

EIGHT WAYS TO GET EXACTLY WHAT YOU WANT

- By Dan Jones & Alison Motluk
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LIFTING THE LID on the science of persuasion

Cajole your boss into giving you a raise, win someone round to your point of view, or persuade your partner it's their turn to put out the trash - getting people to do what you want can be very handy. Persuasion is a key element of all human interaction, from politics to marketing to everyday dealings with friends, family and
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ANCHORS AND FRAMES AND THEMES (Oh My)

- by Eric Oliver

"Many people overestimate how much changing a person can really do. They fail to realize that just going from 'The same damn thing over and over' to 'One damn thing after another' is a real improvement".
- Bill O'Hanlon

GROUND RULE TERRITORY

Perhaps the biggest problem trial attorneys confront, when it comes to communication, persuasion and influence, is what almost everybody consistently ignores about the decision making process. We ignore the fact that the part of the mind that forms most of any eventual decision plays by very different ground rules than we'd like it to. When we ignore this situation, and act as if the decision maker's mind plays by one set of rules - not two - we are most likely disappointed by the results of our persuasive efforts. For attorneys, those disappointments come in the form of failed mediations, unsuccessful negotiations and dreadful outcomes in court.

While it has been decades since anyone in the scientific community questioned the fact of a dynamic between those thoughts which are *conscious* and those that are not, very few in the legal community are trained to actually account for that difference *in practice* when developing and delivering persuasive case stories for settle-

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Publisher's Notes

Hi All -

This issue seems headed in two directions at once; more "lawyerly" with two pieces from the NLJ, and more "edgy" on the persuasion and framing end. But, there still is a unifying theme, for those of you who still keep track of such things after so many years. It is our oldest and biggest factor. The unappreciated, often ignored dynamic between the primary parts of decision making and persuasion that occur out of conscious reach or comment and those which always follow that major processing which can be rationalized and discussed.

As it has always been, while researchers and practitioners alike give plenty of lip service in theory to the other than conscious aspects of mental life, in practice, almost no accommodation is made for mining one of the richest veins of influence available. But, as the article on "unconscious bias" in employment litigation makes clear, the gap that creates the dynamic is a sticky one. One big problem, as the authors make clear, is distilling testimony about "actual knowledge" or "specific intent" about a mental process that is non-specific - though no less potent - by nature.

Judge Levine's compelling review of framing issues in and out of court has one very important element running through it which may well be overlooked when people try to bridge the gap between theory and practice with framing. The mode of delivery described in each of his examples is less direct than most attorneys may likely try, and more effective for that reason. Framing, in one form or another, features prominently in the research review reprinted from *New Scientist*, but a cursory reading might miss the most important aspects of reframing interactions between one person and another as a more - or less - persuasive encounter based on how you act first, and speak later.

My bit is the start of an effort we'll soon back up on video, to not only help attorneys sort out anchors from frames from themes, but to guide their use of all three as more than semantic juggling or verbal "tricks". As I make an effort to point out, framing that doesn't take unconscious bias and implied positioning into account will always be less effective. Anyone trying to use anchors and frames to invite the building of the best case theme by your listeners who doesn't appreciate these tools are 2-way, not 1-way streets, will end up disappointed a lot. However, doing them well can surprise even the most jaded practitioner beyond even high expectations. Thanks to our MetaSystems team members at www.nextsteplawdesign.com for their usual speedy and excellent work on the graphics.

Enjoy! - E.O.

COURTS ARE WARMING TO CLAIMS OF ‘UNCONSCIOUS BIAS’

– By Charles Feuss And Jeremy Sosna

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The theory of “unconscious bias” has been emerging in employment litigation over the past several years. Plaintiffs alleging employment discrimination have attempted to apply this theory to support two specific aspects of their employment discrimination claims: first, their motions for class certification under Federal Rule of Civil Procedure 23; second, their ultimate burden of proving that race, sex or some other protected characteristic played a role in a challenged employment decision. In both circumstances, expert evidence of unconscious bias has become a powerful tool against employers and, if accepted by the federal courts, promises to create new challenges both for plaintiffs and defendants in employment discrimination litigation.

Unconscious bias is a social science theory premised upon the belief that people inherently and unthinkingly apply race and gender stereotypes to everyday decisions.

Under this theory, such stereotypes cloud the process by which individuals process information and directly affects the way they react to those around them. Some research has shown that individuals tend to accept these automatic stereotypes as true and accurate, while at the same time more heavily scrutinizing behavior inconsistent with their own stereotypes. If the theory is true, individuals across all sectors of society may base the way they act and respond to different circumstances upon what other people look like.

In the employment law context, the theory of unconscious bias may complicate the formation of litigation strategies. Plaintiffs have argued that the existence of these unconscious biases necessarily creates the *likelihood* of discriminatory employment decisions by individuals

harboring the alleged biases. See *EEOC v. Morghan Stanley & Co.*, 324 F. Supp. 2d 451 (S.D.N.Y. 2004). Certain social scientists offer expert testimony that the unconscious biases of those making personal decisions often result in inherently discriminatory behavior that violates Title VII of the Civil Rights Act of 1964, even when there is no objective evidence of animus. See *Dukes v. Wal-Mart Inc.*, 474 F.3d 1214, 1226 (9th Cir. 2007) (citing expert social scientist testimony for the proposition that unconscious gender stereotypes are likely to influence personnel decisions when they are based on subjective factors).

The unconscious bias experts claim that the unconscious (and automatic) application of stereotypes, if left unchecked, results in discrimination against employees or prospective employees who do not fit the white male paradigm. According to some experts, this is true even in the absence of the more traditional forms of direct and circumstantial evidence that, until now, has been necessary to prove race and sex discrimination claims under Title VII.

CLASS CERTIFICATION

The most common area in which employment discrimination plaintiffs have relied upon expert testimony by social scientists regarding unconscious bias involves motions for certification of class actions against employers. See, e.g., *Arnold v. Cargill Inc.*, No. 01-2086, 2006 WL 1716221 (D. Minn. June 20, 2006) (accepting expert testimony relating to unconscious bias as evidence of commonality on a motion for certification of a Rule 23 class action); *Beckmann v. CBS Inc.*, 192 F.R.D. 608 (D. Minn. 2000). This application of the unconscious bias theory may pose the greatest threat to

employers in employment discrimination because of the sheer size of the class actions sought, which exponentially increases the potential exposure of the employer. The theory in this context may result in individual or smaller groups of plaintiffs tying together otherwise unconnected employment decisions in a single lawsuit.

The recent decision by the 9th U.S. Circuit Court of Appeals in *Dukes* is a perfect illustration of the manner in which class certification that is based, at least in part, on unconscious bias evidence can create substantial exposure. The class certified in *Dukes* consisted of more than 1.5 million employees working around the nation in vastly different job classifications. The reliance on unconscious bias to form such large classes of plaintiffs dramatically changes the playing field in employment discrimination litigation. Obviously, the potential exposure and cost of defense in such actions becomes significantly greater in the class context. In addition, the potential for large fee awards provides plaintiffs’ attorneys a great incentive for pursuing class, rather than individual, claims.

Often, plaintiffs attempt to introduce evidence of unconscious bias to prove one specific element of the Rule 23(a) certification analysis, “commonality.” See *Cargill Inc.*, 2006 WL 1716221, at *10-*11; *Dukes*, 474 F.3d at 1225-31. The element of commonality requires that the plaintiff prove “that there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(1). Plaintiffs have introduced expert testimony to establish commonality in an effort to link hundreds (and sometimes thousands) of otherwise unconnected – employment decisions. Plaintiffs and their counsel use testimony of expert social scientists

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FRAMING THE ISSUE

– By Douglas S. Levine

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“Hello, old chap you go to work, hey?”

Tom wheeled suddenly and said:

“Why, it’s you, Ben! I warn’t noticing.”

“Say I’m going in a-swimming. I am. Don’t you wish you could.

But of course, you’d druther work wouldn’t you? Course you would!”

Tom contemplated the boy a bit and said:

“What do you call work?”

“Why, aint that work?”

Tom resumes his whitewashing, and answered carelessly:

“Well, maybe it is, and maybe it aint.

All I know is, it suits Tom Sawyer.”

“Oh, come on now, you don’t mean to let on that you like it?”

The brush continued to move.

“Like it? Well I don’t see why I oughtn’t to like it.

Does a boy get a chance to white-wash a fence every day?”

That put the thing in a new light.

Tom Sawyer

Mark Twain

Perhaps I am partial to this excerpt from one of Twain’s great works because I work in downtown Hartford, Conn., only a few miles from where he once lived. I drive by his magnificent house, a major tourist attraction, and the residence of his neighbor, Harriet Beecher Stowe, author of Uncle Tom’s Cabin, all the time.

FRAMING, OR REFRAMING, an issue is a critical skill.

But the principal reason this literary morsel resonates with me is because it provides a pure instance of effectively reframing the issue. Tom persuades Ben

to view the tedious task of whitewashing a fence from a new vantage point. By convincing Ben that painting a fence is a rare opportunity, Tom leads Ben to reformulate his entire view on the subject. An old attitude is transformed into a new one. Something commonplace and boring is now viewed in a new light.

A psychologist I know tells me that reframing is a tool frequently used by family therapists to help clients view their problems from a new perspective. Families will bring a serious problem to the fore, and the therapist will congratulate them for confronting it directly, rather than avoiding it. This brings about new opportunities to confront gnawing issues.

Now I am not a family therapist, but I know that in the legal world, the ability to frame – or reframe – an issue to your client’s advantage is an important advocacy skill. This is on display, particularly, in appellate advocacy, in which both sides explicitly characterize their view of the issues the court must decide. But issue framing is a critical skill in other legal venues as well.

The earlier you can persuade a judge, or jury, to view things from your client’s perspective, the better the likelihood of success. The way an issue is framed can establish the momentum for an entire proceeding. Let’s look at why effective framing of an issue matters so much, and then look at a few examples of successful issue framing.

In most adversarial situations, the decision-maker starts with a relatively neutral mind set. Juries, for example, may know that they will be sitting on a civil case involving an automobile accident, or a criminal case involving assault.

But in most instances, neutral fact-

finders do not have a clear sense of what the case is really about. All they know is that, at some point, various parties with differing agendas are going to start to place evidence before them. This is not to suggest that jurors or other decision-makers, are blank slates. But they begin with most adversarial situations with no strong predispositions, and no contextual framework within which to view the evidence.

Facts, as all recognize, are susceptible to widely varying interpretations. Giving the audience context to understand the facts, as they are presented, is an essential way to predispose toward accepting your arguments. If the decision-maker can be led to see the issues as you want, they will be more likely to interpret ambiguous facts in a manner advantageous to your client.

