

News

From The Mental Edge

Volume 14, No. 1

The Newsletter of Uncommon Sense

Spring 2009

MAKING PREPONDERANCE WORK

- By David Ball, Ph.D.

Originally Appeared in Trial Magazine, March 2008, Volume 44, Issue 3

Almost all jurors expect you to prove your case beyond a reasonable doubt, and you won't change their minds by explaining preponderance. But if you make preponderance a working theme throughout trial, jurors will make preponderance-based decisions about liability and damages. In most civil trials, one of your most important tasks is to get jurors to make decisions based on a preponderance of the

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READY, SET – UH OH

- by Eric Oliver

*“Believe none of what you hear
and half of what you see.”*

– Ben Franklin

THE PLOT QUICKENS

Many trial attorneys have heard of all these spooky research studies about influence in which people seemingly do the job of persuading themselves. Terms like: priming, anchors, framing, conditioning, schema, recency, norming, availability, mindsets and others are used to describe the subject matter being studied. But, whatever terms are used to tag these phenomena, they all share a common attribute; the persuasion that takes place seems to happen with little argument required, typically with no words at all.

- Pine Sol. Researchers found that leaving a water bucket with some cleanser in a room, out of sight, then giving the subjects a crumbly cookie for doing their (phony) experimental task, invites them to clean up their messes in greater numbers than subjects who had no subtle smell suggesting they do it.

- Backpack –v- Briefcase. If you ask a research subject to play a game with rules allowing a range from cooperative to ruthless, some will attack and some won't. More aggressive acts can be reliably invited by leaving a briefcase in sight. Backpacks in view prompt cooperation instead.

- Hot or Cold. Unconscious persuasion apparently even uses *metaphor*.

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Publisher's Notes

Each issue of the Mental Edge does have a theme. The difficulty tracking it on occasion seems to stem from a problem in human perception this issue plumbs as deeply as any we've ever done. The concept of a theme almost demands a Top-Down order, from phrase to feeling. “Profits Over People” “Lawsuits Are A Lottery” The underlying possibilities tying those two theme statements together are endless, but let me offer one: both these notions require the decision maker influenced by them to see the agent in “control” (i.e. the evil corporation or the greedy plaintiff) to be of a class of human that is less deserving than the one being advocated to by the lawyer trumpeting this theme. “Ladies and Gentlemen, I am here to tell you who you are well-advised to find unworthy, so let me tell you why...”

We all know how well-meaning we want to be – or at least be seen as being. And we all know how we fail to project this true fact. And that, is the theme. The gap between our best intentions and what we end up saying, thinking, projecting or actually even doing in conflict with them. And, the reminder that intentions don't run the show.

The article least obviously in line with that theme, would be the featured excerpt from the excellent book, Marketing Metaphoria, recommended to me by my colleague, Amy Pardieck, though many graduates of the TLC school, especially the West Coast branch, have since suggested it to me as well. Language, IS metaphor. Every word you use is not the thing, but a substitute. These marketing gurus have simply gone as far as I think is safe to dive into the well of metaphor in each consumer's head. How could that help you? Well, if you are looking for themes to congruently communicate your client's situation, quickly, cogently and deeply, how could you possibly trust your law-school-distorted brain, when you have the benefits of all these unpolluted sources at your fingertips? Especially since the most popular ways to try and dig out these deep mental arrangements do a very poor job, and these guys don't.

David Ball is a frequent, and always welcome, contributor. I asked him for permission to reprint this primer on proof in the eye of the beholder for this issue dealing with intention and action. As I said since my first book, “You get what you rehearse, not what you intend”. For that insight, I'm grateful to my late mentor, Dr. Dave Dobson. David Ball's formula is designed to help you approach people with the full array of intentions – good to stealth – in a way that takes advantage of more basic, more reliable responses than the routinely, shamefully accepted platitude, “I can be fair”.

If you stop to check the date on the article about Police Chief Rhoads, you may wonder why I'm including ancient history in the time of *Lie To Me on TV, and so many different read-'em-and-weep programs being gobbled up by attorneys consuming nonverbal communication programs. In keeping with our theme, I'm really worried about people who think they are buying into techniques that open some magic access to nonverbal communication, when what they end up using is verbal communication, once-removed. If you have to stop and interpret a behavioral communication before you respond, then you are now breaking off the actual communication to have a conversation with yourself about what you think you just saw “rilly means”. Verbal – once removed. Which leads to my piece. If everyone is responding to what you do as you are thinking, how long can you afford to show them you are analyzing their Darwin Grief Muscle response before it's too late?

My piece jumps off from Chief Rhoads' and heads full speed ahead, back to the future to where I started with my unexpected clients, 25 years ago this, last month. Body first, mouth second. Not what you say, but...

Enjoy! - E.O.

THE LIE: Try to Fool This Cop and He's Likely to See Right Through You

– By Jim Spencer

Chicago Tribune, Jan 20, 1987

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The Mississippi Highway Patrol hunted almost a year for Stacie Pannell's killer. The person who murdered the 18-year-old freshman in her dormitory room at Northeast Mississippi Junior College in Booneville apparently crawled through an open window and caved in the coed's skull with the butt of a drill-team rifle.

It was grisly stuff, probably the most notorious crime in the northern half of the state. People talked about it a lot. Certainly, the cops talked. They questioned dozens of people and narrowed the case down to two suspects. The first was a man with a history of sex offenses. The other was Pannell's boyfriend. He believed she had been unfaithful to him on her trips home from college. He was jealous and angry; he had a motive. Moreover, he failed the lie-detector test when asked if he'd ever thought about killing her.

Still, the highway patrol's detectives didn't have enough evidence to charge anyone. That's why they summoned Steve Rhoads, the police chief of the tiny Chicago suburb of East Hazel Crest (population 1,362), 600 miles to the north. One of the Mississippi investigators had heard Rhoads lecture about a special interrogation technique at a Drug Enforcement Administration seminar. The man knew how to get at the truth.

When Rhoads met Stephanie Alexander, he had already ruled out the sex offender as a suspect and was waiting to talk to Pannell's boyfriend. According to what the investigators told him, Alexander, 21, figured into the case only tangentially. A suite mate of Pannell's, she wasn't a suspect, but police thought she knew something she wasn't telling.

Rhoads said he asked Alexander a series of simple questions: What was

her name, her address, her telephone number, her date of birth, her place of birth, her Social Security number? As she answered, Rhoads carefully watched her eyes. With each response they twitched to the left.

Finally, he said, he asked her to speculate about how Pannell might have been killed. Her eyes went to the right.

"She said she didn't know," Rhoads recalled.

"Who do you think had an opportunity to kill Stacie?" Rhoads wondered next.

Again, she said she didn't know, Rhoads said. But her eyes moved right once more.

"What do you suppose their motive was?"

Same response.

Her eyes had moved right a third time, and inside Rhoads' head, an alarm sounded. His questions grew more specific. Painstakingly, he said, he sought her whereabouts on the night of the crime.

"You said you were asleep at the time of the attack. What time did you go to sleep?"

Alexander's eyes darted right and before she could answer the question, Rhoads stopped her. "Don't tell me that, Stephanie. It's not true."

"You said you took a shower," Rhoads continued, "why?"

Once more, Alexander's eyes twitched right.

"Damn it, Stephanie," Rhoads said impatiently, not letting the young woman get a word out, "you're making that up. I want the truth."

And so it went for the next two hours. Each time Alexander's eyes moved right, Rhoads recounted, he cut her off, admonishing her before she

spoke. Each time her eyes moved left, he let her talk, encouraged her, even. Little by little, Rhoads said, as three astonished highway patrolmen looked on, Alexander admitted to the murder of Stacie Pannell.

At last, the flustered young woman looked at Rhoads.

"You can read my mind, can't you?" he remembers her asking.

"Yes," the cop said simply, "I can."

Actually, what Steve Rhoads reads is a kind of involuntary body language. "Eyes move in patterns," he says, seated in a small, sparsely furnished office at the East Hazel Crest Police Department. "They move differently when you're remembering and when you're creating. And if you're creating when you're talking to me about a crime, you're lying." That's the short of it. The long of it is an elaborate system of evaluation that involves right- and left-brain dominance, sound, sight or feeling orientation, positive and negative anchoring, posture, intonation and a unique application of a 50-cent piece of psychological nomenclature -- Neuro-Linguistic Programming.

Rhoads, 32, learned about Neuro-Linguistic Programming eight years ago while studying for a bachelor's degree in behavioral science at the University of Southern Colorado. It was a relatively new idea then, having been developed only a few years before by Richard Bandler, a mathematician and computer expert, and John Grinder, a linguistics professor in California.

The concept, used initially to establish rapport between patients and practitioners in psychotherapy, held that everybody sees the world through a dominant sense--sight, sound or feeling.

