

News

From The Mental Edge

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The Newsletter of Uncommon Sense

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THE FORENSIC APPLICATIONS OF SOCIAL SCIENCE

by - William A. Barton

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I. INTRODUCTION

Effective jury trial lawyers navigate between the directives of the court's instructions, and the psychological realities of human behavior. The better a trial lawyer functions within this domain, the more we say they possess "common sense." A few attorneys were born with this gift. The rest of us have to run to keep up with them. Fortunately, the instincts these "naturals" apply are well known, studied and understood. They involve the application of principles of human behavior and social psychology. Studying these powerful concepts will improve everyone's courtroom skills. The focus of this paper is on both the ideas behind the psychological "rules" and their practical uses.

Why are the concepts behind the labels so important? Because in order to effectively respond to any problem, it is necessary to correctly analyze it. To mechanically apply rules limits the practitioner to being little more than a technician. A real understanding of the reasons behind the rules enhances creativity and effectiveness. Even more important; the more artistic and creative the practice of law is, the more personally rewarding lawyers will find it to be.

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Publisher's Notes -

Welcome back. This issue contains a couple of pieces, both from first-time contributors, which I've been waiting some time to get into our venerable little letter. The first, from Oregon trial attorney Bill Barton, takes on the subject of juror (and judge) story construction from a practical, forensic perspective, complete with a swipe at the intersection between human minds and jury instructions. The other, by my colleague in the American Society of Trial Consultants, shows in detail what can be done in a large, structured research setting when exploring what may likely happen to pro-plaintiff and pro-defense stories when you mess around a bit with those same instructions. The piece by Sharon Begley, as long time readers will recognize, is added primarily for balance. The theme of stories: elicitation, presentation and construction by the listeners, would not be accurately represented if the nonverbal factor, so closely tied with the other than conscious processes responsible for the bulk of juror story construction. Finally, my additional looks at what we can, and can't know about the details of how people build stories coming to legal judgement, and what trial professionals may want to do about it. Enjoy! - E.O.

Before We Begin

by - Eric Oliver

(Continued from Last Issue)

What a word is truth. Slippery, tricky, unreliable. - B Lillian Hellman

ROOTS OF STORY GROWTH

Since legal decision making starts with stories made up by each party judging any case - in or out of trial - it is no surprise that volumes have been written about how we might all construct those stories we create. Since the bulk of the process works outside anyone's conscious reach, speculation is the rule in these propositions, just as it is in the best of focus groups. Decision making research has developed various models to better appreciate the Conscious-Other than Conscious interplay producing the private versions of any case story. The effort is worthwhile, even though the major target of the quest lies outside the reach of precise measurement, definition or even discussion. We know that the story building process happens, even if we can't be precise about exactly *how*. There are dozens, if not hundreds of models - stories - supposing how we all might be building our personal stories of a matter being judged, negotiated or to be decided in court.

For example, Alex Bavelas reportedly imagines a story-building model composed of four elements: Behaviors, Procedures, Interpretations and Puzzles. He envisions a part of each of our minds approaching a slice of someone's life story as if it were a Puzzle to be solved by observing and appreciating the three factors of: the stuff

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GESTURING AS YOU TALK CAN HELP YOU TAKE A LOAD OFF YOUR MIND

– By Sharon Begley

Excerpt from article appearing in the November 14, 2003, *Wall Street Journal*

Sitting in her office at the University of Chicago, Susan Goldin-Meadow is gesticulating nonstop as she talks to me, which wouldn't be particularly noteworthy except for two things. Prof. Goldin-Meadow is one of the world's leading scientific experts on the meaning and function of the hand gestures that accompany speech, and she is telling me all this by phone. Since I don't have a videophone, the gestures can't be for my benefit.

That may not surprise those of you who lose the power of speech if your hands are immobilized. But the function of waving, flapping or otherwise moving your hands while you talk is only now becoming clear, as Prof. Goldin-Meadow recounts in her new book, "Hearing Gesture: How Our Hands Help Us Think," published by Harvard University Press. Gesture, she concludes, "plays an active role in ... the thoughts we think."

Gesture, as close to a universal of human behavior as you can get, is as much for the benefit of the speaker as for the listener.

Prof. Goldin-Meadow, a teacher of psychology at Chicago, says she herself "gestures a ton," but that isn't why she made it the subject of her research. While studying in Geneva under the eminent child psychologist Jean Piaget, she learned "how important it is to watch children as they learn," she writes. "I chose to watch their hands."

It has been quite a show. In one series of studies, she watched as children figured out what happens when a tall, thin jar full of water is emptied into a short, squat one. The child is asked whether the amount of water has changed.

Very young children say yes, "because the water is lower." They gesture to the water's height in one and then the other container. But children on

the cusp of grasping conservation-of-volume gesture differently. They say the same (wrong) thing, but make a C-shaped gesture with each hand, holding the hands far apart, to indicate the squat container, and then make a tight C-shape with only one hand to indicate the skinny jar. The C shapes – wide or thin – mimic the properties a child needs to grasp to understand conservation of volume.

Children who produce such speech-gesture mismatches are reflecting, with gesture, thoughts that have not yet found their way into speech. But the thoughts are clearly there. With just a little instruction, these are kids who master Conservation after mere hours of instruction. Children who don't produce such speech-gesture mismatches don't benefit nearly as quickly from the same instruction.

It's as if the hands reveal even "information you may not know you have," says Prof. Goldin-Meadow. "Gesturing is a way to take your thoughts and put them out there for you and others to see. It may help you examine your thoughts, even if not consciously."

Studies of gesture were pioneered by University of Chicago linguist David McNeill, who concluded that speech and gesture are two aspects of a single linguistic system. Indeed, there are many hints that the greater the cognitive effort required for speech, the more we gesture. Hands typically go into overdrive when speakers hear their own words played back while they continue talking (that's called delayed auditory feedback - or a bad international connection), and also when bilinguals speak the language in which they are weaker. We also gesture more when describing a picture from memory than we do when it is in plain sight.

And the point of all that hand-waving? Gesturing seems to decrease "cognitive load," the amount of mental effort needed to perform some task. In one series of studies, volunteers listened

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He's bucked liberal orthodoxy by urging the left to change its supposed beliefs that the environment always trumps man and that granola is morally superior to beef.

"SUVs are not inherently evil." he wrote in "Dude, Where's My Country?"

Other Moorian Observations:

"MTV sucks! Animals don't have rights. Not all unions are good. People who commit violent crimes should be locked up. The sun is good for you."

– Michael Moore - Quoted in Detroit Free Press 2/04

TESTING THE COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE

– By Aaron Abbott Ph.D. and Guss von Bolschwing
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This article is a report on an experimental test conducted by a jury behavior research firm. The question addressed by the test was the effect of including or excluding a comparative negligence instruction and question on a special verdict form, and how it affects the verdict and damages awards in a case in which comparative negligence is a viable defense.

AN OVERVIEW OF THE CASE

The president of a successful dot.com company died in early 1998 just before his company launched a very successful IPO. The company was later sold for over \$6 billion. The widow and daughter of the 38-year-old decedent sued a major institution for wrongful death and for its failure to diagnose, refer, and treat a reversible heart condition.

The defense was very concerned about damages. Because of the decedent's age and earnings history, the dot.com president's loss of earning capacity was worth \$100 million according to accepted accounting methods. During trial preparations in late 1999, dot.com valuations were rising to unprecedented levels. At one point, the plaintiffs' accounting methods used to estimate loss of earning capacity exceeded \$200 million. Moreover, the venue in which this case was filed was known to be plaintiff-oriented. What would be the mindset of the average juror in a city where two-bedroom, two-bathroom condominiums in modest areas sold for \$875,000, and single family homes in the region regularly sold for between \$300 and \$400 per square foot? How, in such an environment, could the defense ever present a case that would result in a reasonable verdict if liability were found?

Because the stakes were so high, the defendant institution asked the authors'

jury behavior research firm and third party administrator to conduct focus groups to develop defense arguments, and then to test and refine these arguments in a large panel study. The latter project was also intended to assess the risk of taking this case to trial, determine the probability of a defense verdict, and develop a "high-low" estimate of the probable range of damages in the event of an adverse verdict.

Defense counsel also wanted to use a controversial tactic to enhance the probability of obtaining a defense verdict. While he agreed with the focus group results that showed that a comparative negligence affirmative defense would be persuasive, he also wanted to omit the comparative negligence instructions/question on the special verdict form. He hypothesized that the comparative negligence instructions/question would have a detrimental effect on verdict. He felt that the inclusion of the instructions/question would only invite the jury to render a plaintiff's verdict and then "split the baby." However, in the event of an adverse verdict, would plaintiff jurors take the comparative negligence evidence into account and reduce their damage awards on their own without the instructions/question?

To our knowledge, these hypotheses had never been scientifically tested. Therefore, we developed an experimental design to test the hypothesis as part of the larger study. The primary purpose of this study was to test the arguments that had been developed in prior focus groups, and to provide the client (the institution that was the defendant in the lawsuit) with a statistical assessment of probability of a plaintiff's or a defense verdict, as well as "high-low" statistical estimates of the probable damage awards

if there was a plaintiff's verdict. Such a test required a large sample size to attain statistical power and reliability. Therefore, a panel of over 100 mock jurors was recruited to hear the case in an all-day mock trial. Half of the panel got the comparative negligence instructions and question on the special verdict form. The other half of the panel did not get the comparative negligence instructions/question on the verdict form.

FOCUS GROUP PILOT STUDY

A jury consultant reviewed the case in depth and presented various aspects of the case to three focus groups. Each presentation was structured to test various hypotheses formulated at the outset, and new hypotheses that developed as feedback was obtained from the first and second groups. Focus group results showed that this case had good evidence for a comparative negligence affirmative defense. Based on these and other results, a defense was prepared and tested in a larger panel study to verify and refine the defense's strategy, and to assess the value of the case.

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“Everyone says liberals love America, too. No, they don’t. Whenever the nation is under attack, from within or without, liberals side with the enemy. That is their essence.”

– Ann Coulter

SELECTING MOCK JURORS FOR THE LARGE PANEL STUDY

The primary purpose of the follow-up panel study was to scientifically predict the probable verdict and exposure in this case. This type of study requires a different approach to the typical mock trial. A larger sample size is necessary to provide a statistical measure of exposure. Therefore, 125 mock jurors were recruited with a stratified random sampling procedure throughout the venire; i.e., we sought a group that was representative of the population in the relevant jurisdiction. They were screened on the telephone as they were recruited; this preliminary step helped us to eliminate people who would have been excused for cause, hardship, or who posed potential risks that they would be targets of discovery actions by the plaintiffs' counsel.

The mock jurors that were selected were in fact a representative demographic sample of the venire in terms of age, race, gender, education, and community/neighborhood. The demographic breakdowns were based on U.S. Census data and modified by our own databases of jurors who are ultimately seated in large civil cases in this venue. Participants were paid for their time to participate, thus eliminating the self-selection bias that is inherent with volunteer samples.

111 of the 125 people recruited actually came to the mock trial/research on the appointed day. Upon arriving, jurors were screened again for discovery risks and challenges for cause. All of those who showed up for the research qualified to participate.

PROCEDURE AT THE MOCK TRIAL

Jurors heard statements from the plaintiff and defense. (Plaintiffs' counsel was role-played by another attorney in the defense firm.) Both statements recited deposition testimony, explained clearly their client's position on the case, and presented demonstrative evidence. Both sides also presented and argued their positions on damages. The plaintiffs' statement included the

emotional arguments that would be expected at trial.

