
TRIAL PSYCHOLOGY: COMMUNICATION AND PERSUASION IN THE COURTROOM, was authored by Margaret C. Roberts, a U.S. trial consultant. Ms. Roberts presents a study of human behaviour as it relates to the courtroom in order to help the trial lawyer better represent his or her client. The author’s conclusions and insights are supported not only by her own experience but by the studies and experiments of others in the field. Although many books have been written on trial advocacy, little has been written on the subject matter of this book.

In the first eighty pages of this 498 page effort, there is a detailed look at the notion of primacy and recency — the theory that one’s first and last impressions are best remembered and therefore the most persuasive. The author gives practical advice as to how primacy and recency can be used by the trial lawyer, but she also warns about the theories that invalidate primacy and recency effects. For example, we are told that studies show that up to 80% of juries have made up their minds after opening statements by counsel (primacy) and that jurors look forward to closing arguments (recency); but on the other hand we are also told that primacy and recency tend to cancel each other out because jurors know that the evidence they have heard first will be later refuted, and that a climactic order of evidence (weak-to-strong) is more effective than anti-climactic evidence (strong-to-weak).

However, the author does leave one with a definite impression that the notion or primacy and recency, particularly primacy, does have much to offer for the trial lawyer’s consideration. Some of the author’s conclusions are: a strong first witness, usually the client, is important; emotionally toned evidence is recalled more vividly than strictly factual evidence and therefore should be presented first, while expert testimony should be presented at the end for maximum recall; the least important evidence should be presented in the middle since it will not be well remembered; a good witness should both begin (primacy) and end (recency) each day, and the uneventful witness should appear in the middle of the day when the jurors are likely to be losing interest; and presenting one’s own arguments before the opponent’s in summation is preferable than the reverse.

In another chapter, the author claims that attractive people do better in courtroom proceedings. She underscores how the dress of both client and counsel should be considered carefully as it communicates what the wearer is and is not. Dress falls within the concept of primacy as it creates first impressions that could bear on the decision-making process, just as poise, conduct, speech and mannerisms do. Counsel’s dress before a Canadian jury is of course not as important because the courtroom gown we all wear is a great equalizer unless the tabs and shirts are dirty or the vest ill-fitting. The dress or appearance of the juror can also signal his or her personality. Even the colour of the juror’s clothing tells us
something of his personality traits: blue means reserved and quiet, orange
is cheerful, red is impulsive, yellow means intelligent, and so on.

There is a lengthy chapter on juror analysis. Much of it is not relevant
to the Canadian courtroom as it deals with the voir dire process for jury
selection in the U.S., although perhaps a hint or two can be gleaned for
the purposes of our challenge-for-cause procedure. Of interest is the
information concerning non-verbal communication. The author describes
how body language can be a clue to what the juror is feeling. We learn,
for instance, that eye contact decreases with the degree of dislike and
sustained eye contact can indicate a personal or confidential relationship.
A slouched body position may indicate apathy, or it may signal a positive
state by showing relaxation.

In another chapter the author tells us how to best present a witness,
not only through dress, but also through style and language. She describes
how to reduce a witness’s anxiety so that he or she will be received in
the most favourable light. There is even a part of the book devoted to
the strength and weaknesses of hypnosis in helping a witness to describe
persons and to recall events. The author goes on to deal with the problems
of eye-witness identification, and discusses solutions to the problem of
how juries interpret eyewitness accounts with an examination of memory
processes and memory extraction techniques.

There is a lengthy chapter on effective argument style with an
analysis of the opening and closing statements in three U.S. cases. This
reviewer found this chapter to be overly lengthy for the practical advice
it gives. Of interest however are the author’s findings that post trial
interviews with jurors reflect that “they retain little information from
evidence, confuse important points, and often entirely miss what the trial
attorney thought to be critical points.” Solutions to this problem are
offered. The importance of demonstrative evidence is highlighted. Vivid
language, drama, exhibits, the use of impact or buzz words and repetition
of key facts to fix those facts in the minds of the jurors are techniques
of persuasion which the author suggests will help build an effective
argument. Research indicates that jurors recall 40% of what they have
heard after three hours, but only 10% after one day. Demonstrative
evidence can increase retention to about 75% after three hours and 60%
after one day of testimony.

The book ends with a summing up of why a trial consultant can be
useful to counsel. She adds how members of her profession could be of
great assistance in the selection of a jury, particularly on a voir dire
proceeding. One must keep in mind that in the U.S. this procedure is
designed to find jurors most sympathetic to one side or the other whilst
in Canada our system of jury selection is designed to find the unbiased
juror. Ms. Roberts describes how the trial consultant can assess com-
community attitudes and juror profiles, how to obtain background informa-

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on potential jurors and how to design questions for them. She recommends trial simulation such as the use of a mock jury to privately hear the presentation of the case. This performance is videotaped so that the feedback can help best determine strategies, improve performance and help choose favourable jurors for the actual trial. Ms. Roberts also recommends the selection of a "mirror" or "shadow jury", the members of which mimic as nearly as possible the demographic characteristics and attitudes of the real jury. This mirror jury would hear what the actual jury hears, and the trial lawyer can consult with it on a daily basis for an evaluation of the witnesses and evidence so that corrections can be made (if needed) whilst there is still time.

The purpose of Trial Psychology: Communication and Persuasion in the Courtroom is obviously to educate and to convince trial lawyers that jury trial consultants would be of great assistance in reaching a successful result. After reading this book my feeling was that many of the points the author makes are ones that experienced trial counsel have discovered themselves as part of the ongoing courtroom learning process about human nature. The book leaves experienced counsel with a satisfied feeling because it confirms in many aspects through studies, experiments and experiences of others what counsel have learned by courtroom osmosis. However, this is not to say that even experienced counsel can not learn from some of the insights provided by the author. I did. For younger counsel, this book, in my view, will help them to grow quickly in the courtroom and should be a welcomed addition to that part of their library which is devoted to trial advocacy. The obvious difficulty for the trial lawyer is that he or she does not have the funds to finance this kind of help which the author recommends, nor does the busy trial lawyer have the time to devote to this more sophisticated preparation on a continuing basis. It is my personal view that in most cases, trial consultants will not assist an experienced counsel in bringing about a result which is different than if they had not been retained. There will be those civil and criminal cases, however, when, assuming the funds are available, retaining a trial consultant should be seriously considered.

Such a case was in Regina v. Morgentaler,2 where the emotional issue of abortion was involved, tried in Toronto not long ago. For those who do not have the luxury of retaining a trial consultant, Ms. Roberts' book is the next best thing.

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