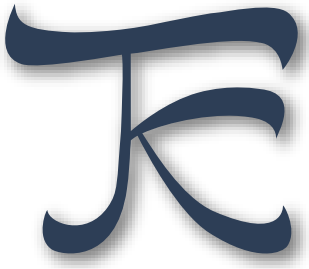

KT Designs, LLC

Litigation Graphics and Information Design

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The Applicability of Learning Theory in Litigation

A KT Designs, LLC White Paper

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The Art of Effective Communication

The key to being successful in litigation is the utilization of clear, concise, effective and persuasive communication. In effect, a lawyer is an educator – disseminating facts and evidence about a case to fact-finders. How those facts and evidence are presented to a jury, judge or panel can mean the difference between comprehension of said information and confusion, boredom and apathy. In today's society of information immediacy, the widespread use of technological advancements and the "CSI effect," finding that perfect balance of properly educating the fact-finder on complex information, without overwhelming them, while effectively rebutting adverse counsel's points are the litigators' main objectives. Understanding how people learn, how to distill and accurately represent complex information in a persuasive manner and how to present said information for maximum comprehension and retention are all important factors to consider during demonstrative development and argument preparation.

Adult Learning and Retention

Although there are a plethora of studies related to the various educational techniques employed in schools and universities, the field of adult learning is relatively new. The prevalent theory is that people utilize past experiences and previously acquired knowledge as a frame of reference. Bold new research in the fields of neuroscience and brain imaging at the University of Birmingham, UK, has provided interesting new data that is applicable to the field of learning. Dr. Doe Kourtzi, Chair of Brain Imaging at UAB, explains, "What we have found is that learning from past experience actually rewires our brains so that we can categorize the things we are looking at, and respond appropriately to them in any context."

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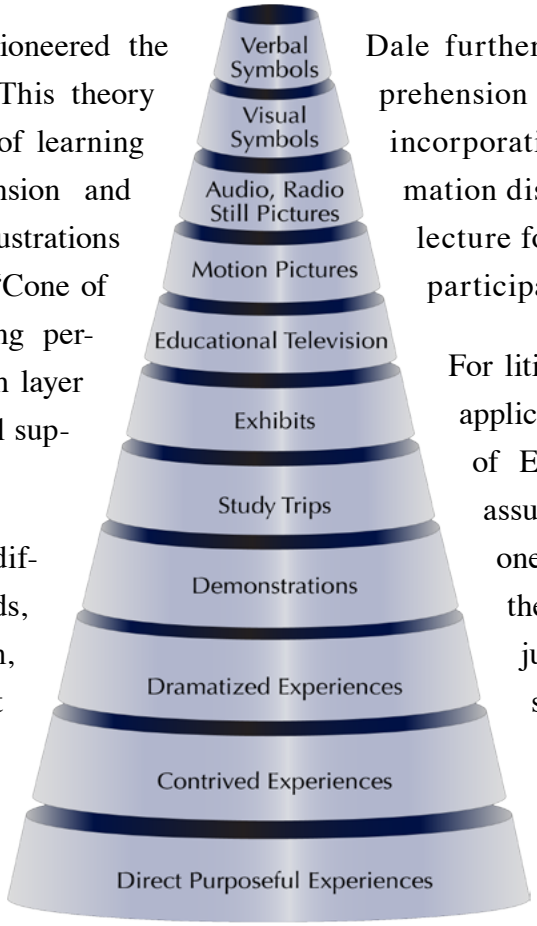
- Dr. Doe Kourtzi,
Chair of Brain Imaging at UAB

Unfortunately, there are no clinical studies related to adult learning techniques or measuring their effectiveness in facilitating comprehension, retention or recollection; there is only theory. Beyond this, it is clear that people learn, process, retain and recall information differently. Though it is still not known how effective one teaching method is in comparison to another, the majority of learning theory experts do agree that whether you are teaching a class of high school students or arguing your case in front of a jury, utilizing more than one teaching method increases the fact-finders' level of comprehension.

US educationist Edgar Dale pioneered the "Cone of Experience" theory. This theory holds that using various types of learning strategies increases comprehension and retention. Although modern illustrations have attempted to improve the "Cone of Experience" model by assigning percentages of effectiveness to each layer of the cone, there is no statistical support for such data.