Next, jurors were instructed on the law. They filled out a questionnaire to capture their pre-deliberation attitudes and verdict, prior to being exposed to the opinions of fellow jurors. Half of the panel got the comparative negligence instructions and question on the special verdict form. The other half did not.

Finally, two subgroups of twelve mock jurors were retained to deliberate the case. One jury had received the comparative negligence instructions/question, and the other jury had not received the instructions/question. Moderators joined each jury to focus participants on specific issues that needed clarification. Deliberations were videotaped and used in a separate analysis.

Three hypotheses were tested:

- A defense verdict is more probable when the comparative negligence instructions/question are excluded.
- Damages awards by plaintiff-oriented jurors are higher when the comparative negligence instructions/question are excluded.
- The "exclusion effect" on damage awards is only applicable to jurors who would normally be inclined to award high damages; they would have previously been identified and eliminated by preemptory challenges.

THE TEST'S RESULTS

The mock jurors decided, first, the question of the institution's liability for the wrongful death of the dot.com president, and second, the amount of damages to be awarded to the plaintiff. Here are the results of testing the three hypotheses.

Hypothesis # 1

A defense verdict is more probable when the comparative negligence instructions/question are excluded.

The inclusion/exclusion of the instructions/question produced a statistically significant effect on the verdict. In fact, the difference was dramatic. (The figures indicate the

percentage of the 111 mock jurors who would find for the defense or for the plaintiff on the question of liability.) Results showed that there was a 45/55 chance of a defense verdict when the comparative negligence instructions/question were included. However, the chance of a defense verdict improved dramatically to 73/27 when the comparative negligence instructions/question were excluded.

Statistically, the probability that this difference was mere chance was only 0.17%, which was well beyond the traditional threshold of 5.0% for asserting that the observed difference is significant. The exclusion of the instructions/question increases the probability of a defense verdict on liability. Therefore, the defense would be better off if it excluded the comparative negligence instructions/question if it is betting on a defense verdict. Whether this can backfire in the form of higher damage awards, in the event of a plaintiffs verdict, is addressed by the next two hypotheses.

Hypothesis # 2

Damage awards by plaintiff jurors are higher when the comparative negligence instructions/question are excluded.

Can the strategy of omitting the contributory negligence instruction/question backfire, i.e., result in a higher damages award, in the event of a plaintiff's verdict? Although excluding the instructions/question enhanced the probability of a defense verdict, to what extent did its inclusion/exclusion affect damage awards by those who were plaintiff-oriented? More specifically, would the exclusion of the instructions/question lessen the impact of the defense's comparative negligence arguments on damage awards by plaintiff-oriented jurors?

The results indicate that the exclusion of the instructions/question did have an impact on damage awards. Awards were significantly higher by plaintiff-partisan jurors who did not get the instruction.

Based on these results, it appears that the defense needs to make a distinct choice:

COMPARATIVE NEGLIGENCE

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- 1) Go for broke by excluding the instruction/question to enhance the probability of a defense verdict; or
- 2) Hedge the bet by including the instruction/question to minimize damage awards, though this will also increase the likelihood of a plaintiff's verdict.

These data were based on *all* jurors who rendered a plaintiff's verdict. The next question is whether jurors who survive peremptory challenges are susceptible to the "exclusion effect."

Hypothesis # 3

The "exclusion effect" on damages awards is only applicable to "high damages" jurors who would normally be identified and eliminated by peremptory challenges.

Although excluding the instructions/question increased the damage awards of jurors who were plaintiff-oriented, did this "exclusion effect" hold up for jurors who survived peremptory challenges? It may be that plaintiff-oriented jurors who survive peremptory challenges will take the comparative negligence evidence into account on their own and reduce their damage awards accordingly.

Peremptory challenges in this study were done somewhat artificially. Since there were 111 people in the panel, it was impossible to *voir dire* all of them. Therefore, we assumed that experienced counsel on both sides would identify biased jurors. Defense counsel would strike emotional, high-damages jurors. Plaintiffs' counsel would strike conservative, defense-oriented jurors. High-damages jurors were defined as the six jurors who had the highest economic damage awards among the 47 plaintiff jurors in the panel.

The results show that the "exclusion effect" disappeared after peremptory challenges were exercised. Apparently, this effect applies only to high-damages jurors. Once they had been eliminated by peremptory challenges, the damages awarded by plaintiff jurors in either condition were statistically identical.

CONCLUSIONS AND RECOMMENDATIONS

The results noted above were startling. Yet, the entire exercise was founded on solid research. The research design was well executed, the sample was large and representative, and the presentations for both sides were exemplary. The resulting choice was clear:

Go for a defense verdict by excluding the instructions/question, or hedge the bet by including the instructions/question to control damages.

We also suspect that this strategy will probably be more effective when liability itself is close, as it was here (55%-45% when the instructions/question was included on the verdict form). The strategy may also be more suitable to a medical malpractice setting. Earlier focus group sessions noted that many mock jurors felt particularly strong about "patient responsibility" and thus to some degree that theme might have been an acceptable substitute for comparative negligence. Only additional case-specific research can determine whether these results apply in other cases.

Nevertheless, this research produced some provocative results that conflict with the common thinking of most experienced trial attorneys.

These results strongly suggest that defense counsel and the client must discuss and decide on their objective:

"Do we want to win the case and accept the risk of a higher award in the event of an adverse verdict, or do we want to control damages and increase the probability of a plaintiff's verdict?"

Whether to include or exclude the comparative negligence instructions/question depends on the objective that counsel and the client jointly decide upon. If the objective is to win the case, then the comparative negligence instructions/question should be excluded. However, both counsel and the client should be clear that this is a "go for broke" strategy. If there is an adverse verdict and there are still some high-damages jurors on the panel, they will not automatically reduce their own awards even when there was ample

evidence presented about comparative negligence.

Consequently, this strategy should only be exercised if both defense counsel and the client are committed to winning the case, and if they believe that the defense can identify high-damages jurors during *voir dire* in the event of an adverse verdict.

Aaron Abbott, Ph.D. is the president of Jury Behavior Research, Inc., headquartered in Portland, Oregon. His firm helps trial lawyers nationwide to anticipate the behavior of juries and turn this knowledge into winning courtroom strategies.

Gus von Boischiwing is a member of the law firm of Goiman and von Boischiwing, P.C. in Sausalito, California, and vice chairman of Octagon Risk Services, Inc. (a St. Paul Companies subsidiary), a Third Party Administrator. He is a member of the Defense Research Institute.

Some members of the Michigan Congressional Delegation have made Iraq safe from foreign vehicles. The State Department has promised that the Bureau in charge of policing Iraq will now buy only American-made vehicles. The State Department Bureau had bought 37 Japanese sport-utility vehicles under a waiver from the Buy American Act because it feared U.S. vehicles would be targeted for attacks.

– Detroit Free Press

to a set of definitions and had to provide the word being defined. Those who were told to keep their hands in the pocket of an apron came up with fewer words than people whose hands were free and gesturing. This study was a bit ambiguous, though, since most people who found the right words did so *before* they gestured.

To test whether gesturing literally takes a load off your mind, Prof. Goldin-Meadow and her colleagues had volunteers solve math problems, such as factoring the expression $x^2 - 3x - 10$. Once the volunteers had done so (the factors are $x - 5$ and $x + 2$), they were given a double task: Memorize a long list of random letters while explaining how they did the math.

The adults who gestured at will while explaining their factoring remembered more of the letters than did volunteers who were not permitted to gesture. Gesturing, then, seems to off-load some of the mental effort needed to explain math, freeing up more cognitive resources for recall. How it does so is an open question. "But at the very least," says Prof. Goldin-Meadow, "we ought to stop telling people not to move their hands when they talk."

Oh, and that stereotype about Italian speakers? They do make larger, more expansive gestures than English speakers, but not more of them.

"George Bush is the president. He makes the decisions, and, you know, it's just one American, whenever he wants me to line up, just tell me where."

– Dan Rather

people do (Behaviors), the accepted ways for doing that stuff (Procedures) and the various possible Interpretations for how stuff can be fit together in the current case. Bavelas proposes that we puzzle things out by attempting to connect up the various Behaviors, Procedures and Interpretations. Likewise, Bruner and Amsterdam might suggest that, once the categories are assigned, the narrative can begin, so rhetoric can soon be called on to justify the perceived conclusions of any listener.

Linguist Charles Fillmore sees a single sentence as the shortest form a story can take. He suggests this as the smallest, simplest and archetypical example of a story expressing interpreted connections among a subject, object and related action. As more such sentences are generated about the inner version of the case story at hand, more complete answers to which behaviors should get the most notice, which procedures prove most important, and thus which interpretations are most trustworthy and true will likely emerge. A subjective story built by any decision maker to reconstruct the one offered in court, mediation or negotiation will ring true for its creator in all four of Bavelas' categories. Many students of rhetoric, like Charles Faulkner, who pointed me to this particular story-about-stories, would also suggest that "the very form of the individual sentences being used begins to create an effect on the listener, [and] when these rhetorical devices and the greater narrative are in concert, it is often termed art - or at the least a compelling story."

And, there is the rub for the trial professional attempting to adjust legal presentations to the needs of a listener's story making process. Just how does one go about making the 'greater narrative' and the rhetoric used to deliver it work 'in concert' for whomever is going to be hearing, and deciding, the next case story? The answer may well begin by avoiding the powerful temptation to rush to prematurely *limit* the many possibilities in even the simplest case story. Once one gets used to thinking of decision maker case stories as

independent variables constructed from a huge range of possible story formulations and not a predetermined stack of facts and law, fixed in one form for any who approach it, the task gets much easier. If it helps to have a speculative *model* for how people may be starting their own stories about the case, the one above has much to recommend it. But, to act as if the process is not happening; that the case stories themselves don't have lives of their own between the ears of every decision maker, and that those stories are far from fixed, but perhaps the most variable element among three: presenter choices and acts, backgrounds of the jurors or judges, and the story facts and law will avail little but a false sense of control.

When an attorney seeks the most compelling Theme, Scope, Point of View, Sequence and all other components of a persuasive case story from a focus group, a good start can be made by keeping an updated model for case stories like that previously suggested in mind. Expecting a general theme more like 'construction' than 'interpretation' for any case story being explored can certainly help trial professionals adopt less limiting means for exploring each participant's many possible constructs of any particular case story. Starting out by consistently expecting people to build independent stories, not just interpret a fixed set of predetermined facts and legal guidelines, can quickly draw professionals to more expansive and inclusive approaches, rather than reductive and limiting ones. Instead of rushing to reduce input from each focus group member to a single conclusion about which side is winning the point, or, at most, an either/or response between fixed choices (i.e. Burning slow or fast?, Doctor as product or parent? Profit: Good or Bad?), the professionals can act a little more open to the unexpected; to just how many ways the participants can find significance where there seemed to be none, and insignificance where obvious truth seemed to clearly reside. You may be tempted to credit each person's *imagination* as much as the thinking, perceptions, emotional reactions, memories and attendant beliefs it moves

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in unexpected directions, sometimes even against “type” and trends. You may soon discover that each person has more than one version of the client’s story, from which he or she can decide the case. Soon, each potential juror and each focus group participant may start looking not like the type of person who has one type of story to tell, but rather someone who can build any number of possible versions of the client’s story, some helpful, some not so, and maybe one which is quite compelling indeed, if not art.

