NEW STRATEGIES FOR OVERCOMING

WINNING Divorce

Like the rest of us, judges bring their own blends of bias and prejudice to the courtroom. Unlike the rest of us, they get to make the ultimate decisions. While it helps to "know your judge," you can also use recent research to overcome judicial bias, to facilitate acceptance of your arguments, and to bring about a judgment that favors your client.

A few years ago, the Association of Trial Lawyers of America (ATLA) sponsored a comprehensive study of juror dynamics. That investigation reshaped trial strategies for the plaintiff's bar. The study showed that lawyers misunderstood how jurors actually process competing trial stories and how attorneys can best persuade within the courtroom. The result? New strategies for overcoming bias at trial.

While the politically correct topic would be alternative dispute resolution, the fact is that some cases will present issues that must be tried. Another layer of cases will require decisions on evidentiary hearings or lengthy oral arguments before the cases are shaped for settlement. Many of the principles discussed below are equally useful in connection with such hearings and arguments.

While ATLA's research and study focused on juror bias, we can use the principles in bench trials as well.[1] The study concluded that lawyers and judges—being human themselves—suffer from the same tendency toward biased decision-making. It is simply part of the human condition: "Professionals are just as likely to fall prey to their schemas as that of lay people . . . . Trial lawyers also fall prey to schemas."

This article will examine the lessons learned and their application to divorce trials. Understanding this fresh approach will help you make your trial preparations more efficient and effective.

Out With the Old

The old trial strategy was to lead with your own client and generate a climate of sympathy. The standard advice was: "As plaintiff,

BIAS AT TRIAL

Trials

By David C. Sarnacki

your description of the plaintiff in a personal injury case should include his activities at work, home, and play. Tell a story about your client. Build him up and make him a human being the jury can relate to and sympathize with."[2] The theory was that by painting this sympathetic portrait of your client, the jury would make a connection. The jury would adopt your client's perspective and identify with him or her when evaluating the circumstances encountered, the actions taken, and the resulting effects. Many divorce trials have been presented on this theme of sympathy.

The problem is that the sympathy approach does not work. After discovering that the plaintiff's lawyers were repeatedly losing cases previously thought to be impossible to lose, ATLA commissioned a comprehensive investigation of the problem.[3] Through extensive social science research and mock trials, ATLA learned that instead of feeling sympathy for a victim, the jurors would blame the victim. Jurors focused their attention on what that person did and did not do to prevent the disastrous results at issue. They distanced themselves from the plaintiff and assumed that they would have reacted in an entirely different, much more responsible manner.

In With the New

The comprehensive research and mock trials conducted by ATLA revealed the key concepts in understanding how the trier-of-fact actually processes competing trial stories. These principles laid a new foundation for winning trials.

Stuff Happens

Sometimes we would rather not assign blame to one person. We would rather accept the influence of chance. This attitude of "these things just happen" has become a very powerful argument for insurance defense lawyers.

> *What it means is that a certain percentage of people will rule for the defendant anyway, and their explanation is, "You know, it's a tragedy that this happened to the plaintiff, but it's just part of life, we all have to play with the cards we're dealt."*[4]

Some judges embrace this attitude: Not all marriages will work out. People grow apart. Who's to say it's his fault (or her fault)? Stuff happens. These people just need to get on with their lives.

Personal Responsibility

At other times, we would like to think that we really do have the power to shape our destiny and make things happen. This second strong argument for insurance defense lawyers arises from the lamentation that people just do not want to take responsibility for their actions, that they would rather blame someone else. Politicians, self-help gurus, and talk show hosts promote this attitude throughout our culture.

> *The spokesperson for conservatives, William J. Bennett, in his best-selling book,* The Book of Virtues, *identifies personal responsibility as a foundation virtue. He points out that to respond is to answer and account for your conduct. Irresponsibility is immature conduct. Taking personal responsibility is a sign of maturity. He explains: "Responsible persons are mature persons who have taken charge of themselves and their conduct, and own their actions and own up to them—who answer for them."*[5]

Personal choice is a powerful theme for any judge: If only the wife had done this (or that), she would not be here blaming her marriage, her husband, or her present circumstances. She had options. If she wanted a different reality, she could have taken charge, made something happen. But she didn't. She chose not to.

Defensive Attribution

We also like to shield ourselves from the thought that someone else's tragedy might become our own, that we could be in the same position, and that we might react in the very same manner.