One of the most serious mistakes a lawyer can make is to frame the issues to his client’s disadvantage by shouldering burdens that are not his or hers. An employment discrimination case over which I presided as a trial judge, pitted a fired employee against a big corporation, provided a perfect example of this.

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“The Gulf War in the 1990’s lasted 5 days on the ground. I can’t really tell you if the use of force in Iraq today would last 5 days or 5 weeks or 5 months. But it certainly isn’t going to last any longer than that.”

– Donald Rumsfeld

to demonstrate that personnel decisions and policies and practices of the employer create common issues of the law or fact because they are inherently discriminatory due to the existence of unconscious bias within the decision-making process.

Some federal courts have demonstrated a willingness to recognize the unconscious bias theory as reliable for purposes of class certification motions and have cited such evidence as one basis for granting a motion to certify a class of employment discrimination plaintiffs. With the plaintiffs' success in *Dukes*, employment lawyers should expect that reliance on unconscious bias evidence in employment litigation will only increase.

MERIT ANALYSIS

The other, and perhaps more problematic, area in which plaintiffs seek to apply the unconscious bias theory is in the merits analysis of employment discrimination claims. In a disparate treatment case, the federal courts have almost universally applied the *McDonnell Douglas* burden-shifting formula to establish the baseline requirements for a plaintiff seeking to prevail. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Recently, some plaintiffs have offered evidence of unconscious bias in the third prong of the *McDonnell Douglas* analysis to prove that the legitimate, nondiscriminatory reason for the unchallenged action is simply a pretext for unlawful discrimination. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58-64 (1st Cir. 1999).

Several federal courts, while not outright adopting the view that expert opinion of unconscious bias can con-

stitute evidence of discrimination, have allowed the use of the unconscious bias theory to buttress intentional discrimination claims during the pretext phase of the analysis. See *Id.* at 51-56; *Butler v. Home Depot Inc.*, 984 F. Supp. 1257 (N.D. Calif. 1997); *Morgan Stanley*. The federal courts' acceptance of evidence of unconscious bias to prove employment discrimination creates the very real risk that Title VII will be expanded to cover not only intentional discrimination, but also discrimination that may be the product of unconscious (and perhaps uncontrollable) biases of those in the decision-making chain.

The emergence of this theory requires employers to reassess the way they implement personnel decisions to ensure that such decisions are sufficiently insulated from any taint by unconscious bias. The introduction of unconscious bias evidence to prove pretext in discrimination actions poses some difficulty for employers defending personnel decisions that are otherwise unconnected to the protected class of the plaintiff or plaintiffs.

First, using evidence of unconscious bias marginalizes the intent requirement inherent in federal anti-discrimination statutes. Congress enacted Title VII and the other federal discrimination statutes to prevent employers from taking employment action that was motivated by an employee's or prospective employee's race, sex, age or disability, among others. Title VII has, at least until recently, been perceived by the courts as exclusively reaching intentional, conscious discrimination.

The acceptance by federal courts of unconscious bias (which is necessarily unintentional or unknowing) to prove pretext may conflict with the concept of requiring plaintiffs to prove that the employer had a specific intent to discriminate based on membership in a particular protected class. This application of the unconscious bias theory in such circumstances may represent a significant shift in Title VII jurisprudence.

Second, and perhaps more problematic, unconscious bias theory by its very nature relies upon generaliza-

tions that may or may not apply to the decisionmaking process challenged in a specific employment discrimination action. The unconscious bias theory relies in large part on the premise that all individuals automatically make decisions based on stereotypes developed by their own unique, personal experience. The problem with this theory, of course, is that the testifying expert does not have actual knowledge (and, thus, cannot take into account) each individual's specific stereotype. The theory itself is based on assumptions regarding what generalizations employment decision-makers apply on behalf of the employer. In other words, the unconscious bias experts assume that because a decision-maker is (for example) a white male, he is predisposed to decisions that harm African-American women. This assumption (itself the product of a generalization) may or may not be true in any specific case, and the unconscious bias expert cannot testify with any specificity whether a particular employment decision is based on such unconscious bias.

It remains to be seen to what degree the unconscious bias theory will alter the employment discrimination landscape. Courts have certainly accepted evidence of unconscious and cognitive biases as a basis for granting Rule 23 class certification. Nonetheless, federal courts may be reluctant to fundamentally do away with the intent requirement of employment discrimination litigation that plaintiffs and defendants have taken for granted for many years.

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"We have to believe in free will. We have no choice"

– Isaac Beshevis Singer

The lawyer for the defendant corporation argued in his opening statement that not only would his client prevail, but that the evidence would demonstrate that the plaintiff was an out-and-out liar. All the defendant had to do to prevail was persuade the jury that the plaintiff had failed to meet the required burden of proof.

By making the aggressive argument he made, however, defense counsel in effect shifted the burden of proof onto his client. The plaintiff won the case.

Now let's look at three examples of issue framing, one from the Bible, and two from traditional legal settings and focus on what makes them effective.

Picture the scene, townspeople are about to impose the punishment for adultery required by the law, stoning. Into the crowd walks Jesus. He does not have much time to argue his case. The tension is palpable. Jesus is intimately familiar with the belief-system of his audience. He knows that the death penalty is about to be imposed. What sort of an argument could he make?

The audience's framing of the issue as Jesus contemplates what to do is something like this: "Why shouldn't the normal penalty be imposed on the adulteress?" Here, according to the scene set out in the Book of John, Verses 4 through 11, is what happened:

"They say unto him, Master, this woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou? This they said. Tempting him, that they might have to accuse him.

"But Jesus stepped down, and with his finger wrote on the ground, as though he heard them not. So when they continued asking him, he lifted up himself, and said unto them, He that is without sin among you, let him cast a stone at her.

"And they which heard it, being convicted by their own conscience, went out one by one, beginning at the eldest, even unto the last: and Jesus was left

alone, and the woman standing in the midst. When Jesus had lifted up himself, and saw none but the woman, he said unto her, Woman, where are those thine accusers? Hath no man condemned thee?

"She said, No man, Lord.

"And Jesus, said unto her, Neither do I condemn thee: go and sin no more."

Jesus has provided us with a sublime, and stunningly effective, example of reframing an issue. Note that Jesus resisted the temptation to argue that the Mosaic law was harsh and should be disobeyed in this instance.

Nor did he simply plead for mercy. The reframed questions could be put like this: "Is there anyone so audacious among you who would claim that he has never sinned?" Why was his argument so effective? Because his question (1) demonstrates a profound understanding of his audience; (2) dynamically puts a question to the audience that, if answered honestly, forced them to radically reframe their view of what was at stake; (3) Appeals to both the intellect (the head) and emotions (the heart). It is also worth noting that this incident occurs in a public setting and that Jesus's question requires a public response.

TWO of the best 'issue statements'

Now let's switch gears and look at two excellent issue statements that appeared in court proceedings. The first occurred during Watergate. The case was *U.S. v. Nixon*, 418 U.S. 683 (1974).

Watergate special prosecutor Leon Jaworski had subpoenaed White House tapes of conversations that had taken place in the Oval Office, but President Richard Nixon refused to produce them, claiming special executive privilege. How would you, as special prosecutor, have framed the issue for the U.S. Supreme Court?

Here is how Jaworski started out his argument: "When boiled down, this case really presents one fundamental issue. Who is to be the arbiter of what a Constitution says? Basically, this is not a novel question, although the factual situation involved is, of course, unprecedented."

Jaworski framed the issue to appeal to the court's fundamental sense of itself as the ultimate arbiter of constitutional questions. This pithy, practical framing of the issue is perfectly framed for the audience.

Now let's take a look at as perfect an example of an effective issue statement as I have ever seen.

In a denaturalization case, the legal issue was whether or not an ex-Nazi should be able to remain in the United States. The average lawyer would probably begin his argument with a humdrum recitation of the factual history or of the immigration statutes involved.

But not Frederick Bernays Weiner, the lawyer arguing the case. He began his argument by simply stating: "The question in this case is whether a good Nazi can be a good American." This is a classic example of wringing every bit of drama from the moment. In a few well-chosen words, Weiner managed to gain the audience's attention and imprint indelibly on the decision-makers his view of what the case is all about. It doesn't get any better than this.

What then are the key elements of an effective issue statement? It should be succinct, factual and eye-catching. It should be persuasive and appeal to the decision-maker's head and heart. It should be tailored to appeal to the particular audience being addressed, and posit a theme that will grab the audience's attention. And if the premise embedded in it is accepted, it should admit of only one answer.

When all is said and done, your goal is to do for your audience what Tom Sawyer did for his friend Ben: put your case in a new light.

Douglas S. Lavine, a judge on the Connecticut Appellate Court, is the author of *Cardinal Rules of Advocacy* (NITA 2002) and *Questions from the Bench* (ABA Section of Litigation 2004).

ment talks or trials. But, the fact remains, when it comes to the genesis of every legal decision, the mind works them out from two distinct parts with distinctly different ways of getting their jobs done. It is actually the dynamic *between* what is consciously available to question and control and what is not that ends up stymieing so many who ignore its role.

Elsewhere, I've referred to what is known about communication, influence and decision making as the *Train of Thought and Action*. In sequence, a decision maker Perceives the message and the messenger, References that perceived message against stored experiences and personal narratives about them, Reacts with a visceral sensation of comfort or disquiet, Responds through habituated patterns expressing anything from interest to outrage, and then, finally, produces several Reasons (not one) why that leaning is justified. The lesson that remains absent from law schools and CLE's is that all but the final step, when language arrives to begin to describe a process already well underway, is not a consciously run activity, and does not play by rules that govern the conscious mind's behavior. So, efforts made to influence that process presuming only one set of rules for both parts of the mind involved, all begin with a lower chance for success.

Habitual references, reactions and responses are the coin of the other than

“They keep talking about a constitution for Iraq. Why don't we just give them ours? It was written by a lot of really smart guys, it's worked for over 200 years, and we're not using it anymore.”

– George Carlin

conscious realm. And, a habituated response is not always a rational or reasonable one. A simple example used often to describe the decision maker poised at the juncture between the two worlds of conscious and other than conscious responses pictures that person entering a store that sells anything from clothing, to furniture to cars. An enthusiastic salesperson rushes up and melodically asks, “May I help you?” The very common, unthinking response is, “No thanks, I'm just looking,” despite the fact that the person went there with a specific intent to buy something.