At that point, by respecting all three major variables - decision maker backgrounds and beliefs, attorney choices and delivery, and the multiple, unfixed, unpredictable case stories themselves - trial professionals may discover there is no right answer to the question, “Which of the three is the most influential variable affecting the construction of decision maker case stories?”. Because, while the possible story versions may have many, many permutations, the outcome of the legal matter based on whichever stories are built and used to judge them is almost always an either/or proposition. Therefore, at any given time, with any given judge, juror, mediator or

negotiator, any one of the three key variables could end up being “the” one that makes the difference. So, addressing all the effort devoted to preparing a case presentation to only one, or two of those variables could be a very costly mistake. The lives of the stories themselves require at least equal consideration.

COMMON BIAS, EXPERIENCE AND SENSE

Perhaps the most useful habit to maintain during *voir dire* and focus groups to help reveal the full range of potential stories a case can generate is to constantly recall that nobody will know the whole story about their own story building, because most of the process happens before we are conscious of it. This is so challenging, not just because for many decades, a great deal of research and trial work has relied on the unproven assumption that people can have access to their whole thinking process just for the conscious asking. An additional impediment is the habit of distorted thinking most of us adopt when we happen to hold a bias common to that held by the majority. People who hold the majority’s bias don’t often see themselves as biased; they just see themselves as right.

The older, commonly accepted version of legal case stories has been that there can only be one story per case, interpreted either well or badly by the decision makers, but never *authored* by them. It often takes breaking new ground through action first, to be able to recognize the limits of thinking which were there all along. Einstein reputedly said, “The significant problems we face cannot be solved at the same level of thinking we were at when we created them.” But, often it is only with the benefit of hindsight, after taking some steps in a different direction, that our thinking catches up to the reality of our actions and their results, as in the case of attorneys who improve beyond the typical 50-50 performance standard in reading credibility who clung to distorted perceptions of their effectiveness until after they do something to improve it. Building new thinking habits is easier than breaking old ones, but neither is really easy. Simple, yes. Easy, no.

The more integrated a perception or

impression may be in our own life story, the less likely it is to be consciously picked out for its real level of influence on our thoughts, attitudes, acts and feelings. Just as many people can be blind to the real extent of a common bias, the influence of shared common experiences can prove quite strong in their effects on decision maker stories long before they ever make themselves consciously known.

In legal cases, one example of such integrated life experiences, and attendant stories about their meanings, crops up whenever the case deals with the right way to drive in traffic. Most people who drive see themselves as pretty good, to very good drivers. They do this often with little real sense of the context for their beliefs, and many times despite a list of easily admitted weaknesses in their driving skills. If a person has had few or no collisions or other poor outcomes on the road, their personal context for realizing their knowledge of, adherence to and actual abilities to follow the rules of the road can often be quite distorted.

Jurors whose only life experience of anesthesia is with themselves or their loved ones “going to sleep and waking up when it was all over,” can easily talk about inherent risks. But, the real threat those risks pose can actually play little to no role in their inner worlds, where case stories that lead to final judgements are recreated. It is the same with stories jurors, judges and other decision makers start to build about driving when their own subjective framework is free of the burden of a more dangerous - or realistic - perspective. Modern moves in rules affecting selection criteria for jurors and judges have tended to suggest that ignorance of the case context improves objectivity. Often it can do the opposite. Experiences will influence the context in which case stories are built for all decision makers. But, having a common experience like driving can produce a very objective context, or a very distorted one, just as the absence of driving experience can. One non-driver may not be a driver’s best judge. But, the next one might. The way to find out is to discover what happens when a habit of thinking is exposed, and alternative associations are presented. Again, any work dealing with the interface of the

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“We have a dangerous role reversal here, the civilians are urging war and the uniformed officers are urging caution... We’re advocating a policy that says we will invade another nation that is not currently attacking us or invading any of our allies.”

– Joint Chief sources quoted on Capital Hill Blue.Com

dynamic between conscious, and other than conscious processes is, by definition, all about the individual mind, and rarely about a 'type'. The exploratory efforts need to rely as much on implication and inference as on conscious, self-reporting.

When decision maker learning about an unfamiliar road rule or standard is essential to a their job of determining the truth of the facts in evidence, and their own perceived driving 'expertise' might contradict that rule, the risk should be clear for both civil and criminal attorneys presenting to the group. When confronting the stated standard or rule of law which contradicts the world as it always has been between their ears, the listener's mind will go to work on the rule. This is not a conscious effort.

The three most prolific functions in our perceptual apparatus in such a situation are our abilities to *distort*, *generalize* and/or to *delete* information from the mix in our story-building process. Without thinking, we will cheerfully change, override or simply remember to forget the conscious message so at odds with our inner, other than conscious collection of life stories about driving. The resulting profound effect on the case story built about driving, based both on a common bias about driving 'expertise' and common experiences driving, can be very difficult, or impossible, for any listener to track just because we might ask him or her to try. And, since the beliefs are so well integrated and a part of the whole world of 'driving according to me', the person is much less likely to realize he or she made such a move at all. Because of its commonplace nature, and extreme familiarity to the driver judging the case about driving, the presenter of the case story would do well to find a way of exposing and reframing this widespread thinking habit before he or she plunges their client's future into the unwitting machinery where the public, conscious contradiction almost always loses out to private, other than conscious convention. Conscious ignorance of the factual context may or may not improve objectivity. But, ignorance of other than conscious influences at work on story

formation can completely wipe out any chance for it.

One way to temporarily interrupt this automated process long enough to make a suggestion or two comes during questioning of potential jurors in *voir dire*. The questions can be adapted for use during the equivalent period of discussion with potential neutrals, or negotiators from the opposing side(s). In either a focus group or *voir dire*, the questioning might take the following form:

"Ladies and gentlemen, by show of hands only, every person who drives any kind of vehicle regularly, please, show me how many of you are willing to admit right here in front of everyone that you are a very, very poor driver - a really *bad* driver. How many?" (Few to none is typical.)

"Well, now that's very interesting. Let me see if I can go at it another way here. How many of you who drive know *someone else* who is a really bad driver? That many, huh?"

"OK. Here's the last round, and I need you to be completely, brutally honest with us on this question, alright? If the person you just had your hand in the air about - the one *you* say is a really poor driver - were sitting here, how many of them would have had their hands in the air, only talking about *you*? They'd be pointing at you just as much as you were pointing at them?"

"OK, while the laughter dies down, what have we learned here? Is it possible, just *possible*, that the way we see ourselves and the way we look at other people when it comes to something like driving may not be altogether the most unbiased, fair and neutral subject in the whole world? Is that possible?" (When you get sufficient agreement, with or without attendant discussion, proceed to insert the suggestion, while the pattern is fully conscious and available; most open to outside, conscious input.)

"It's just not possible that everyone here is a really great driver who knows a really crummy driver, but when the tables are turned and we ask the supposedly crummy drivers, they all turn out to be the great ones, and you are the poor ones. That just can't be, can it? Rather than fighting to be right, which is not really part of the best juror's job description,

who here would be willing to put a question mark in front of whatever may have *felt* right to you about the right way to drive up until this moment here in this room today, just long enough to get curious what the law/rules/official standards that the court will say are right for you to apply to your job here might say? Is everyone willing to try that? Who can tell me right now they are *not so sure* you can do that? How so? Please say a little more."

A little later on, you'll be introduced to many of the different models research and actual practice have developed to describe various functions apparent in the story building process decision makers go through to judge a legal matter. The goal suggested here for trial professionals to maintain is *expansion and inclusion*, opposed to reduction and limitation when eliciting parts of that process out loud. The suggested action to use in pursuit of the many possible stories being formed is *invitation*, rather than instruction.

It is worth examining a little more closely how the thinking habit about driving above is first brought out, then interrupted and finally invited to expand

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"The reaction of people of faith to this tendency of democracy to obscure the divine authority behind government should not be resignation to it, but the resolution to combat it as effectively as possible..."

Few doubted the morality of the death penalty in the age that believed in the Divine Right of Kings."

– Supreme Court Justice Antonin Scalia

BEFORE WE BEGIN
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by including other associations. Note, the listeners are never directly told to reject or consciously try to eliminate a thought from their heads. This, of course, is impossible, and asking someone to consciously overrule or wipe out a thought they never consciously generated basically tells the listener not to expect anything of value to come out of your mouth after that instruction. People cannot consciously control unconscious thinking habits, whether they are aware of them or not. So, isolating such a set of unconsciously formed and maintained associations only to instruct a person - or group - to stop using it, will fail in most cases, and often will make things worse from the reinforcement all the conscious attention creates. ("Do not think of blue. If you think of blue, something awful will happen to you and yours. So, don't even think about thinking of blue.")

Look at the first two lines of the discussion's last paragraph, delivered after everyone has had a chance to produce, laugh at, and consciously acknowledge the possibility of the 'punch line' of their own common, but perhaps unacknowledged, bias about driving abilities. "It's just not possible that everyone here is a really great driver who knows a really crummy driver, but when the tables are turned and we ask the supposedly crummy drivers, they all turn out to be the great ones, and you are the poor ones. That just can't be, can it?"

There are several story building factors and functions being brought up and/or utilized here. First, is the mental processing habit called Attribution, or the assignment of control or 'active party/ingredient' status in a story by the decision maker. The entire discussion is focused on the territory of attributing abilities in driving to self and others. Note, we asked them who they *already know* is a poor driver, not to consciously assign that status, though some will certainly do so, anyway, to join in. Most will have already attributed the skill - or lack thereof - in their own life stories, and automatically will draw from those unconsciously formed associations.

In utilizing the abilities of listeners

to attribute control over good or bad driving to various people in their lives along with themselves, and then by making that selection process more conscious, we move to another mental processing factor often called Availability, or a variant called Norming. The question and answer discussion leading up to the suggestion paragraph at the end works as an invitation for the listeners to make this particular habit in their thinking much more 'available' in their attention than it was minutes before. For many, this more available arrangement of assumptions also suggests the 'normal' way of their inner worlds.

When we repeat the conclusion, or 'punch line' of the inquiry in the first line of the final, suggestion paragraph, we start to use some psychological processing factors to deliver our invitation to the group. Among those factors are Repetition, Reflection and Reinforcement. The rhetorical question, "That just can't be, can it?" gives people a chance to openly acknowledge and identify with their own common thinking habit we've just opened up for consideration, and to repeat its parameters to themselves as a question, one more time. Now, they are focused on their unthinking, but very real bias and the lifetime of experience associated with it. Common bias and common experience both brought to the mind's front burner. What is done next?

"Rather than fighting to be right, which is not really part of the best juror's job description, who here would be willing to put a question mark in front of whatever may have *felt* right to you about the right way to drive up until this moment here in this room today, just long enough to get curious what the law/rules/official standards that the court will say are right for you to apply to your job here might say?"

Here is where the theme of inclusion and expansion is served. Instead of doing the expected and leaving the thinking habit isolated, while trying to get conscious agreement to refuse indulging it anymore, we immediately invite the listeners to place two *more* topics about which they undoubtedly also have some strong, long standing associations on their plates: defense of perceived right and wrong, and the job a good juror has

to do.

The word "right" is offered to all as an ambiguous *anchor* for all three versions of what was - or is - right for each listener about driving, juror jobs and the sense of right and wrong itself. To do so well, a certain amount of vagueness about just which 'right' thing we are referring to at any given moment is best introduced, to make the newly suggested associations a little more available for the listeners as their perceived driving expertise was, all by itself, moments before. The "feeling" of being right about driving is all that anyone can consciously experience of an imbedded bias like the one we've just exposed, when it is actually at work behind the scenes. So, that feeling, should it be noticed now or in the future during deliberations is now also offered up as a kinesthetic anchor to remind jurors or group participants what we've invited them to do with their old thinking habits "for this moment in this room today, just long enough to get curious..."; that is to "put a question mark in front of it", not to 'set it completely aside and guarantee the court, the lawyers and God that it will play no part whatsoever in your thinking about this case at all'. Inclusion and expansion. Not reduction and limitation.

