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Trying a Case Before the Social Media Generation

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Special to the Legal

Keeping the attention of jurors during a trial can be challenging. Trial days are long and most jurors are far removed from the days of listening to lengthy class lectures. These inherent difficulties are only magnified by the decreased attention spans caused by constant social media immersion and smartphone participation. Given these circumstances, it is difficult to imagine how trial attorneys can maintain jurors' attention during key parts of trial. However, by examining how we process information, and how we formulate our beliefs, trial attorneys can find new opportunities to educate and persuade jurors.

The objects and causes of our collective distraction are ubiquitous. A 2019 Pew Research Center study found that 96% of Americans now own a cellphone of some kind. The share of Americans that own smartphones is now at 81%, up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011. With most, if not all, social media platforms available via smartphone, it's easy to understand how these devices capture and hold the attention of their users.



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Social media platforms like YouTube and Facebook, noted as the most popular by another Pew research study, keep people coming back and logged in on a regular basis. The same

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Pew research study found that 81% of Americans log onto a social media platform daily, and 28% state that they are online “almost constantly.” With 43% of Americans claiming that they rely upon Facebook to provide the news on topics such as politics and their community, it is clear that jurors embrace technology and are prone to absorb visual evidence over any in-depth written or spoken analysis.

The overall trend is challenging for trial attorneys. We often become embroiled in the minutiae of reading depositions, crafting the tightest cross examinations and delivering the most persuasive closings. But perhaps we should be spending

more time considering the psychology of the jurors and how they process the information that we are trying to get them to accept.

In 1991, Daniel Gilbert, a Harvard psychology professor, published a landmark article considering how people come to believe conveyed information. Gilbert surveyed the theories of such great thinkers as Baruch Spinoza and René Descartes. Over the centuries, many philosophers have considered how people process information that they receive from observation and verbal or written communication.

Gilbert found that people are faced with two types of information, that which is perceived by the senses and that which is transmitted through other people, usually by the spoken word. The psychological understanding leading up to Gilbert's article was that an individual is more inclined to accept what they personally perceive over information they receive from others:

"Organisms are immersed in a world of activity, and the perceptual system enables them to play their parts quickly and well. One of the ways in which the system accomplishes this end is by using the outputs of early stages of processing to guide urgent action. Organisms immediately believe what they see and only question their percepts subsequently and occasionally (see Bargh, 1989). Perception can afford to work this way because the correlation between a perceptual representation (i.e., one's mental image of an object) and the presence of that object is nearly perfect. Organisms need not question percepts, because percepts are for the most part faithful representations of reality," see Gilbert, D.T. (1991) How mental

systems believe. *American Psychologist*, 46(2), 107-119.

When individuals are confronted with information that is transmitted from another person, the acceptance is immediate, but is subject to a second step that essentially amounts to a verification of the statement:

"Indeed, having comprehended and accepted an idea, Spinoza considered persons entirely free either to unaccept or to certify it. Spinoza's thesis simply implies that unacceptance is a secondary psychological act in which the initial accepting that invariably accompanies comprehension is subsequently undone. Disbelief is by no means an impossibility in Spinoza's scheme; rather, it is merely a deliberate revision of belief."

Like Spinoza, Gilbert believes that individuals temporarily accept an idea, fact or proposition as it is presented to them, but subsequently place the information through a credibility assessment comparing it with other known facts before either confirming their initial acceptance, or disregarding the information as no longer believable.

Gilbert's findings about perception are not surprising when one considers that YouTube is the most popular social media platform. Individuals watching videos are absorbing the information without having to engage in the work of discounting it. It is easy to watch videos, harder to read text or talk to someone.

This idea has been further studied by psychologist and chair of communication studies at the University of Alabama at Birmingham, Timothy R. Levine. He developed the truth-default theory, which stands for the proposition that when humans communicate with each other, we tend to operate on a default presumption that

what the other person says is the truth. Levine states that to break out of the truth-default mindset requires a trigger:

"A trigger is not the same as a suspicion, or the first sliver of doubt. We fall out of truth-default mode only when the case against our initial assumption becomes definitive. We do not behave, in other words, like sober-minded scientists, slowly gathering evidence of the truth or falsity of something before reaching a conclusion. We do the opposite. We start by believing. And we stop believing only when our doubts and misgivings rise to the point where we can no longer explain them away," see Gladwell, M. "Talking to Strangers," New York, NY, Little, Brown and Company, September 2019 citing Levine, T.R. (2014). "Truth-default Theory (TDT): A Theory of Human Deception and Deception Detection," *Journal of Language and Social Psychology*, 33, 378-92.