This sales example mimics the unthinking, but habitually-driven “Yes” answers to the question, “Despite all that, can you set it aside, follow the instructions and *be fair*?” in voir dire from the bench. The challenge to *being a fair person* implied in the question almost always overrides even a thoughtful individual's conscious awareness of a number of specific admissions of biasing impediments to the goal. If you want to see what happens when you force the conscious mind to justify such an other than conscious response, just ask the potential juror, “Honestly, how exactly will you do that?” and watch the internal struggle over a question that can't be answered by the mental part to which it has just been posed.

In the sales world, a catch phrase developed over the years to caution newbies about this interplay between the habits behind the decision making responses and the words we choose to talk about it. The phrase is, “When asked to buy, people will lie!” Or, to be kinder, they will not be able to consciously, and accurately report what their own mind has in mind for them.

How does this affect the trial attorney who wants to develop and deliver the most persuasive case story possible, in any legal venue? It provides guidance – a rule – for exactly how to go about discovering what people think about a certain case story, and then how to take that knowledge, turn around and present a more persuasive story to the actual decision makers. This rule has to respect the primary, other than conscious func-

tions in decision making, as well as the final, conscious bits, as well. That rule is, when engaging the inquiries in both focus groups and voir dire or in attempts to persuade in opening and witness exams, take a more *indirect* approach. Just as the judge's indirect assault on the self-concept of “*me being fair*” overrides consideration of reasonable impediments to that goal, more indirect questions and indirect efforts to influence can reach decision makers closer to where their judgments are first being built.

If you choose the direct question and the direct suggestion every time, you will get the equivalents of the “No, I'm just looking” response – out of habit – for your troubles, more often than not. That is because there is a legal version of that old sales saying. It is, “When you ask them *why*, people will lie!” If you ask them “*Why*?” they think, act or feel a certain way, people (usually) do not intentionally lie, nor do they refuse to answer from bias or enmity. But, they will all spout fiction in their answers anyway. The question shows the deepest disrespect for the structure of each person's decision making apparatus. They will lie when you ask “*why*?” because they do not have access to the part with the answer to that question. They don't have access for two very important, very well-established reasons.

1. Nobody gets to open a conscious window into unconscious processes just because they want to, nor just because you ask.

2. Nobody makes decisions by listing reasons for it first. Reasons – in words - come last. The Caboose on the Train.

A decision, it turns out, is far more *realized* than it is “made” in the traditional sense of the word. The decision maker responds to their perceptions of the message and their subjective references for it by building a private version of the case story. That process starts almost completely outside conscious control. And, much of it is also outside conscious reach. No access just for the asking, if your questions are direct. Indirect communication rules. “Can you *be fair*?” “Uh, yes I am.”

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But, any attorney who has watched a consultant moderate a focus group, watched a judge or lawyer voir dire a panel of prospective jurors, or run their own group or voir dire knows that I've got this all wrong, based on his or her own experiences. They all know that when asked, "Why do you think, feel or react that way?" everybody has an answer. They all do. And, that is absolutely true. And it is the biggest part of the problem, and a huge impediment to change for the better in legal persuasion.

Habit is a powerful master. And, we all rehearse the habit of pretending to have the direct access to our inner thoughts which none of us actually possesses. All the research work on the story model for juror decision making, as well as the more basic science for decades on perceptions and judgments confirms what we all know empirically about our own thinking. Lots of it happens before we get a chance to comment on it, much less direct its course. But, since we rarely have to confront this reality, since nobody is following us around asking the "Honestly, how exactly will you do that?" question when we make up an answer to each "Can you forget all that and be fair?" situation, we all build up the habit of pretending we actually do have access to all sorts of mental processes that are really out of our reach. Our culture reinforces this frame of mind and we are rewarded for rehearsing it. "Thank you for telling me why."

This is a big problem for those attorneys who want to actually become more persuasive. If everybody will make up an answer to the "Why?" question, even if it is a lie, the temptation is to take them at their word. The habit of pretending we each should be in control of our thoughts, should each be in charge of our reactions, to be "clear thinkers", ready to report on any part of our mental worlds on no notice, just because we're asked, is a pervasive, insidious suggestion most people have inculcated without a second thought.

If you want to explore the subjective story-building process as it actually happens, as much as possible, and appeal to the parts of the mind that indisputably get first crack at deciding your case, then the indirect inquiry and the indirect suggestion are the proper methods. If it is true that you can't just demand an accurate answer saying, "Tell me what you think and why you think that," then it is also equally true that, to persuade, you can't simply tell 'em what to think and expect that dictate to be followed, either. Rather, you would be wise to add tools to your practice of researching a case story and then delivering it, that allow you to respond in kind to *both* parts of the decision making mind. Directly for the part that has conscious access. And, indirectly for the majority that does not. That is where a full appreciation of the role of mental *frames* can come in real handy. Facility with framing provides plenty of chances to use indirect influence.

FRAMES OF MIND

Anchors rely on cues that come in the form of select words, images, sounds or sensations. A lawyer and listeners alike can condition themselves to use these cues to revive rehearsed or habituated responses that serve to hold case story frames in mind over time. The anchor is not the cue phrase, sound or image itself, but the conditioned response it evokes. For example, if your cue phrase is "overruled" or "sustained" spoken from the bench, then your habituated response is the "anchor", though most people refer to both cue and response with the same label, as an anchor.

Frames are habituated mental packages of perceptions and meaning into which different parts of a case story are most easily sorted and arranged. These frames are mostly resident in decision makers' minds before an attorney tries to evoke – or invoke – them as part of a particular case story research group or presentation at mediation or trial. Frames are the bridge between simple anchors and the construction of decision maker stories that will reveal a theme.

A theme is what each decision maker

ultimately perceives the case story to be all about. Each will build his or her own theme for the case story you deliver, just like they re-author that story to fit their own internal set of frames and reference experiences from which they are drawn. You can invite decision makers to perceive a certain theme, but you can't just tell them to do it - even if you keep repeating your own theme phrase a lot.

Another reason many attorneys have a hard time escaping the habit of wanting both parts of the mind to play by one set of conscious rules, besides the ubiquitous reinforcement of presumed conscious access, is a built-in problem with framing and legal practice. From the very beginning of their careers, trial lawyers practice highly valuing things that are specific and direct. On the record. Putting the actual presentation of a case story into a frame that prizes *indirect* efforts as a highly-valued factor is hard. Even harder to imagine asking *indirect* questions in focus groups to learn all you need to know about that story. But, just telling everyone what frames your client would like them to use to recreate the case story is not just unpersuasive, it is counterproductive.

Writing about the use of frames in conflict resolution, authors Sanda Kaufman, Michael Elliott and Deborah Shmueli point out why.

"There is a common myth that people, once faced with the bare facts, will be persuaded to side with the truth. In reality, the truth does not always set one free; rather, the truth matters most when it fits pre-existing world views and

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"They were so strong in their beliefs that there came a time when it hardly mattered what exactly those beliefs were; they all fused into a single stubbornness"

– Louise Erdrich

frames. This suggests that a persuasive tactic would be to change people's frames rather than present facts that conflict with their frames." They go on to quote the noted expert on framing, George Lakoff, who summarizes the problem like this, "If the truth doesn't fit the existing frame, the frame will stay in place and the truth will dissipate."

In his latest book, Lakoff describes what I call the Train of Thought and Action as "real reason", in contrast with the version of reasoning that emerged during the Enlightenment, which evidentiary and court rules all still reference, and which Kaufman et al call the "common myth" about decision making.

"We will need to embrace a deep rationality that can take account of, and advantage of, a mind that is largely unconscious, embodied, emotional, metaphorical, and only partly universal. A New Enlightenment would not abandon reason, but rather understand that we are using real reason – embodied reason, reason shaped by our bodies and our brains and interactions in the real world, reason incorporating emotion, structured by frames and metaphors and images and symbols, with conscious thought shaped by the vast invisible realm of neural circuitry not accessible to consciousness."

Consider a couple of frames that professionals have held in the past about the processes that drive decision making. Maybe it can put our challenge into a more helpful context.

- Decisions are not made by a "rational actor" in the mind, as economists might imagine.

- Decisions are not made to reach "secondary gain" in the mind, as psychologists may wish.

- Decisions are not "goal-driven" in the mind, as the MBA's all might hope.

And, it is clear now, that decisions are not made as the law has hypothesized for so long, by filling an "empty vessel" with a stack o' facts, sprinkling some law and rules on top, closing the vessel, shaking well, and pouring out justice. That is

the classical reasoning frame or mindset that still governs most of the assumptions behind denying strikes for cause in courtrooms across the country to this day. As long as the juror "vessel" agrees to stay "empty", he or she is deemed "fair" – even if they honestly have no clue how they might actually try to accomplish such a task. That is why some courts accurately hold that a prospective juror should not be considered an expert on his or her own ability to serve.

Please stop to notice one key component that all these frames from four different professions have in common. Part of their past habituated views on decision making was that they all relied to a great degree on an implicit assumption of conscious control over the process. To act rationally, one must constantly, consciously weigh options and track progress. To achieve secondary gains or benefits of a behavior, one must "choose" that behavior. To act goal-driven, one must set and track progress toward that goal, presuming full access to and awareness of the process. And, to "be fair" by remaining untouched by accumulating case story facts till all are delivered, one must consciously control every part of mind, memory and process.

THE FRAMING HABIT

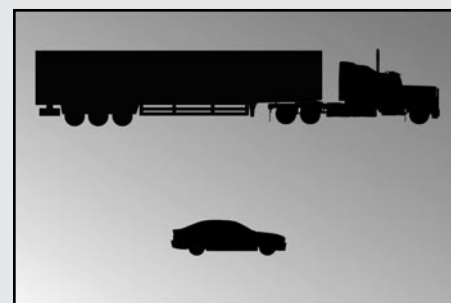
Clearly, there is a different set of rules that govern most of the early process of decision making. Any effort to influence the majority of the mental process that produces any legal decision, by any legal decision maker, in any legal forum must show some respect for the ground rules of that process. So, by necessity, efforts to influence or persuade in legal communication must respect the role that framing of a message plays. Many attorneys are familiar with frames and framing in theory. Many attempt to utilize the phenomenon. Unfortunately, most efforts are made while playing by conscious mind rules. As such, they don't respect the rules the decision maker's mind *outside* consciousness plays by when using existing frames, or when accepting an invitation to adopt different, or wholly new ones.

Lots of people in focus groups and

in venire panels will be unthinkingly applying pervasive mental frames to the construction – or re-authoring – of their private versions of your clients' case stories. Recognizing what frames are at play, or likely at play, among the minds you must persuade is a good starting point. Because people can't be invited to change a frame they are using without first being met at the one they are employing already.

Our legal decision making functions by other than conscious habit first, by classic reason and rationales last. Reasons are the Caboose. That means, when considering how to recognize, appreciate and then *utilize* framing while inquiring about or delivering a case story, the (mostly) conscious tool of language is not the big key.