Finally, we give everyone a chance to publically, and physically identify with taking the suggestion, and include the option that they may opt out of the invitation: "Is everyone willing to try that? Who can tell me right now they are *not so sure* you can do that? How so? Please say a little more." Note, we do not accuse the person of being *unwilling* to consciously choose to follow our invitation, but rather we presume by the form of the final question that they are indeed willing, but may be

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"There are still places where people think that the function of media is to provide information."

– Don Rottenberg

somehow inhibited in their aim. This element of presupposition is yet another means of reinforcing one connection over another without consciously demanding either be excluded by the party inside whose head both options reside.

Common experiences can be associated with very common, and very unthinking bias, so well integrated that we may completely miss its actions on the stories we create without outside help. But, note that the opposite is also true, for a subject area which may be utterly *lacking* in a decision maker's direct life experience outside of the professional realm, like skiing, reading a construction contract or flying a helicopter. When the story maker has no common experiences to reference to make up his or her version of the case story, they do not stop making things up. They just rely more heavily on associations and connections way outside of conscious control to build their stories, and the distortion, generalization and deletion begin in earnest. ("I get the impression he was skiing too fast", "Those kids always go too fast on those skis", or, "I don't recall them saying anything about skiers having a Code to follow.") And, always remember, it's the stories constructed *from* the facts and the law, not the facts themselves, which determine the ultimate decision. So, getting in at the beginning of the listener's story building process, as well

"The notion that the president is a cowboy... as a westerner, I think it's not necessarily a bad idea. I think the fact of the matter is he cuts to the chase. He is very direct and I find that refreshing."

**– Vice President
Dick Cheney**

as that can be done with an unconsciously generated process, can be very critical to finding out what any client's story really is, to decision makers, and then how best *that* would be presented to others.

So, how does the decision maker show the trial professional what the lay of the internal land might be like, if the bulk of their story making process is not even available to him or her to consciously control? As Bruner and Amsterdam say, by the categories, narrative and rhetoric used to express the story which originates outside their own conscious, verbal reach. As Bavelas says, the puzzle is perceived to fit together. As Fillmore says, each sentence reveals the story. And, it can help to bear in mind that each sentence, when focused on the subject at hand, is all about the story forming outside conscious reach, whether we know that or not, and whether we choose to acknowledge it or not. Our implicit memories produce implicit suggestions in the stories they generate about the case stories we see and hear. By using focus groups more like *voir dire* than a lab experiment, attorneys learn to pursue more and more possible permutations of a single aspect of any given story, with any given participant, instead of taking any one answer as the 'whole story'. Then, not only what is just said about the process, but also what is implied beyond the words is available for the professional to consider.

GETTING GROUPS INTO FOCUS

If deciding cases is all about stories being built outside conscious awareness, and each person builds their own version, then what value is there in gathering a whole group of individuals together to consciously talk about their *unconscious* processing? Indeed, recently I received several unsolicited copies of a *Slate* magazine article from trial attorneys across the country apparently asking that very question. The article cites a couple of respected researchers telling consumer product makers and service providers that customers don't really know what they want, and often are inclined to lie about it when put into a focus group. They are said to lie for reasons cited like answering questions outside the actual buying context, because of motives for

participation which don't incline them towards open, honest responses, and due to placating or ingratiating responses offered to please the moderator or the imagined sponsor of the group.

If one were trying to control for variables in the old, two variable model, most of these concerns would have to be fixed on the side of the attorney/presenter choices and delivery, rather than on the side of the variable of participants' backgrounds and attendant stories about life's meanings. But, if you were to approach a focus group in a legal matter as if all three major variables affecting participant story construction are at work, and such 'control' is out of reach, then you might have enough time and energy to spare to ask how these supposedly negative factors differ substantially from those affecting virtually every juror, or other legal decision maker. Aren't they all there because of outside impetus or pressure, whether need for money, human contact or to answer a subpoena or to do their job? Are they all dependent on the presenters to get their job done? Are they all likely to form positive or negative associations for the presenter(s), being humans and having brains attached to spinal columns, attached to glands? Aren't they all prone to speculate about larger, ulterior and unknown motives, factors and forces beyond those being presented? And, do they not all make every decision and choice based on a process that starts out of conscious awareness - not knowing *how* they end up knowing what they think they want? So far, that doesn't sound so different as to disqualify focus group members from hearing, seeing and reacting to a legal case story much as jurors or professional decision makers will.

But, what about when matters get serious? Won't these focus group strangers play poker, hide their full reactions, and offer distorted versions of their own thinking in a hundred different ways? Some researchers suggest that, in order for participants to feel truly comfortable expressing "heartfelt, brutally honest opinions", the presenters leading the group would have to invest huge amounts of time "building trust", or the respondents would simply censor their answers, giving incomplete,

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politically correct or even false responses. Again, if this were all about measurable, repeatable material as if in a lab, or the classroom, these concerns might be valid ones. But, in court, in mediation, and certainly in negotiation, how often are hours devoted to “building trust” followed by floodgates parting to let the heartfelt confessions flow through? Note, professional decision makers are even less likely to meet this open-heart criteria, since most believe a part of doing their job well requires a clinical *distance* from the parties, and an effort to maintain a professional reserve, consciously trying *not* to react to the presenters at all.

Finally, the article’s writers quote author Gerald Zaltman, who provides the big blow against focus groups; the other than conscious mind. In discussing the reputed industry standard 80% failure rate of focus groups to predict success for cars, movies or TV ads, he says, “Contrary to conventional wisdom, they [groups] are not effective when developing and evaluating new product ideas, testing ads, or evaluating brand

*Wolfowitz admitted that, from the outset, contrary to so many claims from the White House, Iraq’s supposed cache of W.M.D. had never been the most compelling *causus belli*. It was simply one of several. “We settled on one issue, weapons of Mass Destruction, because it was the one reason everyone could agree on.”*

– Sam Tanenhaus
in Vanity Fair

images...Standard questioning can sometimes reveal consumers’ thinking about familiar goods and services if those thoughts and feelings are readily accessible and easily articulated. [But m]ost of the thoughts and feelings that influence consumers’ and managers’ behavior occur in the unconscious mind...*Unconscious thoughts are the most accurate predictors of what people will actually do.* [Emphasis added.] In the space of 5 or 10 minutes in a focus group, which is the average air time per person, you can’t possibly get at one person’s unconscious thinking.”

And so you have it. Two different sets of researchers, condemning the focus group method for research their colleagues use, for pretty much the same reason. To paraphrase, “*You don’t have enough time to find out what thoughts they really have behind the scenes.*” What is the common story behind this sentence? What are the implied suggestions about the process of evaluating thinking that are more than likely true in each of the critics’ world models, as reflected by this ‘shortest of stories’?

- Unconscious thoughts are, or can be, separate entities from conscious thoughts.
- Unconscious thoughts drive our responses, while conscious ones comment on them, sometimes badly.
- Unconscious thoughts are the most accurate predictors of what people will actually do.
- Given enough time, you can hear someone’s unconscious thoughts just by asking for them.
- You can “get to” a person’s unconscious thinking - but it takes lots of time.
- There is only one set of ‘thinking’ per customer.

You’ll recall, I earlier suggestioned five presumptions about the processes at work in legal decision makers’ minds, including:

- **Many stories, not one story.** Each person builds their own, and has *many* at their disposal along the way.
- **Inviting, not inserting.** Less direct, less declarative means are most productive to influence early story building, as well as to elicit them as

they are built.

- **Inferring, not explaining.** When exploring how decision makers are responding to, or re-presenting a case story, *inference* is what is best relied upon - in both listener description, and presenter delivery.
- **Beginnings before conclusions.** The earliest process is the most important to reach, and to attempt to recognize as it works.
- **Story elements over story typing.** You can’t ‘get’ to the one ‘type’ of story or one ‘type of person who thinks that way’, because there is not just one there.

When eliciting how people are reacting to the presentation of a case story in a focus group, it is important to respect another well-accepted but widely disrespected fact about the process; it isn’t totally conscious, and it is not consciously controlled. Decision-makers do not consciously select the life references and meanings to be associated with each aspect of the client’s case story. To assume they do will prompt questions they can’t honestly answer, and answers you can’t fully trust. For example, a question like, “Why is that the strongest fact in the evidence you’ve heard for the defendant company?” presupposes full access to the process that created the leaning. The respondent is assumed to know all the references that *could* have been engaged, as well as the other-than-conscious selection process detailing *how* they were engaged. We know that neither of these assumptions is true. A focus group run more like a *voir dire* session where no closed-ended or exclusive questions are asked of the participants, but rather open-ended, inclusive questions about how they are perceiving each story element in their own context rather than the context of the desired trial result is what is needed to respect the way we know their minds are working. And, not coincidentally, this generalized, implication-rich approach is also the best for beginning the actual case presentation.

The problem with focus groups has nothing to do with the nature of the brains and minds sitting at the table receiving the presentation of the case stories from the various parties. The problem lies

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with moderators who would presume to ask questions of one part of the mind, and expect direct answers from the other part, which plays by entirely different rules. But, the problem is also represented by researchers who flatly deny that *any* information of value can be had about juror or judge story building until the brain learns to answer the questions the way some research formats require them to be asked - closed ended, with one or two choices, ranked on a scale from 1 to 5, in under 10 minutes apiece.

Just as in cross exam or deposition of opposition witnesses, after an attorney blames a witness when it was the *question* that very often turns out not to be responsive to the prior answer, so, it appears, many researchers are willing to blame their subjects for their own inadequate methods of eliciting information. If participants can't answer a conscious, verbal question about an unconscious, nonverbal process, and we all already know they can't, then where else can you look for the response? Participants, jurors, negotiators and judges all carry both parts of their minds with them at all times. When they go into their other than conscious thinking, they are not leaving the Earth's orbit to do so. Both parts, conscious and otherwise, are active at all times a person is awake and responding to your questions. The real question to determine the value of the discussion in a focus group may be, "Just how hard are you willing to look for the implied suggestions of the implicit memories forming the story each person is about to use to judge your client's case? And, what will you do when you find them?"

Not long ago, I watched three attorneys deliver short opening statements in a civil case involving a couple, out drinking in two bars through the night, who left the last bar at closing time and shortly thereafter drove into a wreck, seriously injuring the, by then, unconscious passenger. Along with the driver, both establishments were being sued for serving someone who was already intoxicated. At the end of the opening statements, the participants all

filled out a short questionnaire which did not ask them their position towards the case, nor to rate the strength or weakness of any of the three sides, so far. Then, I stood up and asked everyone, in an unpredictable order, "What are your *first impressions* of the stories you just heard?" Previously, participants had offered observations about just what impressions can be made of, including attitudes, ideas, emotional reactions, and especially reminders of previous experiences from their own lives which seem to relate - or just pop up unexpectedly.

One woman, pointing at the plaintiff attorney and calling him by name said, "I was insulted by Mr. Manning. He said, in his opening statement, that it didn't matter if the driver himself was drunk. He said it was the same as ignorance of the law being an excuse. I found that insulting."

