SUBCONSCIOUS ADVOCACY — PART 2: VERBAL COMMUNICATION IN THE COURTROOM AND ETHICAL CONSIDERATIONS

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"Lawyers are students of language by profession . . .
They exercise their power in court by manipulating the thoughts and opinions of others,
whether by making speeches or questioning witnesses.
In these arts the most successful lawyers reveal (to those who can appreciate their performance)
a highly developed skill."[1]

1 Introduction

In Part 1 of this article[2] I discussed an aspect of persuasive communication that most trial lawyers ignore or neglect, namely, nonverbal communication. Social science researchers have overwhelmingly demonstrated that, for a variety of reasons, it is imperative that trial lawyers should learn to "speak" body language. Firstly, nonverbal communication is a powerful tool of persuasion. Some experiments suggest that over 90% of the communicated meaning of a message is conveyed through nonverbal communication. The essential point is that it is not so much *what* speakers say that counts, but *how* they say it and *what they look like* when they say it. Also, receivers generally believe that speakers' nonverbal cues are more revealing than their actual words, because they assume that nonverbal cues are more spontaneous, more difficult to disguise, and less likely to be manipulated.

Moreover, few contexts are as heavily dependent upon the use of both spoken and unspoken discourse as the courtroom environment. In the courtroom, nonverbal communication subtly affects the entire trial process. It is constantly present and being asserted, and it heavily influences the judgments of trial lawyers, clients, witnesses and fact-finders. Lastly, social-scientific principles of nonverbal persuasion could give trial lawyers a competitive edge in the courtroom. That is because nonverbal cues are the most effective way to influence another person's opinions, attitudes and beliefs. Moreover, influencing attitude and opinion change is, after all, what trial work is all about.

In Part 2, I specifically explore the verbal component of subconscious advocacy, and the potential ethical issues implicated by subconscious advocacy generally.

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1 F Philbrick *Language and the Law: The Semantics of Forensic English* (1949) vi.

2 W Gravett "Subconscious Advocacy — Part 1: Nonverbal Communication in the Courtroom" (2018) 29 *Stell LR* 3.

2 The verbal component of subconscious advocacy

Much, and in many instances most, of a trial lawyer's case is delivered through the mouths of witnesses. The trial lawyer is, however, in a position to exercise considerable influence over what comes out. The trial lawyer chooses the witnesses and the order in which to present them; the trial lawyer chooses the questions to ask and the pattern and rhythm of the answering.

Thus, the focus in this part is not on the substance of the trial lawyer's message, but on the speaking style of the witnesses that the trial lawyer calls in the client's case, the trial lawyer's choice of words, and ordering effects in the presentation of evidence.

2 1 Speech style

The anthropologist William O'Barr and his associates brought the observational, analytical, and experimental methods of the social sciences to bear on a question affecting trial tactics: What is the effect of variations in the presentation (speaking) style of witnesses upon fact-finders?[3] This is an important question, because witnesses for each side in a trial give divergent versions of the facts at issue. Thus, the trial lawyers for each side want their witnesses to be perceived as more credible and persuasive than those of the opposing side.[4]

It is trite that the rules of evidence control the substantive content of evidence adduced at trial. However, after the threshold of admissibility has been met, evidentiary rules place few restrictions on *how* the evidence may be presented. This relative freedom in the style of presentation, together with the impact that witnesses' demeanour may have upon the reception of their evidence, renders the prediction and control of the witnesses' presentation style matters of significance to the trial lawyer.[5]

Issues of presentation style have long occupied the authors of texts on trial advocacy.[6] However, as I emphasised in Part 1, although discussions of this kind have some utility in conveying the wisdom of accumulated advocacy experience, the application of the techniques of the social sciences to witnesses' courtroom behaviour is a much more accurate and efficient means of gathering information on styles of presenting evidence, and for drawing conclusions about the effects of style on fact-finders' reception of evidence. Using the methodologies developed in anthropology, linguistics, and psychology, it is possible to generate empirical answers to these questions.

Socio-linguistic research in a wide variety of non-courtroom contexts has revealed that it is possible to distinguish definite styles of speaking, and to trace these styles to the social background and the social surroundings of speakers. Other studies have shown that receivers form impressions of

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3 JM Conley, WM O'Barr & EL Lind "The Power of Language: Presentation Style in the Courtroom" (1978) *Duke LJ* 1375 1375.

4 JD Smith "The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?" (1991) 134 *Military L Rev* 173 174.

5 Conley et al (1978) *Duke LJ* 1376.

6 See, for example, JW McElhaney *McElhaney's Trial Notebook* 4 ed (2005) 102-103.

speakers based, not only on what they say, but also on the way in which they speak. For example, individuals' styles of speaking can influence the degree to which others accept their arguments.[7]

Encouraged by these findings, O'Barr and his collaborators designed a research programme to investigate the influence of courtroom presentation style on fact-finders' impressions of witnesses.[8] The researchers conducted an extensive study of the speaking styles of actual courtroom witnesses. They accomplished this by observing and tape recording all criminal trials in a court in Durham County, North Carolina, during the summer of 1974, yielding more than 150 hours of taped witness evidence.[9] They then analysed these recordings from a socio-linguistic perspective to identify various speech styles and their corollary social contexts. This analysis revealed a number of consistent linguistic patterns that appeared recurrently in witnesses' evidence: (i) the use of "powerful" and "powerless" speech by witnesses; (ii) the delivery of evidence in "narrative" and "fragmented" styles; (iii) the use of "hypercorrect" speech by witnesses; and (iv) the speech behaviour of lawyers and witnesses when they interrupt each other and speak simultaneously.[10]

2 1 1 "Powerful" and "powerless" speech styles

One empirically identified "style" of courtroom speech is characterised by the frequent use of words and expressions that convey a lack of forcefulness in speaking. The specific features of this style consist of the abundant use of the following:

(i) *Hedges*, for example prefatory remarks, such as "I think . . .," "I guess . . ." and "It seems like . . .;" remarks appended to a sentence, such as ". . ., you know;" and modifiers, such as "kind of" and "sort of."
(ii) *Hesitation forms* — words and sounds that carry no substantive meaning but only fill possible speech pauses, such as "uh," "um" and "well."
(iii) *Polite forms* — for example, the use of "sir" and "please."
(iv) *Question intonation* — making a declarative statement with rising intonation so as to convey uncertainty.
(v) *Intensifiers*, for example "very," "really," "definitely" and "surely."[11]

A review of the tapes and notes of the trials revealed that witnesses of low social status — that is, those with little social power, such as the poor and uneducated — were most likely to use this style in giving their evidence. O'Barr et al termed this the "powerless" style of evidence.[12] In marked contrast to the "powerless" style, the researchers also identified a more forceful and direct manner in giving evidence.[13] Those witnesses of higher social status and power — for example, well-educated professionals and expert witnesses — used a speech style that exhibited relatively few features of the "powerless" style. The researchers designated this the "powerful" style

7 H Giles & H Powesland *Speech Style and Social Evaluation* (1975) 111.
8 Conley et al (1978) *Duke LJ* 1378.
9 1379.
10 1379.
11 1380. See also Smith (1991) *Military L Rev* 178-179.
12 Conley et al (1978) *Duke LJ* 1380.
13 1381; Smith (1991) *Military L Rev* 179.

of courtroom speech.[14] The difference between evidence in the "powerless" and "powerful" styles of speaking is best illustrated by examples of the same substantive evidence by witnesses speaking in the two different styles:

Q: Approximately how long did you stay there before the ambulance arrived?	A *(Powerless)*: Oh, it seems like it was just about, uh, twenty minutes. Just long enough to help my friend, Mr Davis, you know, get comfortable. A *(Powerful)*: Twenty minutes. Just long enough to help Mr Davis get comfortable.
Q: How long have you lived in this town?	A *(Powerless)*: All my life, really. A *(Powerful)*: All my life.
Q: You are familiar with the streets?	A *(Powerless)*: Oh, yes. A *(Powerful)*: Yes.
Q: You know your way around:	A *(Powerless)*: Yes, I guess so. A *(Powerful)*: Yes.