Illustration 1



Here is a simple example, sans words, to help drive home this point. Try to avoid a too literal interpretation of these images, falling prey to the same left-brained thinking that needs to be set aside to make room for efforts to influence the other variety. Before you *explain* specifically, you want to *invite* implicitly.

Thinking about frames of mind probably habituated for anybody who has ridden in, seen, or driven automobiles or trucks, can you think of a few that they might apply to this image? Don't forget frames that come from habits in the way we all have learned to read and write. Here's a few:

- People read top to bottom, and left to right. Because we learn our most fundamental interactions from young ages, embodied, physical frames and mindsets carry great sway. We tend to

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ANCHORS AND FRAMES
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frame the more important things as those “on top”.

- We have frames about size, proportion and symmetry embedded in our minds. This image invites the framing of the truck as greater not only in size, but in mass, weight and even speed for most people.

- Most of us have frames about maneuverability and stopping distance rehearsed in our minds and this top-down arrangement invites the most dangerous view of that framing to come to the surface as well.

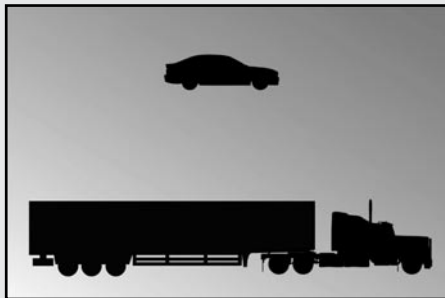
- Even because they are seen in silhouette, frames for such imagery tend to evoke at least seriousness, if not outright danger or malevolence.

...all with no words.

Putting those invitations to frame the truck as “worse” and “more dangerous” than the car into so many words would, naturally, have a far less compelling effect. Why? Because they require the listener to detour through their conscious processing to try and drum up less-conscious frameworks they’ve learned to place over reality for much of their lives. This visual framing is much more powerful than those words would be. No words are even necessary, and if used too much they could overwhelm – even defeat – the desired impact.

But, what if the first image presented to a group considering a trucking liability case were this one instead? What becomes of the framing?

Illustration 2



- The top still draws the attention and brings frames of primacy and im-

portance with it. Only, now the likely stories evoked may have more to do with “choices” and “intent” up there on top.

- Now, the smaller, lighter vehicle on top can invite frames of driver attention, maneuverability and self-preservation first into the mind’s eye.

- And, weight and speed are reversed in this framing, by reversing the implied weight in the images themselves. Now, which one “feels” faster, and which one slower?

- Finally, the silhouette “indictment”, such as it may be invoked by the images will be just as likely to attract suspicion and doubt to the top image as the bottom, if not more likely.

Conscious comments and reasoned arguments are still important. But, they are the Caboose on the Train. As Jack Trout, co-author of the classic book on marketing and frames, called, Positioning: The Battle for Your Mind, said about positioning, “[It is] not what you do to the product, but what you do to the *mind* – the ultimate marketing battleground is the mind, and the better you understand how the mind works, the better you’ll understand how positioning works.” Positioning a product is the process of inviting it to be framed in the consumer’s mind. The consumer positions the product and the advertising images and words provide the cues to do so. Positions and ads. Frames and anchors.

So, to really take full advantage of frames and anchors to help people build

stories with the most desirable themes, we need to recognize and respect their *current* frames if there is to be real hope of inviting them to adopt different or new ones. And, in that effort, as the illustrations above show, everything counts. Sequence of the delivery. Color of the imagery. Life experiences and personal narrative already at work. It all counts. So, knowing some more of the ground rules that govern decision makers’ use of frames can help a lot.

**GROUND RULES –
FIRST THINGS FIRST**

So, two initial ground rules:

- Use an indirect approach *before* the direct one to develop and then deliver case stories, and

- Meet decision makers at *their* current frames before inviting them in different or new directions.

After the first two, there are a couple more to keep in mind. The next has to do with filling “holes” in your case story.

Many attorneys are familiar with observations by visual information guru Edward Tufte, among others about “holes” in stories. Those are “filling defects”, or holes in the narrative of any case story – any human story. The words can never cover all the gaps between events, images and individuals in any story. Frames are mental constructs the observer listening to a story uses to select – outside consciousness – which parts of his or her own reference experiences and personal narratives they will use to “fill”

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Three engineering students were gathered together discussing the possible designer of the human body.

One said “It was a mechanical engineer. Just look at all the joints.”

Another said, “No, it was an electrical engineer. The nervous system has many thousands of electrical connections.”

The last one said, “No, actually it had to have been a civil engineer. Who else would run a toxic waste pipeline through a recreational area?”

these “defects” in the case story as it is being presented.

This rule is a hard one for professionals who practice all their lives filling a record with everything they can somehow get deemed relevant to the proceeding. But, the fact is there always will be far more space than there are stars in it. You cannot – nor should you try – to fill every gap in your story with facts, opinion or emotion. Instead, you want to use the inquiries, direct and indirect, in focus groups and voir dire, to determine which frames are the most important to string together in your delivery, and which anchors will most help that effort, in the context of both side’s conflicting stories. Not every landmine in a case needs to be “answered”. That’s the old direct frame begging to be placated that you feel tugging. Often, all a serious landmine in your case needs are a couple of compelling frames, well-delivered, to turn decision maker attention and perceptions of importance in a totally different direction, casting that negative as not so much “on top” any longer.

All focus group participants have chosen, on an everyday basis through their lives, which gaps to fill in each new story from their own unconscious reference points. Just as important for attorneys to recognize, they also select which gaps to leave alone. Your indirect inquiries will garner plenty of verbal and visual anchors they use to hold those frames in place, which you can then use – or adapt for use – in your own presentation of your client’s case story. But, if you make the mistake of thinking your job is to find and fill *every* hole, you will inevitably fall prey to imposing your framing about what seems important to your (impossible) task, instead of allow-

ing the venire or focus group to lead you where you - and they - most need to go.

The next ground rule has to do with vision. People all have a visual cortex. The act of seeing uses almost half of our brain’s electrical activity at any given time. And, once a thing is seen, those images are stored for future reference, along with all the other reference experiences sorted and used according to the habituated frames in each decision maker’s mind. Perceptions in communication come first. And, *referenced* perceptions for each decision maker, come next.

Yet, when I tell lawyers another ground rule is to *balance* the visual part of their communication with the verbal whenever they are inquiring about or presenting a case story, many act non-plussed. Not only should you give as much attention to the visual parts of your message, but you should consider them first. The brain does. The visual “parts” of any attorney’s message to a focus group, mediator or jury panel, include:

- The attorney’s demeanor and the visual experience within the venue
- The coordinated demonstrative aid package balancing the spoken text of the presentation, and especially,
- The variety of *mental* imagery you plan to reinforce or shy away from.

They all need to be planned. Particularly the single, fact-based mental image you most want associated with your case story theme by the largest number of decision makers possible. More on that later.

The next rule deals with narratives. It is a sort of corollary to both the *indirect first* and *meet at their frames first* rules. Because our decisions travel a long way outside conscious control before we “realize” them and start to discuss their merits with ourselves and others, it is important to respect the nature of that process while you talk to participants in groups or potential jurors about the stories they are busy re-building concerning your client’s case. The ground rule is to always start at the most general level and move slowly towards the most detailed.

People need to be allowed to relate their own experiences and subjective

narratives about their meanings – their frames and themes – to your client’s story in the greatest number of ways. Throw the widest net at first, never the narrowest. Due to the effects of *primacy* on their thinking, this is especially true at the start of a communication, whether of the whole trial or mediation, the start of a witness exam, or the start of the second morning in trial. Always start as generally as you can, and move to the specific details as you go.

Habit again is a rough master. And, habit, in the form of the “fill every gap” frame all good lawyers have, is a constant impediment to applying this rule, no matter how well you intend to. Throwing dozens of details out before the whole story frame is set up will actively invite each decision maker to latch on to some stray detail and spin a wholly unrelated narrative bolstered by unconscious references out of your reach to track or filter. Researchers often call the results “counter-factual reasoning” or attention to “outliers” rarely tracking them back to their source in the attorney’s delivery.

The next ground rule deals with appreciating the frames and themes embodied in each decision maker’s mind before you arrive to persuade them. It’s simple. Be sure you’ve gotten the most complete sense of their frameworks *before* you try to get them to change them. I’ve often referred to this rule as never taking one answer for the whole story. The goal is to harvest all you can before you start trying to plant or invite your listeners to do so. Their anchors and frames, assuming most are elicited, will provide the basis for the best theme and case story for you to deliver.

The method is to use the indirect approach gathering information about the many ways each frame in each story can be viewed, avoiding consensus and expanding rather than reducing group participant input wherever possible by constantly following up. The lawyer’s frame that will work against your effort is in the habit of zealous advocacy. Even if you suppress the overt – the direct – arguments for your client’s position, if you are running the focus group inquiry, you will be telegraphing all sorts of indirect

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“In the long run, our economy is going to be fine”

– George Bush

“objections” to what you’d rather not hear in your choice of words and topics, your voice tone, pitch and volume, the focus of your eyes, the positions and gestures you adopt, and a hundred other signals that require extensive training to catch, much less interrupt.

**WHO,WHAT, HOW, WHEN
AND WHERE BEFORE WHY**

Finally, a “how to” ground rule that covers a number of the bases already laid out. In presenting a case story to persuade, or while making the inquiries of groups that will help develop that eventual presentation, get the implications and suggestions out before the explanations. And, if it’s a choice, always drop the direct explanation in favor of the indirect suggestion.

This is important because what you have read about decision makers constructing or re-authoring a case story is not a metaphor, and far from simple semantics. Take the examples of the Truck and Car illustrations and add the following examples of a spate of recent research on the subject of implied suggestions and implicit memory.

In a series of social science experiments, the frames inside the subjects’ heads are shown to affect the reference experiences they use to build a narrative long before their conscious minds get a crack at the task. Dr. John Bargh, from Yale, said, “We’re finding that we have these unconscious behavioral guidance systems that are continually furnishing suggestions...about what to do next, and the brain is considering and often acting on those, all before conscious awareness...sometimes those goals are in line with our conscious intentions and purposes, and sometimes they’re not.” His experiments dealt with a very indirect sort of framing – metaphors. Subjects were handed either cups of ice-cold coffee or hot coffee before reading about and rating the character of a stranger. Hot cups yielded “warmer” perceived characters, and cold cups produced assessments of “colder” personalities.