While it is true that she has not, and cannot, provide us with a guided tour of her inner mental workings, is it really true that "nothing of value" can be inferred about the structure of the story she has begun building? For instance, is it a big stretch to imagine that the active party in the process she's engaged in so far is not any of the characters in the case story, but the plaintiff lawyer himself? From whose point of view are the observations being made that she finds so insulting, if not from the perspective of the juror sitting in judgment of the case? What is apparent about the scope of the story she is building? Is it dealing with everything that happened before, during and after the event, or is it concentrated more heavily on the 'after' territory to draw its meaning? Is there anything that can be inferred about where in the sequence of the story she figures the driver ought to come, in relation to the two bars and their management or owners? Finally, are we left utterly clueless about what kind of a theme underlies the story she is starting to tell herself, or can we say with some confidence that whatever words she might put to it were she able to do that, the territory from which her theme would emerge probably would have a lot to do with *suspicion of the system*?

I wanted to find out, so I followed up by asking her how she had gotten the

message that he was declaring already being drunk to be OK under these circumstances.

"Because, he said it. He said, 'Just because he was drunk he didn't...no, that he doesn't...that just because you are drunk you don't abdicate your responsibility'." Rather than correcting her mistaken interpretation of her quite accurate restatement of the attorney's line, I asked her, "How so?" "Because the way he said it, it was the same as if he were saying that ignorance of the law is...OK...is..."

"An excuse?"

"Yes. He was saying that being drunk didn't matter. 'You don't abdicate your responsibility just because you are drunk'. Same as ignorance of the law. I found that very insulting, because I believe it does matter, and ignorance of the law is no excuse."

Despite the researchers' claim that this woman would never be able to be "brutally honest" without hours of trust building on my part, I wanted to try and keep a part of her mind open to other storylines for the next 6 or 7 hours, before it was too late. Much like the experienced drivers looking at facts about traffic, here was a person who seemed to imagine she had some expertise in the civil injury lawsuit arena, and she was not about to let herself get fooled about what was right when it comes to suing. I wanted to interrupt the pattern and offer a new suggestion, without condemning it, or making her account for an other than conscious distortion, in front of everyone, with only her conscious, verbal facilities available to use in forming an answer. We had all previously discussed the need for jurors to test disputed recall of the evidence against their fellows', and, "If you are

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"Dictatorship would be a heck of a lot easier - no question about it."

**- President
George W. Bush**

the only one who heard it or saw it that way, you may want to give up on your version.”

I turned to the whole group and asked, “Who else got a similar reaction to that part of what the plaintiff lawyer said?” (Note, I do not ask who agrees or disagrees.) Several people suggested that they had heard him saying the driver still had responsibility, and being drunk was *not* an excuse. But, out of either politeness, group solidarity, conflict avoidance or some other private plot line about potential mindsets, nobody openly told this lady she was wrong. All that was left for me to do was to raise the bar by invoking the higher criteria of the job they all came to do like jurors do it, over the less critical job of hearing every word, just so. In generic, third person terms, I repeated the agreement we’d all recently made to subordinate what we thought we saw or thought we heard to any unanimous, differing version that the rest remember, and, nearing the end of the admonition she’d already heard, but not directly addressing her, I looked her way as I ended with, “...may have to give up yours.” Without actually talking, she nodded, and later, did ‘give it up’ enough to engage her attention with other aspects of the story she was creating with which to decide the case.

One of the challenges of eliciting stories from, or delivering stories to groups is that you are always going to be reinforcing something. Every part of your demeanor is in play as much or more than your words’ meanings as this influence and reinforcement is produced. One almost sure fire way of reinforcing a reaction or connection a listener has built in his or her own mind, is to consciously challenge it. Remember, it is at the intersection of conscious and other than conscious processing that the toughest choices need to be recalled and reinforced, and foremost among them is choosing not to demand conscious awareness of processes and story formulations which are out of conscious reach.

Could I have insisted she heard him ‘right’ and interpreted him ‘wrong’? Yes. Did most everyone else in the room know

this by now? Yes. So, what positive purpose would be served for her, the group, or the attorney sponsoring the inquiry? Because she made her connections unconsciously, she does not know how they came about, nor how to ‘correct’ that process. But, she would certainly know how to feel very uncomfortable about all that, and how to paste that discomfort to my face were I to expose her in public. Instead, again, I made an effort to expand the subjects on her plate beyond the ‘insult’, to include the job she was doing, the group’s efforts, and her prior choices and commitments already made as a member of the group. Then, I suggested they all recommit to the group’s perspective on the story over their own. Nonverbally, I just checked in with her at the end to see if she was paying attention to *all* the items included on the plate, and she did seem to be. Constantly remind yourself that, for the purposes served in a focus group or *voir dire*, the answer, “This is how I always dress”, to the question, “Is your appearance here subject to a subpoena?” is the right answer. The next question is *what else* do you want to learn about that answer?

STORIES ABOUT HOW WE GROW OUR STORIES

The question is not whether there are stories building between the ears and behind the eyes of every person getting the case presentation, in whatever room they sit. The question is how best to elicit *all* the various possible storylines for each person, as much as possible, before they settle on a finished product. The focus group critics confirm for us that assuming unconscious material can be elicited by direct, verbal means alone won’t work. We also know that assuming there is only one story per person, fixed and unchangeable, doesn’t help, much less a fixed and predetermined case story spoken for by the facts alone. And, it helps to recognize that any method - group or individual, written or spoken, used to explore peoples’ stories instantly becomes part of their process - not a neutral, clinical measurement with no effect. That kind of imagined control slips away as soon as the case stories themselves are recognized as the third, independent variable affecting decisions.

The single sentence summary of the focus group critiques above, and the story lying above and beyond the distorted sentence from the opening statement stored in the lady’s head offered us two examples for how to infer certain storyline structures, even the main story elements of Theme, Viewpoint, Scope, Sequence, Active Party and more. Both highlight one way of imagining how the story building process works outside conscious reach. The researchers and the focus group participants each *perceived a presentation*, then *referenced their experiences* to begin assigning narrative and meaning to what they’d seen and heard, and finally *selected/decided* a judgement about how they imagined the story would end.

Put another way, they created categories (lying focus group members,
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Andy Rooney On Phone-In-Polls

You know those shows where people call in and vote on different issues? Did you ever notice there’s always like 18% that say “I don’t know.” It costs 90 cents to call up and vote and they’re voting “I don’t Know.” “Honey, I feel very strongly about this. Give me the phone.” (Says Into Phone) “I DON’T KNOW!” (Hangs up looking proud.) “Sometimes you have to stand up for what you believe you’re not sure about.” This guy probably calls up phone sex girls for \$2.95 to say “I’m not in the mood” .

unconscious drives for the critics of focus groups or insulting attorneys, accountability in the system for the insulted lady), started a narrative (too much time to get inside peoples' heads or getting by with a serious breach of responsibility) and began using rhetoric ("customers don't know what they want" or "it's just like ignorance of the law") to express the stories they each were developing. We could also break down what we heard on the outside about both of these privately-grown, inner stories according to the four determinants of Behavior, Procedures, Interpretations and Puzzles. Many models could apply to the task.

However trial professionals may choose to collect and evaluate inferences expressed about the implicit memories at work behind the scenes and the meaningful lessons each person carries along with them, if the approach helps us appreciate the depth and breadth of the possibilities present in the mind, it has value. Just remember, like in the best of focus groups, speculation is the rule when trying to assess and categorize the story building process outside consciousness in the human mind. We know that it happens, we just can't know specifically and precisely how.

Below are two large groups of factors selected from among many, many ways people have addressed the question of just how we go about developing the stories which lead to judgements. Many

"Intelligence gathered by this and other governments leaves no doubt that the Iraq Regime continues to possess and conceal some of the most lethal weapons ever devised."

– **President
George W. Bush**

trial professionals use these distinctions regularly, some on a daily basis. Attorneys occasionally forget that the words in court transcripts, no matter how much we treat them as such, are still not the facts themselves, but just their verbal referents. That fact can help us recall, while invoking any of these models for the mind's work, that they are all just mental models themselves - useful speculation, educated speculation, but ultimately speculation all the same. People do not really have a five pound Hindsight bias hiding behind their spleen, or a fundamental Attribution error in their liver. Recalling that, we may also be reminded to place the greater part of attention on the *stories* we are trying to measure, and not the yardstick we try to measure them by. Someone once said that Art, like morality, consists of drawing a line somewhere, and many of these models for assessing influences on our thinking and deciding have proven very useful at drawing some lines for many professionals across the globe for many years. If for no other reason than to know a little of the territory people working with the mind travel, these constructs deserve some scrutiny. And, they can help draw some lines distinguishing one storyline from another in focus groups designed to find them.

PERCEPTIONS AND THEIR INFLUENCE

Other than Conscious and Conscious Activity

The most basic dynamic at work in every person forming a judgement by first building a story about the legal matter before them, is the interplay between their conscious, verbal facilities, and the majority of their mental process which is not available to conscious review or direction. As indicated above, it helps to start noticing when you are asking someone a question that they can't consciously answer.

This most commonly happens when an attorney or trial professional asks a mock juror, or an actual one after the verdict comes in, *why* they decided as they did, and exactly how that process went. Nobody has anywhere near full access to that information, and repeated asking doesn't help bring it to mind. We

do have references, since we draw on some of the memories being used to try and describe the story we can't fully grasp. But, the paltry proportion of information available for the conscious asking is something that trial professionals would best keep solidly in mind or fall prey to taking one answer as the whole story one too many times.

This Other than conscious—Conscious interplay is perhaps the single biggest factor consistently forgotten or minimized; the fundamental dynamic between those mental processes in the decision makers' heads which play by conscious rules and those which don't. Because the one is so much more prolific than the other, and because they do indeed play by different rules, learning how to approach their intersection when researching case stories in small groups can be crucial to success. Respecting the limits in getting direct answers about processing further outside conscious awareness and control can open up many alternative ways to turn up lots of potential shapes of case stories brought out by a single client's situation. When will a person be forming meanings for a judgement with the least access to their thinking process, as well as the most? There are divisions here to be noted among messages which are primarily written, spoken or seen, since written influence and responses favor a more conscious focus than some other types of messages. Some people call them more "left brained" input, though geography isn't key. Your methods should always respect *all* parts of the minds you are working with.

Getting The Stories: Many times, when a focus group member, potential juror or a judge *presumes* a fact or connection, or suggests something is obvious to him or her by using terms like "just", "clearly", or even "obviously", they have arrived at an inner storehouse of references and associations and are announcing that important fact.

Delivering Stories: When confronted with substantial sets of associations apparently of an other than conscious nature, avoid asking the person to rush to *any* conclusion. Ask short, general follow up questions, like "What else?", which offer no direction and only presuppose that there is still more to

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come. Expand and include.

Perceptual Preferences

Each person has a preference, often quite pronounced, for expressing in thought and actions, one of the three major sensory systems. We also develop unthinking habits for what we tend to see first, hear most clearly or feel most deeply within the full mix of sensory experience brought into our minds at the moment, or by memories. Do you like a good explanation, or the big picture, first? Can you plan something crucially important for your future without a pen and paper? Is eye contact something you can do without? Can you relive a gut feeling, or just the idea that you had one? Everyone has a full range of sensory perceptions operating in the mind all the time. But, we tend to express ourselves, privately & publicly, through one over the others as we grow up. And, as a

“I am very proud of what Tommy Franks did - up to the moment of deciding how to transfer power to the Iraqis. Then, we go off a cliff...The real key here is not how many enemies do I kill? The real key is how many allies do I grow? And that is a very important metric that they [the Administration] just don't get...The only exit strategy is victory. We are not enforcers. We are the reinforcers. The distinction between these two words are central...”