"If you're sight-oriented, you want

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FOUNDATIONS OF DEEP METAPHORS

How Managers Benefit from Discovering Consumer Similarities

– By Gerald Zaltman & Lindsay H. Zaltman

Excerpted from: Marketing Metaphoria: What Deep Metaphors Reveal About the Minds of Consumers
Harvard Press, 2008

The human ability to observe difference in ourselves and our environment originates in a highly developed, innate capacity for making contrasts. At a very basic level, this capacity allows us to survive. We can distinguish between a moving car and a stationary one when crossing a busy street. We can tell whether the smell of the composition of the milk in the carton has changed overnight. We can compare the consequences of alternative actions, thus enabling ourselves to learn how to walk, speak a language, form social relationships, take responsibility for our actions, or design better products, services, and communications for consumers and employees.

Our ability to perceive differences is so well developed that we even find differences where none exist. For instance, when comparing clearly labeled wines or beers or soft drinks, people will detect taste differences, whereas in unlabeled taste tests of the same products, tasters often detect no differences. People will insist that one brand of medication acts more quickly and effectively than another brand, even when the medicines are identical in chemical comparison. The mere belief that something is different (when it is not) can actually induce measurable albeit temporary changes in our experiences. Not surprisingly, differences capture our attention.

We detect differences so automatically that marketers can easily overlook a significant fact: differences stem from similarities. Differences surround a finite number of commonalities. In fact, we cannot make comparisons - the essence of noting differences - without referring to an underlying common dimension. We cannot say one salesperson is aggressive and one is passive without

reference to the underlying dimension of forwardness. Consumers describe one service provider as prompt and another as always late - a comparison whose gauge is based on the basic notion of responsiveness. They use an underlying dimension of fairness when viewing one price as a rip-off and another, lower price for the same product as a bargain. Using underlying dimensions such as responsiveness and fairness as viewing lenses helps us avoid chaos and organize our experiences.

Our point here is simple but important: in marketers' efforts to identify and communicate some distinct benefit or unique selling proposition, they often give too much weight to differences and pay too little attention to the underlying deep metaphors or viewing lenses consumers use to detect and interpret those differences. This imbalance should surprise no one, since noticing differences occupies our conscious minds while the operation of underlying common or shared dimensions occurs primarily in our unconscious minds. Even here we cannot avoid using the underlying dimension of awareness to distinguish between conscious and unconscious thinking. You already recognize such acknowledged commonalities as primary emotions, core needs, and basic values. In the remainder of this chapter, we explore the cornerstones of deep metaphors, a neglected commonality that shapes what we think, hear, say, and do.

Pattern Recognition

Our penchant for detecting differences would soon produce chaos, were it not for the countervailing ability to notice patterns. Nobel Prize winner Gerald Edelman points out, "There are two main modes of thought-pattern recognition

and logic and the primary mode, giving enormous range in confronting novelty, is pattern recognition." Our ability to see meaningful patterns rather than be overwhelmed by differences enables us to determine where to find food, what is poisonous and what is edible, who are friends and who are enemies, and which financial investments to make and which to forgo. For instance, simply by observing facial patterns, we can identify with surprising ease and accuracy the emotions of others, even complete strangers with ethnically different facial features and expressions.

In detecting patterns, we locate essences or bundles of reference points. This capacity enables us to distinguish realism from abstract art, classical music from jazz, and wine from beer. The ability to recognize patterns gives meaning to our lives. Master violinist Yehudi Menuhin expresses this nicely: "Music creates order out of chaos, rhythm imposes unanimity upon the divergent, melody imposes continuity upon the disjointed and harmony imposes compatibility upon the incongruous." Life would be chaotic, to say the least, if we only experienced differences or if our proclivity for noticing differences overpowered that for noticing similarities.

Pattern recognition involves conscious and unconscious thought. However, we tend to engage our conscious

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If you can stay calm, while all around you is chaos... then you probably haven't completely understood the situation.

to see lightning,” Rhoads explains in an oversimplified example. “If you’re sound-oriented, you want to hear thunder.”

Neuro-Linguistic Programming also maintained that people move their eyes a particular way when the brain processes certain types of information. For example, most right-handed people look up and to the right when creating a visual image. By tuning into a patient’s preferences and thought patterns, a therapist could enhance treatment.

Though he hoped one day to be a police psychologist, Rhoads was no therapist. He was a working cop in Fountain, Co. “I was investigating a lot of child abuse and incest,” he says. “I was trying to get a way to deal with victims. I saw this as a means of developing a rapport fast.”

While it worked that way, he soon discovered it worked even better ferreting out liars among criminal suspects. Soon he was focusing on the negative, manipulating the subconscious minds of drug dealers and other felons. In one case, he convinced the passenger in a car with a dope smuggler to turn in seven other dealers.

All of this may one day make Rhoads famous. Already, it has gained him a reputation much wider than you’d expect for a person running a department with only seven full-time and two part-time officers. That is because Rhoads, who came to East Hazel Crest 2 1/2 years ago after the small police force he commanded in Parachute, Co., was disbanded, is also an instructor in the Drug Enforcement Administration’s basic police school and travels all over the country and occasionally to Europe conducting seminars for the DEA. His

Why do people pay to go up tall buildings and then put money in binoculars to look at things on the ground?

students have come from 57 countries, and his reviews have, by and large, been enthusiastic.

“He’s kind of a treat,” says Tom Poole, training coordinator for DEA’s Dallas division. “There are guys who know their stuff, but can’t get it across, and there are guys who are entertaining, but don’t have anything worth knowing. He’s entertaining, but he’s also got something worth knowing. Most people make this sort of stuff complicated and complex. Steve puts it so you can use it on the street the day after you take his class. I’ve heard a lot of people say it works. I’ve used it myself watching agents debrief confidential witnesses.”

The secret, according to Rhoads, who began his police career in Newport News, Va., in 1972, is meeting police officers at their own level. “Cops typically don’t like touchy-feely kinds of things,” he says. “Rapport building is nice, but they want to hear how they can get (an advantage) over people. So when I teach, I usually bring a couple of people up front and get them to tell me stories. Then I tell them if they’re lying.”

The act is as convincing outside the classroom as in.

Stephanie Alexander has been charged with murder and is awaiting trial. “Watching him was amazing,” says Lt. Steve Williams of the Mississippi Highway Patrol, who headed the Pannell murder investigation and was in the room when Rhoads interviewed Alexander. “There was no special equipment, no chicanery. It was just two people talking one-on-one. Basically, what you’ve got is a human polygraph, and that’s better than a machine.”

Rhoads has sought to make that very point to an extremely skeptical academic community. In deference to doubters, he took his idea off the street and into the laboratory for a controlled experiment. In 1980, he gathered a group of 400 college students and randomly selected some of them to go into a room and do a single activity constantly for three minutes. The rest were given a picture of the same room and told to figure out what they would’ve done if they had gone in.

“I had to determine who went in and

who didn’t,” Rhoads says.

To further measure the efficacy of his method, all of the students also were given lie-detector tests.

“What we came up with was that I was correct 96 percent of the time, and the polygraph operators were correct 72 percent of the time,” Rhoads says.

The scholarly journals to which Rhoads submitted his findings remained unconvinced. They rejected the study, claiming that it might work with college students, but not with criminals. So in 1982, Rhoads repeated his experiment using volunteers from a Colorado state prison. This time he picked the liars in 94 percent of the cases, while the polygraph operators were successful only 61 percent of the time.

Again he tried to publish the results and was turned down. The editors of *Police Chief* magazine showed some interest but they wanted the focus changed.

“They said my article was too positive a statement,” Rhoads says. “They said it needed to be rewritten as an untested theory. I got so frustrated; I couldn’t figure out how to rewrite it. So I gave it to Roger Solomon, a police psychologist in Colorado Springs, and he did it. Now the truth and veracity stuff is buried in rapport building.”

And now, says Charles Higgenbotham, editor of *Police Chief*, the information arm of the International Association of Chiefs of Police and one of the most respected publications in law enforcement, the study will be published. “We’ve accepted it as innovative and of interest and intend to print it,” he says. “But it hasn’t been scheduled yet. It may be a long time before it gets in.”

Meanwhile, Rhoads continues to practice what he preaches. Recently, he was called away from course work in management and administration at the FBI National Academy in Quantico, Va., because a DEA agent’s wife had been murdered. Investigators asked Rhoads to screen potential witnesses who claimed to have seen the victim’s car, which was stolen by the killer.

“There was a woman who said she had seen the license plate number that was broadcast,” Rhoads says. “But she

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only remembered the letters on the plate. She was creating the numbers. Then, there was a guy in Washington, D.C., who always played those numbers in the lottery. He was sure he saw the license plate, but he was creating the letters. Neither of these people saw the car, but they honestly believed they did and were just trying to help.”

Rhoads has found other, less sensational, applications for his technique.

“I love to go to court,” he says. “It’s the ultimate game.”

He also enjoyed watching the Gary Dotson-Cathleen Webb rape recantation hearings that mesmerized Chicago in May, 1985. “You could see them creating all over the place,” Rhoads says. “I kept a videotape.”

In 1984, not long after he arrived in East Hazel Crest from Parachute, Co., several neighborhood children reported an attempted kidnaping. After interviewing them, Rhoads knew that they had made up the story, but he had to make a judgment call: Would his new constituents trust his instincts or should he conduct an investigation of the serious charge?

“I got the kids to admit they threw a rock at a car,” he relates. “The guy got out and yelled at them. They were afraid they were going to get in trouble. That’s why they made up this elaborate kidnaping story.”