People want to believe they live in a world where good things happen to good people and bad things happen to bad people. The idea that a person has suffered undeservedly is so threatening that people often feel compelled to resort to condemning the injured plaintiff. People want to believe they live in a predictable world over which they have some control. Moreover, when jurors are confronted with a severely injured plaintiff, they may feel anxious and blame the plaintiff's irresponsible behavior for the discomfort. Therefore, the more severely a plaintiff is injured the greater the likelihood jurors will engage in defensive attribution or rely on this notion of a "just world."[6]

[J]urors are frightened by the prospect that "there but for the grace of God" they go, and so they will unconsciously disassociate themselves from the plaintiff and his or her pain, suffering, misery, and injury. At no level do they want to bring that tragedy into their own lives.... The pain is too real and the fear is too great. These jurors feel a need to separate themselves from the plaintiff's plight.[7]

Are judges really any different? With the endless parade of spouses pointing the finger at each other, it is easy to join in, with full benefit of 20-20 hindsight and think: He's the one who married her, not me. Why didn't he do this? Why didn't he do that? If that had happened to me, I would have.... I never would have....

Confirmation Bias

We are ready, willing, and able to quickly assimilate information that fits our view of the world, our personal stereotypes of events and people, our internal stories about life on this planet. But when someone argues against our mental framework, we go out of our way to avoid changing our basic beliefs.

The confirmation bias simply refers to the tendency for jurors to search for evidence that confirms their beliefs, critically scrutinize un-confirming evidence, and interpret ambiguous evidence as consistent with their beliefs. We consistently see jurors accept supportive facts and vehemently discount non-supportive facts. To understand this bias, we must understand the concept of schemas.

People organize their knowledge, beliefs, theories, and expectations in cohesive units called schemas. When a person encounters a new experience, he has a cognitive framework for understanding that experience. Schemas influence perception.

Juror schemas, thus, serve as framework for interpreting the evidence. Prototypes are role schemas. They help jurors understand how someone will behave in a given situation. If jurors expect a party to behave in a certain manner, and if the party violates those expectations, jurors may feel the party has acted improperly. Similarly, scripts are event schemas. They help jurors understand how an event should unfold. If events have not occurred in the manner jurors expect, they will look for the cause.

The important point to remember about the confirmation bias is that we should never underestimate the extent to which a juror's prior experience influences his perception of the evidence. We should also make sure that we identify the schemas that persuasively fit the case. Then we should tell the story, emphasizing those schemas. In the final analysis, a core belief will prevail over evidence that challenges that belief.[8]

Judges often look for the hook that places a new case into a familiar box: The case of the man whose job was more important than his family. The case of the middle-aged man who found a younger woman. The case of the wife who became a mother and forgot all about her husband. The case of the mother whose "personal time" with her boyfriend was more important to her than her two children.

Belief Perseverance Bias

Once we choose one version of events over another, we would rather fight than switch. We hate to admit that we might have been wrong or might have rushed to judgment.

The belief perseverance bias refers to the tendency that once jurors adopt a trial story, they cling to the story even in the face of conflicting or discrediting evidence. We continually see in our focus groups jurors maintaining their trial story even when we instruct them that evidence to support their position is lacking. The early-adopted trial story is an interpretive framework for understanding subsequent evidence.[9]

Some cases are, for all intents and purposes, "won" at the first motion hearing or settlement conference. One story is chosen over the other, and each unfolding chapter in the case confirms the judge's original choice. If the judge has not selected one story by the time of trial, the selection is made "forthwith," during opening statements or soon thereafter.

Availability Bias

The fact is that we do judge a book by its cover. Our minds will not wait, so they begin processing the data in the order of receipt. We work with the information at hand, and first impressions really do matter.

The availability of information can influence perception. People often mistakenly equate the availability of information with frequency, probability, and causality. We propose that whatever most occupies juror attention during trial will most influence what the jurors focus on during deliberation and disproportionately use in rendering a verdict. A simple rule of thumb is that if the trial is focused on the defendant's conduct, jurors will focus on the defendant's conduct in deciding the case. In contrast, if the trial focuses upon causation, jurors likely will focus on causation. Likewise, if jurors focus on the plaintiff's conduct during trial, they will focus on the plaintiff during deliberation. That does not mean that we can ignore the plaintiff's conduct if it is an issue or that we should not innoculate against defenses. On the contrary, it just means the focus of the case, and the jurors' attention, should be the defendant's conduct.[10]

As soon as we begin presenting information, the judge begins a search for the simplest human story for what happened and why. If

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- **Knowing how the trier-of-fact will process the competing trial stories enables you to shape your trial strategies.**

the only available data is poor choices by the opposing party (or deliberate wrongdoing), the judge's mental file of personal stereotypes is tapped, the case is moved into a more familiar box, and the coming hours of testimony likely will be reduced into this more manageable central theory of the case.

Applying the New Strategies to Divorce Trials

If you have read this far, you have probably processed the above information in some manner (consistent with the availability bias mentioned above). You have taken the concepts, benchmarked them against your own experience, and compared them with other trial advice you were given in the recent or distant past. Good. That is exactly what you should be doing.