Or, consider the work of researchers ranging from California to the Netherlands. Subjects were invited to play a one-on-one game involving investments with an unseen partner. By setting a black briefcase far at the end of the table in the room with the subject, researchers successfully invoked the *competition* frame in the minds – and actions – of those subjects. Or, after filling out a form, subjects in another room were given a crumbly cake to eat. Those whose minds had been primed by the faint smell of cleaning solution in a bucket hidden from view were encouraged to react from the *neat* frame three times as much as their colleagues who smelled nothing. Or, what about the *guilty* framing of subjects who felt the need to cleanse their consciences after recalling a past unethical deed for experimenters, then being offered a choice between an antiseptic wipe or a pencil for their participation?

If you hold any remaining doubts about personal, subjective narratives being written by every group participant or actual decision maker in a legal matter, consider the results of an experiment run by memory researcher David Pizarro and his colleagues. In describing the “case story” of a man in a restaurant who ended up getting a call and walking out on his check, two groups of subjects got added information, and a third kept the original input. One group heard several

facts depicting “bad” character, and the other heard correspondingly “good” things about the man. Without warning, a week later, the subjects were all asked to recall details about the story, having already rated his original “bad act” of walking the check higher or lower based on “character” evidence. Those who had heard the additional bad stuff (rude to the waiter, liked walking checks, loud on the phone, etc.) added distorted facts to their versions of the story that were never there in the first place.

Dr. Pizarro has said this is the first study showing that social knowledge about an individual can actually distort details about an event – a story - involving that individual. But, there have already been many studies showing that different descriptions of an event (cars “smashing” rather than “hitting” each other, post-event switching of the color of a car in questioning, etc.) will reliably result in recall of those stories being distorted. This latest entry in the collection shows that changing details about a person’s character will also distort memories of the story from that point forward in the mind. Other studies have shown that the unconsciously-generated distortions, additions or deletions every decision maker brings to their task are very resistant to conscious, direct “correction” of their private versions, no matter how distorted they may be. “Jurors

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The study by the Government Accountability Office, expected to be released today, said two-thirds of U.S. corporations paid no federal income taxes from 1998 to 2005 and about 68% of foreign companies doing business in the United States avoided corporate taxes over the same period.

Collectively, the companies reported trillions of dollars in sales, according to the GAO’s estimate.

The study did not investigate why corporations weren’t paying federal income taxes or corporate taxes and it did not identify any corporations by name. It said they may escape because of operating losses or tax credits.

will disregard the previous evidence.”
“You will find my client committed no fraud”

When eliciting stories *from* them, or when delivering stories *to* them, the two parts of every decision maker’s mind need to be addressed in the most productive sequence. That is other than conscious first, and conscious next. Indirect and implicit, first, then direct and explicit, next. The best approach then, is drawing as straight a line as possible from the most general to the most detailed. Never wobble.

Think about the embodied metaphors and narratives in a brain from their most basic, physical level. Those parts of our stories we learn first in the world, and which notables like Lakoff and Clotaire Rapaille confirm carry so much influence in the way we approach others’ stories in later life. Frames like freedom and personal liberty emerge early – with walking - but so do frames evoking the need for parental protection – with falling. Both deal with the same general frame of responsibility, but from two opposing angles. The anchor *personal responsibility* has been heavily reinforced in the past decade to encourage story-building about fault residing with the individual. But, an anchor like *personal accountability*, travelling in the same narrative framework in the mind can not only imply the need for other-centered concerns, but also prime a link to money (“accounting”) in the mind, every bit as much as a cup of coffee can.

Anchors, frames and themes are definitely tools that a trial lawyer can, and should use to both inquire about the possibilities within his or her client’s case story, as well as to turn around and use to deliver the most compelling version of that story that emerges from the effort. But, it’s helpful to always keep in mind they are naturally-occurring phenomena in the mind of every person; lawyer, decision maker or otherwise. Treating them as artificial constructs, or verbal “tricks”, will net an attorney a lot less value, than treating them as gifts to be found by showing a little respect for the ground rules on the Train of Thought.

AVOIDING LIP SERVICE

Think of an art gallery, with blank white walls, light wooden floors, and a few framed pictures here and there, face down, leaning against the walls at the floor level. Anchors can be thought of like the nails set into the wall to hold the frames in place. The frames each turn out to contain messages about a significant part of the overall case story. When they are arranged in a particular story sequence, then delivered that way during voir dire, opening statement, and throughout the witness testimony, that sequence of anchored story frames helps each decision maker establish and then reinforce the most desirable theme for what you want your client’s case story to be all about. You invite each decision maker to build a private version of the story as you go along, using each nail and frame in turn. The theme will be what each decision maker sees his or her ver-

sion of that story to be all about; what the framed pictures, hung by those anchors, in that sequence mean to them.

For the defense, in a civil case about business, not personal injury, what natural, embodied frame has received massive cultural reinforcement over the last couple decades? Evolution. Survival of the fittest. Social Darwinism. Anchors to set up and hold those frames for participants in research groups or decision makers in court could certainly include *Stuff Just Happens* and *Personal Responsibility*. And, since litigation has been framed, for many, as gambling, the indulgence of suing for money over a business dispute where “everyone knows” it’s “everyone for yourself” can be seen less as a legal right and more as a false claim of entitlement. So, suing is just trying to get an unfair advantage inside the “natural” competitive frame.

Or, what about the plaintiff perspective in one of those personal injury suits? The most general territory for active frames in that arena, if not themes themselves, could be found in *protection* and *prevention*. But, what naturally embodied, lizard brain-level framing goes unsaid by implication there? Power. Control. One-up and one-down positions. What the scientists call Locus of Control. Once the frame includes presumed positions of greater and lesser power as a natural arrangement, then an unlawfully injured person can more easily be seen to have *every right to expect every reasonable effort to protect* – or other anchor phrases to that effect. Even more if you offer to show how you were personally responsible enough to cover your own safeguarding bases, first.

What stops efforts at framing and reframing from being taken as just juggling vocabulary is demonstrated appreciation and respect for the other than conscious origins of the story-building. Each decision maker goes through several stops on their mental track before they can come up with words of their own to describe that process *after* a leaning has already been realized. The bias towards the verbal framing of experience that lawyers have habituated will work against showing respect for that. It will

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Pakistan’s top diplomat said Saturday there are no U.S. or other foreign military personnel on the hunt for Osama bin Laden in his nation and none will be allowed in to search for the Al Qaeda leader.

In an interview with the Associated Press, Pakistani Foreign Minister Shah Mahmood Qureshi said his nation’s new government has ruled out such military operations, covert or otherwise, to catch militants.

turn otherwise persuasive efforts into lip service.

A good example can be had from the nationally renowned collector of fancy phraseology, Frank Luntz. He is credited with popularizing the verbal anchor *tax relief* while in the employ of the Republican National Committee and various individual politicians a few years back. The frames that anchor holds in place should be apparent: burden, imposition, subjugation, to name a few. Themes invoked could reach Government Predation. But, it is helpful to pay careful attention to how this anchor became part of people's awareness, and eventually incorporated into many, if not most, minds in America. In a word, it was done by repetition. Massive, multiple, unrelenting, almost ubiquitous repetition. Thousands of times for an average citizen with access to any media. Over years. Most civil trials average about a week, plus. Usually with only one or two advocates for each side. Anchors help. But, in the interpersonal influence world, settling for semantics won't work.

Instead, familiarize yourself with the frames that are likely to come up for decision makers in the legal context, and learn how they are elicited and then communicated less directly. Some examples of such frames would include:

- Context and Content. (The most basic framing division.)

One is the frame or situation outside the picture, One is the details or character within.

"What do all medical professionals agree about such a situation, Doctor?"

"Which step, specifically, are you claiming was not taken, then, sir?"

- Outcome and Process.

Some stories are all about the destination, while others need to be all about the journey.

"What, then, would your company have to pay out more of, Ms. Adjuster?"

"Is it true that over 13 years of development and independent safety oversight go into this one product?"

- Control and Power
The ability to effect changes within the story frame is often a key component.

"What questions did you ask the nurses before you hung up, Doctor?"

"And, whose choice was that, once again?"

- Locus of Control
Who or what wields the power and control; is the Active Party or Active Ingredient driving the events in the story?

"That was information known to those three people and no other at the time?"

"With a price set so far below cost, was there any chance for the other bidders at all?"

- Loss and Gain
The research agrees decision makers are more persuaded by stories that allow them to avoid a loss, rather than achieve a gain. But, the combination is even more persuasive.

"What would stop you – or anyone – from taking the same road again?"

"How many nursing homes need this too?"

FRAMES-FORWARD ACTION

There are other general frames that will very frequently emerge as key elements to decision maker versions of legal case stories. They all can be elicited or communicated by indirect means, or directly laid out for the listener. It is not an absolute, either-or choice. Rather, the task is to put first things first; indirect before direct and general before specific. If you learn which frames emerge – and how – from a good number of test group listeners, you can plan to introduce them at the outset of mediation or trial presentations in the most appropriate fashion. Frames that deal with identity or identification within a story, characterization or caricatures in the narrative, available metaphors, scope of story aspects like time, numbers, people and acts, as well as cultural norms expressed in media morals, myths, religious and literary narratives are all likely veins to mine.

So, how can it be true that research organizations working with trial attor-

neys can pump out projects that expose a strong vein of anti-corporate bias in the national jury pool the very same year that plaintiff lawyers' organizations reveal results that show a huge tilting against injured plaintiffs filing lawsuits? Take a second look at the most basic framing division for legal – or any – persuasion: *context and content* framing. One deals with what's outside the "picture" hanging on the mental gallery wall; the circumstances, the situation and the general surroundings. The other deals with what's inside the picture; the character, the thinking, the details of each event.

In a tough negotiation, with a fair amount of potential for movement and challenges alike, it can be invaluable to keep close track of which frame, context or content, the opposition is currently using. When arguing, you always want your answer framed in the other. When both sides are seeking accommodation or agreement, you want to match their frame. It helps, therefore, to know where they are, so you can make the proper adjustments accordingly before it's too late. Never fight fire with water, unless that's what you *mean* to do.

Here's an example where the contextual frames are the determining factor for attorney choices in persuasion. All decision makers will mentally redraft a case story, in part, as a human narrative, even when big corporations or organizations are the actual entities in conflict. They will, at some point, be drawn to consider the alleged bad acts from a "right-wrong" standpoint, according to their own references outside conscious direction or control. Consider the different framing that a dispute over a

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"We each have to take personal responsibility for ourselves. If you can't work, you don't deserve to eat."

– C-SPAN Caller
Discussing disabilities

contract might encourage compared with a dispute over an anti-trust claim against a company in the marketplace.