He has elicited similar admissions of lies from sexually abused children trying to protect molesting step-parents and from his own officers trying to cover up miscues. Not long ago, one of Rhoads’ cops reported that his squad car had been damaged in a hit-and-run incident on the overnight shift.

“I watched his eyes and asked him if he didn’t want to go out of the room for a minute and come back in and tell me what really happened,” Rhoads says. “So he left the room, then came back and told me he ran into the gate while pulling out of the parking lot.”

minds when noticing differences, thus getting an impressions that differences are pervasive. On the other hand, our unconscious minds will be likely be engaged when we employ unifying dimensions to make conscious distinctions. We do not think explicitly about forwardness when noticing that one salesperson is more passive than another. We do not think explicitly about underlying style when first noticing an impressionist painting that attracts us versus one that repels us. But without an underlying basic dimension, we cannot meaningfully notice much at all.

Pattern recognition is central to another process, categorization, which help us understand deep metaphors. We look at categorization next.

Categorization: The Many Uses of a Shark

Deep metaphors are categories of viewing lenses. For example, people may think about financial planning as “a rocky road,” “an uphill battle,” “like wandering aimlessly,” “an exciting, challenging adventure,” “smooth sailing,” and so on. These specific lenses are instances of a larger category, namely, journey. Since deep metaphors are basic categories of patterned thinking and decision making, managers should understand how categorization works in the mind of consumers.

Categorization is the process of identifying specific features of an object, a place, or an event as an instance of a more general example of that object, place, or event. Thus, there are many kinds of animals but only one called cat. There are many kinds of cats but only one called calico. Through direct and mediated experience, we learn that cats differ from dogs. No matter how many kinds of dogs we encounter, they are unmistakably dogs and not cats, snakes, or birds. Of course, we learn or are taught broader categories and thus know that both cats and dogs are mammals rather than reptiles, insects, or plants.

Consumers develop categories for just about everything. Whether it is a pickup game in the park or the final match of the World Cup, football is football and not cricket or hockey. We learn that certain clouds portend thunderstorms and herald fair weather, one part of the city is congested in the morning and another is not, and one manager’s face is friendly but another’s is intimidating. Whether we are correct or mistaken in how we categorize patterns of clouds, traffic, or managerial disposition, we do it automatically. Our categories typically come to our conscious attention only when we cannot automatically determine which category to use or if we clearly erred in our choice.

Categories are devices for making sense of the world, and like all devices, they are not foolproof. When we categorize (or label) a person, we impose on that person our beliefs about the category—and we may not simply be categorizing the person as African American, Anglo, or Hispanic, poor or rich, blue-collar or white-collar, gay or straight; we may be pigeonholing or stereotyping someone, making oversimplified or exaggerated and frequently offensive generalizations about him or her. Consider the series of popular advertisements for the Government Employees Insurance Company (GIECO) featuring Neanderthal-like cavemen who behave as any affluent, educated, and cultured consumer would. The ads play on the cavemen’s negative reaction to the stereotypical caveman captured in the mack tagline, “GIECO: so easy a caveman could do it.”

We may place the same person, place, even, or object in more than one category. Consumers sometimes organize snack foods as “unhealthy excesses” and other times as “special treats.” Which category people choose reveals something about them in that particular moment, and their beliefs about categories overall reveal about them and about their knowledge, emotions, experiences, biases, tastes, and upbringing. For example, while de-

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veloping an electric-powered vehicle, one automobile manufacturer learned that some consumers categorize those vehicles simply as cars with oversized batteries, while other consumers saw the vehicles as supercomputers. These different categorizations corresponded to differences in consumer sensitivity to environmental concerns: the oversized battery group was less concerned about the environment than the supercomputer group was.

Images from one category help us think about objects, events, or experiences belonging to other categories. Since a consensus usually exists about the nature of categories, we often use them automatically to convey information about quite unrelated items. Without this ability, we could not express and explain our thoughts and actions very well. For example, how often do you refer to fish in the course of one day? Fish live in water, which they constantly gulp, and so a person who abuses alcohol “drinks like a fish.” An extremely quiet

person is “mute as a fish.” When fish hit dry land, they flop about and die, and so we feel “like a fish out of water” when experiencing social awkwardness. We feel as if we are “swimming upstream” when struggling toward a different but important goal. We “smell something fishy” when we suspect foul play. The behavior of particular fish helps us convey the unsavory qualities of certain people such as loan sharks and card sharks. The names for many products and services leverage thoughts about one category to enhance thoughts about brands. For example, a Mustang conveys ideas about a particular Ford car. Chevy trucks are “like a rock.” “Nothing runs like a Deere” denotes a brand of farm equipment. Wheaties cereal is “the Breakfast of Champions,” and Budweiser is “the King of Beers” to denote their positions in the hierarchy of brands. Life insurance companies use ideas associated with various symbols such as umbrellas (Travelers), rocks (Prudential Insurance Company), and hands (AllState) to convey qualities of protection, sturdiness, and support.

Archetypes: Categories of Greatness

Most people know of archetypes such as the wise elder or the great mother as original models or prototypes after which or after whom other things or people are patterned. These archetypes are generic or idealized representations of someone or something usually likened to a certain personality type or characteristic. Archetypes pervade literature. In fact, the Seven Dwarfs introduced earlier are personality archetypes: Grumpy, Happy, and so on. The psychologist Carl G. Jung argues that archetypes are patterns, symbols, and images that represent basic qualities of mind inherent in and shared by every person, regardless of culture. Hence, archetypes are universal and operate in what Jung called our “collective unconscious.”

His views have greatly influenced psychoanalysis, literary analysis, film studies, and marketing research and practice. People have developed his ideas into numerous so-called human archetypes such as hero, outlaw, magician,

innocent, shape-shifter, explorer, creator, caregiver, sage, jester, and ruler. Each archetype has its own defining characteristics and variations that marketers have leveraged in building their brands. For example, Harley-Davidson, associated with breaking rules, symbolizes the outlaw. The Marlboro Man, associated with the Western frontier, stands for the adventurer. The Oprah Book Club, which helps people understand their world, calls up the sage.

For marketers, archetypes can help describe the central tendencies in consumers’ behavior or the role that brands and companies play for consumers. British retailer Marks and Spencer observed what we call orphanlike behavior in men who wandered aimlessly around the store, looking confused and out of place. Apparently unsure of whom to ask for help, these men demonstrated unfamiliarity with their female partners’ clothing size and color preferences and fled the store as if escaping from a hostile environment. Marks and Spencer reported that only one-third of the men studied knew the sizes and color preferences of the female partner for whom they were shopping. Not surprisingly, only one-third of the women surveyed were satisfied with the gifts that these men purchased. Consequently, the retailer introduced an easily identifiable salesperson called “Stocking Fella,” a combination of the sage, savior, and Santa Claus archetypes, to help these “orphan” men during shopping.

The use of human archetypes to describe our experiences with brands, companies, or other aspects of consumption reflects our tendency to anthropomorphize - to ascribe human form and personalities to nonhuman entities and events. As a result, marketers often design research to discover archetypes by specifically asking consumers what kinds of person or what kind of animal best describes a brand or a store. This approach introduces a bias, however. Human and animal qualities are not the only lines, nor even the primary lens, that people use to judge the products and services they consume or the firms that provide them.

“Men are simple... Men are driven by who they are, what they do, and how much they make... And until he’s achieved his goal in those three areas, the man you’re dating, committed to, or married to will be too busy to focus on you.”

- Steve Harvey, the comedian who hosts a nationally syndicated radio show.

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That a consumer will answer such questions does not mean that the answers reflect how he or she actively thinks about the brand or company. So, while human and other archetypes can reveal important consumer thoughts, marketers must elicit them naturally; that is, the archetypes must emerge automatically and spontaneously so that the consumer rather than the researcher is introducing them into the discussion.

Like the archetypes they sometimes contain, deep metaphors are abstractions; they categorize patterns of thought that create our viewing lenses. These metaphors are more comprehensive than personality types, although certain archetypal personalities might be encompassed by deep metaphors. Deep metaphors, then, are broader and more fundamental to cognitive processes than the personality archetypes derived from Jung's original thinking. Of course, personality archetypes can lead to insights relevant to marketing research and communications, but they cover only a limited part of how consumers think.

Recognizing and categorizing patterns are processes that ultimately stem from the partnership between social settings and our minds. See the discussion of this complex activity in "The Mind is What the Brain Does."

The Mind is What the Brain Does

Leading cognitive neuroscientists believe that *the mind is what the brain does*. That is, all our thoughts and feelings, conscious or unconscious, are qualities of *mind* that occur because of firings among a particular set of neurons in our *brain*. For this reason, mind and brain are basically indistinguishable. Firings among neurons produce a thought that is likely to activate other neurons, whose multiple firings yield other thoughts. These thoughts are concepts. A set of concepts that are activated together are variously called mental models, maps, frames, and other image schema. We possess models or schema about nearly every situation in life, ranging from what

constitutes an appropriate brand of nail polish to finding a mate.