Dale's hypothesis incorporates different types of teaching methods, including utilizing symbolism, audio, imagery, video and direct participation.



Dale further explained that maximum comprehension and retention is achieved by incorporating multiple strategies for information dissemination, such as combining a lecture format with imagery and audience participation.

For litigators, Dale's theory has practical applications in the courtroom. The "Cone of Experience" theory reinforces the assumption that by focusing on only one method of information delivery, the litigator risks disconnecting with jurors whose dominant learning style is another.

The Practical Application of Teaching Methods in the Courtroom

When I started my career in the legal industry the use of technology in the courtroom was in its infancy. Litigators preferred transparencies, printed copies and overhead projectors or ELMOs in lieu of laptops. Over the past decade, the method by which evidence is presented has changed. Law firms have taken a measured approach to embracing the use of technology in every stage of the litigation life cycle.

Litigation graphics are far more commonplace in courtrooms and are being included as early as the motions and pleadings phases of the litigation life cycle, as opposed to limited graphics like the obligatory graph or chart on transparency during trial. Now most Opening and Closing statements include the use of visual presentation and it is far more likely to find all exhibits digitized and introduced by computer. Likewise, Federal Courts are retrofitting old courtrooms and building new courtrooms to facilitate the use of new technologies.

These technological innovations hold positive significance for litigators and fact finders alike. For instance, legal teams experience an increase in the organization of evidence and the ability to access any exhibit with the immediacy of a mouse click or scan of a bar code, saving time in the preparation and trial phases. Additionally, this same technology facilitates the litigator's ability to persuasively present their evidence verbally while reinforcing their message with supplemental visual and auditory evidence. Jurors rely on comprehension of the evidence presented to make their decision. Jurors I've interviewed throughout the years expressed an overwhelmingly positive view of the use of technology and graphics in the courtroom, stating that these aids assisted in their comprehension of the arguments, evidence, and governing laws being considered.

Other Efforts to Clarify and Increase Information Retention in Juries and Fact-Finders

Historically speaking, until deliberation, Juries have a passive role in court proceedings. Jurors are to impartially consider the evidence presented and render a verdict based upon that evidence and the rule of law. Within the past few decades, courts have experimented with various changes to procedure. These tweaks in procedures include such exercises as joint case description statements that are read at voir dire, joint statements on applicable laws, giving jurors their own trial binders, allowing jurors to take notes and allowing jury members to ask witnesses questions through the judge. This experimentation has led to controversy because some of these procedures encourage jurors to take a more active role during the evidentiary presentation of trial or have the potential to distract jurors from listening to the evidence being presented.

Two of the more controversial procedures, allowing jurors to take notes and juror questions, are being tested at a measured pace in various jurisdictions across the country. In an effort to understand the implications of these new procedures, several studies focused on the impacts of these new techniques on the jurors and cases in which they were being tested yielded some thought-provoking data. The most notable studies, the Jury Trial Project conducted in New York State and The Arizona Filming Project conducted in 1998 (and a topic discussed at length in the 2006 Vanderbilt Law Review) clinically substantiate the efficacy of these procedures, when well-managed, and provide valuable insight into how jurors think and how they interact with each other.

Juror Note Taking

In education, note taking is not only encouraged but how to take notes properly is now being introduced in curriculum as early as the grade school level. The value of note taking is all around us. In our work and everyday lives we take notes during meetings and important phone calls; write reminders to ourselves in the form of task lists, grocery lists and calendar events. For many, taking notes assists in processing and retaining the information being presented and then facilitates the recall of that information.

Of Jurors who were not permitted to take notes, 76% of jurors on civil trials and 50% of jurors on criminal cases communicated that they would prefer the opportunity to take notes in future trials.

Allowing juries to take notes during the course of a trial has only developed over the past few decades. As this experimental procedure is implemented across the country, extensive studies continue to be conducted and relevant data collected.