For your convenience, here is a summary to help you apply these new strategies to your divorce practice today.

1. Begin shaping the outcome of the case from the very first hearing. Remember that the judge's selection of a trial story may begin well before trial. Before walking into court at all, you should consider what theme and theory best serve the case. Can you explain in 30 seconds what happened, why it happened, and why that means your client should win?[11]

   In addition, always keep in mind that a *judge's* selection of a trial story likely begins with the storyteller. The first rule of trial advocacy is personal advocacy. You want the judge to believe that you know the most about this case and that you will not deceive the court.[12] If you fail that test, your best efforts at trial may be doomed.
2. Know your judge. Develop a trial story that fits the judge's view of the world.

   Of course, the story must fit the facts of the case. A persuasive trial story will be organized to explain what happened, why it happened, who should be believed, how we can be sure, and how the story is the most probable explanation.[13]
3. Start with the opposing party. Focus attention on the other person, not your client.
4. Present your strongest evidence as soon as possible. Repeat it as often as possible. And describe it in details that make it memorable. The recent research does not change the principles of primacy, recency, frequency and vividness. Use them to your advantage.[14]
5. Attack the choices made by the opposing party. Present the details of, and spend time on, what matters most in your case. Show what was done, how it was wrong, and how it caused the problems now facing your client. Show what alternative courses of action were available, what the party could have done differently, and what the likely results were for each alternative. Frame the evidence to show that what the opposing party did was not only wrong in the moral sense, but wrong in a sense that demands relief under the law.
6. Show how the opposing party's conduct and choices are inconsistent with the judge's view of the world.
7. Show how your client is being personally responsible in marriage, in parenting, and all other activities and relationships of daily living. Create an image of strength, character, and deservedness in direct contrast to the choices made by the opposing party. Be brief, but specific.
8. Explain why your client chose to stay in the marriage. What aspects of the relationship and daily life did your client love? What efforts were made to preserve the relationship? How seriously did your client take the vows of matrimony? What alternatives were available? How significant would leaving earlier have been? And always explain *why.*
9. Show how your client's conduct and choices are consistent with the judge's view of the world.
10. Ask for relief that holds the opposing party accountable for his or her conduct and choices. Focus first on the facts, how they do not fit your adversary's theory of the case but do fit your theory. Move to the law and how the facts demand the relief requested. Finish with words that remind the judge of the morality of your theory.

Conclusion

Knowing how the trier-of-fact will process the competing trial stories enables you to shape your trial strategies. You can sharpen your theme and theory of the case. You can arrange the sequencing of witnesses, testimony, and exhibits. You can position your arguments and request for relief as the better, more reasonable resolution of the dispute.

The recent study of persuasion in the courtroom and overcoming juror bias changed the way the plaintiff's bar approaches trial, and it has paid healthy dividends by turning the tide of defense verdicts. Now you can take advantage of that same research and apply it to your divorce practice. Focus on the opposing party, on choices, and on the resulting problems of those choices. You will find that the principles work for judges and jurors alike. Why? Because judges are human too. ✦

David C. Sarnacki concentrates his trial practice on family law and civil disputes. He is a founding member of the Sarnacki Law Firm PLC, chair-elect of the Grand Rapids Bar Family Law Section, and councilmember of the State Bar Family Law Section. He is a past chair of the State Bar Litigation and Law Practice Management Sections. Several other articles are available on-line at www.sarnackilaw.com.

Footnotes

1. Wenner and Cusimano, "A Brief Look at Overcoming Juror Bias," Trial (June 2000), reprinted in ICLE's Masters in Litigation Series: Winning at the Master's Level (April 2001), at 1–10.
2. T. Mauet, *Trial Techniques,* 55 (4th ed., 1996).
3. McArdle, "Plaintiffs Should Always Start by Attacking the Defendant," Lawyers Weekly USA (October 18, 1999).
4. Id.
5. Wenner and Cusimano, at 1–4. (Footnotes omitted.)
6. Wenner and Cusimano, at 1–6. (Footnote omitted.)
7. Mandel, "Overcoming Juror Bias: Is There An Answer?," Trial (July 2000), reprinted in ICLE's Masters in Litigation Series: Winning at the Master's Level (April 2001), 2-2.
8. Wenner and Cusimano, at 1–11. (Emphasis in original.)
9. Wenner and Cusimano, at 1–11. (Footnote omitted.)
10. Wenner and Cusimano, at 1–12.
11. S. Lubet, *Modern Trial Advocacy,* 8 (1993).
12. See generally H. Stern, *Trying Cases to Win* (1991).
13. S. Lubet, at 7.
14. H. Stern.