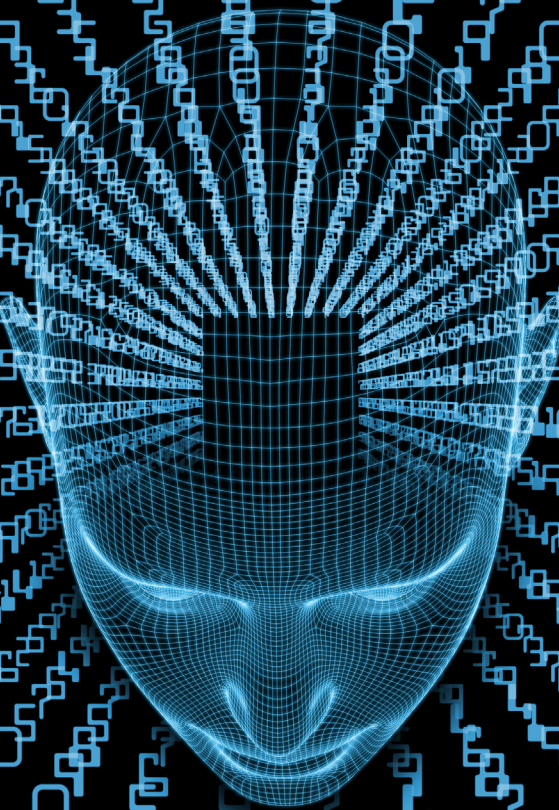


WINTER 2016



WHAT TRIAL LAWYERS CAN LEARN FROM DONALD TRUMP & BERNIE SANDERS



VINSON & COMPANY

EXPERTS IN COURTROOM PERSUASION &
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What Trial Lawyers Can Learn From Donald Trump & Bernie Sanders

In the summer of 2005, a jury in Angleton, Texas rendered its verdict in the matter of *Carol A. Ernst v. Merck & Co. Inc.* It was the first Vioxx case to be tried to a jury. Despite tens of thousands of similar lawsuits filed across the United States, it would also be one of the last. After a month of trial, the jury awarded a single plaintiff a staggering \$253 million. Clearly, the plaintiff had put on a compelling case. Or maybe they had simply put on a case that was easier for jurors to understand. As one juror told *The Wall Street Journal* after the matter had been decided, “Whenever Merck was up there, it was like, ‘Wah, wah, wah.’ We didn’t know what the heck they were talking about.”

Of course, one juror’s confusion is not enough to conclude that a lack of comprehension was the only reason the jury awarded a quarter billion dollars to the plaintiff. But it would not be a stretch to argue that it was a significant contributing factor to the end result. In fact, it would seem that Merck’s difficulty in communicating its case to jurors may have begun with its opening statements.

How do we know this? There are various ways to objectively measure how easy or difficult it is to understand written or spoken communication. One tool for doing this, the FOG Index, analyzes the complexity of words used, length of sentences, and sentence structure, in making its assessment. The score it yields reflects the number of years of education a person of average intelligence would need to quickly and completely understand what is being communicated. When the transcript of the plaintiff’s opening statement from the first Vioxx trial was analyzed using the FOG Index, it revealed that even someone who had not completed grade school would likely have been able to understand what was being communicated. On the other hand, when the transcript of Merck’s opening statement was analyzed, it showed that someone would need twice as many years of education to understand what was being presented by the defense. In other words, it was as if one party was reading from a Mark Twain novel, while the other was reading from the periodical *Science*.