Deep metaphors are outcomes of these complex neural activities. Both right and left brain hemispheres - and multiple sites within each hemisphere - are involved in processing metaphors. The activation of a deep metaphor involves a neural signature, a network of neural activations. Nobelist Gerald Edelman notes that thought can take place without language. For example, when a brand succeeds in establishing a basic association (literally a neural pathway) in consumers' minds, subsequent activations of this association increase the strength of the pathway so that an entire neural network eventually forms to reinforce it. The beer brewer Anheuser-Busch has repeatedly used the idea of connection as its deep metaphor in advertising its Budweiser brand, over time, so the Budweiser owns that association. Consumers' minds implicitly associate Budweiser and social connection. The association hinders other brands from making the same association, and when one of Anheuser-Busch's competitors uses social connection, consumers will think of Budweiser as well.

When neurons from different brain regions fire together, they form connections that create ideas. Consequently, no matter how well we understand the neurological structure and functioning of the brain (and there is still much to learn) we cannot identify a single place in the brain that contains the essence of a specific idea, much less a deep metaphor. There is no single identifiable "spot in the brain," as Jerome Kagan puts it, where Einstein developed the theory of relativity, where Boston's baseball fans developed their commitment to the Red Sox, or where the popular GEICO gecko or the Aflac duck influences consumers in the United States and Japan. The scattered nature of the origin of particular thoughts and feelings in the brain resembles the contagion of a crowd, found not in a specific person, but in the collective.

The same cerebral sites may be activated for very different reasons and hence represent different thoughts. That

is partly why a particular deep metaphor may, with different twists, operate in different situations. This activation parallels that of emotions. For instance, an advertisement intended to arouse fear could activate the amygdala, a part of the brain involved in emotions. But both positive and negative stimuli can cause surprise without involving fear. Fear and surprise - such as an *ooh-aah* response to the design of the ad - produce similar activation responses in the amygdala.

Even precise measures of active brain sites, while helpful, do not tell us the *content of a thought*, such as whether a person is feeling guilt or shame, fear or surprise, or something else. Nor do precise measurements tell us which of several forms of a deep metaphor such as balance may be operating. Marketers must conduct research that reveals whether consumers are experiencing guilt, shame, embarrassment, or some other feeling whether social or moral imbalance is operating. Furthermore, the meaning of guilt will vary considerably, depending on its context. Guilt elicited by an advertisement for diet pills or automobile tires.

Embodied Cognition

Our senses and motor systems provide categories that contribute to how we perceive, understand, and express abstract thoughts and feelings. This categorization is referred to as *embodied cognition*. Embodied cognition is reflected in the metaphors we use in daily language. In this book, for example, we know you "see" what we mean and "get

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"When workers share in profits, they call it communism. When management shares in profits, they call it a bonus."

- Lester Thurow

the point.” We want the idea to “sound” right, not to “stink.” We will explain where we are “going” or “coming from” with this thought, and trust you are “up to” understanding. Executives solve messy problems by “charging ahead” or “taking one step at a time.” When a problem goes away, we feel a “weight lifted from our shoulders,” and no longer “feel down.” As Edelman points out, “we must pay attention to the observation that the brain is embodied and therefore the brain and the body interact critically with each other. Moreover, both are embedded in the real world, which obviously has an enormous influence on these dynamics.”

Our senses and motor systems are essential devices for developing and expressing thoughts. They enable us to:

- Monitor and understand the world around us and within us
- Describe our appearances to others
- Take the appropriate action

Vision is a frequent source of embodied cognition. This is not surprising, given that more than 60 percent of stimuli reaching the brain do so via the visual system. We describe a joke as off-color; we refer to certain verbal expressions as colorful or graphic; someone with a strong sense of purpose is a visionary; attractive or unusual things as eye-catching; a disorganized person is unfocused; and people who cannot plan or look ahead are myopic while those who can are farsighted. Organizations have vision statements, maintain a customer focus, keep an eye on their competition, look ahead, and fail to use their peripheral vision.

Similarly, we use all our senses to convey thoughts not directly tied to

those senses. We are touched by a story, thick- (or thin-) skinned when receiving criticism, have warm or cold hearts, deserve a tongue lashing, are asked to bite our tongue when restraint is needed, are accused of listening but not hearing, allow things to go in one ear and out the other, have bittersweet experiences, and see others as stepping on our toes.

Our sense of physical orientation is another major source of metaphor. We want to get ahead, not fall behind, keep up with the pack, not fall down on the job, rise to the occasion, move up the corporate ladder, grow our savings, not throw in the towel, avoid becoming washed up, grasp difficult concepts, not get stepped on, avoid knee jerk reactions, and so on. One colleague, Jack Carew, has shared over one hundred ways to metaphorically use the simple word *up*. Here are just a few examples: “What’s up? The stock market is up. He is on the up-and-up. I feel up. She is moving up in the company.” In general, there are many more positive connotations with the word *up* than the word *down*.

By using our sensory and motor systems, having an awareness of our bodies generally, and maintaining a sense of orientation, we have developed basic frames for a myriad of experiences, with our body as a primary “yardstick.” The concept of balance, for example, forms very early in life. The idea of container, that is, something - be it our mind, stomach, home, schedule - that holds certain things and excludes others, also originates in reference to our body. In fact, all deep metaphors frequently use our sense of body as a key mode of expression. Thus, our anatomy and physiology - figuratively and literally - are key originators of deep metaphors.

Product design specialists find metaphors reflecting on embodied cognition particularly helpful. For instance, the redesign of an all-terrain vehicle is being guided by such expressions as “It makes me feel like a giant fist,” “It makes me soar emotionally,” “As soon as I get up, I feel up,” and “I get this towering sensation.” These expressions help shape the design guidelines or principles: various design and feature options are evaluated

for their resonance with the deeper ideas behind these expressions. Similarly, a leading consumer goods firm identified several new-product opportunities for men’s body care products by understanding various sensory and motor system metaphors consumers used when discussing health care, their appearance, and social acceptance.

Social Connections Affect Neural Connections

Brain activity shapes, and is shaped by, what other brains do. In other words, other people greatly influence the wiring of any one person’s brain. Daniel J. Siegel underscores these influences on brain formation:

Relationship experiences have a dominant influence on the brain because the circuits responsible for social perception are the same as or tightly linked to those that integrate the important functions controlling the creation of meaning, the regulation of body states, the modulation of emotion, the organization of memory, and the capacity for interpersonal communication. Interpersonal experience thus plays a special organizing role in determining the development of brain structure early in life and the ongoing emergence of brain function throughout the lifespan.

Nature endows us with many possible neural connections to accommodate the very different “settings” required or favored by our circumstances at birth and throughout life. The brain pares away connections used infrequently and potential connections never used (thus, the expression “Use it or lose it”). This paring begins with an infant’s early bonding experiences with an adult. Even some language conditioning occurs prenatally.

As we interact with our cultural and physical environments, we stabilize some neural connections and eliminate the surplus. To be sure, basic predispositions such as temperament exist at birth and can have important enduring effects. But

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If something doesn't feel right, you're not feeling the right thing."

social and physical environments affect the manifestation of people's predisposition. Edelman expands on this observation: "The epigenetic and historical changes in the formation of brain maps are strongly affected by the signals from the body and the environment. This is true during fetal development as well as in development after birth."

Many environments influence us concurrently and overtime: parents, school, peer groups, religious community, geography and historical events, to name some of the most common. However, even very different groups must solve similar social problems, and they often do so in remarkably similar ways. Consequently, basic similarities arise in the mind or brain configurations of very different people who are addressing similar situations. That is why, when probing deeply into the minds of seemingly different consumers, we find the same basic deep metaphors used for the same issues. Moreover, we can explore the minds of only a few people to identify the deep metaphors shared by far more people. Finally, because the brain follows parsimonious yet robust organizing principals, a relatively small number of deep metaphors apply to many diverse circumstances, as we will see.

Summary

Humans have a natural tendency to notice differences. However, we can observe meaningful differences only by using a common denominator- the dimension about or around which people differ. Whether we are noting differences or similarities, we are relying on a fundamental ability, the ability to detect patterns. By detecting patterns, we can place objects, persons, and events in particular categories. A category is a collection of like items that share a common essence. Categories are vital to our making sense of the world around us. Regardless of nationality or ethnicity, people generally agree about what does and does not belong in a particular category. This consensus enables us

to use the characteristics found in one category of objects, events, or persons to convey ideas about people or things found in another category. For instance, consumers use the qualities of fish and, particularly, sharks to describe certain people or their behaviors. Anyone who has ever fished understands what a colleague means by "you are opening a can of worms with that grievance." Thus, pattern recognition and categorization are basic thinking processes and important foundations for deep metaphors. We noted that our bodies offer special subcategories that form an integral part of our metaphor usage. Archetypes are another categorization that provides a useful source of metaphors.

Deep metaphors are matters of the

mind, of course. And the mind is what the brain does. What the brain does is determined in a significant way by the external world. This partnership between neural connections and social connections provides the primary landscape for deep metaphors and assures their universality - different consumers experience the same deep metaphors differently in different circumstances anywhere in the world. Managers can leverage the universality of deep metaphors in the development and implementation of marketing strategy.

