# SHOW WILL TELL

Managing Mental Images with Legal Decision Makers

Eric Oliver
February 3, 2015

**SHOW WILL TELL**

**Managing Mental Images with Legal Decision Makers**

*"Beauty in things exists merely in the mind that contemplates them."*

— David Hume

*"To gaze is to think."*

— Salvador Dali

**Experience and the "Mind's Eye"**

Most of us are aware that our memories have no tangible existence; they are not "recorded," cannot be preserved intact or unchanged from experiences we *think* we remember so well. Instead, memories are *reflected suggestions* of our tangible existence and as such, subject to continuous change once our minds have begun to process them.[1] More significantly, we are not *consciously* in charge of those changes; the processing is done *other-than-consciously.*

However, few people are aware that our vision—our ability to actually process what we look at and see— works in much the same way as how we process memories. Although the physiological apparatus that does the actual seeing—eyes, optic nerves and the brain's visual cortex—is extraordinary, it actually doesn't do the job of "seeing" the way most of us assume it does. What we collect with our visual physiology are not pristine fully rendered images; they are actually incomplete, even impoverished, until they arrive in our brain's visual cortex. That we are able to perceive them as richly rendered and complete as we do is due to an ongoing creative process the brain does with everything we "see," and which is wholly outside our conscious awareness. Once those images reach our brain they become the most recent memory in our short term memory bank, but the (re)creation process of *both vision and memory* continues on.

We see, and what we see is imprinted like film on our visual cortex, but what we *remember seeing* is ever changing, as impressionistic as a Van Gogh painting. We consciously react to the mental images attached to memories as if these images were fixed in concrete, but just as concrete is made with sand, like sand these images continually shift in the "mind's eye" many times every second.

What do trial lawyers need to know and remember about the realities of actual recall and mental imaging? That the eyes may or may not be the window to the soul, but they certainly are the window to the mind. And, that our minds work in more of a "shifting sand" construction process than in a "direct to disk" recording process, is the way legal decisions are reached every day.

---

[1] Schacter, David, *Searching for Memory: The Brain, The Mind and the Past*, Basic Books, New York, 2007; Beil Laura, *The Certainty of Memory Has Its Day in Court*, New York Times (website), November 28, 2011

Many people think that legal decision making is as much a deliberative process in the mind as it is in the jury room. Instead, when we act as legal decision makers we perceive each side's story as they are *presented* to us but then, we immediately (*re)build* them in our heads to form a story of both sides' case very much of our own making, though still related to the stories' details and facts as delivered by the advocates for the parties in conflict.[2] It is from these privately reconstructed stories that individual decision makers develop their leanings and their eventual decisions. The raw material for this (re)building process lies within the acquired and recreated images in the "mind's eye" of each decision maker.

So, what is happening when our individual visual processes and legal decision making come together? What really is going on when people "see" each side's story in their "mind's eye"? When we are presented with visual information how does what imagery we *see* compare with the images we *visually construct* to make sense of what we've seen? And how does this ultimately influence the outcome of decisions we may be asked to make? One thing we know about this process is that the imagery created in the mind's eye of the typical decision maker includes lots of people, and lots of action, regardless of whether the raw material is being generated by attorneys, mediators, judges, or jurors. This is because we are all what the researchers call *embodied* thinkers.[3] We other-than-consciously use embodied metaphors and embodied narratives in our heads to fill in storylines and "flesh out" the people involved in those stories.

Decision makers *receiving*, that is, being *presented* with legal case stories, tend toward *seeing* those stories in active terms, i.e., face to face, eye to eye, and hand to hand. This is because we (re)construct basic human narratives from our own stored life experiences in and around the facts being presented in order to relate personally enough in our own minds to judge the legal case story. For example, if attorneys are discussing an obstacle an injured plaintiff must now struggle to overcome, decision makers likewise will see some form of personal struggle in their own "mind's eye," but not *just* the one they are being presented with in the case. They might see Sisyphus futilely rolling his rock uphill, or a weightlifter pushing the edge of his limits, or a child trying to tie their shoe for the first time. We each have our own private cache of imagery that reflects our own private history of experience, and that private cache is what informs our interpretation of what "struggle" means.

Astute attorneys may wonder if it is possible to tap into those stored mental images in decision makers heads—and, if possible, how to invite decision makers to use one personal collection of images over another when (re)building and, deciding, their client's case.

---

[2] Oliver, Eric, *Facts Can't Speak For Themselves: Reveal The Stories That Give Facts Their Meaning*, NITA, Louisville, CO, 2005

[3] Lakoff , George and Johnson, Mark, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* , Basic Books, New York, 1999

In appreciating the "fleshed out" stories we all envision in our *embodied* thinking, it is important to recognize how closely connected our other-than-conscious thinking and perception of what is around us is to the body we inhabit. When handed a heavy clip board that takes some effort to hold up, and then a very light clipboard that takes no effort at all, and later asked to rate the importance of the material on the pages clipped to those different boards (both held the exact same number of pages), research subjects regularly rated the paper on the heavier boards as "more important." We tend to give more weight, or place higher up, to the things we value more than the things we value less. This may explain why we perceive things that are shown to us visually higher as more valuable or important, than things shown to us lower visually. Nowhere does this apply with more potential impact than with perceptions of legal case stories by decision makers.

Sexual arousal, attraction, disgust, admiration, compassion, pity and other empathic responses are very strongly driven by mental images. This is true despite the fact that very little of our mental cache of imagery is available *consciously* to us even as we experience the emotional reactions they drive. How can knowing about how our minds perceive and process mental imagery improve the trial attorney's practice? For starters, since all legal decisions, whether large and complex or small and simple (or the inverse), are driven by the mental imagery at work in the decision maker's head, mental imagery is also part of the perceptions that coalesce to create judgments. The attorney with an awareness of how this mental process works, and who is willing to approach legal decision makers with some respect for the process, will be the attorney who successfully influences the decision maker's mental imagery, and ultimately, their decision.

Just because most of the legal decision making process is outside our conscious reach doesn't mean that the conscious mind, i.e., our conscious awareness from minute to minute, doesn't play an important role also. It does. Think of a road trip in a car as an analogy for the dynamic between conscious and other-than-conscious processing and you will have a good sense of the "division of labor" at work in the mind. The car represents the multiple resources our bodies have to draw on at any given moment but that are not under our conscious control. Just *try* to sneeze, have a spontaneous thought, or lower your blood pressure—each is a complex and useful process but each is controlled other-than-consciously and is not subject to your "whim." The road represents our perception(s) of the external environment, also directed and maintained outside our conscious control. A map (or navigational device) represents yet another process outside our conscious direction. So, what *does* represent conscious control on our mental road trip? The driver. The driver is the one who *steers* the car,[4] selects *where* the car will go on a second by second basis, and with eyes looking out the windshield and hands on the wheel, it is through the driver that the power of that vehicle's full potential is realized.

[4] I first heard this Car/Mind analogy from the late hypnotherapist, Dr. Dave Dobson.

This is what legal decision making is like: decision makers "looking out their windshields" at what there is to see, and at each and every moment along the way of your presentation of your client's case story to them, making selections about what to steer toward, and from what to steer away. Managing decision makers' perceptions by offering up images to help them "steer" their way toward a story favorable to your client is what this article is all about.

Now, a caveat. Unfortunately, the human mind doesn't make the job of *using* imagery to *influence* imagery easy. You can't just *ask* a focus group member at any given moment what they're seeing as the most persuasive mental image driving their decision in your case. Remember, our vision and most of our memories—and thus, our decision making process as a whole—are not consciously controlled. In fact, they are not even consciously available for this kind of "on demand" review. However, hints *are* available as to what the important images might be.

For example, when presenting antitrust cases to focus group participants, or to actual jurors, attorneys often (though quite unintentionally) misdirect the "embodied" narratives in decision makers' heads. When deciding violations of antitrust laws, instead of being asked to consider the parties in the suit and their particular conflicts with each other, decision makers usually are instructed to focus on the much broader concept of "competition in the relevant market." They are *not* asked to *envision* the two parties in order to determine how fairly (or unfairly) they acted towards each other during the time period the alleged antitrust violations occurred, and thereby miss altogether how the conduct of the party accused of antitrust violations affects the "health" of that competition. Yet, *envisioning* the two parties in just this way is most likely what decision makers *will* do, because this is the human narrative they are most likely to bring up in their own mind's eye to make sense of the case stories being delivered to them. Attorneys who are aware of this challenge can adjust the imagery in their case presentation to "invite" decision makers to steer their thinking in a more productive direction for their client.

It turns out that making sense of your client's legal story, or any story for that matter, is a *literal* process. We *literally* make sense of everything around us through hearing, seeing, and physically feeling. This is other-than-consciously perceiving, and this is how we (re)build our narratives about whatever comes our way. There are some attorneys who think that jurors should not sit on cases where the technical, scientific or legal complications might be "too much" for them to understand clearly enough to make the "right" judgment. On the other hand, there are some attorneys who believe that jurors (like voters) are fully equipped to render the "right" judgment in *any* kind of case, as long as those jurors are presented with a story they can actually perceive well enough to develop a human narrative in their own mind's eye. When it comes to legal persuasion – what *they see* is what *you get*. The eye of the beholder rules—the mind's eye of the beholder, that is.

