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PRIMACY, RECENCY, ETHOS, AND PATHOS: INTEGRATING PRINCIPLES OF COMMUNICATION INTO THE DIRECT EXAMINATION

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PROLOGUE

The scene has been repeated over and over again in law offices everywhere for more than a hundred years. The junior associate, near the eve of her first jury trial, solicits the advice of weathered and respected trial veterans in her firm, seasoned from years of courtroom battles. The novice, paralyzed by the fearful prospect of facing an actual judge and jury in an actual courtroom, asks, "What are the keys to winning in front of a jury?"

One veteran replies, with a sly smile: "Isn't it obvious? You have to convince the twelve citizens in the jury box that you are right and your opponent is wrong."

"Very funny," says the junior lawyer with a humorless grin. "But exactly how do you convince them that you're right?"

"Two words, young lady: closing argument. That's when you win or lose. It's real advocacy—no holds barred. One chance to make your case and to make it powerfully. Pull out all the stops. Appeal to the emotions of the jurors, their sense of fairness and justice. Bring your case to life, and then lovingly hand it over, entrusting it to the jurors' good sense. Yep, the close is where real lawyers do their most important work."

"No, no, no!" exclaims another grizzled veteran. "Opening statement is where you really make the difference. That's when the jury's attention is at its highest. It's where they really form an opinion about which side they favor. It's next to impossible to win them over if you don't grab them in the opening."

"Bull!" growls another sage voice from the back of the conference room. "Cross-examination. That's where you take the teeth out of opposing counsel's case. No teeth, no bite. If you want to work on something, work on your cross-examination of the opposing party. If you can make the opposing party look bad and cause the jury to question his story—that's it. End of case. You win."

"Speaking of examination," says the novice, "I want to ask you a question about the direct examination of my client. I'm concerned that—"

"Direct examination?" chimes a chorus of advice givers, shaking their heads. Another veteran speaks for the group: "Why are you worrying about the direct? That's the easiest part of trial. The witnesses are almost always on your side—they actually want to help you. It's no big deal. My twelve-year-old could do it. It's simple: You ask the questions and your witness gives the answers. Get out the information you need to make your case, and then tie it all together during the close.

Piece of cake. If there is one part of the trial that pretty much takes care of itself, it's the direct. Don't spend your time or energy there."

I. INTRODUCTION: WAR STORIES AND TRIAL ADVOCACY TRAINING

Advice about how to try lawsuits is easy to come by and much in demand.[1] Perhaps that is true because effective advocacy at trial is an art, not a science;[2] it defies precise measurement or scientific analysis,[3] thus opening the door to a large amount of subjectivity in advocacy training and legal literature.[4] The notion that advocacy is an art form leads to an exaggerated focus on the "artists"—the advocates at trial—and the techniques they use before the jury. The stories the artists tell of their triumphs become "war stories," and they are passed down from one generation of lawyers to another until they become accepted as the "right" way to try a case.[5]

A. Stories About Jewelry and Jury Selection

The literature is replete with anecdotal advice for trial lawyers, and it ranges from the very practical, to the sublime, to the humorous. In the early 1900s, William F. Howe, a successful criminal defense attorney in New York, espoused an unusual "dress for success" approach

1 *See, e.g.*, Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 689 n.4 (1991) (noting that the National Institute of Trial Advocacy (NITA) sponsors 35 Continuing Legal Education (CLE) seminars per year with about 3000 students enrolled and that more than 23,000 lawyers have participated in NITA programs since its creation). Based upon the experience of the authors, it appears that the number of trial advocacy CLE courses and the quantity of trial advocacy literature produced in any year is constantly expanding.

2 JAMES W. JEANS, TRIAL ADVOCACY § 1.2 (1975) (observing that "[a]dvocacy is an art," "not a science," and that the advocate's "effectiveness will depend upon his own unique make-up, that peculiar blend of soul, mind and spirit that identifies the individual"); Lawrence C. Doan, *The Art of Trial Advocacy for Prosecutors*, PROSECUTOR, Mar.–Apr. 1999, at 35 ("[T]rial advocacy is not science but art.").

3 *See* KENNEY F. HEGLAND, TRIAL AND PRACTICE SKILLS, at vii–viii (2d ed. 1994) ("The practice of law is art. Grace, style, and beauty can be presented in radically different ways. What you will read here is simply one concept, one view of how it can be. You too are an artist. . . . [S]tudy what others have done. Copy their work. Then move beyond.").

4 *See id.* But that does not mean there are no rules of effective trial advocacy. As Professor Jeans has noted: "Even art has rules. . . . Certain well defined skills must be mastered and these will involve the knowledge and application of specific information. The painter must know the chemistry of color and the sculptor the science of stone. . . . Art presupposes knowledge, in this case knowledge of the law." JEANS, *supra* note 2, § 1.2, at 2–3.

5 *See, e.g.*, 1 HERBERT J. STERN, TRYING CASES TO WIN 6–8 (1991) (describing the unfortunate reliance on war stories in trial advocacy training).

to trial.[6] He believed that if the lawyer were clothed in the proper attire, it would shift the jury's focus from his client, the defendant, to him.[7] On the first day of a homicide trial, he would set the scene by wearing a gray sack suit, a red tie with a red flower in the buttonhole, and a heavy watch fob stretched across his belly from one vest pocket to the other for an impeccable appearance.[8] As the trial progressed, the shades of his suits would become darker and darker until his summation, when he would appear in his black suit, black tie, and black cuff links, stripped of the flower and fob.[9] Somehow, this radical change of color and adornment would purportedly make Howe the object of the jury's attention and shift it away from his client, thus benefitting the client.[10]

If lawyers are not dispensing fashion tips, they are likely to be giving advice about jury selection. Howe, for example, knew that to gain victory as a defense lawyer he needed only one of the twelve jurors.[11] For this reason, he advised criminal defense lawyers to select a jury of mixed nationalities (a Jew, a Gentile, an Irishman, a German, and an Italian) and socioeconomic status (a rich man and a poor man) because such a jury could never agree on anything.[12] In a similar vein, Francis L. Wellman, the famous trial advocate from the first half of the 1900s, believed that lawyers should pay close attention to the ethnicity of their venire.[13] He advised: "Irish are sometimes prejudiced against the Hebrews and *vice versa.* Germans are stubborn, but generous. Hebrews, as a rule, make fine jurors, except where they are prejudiced. Young men are much safer than old men, unless the advocate is for the defendant, when he wants older men."[14] Both Howe and Wellman thought juror diversity was critical in successfully defending a case.

The master advocate, Clarence Darrow, followed this approach as well, relying on racial and ethnic stereotypes to select a jury.

> An Irishman is called into the box for examination. There is no reason for asking about his religion; he is Irish; that is enough. We may not agree with his religion, but it matters not; his feelings go deeper than any religion. You should be aware that he is emotional,

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6 *See* FRANCIS L. WELLMAN, SUCCESS IN COURT 51–52 (1942).
7 *See id.* at 64.
8 *Id.*
9 *Id.*
10 *See id.*
11 *Id.* at 65.
12 *See id.*
13 *See* FRANCIS L. WELLMAN, DAY IN COURT 125 (1910).
14 *Id.*

> kindly and sympathetic. If he is chosen as a juror, his imagination will place him in the dock; really, he is trying himself. You would be guilty of malpractice if you got rid of him, except for the strongest reasons.
>
> An Englishman is not so good as an Irishman, but still, he has come through a long tradition of individual rights, and is not afraid to stand alone; in fact, he is never sure that he is right unless the great majority is against him. The German is not so keen about individual rights except where they concern his own way of life; liberty is not a theory, it is a way of living. Still, he wants to do what is right, and he is not afraid. He has not been among us long, his ways are fixed by his race, his habits are still in the making. We need inquire no further. If he is a Catholic, then he loves music and art; he must be emotional, and will want to help you; give him a chance.[15]

These rigid stereotypes may have worked for these particular advocates in their time (though we doubt that the stereotypes were any more accurate then than they are today), but in truth they are nothing more than anecdotal observations gleaned from each advocate's personal experience. Using such anecdotes as the primary tool for teaching trial advocacy defies common sense. Howe, Wellman, and Darrow each treated the jurors as one-dimensional objects, rather than as complex humans whose diversity knows no bounds. If today's lawyers relied on their advice, the consequences would likely be disastrous.

B. Stories About Witness Examination

War stories about cross-examination litter the terrain of trial advocacy training as well. In fact, such stories are frequently the only sources used to teach witness examination. One such notable example comes from Irving Younger and his classic monograph, *The Art of Cross-examination.*[16] The defense lawyer in the story was defending a man accused of biting off the victim's nose.[17] The prosecution's first witness had testified that the defendant bit off the victim's nose.[18] The defense lawyer then rose to cross-examine.

> Q: Where were the defendant and the victim when the fight broke out?
>
> A: In the middle of the field.

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15 Clarence Darrow, *Attorney for the Defense,* ESQUIRE, May 1936, at 36, 37.

16 IRVING YOUNGER, THE ART OF CROSS-EXAMINATION 30–31 (1976).

17 *See id.*

18 *Id.* at 30.

Q: Where were you?
A: On the edge of the field.
Q: What were you doing?
A: Bird watching.
Q: Where were the birds?
A: In the trees.
Q: Where were the trees?
A: On the edge of the field.
Q: Were you looking at the birds?
A: Yes.
Q: So your back was to the people fighting?
A: Yes.
Q: Well, if your back was to them, how can you say that the defendant bit off the victim's nose?
A: Well, I saw him spit it out.[19]

Younger uses this anecdote to demonstrate one of his ten commandments of cross-examination, that the examiner should not ask one question too many.[20] Younger's point is a valid one. Effective cross-examination requires the discipline to know when to sit down and thereby limit the ability of the witness to explain. But, with this particular story, Younger may lead a lawyer into a greater trap than merely that of asking one question too many. If the lawyer does not ask the last question, as Younger would advise, the lawyer leaves the impression that the witness does not know whether the defendant bit off the victim's nose, and thus, she must have been lying in her testimony on direct examination. Yet, the witness does know that the defendant bit off the victim's nose (because she saw the defendant spit it out), and that will become apparent to the jury immediately upon redirect examination, leaving the cross-examiner at risk of losing credibility before the jury ("That lawyer was trying to trick us!").[21] In any event, most trial advocacy instructors would fault the cross-examiner for asking a number of nonleading questions, as opposed to a close-

19 *Id.* at 30–31.

20 *See id.* at 30.

21 *See* 1 STERN, *supra* note 5, at 7–8. Herbert Stern argues that "a moment's reflection will demonstrate that [Younger's] hallowed tale is nonsense—and that the lesson is a false one." *Id.* at 7. He uses two rhetorical questions to prove his point:

> What happens after [the cross-examiner] sits down and the redirect reveals not only the point the cross-examiner deliberately concealed by his carefully edited questions but also the intentional concealment? What will happen to the credibility of the cross-examiner if he is perceived to be editing his dialogue to give a false or skewed picture to the jury?

Id. at 8.

ended, leading question.[22] Again, although the advocate typically wants to control the examination of adverse witnesses by leading them,[23] there are times when an open-ended question to an adverse witness conveys the impression that counsel is only trying to get at the truth.

Another equally well known cross-examination anecdote features Max Steuer's cross-examination of the child-witness in the so-called "Triangle Shirtwaist Fire" case.[24] In that case, Steuer violated two traditionally taught rules of cross-examination: (1) he repeatedly asked the witness nonleading questions, and (2) he allowed her to repeat her direct examination testimony several times during the cross.[25] However, by having the witness repeat her story word-for-word, Steuer was able to establish that the witness's testimony had been scripted and, therefore, should not be believed.[26] This story is often used to remind trial lawyers of the dangers of scripting witness testimony and to demonstrate that even the most hard and fast rules of witness examination have exceptions.[27] Yet, the remarkable circumstances of

22 *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS 522–23 (2d ed. 1999) (instructing trial lawyers to "avoid asking one question too many"); *see also* JEANS, *supra* note 2, § 13.36, at 325 (advising lawyers to stop short of the climax on cross-examination). "[T]he consummation comes at closing argument. Cross-examination supplies the facts from which the arguments will be made at a later and more propitious time. When the urge arises to go all the way remember, 'coitus interruptus isn't half bad.'" *Id.*

23 *See* YOUNGER, *supra* note 16, at 23 (stating that while he was a judge, "my very soul was offended by hearing lawyers say on cross-examination, 'What happened next?'").

24 *See* 3 HERBERT J. STERN, TRYING CASES TO WIN: CROSS EXAMINATION 402, 411 (1993) (noting that Steuer's cross-examination has been immortalized in story and lecture).

25 *See id.* at 411–12. Steuer asked the witness, "Now tell us *what* you did when you heard the cry of fire." *Id.* at 412 (emphasis added).

26 *See id.* at 416–19 (reproducing the transcript of Steuer's cross-examination, which shows that he asked the witness to repeat her direct testimony in full two times during the cross-examination and to repeat part of it a third time).

27 *See* YOUNGER, *supra* note 16, at 25–28 (using Steuer's cross-examination to demonstrate an exception to the general rule that the cross-examiner should avoid repetition). Younger's use of the "Triangle Shirtwaist Fire" anecdote demonstrates another danger with "war stories": with each retelling, the facts of the actual event became more and more unrecognizable. Although Younger is correct that Steuer allowed the witness to repeat her direct examination testimony, he substantially simplifies Steuer's cross, leaving the false impression that Steuer's examination consisted solely of asking the witness to "tell it again." In reality, Steuer asked the witness a number of other questions and interspersed her repetition of the direct with specific queries about her knowledge of the fire. *See* 3 STERN, *supra* note 24, at 405–22 (reprinting excerpts of Steuer's cross-examination).

Steuer's case severely limit the story's utility. In the first place, a trial judge almost certainly would limit the repeating of the verbal testimony by sustaining a "cumulative" and an "asked and answered" objection.[28] In the second place, few lawyers are likely to have the same experience as Steuer did, facing an immigrant child witness who clearly memorized her testimony in words not of her own choosing. Despite the anecdote, the novice trial lawyer is still left wondering when, as a practical matter, to ask nonleading questions on cross-examination. The story is entertaining, even amusing, but its value as a teaching tool is quite limited.

That does not mean, of course, that the anecdotal material from the past should be dismissed out of hand. Indeed, many of the old stories are grounded, albeit some by happenstance, in sound theory and technique. The highly esteemed trial lawyer, Louis Nizer, wrote these sage observations about how to prepare a witness for direct examination:

> [A] lawyer who will put a witness on the stand without thorough preparation disserves his client, his profession, and the truth. He defeats justice, because such a witness will wander about unknowledgeably without the benefit of having had his memory refreshed by documents, the recollection of others corroborated by objective facts, and the truthful history painfully reconstructed by interviews, deposition, and written evidence gathered over a period of years, sometimes all over the world. If I should ask you, without preparation, to tell me what you did on a particular day only last month, you would either not remember or your spontaneous reconstruction would be full of holes. But if I had interviewed your secretary, examined your diary, read the letters you sent that day, traced the people you were with, pressed your own recollection for hours at a time and weeded out errors, you could reconstruct the events of that day with substantial accuracy.[29]

Despite Nizer's astute comments, it remains that the anecdotal advice from Howe, Wellman, and Darrow, and to a lesser extent from Younger is best used to illustrate and entertain, not to teach. They are "war stories" in the worst sense. They reflect the unique experiences of one advocate and should not be held up as examples of effective advocacy to which others should aspire. If the road to hell is paved with good intentions, then the road to ineffective and unsuccessful trial advocacy is paved with well-intentioned war stories.

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28 *See* HAYDOCK & SONSTENG, *supra* note 22, at 186–87 ("If a new question calls for an answer previously given on cross-examination, the question is objectionable as repetitious.").

29 LOUIS NIZER, MY LIFE IN COURT 240 (Doubleday & Co. 1961) (1944).

C. *Direct Examination and the New Millennium*

Unfortunately, this anecdotal method has been one of the primary teaching tools for generations of trial lawyers. The last two decades or so, however, have witnessed movement away from the "learning by war story" method to the "learning by doing" method.[30] In this way, trial advocacy training has matured to some extent. Yet, there remains a vast legion of lawyers in the trenches of litigation trying cases as they always have without regard to the advances of recent years. Moreover, despite the proliferation of trial advocacy clinics[31] and the offerings in law schools,[32] much of what is actually taught is still unduly colored by the anecdotal experiences of the teachers.

In this Article, we intend to continue the move beyond the "war story" or anecdotal method of training trial advocates. Our goal is to meld sound principles of communication theory with one of the most critical components of every trial, the direct examination of witnesses before a jury. Indeed, trial lawyers have much to learn about advocacy in general and direct examination in particular from contemporary communication and psychological research and, rather than ignore those disciplines, lawyers should look to them for instruction and guidance. Two of the authors of this Article are not lawyers: one holds a Ph.D. in psychology,[33] and the other has been a practicing trial consultant who has studied juror decision making for nearly fifteen years.[34]

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30 *See* PETER L. MURRAY, BASIC TRIAL ADVOCACY 1–5 (1995) (describing advances in trial advocacy training from "sink-or-swim" and anecdotal methods to the learning-by-doing approach, which "combines both practical and theoretical or systematic elements").

31 *See* Anthony T. Kronman et al., *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 154 (1995) (noting that even Yale University Law School is now offering a clinic).

32 *See* Lori Tripoli, *Filling Law Firm Needs . . . Second-Drawer Schools Create Top Notch Litigation Training*, INSIDE LITIG., Apr. 1998, at 1 (noting that second tier law schools are competing with higher ranked law schools by offering students more opportunities for practical trial experience).

33 Sharon Gross has a Ph.D. in Social Psychology from USC. Her major area of research is attitude change, and she has numerous presentations, articles, and book chapters to her credit. Dr. Gross has taught Social Psychology and Research Methods at USC and Pepperdine University as well as statistics at Los Angeles Pierce College. She is a diplomate of the American Board of Forensic Examiners with a specialty in psychology. Dr. Gross has conducted complex research projects on more than sixty civil and criminal cases.

34 Richard Gabriel is a founder of Decision Analysis, a national trial consulting firm that has done jury research and case communication strategy for high profile and complex litigation cases. He has been the author of numerous legal articles, has

In their professional lives, Sharon Gross and co-author Richard Gabriel use their social science training to help lawyers hone their message and improve the effectiveness of their communication with jurors. Their very existence makes our point: research from the fields of communication theory, learning theory, and social psychology should provide the grids and supports for effective advocacy, including direct examination.[35] After all, the goal of every advocate is to conduct direct examinations that cause the fact-finder to retain the testimony and be influenced by it.[36] Use of the principles discussed in this Article will guide lawyers to effectively tell the story of their case through their witnesses.

This view of the direct examination contrasts starkly with the perspective of generations of lawyers depicted in the imaginary scene in the Prologue.[37] Conducting a direct examination is not simple or easy.[38] It requires thorough preparation and carefully honed ques-

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contributed to two books on jury selection, and has conducted CLE training for several years.

35 The increased attention that social scientists have given to the trial process in recent times has created a substantial resource body of literature. *See* E. Osborne Ayscue, Jr., *Epilogue: The Art of Advocacy in a Changing World*, 50 S.C. L. REV. 853, 854 (1999). According to Ayscue, there has been an

> explosion of literature about the art of trial advocacy. . . . [T]he art of persuasion has been dissected under a microscope. The rapid development of the social sciences, particularly psychology, and their application to the art of advocacy has already produced more literature than one could reasonably read and digest in a lifetime.

Id.

36 *See* HARRY M. CALDWELL ET AL., WEST'S CALIFORNIA CRIMINAL TRIALBOOK 7-2 (3d ed. 1996); THOMAS A. MAUET, TRIAL TECHNIQUES 73 (4th ed. 1996).

37 One means of gauging the perception of lawyers about the relative difficulty of conducting a direct examination is to compare the literature about direct examinations to the literature about cross-examinations. The veritable flood of writings about cross-examinations and the pitiful trickle written about the direct reflects the cavalier attitude of many toward the direct. For a sampling of the imbalance, compare, for example, F. LEE BAILEY & HENRY B. ROTHBLATT, CROSS-EXAMINATION IN CRIMINAL TRIALS (1978); ROBERT L. HABUSH, ART OF ADVOCACY: CROSS-EXAMINATION OF NON-MEDICAL EXPERTS (Robert L. Habush ed., 1990); LOUIS E. SCHWARTZ, CROSS-EXAMINATION OF PLAINTIFFS IN PERSONAL INJURY ACTIONS (1933); NOEL C. STEVENSON, SUCCESSFUL CROSS EXAMINATION STRATEGY (1971); FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION (1948); ARNOLD J. WOLF, CROSS-EXAMINATION ON TRIAL (1988); and YOUNGER, *supra* note 16, with HOWARD HILTON SPELLMAN, DIRECT EXAMINATION OF WITNESSES (1968).

38 *See* William T. Hangley, *Direct and the Director: Writing, Staging and Telling the Story*, LITIG., Fall 1998, at 20, 20–21 ("Direct examination is one of the most basic of all trial skills but perhaps the most difficult to master. . . . I have reluctantly con-

tioning skills.[39] It is not something any twelve-year-old could do well. Instead, it is a sophisticated, demanding exercise, perhaps the most difficult task at trial. The advocate must communicate to jurors a clear and compelling story without being able to speak to them directly, and all the while subject to constant interruption.[40] The centrality of direct examination at trial demands that it receive great attention by advocates and that it include a more complete understanding of the psychology of the jury and how people receive and process information.[41] This Article undertakes that task.

Part II begins with an overview of basic principles of effective communication, including the importance of the memory and motivation of the audience, the critical significance of developing a memorable theme for each case, and the influence of the advocate and his or her credibility before the jury.[42] Part III describes the nature of complexities presented by the very structure of the direct examination, requiring the advocate to communicate with the jury indirectly through the witness. It then identifies the deficiency of the traditional approach in attempting to deal with the direct's complexity.[43]

Part IV demonstrates the practical application of communication principles in the direct examination by describing specific trial techniques to improve the clarity and persuasiveness of the direct. In each of these Sections, the technique is briefly described, then a sample examination is used to demonstrate the technique, and finally the empirical data and social science studies that support the described techniques are reviewed.

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cluded that cross just is not terribly important to the outcome of a case when compared to direct examination.").

39 JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 343–46 (3d ed. 1994); *see* Jonathan M. Purver et al., *Winning the Trial Through Direct Examination*, CASE & COMMENT, Jan.–Feb. 1988, at 10, 10.

> Despite its importance, direct examination may be the least studied aspect of the trial process. Many lawyers assume that direct examination will be among the easiest phases of trial because they will introduce evidence from their own witnesses. Nothing could be further from the truth, for the examination of witnesses introduces a dangerous and unpredictable element into trial—a third person over whom you have only limited control.

Id.

40 *See* MCELHANEY, *supra* note 39, at 342–45.

41 *See* MICHAEL T. NIETZEL & RONALD C. DILLEHAY, PSYCHOLOGICAL CONSULTATION IN THE COURTROOM 134–54 (1986); Martin Kaplan, *Cognitive Process in the Individual Juror*, *in* THE PSYCHOLOGY OF THE COURTROOM 197, 197–99 (Norbert L. Kerr & Robert M. Bray eds., 1982).

42 *See infra* Part II.

43 *See infra* Part III.

Part IV begins with the technique of headlining and blocking, whereby an advocate divides the direct examination into discrete subparts, called blocks, and then gives the jury a headline for each new subject area. Next, personalization and rapport building is discussed, describing a means by which the witness can build a stronger personal connection to the jury. Then, the technique of staging is described, whereby the advocate provides a background or context for the witness's testimony. This is followed by a discussion of the use of visual and demonstrative aids, including the effectiveness of using such evidence to communicate more powerfully with juries. Then we address the technique of disclosing weaknesses to the jury and provide a technique for trial advocates to innoculate the perceived weaknesses or vulnerabilities in the case. Part IV concludes with a discussion of the use of lists and how counsel can bullet-point the witness's testimony to increase juror retention of evidence.

II. MESSAGES AND MESSENGERS

The objective of any effort to communicate depends heavily on context—the particular needs of the speaker, the make-up of the audience, and the specific circumstances present.[44] The injured person describing pain sensations to a doctor is in a very different role than the stand-up comedian doing her act at a comedy club or a lawyer addressing judge and jury. In the courtroom, the advocate must inform and persuade; he must respect the cumbersome rules of the court but still present the facts in a memorable and compelling way. That is, the advocate's message must be accurate, factual, and legally adequate, but also absorbing, captivating, and emotionally forceful. Similarly, the advocate, as messenger, must not only be lawyerly, making sure that all the "i's" are dotted and "t's" are crossed, but also credible and likeable. Both message and messenger play critical roles in the communication process. Thus, before one can begin to consider the particulars of direct examination—the kinds of questions to ask or the specific techniques used to elicit testimony—a primer on effective communication is necessary. What is the perspective of the jury, and what will move it to the desired decision? What information is the jury most likely to remember, and how might presentation style enhance the jurors' retention of that information? Two fundamental aspects of communication must be understood by every trial lawyer to

44 Harold D. Lasswell, *The Structure and Function of Communication in Society, in* JEWISH THEOLOGICAL SEMINARY OF AMERICA, INSTITUTE FOR RELIGIOUS & SOCIAL STUDIES, THE COMMUNICATION OF IDEAS 37, 38 (Lyman Bryson ed., 1948).

effectively shape his message: memory and motivation. Both of these aspects of learning are discussed in turn below.