"As in the Soviet-Afghan war, various groups of insurgents in Iraq are fighting the occupiers with what is thought to be little more affiliation than who can front money for ammunition and weapons. This is most frustrating because the insurgency's 'leaders' often have little idea whom they are aligned with or why. When I spoke to TQ's intelligence analysts, Lance Corporal John Trainor and Sergeant Warren Bubsey, about the makeup of Iraq's insurgency in general and its more local makeup in Anbar province, Lance Corporal Trainor voiced the popular line he would rather be 'sitting here getting shot at' by 'everyone who's converging on Iraq' than see the United States suffer another attack. Sergeant Bubsey has a more nuanced view: 'You have people coming, Saudis and Algerians, whoever else wants to come in and get their two shots. Those are who we consider the true terrorists, whereas these people, the local insurgents, they're pretty much justified in their actions. We invaded their country. We're sitting here occupying it; they have a right to counterattack us.'"

- Tom Bissel reporting in Harper's

A subject (like a juror) who is handed a hot or iced cup of coffee, then meets an experimenter doing his or her business, who is later asked to describe that lab person's character, will reliably describe the "type" of person based on the "type" of coffee; whether or not the actual word "warm" or "cold" is used in that description.

- Sour Tones. Large numbers of subjects who saw and heard judges reading actual jury charges from some 30-plus criminal cases accurately picked which cases were against defendants who had prior criminal convictions and which were not by the judges' voice tones used to read those charges. Unfortunately for future criminal defendants in those courts, the subjects got the message the defendants were guilty, not just carrying old convictions. And, so did the actual juries involved, by 2 to 1.

Each of these experiments takes advantage of decision makers' *pre-recorded* mental storylines. Whether the private message is carried by a disinfectant smell, the temperature of a cup, the sight of a businesslike accessory, or a judge's voice tone, the subjective storylines each receiver "lights up" in the mind are clear: cleanliness, approachability, competitiveness or distrust. Most of these responses reference pretty universal experiences, making their influence more potent. This powerful persuasive impact also owes its strength to certain factors controlling the success of your delivery with legal decision makers, professional and laypersons alike.

1. The persuasive act invites decision makers' to use storylines based in their *own* mental imagery.
2. The persuasive act leaves reasoning till after the influence has started – or ended.

We've known for many decades that the most powerful persuasive appeal is not made to reason first, but to our other than conscious faculties, inviting every individual decision maker's pre-existing

mental images to carry the load. The greatest weight of the most revealing research shows that framing legal influence more to evoke desired perceptions before a verbal injection of reasoning is the proper practice if your aim is to truly persuade. The challenge is obvious for effective persuasion in a legal context, where the force of habit and tradition have always biased influence towards words alone.

EITHER APPEAL OR APPALL

In 1996, Doug Keene and Paul Begala explored the idea of perceptual framing in the mind, demonstrating how potential jurors will apply a private storyline from a seemingly unrelated frame (declaring their ideas of the cause of homelessness) to a legal case later on. When asked, subjects drew out storylines focused either on *circumstances and situation*, or *character and choices* to explain their private stories about the source homelessness. Working along these personal narrative lines, the surveyors showed which side of a case against a corporate defendant the authors of which homeless storyline were likely to favor. Bear in mind, nobody was asked, "Because you see homelessness as a moral failing, will you favor the corporate defendant in this civil case?" Had they all been asked such a direct question, the results would have been almost universal "no" answers.

What this study took advantage of, and what is frequently missed is that this private mental framing process is not a one-way street with only one stop along the way. Inviting a decision maker to pull out his or her "homelessness" frame can prime a related response for the next event; using the same frame of mind jumping from homelessness, to guessing sources of a crime, to presuming another's political affiliations, to intuiting the "real" reason for an injured plaintiff's complaint, to projecting someone's ultimate deliverance or damnation. Pavlov called this inner talent for taking one rehearsed response and linking it to another situational cue, then to another, *translation*.

The influence of framing is left com-

pletely unaccounted for when lawyers or consultants discuss attitudes, ideas and beliefs with focus groups, potential jury panels or interviewing jurors after trials. There, far too often, direct questions about this most powerful level of *indirect* influence are relied on to try and reveal the path persuasion may take, or already has taken, for a given decision maker.

In this way, it appears our own inner storylines can betray our best efforts to influence others. While we all know decision making is not a consciously-driven experience, we still want conscious play-by-play accounts when we ask for them. When you ask someone else what causes homelessness, a storyline is invoked for them and maybe revealed aloud, indirectly, in the bits of spoken narrative along that unconsciously-given line.

But, when *we* are asked why someone decides one way or another, we've all rehearsed a storyline that suggests one, and only one, attitude, idea or belief "caused" that decision to be made. Furthermore, our storyline also presumes that singular attitude, idea or belief came across in the decision maker's head in one, grammatical sentence just waiting for us to come along and demand to hear it quoted aloud by a part of the brain that has virtually no access to the decision process at all; the conscious part.

BEYOND A PREPONDERANCE OF REASON

It is time to put away this childish thinking. Pavlov's work in conditioned (not conscious) responses over seven decades through the turn of the century started suggesting as much. Later, work on both Placebo and Pygmalion effects, proving that *indirect* suggestions we give to ourselves or to others always carry more weight than their weaker, direct cousins made it more clear. Dr. Milton Erickson's entire life's work validates the almost unlimited potential in approaching a person by indirect, less conscious means; in his case, establishing a stellar record for success in a field, clinical psychology, with a relatively abysmal record by their own measures. Bandler and Grinder studied Erickson's approach and laid out a basic nonverbal "vocabu-

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lary” based in sensory, not conceptual communication as signposts on the path Erickson blazed.

Contemporary work in multiple fields only makes the direction to follow more distinct. Research on the brain itself, aided by ever-sharper scanning methods, confirms what Michael Gazzaniga observed in the eighties, and his contemporaries, like Giacomo Rizzolatti and Marco Iacoboni found in the nineties and still today; that rather than starting a mental process like decision making with a reason or intention in words, the process is all done before several reasons are generated, like multiple cabooses on the train of thought. Today’s marketing luminaries, Clotaire Rapaille and Gerald Zaltman have built far beyond what Trout and Reis may have imagined possible when they wrote their seminal work, Positioning, establishing as fact the same subjective, individual perceptual frames that Keene and Begala used studying potential jurors. The direction in which Zaltman, and especially Rapaille have extended marketing know how is consistent; as Rapaille says, “People do not know *why* they make a decision to buy.” They both point away from the mental surface, deeper and deeper.

That message is more than echoed and expanded by experts in framing and metaphor like George Lakoff or Charles Faulkner, decision making researchers in the political field, like Drew Westen, pros in linguistics like Steven Pinker or Frank Luntz, Daniel Schacter searching for the structure of memory, Antonio Damasio looking into interactions among emotional reactions, recall and judgments and many, many others have declared that the jury has long been in. The winner, in the persuasion contest, is not now, nor has it ever been, conscious, verbal, rational delivery of an argument for a case story.

Our outdated, inner storyline about reasoning championed a view of decision making as a linear, cause-effect process. Reason, it turns out, is not what we’ve rehearsed thinking it may be, no mat-

ter how many stringent presumptions along those lines still are being imposed by rules of evidence and procedure that continue to force people in courtrooms to dutifully pretend they just tell themselves what to do, think or feel. George Lakoff, with a little hyperbole, nonetheless puts it well,

“The old Enlightenment values were a great advance, in their day. But we know so much more now than in the eighteenth century about what it means to be human...[we] require an understanding of what contemporary brain science has taught us about who we are and how we think.

We will need to embrace a deep rationality that can take account of, and advantage of, a mind that is largely unconscious, embodied, emotional, empathetic, metaphorical, and only partly universal. A New Enlightenment would not abandon reason, but rather understand we are using real reason – embodied reason, reason shaped by our bodies and 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 and invisible realm of neural circuitry not accessible to consciousness.”

All the experiments, all the conclusions of the researchers and all the successful techniques of the practical professionals cited above have at least one thing in common; when it comes to persuasion, they agree:

1. *Other* than conscious comes first, and
2. *Other* than conscious counts most.

Like all decisions, legal decisions are more *realized* than made in the traditional sense. We are clued into a leaning we’ve formed outside our conscious thoughts, and we then justify a decision that falls in the direction we’ve found ourselves leaning. Self-interest economic theory and personal gain psychological theories were neat, but they are just wrong to the extent they reinforce this inaccurate way of casting decisions as always beginning with a good reason.

What difference does that make in the daily practice of trial law? It means that you can no longer safely act as if decisions are made, according to the old, cause-effect storyline, because you will be misled by everything you hear from focus groups, venire members and actual jurors interviewed post-trial just because you’ll ask them questions in ways that produce worthless responses.

What’s the worst question you can ask? *Why did you do/think/say that just now?*

First, even if there were a single, answer starting with, “Because I decided that...”, the person responding doesn’t have any direct access to rummage around in his or her brain to pull such an answer out. And, more importantly, with apologies to Gertrude Stein, “There is no ‘why’ there”. With regard to legal decision making, the reasons come last, there is always more than one, and none that come out of the mouth may have anything of value to do with what’s really going on behind the eyes.