– Newt Gingrich

result, we tend to favor - or ignore - input and memories packaged in that preferred system over another.

Often, catastrophic injury cases favor visual evidence of both real, and sometimes imagined, forms - debriefing burns, for example, if the event is not videotaped. But, the person very accustomed to expressions of visual images coming and going as the primary channel for relating to the world's offerings may not be the one on the mediation panel most affected by the images in this story, on this day. And, this observable habit in our perceptual apparatus could alert you to that fact long before it was too late.

Evidence can have a bias toward imagery, words or just a sensation. Lawyers presenting cases each have, and thus each express their client's case story through this preferred filter of words or images, or sensation. If you are not cautious, you may end up asking someone to see eye to eye who is far better equipped to hear what you say, thus diluting both the ability to receive the message and also to reply as well as he or she might have. You could presume an automatic impact of certain images, or written statements that have that effect only for people who happen to be arranged the way you are - not the way your judge, mediator, or most jurors happen to be. Knowing how to identify this basic perceptual filter, at work, operating on all our minds all the time, can help you plan the presentation of case stories to avoid those weak spots. One excellent arena to practice observing this perceptual patterning at work is among focus group members discussing case stories.

Getting The Stories: Often, focus group participants and *voir dire* panelists (and judges and mediators) will demonstrate a propensity to either emphasize or diminish whole tracts of a case story based on a sensory bias at work; strongly filtering for either visual, auditory or kinesthetic input, or working to filter it out.

Delivering Stories: If you learn to recognize the verbal and behavioral cues that advertise this constant filtering, and you practice delivering a message well in any one of the three basic sensory channels at will, then you can adjust your

delivery to meet this unspoken need of this kind of decision maker in time to do some good, either 'translating' imagery to words, for example, or 'doubling up' on the verbal packaging that is already a part of your presentation.

Verbal and Nonverbal Messages

The dynamic between the mental processing which is and is not conscious is just that; dynamic; subject to divisions by degree which are often much less solid than writing about them tends to suggest. Putting influences of spoken and written language in the conscious camp, and facial expressions, demonstrative graphics, voice tones and gestures in an other than conscious one is not a complete solution. Someone who can accurately recall long strings of attorney or witness commentary may indeed have a more pronounced verbal set of mental muscles, but it could also very well be a tone of voice, a drop in volume, or even a facial grimace from a witness that 'told' this individual which specific parts to recall so well. And, that cue may be lost to conscious review and evaluation, while the words it marked out take center stage for both the decision maker and the professionals questioning him or her. What is most important is to avoid the temptation to only count and measure what is most easily counted and measured.

For example, though the majority of people attending to a case story probably won't prefer visual processing, it would be a mistake to think that this group was somehow less influenced therefor by demonstrative illustrations of the testimony. One well known study points out, for instance, that average retention of presented material, measured after 72 hours, goes up dramatically when the verbal message is supported by a visual element, and that, in a contest, visual messages are retained better than strictly verbal ones.

So, you know that matching visual aids to the key verbal points can help decision makers hold your key points in memory longer, and maybe even emphasize those points as if they were key to their version of your story as well. But, discounting drafting, mechanical or medical drawing techniques, and the general principles of good design, how will

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you know which elements of the story to single out for visual representation, and how best to present the visuals, exactly? Being prepared to search and sort out the visual, verbal or feeling influences in people's expression of a case story can certainly point you in the right direction, even when the people themselves aren't conscious of the role an image may be playing in their own thinking, and are putting it across indirectly. They may be so wrapped up in defending a position, that they fail to notice their own use of visual imagery and analogies as they paint their big picture for you. But, you might just see the value of their nonverbal message very clearly indeed, as long as you are looking for it.

Getting The Stories: One major key to help you track the other than conscious trends in a developing case story is to carefully observe both nonverbal and implicit *marking* of points, concepts or sections of those stories during the telling by the individual.

Delivering Stories: Among other things, catching this overlap of verbal and nonverbal emphasis, whether positively or negatively positioned in regard to your desired outcome, can often point out the *degree* of importance being assigned to those story elements by the individual, as it tracks very well for which points are most strongly *retained*. You can increase your sensitivity to these layers in communication simply by always striving to balance your delivery to individuals and groups along both nonverbal and verbal lines.

Life Experience Biases

These are the more familiar "biases, prejudices and sympathies" the court warns every juror to exclude from their decision making process for the length of the trial and deliberation. Life experience tends to reinforce a consistent set of attendant biases, attitudes and assumptions which, though not impervious to change, tend to maintain an equilibrium rather than evolving. As the late Harry Lipsig said quite well about the ideal of the impartial juror and its reality, "The human being is never impartial. He is biased by everything he

has experienced, suffered, and seen." Our expectations of every event are affected, sometimes deeply, by the reference experiences we have stored as the sum of our lives to that point. But, each new experience has the potential to change the arrangement somewhat, in ways that range from imperceptible to shattering.

These biasing habits in our thinking, while activated by a civil case story's content, are not wholly driven by that story content. Viewing a situation in hindsight will tend to make trouble on the path seem more apparent. But seeing the outcome as more predictable or apparent at the time doesn't mean that one side only, say the defendant, will always have been seen to have had the capacity to avert that outcome. It is, likewise with attributing blame for harm more to personal responsibility than to circumstantial forces at work. That habit of attribution does not always single out which person; plaintiff, defendant or third party, fault will be attributed to. Each bias has a demonstrated trend, but not a universal one. (See also Hindsight bias and Attribution errors, below.)

Some suggestions can be made for how best to approach and deal with habits of thinking formed from a lifetime's experiences, and reinforced by the stories we tell ourselves to give them their meanings. First, it is more important to notice them, than to name them. It is very unlikely you can get someone to consciously change such a life habit for the length of a focus group or a trial, but you may occasionally find a way to get them to use a *different* set of biases not usually associated with the kind of storyline they expected to hear. One key to doing that is to start to make distinctions that go beyond just how someone may seem to use one bias, or prejudice over another. Start looking for the *degree* to which that thinking habit, attitude or belief is expressed, and how many others seem available to use, as well.

For example, the invitation was extended in the focus group described above for the lady who thought herself insulted by the attorney, to use her attitude toward being the best 'juror' she could, and for doing the best job she can. Perhaps the degree of attachment she has

to her beliefs about work and juries can help her hear something different, as the case story is delivered. Most importantly, it is never a wise idea to mistake the whole person for one bias they may have learned, even a very strong one. They may have another one, equally strong, sitting right next to it waiting to help. Assume that there will always be more, and consistently invite their *inclusion* in the process.

Getting the Stories: Do not overlook the obvious. Often, the life story elements most heavily influencing a focus group member's or *voir dire* panelist's story building efforts are those which are made most apparent by their *absence* in conscious self-reports of what seems to stand out to that person. Their influence is so pervasive and common, it is more often presumed than consciously noted and declared.

Delivering Stories: Get used to seeking out evidence between the lines where the three big filters of *distortion, generalization and deletion* are at work on both the story context, and its content. Practice following up by exploring where you detect hints of distortions, generalizing and deleting in the broader story contexts first, before you move to question the case, or fact-related specifics which may have drawn them up. Avoid reducing to detail, or single, closed-choice options what can be included in larger frame questions and answers.*

*To be continued

"The word "genius" isn't applicable in football. A genius is a guy like Norman Einstein."

– Joe Theisman,
NFL Quarterback &
sports analyst

II. LAWYERS THINK, AND JUDGES INSTRUCT DEDUCTIVELY, YET JURORS THINK INDUCTIVELY

We lawyers suffer the disadvantage of being legally trained, a contaminant with which ordinary folks aren't burdened. Legal training is grounded on deductive thinking and logic. Lawyers think in syllogisms, meaning we begin with the facts, and then carefully build, from the "bottom up", to conclusions supported by the facts. In reality, people process information inductively, meaning they think from the "top down." They form early impressions/opinions, then collect facts to support what they already believe. Inductive processing is obviously different from the legal template commanded by the court's instructions. This general proposition is not news to most jury trial lawyers, however, the degree of the inconsistency is. Within this gaping chasm lie both the challenges and the opportunities.

In measuring the width of the divide, let us begin with the mandates of positive law, i.e., the boilerplate instructions with which judges routinely charge juries. A cursory examination of pattern jury instructions quickly illustrates the schism between the terms of the court's charges and the inductive decision making processes natural to the jurors.

After each of the following instructions, I contrast the mandates of the charge with the realities of the jurors'

"The war on terror involves Saddam Hussein, because of the nature of Saddam Hussein, the history of Saddam Hussein, and his willingness to terrorize himself."

**– President
George W. Bush**

inductive thinking processes and their strong inclination to assign justice in a "fair" or distributive manner.

Jury Instructions:

1. "You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give you. That is how you will reach your verdict." Stated differently, "Do not attempt to decide the case until you begin your deliberations."

Jurors form early impressions, which they thereafter defend.

2. "You must follow the law whether you agree with it or not."

The jurors will do justice, meaning what they think is fair. Three aspects of the instructions, the charge for them to apply their considered judgment, commanding jurors to both draw from and rely upon any reasonable inferences, and explaining that a verdict can be based solely upon circumstantial evidence, all invite and legitimize jurors applying their own notions of fair play and common sense.

3. "You must not be influenced by sympathy for, or prejudice against, any party."

This is the heart of jury selection. These values resist being sanitized from jurors and their deliberations.

4. "The jury is not to consider whether any of the parties have insurance, or the ability to pay for any loss." Under ORE 408 insurance is not admissible.

In determining which of the parties should bear the loss, jurors may not only discuss insurance, but also whether the plaintiff really needs the money, a point which is entirely separate from whether the plaintiff is entitled to it under the court's instructions.

5. "Do not determine whether a party was negligent by consideration of subsequent events."

This collides with hindsight bias. An excellent example is in an insurance "bad faith" case, where the evidence in the later bad faith trial consists not only of all the earlier insurance offers in the underlying case, but most important, the verdict.

6. "The amount of money requested by the plaintiff in the complaint should not be considered in arriving at your

verdict except that it does fix a maximum amount you can award the plaintiff."

The amount of the prayer is psychologically important because it is where jurors begin their analysis, this is known as an anchoring number.

The next three judicial directives deal with matters of evidence.

7. "When the court orders that evidence is stricken from the record, the jury must disregard that evidence."

Yeah, right! This is called "unringing the bell!"

8. "When evidence is admitted for a limited purpose, you may consider it only for the purpose it was received."

The temptation to stray is almost irresistible.

9. "Whenever I sustain an objection to a question, ignore the question and do not guess what the answer would have been."

Same problems as numbers seven and eight.

Application:

Motions in limine, including ORE 104 pretrial motions, are all antidotes to insulate the jury from hearing what they should not. The prohibition against speaking objections is a subdivision of this general concern.

The application of positive law (the substantive and procedural rules that govern the case) to the facts of the case, when filtered through the common sense of ordinary citizens serving on juries, assures that our civil justice system remains grounded in community values. The result is known as our common law, which is a gestalt that is both a process and a result.