A. Communicating the Message: Memory and Motivation

1. Memory

Cognition deals with three elements of information: the encoding and storage of information in memory, and its retrieval from memory.[45] There are three types of memory: sensory, short-term or working memory, and long-term memory.[46] Sensory memory is the fleeting, unconscious, but sometimes powerful, impressions that can be caused by the nonverbal or behavioral characteristics of a witness or an attorney during the examination.[47] One might think of this as the preattentive stage in that it encompasses the images that a juror or judge receive prior to focusing on the substantive aspects of testimony.

Short-term memory lasts no more than twenty seconds and is used when jurors hear an aspect of witness testimony that they deem to be important.[48] At that point, they either tell themselves that they should remember that point for later recall, or they record it in their notes for later use. It is the only memory stage in which conscious processing of material takes place.[49] This processing encodes the

45 Ebbe B. Ebbesen, *Cognitive Processes in Understanding Ongoing Behavior, in* PERSON MEMORY: THE COGNITIVE BASIS OF SOCIAL PERCEPTION 179, 179 (Reid Hastie et al. eds., 1980); *see* Joseph Spadaro, *An Elusive Search for the Truth: The Admissibility of Repressed and Recovered Memories in Light of* Daubert v. Merrell Dow Pharmaceuticals, Inc., 30 CONN. L. REV. 1147, 1158–63 (1998) (examining the scientific categorization of memory as it developed from Sigmund Freud to current day analysis); *see also* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 155 (1987) ("For communication to be persuasive, the audience must attend to it, understand it (process it), store it in memory (encode it), yield to the position advanced, and recall the message in some form (retrieve it).").

46 Spadaro, *supra* note 45, at 1155; *see also* R.C. Atkinson & R.M. Shiffrin, *Human Memory: A Proposed System and its Control Processes*, 2 PSYCHOL. LEARNING & MOTIVATION: ADVANCES RES. & THEORY 90 (1968).

47 *See* A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 59–61 (1979) (noting that sensory memory is the first stage of memory during which "information is analyzed and coded immediately in terms of its physical characteristics").

48 *See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 314 (1989). The author notes that in order to retain the trial testimony in long-term memory, a juror can refer the information received from short-term memory to a schema in long-term memory. *Id.* However, short-term memory may be unable to direct incoming information to all the schemas that would be necessary to track the many hypotheses in a complicated case. *Id.*

49 PHILIP G. ZIMBARDO, PSYCHOLOGY AND LIFE 313 (11th ed. 1985).

memory and presumably places it in long-term memory for later recall. Thus, it is long-term memory that is used in the deliberation process to recall testimony.[50] Of course, it is also employed as jurors recall events from their own past that are triggered by witness testimony.

Two principles that aid memory and retention of information are the *frequency* with which a particular message is sent and the *uniqueness* of that message.[51] Trial lawyers can use these principles by having a witness or witnesses repeat an essential fact or opinion in the case. Uniqueness can be developed by presenting the information in a novel way or by varying the format of the testimony, as through the use of demonstrative evidence and other visual devices that, in addition to increasing interest and attention, can expand the variety of senses required to encode the messages and thereby enhance recall.

The principles of *primacy* and *recency* are also critical in the retention of information. The primacy effect reveals that information presented first is more effectively recalled.[52] Thus, for example, the expertise of the witness should be established first because it will color the jurors' receptivity to his or her testimony in a positive way. Or, if the advocate believes there will be an immediate negative reaction to a witness because of his or her appearance, it is best to bring out background information that will allow the jurors to identify favorably with the witness. If background information is tangential to the testimony, the advocate should begin by establishing the most important piece of information first, substantiating it second, and then repeating additional aspects of the important evidence. This same principle reveals that if a percipient witness is testifying to a chronology of events and the key event is in the middle of the chronology, it may be lost by the jury.

Recency, as the term suggests, holds that the last thing a person hears about a topic will be remembered best.[53] Many advocates in-

50 *See* Moore, *supra* note 48, at 314 ("The juror must therefore select the information which can be referred to a limited number of schemas in long-term memory.").

51 *See* David A. Sousa, *The Ramifications of Brain Research*, SCH. ADMIN'R, Jan. 1998, at 22, 22–23 (explaining that in order to teach effectively, teachers must be cognizant of the fact that the brain responds to novelty, but, additionally, in order to present information effectively, it must be given with sufficient frequency).

52 *See* MARGARET C. ROBERTS, TRIAL PSYCHOLOGY 23 (1987) (reconciling experiments conducted concerning primacy and recency effects on cognition with the jury deliberation process).

53 *See* Robert S. Wyer, Jr. & Thomas K. Srull, *The Processing of Social Stimulus Information: A Conceptual Integration*, *in* PERSON MEMORY: THE COGNITIVE BASIS OF SOCIAL PERCEPTION, *supra* note 45, at 227, 254 ("The more recently a piece of information has been received and processed, the more likely it is to be recalled and used again.").

stinctively save a dramatic conclusion or key fact for the end of testimony because of the theatrical effect on the jurors.[54] This instinct proves to have a sound basis in research. Jurors' attention improves as they perceive that the end of testimony is near.[55] The brain seems to mark an ending point in testimony and therefore more easily encodes, stores, and recalls the last elements of the testimony.[56] This helps explain why questions that summarize a witness's testimony can be an effective communication tool.[57]

The sheer volume and complexity of the testimony produced at trial may be a bar to meaningful retention of the information.[58] Jurors frequently suffer from information overload in a trial and, by force of necessity, find themselves unable to remember all of the testimony and evidence presented. Obviously, for the advocate, how jurors retain information and what they retain dictates ultimate success or failure. The principle directly tied to the identification and salience of testimony is categorization.[59] Categorization is the primary

54 *See* Fred Wilkins, *Tools of Persuasion: Unfolding the Human Drama*, TRIAL, July 1994, at 72, 80–81 ("While it is fine . . . to build feelings of indignation as the case advances, the appropriate time to reach fever pitch is right before jurors leave the courtroom."). Other commentators have stated:

> Various research leads us to conclude that facts or arguments presented either first or last will have a distinct advantage over those presented in between. The internal ordering of facts can be framed as climax and anticlimax, as building to a strongest element late in the presentation versus hitting with the strongest fact first. A decision in a particular case should rely on the facts and circumstances at hand.

NIETZEL & DILLEHAY, *supra* note 41, at 147; *see also* SPELLMAN, *supra* note 37, at 70 ("The first and last witness called by a party should be strong."); C. Frederick Overby, *Preparing Lay Witnesses*, TRIAL, Apr. 1990, at 88, 91 ("It always helps to finish a damages presentation with a flourish. Pick one of your best witnesses to close the testimony."); Deanne C. Siemer, *The Heart of a Trial: Direct Examination*, TRIAL, Feb. 1992, at 48, 50 ("The end must be strong. . . . Direct should never end with a question to which your opponent can object successfully or with an objection that has been sustained.").

55 *See* Wyer & Srull, *supra* note 53, at 254–55.

56 *Id.*

57 *See id.* (noting that when a list of bland information was repeated to a subject in a memory experiment, words at the end of the list were best recalled).

58 James W. McElhaney, *The Case Against Clutter*, A.B.A. J., July 1999, at 76, 76 ("All cases collect clutter. Unnecessary legal theories that can kill the case. Disconnected factual issues that alienate and confuse judges and juries. Witnesses who do more harm than good. Mountains of documents that smother simple facts and confound basic ideas. Clouds of needless exhibits that numb judges' and juries' perceptions.")

59 *See* MAUET, *supra* note 36, at 76 (noting that witness testimony should be broken up into distinguishable topics separated by transition sentences); G. Nicholas Herman, *How to Master Direct Examination*, TRIAL, Apr. 1995, at 70, 76.

principle behind the techniques of blocking and headlining, which are described in some detail below. Blocking allows the litigator to put information in prioritized "digestible" segments. This aids the juror's ability to encode, order, and store the witness's testimony.[60] Headlining each block identifies and labels the information. This simplification greatly enhances later recall during deliberation.[61] Additionally, the use of lists can help the fact-finder categorize the information in a witness's testimony.

Finally, the brain tries to make a cohesive story out of the various disparate issues, evidence, and fleeting impressions that are stored in memory.[62] Consequently, it is incumbent on the trial lawyer to provide all the necessary facts, including background information and other context-related issues that allow the jurors to create a cohesive, complete story out of the testimony. This process is described in some detail below in the Section on the techniques of staging.[63]

2. Motivation

How motivated and receptive are your jurors? What aspects of their experience cause them to become persuaded by the arguments put forth by one side or the other? Research reveals that several elements have to be in place for jurors to be persuaded by a witness's testimony.[64] Jurors must like the witness[65] and understand the witness.[66] And, of course, they must make a decision to do something about what they hear or see.[67] Ultimately, the issue is whether the

60 *See infra* Part IV.A.

61 *See id.*

62 *See* ROBERTS, *supra* note 52, at 72–73 (noting that once jurors have created this story of "what happened" in their own minds, their versions of the facts are impervious to change); *see also* FREDERICK, *supra* note 45, at 207 ("[J]urors need a schema or theme by which to integrate the information presented at trial. This schema will facilitate understanding of and memory for the trial information . . . .").

63 *See infra* Part IV.C.

64 *See* NIETZEL & DILLEHAY, *supra* note 41, at 135 (stating that the psychological process involved in the effect of the persuasion on attitudes have been described as attention, comprehension, yielding, retention, and action).

65 We are attracted to people we like and we like the people to whom we are attracted. *See* JOHN C. BRIGHAM, SOCIAL PSYCHOLOGY 183 (1986). We assume that people we like share our attitudes and, conversely, we assume that people we do not like do not share out attitudes. *See generally* FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958) (discussing the balance theory, as developed by Heider); Fritz Heider, *Attitudes and Cognitive Organization*, 21 J. PSYCHOL. 107, 107–11 (1946) (same).

66 Clearly, if information is not understood, it cannot be encoded in a manner that allows easy recall, if it is recallable at all.

67 *See* Wilkins, *supra* note 54, at 74, 80–81.

testimony of a particular witness creates an attitude change in the trier of fact.[68]

One of the techniques described below is personalization of witnesses. By revealing certain biographical information about the witness to the jury, you can increase the likelihood that jurors will identify with the witness.[69] This technique helps to ensure that positive first impressions are formed. Because personalization affects jurors' encoding of the information they receive from a witness, it can also strongly influence how persuasive that testimony is.[70] The credibility, weight, and persuasiveness of a witness are often directly proportional to the perceived similarity between the witness and the jurors.[71] This similarity can be present in overall appearance (for example, dress, grooming, body type, mannerisms), demographics (for example, age, education, gender, race), background (for example, where they were born and raised, where they were educated, where they reside), lifestyle characteristics (for example, hobbies, organization membership, past experiences related to the case), or perceived values (for example, right to life, personal responsibility).[72]

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68 *See* NIETZEL & DILLEHAY, *supra* note 41, at 129 ("[A]lthough communicator confidence and factual accuracy were unrelated, impressions of confidence nonetheless accounted for 50% of the variance in decisions to accept what was said as true."); *id.* at 135 ("[T]here is ample opportunity to modify social and psychological influences at work in the courtroom."); Wilkins, *supra* note 54, at 74, 80–81.

69 *See* NIETZEL & DILLEHAY, *supra* note 41, at 143–44.

70 *See id.* at 136.

> Identification is based on a positive affective relationship to another person—a witness, party, or attorney—which may be used to induce acceptance of a particular interpretation of the evidence. Identification as an affective process derives in turn from perceived similarity to the other person, admiration, or other motivational states.

Id. Decision Analysis has conducted numerous community surveys, focus group studies, and post-trial interviews and has assisted in the selection of juries in hundreds of civil and criminal cases. The data collected from those efforts demonstrate the power of personalization.

71 *See* FREDERICK, *supra* note 45, at 166–68 (noting that jurors are influenced if the witness is a member of the same political, religious, social, economic, employment-related, or demographic reference group as the juror).

72 *See, e.g.*, BEM P. ALLEN, SOCIAL BEHAVIOR: FACTS AND FALSEHOODS ABOUT COMMON SENSE, HYPNOTISM, OBEDIENCE, ALTRUISM, BEAUTY, RACISM, AND SEXISM 107, 118–19, 168 (1978). "One's physical appearance undeniably affects the impressions formed by observers in almost any setting. . . . Dress, grooming, and behavior in the courtroom are companion concerns of style and content of testimony." NIETZEL & DILLEHAY, *supra* note 41, at 127. "An attractive communicator is more effective. As with other factors, the audience's definition of attractiveness is a key element." *Id.* at 143; *see* Gary Marks et al., *The Effect of Target's Physical Attractiveness on Assumptions of Similarity*, 41 J. PERSONALITY & SOC. PSYCHOL. 198, 203–06 (1981); Elaine Walster et al.,

Jurors also assess witnesses based on numerous nonverbal clues. For example, studies show that overall attractiveness, body language, vocal characteristics, and behavioral attributes are interpreted and given meaning by jurors.[73] Similarly, the jury's assessment of the credibility and honesty of a witness is often directly proportional to the degree of eye contact with or mannerisms exhibited by the witness.[74]

Personalization can break down stereotypic biases.[75] By increasing the jurors' perception of the witness as an individual rather than a perceived stereotype, the advocate allows jurors to classify and judge the witness and his or her testimony based on its merit rather than on a limiting stereotype or a negative impression.

Prior to the development of theories that stress the importance of personalization in quelling the effects of placing people in clearly delineated and narrow pigeonholes, it was assumed that *mere exposure* to diverse groups[76] of people was sufficient to reduce stereotypic categorization.[77] Later, researchers added stipulations about the nature of the exposure and called this the *contact hypothesis.*[78] However, due to

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Importance of Physical Attractiveness in Dating Behavior, 4 J. PERSONALITY & SOC. PSYCHOL. 508, 511–16 (1966). "Much experimental research concludes that, other factors being equal, similarity between a source and an audience increases liking and persuasiveness." NIETZEL & DILLEHAY, *supra* note 41, at 143. "Various research leads us to conclude that facts or agreements presented either first or last will have a distinct advantage over those presented in between." *Id.* at 147.

73 *See* FREDERICK, *supra note* 45, at 166 (noting that in some cases an attractive nonexpert source has been shown to be more persuasive than a nonattractive expert source). "Actions and nonverbal cues such as posture can affect the judgment of the jurors of one's self-assurance and confidence in the issues litigated." NIETZEL & DILLEHAY, *supra* note 41, at 127. "It accomplishes little for a witness to be clear, organized, and effective in communicating ideas if the witness is not perceived by jurors to be credible." *Id.* at 128. "[C]ertain kinds of nonverbal and paralinguistic behavior are used by experimental subjects to form judgments of communicator honesty. Among these are anxiety, voice pitch, excessive or exaggerated behavior, uncertainty, and contradictions among communication cues." *Id.* at 129.

74 *See* NORBERT L. KERR & ROBERT M. BRAY, THE PSYCHOLOGY OF THE COURTROOM 187–88 (1982) (noting that facial and body cues by a testifying witness that are perceived by the jury have an effect on their ability to detect deception).

75 *See* Marilynn B. Brewer & Norman Miller, *Beyond the Contact Hypothesis: Theoretical Perspectives on Desegregation*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 281, 281–82 (Norman Miller & Marilynn B. Brewer eds., 1984).

76 *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 651 (1944).

77 *See* Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. pt. 2, at 1, 1–2, 23–24 (Monograph Supp. 1968).

78 *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 250–68 (1958); GOODWIN WATSON, ACTION FOR UNITY 54–64 (1947).

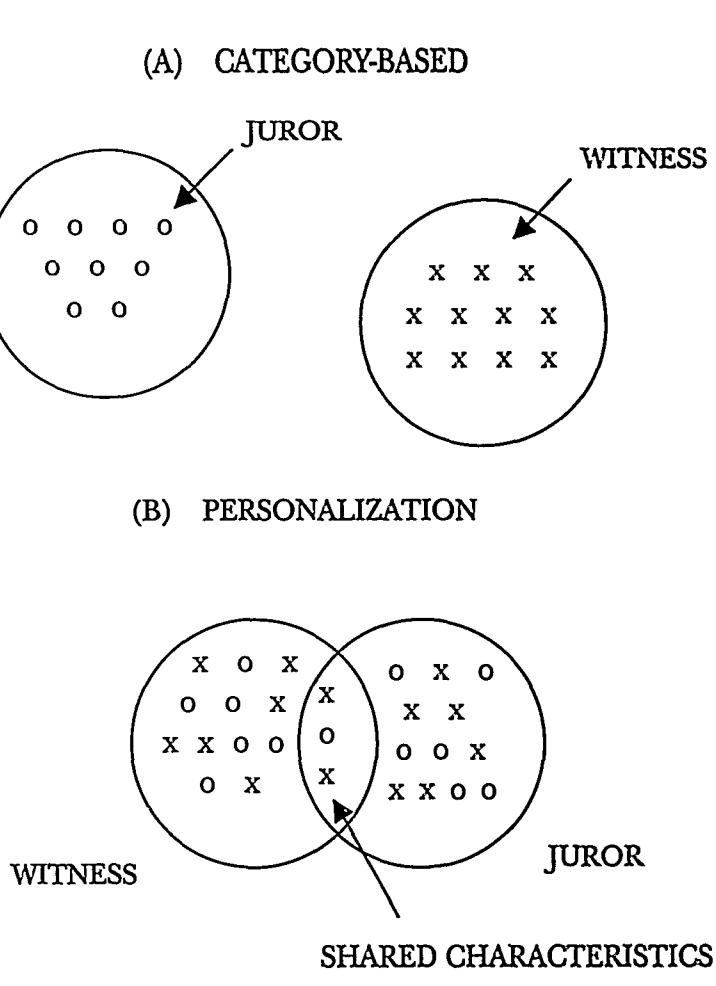
the limited effectiveness of these ideas, they became superceded by research regarding the effects of social categorization.

With time, it became a well-known finding that people tend to divide their social world into "us" and "them."[79] That is, we see our in-group (which is any group to which we belong, for example, Catholic, Protestant, professionals, blue-collar workers) as comprised of a large group of people with heterogeneous traits that are mostly good, whereas the out-group (which is any group to which we do not belong) is typically viewed as a smaller group with fairly homogeneous characteristics that are mostly bad, as in: "They're bad. We're good." (see Figure 1(A), Category-Based Thinking). These effects are most obvious when dealing with stereotypic attitudes regarding race (for example, whites tend to think that more blacks and fewer whites have a low IQ) and religion (for example, Catholics tend to view most Jews and few Catholics as miserly).

By personalizing the witness—that is, by bringing out attributes with which your jurors can identify favorably—the witness can be viewed as an individual rather than a stereotypical outgroup member (see Figure 1(B), Personalization). In this way you can increase the probability that your jurors will be primarily influenced by the substantive testimony rather than be biased in their receptivity to it or discount it altogether.

79 *See, e.g.*, John Duckitt, *Psychology and Prejudice: A Historical Analysis and Integrative Framework*, 47 AM. PSYCHOL. 1182, 1189–91 (1992); Patricia W. Linville et al., *Perceived Distribution of the Characteristics of In-Group and Out-Group Members: Empirical Evidence and a Computer Simulation*, 57 J. PERSON. & SOC. PSYCHOL. 165, 165 (1989); Mark Schaller & Anne Maas, *Illusory Correlation and Social Catergorization: Toward an Integration of Motivational and Cognitive Factors in Stereotype Formation*, 56 J. PERSONALITY & SOC. PSYCHOL. 709, 710 (1989).

Figure 1: Perceived Variability of In-group and Out-group Characteristics



One last principle of the motivational aspect of communication is the principle of *inoculation*.[80] Advocates can defuse or at least substantially limit the impact of weaknesses in their case by disclosing them to the jury as early as possible and explaining them away.[81] In Part IV of this Article we discuss this technique. Similar to the medical use of

80 *See* William. J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, 1 ADVANCES EXPERIMENTAL & SOC. PSYCHOL. 191, 200–03 (1964).

81 *See* McElhaney, *supra* note 58, at 77 ("Don't try to conceal evidence that hurts your case. Bring it out yourself in the middle of the case (so you don't draw undue attention to it)."); *see also* Chris Gair, *Problem Witnesses: Coping with Character Attacks*, TRIAL, Sept. 1996, at 65, 65 (discussing "how to present a problem witness when there is no choice").

antidotes by doctors, the advocate injects a small portion of a perceived virus by leaking out "infected" facts and uses that disclosure to preempt an effective attack by the other side and to build up the jury's immunity to the disease (that is, the weaknesses in the case). Inoculation also bolsters the credibility of the advocate and the party making the disclosure, which increases the jury's motivation to believe the party's case and find for that party.

The umbrella principles of memory and motivation provide an extremely useful framework to substantiate and validate the techniques and methodologies presented in this Article.

B. Communicating the Message: Themes and Theories

In the same way that it is critically important for advocates to understand the cognitive processes of jurors, it is essential that they appreciate the value of distilling their case to an easily remembered central theme.[82] Advertising makes its money by creating memorable images and phrases that positively attach to a product or service.[83] Effective media placement then ensures that those refined advertising messages for cars, beer, or internet services are played again and again and again. Trial lawyers, much like advertising executives, must develop a case theme, repeat it, and incorporate it so that by the time the direct and cross-examinations occur, the case theme is well established in the jurors' minds.[84]

A good theme encapsulates the core issue that you want the jurors to focus on during the trial.[85] Although there can be several subissues in a case, there should be one primary theme that captures the essential and critical case issues. As in any good movie, play, or symphony, the theme allows jurors to explain to themselves, and to other jurors, what they think the case is all about. Good themes are typically short, one to two sentences at most.[86] For example, in a plaintiff's product liability case, the theme may be: "This case is about a company that knew it was making cracked cylinders on their furnaces. They knew they were trading the lives of their consumers, like Mr. and

82 *See* Hangley, *supra* note 38, at 20 ("What is necessary is that the story be built on a theme with which the triers-of-fact can identify.").

83 *See, e.g.*, David L. Hamilton et al., *Organizational Processes in Impression Formation*, *in* PERSON MEMORY: THE COGNITIVE BASIS OF SOCIAL PERCEPTION, *supra* note 45, at 121, 124–25; John H. Lingle et al., *Of Cabbages and Kings: Assessing the Extendibility of Natural Object Concept Models to Social Things*, *in* 1 HANDBOOK OF SOCIAL COGNITION 71, 72–111 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984).

84 *See* CALDWELL ET AL., *supra* note 36, at 1-7, 1-8.

85 *See id.*

86 *See id.*

Mrs. Jones, for the money they would save in redesign and retooling." This theme encapsulates the essential facts and turns the focus of the case to the conduct and intentions of the company. Now, depending on the factual strengths, this same theme may be refocused for damages by saying: "Mr. and Mrs. Jones, who were both 35 years old when they went to sleep one night, relied on their furnace to keep them warm. Instead, their children woke up two weeks later parentless and brain damaged as a result of the cracked cylinder that Acme Furnace Company designed, manufactured, and sold."

Theme development helps the attorney identify the key issues in the case. Issues are broader than specific, individual case facts. Precautions should be taken to limit the number of issues presented to a jury. In addition to focusing attention on key issues, the theme helps to organize them. The core themes and issues should contain language that the advocate wants the jurors to latch on to and repeat during deliberations—in the above mentioned case, ideas such as *responsibility* and *intent*.[87]

C. *Communicating Through the Messenger: Credibility, Likeability, and Personality*

Conventional wisdom holds that direct examinations are the one point in the trial when advocates should shift the spotlight from themselves to their witnesses.[88] The lawyer must relinquish control of the courtroom, allowing the jury to hear the testimony of the witness with as little interference from the lawyer as possible.[89] All too often, however, lawyers have taken that advice to mean that they do not have an active role in the direct, and they therefore believe that their role is largely passive. It is the lawyer/examiner, of course, who must construct the direct in such a way that the jury's attention is drawn to the witness; it is the lawyer who must prepare the witness to tell his or her story despite the intimidating glare of the spotlight; and it is the lawyer who must ensure that all of the testimony needed from each witness is elicited in a clear and memorable way.[90]

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87 *See id.* at 1-8.

88 *See id.* at 7-4 ("The lawyer during direct should view himself or herself as a mere conduit through which the witness can tell his or her story."); MAUET, *supra* note 36, at 73 (explaining that at the conclusion of a well-conducted direct examination, the jury should recall the witness as being particularly convincing, but should not remember who conducted the examination).

89 CALDWELL ET AL., *supra* note 36, at 7-4 ("[T]he jury's attention should be focused on the witness, not on the lawyer asking the questions.").

90 *See* Herman, *supra* note 59, at 70 ("There are four goals of direct examination: (1) to have witnesses tell a coherent story, (2) to 'get to the point' of the case, (3) to

Thus, the direct examination is much more than merely a collection of techniques or gimmicks designed to hoodwink the fact-finder through clever packaging and delivery. Instead, it is an attempt by the examiner and the witness to communicate a story or position to the fact-finder. And, as is true of all communication, the success of the direct examination ultimately turns on whether the jury believes and likes the messenger.[91] In the context of the direct examination, however, the messenger is not merely the witness who is testifying from the witness stand, but it is also the examiner who calls the witness and elicits the testimony, for he implicitly vouches for the witness to the jury.