If you’d like to prove this sometime, describe a legal conflict to anyone, in conversation until they clearly have developed a leaning toward or away from the side you are advocating. Now, ask them the “why” question. Listen to their answer without interrupting.

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“Listen, you fatuous, condescending lunatic, when you whiff on the biggest job of any Presidency ever, you don’t get credit for getting a ‘C’ on the pop quizzes that follow.”

- Keith Olbermann on Dick Cheney taking credit for shouldering a burden by starting the “War on Terror”

Then, pause and say, “That is really very interesting. Now, if you would, please, tell me why if it were *not* [what they just said]? Repeat as many times as you like, or until they get to “I guess that’s what God intended”, or “Go ask your mother, she knows everything”.

Discussing attitudes, ideas or beliefs with focus groups, venire panels, in juror interviews, or more crucially with opposing counsel, negotiators, mediators or arbitrators in settlement efforts, asking direct questions about *indirect* influences on their thinking can only make trouble. Where the subject is a personal decision, when asked why, people will lie. Not usually because they want to deceive you, but simply because they don’t know the answer, because there is no ‘why’ there. However, we all have a deeply imbedded storyline about “control” regarding our own thoughts and feelings every bit as central as trial lawyers’ particular storylines on control of their cases. That storyline demands we act as if we certainly do control all of our thoughts and feelings, and drives the best of us to lie when asked why about them. We make up an answer. If asked, we’ll make up another, just like the first one, as you’ll see when you try the exercise described above, or have already confirmed by doing it with yourself.

The danger for the attorney still asking the “Why did you think that way?” question comes when he or she writes down the first answer, takes that for the whole story of the inner workings of the decision maker’s mind, and starts to think a useful lesson has been learned.

“Throwing \$700 billion at a problem only works if you actually aim it at the problem”

**- Economist
Elizabeth Warren**

As Robin Williams would say, “Bzzzz. Sorry. Thank you for playing. Better luck next time. Here is your lovely parting gift...” Or, more seriously, here’s what neuroscientist and political analyst Drew Westen says on the same subject:

“...[M]uch of political persuasion occurs through changes in networks that are inaccessible to consciousness. If you ask people conscious questions about unconscious processes, they will be happy to offer you their theories. But, most of the time, those theories are wrong.”

He has likened the effort to a person trying to accurately describe the current functioning of their own spleen.

So, if decisions are more realized than rationalized, how do you prepare yourself to most effectively persuade someone to *realize* the right leaning?

MESSENGER CAN KILL THE MESSAGE

You put your blood, sweat, toil and tears into a piece of work that can be copied, but not actually replaced, you pack it carefully, and seal it up in the shipping box, double checking the label to insure safe delivery to its intended destination. Heaving a sigh, you hand it over to the professional to deliver the results of all your hard work.

And, three weeks later, your overnight package is still missing without a trace.

Or, it’s reached a destination, but the completely wrong one, never heard from again.

Or, it arrives, broken, partly burnt and soaking wet.

So it is with your client’s legal case story these days. There is no lack of effort, time and resources expended on *developing* a case story. Research on jurors, typed by affinity for story frames, legal claims or generational cohort aims. Painstaking construction of rules to which opposition witnesses must agree, and even more painstaking discovery and deposition exams to get them to do so. Armies of focus groups building or testing stories, themes, visuals, anchors, frames, metaphors (shallow and deep), and codes for primal identification with the soul of the client’s case all are mar-

shaled in the worthy effort to prepare – to develop – the better case and voir dire strategy with which to cull the audience to judge it.

Since I first worked training a group of trial lawyers to use advanced skills in communication and persuasion that rely heavily on indirect influence, I’ve been privileged to watch two big trends arise in what once was called “trial advocacy” work these lawyers have done over about 25 years.

1. Attorneys sought to really appreciate and then elicit the nuts and bolts of legal decision making from focus groups.

2. Thereafter, they sought more sophisticated means and methods to prepare their cases with those newly appreciated decision making models in mind.

The early concentration, when I first got involved in the field of legal persuasion, was still on typing of potential jurors. That practice became more focused, contextualized and keyed less by juror backgrounds and more by measured affinities for or against case story components. Then, decision making processes, like heuristics, schema and biases captured the focus with an eye not only towards de-selection of jurors in voir dire, but also in repackaging the case to better appeal to those better known qualities in the jury pool. Tons of work has been done on matching generational cohorts (Boomers, Gen X, etc.) up with general trends in juror decision making. These days, the emphasis seems to be on digging into deep metaphors and primal drivers of human narrative and emotional response to hone the structure of a case story to make it most compelling at those powerful, other than conscious levels.

There’s only one thing wrong with this picture. Researchers like Albert Mehrabian, and all those language and communication experts like him are still right. No matter how thoroughly you prepare a case, no matter how cleverly you arrange the packaging of the facts and the law to appeal to all these critically important mental functions that work wholly outside our conscious reach,

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the darn thing will still not deliver itself. Facts still can't speak, for themselves or anybody else, no matter how hard you've tried and how much you deserve a break. Eventually, you have to artfully deliver the most elegantly developed case story to one or to several real, live, breathing human beings.

Lawyers have a love-hate relationship with *control*. Control is the subject of a major, mental storyline for any serious trial attorney. After studying "anchors, priming, framing, codes, norming" and such, as expressed by Generation Z, X or Q, from this juror bias or that, we often have the truth of the old goose-gander thing sneak up on us. And, that truth is a part of the potentially deadly storyline on control that leads us to frame influence as happening only where we *intend* it to happen.

Turns out, the real story is a little more involved – literally. Cutting edge neurological research confirms we are all more involved, at far deeper levels, with people we influence than we might ever want to know - and they with us. No two minds are the same is something we all know. That your mind may not be alone when the best of persuasion occurs is something new, and really spooky.

There's nothing wrong with trying to understand how decision makers' inner persuading works. It can be important to recognize that the effort to develop a compelling case story, without an equal effort spent on its delivery can lead to a severely unbalanced job of persuasion. The "control" frame can lead you to invest everything in *developing* a case story, and far too little in its *delivery*.

What you consciously know does not control what you do. This is true not only as all the research on people who've been persuaded of something shows, but it is equally true for legal professionals who would do that persuading.

- Knowing what should appeal to a bunch of Generation X jurors in your injury case that has real strong liability; that, as a group, they are prone to bring bigger damage numbers can still fall flat.

Not because you didn't understand the research about bigger numbers, but because of how you *acted*, trying to convey what you saw as "real strong liability".

- Or, you could have an intimate understanding of liability, painstakingly built following the excellent Rules of the Road model in hours of rules research and depositions getting defense witness agreement to every point. But, the damages don't flow when you win, because the jurors just saw a tangle of 15 broken rules on a chart, not three groups of cleanly clear categories they could really wrap their heads around.

- Unearthing the cultural code underlying the most visceral responses to the issues in your case can't possibly hurt, and may win the day. But, not if you waltz into the courtroom, and mercilessly drive the key phrases into jurors' skulls, over and over, in a dentist-drill tonality to be sure you completely eliminate any resistance to your story. If your hard work breaking the code causes you to treat all your decision makers as mere combination locks, you still may find yourself (and your client) disappointed.

DEVELOP AND DELIVER

Often, the most basic question is the best one. Here, it might be, "How the heck does that all work, and how do I get it to work for me and my clients?"

Since it all works outside conscious reach first, first reach outside. The shortest line between two points is a straight one. Follow the proven *other* than conscious leader. Start with evoking – not declaring – mental images, until decisions begin to be realized, and it's time for the reasons to come out. And, as Shakespeare suggested long ago, "Know thyself". If your head doesn't know what your hands, eyes, mouth and body are doing at any given moment you try to deliver your exquisitely prepared case, you could be taking away with your voice tone, everything you planned to put across after the focus groups. The judges in the Stanford studies all undoubtedly imagined themselves to be acting with complete impartiality. Their words all said, "fair, fair", but their voices all said, "guilty, guilty"!

The final conclusion about persuasion to be drawn from those experiments cited at the start of this article, along with the persuasive act leaving reasoning till after the influence starts, and relying on the listener's mental images to persuade first, is this:

- The persuasive act aims to cross the line from the minor lever of influence (verbal and conscious) to the major lever (nonverbal and less conscious).

Words and images presented to decision makers can elicit or function as Pavlovian conditioned responses, or *anchors* for those responses. Perceptual frames are larger chunk collections of our inner mental storylines, formed over a lifetime's experience. If an anchor is seen as a nail in an art gallery wall, then a frame will be a picture held in place by that anchor. A collection of a dozen of these anchored frames, hung in just the right sequence, invite viewers to string together twelve of their own storylines with one similar theme for the case story developed for them.

However, if the anchor in your own mental wall is the word "bad", and the frame it holds in place is "eliminating biased jurors", the theme of your conduct in focus groups or jury selection looks just like Whack-a-Mole for each mole with whom you speak. But, if you change the anchor/nail to "fair person", holding up the frame/storyline of "ready to do the best job", then the theme of your whole inquiry can freely become "Encouragement" to do that best juror job...elsewhere.

