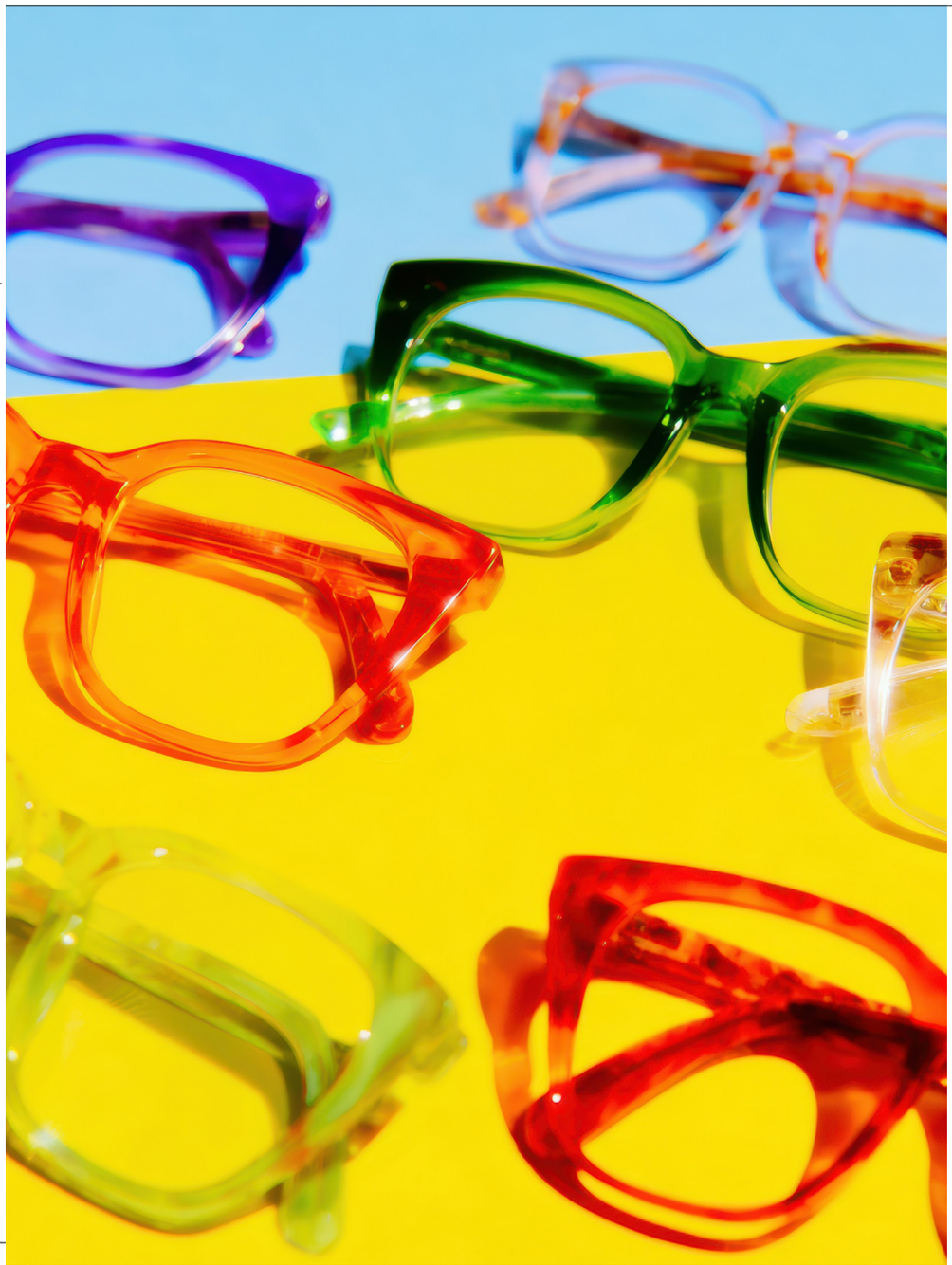
BY JOSEPH A. BUGNI

Trial Lawyers:

Trying a Case with Different Eyes



As we grow in mastery over our craft, trial lawyers can yet stray from the ideal, letting bad habits unconsciously creep into our practice. Learn about the psychology that underlies and informs why lawyers lose sight of that ideal and how to combat it. Whether trying a case to a jury or the bench, there are lessons to be learned or relearned in how we present our cases.