In each you will still be tasked to get the best from every participant in a focus group, by indirect means at first, about the shapes of the stories they are re-authoring about the case. Their anchors. Their frames. Their narratives and mental imagery. But, the context of judging right and wrong is 180 degrees opposite, according to the legal standard. In one case it's probably OK to look at the details (content frame) and ask whether one party acted fairly towards the other at the time. But, in the other, the right-wrong question is all about the wider world of the situation in the marketplace as a whole (context), where fairness between the parties is a side is-

sue, and effect on overall competition is the rule.

Where it gets interesting, just as research findings that show jurors are biased against both corporate defendants and injured plaintiffs, is when the theme territory of the story seems the same – *Protection* – but the frames are opposites – *fair treatment* or *preserved competition*. It really is not what you say you need, but how you get there that counts.

For attorneys planning on actually delving into using anchors and framing in *practice*, not just at the “tax relief” theory level, it can be some comfort to keep in mind that a habituated response is not always a rational and reasonable one. Often, that reality will appear at the juncture between content and context framing of the message. For instance, columnist Maureen Dowd points out the empirically verifiable observation that,

“For Obama, the expedient and politically intelligent thing would have been to denounce Wright, cut him loose and move on. Instead, he did what Hillary Clinton did not after Ferraro shot off her mouth, what George W. Bush did not after he spoke at Bob Jones University, what John McCain did not after he wimped out about the Confederate flag, what Ronald Reagan did not after he blessed ‘state’s rights,’ what Jimmy Carter did not after he invoked ‘ethnic purity.’

He showed courage. He seized the teachable moment. Then he taught that moment, not in the stark and simplistic black-and-white terms so often preferred by blacks and whites, but, rather, with a sophisticated grasp of the thorny nuances of race and a compassion vast enough to comprehend not only the anger and frustration of blacks, but also that of whites - and to recognize the righteousness in both.

– **Columnist Leonard Pitts, Jr.**

“The idea of American exceptionalism doesn’t extend to [individual] Americans being exceptional...The people who want English to be the official language of the United States are uncomfortable with their leaders being fluent in it.”

WHEN LESS IS NOT MORE

One frame most lawyers have incorporated somewhere along the line is the habit of isolating and challenging a premise in a question, answer or statement. These premises, or presumptions are often anchors for a frame, or frames in and of themselves. For instance, do not greet a venire panel by thanking them for their *desire* to serve. But, feel free to show your gratitude for their *willingness* as you start to question their *ability*, based on what *they bring in* the door with them, that could *impede their effort, block their way, or make it impossible* for them to do the *job as well as it needs doing* – in this *one case*.

These premises imbedded in the shorthand version of preframing remarks for voir dire above:

- Willingness to serve
- Ability to do so
- Impediments from *outside* (they bring with them)
- Doing a job
- One job among many,

...can all help people frame their experience of voir dire in such a way that they are most likely to acknowledge any good cause to question their ability to do the job here, compared to somewhere else they can do it as well as it needs to be done. In other words, the indirect message challenging a potential juror’s character hiding in the question, “Can you still *be* fair?” gets reframed into a quest for them to determine for themselves just where they will best be *allowed* – by their circumstances – to act as fairly as we already presume them to be.

You need not start from scratch. One useful head start comes from the habit of rehearsing challenges to premises; the practiced ability to catch a premise on the fly. But, instead of just challenging every one in a knee jerk fashion, expand your daily practice in legal communication to

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include all five of the approaches listed below. Notice how quickly a simple premise you already know how to recognize can start revealing whole frames of mind that were always residing behind it. And, start collecting the (mental) images and phrases serving as anchors holding them in place. One caveat; much of this work can't be done out loud.

- Challenge the premise

“Actually, that isn't an accurate assumption.” “No, not always.”

- Declare the premise

“What you're saying is...?”

- Imply the premise

“What priority of patient safety is served by...?”

- Reframe the premise

“If by that you mean...” “No, not if...”

- Expose the premise

“So, you want jurors to think...?”

Here are the beginnings of two draft openings taken from a plaintiff's manufacturing defect case involving a fatality. The claim was more about a known dangerous propensity of the equipment, than any faulty parts or construction. One relies more on direct suggestions, one on indirect ones to invite the decision makers to set up frames with which to start building their versions of the conflicting case stories.

Focus group participants revealed several mindsets, including an almost universal awareness of the manufacturer with few big biases toward it; a slight majority who had first-hand and/or second-hand life experience working with the claimed defective construction vehicle; half of those people claimed they had (safely) experienced the dangerous performance defect; many showed a certain level of suspicion about plaintiff counsel and money motives; and a strong trend towards an “all or nothing” attribution of perceived fault, one way or the other.

Make an effort to track how many anchors and frames of mind are being proposed, to what likely effect, *and*

whether those efforts are more direct or indirect in practice.

VERSION ONE

Big or small, every company's number one goal is to make money. That's the way it should be, and I think we can all agree on that, true?

But, if a company chooses to make and sell a product that has some built in dangers, then along with that number one goal of making money, comes a number one responsibility to do all they reasonably can do to assure their customers' safety.

In this case, the law you are here to enforce says that number one responsibility to safety is equally important as the number one goal. You will get an instruction from the judge when you are deciding each question on the verdict form called, “Duty of Manufacturer and Seller”. A part of it says any company that sells a product like this [construction vehicle] with some built in dangers that products like shoes don't carry, has a legal responsibility. That company must meet their responsibility to customer safety by showing the degree of care equal to the degree of danger that can be reasonably anticipated – under circumstances common when using that product. The greater the danger anticipated, the greater the care demanded.

At their heart, the laws and rules that apply to companies that choose to make their money selling products with built in dangers say those companies have a duty to show the degree of care equal to the degree of danger by drawing a line somewhere. They have to draw the line on safety for their customers. The customers need that line showing them when you are crossing over from reasonable safety to unreasonable danger.

As the evidence comes in, you will soon see there are at least three ways they can draw that line for their customers: they can equip their products well, they can instruct well, and they can warn. Testimony from that witness stand will show you that, if [this manufacturer] had done any one of those three things reasonably well – much less all three – there would be no need for this case

and nobody in this family would have had to die.

VERSION TWO

[This manufacturer] is a longtime manufacturer of [construction equipment/vehicles]. Like all companies, big or small, [manufacturer] will tell you its overall goal is to make money, and that there is nothing unusual about that goal. But, when a company chooses to make and sell a product in order to make money, the law requires the company to do all they reasonably can do to assure their customers' safety.

In this case, the law you are here to enforce says that a company's responsibility to make safe products, and to warn and instruct buyers against danger, must be equally important to a company as making money. In other words, the law requires companies to not just care about making money, but demands companies test their products, and warn and instruct against danger. This is true even if it costs a company money to test, instruct and warn.

In the case you will hear in this courtroom, you will learn that [manufacturer] makes these [construction vehicles]. You will learn that these [vehicles] easily [create dangers] and that [manufacturer] is well aware of this problem. They've been aware of this problem for years. What has [manufacturer] done to test its [vehicles] for this [dangerous] problem? What has [manufacturer] done to warn its customers? What has [manufacturer] done to instruct [vehicle] users to avoid [dangerous problem]? These will be your questions to answer and they form the very heart of this case.

At the end of this case, after you

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“Not only is she young, they're saying she's the prettiest candidate for Vice President since John Edwards.”

– Jimmy Kimmel

have heard all the evidence, and listened to the arguments of each side, you will be given a set of jury instructions that will state to you the law of this state that applies to this case. Each jury instruction is meant to instruct you, the jury, so that you will understand the applicable law as you make your decision.

So, as you are looking through these jury instructions, you'll see an instruction from the judge when you are deciding each question on the verdict form called, "Duty of Manufacturer and Seller". A part of it says any company that sells a product like this [construction vehicle] with some built in dangers that products like shoes don't carry, that company must meet their responsibility to customer safety by showing the degree of care equal to the degree of danger that can be reasonably anticipated – under circumstances common when using that product. The greater the danger anticipated, the greater the care demanded.

You will learn from this jury instruction that the law provides that some products, like a pair of shoes for example, require a lesser degree of care because it is difficult to suffer great bodily harm from a defective pair of shoes. Other products, products that are capable of causing great bodily harm, or death, require the highest degree of care. You will see from the evidence in this case that a [vehicle] is quite capable of causing the greatest bodily harm, death. As such, when protecting against [dangerous property] of these [vehicles], [manufacturer] was required to use the high degree of care equal to the degree of danger – in this case, death. The law requires that [manufacturer] take these [dangers] very seriously, even if it costs [manufacturer] money.

Because these are two draft openings produced for the same case, many of the proposed anchors are the same. But, if you have trouble separating one from another, deciding which invites frames of mind along the lines of *greater the danger the greater the care* versus *costs*

of compliance as motive, which sets up anchors like (*known*) *dangers* and *responsibility* versus *making and spending money*, and which services a theme in the vicinity of "Care not equal to the danger" versus "Profit over people", then run through them again. One example of the difference between direct suggestion and indirect suggestion can be found in how the critical case story framing of *prior knowledge* of the manufacturer is handled.

MEAN WHAT YOU SAY BEFORE YOU SAY WHAT YOU MEAN

Attorneys who struggle a bit wrapping their heads around the variety of stories available in any given situation may want to read some of the new book by social scientist Drew Westin, called The Political Brain. In it, he points out that, in political races, a successful candidate has to have four stories - not one. And, he or she has to have four stories that relate effectively with the four stories on the other side, too. What are the four stories? Your story about yourself, the other guy's story about you, your story about the other guy, and the other guy's story about himself. Westin's excellent contention is that a good campaign will have, hold and project consistent and effective stories of all four varieties. A strong facility with anchors and framing is essential to make and hold those distinctions between the same subjects from four different perspectives.

Drafting your presentation for your legal case story, after sorting through the best of the input from your focus group participants, involves establishing the most effective sequence for the three steps of your narrative, and arranging your anchors to hold the three or four frames in place, in order, that each of those three larger story steps will contain. Delivering that story, in that sequence, indirectly at first, will produce the most productive responses from the largest number of decision makers, setting up and reinforcing private stories with themes as close to the desired territory as possible.

But, don't forget one of the tougher ground rules in the process. Balancing

the visual delivery with the verbal. Two final prescriptions on this point can round out your approach to anchors and frames that encourage the best themes for any decision maker in any venue. First, the story's Central Image.

Themes are, by nature, very general, more metaphoric and symbolic than explanatory and detailed. And, they are highly visual, in that they enforce the broadest referencing of large tracts of stored experiences in the decision maker's mind. Those reference experiences all have language linked to them down the road. However, psychology and neuroscience both agree that the primary means for referencing all those experiences sorted (outside consciousness) under one large thematic grouping or another, is by imagery. For practical purposes, what this fact about the brain – and the mind – means to the trial lawyer seeking to invite the use of one theme over another is that the job is only half done when you think you have a phrase or two that adequately represents your theme. You also need an image. A Central Image.