According to findings based on research by the Jury Trial Project in New York State, no judge or attorney reported juror note taking being a distraction. Judges reporting their opinions on juror note-taking were overwhelmingly positive, perceiving an increase in juror attentiveness and their understanding of evidence, laws and in reaching a decision in the case. Additionally, Jurors permitted to take notes during the course of the trial also described an increased ability to recall evidence, aided in the comprehension of the laws at issue, and greater ease in reaching their decision. Of Jurors who were not permitted to take notes, 76% of jurors on civil trials and 50% of jurors on criminal cases communicated that they would prefer the opportunity to take notes in future trials.

Although slow to adopt changes, the majority of courts now permit jurors to take notes and provide them with writing materials. In some cased, for example, Florida civil cases lasting less than five days, Louisiana land condemnation cases and Pennsylvania criminal cases or civil cases lasting less than two days Jurors are not allowed to take notes. Attorneys who participated in the New York State Jury Trial Project expressed mixed opinions on the effect of juror note taking on attention, understanding the evidence being presented, understanding the laws at issue and their ability to reach a decision. Many attorneys remain unconvinced that note taking is a useful tool for jurors and believe it could be a hindrance. Their criticisms related to note taking include being a distraction, focus on note taking rather than witness testimony the potential that those who take notes could dominate jury deliberations, inaccuracies in juror notes, and that juror notes could outweigh juror recollection of testimony or evidence.

Juror Questions

The latest procedure being experimented with in courts is Juror posed questions. This allows Jurors' to submit questions to witnesses through and at the discretion of the presiding Judge. Although very controversial, the initial feedback from various commissions and studies provide positive feedback. In the Arizona Filming Project, juror questions generally focused on the central issues of the case. Over 28% of all juror questions observed in this study gravitated towards obtaining or clarifying factual information. Over 61% of juror questions reviewed were evaluating questions focused on discrepancies in testimony or disputed facts being presented.

In general, cases where this technique was employed, and managed properly, attorneys and judges alike reported jurors appeared more engaged in the proceedings and that the majority of the questions submitted were both thoughtful and germane. The Arizona Filming Project further reports that, though Jurors consider the answers obtained by their questions during the deliberations process, this information is not given more weight than any other evidence or information presented during the course of the trial. Additionally, a presiding Judge choosing not to ask a juror submitted question did not reflect negatively during the deliberations process.

There are detractors to allowing juries to question witnesses. Many of these concerns relate to the redefining of the jurors' role from a passive fact-finder to participant in the court proceedings, and allowing potentially prejudicial questions posed by jurors to impede impartiality. Of the 829 juror submitted questions examined in the Arizona Filming Project, 69 of them appeared argumentative. Three-fifths of the trials surveyed had no instances of juror submitted argumentative questions and one-fifth of the trials in the experiment had 1 argumentative question submitted by a member of the jury. One trial experienced 10 instances of a juror-submitted question considered argumentative.

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Although only a small representative sample, the data leads one to hypothesize that juror submitted questions, if reviewed and considered permissible by judges and attorneys for relevance and impartiality beforehand, can aid Jurors by clarifying legal concepts, understanding information and evidence presented, evaluating witness or story credibility and understanding and evaluating of disputed facts.

Conclusion

How people best understand information presented, internalizes, and then retains that information for later recollection varies. By courts utilizing multiple teaching methods in the courtroom, explaining evidence, assisting in processing information presented and facilitating memory retention and recall, jurors are better prepared to carry out the duties they are charged with.

In April 29, 2005, the Hon. Michael F. McKeon, one of the judges that agreed to take part in the Jury Trial Project in New York, wrote an article in The Daily Record entitled "How Experience Changed My Practice On Juror Note Taking." In it he states, "To expect all jurors to process information in the same manner is not only ludicrous but in some respects dangerous."

"If one of our goals in jury trials is to send into a jury room a jury well equipped to render a fair and impartial verdict, then in my view, we are shortchanging all litigants if we are not providing our jurors with all the necessary aids and tools to enable them to perform the critical tasks we ask them to undertake."

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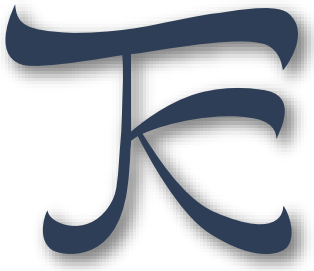

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