The first and most important component of persuasive communication is the credibility of the advocate, or what the Greeks called "ethos."[92] Aristotle framed ethos as consisting of three parts: "good sense, good moral character, and good will."[93] The same is true of credible advocates. During the trial the jury consistently asks: "Can I trust the lawyers? Can I trust the evidence? Are they simply paid partisans trying to win at all costs? Or are they professionals concerned with trying to find the truth?" The advocate builds his credibility in a million ways through acts both large and small. At every opportunity, advocates must demonstrate their even-handedness, their respect for the process and all the trial participants, as well as their fair, but firm, belief in their case.[94] The trial lawyer's ethos before the jury results

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have witnesses sufficiently explain the testimony in anticipation of damaging cross-examination, and (4) to maintain the jury's attention throughout the direct examination."); Purver et al., *supra* note 39, at 10 ("The objective is to organize and present testimony and other evidence from a variety of sources . . . so that the listener is left with a clear understanding of the logic and the equities supporting your position.").

91 *See* McElhaney, *supra* note 58, at 77 ("Choose witnesses who are pleasant, understandable and fun to listen to. Avoid long-winded, disagreeable, pompous and incomprehensible witnesses whenever you can.").

92 RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 109 (1990).

93 *Id.* at 116; *see* Ronald J. Waicukauski et al., *Ethos and the Art of Argument*, LITIG., Fall 1999, at 31, 31 (noting that Aristotle identified integrity, knowledge, and good will as essential parts of ethos). Twenty-five centuries later, Aristotle's notion of ethos is still true. Richard Rieke and Randall Stutman found that researchers today agree that credibility consists of two essential components: trustworthiness and expertise. *See* RIEKE & STUTMAN, *supra* note 92, at 116.

94 *See* 1 STERN, *supra* note 5, at 29–49 (advising advocates to not be "too partisan" and to "at all times be respectful" so that the jury will not believe that the lawyer is solely "in it for the money"); Waicukauski et al., *supra* note 93, at 33–34 (advising lawyers to demonstrate their sense of fair play and to "be courteous and civil at all times").

from disclosing weaknesses instead of hiding or ignoring them,[95] from not making claims that are without solid evidentiary support,[96] from treating all witnesses, opposing counsel, and the judge with respect and courtesy,[97] and from refusing to patronize the jurors or otherwise treat them with condescension.[98] A lawyer who has the jury's trust has a powerful weapon:[99] he will get the benefit of the doubt from the jury, which is an advantage of inestimable value.

The second and third essential components of persuasive communication—the advocate's likeability and personality—are closely related and equally important. If the examiner is unable to create a connection with the audience (the jurors), then no technique in the world can bring about comprehension or retention of the message. This ability to connect to jurors depends on two separate factors: similarity and charisma.[100] Similarity between the advocate and the juror creates rapport.[101] The more advocates appear to have the same val-

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95 *See* 1 STERN, *supra* note 5, at 171 ("It is vital that [the jurors] hear it first from you so that your credibility . . . is not undermined by the slightest suggestion that you attempted to conceal the unfavorable material . . . ."); Waicukauski et al., *supra* note 93, at 32 ("[W]hen you disclose bad facts up front in the courtroom, you not only minimize the adverse effect of the bad facts, but you also make yourself appear more credible in the process.").

96 *See* 1 STERN, *supra* note 5, at 30 (advising advocates to "never advance a weak argument" nor "mingle strong arguments with weak ones" because it causes the jury to question the advocate's credibility); Waicukauski et al., *supra* note 93, at 32.

97 *See* 1 STERN, *supra* note 5, at 29 (stating that lawyers should "at all times be respectful—respectful to jurors, to judges, and to witnesses . . . because it is appropriate").

98 *See* Waicukauski et al., *supra* note 93, at 34 (advising lawyers to "never talk down to your audience").

99 *See* NIETZEL & DILLEHAY, *supra* note 41, at 141 ("Of the communicator variables that are important in court, credibility is probably paramount."); 1 STERN, *supra* note 5, at 13 ("The greatest weapon in the arsenal of an able trial lawyer is not the law, or even the facts. It is personal advocacy, coupled with your personal standing with the jury.").

100 *See* Waicukauski et al., *supra* note 93, at 34, 75 (noting that "listeners are more easily persuaded by those they perceive as similar to themselves," and that "the more energy and enthusiasm . . . an advocate shows, the more likely she is to get a favorable response").

101 *See supra* note 72 and accompanying text.

> Similarity, like attractiveness, increases positive feelings toward the source and therefore can influence persuasion. The shared experiences and values implied by perceived similarity can increase the source's credibility. This results in the source's message being perceived by the listener as arising from the same types of "valid" considerations as the listener would employ.

FREDERICK, *supra* note 45, at 167; *see* Waicukauski et al., *supra* note 93, at 34 ("Psychologists have found that we trust and like people who are like ourselves.").

ues, experiences, and even behaviors as the jury, the more approachable and credible they become.[102] Charisma, on the other hand, is the sheer "star power" of the advocate. Whereas audience similarity enhances the rapport between the advocate and audience, charisma enhances the advocate's persuasiveness.[103] Charisma is the ability of the presenter to grab and retain the audience's attention.[104]

The importance of the advocate's personality is illustrated by a study of medical educators and students in which a "lecturer" presented a nonsensical lecture entitled "Mathematical Game Theory as Applied to Physical Education."[105] The lecturer, Dr. Fox, was given a lofty but invented academic background.[106] The purpose of the experiment was to test whether the credentials and humorous, animated style of the lecturer would seduce the audience, despite the fact that the lecture was full of "double talk, contradictions, and meaningless references to unrelated topics."[107] The response to Dr. Fox's lecture was almost unanimously favorable. Many in the audience claimed he was brilliant.[108]

In a subsequent experiment, Dr. Fox presented twenty-minute videotaped lectures on the biochemistry of memory.[109] The researchers prepared six different versions of the same lecture that varied the amount of information provided and the animation of the speaker, ranging from low to medium to high.[110] The researchers showed the different lectures to groups of students and tested their comprehension and retention.[111] Again, the results showed that the audience was seduced by the lecturer and that the interest maintained by the speaker was more important than the content of his remarks in caus-

102 *See* NIETZEL & DILLEHAY, *supra* note 41, at 143 ("Much experimental research concludes that, other factors being equal, similarity between a source and an audience increases liking and persuasiveness.").

103 *See* RIEKE & STUTMAN, *supra* note 92, at 117 (noting that "dynamism" intensifies the advocate's trustworthiness and expertise, as "high dynamism on the part of the speaker will intensify the evaluations of a speaker so as to make a communicator with moderate expertise appear more expert and one with moderate character appear more trustworthy").

104 *See* Waicukauski et al., *supra* note 93, at 75 (noting that the speaker's dynamism helps keep the listener's attention).

105 JEANS, *supra* note 2, § 9.3, at 214–15.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

ing the students to retain the information.[112] Moreover, the importance of primacy was demonstrated by the sustained effect of the students' first impressions. In the trial context, the impression of counsel that is formed early in the trial will color both the client and the case.

An advocate's personality and style are perhaps the great intangibles. Some trial lawyers, just as some people, are blessed with powerful personalities and, as a result, will often be more favorably received by an audience. This advantage is built-in. A winning personality cannot be taught. Charm does not come in a bottle. Likeability does not come easily to everyone.

However, there are basic principles of trial advocacy that can help trial lawyers improve the quality of their advocacy and help them avoid the pitfalls of a negative impression. Although there is no magic formula to enhance the likeability or charisma of the witness (or advocate), there are a few fundamental techniques available to anyone. For example, lawyers should avoid (1) the use of legalese or jargon associated with the case,[113] (2) speaking down to the jury in a condescending manner,[114] (3) inadequate preparation,[115] (4) excessive partisanship, and (5) an unnecessarily combative demeanor.[116] All of these behaviors serve to distance and alienate the jurors.

Undoubtedly, there is no one right way to try a lawsuit, but there are a number of wrong ways to go about it. By observing and practicing sound communication techniques, trial counsel can more effectively build rapport with the jury and increase the retention and persuasiveness of evidence presented through witness testimony. Regardless of a lawyer's built-in charisma (or lack thereof), advocates can maximize their effectiveness by integrating the techniques and methodologies described in this Article.

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112 *See id.*

113 CALDWELL ET AL., *supra* note 36, at 7-4 ("Only the egos of the questioner and expert witness are served if testimony is limited to expertise.").

114 *Id.* ("Direct examination is the time to educate the jury, not confuse them.").

115 *See* Jeffrey H. Kinrich, *Dull Witnesses*, LITIG., Spring 1993, at 38, 38. However, Jeffrey Kinrich warns about having too much of a good thing:

> Don't over-rehearse testimony. An overly prepared witness can appear rushed or glib. You want your witness prepared to answer the questions, but not to have a canned answer ready. Absolutely the worst thing that can happen with an over-prepared witness is drawing a blank: If the witness has virtually memorized her testimony, moving from specific point to specific point, but then there is a distraction or diversion, the result can be a witness completely at sea.

Id. at 40.

116 *See infra* note 225 and accompanying text.

III. TRADITION AND TRIANGLES

The direct examination holds a place of critical importance at trial because it is a party's primary opportunity to elicit the testimony necessary to support the party's claim or defense.[117] At the same time, the direct requires the examiner to surmount a number of imposing obstacles to communicate with the jury. Unlike the opening statement or closing argument, the advocate on direct must communicate with the jury through the mouth of a witness. Unlike cross-examination, the examiner may not ask the witness leading questions or otherwise argue the case to the jury through those questions.[118] Moreover, the examiner is subject to interruptions by opposing counsel in the form of objections either to the questions asked or the answers given. These limitations on direct examination impose formidable barriers to telling the jury a memorable and interesting story.

The unique challenges posed by the direct examination can be depicted as a triangle, with the examiner at one corner (A), the witness at the top (B), and the jury at the third corner (C) (see Figure 2). During voir dire, opening statement, and closing argument, the advocate is able to speak directly to the jury—that is, to go from A to C without having to transmit the message through B (the witness) (see Figure 3).[119] Consequently, the lawyer speaks to the jury without filter or restraint. Voir dire allows for the luxury of hearing directly from the jurors (see Figure 2). This greatly enhances the communication

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117 *See* Herman, *supra* note 59, at 70.

> Most cases are won or lost on direct examination. This is not surprising because direct examination is the heart of your case. It is the story you promised in opening statement that the jury would hear, and it is the proof you will tell the jury in closing argument that you have delivered.

Id.; *see* Purver et al., *supra* note 39, at 10 ("Trials are most often won on the strengths of your case rather than on the weaknesses of your opponent's case. The direct examination of witnesses is the centerpiece of your presentation.").

118 *See* Herman, *supra* note 59, at 74 ("Leading on direct is prohibited. But it is permissible when discussing preliminary matters or when examining an adverse or hostile witness."); Siemer, *supra* note 54, at 50 ("[I]t is best to avoid leading questions for two reasons: first, an objection can impede the pace of the direct and, second, the jury may think the examiner is spoon-feeding the witness, and believability or persuasion will be affected adversely.").

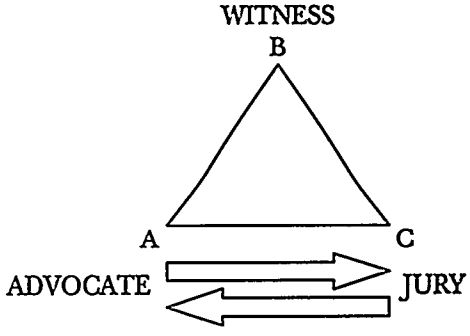
119 *See* Hangley, *supra* note 38, at 20–21.

> [T]he lawyer must envision a direct examination as a conversation that includes the jurors as well as the witness. The conversation between witness and jurors is a curious one, to be sure. The lawyer manages both sides of the dialogue. One of the participants, the juror, does not get to ask his questions or express his views until the other participants have left the room.

Id.

process. On the other hand, the direct examination necessitates traveling two legs of the triangle, from the examiner (A) to the witness (B) and from the witness (B) to the jury (C). This substantially complicates the communication process (see Figure 4).[120] Although the cross-examination also requires a trip through the witness, procedural rules enable the lawyer to communicate his message to the jury more directly than during the direct. For example, the ability of the cross-examiner to ask leading questions[121] makes it possible, without regard to the cooperation of the witness, to argue a point to the jury by the questions asked, and thus, to travel directly from A to C.[122] At the same time, of course, the cross-examiner confronts a hostile witness, one who is typically not interested in assisting the examiner. Undoubtedly, this aspect of the cross makes control of the witness critical to ensure that the witness is not able to communicate his message to the jury during the cross.[123]

Figure 2: Voir Dire



120 *See id.* at 21 ("[A]lthough his testimony has to sound and feel like a conversation, the artificial, nonleading, question-answer form of direct examination is nothing like a normal conversation.").

121 *See* FED. R. EVID. 611(c).

122 *See* 3 STERN, *supra* note 24, at 1–2. Stern asserts that the purpose of cross-examination is to argue the case to the jury "right through the witness." *Id.* at 2. He then compares this aspect of the cross to the other parts of the trial, as follows:

> [D]uring cross examination it is far, far easier to argue than when . . . conducting voir dire (when [the advocate is] supposed only to get information from jurors), or opening [the] case (when [the advocate is] forbidden by custom to argue), or conducting . . . direct examination (when [the advocate] too often merely store[s] information into the record for later use). For now that we are on cross-examination, we will not only be permitted to argue the case; we will be encouraged to do so.

Id.

123 *See id.* at 58 (noting that the difficulty with cross-examination results from the "noncooperating witness who . . . is more prone to deny than agree with the assertions in your 'questions'").

Figure 3: Opening Statements and Closing Arguments

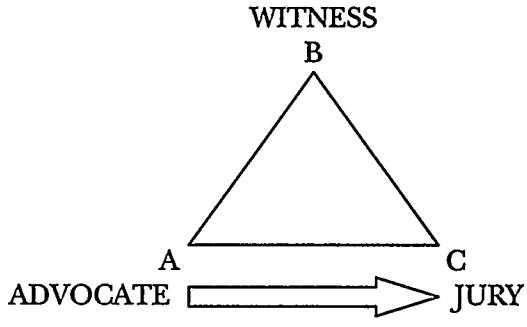
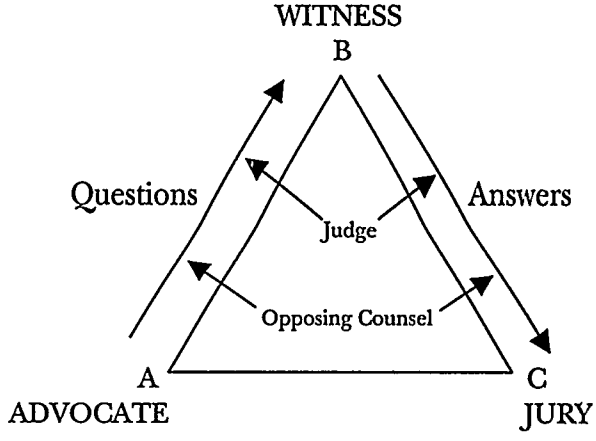


Figure 4: Direct and Cross-Examination



The direct examination is complicated not only because of the need to communicate through the witness,[124] but also because of the other players in the courtroom drama—the opposing counsel and the judge. They both reside in the middle of the triangle, poised to interrupt the direct examination at every turn (see Figure 4). The opposing lawyer can disrupt the direct examination between A and B by interposing an objection to the question asked or can disrupt the direct between B and C by interposing an objection to the answer given. In either event, the judge can sustain the objection and prevent the

124 *See* Purver et al., *supra* note 39, at 10.

> Despite its importance, direct examination may be the least studied aspect of the trial process. Many lawyers assume that direct examination will be among the easiest phases of trial because they will introduce evidence from their own witnesses. Nothing could be further from the truth, for the examination of witnesses introduces a dangerous and unpredictable element into trial—a third person over whom you have only limited control.

Id.

information from reaching the jury or can lodge an objection *sua sponte*. Equally important, the judge can order a sidebar or a recess. This robs the examination of the natural rhythm desired by all advocates.[125] Put in perspective, these challenges combine to make the direct a terribly difficult means of transmitting the story of the case to the jury.

The traditional approach to direct examination fails to provide a satisfying answer to the direct's communication barriers. Indeed, a direct examination conducted today would likely look much as it did decades, and even centuries, ago. A Clarence Darrow or William Jennings Bryan examination from the early 1900s would have sounded much like a Louie Nizer examination from the 1950s and much like a typical examination today. Whereas these masters, by force of their vast talent, can thrive under most any scenario, it remains for the more common traveler to seek a path more likely to ensure consistent success.

The traditional approach to direct examination is an ill-advised path. That approach is to work chronologically through the information and to do so in an unbroken chain of questions and answers that frequently run the real risk of degenerating into a mind-numbing continuum, with a long series of questions and answers merging into more questions and answers. Soon topics merge into topics, and the jurors' attention is compromised as they lose any sense of what is important about the witness's testimony. Because the traditional "continuum" direct examination moves from question to answer to question to answer in a seamless flow, there is no pause or break to allow the audience to collect itself and absorb what it has heard, much less reflect on the points being made.[126] This presupposes that jurors are recorders, noting all that is said. It also presupposes that they are able to discern or divine what counsel deems to be the most significant points. There is no attempt to categorize or prioritize the testimony so that the jury can understand the most important elements in the examination.[127] The uninterrupted flow of information can, and

125 On the importance of rhythm, see *id.* at 14 ("[V]ary the rhythm of your speech and the structure of your sentences .... Adopt a more conversational tone by using open-ended questions that call for descriptive responses.").

126 *See* Herman, *supra* note 59, at 76 ("Particularly in a long direct, let the jury (and your witness) know when you are switching from one topic to another.").

127 *See id.* at 70 ("[T]he content of each direct examination should have a logical structure. Usually, this takes the form of eliciting the background of the witness to establish rapport and credibility with the jury, detailing what happened, and amplifying the witness's testimony with real or illustrative evidence.").

generally does, become overwhelming and frequently jeopardizes its effective processing.

Similarly, the structure of the traditional direct examination is rarely planned or thought out in any careful or meaningful way. The information is presented in the same order for each witness, regardless of the nature of the witness testimony. The examiner begins with the briefest possible background of the witness—perhaps nothing more than the witness's name and address—then mechanically elicits the educational and employment history of the witness and then asks about the witness's personal knowledge of the pertinent events, always in chronological order.

This, of course, is not the most effective way of going about the business of direct examination. It is the focus of this Article to set forth seven techniques designed to improve direct examinations. If executed effectively, these examination skills will translate into more interesting and compelling witness testimony. The list of techniques is by no means exhaustive, and the incorporation of each technique is, of course, not a guarantee of success. Instead, the techniques included herein are merely illustrative. We have selected two techniques for organizing and structuring the direct (headlining and blocking), two techniques regarding particular parts of a good direct (personalization and staging), two techniques related to the tools used to communicate the testimony to the jury (visual aids and lists), and one technique for building the credibility of the advocate and witness (disclosing weaknesses).

It should be obvious that an effective direct examination encompasses much more than these seven techniques. This Article is not about how to ask good questions,[128] or how to develop the action sequence,[129] or how to sequence the material in the direct.[130] Time and space preclude a thorough discussion of the importance of a central theme for the case[131] and the relationship of each direct examination

128 On how to ask good questions, see *id.* at 72 ("Harness your witness with short, clear questions that do not call for a narrative."); James W. McElhaney, *Direct Questions*, LITIG., Fall 1999, at 63, 63; McElhaney, *supra* note 58, at 76 ("Then there is verbal clutter: long, confusing questions that destroy the pace and flow of even the best witness's testimony.").

129 On developing the action sequence, see CALDWELL ET AL., *supra* note 36, at 7-4 ("An effective direct examination sets out the essential preliminaries before there is testimony about 'what happened.'").

130 On sequencing, see Herman, *supra* note 59, at 70 ("[Y]ou should consider whether a topical structure for presenting the testimony would be more effective than a chronological one.").

131 On the importance of a central theme, see *id.* ("A coherent story must also contain a coherent legal theory. Thus, be sure your direct examinations elicit the

to that theme.[132] Moreover, the fundamental task of witness preparation obviously calls for more than the one paragraph in this piece.[133] Our omission of these critical points does not reflect, in any sense, that they are unimportant or less important than the techniques we discuss. To the contrary, each and every one of these topics plays an undeniably important and, in some cases, central role in the direct examination.

IV. Examination Techniques and Empirical Data

A. Blocking and Headlining

1. Overview of Blocking and Headlining

The first step toward constructing a clear and coherent direct examination is to fully appreciate the jury's condition as it listens to witness testimony. First, the jury does not interact with the witness. They are passive recipients of the testimony.[134] Second, the witness's story does not come to the jury as a narrative whole. Rather, it is revealed in pieces, constantly interrupted by another question, an objection, or a recess.[135] Third, much testimony is communicated in legal language and unfamiliar case terminology.[136] These barriers to any kind of fluid or clear revelation make the direct examination extraordinarily difficult and require the advocate's constant attention to the jury's perspective during the direct examination. Viewed from the jury's

testimony that establishes the elements of your claim or defenses."); Wilkins, *supra* note 54, at 76 ("Jurors should concentrate on the heartbeat of the case throughout the trial. They will be able to remember only a limited amount of information, and so the attorney should concentrate on a few key issues rather than employing an approach which is too diffuse.").

132 On the significance of establishing proof, see Herman, *supra* note 59, at 72 ("A compelling story cannot overlook technical requirements of proof.").

133 On the importance of witness preparation, see *id.* ("Coherent testimony requires preparing each witness for direct examination. It is not sufficient to merely tell the witness what you will ask; instead, you must conduct one or more complete examinations of the witness before trial.").

134 *See* William S. Bailey, *Lessons from "L.A. Law" Winning Through Cinematic Techniques*, Trial, Aug. 1991, at 99, 98–99 ("Whenever possible, examination of a witness or an oral argument should start with a dramatic punch that hooks the jury to the theme of the case.")

135 *See* Siemer, *supra* note 54, at 49–50 ("Transition sentences can ease the shift from one topic to another. Keeping the chronology confined to one topic may also help the witness give a complete account without prompting.").

136 *See* Caldwell et al., *supra* note 36, at 10-3; Herman, *supra* note 59, at 74 ("Words and phrases you are accustomed to as a lawyer may be foreign or awkward to the jury. Speak their language.").

perspective, effective direct examinations must continually give them updates about what the witness has said, what the current topic of discussion is, and why that topic is important.

The reality, of course, is that *every* witness's testimony consists of discrete parts and subparts. Witnesses will reveal some information about their personal or professional background and will discuss various aspects of the events in question.[137] Each part or block should begin with a headline, or signpost, alerting the jury to the subject matter of the upcoming part. The headline should be followed by a series of short, prodding questions that allow the witness to relay the pertinent information. Each block should conclude with a wrap-up of the information imparted during that block and then a transition to the next block.[138]

As discussed, the traditional approach to direct examination is to work through the information chronologically and to do so with an unbroken chain of questions and answers.[139] While at first blush this may seem correct, such an approach frequently degenerates into a continuum too massive to be retained.[140] Blocking, on the other hand, recognizes the reality that *every* direct examination is made up of component parts.[141]

Parallels to the use of blocks and headlines in other forms of communication abound. Just as well-formed paragraphs have topic

137 *See* MCELHANEY, *supra* note 39, at 343–44 (stating that using leading questions initially as permitted in the Federal Rules of Evidence relaxes the nervous witness).

138 *See* JEANS, *supra* note 2, § 9.13, at 222 (comparing the use of topic sentences in direct examination to chapter and heading organization in printed material to assist the reader in digesting the subject matter); *see also* MCELHANEY, *supra* note 39, at 339 (noting that witnesses adopt the pace of the examining lawyer, and if the lawyer's pace is slow and convoluted using overly long questions, the testimony will replicate this demeanor, lulling the jury to sleep). James McElhaney also notes the importance of pace and organization to assist the jury in comprehending the testimony and to keep the jury's interest. He suggests organizing the material into logical or chronological order, or both. *See id.* at 343–44. A short, clear question, in McElhaney's opinion, is the most sophisticated direct examination technique, as both witness and jury understand the question, keeping the witness from becoming befuddled. *See id.* at 358.

139 *See* Bailey, *supra* note 134, at 99 ("In 'scripting' the testimony sequences, lawyers should keep in mind that short, pithy statements are always preferable to long, convoluted ones."); *cf.* Kinrich, *supra* note 115, at 38 ("The structure of the testimony—the flow of questions and answers—may also be a cause of dullness. This is a polite way of saying that the lawyer may be more the problem than the witness.").

140 *See* JEANS, *supra* note 2, §§ 9.13–9.14, at 222.

141 *See id.*

sentences[142] and good essays have a clear and easy-to-follow organization,[143] so too must an effective direct examination have clear and identifiable blocks introduced by headlines.[144] For instance, in examining a percipient witness to an automobile collision, it is first necessary to understand the perspective, or vantage point, of the witness who viewed the collision. That vantage point should be elicited apart from the actual action sequence, the part of the witness's testimony wherein the witness relates what occurred. Under the continuum approach, an examiner would elicit information related to the witness's perspective prior to shifting to the accident itself. However, the examiner will not break or sever those two discrete topics in any noticeable way.[145] Instead, the first simply bleeds into the second. In contrast, if the advocate addressed these two topics separately, the jurors would have an opportunity to focus first on one, then the other, and to know the purpose and content of each block in advance.[146] Blocking allows jurors the opportunity to take the testimony in smaller doses that are more easily retained.[147] Blocking also breaks direct examination into "digestible" subparts, so that learning and retention are optimized.[148]

Recognizing the decreasing attention spans of most Americans, a technique or device that relates information in smaller doses increases the likelihood that the target audience will retain that information.[149] Therefore, to conform with the typical juror's attention span,[150] short

142 WILLIAM STRUNK, JR. & ELWYN BROOKS WHITE, THE ELEMENTS OF STYLE 16 (3d ed. 1979) ("As a rule, begin each paragraph either with a sentence that suggests the topic or with a sentence that helps the transition.").