Once anthropological and linguistic procedures identified the "powerless" and "powerful" styles of in-court evidence, the researchers turned to the methods of experimental psychology to investigate the consequences of each speech style on the reception of the evidence by the fact-finder.[15] Participants in the study listened to different versions of the same substantive courtroom evidence. The evidence differed only in respect of the speaking style used by the witness, that is, "powerful" or "powerless."[16]

Participants rated the witnesses who used the "powerful" style of speech as more convincing, more competent, more intelligent, and more trustworthy than witnesses using the "powerless" style. As such, receivers showed greater acceptance of the information conveyed by speakers using the "powerful" speech style.[17]

These findings suggest that trial lawyers could enhance the credibility and persuasiveness of their witnesses by preparing them to give evidence using the "powerful" speech style. It goes without saying that, although the experiment focused on witness speech patterns, it seems safe to generalise

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14 Conley et al (1978) *Duke LJ* 1381.

15 1381.

16 1382; Smith (1991) *Military L Rev* 179. The researchers followed the following methodology: They identified a segment of "powerless" style evidence in the original tapes. The evidence was then recorded on audio tape with actors playing the parts of lawyers and witnesses. The actors strove to replicate as closely as possible the speech characteristics found in the original evidence. A second recording was then made using the same actors. However, in this recording the actors omitted most of the features that characterised the "powerless" speech style, thereby producing an example of evidence in the "powerful" style. The experimental evidence differed only in the characteristics related to the speech style used by the "witness." In both samples of evidence, exactly the same factual information was presented by the same witness. Conley et al (1978) *Duke LJ* 1382.

17 1382-1386; Smith (1991) *Military L Rev* 179; B Erickson, EA Lind, BC Johnson & W O'Barr "Speech Style and Impression Formation in a Court Setting: The Effects of 'Powerful' and 'Powerless' Speech" (1978) 14 *J Experimental Psychol* 266 268.

the results to the speech of the trial lawyers themselves, that is, trial lawyers should likewise speak in the "powerful" style.[18]

2 1 2 "Narrative" and "fragmented" styles of evidence

O'Barr and his collaborators also noted that some of the recorded examinations-in-chief of witnesses were characterised by relatively infrequent questions by the trial lawyers, and longer "narrative" answers by the witnesses. By contrast, other evidence was noticeable for the frequency of questions by the trial lawyers, and the brief answers of the witnesses.[19] The following excerpts exemplify the differences between the "narrative" and "fragmented" styles of evidence:

"Narrative" style:	
Q: Now, calling your attention to 21 November, a Saturday, what were your working hours?	A: Well, I was working from 7 am to 3 pm. I arrived at the shop at 6:30 am and opened the doors at 7 am.
"Fragmented" style:	
Q: Now, calling your attention to 21 November, a Saturday, what were your working hours?	A: Well, I was working from 7 to 3.
Q: Was that 7 am?	A: Yes.
Q: And at what time did you arrive at the shop?	A: 6:30.
Q: 6:30. And did, uh, you open the doors at 7 o'clock?	A: Yes.

Trial advocacy texts frequently advise that witnesses' credibility can be enhanced during examination-in-chief if trial lawyers allow and encourage their witnesses to give evidence in the narrative style.[20] Although this point may seem obvious as an intuitive matter, O'Barr et al hypothesised that the use of one style or the other might have different, more complex effects. Specifically, because the "narrative and "fragmented" styles entail differences in the speech behaviour of both trial lawyer and witness, it seemed that fact-finders might interpret the use of the "narrative" or "fragmented" style as an indication of the trial lawyer's own evaluation of the witness.[21]

The researchers conducted an experiment similar to the one described above to investigate the effects of "powerful" and "powerless" speech. Receivers routinely evaluated witnesses who testified in the "narrative" style more favourably than those who testified in the "fragmented" style. Moreover, receivers tended to base their evaluations of a witness on their perceptions

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[18] MJ Saks & R Hastie *Social Psychology in Court* (1978) 114.

[19] Conley et al (1978) *Duke LJ* 1387.

[20] WH Gravett *The Fundamental Principles of Effective Trial Advocacy* (2009) 55; TH Mauet *Trial Techniques* 5 ed (2000) 109; S Lubet *Modern Trial Advocacy: Analysis and Practice* 3 ed (2004) 48-49.

[21] Conley et al (1978) *Duke LJ* 1387.

of the examining trial lawyer's opinion of the witness. Receivers believed that the lawyer determined the use of either the "narrative" or "fragmented" style. Thus, the witness's use of the "narrative" style indicated faith by the trial lawyer in the witness' truthfulness and competence. Conversely, when a witness used the fragmented style, again presumably under direction of the trial lawyer, receivers believed that the lawyer considered the witness to be incompetent.[22]

2 1 3 Hypercorrect speech in witness evidence

A trial court is one of the most formal and most intimidating environments that a lay witness is likely to confront. Evidence in court thus tends to be considerably more formal than everyday conversation. However, O'Barr and his colleagues found that some witnesses attempted to speak in a much more formal style than was their custom.[23] Witnesses who used this "hypercorrect" style of giving evidence tended to use convoluted grammatical structures; to substitute more difficult and obscure ("bookish") words for their ordinary vocabularies; and to use bits of legal terminology and overuse whatever technical or professional vocabulary they did possess.[24] Accordingly, these witnesses gave their evidence in a stilted and unnatural manner, rather than merely the formal style that they apparently aimed for.

The experimenters first noted this phenomenon in the evidence of an assistant ambulance attendant. Although this witness had only minimal training in first aid, he obviously wished to impress the court with the depth of his medical knowledge. He sprinkled his evidence with hypercorrect malapropisms, presumably designed to promote his own importance. He invariably described "three days" as "seventy two hours"; he described a person who had been merely knocked unconscious as "comatose"; he characterised a slightly injured patient as "in a somewhat less than dire condition"; and with regard to events he did not remember, he said he was "not cognisant" of them.[25]

To study the effect of "hypercorrect" speech on receivers, O'Barr conducted a social psychological experiment. He had subjects listen to evidence in which the witnesses used either "hypercorrect" speech or the standard formal courtroom speaking style.[26] The subjects rated the witness who used the ordinary formal style of courtroom speech as significantly more convincing, more competent, more qualified, and more intelligent than those who used the "hypercorrect" style.[27]

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22 1387-1389; Smith (1991) *Military L Rev* 180-181.

23 Consequently, these witnesses made frequent errors in grammar and vocabulary. Conley et al (1978) *Duke LJ* 1389.

24 Smith (1991) *Military L Rev* 179. The phenomenon of "hypercorrect" speech is prevalent in any number of social contexts in which a speaker would feel compelled to "talk up" to the audience. Conley et al (1978) *Duke LJ* 1389.

25 WM O'Barr *Linguisic Evidence: Language, Power and Strategy in the Courtroom* (1982) 149-156.

26 Actors recreated on tape a segment of evidence in which a witness used the "hypercorrect" style. The experimenters then made a second recording in which the evidence was presented in the ordinary formal style. 1389-1390.

27 1390.

These results led the experimenters to conclude that fact-finders quickly develop expectations about witnesses' behaviour based on what they infer regarding the witnesses' background and social status. When witnesses violate these expectations by attempting to speak with an inappropriate degree of formality, fact-finders react negatively.[28] Thus, trial lawyers would be well advised to prepare their witnesses to give evidence using their normal, out-of-court vocabularies, while, of course, observing the confines imposed by formality upon court proceedings.