When it comes to which of our three primary sensory systems are used to process and "make sense" of any case story: 1) words and phrases (auditory), 2) sights and images (visual) and 3) sensations and emotions (feeling), it is the second one, visual imagery, that is the most influential when building the embodied narratives that lead to a particular leaning or eventual judgment. Of course, this makes complete sense. You really can't appreciate a human narrative without *seeing* the humans involved in the events. How many times have you thought "the movie wrecked the book," or maybe the opposite, how the movie predetermined what you saw when you read the book.

Most people believe that they *are* "visual thinkers," that their thoughts are primarily constructed of images. And, most people would be wrong. While we seem to live in an increasingly visual culture, that distinction is based on the actual input we are receiving, not how that input is being processed in our heads. In fact, most of us tend to make sense of the world by talking to ourselves about it; we translate all of our sensory experiences into words before anything else.

So, why emphasize mental imagery so much? Although we have all three sensory systems working in our minds all the time, attorneys would be wise to recognize that the proportion between the three is different for each of us. Specifically, there are three types of people: those who respond first and best to verbal input (the largest group), those who respond first and best to visual input, and those who responds first and best to sensory stimulation of a feeling nature (the smallest group). However, when it comes to the mind, just because most decision makers prefer to think in words or phrases doesn't mean that images have a less powerful effect on their mind's eye. In fact, the reverse is often true. The more a person tends to think in words, the more sensitive they are to effective visual communication.

Whichever sense system a decision maker might (other-than-consciously) prefer, all three sensory building blocks—words, pictures and feelings—inform the case story they (re)construct in their heads, and it is the *perceptions* of the facts in a case, *not* the facts themselves, that drive any decision in any case. This is equally true for the professional legal decision maker as for the nonprofessional. Impressions *always* take precedence over interpretation. By the time we begin to interpret, our impressions have already created the framework that rules the mental territory where decisions are realized.

Images are a potent force that drive powerful reactions among human beings; think of prejudice, for example. When you hear a claim made about a manager, administrator or judge making a choice about another person based on prejudice, what comes to mind? What do you *envision*? Subjects in research studies see *something* that leads to an "unconscious" (so called) bias that produces prejudicial choices and actions, even as the subjects sincerely are unaware of the tendency.[5] This is known to drive many managerial decisions and result in many lawsuits. In a recent issue of the journal *Science,* researchers

[5] Feuss, Charles and Sosna, Jeremy, *Courts are Warming to Claims of Unconscious Bias,* The National Law Journal, October 1, 2007

reported on studies they did in "the boardroom" using the same techniques they had used to ferret out "unconscious bias" to make predictions about the bedroom.[6] They found that people who momentarily hesitated when flashed a picture of their fiancée before clicking on a reaction word like "amazing" or "awful," were more likely to have marriages that did not last as long as those who did not hesitate before clicking. What did the research subjects perceive to create such a measurable response? I think we safely can assume that it wasn't a hastily constructed list of pros and cons about their intended.

So the key to how to most effectively persuade decision makers is to ask yourself first, "What do they need to see?" And even more important, "How do they need to see it in order to see things my client's way?" Just as you can't expect to succeed by simply telling people *what to think*, simply telling them *what to see* doesn't succeed either. Persuasion is much more effective when it comes in the form of an "invitation" to look at things a certain way without directly saying the words that only represent what you want them to see. As well, demanding that someone "just look at it this way" can come across as rude and aggressive to a decision maker and negate its effectiveness. *Show* them what you'd like them to see, literally or figuratively, and your chances of *managing* their mental imagery—and their perceptions—increases exponentially. You've truly invited them to *see* their way right into your client's case story and to make sense of it as you would most like them to.

**Looking Inside the "Mind's Eye"**

The danger of presuming focus group participants, potential jurors in Voir Dire, or any other legal decision maker, can access their own mental processes on demand, is that anyone you ask about what's going on in their mind's eye will answer almost every time with an answer they have *consciously* made up on the spot.

Asking someone *why* they think, feel or act a certain way is like opening a Pez dispenser and pulling out just one Pez candy. You know there are many more identical Pez candies in the spring loaded dispenser, ready to pop up and out just like the one before. So it is with the conscious "guesses" people return to direct questions about what they're thinking, and especially how they came to be thinking it. Research has shown that these kinds of guesses/answers are pretty much the same, one to the next; they will keep popping out of people's mouths as long as you keep asking—just as each Pez in the stack is identical to the next one that pops out, and the next, and the next. Asking open ended questions always opens up a "dispenser" of clues about the mental process going on inside a decision maker's head while asking close ended questions always closes off access. Can anyone really expect a fully thought out, contextually accurate answer to a question like, "Is there *anything* about *any of those things* that would

[6] Reported by Weintraub, Karen, *Subconscious Relationship Doubts? Trust Gut Instincts*, USA TODAY, November 28, 2013

keep you from being fair in this case?" Has there ever been a question asked in our courtrooms that regularly elicits more "knee-jerk lies" as answers as that one?

How so? A potential juror will admit to attitudes, ideas, thoughts and beliefs that stem from their life experiences, any of which could make the job of impartially judging a particular case harder, or maybe even impossible. Yet, when asked to envision the influence of anything that might, or could stop them from *being* fair, what type of image do you think is most likely to come to their mind? Hint: based upon that mental image, their answer would not be, "Yes, I can," but rather, "Yes, I *am*!"

When confronted with the "*be* fair" question (as typically phrased), most of us maintain a self image of a fundamentally fair person. That is, an image of a person who simply *is* fair as a part of their character as a whole, not one who simply *acts* fair when circumstance requires. What would stop you from *being* who you are? The question demands a potential juror deny their own "self image" which in turn reflects more bias from the questioner than it reveals in the respondent.

Imagine the question asked quite differently, "How much would *anything* about *any of those things* get in the way of your being as fair as you are *able* to be?" Now what happens? Mental imagery is immediately shifted closer to what the Voir Dire inquiry is actually designed to achieve, that the image *of fairness* is an *ability*, and the biasing element is seen as something getting in the way of *acting as fairly as one is able*. Now, because the challenge to one's personal character as a "being fair" is removed, the mental imagery actually can support a sincere consideration of the effect the biasing factors may actually have.

So, clearly the prescription is to "show" as well as "tell," and to "look" as much as "listen." Ask yourself, what decision makers should be *seeing* at each important point in your story, and what do you need to do to invite them to see that as well as you can? Three things: demonstrative visuals, mental image framing, and congruent visual presentations.

**Distance Between Two Points**

When you read the phrase "distance between two points," how many ways of seeing a "straight line" are you conscious of being able to bring to mind? How many images might exist outside your conscious awareness? If you want decision makers to use certain images in their heads while constructing a story helpful to your client's needs, the "straightest" line in your persuasive efforts may be to simply *show* them the imagery you'd like them to adopt and use.

In the Federal Rules of Evidence those images are defined as *Demonstrative Evidence*. [7] They are exhibits that are used to illustrate or clarify oral testimony, or recreate a tangible thing, occurrence, event

[7] "Demonstrative Evidence is any secondary proof that illustrates or explains documentary, testimonial or other substantive evidence. It is typically especially prepared for trial, unlike substantive evidence, which has an

or experiment. They help legal decision makers establish a *context* among the facts presented in a case. They can be delivered in many forms including, photos, x-rays, video, sound recordings, diagrams, forensic animation, maps, drawings, graphs, animation, simulations, models, and so on.

But, for a moment, consider the labels demonstrative "evidence" or demonstrative "aids"; can you begin to appreciate the "invitation" process at work by noting the differences in images that come to your mind's eye when you read *evidence* versus *aid*? Which is more likely to bring stronger images to mind? To help remind yourself what to emphasize for decision makers receiving your client's case story, I suggest you refer to them as demonstrative *visuals*.

Although not a guarantee, selecting words that are more likely to evoke the mental imagery that will help decision makers build a better story for your client is effort worth expending. Inviting the right image affects the value of your client's case story as it is (re)constructed by any decision maker. As the mediator winking in the back of the elevator said (while tapping the charts tucked under the plaintiff attorney's arm on which the demonstratives for his client's case story were printed) "Good stuff; more money!" The plaintiff attorney's successful *visual* presentation had just led to overseas excess insurance carriers being called on the phone during the mediation to bring the settlement value up to twice what the client had hoped.

Get it?

Fewer words. More pictures.