143 *See id.* at 15.

144 Wilkins, *supra* note 54, at 76 ("[T]he lawyer should provide a headline . . . for the topic to be covered next. . . . [I]t breaks up a long line of questions and lets jurors focus on what topic is next.").

145 *See id.*

146 *See id.*

147 *See* JEANS, *supra* note 2, § 9.13, at 222.

148 Wilkins, *supra* note 54, at 76–77.

149 *Cf.* Sousa, *supra* note 51, at 22 (noting that with the development of a multimedia society, children's attention spans have diminished because of the increased pace of living and that children's brains have adapted to this influx of rapid sensory and emotional changes by "engaging in all types of activities of short duration at home and in the shopping malls").

150 *See* William S. Bailey, *Expert Witnesses in the Sound-Bite Era: Keeping Jurors' Attention*, TRIAL, Feb. 1993, at 65, 65 ("The shrinking attention span of the public is a fact of life in the last decade of the 20th century. Everywhere you look, consumers of information are being given abbreviated, concentrated messages that don't require much sifting to get to the point.").

examination blocks should be utilized.[151] Because the attention span of the typical juror is seven minutes,[152] blocks should be limited, to the extent possible, to about seven minutes. Accommodations must be made to keep abreast of changing audience information demands, and blocking is just such an accommodation.[153]

Each block should begin with a headline, or signpost.[154] This headline is a simple statement announcing the next topic, followed by a question. It is designed to clearly set forth the subject matter of the forthcoming block.[155] The headline alerts the jurors to the subject matter of that particular block and signals that the examiner is now shifting topics and is setting the stage for that new topic. Given the general prohibition against asking leading questions[156] during direct examination, lawyers are often reticent to utilize them.[157] Even many lawyers aware of the need for headlines allow the leading question prohibition to severely restrict their use of headlines. Thus, they often say to a witness, "directing your attention to the night of May 1 . . ." rather than separating the headline from the question. Instead, the examiner should clearly separate the headline from the next question, as follows: "Now that we are familiar with your education, let's talk about the professional positions you've had. What was your first job out of college?"

The paralyzing fear of suffering a leading question objection is often unnecessary. The Federal Rules of Evidence and state evidence codes exempt transitional statements from the leading question prohibition and, in fact, can actually be cited to support the use of headlines.[158] For example, Rule 611(c) of the Federal Rules specifically

151 *See* Wilkins, *supra* note 54, at 75–76 ("It is helpful for counsel to present a single topic before the jury instead of wandering among several subjects. Each topic can be a separate package of information.").

152 Bailey, *supra* note 150, at 65–66; J. Patrick Hazel, *Direct Examination*, LITIG., Fall 1987, at 6, 8.

153 *See* Wilkins, *supra* note 54, at 76.

154 *See* JEANS, *supra* note 2, § 9.13, at 222.

155 *Id.* § 9.14, at 222.

156 A leading question most often is one that may be answered with a "yes" or "no" response and suggests the desired answer, for example, "was the light green when the white truck entered the intersection?" Leading questions prevent the jurors from hearing the testimony from the witness and deprive the jurors of assessing the witness's credibility. After all, the only words the jurors will hear from a witness subjected to leading questions is "yes" or "no." *See* PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 112–13 (3d ed. 1997).

157 *See* MCELHANEY, *supra* note 39, at 342–43.

158 *See* FED. R. EVID. 611(c); DENNIS D. PRATER ET AL., EVIDENCE, THE OBJECTION METHOD 12 (1997) (noting that subpart (c) carves out a rather broad exception to the limitation of leading questions placed within the discretion of the trial court).

states that leading questions may be used on direct examination "as may be necessary to develop the witness's testimony."[159] The headline, followed by a nonleading question, is nothing more than an effort to develop the witness's testimony.

This is an opportunity for the examining lawyer to boldly set the stage for the jurors and the witness. Once the headline is in place, the examining lawyer must figuratively step back and refocus the jurors' attention solely on the witness. This is perhaps the only part of the trial where the lawyer should relinquish the white-hot spotlight.[160] The short, prodding "What happened next?" type of question is ideally suited for this purpose.[161] Instead of constantly shifting from the examiner to the witness, these questions allow the jurors to devote their attention exclusively to the witness.

In addition to setting the stage for the new block of testimony, each headline also should contain a transition that segues from the just completed block. This transition serves not only to shift topics, but also as an opportunity to recap the just completed block. The examiner can briefly highlight for his audience the essence of what they should have retained from the just completed block.

In the planning stage, counsel will determine how long he or she wants the witness to testify and how many blocks to include. The number of blocks will vary depending on the complexity of the witness's testimony. A witness to a car accident may involve as few as four blocks, whereas the direct examination of an expert witness in a product liability case may involve a dozen blocks. When in doubt, go to another block. As a general guide, potential blocks might include: a background or personalization block; an expertise, experience, or education block; a staging or context block; an action sequence or observation block; an opinion or characterization block; and a summary block. Several of these blocks will be described in much greater detail later in this Article.

Another significant advantage of blocking is that each new block provides the examiner, the witness, and, most importantly, the jury with the opportunity to start over fresh. Because each block is self-

159 FED. R. EVID. 611(c).

160 During the opening statement, closing argument, and cross-examination, the examiner wants the jury to focus entirely on him or her. This is referred to as the "white-hot spotlight," as in a live stage show when the room goes dark except for the spotlight on the performer on stage. During direct examination, however, the focus should shift from the examiner to the witness so that the jurors are picking up the "intangibles" which will aid them in developing rapport with the witness and ultimately increase witness credibility. *See* CALDWELL ET AL., *supra* note 36, at 7-4.

161 *See* MCELHANEY, *supra* note 39, at 358.

contained, with a beginning (headline), middle (short, prodding questions), and end (wrap-up and transition to next block), if a particular block becomes confused, or the witness loses focus, the problem is minimized as soon as that block is completed. In the subsequent block, the examiner, the witness, and particularly the jury will start anew, refocused on the new topic. In contrast, with the continuum method, once the rhythm or concentration is lost, confusion ensues, and it is very difficult to set things right. Blocking, with its frequent breaks, allows all parties to regroup and re-focus. In a recent jury research project involving contract issues and a default between a bank and land developers, one mock juror spoke about his confusion:

> I got very lost when he was discussing all the letters back and forth. Once I got lost, it was hard for me to get back into it. It would have been very helpful if he had refuted the plaintiff's position point by point. He also should have elaborated more on the chronology of events leading up to the lawsuit.[162]

This illustrates how jurors can get lost in testimony and how blocking can assist them in segmenting information so that they can more easily retain it.

2. Illustrations of Headlining and Blocking

The following illustrates headlining and blocking during direct examination. In this case, liability turns on whether the plaintiff, Mrs. Putman, was in the crosswalk or fifteen feet beyond the intersection when she was struck by defendant's car. In the preceding block, the plaintiff's attorney elicited the witness's background information, including the fact that she is employed as a crossing guard. The examination now picks up with a headline.[163]

> *BLOCK #1: So now that we know you were a crossing guard on duty at the time of the accident, let's turn to your vantage point just before the accident. Where were you?*
>
> A: I was standing on the southwest corner of Boulder and Cameron.
>
> Q: What were you doing?
>
> A: I had just stopped a little boy who had run across the crosswalk. I was bent down and talking to him.

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162 Client confidentiality concerns preclude recitation of any specific information about the parties in the referenced case. However, based on the experience of the authors, the juror's reaction is typical of many cases.

163 Prior to the staging block reproduced in the text, the previous block would have covered the personal background of the crossing guard, her training and duties as a crossing guard, and the importance of the observation skills of a crossing guard.

Q: How were you positioned in relation to the intersection?
A: I was facing the intersection.
Q: Was there anything blocking your view of the intersection?
A: No.
Q: Was the sun a factor?
A: No.
Q: Why was that?
A: The sun was at my back.

BLOCK #2: Now that we can visualize your position at the southwest corner of Boulder and Cameron while you were facing the intersection, let's turn our attention to what happened. Please tell the jury when you first saw Mrs. Putman.

A: I first saw her while I was talking to the little boy.
Q: And where was she?
A: She was crossing Boulder Avenue in the crosswalk.
Q: What drew your attention to her?
A: The fact that she began crossing the street—it's my job to pay attention when anyone is in the crosswalk.
Q: Describe how she was walking. Was she running?
A: No, she was not running. She was walking in an average stride.
Q: How far was she from you when you first noticed her?
A: Well, she was just approaching the median area, so I would have to say that she was about 40, 45 feet from me.
Q: What did you notice next?
A: I noticed defendant's car.

BLOCK #3: Let's stop right there. As you were standing at the intersection and had an unobstructed view of Mrs. Putman and defendant's car, what drew your attention to defendant's car?

A: Well, I remember being concerned when I saw Mrs. Putman crossing because she didn't wait for my assistance. It's a busy intersection, and that's why the city hired a crossing guard for peak traffic times. So, when I saw Mrs. Putman crossing, I looked to see if any cars were coming.
Q: How far was defendant's car from you when you first noticed it?
A: It was about 50 or 55 feet from me.
Q: Were there any obstructions blocking your view of defendant's car?
A: No.
Q: When you saw defendant's car, was it moving or stopped?
A: It had slowed down to turn but it kept moving.
Q: How fast would you say defendant's car was going?
A: I would estimate between 10 and 15 miles per hour.
Q: What happened next?

A: Well, Mrs. Putman continued to cross the street. Like I said, she was about halfway through the intersection. I looked away for a second or two to watch the little boy walk down the street when I suddenly heard a loud thud followed by screeching brakes. Immediately I looked back and saw Mrs. Putman on the hood of the car. It was horrible. I have never seen anything like that before.
Q: Where was the defendant's car in relation to the intersection when you saw Mrs. Putman on its hood?
A: Just a couple of feet past the intersection.
Q: How many feet is a couple?
A: Three or four.
Q: How long had you looked away before you saw Mrs. Putman on the hood of the defendant's car?
A: Half a second or two. It was very brief.
Q: And where was Mrs. Putman just before you looked away?
A: She was in the crosswalk.

This example provides three blocks: a staging block about where the witness was and what she was doing, a second staging block reiterating her vantage point and describing her observations just prior to the accident, and then an action sequence block where the witness describes the actual accident. In the headline for the first staging block, the examiner wrapped up the preceding section so that the jury had a second opportunity to hear the information already provided and then previewed the current block. By tying in the previous information with the next point of focus, the examiner gave the jury a framework on which to build, thus augmenting the jury's ability to retain testimony.[164] From the first staging block, the jury learned that this witness was responsible for knowing who was in the intersection and that the witness was looking directly at the crosswalk for almost the entire action sequence. The second staging block precisely described her observations just prior to the accident. When there are several eye-witnesses to an accident, all with differing vantage points and testimony, the examiner must establish the credibility of his or her witness as opposed to the others who merely happened on the scene or were preoccupied with other activities when the accident occurred. With the completion of the preparatory staging blocks, the examiner turns to the action sequence. The more compelling the testimony of the witness, the more the jury will attend to and retain that testimony.

When the stage has been properly set, the action sequence can be delivered without interruption because the details were previously cov-

164 *See* MAUET, *supra* note 36, at 76.

ered. For instance, it would disrupt the action sequence if the examiner had to ask how far the witness was from the plaintiff just before the accident. That is a detail that should be in place before launching into the action sequence.

3. Empirical Data to Support Use of Blocking and Headlining

a. Memory and Concept Import

Philosophers and researchers have long been intrigued with memory—what is retained and what is forgotten.[165] A critical finding is that memories that are organized around a central concept or topic are remembered, whereas those that are not are mostly forgotten.[166] Certainly everyone has had the experience of remembering the concept or even the conversation and forgetting the components. For example, we might remember that we definitely will not vote for a particular candidate because he's not trustworthy and, at the same time, not be able to recall the event that led to this conclusion.[167] The concept (for example, untrustworthiness) can frame what is recalled. Consequently, headlining alerts the jury to the topic at hand, and blocking directs the information to the particular topic.

It is important to bear in mind, however, that people differ in the way they frame recalled information.[168] That is, any particular headline might have different associations for different people. Subsequent information that is seen as consistent with the headline for one juror may be viewed as inconsistent for another.[169] It is also possible that the headline chosen by the attorney will not be the one retained as relevant by every juror.

165 *See, e.g.*, Hamilton et al., *supra* note 83, at 121–22; Lingle et al., *supra* note 83, at 71; Anne M. Treisman & Garry Gelade, *Feature-integration Theory of Attention*, 12 COGNITIVE PSYCHOL. 97, 131–34 (1980).

166 *See* Treisman & Gelade, *supra* note 165, at 131–34.

167 Or, if we agree to do something (theme), we find it easy to justify our behavior even if it runs counter to our free choice. *See, e.g.*, Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279, 297–300 (1977); Thomas K. Srull & Robert S. Wyer, Jr., *Category Accessibility and Social Perception: Some Implications for the Study of Person Memory and Interpersonal Judgments*, 38 J. PERSONALITY & SOC. PSYCHOL. 841, 851–55 (1980).

168 SIEGFRIED STREUFERT & SUSAN C. STREUFERT, BEHAVIOR IN THE COMPLEX ENVIRONMENT 17–18 (1978); Barbara Hollands Peevers & Paul F. Secord, *Developmental Changes in Attribution of Descriptive Concepts to Persons*, 27 J. PERSONALITY & SOC. PSYCHOL. 120, 126–27 (1973).

169 *See* Seymour V. Rosenberg & Andrea Sedlak, *Structural Representations of Implicit Personality Theory*, 6 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 235, 236–38 (1972).

Two factors strongly influence the probability that a category or block will be used to encode new information: the frequency with which one has used it in the past and the recency with which it has been activated.[170] Because the examiner has no control over the frequency with which a particular "headline" has been used in the past by the jurors, it is best to choose one that the advocate believes is connected to the jury's common experiences. The examiner does, however, have control over recency. By labeling his questioning with a headline, the advocate helps the jurors to organize all of the information that follows.[171]

Additionally, choosing a headline that is unique or distinctive can also serve to enhance the probability of its usefulness.[172] Minority status is a salient or distinctive feature for jurors who share that minority status. If race or gender is an issue, jury members who share the witness's minority status will identify more strongly with the witness than will those of majority status.

Categorizing allows people to make inferences based on incomplete information. These inferences are based on (a) memory for attributes associated with the category in one's past experience, (b) memory for attributes stereotypically associated with the category, and (c) memory for some particular instance of experience with the category.[173] Categorization research presupposes that concepts are stable mental representations both within and across individuals.[174] It is presumed that once a person acquires a concept, its critical attributes remain the same across items and contexts. In addition, it presumes

170 *See, e.g.*, E. Tory Higgins & Gillian King, *Accessibility of Social Constructs: Information Processing Consequences of Individual and Contextual Variability*, *in* PERSONALITY, COGNITION, AND SOCIAL INTERACTION 69, 78–80 (Nancy Cantor & John F. Kihlstrom eds., 1981); Srull & Wyer, *supra* note 167, at 851–54; Thomas K. Srull & Robert S. Wyer, Jr., *The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications*, 37 J. PERSONALITY & SOC. PSYCHOL. 1660, 1669–71 (1979).

171 This is also called "priming."

172 *See, e.g.*, William J. McGuire et al., *Effects of Household Sex Composition on the Salience of One's Gender in the Spontaneous Self-concept*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 77, 88–90 (1979); William J. McGuire et al., *Salience of Ethnicity in the Spontaneous Self-concept as a Function of One's Ethnic Distinctiveness in the Social Environment*, 36 J. PERSONALITY & SOC. PSYCHOL. 511, 511–19 (1978); William J. McGuire & Alice Padawer-Singer, *Trait Salience in the Spontaneous Self-concept*, 33 J. PERSONALITY & SOC. PSYCHOL. 743, 744 (1976) ("[O]ne selectively notices the aspects of the object that are most peculiar."); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163, 174–76 (Daniel Kahneman et al. eds., 1982).

173 Lingle et al., *supra* note 83, at 92.

174 *See id.*

that to the extent that people have similar representations of the concept, they will assign the same attributes to it.

Some categories are clearer than others.[175] For example, it is obvious that a chair belongs to a furniture category, but not obvious that a rug does. Thus, for categories such as "good," "bad," or "expert," many attributes will be held in common by all people, but many will be uniquely held by particular individuals.

Just as the trial "story" must have a coherence, category membership has a coherence.[176] The attributes of a bird (for example, has wings, flies, has feathers, lives in trees) are not independent; they bear a functional inter-relationship. Thus, the headline must follow with attributes that clearly support it.

b. Primacy

As stated, primacy refers to the findings that we best retain what we first learned or heard.[177] Because of the power of primacy, a direct examination should utilize this effect by "front-loading" the examination, or placing the most important pieces of information at the beginning of the testimony.[178] This principle is directly tied to headlining and blocking. Think of direct examination as a newspaper article with a headline, a sub-headline, and the body of the story. The body of a newspaper story starts with a first paragraph that contains all of the basic information in the story (who, what, when, where, why, and how). Successive paragraphs flesh out the story by providing more and more background information until the end of the article. This is a model for how a modern jury listens to trial testimony.

These illustrations and others show how recall can be enhanced and demonstrate the effect of information first received on subsequent evaluation and memory. Taken together, they demonstrate the

175 *See, e.g.*, Eleanor Rosch et al., *Basic Objects in Natural Categories*, 8 COGNITIVE PSYCHOL. 382, 383–93 (1976); Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL.: GEN. 192, 197–99 (1975); Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 28, 28–29 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

176 *See* Lance J. Rips, *Similarity, Typicality, and Categorization*, *in* SIMILARITY AND ANALOGICAL REASONING 21, 21–59 (Stella Vosniadou & Andrew Ortony eds., 1989).

177 *See* Hazel Markus & R.B. Zajonc, *The Cognitive Perspective in Social Psychology*, 1 HANDBOOK OF SOCIAL PSYCHOLOGY 137, 180 (Gardner Linzey & Elliot Aronson eds., 1985).

178 *See* MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 283, 288 (1989) (noting that strong witnesses should be at the beginning and at the end, sandwiching any weaker witnesses in the middle); BERGMAN, *supra* note 156, at 100; MAUET, *supra* note 36, at 75.

primacy effect—the tendency to have greater recall for that presented first. Researchers are as interested in "why" something occurs as in "what" occurs. This search for explanations falls into two main categories: motivational and cognitive. Motivational explanations are essentially "need" based.[179] That is, the behavior serves some self-serving human need.[180] Cognitive explanations are assumed to be a function of how our brains work, regardless of any personal desire.

c. Attention

Many aspects of what "grabs" our attention are cognitive. For example, we tend to notice items or events that are novel, unexpected, or salient more than those that are common or mundane.[181] In addition, once a judgment has been made about an item or event, it can create an expectation for the future.[182] Much of Jack Benny's humor was based on this concept. Listeners to his radio shows would laugh at the fulfillment of their expectation, as the sounds of his arduous trip to his vault for money, his off-key violin playing, or his "Well!" occurred frequently during his shows. Milton Berle also used this comic ploy when an off-stage actor emerged to hit him in the face with a giant powder-puff every time he yelled "Make up." Other celebrities such as Howard Stern, Madonna, and Dennis Rodman have created the expectation for behaviors that are shocking or scandalous.

Lawyers have puzzled for years over some fundamental questions about jurors' decision-making process. What will jurors remember? What will they carry with them into the deliberation room? The process of remembering requires that information or an event is (1) encoded into the brain, (2) stored in the brain, and, finally, (3) retrieved from the brain. As stated, for an event to be encoded in the first place, one must pay attention to it. As events occur around us, there is a *preattentive* stage. This stage is purely sensory, automatic, and nonconscious.[183] For example, much occurs within a courtroom: the members of the audience may be whispering, coughing, or adjust-

179 S.E. Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCHOL. 258, 258–60 (1946); *see* Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603, 606 (1980) (explaining "confirmation bias" in memory functioning).

180 *See* Greenwald, *supra* note 179, at 605.

181 *See infra* note 188 and accompanying text.

182 *See* FREDERICK, *supra* note 45, at 205 ("To facilitate the processing of information about people and events, people rely on schemata or themes to 'chunk' or group information in such a way that organization, structure, and meaning are imposed. These schemata establish expectations about future events and interactions.").

183 ZIMBARDO, *supra* note 49, at 194.

ing their clothes; there may be movement at the defense and plaintiff tables; the bailiff may be busy reading papers; and the judge may be fidgeting. The subconscious awareness of all of these events occurs at the preattentive stage.

In contrast, attention is defined as a "state of focused awareness accompanied by sensory clearness and a central nervous system readiness to respond to stimulation."[184] In other words, attention is selectively paid to events that might require us to modify or regulate our own behavior.[185] This selection depends on both internal and external factors. For example, one might spend a lot of driving time in the preattentive stage, with no conscious awareness of stopping for red lights or regulating speed, while simultaneously thinking about and rehearsing his opening statement to the jury. However, if a car darts out in front of that person, his attention will immediately turn to the car. This is because a person can only fully *attend* to one thing at a time.[186] The driver is only able to continue to drive because driving has become an automatic process. Attentive processing requires the conscious perception of the event and its classification into something meaningful. This classification, or encoding, entails the translation of an incoming stimulus into a unique form that the brain can process.[187] Information that "goes over the jury's head" is an example of unclassifiable information. As such, the information will not be remembered.

What "grabs" the jury's attention? Some principles have universal application. People attend to external events that are novel (for example, an elephant crossing a city street), intense (for example, a loud bang), changing (for example, a flashing light), unexpected (for example, a child darting into the street in front of a car), or that stand out as special or salient (for example, a red pillow in a black and white room).[188] One's current life situation can also dictate what gets noticed. A pregnant woman is more likely to notice other pregnant women than are those who are not pregnant. When hungry, signs advertising food or restaurants will be more salient and noticeable than when one is not hungry.

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184 *Id.* at 190.

185 CHARLES S. CARVER & MICHAEL F. SCHEIER, ATTENTION AND SELF-REGULATION: A CONTROL-THEORY APPROACH TO HUMAN BEHAVIOR 33–55 (1981).

186 *See generally* DONALD ERIC BROADBENT, PERCEPTION AND COMMUNICATION (1958).

187 SPENCER A. RATHUS, PSYCHOLOGY IN THE NEW MILLENIUM 285, 302, 310 (7th ed. 1999).

188 *See* Tversky & Kahneman, *supra* note 172, at 174–76.

Although it is impossible to know much about the internal states of the jurors (for example, hunger or preoccupation with concerns about money), the lawyer will have some clues that could be pertinent to the case. Because stimuli that are salient stand out, factors such as gender, race, ethnicity, or religion can help the advocate predict which jurors will most likely be attending more carefully to the witness and how that attention might be skewed.[189] Just as "ears perk up" when they hear their name, jurors' attention will perk up when they can identify with the witness. Therefore, jurors who share a trait with the witness are more likely to attend carefully to the witness than are those who do not share it. For example, Lutherans who hear that the witness is also Lutheran will attend to that witness more than those of other religions. This attention can then color the interpretation of the testimony. In opposition to this positively toned attention, negative attention can also occur.[190] If an antisemitic juror hears that the witness is Jewish, this will be an attention grabber, and the information given by the witness will be categorized from a negatively biased perspective.

d. Memory

Attention is only the first step toward remembering. If the information is not processed, it is most likely forgotten.[191] Current views divide information processing into three stages: sensory memory, short-term or working memory, and long-term memory.[192] Sensory memory refers to the fleeting impressions we receive from the sights, sounds, smells, and textures of the immediate circumstance.[193] The amount of information we are able to take in at any given moment is

189 *See id.* at 176–77.

190 *See id.*

191 *See* FREDERICK, *supra* note 45, at 205.

> People actively select and process information as it is being received. They have to. It would be impossible to attend to and process all available information; the amount of information available is simply too great. To facilitate the processing of information about people and events, people rely on schemata or themes to 'chunk' or group information in such a way that organization, structure, and meaning are imposed.

Id. "Schemata are helpful in many ways: . . . they increase memory for information and events." *Id.* at 206.

192 *See* Spadaro, *supra* note 45, at 1155.

193 RATHUS, *supra* note 187, at 288 ("Sensory memory is the type or stage of memory that is first encountered by a stimulus. Although it holds impressions briefly, it is long enough so that a series of perceptions seem to be connected.").

quite large, but it lasts only for a second or two.[194] This brief time allows us to decide what is worth processing. Sights (visual memory or icons) last about half a second, and sounds (auditory memory or echo) last several seconds.[195]

The second stage of information processing, short-term memory, lasts up to twenty seconds unless special attention is paid to its content or it is reinstated by rehearsal.[196] We have all had the experience of holding a phone number in our short-term memory by repeating it over and over until we are able to write it down. Researchers have determined that we can only hold seven, plus or minus two, "chunks" of information in our short-term memory.[197] A chunk is either a single piece of information (for example, the number "2") or a grouped set of pieces (for example, the number "123").[198]

In order to store information in our long-term memory, it must be encoded in such a way that we can retrieve it as necessary. Suffice it to say, there are many theories about how this occurs. The capacity of our long-term memory is unknown, but experience suggests that it holds a lifetime of selected information.

e. Retention

Retention refers to an individual's ability to hold the information in working memory.[199] The working memory processes information by sorting it, linking it to prior learned information, and plugging the new information into the structure of what is already known on that topic. When too much information is provided, the working memory becomes overloaded and cannot process the information fast enough to retain it.[200] And, if the information is not presented in an organized, structured manner that allows the formation of links to prior knowledge (even material presented earlier within the same lecture), retention decreases.[201] Blocking is directly related to retention. Blocking presents only limited amounts of information at a time. Thus, the working memory is not overloaded. As such, the information in the block can more readily be processed and retained.