Successful jury trial lawyers are deft at tiptoeing between the mandates of the positive law and the subtleties of jury persuasion. It strikes me that personal injury lawyers tend to fall into two skill sets that are a reflection of their differing job requirements. Defense attorneys are strong on the law, all motion practice, and the technical aspects of causation. Plaintiffs' attorneys hope to survive all the factual and legal hurdles the defense throws at them, and live to deliver passionate closings. While all good trial lawyers appreciate the importance of preparation, plaintiffs' lawyers are probably better with improvisation. Each has their strengths, and they are

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certainly not mutually exclusive.

It is also my impression that lawyers who try commercial cases are more comfortable with the technical aspects of their cases than they are at telling stories about the people they represent. Without disrespect, many commercial cases are arbitrated or decided by bench trials. As lawyers move farther away from juries, the more "book smart" they seem to become. The closer lawyers get to juries, the more "people smart" they necessarily become. Being "book smart" has little to do with being "people smart", in fact they are probably reverse correlates.

When challenged or stressed, it is natural that we all instinctively resort to our perceived strengths, whether it be power of analysis and "book smarts" or our people skills. These differing orientations color our very perception of "what the problem is." This is called correspondence bias, and explains why, within a common set of facts, a "book" lawyer will try one case, and a "people" lawyer will try quite another.

III. JURORS METE OUT "JUSTICE" IN EITHER A COMPOSITE OR DISTRIBUTIVE MANNER

Jurors make decisions in a composite, or distributive manner, without strict compliance with the court's instruction. This allows astute trial lawyers who are psychologically ambidextrous to persuasively weld the letter of the law to the jurors' common sense, producing the results they desire, a.k.a., "justice." Yes, strong liability can provoke weak damages, and good damages can provoke weak liability. There will never be a final answer to the trial lawyer's question, "Which is more important, a 'good plaintiff, or a target defendant?'" This is the stuff of professional folklore. Even the judicial system with its deductive mantras concedes this.

The bottom line here is, the sequence of questions on a special verdict form, beginning with liability and ending with damages, presents the format jurors must follow during their deliberations. I'm sure they do, if they think it's fair.

IV. WHAT JURORS THINK - THEIR OUTCOME DETERMINATIVE BELIEFS

Jurors individually and collectively represent all the messy stuff that makes us the people we are. This includes all of our biases, sympathies and prejudices, the very attributes courts instruct all jurors to put aside. The legal system's answer is that sufficient fairness is produced by allowing all sides to question prospective jurors, and then eliminating the extremes on both ends by exercising juror challenges. The result is a jury, a committee of the community, that our culture deems to be "fair." We also know all sides are trying to obtain a jury that is biased in their favor. This is as it is intended, as the adversary model assumes justice will result when opponents vigorously pursue self interest within this system.

Each of the following beliefs is introduced by title with a brief explanation, followed by a paragraph captioned "Application", which discusses the concept's use in the courtroom. An example follows when necessary.

It is important to understand this section deals with what people believe, meaning the content. Distinguish this from how people think, meaning process information. These are the outcome determinative attitudes that foreshadow jurors' votes. Common content or belief examples include: "Money really won't do any good, because it's not going to bring back the dead," "A rich person may be legally entitled to a verdict, but not need the money as badly as a really nice defendant who owes it," also any matter concerning race, gender or religion or that a plaintiff or defendant is either "too attractive or unattractive." These are the concerns attorneys for both sides must explore. A good way to identify these outcome determinative attitudes is to ask yourself, when the jury later retires to deliberate, "What are the first things they are going to talk about that scare me?" We all know the court instructs the jury not to be influenced by "bias, sympathy or prejudice" and that, "There is to be no conjecture, speculation or guess work." If these mandates were self fulfilling we wouldn't need jury selection.

1. Personal Responsibility - This means not blaming others for life's challenges or choices you have made. Personal responsibility is one of America's most enduring and endemic values. Being irresponsible is a sign of immaturity, while taking responsibility is viewed to be a sign of maturity and moral strength. Many of my defense attorney friends suggest this idea is aptly summarized by the bumper sticker seen in the movie "Forest Gump" regarding something happening. The fact that a plaintiff has filed a lawsuit claiming someone else is responsible for his or her injuries arguably places them in opposition to notions of personal responsibility.

I begin each case assuming that jurors will impose a higher standard of responsibility on the plaintiff than on the defendant. It is my sense jurors believe it is more likely they will be sued rather than becoming injured themselves and suing, thus making it easier for them to identify with the defendant.

Application: Splinter the allegations of fault against the opposing side into as many discrete choices or acts as possible. With choice comes power, which ultimately means responsibility. Even more important than being able to identify each separate, negligent act, is being able to explain why the opposing side made that choice. Motive is so important because juror decision making is a process of story formation, and at the center of any story is always the "Why" question. At this point, plaintiffs' lawyers talk about corporate profit

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"I'm not going to have some reporters pawing through our papers. We are the President."

**- Hillary Clinton
commenting on the
release of subpoenaed
documents**

and defense lawyers talk about "people who sue."

2. Anti-plaintiff bias - This is part of the belief that the civil justice system is broken, and is closely related to the next bias, i.e., anti-lawyer bias. These are all planks in the conservative tort reform political agenda, i.e., there are too many (frivolous) lawsuits, lawyers, big verdicts, and punitive damages awards.

Application: Do not attempt to take on the system and try to defend the McDonald's hot coffee verdict. Differentiate your client from the jurors' perceptions of how plaintiffs who file frivolous lawsuits act.

Example: As plaintiff's counsel, admit during jury selection that "Yes, occasionally frivolous lawsuits probably do occur, however, the question for this particular jury is 'Is this case one of those?'" With this introduction, your next question is: "Mr. Juror, in answering that question, what types of facts will you be looking for to determine if this case is frivolous?" Jurors generally answer: "Well, I would look for exaggerations, a failure to return to work promptly, and how soon after the injury did they contact and hire a lawyer? Can the doctors find anything (physically) wrong with them? What is the plaintiffs work history? Has this plaintiff filed lawsuits before? If so, how many and for what? How much money is the plaintiff suing for?"

3. Anti-lawyer bias - Many people like their lawyer, yet hate lawyers generally. Many voters like their congressman, yet distrust Congress. This is why lawyers should avoid conduct that conforms to jurors' preexisting negative stereotypes of attorneys, such as looking or acting slick, contentious, or pandering to the jurors' emotions. This conduct assures you will fail the jurors' citizenship test, and thus fail to earn their trust.

Application: Similar to how the anti-plaintiff bias was processed.

Example: Concede that there might be too many lawyers and that the credibility of the legal profession is low. Directly ask the jurors what you, as an attorney advocating to them in this courtroom today, can do to earn their

trust? They will tell you: "Always be honest, never exaggerate, and if you make a mistake, quickly admit it." You now know what you must do. If you honor these requests, the jury will trust you. They have told you so. If you do what the jury requests, you might still lose, but it won't be because of your poor citizenship. Every trial lawyer will tell you the most important attribute is credibility. Why? Because, without it, it doesn't matter what you say...

V. THE ORDER OF PROOF - WHY IT IS SO IMPORTANT

Solomon Asch, an eminent social psychologist, demonstrated the importance of sequential order in an experiment. In the study, subjects received the following statements and then were asked to rate the person.

1. Steve is intelligent, industrious, impulsive, critical, stubborn, and envious.
2. Steve is envious, stubborn, critical, impulsive, industrious, and intelligent.

The two statements contain the same words, simply in reverse order. What Asch found was that Steve was rated more favorably when he was described with positive traits first.

1. Availability Bias - Whatever most occupies juror attention during the trial will influence what the jurors focus on during their deliberations. Why? Because jurors mistakenly equate the availability of information with frequency, probability, and causality. For example, people often assume that murder is more common than suicide, even though it occurs almost 50 percent less often. The reason for this assumption is that murder is more widely reported and suicide is under reported; thus, murder is more available in memory. Another example is when the public is bombarded with information about frivolous lawsuits, people understandably assume such cases are common, when statistically they are not.

Application: Seize the initiative. Try your case. Keep the focus on the opponent's misconduct. When I began practicing law more than thirty years ago, the prevailing thought was to begin the case by calling the plaintiff first, thereby introducing the plaintiff to the jury as a

real person. The insights of the trial consulting profession concerning availability bias have changed this. Opening with the opponent's misconduct defines what the case is about. Following with the plaintiff also permits the injured person's shortcoming to be viewed in a more favorable light. There are many attractive plaintiffs' arguments that naturally flow, including "The law says that a defendant/wrongdoer takes their victim 'as is'", and, is no defense to a wrongdoer's misconduct to highlight the shortcomings of their victim ..."

2. Belief Perseverance Bias - This bias refers to jurors' tendency to cling to a story once adopted, even in the face of conflicting evidence. It is a sequential corollary to availability bias.

Application: An (early) adopted trial story becomes a conceptual template for interpreting and understanding subsequent evidence. Jurors do not continually update an adopted trial story as new evidence is introduced. Consistent evidence strengthens a trial story once adopted, while inconsistent evidence is critically scrutinized and often ignored.

Primacy, Recency and Preemption - Every lawyer is familiar with this trilogy, however, each are so important that no discussion concerning the order of proof is complete without at least mentioning them.

3. Primacy - Information presented early tends to be remembered best, and therefore has an inordinate influence. Primacy reinforces the potency of both the availability and belief perseverance biases. The power of primacy applies not only to the entire trial, but to every part thereof.

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"It's no exaggeration to say that the undecideds could go one way or another."

**- President
George W. Bush**

Application: Begin and end each witness with strengths, begin and end each day, and each part thereof, with your best points.

4. Recency - The last thing jurors hear is more easily remembered. Melding primacy and recency, it follows that your "weakest" evidence should be buried in the middle of the trial and each part thereof. This is one of the reasons why defense counsel will request that the court instruct the jury after the closings rather than before; thereby avoiding the jury retiring to deliberate with plaintiffs rebuttal argument ringing in their ears.

5. Preemption - This involves being the first to present negative material. Preemption is done not only to preserve credibility, but also to reduce the impact of any unfavorable facts, thus minimizing the opponent's opportunity to exploit such material. Use preemption during the jury selection and opening statement. The psychological result of effective preemption is called deconditioning. The more one is exposed to a particular stimulus, the weaker the response becomes. The repetitive playing of the video tape showing the police beating the defendant in the initial Rodney King state court criminal trial is a good example. The video tape was played to the prospective jurors more than 60 times during jury selection and the opening. The arresting officers were acquitted. At a personal level, each of us can see the effect of this deconditioning in our own response to violence in the media.

Before utilizing preemption, determine if you can turn any weaknesses into strengths. Once again, the "as is" or previous infirm condition, is a good example, i.e., "The more fragile the plaintiff was, the less trauma it took to injure him."

VI. How Jurors Think - Five Information Processing Behaviors Called "Biasing Errors"

While a number of these "biasing errors" are similar and superficially may seem the same, each is unique. The differences are more than labels. These errors describe thinking processes that

affect perception, and therefore ultimately the conclusions a person comes to embrace. Biasing errors (process) must be distinguished from the specific beliefs (content) that a juror has.

1. Confirmation Bias Error - This is at the heart of processing information inductively. Jurors will search for evidence that confirms their preexisting beliefs, critically scrutinize evidence that is contrary, and interpret ambiguous evidence consistent with their preexisting beliefs.

Beliefs are primarily driven by life experience. This is why it is imperative to fully explore life experiences during the jury selection. A core belief will prevail over evidence that challenges that belief. These are contaminating outcome determinative attitudes. Core beliefs must be identified, discussed, and thereby neutralized during jury selection. If not confronted during *voir dire* it is too late when the jurors retire to deliberate.