Whatever your own story is all about on the inside, anchored by mental images and framed by private storylines of your lifetime, you will *sound, look and act* like the overall theme they string together, no matter how you *mean* to present yourself. In *voir dire*, if you are holding your mental mallet, you will act in ways that advertise you are ready to whack. "Guilty, guilty". So, a storyline for jury selection that centers on getting rid of people primarily through peremptory strikes will most likely communicate distrust and antagonism, just as well as a cold cup, probably through your uncon-

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sciously driven tone of voice. Should you be seeking to engage the suspicious, or even the stealthy juror, you're probably going to be planting seeds on rocks.

There is one more set of very new studies to consider taking to heart. What if you learned that a single communication technique, tested and repeated with success in multiple settings, showed that research subjects could be engaged by experimenters in a very brief time, to such an extent that they were far more likely to agree to negotiated arrangements that were not in their best interests than those subjects with whom the communication skill was not employed? Other subjects who were being "sold" a new soft drink were engaged to the extent that they not only "bought" it far more often than less-engaged subjects, but touched, referred to and drank much more of it during the research itself – backing up what came out of their mouths with what went into them. The most compelling bit of the soft drink studies was that those subjects who were engaged with this persuasive technique were found to actually try to help the selling experimenter persuade them to buy more when the researcher let them know they really wanted to convince them to buy.

How were those research subjects who knew they were being sold a soft drink turned from a natural posture of reticence to actually trying to help the scientist sell them? How do you take a legal decision maker from the land of suspicion closer to *empathy* without a word? *Mirror* their body or their voice before you try to influence their mind. That's all these people were doing differently in the studies.

The body primes the mind. Voice tone matching primes reception of your words. Body posture and gesture matching primes identifying with you and your case story. Real rapport can't be asked for, but can be quickly engaged nonverbally. A little effort establishing and maintaining an unspoken contact can do wonders for any case story before it's even heard.

Over the last ten years alone, doz-

ens of human and animal studies have confirmed what has been shown to work without the science to back it up for decades; you can improve receptivity to any communication by matching some – not all – of the nonverbal output of the people with whom you'd like to form a connection. What wasn't known for certain, that the data now confirm, is that certain higher brain functions that run storylines that could be termed "engagement", "compassion", "altruism" and the like happen most effectively when we are fully engaged – in complete rapport – with another more than at any time when we are by ourselves. That is, some of the highest value experiences in human life lost in personal injury and wrongful death cases, right in line with those plaintiff attorneys have always struggled to put into words, can be better accessed *jointly* by both the attorney and the decision maker he or she would persuade if the lawyer simply starts at the beginning, with nonverbal influence through careful mirroring.

The most interesting development in this research for trial attorneys seeking the best place to start to balance their case development efforts with effective case delivery tools, may be what the neurologists who physically probe brains, as well as scan them with the latest techniques say they've found in their mirroring studies. Many attorneys have come back to me over the years with tales of witnesses in deposition and trial volunteering information to questions they knew they should not have after the lawyer employed the proper mirroring technique. Hundreds of times I've had the experience of people volunteering far more in conversation when mirrored than when not, so I tended to credit their claims. Now, we can say we know at least a little more about how, specifically, that happens for them with hardened expert and fearful lay witnesses alike, along with reluctant voir dire panelists and even opposing counsel.

It turns out that the brain structures the researchers have dubbed *mirror neurons*, when engaged at the nonverbal level by a judicious matching of voice tone, or posture, or gesture, are the same

ones that light up when the person experiences *empathy*. That is, by reaching outside conscious discourse first, where decision making starts anyway, a lawyer can encourage the decision maker to shift from a posture of reticence or suspicion, to one of more acceptance, if not empathy. Perhaps they may even move so far as to help the lawyer persuade them, just like the subjects in the studies did, at a rate six times more often than those who were not mirrored first.

What's next, if you want to develop a delivery strategy to match your development efforts?

- Overcome the common bias to use "word pictures" instead of real images on demonstratives to invite decision makers' mental images out. Storyboard your case in its *delivery*, not just its development, using well constructed demonstrative aids to help decision makers build their own images, supported by – not following – the actual exhibits in evidence.

- Prep your witnesses to be good story tellers about their own experiences first, and accurate dispensers of discrete facts later.

- Discipline your vocabulary. Each case should have one, and you should manage its delivery with every witness, on direct or on cross.

- Balance the verbal message with the visual one. Take the analogy of the art gallery literally. Find and use the words and images (mental and solid) that best invite *anchoring* to hold a set of no more than 12 storyline *frames* in place, in a three step, case story sequence, and deliver that sequence of frames and anchors in that order, from start to finish at trial or in mediation.

- Finally, and most importantly, balance your *other* than conscious message with the conscious one. Be a congruent messenger by engaging decision makers with what you say, but also with *how* you say it. Deliver the goods.

MAKING PREPONDERANCE WORK
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evidence. Throughout your career, you'd probably have won most of the cases you lost if the jurors had decided based on preponderance. But they didn't.

There is a simple and highly effective template you can follow to ensure that jurors will make preponderance-based decisions. Follow the template meticulously. Omit nothing, change nothing, unless forced to. (Because this template works so well, don't use it when a lowered burden will hurt you—such as with a dangerous affirmative defense. Don't do the defense any favors.)

The goal is this: In deliberations, when a defense-oriented juror says, "I'm just not sure," you want the other jurors to say, "We're not here to be sure. We're just here to say whether the plaintiff is more likely right than wrong." Yet pattern instructions and attorney explanations almost never get jurors to say that.

Certainty, not preponderance, is every juror's default standard. But the template will make jurors enforce preponderance in their deliberations.

The template's overriding requirement: All through trial, not just in voir dire and closing, keep the concept of "more likely right than wrong" in front of the jurors. Failure to do this is the most common reason plaintiffs lose and a major reason so many cases do not result in fair compensation. The only remedy is to use the template to make preponderance the lens through which jurors will see and gauge the evidence not in retrospect, but as it comes in.

For two reasons, this is essential. First, when you explain preponderance in voir dire and then drop the subject until closing, jurors don't remember it. Second, when you remind jurors in closing, it does no good—because no one can think backwards. You can't even say your own Social Security number backwards. So when you remind jurors about preponderance in closing, how can you expect them to go backwards and reweigh the evidence? Can't be done.

You must ensure that they keep

preponderance in mind throughout trial. Otherwise you cannot topple the juror default standard of certainty.

Following the template is easy. It works—if you do every step, starting with jury selection. Even if you don't get to conduct your own jury selection in your jurisdiction, study the next section to understand the principles you will use in opening.

Jury selection

In voir dire, say this:

In trials like this, jurors make their decisions on the basis of whether my side is more likely right than wrong.

Use those exact words. Don't mess around with them.

HANDS. As you say "more likely right than wrong," position your hands side by side and close together, palms up, at waist level. Position your right hand a

half inch higher than your left.

Do this every time you say "more likely right than wrong" for the rest of trial. This will be over and over and over. The result: Jurors will use that exact hand language on your behalf in deliberations. The judge will probably do it when reading the jury instructions. Sometimes even defense counsel does it in closing.

Don't use the words "preponderance" or "burden" or phrases like "greater weight of the evidence." Wait until closing to connect these concepts to the language of the law. Jurors neither like nor understand legalese. Many are suspicious of plaintiff attorneys who use it; if you do, they are likely to regard you as arrogant or even comical. Plain English is a great invention, so simply say, "more likely right than wrong." It's clear, and clarity is your best friend.

Then say:

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"But, folks, as long as we accept lies as part of doing business, we are going to get lying businesses. We need to get indignant. We need to change laws. We will jail a common thief for robbing a liquor store far longer than we'll jail a CEO for robbing thousands of investors.

How often have we read in recent weeks about suicides by people who were overwhelmed by business trauma? Don't kid yourself that a white collar can't run blood red.

And yet we shrug and bite the bullet. We accept no truth in advertising. We accept all those weird assorted charges on a cable or phone bill. We accept multinational banks- who view us as stupid little people- taking our tax money and delivering nothing in return.

At a time when people are scraping for their last nickels, this kind of behavior is not only inexcusable, it's abhorrent, immoral and should be illegal.

When that movie father tells his daughter, 'It's a business lie. It's not the same as a life lie' - the truth is, he's right.

It's worse."

– Columnist Mitch Albom

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Some folks think “more likely right than wrong” [use hands] is not quite fair—because it makes things a little too easy on my side and a little too hard on the defense, because my side doesn’t really have to prove anything. Other folks feel that our having to be only more likely right than wrong [hands] is OK.

So, Mr. Juror, are you a little closer to the people who think it’s a little unfair, too easy for my side? Or are you a little closer to the people who think it’s OK?

Don’t ask, “Which side do you agree with?” Jurors will more likely respond comfortably to “Which are you a little closer to?” And when Mr. Juror responds, ask him the all-purpose follow-up question: “Please tell me about that.”

Don’t lead. The only follow-up question to ask is the wide-open “Please tell me about that.” And after the juror tells you about that, say, “Please tell me more about that.” If you have time, ask Mr. Juror that same question until he has no more to say.