And, demonstrative visuals are not just for court anymore (nor were they ever). Opposing counsel, insurance adjusters, negotiators, referees, expert witnesses, lay witnesses and judges all use mental imagery to build private versions of case stories in exactly the same way as everyone else: *other-than-consciously*—and at your best invitation. As the attorney in the insurance bad faith case discovered three days into trial, the opposition can comment derisively all they want on the images you've invited them to *see*, doing so only sets the images more clearly (and firmly) in their heads. The opposing counsel for the insurance company literally laughed out loud when shown the plaintiff attorney's demonstrative visuals, calling them "simplistic" and "completely unconvincing." However, a few days later, when the defense showed up with their own hastily constructed versions of similarly "simplistic" images, they discovered they were too late to compete with the mental images jurors had already adopted and integrated.

Unfortunately, we usually are far less inclined to respect the image making process than the words we string together to try to persuade them. Most attorneys, even if they have an image in mind, will

---

independent existence. Demonstrative exhibits may take the form of charts. graphs, maps. diagrams, photographs, videos, models and even demonstrations or experiments conducted in the courtroom. A recent addition to the list is computer simulations or animation." Delaney, Timothy and McMahon, Charles, *Jumping Over the Evidence Hurdle at Trial*, National Law Journal, August 7, 2000

deliberately withhold it from those who they most need to influence—the other side—in the mistaken belief they will lose that image's impact "when we get to trial." The unfortunate consequence of this way of thinking is that the one image that could perhaps "make or break" it, ends up being "saved" for the scant five percent of the time a case actually might go to trial. In the meantime, without that crucial image nagging at them, the opposition feels free to devalue your losses. Think how often you hear something like, "Does that *sound* right to you?" and how rarely you hear something like, "How does that *look* to you?" Yet, it is usually the latter that drives the story decision makers (including other attorneys) construct in their mind's eye.

We humans are very effective at *conditioning* ourselves to respond to certain cues in certain ways. We are also very adept at linking words or phrases to a mental image and then, other-than-consciously using that perceptual pairing to repeatedly produce the same response. Many attorneys know this phenomenon as the *anchoring effect*.[8] In recent years, plaintiff attorneys have sought out big numbers to reference in their case presentations just so that they can invite that as an anchoring effect in decision makers' minds. For example, the hundreds or thousands of hours of plaintiff suffering prior to trial, and many times that number of hours of suffering to look forward to in the future. When it comes to using *time* as an anchoring reference for the value of harm in the case, the intention is to invite decision makers to associate—and equate—big numbers in hours with big numbers in dollars. However, most attorneys stop there, defeating the purpose. This tactic succeeds not just when the numbers are *heard* by decision makers but only when the verbal delivery of the numbers is linked to an *image*—the right image—creating a much more powerful anchor in the decision maker's mind.

Here is a good example. A medical negligence case dealing with a fatal error of delay in diagnosing a young mother's breast cancer. West Virginia attorney Jim Lees[9] told jurors a story using the big number portion of the anchor he had invited them to set—he counted out either the days or hours from the point when the diagnosis should have been made to the date and time of the start of the trial. By repeatedly making a verbal association between those calendar numbers and the *daily fee* of just *one* defense expert, he invited jurors to form an *even bigger number* in their minds. But was it just the two numbers that actually created a leaning about the magnitude of the value plaintiff's harms? No, it was the *image* he provided with the story that pushed jurors to multiply—almost exactly—the amount of the expert's daily fee by the number of the plaintiff's lost hours and days in their final verdict valuation of the harms caused.

So, what was the image he invited people to use?

---

[8] Kahneman, Daniel, *Thinking, Fast and Slow*, Farrar Strauss and Giroux, New York, NY, 2011, pp 119-129, 363-376; also excerpted in *News From the Mental Edge*, Fall 2012 (available at www.eric-oliver.com/newsletters)
[9] Discussed at the Louisiana Association for Justice "Last Chance" Conference, December 2011

The plaintiff's four year old daughter repeatedly reaching to be picked up by a mother whose severely advanced breast disease—and treatment—forces her to look down at her daughter's little upturned face and outstretched arms and say, "No." Over and over again, she is forced to answer, "No," at the same time as knowing how few days left to enjoy with her daughter were being allowed her by the defendant's negligence. In this case, the mental image of a "formula" would read: *numbers over time* plus *image over time* equals *value of loss over time*.

When we use words like justice, pain, fairness, family, negligence, and fault with phrases that also link to our shared emotional responses, we make sense of those words not by their objective definitions, but by the subjective imagery we attach to them in our own mind's eye; not as if they were written in stone but rather, as if traced in shifting sand. When someone says, "I don't get it," they are actually saying "I don't see it."

With that in mind, consider the following variety of plaintiff case stories, and examples of language that invite decision makers to steer in helpful, or not so helpful, directions.

- Nursing Homes

  *"Fall" v. "Drop."* You only need to see one person, the injured plaintiff, to see a fall, but, it takes seeing two people for someone to *get* dropped.

  *"Lift"* v. *"Lift and Transfer."* In the first, a lift is a friendly hand up; in the second, it is a serious matter of maintaining patient health and safety through the transfer.
- Car Wrecks

  *"Accident"* v. *"Wreck"* or *"Crash."* One is like lightening striking, it's unexpected and through the fault of no one person; the other two are not.
- Medical Practice

  *"Care Given"* v. *"Actions Taken"* or *"Actions Withheld."* The first invites imagery that overrides any claim of neglect itself; the second two reinforce imagery of neglect.
- Claim Language

  *"Failed to"* v. *"Did Not Do Properly."* Which picture actually invites decision makers to envision "good intentions" on the part of the bad actors? Ironically it's, "okay, he *failed*, but he meant well and we should let him keep at it," instead of the more straightforward, "he did not do it *right*, although doing it *right* is his job."
- Damage Attribution

  *"The Plaintiff Develops/Acquires More Consequences"* v. *"The Plaintiff Is Forced to Go Through These Consequences."* In the former version, the plaintiff is seen as the only apparent party actively affecting his or her condition; in the latter, the plaintiff's condition is actively linked to the effects of

negligent actions. This particular kind of mismanagement of mental imagery is the bane of catastrophic injury work.

- Terms of Art

  *"Minor Head Injury"* v. "*Injury to the Brain."* No permanent or serious images are allowed to be seen or imagined in version one; in version two there is no doubt as to what is there to see.

When it comes to the most direct line between an "invitation" for mental imagery—your delivery and demonstrative visuals— and the mental imagery a decision maker responds with—what is important to keep in mind?

First, that not all demonstrative visuals are created equal; some are much stronger invitations to much stronger imagery than others. Second, it is important to remember what strong demonstrative visuals are *not*. They are *not* page after page of blown up deposition testimony; they are *not* line after line of statutes, policies, regulations, professional standards or lines from a contract, highlighted here and there in day-glo yellow; they are *not* a page from a medical text on anatomy; they are *not* or an image from a manual on the safe operation of some kind of equipment; they are *not* a ten point list of *anything—not* "rules of the road," not "bad faith choices," not "choices the defendant made."

So then, what *is* a strong visual?

*Images* that create *Context.*

That is, *images* that put particular parts of the case story *in context* for any decision maker. If the bad acts happened during a meeting, then the telling image might be a board room and people at a conference table. If the dispute is over a contract, then that image might be two figures shaking hands on a deal. If the dispute is over barriers being thrown up to hinder proper treatment of injured parties, the image might be an actual obstacle course. The strongest images are dictated by the case story itself, and images tied to a basic human narrative *are* the case story. Try to discover which image (or images) generated by your case story best link with key phrases the decision makers can condition themselves to use in their private versions of your story to make sense of where justice lies.

For example, in a contract case it's the handshake linked to the phrase "Mutual Risk for Mutual Benefit." In a workman's comp bad faith case, it's the obstacle course linked to the phrase "Obstacles to Proper Treatment." In a professional negligence case, it's the powdered layer of deadly toxin blanketing a construction site linked to the phrase "Contamination Up to Four Feet Deep." In both a bad faith and medical neglect case, it's the x-ray image of a patient's condition, prior to being denied treatment linked to the phrase "Can't Assume the Best Until You Rule Out the Worst, First."

Now, how to select and deliver those images? Let's take a look at one of the masters of linking images to internal narrative and emotion.

**Hitchcock's "Rules of the Visual Road"**

Among the many talents Alfred Hitchcock had was an unwavering respect for his audience's other-than-conscious ability to use their innate mental imagery "to scare themselves to death." That is how he came to consistently leave out the crucial image at the transformative moment. For example, not showing the knife actually stabbing Janet Leigh in *Psycho,* not showing Jimmy Stewart actually hitting the ground in his many imagined falls in *Vertigo*, and not showing Raymond Burr committing actual murder, except in silhouette, in *Rear Window*. Using this "Hitchcock Effect," i.e., of using the *penultimate image* to lead decision makers to "see" what you haven't depicted, leaves the *ultimate image* to their own imagination, and is an artful way of steering them toward participating even more in their own persuasion. By never depicting his final anchor image, Hitchcock took advantage of the *multiple* images people would automatically create on their own on the way to "scaring themselves to death."

Trial attorneys aren't making films but they would do well to consider approaching their delivery from the filmmaker's perspective and add the following tools for effectively incorporating persuasive imagery into their practice.