2 1 4 Interruptions and simultaneous speech

For the purpose of a fourth study of the effects of stylistic differences in evidence, the researchers turned their attention from examination-in-chief to cross-examination. Cross-examination is frequently characterised by verbal clashes between trial lawyer and witness. In vying for control of the evidence, the trial lawyer and the witness often interrupt each other. These interruptions are usually followed by simultaneous speech that reduces the issue of control to the question of which speaker can persevere longer. In any particular instance of simultaneous speech, the lawyer might stand fast while the witness stopped speaking, or the witness might dominate while the lawyer deferred.[29]

In this fourth experiment, O'Barr et al examined the effects of these hostile exchanges on receivers' perceptions of the witness and the trial lawyer. Subjects listened to recorded evidence in which two actors (one playing the trial lawyer and the other the witness) recreated several versions of a segment of an actual cross-examination. In the control version of the cross-examination excerpt, there was no simultaneous speech — each speaker provided the other the opportunity to finish before speaking. In the other three versions, considerable simultaneous speech occurred, with each speaker interrupting the other. These consisted of the following scenarios: (i) the lawyer dominating, persevering in most of the simultaneous speech; (ii) the witness dominating, persevering in most of the simultaneous speech; and (iii) neither dominating the frequent interruptions and consequent simultaneous speech, each persevering approximately as often as the other.[30]

This experiment brought to light two significant findings. Firstly, receivers considered the trial lawyer to have less control over the presentation of evidence in *all* instances of simultaneous speech.[31] Thus, regardless of whether the trial lawyer or the witness dominated the simultaneous speech during the cross-examination, receivers judged the lawyer as having far less control over the presentation whenever simultaneous speech occurred. Similarly, receivers rated the witness as more powerful and more in control whenever simultaneous speech occurred.[32]

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[28] 1390; Smith (1991) *Military L Rev* 180.
[29] Conley et al (1978) *Duke LJ* 1391.
[30] 1391.
[31] 1392; Smith (1991) *Military L Rev* 181.
[32] Conley et al (1978) *Duke LJ* 1392; Smith (1991) *Military L Rev* 181.

Secondly, even in those instances of simultaneous speech in which the trial lawyer dominated (that is, persevered in the majority of simultaneous speech exchanges), the lawyer "lost" in the eyes of the receivers. Receivers rated the lawyer as giving the witness less opportunity to present her evidence, as less fair to the witness, and even as less intelligent.[33]

This study suggests that the trial lawyer should attempt to avoid interruptions and simultaneous speech during cross-examination, lest the lawyer be perceived as losing control over the examination. When simultaneous speech does occur, the trial lawyer should not attempt to dominate the exchange. To do so creates an appearance of unfairness to the witness, and results in a strongly negative overall assessment of the lawyer by the fact-finder.[34]

In sum, the four speech style studies demonstrate that witnesses who speak in a straightforward, powerful and naturally formal style, who give evidence with minimal assistance from the examining lawyer, and who are able to resist efforts from opposing counsel to cut short their evidence, will enhance their credibility, because they will make a favourable impression upon the fact-finder.

2 2 Word choice

Social scientists have discovered that trial lawyers could subtly control the facts that witnesses report to have observed. Elizabeth Loftus made one of the most convincing demonstrations of the power of words in her work on eyewitness evidence. In a serious of ingenious experiments, she showed that from the earliest moment eyewitnesses started talking about an event, their words capture, encode and shape their memory of the event.

In one experiment, subjects watched films of motor vehicle accidents, and then later answered questions about the events depicted in the films.[35] Loftus and Palmer were able to illustrate that questions using different verbs to describe the action elicited different answers. The question, "About how fast were the cars travelling when they *smashed* into each other?" elicited higher estimates of speed than the same question containing the verbs "collided," "bumped," "hit" or "contacted".[36] One week after the initial experiment, subjects who had been questioned using the verb "smashed" were significantly more likely to answer in the affirmative when asked, "Did you see any broken glass?" although there was no broken glass in the film.[37]

Mark Twain said: "The difference between the *almost right* word and the *right* word is really a large matter — 'tis the difference between the *lightning bug* and the *lightning*".[38] Many trial lawyers who are sensitive to the

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33 181-182.

34 182.

35 E Loftus & J Palmer "Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory" (1974) 13 *J Verbal Learning & Verbal Behavior* 585-589.

36 586. The verb "smashed" elicited a mean speed estimate of 40.8 miles per hour, while the verb "contacted" elected a mean speed estimate of 31.8 miles per hour. The mean speed estimates elicited by the verbs "collided," "bumped" and "hit" fell between these extremes.

37 587.

38 As quoted in G Bainton *The Art of Authorship* (1890) 87-88.

importance of lexical choice may already use the tactics suggested by Loftus' study. However, the social science data provides unambiguous empirical evidence of their effectiveness.[39]

Other results from Loftus's research illustrate the way in which trial lawyers can insert facts not actually observed by the witness as incidental features of early questions, for example at the very first consultation with the witness.[40] These "facts" then become incorporated into the witness's memory of the event, and the trial lawyer in later questions (in subsequent consultations and during examination-in-chief in court) could elicit these "facts" as though the witness had in fact observed them.[41]

In this experiment, subjects watched a film depicting a multi-vehicle accident, and then completed a questionnaire consisting of 22 questions, including six critical questions.[42] Three of the critical questions asked about items that appeared in the film, whereas the other three asked about items not present in the film. For half the subjects, all the critical questions contained the definite article "the", for example, "Did you see *the* broken headlight?". For the remaining half, the critical questions contained the indefinite article "a", for example, "Did you see *a* broken headlight?".[43]

Subjects responding to questions containing the indefinite article "a" were more than twice as likely to respond, "I don't know" as subjects responding to questions containing the definite article "the". The result held true whether or not the item (such as the broken headlight) was actually present in the film.[44] In addition, subjects who answered "the"-questions were more than twice as likely to report seeing something that was not depicted in the film. Put differently, subjects who answered questions containing the definite article "the" falsely reported the presence of an item more than twice as often as the subjects who answered questions containing the indefinite "a".[45]

Loftus also demonstrated the ability of subtle variations in the wording of a question to influence the answer, not only in the context of eyewitness evidence, but also with regard to individuals' personal experiences. In this study, the experimenters interviewed 40 people about their headaches and

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39 Saks & Hastie *Social Psychology in Court* 115.

40 EF Loftus & G Zanni "Eyewitness Testimony: The Influence of the Wording of a Question" (1975) 5 *Bull of the Psychonomic Soc* 86-88.

41 Construction of a "fact" can thus be incorporated into the very question that purports to inquire about the "fact."

42 Loftus & Zanni (1975) *Bull of the Psychonomic Soc* 87.

43 86.

44 87.

45 87-88. The question "Did you see *a* broken headlight?" implicitly contains two separate questions, namely (1) "Was there a broken headlight?" and (2) "If there was, did you see it?". If a subject decides that the answer to Question 1 is "Yes", she can then ask herself Question 2, and she should be fairly certain of this response. The problem that arises for a subject is that filmed accidents play out in a matter of seconds, rendering it nearly impossible to be certain of the answer to Question 1, and therefore increasing the likelihood that the subject will respond "I don't know" much of the time. By contrast, the question "Did you see *the* broken headlight" can be translated into the nearly equivalent "There was a broken headlight. Did you see it?". Thus, the subject does not need to answer Question 1. Effectively the answer is "Yes." She need only answer Question 2, and at this point she can be fairly certain of her response. Thus, fewer "I don't know" responses occurred in response to questions containing the definite "the". Moreover, if a subject's recollections tend to conform, for some reason, to what she believes actually did occur, then the definite article may lead to a greater "recognition" of events, even when they never in fact occurred. 87.

headache products on the premise that they were participating in market research.[46] Two questions were crucial to the experiment. The first asked about products other than those currently being used in one of two wordings:

(1a) "In terms of the total number of products, how many other products have you tried — *one, two or three*?"

(1b) "In terms of the total number of products, how many other products have you tried — *one, five or ten*?"

