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[LETTER to a young trial lawyer]

SEIZE THE DAY WHEN IT COMES TO CREATIVE TRIAL ADVOCACY

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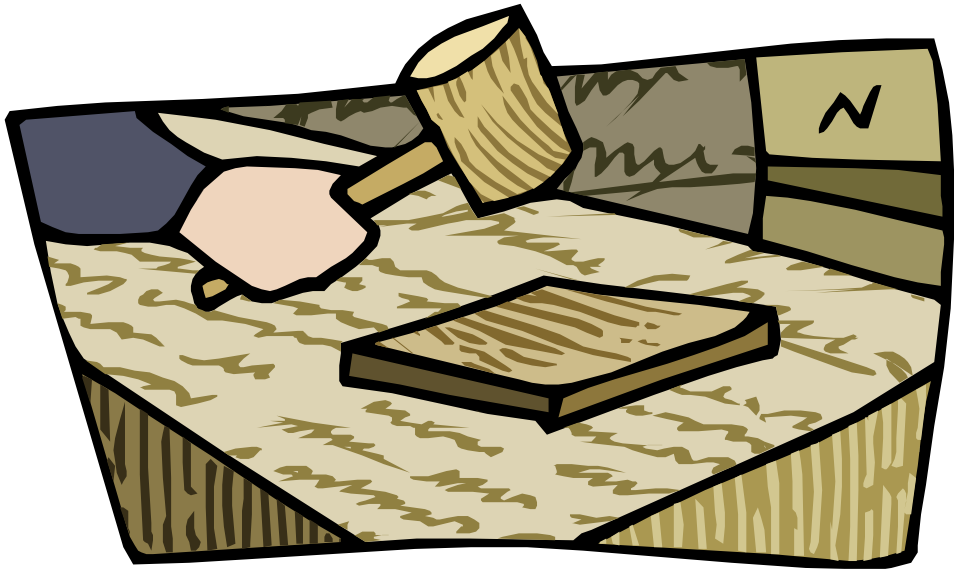

Trial lawyer anxiety has reached an all-time high, with lawyers and judges writing and worrying about the age of the vanishing jury trial. Despite this existential crisis, lawyers have had no better opportunity for creative advocacy than they do today.

Three developments stand out in particular. First, new scientific discoveries reveal the importance of emotions in decision-making for everybody — judges, jurors, arbitrators and everyone else — and these findings should change the way lawyers prepare their cases. Second, the revolution of digital information allows trial lawyers to empower their audiences more effectively than in the past. Third, the emerging fields of trial science and strategy give lawyers even further ability to tailor the presentation for successful advocacy.

1. The role of emotions in decision-making: The tort-reform debate largely centers on whether trial lawyers skew results by inflaming the passions and prejudices of juries, which then leads to runaway verdicts. But no matter how one views this debate, advocates on both sides of the docket should pay heed to scientific discoveries of the past 15 years about how emotions affect everyone's decision-making. The point is not whether emotions should influence decisions but rather that emotions are necessary for people to make decisions in the first place.

These discoveries should change how lawyers prepare and try cases. A leading work in the area is Antonio Damasio's 1999 book "The Feeling of What Happens: Body and Emotion in the Making of Consciousness." Damasio, a leading neuroscientist, has found that decision-making depends on emotions and logic, not on logic alone. In other words, people who lack adequate emotional faculties also lack the ability to decide or choose even the simplest courses of action.

Damasio relied on studies of patients suffering from emotional — not intellectual — deficits (e.g., as a result of tumors or strokes). These patients could analyze problems but could not make decisions. As Damasio said in a July interview on the Web site FORA.tv, this inability to choose existed because the patients lack what he called the "lift" that comes from emotion; the patients had no ability to mark things as good, bad or indifferent.

Of course, decision-making also requires the use of reason, logic and knowledge. However, as Damasio noted,

these intellectual traits work in tandem with emotional states as people make decisions. Emotion often serves as a first guide, then reason empowers people to test whether their emotional state makes sense.

These findings have significant value to trial lawyers. For example, lawyers make a mistake in ignoring the emotions of the judge, jury or arbitrator, just as they make a mistake in ignoring the intellect of the decision-maker. In many ways, good lawyers have tried cases with this approach since the days of Cicero. But Damasio's findings give trial lawyers a deeper understanding of how and why to do it that way.

2. New types of evidence: The digital age allows lawyers to apply Damasio's lessons to the courtroom through the ever-changing world of demonstrative evidence. Early developments in demonstrative evidence occurred a generation ago through the work of lawyers such as Melvin Belli. As Belli remarked in his 1954 treatise "Modern Trials," the possibilities of demonstrative evidence were limited by "only the ability of counsel to portray it." Belli exploited the technological advances of his day by using enlarged photographs, day-in-the-life videos, and other diagrams and charts.

Since Belli's death in 1996, innovations in digital audio, graphics and quantitative analysis have given lawyers exponentially greater media with which to present evidence than Belli had. Moreover, although the number of trials has decreased, the complexity of cases that reach trial — as well as arbitration, preliminary hearings and the like — has grown. In Belli's day, personal-injury cases dominated the dockets of all the large firms and major litigation boutiques. That is no longer the case. The majority of large-scale trial practices emphasize complex intellectual property, business and criminal disputes. As trials and other disputes have become more complex and varied, so have the ways in which lawyers can present those cases.

3. Innovations of trial science and strategy: A third advantage today's trial lawyers have over their predecessors comes from the developing fields of trial science and strategy, both of which allow lawyers to refine their trial skills without going to court. Trial science uses mock trials and focus groups. Technology has made these tools less expensive and easier to use. For example, trial lawyers can conduct a focus group far easier today than they could even a decade ago through the fast editing of videotaped depositions and digital management of exhibits.

Moreover, the literature of trial strategy continues to grow. For example, two prominent former federal prosecutors, Robert Klonoff and Paul Colby, present new and insightful theories in their book "Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials." Klonoff and Colby reject the notion that lawyers should try to defuse or defang their opponents' cases by introducing negative evidence. The authors contend that lawyers should focus on putting on only their strongest evidence. They also counsel against putting on marginal or neutral evidence because the jury assumes the advocate only puts on his best evidence and in the best possible light; as a result, the marginal evidence tends to diminish the jury's faith in the strong evidence.

THE REVOLUTION OF DIGITAL INFORMATION ALLOWS TRIAL LAWYERS TO EMPOWER THEIR AUDIENCES MORE EFFECTIVELY THAN IN THE PAST.

In short, Texas trial lawyers live in times of extraordinary change in trial advocacy. The most important, exciting moment in trial advocacy was not 50 years ago, 25 years ago or any other time in the past. The most important moment in trial advocacy is now.

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