**Story Boards**

Hitchcock famously had *each* frame of *each* scene he was preparing to film, drawn on 5 by 7 cards *first*. He then tacked them onto a large presentation board in order to visually review and refine the sequence of his story. He wanted to make certain that the imagery he had in mind actually supported the story sequence.

When planning the delivery of legal case stories it is not necessary to provide a correlating image for every fact, every event, or every action in the story, but you do want to consider providing an image for each key topic. That image must be the best you can devise to "speak for itself" about that key topic, whether it is the risks to any person in the plaintiff's position, or the harms attributable to the fault of the defendant. Ask the questions. What image best depicts the cause of the harms? What image can decision makers use to ratchet up their view of the gap between proper actions under the circumstances, and what defendants did instead? When you find that image, keep words to a minimum, using just those you want decision makers to link with the images you provide to form an *anchor* for each key topic in its turn. Being able to *see* the anchored sequence of your story will lead decision makers to construct a common theme among themselves without having to be told directly what that theme is.[10] The sequence with which you deliver these well-crafted anchors during any presentation (in mediation, to the bench, or to

[10] Oliver, *Facts*, ibid. Also presented in detail in Vol. 2, *The Persuasion Edge for Legal Communication*, "*Sensory, Systems and the Story*."

jurors) will guide your decision makers toward a common theme as they move through your sequence in their mind's eye.

**Indirect Suggestion**

Indirect suggestion encourages us to inject images of our own at crucial points of any story. During a presentation, this is accomplished by leaving out pieces of direct information, and, more important, indirect suggestion encourages decision makers to create more than one image in their mind's eye to plug into a story. For example, when you overwhelm a focus group with a half-hour opening filled with direct descriptions of multiple facts, details and excerpts from testimony, participants will tend to pick just a small portion of it to focus on, and also react to when questioned about the story overall. Instead, if you deliver a very brief opening (though still covering your whole story sequence) that emphasizes the visual anchors rather than a dissertation on dozens of facts in evidence, focus group participants are given far more room in which to build their own stories about your case. And when questioned, they are much freer to reveal how far and wide their imaginations can take your story. Avoid telling them everything *you want to hear them say*, and you'll be giving them enough room to reveal the clues to how what *they see* actually looks to them.

For most trial attorneys, presenting more indirectly than directly can be a very challenging skill to even think about trying to develop. They have spent their professional lives epitomizing what it means to be direct and explicit, both through the language of law and the delivery of evidence and testimony. In the trial attorney's world view, generalities or a generic delivery of a client's case story is a cardinal sin. Yet, for a decision maker actually present for the early parts of your injured client's story, a generic (read: *indirect*) description of the risks at hand and the rules put in place to keep us safe from those risks, invites them to inject *their own* life experiences, ideas and beliefs (along with the images they've attached to them) into your client's case story as you deliver it. A delivery which descends rapidly into "detail spin" can never, and never will, produce the same invitation.[11]

An opening statement about the risks present under circumstances that *anyone like the plaintiff* could have encountered, and the rules justified by those risks, leaves more room for decision makers to jump into the story with their own mind's eye, and strongly relate the images to themselves, close friends or loved ones. This creates a much stronger story than one which is specifically and precisely tied *only* to your client. Since all legal decisions have an emotional basis, delivering your case story in a way more likely to steer decision makers toward that territory can prove to be quite valuable.

[11] Oliver, Facts, ch. 7

**Central Image**

In my second book written for trial attorneys, *Facts Can't Speak for Themselves,*[12] I describe several key elements that make up a persuasive case story. One of them I call the "Central Image," i.e., the fact-based image that most supports the theme and the answer to the question: "What *is* this case really all about?" It may sound a bit challenging to find just one image to encapsulate "the whole thing," so let's go back to Hitchcock for some guidance. If the general theme of *Psycho* can be stated as "jealousy, shame and attraction," what image did Hitchcock use to invite viewers to create a mental anchor for that theme? The foreboding house way up on the hill, with a lighted window at the top that represents Bates' never-seen mother. What is the theme of *Vertigo*? That's an easy one. "losing control" and the central image is, of course, Jimmy Stewart spinning his way down the hypnotic maelstrom, but never landing. What's the theme of *Gone with the Wind?* Probably "loss," and what image in the film is central to that? Some say the burning of Atlanta; others say Tara in shambles and Scarlett working in the fields. What's the theme of *Star Wars*? And what image in the film most supports that theme? You see how the game is played. Because of the power mental images wield over decision makers' story (re)building process, the central image plays a much more persuasive role than just the theme phrase to which you want it to be linked.

Story boards, indirect suggestion and a central image all have some things in common. They focus on the receiver of the message, not the sender. They reward an open-ended delivery instead of a closed off approach. And, most important, they reinforce respect for the story as an internal (re) construction project by the receiver at the *invitation,* not the *dictation*, of the messenger. Although images get their persuasive strength from "the inside out," any attorney who delivers a story while respecting this view of decision making can encourage imagery from "the outside in."

For example, when seeking to accurately describe the effects of a brain injury, don't all expert witnesses demonstrate this "inside out" way of thinking? What do they immediately reach for to depict the effects of an injury to the brain? Do they settle for stating the exact details of interrupted or hyperactive neuronal activity as measured by a machine? Or, do they reach for analogies and metaphors that are part of the human narrative, i.e., "it's like walking through Jell-O." A baby whose distress increases as it loses its vital reserves because its delivery has been put off too long, is said to be "like a swimmer who, continuously surfacing for air, is pushed back under water before being able to get a full breath every time." In our heads, imagery rules story building.

[12] Oliver, *Facts* ibid pp228, 323

In my summer, 2010 newsletter,[13] I advised determining an operating metaphor (or two) suggested by the context of your client's case story. I detailed a list of seven metaphors from which to choose: *balance*, *connection*, *container*, *control*, *journey*, *resources* and *transformation.* Research specifically shows that because these seven metaphors are tied directly to human narrative, they fit strongly into our internal decision making process. Try to read any one of those phrases without becoming conscious of the mental imagery of the human condition that any one of them evoke. Imagine then, if you are conscious of only a few, just how many other images are being constructed behind the scenes simultaneously by your other-than-conscious brain. In the interest of aligning the persuasive language you use with the variety of mental images you want to invite decision makers to associate with your client's case story, settling on which metaphor(s) are most evocative of the basic human aspects of your story can help enormously. How so? By reminding you to keep a consistent verbal delivery going in order to maximize your results; by guiding your selection of certain adjectives and other modifiers over others that don't serve to extend the selected metaphor(s); and certainly by steering you in the direction of preferred images among the images in your own mental cache with which to (in turn) influence the mental imagery of decision makers. As long as you are looking at various versions of *containers* and things or people being contained, you will be less likely to slip into inviting imagery about a *journey*.

Under the heading of *look* before you *listen*, try discerning what images are most likely behind what decision makers are telling you during focus groups, depositions, rulings on motions, Voir Dire and during almost every conversation you have in a typical day. Get in the habit of asking yourself, "What would they have to be *seeing* in order to *talk* about it that way?" For example, in a focus group about nursing home abuse, what mental images do you think elicited the following (directly quoted) comments about a very elderly victim of sexual assault by a fellow very elderly resident?

"If she's that near death, how much suffering could she really do?"

"How can it be the administrator's fault when he wasn't even there?"

Another example is provided by a case story about a refusal to provide proper safety measures for ironworkers on a construction site—what images could be driving comments like the following from focus group participants and venire members?

"If that were me I'd never take a single step unless I was tied off."

"I just could never see myself doing that kind of work; they know how dangerous the job is."

"As a rock climber who has never been injured, I can tell you how you need to be responsible for your own safety, and always get equipment that provides double redundancy on safety."

---

[13] Oliver, Eric "Brain Friendly Case Stories Part 1" *News From the Mental Edge*, MetaSystems, Ltd. Summer 2010, Zaltman, Gerald and Lindsay *Marketing Metaphoria: What Deep Metaphors Reveal about the Minds of Consumers,* Harvard Business Books, 2008

The last comment came from a man who became the foreperson on the jury that decided in favor of a catastrophically injured iron worker who had stepped out onto a girder with no safety tie off. Note that there are two operative images at work in the rock climber's statement: the uninjured *responsible* climber and the *doubly redundant* safety equipment he "gets." What's the key difference between these two crucial images? The picture of the rock climber *using* the safety equipment is most likely seen as climbing and handling safety *by himself*. But, the image evoked by the rock climber *getting* the "doubly redundant" safety equipment suggests he must get it *from someone else.* Despite his earlier remarks about relying on personal responsibility, can you see how I thought the rock climber was uniquely positioned to advocate among his fellow jurors for someone else *getting* safety equipment to the "vulnerable party" (the rock climber *seen* in his life, the plaintiff *seen* in his life) and to help deliver a higher value verdict for the worker who was injured by the defendant's purposeful withholding of safety equipment? The imagery already in the rock climber's mind's eye fit our theme of equipment being withheld, perfectly.