FOG INDEX: THE FIRST VIOXX CASE

	GRADE	RATING	EXAMPLE
	6	Easy	Mark Twain
PLAINTIFF OPENING	7		
	8		
	9	Ideal	<i>Reader's Digest</i>
	10		
	11	Acceptable	<i>Time, Newsweek, WSJ</i>
	12		
DEFENSE OPENING	13	Difficult	<i>Science</i>
	14		
	15		Lawyers' briefings
	16		
	20	Genius	Dissertation

DONALD TRUMP & BERNIE SANDERS: THE EFFECTIVENESS OF SIMPLE MESSAGING

This election season has provided two stunning examples of just how effective simple messaging can be. Bernie Sanders, the Vermont senator, employed it with surprising efficacy. And although he ultimately failed to secure his party's nomination for President of the United States, he gave Hillary Clinton a much more challenging primary race than many had anticipated. Of greater consequence, though, may have been the sheer intensity of emotion that his simple messages invoked – or, as we shall see, capitalized upon.

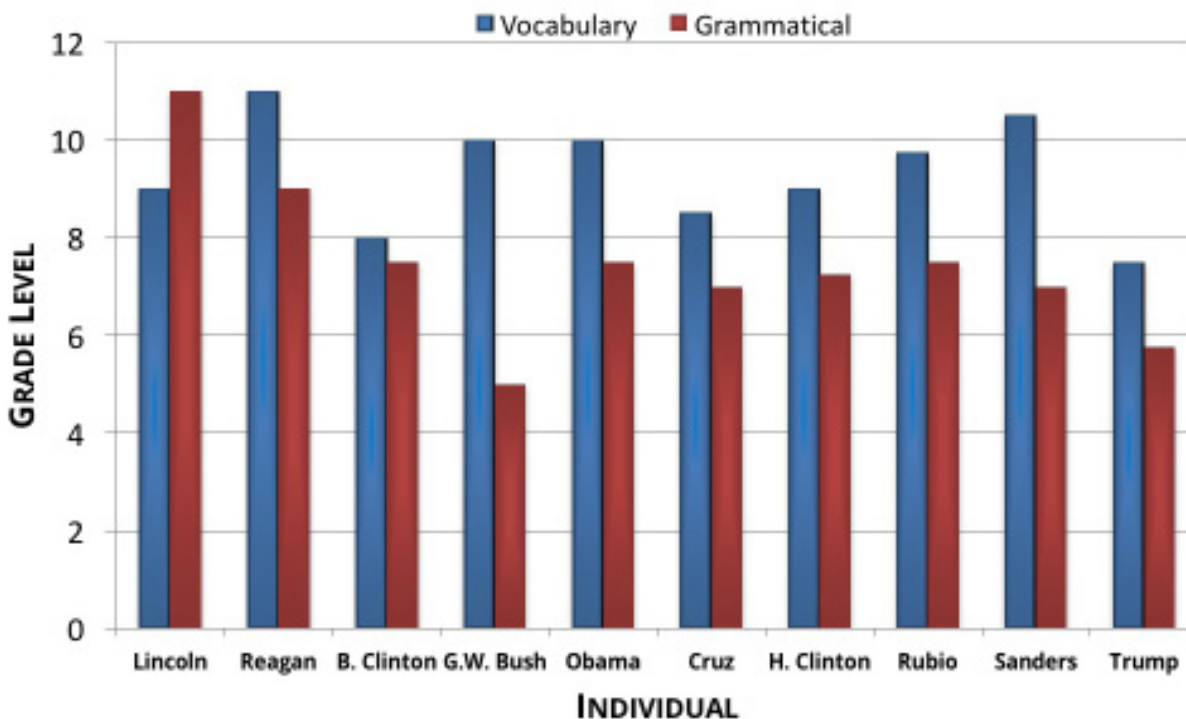
On the other side of the political aisle, Donald Trump's own set of simple messages – which are communicated not only in his speeches, but also in his blunt style and brusque demeanor – has helped him to repeatedly defy expectations.

But what does it mean to have a simple, persuasive message? What are the necessary preconditions? For both Mr. Trump and Mr. Sanders, it is not just the basic elements of vocabulary and grammar. Indeed, while Mr. Trump's non-teleprompter speeches have consistently employed vocabulary and grammar that can be understood by even a sixth grader, Mr. Sanders' campaign speeches¹ used language more appropriate for those with at least some high school education.² And even Ronald Reagan, often thought of as "The Great Communicator," used grammar and vocabulary that was more sophisticated than that used by many politicians in this era.

