contractual right, but really what's at stake is the survival of our ability to trust agreements, because that's what keeps us in order." When it comes to your specific case, it is a matter of asking, "What am I fighting for, what's the larger principle at risk?"

Fear is another contributor to persuasive resistance. Fear motivates people to hold a position because it increases feelings of security and reduces feelings of dread. Fear is a strong motivator due to what psychologists call the 'Locus of Control,' or the perception that one determines the events and outcomes that occur in life. For example, compare deaths related to gun ownership and deaths related to terrorism. Gun owners believe that when they have the gun, they keep it safe, their kids know not to use it and they're going to use that gun to protect themselves from other people with guns. They place the locus of control within themselves and feel gun rights promote safety rather than vulnerability as a result. Terrorism, on the other hand, is the bolt from the blue. How do you protect yourself from someone with a van driving on a crowded bike path? The lack of control promotes greater fear even if the data suggests that life-threatening risk is much more likely to come from an American firearm than a terrorist act.

The book titled, “Reptile: The 2009 Manual of the Plaintiff’s Revolution,” by David Ball, a trial consultant, and Don Keenan, a well-regarded plaintiff’s attorney, provides another explanation for fear’s relationship to persuasive resistance. The advice boils down to trying plaintiff’s cases by portraying the defendant’s conduct as a threat to the juror’s safety and to community safety. The theory is that, through those threat appeals you awaken the “reptile brain” within jurors and their motivation to protect themselves and their families. The resulting fear incentivizes the jury to find for the plaintiff.

If the metaphorical reptile can be awoken by a threat to the community, then it can also be mollified by the notion of a defendant already committed to safety. For example, in a ski-injury defense case with a plaintiff’s attorney using reptilian questioning with a ski-area manager, the attorney asked, “You would agree with me, in managing your ski area, that it’s always a good idea to avoid any unnecessary risks.” The well-seasoned ski manager responded, “Hell, skiing is never necessary. If you wanted to avoid unnecessary risks, you’d shut down the whole mountain.” His response was effective, because what is being threatened? Our choice to engage in an activity that brings pleasure and fitness is the only thing being threatened.

As another defensive approach, defense attorneys can tap into these threats, even crafting their own safety rules, for example, noting, “We make the hazards known and we let individuals make their own reasonable choices.” That is the kind of a safety rule that protects not only people, but also the underlying goal of skiing and recreation.

Tribalism is a fourth contributor to persuasive resistance. Identification with social groups is a powerful influencer that shapes beliefs and behaviors. Families, religious organizations and ethnic groups give individuals a sense of value and community. Before jurors ask themselves, “What do I think about this attorney’s argument,” they implicitly ask, “How will my agreement or disagreement with this argument impact my identification with my tribe(s)”?

In preparation for trial, lawyers can conduct social media research on witnesses, parties and potential jurors to understand the key social groups that may affect a juror’s perceptions in a case. People frequently share their thoughts about the world via their social media accounts. For example, in a case involving an oil and gas company, one potential juror “liked” the page for Mother Earth News and stated on social media, “I feel we should keep the oil companies honest.” These insights signal that a juror might be high risk to an oil and gas defendant.

In situations where a lawyer is left to persuade a seated jury, a rhetorical strategy called transcendence can be used to trigger a higher level social group or social norm — thereby transcending their more basic social identity. Imagine you have identified computer programmers who could not be excluded from a jury, but are potential high-risk jurors. Consider expanding the tribe from computer programmers to professionals who value written agreements, transcending the social identity of the higher risk group in favor of a lower risk group with potentially different central values.

Conclusion

Today’s persuasion environment is challenging. Each day produces more available information than the day before and sifting through what is accurate and what is “fake” is difficult. The challenge for litigators is to identify what psychological factors may contribute to jurors’ tendencies to ignore or minimize evidence. Then, present your case

in the most persuasive manner possible.

Jurors might be entrenched in their own facts and uniquely resistant to persuasion. But the best response to the new facts of the jury comes down to a very old principle: understand and adapt to your audience.

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[1] [“Many Americans Believe Fake News Is Sowing Confusion.”](#) December 2016. Pew Research Center. <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/>