194 Robert G. Crowder & John Morton, *Precategorical Acoustic Storage (PAS)*, 5 PERCEPTION & PSYCHOPHYSICS 365, 366 (1969).

195 *See generally* ULRIC NEISSER, COGNITIVE PSYCHOLOGY 138, 199–206 (1967).

196 *See* Spadaro, *supra* note 45, at 1155.

197 *See* George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81, 91–93 (1956).

198 *Id.*

199 *See id.* at 81, 90–93.

200 *See id.*

201 *Cf.* Sousa, *supra* note 51, at 24, 25.

f. Persuasive Communication

Although researchers have attempted for the past fifty years to find general laws governing persuasion, to date no single pattern has clearly emerged.[202] Even in Carl Hovland's, Irving Janis's, and Harold Kelley's classic Yale University Communication Programme results,[203] they cautioned against drawing generalizable conclusions.[204]

William McGuire extended Harold Lasswell's classical analysis of persuasion,[205] suggesting that the components include the source, message, channel, receiver, and target.[206] In a trial, the sources of the communication are the witness and the attorney. The message(s) should be encapsulated in the headlines chosen for each witness. The channel is the means by which the message is communicated (that is, the testimony, demonstratives, or physical evidence touched by the jurors). The receivers are the jurors, and the target of the message is the behavior you wish to influence (that is, finding the defendant guilty/liable or not). Each component is presumed to have an independent (and possibly additive) effect on the outcome.[207]

McGuire detailed a comprehensive list of twelve events that must occur to influence attitude and/or behavior change.[208] They do not all necessarily apply to all situations. First, you must have the receivers' attention. This requires (1) exposure to the communication, and (2) making sure they are attentive. Attention alone, however, does not insure attitude change.[209] The receivers must also process this information.[210] For this to occur, the receiver must (3) like the message, (4) understand it, (5) generate thoughts related to it (often called "active listening"), (6) be able to do something about the information—this too may not be relevant to jurors in a trial—and (7) agree with the message.[211] Because jurors are instructed not to reach

202 MICHAEL BILLIG, ARGUING AND THINKING: A RHETORICAL APPROACH TO SOCIAL PSYCHOLOGY 99 (2d ed. 1996) ("Social psychologists working in the area of persuasion would freely admit that the bold version of Hovland remains unfulfilled.").

203 CARL I. HOVLAND ET AL., COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953).

204 *Id.* at 5–6 ("Only in this way [systematic follow-up studies] can one ultimately determine whether or not the hypothesis is a valid generalization and, if so, whether it requires specification of limiting conditions.").

205 Lasswell, *supra* note 44, at 37–38.

206 William J. McGuire, *Attitudes and Attitude Change, in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 233, 258 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).

207 *See id.*

208 *See id.*

209 *See id.*

210 *See id.*

211 *See id.* at 258, 260.

a verdict immediately upon hearing a piece of testimony, memory is important. The message must be (8) stored when it is received and (9) retrieved during deliberation.[212] Finally, there must be a demonstration that the message was effective in persuading the jurors to cast their votes as you desire. This is shown in their verdicts and requires (10) making a decision, (11) acting on that decision, and (12) finding that decision congruent with one's self-image.[213]

g. Likelihood of Attitude Change

A trial is a dynamic process. Jurors' opinions shift as they hear testimony by various witnesses and even thoughts from fellow jurors during deliberation.[214] The degree of shift is a function of where a juror currently stands. Muzafer Sherif's and Hovland's seminal contribution to the various ways people react to attitude statements is called *social judgment theory*.[215] The theory was an outgrowth of classical psychophysical studies in which people gave psychologically-based descriptions of physical objects.[216] For example, imagine that you are blindfolded, given an object, and told it weighs two pounds. Now, you are asked to put that object down and are given another one that weighs two and a half pounds, and you are asked to guess how much it weighs. Then, after holding the two pound object again, you are given a twenty pound object and asked to guess its weight. Consistently, findings show that judgments of the heaviness of all weights are affected by the weight of the standard of comparison.[217] When the weight of the new object is close to that of the standard (or anchor), its weight is underestimated, but when it is distant from that of the standard, its weight is greatly overestimated.[218]

Sherif and Hovland noticed that similar effects occur with the comparison of the position of a message and one's own position regarding that issue.[219] They proposed that there are three latitudes that lie on a continuum that describe the relation between one's own position and that of the message.[220] The latitude of acceptance en-

212 *See id.* at 260.

213 *See id.*

214 *See generally* MUZAFER SHERIF & CARL I. HOVLAND, SOCIAL JUDGMENT: ASSIMILATION AND CONTRAST EFFECTS IN COMMUNICATION AND ATTITUDE CHANGE 146–76 (1961) (discussing the likelihood of attitude changes as a result of communication).

215 *See id.* at 4–14.

216 *See id.* at 19–36.

217 *See id.* at 36.

218 *See id.*

219 *See id.* at 127.

220 *See id.* at 127–45.

compasses all attitudes that one readily accepts. If the message lies within this range, one automatically accepts and agrees with it, assumes it is closer to one's own view than it actually is, and therefore changes one's view only slightly at best.[221] The latitude of rejection includes all attitudes that would be immediately dismissed. If the message lies within this range, it will be seen as even further from one's position than it actually is and will exert no pressure toward attitude change.[222] Finally, the latitude of noncommitment covers all other attitudes. If the message lies within this range, chances of influencing, or changing, opinion and behavior are greatest.[223]

It is extremely important to bear in mind that the size of each latitude varies between topics and between individuals. A devout Catholic has large latitudes of acceptance and rejection regarding religion and a very small latitude of noncommitment. In contrast, this same devout Catholic might have a large latitude of noncommitment regarding golf (they could take it or leave it) and small latitudes of acceptance and rejection.

Thus, it is the advocate's task to assess the jurors' likely current positions regarding a central issue. What is known about their predispositions and attitudes toward relevant core issues? What does their body language reveal? Ideally, the advocate must cast the issue such that it falls into the latitude of noncommitment for the most jurors.

Finally, the advocate must be careful not to present a position that falls into the jurors' latitudes of acceptance so forcefully that the lawyer creates reactance.[224] This may occur when an expert witness is so strong an advocate that middle-of-the-road jurors may move away from the witness's side as a result of their reaction to his vehemence.[225] Therefore, not only should the message have a moderate distance from the position of the jurors, the delivery of the message should be moderately presented. Reactance can also occur in the de-

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221 *See id.* at 129.

222 *See id.*

223 *See id.* at 148.

224 *See* FREDERICK, *supra* note 45, at 204.

> [A] receiver characteristic related to resisting persuasion is psychological reactance . . ., which involves the reaction of individuals to the loss of freedom of choice or behavior. When individuals perceive their freedom to be threatened or eliminated, they are motivated to restore the threatened or lost freedom. . . .
>
> . . . . [Therefore] arguments to the jury (or judge for that matter) should be developed so as to avoid reactance against one's case.

Id.

225 *See id.* ("Arguments should be forceful, but not so extreme as to make jurors feel that you are trying to remove their freedom to decide the case.").

liberation room if some jurors emphatically state that a particular verdict is ludicrous. This might cause those who previously would have agreed to look for opposing arguments.

B. Personalization and Rapport Building

1. Overview of Personalization and Rapport Building

In the same way that every direct examination consists of parts and subparts, each witness who testifies on direct is a flesh-and-blood human being with a story to tell. From the jury's perspective, it is just as important to know *who* is testifying as it is to understand *what* they say. Thus, *every* direct examination should begin with an attempt to personalize the witness and to reveal some of the witness's background. This getting-to-know-the-witness block should begin with a headline explaining the purpose of the block and then should go on to develop a personal overview, including areas such as marital status, children, significant nonprofessional activities, and even the part of the country from which the witness comes. These personal facts give jurors a way to identify with the witness. Personalization creates rapport between the witness and the jury that leads to credibility and trust.[226]

There is a real reticence, even an outright refusal, on the part of many trial lawyers to personalize each witness called for direct examination.[227] This reluctance is confounding, given that people often make critical decisions based on intangibles such as personal relationships and subjective impressions. This resistance to personalization is due to the fact that the witness's personal history is perceived as not essential, or even material, to the particular events of the case.[228] Whether or not a witness is married with two children and coaches his daughter's soccer team may be legally irrelevant to the witness's expert testimony about the defendant. In fact, however, each witness's (including each expert's) human side is important to every case. Dis-

226 JEANS, *supra* note 2, § 7.14, at 178 (noting that voir dire is the first opportunity to develop the relationship with the jury which can lead to more effective persuasion); James W. McElhaney, *Direct of Experts*, LITIG., Winter 1995, at 57, 58; Siemer, *supra* note 54, at 49; *see also* TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS 150–55 (1992) (describing the decision to put the victim in the Central Park Jogger trial on the stand for the sole purpose of personalizing the victim, who had remained an abstract in the minds of the jurors up until that point, thus giving the jurors a real person to avenge, creating immense sympathy for her, and making her credibility unimpeachable).

227 *See* MCELHANEY, *supra* note 39, at 348 (stating that background should be established quickly and consist of only those details that "matter").

228 *See id.*

closure of the witness's personal background can build common bonds with the jurors. It gives the testimony more practical meaning, makes it more understandable, and ultimately gives it more weight and credibility.[229]

One reason that personalization enhances the weight of the testimony is that it makes the witness more accessible to the jurors.[230] Accessibility provides a sense of connection between jurors and the witness and more readily allows the jurors to view the testimony from the witness's perspective. This maxim is so obvious that it is often overlooked. This rapport process takes place in two stages: (1) prior to the informational segment of the examination and (2) while the witness is relaying the relevant facts. In the rush to get to the heart of the case—to get to the facts—trial lawyers often overlook the fact that jurors make critical decisions based on intangibles such as likeability and trust. If the jurors like and trust a witness, they are more likely to believe that witness's view of events.[231] For instance, consider a juror interviewed after a bad faith insurance case involving a home which sustained damage in the Northridge, California earthquake. The juror might well complain about the inadequate methods the insurance company proposed to repair the house, asserting: "Personally, *I* have the same concerns with my house. *I* would want it returned to its original state. *I* would want the house raised up and set the footing down to the bedrock."

229 *See* Darrow, *supra* note 15, at 37, 211. Although Darrow had stereotyped people according to their race and religion, the main point he was making in his article was that jurors should be selected on the basis of what they have in common with your client so that they will sympathize with your client. This information that links the client to the jurors must come out in the testimony for it to be effective. It goes without saying that the same holds true for witnesses.

230 *See* Herman, *supra* note 59, at 72 ("[T]he usual structure of a direct examination begins with questions about the witness's background to establish credibility and rapport with the jury."); Siemer, *supra* note 54, at 49 ("Accrediting the witness by asking a few background questions lets jurors understand who this witness is. Fact witnesses must be humanized to show what is interesting about them."); Wilkins, *supra* note 54, at 74 ("Lawyers must know not just the case file, but also the *people* . . . [l]awyers should list compelling facts and situations which credibly demonstrate in real-world terms just how the tragedy came about and *show* the impact it has had on the people affected.").

231 *See* Wilkins, *supra* note 54, at 72 ("We must present a human story that touches the heart and simultaneously provides the jurors with a factual understanding on which to base a verdict consistent with their obligation to see justice done in accordance with the law.").

Familiarity can lead not only to trust and likeability, but also to empathy or pathos.[232] Witness personalization allows jurors to connect with the witness on an emotional level, not just a factual one, and to appreciate the larger implications of the case. Apart from personalizing, this getting-to-know-the-witness block may be the opportunity for witnesses to open up to the jurors and disclose personal information or feelings that will humanize their testimony.[233] A well-placed "feelings" question can be an extremely powerful tool.[234] For instance, in an unlawful termination case, the examiner may ask the plaintiff, "How did you feel when you were told you were fired?" The plaintiff's response is likely to be emotional and to convey to the jurors the deep sense of loss suffered. Such a question allows the witness to share his feelings with the jury and to create a bond built on that empathy.[235] This questioning should be constructed on top of the framework of the witness's background. As such, a personal or "feelings" question will not seem gratuitous or designed to play on the juror's sentiments.[236] If personalization questions are carefully designed, they will seem like a natural extension of the examination and will elicit a positive response from jurors.

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232 *See* SULLIVAN, *supra* note 226, at 150–55. Timothy Sullivan describes the effect of placing the Central Park jogger on the stand, making the jury empathize with her. *See id.* She had remained an abstract victim despite the jury having seen photographs of her badly beaten body. *See id.* The sympathy generated for her by her testimony led the defense to bypass cross-examination altogether in order to get her off the stand as soon as possible. *See id.*; *see also* BERGMAN, *supra* note 156, at 105–06 (noting that background information adds to the credibility of a witness).

> Once there is a keen recognition that "this could have been me or someone I love," there is a whole new framework for attention and caring. This is the stuff of real life. Even if plaintiff's conduct played a role in bringing about the tragedy, jurors are far more forgiving of the conduct of people they know and care about than that of strangers.

Wilkins, *supra* note 54, at 74–75.

233 *See* Siemer, *supra* note 54, at 49.

234 *See* MCELHANEY, *supra* note 39, at 345–46 (noting that trial lawyers must look for the dramatic elements amidst the mundane to avoid creating a dull trial; hence, a "man who can no longer tie his shoes carries a greater impact than a plaintiff whose ability to bend at the waist has been impaired"); *see also* CALDWELL ET AL., *supra* note 36, at 7-4, 7-5 (suggesting that lawyers should ask the witness to express his feelings in an effort to "pull [the] testimony back to life").

235 *See* CALDWELL ET AL., *supra* note 36, at 7-4, 7-5.

236 *See* Herman, *supra* note 59, at 72 ("[E]liciting background testimony about a lay witness's church activities, participation in civic organizations, number of grandchildren, and the like may come across as self-righteous.").

2. Illustrations of Personalization and Rapport Building

In this demonstration of personalization, the examiner begins direct examination by "getting to know the witness." The witness in this example is the plaintiff in a wrongful termination action. The examiner, wholly apart from the facts of the employment situation, takes the time to bring this witness's personal life before the jury.

BLOCK #1: Mr. Stevens, before we get to the events surrounding your employment and later discharge, I want to ask you some questions about your personal background to help the jurors learn about you and better understand your testimony. First, tell us a little about yourself.

A: Well, I'm married and have two children.
Q: What is your wife's name?
A: Anna.
Q: How long have you and Anna been married?
A: Eight years.
Q: How would you describe your marriage?
A: Anna and I have a good life together. We are perfect partners, we have so many things in common. We like the outdoors and camping and cycling and, together with our children, we do those kinds of things most every weekend. She has a great sense of humor. She kids me all the time.
Q: Tell us about your two children.
A: Okay. Kristen is six. She is a radiant little girl. Extremely precocious and willful. She can be a handful sometimes.
Q: And your second child?
A: Little Kyle just turned two and he is a wild baby. He was walking at nine months and it seems like he is in perpetual motion. He is just like "Curious George." He gets into everything.
Q: Describe your relationship with your two kids.
A: Well, the highlight of my day is coming home and being greeted by Kristen and Kyle. I am learning to play the piano with Kristen. And the four of us are trying to learn Spanish together. I find I don't even want the kids to go to bed sometimes.
Q: How about the weekends?
A: Well like I said, just about every weekend we go to one of the biking trails. Kyle rides with me and Kristen, with Anna riding separately. The kids love wearing their little biking helmets and knee pads.
Q: Where do you and your family live?
A: We live here in Yorktown, at 25001 South Victoria.
Q: How long have you lived there?
A: About six and a half years.
Q: How did you end up in Yorktown?

A: Oh, I've always lived here except for college. I grew up in Yorktown, went all the way through high school here, and I'm enjoying raising my kids here.

BLOCK #2: Thank you, Mr. Stevens. Now that we know a little about you and your family, I'd like to move to your educational background.

A witness who takes the stand and is immediately directed to the facts in dispute is not going to warrant the same weight as a witness whom the jurors feel they personally know and respect.[237] In the same vein, personalizing also allows the advocate an opportunity to identify values the jurors may find important in assessing the ultimate credibility of the witness.[238] Even though the facts of this witness's personal life do not directly bear on whether or not he was wrongfully discharged and, thus, may not be legally relevant in a technical sense, they are nonetheless vitally important to the people who ultimately must decide this case, the jurors.[239] The jurors do not sit and react in a vacuum. Instead, they tend to view the evidence as a story, full of real flesh-and-blood characters. Witness testimony is only as good as witness credibility, and a meaningful gauge of credibility is how a person lives his life, who that person loves, and who loves him. How that person reacts to life's blessings and curses are keys to building bonds with the jury. Personalization is idiosyncratic. If jurors perceive that personal information is contrived or "corny," witness credibility may plummet. Thus, the advocate must provide substantive reasons for witnesses to describe aspects of their personal life. Counsel should also consider including an innocuous negative about the person to avoid the perception that they are portraying a false, "rosy" picture of the witness. In the previous illustration, note that the headline suggested to the jury the importance of personalization in understanding the testimony. However, an advocate must be sensitive that personalization does not appear to be merely a ploy designed to tug at the heart strings of the jurors.

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237 *See supra* notes 226–36 and accompanying text.

238 *See id.*

239 Any student of the appellate process knows that issues of fact determined in the lower court will not be reviewed by the higher court because the trial court is in a better position, after viewing the live testimony of the witnesses, to make the factual determination and weigh the credibility of the witnesses. This presupposes that the judge and jury are using the "intangibles" to make these assessments and that these "intangibles" do not translate to the written page of the transcript which the appellate court has to review. *See* PRATER ET AL., *supra* note 158, at 58 (citing United States v. Bedonie, 913 F.2d 782 (10th Cir. 1990) (noting that the Federal Rules of Evidence sufficiently provide a means for testing a witness's credibility, and therefore the jury remains "the best arbiter for such determinations")).

3. Empirical Data to Support the Primacy Effect

Many people are aware of the importance of making a good first impression. Studies of attractiveness show that good-looking people are immediately liked more than less attractive people.[240] In addition, we tend to think that attractive people are more similar to us than unattractive people.[241] In one study of attractiveness, those individuals who were perceived to be beautiful were also perceived to be good.[242] This led to the commonly accepted saying "beautiful is good," and out of that grew "black is beautiful."

Early research in impression formation suggested that our opinions of others are based on the information that we *first* receive about them.[243] Subsequent research has supported this conclusion.[244] As suggested, this primacy effect is assumed to serve our need for consistency.[245] That is, we need to see the world in a reliable and consistent fashion in order to function with ease and assurance. Thus, once an impression is formed, all subsequent disconfirming information is either ignored, discounted as trivial, or reinterpreted.[246]

In S.E. Asch's classic study, he asked college students to form an overall impression of a person who was "intelligent, industrious, impulsive, critical, stubborn, and envious."[247] Note that this list begins with positive traits and moves on to more negative ones. A second group of students received the list in the opposite order, with the negative traits preceding the positive ones.[248] Asch found that the presentation order greatly affected the overall impression. Students exposed to the positive traits first formed a more positive impression of the person than did those students exposed to the negative traits first.[249]

240 *See* Marks et al., *supra* note 72, at 198–206.

241 *See id.* at 198, 202.

242 Gerald R. Adams & Ted L. Huston, *Social Perception of Middle-Aged Persons Varying in Physical Attractiveness*, 11 DEVELOPMENTAL PSYCHOL. 657, 657–58 (1975).

243 *See* Markus & Zajonc, *supra* note 177, at 180.

244 *See* Greenwald, *supra* note 179, at 606–07; Edward E. Jones & George R. Goethals, *Order Effects in Impression Formation: Attribution Context and the Nature of the Entity*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 27, 30–32 (Edward E. Jones et al. eds., 1972); *see also* Robert E. Lana, *Three Theoretical Interpretations of Order Effects in Persuasive Communications*, 61 PSYCHOL. BULL. 314 (1964) (discussing various studies conducted regarding order effects in persuasive communications, including a 1963 study conducted by D.P. Schultz).

245 *See* Greenwald, *supra* note 179, at 606–07.

246 *See* Adams & Huston, *supra* note 242, at 657–58.

247 Asch, *supra* note 179, at 270.

248 *Id.*

249 *Id.* at 271–72.

As suggested, people tend to reinterpret subsequent contradictory information to make it consistent with prior information.[250] For example, if jurors first hear about a defendant's cruelty and then hear testimony about kind gestures, the kindnesses could be construed as disingenuous acts designed to foster trust. In other words, the meaning of the behavior is interpreted in the light of its context or order of presentation.

Researchers disturbed by the seeming intransigence of first impressions worked to find ways to alter the primacy effect. In a modification of Asch's experiment,[251] Ralph Stewart found that if you instruct students to reformulate their opinion with each successive trait, the primacy effect disappears.[252] Essentially, this forces people to pay attention to each trait equally. Judges' instructions to jurors to not "form or express any opinions on this case until the matter is finally submitted to you" is another way to combat the primacy effect.[253] Thus, if jurors are asked to recall and examine all of the evidence before arriving at a conclusion, the primacy effect can be neutralized.

Personalization and rapport depend on the perceived similarity between a witness and the jury. If a particular witness has characteristics that vary from those of the jurors and you wish to form a positive impression,[254] it is important to present as many aspects of the witness as possible that are similar to those of the jurors. By so doing it is possible to break down the naturally occurring in-group/out-group categorization that leads to biased information processing.[255] By per-

250 *See* Martin F. Kaplan, *Evaluative Judgments Are Based on Evaluative Information: Evidence Against Meaning Change in Evaluative Context Effects*, 3 MEMORY & COGNITION 375, 378–80 (1975); Mark P. Zanna & David L. Hamilton, *Attribute Dimension and Patterns of Trait Inferences*, 27 PSYCHONOMIC SCI. 353, 354 (1972). *See generally* Thomas M. Ostrom, *Between-theory and Within-theory Conflict in Explaining Context Effects in Impression Formation*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 492 (1977) (discussing various studies conducted in the area of impression formations and the effect context may have on ambiguous test traits).

251 *See* Asch, *supra* note 179, at 270–72.

252 *See* Ralph H. Stewart, *Effect of Continuous Responding on the Order Effect in Personality Impression Formation*, 1 J. PERSONALITY & SOC. PSYCHOL. 161, 162–64 (1965).

253 1 CALIFORNIA JURY INSTRUCTIONS—CRIMINAL 8 (6th ed. 1996); *cf.* Martin F. Kaplan, *Stimulus Inconsistency and Response Dispositions in Forming Judgments of Other Persons*, 25 J. PERSONALITY & SOC. PSYCHOL. 58, 60 (1973); Abraham S. Luchins, *Experimental Attempts to Minimize the Impact of First Impressions*, *in* THE ORDER OF PRESENTATION IN PERSUASION 62, 62–75 (Carl I. Hovland ed., 1957).

254 Of course, if you wish to create a negative impression, you must do the reverse of all included herein and strive to maintain stereotypic thinking of the witness.

255 *See* Henri Tajfel, *The Achievement of Group Differentiation*, *in* DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 77, 77, 86–89 (Henri Tajfel ed., 1978).

sonalizing the witness, it is possible to convert negative and stereotypic views about the person testifying to positive ones in the eyes of the jurors.

a. Contact Hypothesis

Another topic in personalization that has bearing on impression formation addresses the assumption that we think more highly of our in-group, as we have more contact with them, than we do with members of groups to which we do not belong (for example, a different race or religion). Research on this topic is the outgrowth of years of study on prejudice—a topic that has received vast attention in social psychology. As a brief background, researchers began with the notion that prejudice resulted from ignorance based on people's lack of contact with those of other ethnicities.[256] At first it was assumed that *mere exposure* to those of different races or religions would reduce the in-group bias and outgroup stereotyping.[257] Later stipulations about the nature of the contact required that it (1) place everyone on equal status, (2) disconfirm the stereotype, (3) include cooperative behavior to achieve a desired goal, and (4) promote seeing each other as individuals. This is called the *contact hypothesis.*[258] This hypothesis was appended to the plaintiffs' briefs in *Brown v. Board of Education,*[259] in which the Supreme Court declared that segregated schools were unconstitutional. The argument noted that racial integration reduced disparate status and stereotyping and promoted cooperation and the pursuit of mutual goals.[260] The more contact a person has with a person of another race, culture, or demographic, the more he is likely to see that person as an individual with similar goals and values.[261]

b. Heterogeneity/Homogeneity

Part of the in-group/out-group phenomenon, or stereotyping of the out-group, includes the perception that members of the in-group (for example, Caucasians, Protestants, blue-collar workers) possess a

256 *See, e.g.*, MYRDAL, *supra* note 76, at 651.

257 *See* Zajonc, *supra* note 77, at 1.

258 *See generally* ALLPORT, *supra* note 78, at 261–81; WATSON, *supra* note 78, at 54–64; ROBIN M. WILLIAMS, JR., THE REDUCTION OF INTERGROUP TENSIONS: A SURVEY OF RESEARCH ON PROBLEMS OF ETHNIC, RACIAL, AND RELIGIOUS GROUP RELATIONS 32 (1947).

259 347 U.S. 483, 493 (1954).

260 *See id.* at 493–94.