¹ Mr. Trump has begun to use a teleprompter and prepared speech content and when he does, it elevates the sophistication of his speeches to the 9th grade.

² A Readability Analysis of Campaign Speeches From the 2016 US Presidential Campaign, Carnegie Mellon University.

VOCABULARY & GRAMMATICAL COMPARISON OF SELECT PRESIDENTS & 2016 PRESIDENTIAL CANDIDATES



Additionally, a persuasive message need not be specific. Both Mr. Trump and Mr. Sanders were able to obtain broad support by exploiting vague, almost ephemeral ideas.

The genius of both candidates' approach, however, has been that their main campaign messages have not just tapped into ideas shared by their supporters, but *values* deeply held by them. *Values* reflect hopes, dreams, aspirations, wants and desires. And they are comprised of a variety of attitudes that are infused with emotional relevance.

For many candidates, "love of country" is a core value upon which they attempt to capitalize. However, in the case of Mr. Trump and Mr. Sanders, each interprets this value differently – but in a way that is consistent with their supporters' attitudes that a revolution is the only way to achieve it. Mr. Trump's message that we must, "Make America Great Again," feeds on attitudes such as:

- "America has been taken advantage of in trade deals."
- "To be great we need to be strong and not give an inch."
- "We have to use our might to get what we want."

In contrast, Mr. Sanders' message about love of country translates to, "Our nation cannot survive when so few have so much." The attitudes his supporters embrace include:

- "The middle class is being destroyed."
- "The rich get richer."
- "A living wage is becoming more and more difficult to obtain."

Yet, while the specific attitudes Mr. Trump and Mr. Sanders exploit are quite distinct, they all generate strong emotional reactions.

There are five emotions that are generally considered universal: anger, fear, disgust, sadness and happiness.³ Mr. Trump's main message – "Make America Great Again" – appeals to the emotions of fear and anger; anger that America is no longer a world leader and fear with regard to what that means for the nation's ability, now and in the future, to create economic prosperity for its citizens. Mr. Sanders' main message – Close the Wealth Gap – likewise appeals to feelings of fear and anger, but also disgust; anger with the influence and wealth of corporate entities, fear that many will no longer be able to make a reasonable living, and disgust that so few have so much.

WHY SIMPLE IS EFFECTIVE

Simple messages are not inherently persuasive, primarily because they are not always emotionally relevant. But emotionally relevant messages are almost always quite simple.

So why are simple, emotionally relevant messages so effective? It is certainly not because they change attitudes. Indeed, persuasion is not about changing attitudes. Attitudes are formed over a lifetime of learning, experience and observation. Attitudes seldom change; and if they do, the change occurs slowly, over time, as new experiences, new observations and new learning create a new way of thinking. The party jurors favor in a trial may shift, and whom they think they will vote for in an election may change. But over the course of a trial, or even over the course of an election campaign, the transformation of pre-existing attitudes is rarely the cause.

Note that both Mr. Trump and Mr. Sanders present their messages as truisms – things that must be or that must be done. In essence they reflect core values that many voters hold; values that resonate with what many *already* feel. Mr. Trump's primary goal is not attempting to convince anyone that America is not great. Nor is Mr. Sanders' main objective trying to persuade anyone that inequality must be reduced. Rather, both are speaking to what their adherents already believe.

³ Surprise is an emotional response, too, but it is directed by either fear or happiness. Thus, surprise is not generally considered a basic emotion.

If persuasion is not about changing attitudes, then what is it about? Persuasion is really about understanding the existing attitudes and values of a target audience – be that an individual, an electorate, or a jury – and identifying how to present one’s claims, goals or objectives in a way that demonstrates how they are consistent with those values, in order to motivate a particular behavior. In the political sphere it is casting a vote, in a trial it is about rendering a verdict.