When the question was phrased in terms of small increments, as in Question 1a (one, two or three), the subjects claimed to have tried an average of 3.3 products. However, when the possible responses encompassed larger increments, as in Question 1b (one, five or ten), the subjects claimed to have tried an average of 5.2 products.[47]

The second key question asked about the frequency of headaches in one of two formulations:

(2a) "Do you get headaches *frequently*, and, if so, how often?"

(2b) "Do you get headaches *occasionally*, and, if so, how often?"

The "frequently" subjects reported an average of 2.2 headaches per week, whereas the "occasionally" group reported only 0.7 headaches per week.

In sum, the social science research demonstrates that subtle variations in the wording of questions can influence the answer given dramatically, particularly in the contexts of eyewitness evidence and evidence regarding personal experiences. The results suggest that trial lawyers can influence witnesses' evidence by employing careful lexical choices in formulating the questions they ask. Although this may result in a witness providing a version of events that is most favourable to the trial lawyer's client, that evidence may not necessarily be the most factually accurate.[48]

3 Message order effects in persuasion

It had long been speculated in both trial practice and social psychology that the order in which arguments are presented might inject some advantage to one side or the other.[49] This arguably applies to both the gross ordering of presentations (the order in which the trial lawyers speak) and internal ordering (whether trial lawyers might garner an advantage by presenting their strong material early or late in the presentation).[50] When information presented early is more persuasive, it is termed a "primacy effect"; when later information is found to be more effective, a "recency effect" is said to operate.[51] Because the law of evidence and rules of procedure determine the order in which the trial lawyers speak in court (the gross ordering of presentations), trial lawyers are interested in the theories of primacy and recency principally to determine when to present specific evidence in their individual presentations to the court, so as to garner the most persuasive impact from that evidence.

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46 EF Loftus "Leading Questions and the Eyewitness Report" (1975) 7 *Cognitive Psychol* 560-572.

47 561.

48 Smith (1991) *Military L Rev* 184. I deal below with the ethical issues surrounding word choice, as well as the other verbal and nonverbal advocacy techniques.

49 Saks & Hastie *Social Psychology in Court* 105.

50 105-106.

51 See WD Crano "Primacy and Recency in Retention of Information and Opinion Change" (1977) 101 *J Social Psychol* 87 87-88. For a discussion of primacy and recency effect in the context of the opening address, see W Gravett "Opening Address: Powerful Tool of Persuasion or Waste of Time?" (2018) *De Jure* (forthcoming).

Unfortunately, the empirical results produced by social science are far from convergent. In the earliest research in this area, Frederick Lund presented subjects with a written communication either supporting or opposing the implementation of protective tariffs.[52] He then presented subjects with a communication on the other side of the issue. Lund observed a "disproportionate influence of the first discussion (message) in determining the subjects' final position".[53] These results led him to postulate a "law of primacy in persuasion".[54] Later studies reinforced this finding.[55]

The field of social psychology appeared to accept primacy as a reliable phenomenon, until this seeming tranquillity was shattered in 1950, when Harvey Cromwell found a statistically reliable recency effect in persuasion.[56] Some years later, Hovland and Mandell conducted a series of studies in the primacy-recency paradigm. One study using the tariff topic showed a significant primacy effect, and another using the topic of atomic submarines showed a significant recency effect. Based on these findings, the researchers concluded that they could not discern any universal law of either primacy or recency.[57]

It seems that interaction with other variables is critical in determining the circumstances in which either primacy or recency would prevail.[58] Some studies have indicated that the effects of primacy and recency are mediated by the kind of information presented. Some information activates primacy and is thus said to be primacy-bound, such as that which is non-salient, controversial, interesting, or highly familiar.[59] Accordingly, salient, non-controversial, uninteresting, or unfamiliar information is recency-bound.[60]

Moreover, emotional material is better remembered than factual material.[61] In fact, the more factual the information, the more quickly it loses its power.[62] Social psychologists would thus advise trial lawyers to present emotional material first. When trial lawyers present emotional material first, fact-finders are "likely to construct a logic to justify it"; that is, fact-finders tend to make evidence that is presented later "fit" with the early encountered more emotionally-laden evidence.[63] Concomitantly, since memory of factual

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[52] FH Lund "The Psychology of Belief. IV. The Law of Primacy in Persuasion" (1925) 20 *J Abnormal Psychol* 183-191.

[53] 187.

[54] 187.

[55] See, eg, R Knower "Experimental Studies of Changes in Attitude: II. A Study of the Effect of Printed Argument on Changes in Attitude" (1936) 20 *J Abnormal Psychol* 522-532.

[56] H Crowell "The Relative Effect on Audience Attitude of the First Versus the Second Argumentative Speech of a Series" (1950) 17 *Speech Monographs* 105-122.

[57] CI Hovland & W Mandell "Is There a 'Law of Primacy' in Persuasion?" in CI Hovland et al (eds) *The Order of Presentation in Persuasion* (1957) 1-22.

[58] CP Haugtvedt & DT Wegener "Message Order Effects in Persuasion: An Attitude Strength Perspective" (1994) 21 *J Consumer Research* 205 206-207.

[59] Saks & Hastie *Social Psychology in Court* 106.

[60] 106.

[61] JA Call "The Psychology of Courtroom Persuasion" (1987) 16 *Brief* 47 50.

[62] J Voss "The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom" (2005) 29 *Law & Psychol Rev* 301 312.

[63] T Sannito "Psychological Courtroom Strategies" (Summer 1981) *Trial Diplomacy J* 30 30.

information decays quickly, trial lawyers should save technical evidence for last to obtain the greatest possible recency effect.[64]

These suggestions relate both to how trial lawyers should present their overall cases in-chief, but also to how they should structure the presentation of evidence for each day. For example, in a claim for damages based on personal injury (such as medical negligence, for example), it would be advisable for the plaintiff's trial lawyer to call the economist expert witness, who will give evidence as to lost earnings, last — not only on the last day of plaintiff's case in-chief, but also as the last witness on the last day. This would increase the chances that the fact-finder would be better able to recall the rather dry but crucially important figures.[65]

American trial lawyers and advocacy scholars have, for the most part, solved the primacy/recency debate by emphasising the importance of both. For example, Steven Lubet argues:

> "The principles of primacy and recency may be applied to almost everything that a lawyer does in the course of a trial. In . . . opening statement, witness examination, final argument . . . the axiom holds true that people tend most to remember the things they hear first and last. Thus, as a general rule, the most important points should come at the beginning and end of every presentation.
>
> In opening statement and final argument, therefore, the preferred practice is to start strong and end strong. Lawyers structure their presentations so as to make the most important and memorable impression on the fact-finder. In [examination-in-chief] too, it is useful to begin by addressing a critical or decisive issue and return to one at the end of the witness's testimony."[66]

4 Ethical considerations implicated by subconscious advocacy

All the nonverbal and verbal advocacy techniques described above and in Part 1 have at least one thing in common: they persuade subconsciously.[67] The legitimacy of the legal system is in part based on the assumption that, when permitted to choose what evidence to accept and what community values to reflect in their judgments, fact-finders have the ability to choose consistent with both logic and fairness. Judicial independence is therefore central to judicial legitimacy. There are those who claim that subconscious advocacy erodes judicial cognitive independence, because a fact-finder cannot scrutinise and choose to reject a message that is received from a trial lawyer on a subconscious level. In other words, because of the "covert" nature of these techniques, fact-finders might be unable to detect and reject the subtle thrust of the trial lawyers' efforts.[68] Also, once the "covert" message is received, it can affect other choices that fact-finders make about subsequently received evidence.[69]

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64 Voss (2005) *Law & Psychol Rev* 312; Call (1987) *Brief* 50.

65 Call (1987) *Brief* 50.

66 Lubet *Modern Trial Advocacy* 16. See also TA Mauet *Trials: Strategy, Skills, and the New Powers of Persuasion* (2005) 24; Gravett *Fundamental Principles* 13-14.