Here's your trouble. While a theme will almost always be something facile and conceptual, even when properly linked to the language of the legal rules in the case, the image you select to push forward and get adopted by your decision makers has to be based in consensual reality. The reality of the case facts. You can't just swing in with a demonstrative aid storyboarding a big, bad company putting profits over people on whose necks they've placed their big feet. Nor can you flip up a slide showing a greedy, grasping plaintiff attorney whispering in the ear of a marginally-injured, morally bankrupt client, with a big "F" for frivolous on the lawyer's chest. The only thing worse, is to not try and provide a central image at all.

So, again, you turn to the focus group participants, and review the video of all of their input for both the direct references they make to images associated with the case story, and especially the images they must be referencing to make their comments or ask their questions even when they don't mention them

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aloud. Among all these case-specific, fact-based images will be the one that most cleanly and clearly reinforces the theme as you've isolated and written it. For practice, go back to the two opening statement drafts and review them seeking out the one mental image, based in the facts not your editorial comments, that most clearly sets up and can reinforce the theme territory for one and then for the other.

Lastly, we return to the toughest ground rule of all for many attorneys; the primary choice of indirect over direct efforts at persuasion. Outside consciousness means just that. You do not become conscious of all the mental processes outside consciousness merely by verbally acknowledging that they exist. Though it is remarkable how many of us act as if that were the case. There is a real difference between theory and practice, words and reality.

Anchors and frames, for example, are not a one-way street. The physical effect on your presentation of yourself, when adopting one frame of mind over another often goes unacknowledged, but never unobserved. That is why stopping at the level of verbal "tricks", like "tax relief," as if that were all framing can provide, is so dangerous. Because the frame you will unthinkingly adopt to deliver your message, using your whole brain and your whole body demeanor from voice tone to tapping fingertips, will be *tricks*, not *relief*. That is the frame you will advertise, as long as that is the frame you hold, regardless of your good intentions to the contrary.

We've taken to demonstrating this unsettling, but ultimately empowering, fact of life in legal persuasion by putting attorneys on video in front of a group, and having them start the first two minutes of an opening statement, then pause, and start the opening again for the same case. By show of hands, the majority of the group (190 out of 200 in one case) always shows a preference for one version over the other.

One thing they all see, is me whis-

pering in the ear of the attorney just before he or she starts each version of the brief opening. I then have them all guess what it was I said to provoke the response they liked, and the one they did not. What follows are many guesses that all always have two things in common. First, they all relate to a couple of the fundamental framing factors like Outcome and Process, Loss and Gain, and particularly Control and Power. And, second, just like our four examples of presumed conscious control over decision making from the four professionals of economics, psychology, business and law, they all presume that the control

over the delivery I asked for was conscious in both nature and application. Bear in mind, these groups of attorneys have just finished hearing a similar description of the primary role of *other* than conscious processing, much like you've just read, above. But, the habit of theory over practice is a tough one to outgrow.

What is actually done, is to invite the attorney to use an anchor, like silently repeating to him or herself, congruently in the imagined context, "Your Honor, you have to understand..." and immediately launching into the opening aloud. The next try starts with a silent inner comment like, "This is a story about..." and then

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"Speaking truth to power doesn't make successful Sunday-morning television, leads to 'jealousy, upsets, persecution,' and doesn't draw a salary of \$5 million a year. The notion that journalists were once in the habit of doing so we borrow from the media of print, from writers in the tradition of Mark Twain, Upton Sinclair, H.L. Mencken, I.F. Stone, Hunter Thomsson, and Walter Karp, who assumed that what was once known as 'the press' received its accreditation as a fourth estate on the theory that it represented the interests of the citizenry as opposed to those of the government. Long ago in the days before journalists became celebrities, their enterprise was reviled and poorly paid, and it was understood by working newspapermen that the presence of more than two people at their funeral could be taken as a sign that they had disgraced their profession.

On television, voices of dissent can't be counted upon to match the studio drapes or serve as tasteful lead-ins to the advertisements for Pantene Pro-V or the U.S. Marine Corps. What we now know as the 'news media' serve at the pleasure of the corporate sponsor, their purpose not to tell truth to the powerful but to transmit lies to the powerless."

- Lewis Lapham

ANCHORS AND FRAMES
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away they go out loud. No directions. No stage management. Just an anchor. The frame of mind driving the delivery comes along automatically, without help. I'll leave it to you to guess which version is inevitably found superior by the lawyers watching and listening.

WE WUZ FRAMED

The fundamental problem is the same as the one cited from the start. The dynamic between other than conscious and conscious functions of our minds is sometimes recognized and given some

lip service in theory when talking about legal decision making, but it is then almost always promptly forgotten about in practice. The habit of putting the words "on top" is a strong one.

But, in less than the last dozen years, scientists researching neurons in the brain, not just sociology and psychology, have eliminated the last excuse for avoiding the inevitable, and reframing that approach to legal persuasion and communication. It turns out that, simply by reframing your own version of what greeting and attention to any other person entails, from something *said* to something *done* opens up a proven door to persuasion that surpasses anything

yet imagined in the wildest dreams of advocates.

Remember *habit* is the coin of the other than conscious realm. It turns out that the human habit of empathy, or altruism, or engagement, or identification with any other person has been tracked down and verified, with everything from functional magnetic resonance imaging to repeated successful experiments that don't require physically probing brains. What all the experimentation and searching has turned up are the neurons and other brain structures that a lawyer taking a persuasive tack can invite a listener – any listener – to engage and, starting from a mental stance of reticence or even suspicion, quickly shift to a frame of mind that actually, measurably leans more toward *helping* you persuade them. And, the method you need is almost completely nonverbal.

These neurons even have a name. They are called "mirror neurons" after the physical activity involved. If you successfully reframe a greeting or attention to another to include the physical act of doing something like they are doing, with a couple second's lag in the rhythm, it is now beyond question they will be more receptive than someone you fail to greet this way. You can invite decision makers to switch the framing in their heads from closer to suspicion of your persuasive efforts to closer to cooperation with them, before much, if anything, is even said.

So, the new formula for the most effective approach to persuasive efforts using all that we know about artfully inviting decision makers to adopt or build anchors and frames leading to the most productive case story themes turns out to be really simple:

1. Invite empathy by applied mirroring
2. Harvest or sow anchors and frames, generally first
3. Distill or deliver the most productive narrative – in sequence, frame by frame.

Can you cry underwater?

How important does a person have to be before they are assassinated instead of just murdered?

Once you're in heaven, do you get stuck wearing the clothes you were buried in for all eternity?

Why does a round pizza come in a square box?

What disease did cured ham actually have?

How is it that we put man on the moon before we figured out it would be a good idea to put wheels on luggage?

Why is it people say they 'slept like a baby' when babies wake up like every two hours?

If a deaf person has to go to court, is it still called a hearing?

Why are you IN a movie, but you're ON TV?

If Jimmy cracks corn and no one cares, why is there a stupid song about him?

EIGHT WAYS

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colleagues. “Persuasion is a basic form of social interaction,” says Eric Knowles, emeritus professor of psychology at the University of Arkansas in Fayetteville. “It is the way we build consensus and a common purpose.”

Unfortunately persuasion is both notoriously difficult to pull off and almost impossible to resist when done well. Psychologists have long been fascinated by persuasion - why some people are more persuasive than others and why some strategies work where others fail. Here we bring together some recent insights into the science of persuasion.

For those who don't want to be persuaded, there are lessons here too. Knowing the strategies charmers and advertisers adopt can help you resist their guile.

BE A MIMIC

When you're aware of it, it's one of the most infuriating behaviours imaginable. Yet mimic someone's mannerisms subtly - their head and hand movements, posture and so forth - and it can be one of the most powerful forms of persuasion. That's the conclusion of a number of recent studies.

William Maddux at the INSEAD business school in Fontainebleau, France, explored the effect of mimicry on 166 students in two role-play experiments, one involving negotiation between job candidates and recruiters, the second between buyers and sellers (*Journal of Experimental Social Psychology*, vol 44, p 461). In both cases, the outcome of negotiations was better for the would-be persuaders when they employed subtle mimicry. For example, in the buyer-seller experiment, 67 percent of sellers who mimicked their target secured a sale, as opposed to 12.5 percent of those who did not.

Another study by Robin Tanner at Duke University in Durham, North Carolina, asked students to discuss a new soft drink with sales reps (both the reps and the drink were fictitious, though the students did not know this). Half of the

reps were instructed to mimic the physical and verbal behaviour of half of the students they spoke to.

These “chameleon” reps elicited more positive ratings of the drink, and volunteers they mimicked consumed more of it during the chat. “Ours is the first study to show that mimicry can essentially enhance persuasion in interpersonal interactions,” says Tanner. Intriguingly, people felt especially positive about the drink and its market prospects when the mimic explicitly stated their vested interest in the success of the drink.

It is possible, though, that the reps in the “no mimicry” group subconsciously resorted to mimicry. Jeremy Bailenson and Nick Yee of Stanford University got round this by using virtual reality avatars. They asked 61 students to watch and listen to an avatar arguing that students should carry ID cards at all times - an unpopular proposal. For one group, the avatar moved in a pre-programmed human-like way. In the other, computers tracked the students' head movements, which the avatar mimicked after a 4-second delay (previous studies suggested a delay of 2 to 4 seconds works best). Students who had been mimicked were more likely to respond favourably.

But be warned, overt mimicry can backfire on the mimic, or at least be very embarrassing if detected, says Tanner. “It's far from a free shot at persuasiveness.”

The crucial factors are: be subtle, leave a delay and, whatever you do, if you think there's even the slightest chance you've been rumbled, stop.

LOOK AT IT THIS WAY...

If you want to bring people round to your point of view, try “framing”, a favourite tactic of spin doctors. “Framing is about leading people to think about an issue or opinion in a way that is advantageous to you,” explains George Bizer of Union College in Schenectady, New York. “For example, opponents of inheritance taxes prefer to frame them as ‘death taxes’.”

Framing is a key tactic in election campaigns, so Bizer wanted to see

whether voters were more or less persuadable to change their views when asked to frame them in different ways.

He asked 69 undergraduates to read an article about two fictitious candidates' views and policies (one candidate, Rick, was conservative, while the other, Chris, was liberal). Half of the students had to choose between the two statements: either “I support Rick” or “I oppose Rick”; the other half chose between equivalent statements about Chris. Participants also rated their preference for both candidates on a sliding scale from “strongly support” to “strongly oppose”.