**Framing Pictures in Our Heads**

The second way to help manage decision makers' mental imagery deals less with images you physically produce and point at than those you *suggest* your decision makers produce for themselves. This process of suggestion is also called *framing* the story. A frame is the construct by which our minds know where to look for the personal images we have stored other-than-consciously. Inside the frame is a collection of related experiences united by their commonality. Each of the seven operating metaphors *frames* stored experiences and images related to it. Often referred to as a *frame of reference* it determines much of the meaning we give to an event, thought or action. Subjective meaning assigned to a case story by a decision maker always comes from these collected frames of reference. Your delivery still will invite decision makers to react to images, but it will be to *their own* imagery as evoked by the framing of your case story linked to the demonstrative visuals you use.

Here is a more literal interpretation of this mental process. If you think of an anchor (again, an image plus a phrase or word) as a *nail*, then the image the nail holds up on your mental "wall" is a *frame*. Thus, an *anchor effect* is established, reinforced, and then triggered by the cue a certain image and linked phrase provide. Stop and think again for a minute of the image of the mother having to say "no" to her little girl reaching for her with outstretched arms. Then, think of an image that depicts the enormous number of suffering hours for mother and daughter and *multiply* that by the *per hour* expert witness fee. The image and numbers are reinforced by the attorney's delivery, becoming the cue for an *anchored effect*. But the actual effect – the perceived *value* of all those stolen hugs – comes from an emotional response in each decision maker that is never seen or spoken of consciously, at all.

One example in plaintiff personal injury work uses a frame we all have individual references for: *safety*; at work, at home or at play. A defendant seen wrongfully and needlessly depriving an individual of the personal safety they have every right to expect under the circumstances can be seen as acting quite badly indeed. This may explain the push among members of the defense bar to file pretrial motions asking judges to disallow plaintiff lawyers from using the phrase *safety* against their defendant clients. The image of a defendant doctor depriving a patient of the *accepted standard of care* doesn't create the same sense of urgency as an image that shows that same professional *taking away* a patient's *health and safety* by violating that standard.

Suggestive frames also can be employed along with your demonstrative visuals to increase the effectiveness of both. The following is a fine example of this approach. In a recent trial,[14] Chicago plaintiff attorney Brad Cosgrove presented a case in which a defendant doctor was negligent when it came to recognizing his patient's appendicitis. This kind of case is usually referred to by the anchor phrase, *failure to diagnose*, an unfortunate phrase that suggests rather weak imagery. The subjective frame of reference often associated with "failed to" is *human error*. Among students of legal decisions, that frame also is referred to as "stuff just happens," and almost always compels decision makers to render a defense verdict. The passive language (similar to the traffic wreck version *failure to yield*) tends to steer the mind's eye toward an image of a "blameless" sin of omission.

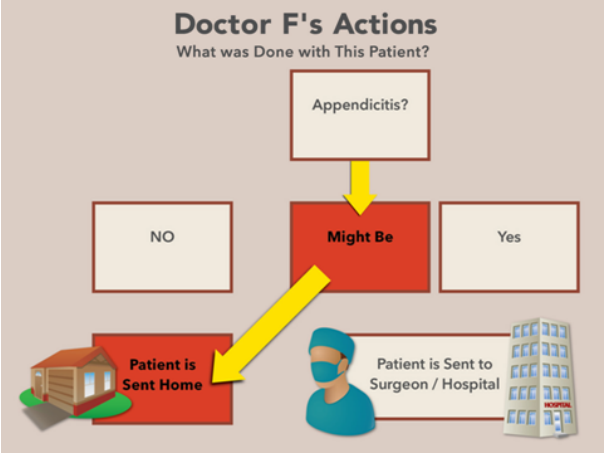
Here's what Cosgrove did to avoid that trap in the framing of his case story delivery: "Rather than say this was a *failure to diagnose* appendicitis case, I got the doctor to admit [in deposition] that he was *thinking* appendicitis. Then it [became] a case about *correct* thinking but *wrong* actions. He *thinks* appendicitis but *does not act* like it is appendicitis." Although, at first glance, this tack appears to be giving the doctor some benefit of the doubt—after all, he correctly was thinking appendicitis —a closer look reveals that framing the danger, or risk portion, of the story as *correct thinking* about the possibility of appendicitis but then, *not acting*, i.e., doing nothing about it, invites decision makers to construct for themselves one of the most potent frames there is for a defendant's choices: *knowing wrongdoing*. The medical professional is seen as admitting he knows better than to do as he did.

One frame, and its attendant mental imagery, essential to help decision makers see the widest gap possible between what *should have* happened, and what *was done* instead, is what I call the *right way* frame. In the domain of expert witnesses the *right way* frame can be introduced as the answer to the question, "Under these circumstances what would it have looked like if everything were done right according to the rules?" In this case of *knowing wrongdoing*, Cosgrove used demonstrative visuals to help jurors see the gap between the *right* way and the *wrong* way. Whenever delivering *right way* procedures,

[14] The case was Stawarz versus Central Chicago Medical Clinic

standards or precautions, always play it out to the "happy ending" where protection, health or safety are achieved for persons facing risks common to the circumstances of the plaintiff.

The demonstrative visuals Mr. Cosgrove produced at trial to help jurors condition themselves to see *knowing wrongdoing* by a doctor are simplicity itself:


Each decision tree slide looks deceptively obvious, but in fact, because they are a comparative pair, careful thought was taken to make certain that images not beneficial to the plaintiff's story were not inadvertently introduced into the minds of decision makers. An earlier draft of the *right way* slide on the left had the "home" box placed in the upper left corner, instead of the lower left. Because English is read from top to bottom and left to right, the former layout ran a needless risk of inviting decision makers to other-than-consciously validate the *wrong* choice *just because* of where it is positioned on the chart. Also, the "embodied" thread which places important items higher up, could exacerbate that risk. Sequence is important too. The last thing to be read and retained will be the bottom right corner, so the safest destination for both boards is the bottom right corner.[15]

Cosgrove's demonstratives also show that *color*, and all the meanings we associate with a particular color (or colors), counts a lot. The original *wrong way* slide had some boxes filled in with the same green color used in all the *right way* boxes. Red, because of the negative and/or dangerous signal it indicates in the basic human narrative, obviously was the better choice for a persuasive color for the *wrong way* box outlines and interiors. Additionally, making the arrows depicting the choices available in each decision tree different colors—and specifically very vibrant colors, i.e. bright yellow for the *wrong* way, green for the *right* way—not only helps decision makers sort the right way from the wrong ways

[15] There is a third basic function of our perceptual habits that make the "down and to the right" visual position so strong. For those aware of the sensory "semaphore" revealed by eye movements isolated and taught by the founders of the Neurolinguistic Programming communication model, will note that is the spot our eyes drop down to when we are primarily experiencing *feelings*.

being presented to them, but also helps that much more to emphasize in their mind's eye, the defendant's fault of *knowingly* choosing to create injury where none ever need be in the first place.

Ultimately though, the indisputable power of these visual demonstratives lies in the other-than-conscious imagery we connect with the alternative choice diagrams. Without those images bringing up frames of reference and meaning, there is no real human narrative with which the decision maker can identify.

This type of *framing,* linked with demonstratives, can go a long way in producing a strong plaintiff case story delivery that even a three year old can grasp. I know this for a fact because Cosgrove sent me a video of *his* three year old daughter pointing at the home and hospital images on the charts and chiding "that doctor" for sending the patient "home" instead of where he needed to be: "in the hospital." By framing the *risk* and *right way* parts of this medical neglect story as *knowing wrong doing* instead of a *failure to diagnose*, Cosgrove was able to invite decision makers to (re)build their own stories on a much firmer emotional basis. Because all legal decisions have an emotional basis, managing decision makers' perceptions—especially through imagery that steers people towards emotional reactions— is time and effort invested very well.

Another example that often proves challenging to present in ways that maximize damage values in decision makers' heads is from a type of medical neglect case in which harms include a *loss of a chance to survive*, delivered as a percentage of likely outcome. In case stories that include this kind of future damage factor there are at least two frames already in a decision maker's mind that are likely to undermine the potential for damages values being perceived as higher than lower. The first could be called the *hopeful* or *optimistic* outlook. And, the second could be identified as the legal decision maker's version of *attribution error*, i.e., the *"*that's not me*"* lever.