Ultimately, persuasion is not about convincing an audience to embrace a message, but crafting the message to fit the audience – or more properly, the audience’s attitudes. Identifying those relevant, meaningful predispositions can be difficult, but capitalizing on them is not. When speaking to the attitudes and beliefs an audience already holds – there is no need to waste time explaining; there is no need to educate; there is no effort required to convince. It is like having a head start, but the advantage is not just in being able to build upon what is already known, believed or felt. The most important opportunity afforded by speaking to existing attitudes is the opportunity for *the audience* to interpret the rest of the message in ways that confirm what they already believe.

LOGIC IS COMPLICATED – FEELINGS ARE SIMPLE

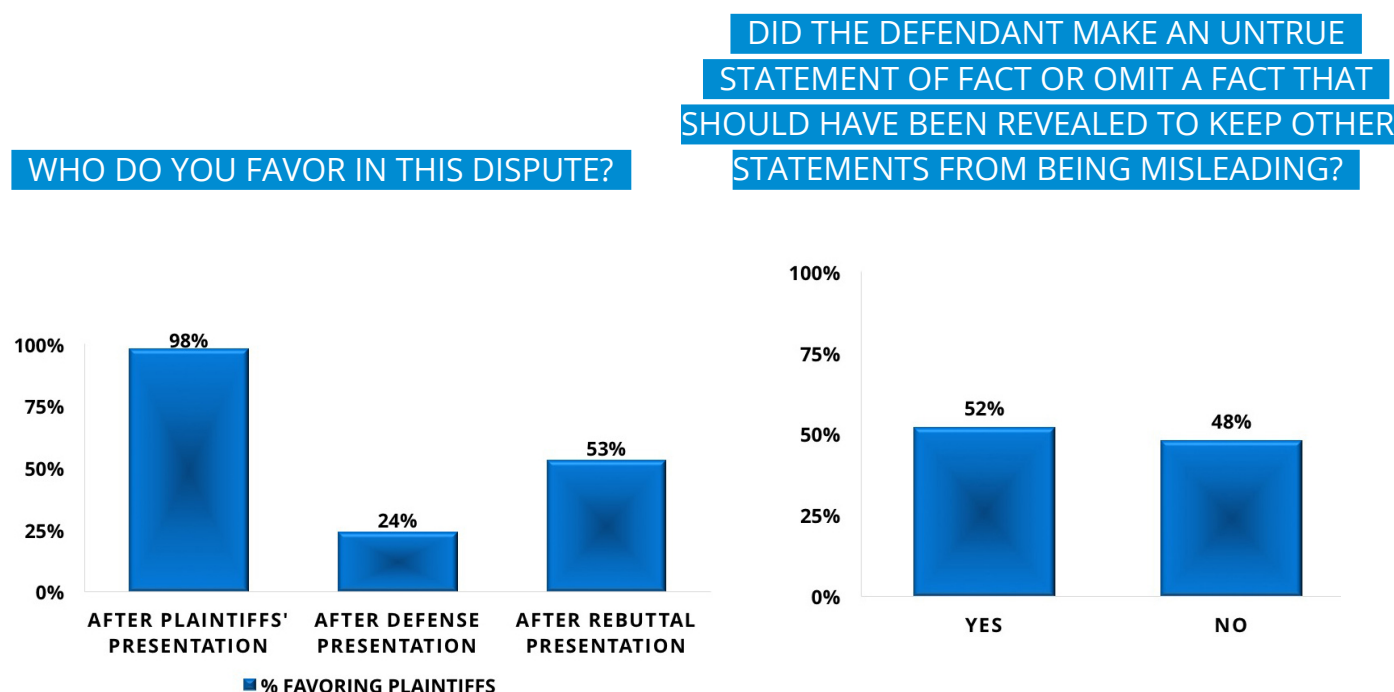
The theme that we need to “Make America Great Again” is so powerful that its adherents have demonstrated a heroic ability to downplay, forgive, dismiss or ignore its most vocal champion’s equally Herculean gaffes.