Being a public defender means being a trial lawyer. For years, I prepared for (and lived) that reality – devouring everything I could about growing as an advocate. I went to the "trial colleges" and cross-examination seminars; I read the canon of trial books and listened to the great advocacy podcasts. (Among the very best podcasts on advocacy right now is "Sanctuary in the Jungle" by Aaron Nelson – it will help all advocates improve in the craft.) And if you had ever asked me whether I stick to the fundamentals, while constantly trying to grow as an advocate, I'd have said yes – without question. But recently I tried a large federal conspiracy case with a trial consultant who revealed how far I'd unconsciously drifted from the best practices, practices I knew so well and honestly (yet wrongly) believed I was sticking to. That experience taught me that I am still not the lawyer I want to be, and it made me confront how I'd fallen into some common psychological traps. This article is about what happens to lawyers as we grow in mastery over our craft, and yet stray from the ideal, letting bad habits unconsciously creep into our practice. And it's about the psychology that underlies and informs why we lose sight of that ideal and how to combat it. This is a story of that humbling (and fruitful) experience.

Seizing the Opportunity

For years, I was blessed with a great paralegal, Shavon Caygill. For a decade, she worked with one of the state's best trial lawyers (Steve Hurley) and did scores of trials with him. That experience forged in her a keen sense of what it takes to win. As a result, she has complete command of every part of the case, and I trust her judgment – without reservation.

As we prepared for a beast of a trial, the lead defendant announced it was hiring Rob Rosenberg and his company RCS to run the presentation. At this news, Shavon told me, "you don't need me. Rosenberg is the best I've ever seen." She's not prone to hyperbole, so I asked for some details. What followed was 40 minutes of praise about Rob Rosenberg, his precision, his artistry, and how his command of a case was even better than the lawyer's. She exclaimed, "just wait, you're going to be blown away by the guy." I was.

By way of background, Rosenberg had been consulting on trials for over 25 years. In that time, he'd handled over 350 jury trials – not a typo. This included trials worth billions of dollars and trials lasting more than six months. In that time, he'd seen it all, and he honed a unique insight into what persuades a jury.

But it isn't just the quality of his work that made him so good and worthy of that praise. It's how he does it. And he doesn't do it alone. Rosenberg has surrounded himself with a team that works seamlessly together, with each person building on the other's ideas, talking through what works, and rethinking what doesn't. This team includes a graphic designer and trial consultants who are all immersed in the case – bringing to the table a fresh and informed perspective of what it takes to win. Working together, they arrive at something truly creative and most of all, effective.

Lessons From the Master

Fortunately for me, the lead defendant agreed that all the defendants could use Rosenberg's services. When I made my appointment, it was simply to refine my opening statement. I was so full of myself that I was honestly just hoping for a tweak here or a graphic there and an atta-boy – you're doing great. Instead, I received a master class in how I need to reimagine my approach to advocacy.

At their office, the RCS team asked me to explain my case. For three hours I gave my view of the evidence and my client's innocence. They challenged some of my points, seemed indifferent to a few, and outright frowned at others; they pushed back on my themes, acknowledged what worked, and were adamant about what didn't.

Exhausted and defeated, they eventually rendered the verdict: I was too close to the case. For a year I'd mastered the organizational charts, the emails, and the spreadsheets – all the details. And that was stifling my ability to communicate what mattered most: my client's innocence. They asked me to think about how (and whether) a jury could receive and digest all this information in just a few weeks of testimony. And they assured me that after three hours of talking, and with all their experience, they could not. That was a problem.

Despite my bruised ego, I tried again. I sought to build a clean narrative. Some points fell away, others were recast, and solid themes began to emerge. As that all came together, the RCS team stepped up – drawing visuals, bouncing ideas off one another, scrapping them, and beginning again. The creative process was in full swing.