This starts a powerful process that accomplishes the three critical things you need to achieve in voir dire:

It gets you many cause dismissals. Many jurors will not agree to decide on

the basis of 80 percent or 70 percent or 60 percent certainty, so they are easy to remove for cause.

It exposes tort “reform” jurors. Jurors who are uncomfortable with preponderance strongly tend to be tort “reform” jurors.

It initiates the theme of “more likely right than wrong” as the lens through which jurors will view each new piece of evidence as it comes in.

After the jurors have their say, tell them:

I had to ask about this because in this case, you will be required to make all your decisions on the basis of whether we’re more likely right or wrong [hands].

We expect to show you far more than that. But by the end of the trial, even if someone has doubts, and even if someone thinks we’re only more likely right than wrong [hands] on a question, you will be required to decide that question in our favor.

Mr. Defense Attorney agrees that you have to base all your decisions on whether our side is more likely right than wrong [hands]. And Her Honor will tell you that “more likely right than wrong” [hands] is the law.

Do not omit “Mr. Defense Attorney agrees. . . .” Preponderance becomes the operative rule only when jurors hear that your opposition—not merely the judge—agrees with it.

Then say:

So, Mr. X [choose a juror who had trouble with this], what trouble would you have, even a little, making your decisions on the basis of just whether we’re more likely right than wrong [hands], not whether we give you total proof?”

This will probably lead to more cause dismissals than you’ve ever had. Any juror who says he or she would not be able to—or would find it hard to—decide on the basis of “more likely right than wrong” is not competent to serve.

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“Here in the United States of the Aggrieved, there is no malady, mark, mannerism, mind-set or malformation too miscellaneous to have its own support group, along with a cadre of lobbyists and lawyers hypervigilant for any suggestion of mistreatment or actionable discrimination.

Largely as a result, American English has become a morass of compound constructions and newly invented technologies designed to leave no one out, give no one cause for offense. Sometimes you wonder if, in so radically revising the way we communicate, we have not compromised our ability to do so.

A few years ago, I showed one of my college classes an episode of ‘All in the Family.’ The students were offended. Nor were they persuaded by my protestations that the show was: (a) hilarious and; (b) a satire that condemned bigotry by making it ridiculous. They are children of a different era when you simply cannot say the things Archie Bunker did, even to ridicule them.

Sometimes, I think that’s progress. Sometimes, I call it something else entirely.”

-Columnist Leonard Pitts, Jr.

Your final two voir dire questions—about jurors’ rights—will bolster your preponderance theme:

Folks, jurors have certain rights. It’s important for you to exercise these rights when necessary. So I need to ask you about them.

First, you have the right to hear all the testimony. Every word. So if you don’t hear something a witness says, will you all be comfortable raising your hand and telling the judge, “Your Honor, I did not hear what the witness said. Could you ask her to repeat it?”

Then:

Second, and even more important: You have the right to clearly understand the law. You have the right to know that every other juror clearly and correctly understands the law. You have the right to know that you are on a jury in which every juror is following the law. So during deliberations, if there’s anything about the law you don’t understand, or if there’s any disagreement among you about the law, or if anyone is refusing to follow the law the judge gives you, will you be comfortable asking your foreperson to knock on the door and tell the bailiff you need the judge to come explain that part of the law again?

Never omit these questions. They become important when you get to closing.

If this kind of questioning is new for you, run a practice session with half a dozen strangers in your office the evening before trial. You want to be comfortable, not tentative, asking these questions of real jurors.

Opening statement

In opening statement, you will continue to reinforce the “more likely right than wrong” theme. Every time you refer

to what a witness is going to say, include this theme. For example: “Heather Witness will tell you the light was green. She’ll also tell you she is more likely right than wrong [hands] when she says the light was green—and that beyond that, she is sure.”

When referring to an expert witness, tell the jurors:

Dr. Expert will tell you that her conclusion is more likely right than wrong [hands]. She’ll also explain that beyond that, her conclusion lies within a reasonable degree of medical [or engineering or whatever her field is] certainty. And she will explain that when she says “reasonable degree of medical certainty,” she means “that degree of medical certainty that is based on reason.”

Case-in-chief and rebuttal

Remember: A theme is a theme only if it is continuously maintained. So during testimony, continuously do what you promised in opening:

Q: Ms. Witness, when you say the light was green, are you more likely right than wrong [hands] about that?

A: Yes.

Q: And beyond that, are you certain?

A: Of course.

And:

Q: Mr. Engineer, when you say that the van was going 34 miles an hour, are you more likely right than wrong [hands] about that?

A: Yes.

Q: And beyond that, does your conclusion lie within a reasonable degree of engineering certainty?

A: Yes.

Q: And what do you mean by engineering certainty?

A: I mean that degree of engineering certainty that is based on reason.

If you can’t rely on your expert to answer that question properly, you may need to lead. So ask, “When you say that your conclusion lies within a reasonable

degree of engineering certainty, do you mean that degree of certainty that is based on reason?”

Your frequent repetition of “more likely right than wrong”—like a memory sticker on every piece of evidence—will continually remind the jurors that preponderance is the requirement.

Every so often, precede a question by referring to the jury’s task: “Mr. Beckett, these folks [the jury] have to decide whether we are more likely right than wrong [hands]. So when you say you waited by the side of the road for more than six hours, are you more likely right than wrong [hands] about that?”

In these simple ways, you keep the jurors’ judgments focused on preponderance throughout your case-in-chief. But because the defense lawyer is not likely to mention “more likely right than wrong” during the defense case, the jury will probably default to its “certainty” standard. So during your closing, you must recall the jurors to their preponderance senses.

Closing argument

Via slide, board, or paper, show and tell the essential fragment of the jury instruction on preponderance. Face the jury with the instruction behind you, and recite the fragment verbatim from memory. Don’t turn around and read it. You want the jurors to see that you know the law without having to look at it. Then say:

This just means what we have been saying throughout trial: Are we more likely right than wrong? [hands]

We have shown we are far more than just more likely right. [Raise one hand as high as you can.] But the law says that even if someone thinks we’re only more likely right than wrong [hands]—even by the smallest amount—then you have to answer that question our way. You can have all the doubts you want on both sides, as long as when you come down to it, you think we are more likely right [hands].

Mr. Defense Attorney agrees that “more likely right than wrong” is the way you must decide. And after I sit down,

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the judge will officially instruct you that “more likely right than wrong” is the law you must follow.

Next, you’ll do the most important thing you can do in closing: You will arm your favorable jurors to go into deliberations and speak on your behalf. Just as you are your client’s advocate, you must make your favorable jurors into your advocates.

To do this, give your favorable jurors the exact words and phrases they will need in deliberations to advocate for you. Use simple, 5- to 10-word “boil-downs”—shorthand versions of each crucial point in the case. Make sure your favorable jurors can comfortably use these words, phrases, and boil-downs. Use no legalese, no complex sentences or ideas, no big words, no technical language. Use simple phrases and short sentences. You’ll say,

Folks, during deliberations, if anyone says ABC, remind them that XYZ.

These may be the most important words you ever say. You must arm jurors in this way for every important matter in the case. And one of the most important matters is preponderance. Do it this way:

Over the course of deliberations, if anyone says they’re just not sure [that’s the ABC], remind them that you don’t have to be here for weeks trying to be sure. All you have to do is follow the law: Are we more likely right than wrong? [That’s the XYZ.] Even just a little more right than wrong.

Then explain what the jurors should do if one of them won’t go along with the law:

After you explain it, if a juror is still not willing to go along with ‘more likely right than wrong’ [hands], tell your foreperson to reread instruction number five out loud again.

And here’s the enforcer: If that juror is still not comfortable with ‘more likely right than wrong’ [hands], ask your foreperson to knock on the door and tell the bailiff that you need the judge to come talk to a juror who is refusing to obey her instructions.

If you meticulously follow this model from jury selection through closing, your jurors will decide not on the basis of certainty but on the basis of preponderance. Even tort “reform” jurors will go along with preponderance. They, even more than other jurors, respect rules—and preponderance is a major rule. So if you practice this technique before trial and leave nothing out, you will win the cases you ought to win—even in the current tort “reform” climate.

Do not underestimate this technique. As simple as it is, it will empower you

to help your clients as they need and deserve to be helped.

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“Traditionally, devotion to public service was a crucial part of the lawyer’s professional role. Over time, however, public service and private practice came to be seen as irreconcilable opposites. Work for social justice was regulated to a career path called ‘public interest’: practitioners were often poorly compensated and demoralized by 30 years of deregulatory politics that treated their reform efforts as obsolete.

Attorneys in private practice increasingly adopt a ‘business model,’ competing frantically for revenue. Clients no longer sought wise counsel but wanted streamlined service for narrowly defined interests. Private practitioners could scarcely imagine being able, let alone professionally obliged, to participate in social transformation. This situation is unhealthy. It squanders much of our best talent. Skills and perspectives gained in practice can benefit government. Treavails and satisfactions of government service can rejuvenate practice. Working next to lawyers with divergent experiences challenges orthodoxies and ossification. By segregating public service from private practice, we have weakened both.

The time has come for us to resurrect the citizen-lawyer. We have a society to serve and a profession to renew.”

- Rachel F. Moran writing in National Law Journal

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