261 *Cf.* RIEKE & STUTMAN, *supra* note 92, at 118–20 (noting that listeners tend to trust and believe speakers with similar backgrounds, experiences, and educational attainments).

greater variety of characteristics—they are more heterogeneous—whereas members of the out-group (for example, blacks, Muslims, unemployed) are made up of a smaller and more common set of characteristics—they are more homogeneous.[262] Many of us can recall the childhood experience of seeing people of another race for the first time and finding it impossible to differentiate them because "they all look alike."

Phyllis Katz subjected children to three tasks to determine what was necessary and sufficient to increase the perception of differences between children of a different race.[263] She found that prejudice decreased among black and white children when they were asked to (1) learn the names associated with the pictures of children of the other race or (2) judge if the children of the other race depicted in pairs of pictures were similar to or different from one another.[264] In contrast, prejudice remained unchanged when the children simply observed pictures of children of the other race.[265]

Note that the first two tasks required greater cognitive complexity than did the third. Thus, it is important to (1) say the name of your witness a sufficient number of times so that every juror will know it, and (2) make your jurors think about themselves in relation to a positive attribute of the witness. For example, and if possible, bring in aspects of the witness being a good parent, attending church regularly, liking a popular movie, and/or having a good sense of humor. Stereotypes are an oversimplification of reality.

c. Perceived Threat

Judgments of people are typically biased against people whom they perceive as harmful or threatening.[266] The threat can be race, religion, or the charge against the witness. For example, a study conducted more than fifty years ago found that non-Jews hold greater

262 Virginia Hensley & Shelley Duval, *Some Perceptual Determinants of Perceived Similarity, Liking, and Correctness*, 34 J. PERSONALITY & SOC. PSYCHOL. 159, 167 (1976); *see* Henri Tajfel et al., *Content of Stereotypes and the Inference of Similarity Between Members of Stereotyped Groups*, 22 ACTA PSYCHOLOGICA 191, 199–201 (1964); David A. Wilder & Vernon L. Allen, *Group Membership and Preference for Information About Others*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 106, 106–10 (1978); *see also supra* Figure 1(A).

263 *See* Phyllis A. Katz, *Stimulus Predifferentiation and Modification of Children's Racial Attitudes*, 44 CHILD DEV. 232, 233–34 (1973).

264 *Id.* at 234–37.

265 *Id.*

266 *See* Vladimir J. Konecni, *The Role of Aversive Events in the Development of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 85, 93 (William G. Austin & Stephen Worchel eds., 1979).

malevolence toward Jews in a money matter when their financial situation is poor than when it is good.[267] Similarly, some researchers have found that lower-class whites show greater racism against blacks than do those of higher socioeconomic status.[268]

d. Personalization

Another cognitive process applicable to a trial situation is that of categorization. Because jurors are charged with listening and making decisions based on facts, they are prone to categorize those facts, events, and people in order to process the volume and complexity of evidence in a case. The danger rests with jurors who may depersonalize the defendant and ascribe motivations that are constructed by a negative stereotype or category. Personalization helps to avoid this danger. This switch from category-based thinking can create comparisons that cross category boundaries and make a witness more understandable or empathetic to the jurors.[269]

The speaker's disclosure of intimate aspects of his life causes people to view him as trustworthy, friendly, and warm.[270] If, however, the disclosure is seen as violating social norms (for example, involving tattoos or satanic worship), the speaker will be judged disfavorably.[271]

In most studies of personalization, participants are specifically asked to notice an outgroup member's attributes (personalization) or not (impersonal). Results consistently show that the outgroup member is more positively viewed under personalized than impersonal conditions.[272]

There is also an interaction that generally occurs between the social status of the jurors and that of the witness that is particularly pertinent to expert witness testimony. Namely, low-status people (for

267 *See* Angus A. Campbell, *Factors Associated with Attitudes Toward Jews, in* SOCIETY FOR THE PSYCHOLOGICAL STUDY OF SOCIAL ISSUES, READINGS IN SOCIAL PSYCHOLOGY 518, 520–22 (Theodore M. Newcomb et al. eds., 1947).

268 *See* GERTRUDE J. SELZNICK & STEPHEN STEINBERG, THE TENACITY OF PREJUDICE: ANTI-SEMITISM IN CONTEMPORARY AMERICA 180 (1969); Minako K. Maykovich, *Correlates of Racial Prejudice,* 32 J. PERSONALITY & SOC. PSYCHOL. 1014, 1014–20 (1975).

269 *See* Brewer & Miller, *supra* note 75, at 281.

270 *See* Carol Ann Dalto et al., *Self-disclosure and Attraction: Effects of Intimacy and Desirability on Beliefs and Attitudes,* 13 J. RES. PERSONALITY 127, 136–38 (1979).

271 Valenan J. Derlega & Jasnusz Grzelak, *Appropriateness of Self-disclosure, in* SELF-DISCLOSURE: ORIGINS, PATTERNS, AND IMPLICATIONS OF OPENNESS IN INTERPERSONAL RELATIONSHIPS 151, 162–64 (Gordon J. Chelune et al. eds., 1979).

272 Norman Miller & Hugh J. Harrington, *Social Categorization and Intergroup Acceptance: Principles for the Design and Development of Cooperative Learning Teams, in* INTERACTION IN COOPERATIVE GROUPS: THE THEORETICAL ANATOMY OF GROUP LEARNING 203, 206–08 (Rachael Hertz-Lazarowitz & Norman Miller eds., 1992).

example, those less educated or from low-income households) tend to evaluate high-status people more favorably than do those of equal or higher status.[273] This says that, as a general rule, low-status jurors will give more weight to the testimony of experts than will high-status jurors. Personalization, however, becomes the great equalizer in that it seems to place the low-status jurors on an equal footing with the witness, and their evaluation of the witness now equals that of the high-status jurors. This suggests that if there are low-status people in the jury, it is better not to personalize the expert witness. Instead, it is best to let his credentials form the opinion that he is a person of high-status; you lose nothing from your high-status jurors and gain from your low-status ones.

C. Staging

1. Overview of Staging

The goal of any direct examination is for the jury to believe the witness's account of the events in question. With that in mind, some might suggest the examination should begin and end with just the facts relevant to the events in question. After all, lawsuits are about getting to the bottom of things, getting to the facts. However, to hold to this naïve point of view is to turn a blind eye to the reality of human learning and common sense. Jurors, like all of us, want and even demand a context, a framework, for understanding events.[274] Part of the context is a sense of the environment or world of the parties involved in the case. For example, jurors bring a set of assumptions (perhaps erroneous) about the process of claims handling in bad faith insurance cases. Jurors may believe that a claimant is entitled to all the money that he or she has paid out in premiums even if that is not provided by the insurance policy.

Another part of context is understanding the circumstances that led up to the events in question. This includes the witness's vantage point or perspective for viewing or otherwise perceiving the events. This could also include how the claimant or the claim adjustor came to this understanding in this same case example.

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273 Norman Miller & Hugh J. Harrington, *A Model of Social Category Salience for Intergroup Relations: Empirical Tests of Relevant Variables*, *in* EUROPEAN PERSPECTIVES IN PSYCHOLOGY 205, 217 (Pieter J.D. Drenth et al. eds., 1990).

274 *See* Purver et al., *supra* note 39, at 16 ("[S]tructure your direct examination so that the witness sets the scene before he or she describes the action. Once the witness has described the scene, you will not have to interrupt the critical action testimony, and your direct examination will flow smoothly and dramatically.").

This process of eliciting the circumstances is called *staging*. The staging block precedes the action sequence and should contain sufficient detail and background information for the jury to fully appreciate the forthcoming action sequence block. With the foundation of the necessary material in place, the action sequence will be more clearly and powerfully communicated.[275]

Staging may involve a thorough understanding of a physical layout or design. For example, the design and layout of a warehouse in a personal injury forklift accident case may need some detailed description, including photographs and diagrams, before the actual events that caused the injury are described. With that information in place, the jurors understand that the witness could have seen what she claims to have seen. Staging may also involve an understanding of the relationship between various parties. For instance, it would be important to know that the victim in a criminal case and an eyewitness to the crime once had a dating relationship. Staging demands that the essential background details be clear as the witness moves to the events in question. Staging is important because it provides the jurors with the necessary context for understanding the testimony about the critical events.

Proper staging also protects against distractors. Distractors are things that impede the ability of the jurors to focus on the essential facts. The most compelling way to avoid distractors is by clearly and coherently recounting the incident in question, without unnecessary detail or clutter. A direct examination that has progressed to the action sequence without proper staging must temporarily divert from the action testimony to fill in necessary details. This diversion takes away from what should be compelling testimony by breaking up the witness's account. The action sequence delivered in stops and starts will not have the same vitality or clout as a story told without interruption or distraction. For instance, assume that a percipient witness is about to describe how one car slammed into the side of another when she is stopped because the examiner, now aware that he has failed to properly set the stage, is forced to back up and ask about traffic conditions and whether there was a left-turn lane. Without staging such necessary details, the action sequence is, at best, unclear and often confusing. Consequently, what should have been the crescendo of that witness's testimony has been disrupted and has lost much of its impact.

275 *See* Wilkins, *supra* note 54, at 76 ("This is a matter of timing and, more important, a matter of *context*. In planning presentation of proof, consider the most productive setting for introducing important pieces of evidence.").

2. Illustration of Staging

The illustration of staging that follows is based on the direct examination of a rape victim. Assume that in the block preceding this one, the witness was personalized. In this block, which will come before the action sequence, the stage is being set. All the background questions are answered so that there will be no distractions once the examiner moves to the action. The overarching issue in this hypothetical case is the victim's identification of her rapist. She will testify she was startled awake from her mid-morning sleep by an attacker standing in the doorway to her apartment. At that point, she saw his face. As the attacker then moved from the doorway to her bed, he pulled up a bandana covering his face below his eyes. The goal of this staging block is to reinforce the certainty of her eyewitness identification of the assailant.

BLOCK #1: Miss Taylor, now that we've had an opportunity to learn about your personal life and about your university experience, and before we turn to the morning you were attacked, I want to ask you some questions about the layout of your apartment. At the time of the attack did you live alone?

A: Yes.
Q: Tell us about where you lived.
A: It was a studio apartment on Baltic Avenue. It was about three blocks from the university.
Q: Is your unit in a large apartment complex?
A: Yes, there are probably forty units. It is pretty big.
Q: Is your unit upstairs or downstairs?
A: Downstairs.
Q: Describe your apartment for us.
A: It's an end unit. It is pretty small, but up until then I liked it just fine.
Q: I understand. Well, tell me about the design.
A: It's a studio apartment which means it doesn't have a bedroom. When I wasn't in bed, the bed folded back up into a closet.
Q: How about a kitchen?
A: It has a cute little kitchenette. There is a small stove, an oven, a sink, and some cupboards. I had bought a small table with two chairs to eat at.
Q: Miss Taylor, I want the jurors to get a sense of how big your apartment is. How long would you say it is?
A: I'm not very good with distances. Maybe from me to where you are standing.
Q: Your Honor, may the record reflect I am about thirty feet from Miss Taylor.
The Court: That seems about right.

Q: And about how wide?
A: Maybe about two-thirds of that.
Q: I take it there is just one door.
A: That's right.
Q: Does that door open into a hallway or directly to the outside?
A: It opens into a hallway.
Q: Miss Taylor, where is the bed in relation to the door?
A: The bed is across the room from the door, not quite from me to you.
Q: Well, because I am about thirty feet from you, would you estimate between twenty and twenty-five feet?
A: That seems about right.
Q: Let's turn to the windows in your apartment. How many are there?
A: Just the one by the door on the joining wall.
Q: Describe that window.
A: It's a pretty good sized window, maybe three feet by five feet.
Q: Is there any covering for the window?
A: Yes, it has a set of curtains.
Q: Would you say that these are heavy or light curtains?
A: They are thick curtains, but they are unlined. There is a lot of light that comes in around the top and sides. I don't mind, though. I don't need to have it pitch black when I sleep.
Q: Were the curtains open or closed at the time you were attacked?
A: They were closed.
Q: Were there any lights on in your apartment at the time of the attack?
A: I had been reading when I fell back asleep, and my bedside lamp was still on.
Q: Was that light shining in your eyes in any way when you woke up?
A: No, it has a shade on it that softens the light. I don't like bright light when I am reading.

BLOCK #2: Thank you Miss Taylor. I think we have a pretty good idea of how things were that afternoon. We now need to turn to that mid-morning back on November 22 when you were raped.

This staging block was designed primarily to address the witness's ability to identify the defendant. First, there is the distance from the bed, where the victim first saw the defendant, to the doorway, where the defendant was standing. Next, there is the issue of the backlighting of the defendant as he stood in the doorway. Because the door opened into a hall and not directly to the outside, backlighting should not be an issue. And finally, the lamp at the victim's bedside would have provided some light to view the defendant's partially concealed

face. With this staging block in place, the examination would then move to a block in which the witness identifies the rapist and describes the rape itself.

3. Empirical Data Supporting Staging

In a study by Reid Hastie, Steven Penrod, and Nancy Pennington, the researchers found that mock jurors made sense of the evidence by creating a cohesive and probable story.[276] Each story was based on the evidence found compelling. Incompatible evidence was often excluded. On the basis of this finding, the researchers defined a *story model* that consisted of three stages.[277] First, jurors organize the information into one or more plausible accounts.[278] This story is largely based on each juror's general knowledge about human behavior and situational demands.[279] Next, the verdict categories are considered along with the decision rules for each verdict.[280] Finally, the best match between the story and the verdict is selected.[281]

The reasoning skills and experience of the jurors can differ greatly.[282] What one person finds plausible, another does not. Therefore, the evidence included and excluded from each story can create wildly different accounts of what occurred. There are as many stories as there are jurors.

These findings suggest that attorneys must create a cohesive and complete story of the evidence as it unfolds through the mouths of the witnesses. This story should be as simple and as straightforward as possible. It should fit the common sense and experience of the jurors sitting on the case. Staging allows attorneys to provide the most comprehensive and fundamental background information to jurors so that they understand the essential facts of the case.[283]

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276 REID HASTIE ET AL., INSIDE THE JURY 18–20 (1983).

277 *See id.* at 22.

278 *Id.*

279 *See id.*

280 *See id.*

281 *See id.*

282 *See* Reid Hastie, *Introduction*, to INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 3, 3–5 (Reid Hastie ed., 1993).

283 *See* Deanna Kuhn et al., *How Well Do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task*, 5 PSYCHOL. SCI. 289, 293–96 (1994).

D. Visual Learning/Demonstrative Evidence

1. Overview of Visual Learning

Juries have a growing sophistication in visual imagery.[284] Although blowups and charts have been used predominantly for illustrative or substantive purposes, the expectations and demands of today's fact-finders dictate that litigators pay attention to several issues in dealing with demonstrative evidence: (1) jurors have a constant need for visual stimulus to reinforce verbal content,[285] (2) juror retention increases with the use of interactive demonstrative evidence,[286] and (3) jurors are growing increasingly discerning and expert in the use of media and technology.[287] The ultimate goal in the selection and use of demonstrative evidence is to help the jurors organize the case evidence and to increase the persuasiveness of that evidence.

Many trial lawyers are concerned that the use of multimedia presentations or computer technology in the courtroom creates the impression of wealth; this use should, therefore, be tempered.[288] Ad-

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284 Christine Froehlich, *Effective Use of Demonstrative Evidence and Trial Technology*, TECHNOLAWYER COMMUNITY 1 (Sept. 2, 1999), *at* http://www.technolawyer.com (on file with authors).

285 *See* John R. Phillips, *Presenting Financial Damages*, A.B.A. J., Jan. 1989, at 68, 69 ("[P]rovide the judge and jury with familiar visual images for the key points you want them to remember. The closer the images apply to their daily experiences, the more likely it is that they will remember your arguments."); *see also* Gary Christy, *A Storybook Approach*, TRIAL, Sept. 1994, at 70, 70.

> Visual aids will work if they are accurate and focus on the subject, are efficient and present a bird's-eye view, are empowering and have life, and are pertinent to the central theme. They should simplify complex facts, cancel the other side's arguments, and reinforce through repetition. Visuals are more compelling, more memorable, more objective, and more succinct than lectures and arguments.

Id.

286 *See* Robert F. Seltze, *Using Computer-animated Evidence in the Courtroom*, *in* WINNING WITH COMPUTERS: TRIAL PRACTICE IN THE TWENTY-FIRST CENTURY 361, 361 (John C. Tredennick, Jr. & James A. Eidelman eds., 1991) (noting that jurors are better able to relate to and recall material presented in a television-type format or program); *see also* Phillips, *supra* note 285, at 69 ("More than any other sensation, we perceive our surroundings through sight. In fact, we see and remember pictures of familiar images so easily that we often use them to memorize lists.").

287 *See* Datskow v. Teledyne Cont'l Motors Aircraft Prods., 826 F. Supp. 677, 685 (W.D.N.Y. 1993) ("Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated."); *see also* Froehlich, *supra* note 284, at 1 ("Juries and judges have grown more sophisticated in their expectation and demand for visual teaching tools.").

288 *See* Froehlich, *supra* note 284, at 1 (noting that there is a myth that technology gives an impression of wealth).

ditionally, there is a concern that a sophisticated visual presentation is perceived as a slick cover-up for a lack of meaningful evidence. The overwhelming feedback from post-trial jury interviews and jury research projects, however, has laid this myth to rest.[289] Jurors *expect* visual evidence to help them make discerning judgments about complex litigation issues. In fact, if a jury feels that a party in a case can afford it, it is highly critical of that party if the party does not devote these resources to helping the jury understand the substantive and legal issues in a case.[290] Because there are so many presentation options available to trial counsel these days, it is easy to become overwhelmed. There are a number of issues that trial lawyers need to take into consideration when selecting and using demonstrative evidence in witness presentations.

a. Determine the Key Issues in the Case

When using demonstrative evidence in trial, it is important to select which issues would benefit from illustration. Blowup after blowup of accounting records will lose the attention of a jury almost as quickly as will hours of detailed verbal testimony unaccompanied by graphic evidence. Because visual reinforcement creates added importance for a judge or jury, a lawyer should selectively determine the most critical issues in a witness's testimony to accentuate with the use of visual elements. By prioritizing these issues, the lawyer directs the audience's focus of attention where desired.

b. Choose the Presentation Media

When a case is document or witness intensive, the task for counsel is to determine how meaningfully to organize the evidence for the jury. The advent of affordable technology presents a vast array of choices for *how* to present case information at trial. Whereas in the past, documents were commonly blown up or displayed on an overhead projector, currently an increasing number of trial attorneys are using document cameras,[291] presentation software,[292] and trial pres-

289 *See* Kinrich, *supra* note 115, at 40–41 ("If they can follow testimony with their eyes as well as their ears, jurors—members of the TV generation—can absorb more information and stay more interested.").

290 *See* Froehlich, *supra* note 284, at 1 ("If a jury feels that a party in a case can afford it, they can be highly critical of a party who fails to use the resources that are available to present graphically what is being presented verbally.").

291 A document camera is presentation hardware that employs what is essentially a small video camera that focuses down onto a flat surface where the presenter can place documents or photographs. The image is transferred to a television monitor or

entation systems[293] to help organize and present information to the trier of fact.

Document cameras project a video image of a document or photograph onto a screen or a television monitor. This system allows counsel great flexibility in the presentation. It allows the attorney to show the entire document or photograph or to zoom in on specific parts of the display. Most of these document cameras also serve as an overhead projector for transparencies.

With the size of computer hard drives increasing and the ability to write to CD-ROMs, the scanning and storage of documents has become more manageable. In addition, there are numerous database software packages[294] that allow a lawyer easily to organize and index documents for retrieval.

Business graphics software packages are becoming more and more sophisticated and easy to use.[295] Trial counsel or an expert witness can easily create charts and graphs to illustrate evidence points. Most of these packages also have the ability to import documents or video or audio files to accompany the charts that are created within the package.

There are two other demonstrative evidence elements that will help to clarify a complex case for the fact-finder. The first is the use of summation charts.[296] These synopsize the evidence or opinion of a witness and leave the judge or jury with an overview or roadmap of the overall testimony along with an emphasis on the primary points. The second is the use of trial notebooks.[297] They also help to organize

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projector and the presenter has the ability to zoom in and out of specific areas of the document.

292 Some examples of the presentation software available include Virtual Trial, Mind Set, Outliner, and Ballistic Bar Coding.

293 The experience of two of the authors as trial consultants reveals the increasing use of technology in the presentation of evidence, including such programs as Virtual Trial, TrialPro, and Trial Director.

294 Examples of database software packages include Summation and Concordance.

295 *See* Douglas K. Derwin, *Computers in Court: Lessons from* NEC v. Intel, *in* WINNING WITH COMPUTERS: TRIAL PRACTICE IN THE TWENTY-FIRST CENTURY, *supra* note 286, at 307, 310 (noting that demonstrative evidence is becoming readily available due to laptop computers and easier to use software).

296 *See* STEVEN LUBET, MODERN TRIAL ADVOCACY, ANALYSIS AND PRACTICE 493–94 (2d ed. 1997) (noting the use of visuals in summation to help the jury understand); *see also* MURRAY, *supra* note 30, at 361–62 (noting that it is not only proper, but necessary to use visual aids and charts in summation).

297 *See* LUBET, *supra* note 296, at 385 ("[I]t is possible to assemble all of the documents into a bound or loose-leaf 'exhibit book,' copies of which can be provided to the court, to each juror, and to witnesses as necessary.").

documents for jurors and serve as a reference guide for their later deliberations. These notebooks can place the documents or photographs in question directly in the jurors' hands for their close examination during trial.

c. Select a Variety of Presentation Media

As counsel works through the various witness issues, he or she should think about what might visually illustrate each point. Traditional media for a witness's testimony include document blowups, bar graphs, pie charts, photographs, and bullet-point charts. Additionally, the use of video, animations, models, and demonstrations is increasing. Because the presentation of lengthy or complex evidence makes strong demands on the jury's attention, it is important to select at least two or three different modalities to present case elements.[298] By varying the type of demonstrative exhibits, the examiner can capitalize on the multiple senses a fact-finder uses to process information (that is, sight, sound, touch). This ultimately enhances the fact-finder's ability to retain the evidence. The goal in selecting various presentation media is to "storyboard" the case by providing visual images to accompany all of the complex verbal issues.

Counsel should try to determine which media are best suited to demonstrate the points he or she is trying to make. A video of a crime scene taken under similar conditions as the evening of the crime might best show how a witness viewed a robbery. Product liability and construction defect cases often need animations or models to show the movement of the product or materials. And, sometimes an expert using a white sheet of paper on a flip chart might best show the calculation of damages.

d. Create Interactive Presentations to Enhance Retention and the Impact of Evidence

Television has caused most people to become quite passive in their information acquisition. However, the computer industry and online services are starting to change that. CD-ROM and online game entertainment have made entertainment interactive. Interactive presentations allow the fact-finders to actually participate in and experience the evidence they see and hear. This significantly increases

298 *See* Froehlich, *supra* note 284, at 2 (noting the use of a variety of demonstrations will appeal to the "multiple senses" of the jurors).

learning and overall retention of presented testimony.[299] Sequentially adding strips to a magnetic board can illustrate the product development process. A car in the courtroom can be used to better illustrate an exploding gas tank case. A model of a hillside can demonstrate the shifting of soils in an earthquake. Physically viewing the Bundy and Rockingham crime sites in the O.J. Simpson criminal trial made testimony more understandable for those jurors. Even the simple use of a tape measure or stopwatch can make the measurement of distance or time more vivid for a judge or jury.[300]

e. Carefully Think Through and Practice with All Demonstrative Evidence

All exhibits need to illustrate, demonstrate, clarify, and simplify the evidence being presented. Too much information in a visual exhibit can serve to confuse rather than to clarify.[301] Timelines that contain every event in the case can overwhelm a judge and jury. It is also extremely important to attempt to anticipate how the opposing side might use the exhibit to its advantage. The notorious "glove demonstration" in the O.J. Simpson criminal trial is an example of how devastating lack of forethought can be.[302] This also points out the importance of counsel practicing with whatever system he or she is using. Both judges and juries become extremely impatient while trial counsel fiddles with a computer program or a VCR. It is advisable to always have a backup system when using technology in the courtroom. This may mean having a duplicate computer system *and* a set of blow-ups or paper copies of the presentation to use with a document camera.

299 *See* Stephen D. Heninger, *Cost-effective Demonstrative Evidence*, TRIAL, Sept. 1994, at 65, 65 ("There is an old Chinese proverb, 'Tell me and I will forget, show me and I may remember, involve me and I will understand.'").

300 With greater access and use of technology, virtual reality is taking interactive courtroom presentations to a new level. While there is no written opinion of the case, based upon co-author Gabriel's personal knowledge, in *Stephenson v. Honda Motors Ltd. of America*, No. 81067 (Cal. Sup. Ct. Placer County June 25, 1992), jurors viewed a three-dimensional virtual reality film of terrain from the perspective of the motorcycle rider. Although cost and legal hurdles make this type of evidence rare, the future may provide the opportunity for jurors to see, hear, feel, touch, smell, and taste evidence.

301 *See* MCELHANEY, *supra* note 39, at 578.

302 Stephen D. Easton, *Lessons Learned the Hard Way from O.J. and "The Dream Team,"* 32 TULSA L.J. 707, 732–33 (1997) (noting that the result of the glove demonstration was "disastrous").

The old adages are true. "Seeing is believing," and "a picture is worth a thousand words."[303] By wisely selecting and using a variety of demonstrative evidence, trial counsel can increase the clarity and impact of witness testimony.