The reality is that feelings are often more important than logic, reason and comprehension. They afford us the uncanny ability to see what’s not there, and ignore what is; to filter the evidence before us in ways that confirm what we already believe; and to make the facts serve our interests. Both Mr. Sanders and Mr. Trump were, and have been, criticized for their lack of substantive policy proposals. Nonetheless, their populist rhetoric has attracted widespread support. Why? Because vague ideas, built around a core value comprised of emotionally relevant attitudes, allow the audience to interpret what they hear in ways that are consistent with their own beliefs (much like a Rorschach inkblot test).

Honesty, for example, is a value that most Americans share, but who is honest and who is dishonest are attitudes that are not consistent across the country, or even across the street. Plaintiff attorneys can capitalize on this value if some members of their jury are predisposed to believe that all corporations are dishonest. Defense counsel has the upper hand if jurors are instead inclined to think that individuals who file personal injury lawsuits are just looking to make a quick buck.

But what about when the issues are more complicated, and it's not simply about which party is honest and which party is not? Or what it means to love one's country? It is in precisely such situations where the power of feelings over logic becomes most obvious.

Here's a paradox. In jury research exercises involving complex concepts, it is not uncommon to find that surrogate jurors – after hearing detailed case presentations for the parties – are evenly divided when asked to render their individual verdict inclinations. This is true not only with regard to a generic, “Who do you favor” measure, but also in response to specific verdict questions. In a recent financial dispute, the results looked like this:



In this scenario it would have been reasonable to assume that the deliberation process would be a horse race between two balanced constituencies fighting for their respective positions. And yet, that assumption would have been mistaken, as the deliberation process revealed that one group of jurors was more vocal, more passionate, and more motivated than the other – and the views they espoused came to dominate and prevail.

The results of their deliberations looked like this:

WHO DO YOU FAVOR IN THIS DISPUTE?

VERDICT FORM QUESTIONS	JURY 1	JURY 2	JURY 3	JURY 4
Did the defendant make an untrue statement of fact or omit a fact that should have been revealed?	YES	YES	YES	NO
Was the untrue or omitted fact material?	YES	YES	YES	N/A
Did the untrue or omitted fact cause the plaintiffs' loss?	YES	YES	YES	N/A
What amount of damages are the plaintiffs entitled to recover?	\$500M	\$500M	\$500M	N/A

How could this be?

The paradox can be understood when we recognize that typical measures of verdict orientation fail to take into account a critical component of decision-making – the role of emotion. When assessed in advance, insight into jurors' feelings about a case can often serve as a reliable predictor of the group decision-making process. In our example, when asked not just whom they favored, but *how strongly they felt* about each party, the results revealed that there were almost twice as many jurors who felt a strong commitment to the plaintiffs as compared to the defendant. The case was not going to be a horse race, but a blowout. ⁴

⁴By chance, most of the surrogate jurors in this exercise who felt strongly committed to the defendant wound up in the 4th jury group – the one group out of the four in this study who found for the defendant.

VERDICT INTENSITY

**COMMITTED
PLAINTIFF JURORS****43%****NON-COMMITTED
JURORS****31%****COMMITTED
DEFENSE JURORS****26%**

Importantly, in this matter surrogate jurors who sided with, argued for, and ultimately decided the case in favor of the plaintiffs did not do so because of one piece of “smoking gun” evidence. Instead, they were guided by what they *felt* would be the right decision and then took bits and pieces of the evidence presented and interpreted it – often times erroneously – as independent support for the plaintiffs’ claims. Not all plaintiff-leaning surrogate jurors found all of the plaintiffs’ evidence to be compelling, but each of them found *something* in the plaintiffs’ arguments that seemed consistent with a basic attitude they held.