As the team worked, they stressed that jurors, normal people, learn differently than lawyers. I had to remember that I'm talking to people from a variety of backgrounds; some jurors are verbal learners, but almost everyone understands pictures. The RCS

team then created images that didn't just complement my themes; they crystallized them. They reminded me that PowerPoint was not effective with tedious, bulleted lists – I had to make the themes stick with the jury as they received the evidence. And so, the lists disappeared and the visual themes emerged.

Reaching Jurors with Different Learning Styles

After the trial was over and I could finally take some time to reflect on my experience with RCS (including some long and meaningful conversations with Rosenberg and his team), I came to see that their approach was to embrace the psychology of learning. Everyone has different learning styles, and these styles are shaped by various factors, including biology and experience.[1] Based on how quickly (and easily) we can grasp ideas, we start to prefer certain learning styles over others. And we become more efficient at understanding and using information as we create our preferred mental frameworks.[2]

As a general matter, lawyers are (whether through disposition or training) almost always cued into learning through written words.[3] But in trial we're not persuading other lawyers, we're helping reach the jurors' diverse learning styles. Each juror is making sense of sometimes complex arguments through their "personal toolbox." Auditory learners may benefit from a clear and linear story; visual learners may need images, charts, and other aids; and kinesthetic learners may benefit from a simulation that they can participate in.[4] Lawyers who know (and appreciate) this will tailor their presentations to incorporate those styles and modes of conveying information. That's pretty basic. And I'd heard it all before, but along the way I'd forgotten so much of it. I had fallen into a rut.

As we geared up for trial, RCS's emphasis on learning styles was in full effect. The case was a conspiracy to (among other things) hide the condition of a mill from auditors and regulators. One of the defense theories was that if there had been such poor conditions at the mill, a constant stream of audits and inspections would have revealed them. So, RCS made a summary exhibit, where the jurors had a calendar on an iPad and they could press any day of the relevant four-year period to see who was at the mill and what had been reported. The summary was not the traditional bulky calendar or a stale chart capturing the evidence in cumbersome bullet points. Instead, RCS created a completely immersive and interactive summary that made the data accessible for the jury and let them scroll through it, so they could grasp and work within a familiar and intuitive setting: a touch screen.

This was so novel and so good it caused the judge to remark: "I've never seen anything like this before." What RCS had done was as profound as it was simple: they refused to abide by what had always been done; they reimagined how this information could be presented – harmonizing it with how we learn in everyday life. It was (lacking a better term) truly remarkable.[5]

Moving Outside My Echo Chamber and Embracing a Diversity of Opinions

That summary exhibit was just a small part of RCS's approach to challenging the lawyers to think differently. Every trial lawyer knows that at some point

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we go into the proverbial cave, we drink the Kool-Aid – convinced that the only reasonable way to view the evidence is ours.[6] I am very, *very* guilty of that. A month out from trial, I had made that cave my second home. But RCS refused to let me stay there. They forced me to see the evidence with different eyes. I had to forget the spin I placed on every fact and understand how *other* people would perceive and be affected by the evidence. That meant venturing outside my echo chamber, where I only solicited the views of other defense attorneys, and seeking out a diverse range of opinions.

Diversity is a must – the benefits are undeniable and have been proven time and again.[7] The law is historically (and sadly) one of the least diverse fields.[8] That reality can (and often does) interfere with an attorney's ability to identify and address their blind spots.[9] In psychology, that phenomenon is called a narrative bias.[10] As that term is used in psychology, a narrative bias tells us that our story is the correct version, so we fail to see other relevant information that might lead us to a different conclusion about how the story should be presented.[11]

In trial, cleaving to a narrative bias can be catastrophic.[12] Often the people we brainstorm our cases with are other lawyers, so instead of our narrative bias being dispelled, it's simply confirmed and often magnified. We get a one-track mind, and we close our mind to other perspectives, including the perspective that matters: the judge's and the jury's.

By failing to account for how others might view the evidence, we are not zealously serving our clients. To fight against this, we need to solicit outside viewpoints and incorporate other's perspectives. This lets lawyers tackle the reality that at least one juror won't see the evidence exactly the way we do – as some dorky lawyer. By intentionally focusing on diversity of thought, life experiences, and worldviews, we have a better chance of understanding how jurors may perceive the evidence. That's the only effective way to combat narrative bias.