67 V Gold "Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom" (1986-1987) 65 *North Carolina L Rev* 481 497.

68 485-486.

69 Gold (1986-1987) *North Carolina L Rev* 498.

4 1 Extra-legal bases for judicial-decision-making

Critics of the use of subconscious advocacy, such as Victor Gold, are concerned about the ways in which such advocacy techniques contribute to the erosion of trials' truth-seeking function.[70] They claim that subconscious psychological advocacy techniques induce fact-finders to employ extra-legal bases for decision-making. Gold considers a decision-making input to be extra-legal when it is, among other things, irrelevant to the legal or factual issues of the case.[71]

For example, courtroom style — the way in which trial lawyers and witnesses tell their stories in the courtroom through body movement, physical appearance and style of speech — is an extra-legal basis for decision-making, because the demeanour of lawyers and witnesses is ordinarily not connected to the legal and factual issues in the case, and thus should not be the basis of fact-finders' decisions.[72]

As described above, in experiments receivers consistently and quite strongly evaluated speakers (witnesses) who used the "powerful" speech style as more credible than those who spoke in the "powerless" style. However, the researchers found that the "power" component of linguistic style was not correlated with the truthfulness of a witness, but with the witness's social status.

Gold contends that these results encourage trial lawyers to "train" their own witnesses to use "powerful" speech, and to use that linguistic style themselves. They further encourage trial lawyers to seek to induce "powerless" speech in opposing witnesses.[73] Because the distinction between "powerful" and "powerless" witness speech is not probative of the credibility of witnesses, or any other relevant matter, efforts by trial lawyers to exploit this distinction is an attempt to use an extra-legal basis for judicial decision-making.[74] Furthermore, when trial lawyers use "powerful" speech to enhance their own credibility, they seek to focus the fact-finder's attention on another extra-legal matter, namely the credibility of the lawyer, which is likewise irrelevant and not evidence.[75]

Many other courtroom style techniques — such as dress and other aspects of lawyer and witness courtroom demeanour — seek to capitalise on this psychological correlation between credibility and social status. According to Gold, through these nonverbal cues, trial lawyers seek to enhance their own and their witnesses' credibility by manipulating their social image.[76] By seeking to subtly (subconsciously) create the impression of power, these techniques focus fact-finders' attention on extra-legal bases for decision-

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[70] JA Tanford & S Tanford "Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration" (1987-1988) 66 *North Carolina L Rev* 741 741.
[71] Gold (1986-1987) *North Carolina L Rev* 484.
[72] 484.
[73] 485.
[74] 485.
[75] 485.
[76] 486.

making.[77] The goal of courtroom style techniques aimed at enhancing lawyer and witness credibility is to influence how fact-finders perceive the evidence. By focusing on an extra-legal basis for decision-making, these techniques attempt to "covertly" mislead fact-finders as to the actual meaning or value of the evidence.[78]

4 2 Heuristics and knowledge structures

Gold next accuses trial lawyers of inducing the "improper use of heuristic reasoning" in fact-finders.[79] Heuristics are cognitive simplifying strategies ("cognitive shortcuts")[80] that all human beings use to reduce the complexity of information that must be considered in making a decision.[81]

One manifestation of these cognitive shortcuts is referred to as the "representativeness" heuristic.[82] This heuristic reduces problems associated with estimating the relationship between events or physical objects to what are essentially similarity judgments.[83] For example, in deciding to categorise a particular plant as a tree or a bush, instead of engaging in a systematic botanical study of the subject plant, the decision-maker might simply assess to what extent the salient features of the plant is representative of, or similar to, the features presumed to be characteristic of the categories "tree" and "bush." If the plant appears to be mature but is only half a meter tall, the representativeness heuristic will suggest to the decision-maker that the plant is a bush and not a tree.

Although this and other heuristics are quite helpful as we navigate daily life, they might lead to inferential error.[84] The representativeness heuristic described in the example above would likely lead to inferential error if the decision-maker is not familiar with bonsai trees, a category of trees no bigger than bushes when fully grown.[85] Similarly, if the trial lawyer and witness appear authoritative because of manipulation of speech style and nonverbal cues, the representativeness heuristic might produce the subconscious impression that the witness's evidence is credible, while the fact-finder's attention is (again, subconsciously) diverted from gaps or inconsistencies in the evidence that are much more probative of credibility and reliability.[86]

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77 486.
78 488.
79 489.
80 See WH Gravett "The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-making" (2017) 134 *SALJ* 53 54. "Decision science teaches us that human beings rely on *heuristics* — cognitive shortcuts or rules of thumb — to make complex decisions. With the aid of these heuristics, we reach conclusions and generate judgments without having to consider all the relevant information, relying, instead on a limited set of cues. We rely on heuristics because humans have limited cognitive and motivational resources, and we need to use these resources efficiently to make literally hundreds of decisions every day." 54.
81 Gold (1986-1987) *North Carolina L Rev* 489-490.
82 Gravett (2017) *SALJ* 53.
83 Gold (1986-1987) *North Carolina L Rev* 490.
84 Gravett (2017) *SALJ* 54.
85 Gold (1986-1987) *North Carolina L Rev* 489-490.
86 490.

Gold notes that the danger presented by trial lawyers imposing improper heuristic reasoning upon fact-finders is magnified, because the process generating these cognitive errors has an aura of logic that might inspire a strong sense of confidence in the fact-finder, and thus discourage critical self-analysis.[87]

These courtroom style techniques of persuasion could also affect judicial decision-making through the cognitive process of "knowledge structures". Fact-finders — like all human decision-makers — cannot evaluate evidence as if it were *sui generis*. They always relate such evidence to past experiences and preconceived ideas about the world — the "knowledge structures" that they have accumulated over a lifetime.[88] Thus, people use their knowledge structures to form general beliefs or theories about the world and the things in it.[89]

Knowledge structures might lead to inferential error when they are inaccurate representations of the real world. All human beings have unreliable knowledge structures. These incorrect preconceptions lead us to resist conflicting evidence and accept confirming evidence. Moreover, we revert to these inaccurate preconceptions subconsciously, misleading ourselves into believing that we are evaluating evidence objectively.[90]

Gold argues that nonverbal and verbal courtroom style techniques affect judicial decision-making through the operation of one or more knowledge structures. These subconscious advocacy techniques might activate the widely-held social stereotype linking high status, physical attractiveness, and powerful speech and demeanour, with a high degree of personal credibility.[91]

As Gold sees it, the danger inherent in advocacy techniques through which lawyers manipulate their and their witnesses' courtroom style, is not only that they focus fact-finders' attention on extra-legal bases for judicial decision-making. Through the improper and unethical use of heuristics and knowledge structures, trial lawyers also induce fact-finders to commit inferential error in evaluating the meaning of evidence and thereby crippling fact-finders' ability to detect and prevent such error.[92]

4 3 Meaning manipulators and weight manipulators

Gold identifies a second category of subconscious psychological advocacy techniques that seek to induce fact-finders to evaluate evidence illogically — that is, to decide incorrectly that evidence is or is not probative of a fact in issue.[93] These techniques Gold labels "meaning manipulators".[94] Fact-finders also commit errors of logic in evaluating evidence when they permit the

[87] 490.
[88] 492.
[89] 490.
[90] 491.
[91] 490.
[92] 490.
[93] 494.
[94] 494.

evidence to have an effect in decision-making that is disproportionate to the probative value of such evidence — so-called "weight manipulators".[95]

Gold draws attention to an article by a seemingly unscrupulous behavioural psychologist in which the psychologist notes that trial lawyers could diminish the ability of fact-finders to perceive evidence simply by manipulating other *stimuli* in the courtroom:

> "As a defensive tactic, an attorney can load the courtroom with spectators, presenting a variety of new contextual stimuli which might succeed in drowning out the stimuli presented by the opposing lawyers . . . [A] particularly damaging witness for the opposing side can be made through various techniques to blend into the background stream, so that it is difficult for the [fact-finder] to remember what he or she said."[96]