They then read another article, this time arguing against the merits of their preferred candidate, and then had their opinions reassessed. Overall, people whose preference for a candidate had been expressed in terms of opposition to the other candidate were less likely to modify their opinions “A simple change in framing - leading people to think of their evaluations in terms of whom they oppose instead of whom they support - leads to stronger, more resistant opinions,” says Bizer.

These findings fit with a broad body of research suggesting that negative

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“When they were vetting her for this job, like three seconds ago, she said, quote, I'm not making this up, ‘What is it exactly that the VP does every day?’ Let me field that for you, Sarah.

They start wars, they enrich their friends, they subvert the Constitution, and they shoot people in the face. That's what the vice president does.”

– Bill Maher

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information frequently has a more powerful influence than positive messages. So if you want to sway someone when they choose between two options, a good tactic is to be negative about the option you don't want them to pick.

LESS IS MORE

In most battles, outnumbering your opponent will hand you victory, and it would seem common sense that the more arguments you can call on, the more persuasive you'll be. Yet, the evidence suggests otherwise. A number of studies have revealed that the more reasons people are asked to come up with in support of an idea, the less value they ascribe to each. The result: asking people to "think of all the reasons why this is a good idea" is likely to backfire, and may serve to harden their views.

Zakary Tormala and Richard Petty of Ohio State University, working with Pablo Briñol at the Autonomous University of Madrid in Spain, demonstrated the effect in 2002. The researchers told 59 university students that there was a plan to introduce new exams into their

courses - an unwelcome prospect. They then asked half the students to produce two reasons why this was a bad idea, and the other half eight reasons. On average, students who supplied just two arguments against the proposal were subsequently more opposed to the exam policy than those who gave eight.

Tormala and colleagues argue that the ease with which we can summon up thoughts affects how much confidence we place in them, and it is generally easier to think of two reasons for believing something rather than eight. This finding has some clear practical implications. "If you want to persuade people by getting them to think positively about your message, idea, product or whatever, ask them to generate just a few positive thoughts - three at most - because that's easy and they'll feel confident about their positive thoughts," says Tormala.

Conversely, next time you're in an argument, avoid the temptation to spin the "give me one good reason" line; it'll only strengthen your adversary's hand.

GRIND THEM DOWN

Hunger is a powerful thing, but how many times have you reached for a quick snack, only to regret it when it's lying heavily in your stomach? Just as your standards for food quality can slip when your stomach is empty, so you should avoid engaging in argument or doing battle with sales people when your mental batteries are running low. Conversely, if you're trying to be persuasive, strike when your target is running low on mental energy.

Edward Burkley of Oklahoma State University in Stillwater studied the impact of cognitive exhaustion on the resistance levels of 78 students. The plan was to try to convince them to accept one month's summer holiday instead of three. Half the students came to the study fresh. But the other half first had to complete a self-control task in which they wrote down all thoughts that came into their heads while suppressing any thoughts about a white bear.

This task, Burkley argued, would use up some of their reserves of self-control. He found that the students who

had performed the white bear task were less resistant to the idea of giving up two months of holiday.

Burkley also studied the flip side of this effect. He asked a different group of 72 students to rate the plan to shorten their holidays. Half were told it would be implemented within two years, making it personally relevant. The other half were told it would not be implemented for 10 years. He wanted to test the hypothesis that students presented with the two-year scenario would use up more of their mental resources, because they would be more motivated to argue against that unwelcome suggestion.

The students then had to try to complete an (unbeknown to them) unsolvable puzzle - a technique commonly used in such studies to measure how much self-control a person has. On average, students in the 10-year group persisted for more than a minute longer before giving up, suggesting they were less mentally exhausted than those in the two-year group.

Of course, there is a form of mental exhaustion that doesn't require thought: nag them into submission. Children have got this technique sussed, says Burkley.

THE MEDIUM IS THE MEANS

In this fast-paced world, we seldom have time for face-to-face meetings. You are just as likely to conduct your personal and business negotiations by email, or some other electronic medium, as you are in person. How does this impact your powers of persuasion?

The question intrigued Rosanna Guadagno of the University of Alabama and Robert Cialdini of Arizona State University, who have been comparing the persuasive power of online communication with face-to-face meetings.

In a study published in 2002, Guadagno and Cialdini had a group of students discuss the introduction of new exams. The group was split into same-sex couples. Unbeknownst to the subjects, each pair included an accomplice of the experimenters whose role was to provide arguments in favour of the idea. Half the discussions took place in an online chat-room, the other half sat face-to-face.

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"I think this is pertinent because McCain has been running this campaign based on 'we're at war,' it's a dangerous world out there. The democrats don't get that. I, John McCain, am the only one standing between blood-thirsty Al Qaedas and you. But if I die, this stewardess can handle it."

-Bill Maher

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While overall men rated the proposals similarly whether they participated in the electronic or face-to-face sessions, women in face-to-face sessions rated them more highly than those who only took part online. Guadagno and Cialdini suggest this is because groups of women tend to form communal bonds and reach agreement. Electronic communication disrupts the exchange of social cues women use to establish a communal bond and is therefore less conducive to persuasion.

On the other hand, groups of men typically try to establish their competence and independence, which can lead to competitive encounters. When two men who have not met before debate a point, online interaction is about as effective and persuasive as face-to-face.

But if they have met and had a competitive exchange, subsequent face-to-face meetings are less productive, whereas online exchanges fare far better. So while online communication can prevent women “connecting”, it can help men suppress competitive urges that hamper persuasion.

So, if you’re a woman and want to persuade other women you’d be better off meeting face-to-face, while men are less confrontational if contacted by email. The researchers are now studying these effects in mixed couples.

STYLE OVER SUBSTANCE

It was midnight when the knock came at the door. It was “Paul”, a “neighbour”, who’d “just moved in”. He spoke non-stop, without pause or hesitation, detailing a problem with a truck that had run out of gas and his need for \$20, which he would, of course, return first thing in the morning. Later, Kurt often looked back and wondered just how it was he got taken in so easily.

“Paul” was a master of his craft: Kurt later learned that four other people on the street had also been taken in by the con.

Maybe we shouldn’t be so surprised when things like this happen. Persuasion, it turns out, may have as much to do with

how you say something as what you’re saying. And the less time you’re allowed to think about the content, the more the style of delivery matters. At least, those are the findings of two marketing professors who decided to tease style and substance apart.

John Sparks at the University of Dayton in Ohio and Charles Areni at the University of Sydney, Australia, knew from earlier work on courtroom transcripts that people equated certain kinds of speech with lack of credibility. In particular, hesitant phrases such as “I mean”, “you know” and “isn’t it?” reduced a speaker’s power. But no one had looked at the exact relationship between style and content.

The researchers asked 118 undergraduates to read a transcript of a testimonial about a scanner. In one version, the speaker used hesitations like “I mean” and “ummm”; in the other, he used none. They also gave half the students enough time to read it thoroughly, while the others

got just 20 seconds, to see how limiting a person’s understanding of the substance would alter the persuasiveness of the style.

The researchers found that in both versions style was important. When hesitant language was used, people were less easily convinced that this was a scanner worth buying - even when it was a better scanner at a lower price. Style was especially important, the researchers found, when time was limited. “If you can’t pay attention to what the speaker is saying,” Sparks says, “you pay attention to how they say it.”

So take a lesson from Paul, the con-man. If you want to be persuasive, don’t stumble, pause or use language that shows hesitation. And for goodness sake, don’t give your listeners time to think about what you’re really saying.

GET THEM ANGRY

Angering people may seem like an

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“The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”

“So who has won?... Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this nation’s foreign policy to unelected, politically unaccountable judges...”

**- Supremes Anthony Kennedy and John Roberts
(in dissent from the majority) on the
June ‘08 Guantanamo Habeas Ruling**

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odd way to go about persuading them, but according to Monique Mitchell Turner, a communications professor at the University of Maryland, College Park, it is seriously underrated as a tool of persuasion.

Much study has gone into how emotions aid persuasion. The best known and most studied is fear. It serves well in campaigns that try to steer you clear of certain activities, like smoking or unprotected sex.

But fear doesn't always work, says Turner, and over time, people become more resistant to scare tactics. The same applies to guilt. It can be effective (think of maternal guilt), but not once people clue into the fact they're being manipulated. Worse, it has to be carefully calibrated: too much and people resist. "We don't want people telling us we're bad people," says Turner.

Anger is different. For one thing, it's focused on someone else's misdeeds, not your own. Also, it's a very utilitarian

emotion, she says, usually in response to a perceived injustice. "Anger makes people feel empowered," Turner says.

There has been a long debate, she says, about whether anger can be constructively harnessed. In studying groups that employ anger as a tactic - most notably animal rights groups such as People for the Ethical Treatment of Animals, as well as environment organisations and even political campaigns - she has found that, given the right conditions, it can.

First, people have to be convinced that the issue is relevant to them, that it affects them or their children or their community. At that point, says Turner, you need to hammer home what's wrong with the world as it is. Once you have got people roiled up, you can offer them a way to remedy the situation.

"When those feelings of anger are accompanied by the feeling that there is a solution to this problem, then the message is more likely to be persuasive," she says.

RESISTANCE ISN'T FUTILE

Historically, psychologists studying persuasion have concentrated on what

makes certain messages more appealing than others. But over the past few years researchers have begun revising that idea. A growing body of evidence suggests that breaking down people's resistance to persuasion can be even more important.

The reason for this is that people are naturally suspicious of attempts to persuade them. This is especially true if they think they are being duped.

In laboratory studies, merely reminding people that they are vulnerable to manipulation - for example, showing them magazine adverts with celebrities or models endorsing products they clearly know nothing about - makes them generally more difficult to persuade.

So far so obvious, but there's a useful point here. Resistance means that very persuasive arguments can backfire. People who successfully resist persuasion often become even more entrenched in their wrong-headed opinions, and the stronger, more credible or authoritative they perceive the attempt at persuasion to be, the more certain of their opinions they become when they resist it.

At first blush, this seems paradoxical. You might think a strong, authoritative argument would hold greater sway. Not necessarily. It seems that if people resist good arguments presented by an expert, they conclude their own arguments must be even stronger.

This sets up a bit of a catch-22. "If you want to change people's attitudes, it's good to have strong arguments," says Zakary Tormala of Stanford University. "But if they manage to resist your message, they might become more certain of the very attitudes you want to change."

How to overcome this deadlock? Tormala's colleague Richard Petty of Ohio State University says: "Present positions closer to your target's views, then move them towards your goal a little at a time." You could also try charming them by boosting their self-esteem. "When people feel good about themselves, they are more open to challenging messages," he says.

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A person who smiles in the face adversity... probably has a scapegoat.

News From The Mental Edge

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