RCS's Refusal to Let Me Stay in the Cave of My Own Narrative

While RCS was clearly "on the defense team," they always brought an outsider's view – a fresh perspective that wasn't wedded to what I wanted to hear but to what I needed to hear. Two instances of this changed the trial and cemented for me the need to always bring in several people without a J.D. to talk through my case.

First, RCS was keen on the jurors' backgrounds. They encouraged us to stress points that would resonate with particular jurors. So, the juror who oversees human resources (HR) for a large company would understand the need to trust those you've delegated tasks to; the juror in compliance would understand how much my client had to trust the data he was given, his job wasn't to verify the data, just compile it; and the juror in information technology (IT) would be familiar with some of my other themes implicating the company's computer system and user error. Recognizing and tailoring points to the jurors' particular backgrounds added entire chapters to my cross-examination. Indeed, RCS challenged me to reach beyond my outline of what *I thought* was convincing and think of concrete subsidiary themes that would resonate with *this* jury, made of these individual jurors. Developing those additional themes added a richness to my presentation that I would have otherwise missed because I was too in love with the way I saw the case.

The second instance of RCS's brilliance was pure gold. Deep in the trial, we were reviewing emails and I was explaining a point I needed to make with a particular witness. Rosenberg noticed something the (many) defense lawyers had missed over the past year – one attachment was titled 2015log.xls(backup)(backup)(backup)(backup). I had been thinking about the data in terms of Microsoft 365 and not Excel 2013, which the company was using at the time. And I had missed the subject line's importance. To help me understand the point (and so I could then explain it to the jury), Rosenberg went to Office Depot and found an actual CD of Excel 2013. Then, he loaded it and made a video of how the system had to crash multiple times for the file to have that name. That became one of the most important points in my closing – it would take another article to explain why it worked, but it *worked*. And that small piece of insight (read: brilliance) was the product of a diverse team of people

working together to see the case accurately so we could persuasively convey it to the jury. That diversity of knowledge and experience changed the trial and helped me see that I must prepare for trials differently – I must prepare for them outside of my oh-so-comfortable echo chamber.

Breaking Out of My Fixed Mindset

For decades, I've embraced (in the abstract) the fact that everyone learns differently, and that diversity helps us see issues through new lenses. If before that trial, I was ordered to rate myself on both points, I'd have given myself a near-perfect score. Yet upon reflection, in the last decade of my career, my trial presentation rarely reflected those beliefs. I communicated in the way I was comfortable and I thought was persuasive – not in the way a diverse jury would embrace and understand. And I usually only talked about my case with other criminal defense attorneys. I rarely asked others to hear about the case and how they perceived the evidence. Looking back, I can see that after 15 years of practice, what was once exhilarating had somehow become routine.

The point is this: Experienced lawyers can (over time and unintentionally) develop a fixed mindset.[13] We get used to using the same techniques because they work – or at least, at some previous time long ago they did and we anticipate that they will again. We forget that a different approach might be more persuasive. Despite our best intentions, we fail to embrace different strategies – we fall into a rut.[14]

That's not all bad. A well-worn path becomes smoother and quicker, getting us closer to success with less effort.[15] But that familiar road often causes us to lose our innovation and the desire to adapt. Just as we must embrace jurors' different learning preferences and solicit others' views, we also need to know when to forge a new path – particularly with how we approach our craft.

Looking back, I can see that I was in a professional rut, and RCS broke me out of it. The team modeled for me a different and better way: I needed to not just recapture the open-mindedness of my early days in practice, I also had to go back to the fundamentals and confront whether I was embracing them *today.* That trial opened my eyes and convinced me of the fact that I need to ruthlessly reexamine my approach to advocacy and challenge myself to reengage with the fundamentals.