It is also in this context that a piece of American trial advocacy folklore is often repeated. The legendary American trial lawyer, Clarence Darrow, is said to have used distraction as an advocacy device. Once he apparently inserted a wire through the centre of his cigar, thus preventing the ash from falling. As the ash grew impossibly long during the closing argument of opposing counsel, all eyes in the courtroom became fixed on the cigar rather than the trial lawyer attempting to do summation.[97]

Gold also asserts that trial lawyers might induce fact-finders to err in the opposite direction by according evidence significance to an extent that is greater than the probative value of that evidence.[98] By manipulating the ordering of information in the presentation of evidence, trial lawyers can affect the weight that fact-finders attribute to that evidence. As explained above, the first (primacy) and the last (recency) portions of evidence at any given stage of the trial, such as evidence-in-chief of a witness, might have a disproportionately large influence over judicial decision-making, because these portions of the evidence have an inclination to be particularly memorable. However, Gold's argument is that the order in which trial lawyers present items of evidence has no logical connection to probative value.[99] Counsel can manipulate the presentation of evidence to induce fact-finders to overestimate the significance of the evidence.[100]

Gold's concern about the dangers inherent in "covert" advocacy rests upon a vital assumption about fact-finders' ability to resist bias and avoid errors of logic. He assumes that fact-finders are able in good faith to set aside their biases and logically choose which evidence and arguments to accept and which to reject.[101] This is the fundamental flaw in Gold's reasoning about what he perceives to be the unethical nature of subconscious advocacy.

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95 490.
96 494, citing DE Vinson "Juries: Perception and the Decision-making Process" (March 1982) *Trial* 52 54.
97 Voss (2005) *Law & Psychol Rev* 321.
98 Gold (1986-1987) *North Carolina L Rev* 495, 496.
99 496-497.
100 497.
101 501. For Gold this assumption is analogous to assumptions that underlie democratic political theory: Given the opportunity to choose fairly between competing thoughts, parties and candidates, the people can exercise sufficient judgment to justify a system of self-government.

4 4 Psychology of the trial process

Gold's charges against the use of social psychology by trial lawyers rest on the critical assumption that fact-finders in their natural state are either unbiased or can easily put aside their biases. Although he acknowledges that human beings rely on biases in making decisions through cognitive devices such as heuristics and knowledge structures, he believes that these cognitive biases only affect fact-finders when imposed by trial lawyers. Gold thus dismisses the concept that inherent biases and prejudices significantly affect "normal" judicial decision-making. He also rejects the idea that extraneous non-evidentiary factors, such as the presentation styles of witnesses and trial lawyers, normally affect judicial decision-making.

However, Gold's assumptions are fundamentally inconsistent with what social scientists know about human behaviour. In fact, in a complex task, such as deciding on a judgment in a trial, cognitive biases are a natural consequence of the decision-making process.[102] They serve to simplify and organise information, and they reflect the way *all* human beings — including fact-finders — think. Therefore, fact-finders are *naturally* susceptible to biases without any assistance from trial lawyers.[103] Fact-finders tend *naturally* to make decisions about the credibility of witnesses and trial lawyers based upon their social status, style of speech and physical appearance. The order in which trial lawyers present evidence or argument *naturally* affects fact-finders' perception of the evidence.[104]

For example, with reference to the work of O'Barr, Gold writes that trial lawyers induce otherwise unbiased fact-finders to misjudge witnesses' credibility by either training those witnesses to use "powerful" speech during examination-in-chief, or tricking them into using "powerless" speech during cross-examination.[105] However, Gold has an extremely myopic view of the work of O'Barr and his collaborators. Viewed in its proper context, what these researchers discovered was that when lawyers do *not* intervene, fact-finders inaccurately assess the credibility of witnesses based upon their perceptions of the witnesses' social status as revealed by their speech style. O'Barr et al thus gave trial lawyers the socio-linguistic tools to help eliminate this inherent bias against witnesses who naturally use "powerless" speech because of their social status, but who in fact are no less credible than other witnesses. By training their witnesses of lower socio-economic status to use more powerful speech, trial lawyers are not attempting to mislead fact-finders into incorrectly giving too much weight to their evidence, as Gold suggests. In fact, trial lawyers are trying to eliminate in fact-finders a *natural* tendency mistakenly to attach too little credit to a witness's evidence because of class prejudice.[106]

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[102] Tanford & Tanford (1987-1988) *North Carolina L Rev* 749. For an exposition of cognitive biases and heuristics in judicial decision-making, see also Gravett (2017) *SALJ* 53-79.

[103] Tanford & Tanford (1987-1988) *North Carolina L Rev* 749.

[104] CA Insko, EA Lind & S LaTour "Persuasion, Recall, and Thoughts" (1976) 7 *Representative Research in Soc Psychol* 66 77-78.

[105] Gold (1986-1987) *North Carolina L Rev* 484-485.

[106] Tanford & Tanford (1987-1988) *North Carolina L Rev* 750.

4 5 Trials are not one-sided

In his mostly negative assessment of subconscious advocacy, Gold also relies on a faulty empirical premise about trials. Gold's analysis employs a paradigm in which trials present fact-finders with a single, unambiguous version of the "the truth", from which the trial lawyer with the weaker case will attempt to divert the fact-finders by using subconscious psychological persuasion techniques.[107] Gold assumes that in most cases the evidence is clear and consistent, rather than contradictory.[108]

As any trial lawyer knows, Gold's assumption presents a misleading picture of the reality of the trial process. The overwhelming majority of cases going to trial involve two or more plausible versions of uncertain facts, rather than one set of certain facts.[109] Although one of the goals of a trial may be to reconstruct historical fact, in actuality human memory is notoriously unreliable. As witnesses with faulty memories, biases and personal prejudices attempt to reconstruct an event, it is likely that conflicting versions of what had occurred will emerge much more often than a single consistent picture. Most cases thus involve conflicting evidence that provides anything but a clear picture of the events that had transpired.[110]

The other dimension to Gold's faulty empirical premise is that persuasion at trial takes place in only one direction — away from the facts.[111] Gold's paradigm is a trial in which one trial lawyer exerts maximum influence over the fact-finder through subconscious advocacy, while the other lawyer stands idly by. However, it is trite that, in fact, the adversarial structure of trials provides well-founded guarantees that in Gold's worst-case scenario — a desperate lawyer using subconscious advocacy techniques to distract the fact-finder from the evidence — the other lawyer will be attempting the much easier task of persuading the fact-finder to follow the evidence.[112] After all, most trials involve efforts by both trial lawyers to persuade the fact-finder in a manner consistent with the evidence.

4 6 The adversarial trial process

Lastly, Gold makes an erroneous jurisprudential assumption about trials, namely that the only legitimate goal guiding trials is, or should be, truth seeking. As a statement of the jurisprudence of trials, it is both simplistic and wrong.[113] The trial lawyer's proper role is most certainly not only, or perhaps

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[107] 759.

[108] 760.

[109] Most cases handled by able and experienced trial lawyers in which the evidence predominantly favours one side will be settled before trial.

[110] Tanford & Tanford (1987-1988) *North Carolina L Rev* 760, 761.

[111] Gold portrays extraneous, non-evidentiary factors — such as style of speech, order of presentation and manner of dress — as tending to overwhelm the merits of the case. In reality, fact-finders actively evaluate all trial information, both evidentiary and non-evidentiary, and evidence is a far more important factor in decision-making than fact-finder biases. 745-746.

[112] 761-762. Although there is obviously some danger that in the occasional trial, one trial lawyer might significantly outperform the other and thereby affect the outcome, this danger is hardly unique to trial lawyers employing subconscious advocacy. 762.