The first reflects the decision maker who is prone to "look at the bright side" of things and who has "faith that things have a way of always working out for the best." These decision makers can have difficulty aligning with pessimistic predictions such as a lower percentage chance of survival, choosing instead (by habit) to reduce the damage imagery in their mind's eye by "hoping for the best" in their heart. So, what does this kind of decision maker need to see to counter their naturally optimistic framing? And, how is the best way to invite them to see it? By inviting them to *see* the most optimistic outcome as already existing, then completely *erasing* that optimistic frame of reference by replacing it with a strong image that depicts the *neglect* of the defendants. If the image of at least an 85% or 90% chance of a healthy and safe life for the patient in the future is sequenced early in the story and clearly delivered — well ahead of introducing the much reduced chances of such a life post-bad acts—then when the time comes to form a leaning, decision makers are less likely to need to see it as a hopeful outcome for the patient. The *chance* for "things to work out for the best" was present, but then *removed*. Because the

optimistic and hopeful imagery was what they were presented with first, their mind's eye can actually *see* it as being *in the past,* and thus, when the post-bad acts imagery is presented to them later, the other-than-conscious frame of reference for the imagery—a strong sense of *loss*—will likely override any natural optimism. This is a kind of framing that many trial attorneys know as *loss framing*. [16]

*Loss framing,* as contrasted with *gain framing,* focuses on depicting what the injured party, unless justly compensated, stands to lose, not what they *need* to gain. In a loss of the *chance to survive and thrive* case story, this means depicting the loss not in terms of the chance of survival and future well being, but rather in terms of the much more likely chance of *death and no future well being*. The *chance* for survival and well being must be framed so that it is seen as being removed or taken away by the actions of the defendant. When it comes to valuing damages, showing the *optimistic* person their "preferred" image placed in the past, i.e., *pre-bad acts*, then taking away that image and replacing it with an image of a *pessimistic* outcome—a needlessly increased chance of death—can invite even the most hopeful person see the less hopeful story in a more significant light.

The *"*that's not me*"* frame of mind can also distract a decision maker from perceiving higher damage values in increased *chance of early death* case stories. The reaction plaintiff attorneys need to learn to recognize (and counter) when presenting a patient's chances of dying in the future as needlessly increased, is the decision maker's own perception of self-preservation. Decision makers come to venues with perceptions of themselves and their loved ones already distanced, if not disconnected, from their perceptions of the injured plaintiff's story. They literally take themselves and those they know and/or love "out of the picture." So, what does a decision maker need to see to join the human race? And how is the best way to invite them to engage with the plaintiff and their story? They need to see two things: "an image" of themselves (or someone *like* themselves) alongside the defendant(s) in the case.

The way to handle the troublesome attribution frame[17] (making it work for, instead of against, your client) is to shift the focus off the *someone* from whom one wants to distance themselves, to the *something* that shows how *different* that person's situation is from "me and mine." The following is an example of where the danger of the former lies for trial attorneys presenting the damages part of an *increased chance of death* case story. Whether framed as a gain: *he still has a 40% chance of living a full life,* or a loss: *he has a 6 in 10 chance of dying long before his time,* do you recognize the problem of perception the images those phrases evoke?

There is only one person in the picture—the plaintiff.

To help the decision maker disinclined to perceive a greater percentage chance of dying early as a damage equal to high compensatory value, the images you want to evoke need to include a large number

[16] Wenner, David and Cusimano, Greg "Motivating Jurors" *TRIAL* March 2008 Vol. 44, #3.
[17] In some plaintiff circles this frame is referred to as "Defensive attribution."

of generic patients, never just this *one* patient. And likewise, include more patients with similar stories of having been directly acted upon by people just like the defendants. For example, what image comes to mind with these words: *"patients who have this taken from them/get this done to them, all are forced to face the same numbers—a 60% greater chance of death within 5 years"*?

Now the patient is no longer alone on the decision makers's mental screen. Next, bring the defendants into the mix: "*those, you will learn, are the same numbers the defendant doctors imposed on their patient's future – 60% greater chance of early death—when no greater chance at all needed to be hung over anyone's head."* An entire "population" of patients has been introduced now as being acted on by the defendant doctors (or others like these unreasonable doctors), summarily negating the focus on our solitary plaintiff. Now, the invited frame of reference has a broad context outside just some individual identified as "the complaining party." Fewer differences in the imagery presented to decision makers can mean less *distancing* and more *identifying* with the plaintiff's *circumstances*, thereby avoiding the dangers of unintentionally inviting decision makers to *negatively* contrast their own experiences with those of the plaintiff. This is similar to the unjustified assumption many attorneys make: that finding jurors with similar life situations as their clients will lead to greater identification with their client.

The American Association for Justice has suggested for years that the defendant should be in the foreground of the picture when a case for an injured plaintiff is delivered.[18] Their baseline suggestion for trial attorneys to structure a more persuasive presentation of their client's case is to deliver a story that focuses more on the defendant's *bad acts* than on the person their *bad acts injured*. Their prescription, (and I don't disagree) is to tell the plaintiff 's story from the defendant's perspective.

In a breach of contract case filed by a large retailer against a large credit card company, the retailer accused the credit card company of backing out of a five-year deal promoting the use of a store branded credit card to the retailer's customer base. Listening "between the lines" to focus group members reveals that they consistently use an "if/then" construct to frame their views: *"If you can show me the retailer did all they needed to do to fulfill their end of the bargain, then I can see where the card company might very well be at fault."* This stronger story construct led to a delivery at trial that presented the two parties as equal participants in the contract. The need to be able to rely on the other side to fulfill the deal became a *mutual risk* for both parties, and the loss of the *mutual gain* for both parties is what the credit card company's bad acts were perceived to have caused. The frame of reference inviting decision makers' mental imagery actually was more about needing to rely on a partner in an endeavor than it was about strict claim language that addressed only contract breaches.

In the same way that attorney Brad Cosgrove supported the framing of his case story with demonstratives, this commercial case was introduced with the support of a demonstrative titled "Mutual

[18] Wenner and Cusimano, ibid, also see the AAJ Program "Overcoming Juror Bias"

Risks for Mutual Reward." Two silhouetted figures (each sporting their company logo) are shown shaking hands over a deal wherein large amounts of money (shown in bags behind one of the figures) and access to tens of thousands of customers' data (shown as a crowd being "released" from behind a gated wall) are exchanged. In the focus group, the participants' response to the demonstrative told the attorneys exactly what decision makers needed to *see* to help them build stories in their mind's eye that favored the plaintiff retailer. Though "reliance" wasn't a specific claim in the legal filings, it was a crucial element in the "mutual risk" narrative decision makers were invited to see. To see "reliance" in the mind's eye, not only must both parties be in the picture, but they also must be depicted equally in terms of their capacity *to act* in reliable ways. Hence, the "handshake" image.

**Reframing Mental Images**

But, how do you go about suggesting the proper caliber of image for all decision makers to associate with while (re)constructing their own stories about your client's story, when each decision maker's sensory needs are different?

Most plaintiff injury cases center either on *prevention* themes or on *protection* themes. So, what would a mental picture of *preventative* actions and choices look like? How would those images differ from a mental picture accompanying *protective* actions and choices? How do you go about suggesting the proper caliber of image for *all* decision makers to use to construct their stories, when each decision maker's needs are very different?

The meanings of each of these *theme anchors* don't seem to be all that different, but when visualized, their meanings are almost completely opposite. *Prevention* happens before events, often quite a long time before. *Protection* happens at the scene of an event. *Prevention* has a broad reach not just in terms of time, but also in terms of people, numbers and actions. *Protection* is more often seen in terms of a single action involving a limited number of individuals in a limited arena and time frame. Recall the seven operating metaphors introduced earlier in this article; the *container* metaphor lends itself more to a narrative about *protection*, while the *control* metaphor tends to align more with a narrative about *prevention*.

What happens to decision makers when the defendant produces a very powerful image that strongly frames parts of their story? What is the best way to get decision makers to mentally "edit" the defendant's images to align more with your client's case story? What if decision makers see something you'd rather they not see, or worse, see it in their mind's eye? And, yelling, "Close your eyes, Turn your heads!" is completely ineffective—it only makes them want to look more and/or remember more of what they've already seen.

Consider the case of the college professor and his wife, just months from retirement, driving to work one absolutely clear weekday morning on their motorcycle in the right lane of a divided, four lane highway. Up ahead, to their right, is a freeway entrance ramp; on their left, directly across from the entrance ramp is a break in the median island with a left turn lane allowing traffic coming toward the couple from the opposite direction to cross the two lanes (the couple was in the far right of these two) to get to the entrance ramp. On this morning, the oncoming traffic about to cross in front of the couple to enter the freeway (via the entrance ramp) is an 18 wheel diesel truck.

Knowing this is a plaintiff's lawsuit, many of you are expecting to read that the truck did not yield to oncoming traffic. But, at that point in its turn toward the entrance ramp, the truck was already perpendicularly across both oncoming traffic lanes, blocking both completely.The couple on the motorcycle ended up crashing into the rear wheels of the truck's cab, a full 28 feet behind the cab's front bumper.

The trucking company's lawyers hired a very creative expert who, without the aid of a specific claim of *obscured vision by the truck driver* (though the driver did say he did not see the bike before it hit him), offered the decision makers a "moving picture" of just how obscured a driver's view could be at that location. Before trial, he had gone to the site, placed a step ladder in the left turn lane closest to the island, and climbed to the height of the truck driver's seat. From that perspective, he took pictures and, later on, shot video. Then, he had the video enhanced with computer graphic images "depicting" what the driver *could see,* and what he *could not see* that clear weekday morning.