2. Empirical Data to Support Use of Visual and Demonstrative Evidence

Even without possessing the rare skill of a photographic memory, our ability to recall a picture is astounding.[304] Whereas even memorized verbal information is subject to forgetting, iconic (visual) images are relatively permanent, and our capacity for them seems virtually unlimited. A study by Lionel Standing, Jerry Conezio, and Ralph Haber exemplifies our ability to remember pictures.[305] On day one of the study, participants saw as many as 2560 slides.[306] Each appeared only once for a period of ten seconds.[307] The following day, the experimenter showed each participant 280 pairs of slides (one previously seen image and a new one) and asked the participant to pick out the one he or she had seen before.[308] On average, the participants chose the correct one 85 to 95% of the time.[309] This held even when the pair included a mirror-image of the initial picture; it was still accurately identified.[310] For this reason, litigators need not worry about the number of pictures they present; almost all will be remembered.

In addition to actual pictures, words can be used to paint pictures in one's mind as well. Creating an image to link events is easier with concrete items (for example, a seatbelt or retraction loop) than it is for abstract ones (for example, defective design), but, with a little imagination, you can guide the jurors to an "icon" for even complex ideas. Further, if you can add emotional impact to a pair of disparate

303 *See* Herman, *supra* note 59, at 72 ("Just as 'seeing is believing,' seeing is also entertaining. Effective use of real and demonstrative evidence will enhance the impact of direct by capturing the jury's attention.").

304 *See* A.R. LURIA, THE MIND OF A MNEMONIST: A LITTLE BOOK ABOUT A VAST MEMORY (Lynn Solotaroff trans., 1968) (describing a case study of a man with the ability to totally recall whatever he saw, even when he attached no meaning to it); Ralph Norman Haber, *Eidetic Images*, 220 SCI. AM. 36, 36 (1969) (noting that the term "photographic memory" was coined because some rare people report "seeing" an image in front of their eyes).

305 *See* Lionel Standing et al., *Perception and Memory for Pictures: Single-trial Learning of 2500 Visual Stimuli*, 19 PSYCHONOMIC SCI. 73, 73–74 (1970).

306 *Id.* at 73.

307 *Id.*

308 *Id.*

309 *Id.*

310 *See id.*

items, they will be better remembered.[311] This emotion can be positive or negative. For example, saying, "It was a greater concern for profit than for human life that allowed the defendant to ignore the possibility that their retractor design could cut the seatbelt in two" stirs emotions to link the torn seatbelt to a retractor mechanism.

Adding novelty enhances a paired association between two images because it engages one's attention (the prerequisite to remembering).[312] Further, it is possible to create a bizarre picture that links two disparate ideas, and recall is almost completely assured. In a study examining the capacity of human information storage, subjects were asked to create a bizarre mental image to connect each of 500 pairs of words.[313] When prompted with the first word, its pair was retrieved 99% of the time.[314] In fact, it took 700 pairs to cause recall to falter to 95%.[315] As a courtroom example, if the witness were able to say, "It's as if the retractor acted like the jaws of a shark when it ripped the seatbelt apart," this bizarre image will stay in the jurors' memory so that mention of the word "retractor" will cause "seatbelt" to spring to mind (in the jaws of a shark).

In assessing the need for pictures or the need to create a mental image, the litigator must decide whether the ideas he is trying to juxtapose are closer to each other in a semantic organization (words only) or a visual one. For example, it takes longer to judge the accuracy of the statement "cats have heads" than it does to judge the statement "cats have claws."[316] This is explained as a function of the hierarchical distance between the two parts of the sentence. Having claws is a specific property of cats, whereas having heads is a general property of animals.[317] However, when asked to form a mental image of a cat first, "cats have heads" was identified faster. In the mind's eye image of the cat, the head is "seen" more easily than are the claws. Whether

311 Edward K. Sadella & Stanley Loftness, *Emotional Images as Mediators in One-trial Paired-associate Learning*, 95 J. EXPERIMENTAL PSYCHOL. 295, 297 (1972).

312 *See id.*

313 *See* PSYCHOLOGY '73–'74 TEXT 553–55 (Anne Storz ed., 1973) (discussing the 1957 University of Pennsylvania study conducted by W.H. Wallace, S.H. Turner, and C.C. Perkins).

314 *See id.*

315 *See id.*

316 *See* Stephen Michael Kosslyn, *Can Imagery Be Distinguished from Other Forms of Internal Representation? Evidence from Studies of Information Retrieval Times*, 4 MEMORY & COGNITION 291, 292 (1976); Stephen Michael Kosslyn, *Information Representation in Visual Images*, 7 COGNITIVE PSYCHOL. 341, 343–44 (1975).

317 Allan M. Collins & M. Ross Quillian, *Retrieval Time from Semantic Memory*, 8 J. VERBAL LEARNING & VERBAL BEHAV. 240, 241 (1969).

through the use of visual pictures or word pictures, juror retention is significantly enhanced.

E. Disclosure of Weaknesses

1. Overview of Disclosing Weaknesses

The adversary system, at first blush, appears to emphasize partisanship above all else, a single-minded focus on presenting the party's claims in the best light.[318] For lawyers who adopt this view of advocacy, the notion of "disclosing weakness" is unadulterated nonsense.[319] They hold to the view that a "real" partisan never discloses anything to the other side and certainly does not disclose any weaknesses.[320] They believe that the jury expects each party to present only favorable facts and will, in fact, consider the party to vouch for any evidence it introduces.[321] The reality, however, is that exaggerating one's strengths and turning a blind eye to one's weaknesses is not required in an adversary system and is likely to cause the advocate more harm than good. This "head in the sand" approach to trial advocacy actually costs advocates the one thing they can least afford to lose: their credibility before the jury.[322]

Every case that gets to trial has numerous problem areas or weaknesses, and most witnesses who testify at trial have one or more poten-

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318 *See* MURRAY, *supra* note 30, at 11–12 ("The spoils go to the lawyer who is able to persuade the factfinders that the fact picture portrayed by her and her witnesses is the best reflection of reality."); Gair, *supra* note 81, at 68 ("The task on direct is to take the wind out of the cross-examiner's sails by presenting a complete picture framed in your terms.").

319 *See* Gair, *supra* note 81, at 65 ("Lawyers are inclined to ignore or gloss over flaws in witnesses who have something helpful to say.").

320 *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 48 (3d ed. 1992) (arguing that when advocates volunteer their own weaknesses, it only puts undue emphasis on those weaknesses).

321 *See* ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS 19–21 (1990) (arguing that lawyers should not disclose weaknesses to the jury as a matter of course because the "jury views the advocate as the client's champion and spokesman and thus as fundamentally biased . . . a 'hired gun'" and the skeptical jury will "infer that each side's case can be *no better* than that stated by the attorney"); Gair, *supra* note 81, at 65–66 ("When a client's or witness's behavior suggests an embarrassing line of cross-examination, the careful lawyer must thoroughly explore the issue. Otherwise, the jury may decide that *you* aren't to be believed.").

322 *See* LUBET, *supra* note 296, at 63 (observing that "it will be all the more damning if the witness is seen as having tried to hide the bad facts"); MURRAY, *supra* note 30, at 116 (noting that if unfavorable material is omitted, the appearance later will cast doubt in the jury's mind as to the reliability of the omitting party).

tial problems with their testimony.[323] The particular weaknesses will vary from case to case—a prior inconsistent statement, a loss of memory, a bias or prejudice against one party or the other, a claim that simply does not add up, or a past that is less than spotless.

The existence of some problem areas and the need to disclose them to the jury is a constant.[324] If the advocate does not address these weaknesses on direct, the jurors are left with the impression that the advocate has either misrepresented the true facts to them or is purposely trying to sell them a slick, idealized version of the case facts. This causes them to wonder if the advocate has misled them on other matters as well.[325] Moreover, by not taking the initiative and disclosing the weaknesses at the earliest opportunity, before the other party has the opportunity to do so, the advocate essentially gives control of that "problem area" to the opposing party, allowing the opposition to reveal and characterize the problems in all of their terrible grandeur.[326]

Disclosure, on the other hand, preserves some control for the advocate and creates the impression that the advocate has nothing to hide. Further, it suggests that this supposedly damaging evidence is, in fact, no big deal. Thus, the disclosing party is able to characterize and to mitigate the information before opposing counsel can cast an ominous shadow over a case fact or create a sinister implication about it. Disclosure of weaknesses is also consistent with jurors' expectations.[327] They believe, for the most part, that both parties did something wrong or they would not be at trial. In that light, it actually could be advantageous to identify weaknesses to disclose, because disclosure can actually enhance witness and party credibility.

The rationale for disclosing weaknesses is derived from the common sense premise that most people do not openly disclose their flaws

323 *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL THEORIES, TACTICS, TECHNIQUES 353 (1991) (stating that all witnesses have some weaknesses and problems with their testimony).

324 *See* CORNELIUS P. CALLAHAN, THE SEARCH FOR TRUTH 81 (1997) (noting that advocates should bring out all negative elements of a witness's testimony, including partisanship and inconsistencies on direct); *cf.* Hangley, *supra* note 38, at 22.

> And you can go too far with this 'tell it first' business. I recently saw a witness testify on a fairly collateral point, and spend half again as much time going through a litany of all the inconsistent statements she had made in the past. . . . [T]he entire gist of her intended story was lost in the clutter. . . .

Id.

325 MURRAY, *supra* note 30, at 116.

326 MAUET, *supra* note 36, at 51 (noting that the opponent is always glad to bring out a weakness with twice the impact).

327 *See id.* (noting that jurors expect honesty and candor from attorneys).

and that when they do, the disclosure is reliable. In fact, an exception to the hearsay rule of ancient origin is the exception for declarations against interest.[328] It is based on the supposition that statements made against the declarant's interest are generally trustworthy.[329] The effect of disclosing weaknesses extends beyond merely convincing the jury of the witness's shortcomings; it causes the jury to look on all of the party's witnesses' testimony more favorably. The reasoning goes something like this: "If the witness was willing to tell me that bad stuff himself, he must be telling the truth. Therefore, I can believe him when he testified about other matters."[330] Moreover, the spill-over effect of disclosing weaknesses even extends to the lawyers themselves. If an attorney makes a humble admission of a mistake, the jurors see that the lawyer is not simply an advocate for hire looking for any advantage to win. Rather, he is interested in finding out the truth. These disclosures or admissions create balance in the attorney's presentation of the case.[331]

We include the disclosure of weaknesses in our list of effective techniques on direct examination not because the idea is new or revolutionary; it most certainly is not.[332] Most commentators agree that lawyers should disclose their weaknesses before the other side has the opportunity to exploit them.[333] We include it because, despite the

328 *See* FED. R. EVID. 804(b)(3).

329 *See* Williamson v. United States, 512 U.S. 594, 600 (1994) (noting that the declaration against interest exception is based on "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true"); *see also* NIETZEL & DILLEHAY, *supra* note 41, at 148 ("[R]esearch . . . indicates that two-sided presentations (communications that include not only arguments for one's own conclusions but also a recognition of the other side's points, which would include one's own weaknesses) are more effective in changing opinions than are one-sided communications . . . ."); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 172, at 129, 149 ("[A]n inevitable consequence of our willingness to process evidence in the light of our prior beliefs is the tendency to perceive more support for those beliefs than actually exists in the evidence at hand.").

330 *See* NIETZEL & DILLEHAY, *supra* note 41, at 142 ("One who is perceived as arguing against one's own vested interests is more persuasive than one who is perceived to have vested interests consistent with the conclusions.").

331 *See* 1 STERN, *supra* note 5, at 174.

332 *See, e.g.*, JOHN C. REED, CONDUCT OF LAWSUITS OUT OF AND IN COURT 250 (Boston, Little, Brown & Co. 1885) (noting more than 100 years ago that "if there [was] something adverse apparent on the surface, the examiner in chief had better [draw] it out himself").

333 *See* CALLAHAN, *supra* note 324, at 81; LUBET, *supra* note 296, at 63; MAUET, *supra* note 36, at 51; MURRAY, *supra* note 30, at 116; REED, *supra* note 332, at 250.

good advice, lawyers all too often do not make the needed disclosure, make an inadequate or half-hearted disclosure, or make the disclosure at an inopportune time during the direct examination.[334] Each of these errors is addressed below.

Stated broadly, a weakness is anything that could damage the credibility of a witness or make the jury less likely to believe a party's claim or defense.[335] It includes any potential impeachment material,[336] witness testimony that seems incredible, or "smoking gun" documents. The list of specific "weaknesses" depends upon the facts of each case. A good rule of thumb, however, is to ask whether that issue or fact is one *you* would raise on cross-examination or during argument if you were on the other side of the case.

The decision to reveal weaknesses turns on what the opposing party knows about the weakness and the materiality of the harmful information.[337] The easiest situations are those in which the other side clearly knows or clearly does not know about the damaging material. In the former instance, the lawyer should make full disclosure, whereas in the latter, the lawyer should make no disclosure at all.[338] The more difficult circumstances occur when the lawyer cannot be certain that the opponent has possession of the pertinent information. Here the advocate must simply play the probabilities: how difficult was the information to obtain, how diligently has opposing counsel engaged in discovery, and what signals has opposing counsel given about what they know (or do not know)? When in doubt, the lawyer should make the disclosure and use it to his or her advantage by showing fairness and commitment to finding the truth regardless of where it may lead.

Perhaps the two greatest risks when making the disclosure are appearing overly defensive and causing the weakness to take on

334 *See* LUBET, *supra* note 296, at 64 (noting that attorneys need to bury weaknesses in the direct exam and need to personalize the witness before disclosing weaknesses in order to minimize the impact of such material).

335 *See, e.g.*, LUBET, *supra* note 296, at 63; MAUET, *supra* note 36, at 51; MURRAY, *supra* note 30, at 116.

336 *See* MURRAY, *supra* note 30, at 115 (stating the need to bring up all facts which would tend to discredit a witness's testimony); *see also* MCELHANEY, *supra* note 39, at 351 (noting that sometimes a cross-examiner has an opportunity for real impeachment).

337 *See* LUBET, *supra* note 296, at 63 (advising lawyers to only disclose negative information if they are sure the information is known to the other side and is admissible).

338 Subject, of course, to appropriate discovery requests from the opposition and to the parties' obligations to disclose pertinent material in the discovery process. *See, e.g.*, FED. R. CIV. P. 26.

greater significance than it warrants.[339] In short, the advocate should take care that the disclosure does not look like a disclosure. Sometimes it is necessary to make the disclosure as straightforward and unvarnished as possible, such as when disclosing a witness's prior felony conviction. Other times, however, the lawyer can weave the disclosure into the direct so that it is not apparent that something is being revealed. This can be done by explaining the context of the problem so that the jury understands how the mistake was made.

The content of the disclosure will obviously depend on the nature of the weakness being revealed. In the conventional situation in which the desired disclosure relates to a potential impeachment point, the lawyer, in making the disclosure, must walk a fine line between making full and complete disclosure and overemphasizing the harmful information.[340] On the one hand, the disclosure should be sufficiently detailed to diffuse the impact of the cross-examination questioning about the matter. At the same time, however, the advocate must resist the temptation to devote too much time and attention to the weakness so that it diverts the jury's attention from the witness's testimony and becomes the primary focus of the examination. One of the ways to dilute the impact of the disclosure is to follow up with questions that emphasize the positive steps taken to remedy the situation or problem. As in most of life, balance is the key to effective disclosure: the lawyer must provide the jury with enough information about the weakness, but not too much. Striking the right balance comes with experience.

A different and equally important kind of disclosure arises when witnesses testify to a claim or an event that defies common sense or severely stretches one's imagination. In that situation, the lawyer does not so much direct the witness to a "disclosure" as the lawyer challenges the witness to fully explain to the jury why the testimony, despite its apparently incredible nature, actually does make sense and should be believed. This disclosure should come in response to a challenge question—a question that challenges the witness's version of the underlying events. This technique is particularly essential when witnesses have explanations for critical events that seem farfetched. The advocate, instead of simply eliciting the questionable explanation without comment, must take on the role of the skeptical juror and ask

339 *See* MAUET, *supra* note 36, at 51 (stating that some attorneys believe that pointing out one's own weakness only emphasizes it).

340 *See* MCELHANEY, *supra* note 39, at 350–52 (noting that a witness should bring out damaging evidence without undue emphasis, but should make the disclosure fully and fairly).

the question that one might imagine the juror asking: "You mean to tell me that you were not intoxicated even though you were swerving all over the road and failed three field sobriety tests?" The challenge question allows the lawyer to associate with the jury's skepticism and at the same time helps direct that skeptical juror to the answer. Both of these disclosure techniques are demonstrated below.

The final consideration when making a disclosure is in determining its placement in the direct examination sequence. The principles of primacy and recency dictate that the harmful information should not be placed close to the beginning or the end of the direct examination.[341] If the direct begins with a damaging admission, then the jury's impression of the witness is permanently tainted.[342] If you end with the disclosure, it takes on disproportionate importance as the fact the jury hears last and thereby remembers most about the witness.[343] Ideally, then, the information should be elicited in the middle of the examination.[344] The exception to this rule is when the disclosure is so central to the case that counsel must address it first before the jury is willing to listen to anything else. The disclosure must also be made at a logical point during the direct. If the disclosure is made abruptly or awkwardly it will draw the jury's attention to it.[345] For instance, if the direct examiner transitions from asking about where the witness was at the time of the car accident to questions about a prior felony conviction ("By the way, have you ever had any trouble with the law?"), the lawyer will likely do more harm than good. As such, the transition to the witness disclosure is key to not placing undue importance on it. When planning witness testimony, decide what you want the jury's final impression to be.

2. Examples of Disclosing Weaknesses

a. The Conventional Disclosure

In the typical situation, the technique for disclosing a weakness is not nearly as important as making the disclosure in the first place and

341 *See* LUBET, *supra* note 296, at 63–64 (reminding advocates to make disclosures according to the principles of primacy and recency); MCELHANEY, *supra* note 39, at 353–54.

342 *See* MCELHANEY, *supra* note 39, at 353 (noting that the event heard first is the event more likely to be accepted by the jury as true).

343 *See id.* (noting that the last words are given special value by the listener).

344 *See* LUBET, *supra* note 296, at 64; MAUET, *supra* note 36, at 48, 83; MCELHANEY, *supra* note 39, at 353–54.

345 *See* Gair, *supra* note 81, at 68 ("Good direct examinations have an internal logic that the jury can follow, and the impeaching facts fit in a logical place.").

making it in a timely manner. The disclosure itself is simply a matter of eliciting the critical facts and giving the witness a chance to explain. The example that follows comes from a most difficult set of circumstances. The excerpt is from the direct examination of a defendant prosecuted for the murder of his ex-wife. The defendant had a previous conviction for disorderly conduct when he physically abused his now deceased wife. He had pleaded *nolo contendere* and completed counseling and community service. Obviously, one might legitimately decide not to call the defendant with such a significant boil to prick. Assume for purposes of this exercise, however, that the defendant was called to testify. After spending some time developing the defendant's personal background, his upbringing, and his professional career, the examiner turned to the defendant's relationship with the victim. First, the defendant tells the story of their meeting and falling in love. The weakness is placed at its logical point in the direct—the point in time when the defendant turned violent toward the victim.

Q: *Now that we have a sense of who you are, where you came from, and what you do to make a living, I want to turn to your relationship with Nicole. Let's start at the beginning. How did the two of you meet?*

A: We had a mutual friend who thought we might hit it off, so he invited both of us for a barbecue at his house.

Q: When was that?

A: Let's see. That was in 1990, so about ten years ago.

Q: And did the two of you hit it off?

A: Oh yes. And we started seeing each other right away. It quickly became a serious relationship.

Q: How did the relationship develop from there?

A: Nicole moved in with me a couple of months later, and in December 1991, we got married.

Q: Tell us about the relationship you and Nicole had developed.

A: It was great. Before I met Nicole I didn't think I would ever get married. But what I felt toward her and she toward me was such an overwhelming love that I needed to make the strongest commitment to her that I could.

Q: What kinds of things did the two of you do together?

A: It seemed like we did everything together. Everything worked for us. We were in a position where we could take long vacations, we golfed a lot, we had a wide array of friends. Life was wonderful. We were as in love and as happy as a couple can hope to be.

Q: *Now I want to move ahead to 1995. I understand there was a problem. Tell us about that.*

A: This is one of the most shameful things in my life. I lost my temper and slapped Nicole.

Q: I understand this is difficult for you. Please tell us the circumstances.
A: Nicole was a beautiful woman, and, because of that, men frequently would express an interest in her, looking at her. You know, checking her out. That wasn't always so easy for me, but I handled it pretty well except for that one time.
A: Go on.
Q: We had been golfing, and at the clubhouse I noticed a man really looking Nicole over. I was more or less used to that, so I didn't think it was a big deal. But then a little later I noticed Nicole look back at him, and it just got to me. I can't explain it rationally. It just got to me.
Q: What happened then?
A: When we got home I asked her about the guy at the clubhouse. And I remember she looked at me and said: "Don't be a jerk. It's a free country." Her remark surprised me and then angered me and, without thinking, I slapped her in the face with my hand. As soon as I did it, I couldn't believe that that had been me. I was so ashamed.
Q: What happened then?
A: I tried to apologize to her, to hug her. But she wouldn't have any of it. She called the police, and I was arrested.
Q: Go on.
A: I was charged with domestic violence, and I knew I was guilty. So, at the first court appearance, I wanted to plead guilty, but my lawyer told me to plead *nolo contendre.* And that's what I did.
Q: So you admitted that you slapped her?
A: Yes.
Q: What was your sentence?
A: I paid a fine, performed 150 hours of community service, and received counseling.
Q: Tell me about the counseling.
A: Sure. At first I really resented it. After all, it was once a week for a year. But once I got into it, I found it very helpful, and it allowed me to come to terms with the jealous feelings I often had. By the end of the year, I truly believe I was a better person and certainly a better husband than I had been before.
Q: How did this whole episode affect your relationship with Nicole?
A: She forgave me. She told me that she didn't believe I was violent and that this had just been a mistake. We were able to pick up and, like I said, our marriage actually got stronger as a result.

The examiner in the example carefully develops the relationship between the defendant and the deceased before revealing the prior

criminal offense. Yet, the advocate does not elicit the weakness and then abandon it as if it were some infected object. Instead, the lawyer gives the witness the opportunity to explain the relationship's development since the abuse and to articulate the lessons learned since that time. Thus, the disclosure is made toward the middle of the examination and even toward the middle of the relationship block itself. Moreover, the disclosure is full and complete. It does not try to minimize the nature of the wrong or withhold critical facts. In that way it strips the cross-examiner of his ability to dramatically unveil the prior conviction. Moreover, the disclosure elicited during direct enables the witness to explain the conviction and to personalize its effects on the defendant's relationship with his wife.

b. The Challenge Question

The challenge question is an effective technique to deal with witness testimony that is difficult to believe because it is contrary to common sense or ordinary experience. The excerpt below is from the direct examination of the plaintiff in a hypothetical defamation case. The plaintiff, a high school football coach, sued the defendant for libel and slander after the defendant told others that the plaintiff had illegally recruited students to play football at his school. The defendant defended the suit by claiming his statements were true based on two letters the plaintiff allegedly sent to an eighth-grade football player, enticing him with scholarships and a job for his parent. The plaintiff claimed that he did not send the letters, but instead believed that his overactive booster club was likely responsible for the misdeeds. After developing the plaintiff's childhood, schooling, and coaching career, the examiner moved into his work as coach at the current school and the claims that he tried to recruit the eighth grader.

Q: *I want to ask you some questions about Kermit Bell, the eighth grader that the defendant claims you tried to recruit. When did you first come to know about Kermit Bell?*

A: I knew about him from the time he was in fourth grade—nine years old—when he was playing youth football.

Q: What position did he play?

A: Quarterback, always quarterback.

Q: Did you keep track of his career?

A: Oh yes. He was fun to watch—a natural athlete. I watched some of his games and read about his exploits in the local newspaper.

Q: Why did you keep up with him?

A: First of all, I'm a football fan. I love the game, and it's always fun to watch someone who has that innate ability to play the game. Second, I keep up with the players coming up through the ranks to give me a better sense of what the future holds for my program.

Q: Let's move to the year that Kermit was in eighth grade—1992.

A: Okay.

Q: How good was he as an eighth grader?

A: He was good, very good. I compared him to Steve Young, the great San Francisco 49er quarterback. I used to watch him when he was a kid too. This kid had all the skills.

Q: Did you ever tell anyone else about Kermit's promise in football?

A: You bet. I'm sure I told lots of people about him, including his mother, Mrs. Bell.

Q: How about your athletic booster club at school, did you ever tell them about Kermit?

A: Absolutely. You know how boosters are. At the spring meeting they all want to know about next year, who the new players will be, and who might be joining our program. I know that on more than one occasion I mentioned Kermit as a local player who would be a tremendous football player in the future and someone I would dearly love to have on my team.

Q: Why did you do that?

A: As I recall I was simply trying to answer a booster's question about outstanding area players.

Q: Did you ever attempt to influence Kermit Bell to play football at your school?

A: No way.

Q: Did you ever send Kermit or his mother a letter enticing them to attend your school?

A: I did not.

Q: Why not?

A: That would have been recruiting. That's against the rules, and I personally don't believe in doing that.

Q: Your Honor, I have what's been marked as defendant's Exhibit 1 for purposes of identification only. May I approach the witness?

Judge: You may.

Q: Do you recognize defendant's Exhibit 1?

A: No, I don't.

Q: Who is the letter addressed to?

A: It is addressed to Kermit Bell's mother, Mary.

Q: And who signed the letter?