Application: This is what jury selection is all about - identifying the "outcome-determinative" attitudes of each juror that foreshadow their ultimate decisions. Stated differently, how a juror finally votes is generally determined by their preexisting attitudes. When unfavorable to you, these attitudes need to be clearly identified, acknowledged, and to the extent possible, neutralized. Life experiences will generally trump the court's prohibition against bias, sympathy and prejudice. Legal directives rarely negate a bias, however, skilled jury selection can reduce it. Consider the use of written instructions for reinforcement of the prohibition against bias, sympathy and prejudice during closing. A copy of the instructions then goes back to the jury room, where it continues preaching during the deliberations. Make the effort to prepare a copy for each juror.

Example: I write on an easel in large letters the outcome determinative attitudes that are unfavorable to me. I label these as biases. A legal verdict is only supposed to be based upon the law and evidence. There is to be no bias, sympathy or prejudice, nor conjecture, speculation or guesswork. This begins a frank discussion along the following general format. I begin with the general statement that we are all biased in some

way, inviting the jurors to admit they have strongly held beliefs on topics that are relevant to this case, such as tort reform, and that given these firm beliefs it is difficult to begin the trial being completely impartial to both sides. I then progress to the question in the juror's mind, given their strongly held beliefs and the facts of this particular case, "Is this is the right case for this particular juror to sit on?" If they decline my invitation to ask the judge to excuse themselves (I call this "attempted self-recusal"), I then inquire how they are going to prevent strongly held beliefs/biases from contaminating their decision making. The magic here isn't what the juror you're questioning says, it is the rapt attention the other jurors are paying as they listen to the comments of their fellow jurors. This begins a kind of group inoculation against biases.

2. Fundamental Attribution Error FAE refers to the tendency to over attribute to other people the influence of "internal" factors, (i.e., personal responsibility, individual choices, etc.), yet when it comes to themselves, the same people flip-flop. They will under attribute the influence of their own actions or choices, and over attribute causality to external factors or situational factors, such as the acts of others. This quality is common to all people - that is why it is called fundamental. For example, most parents are excessively proud of their children. If their child is sitting on the bench in athletics it is because of bad coaching. If the same child were playing more, it is always because of talent, never bad coaching.

In a car accident, the juror will look at the plaintiff and say: "You dumb driver, you were not paying attention." The same juror is later in a car accident herself and says, "I am a good driver, my brakes failed, the other driver wasn't paying attention and that's what really caused the accident!"

Application: I have two responses to FAE. First work hard to present your witnesses as people the jurors will like. Why? Because if the jurors positively relate to them, they might see themselves in the shoes of that witness and identify with them. The jurors will then attribute the favorable internal presumptions to that witness; the converse is just as true

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if the witness is not liked by the jurors. Second, specifically develop and emphasize all the evidence that either supports or contradicts the internal and external presumptions foreseeable to your side that flow from this FAE.

3. The Just World Hypothesis Error - This is when a juror says "If you play with matches, you are going to get burned!" or "The plaintiff got just what they deserved." It relates to peoples' psychological need to believe that the world is an orderly place and that everything happens for a reason, i.e., "Good people are rewarded for good deeds, and bad choices produce bad results."

Application: To the jurors, conclusions flowing from a just world hypothesis are just plain common sense. Such conclusions are so organic to the jurors' values that jury selection neutralization techniques are not very effective. A pre-emptory strike is necessary. Given that each side usually has only three pre-emptory strikes, this is when motivating a prospective juror to try and recuse themselves is so important.

Example: Similar to the format used earlier with confirmation bias, try to entice jurors to request that the judge allow them not to serve on this particular case, because by their own admission they will find it difficult to be fair. This line of questioning does help neutralize, to some extent, the issue for both the individual jurors and the panel at large. It is my sense that it is easier to neutralize confirmation biases than conclusions flowing from a just world hypothesis. Revelations of strongly held (adverse) beliefs on matters central to the case also preclude the disclosing juror from later sneaking up on the other jurors during deliberation with an undisclosed agenda. This is because the entire juror panel knew exactly where that specific juror stood before the trial even began.

4. Hindsight Bias Error- This is nothing more than Monday morning quarter backing. It smells a little like confirmation bias. Hindsight simply allows one to interpret the past with the benefit of knowing the outcome of a

choice. Because of hindsight biasing errors, jurors skip the analytical questions of foreseeability and go straight to the conclusion of fault, answering "yes." This erroring bias tends to favor an injured plaintiff as the plaintiff can argue that "Because of choices the defendant made, there was an 'accident waiting to happen', and this time it did." Stated slightly differently, "There was no question someone was going to get hurt, the only question was 'who' and 'when', not 'if'." The defendant conversely will use hindsight bias to their advantage when arguing comparative fault by focusing on choices the plaintiff made.

Application: If defending emphasize that the law states that fault is determined at the time of the acts, not in hindsight. Simply saying that the judge will also later be instructing the jurors that this is the law is not enough, even with written instructions. The jurors must, with your assistance, generate examples from their own lives. They always give greater weight to examples from their peers than those coming from a lawyer.

Example: Invite the jurors to think of an instance where they already know the outcome of a choice, and later criticize it. It's easy to know the answers to the test questions when you have the answer sheet. How many of us are quick to criticize prior investment choices based upon what we learn a week later in the *Wall Street Journal*. The jurors must generate their own examples, not simply embrace yours.

5. Defensive Attribution Error - When jurors are anxious because they feel threatened at a deep psychological level, they tend to blame the injured person as a way of processing or dealing with their own emotional discomfort. When jurors imagine themselves confronting the same situation the plaintiff did, they ask themselves how their ideal self would have behaved, not "Have I *ever* acted like that?" This explains why jurors who are mothers so harshly judge other mothers in child dart cases, especially those mothers on the jury who have never left their child unattended, not even for a moment!

This biasing error involves jurors unconsciously blaming the victim in order to avoid thinking that they too

might suffer a similar fate. If the hindsight error favors the plaintiff, then defensive attribution favors the defense. This biasing error is vexing because without specific knowledge of both the existence of the biasing error, and that it operates unconsciously, most lawyers will think they want a juror similar to the plaintiff. Paradoxically, this similarity is exactly what prompts the frightened jurors to defensively attribute fault. This is an example where instincts and common sense betray many lawyers.

Neutralizing techniques generally do not work well. The process is similar to handling FAE. Will the jurors like the witness? Emphasize facts that either support or contradict FAE presumptions. These facts are probably less useful for you to use in attempting to persuade unfavorable jurors, than they are for partial jurors to later use during deliberations in their attempts to persuade "swing" votes.

VII. APPLYING BIASING ERRORS TO THE ISSUE OF CAUSATION

There is a good reason why the LSAT specifically tests the applicant's analytical skills. Learning to "think like a lawyer", in large part, involves refining your ability to understand and communicate precisely why a particular event has occurred. Typical examples of causation arguments include "The plaintiff would never have been injured if..." and "Yes, it might be true, but..." Remember, what we lawyers call "causation", jurors understand as an explanation.

Consultants teach lawyers that in determining "the" cause of an outcome, jurors instinctively construct alternative scenarios that might lead to different results. This process is called "counterfactual" thinking. The more easily jurors can imagine a different sequence of events producing a different result, the more likely jurors will focus on the interchangeable element as "the cause" of the result in question.

Illustrating with a basic slip-and-fall case, if jurors can comfortably construct an alternative scenario to what actually happened, such as the plaintiff traversing a different route into the building, they are likely to conclude, "Had the plaintiff just gone the other way, the accident

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would not have happened." Thus, the plaintiff becomes the focus, ergo increasing his responsibility. If jurors construct an alternative scenario that includes the building custodian placing a "slippery when wet" sign at the base of the stairs, the jurors are likely to conclude, "Had the building custodian just put a sign up, the accident wouldn't have happened." Thus, the building management becomes the focus (remember availability bias), thereby increasing the defendant's responsibility. Effective defense lawyers encourage jurors to embrace an alternative (counterfactual) scenario that favors their client by questioning the plaintiff (e.g., "Did you see the sign that said 'slippery' near the stairs?") and articulating all the choices/responsibilities the opponent ignored.

Experienced lawyers sweep up and down the entire factual continuum of the case, both before and after the precise moment of the plaintiff's injuries, carefully searching for the best spot, or "causation event" from which to either attack or defend. When defending, they look for something unique that happened to explain the bad outcome. This works because if an unusual occurrence explains what happened, the suggestion is it probably will not happen again, i.e., the world is a safe place and there is no need for the jury to educate the defendant with a large plaintiffs verdict to prevent a similar injury from recurring. The plaintiff, on the other hand, wants to

assign fault to an event, or non-event, which is characterized as a choice, as early and as often as possible in the continuum of events. Both sides will then want to splinter each choice into as many discrete acts as possible. Again, the reason is that with increased choices comes increased responsibility, and therefore potential legal liability.

Whatever issue the attorneys decide to build their case theme and trial around, it must align with community values, namely fair play. This comports with common sense. The art is in selecting the right issue(s) on which to try your case. The more successfully this is done, the "better" the lawyer. This ability is often called instinct. Senior Eugene attorney John Jaqua said it best when, a long time ago, I heard him compliment an opposing lawyer saying, "He had a great sense of sidewalk justice." The tactical high ground you choose to try your case on will be driven by your view of what the controlling community values are.

Trial effectiveness requires that a lawyer be able to anticipate the core issues of the opponent's case. This knowledge allows you to preempt and neutralize the opponent. This does not mean you should ever allow an opponent to dictate how you try your case; it does however permit you to begin the process of preemption by framing the contested issues in a light most favorable to you and by refining your proof in these areas.

This is crucial for the plaintiff. Why? Because it is the plaintiff who wants compensation and only the plaintiff has the burden of proof. The defendant can do nothing and win.

I offer one additional point with all proper respect and deference to the worthy lawyers whom our office routinely faces. When serious claims are brought by plaintiffs, the insurance companies understandably and properly hire only the finest lawyers. The attorneys they employ are uniformly men and women of stature. By virtue of professional standing, they bring a certain air of authority to the legal positions they advocate. They are the essence of credibility and competence. This means that when a prominent defense lawyer explains to a judge and a jury that this is a very simple case that can be boiled down to one issue, you

know you are in big trouble! Assume the defense lawyer has framed the issue, and thus the case, in a manner that is favorable to his or her position. Unless this is effectively anticipated and blunted, you are probably going to lose.

Once you anticipate the issues or "high ground" on which the opponent will try their case, ask yourself, "What credible responses are available?" Jury consultants will tell you that when liability is clear in medical malpractice cases, the defense still wins most of the time by focusing on the separate issue of causation.

After the opposing lawyer's opening is delivered, have it transcribed by the court reporter. This provides you with their road map. If they vary from it, remind the jury of this during the closing argument by reading, verbatim, what the opposing lawyer promised during the opening.

VIII. CONCLUSION

The principles discussed herein are equally available to all lawyers in all courtrooms. Think of each concept as a tool. The more knowledgeable you are about the tool, the more effective you can be in its use. Understanding the psychology of human behavior will improve your jury selection, alter the order of your proof, provide you with new paradigms in developing your case theory, and improve the quality of your trial tactics. As your confidence grows and your instincts sharpen, you will progress beyond the mechanics of being a good trial lawyer to becoming a craftsman of your trade.

The best of luck to you...

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"Whenever I watch TV and see those poor starving kids all over the world, I can't help but cry. I mean I'd love to be skinny like that, but not with all those flies and death and stuff."

– Maria Carey

News From The Mental Edge

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