The defendant expert's theory, supported at trial by the doctored video, showed how it was *fate* that managed to perfectly align the relative positions of the motorcycle and truck as they moved toward each other that day. How so? A simple traffic sign between them. A metal pole with a rectangular black and white sign attached at the top labeled with a graphic indicating "divided highway; keep right." The expert claimed that as the motorcycle drove towards the truck, and as the truck moved into the turn lane toward the break in the island, "the angles created just happened to work out perfectly" so that the truck driver could never have seen the motorcycle. In the truck driver's line of vision, the motorcycle was always hidden behind the black and white sign because it just "happened" to always be in a spot relative to the truck that put the sign just exactly between them no matter where the truck driver was when he looked up. And, of course, the motorcycle driver couldn't possibly miss the sight of a huge truck up ahead in the left turn lane, because such a little sign couldn't possibly block the view of something so large.

A fact introduced by the defendant in the case was that no brake light was seen by any of the drivers behind the motorcycle and, there were no skid marks left by the motorcycle. Either the turning truck blocked the motorcyclist's path so quickly that there was no time at all for him to react, or he saw the truck in time to let off the gas with his hand (as his wife testified) but not in time to begin applying the

brakes with his foot and hands. What would decision makers have to be invited to see (and how best to invite them to see it) to reframe the effects of the expert's speculative video, the fact of the missing skid marks and the supposed impossibility of missing the oncoming truck?

In focus group research, it was discovered that using the term "intersection" was extremely damaging to the plaintiff's position in the mind's of the participants. People tend to see traffic signals in their mind's eye when that term is used, *even if* they are shown a graphic *without* them. Every time an attorney used "intersection," in the minds of the decision makers the responsibility of the motorcyclist was just as if he ignored the traffic lights altogether.

Demonstrative visuals were produced at trial to suggest four things to jurors. The plaintiff attorneys also framed the relevant parts of the story[19] to invite jurors to use their own frames of reference when looking at the visuals.

Image 1—shows the truck's position at the moment before it turned its wheels to travel across the two lanes of oncoming traffic to the entrance ramp. It appeared in the visual as it apparently did to the oncoming traffic that morning, as if it were stopped and waiting for traffic to clear. Regular travelers of this road, like the plaintiff (as well as every member of every jury pool in the country) have seen trucks, cars minivans and motorcycles stop at that same (or similar) spot directly and wait for oncoming traffic to clear so they can safely go forward across the two lanes.

Image 2—shows the truck's position as perpendicular to, and fully blocking, both lanes of oncoming traffic.

Image 3—uses the same blocking image but highlights the absence of the truck's left turn signal while in the turn lane.

Image 4— uses the same blocking image again, this time with a large red label stamped over the entire chart that says, "Under 1.5 seconds," i.e., the time it took the truck to completely block both lanes (as admitted under oath by the driver).

The images were designed to work as "out takes" against the speculative defense video. (Hint: still images last; decision makers can review them multiple times in order to fully absorb them.) They support, and were likewise supported by, the *framing* of this critical part of the plaintiff's story by his attorneys— that the truck driver, knowing his vehicle posed the far greater risk to any oncoming vehicle, also knew he needed to use caution *equal to the potential hazard* he posed for other drivers and their passengers. He also knew he should have stopped and let traffic clear *before* he made his turn for the entrance ramp directly in front of oncoming traffic (*without* activating his truck's turn signal) and blocked *both* lanes.

[19] The case was Edwards versus Service Partners, LLC, tried in Ogle County, IL by attorneys Joe Power and Todd Smith

In fact, he admitted under oath that once he started to turn at the speed he was going at the time, he would be fully blocking both traffic lanes in "under one and a half seconds." Defense experts had to agree. He also knew, even if he could not see the motorcycle when he was that close to the intersection, that as a responsible truck driver it was his job to be certain he didn't suddenly block the road, eliminating both time and room for anyone to react and safely stop even if they could. His defense experts had to agree again.

Proper story sequencing is simply a matter of arranging your frames in the most *persuasive* order possible[20] and delivering them *in that order*, consistently from start to finish, in negotiation, in mediation, at trial in Voir Dire and in opening, to jurors or at the bench. Productively managing the sequence of frames requires a plan to manage the visual perceptions you want your *anchors*, and your chosen *frames of reference* to bring up, one after the other, in decision makers' minds. The way to best achieve that goal is not to worry about what you as an attorney are going to say, but rather what a decision maker is going to *see* because of what you say and, even more, because of *how* you say it.

**Visual Etiquette**

Decision makers often frame demonstratives by the other-than-conscious expectations in their minds. Just like the expectation of what's seen higher up or lower down, and how it is valued, or what associations have already been made between certain colors and images, the ubiquitous "timeline" many attorneys feel naked without also can be subject to some *preframing* by decision makers. Although the case story dictates how broad of a scope decision makers need to see depicted by the timeline, be certain the orientation of the timeline doesn't undercut the perception you want to invite. A chronology presented vertically tends to shrink the impression of how long the time is that is being covered, even when the timeline spans several years. Conversely, a chronology presented horizontally expands the sense of time covered, even if it spans just *one* day.

What the decision maker needs to see at each key point, and how best to get them to see it, is frequently more about delivering a "big picture," than about delivering a series of "telling" details. And, any "big picture" includes the effort attorneys make to meet decision makers' expectations in a way that respects *how* the presentation will be seen, not just what words will be heard. Like choosing between vertical or horizontal timelines to meet decision makers' expectations in a way that invites them see, (re)build and remember your client's story in the most productive way, is often just a matter of respecting decision makers' habits, expectations and perceptions.

Whether legal, scientific or medical, most professional "terms of art" do not come with a prescribed set of images for lay people. And, unless you invite more productive imagery to pop into their

[20] Oliver, *Persuasion Edge*, Ibid

heads, it won't be long before counter productive imagery will be linked to those terms, creating an unwanted *anchor*. For example, David Ball recommends a simple, yet extremely powerful, visual anchor for plaintiff attorneys to use when introducing and reinforcing the terms *preponderance*, *greater weight*, and *more likely true*. He suggests, with your hands at chest height, depict a tiny scale balanced at first with hands even, then tipped very slightly one way to demonstrate the *greater weight* of evidence at work. At the start of trial, this scale is juxtaposed with another move with just one of your hands—a huge sweep far above your head—to represent the *beyond all reasonable doubt* criminal standard. Used with key phrases in Voir Dire, opening and with witnesses, I've seen this kind of anchor (word *plus* image) repeatedly work for jurors who otherwise would have been said to have misunderstood the meaning of *preponderance*. Proper invitations steer decision makers away from needless misunderstandings.

However, how an attorney chooses to perform David Ball's tipping v. big tipping with an imaginary scale, will make it either harder or easier to see, and retain, the intended message. If the hands aren't kept close together at chest height, slightly lowering and raising the same hand consistently each time, the message can get muddied. If an attorney's hands are fully outstretched, moving from the shoulder instead of closely pulled in, decision makers may perceive the opposite of the intended message about how much weight is involved in judging the *greater weight* of the evidence. A larger scale means lots more weight needed to tip it, and is the exact opposite of the image a plaintiff wants linked to the phrase *preponderance*.

Some of the care in framing topics, presenting demonstrative visuals, and inviting decision makers' mental imagery in all the ways described here is simply common sense. If you are using digital media devices (video and PowerPoint projectors, computer or DVD video recordings), or just the old standby, an easel, make sure you have practiced with it and tested it the day of the presentation, so you can act professionally and consistently during your delivery. Interrupting your invitation to decision makers to see things your client's way with fumbling, searching, or the dreaded restarting, is not at all helpful. Often, a careless delivery invites a major problem. In closing argument on damages in a case where the movement of the plaintiff attorney's hands literally retracted everything his mouth was saying resulted in a lower than expected value by jurors for the client's harms.

The attorney was using a technique designed to raise the importance of non economic harms over the hard numbers of economic losses. Often referred to as the "Zero Line" argument, an attorney shows a slide, a chart or a page that has a horizontal line drawn across the middle, with a big zero and dollar sign on the left:

**$0**_____

The categories of past economic damages with dollar values are listed under the line and dispensed with succinctly by the attorney; everything *below the line* is invited to be framed as less important by linking deliberations on those items with the attorney pantomiming with a handheld calculator while saying:

> "These numbers all are known, ladies and gentlemen. There are medical bills, tax returns, paycheck stubs and the like to show them. We don't really need jurors to just add these proven losses up; a little calculator from Wal Mart will do. All these damages do is get the plaintiff back to Zero by filling the hole of all the money that has been lost or needed to be paid out. That merely brings this family back to Zero; the point just before the defendants' actions caused all the harms. What we need jurors for—and we rely on jurors alone to do—is to set a full monetary value on each of the harms that negligence caused that are *above the line*."

Then, the attorney fills in the names of the appropriate damage categories (future costs, pain, suffering, loss of life's enjoyment, loss of relationship, etc.) one at a time *above the line*, making his argument about each in turn.

