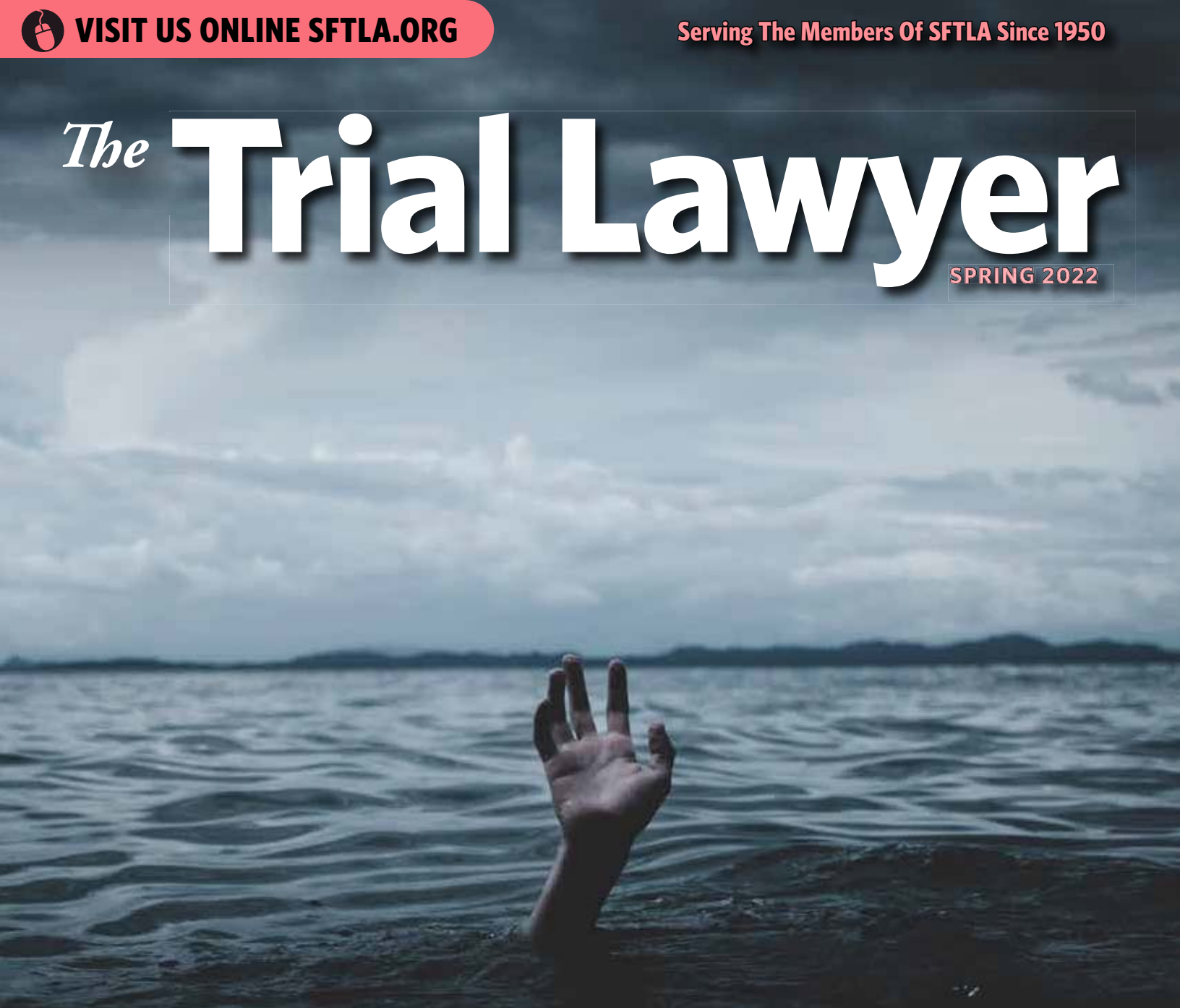




# *The* Trial Lawyer

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## Persuasion Science By John Blumberg