[113] 762.

even primarily, to facilitate a search for the truth. I hasten to clarify that I do not suggest that truth-seeking is unimportant in a trial. As an officer of the court, the trial lawyer always owes the fact-finder a duty of unqualified and absolute honesty. I merely suggest that, in his critique, Gold seems to completely abrogate the adversarial nature of the trial process.

At least equally as important as the duty of uncompromising honesty to the court, is trial lawyers' duty to represent their clients zealously. All litigants are entitled to partisan advocates who will present their evidence and argue their positions regardless of the apparent strength of that evidence. It is as vital functionally and jurisprudentially to maintain this adversarial structure as it may be to strive to determine the truth.[114] The adversarial structure of trials assures litigants that they will be fully heard before any court deprives them of liberty and property.[115]

Moreover, the adversarial system has been defended on the ground that it, in fact, furthers the search for truth. Partisan cross-examination, for example, has been said to be "beyond any doubt the greatest legal engine ever invented for the discovery of truth",[116] and "the surest test of truth, and a better security than the oath".[117] Social psychologists have also found some support for the proposition that an adversarial form of trial presentation, in contradiction to an inquisitorial one, counteracts biases in decision-makers.[118]

Furthermore, the adversarial nature of trials has a utilitarian value, apart from whether it aids truth seeking. In a society operating under the rule of law, as a general rule, citizens must accept court decisions. Whether a trial is perceived to have resulted in the "correct" judgment depends not only on whether the truth apparently was discovered, but also on whether the process seemed to have been fair. Both litigants and society-at-large regard adversarial trials to be procedurally more fair than inquisitorial trials, because the adversarial process maximises participation by the litigants and appears better to protect individual rights and interests.[119]

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[114] In other words, the adversarial process by which results are achieved is at least just as important as the accuracy of those results. Tanford & Tanford (1987-1988) *North Carolina L Rev* 763. In fact, the principles of adversarial justice have had as much of an effect on the development of trial law as truth-seeking. 762. The debate over the guiding principles of trial and the proper role of trial lawyers is beyond the scope of this article, save to note that a few scholars agree with Gold that truth-seeking is either the sole or the most important function of a trial, and lawyers should thus be limited to assisting that goal and criticised when they diverge from it. See, eg, R Park "The Hearsay Rule and the Stability of Verdicts" (1986) 70 *Minnesota L Rev* 1057-1072. Other scholars assert diametrically opposed theories, arguing that trials are not searches for the truth at all, but instead primarily or exclusively games (C Pulaski "Criminal Trials: 'A Search for Truth' or Something Else?" (1980) 16 *Criminal Law Bulletin* 41 44-45), or tools for social engineering (LM Seidman "Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure" (1980) 80 *Columbia L Rev* 436 437).

[115] 763.

[116] J Wigmore *Evidence* (1974) 32.

[117] Francis Wellman *The Art of Cross-Examination* (1997) i.

[118] J Thibaut, L Walker & EA Lind "Adversary Presentation and Bias in Legal Decisionmaking" (1972) 86 *Harvard L Rev* 386-401.

[119] Tanford & Tanford (1987-1988) *North Carolina L Rev* 766.

4 7 The Uniform Rules of Professional Conduct

As alluded to above, trial lawyers must fulfil their roles both as zealous advocates and as officers of the court. With regard to zealous advocacy, the *Uniform Rules of Professional Conduct* ("Uniform Rules") demand that:

> "[A]n advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his clients without regard to any unpleasant consequences either to himself or any other person.
>
> Counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched."[120]

The trial lawyer's duty to the court encompasses the following:

> "Counsel's duty to divulge to the Court material facts of which he has knowledge is governed on the one hand by his overriding duty not to mislead the Court, and on the other by his duty not to disclose to any person including in a proper case the Court itself, information confided to him as counsel."[121]

Does the use of subconscious advocacy conflict with the *Uniform Rules of Professional Conduct*? I believe the answer is a qualified "no." Let us test each of the subconscious advocacy techniques described in Parts 1 and 2 against the *Uniform Rules* in turn.

4 7 1 Kinesics, paralinguistics and ordering effects

Kinesics (bodily actions, such as gestures, facial expressions, posture, and eye contact) and paralinguistics (vocal behaviours apart from the words themselves, such as pitch, loudness, and tempo) should be viewed as zealous advocacy and not as an attempt to mislead the court. Firstly, the use of these techniques is simply an effort by trial lawyers to increase the persuasive impact of the substance of their presentations. The use of kinesics and paralinguistics is akin to the trial lawyer practising the delivery of an opening address or closing argument. True to their duty as zealous advocates, trial lawyers who are alive to the effects of kinesics and paralinguistics are attempting to find the most persuasive method of communicating to the fact-finder the factual and legal basis for a favourable verdict.[122]

Secondly, and most importantly, our legal system implicitly recognises that the trial lawyer's duty to fearlessly advance the client's interests involves more than merely identifying facts and legal arguments that support the client's position. If the only requirement was to find the right words, then trial lawyers could present their entire cases to fact-finders as written argument. However, our adversary system is rooted in a tradition of *oral* advocacy. This fact constitutes at least an implicit acknowledgment that the manner in which a trial lawyer presents evidence in the courtroom is a pivotal component of the trial process. It is difficult to view the use of kinesics and paralinguistics as

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[120] General Council of the Bar of South Africa *Uniform Rules of Professional Conduct* C.1 paras 3.1 and 3.2.
[121] C.2 para 3.2.
[122] See Smith (1991) *Military L Rev* 187-188.

anything but a legitimate and ethical attempt by trial lawyers to increase the persuasiveness of their presentations to fact-finders.[123]

The same holds true, *mutatis mutandis*, for the order in which trial lawyers might strategically decide to present certain evidence, that is the use of primacy and recency.

4 7 2 Speech style

Generally, instructing witnesses to give evidence in the "powerful" style of speech so as to influence fact-finders' assessment of witnesses' credibility, truthfulness and persuasiveness, does not violate the *Uniform Rules*. In fact, more than merely tolerating this practice, I believe that it should be actively encouraged.

As previously discussed, although receivers (fact-finders) tend to correlate witnesses' speech style with their truthfulness, credibility and persuasiveness, in reality witness's speech style corresponds with their social status. Consequently, a fact-finder's decision about a witness's credibility might rest entirely upon the social status and power of that witness, rather than upon the strength of the witness's evidence. Trial lawyers can mitigate this error by preparing their witnesses belonging to lower social classes to give evidence in the "powerful" style of speech. This will counteract the fact-finder's natural tendency to view these witnesses as less credible, less trustworthy and less persuasive.[124]

Of course, although "coaching" witnesses to give evidence using the "powerful" speech style does not violate the *Uniform Rules*, instructing witnesses to change the substance of their evidence would clearly violate the trial lawyer's overriding duty not to mislead the court.

4 7 3 Using word choice to influence witness evidence

It is in the context of consulting with witnesses that trial lawyers should be particularly cautious in their use of subconscious verbal advocacy techniques. During pre-trial consultation, trial lawyers could, by carefully choosing their words (for example, "Did you see *a* headlight?" or "Did you see *the* headlight?") influence witnesses' recollection of what they actually observed or experienced. After further rehearsal and coaching, this version of the "facts" created through the trial lawyer's strategic use of language might well become the witness' evidence during examination-in-chief.

It does not even behove argument that trial lawyers would violate the *Uniform Rules* if they intentionally interview and prepare witnesses for their evidence using carefully formulated questions to knowingly present favourable — but false — evidence. However, such clearly unethical conduct is probably infrequent. The more common, and also more difficult, situation is one in which, even with no unethical intent on behalf of the trial lawyer, a witness might, after carefully formulated questions by the trial lawyer,

[123] 188.
[124] 190.

render a favourable version of events that leaves the trial lawyer uncertain of whether it is true or not. Would it be unethical for the trial lawyer to present that version of events at trial?