The visual depiction of categories *above the line* and *below the line* is very important here. And, that's when the attorney referenced earlier let his hands "take back" what he said. You see, as he argued more globally about the value of the harms caused as proven in evidence, filling in each category, he wasn't paying attention to a particular habit he has when he talks. He begins a point with both hands off to his left side at about chest height, and as he talks through a sentence or two, his hands move across his body to the right side in rhythm with his speech. This repetitive habit in his delivery demeanor very likely cost him and his client in this case.

How so?

By focusing jurors' attention on the damage categories as he argued about them, he inadvertently led everyone's eyes back and forth on a *horizontal* plane, not a *vertical* one. The image he was actually inviting, despite the orientation of the chart itself, was of a chart with no top or bottom. Because everything he laid out by the movement of his hands was in a straight line, with nothing *above* and nothing *below*, all was perceived as *equal*. Instead of inviting decision makers to *lower* the importance of hard numbers and *raise* the value of what are often called "human harms," the delivery very likely flattened out those distinctions in jurors' minds. This appears to be the most likely explanation for the disappointing numbers produced in deliberation.

**Showing Instead of Telling**

In addition to *demonstrative visuals* and *framing*, the third way to invite decision makers' mental images to be used in valuable ways is to learn to adopt a *congruent visual delivery*. As in the examples

just referenced, this has to do with the predominant demonstrative visual in any room where legal decisions are being made: the attorney.

*How* an attorney delivers the invitation to decision makers to see things their client's way is often the most important factor in a successful outcome. Because vision, memory and decision making are all *other-than-conscious* (re)construction projects in each person's mind, and because images are such a big part of decision makers' (re)construction process, attorneys interested in maximizing their own influence find the straightest line between their presentations and the *other-than-conscious* imagery in decision makers' minds.

The first set of images attorneys will want to address are called *mirror images*. The research has long confirmed that *rapport*—the connection with another person that opens the door to influence and persuasion—is a functional result of mirroring behavior between people.[21] When a decision maker looks at an attorney and a part of their mind sees/perceives a head tilt, leaning, posture, movement, arrangement of limbs or facial features similar to their own, *mirror neurons* fire off in their head. While the research is ongoing, there is already a large consensus that this neurological reaction outside conscious awareness is strongly linked to sympathetic, altruistic and even empathetic responses between humans. In other words, *rapport*. If you show people you are attending to them in this way, the connections you can make pave the way for much more effective persuasion, including invitations to use mental images that are the most helpful to your client's case story.

Once *rapport* is established, you still have to "deliver the goods," i.e., the compelling images either prompted in the decision maker's mind's eye by persuasive story framing, or by demonstrative visuals, or by both working in concert. It is often the delivery itself that will best determine the attorney's success. However, there is a right way and a wrong way to delivering a point in a visual fashion.

British poet G.K. Chesterton (1874-1936) once said, "Art, like morality, consists of drawing a line somewhere," and if an attorney is looking for a place to start practicing drawing that line—a straight one, of course—it would be with how to *express* visual perceptions. Some attorneys are familiar with communicating visual meaning through something called a "behavioral package;" just like the means of establishing rapport through mirroring behavior, these expressions rely mainly on *how* you say things *before* you actually say them.

As referenced earlier, there are three sensory systems with which the mind constructs meaning: visual, auditory and kinesthetic (feeling). But, these are not only the means by which the sensory stuff of human stories is processed; they are also the means by which our inner perceptual world is *expressed*.

---

[21] Oliver, Eric *The Persuasion Edge: Mirroring and Rapport* DVD Program available through TrialGuides.com, also Iacoboni, Marco *Mirroring People: The New Science of How We Connect with Others*, Picador Books, New York, NY 2008

And, to return to the "straight line" analogy, if you want any decision maker to see what you are saying, you need to show it to them in a purely visual way.

The quality of your "show" will "tell" in their responses.

Let's start with the following words: "the kind of language that suggests imagery." Remember that you want to make the effort to influence a decision maker's *personal* narrative and you can't do that with a stack of facts and law. For example, in the truck and motorcycle story, a description such as, "It's a clear week day morning" is more effective than, "The evidence will show that visibility was unlimited for all drivers that morning." Using language of colors, shapes, sizes, visible textures, perspectives, distances and vistas suggests scenes and situations visually; then, people, faces, positions, objects and actions "flesh out" the scene in their embodied stories. The more consistently the visual description is delivered, the better; avoid slipping into talking *about* a discussion, or *about* how cold it is until the "big picture" is clearly drawn.

The three basic components in our behavioral repertoire that have been shown to invite perceptions of sights, sounds or sensations from others are certain language, gestures and eye movements associated with each of the three perceptual systems. They usually are not delivered separately or distinctly, but mixed together, similar to talking about feelings and images at the same time. It takes practice to sort out how to artfully deliver a congruent visual message, but, you will find it is well worth the effort.

Attorneys interested in learning how to a present a visual delivery with the greatest chance of success, should know that it will take a bit of practice to unscramble the signals they are currently using. But, because there are only three things to watch out for: visual phrases, gestures, and visual eye movements, the task is certainly manageable. The basics can be taught in half a day[22]. The rest is increased focus and— practice, practice, practice.

When inviting decision makers to focus on the images you want to suggest they use while building key parts of the case story for themselves, make the effort to use visual terms exclusively and save presenting what was said, read or spoken about, along with the room temperature, the pain inflicted, or the connections among family members, until the picture is fully "painted" with visual terminology. There will almost never be a situation when a focused visual delivery need go on for more than 60 seconds at one time. But, during those 60 second segments, the more clearly visual your delivery is, the more the decision maker's visual systems will be stimulated by and engaged with the mental imagery you are suggesting for them.

The other two behavioral parts of the package are gestures and eye movements associated with a more visual expression. Eye movements that communicate internal visualization are those which move up

[22] I do so with attorney groups in *The Persuasion Edge* trainings. See www.eric-oliver.com.

and to the left or right corners of the eye, or sometimes, just straight up. Sit in a restaurant, airport waiting room, or lecture hall and watch people think as they listen or talk. You'll see a preponderance of these visual eye movements as a part of the self expression of about 25% of the population in that room. Others will use them, but nowhere near as much. That percentage of people in the room, who move their eyes upward three or four times for every time they move them elsewhere (i.e. side to side, or down and to the left or right) are most likely the folks who developed a preference for visual processing by about the age of seven.[23]

Eye movements are the least consciously available behavior, but you can practice becoming more aware of them by seeing them in others and then, purposely matching that movement with your own eyes. As with all practice in mirroring another's behavior, the most likely result will be to enhance your level of *rapport* (and a momentarily awkward feeling on your part that comes with adopting someone else's movements or postures). Mirroring, of any kind, should not go on for more than ten seconds without a break.[24]

The third and final component in the "behavioral package" are gestures that are perceived as being "visually loaded." There are a variety of gestures associated with the expression of imagery. Many take the form you might expect: pointing, turning head and eyes upward, hands at chest height or above, palms mostly turned down, while the hands "describe" or "paint" imagery in the air in front of the speaker. Visual gestures do not consist of touching parts of the body, rhythmic movements of head, arms, hands or legs, crossed arms, hands to the face, in pockets or behind the back. Tapping a pencil is not a visual gesture. Pointing at the power point screen is, especially when the screen is currently blank and the attorney is referencing an image that has already been displayed there. Pointing at the witness stand, while visually describing an upcoming witness who is not sitting there just yet, is also a visual gesture, and begins to invite a mental image of that witness to take shape.

So, the formula for a *congruent visual delivery* is upward eye movements plus visual gestures, accompanied by strictly visual phrases, delivered without being diluted by any stray hints of sounds or feeling during the few seconds it takes to present it to decision makers. *Seeing* what the attorney is suggesting be seen is far more likely to happen when delivered in this way than by just trying to tell someone what to think or see.

Trial consultant, Dr. Sunwolf has devoted a good deal of effort to giving attorneys a much clearer view of juror positions based upon the experiences they have when they serve as jurors. She writes, for

[23] I discovered early on when training trial attorneys that they had an advantage over most others when working on learning about and responding properly to eye movements. Because they have all practiced recognizing "preponderance" when they see it, they have already practiced one skill in the set required to quickly identify an individual's sensory system preference among visual, auditory and kinesthetic because that relies on identifying a preponderance of the eye movements observed at any given time.
[24] Oliver *Mirroring and Rapport* Ibid

instance, of the influence of bailiffs on that experience and how it can affect eventual judgments.[25] She warns about verbal habits, such as referring to those claiming criminal assault as "victims" before the case is decided. Her grasp of the many influences normally overlooked or taken for granted in the juror experience that can actually affect the way they build their versions of a case story is remarkable. If the fact that the way a bailiff simply talks to the panel following a witness' testimony can prove to be a significant factor influencing juror decision making, imagine how much more significant a factor it can be to be able to influence what a decision maker sees in his or her own "mind's eye."

Eyes up. Hands up. Visual terms only. Show *will* tell.

[25] Sunwolf, *Practical Jury Dynamics: From One Juror's Trial Perceptions to the Group's Decision-Making Process* LexisNexis Charlottesville, VA 2004