**Isn't losing a case terrible? It is a rejection by the jury of what we believed to be true. And we ask ourselves, "Why wasn't the jury convinced?"**

Ten years ago, I began my search for answers to the question of why our advocacy is sometimes rejected. What I learned was that the answer is rooted in science, namely how the human brain processes and filters information, how mental fatigue and cognitive overload affect reception of information, and how information is regularly distorted so that it doesn't conflict with our view of how things are supposed to be. Understanding this science is crucial to our responsibilities as trial lawyers. I decided to write a book about it: *Persuasion Science for Trial Lawyers*. This article is adapted from some of the chapters.

**We don't see things as they are; we see things as we are**

Actor Colin Firth (*The King's Speech*) funded an academic study whose purpose he said was "to find out what was biologically wrong with people who don't agree with me." The study results did not find that there was anything biologically "wrong" but did confirm a possible correlation between brain structure and how different people filter information. For example, the well-known senses of sight, touch, hearing, smell, and taste allow us to experience the world. The stimuli are identical but experienced differently from person to person. This is due to differences in individual processing. In other words, everyone has "filters" that are due, in large part, to evolution.

The earliest humans lived in an environment where they faced daily threats to their existence: wild animals, natural disasters, hostile neighboring tribes, injury, infection, death. Fear of and protection against negative consequences, likely allowed their survival as a species and our existence today. Numerous studies have resulted in a theory

that the fear of negative consequences created a "negativity bias" that affects everyone differently. For example, in a crisis, some see only danger, but others see opportunity. Perception is not a reflection of universal reality; rather, it is a filter created by each person's unique experience and biological brain function.

### Challenging the status quo

Lawsuits are filed and prosecuted because the plaintiff wants to change the status quo. The defense tries to keep things the way they are. The jurors must decide whether the defendant keeps its money (the status quo) or gives it to the plaintiff. Long before social scientists discovered the psychological and evolutionary basis for why change is hard, philosophers had an inkling. In the 16th century, Niccolò Machiavelli stated in his political treatise, *The Prince*, "There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things." When trial lawyers present new information to jurors, their first thought isn't, "What an interesting and logical idea." More likely, it is, "Yeah, not so sure about that . . ." Jurors will not change their beliefs, so it is incumbent on trial lawyers to frame their cases so that the message is consistent with what jurors already believe.

Understanding liberal versus conservative orientation may be the key. There is broad consensus that the brains of liberals and conservatives process information differently, leading to their respective political alignment. But

beyond political alignment, their differences in cognitive processing also result in different attitudes and values. For the trial lawyer, it is important to recognize that these differences may be the reason that facts and arguments are accepted or rejected. The degree to which one's filter is focused on fear and negativity creates the liberal versus conservative belief system and worldview. Conservative inclinations include security, conformity, authority, predictability, certainty, preference for order, tradition, and traditional values. These all favor maintaining the status quo. Such pre-dispositions should be the building blocks of how you frame plaintiff's case.

An example of framing that reaches those typically opposed to change is found in the inaugural address by President Bill Clinton on January 20, 1993:

"When our founders boldly declared America's independence to the world and our purposes to the Almighty, they knew that America, to endure, would have to change. Not change for change's sake, but change to preserve America's ideals: life, liberty, the pursuit of happiness. Though we march to the music of our time, our mission is timeless. Each generation of Americans must define what it means to be an American . . . and the urgent question of our time is whether we can make change our friend and not our enemy."

Clinton's message was carefully designed to reach conservatives who were resistant to change by framing change as the original intent of our

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founders. When framing plaintiff's case, instead of advocating a change in the status quo, your message should be to apply traditional values to *restore the status quo*.