It should be borne in mind that the process of remembering is more a process of reconstruction than of recollection.[125] Freedman argues that the process is inherently a creative one in which questions play an essential role in the reconstruction of what happened. Moreover, honest clients will, without realising it, both invent facts and suppress them.[126] A witness's evidence, therefore, is often "subjectively accurate but objectively false", and "accurate recall is the exception rather than the rule".[127]

It would thus appear that carefully formulated questions designed to elicit favourable evidence is not unethical, provided that trial lawyers do not elicit or use evidence that they know is false. The fact is that *both* trial lawyers will likely attempt to portray as favourable a picture of events as the ethical strictures would allow. Thus, when both trial lawyers strive to protect their respective clients' interest, they can be zealous advocates and be reasonably assured that justice is being done.[128]

5 Conclusion

Social science has been used with increasing success in a wide variety of human endeavours. Marketing, human relations, voting behaviour, and the delivery of health services are only a few of the widely expanding applications of the classic disciplines of psychology, sociology, anthropology, and social psychology.[129] More recently, trial lawyers have also shown increased interest in applying the research findings and theoretical insights of social science to litigation. Although trial lawyers have been using subconscious nonverbal and verbal persuasion techniques for centuries, social science has recently provided empirical support for trial practice theories that heretofore have been based solely on folklore, intuition, and experience. It is the thesis of this article that the melding of psychological theory and research with systematised data collection better equips trial lawyers to represent their clients.[130]

There are of course those who believe that the use of subconscious (or as the critics prefer, "covert") advocacy techniques is unethical and endangers our legal system. Gold, for example, claims that the increasing body of psychological literature on the effects of subconscious verbal and nonverbal persuasion, has enabled trial lawyers to improve their courtroom effectiveness to the point where they can "covertly" control how fact-finders decide cases, and even deceive fact-finders into deciding cases against the evidence. He

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[125] M Freedman *Lawyer's Ethics in an Adversary System* (1981) 59-77.

[126] 65-68. "The most honest witnesses frequently give evidence which is unsound, though they are quite sure it is true. Indeed, it has been estimated by psychologists and by experienced judges that something like one-fourth of the evidence given by truthful witnesses is unreliable." J Munkman *The Technique of Advocacy* (1991) 18.

[127] 66.

[128] Smith (1991) *Military L Rev* 192.

[129] DE Vinson "Litigation: An Introduction to the Application of Behavioral Science" (1983) 15 *Connecticut L Rev* 767 767.

[130] Gold (1986-1987) *North Carolina L Rev* 507.

portrays extraneous non-evidentiary factors, such as speech style, order of presentation and demeanour, as tending to overwhelm the merits of the case.

The social science literature refutes the notion that trial lawyers can influence fact-finders to make decisions on a subconscious level based on non-evidentiary factors.[131] It is true that social scientists have discovered a myriad of factors that affect judicial decision-making, but that have nothing to do with the merits of the case. However, by communicating this information to trial lawyers, social scientists have actually decreased the likelihood that these extraneous influences will affect judicial decisions. They have identified *existing* barriers to rational decision-making and have devised strategies to reduce the impact of these barriers, and thereby improve the chances that fact-finders will understand and consider each litigant's case without bias, and thus render better, more informed, and more rational judgments.[132]

Critics also completely overlook the possibility that the truth-seeking functions of trials might actually benefit from lawyer-psychologist collaboration. For example, social psychologists have discovered numerous flaws in the structure of the legal system that cast doubt upon the accuracy of judicial decisions. Perhaps the most significant of such research demonstrates that, although fact-finders regularly rely heavily on eyewitness evidence, eyewitnesses are in fact often wrong. Many factors can reduce the reliability of an eyewitness's initial perception,[133] cause deterioration of memory,[134] or induce inaccurate recollection.[135]

In the trial's evidence presentation phase, psycho-legal research can aid trial lawyers in presenting evidence more coherently so that it is heard, understood, and remembered by fact-finders. As discussed, the anthropologist William O'Barr and his associates have discovered that fact-finders view witnesses who use the "powerless" style of speech as less convincing, truthful, competent, intelligent, and trustworthy than other witnesses. Work on primacy and recency effects has helped trial lawyers to structure witness evidence and argument so as to emphasise the most important parts, thereby ensuring that fact-finders are more likely to understand and remember that evidence.

The gist of the critics' fears is that the use of subconscious nonverbal and verbal advocacy techniques might turn a bad case into a winner. Can the trial lawyer with the weaker facts get back the game by relying on subconscious advocacy? The leading researchers believe not:

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[131] Tanford & Tanford (1987-1988) *North Carolina L Rev* 779.

[132] 741-742, 758.

[133] See, eg, B Clifford & R Bull *The Psychology of Person Identification* (1978) 88-109. It has been suggested that, "in general, when the average man reports events or conversations from memory and conscientiously believes that he is telling the truth, about one-fourth of his statements are incorrect." WC Costopoulos "Persuasion in the Courtroom" (1971-1972) 10 *Duquesne L Rev* 384 407.

[134] RN Shepard "Recognition Memory for Words, Sentences, and Pictures (1967) 6 *J Verbal Learning & Verbal Behavior* 156-163. "[T]he tendency to false memory is the greater the longer the time since the original experience." Costopoulos (1971-1972) *Duq L Rev* 407.

[135] E Loftus *Eyewitness Testimony* (1979) 88-109 (For example, inaccurate recall can be induced by police questioning).

> "The social psychologist cannot provide the attorney with a simple set of surefire tricks that will automatically increase persuasiveness in the courtroom . . . While social psychologists can assist the trial attorney by making an already good case better, they cannot turn a bad case into a good one."[136]

Every law and legal institution is based upon assumptions about human nature and the manner in which human behaviour is determined.[137] As the above analysis shows, principles of human behaviour derived from social psychological laboratory and field research illuminate the behaviour of actors in the courtroom, and even suggest ways in which the trial system could be improved.[138] Subconscious psychological persuasion techniques are most productively and ethically employed to further the goal of fair and impartial trials, to reinforce the evidence, and to assist fact-finders in overcoming their inherent biases.

Subconscious advocacy techniques enable trial lawyers to become more complete and effective oral advocates. Fact-finders are human beings — and all human beings can be persuaded. And it is trial lawyers' duty to do just that by all the means ethically at their disposal.

SUMMARY

Social science has been used with increasing success in a wide variety of human endeavours. For example, marketing, human relations and the delivery of health services are among the widely expanding applications of the classic disciplines of psychology, sociology, anthropology and social psychology. More recently, trial lawyers have also shown increased interest in applying the research findings and theoretical insights of social science to litigation. After all, every law and legal institution is based upon assumptions about human nature and the manner in which human behaviour is determined. Although trial lawyers have been using subconscious nonverbal and verbal persuasion techniques for centuries, social science has recently provided empirical support for trial practice theories that heretofore have been based solely on folklore, intuition and experience. I aim to show that principles of human behaviour derived from social psychological laboratory and field research illuminate the behaviour of actors in the courtroom, equip trial lawyers to better represent their clients, and even suggest ways in which the trial system could be improved. Some scholars claim that the increasing body of psychological literature on the effects of subconscious verbal and nonverbal persuasion has enabled trial lawyers to improve their courtroom effectiveness to the point where they can "covertly" control how fact-finders decide cases. It is true that social scientists have discovered a myriad of factors that affect judicial decision-making, but that have nothing to do with the merits of the case. However, by communicating this information to trial lawyers, the social scientists have actually decreased the likelihood that these extraneous influences will affect judicial decisions. They have identified *existing* barriers to rational decision-making, and have devised strategies to reduce their impact, and thereby improve the chances that fact-finders will render better, more informed, and more rational judgments.

[136] DG Linz & S Penrod "Increasing Attorney Persuasiveness in the Courtroom" (1984) 8 *Law & Psychol* Rev 1 46-47.
[137] Saks & Hastie *Social Psychology in Court* 1.
[138] 1.