Literature has described this second assessment step as "resource demanding." "Unbelieving (i.e., revising or updating) requires cognitive effort, leaving people vulnerable to distraction," see Brashier, N.M. & Marsh, E.J. (2019). "Judging Truth," *Annual Review of Psychology*, 2020(71), pp. 9.1-9.17.

Brashier and Marsh believe that individuals construct truth judgments based on inferences from base rates, feelings and consistency with memories. If a presented fact draws on a jurors' prior probabilities, is accompanied by a feeling of ease and is consistent with information stored in the jurors' memory, that juror is more likely to confirm acceptance of that fact. This is especially important in our "post-truth" world, where objective facts have become less influential in shaping truth than

appeals to emotion and personal belief. Against this backdrop, attorneys must be mindful of how jurors are likely to perceive the information being presented to them.

The process of discriminating between true and false propositions is further tainted by the jurors' inherent biases toward their typical methods of receiving information. According to Pew, 75% of American adults use YouTube, an inherently visual and therefore perceptive medium. While some videos contain text and narration, images prevail. Therefore, jurors are accustomed to a form of learning by watching and listening to videos.

While the use of technology in the courtroom has been heralded over the last 10 years, many trial attorneys rely, at most, upon PowerPoint presentations. Displaying black words on a white background is not sufficient to trigger the perceptual understanding that Gilbert describes. Instead, these images require the jury to assess the displayed information. Gilbert's thesis, which has been widely accepted in the psychological community, would indicate that trial attorneys are better served by proving their points and advancing their positions with perceptive communication, not merely spoken or written words.

For instance, while impeachment of a witness with prior deposition testimony seems to be effective, the trial attorney is asking the jurors for three actions: discounting a previously accepted statement by the witness; accepting the contravening statement from the deposition and; assessing the new statement and confirming it to be true. Considered in isolation, this would seem to require minimal energy. When considered in the context of an entire day of assessing information

at trial this resource-demanding task of disbelieving facts that they may have previously accepted can be exhausting.

On the contrary, impeachment of the witness with videotaped testimony allows trial counsel to communicate with the jury on a more fundamental level. The jurors, bolstered with their past experience with YouTube, Facebook and other social media, are primed to readily accept information from a video. The acceptance of this information is also less subject to disbelief and the jurors do not expend as much energy receiving the information.

If social media posts are available to impeach the witness, the message is even stronger. An Instagram post of the plaintiff in the gym after testifying that he can no longer exercise due to his injuries or the defendant street racing on YouTube after claiming he no longer drives provides the jurors with easily digestible information that they immediately perceive as credible.

Further, jurors start each day with limited mental resources. Other than an hour where the juror has to find lunch in an area that may not be familiar to them, there is no provision for napping or recharging during the trial day. So, as the day proceeds, the jurors' inclination and energy to continue the assessment required to determine the credibility of statements ebbs.

And while we should not discount the perceptual information transmitted by a typical witness via their dress, demeanor and deportment, the fact remains that jurors absorb a substantial amount of nonperceptual information in the form of testimony. Throughout a typical direct and cross-examination, the jurors are accepting—then assessing—

dozens, if not hundreds of facts and propositions from a witness.

As trial attorneys, we are continuously faced with the challenge of presenting information to a jury that will result in positive outcomes for our clients. Presumably the information that we present at trial favors our client's position. As the ultimate purveyors of information at trial, we must be attuned to the ways in which technology has impacted how individuals receive and process information. Jurors are more apt to believe and accept facts and information that is portrayed in a visual medium.

Like all of us, jurors also have a limited supply of mental resources when they start each day. Trial counsel should consider when important information should be presented. While the typical thought is that one should not play their videotaped witnesses in the afternoon when jurors are tired, isn't it better to select a time when the jurors are more likely to accept the video as perceptive communication and less likely to have the resources to assess and reject the statements of the witness?

It is our job as trial attorneys to take this information and craft our trial strategy in such a way to persuade jurors to definitively accept our client's truth, while also convincing them to discount the untruths from the other side. This is no small feat, but it can be accomplished through a focus on modern technology, scheduling of witnesses, evidence selection and how they merge with an individual's learning and attention. ●