### Security, Conformity, and Protecting the Status Quo

One view of protecting the status quo is not to change anything. You can advocate that adherence to rules and values preserves the status quo. Thus, if the defendant violated the rules, it was the defendant, not the plaintiff, who threatened the status quo. Example: "Stability of our community comes from rules that are followed, not broken." Conservatives see tradition, stability, conformity and order as rule-based and their concern about negative outcomes results in a more harsh and demanding expectation of behavior. Therefore, it is important that the rules be presented as concrete, detailed, and clearly defined, so it's clear that the defendant knew specifically what was prohibited. Conservatives believe generally that rule violators endanger society and should be condemned for their transgressions.

Studies have shown that conservatives are more critical of transgressions than omissions. Therefore, whenever possible, an omission should be re-characterized as a rule-breaking action. For example, in a case involving a child hit by a car driving through a neighborhood, the negligence should not be described as the failure to keep a lookout, that is, an omission. Instead:

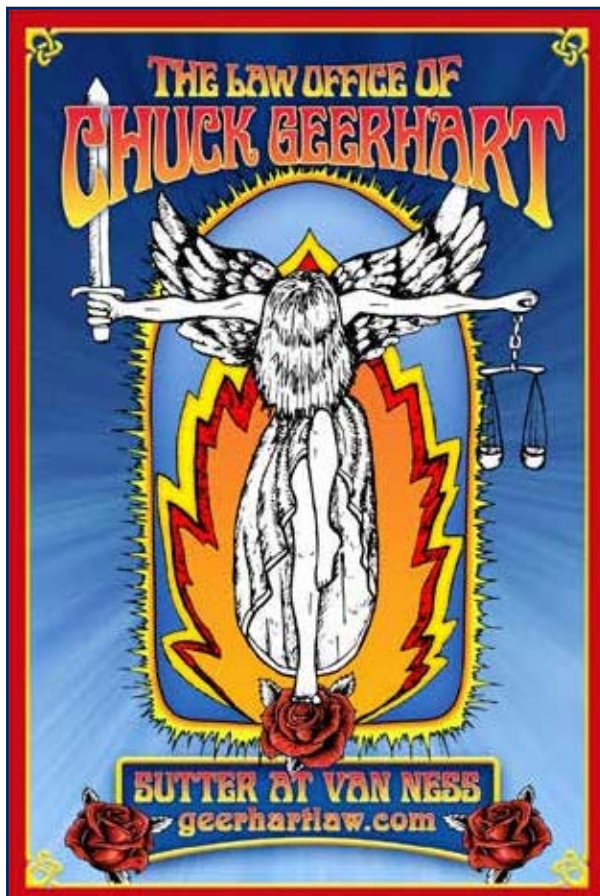
"The driver knew that there could be children, knew that safe driving rules required that he be vigilant to protect the children, and intentionally drove as if he were on the open road. And that action had predictable consequences."

The conservative view of fairness was examined by psychologist Jonathan Haidt in his book, *The Righteous Mind—Why Good People Are Divided by Politics and Religion*, as a combination of the Protestant work ethic and the Hindu law of karma: "People should reap what they sow. People who work hard should get to keep the fruits of their labor. People who are lazy and irresponsible should suffer the consequences." This view can be used to advantage by framing the case to fit this concept of right and wrong. For example:

Lindsey always took personal responsibility for her life and the lives of her family. She didn't believe in laziness; she worked hard, but now she doesn't get to enjoy the fruits of her labor. Why not? Because of the irresponsibility of the person who took everything away from her that she had earned. That person wants a free ride, trying to blame anyone but himself and refusing to accept responsibility.

### Conclusion

The status quo is not a reality; it is a perception. Viewed one way, it can cause a jury to resist change, but framed differently, it can impel the jury to require change to set things right. Liberal jurors are more likely to award damages to relieve the suffering of a plaintiff and to promote his or her well-being. But conservative moral values can result in an award of damages to the plaintiff as punishment of a defendant whose violation of the rules caused a burden on society or the damaging of a person who was an asset to the community. Together, liberal and conservative moral values, fairness, and sense of social justice and social order can combine to reach a common ground that honors each and benefits the plaintiff. **TL**



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**Chuck Geerhart is  
a proud supporter  
of SFTLA as a  
Guardian of Justice**

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