A: Well, it has my name signed on it, but I know for a fact that I didn't sign or send this letter.

Q: How can you be so certain?

A: I do not send letters to potential players or their parents, promising them jobs and the like, trying to get kids to play football for me. That would be recruiting, and I don't do it.

Q: Why not? The benefit is worth the risk, isn't it?

A: It's not a matter of weighing the benefit versus the cost. I take my role as an example for my players very seriously, and I value my reputation as a high school football coach. Recruiting is against the rules—it's cheating—and I don't do it. We only take on students that are enrolled in school.

Q: So is it your belief that someone forged your signature on that letter?

A: Somebody must have. I know I didn't sign it.

Q: Coach, I need to stop you right there. I want to focus your attention on this letter for just one more moment. *How in the world do you explain that this letter, defendant's Exhibit 1, on your personal stationery, made it from your office to Kermit Bell's house?*

A: I only know one thing for certain. I didn't send it. You have to understand that I have a very active booster club. It has over one thousand members, and it meets every week. It lives and breathes football. Also you have to understand that my office, which is where my personal stationery is kept, is a gathering place for boosters during the week. We have newspaper clippings and current statistics for the team, and, consequently, the boosters tend to congregate in that area. We send out a newsletter to the boosters every month, and I write a little column and at the end it has my signature. Finally, I had talked to the booster club about Kermit before these letters were sent. We've changed how we do things now—we're not as open as we used to be. But at the time of these letters, an overactive booster club member could quite easily have gotten some of my stationery and traced my signature on the letters. If they did so, they did it without my knowledge or permission. We don't need to cheat to win. We are doing just fine playing by the rules.

The defendant faces a tactical choice when confronted with the highly incriminating letter. He can deny that he sent it and then bury his head in the sand, disclaiming any knowledge of how it got to Kermit Bell's house. Alternatively, he can take the approach demonstrated above—deny that he sent it and then provide the jury with a plausible explanation for the letter. The tendency for advocates is to avoid directly confronting the really difficult questions in a case. The challenge question takes the opposite approach, directly confronting the hard question and, to the extent possible, mitigating its impact. The transcript includes two challenge questions, both of which give

voice to the jury's skepticism and provide the witness a chance to overcome that skepticism. The questions build the credibility of both the lawyer and the witness. The jury is likely to respect and ultimately trust the party that refuses to dodge the tough questions and instead answers those questions, providing a comprehensive narrative of the defendant's case.

3. Empirical Data to Support Disclosure of Weaknesses

As stated, a trial is a dynamic process. Jurors' positions ebb and flow with the presentation of evidence. Attribution theories describe the circumstances under which people make the assumption that a person's behavior is caused by the circumstance (situational attribution) or by a stable characteristic of the person (dispositional attribution).[346] A common error is to assign more weight to the actor as causing an outcome than to the situation.[347] This means that even random events that are out of one's control are often viewed as caused by the victim in the circumstance (for example, rape: "She must have asked for it," or robbery: "They shouldn't have left a window open").

In addition to jurors mistakenly ascribing the cause for negative outcomes to the witness for his or her actions, there are times when the negative outcome is correctly attributable to the witness (for example, past transgressions, errors in judgment, mistakes). As stated, rather than assume that all such events are to be minimized, there are conditions under which lawyers can use them to their advantage. We previously indicated that a way to stem the loss of jurors because of a problem with the case is suggested by the theory of inoculation.[348] Similarly, by inoculating the jurors with a "sympathetic" disclosure of the problem, lawyers can greatly mitigate the harm the opposition will be able to wreak during cross-examination.

Another set of circumstances that allows lawyers to capitalize on weaknesses comes from a series of studies by Elliot Aronson and his colleagues.[349] He became intrigued with the apparent paradoxical findings in the literature that people did not tend to like the group

346 HEIDER, *supra* note 65, at 66–70; Fritz Heider, *Social Perception and Phenomenal Causality*, 51 PSYCHOL. REV. 358, 358–72 (1944); Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, 2 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 219, 263–64 (1965).

347 This is called Fundamental Attribution Error. *See* Lee D. Ross et al., *Social Roles, Social Control, and Biases in Social-perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485, 491 (1977).

348 *See* McGuire, *supra* note 80, at 200–03.

349 *See* ELLIOT ARONSON, THE SOCIAL ANIMAL (1972).

members that they considered to be the most competent.[350] He hypothesized that highly competent people were intimidating and made people uncomfortable.[351] So, when he read a Gallup poll finding that President John F. Kennedy's personal popularity actually increased following the fiasco at the Bay of Pigs in 1961, he was astounded.[352] Based on this, Aronson formulated a new hypothesis, "Some evidence of fallibility (like being responsible for a major blunder) could have served to make him more human in the public eye and, hence, more likeable."[353]

To test this hypothesis, Aronson created four audio tapes of a supposed interview between a candidate for the "College Quiz Bowl" and an interviewer.[354] Across all four tapes, the questions asked by the interviewer were extremely difficult. On one tape (the "superior" person), the candidate showed a high degree of competence, scored 92% correct, and modestly answered questions that revealed him to be an honor student, the editor of the yearbook, and a member of the track team.[355] On another tape (the "average" person), the same actor showed an average degree of competence, scored 30% correct, and revealed that he had received average grades in high school, was a yearbook proofreader, and failed to make the track team.[356] The other two recordings were identical to the two described except that near the end of the interview, the candidate committed an embarrassing blunder. Amid the sounds of commotion, clatter, and the scraping of a chair, the candidate said, "Oh my goodness, I've spilled coffee all over my new suit."[357]

For each of the four experimental conditions (the superior candidate with and without the blunder, the average candidate with and without the blunder), the study participants rated their impressions of the person they heard (that is, how likeable he seemed). The results showed the following rank order from most to least attractive: (1) superior candidate who blundered, (2) superior candidate who did not blunder, (3) average candidate, and (4) average candidate who blundered.[358] Aronson concluded that although a high degree of compe-

350 *Id.* at 213.
351 *See id.*
352 *See id.*
353 *Id.*
354 Elliot Aronson et al., *The Effect of a Pratfall on Increasing Interpersonal Attractiveness*, 4 PSYCHONOMIC SCI. 227, 227 (1966).
355 *Id.*
356 *Id.*
357 *Id.*
358 *Id.* at 228.

tence does make a person more credible and attractive than does a lower degree of competence, some evidence of fallibility increases that attractiveness even more.[359] This suggests that if you have an expert witness who has made a human error, the jurors will like (and therefore possibly side with) this witness even more than if he or she had not made the error.

In a subsequent study, Aronson and his colleagues tested and found that the self-esteem of the raters (high, average, or low) made a difference in the degree to which the blunder enhanced the attractiveness of the highly competent target.[360] Those of average self-esteem rated the target as significantly more attractive when he blundered than when he did not, whereas those of both high and low self-esteem were significantly more attracted to this target when he did not blunder.[361]

Because Aronson's studies used only male targets and raters, Kay Deaux wondered if the results would hold for women as well as men.[362] She replicated Aronson's original study but added four more audio tapes with a female candidate and used both male and female raters for all eight conditions.[363] She found that Aronson's results only applied to males rating males. That is, only males found the competent male more attractive when he blundered.[364]

Taken together, these findings suggest that if an important aspect of your case is to combat an error made by your highly competent male expert, you will want male jurors of average self-esteem rather than high or low self-esteem, and you will want more of these males than females. Conversely, for an opposing witness in this situation, you will not want your male jurors to be those with average self-esteem, and you will want female jurors.

In 1892, William James defined self-esteem as the degree to which your actual successes coincide with your goals and aspirations.[365] This definition is as good today as it was more than one hundred years ago. Some common sense observations can be reliable indicators of the

359 *Id.*

360 Robert Helmreich et al., *To Err is Humanizing—Sometimes: Effects of Self-esteem, Competence, and a Pratfall on Interpersonal Attraction*, 16 J. PERSONALITY & SOC. PSYCHOL. 259, 263–64 (1970).

361 *Id.* at 263.

362 Kay Deaux, *To Err is Humanizing: But Sex Makes a Difference*, 3 REPRESENTATIVE RES. SOC. PSYCHOL. 20, 20–21 (1972).

363 *See id.* at 21–23.

364 *See id.* at 25–26.

365 WILLIAM JAMES, PSYCHOLOGY: BRIEFER COURSE 168 (Gordon Allport ed., Harper Torchbook 1984) (1892).

self-esteem of potential male jurors. Nonverbal cues such as tone of voice and degree of timidity or information about the accomplishments of potential jurors can aid you in selecting for this characteristic. If you are able to conduct a potential juror questionnaire, you might want to include some questions that measure self-esteem.[366]

F. Using Lists

1. Overview of Using Lists

The jurors' retention of the testimony they hear at trial depends largely on the effectiveness of the lawyer's presentation. That is the fundamental premise of communication theory and research. Style matters.[367] The form of the presentation is often as important as the content. The techniques discussed above all follow logically from this simple axiom. The organization of the direct examination into blocks, the introduction of each block with a headline, the liberal use of visual aids, the proper staging of critical events, and the personalization of witnesses all serve to make the substance of a case easier for the jury to understand and remember.

An additional technique that aids juror retention is the use of lists.[368] In fact, along with blocking and visual aids, the organization of material into lists forms the third leg of what might be called a "retention triangle." Lists are similar in purpose to blocking inasmuch as they help categorize and organize the material for the jury in a memorable and understandable way. At the same time, a good list is a visual aid that gives the jurors another way to store and prioritize the information. Additionally, the use of lists aids retention by allowing jurors to actually take down in note form these lists of points that *you* deem important.

Despite these clear advantages, however, many lawyers underutilize or totally ignore lists, using them only during closing arguments,

366 *See, e.g.*, MORRIS ROSENBERG, CONCEIVING THE SELF 291–300 (1979).

367 *See* RIEKE & STUTMAN, *supra* note 92, at 118–26 (describing the importance of message style, nonverbal cues, and paralinguistic behavior to the credibility of any speaker, particularly including trial advocates); Kinrich, *supra* note 115, at 39 ("What is needed is the equivalent of punctuation—highlighting, italics, and bold face print. Change your tone of voice when you want people to pay attention. To the extent the judge allows, point, gesture, and escape the confines of the podium.").

368 *See* Gordon H. Bower et al., *Hierarchical Retrieval Schemes in Recall of Categorized Word Lists*, 8 J. VERBAL LEARNING & VERBAL BEHAV. 323, 340 (1969) ("If *S* can discover or learn a simple rule or principle which characterizes the items on a list . . . then he uses that rule as a retrieval plan in reconstructing the items from memory . . . ."); *see also* Wilkins, *supra* note 54, at 76 (noting that each topic covered during direct examination should be listed and given headlines).

if at all. Lists are too valuable to be "saved" for the close; instead they should be used at every opportunity—during both the opening statement and direct examinations. The opening statement provides a great opportunity for the advocate to list the critical pieces of evidence in the case or to identify the reasons that should cause the jury to support a party's claims.[369] The lawyer can then return to the list during closing argument and complete the circle, demonstrating that the party elicited the critical evidence or made the pertinent points through the trial testimony and exhibits.[370] Almost without exception, every opening statement should contain a list.

Of course, this Article concerns direct examination, not opening statements, and, at first glance, lists may not appear to be well-suited for use during direct examination. In the first place, any list must, by necessity, come from the witness and not the lawyer, unlike the other techniques discussed above. The lawyer must rely on the witness to recite the list in response to a question asked by the lawyer. It would be absurd, if not objectionable, for the lawyer to ask the witness, "Can you put your answer in the form of a list?" Additionally, enumeration of the items in a list creates the risk that the witness will appear to have scripted his or her testimony beforehand. The witness's suggestion that "there are three reasons why the plaintiff's seatbelt broke" can create the appearance that the witness has scripted the response to a particular question if that witness does not look like he or she is sincerely trying to explain a particular issue.

Yet, neither of these concerns are insurmountable. They merely mean that the use of lists requires thorough and effective witness preparation, unlike the other techniques that depend more heavily on the skillfulness of the lawyer who is conducting the examination.[371] The use of lists may not be useful for some fact witnesses, whose testimony would not be enhanced by enumeration; however, the use of a list can greatly enhance an expert witness's testimony. This is espe-

369 *See* MAUET, *supra* note 36, at 43 (stating that opening statements are the time to show the jury the reasons your side is the right side).

370 *See* Kinrich, *supra* note 115, at 40 ("A jury needs a point of reference. The jurors must know *why* they are listening to a witness, and they need to know *what* they are expected to learn. . . . Accordingly, establish one or two key themes for each witness, and organize the testimony around those themes."); Wilkins, *supra* note 54, at 77 ("Jurors . . . tend to remember images far better than individual words. Accordingly, lawyers need to be wordsmiths who search for vivid words to create images jurors can readily recall.").

371 *See* Kinrich, *supra* note 115, at 40 ("[L]et the jury know why the witness is there and what this testimony is all about. Next, provide the detail necessary to explain and support the testimony, and, finally, conclude with a summary of what the jury learned from this witness.").

cially true for experts testifying to complex fact patterns or opinions. The expert is hired by one party or the other for the very purpose of forming opinions about the issues in the case and explaining to the jury why those opinions are correct.[372] The jury recognizes that the expert is rendering a professional service for one of the parties and typically does not find it surprising or alarming that the expert, in thinking about those opinions, has formed a list to explain their validity. Thus, the context in which experts testify suits the development of a list perfectly, and the jury is unlikely to hold this against the expert.

To the contrary, the jury will almost certainly receive the list with welcome arms. A list is much like a life jacket tossed to the jury as they drown in a sea of incomprehensible jargon spewed at them by experts. In the midst of that life-and-death struggle, a list gives the jury a lifeline to hold on to. They tend to listen to the testimony more closely, remember it more clearly, and view the expert (and party) more kindly. One of the great advantages of lists is that they force experts to communicate to the jury in understandable terms. In developing lists experts must distill their opinions down to pithy sound bites.[373] Experts must turn the sophisticated analysis they have placed in their reports into short and understandable bullet-points. The effect is to help experts remember that their audience is a jury hearing the information once and only once. They must target their remarks to the lay jury and not to their professional peers. The list also helps to ensure that experts have engaged in the critical, but difficult, task of analyzing the reasons that support their opinions. It ensures that they persuasively demonstrate the validity of their opinions.

Perhaps more significantly, each item in a list reinitiates the principle of primacy,[374] recapturing the jury's attention anew. After the expert has identified the three reasons that support his opinion, the lawyer can then ask about each point separately, confident that the jury will be tuned into the testimony. In fact, an effective and well-

372 *See id.* at 42.

> Invite the witness to teach you and the jury, not just *what* the right answer is, but *how* to reach it. The witness explains her thinking, thereby letting the jury in on her specialty. After explaining the approach, the witness applies the approach to the case, leading the jury to the witness's conclusion.

Id.; *see also* Phillips, *supra* note 285, at 70 (noting that the experts' "background should demonstrate their expertise and they should be able to render clear, authoritative opinions on the issues you will be discussing in court").

373 *See* Wilkins, *supra* note 54, at 76 ("It is prudent to pick out the key phrase most critical to the case and weave it throughout the presentation."); *see also* Herman, *supra* note 59, at 76 ("Especially when your witness is an expert, it is essential that all technical terms be explained.").

374 *See supra* notes 177–80 and accompanying text.

timed list gives jurors confidence that they have a grasp of the expert's testimony and something tangible to take with them in to deliberation. The expert, in enumerating the list, sends a message to the jury that, at the end of the day, the three points in the list are what the jury needs to remember about the expert's testimony. Jurors inevitably appreciate the focus and direction provided by a list.

2. Example of the Use of Lists

The tremendous benefit of clearer and more memorable testimony is worth the time and effort spent with the expert working to develop and refine the list. The list is perhaps most naturally placed immediately after the expert's opinion, at the point when the expert is prepared to explain the opinion. An example that contrasts the two approaches, one an expert's testimony *with* a list and one *without*, will demonstrate the benefits of lists better than the most descriptive prose. In the example that follows, the expert witness is an engineer testifying in a product liability lawsuit. The plaintiff sued the manufacturer of her car, claiming that its seatbelt system was defectively designed, thus causing it to tear into two pieces during a collision with another car.

Both transcripts begin by eliciting from the expert her opinions about the passive restraint system in the defendant's car:

Q: *Dr. Mayflower, now I want you to focus on the conclusions you have reached about the safety of the defendant's seatbelt design. Based on your 25 years of engineering experience, your many years spent designing automobile seatbelt systems, your personal inspection of the seatbelt in Ms. Jones's [the plaintiff's] car, your careful evaluation of the accident scene and the other physical evidence, and your review of the depositions taken in this case, have you reached a conclusion about whether the seatbelt in Ms. Jones's car was properly designed by the defendant for its intended purposes?*

A: Yes, I have reached a conclusion.

Q: And what is your conclusion, Doctor?

A: My conclusion is that the seatbelt in Ms. Jones's car was unsafe for use as a restraint system because it was not properly designed for that purpose by the defendant manufacturer.

Q: Why?

Here the expert must choose to answer with a list or to simply describe in paragraph format the support for her opinion. These two starkly different approaches are contrasted below.

a. With a List

A: *Three reasons. First,* the very fact that the seatbelt split into two pieces; *second,* the poor retractor design for the seatbelt system in the car; and *third,* the severity of the plaintiff's injuries.

Q: *Let's start with your first reason.* How does the fact that the seatbelt split into two pieces support your opinion that it was not properly designed by the defendant?

A: Seatbelts are designed to prevent injury, not to cause them. A seatbelt that comes apart during an accident involving only moderate speeds, such as the one here, must be defective in some way or another. That is especially true when the seatbelt is in a relatively late model car such as the plaintiff's. A properly designed and manufactured seatbelt does not break apart on impact.

Q: *How about the second reason for your opinion*—that the seatbelt design was not a good design—how does that support your opinion that the defendant's seatbelt system was unsafe?

A: As I mentioned earlier, the car's restraint system caused the ultimate failure of the seatbelt. In defendant's car, the webbing of the seatbelt is routed through a loop that is attached to the interior of the car above the driver's left ear. This loop was designed to rotate to maximize the comfort of the driver. However, that design caused the webbing of the seatbelt to bunch up against the closed end of the loop, significantly reducing the webbing's strength and leading to the tearing of the belt. The bunching of the seatbelt is demonstrated by the marks on the guide loop on only one end, the closed end. If there had been no bunching, then the marks would be uniform across the guide loop. But, they are not.

Q: *How does your third reason*—the injuries suffered by Ms. Jones—support your opinion that the defendant's seatbelt design was unsafe?

A: Ms. Jones's accident was not at a terribly high speed. Yet, the injuries she suffered were much greater than those suffered by the crash dummies in the 30-miles-per-hour crash tests performed by defendant in the safety testing of their cars. That demonstrates that plaintiff was effectively unrestrained in the car and that the seatbelt broke at the very beginning of the accident sequence, thus causing the plaintiff's body to slam into the dashboard and steering wheel inside the car with great force.

b. Without a List

A: If the belt functioned properly, there would be evidence of retractor lock. I tested the emergency locking retractor from the driver's side of the Jones vehicle and found it to operate within specifications for the lock up angles in all directions. In other words, the retractor mechanism was functional. However, the lack of deformation of the metal components of the restraint system show that the retractor was never activated under load.

Q: How do you know that?

A: If the retractor activated under load, the teeth of the retractor would show some signs of that load. There is no such sign here.

Q: Is there any other evidence of failure?

A: No, although the pendulum in the retractor probably moved properly, the belt had already been cut by the time the pendulum locked on the retractor teeth or at the same time.

Q: Would the plaintiff have suffered the same injuries if the seatbelt had not failed?

A: No, although it does appear from United's crash test data that the driver would suffer some injuries during a frontal collusion even if the shoulder belt did not fail. United Motor Company's crash test of a similar United vehicle, Test No. B-4500, in which the belt did not rip, shows that the dummy's head hit the steering wheel rim.

Q: Why do you say that is unacceptable?

A: My study of the test data indicates that the upper torso webbing continued to pay out after the retractors had locked. This condition is known as "film spooling." In the video tape that documents the crash test, the slack in the belt is obvious.

Q: Isn't that something that occurs in virtually every retractor system?

A: Yes, but that does not make it acceptable. The restraint designer should endeavor to keep the occupant's head from striking the interior of the vehicle—in any vehicle. In this vehicle, the United Champion SUV, the passenger compartment is probably the largest driver work space of any mass produced vehicle. A restraint system that allows the driver's head to contact the steering wheel during a standard 30-miles-per-hour crash test is unacceptable. No prudent automotive designer would allow that.

The use of lists neatly compartmentalizes the issues of the expert in this case. These three components can be easily recited by jurors in deliberation and may actually frame their discussion on the seatbelt design. Care must be taken, however, to limit the number of points on a list. Whereas three or four points are relatively easy to remem-

ber, a list with too many points—eight to ten or more—can become overwhelming to a jury trying to assimilate complex testimony. In order to avoid this trap, subpoints can be included in major topic headings on a list. For example, for the previous example, the seatbelt design category can have several subpoints that can also be listed.

The expert who used the list in the example had a natural structure to follow. The examiner simply walked the expert through the three points, making the testimony much easier for the jury to follow. The expert who did not use a list provided the jury no such assistance, significantly increasing the difficulty of the jury's task. The benefits of using a list can be heightened by creating a visual summary of the list for the jury in the courtroom, providing an additional repetition of the list, and helping to ensure that it will not be forgotten.

3. Empirical Data to Support the Use of Lists

As stated, people remember things better when they are organized than when they are not. This "organization" means that some "rule" has been used. For example, it is easier to remember a marketing list if it is organized in alphabetical order than when it is randomly ordered. Mnemonic (memory assisting) devices relate new material to some previously learned organizational scheme. They make a meaningful connection between the information that is to be remembered and information the listener already knows.

Ancient Greek and Roman orators used a mnemonic device to aid them in recalling the parts of their speech without resorting to notes.[375] They used the method of loci in which they identified "stations" within a familiar place. So Plato, for example, would visualize the topic word from his opening statement at the entrance to his garden, his next issue he would visualize with his statue just inside the entrance, et cetera.[376] To return to the market list, it would be easier to remember if it were organized and visualized around the person's pattern of walking through the market (for example, first the person goes to the produce section: bananas, lettuce; then the person goes to the meat department: bacon, four T-Bones, et cetera). This method is rarely useful at trial because it requires that the stations be firmly fixed in one's mind and in a fixed order. It could be used, however, to associate evidence with the crime scene. For example, at O.J.'s home, most people still remember that the glove was outside in the dirt; that there were blood stains on the driveway, in the entrance, and on the carpeting leading upstairs; and that the blood-spotted socks were near

375 *See* HARRY LORAYNE & JERRY LUCAS, THE MEMORY BOOK 17 (1974).
376 *See id.*

the foot of his bed. The sequential movement from outside to inside allowed the jurors to recall the evidence (of course with the spin they supported from the testimony). And again, the ability to actually be at the scene helped reinforce this information as well. As stated previously, the more ways that the information is encoded, the more likely it is to be remembered. The advocate should show the evidence (iconic), list its pertinent parts (echoic), and pass it around to the jurors (tactile).

Acronyms are a mnemonic device that are very helpful to the recall of a long list of items.[377] Given some thought, it may be possible to capitalize the first word (or more) in your list to form a meaningful word in the case. Using the previously cited example of the product liability case, the three reasons that the expert concluded negligence were:

(1) *S*plit seatbelt,
(2) *L*oop in retraction device, and
(3) *I*njury, *P*hysical.

Notice that the single phrase to aid in the recall of these reasons could be "They *SLIP*ed up!"

Another memory aid is to link items by rhyming. We have all experienced that it's easier to learn "Thirty days hath September. . ." than it is to memorize the four months that have thirty days. (This too was used in the O.J. case: If "[i]t doesn't fit; you must acquit."[378]). Taken together, these mnemonic devices all describe ways to organize the major points in a witness's testimony in a fashion conducive to easy recall by the jury.

CONCLUSION

At its best, the direct examination is more than merely a series of nonleading questions and responsive answers; it is more than a simple chronological recounting of what the witness knows or a transfer of information from the witness to the jury. In the hands of a master, the direct examination is a powerful tool of advocacy; it is an opportunity to tell the jury a compelling and convincing story, to convey to the jury the utter trustworthiness of the witness and the advocate, and to severely limit and frustrate the ability of the opposing party to cross-examine the witness.

This Article's purpose, in large part, consists of describing techniques that enhance an advocate's ability to tell the witness's story ef-

377 *See id.* at 23–24.

378 People v. Simpson, No. BA097211, 1995 WL 697930, at *46 (Cal. Sup. Ct. Sept. 28, 1995) (closing argument by Johnnie Cochran).

fectively while building credibility and trust. In the "Information Age," when there is more data available about people and their preferences than ever before, it makes no sense to conduct direct examinations the same way we always have simply because "that's the way it's done." In its effect to draw upon the growing body of knowledge about learning theory and communication, this Article is the genesis of a grander goal: to identify techniques and methodologies, indeed even additional communication theories, that would advance not just the direct examination of witnesses, but all aspects of trial. Opening statement, cross-examination, closing argument, and voir dire all scream for the rejuvenation that communication and learning theory could provide. Indeed, many of the communication theories discussed in this Article have concurrent application to different aspects of trial presentation.

The techniques and methodologies discussed above are not exhaustive, but simply illustrative of the potential impact of communication principles in helping to move direct examination beyond the anecdotal "war story" approach to the "new millennium of direct examination," leading to greater retention by the jury and better advocacy by trial lawyers.