How did this seemingly haphazard approach manifest itself during the deliberation process? Did surrogate jurors present a cogent representation of what they believed the totality of facts proved? Not at all. The arguments they made were wildly disparate, cobbled together from various pieces of evidence that each juror individually believed to be dispositive of the matter. And because of the multitude of arguments plaintiff jurors were able to concoct, most defense jurors were eventually worn down and capitulated to a finding for the plaintiffs.

Another way in which feelings trump logic may be inferred from archival data gathered from 66 actual jury trials, all of which related to mass tort litigation in one particular industry. The alleged wrongful acts were the same across the trials, but the injuries suffered by the various plaintiffs differed significantly. Importantly, there was a positive correlation between compensatory and punitive damages awarded. That is, the higher the compensatory award, the higher the punitive award.

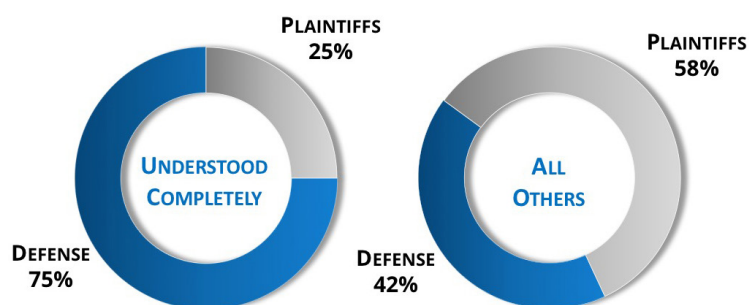
What is striking is that this suggests that punitive awards, which are intended to deter and punish malicious conduct and are supposed to be determined separate and apart from compensatory damages, were influenced by the perceived severity of the injury suffered by the individual. Furthermore, and contrary to assumptions, there was no observed “compunatory” mitigation. That is, it does not appear that the juries in these 66 trials reached any sort of compromise verdict wherein a higher compensatory award would be offset by limiting the amount of punitive damages awarded.

DAMAGE AWARD DECISIONS IN MASS TORT LITIGATION

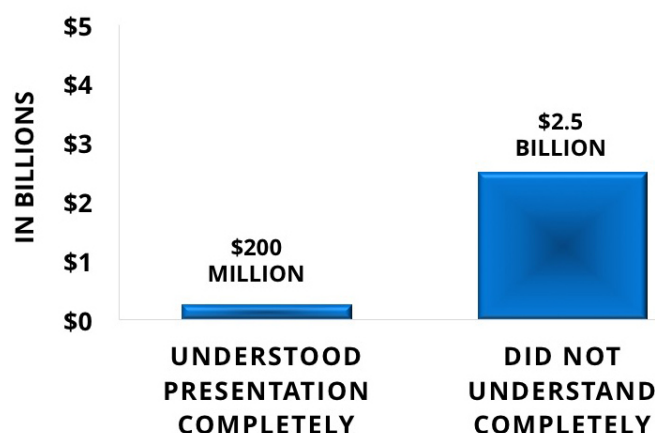
WERE PUNITIVE DAMAGES AWARDED?	AVERAGE COMPENSATORY BEFORE COMPARATIVE FAULT
NO	\$3.7 million (n=35 trials)
YES	\$6.5 million (n=31 trials)

Similarly, jury research has shown that jurors, when asked to consider a complex dispute, are not inhibited by their own lack of comprehension when it comes to awarding damages. In one example of this, jurors were asked to provide self-reports of their level of understanding of the case that had been presented to them. They were then asked to provide their individual views regarding liability and damages. Those who claimed to have understood the case completely were three times as likely to side with the defendant. However, this represented only a small proportion of jury research participants. The majority, who admitted to having some difficulty understanding the case, were 50% more likely to favor the plaintiffs. Most striking, though, was the fact that those who reported having some difficulty understanding the case were willing to award punitive damages in an amount 10 times higher than the amount that was considered appropriate by those who claimed to have a solid understanding of the case.