Last Thoughts

It was truly a privilege working with Rob Rosenberg and his team, and I hope every lawyer has the opportunity to work with them or a different group – one that forces them to reexamine how we think about our practice. But the lesson of this article is less about RCS and more about confronting the fact that there's always room to grow. We need to look for people who will help us do that. It could be RCS, it could be a mentor, or it could be a colleague who simply cares enough to challenge us on whether we're abiding by the fundamentals.[16] Whoever it is and whatever form it is in, we need to step back and honestly ask whether our advocacy reflects the best practices that we know to be true but have (for some reason) failed to maintain. Breaking out of our plateaus and returning to those best practices will often be the difference between winning and losing a case. It was for me. **WL**

ENDNOTES

[1]*See generally* Karen J. Sneddon, *Square Pegs and Round Holes: Differentiated Instruction and the Law Classroom*, 48 Mitchell Hamline L. Rev. 1095, 1097-1104 (2022); Deborah L. Borman & Catherine Haras, *Something Borrowed: Interdisciplinary Strategies for Legal Education*, 68 J. Legal Educ. 357, 367-69 (2019).

[2]*See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. Rev. 273 (1989).

[3]Kenneth J. Lopez, *Seeing "Eye to Eye" with a Jury: Study Reveals Attorneys and Juries Learn and Communicate Differently*, 24 Ent. & Sports Law. 12 (2006) ("Based on the results of the study, a typical twelve-person jury would likely be composed of seven 'visual' jurors, three 'feeling' jurors and only two 'hearing' jurors. Practicing lawyers, on the other hand, were shown to be far less likely (less than half) to be visual in nature and were ten percent more likely to be hearing/speaking-dominant."); *contra* John Hattie & Gregory C. R. Yates, *Visible Learning and the Science of How We Learn* (1st ed. 2013) ("We are all visual learners, and we all are auditory learners, not just some of us.").

[4]April A. Christine, *Applying Neurolinguistics During Trial*, L.A. Law., Sept. 2009, at 10.

[5]The RCS website has several other versions of how they have reimagined trial presentations. *See* https://rcs-legal.com/our-services/trial-graphics/.

[6]Mark Kitrick & Mark Lewis, *Looking Inside Your Own Mind,* 51 TRIAL® 16 (2015).

[7]L.E. Gomez & Patrick Bernet, *Diversity Improves Performance and Outcomes*, 111 J. Nat'l Med. Ass'n 383, tbl. I (2019) (gathering similar research); Joep Hofhuis, Pernill G. A. van der Rijt & Martijn Vlug, *Diversity Climate Enhances Work Outcomes Through Trust and Openness in Workgroup Communication*, 5 SpringerPlus 714 (2016).

[8]Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 U. Cal. Davis L. Rev. 1105, 1145 (2018); Sybil Dunlop & Jenny Gassman-Pines, *Why the Legal Profession Is the Nation's Least Diverse (And How to Fix It),* 47 Mitchell Hamline L. Rev. 129 (2021).

[9]Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 Nev. L.J. 537, 540 (2015) ("Social cognition theory helps us recognize that our legal training does not immunize us against biases.").

[10]Max H. Bazerman & Colly Chugh, *Bounded Awareness: Focusing Failures in Negotiation* in Negot. Theory & Rsch, 7 (Leigh L. Thompson, ed., 2006).

[11]Kitrick & Lewis, *supra* note 6, at 18.

[12]*Id.* (highlighting narrative bias in advocacy); *see also* Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Bias*, 115 W. Va. L. Rev. 305 (2012) (highlighting narrative bias in juror understanding).

[13]Paula Davis-Laack, *Grit: A Critical Success Strategy*, Wis. Law., Dec. 2014, at 49 (describing grit as a product of a growth mindset, as compared to fixed mindsets, which view failure from trying new things as a negative).

[14]*See generally*, *Routine: The Good, the Bad, and the Ugly*, The OptimalWork Podcast (Oct. 11, 2021) (featured on all major platforms).

[15]*Id.*

[16]For more on coaching and mentorship, see Atul Gawande, *Personal Best*, New Yorker (Sept. 26, 2011), https://www.newyorker.com/magazine/2011/10/03/personal-best; Season 2 of Michael Lewis, *Against the Rules*, Pushkin (featured on all major platforms). **WL**