COMPREHENSION & FINAL VERDICT



COMPREHENSION & PUNITIVE DAMAGES



Clearly, jurors do not need to be confident in their understanding of the facts of a dispute to be confident in the way they *feel* about how a dispute should be resolved.

Of course, it is a long way from the presentation of the evidence to a verdict. And jurors' feelings come into play not just in their final decisions, but are instead operating continuously throughout trial, influencing the way in which they perceive the evidence as it comes in.

Jurors' assessments of witnesses are perhaps most illustrative of this phenomenon. In post-trial interviews, jurors' recall of the specifics of expert witness testimony is generally poor. Instead, jurors more often recollect (and want to talk about) those factors that impacted how the witnesses made jurors *feel* about them. The witnesses' demeanor; body language; whether they looked at opposing counsel during cross-examination or whether they looked away; if they sat forward and exhibited confidence when answering questions, or if they leaned back, intimidated by the attorney conducting the examination; if they answered questions too quickly, or too slowly.

This is, of course, why witnesses are cautioned not to fall into traps of rhythm and timing while being examined. While jurors may not recall the content of the witness' answers, they will recall a disconnect between the way in which they responded to different questions (e.g. quick and elaborate on direct; but slow and succinct on cross). It is for these reasons that witness preparation exercises deal with non-verbal and meta-communication, not content. Non-verbal and meta-communication are perhaps the most basic and simplistic means of communication, but they are often conducted on an unconscious level. And what they communicate is based not simply on what the individual would like or want to communicate, but on how the *observers* interpret ambiguous cues they record about a witness' posture, gestures, facial expressions, pace of speech, and mannerisms.

But this is not to say that jurors are unable to recollect any of the substantive testimony a witness offers. In fact, jurors are quite adept at recalling the general themes of a witness' testimony in much the same way voters "get" the broad focus of a presidential candidate's campaign message. And as Mr. Trump and Mr. Sanders have taught us, big, broad, thematic messages that connect with emotionally relevant attitudes have more persuasive appeal than dry facts and complicated details.

BUT WHAT ABOUT THE DETAILS?

Donald Trump, Bernie Sanders and scores of effective trial lawyers across the country have achieved impressive results – in part, by finding messages that resonate with their audiences at an emotional level; maintaining a laser-like focus on those powerful messages; and not allowing unnecessary details and complexity to undermine their persuasive appeal.

But while politicians may be able to get away with rhetoric alone, trial lawyers are arguing to more than just a jury. Their arguments are also being heard by the Court, are necessary to make a record, and may be reviewed on appeal. What they say must be supported by the evidence that exists, and tying arguments to the evidence is not typically something that can be done in sound bites. So what can trial lawyers really learn from Donald Trump and Bernie Sanders?

What Mr. Trump and Mr. Sanders have demonstrated is just how far one can get by focusing on simple, yet powerful messages that resonate with their intended audiences. Their campaign speeches have essentially been their opening statements. They have not allowed themselves to get bogged down in the minutiae of how they will achieve their objectives. They understand those discussions are for a later time, and a different audience.

In a similar vein, trial counsel must realize what their initial communication to a jury must contain, and what it must necessarily leave out. The case-in-chief is the time for the fine points of the evidence to emerge, but those fine points will be lost or misconstrued if they cannot be tied back to a major theme that jurors actually care about or are presented before jurors have an understanding as to how they should be interpreted.

Opening statements represent an opportunity to provide jurors with a framework that will guide their interpretation of the evidence. But to be truly effective, that framework must be comprised of emotionally relevant, thematic concepts that will capture jurors' interest, attention and support. And those themes, in turn, should reflect not just what counsel would like jurors to believe, but the attitudes jurors already hold and the ways they already feel. Identifying such attitudes is the difficult part. Speaking to them, that's simple.



About THE COMPANY



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Our jury research programs are based upon sophisticated social science research methodologies and decades of practical courtroom experience. We pioneered the field of jury research and have advanced the field with proprietary tools and unique research designs.

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